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Subject: State Leaders Head to Washington

State Leaders Head to Washington

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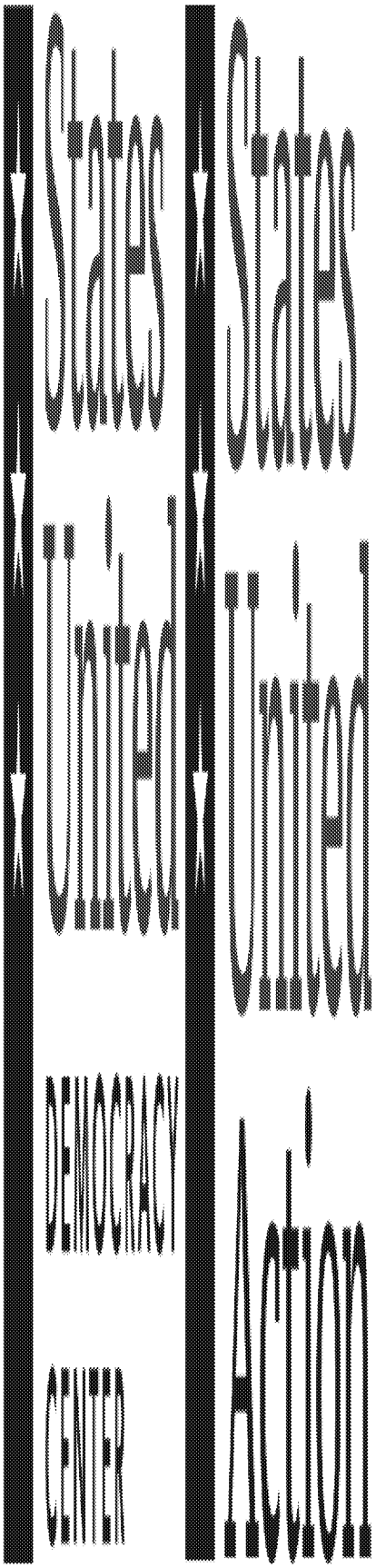

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Only have a minute?

- Election Deniers scored multiple wins in the Arizona and Michigan primaries and will now head to the general election in November. As **States United** has documented, candidates who continue to spread lies about our elections are running for positions that oversee or **influence election administration** across the country, posing a threat to our democracy.

- Bipartisan leaders testified in front the Senate Rules Committee urging Congress to pass reforms to the Electoral Count Act that would **protect the peaceful transfer of presidential power** and prevent a repeat of the January 6 insurrection. "We have a duty and responsibility to make sure it never happens again," Senator **Joe Manchin** of West Virginia told his colleagues.

- Two Arizona Republicans—**Kelli Ward**, the chairwoman of the Arizona Republican Party, and **Kelly Townsend**, a state senator—privately expressed concern in December 2020 that a plan to put forward a **slate of fake electors** for **Donald Trump** could be seen as treason, according to emails obtained by The New York Times. Kelli Ward signed on as a fake elector anyway.

- **Guy Reffitt**, who brought a gun to the Capitol on Jan. 6, 2021, and was the first of the rioters to be convicted at trial, was sentenced to more than seven years in prison. Before handing down the penalty, Judge **Dabney Friedrich** described Reffitt's behavior as the **"antithesis" of patriotism**.

State Leaders Head to Washington

Two secretaries of state traveled to Capitol Hill this week with one simple message: Election officials across the country are facing an unprecedented wave of harassment and threats, and it has to stop.

In testimony before the Senate Judiciary Committee, Secretaries of State **Jocelyn Benson** of Michigan and **Maggie Toulouse Oliver** of New Mexico described a vicious climate of intimidation that election administrators are enduring, just for **doing their jobs**. Some have had their families threatened or been forced into hiding themselves.

"The status quo is unsustainable and unacceptable," Benson said.

She's right. A Justice Department task force created last year to examine threats against

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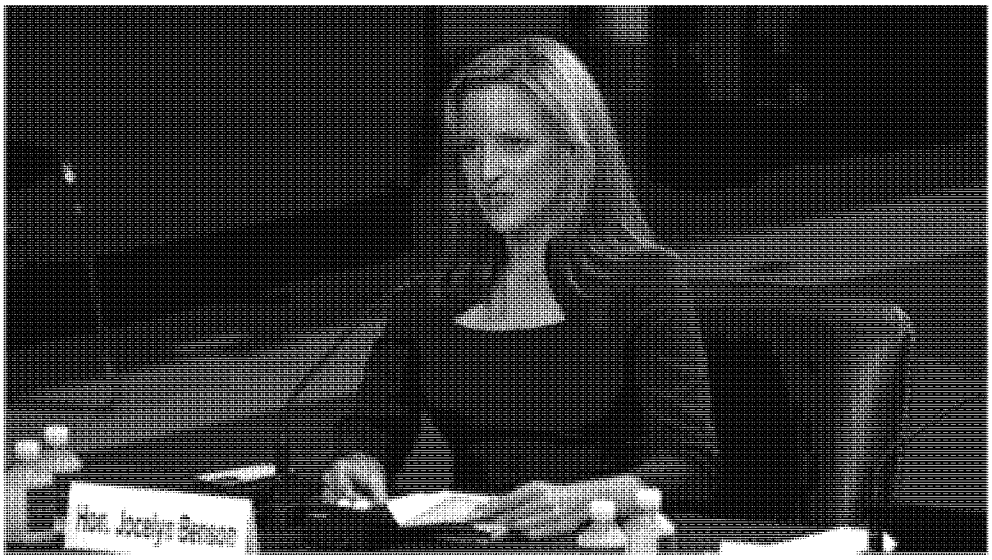
election workers has looked at more than 1,000 contacts that were reported as hostile or harassing. About one in 10 were serious enough to trigger a criminal investigation.



The harassment and threats are often based on lies about our elections, which have fostered what Toulouse Oliver called an "atmosphere of distrust." Nationwide, one in three election officials report feeling unsafe. Many have left their jobs.

At the same time, election officials are facing new laws meant to complicate or criminalize their work, and they are being bombarded by "burdensome and often nonsensical" demands for information and access to secure election equipment, as Benson said.

Both secretaries called on Congress to pass additional protections for election officials, including safeguarding their personal information to prevent doxxing and harassment.

The stakes are clear. As Benson put it: "We cannot have a secure democracy if we do not **protect the security of the people who administer our elections**."

State of the States

In Arizona, the Republican attorney general concluded there was no truth to the claim that hundreds of ballots were cast on behalf of dead voters in 2020. Attorney General **Mark**

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Brnovich said his office investigated allegations by the state Senate president that 282 people who died before Oct. 5, 2020, somehow voted in the November election. His office only identified one such case. Senate President **Karen Fann** made the complaint based on reports from the Cyber Ninjas, the firm hired to run the so-called audit of the election results in Arizona. "Our agents investigated all individuals that Cyber Ninjas reported as dead, and many were very surprised to learn they were allegedly deceased," Brnovich wrote to Fann.

Also in Arizona, the Santa Cruz County Superior Court rejected an attempt by the chair of the county Republican Party to gain access to confidential voter signatures on early ballot affidavit envelopes and in the voter registration file. The party chair sought to misuse a challenge process to improperly second-guess county election officials' signature verification of early ballots. The Arizona secretary of state filed an amicus brief explaining to the court that the request violated Arizona law, could disenfranchise voters, and could disrupt accurate and timely processing and counting of early ballots. The **States United Democracy Center** served as pro-bono counsel on the brief.

In Pennsylvania, the state Supreme Court upheld a law that allows any voter to use a mail-in ballot. Pennsylvania's vote-by-mail law passed in 2019 with wide bipartisan support but was challenged two years later by a county election commissioner and Republican lawmakers, many of whom had voted for the measure. More than 5 million Pennsylvania voters have used mail-in ballots since the passage of the law, which also gives voters more time to register and to return absentee ballots. The **States United Democracy Center** is serving as pro-bono co-counsel with the attorney general of Pennsylvania, as well as **Hangley Aronchick** and **Kaplan Hecker**.

In Texas, a federal judge struck down restrictive residency requirements in SB 1111, a voting law passed last year. Judge Lee Yeakel of U.S. District Court for the Western District of Texas found that two provisions of the law were unconstitutional and permanently blocked their enforcement. The first prohibited voters from establishing their residence with the aim of influencing an election, and the second appeared to eliminate the option for voters to register to vote at a temporary address. The **States United Democracy Center** is serving as pro bono co-counsel for **Lisa Wise**, the election administrator of El Paso County, who made the case that the provisions were vague and confusing, could lead to voter suppression, and did not further county interests. Two days after the decision, the Texas Attorney General and two county election officials—all of whom intervened in the case as defendants—filed an appeal.

In the News

The New York Times: In 4 Swing States, G.O.P. Election Deniers Could Oversee Voting. By Jennifer Medina, Reid J. Epstein and Nick Corasiniti.

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*"If any one of these election deniers wins statewide office, that's a five-alarm fire for our elections," said **Joanna Lydgate**, the chief executive of the **States United Action**, a bipartisan legal watchdog organization. "It could throw our elections into chaos. It could put our democracy at risk."*

Public News Service: MN Primary: Democracy Concerns Swirl Around Election Deniers. By Mike Moen.

*"Minnesota's primary vote is less than a week away, and a pro-democracy group reported it is one of several states with a number of 'election deniers' on the ballot. The **States United Action** contended the nationwide trend poses a threat to future elections."*

AZ Mirror: Mark Finchem is the latest in a wave of election deniers moving toward controlling elections. By Kira Lerner.

*"As of July 28, at least 20 election deniers are running for secretary of state in 16 states, according to **States United Action**, an organization that tracks these races."*

The Washington Post: Memo shows Wisconsin GOP lawyer privately opposed decertifying Biden's 2020 win. By Patrick Marley.

"The contrasting public and private messages offer a glimpse into the dueling pressures facing Republicans in Wisconsin as they struggle to balance Trump's baseless demands for reversing the election with the legal and political realities on the ground."

Houston Public Media: Harris County will consider legal action against Texas over its selection for a 2022 election audit. By Andrew Schneider.

"Harris County Attorney Christian Menefee ... said such audits without any evidence of voter fraud could undermine the credibility of the election results. 'Not only do we have these audits, which drain county resources, but we have conspiracy theorists who file lawsuits against Harris County that my office ends up having to defend,' Menefee said."

Quote of the Week

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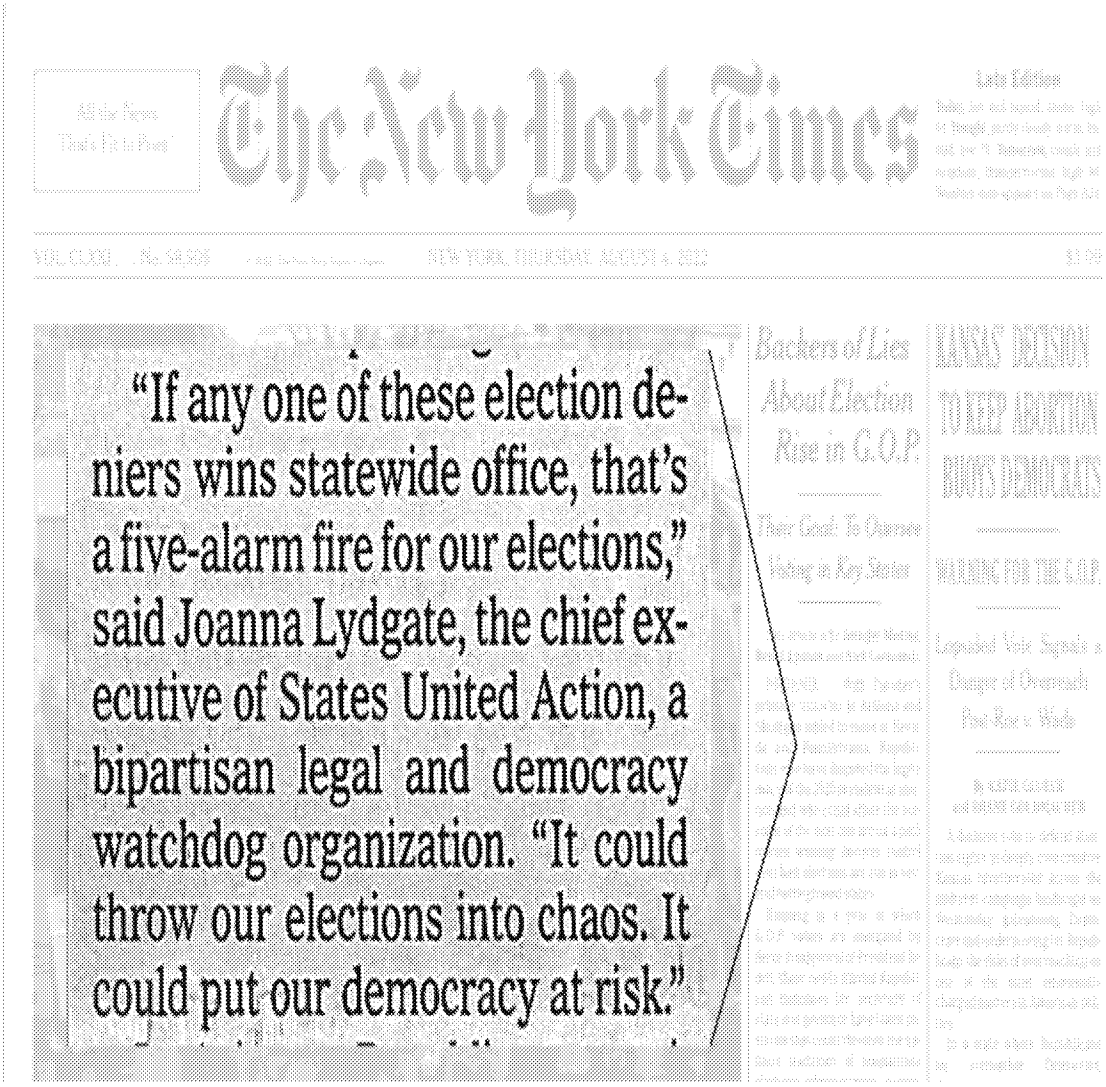
***States United** CEO **Joanna Lydgate**, on the front page of The New York Times, explains what's at risk if Election Deniers take control of statewide offices that run and defend elections:*



The New York Times

"If any one of these election deniers wins statewide office, that's a five-alarm fire for our elections," said Joanna Lydgate, the chief executive of States United Action, a bipartisan legal and democracy watchdog organization. "It could throw our elections into chaos. It could put our democracy at risk."

Backers of Lies About Election Rise in G.O.P.

Their Goal: To Oversee Voting in Key States

KANSAS DECISION TO KEEP ABORTION ROILS DEMOCRATS

WALKING FOR THE G.O.P.

Follow **States United** on Twitter and Facebook to stay up-to-date!

About the States United Democracy Center

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit

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www.statesuniteddemocracy.org.

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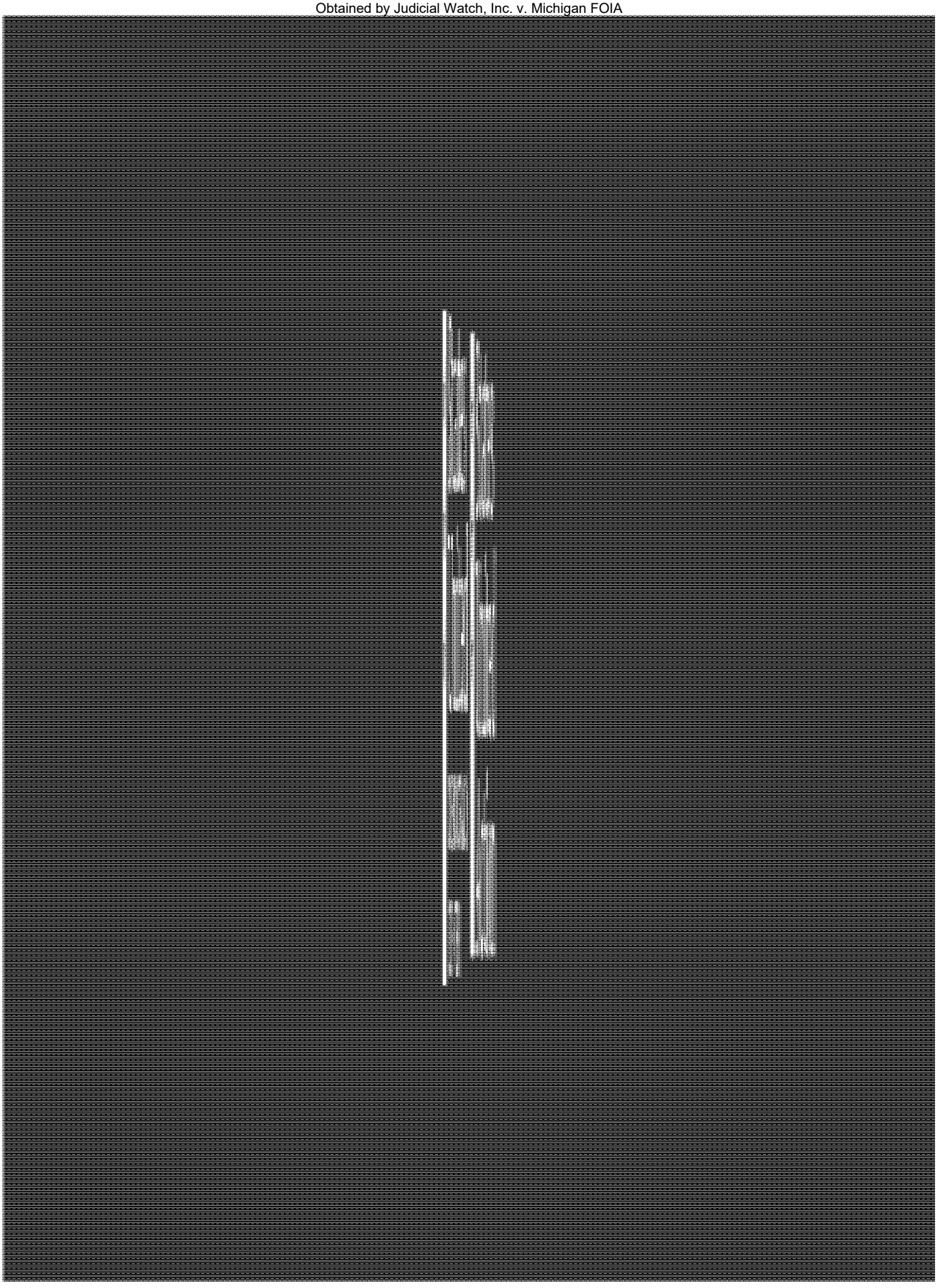

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Clearing the Bar for Accountability

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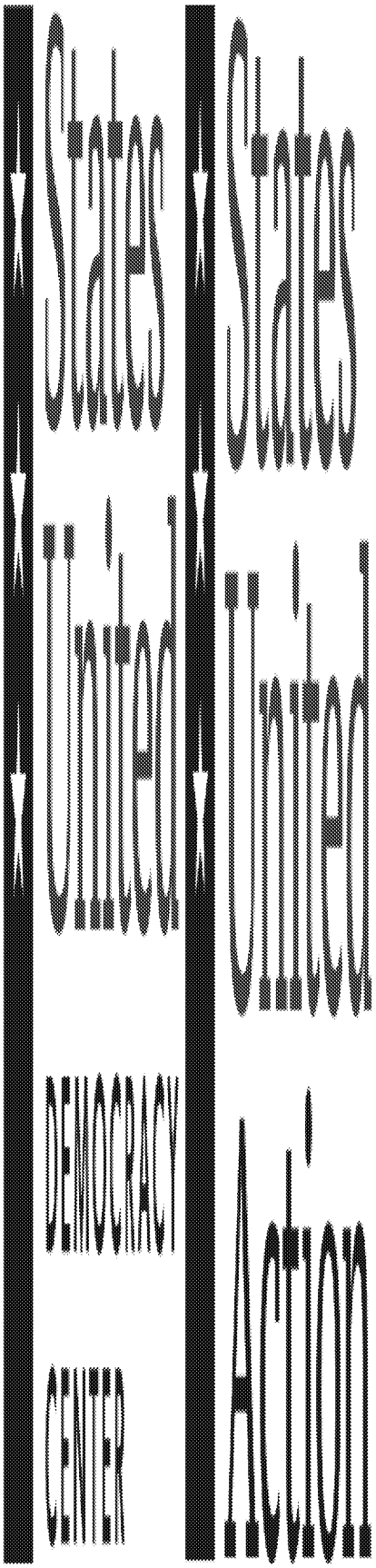

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Only have a minute?

- **Michael Gableman**, who led a **partisan sham review** into the 2020 election results in Wisconsin, was fired by Assembly Speaker **Robin Vos**. The review, which has cost taxpayers roughly $1 million, has been plagued by partisan antics and comical errors. Gableman was warned repeatedly by judges to stop deleting records and was held in contempt by one court. A judge said last month that Gableman's review had turned up "absolutely no evidence of election fraud."

- **Tim Michels**, an Election Denier, won the Republican nomination for governor in Wisconsin on Tuesday. He will face Democratic incumbent Gov. **Tony Evers** in the general election. Michels has avoided questions about certifying election results in 2024, and he has declined to rule out the so-called decertification of the state's 2020 results, an idea that has **no basis in law or the Constitution**.

- News of the FBI search at Mar-a-Lago, the Florida home of former **President Trump**, touched off a surge of **violent rhetoric** on the far right that reminded some experts of the days before Jan. 6, 2021. **Rachel Kleinfeld**, a senior fellow in the Democracy, Conflict, and Governance Program at the Carnegie Endowment for International Peace and a States United Advisory Board member, told The New York Times that such rhetoric "normalizes violence and encourages people inclined toward it to be more violent."

- A judge in Georgia gave parties until the end of this week to respond to an amicus brief filed by a group of former federal prosecutors arguing that Sen. **Lindsey Graham** should be required to comply with a special grand jury subpoena. The special grand jury is examining **attempts to overturn the 2020 election results** in Georgia. The judge said she expected to rule soon. The States United Democracy Center, Kaplan Hecker & Fink LLP, and Jonathan L. Williams, P.A., served as co-counsel on the brief.

Clearing the Bar for Accountability

When they are admitted to the bar, lawyers swear an oath to uphold the Constitution. They are guardians of the rule of law in the United States, and that includes protecting our democracy.

John Eastman did the opposite. He was an architect of former President Trump's attempt to overturn the 2020 election, including by arguing that then-Vice President Pence could throw out valid electoral votes for President Biden.

"This was false, and Dr. Eastman knew it was false," as Rep. **Liz Cheney**, the vice chair of the House select committee investigating the January 6 attack on the Capitol, put it at a hearing in

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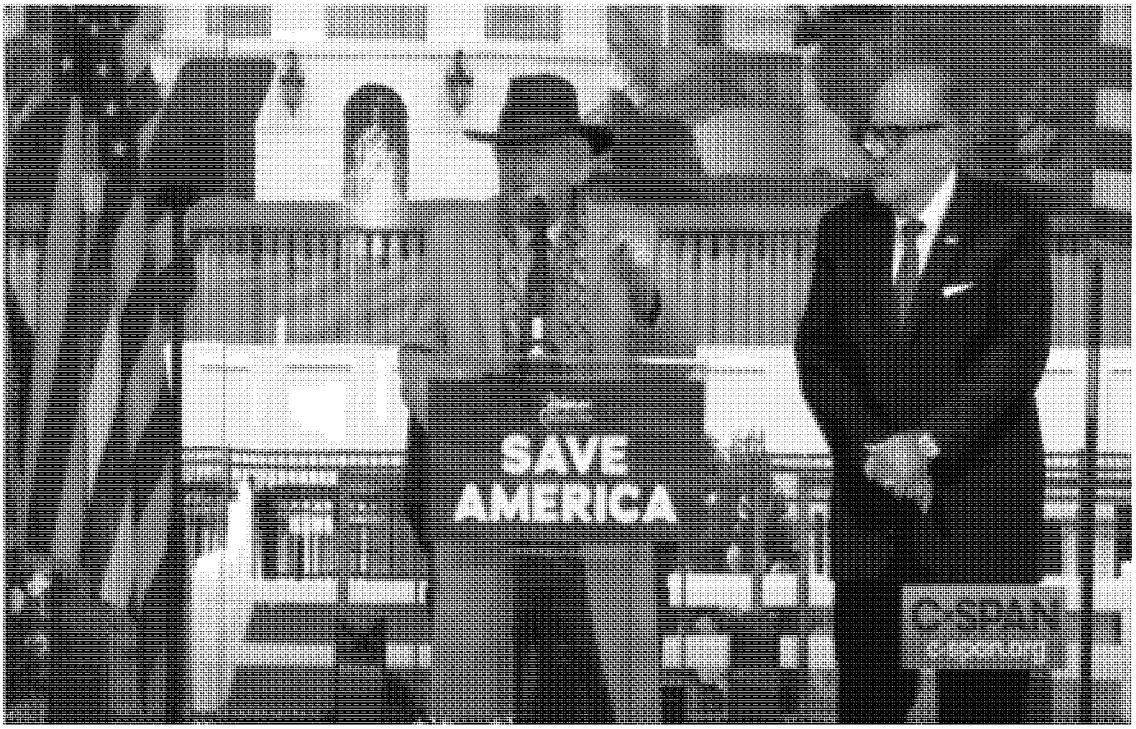
June. "In other words, it was a lie."

Recent evidence has further highlighted Eastman's misconduct. Thanks in part to the select committee, we've learned that he asked for a presidential pardon, and that he knew his arguments wouldn't hold up in court.



This week the States United Democracy Center and our partners at Lawyers Defending American Democracy (LDAD) filed a bar complaint asking the District of Columbia's Office of Disciplinary Counsel (ODC) to **open an investigation into Eastman's conduct**.

The complaint was signed by 50 prominent attorneys and former officials from both parties. Signatories include former presidents of the D.C. Bar, former federal judges, and White House ethics advisors from the Bush and Obama administrations.

The request to the ODC is the latest in Eastman-related accountability news. The State Bar of California is already investigating Eastman after States United and LDAD filed similar complaints there. In Georgia, a special grand jury has issued a subpoena for Eastman's testimony as it examines the attempt to overturn the 2020 election there. And the Justice Department recently obtained a warrant to search Eastman's cell phone.

This complaint is another example of steps States United is taking toward holding Eastman and

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others to account for undermining free and fair elections. Preserving our democracy starts with the principle that no one is above the law—including lawyers.

State of the States

In Georgia, a judge ordered Rudy Giuliani to appear in person before the special grand jury investigating attempts to overturn the 2020 election results in that state. Fulton County Superior Court Judge Robert McBurney set Giuliani's appearance for Aug. 17 unless he can provide a better explanation from his doctor about why he needs more time. As part of her investigation, Fulton County District Attorney Fani Willis is looking into two appearances by Giuliani before Georgia legislators in December 2020 to promote election lies.

In Michigan, Attorney General Dana Nessel is seeking a special prosecutor to consider charges against nine people in an alleged plot to gain improper access to vote-tabulating machines used in the 2020 election. One of the nine is Matthew DePerno, the Election Denier chosen by Michigan Republicans to run against Nessel this fall. Papers filed by Nessel describe DePerno as "one of the prime instigators of the conspiracy" and say she is seeking the special prosecutor because of the potential conflict of interest posed by this year's election.

In Pennsylvania, Doug Mastriano, the Republican nominee for governor and an Election Denier, appeared virtually before the House select committee investigating the January 6 attack. The session lasted less than 15 minutes, his lawyer told The Philadelphia Inquirer, and a source told CNN that Mastriano didn't answer a single question. Mastriano, a state senator, was filmed passing through breached barricades and police lines at the Capitol during the attack. He was subpoenaed by the select committee earlier this year.

In the News

Arizona Mirror: Senate 'audit' leaders Doug Logan and Ben Cotton are facing a Michigan criminal probe. By Jerod MacDonald-Evoy.

"The office of Michigan Attorney General Dana Nessel, a Democrat, has petitioned the Michigan Prosecuting Attorneys Coordinating Council to name a special prosecutor to investigate Logan and others who falsely believed the election was stolen from Donald Trump and then set out to gather evidence by gaining access to ballot tabulators."

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The Associated Press: Jury is told 2 men wanted to kidnap Whitmer, start revolt. By Joey Cappelletti and Ed White.

"Two anti-government extremists sought to spark a 'second American revolution' by kidnapping Michigan Gov. Gretchen Whitmer, a prosecutor told jurors Wednesday, as the government tried for a second time to get convictions in an alleged plot to shock the country into chaos before the 2020 election."

Houston Chronicle: How Texas counties are helping voters after new law led to 25,000 rejected mail ballots. By Taylor Goldenstein and Jen Rice.

"As primary voting started early this year, Texas election officials spent much of their time on the phone with voters who were frustrated and confused about new rules for mail voting that led their ballots to be rejected."

MLive: '2000 Mules' fact check: Michigan experts debunk election fraud claims. By Ben Orner.

"It's a supposed blockbuster film on the political right showing widespread ballot drop box fraud in Michigan and other battleground states. But insufficient methods and a lack of convincing evidence fail '2000 Mules' in proving its central claims about the 2020 election, according to MLive interviews with voting, technology and politics experts."

The Associated Press: Nevada judge denies loser's protest of GOP governor primary. By Scott Sonner.

"[Republican Joey Gilbert] was seeking a recount of ballots by hand that he claimed — without any evidence — would result in him winning the GOP nomination by more than 55,000 votes."

The New York Times: Hunting for Voter Fraud, Conspiracy Theorists Organize 'Stakeouts'. By Tiffany Hsu and Stuart A. Thompson.

"In the nearly two years since former President Donald J. Trump catapulted false claims of widespread voter fraud from the political fringes to the conservative mainstream, a constellation of his supporters have drifted from one theory to another in a frantic but unsuccessful search for evidence."

Tweet of the Week

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Integrity First for America (@IntegrityforUSA) on five years after the violence in Charlottesville, Virginia:

Integrity First for America
@IntegrityforUSA

Five years ago today, Nazis and white supremacists stormed the city of Charlottesville with a plan to commit violence, unleash terror, and spread their hate.

Five years ago today, the people of Charlottesville came together to resist fascism and defend their community.

9:26 AM · Aug 11, 2022 · TweetDeck

We're Hiring!

The States United team is growing. We're building out key positions as we work to protect the integrity of our elections and serve as a resource to state leaders. You can check out our open positions and apply here.

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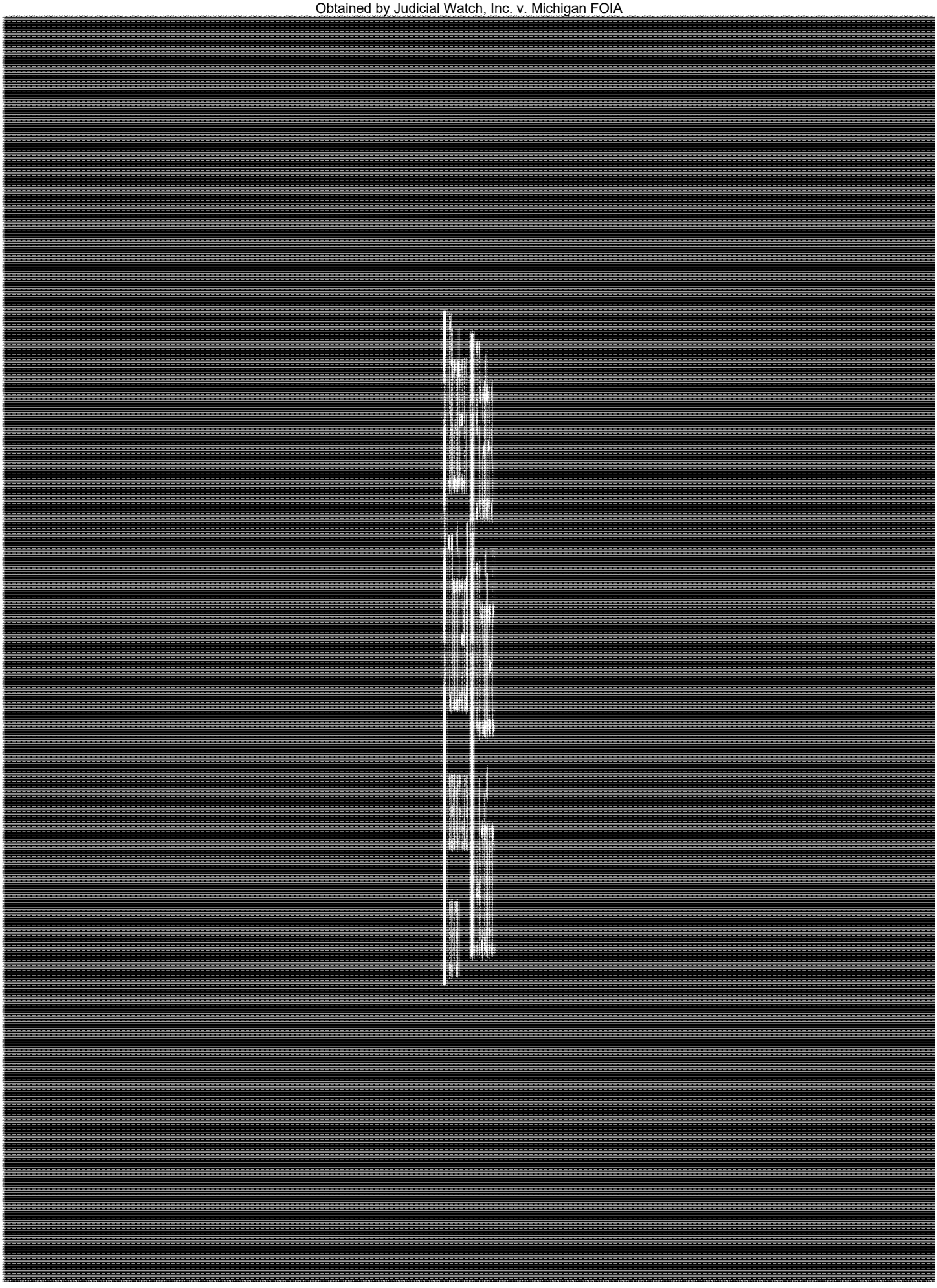

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States United DEMOCRACY CENTER States United Action

Only have a minute?

- **Election Deniers** running to oversee voting were **defeated across the country** in the midterm elections. Some did win—mostly Republican incumbents. But through Friday morning, only a handful of non-incumbent Election Deniers had won their races for governor, attorney general, or secretary of state, according to States United Action.

- Voters in Michigan, Pennsylvania, and Wisconsin can be confident that their votes will be counted and respected in 2024, after Election Deniers **lost all their races for statewide election oversight roles** in those states. "Your right to vote won," **Josh Shapiro**, the governor-elect of Pennsylvania, told supporters.

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- **Vote-counting continues** in Arizona, where Election Deniers are on the ballot for all three statewide offices that control elections, and in Nevada, where Election Deniers are on the ballot for attorney general and secretary of state.

- Federal authorities have seen **no evidence that any voting system in the United States deleted or changed votes**, or was "in any way compromised in any race in the country," the director of the **Cybersecurity and Infrastructure Security Agency** said after the election.

A Good Day for Democracy

It was the biggest trend of this election year: Across the country, 141 Election Deniers ran for governor, attorney general, or secretary of state. Each of them had undermined trust in our elections. Each of them wanted the power to oversee elections in the future.

Many were sent packing in the primaries—often by Republican incumbents who refused to endorse the Big Lie. But dozens advanced to the general election. Election Deniers were on the ballot in more than half the country.

On Tuesday, voters had the final say. And they made clear that they **believe in free and fair elections**. They won't accept statewide officials who ignore the will of the people and pick the winners themselves.

Election Deniers were rejected in state after state, including a clean sweep in races for statewide offices that oversee elections in Michigan, Pennsylvania, and Wisconsin.

"You showed up because you saw our democracy was on the brink of existence," Wisconsin Gov. **Tony Evers** told supporters after he fended off an Election Denier challenge. "And you decided to do a damn thing about it."

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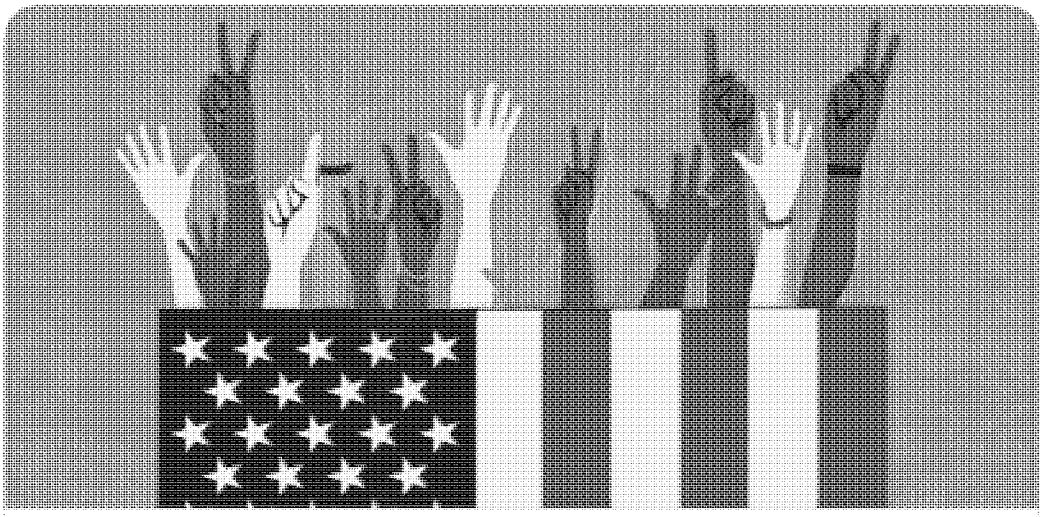
Brennan Center
@BrennanCenter
Official

Glitches were few. Voter intimidation was rare. And many of the election deniers were denied. Democracy won in the 2022 midterms.



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Democracy Wins the 2022 Midterms

As of early Friday, out of 94 races this year for governor, attorney general, and secretary of state, only five non-incumbent Election Deniers had won their races, according to States United Action. Nine others were already sitting elected officials in red states.

It was a resounding win for democracy. Of course, even one Election Denier is too many. And scores of other Election Deniers did win races for Congress and in state legislatures. The lies these candidates spread did real damage, and that can't be left unaddressed. We must continue telling the truth and combatting the lies about our election system and election officials who are conducting free, fair, secure elections in the face of threats.

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So the fight goes on. Not just in two years, but now. When Election Deniers hold office and try to ignore the will of the people and break the law, we must hold them accountable—shining a light on what they say and do, calling them out, and taking them to court.

We can do that while still celebrating the overwhelming judgment of the American people: They're fed up with the lies about our elections. They want the will of the people to prevail. This week, we can all be grateful that it did.

State of the States

In Arizona, Election Denier candidates made irresponsible claims about the election while the votes were still being counted. Abraham Hamadeh, running for attorney general, tried to claim victory before the results were clear. Kari Lake, the Election Denier running for governor, talked about "cheaters and crooks" in her Election Night speech. And Mark Finchem, a candidate for secretary of state, floated unfounded conspiracy theories about the count.

In Georgia, former House Speaker Newt Gingrich must appear before the special grand jury investigating interference in the 2020 election, a judge ruled. Fani Willis, the Fulton County district attorney, is seeking Gingrich's testimony as part of a wide-ranging investigation into efforts by Trump allies to overturn the election results in Georgia. In a petition to the judge overseeing the special grand jury, Willis said that Gingrich was involved in a plan to run TV ads that relied on false claims of election fraud. She said her request was based on information made public by the House January 6 Select Committee. Separately, a South Carolina judge said in a written order this week that Mark Meadows, the former White House chief of staff, must testify before the special grand jury.

In the News

The New York Times: Election Denial Didn't Play as Well as Republicans Hoped
By Nick Corasaniti, Reid J. Epstein and Jonathan Weisman

*"The voters stepped up to defend democracy," said **Joanna Lydgate**, the chief executive of **States United Action**, a nonpartisan election group. "In most places, Americans decisively rejected election deniers who wanted power over their votes."*

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TIME: Election Deniers Were Among the Biggest Losers of the 2022 Midterms
By Charlotte Alter

*"When it comes to the statewide positions that control our elections, Americans pretty decisively rejected the election deniers who wanted power of their votes," says **Joanna Lydgate**, CEO of **States United Action**. "Really very few of these folks have been successful."*

WBUR: Election deniers: The winners and losers
Here & Now

*"Here & Now's Peter O'Dowd talks with **Joanna Lydgate**, president of the non-profit **States United Action**, which has been tracking these election deniers seeking to hold office and have the power to run future elections."*

The Washington Post: Key election deniers concede defeat after disputing Trump's 2020 loss
By Emma Brown and Amy Gardner

"In a number of cases, the losing candidates conceded their races Wednesday, opting not to follow a precedent that Trump had set and that scholars had feared could become a troubling new norm of American democracy."

The Associated Press: VoteCast: Inflation top concern, but democracy a worry too
By Josh Boak and Hannah Fingerhut

"Just as Republicans had hoped, high inflation was the top consideration for voters in the midterm elections, AP VoteCast shows. But the survey reveals that a core issue for President Joe Biden, the survival of democracy, also weighed heavily on voters' minds, as control of Congress — and a choice between sharply contrasting visions of America — hung in the balance."

Vox: The midterms showed American democracy won't go down without a fight
By Zack Beauchamp

"...Republicans who denied the legitimacy of the 2020 election seem to have performed particularly poorly. At the state level, where the actual power to disrupt future elections lies, Democrats are very close to running the table. ... When you combine these results with Georgia, where Republican Gov. Brian Kemp and Secretary of State Brad Raffensperger held on despite resisting Trump's attempt to alter the vote total in 2020, the picture for 2024

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suddenly looks far rosier for small-d democracy than expected."

The Arizona Republic: Despite judge's order, Cochise County officials proceed with plans for a full hand count of ballots
By Mary Jo Pitzl

"Cochise County officials are proceeding with a hand count of every ballot cast in Tuesday's election, despite a court ruling that bars them from doing so. Meanwhile, the Board of Supervisors on Wednesday authorized its attorney to appeal that ruling to the Arizona Supreme Court, complicating the timeline for when — or if — the controversial count would actually happen."

Reuters: Arizona, Nevada election officials count ballots under high security
By Tim Reid and Ned Parker

"Arizona and Nevada security officials remained on high alert on Wednesday for election-related protests and allegations of voter fraud, as they prepared for days of ballot counting to determine final results in key races for governor and U.S. Senate."

Detroit Free Press: Michigan has unofficial 2022 election results. Here's what happens next.
By Clara Hendrickson

"Once counties have certified their results, the state board reviews the vote totals from all 83 counties in Michigan and certifies statewide races and those races that cross county lines. This year, the Board of State Canvassers has until Nov. 28 to certify the midterm election results. Secretary of State Jocelyn Benson said she predicts quick resolution if a county fails to certify its results or the state board deadlocks."

Video of the Week

HBO's "Last Week Tonight with John Oliver" cited States United in a breakdown of election subversion of all kinds. The episode aired before this week's midterms, but it includes themes that remain as threats to our democracy.

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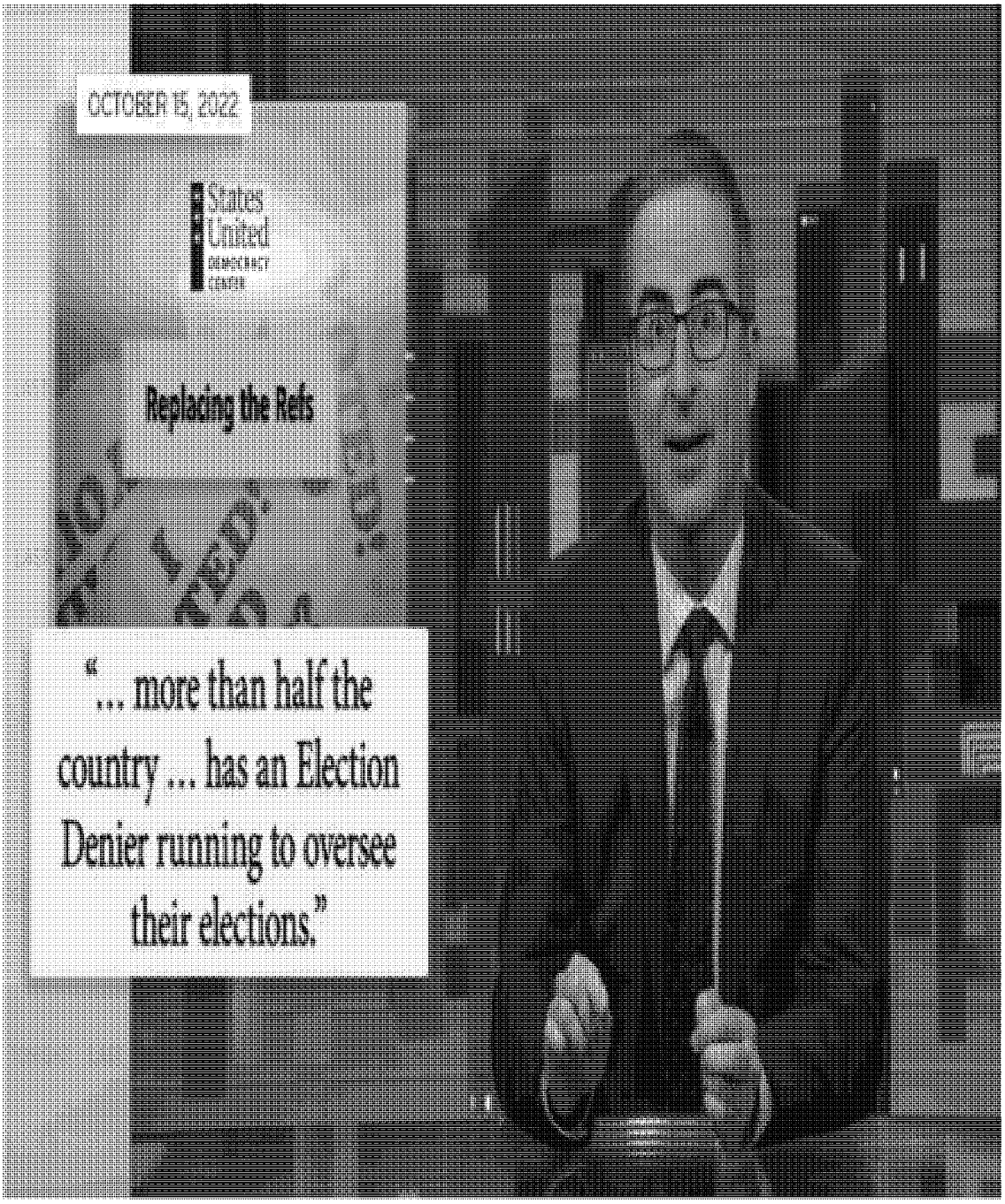

We're Hiring!

The States United team is growing. We're building out key positions as we work to protect the integrity of our elections and serve as a resource to state leaders. You can check out our open positions and apply here.

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The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit www.statesuniteddemocracy.org.

About States United Action

States United Action is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit www.statesuniteddemocracy.org/states-united-action.

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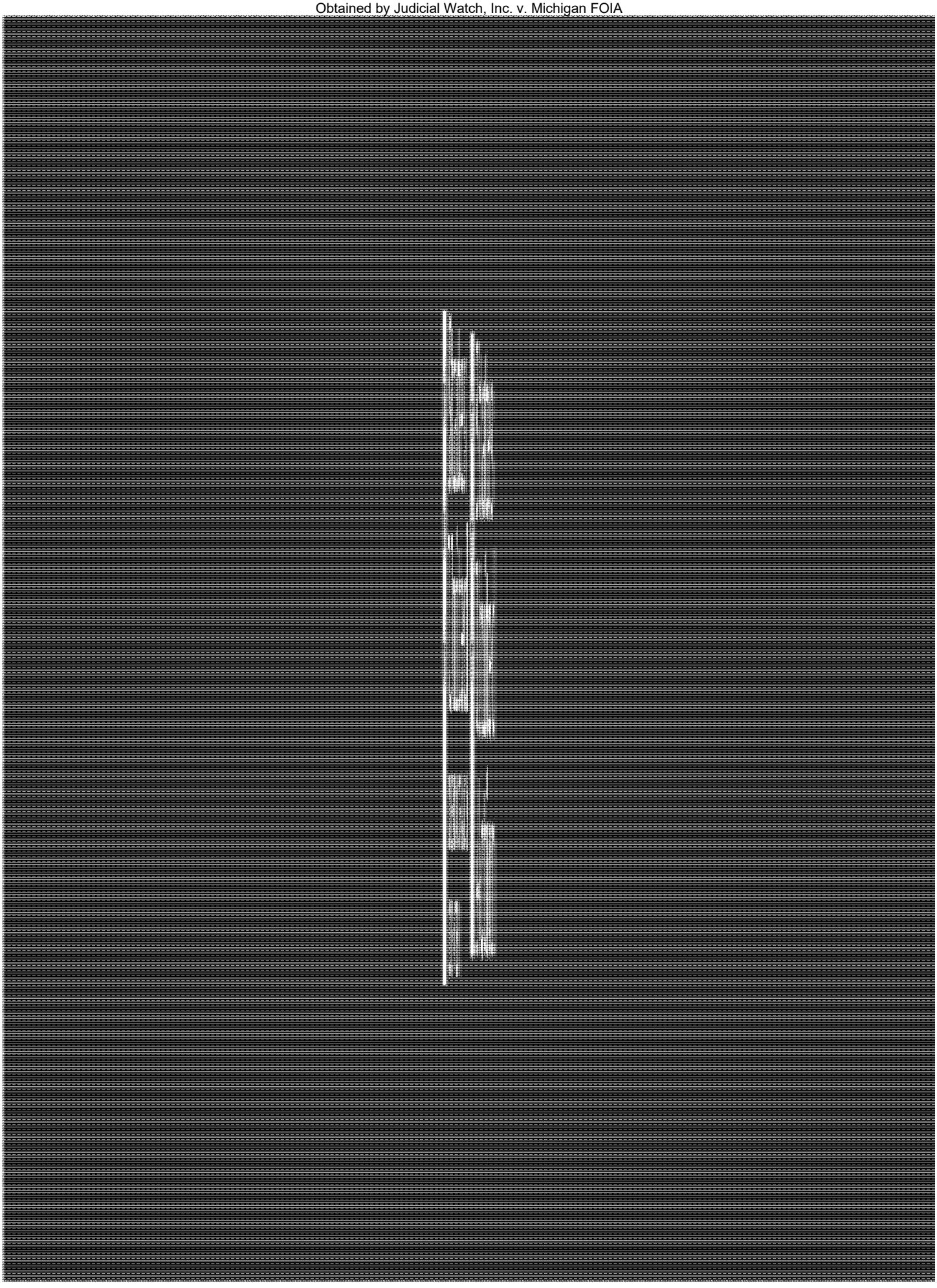

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What Accountability Looks Like

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States United Action

Only have a minute?

- The State Bar of California announced 11 disciplinary charges against **John Eastman** and will seek to have him disbarred for his role in trying to **overturn the results of the 2020 election** on behalf of former **President Trump.** States United first filed an ethics complaint against Eastman with the California Bar in October 2021.

- A jury in Washington, D.C., convicted four members of the **Oath Keepers** of **seditious conspiracy** for their roles in the Jan. 6 attack on the Capitol. Stewart Rhodes, the group's founder, and Kelly Meggs, the leader of its Florida chapter, were convicted of the same charge in November. All six are awaiting sentencing.

- Arizona Attorney General **Kris Mayes** plans to redirect her office's Election Integrity Unit to focus on **defending the freedom to vote and protecting election officials and**

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election workers. Under Mayes's predecessor, the unit focused on voter fraud and "found scant evidence of it occurring in Arizona," Mayes told The New York Times.

What Accountability Looks Like

Accountability is one of the strongest tools we have to prevent another attack like Jan. 6. When people step outside the bounds of our democracy, they must face consequences — not just in the courts but within their professions.

The State Bar of California this week took a major step toward accountability for **John Eastman,** who helped craft a legal strategy to try to overturn the 2020 election on behalf of then–**President Trump.**

The state bar unveiled 11 disciplinary charges against Eastman and said it would seek to have him disbarred.

George Cardona, the California Bar's chief trial counsel, said Eastman violated his "highest legal duty," adherence to the U.S. and California Constitutions, in "an attempt to usurp the will of the American people and overturn election results for the highest office in the land."

"There is nothing more sacrosanct to our American democracy than free and fair elections and the peaceful transfer of power," Cardona said.

After the 2020 election, Eastman devised strategy, drafted legal memos, and advised President Trump and Vice President Pence with the purpose of obstructing the counting of electoral votes on Jan. 6, 2021.

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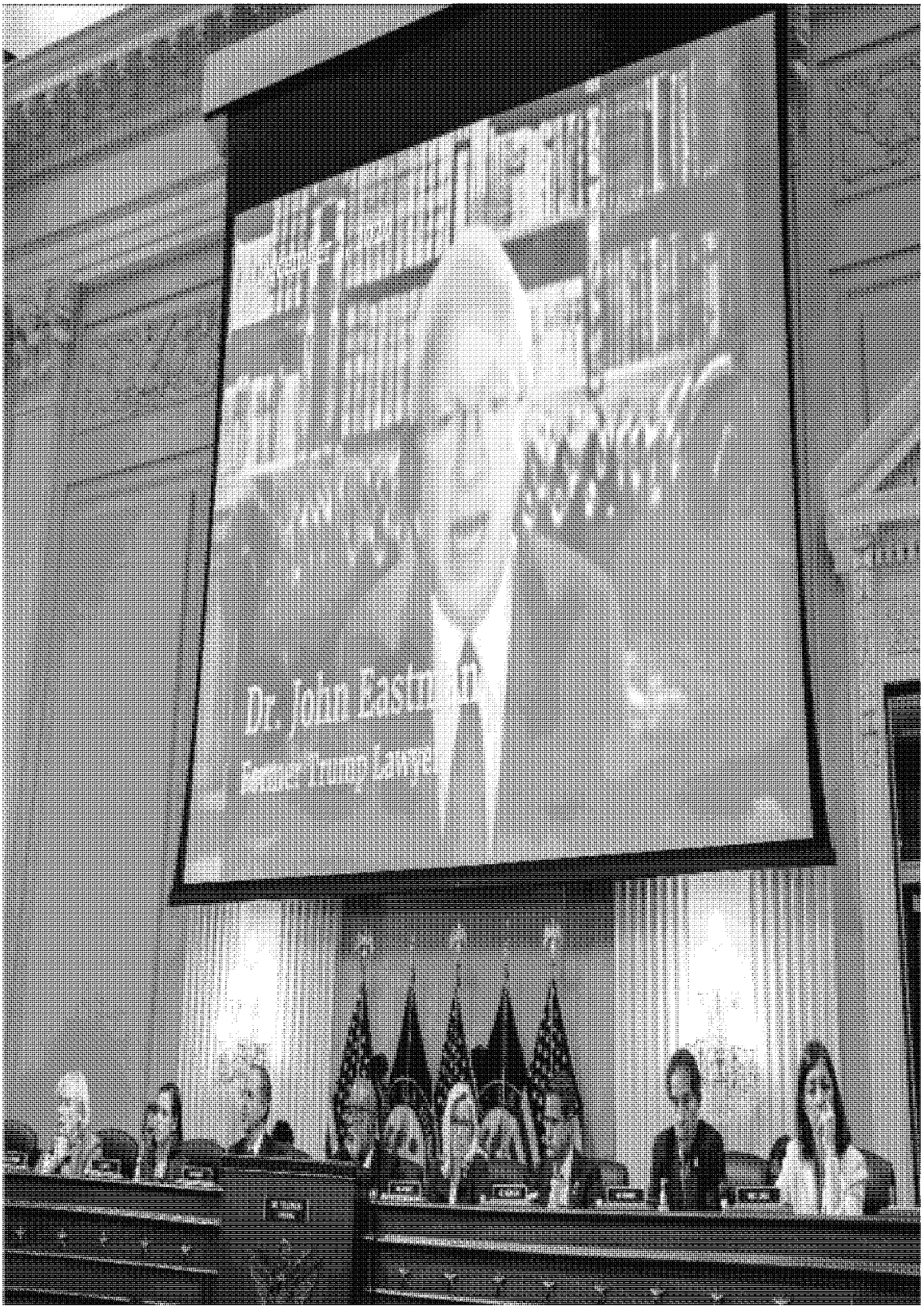

John Eastman appears on screen during a hearing of the House January 6 Select Committee last year. (Jabin Botsford/The Washington Post via Getty Images)

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As the California Bar's Notice of Disciplinary Charges spells out, Eastman knew, or should have known, that his efforts were not supported by the facts or the law. And on Jan. 6, 2021, his lies helped provoke the crowd that later attacked the Capitol.

States United first filed an ethics complaint against Eastman with the California Bar in October 2021, and continued to file supplemental material as more information came to light about Eastman's role in trying to overturn the election.

Accountability shouldn't stop here. And as we said in a letter to the House January 6 Select Committee last year, other lawyers who took part in the efforts to overturn the 2020 election should face consequences.

We encourage other state bars to follow the strong example set by the California Bar. John Eastman betrayed our democracy and repeatedly, willfully violated his professional duty to uphold our Constitution. He should never be allowed to practice law again.

State of the States

In Georgia, Fulton County District Attorney Fani Willis said "decisions are imminent" in the criminal investigation into attempts to overturn the state's 2020 election results. Willis argued at a hearing this week that a special grand jury's final report on the investigation should be kept under seal for now. "The state understands the media's inquiry and the world's interest, but we have to be mindful of protecting future defendants' rights," she told Judge Robert McBurney. News organizations argued that the report should be made public. McBurney did not immediately rule on the matter and promised there would be "no rash decisions." The special grand jury heard from dozens of witnesses about attempts to reverse former President Trump's loss in Georgia. Willis will determine whether to seek criminal charges following the special grand jury's report.

In the News

The Washington Post: Calif. seeks to disbar Trump adviser John Eastman over Jan. 6 charges
By Mariana Alfaro

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*"The move to file disciplinary charges against Eastman was applauded by the **States United Democracy Center,** a Washington-based group promoting fair and secure elections that in a statement described Eastman as the 'mastermind' of the plot to overturn the 2020 election. 'He abused the legal system and violated the oath he swore as an attorney, in an attempt to block the will of the people and prevent the peaceful transfer of power,' said **Christine P. Sun,** the group's senior vice president of legal."*

Los Angeles Times: Op-Ed: Hold John Eastman accountable for Trump's coup strategy
By Norm Eisen, Dennis Aftergut, and Christine P. Sun

"Swift action from the bar is critical to stopping Eastman from continuing to undermine both the legal profession and our democracy — and to warn other lawyers never to take this dangerous path."

AP: Lawmakers seek to bar insurrectionists from holding office
By Maysoon Khan

*" ... The committee's recently concluded work may have provided another springboard for lawmakers to act and propose ways to hold people accountable, said **Victoria Bassetti,** a senior policy adviser at **States United Democracy Center,** a nonpartisan organization that advocates for fair elections."*

POLITICO: Election deniers set sights on next target
By Zach Montellaro

"Swing state voters broadly rejected candidates in last year's midterms who questioned the results of the 2020 elections. But unfounded accusations of fraud and other malfeasance continue to tear at the machinery of U.S. elections."

Arizona Mirror: Election denial is lucrative: Kari Lake raised $2.5 million after Election Day
By Jim Small

"Following the election, Lake's campaign spent $3 million. And while she was telling her supporters that the money was needed to contest the election and ensure she was installed as the rightful governor of Arizona, that didn't happen. Only $228,000 was spent on the lawsuit aiming to overturn the election — less than 10% of her post-election haul."

Bridge Michigan: Michigan clerks: We need more money, guidance to implement early voting
By Yue Stella Yu

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"State elections clerks say they want more funding, time to process ballots and guidance as they adjust to a new, constitutionally implemented system that requires nine days of early voting."

City & State Pennsylvania: Bipartisan state panel issues new report aiming to clarify mail-in ballot rules
By Harrison Cann

"Since the implementation of Act 77, the 2019 law that allowed mail-in voting, county and elections officials have agreed on one thing: voters need clarity on how to do it. A bipartisan research group within the state legislature issued a report on mail-in ballots this week that addresses some concerns about mail-in voting, recommending the General Assembly clarify laws surrounding date and signature requirements, secrecy envelopes and drop boxes."

Votebeat and The Texas Tribune: Three Texas counties are suing the attorney general to get clarity on when the public can access post-election ballots
By Natalia Contreras

"At least three Texas counties — Tarrant, Williamson and Harris — have sued Attorney General Ken Paxton and are asking a judge to strike down a legal opinion he released last year that says anyone can access voted ballots right after an election. The lawsuits allege Paxton's opinion violates state and federal law, contradicts his own previous direction on the issue and exposes local elections administrators to potential criminal charges."

Tweet of the Week

Our friends at ***Issue One*** *look at the lucrative business of election lies:*

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Issue One
@IssueOneReform

Who were some of the companies and political consultants that turned election denialism into profit during the 2022 midterm cycle? Our report pulls back the curtain.

issueone.org
Who Profited from Election Deniers? - Issue One

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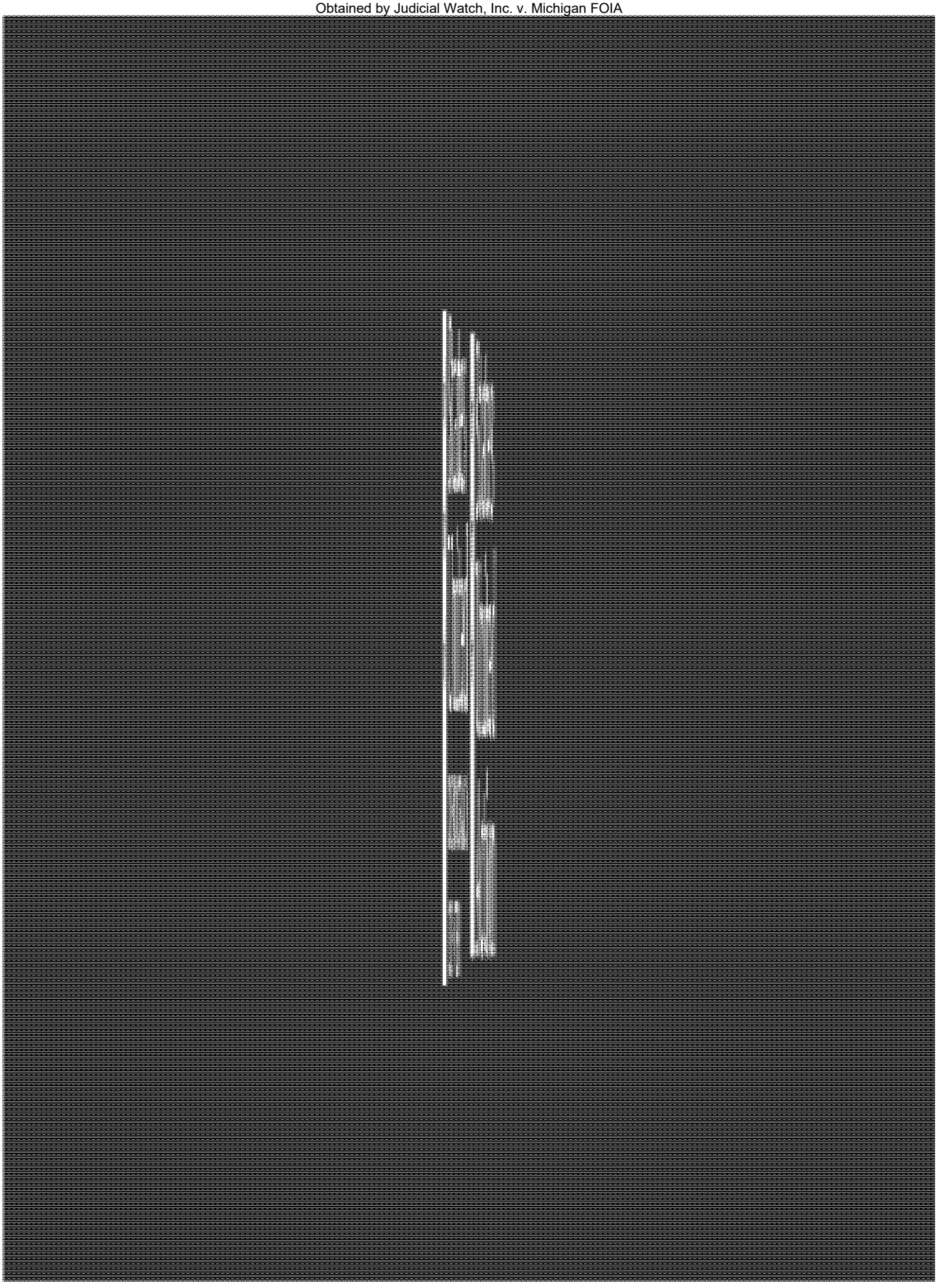

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Fox and Facts

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Only have a minute?

- The **Justice Department** urged a court to reject former **President Trump's** claim that he should be immune from being **sued over the Jan. 6 attack.** Two Capitol police officers are among those suing the former president for the physical and psychological injuries they suffered during the riot.

- The **Supreme Court** asked for more briefs to inform its next steps in Moore v. Harper, a redistricting case concerning a **radical legal theory** that could give partisan state legislatures virtually unchecked power over federal elections. The North Carolina Supreme Court agreed last month to reconsider the underlying dispute.

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- Michigan Attorney General **Dana Nessel** said she was among those targeted by a heavily armed man who allegedly threatened to kill all Jewish members of the state government.

Fox and Facts

In the days after the 2020 election, Fox News and Fox Business broadcast wild and unfounded allegations about rigged voting machines and other conspiracy theories.

Behind the scenes, we now know that Fox's own hosts and executives were ridiculing these claims as "absurd," "ludicrous," and "shockingly reckless." But they were worried about losing viewers to far-right competitors. Profits were at stake.

These are among the revelations from a $1.6 billion lawsuit filed against Fox by Dominion Voting Systems. In a deposition made public this week, Rupert Murdoch himself said he wished the networks had been "stronger in denouncing" the lies, despite acknowledging that Fox hosts repeatedly endorsed conspiracy theories about a stolen election.

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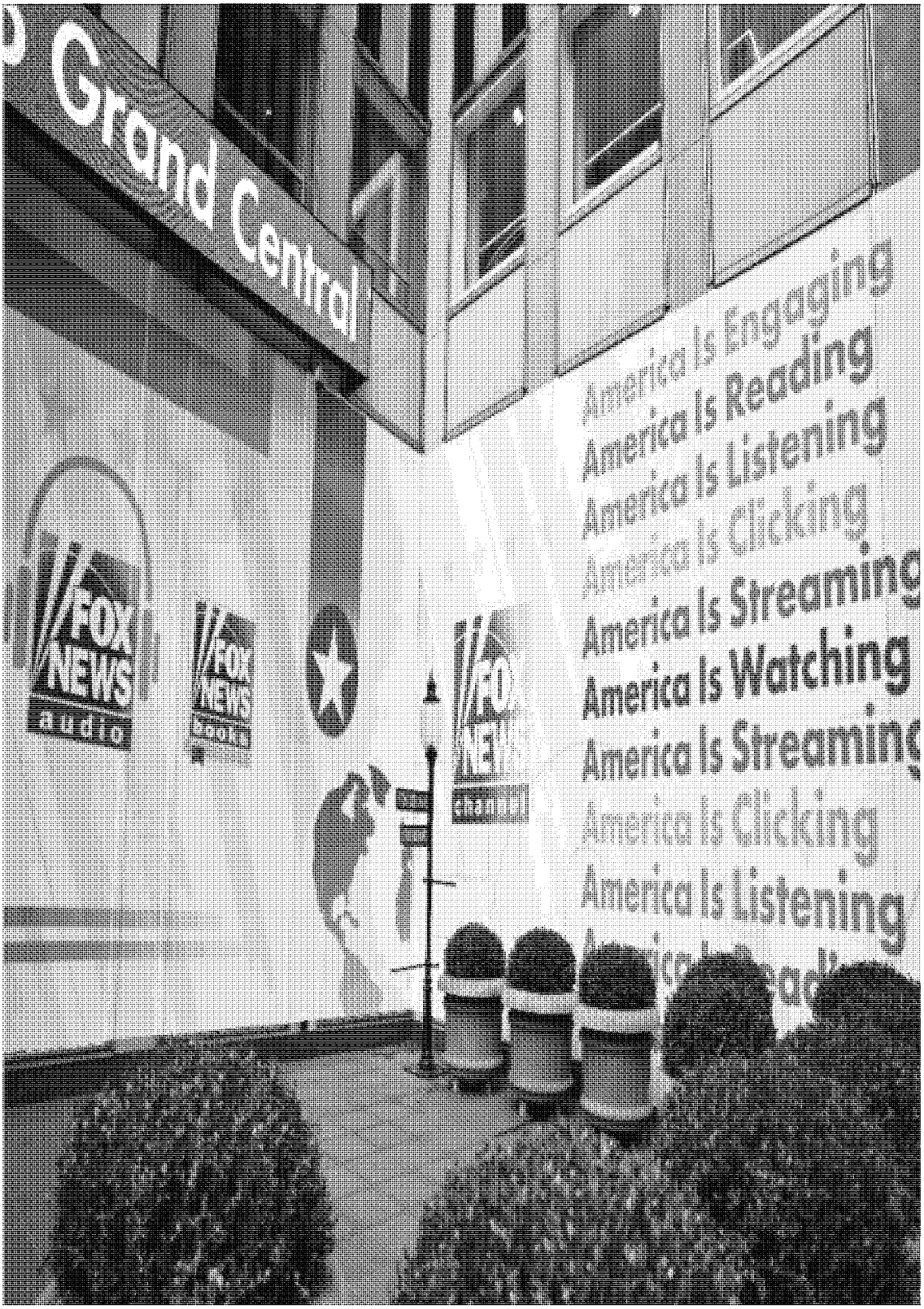

Michael M. Santiago/Getty Images

It will be up to a court to decide whether the networks' conduct amounted to defamation. But it was a clear disservice to Fox viewers, who deserved to know that the election wasn't rigged or

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stolen. It was **free, fair, and secure.**

It was also a disservice to hundreds of dedicated state and local election officials, who had to fight a torrent of disinformation, not to mention threats to their own safety, to get the truth out in real time.

"Even under wave after wave of scrutiny," as Votebeat wrote this week, state and local election officials' "reassurances about the security and integrity of the 2020 election have been supported by the facts."

By giving oxygen to what were obviously ridiculous conspiracy theories, Fox caused lasting damage to Americans' faith and confidence in our elections. The voters who tuned in deserved better. They deserved the truth.

State of the States

In Wisconsin, the nonprofit organization Law Forward filed an ethics complaint against Michael Gableman, who was fired after leading a sham review of the 2020 election that found no evidence of fraud. Law Forward filed the complaint with the Office of Lawyer Regulation, an agency of the Wisconsin Supreme Court, and urged the agency to hold Gableman accountable. The complaint, which runs more than 100 pages, details how he hired conspiracy theorists, intimidated voters with unlawful subpoenas, spread disinformation, and lied repeatedly to the government and the public. An accompanying letter calls Gableman's review a "disastrous and embarrassing attack on Wisconsin's legal and political institutions." Law Forward said in a statement: "His actions were and continue to be a threat to democracy, plain and simple, and a violation of his sworn duty to uphold both the U.S. and Wisconsin constitutions."

In the News

AP: Failing at polls, election deniers focus on state GOP posts
By Nicholas Riccardi and Joey Cappelletti

*"'The rise of this dangerous ideology nationwide and the rise within party machinery are ominous,' said **Norm Eisen**, a prominent Washington lawyer and former ambassador who is executive chair of States United Democracy Center, which tracks election deniers. 'It's an*

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outrageous phenomenon.'"

Newsweek (Opinion): The Threat of Election Denial Is Still Real—and Very Dangerous
By former U.S. Sen. Tim Wirth and Tom Rogers

" ... election deniers are still very much regrouping for another assault on our democratic election process, and they still have plenty of troop strength at the state, the county and local level."

The Wall Street Journal: House Republicans Plan Wider Media Access to Jan. 6 Video
By Andrew Ackerman and Siobhan Hughes

"House Republican lawmakers said they plan to allow a broad group of media outlets to view security-camera footage from the Jan. 6, 2021, riot at the U.S. Capitol, about a week after Fox News host Tucker Carlson said his show was granted access to the tapes."

The Arizona Republic: At Arizona Capitol, Republican leaders spotlight far-fetched election conspiracies
By Ray Stern

"If the presentations have proven anything, it's that conspiracy-minded Republican leaders aren't backing down in the face of election losses and investigations that continue to debunk their claims."

Votebeat: Cochise County gives election skeptic recorder near full control of elections
By Jen Fifield

"Elections in Cochise County [Ariz.] will now be run almost entirely by Recorder David Stevens, an election skeptic who has said he does not fully trust all of his county's election procedures and believes the county can and should move to hand-counting ballots."

MLive: Bills would ban guns at Michigan polls, punish election worker harassment
By Ben Orner

"Michigan House Democrats have introduced a package of bills they say will protect election officials and workers by increasing penalties for harassment and banning guns from voting locations. The four bills follow promises that Democrats have made early in this new legislature — where they hold majorities in both chambers — to further secure Michigan's elections."

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Bolts: West Virginia Adds to Election Deniers' Ongoing Takeover of State Politics
By Alex Burness

"This takeover of GOP infrastructure by candidates who spread false conspiracies about the 2020 election has continued even since their high-profile losses in the fall of 2022."

WPR: Pricetag on Assembly Republicans' investigation into the 2020 presidential election nears $2.5M
By Anya van Wagtendonk

"A court judgment against Assembly Speaker Robin Vos, R-Rochester, has added another $135,000 to the cost of the Assembly Republicans' investigation into the 2020 presidential election. The ruling brings the total price tag attached to that investigation to almost $2.5 million in taxpayer dollars, according to a review by WisPolitics."

Profile of the Week

*Arizona Attorney General **Kris Mayes** spoke to The Guardian about protecting the freedom to vote and her vow to prosecute those who threaten election officials.*

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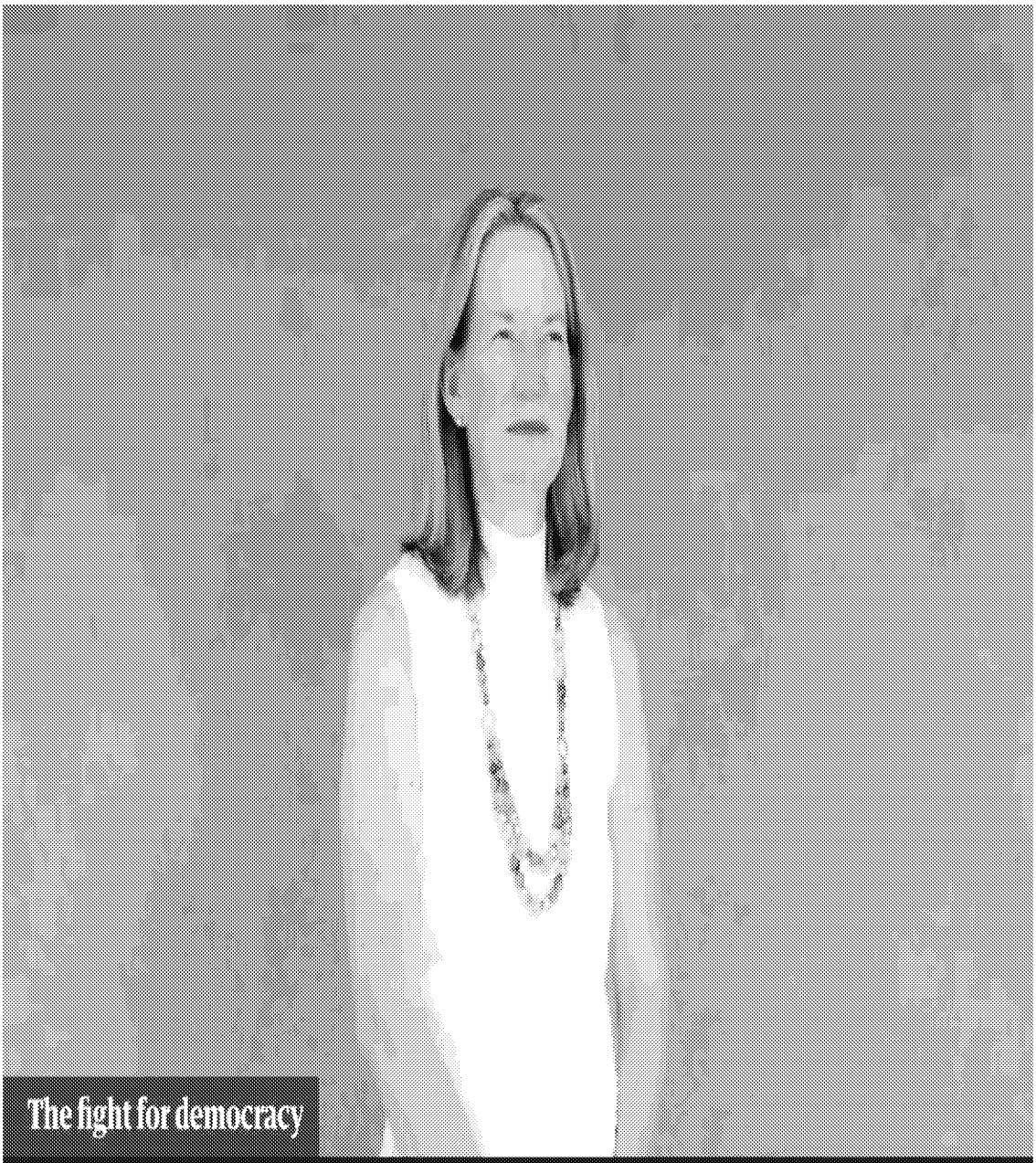

The fight for democracy

'We will prosecute death threats': Arizona's new attorney general fights to protect election workers

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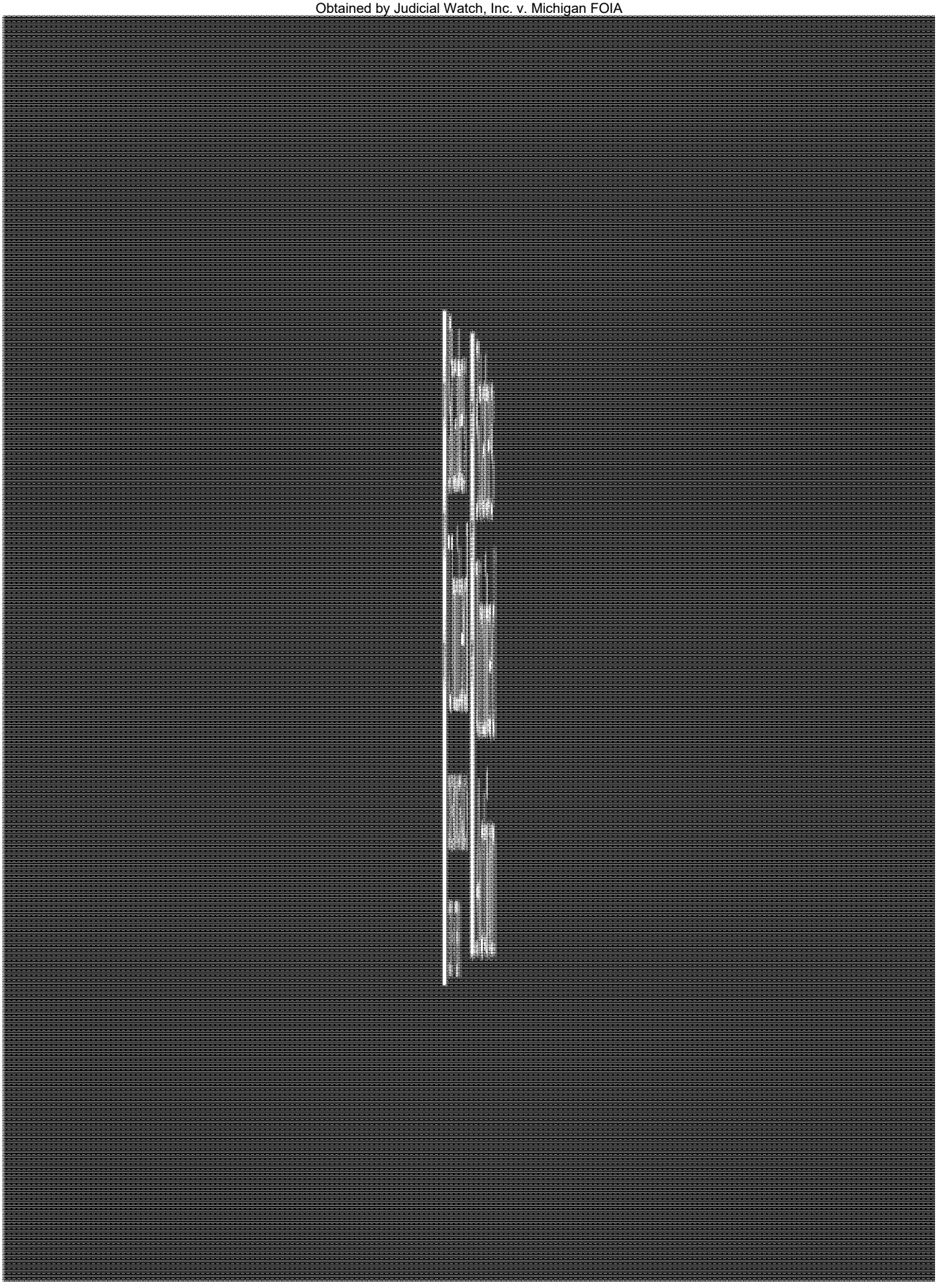

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Only have a minute?

- As a jury continued deliberations in the trial of six affiliates of the **Oath Keepers** charged for their actions **during the Jan. 6 attack on the Capitol**, federal prosecutors completed more than two months of testimony in a separate case against five members of the **Proud Boys.**

- A man accused of aiding the plot to kidnap Michigan Gov. **Gretchen Whitmer** pleaded guilty to attempting to provide material support for terrorism in the 2020 kidnapping conspiracy. He **agreed to cooperate with prosecutors** in their case against four additional defendants who are set to face a state terrorism trial in August over the plot.

- An annual threat assessment from the **U.S. intelligence community** affirms that Russia tried to interfere in the 2022 midterm elections. The report warns that these efforts, including spreading disinformation, have intensified over the past few years. **States United** continues to make **combatting the spread of disinformation** a top priority.

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Who Political Violence Threatens

In Michigan, the three statewide officials responsible for overseeing and defending elections are all women: Gov. Gretchen Whitmer, Secretary of State Jocelyn Benson, and Attorney General Dana Nessel.

All three defeated Election Deniers to win re-election last fall. All three have been threatened with violence. In 2020, Whitmer was the target of a plot by a group of men who planned to kidnap her and kill any police officers who stood in their way. Accountability for those threats is still ongoing.

Our history reflects the countless and continuing efforts of women to strengthen our democracy and make it more inclusive. But we must also acknowledge that women are disproportionately targeted by political violence.

Public officials who are women and racial or ethnic minorities are much more likely to report being harassed or threatened, according to a survey of local elected officials last year by Princeton University, Bridging Divides Initiative, the Anti-Defamation League, and CivicPulse.

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The 19th, a news organization that focuses on gender, politics, and policy, this week published an enlightening read on this sobering reality.

As **Katie Reisner**, senior counsel at States United, explains in the story, a recent example in

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New Mexico illustrates how easily Election Denier behavior and disinformation can translate into direct danger for elected officials.

In that case, authorities say a failed political candidate was at the center of a series of drive-by shootings at the homes of Democratic officials, including state Sen. Linda Lopez. A bullet went through the bedroom of her 10-year-old daughter.

Confronting political violence, along with the disinformation that feeds it, is an urgent priority. At States United, we provide guidance on best practices for countering political violence, and work with law enforcement to help keep election officials safe. Fighting dangerous election lies goes hand in hand with these efforts.

The climate of threats faced by the country's thousands of dedicated election officials and election workers, most of them women, is unacceptable. Their security is essential to maintaining peace, order, and trust in our democracy.

State of the States

In Arizona, Attorney General Kris Mayes said the State Bar and other entities should determine whether her predecessor, Mark Brnovich, faces consequences for withholding a report by state investigators that found there was no widespread fraud in the state's 2020 election. After Brnovich kept the findings private, Mayes published them herself last month and said they "show what we have suspected for over two years — the 2020 election in Arizona was conducted fairly and accurately by elections officials." Gov. Katie Hobbs's office has urged the State Bar to look into Brnovich's withholding of the findings, saying the revelation "exposed what is likely unethical conduct" by the former attorney general.

In the News

The 19th: Threats against Michigan women leaders highlight ongoing concerns over political violence
By Barbara Rodriguez

"Experts on political violence say women, and particularly women of color, are disproportionately impacted by threats of harassment and political violence. 'The New Mexico example illustrates how quickly it can go from someone aggrieved because of election

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*disinformation or denialism … to someone acting on the way in which they are aggrieved,' said **Katie Reisner**, senior counsel for **States United Democracy Center**, a nonpartisan organization that advocates for free, fair and secure elections."*

The Washington Post: The hits keep coming for election-deniers
By Aaron Blake

" … while the wheels of justice indeed turn slowly, the sanctions for those who baselessly spread and promoted such claims continue to increase. Just this month, that list grew to include both a Trump campaign legal adviser and one of the most conspiratorial, Trump-backed candidates to appear on the 2022 ballot."

The New York Times: 'History Will Hold Donald Trump Accountable' for Jan. 6, Pence Says
By Jonathan Weisman

"Former Vice President Mike Pence, delivering his strongest public rebuke yet to the president who made him his running mate, said on Saturday night 'that history will hold Donald Trump accountable' for the Jan. 6, 2021, attack on the Capitol, which he called 'a disgrace.'"

Votebeat: States' withdrawals weaken ERIC and show conspiracy theories taking deep root
By Carrie Levine

"Withdrawing from it will leave states with fewer tools to uncover voters who have moved or died and should no longer be on the rolls, creating more opportunities for the voter fraud that critics say they are worried about. The program's diminished membership also will result in less outreach to eligible voters who haven't yet registered."

Axios: Colorado GOP picks election denier to lead party into 2024 election
By John Frank

"The Colorado Republican Party's new leader believes Donald Trump won the 2020 election and considers Senate Republican leader Mitch McConnell a 'feckless leader.' … The party's roughly 400-member central committee selected Dave Williams, a former state representative who challenged incumbent GOP congressman in 2022 and lost, as the party's new chair."

Reveal: DeSantis' Election Police Have Largely Flopped in Florida Voter Prosecutions. A New Law Aims to Change That.
By Maryam Saleh and Ese Olumhense

"A new Florida law gives Gov. Ron DeSantis' prosecutors power to pursue more election-related cases — a move explicitly designed to circumvent recent judicial scrutiny of the state's

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highly politicized voter prosecutions.

The Texas Tribune: Texas Senate passes bill to make illegal voting a felony again
By Pooja Salhotra and Natalia Contreras

"The Texas Senate on Tuesday gave final approval, on a 19–12 vote, to legislation that would raise the penalty for voting illegally from a misdemeanor to a felony, a priority for Texas Lt. Gov. Dan Patrick and other conservative lawmakers who have worked to remake the state's voting laws since the 2020 election, despite the lack of evidence of widespread voter fraud in Texas."

The Texas Tribune: Ken Paxton's campaign against election crimes ensnared a Texas justice of the peace three times before judges thwarted the efforts
By Alejandro Serrano

"Many of the illegal voting cases the Texas attorney general has boasted about are unraveling after a key court ruling. But Tomas Ramirez III said the pursuit of charges against him has taken its toll."

Opinion of the Week

***Tom Joscelyn**, a former staffer for the House January 6 Select Committee, calls out Tucker Carlson's distortion of Jan. 6, 2021 in Politico Magazine.*

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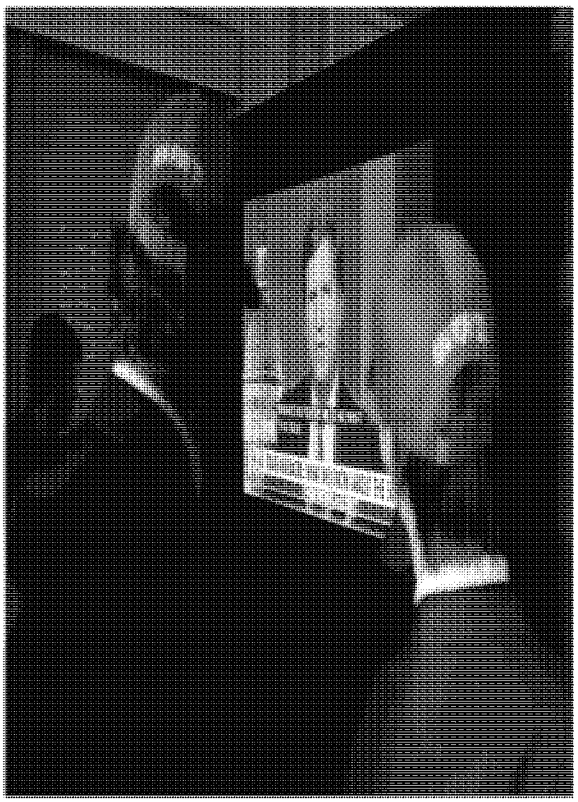
MAGAZINE

LAW AND ORDER

Opinion | I Helped Write the Jan. 6 Committee Report. Here's What Tucker Carlson Left Out.

Conspiracy theories from the Fox News host are easily squashed.



Tucker Carlson promised viewers that his reveal of this massive tranche of video would dramatically alter our collective understanding of the events. It did not. | Brynn Anderson/AP Photo

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The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit www.statesuniteddemocracy.org.

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States United Action is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit www.statesunitedemocracy.org/states-united-action.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/20/2024 9:30:39 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Michigan webpage
Attachments: Protecting Michigan Voters from AI Generated Election Misinformation - DRAFT-2.docx

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Hi Heather,

Our team's comments are attached. Have a great weekend!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, September 18, 2024 at 8:40 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Re: Michigan webpage

AG wants to go live as soon as possible.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, September 18, 2024 5:39:51 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Michigan webpage

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Thanks. Will get back to you ASAP. Do you have a deadline?

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, September 18, 2024 at 3:39 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Michigan webpage

Hi Jonathan,

Attached is what we can provide, screen shot and word doc. If changes could be made in track changes on word doc that would be great.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Osher, Daniel [OsherD@michigan.gov]
Sent: 3/29/2024 1:04:06 PM
To: Robert Cotter [Robert@statesuniteddemocracy.org]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Re: CA bar court recommends disbarring Eastman

Thanks, Robert

Daniel Osher
Deputy Legal Counsel, Executive Office of the Governor
osherd@michigan.gov
(517) 242-0089

From: Robert Cotter <Robert@statesuniteddemocracy.org>
Sent: Thursday, March 28, 2024 3:10:16 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Re: CA bar court recommends disbarring Eastman

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Hi Heather and Dan,

Flagging for you the State Bar Court of California's recommendation that John Eastman be disbarred from the practice of law in California. *Matter of Eastman*, Case No. SBC-23-O-30029-YDR (Cal. Bar. Ct. Mar. 27, 2024). The recommendation comes following a 35-day trial last year that detailed Eastman's role in efforts to overturn the results of the 2020 election.

Specific to Michigan, the decision makes the following references to:

- Eastman's involvement in *Texas v. Pennsylvania*, the lawsuit brought seeking to invalidate election results in the 2020 election in Michigan and other states. *Id.* at 9–10.

- Eastman's "January 6 scenario" memos outlining his recommendation that Vice President Pence acknowledge fake slates of electors from seven states, including Michigan, and declare Trump re-elected. *Id.* at 43.

- Eastman's allegation in the "January 6 scenario" memos that Michigan mailed out absentee ballots to every registered voter ahead of the 2020 election, instead of absentee ballot applications as permitted by law. *Id.* at 46

- Eastman's 1/5 meeting with Greg Jacob and Marc Short, respectively legal counsel and chief of staff for VP Pence, where Eastman repeated his request that VP Pence reject electoral votes from Michigan and other states. *Id.* at 66.

- Eastman's article published in *American Mind* on Jan.18, 2021, where he repeats allegations of fraud in Michigan's 2020 election. In the article, Eastman alleges there were "more absentee votes cast than had been requested" in Wayne County and "votes were electronically flipped from Trump to Biden" in Antrim County. *Id.* at 71. The opinion specifically notes that by November or December of 2020, Eastman was aware that Michigan had conducted a full hand count of Antrim County and found that the machine count was accurate. *Id.* 73. This portion of the decision cites testimony from Jonathan Brater. *Id.* at 72.

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- Eastman's false statement in the *American Mind* article that a report by J. Alex Halderman supported his Antrim County claims. *Id.* at 73.

- Eastman's use of reports generated by Russell Ramsland analyzing Dominion voting machines and the results in Antrim County. *Id.* at 73. The opinion states, "Ramsland's claims were not credible and reflected a fundamental misunderstanding of Michigan election administration." *Id.*

Eastman will officially become ineligible to practice law in California in two days. He may request an appeal with the State Bar Court's Review Department and then later with the California Supreme Court. We will keep you updated.

Thanks,
Robert

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Wednesday, March 27, 2024 at 6:17 PM
To: Heather Meingast <meingasth@michigan.gov>, Osher, Daniel <osherd@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: CA bar court recommends disbarring Eastman

He can appeal but will not be able to practice during the appeal. Will review decision (attached) for references to Michigan tomorrow. Please let Mike know. Thank you.

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 3/29/2024 9:51:26 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 'This Is a Big Deal'

'This Is a Big Deal'

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States United Democracy Center

States United Action

This Week in Democracy

- After a lengthy ethics trial, a judge recommended that former Trump attorney **John Eastman should permanently lose his law license** in California because of his role in the plot to overturn the 2020 presidential election. **States United** filed the initial ethics complaint in 2021 against Eastman.

➡ **READ:** States United's statement

- Former Justice Department official **Jeffrey Clark** began his own disciplinary trial in Washington, D.C. Clark could be the next former Trump attorney to **lose his law license** for efforts to overturn the 2020 election. His actions were "essentially a coup attempt at the

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Department of Justice," a lawyer for the D.C. Bar said.

- The **U.S. Department of Justice** announced that it is **cracking down on threats to election officials.** Since the creation of its Election Threats Task Force in 2021, the department has brought about 20 prosecutions, with many resulting in substantial prison sentences.

- A judge imposed a partial gag order on former **President Trump** in his **New York criminal case** about falsifying business records to hide damaging information from voters before and after the 2016 election. The order prevents Trump from making statements about prosecutors, court staff, jurors, and potential witnesses. The case is scheduled to go to trial on April 15.

'This Is a Big Deal'

This week saw a landmark moment in the fight for democracy and the rule of law.

A California judge on Wednesday recommended disbarment for John Eastman, who was a principal architect of Donald Trump's plot to steal the 2020 election. To protect both the public and the legal system, the judge said Eastman deserved "the most severe available professional sanction."

Accountability takes time, but it's worth it. States United filed a bipartisan ethics complaint against Eastman two and a half years ago, asking the California Bar to investigate "serious evidence of professional misconduct."

That complaint clearly and methodically laid out the case that Eastman betrayed his duty to uphold the law when he helped Trump try to stop the transfer of power. Eastman pushed the unfounded theory that Vice President Mike Pence could single-handedly reverse the outcome of the election. And Eastman did so with dire consequences for our democracy.

The California Bar opened an investigation and later filed 11 disciplinary counts against Eastman. At trial last year, election officials from both parties testified that Eastman's claims were baseless, and that the 2020 election was free, fair, and secure. Eastman stuck to conspiracy theories, even while the trial was underway.

On Wednesday, the judge concluded the bar proved 10 counts by clear and convincing evidence,

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including that Eastman misled the courts, failed to uphold the Constitution, and committed acts involving "moral turpitude." Lawyers have a duty to zealously represent their clients, the judge wrote, but they must stay within the bounds of the law.

There's more on the decision, including reaction from States United, in these reports from The New York Times, The Associated Press, CNN, and the Los Angeles Times.

Now, accountability marches on. Eastman still faces criminal charges in Georgia. Jeffrey Clark's bar trial opened this week, and other lawyers connected to the Trump plot face their own disciplinary proceedings. It all reinforces one principle: No one is above the law—not presidents, and not their lawyers.

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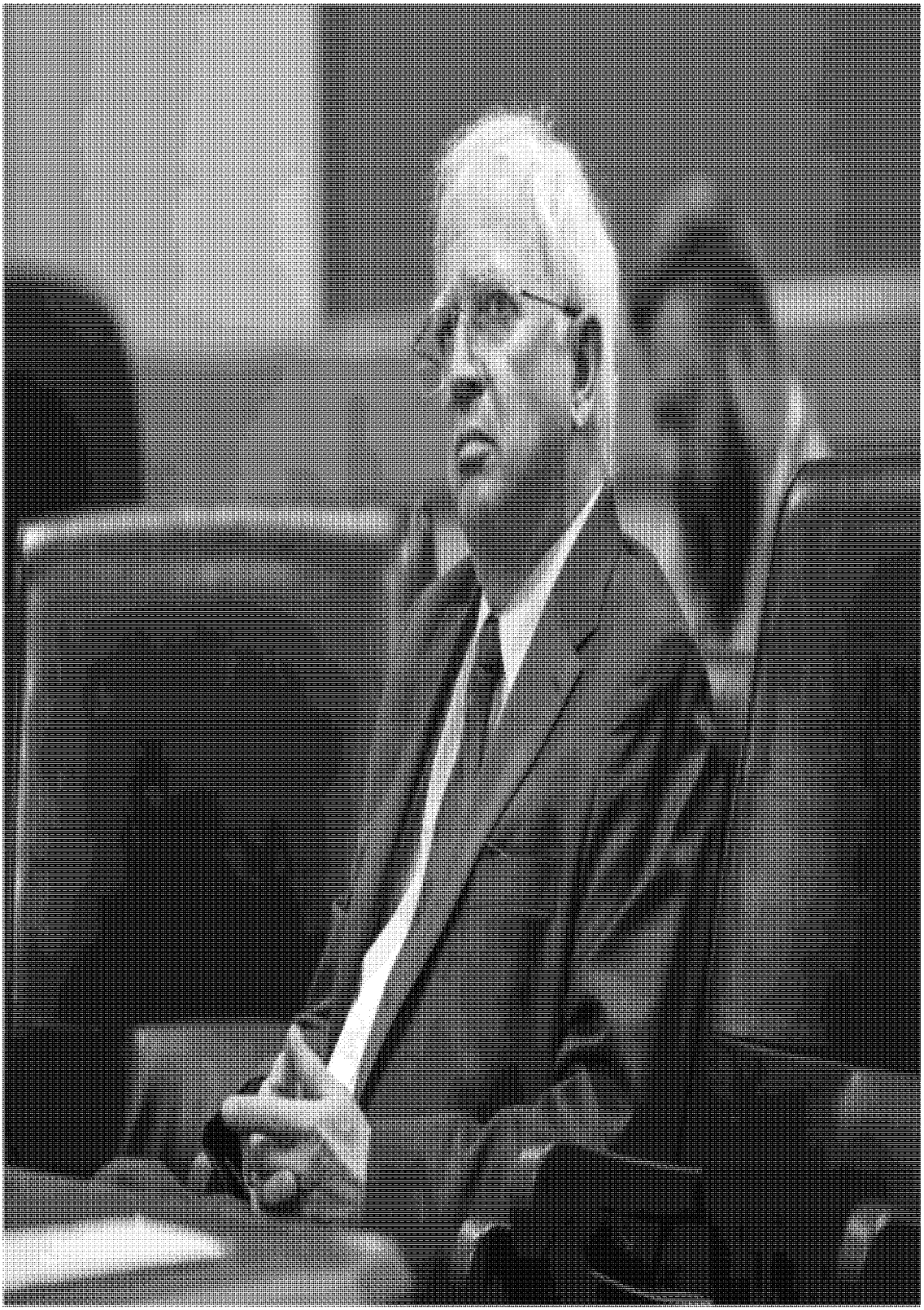

John Eastman. (Jason Getz/Pool/Getty Images)

Justice for Crystal Mason

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A Texas appeals court this week acquitted Crystal Mason, who was wrongfully convicted of illegal voting in a case that bipartisan legal experts called a clear miscarriage of justice. In 2018, Mason was sentenced to five years in prison for casting a provisional ballot in the 2016 presidential election, believing she was eligible to vote. The system worked exactly as intended: Mason's provisional ballot received additional scrutiny, state election officials determined the Tarrant County resident was ineligible, and her vote was never counted. Despite the lack of any concrete harm to the county and no intent to commit fraud—Mason was then prosecuted, convicted, and sentenced to five years in prison for her mistake. States United filed two friend-of-the-court briefs in support of Mason's acquittal.

Mason said she was overjoyed by the appeals court's decision. She also expressed determination: "I was thrown into this fight for voting rights and will keep swinging to ensure no one else has to face what I've endured for over six years, a political ploy where minority voting rights are under attack."

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Crystal Mason. (ACLU of Texas)

Celebrating Women's History Month

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As Women's History Month comes to a close, we celebrate the women who power and protect our democracy. State officials, election workers, pro-democracy organizations, and more all play a vital role. You can read more about some of the women leading that work on our X profile.

Women—particularly women of color—are also far more likely to endure harassment and threats of political violence. Just this week, District Attorney Fani Willis wrote that she, her family, and her staff are still receiving threats, seven months after Trump and his allies were indicted in Fulton County, Georgia. The same goes for Judge Tanya Chutkan, who is overseeing Trump's criminal trial in D.C. There are plenty more cases like theirs, at all levels of government.

There is justice coming, though. Georgia election workers Ruby Freeman and Shaye Moss were awarded $148 million in damages in December after Rudy Giuliani falsely accused them of election fraud. A man who threatened Arizona Gov. Katie Hobbs was sentenced this week to more than two years in prison.

Our democracy depends on women—they make up 80% of election workers—but they also depend on us. It is imperative that we hold accountable those who threaten our democracy, and who threaten the women who help uphold it. We're so grateful to all the women who partner with us in that work.

State of the States

In Arizona, Kari Lake requested default judgment in a defamation case brought by Maricopa County Recorder Stephen Richer. Richer brought the case after Lake spread lies and conspiracy theories alleging that he was involved in election fraud. She falsely claimed it resulted in her loss in the 2022 election for governor. By requesting default judgment, Lake essentially admitted that she defamed Richer and that her statements were untrue. "After months of doubling down and defending their lies across Arizona, in the media, and on social media, when push came to shove, the Defendants decided to completely back down and concede that their lies were just that: lies," Richer said in a statement. The matter now goes to a jury to determine damages.

In Pennsylvania, a federal court dismissed an attempt by 24 state lawmakers to challenge the state's automatic voter registration policy, which was implemented by Gov. Josh Shapiro. "I will always remain focused on protecting our democracy and ensuring our elections are free, fair,

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safe, and secure," Shapiro said in a statement. "Let today's ruling be another reminder that taking legal advice from Donald Trump is never a winning strategy."

In the News

- USA Today: Judge recommends disbarment for John Eastman, one of Donald Trump's lawyers challenging 2020 election results

*"This is a big deal," said **Joanna Lydgate,** CEO of the **States United Democracy Center,** said in a statement. "When he helped Donald Trump try to overthrow the results of a free and fair election, John Eastman put his personal agenda above the decision of American voters. He broke his oath to uphold the Constitution, and he betrayed the legal profession."*

- The Nevada Independent: Nevada lawmakers named in election denial report walk back past comments

The two Nevada lawmakers highlighted in a new report tracking election deniers in state legislatures have reversed themselves and now say that there was no evidence that massive voter fraud occurred in the 2020 election.

*The March report from **[States United Action]** claimed that state Sen. Jeff Stone (R-Henderson) and Assemblyman Ken Gray (R-Dayton) spread lies that former President Donald Trump won the 2020 election, despite evidence to the contrary, and noted that the two could influence election-related legislation as members of their respective chambers' judiciary committees.*

- ABC News: Fani Willis vows nothing 'will derail' Trump's election interference trial

- The Washington Post: GOP scrambles to organize early and mail voting despite Trump's attacks

- The Washington Post: How disinformation fuels violence — and makes our politics worse

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- The Washington Post: Was the 2020 election stolen? Job interviews at RNC take an unusual turn.

- The Guardian: Revealed: the election deniers relentlessly hounding Georgia officials

- The Guardian: Overworked, underpaid, under attack: on the frontlines in a US election office

- NPR: Meta is limiting how much political content users see. Here's how to opt out of that

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prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit [illegible]

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Trying Times

Trying Times

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This Week in Democracy

- Justice Department Special Counsel **Jack Smith** urged the **U.S. Supreme Court** to reject former **President Trump's** latest immunity claim. **Smith's brief rejects the argument that Trump is immune from prosecution** in the federal election interference case. Trump's claim was strongly rejected by a federal appeals court in February. The Supreme Court will hear the case on April 25.

→ **READ:** The federal charges, explained

- Attorneys for Trump made three attempts to delay his **upcoming criminal trial in New York.** Each attempt was denied. The former president's trial about falsifying business

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records and hiding information from voters in 2016 is scheduled to begin on Monday.

- Attorneys for the **State Bar of California** asked a judge to reject **John Eastman's** request to **reactivate his law license.** Last month's recommendation that he be disbarred shows that Eastman "demonstrated a willingness to misrepresent facts, violate the law, and pursue frivolous claims on behalf of clients," prosecutors argued.

— **READ:** Backgrounder: John Eastman's ethics trial

State of the States

In Georgia, Fulton County District Attorney Fani Willis asked the Georgia Court of Appeals to reject the latest attempt to delay the election interference case. Willis urged the court to refuse to hear an appeal seeking to reverse Judge Scott McAfee's ruling that she can continue prosecuting the case. On behalf of legal and ethics experts, States United filed a brief arguing that the Court of Appeals should refuse to accept the appeal and let the trial court's ruling stand.

In the News

- NBC News: Trump official Jeffrey Clark likely violated ethics rules with 2020 election theories, D.C. Bar panel finds

Gillian Feiner, *senior counsel at the* ***States United Democracy Center,*** *said that the board's preliminary finding "is another step towards holding Clark accountable" for conduct that undermined democracy and the rule of law.*

"We've already seen other attorneys like Rudy Giuliani, John Eastman, and Jenna Ellis face consequences for their actions concerning the 2020 election, and today's decision signals that Jeffrey Clark is up next," ***Feiner*** *said. "No one is above the law."*

- WIRED: Election Workers Are Already Burned Out—and on High Alert

Research conducted by the nonpartisan election integrity group ***States United***

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Action *found 201 election deniers currently serving as state legislators in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin, the seven states that pushed fake electors following the 2020 vote. Forty-nine of these legislators,* ***States United Action*** *tells WIRED, "sit on committees that deal most directly with election-related bills and/or hold legislative leadership positions that allow them to influence those committees and bills."*

- 12News: Democracy watchdog identifies 31 'election deniers' at AZ Legislature

"Election deniers in state legislatures have the potential to undermine the will of the voters," said ***Kelly Rader,*** *Research Director for* ***[States United].*** *"We also think there is a connection between the election denier rhetoric, the conspiracy theories about our elections, and the potential for violence in and around elections."*

- The Associated Press: Judge rejects Trump's First Amendment challenge to indictment in Georgia election case

- The New York Times: Georgia's Lieutenant Governor to Face Inquiry for Role as Fake Trump Elector

- The New York Times: Capitol Police Hire Special Prosecutors to Handle Rise in Threats Against Congress

- The Washington Post: New voting laws in swing states could shape 2024 election

- CNN: RNC under Lara Trump spreads 'massive fraud' claims about 2020 election

- Stateline: Republicans scrutinize voting rolls and ramp up for mass challenges ahead of election

- The Detroit News: Pushing election fraud theories, nonprofit spent $1.2 million in Michigan in 2022

- Las Vegas Review-Journal: Lawsuit to block Nevada election worker protection law dismissed

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Recommended Reading

In an op-ed in the Erie Times-News, Secretary of the Commonwealth of Pennsylvania Al Schmidt details some of the steps his office is taking to make sure that the state's elections—including the primaries on April 23—are fair, safe, and secure.

Sec. Al Schmidt: How Pa. is working to ensure free, fair, safe and secure elections

Al Schmidt Your Turn

Published 4:45 a.m. ET April 5, 2024 | Updated 4:45 a.m. ET April 5, 2024

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Suite 250
Washington, DC 20036

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 4/10/2024 9:56:50 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: Re: Keefer v. Biden -- Privileged

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Thanks!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, April 10, 2024 at 3:56 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Osher, Daniel <OsherD@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>, Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: Keefer v. Biden -- Privileged

Here is the opinion.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, April 10, 2024 3:20 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: Keefer v. Biden -- Privileged

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Overcome by events, as they say. Congrats.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Wednesday, April 10, 2024 at 1:23 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>, Osher, Daniel <OsherD@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>, Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: Keefer v. Biden -- Privileged

A/C Priv MCL 15.243(1)(g)

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, March 26, 2024 at 3:13 PM
To: Osher, Daniel <OsherD@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>, Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: Keefer v. Biden -- Privileged

A/C Priv MCL 15.243(1)(g)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
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From: Osher, Daniel <OsherD@michigan.gov>
Sent: Tuesday, March 26, 2024 2:37 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: Keefer v. Biden -- Privileged

A/C Priv MCL 15.243(1)(g)

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, March 26, 2024 1:55 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Keefer v. Biden -- Privileged

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Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 4/5/2024 9:11:21 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Another Round at the Bar

Another Round at the Bar

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States United Democracy Center

States United Action

This Week in Democracy

- Judge **Scott McAfee** denied former **President Trump's** latest attempt to have his election interference charges dismissed in Georgia. McAfee ruled against Trump's argument, saying that the **charges couldn't be dismissed** on First Amendment grounds at this point in the trial.

➡ **READ:** Trump's Georgia charges, explained

- Former Justice Department official **Jeffrey Clark** committed at least one professional ethics violation when he **worked to help Trump try to overturn the 2020 election,** a D.C. Bar panel found. The panel's preliminary finding could result in Clark's law license being revoked.

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➞ **READ:** Backgrounder: Jeffrey Clark's disciplinary trial

- Judge **Juan Merchan** rejected Trump's attempt to delay his **criminal trial in New York** about falsifying business records and hiding information from voters in 2016. Merchan also expanded the gag order he issued last week after the former president **attacked the judge's family on social media.**

- **States United Action's ElectionDeniers.org** is nominated for a Webby Award for Best News & Politics website! You can vote for the site—the only comprehensive tracker of Election Deniers in America—by selecting "Replacing the Refs". Voting is open until Thursday, April 18.

➞ **VOTE:** The Webby Awards

Another Round at the Bar

In 2022, Washington, D.C. Bar officials filed disciplinary charges against Jeffrey Clark, a former Justice Department official. They alleged that while he was working at the Justice Department in the final months of the Trump administration, Clark worked to help Trump try to overturn the 2020 election in Georgia—and violated his professional ethics obligations in the process.

On Thursday, the committee that heard evidence and arguments in his disciplinary trial made a preliminary finding that Clark had violated at least one attorney ethics rule. The decision puts Clark on a path to potential disbarment, just as former Trump attorney John Eastman was recommended for in California last month.

Accountability takes time, but it's worth it. As States United Senior Counsel Gillian Feiner said simply in a statement to the press on Thursday: **"No one is above the law."**

➞ **READ:** Backgrounder: Jeffrey Clark's disciplinary trial

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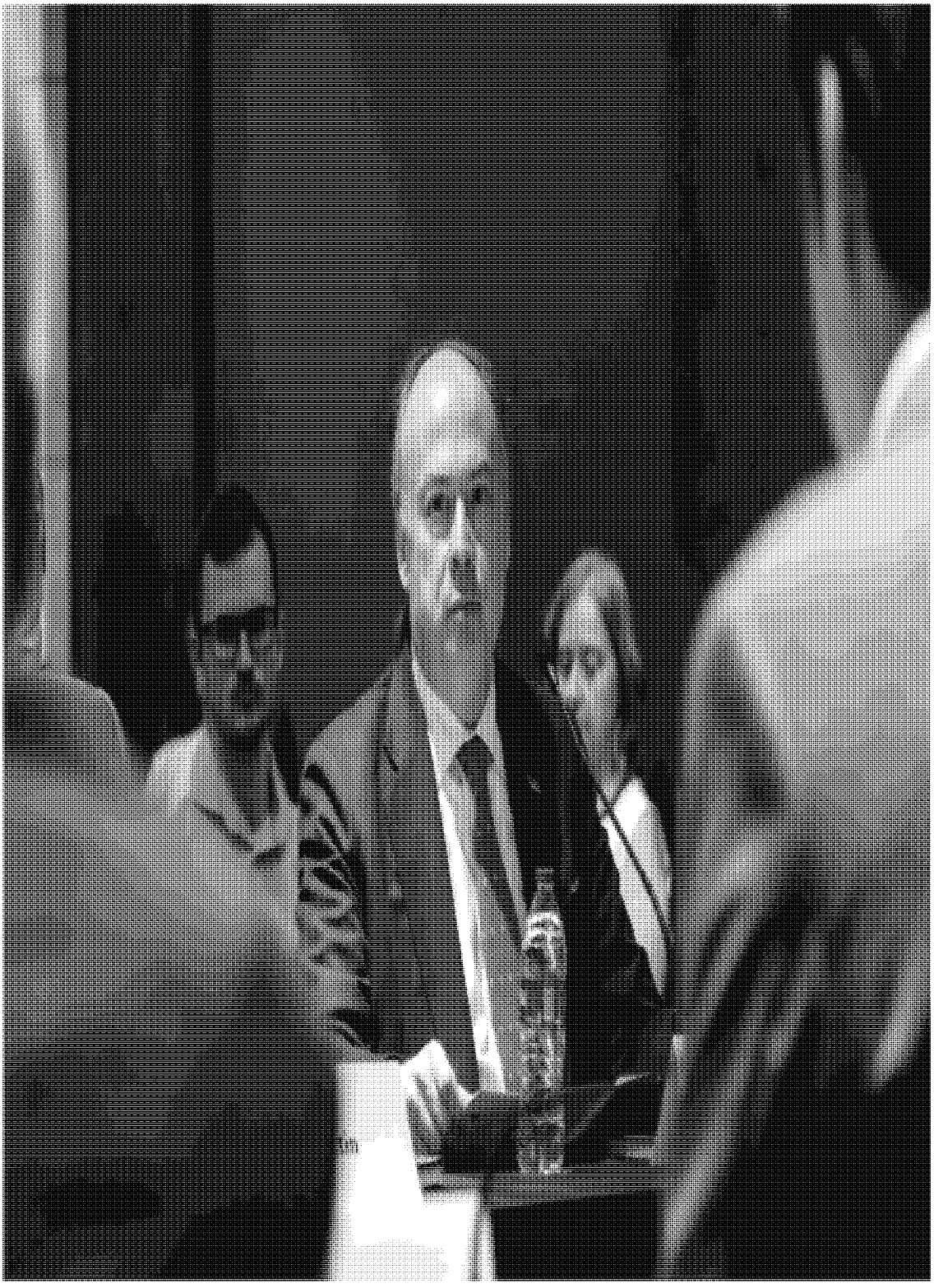

Jeffrey Clark. (Michael A. McCoy/Getty Images)

State of the States

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In Wisconsin, Gov. Tony Evers filed a brief urging the Wisconsin Supreme Court to decide that clerks in the state may choose drop boxes as one option for safe, secure voting. Seeking to intervene in *Priorities USA v. Wisconsin Election Commission*, Evers argued that the court's 2022 decision to ban most drop boxes should be reversed as Wisconsin's election laws do not prohibit drop boxes. In March, the state Supreme Court agreed to decide whether their prior decision should be reversed.

"Drop box voting is safe and secure," Evers said in a statement. "In Wisconsin, we must work to protect that freedom and to empower our clerks and election administrators working hard at the local level to make decisions that are right for their communities."

In the News

- Los Angeles Times: Editorial: John Eastman tried to help Trump overturn the 2020 election. Of course he should be disbarred

- The Associated Press: States move to shore up voting rights protections after courts erode federal safeguards

- The New York Times: From Pizzagate to the 2020 Election: Forcing Liars to Pay or Apologize

- CBS News: Judges, witnesses, prosecutors increasingly warn of threats to democracy in 2024 elections as Jan. 6 prosecutions continue

- NBC News: Meet some of the violent Jan. 6 rioters Donald Trump keeps calling 'hostages'

- The Guardian: RNC plan for 2020 denialist to head 'election integrity' unit raises alarms

- CNN: Poll: Most Americans want Supreme Court to reject Trump immunity claims

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- NBC News: Texas woman acquitted of voter fraud in high profile case says it's her 'duty' to continue voting rights advocacy

- CBS Detroit: Detroit-area man charged with threatening Oakland County election official

- Votebeat Wisconsin: How Milwaukee's top election official has worked to restore trust after a 2020 misstep

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2024 WL 1285538
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United States District Court, M.D. Pennsylvania.

DAWN KEEFER, et al., Plaintiffs,

v.

JOSEPH R. BIDEN, et al., Defendants.

Civil No. 1:24-CV-00147

|

Filed 03/26/2024

MEMORANDUM

JENNIFER P. WILSON United States District Judge Middle District of Pennsylvania

***1** This lawsuit, brought by twenty-six Pennsylvania State Representatives and one Pennsylvania Senator,[1] challenges certain executive actions regarding voter registration taken by both United States President Joseph R. Biden and various federal officials[2] and Pennsylvania Governor Joshua Shapiro and various state officials[3] on the ground that these executive actions violate both the Electors and Elections Clauses of the United States Constitution. (Doc. 18.) Before the court are the motions to dismiss for failure to state a claim and lack of jurisdiction filed by the Federal and State Defendants. (Docs. 40, 46.)[4] The motions to dismiss will be granted because this court does not have subject matter jurisdiction due to Plaintiffs' lack of standing to raise the claims at issue.[5]

1 The Plaintiffs in this matter are Representatives Dawn Keefer, Timothy Bonner, Barry Jozwiak, Barbara Gleim, Joseph Hamm, Wendy Fink, Robert Kauffman, Stephanie Borowicz, Donald (Bud) Cook, Paul (Mike) Jones, Joseph D'Orsie, Charity Krupa, Leslie Rossi, David Zimmerman, Robert Leadbetter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rose, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen, and Senator Cris Dush. They are referred to collectively as "Plaintiffs."

2 The individual federal government Defendants, all sued in their official capacity, are as follows: President Joseph R. Biden, Secretary of Agriculture Tom Vilsack, Secretary of Health and Human Services Xavier Becerra, Secretary of State Antony Blinken, Secretary of Department of Housing and Urban Development Marcia Fudge, Secretary of Energy Jennifer Granholm, and Secretary of Education Dr. Miguel Cardona. Plaintiffs also name the United States, U.S. Department of Agriculture ("USDA"), U.S. Department of Health and Human Services ("HHS"), U.S. Department of State ("State Department"), U.S. Department of Housing and Urban Development ("HUD"), U.S. Department of Energy, and U.S. Department of Education as defendants. Collectively, the foregoing people and entities will be referred to as "Federal Defendants."

3 The individual state government Defendants, all sued in their official capacities, are Governor Joshua Shapiro, Secretary of the Commonwealth Al Schmidt, and Deputy Secretary for Elections and Commissions Jonathan Marks. They are referred to collectively as "State Defendants."

4 State Defendants filed their motion to dismiss on March 20, 2024. (Doc. 46.) Although this motion is not fully briefed, the issue of standing has been fully addressed in the context of Plaintiffs' motion for injunctive relief, such that the court can address the issue of standing with no further briefing.

5 The court also notes that Plaintiffs filed a motion for preliminary injunction on February 16, 2024. (Doc. 19.) Because Plaintiffs do not have standing to bring the claims asserted in this lawsuit, the motion for preliminary injunction will be denied as moot in a separate order.

BACKGROUND AND PROCEDURAL HISTORY

***2** Plaintiffs challenge an Executive Order issued by President Biden, an announcement by Governor Josh Shapiro, and a "directive" issued by Former Pennsylvania Governor Tom Wolf, all regarding various aspects of voter registration. (Doc. 18.) Plaintiffs allege that these three executive actions have violated their individual Constitutional rights under the Electors and Elections Clauses of the United States Constitution. (*Id.* at ¶67.)

The Electors Clause provides as follows:

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> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

Plaintiffs allege that:

> [U]nder the Electors Clause, the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislators, as part of two associations called the senate and the house of representatives respectively, may enact laws, subject to the Governor's veto, to regulate the times, places, and manner of Presidential and Congressional elections. Thus, Plaintiffs, as individual state legislators, have federal rights under the Elections Clause and the Electors Clause to oversee and participate in making legislative decisions regulating the times, places, and manner of federal actions.

(Doc. 18, ¶¶ 49, 50.)

Regarding the Federal Defendants, Plaintiffs challenge Executive Order 14019 ("EO 14019"), [6] which, they allege "requires all federal agencies to develop a plan to increase voter registration, and increase voter participation, or get out the vote ... efforts." (*Id.* at ¶ 70.) Plaintiffs allege that HHS, HUD, Department of Energy, USDA, and U.S. General Services Administration "GSA"), [7] have implemented voter registration plans in accordance with EO 14019 and have registered voters in Pennsylvania in accordance with these plans. (*Id.* at ¶¶ 72–84.) Plaintiffs contend that EO 14019

> directs *all* non-independent executive agencies to engage in voter registration and to solicit and facilitate third-party organizations to conduct voter registration on agency premises, including those located in the state of Pennsylvania, so it is certain that other agencies are carrying out similar efforts without disclosing their unlawful activities to the public or to the Pennsylvania Legislature.

(*Id.* at ¶ 85.) Plaintiffs allege that EO 14019 requires all federal agencies to "identify and partner with specified partisan third party organizations[,]" "distribute voter registration and vote-by-mail ballot application forms[,]" "assist applicants in completing voter registration and vote-by-mail ballot application forms[,]" "solicit third-party organizations and directs state officials to provide voter registration services on agency premises." (*Id.* at ¶¶ 86–90.)

6 EO 14019 went into effect on March 7, 2021.

7 GSA is not a named defendant in this action.

Plaintiffs contend that "all agency action in conformity with [EO] 14019 is without congressional delegation or funding, and conducted merely by executive fiat[,]" and that "all federal agency actions in conformity with [EO] 14019 are unauthorized by law." (*Id.* at ¶¶ 102, 103.) Plaintiffs further allege that EO 14019 is not in conformity with Pennsylvania's voter registration scheme, as provided by Pennsylvania law. (*Id.* at ¶¶ 107, 108.)

***3** In Count I, Plaintiffs request a declaratory judgment that EO 14019 is unconstitutional because it "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular

rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 178.) Plaintiffs also allege that they are suffering "an injury-in-fact because the Executive Order denies them a voting opportunity to which the Constitution entitles them." (*Id.* at ¶ 179.) In sum, the Plaintiffs allege that EO 14019 unlawfully attempts to regulate the registration of Pennsylvania electors and, thus, "[t]he order should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections." (*Id.* at ¶ 186.) In Count II, Plaintiffs challenge EO 14019 under the Administration[8] Procedure Act ("APA") as substantively arbitrary and capricious and contrary to Constitution or statute. (*Id.* at ¶¶ 194–201.) In Count III, Plaintiffs challenge EO 14019 as procedurally arbitrary and capricious for failing to comply with notice and comment procedures under the APA. (*Id.* at ¶¶ 202–21.)

8 The court notes that 5 U.S.C. § 706 is more commonly referred to as the Administrative Procedure Act.

Regarding the State Defendants, Plaintiffs challenge two executive actions. First, Plaintiffs challenge Governor Shapiro's 2023 announcement that "he was unilaterally implementing automatic voter registration in Pennsylvania." (*Id.* at ¶ 109.) Plaintiffs allege that "[b]eginning on September 19, 2023, Commonwealth residents obtaining new or renewed driver licenses and ID cards have been and continue to be automatically registered to vote by the Pennsylvania Department of Transportation unless they opt out of doing so." (*Id.* at ¶ 110.) Plaintiffs allege that the "regulatory schema of elections" set forth by the legislature requires an "application" to register to vote, which requires an overt action by the applicant. (*Id.* at ¶¶ 115–119.) In sum, Plaintiffs argue that Governor Shapiro's directive to the Department of Transportation to change the process for applying to vote in conjunction with applying for a driver's license violates Pennsylvania's established procedures, codified at 25 PA. CON. STAT. ANN. §§ 1321, 1323, 1327. Plaintiffs allege that "Governor Shapiro's directive to the Pennsylvania Department of Transportation, and its implementation, is inconsistent with existing laws, and as such, is not legally authorized." (*Id.* at ¶ 128.)[9]

9 Plaintiffs also allege that the state legislature has previously declined to pass automatic voter registration laws, most recently in January 2023, as support for their claim that this action by the Governor nullifies their votes. (*Id.* at ¶¶ 132, 133.)

In Count IV, Plaintiffs bring a claim under 42 U.S.C. § 1983 against Governor Shapiro seeking an injunction "enjoining and prohibiting [his] automatic voter registration regime" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses, "diminishes the influence of the individual legislators," and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 215.) Plaintiffs also allege that the announcement "denies Plaintiffs a voting opportunity to the acceptance [or] rejection of a voter registration schema, that under the U.S. and Pennsylvania Constitutions can only originate in the Pennsylvania legislature or U.S. Congress." (*Id.* at ¶ 216.)

The second state executive action that Plaintiffs challenge is a 2018 "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications" ("2018 Directive") issued under former Governor Tom Wolf. (*Id.* at ¶ 139.) This challenge is brought against Secretary of the Commonwealth Al Schmidt and Deputy Secretary for Elections Jonathan Marks. (*Id.*) The 2018 Directive "directs Pennsylvania counties to register applicants even if an applicant provides invalid identification." (*Id.* at ¶ 140.) Plaintiffs allege that this directive violates Pennsylvania law, specifically 25 PA. CONS. STAT. ANN § 1328. (*Id.* at ¶¶ 144–46.) Further, Plaintiffs allege that the directive, which "direct[s] the counties to process incomplete or inconsistent voter applications like all other applications violates clear provisions of Pennsylvania law[,]" and as such, "undermines the state legislature as the 'entity assigned particular authority by the Federal Constitution' to regulate the times, places, and manner of Presidential and Congressional elections." (*Id.* at ¶¶ 154, 155.)

***4** In Count V, Plaintiffs bring a claim under 42 U.S.C. § 1983, asking the court to enjoin and prohibit the 2018 Directive "and similar guidance" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses,

"diminishes the influence of the individual legislators" and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 223.) Plaintiffs also allege that the 2018 Directive denied them "their U.S. constitutional right to vote on and direct election policy, established under both the Elections Clause and Electors Clause." (*Id.* at ¶ 226.)

Underlying all counts, Plaintiffs allege they have standing as state legislators because they "are injured by Defendants when [Defendants] exercise positive regulatory authority over election practices that circumvent or usurp the authority of the legislature." (*Id.* at ¶ 160.) Specifically, Plaintiffs allege they have "been denied the opportunity to exercise their constitutionally vested authority to cast their legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.) Plaintiffs also allege they have standing as candidates who will suffer the harm of having to compete in "elections [that] have been interfered with by unlawful regulations" and "where their opponents have been provided an unlawful advantage." (*Id.* at ¶¶ 171, 172.) Finally, Plaintiffs allege they have standing as citizens, taxpayers, and voters. (*Id.* at ¶¶ 174, 175.)

Plaintiffs initiated this lawsuit by filing a complaint on January 25, 2024. (Doc. 1.) Thereafter, they filed the operative amended complaint and simultaneously filed a motion for preliminary injunction. (Docs. 18, 19.)[10] Federal Defendants filed a motion to dismiss for failure to state a claim and lack of jurisdiction on March 1, 2024. (Doc. 40.) Federal Defendants also filed a brief in opposition to the motion for preliminary injunction on the same date. (Doc. 41.) State Defendants filed a brief in opposition to the motion for preliminary injunction on March 1, 2024. (Doc. 42.) Plaintiffs filed reply briefs to State Defendants and Federal Defendants briefs in opposition on March 15, 2024. (Docs. 44, 45.) On March 20, 2024, State Defendants filed a motion to dismiss and brief in support. (Docs. 46, 47.) Accordingly, the issue of standing is ripe for review.

10 On February 23, 2024, the Foundation for Government Accountability filed a motion for leave to file an amicus brief, which was granted on February 26, 2024. (Docs. 29, 33.) The amicus brief was filed on February 26, 2024, and the court reviewed the amicus brief in considering the motions to dismiss. (Doc. 34.)

STANDARD OF REVIEW

Defendants seek dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. The court, in determining whether it has subject-matter jurisdiction, must decide "whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006) (quoting *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 260 (3d Cir. 1994)). Rule 12(b)(1) challenges may be "facial" or "factual." *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges whether jurisdiction has been properly pled and requires the court to "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen*, 549 F.2d at 891.) Conversely, when a defendant sets forth a factual attack on subject-matter jurisdiction, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case.... 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.' " *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *Mortensen*, 549 F.2d at 891).

***5** In this instance, Defendants argue Plaintiffs do not have standing and present the court with a facial attack on subject matter jurisdiction. As a result, the court will "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc.*, 220 F.3d at 176 (citing *Mortensen*, 549 F.2d at 891.)

DISCUSSION

Both the Federal and State Defendants argue that the amended complaint must be dismissed for lack of subject matter jurisdiction because Plaintiffs lack standing to pursue their claims. Plaintiffs argue they have standing because the

complaint alleges "that the Elections and Electors' Clauses' references to 'legislature' confer rights onto the individual state legislators." (Doc. 21, p. 10.) On this basis, Plaintiffs contend that their individual rights as state legislators are injured by the executive actions at issue because those actions are an "exercise [of] positive regulatory authority over election practices that circumvent[s] or usurp[s] the authority of the legislature." (Doc. 18, ¶ 160.) Essentially, Plaintiffs argue they have each been injured individually because they have "been denied the opportunity to exercise their constitutionally vested authority to cast their legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.)

Plaintiffs present various arguments to support their theory of individual legislator standing. First, Plaintiffs analogize their membership in the legislature to various other types of entities, such as a corporation, arguing that as "the purpose of extending rights to corporations is to protect the rights of the people associated with the corporation[,]" so too the "purpose of the Elections Clause and Electors Clause ... is to protect the privileges and rights of the individual state legislators." (Doc. 21, p. 9.) Plaintiffs also analogize a state legislature to a militia and the press, as "entities" made up of real persons who have the right to defend their participation in the entity. (Doc. 44, pp. 10, 11.)

Second, Plaintiffs rely on *Coleman v. Miller*, 307 U.S. 433 (1939), *Moore v. Harper*, 600 U.S. 1, 27 (2023), [11] and their assertion that the Pennsylvania Supreme Court has authorized "individual state legislators to bring legislative usurpation claims." (Doc. 21, p. 10.) (citing *Fumo v. City of Phila.*, 972 A.2d 487, 491 (Pa. 2009)). Plaintiffs also argue that they have standing as candidates for office who potentially may run in an unlawfully-operated election. (*Id.* at 12.) Plaintiffs argue that they are injured by the executive actions because "it results in the registration of voters outside of [Pennsylvania's] carefully constructed and constitutionally-authorized registration regime." (Doc. 45, p. 14.) Finally, Plaintiffs argue they have standing as citizens, taxpayers, and voters. (Doc. 21, p. 13.)

[11] Plaintiffs' reliance on *Moore v. Harper* consists of quoting the language from the decision stating: "[t]he legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution." 600 U.S. at 27. Plaintiffs rely on this quotation to support their theory that because they are members of "the entity assigned particular authority by the Federal Constitution [,]" they possess an individual right that gives them standing to vindicate that right in the federal courts. (Doc. 21, p. 10.)

***6** In response, Federal Defendants argue that, under Supreme Court case law, "individual members [of a legislature] lack standing to assert the institutional interests of a legislature." (Doc. 41, p. 11.) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019)). In support of this argument, Federal Defendants contend that Plaintiffs' alleged injury, usurpation of the authority to regulate elections conferred upon state legislatures, is not meaningfully distinguishable from the institutional injuries alleged in *Raines v. Byrd*, 521 U.S. 811 (1997), *Goode v. City of Phila.*, 539 F.3d 311 (3d Cir. 2008), and *Yaw v. Delaware River Basin Comm.*, 49 F.4th 301 (3d Cir. 2022). In each of these cases, the Supreme Court and Third Circuit, respectively, found that individual legislators did not have standing to bring a challenge to an action that allegedly injured the legislature as a whole. (Doc. 41, pp. 11–13.) In sum, Federal Defendants argue that the alleged injury "concerns the right to vote of '*all Members* of' the Pennsylvania Legislature 'equally,' and so it is precisely the type of non-particularized, 'institutional injury' that is insufficient for legislator standing." (*Id.* at 13) (emphasis in original)). [12]

[12] Both Plaintiffs and Federal Defendants address standing globally and make no separate arguments based on the cause of action. Therefore, the court will do the same.

In response to Plaintiffs' argument regarding their potential standing as candidates, Federal Defendants argue that the amended complaint "contains no concrete allegations establishing that the EO will have a material impact on the votes cast in Plaintiffs' particular districts, and that this impact will harm Plaintiffs' electoral prospects." (*Id.* at 15.)

State Defendants' arguments regarding institutional injury and legislative standing largely mirror those of Federal Defendants and rely on the same body of case law. (*See* Doc. 42, pp. 12–19.) State Defendants additionally note that the declarations attached to the amended complaint simply state that Defendants have violated the law and provide no

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individualized allegation of injury, the amended complaint contains no allegation of "how any Plaintiff is affected by the conduct challenged in this case in a way that is any different from any other member of Pennsylvania's General Assembly [,]" and the amended complaint contains no allegation that "legislative powers have been usurped" because "[n]either changes to a registration application nor instructions to counties–both done under statutorily assigned authority–stops the General Assembly from passing any laws regarding either topic." (*Id.* at 17–19.)

A. Article III Standing

Pursuant to Article III of the United States Constitution, federal courts are constrained to resolve only "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines*, 521 U.S. at 818 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976)). Ensuring that a plaintiff has Article III standing " 'serves to prevent the judicial process from being used to usurp the powers of the political branches,' and confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted).

Article III standing requires that the plaintiff, who bears the burden of establishing these elements, prove: (1) an injury-in-fact; (2) that is fairly traceable to the defendant's conduct; and (3) that is likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). When standing is challenged at the pleading stage, "the plaintiff must 'clearly ... allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

As to the first element, an injury-in-fact must be " 'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Lujan*, 504 U.S. at 560). A particularized injury must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Further, any threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

1. Plaintiffs Lack Standing as Legislators

***7** The seminal case regarding legislative standing is the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). There, members of the U.S. Congress who voted against the Line Item Veto Act sued the Secretary of the Treasury and the Director of the Office of Management and Budget, asserting that the Line Item Veto Act was unconstitutional because it altered "the legal and practical effect of all votes [the members] may cast on bills[,]" divested the members "of their constitutional role in the repeal of legislation," and altered "the constitutional balance of powers between the Legislative and Executive branches[.]" *Id.* at 816.

The Supreme Court held that the members who filed suit did not have standing because they did not allege any "injury to themselves as individuals," rather "the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829 (citations omitted). The Court held that the members who filed suit failed to allege an injury to themselves as individuals because they had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies[,]" and they only alleged that the Act caused "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both House of Congress equally." *Id.* at 821. Further, the Court noted that the members did not allege a deprivation of "something to which they *personally* are entitled–such as their seats as Members of Congress after their constituents had elected *them*." *Id.*

The Court also distinguished one prior case that addressed the issue of legislator standing, *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Kansas State Senate was split twenty to twenty on the passage of the child labor amendment to the federal constitution. *Id.* at 436. The Lieutenant Governor then cast a tie-breaking vote, and the twenty losing Senators sued to challenge "the right of the Lieutenant Governor to cast the deciding vote in the Senate." *Id.* The Supreme Court held that the twenty senators who voted against ratification had standing to sue because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. The *Coleman* Court further explained that the Kansas senators had "set up

and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege." *Id.*

The *Raines* Court limited the holding and application of *Coleman*, stating that *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823. Thus, the *Raines* court held that the members in that case did not have standing under *Coleman* because they did not allege "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824.

The Supreme Court has considered legislator standing twice since *Raines*. In *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 792 (2015), the entire Arizona State Legislature sued to challenge the constitutionality of a voter-adopted initiative which established an independent commission charged with drawing and adopting redistricting maps, arguing that giving this authority to an independent commission is contrary to the Elections Clause's directive that the legislature of each state shall determine the times, places, and manner of elections. In *Arizona*, the defendants challenged the plaintiffs' standing under *Raines*, but the Supreme Court held that the legislature, as a whole and authorized by an internal vote, had standing to redress the alleged institutional injury suffered by the legislature as a whole. *Id.* at 802. Ultimately, the court held that the voter initiative at issue "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id.* at 804 (citing *Raines*, 521 U.S. at 823–24). [13]

13 On the merits in *Arizona*, the Supreme Court held that "the Elections Clause permits the people of Arizona to provide for redistricting by independent commission[,]" and denied the Legislature's appeal. *Id.* at 813.

***8** Conversely, in *Va. House of Delegates*, the Supreme Court held that only one house of a bicameral state legislature did not have standing to sue on behalf of the legislature as a whole. *Va. House of Delegates*, 139 S. Ct. at 1952. First, the Court noted that it is possible for a state to designate its House of Representatives as its agent, which would be sufficient to confer standing to vindicate the state's interests. *Id.* at 1951–52. Per the *Va. House of Delegates* Court, a state may authorize the "House to litigate on the State's behalf, either generally or in a defined class of cases." *Id.* at 1952. The Court held that Virginia had not done so in that case. *Id.* Second, the Court considered whether the House of Representatives had legislator standing under *Raines*. The Court held that the "Virginia constitutional provision the House [challenges] allocates redistricting authority to the 'General Assembly,' of which the House constitutes only a part." *Id.* at 1953. Thus, the Court held the case was more similar to *Raines* because "[j]ust as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953–54 (citations omitted).

The Third Circuit has decided cases in line with *Raines*, most recently in *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302 (3d Cir. 2022). In *Yaw*, a group of Pennsylvania Senators sued the Delaware River Basin Commission, arguing that the ban on fracking at issue in that case "deprived [them] of their lawmaking authority relative to millions of Pennsylvanians residing within the 6,000 square miles of Sovereign territory subsumed by the Basin and any legislation, now or in the future, on this subject has been nullified." *Id.* at 311. Relying on a review of the same cases discussed above, the Third Circuit held that "this argument runs headlong into the well-established principle that individual legislators lack standing to assert institutional injuries belonging to the legislature as a whole." *Id.* The Third Circuit held that the alleged injuries were "classic examples of institutional injuries because they sound in a general loss of legislative power that is 'widely dispersed' and 'necessarily damages all [members of the General Assembly] ... equally.' " [14] *Id.* at 314 (citing *Raines*, 521 U.S. at 821) (alterations in original). The Third Circuit noted that the plaintiffs "alleged no injury to themselves as individuals[,]" and had not "been authorized to represent the interests of these institutions in court." *Id.* at 314. Finally, the Third Circuit noted that, under the theory presented by plaintiffs, "*any* individual legislator would have standing to challenge *any* federal statute or regulation ... that, under the Constitution's Supremacy Clause, has a preemptive effect on state lawmaking. Article III does not sweep so broadly." *Id.* at 315 (citation omitted).

[14] The alleged injuries in *Yaw* included suspending law in the Commonwealth, displacing/suspending the Commonwealth's "comprehensive statutory scheme," attempting to "exercise legislative authority exclusively vested in the General Assembly," wholly nullifying "any present or future legislative action," depriving Commonwealth citizens of the "right to be governed by their duly-elected representatives," diluting the rights of the citizens of the Commonwealth "to choose their own officers for governmental administration," and diminishing the "legislative powers of the Senate Plaintiffs." *Id.* at 313–14.

Here, Plaintiffs attempt to circumvent the institutional injury issue by asserting that the Elections and Electors Clauses give them an "individual" right which they are seeking to vindicate. However, as the descriptions of their alleged injuries make clear, they are seeking to vindicate injuries that would be suffered by the Legislature as a whole.[15] Just as in the binding precedent described above, Plaintiffs here do not allege that they specifically, as individuals, are suffering a harm because of the executive actions at issue. Rather, the harm is to the authority of the Pennsylvania General Assembly to establish the times, places, and manner of elections as provided by the Constitution. Moreover, Plaintiffs claim that they, as "real persons who are part of an exclusive entity, the state legislature of Pennsylvania[, ... have] a right to protect [their] individual [ ] constitutional rights and privileges to participate in making laws regarding the manner of elections [ ]." (Doc. 44, p. 7.) Just as the Third Circuit concluded in *Yaw*, this claim sweeps too broadly. If every state legislator has an individual right to vindicate their right to "participate in making laws," then the standing requirement of a particularized injury would be rendered meaningless because *every* legislator would suffer an injury in the same way. *See Yaw*, 49 F.4th at 314.

[15] For example, Plaintiffs allege that EO 14019 "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (Doc. 18, ¶ 178.) They allege the automatic voter registration announcement by Governor Shapiro "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 215.) And, they allege the HAVA directive by Secretary Schmidt "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 223.)

***9** Further, there is no allegation that these specific Plaintiffs have suffered an injury that is any different than any other member of the Pennsylvania General Assembly. Thus, Plaintiffs have alleged only an institutional injury resulting from "a general loss of legislative power[.]" *Yaw*, 49 F.4th at 314. Additionally, unlike in *Coleman*, Plaintiffs here have not suffered a complete nullification of their vote, such that they no longer can legislate in the election field. Plaintiffs' argument that they "have no ability to undo the executive actions through ordinary legislation[,]" and that the laws they already have passed "have been nullified and overridden by the executive actions[,]" overstates the matter, as none of the executive actions challenged in this case remove or divest any authority from the legislature in creating voting regulations within the state, such as in *Arizona*. Should the General Assembly wish to counter any of the alleged effects of the challenged executive actions, the executive actions do not constrain them from doing so. Moreover, as in *Arizona*, should the Pennsylvania General Assembly, as a whole, wish to challenge these executive actions as contrary to law and usurping its authority, the General Assembly may do so. However, these twenty-seven Plaintiffs, may not seek to vindicate that institutional injury without the approval of the institution. Therefore, Plaintiffs are seeking to assert an injury to the institutional rights of the Pennsylvania General Assembly, which they cannot do as individual legislators.[16]

[16] The court notes that there is no allegation that they have been authorized to undertake this action on behalf of the General Assembly as a whole.

> Plaintiffs argue that they have been "authorized' by the State to undertake litigation in a "class of cases" under *Va. House of Delegates*. (Doc. 45, p. 11.) Plaintiffs claim that Pennsylvania case law holding that legislators "are granted standing to challenge executive actions when specific powers unique to their functions under the constitution are diminished or interfered with[,]" shows that they have been authorized to litigate on the state's behalf in "a defined class of cases." (*Id.* (citing *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976) and *Va. House of Delegates*, 139 S. Ct. at 1952)). This is incorrect. The Supreme Court in *Va. House of Delegates* pointed to state statutes, such as in Indiana, where the legislature, through statute, had authorized itself to "employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." 139 S. Ct. at 1952 (citing Ind. Code § 2-3-8-1 (2011)). Holding that a certain party has standing to pursue a certain case does not equate to the state authorizing that party to bring all actions on its behalf.

The court recognizes that Plaintiffs rely on *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014) ("*Kerr I*") to support their argument that an individual legislator has standing to challenge a specific law that "has stripped the legislature of its rightful power." *Id.* at 1167. However, as noted by State Defendants, although Plaintiffs state that the judgment in *Kerr I* was "vacated on other grounds," it was, in fact, vacated on the issue of standing after the Supreme Court decided *Arizona*. *See Hickenlooper v. Kerr*, 576 U.S. 1079 (2015). On remand, the Tenth Circuit looked again at the issue of whether individual legislator plaintiffs had standing to claim that a state constitutional amendment "deprive[d] them of their ability to perform the 'legislative core functions of taxation and appropriation.' " *Kerr v. Hickenlooper II*, 824 F.3d 1207, 1215 (10th Cir. 2016) ("*Kerr II*"). In *Kerr II*, the Tenth Circuit explicitly held that "the legislator-plaintiffs assert only an institutional injury, and thus lack standing to bring this action." Accordingly, the decision in *Kerr II* provides no support to Plaintiffs.

Finally, to the extent that Plaintiffs argue they have standing based on Pennsylvania law, this same argument was dismissed by the Third Circuit in *Yaw*. Whether it is true or not that individual legislators have standing under Pennsylvania law, the *Yaw* court held that "[t]he fact that a party has standing in state court does not mean that they have standing in federal court.... Article III standing 'limits the power of *federal* courts and is a matter of *federal* law. It does not turn on state law, which obviously cannot alter the scope of the federal judicial power.' " *Yaw*, 49 F.4th at 316 (citing *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 730–31 (7th Cir. 2020)).

***10** Accordingly, the court concludes that, in reality, Plaintiffs allege an institutional injury to the power of the Pennsylvania General Assembly as a whole to legislate the times, places, and manner of elections. As such, Plaintiffs, as individual legislators, do not have standing because they have not alleged any particular injury that is not also suffered by each member of the Pennsylvania General Assembly.

B. Plaintiffs Lack Standing as Candidates

Plaintiffs also argue they have standing as candidates. (Doc. 18, ¶¶ 169–173; Doc. 21, pp. 11, 12; Doc. 45, pp. 12–15). Plaintiffs argue that "Defendants' actions collectively undermine the integrity of Pennsylvania's elections by introducing procedures that were not provided by the Legislature." (Doc. 21, p. 12.) They further argue that implementation of these executive actions results in "the pool of Pennsylvania voters [being] manipulated by legally unauthorized, deceptive practices, undermining the integrity of elections across the Commonwealth." (Doc. 45, p. 15.)

Federal Defendants argue that this injury is not "certainly impending[,]" as required by Article III and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013), and the "Complaint contains no allegations describing how Plaintiffs' candidacies will 'certainly' be harmed by the EO." (Doc. 41, p. 15.) State Defendants argue that "Plaintiffs fail to identify any concrete or particularized way that eligible electors registering to vote injures them in any of these [candidates, citizens, taxpayers, and voters] capacities." (Doc. 42, p. 19 n.6)

The court agrees with the Federal and State Defendants that Plaintiffs have not alleged any particular harm to their candidacies as a result of any executive actions taken by any defendant. A vague, generalized allegation that elections, generally, will be undermined, is not the type of case or controversy that this court may rule on under Article III. *See Toth v. Chapman*, 2022 WL 821175, at * 7 (M.D. Pa. March 16, 2022.) Accordingly, Plaintiffs do not have standing as candidates. [17]

[17] Plaintiffs also alleged they have standing as citizens, taxpayers, and voters. (Doc. 18, p. 29.) As noted by both Defendants, these claims are entirely speculative, and Plaintiff does not argue these bases of standing beyond their motion in support of preliminary injunction. (Doc. 41, p. 16; Doc. 47, p. 22 n.4.) Accordingly, the court concludes that Plaintiffs have not established standings on any of these grounds either.

CONCLUSION

Plaintiffs do not have standing to assert the institutional injuries they raise here. Plaintiffs argue they have been granted an "individual" right in the Electors and Elections Clauses of the U.S. Constitution, but binding precedent obligates this court to reject this argument. The injuries that Plaintiffs allege are suffered equally by each Pennsylvania legislator. As such, Plaintiffs have not alleged any individualized and particularized harm. Accordingly, Plaintiffs do not have standing to pursue their challenges to the executive actions at issue in this lawsuit, and their amended complaint is dismissed. An order follows.

All Citations

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From: Osher, Daniel [OsherD@michigan.gov]
Sent: 4/12/2024 8:04:55 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: Re: US v. Mackey oral argument

Thanks, Jonathan

Daniel Osher
Deputy Legal Counsel, Executive Office of the Governor
osherd@michigan.gov
(517) 242-0089

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, April 12, 2024 3:14:30 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: US v. Mackey oral argument

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Hi Dan and Heather,

I hope you've had a good week. As I mentioned, I listened to the oral argument in *United States v. Mackey*, which took place before the Second Circuit last Friday (after the earthquake).

Wk Prod MCL 15.243(1)(h)

Wk Prod MCL 15.243(1)(h)

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A/C Priv MCL 15.243(1)(g)

Happy to address any questions I can. The case is expedited, and we'll keep an eye out for the decision.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
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jonathan@statesuniteddemocracy.org

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Sent: 4/18/2024 5:57:42 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Re: Appeal in Kardaal AVR Case

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Will do. We'll send it to you when it's filed.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, April 18, 2024 at 1:38 PM
To: Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Appeal in Kardaal AVR Case

Interesting, thanks Zack. I would like to get a copy of their brief when it is filed. Wk Prod MCL 15.243(1)(h)

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
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Michigan Department of Attorney General
meingasth@michigan.gov
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From: Zack Goldberg <zack@statesuniteddemocracy.org>
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Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Appeal in Kardaal AVR Case

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Hi Heather,

We just wanted to flag that Erick Kardaal today filed a notice of appeal in *Keefer v. Biden*—the ISL case brought by Pennsylvania legislators challenging automatic voter registration that was dismissed last month.

Best,

Zack Goldberg (he/him) | Counsel
States United Democracy Center
917.656.6234 | @statesunited
zack@statesuniteddemocracy.org

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From: Zack Goldberg [zack@statesuniteddemocracy.org]
Sent: 4/18/2024 5:10:03 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Appeal in Kardaal AVR Case
Attachments: Keefer NoA.pdf

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Hi Heather,

We just wanted to flag that Erick Kardaal today filed a notice of appeal in *Keefer v. Biden*—the ISL case brought by Pennsylvania legislators challenging automatic voter registration that was dismissed last month.

Best,

Zack Goldberg (he/him) | Counsel
States United Democracy Center
917.656.6234 | @statesunited
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Obtained by Judicial Watch, Inc. v. Michigan FOIA

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Representatives Dawn Keefer, Timothy Bonner, Barry Jozwiak, Barbara Gleim, Joseph Hamm, Wendy Fink, Robert Kauffman, Stephanie Borowicz, Donald (Bud) Cook, Paul (Mike) Jones, Joseph D'orsie, Charity Krupa, Leslie Rossi, David Zimmerman, Robert Leadbeter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rowe, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen And Senator Cris Dush— All Pennsylvania Legislators,

Plaintiffs,

v.

Joseph R. Biden, In His Official Capacity As The President Of The United States, Or His Successor; United States; U.S. Department Of Agriculture; Tom Vilsack, In His Official Capacity As Secretary Of Agriculture; U.S. Department Of Health And Human Services; Xavier Becerra, In His Official Capacity As Secretary Of Health And Human Services; U.S. Department Of State; Antony Blinken, In His Official Capacity As Secretary Of State; U.S. Department Of Housing And Urban Development; Marcia Fudge, In Her Official Capacity As Secretary Of Housing And Urban Development; U.S. Department Of Energy; Jennifer Granholm, In Her Official Capacity As Secretary Of Energy; U.S. Department Of Education; Dr. Miguel Cardona, In His Official Capacity As Secretary Of Education; Josh Shapiro, In His Official Capacity As Governor Of Pennsylvania, Or His Successor; Al Schmidt, In His Official Capacity As Secretary Of The Commonwealth, Or His Successor; Jonathan Marks, In His Official

Civil Case No. 1:24-CV-00147

Judge Jennifer P. Wilson

NOTICE OF APPEAL

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Capacity As The Deputy Secretary For Elections And Commissions, Or His Successor,

Defendants.

Notice is given that the Plaintiffs Representatives Dawn Keefer, Timothy Bonner, Barry Jozwiak, Barbara Gleim, Joseph Hamm, Wendy Fink, Robert Kauffman, Stephanie Borowicz, Donald (Bud) Cook, Paul (Mike) Jones, Joseph D'orsie, Charity Krupa, Leslie Rossi, David Zimmerman, Robert Leadbeter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rowe, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen And Senator Cris Dush, appeal to the United States Court of Appeals for the Third Circuit from the district court's Memorandum filed on March 26, 2024 (Doc No. 48) and Order filed on March 26, 2024 (Doc. No. 49), granting the Defendants' motion to dismiss (March 20, 2024 (Doc. No. 46)). The Memorandum, Decision, and Order and judgment adjudicated all claims as to all parties.

Dated: April 18, 2024

/s/Erick G. Kaardal

Erick G. Kaardal, 229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
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Attorneys for Plaintiffs

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Janae Steggall [janae@statesuniteddemocracy.org]
Sent: 4/25/2024 7:16:42 PM
To: Brady, Mike (MDOS) [BradyM@michigan.gov]; Caroline Chambers [caroline@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]; Grossi, Christina [GrossiC1@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; Katherine Reisner [katie@statesuniteddemocracy.org]; Kerrin Garripoli [kerrin@statesuniteddemocracy.org]; Zoe Chernicoff [Zoe@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]; Anderson, Christina (MDOS) [AndersonC42@michigan.gov]; Benander, Angela (MDOS) [BenanderA1@michigan.gov]; Hardmon, Cheri (MDOS) [HardmonC@michigan.gov]; Edevbie, Aghogho (MDOS) [EdevbieA@michigan.gov]; Craine, Khyla (MDOS) [CraineK@michigan.gov]; El-Sulayman, Halima (MDOS) [ElSulaymanH1@michigan.gov]; Caroline O'Leary [carolineo@statesuniteddemocracy.org]; Lizzie Ulmer [lizzie@statesuniteddemocracy.org]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Rollow, Jake (MDOS) [RollowJ@michigan.gov]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Sharon Song [sharon@statesuniteddemocracy.org]; Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]; Banghart-Linn1@michigan.gov; Nassim Alisobhani [nassim@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]

Subject: Research Update
Location: Microsoft Teams Meeting

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End: 4/30/2024 9:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Privileged - EPGA

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This is really helpful. Thank you.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, May 3, 2024 at 10:38 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Privileged - EPGA

Hi Jonathan,

Maybe these briefs will help?

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Allen, Christopher (AG) <AllenC28@michigan.gov>
Sent: Friday, May 3, 2024 9:44 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Sherman, Ann (AG) <ShermanA@michigan.gov>; Restuccia, Eric (AG) <RestucciaE@michigan.gov>
Cc: Gustafson, Holly (AG) <GustafsonH@michigan.gov>
Subject: RE: Inquiry from States United SAAG

Heather,

See attached the merits briefing on behalf of the Governor in the MSC. The supplemental brief ordered by the Court has some history of the emergency powers laws and other public health related laws, and the supplemental authority was filed after that with some additional points. Let me know if you need anything else!

Chris

Christopher M. Allen
Assistant Solicitor General
Michigan Department of Attorney General
517.582.5546 (work cell)
517.335.7628 (SG main line)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Teams call

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Thursday, May 2, 2024 4:37 PM
To: Sherman, Ann (AG) <ShermanA@michigan.gov>; Restuccia, Eric (AG) <RestucciaE@michigan.gov>; Allen, Christopher (AG) <AllenC28@michigan.gov>
Cc: Gustafson, Holly (AG) <GustafsonH@michigan.gov>
Subject: Inquiry from States United SAAG

Hi Team,

I have a request for a brief(s) from the EPGA case, MSC No. 161492, that would have a nice history of the laws. Do you recall which brief had a nice outline, and if so can I get a copy? Not super urgent.

Thanks,
Heather

Heather S. Meingast, Division Chief
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/1/2024 9:38:36 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Keefer v. Biden (PA Kaardal case)--privileged

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, May 1, 2024 5:18:18 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Keefer v. Biden (PA Kaardal case)--privileged

A/C Priv MCL 15.243(1)(g)

Heather

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, April 30, 2024 6:41 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: Keefer v. Biden (PA Kaardal case)--privileged

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Quick update on this: Kaardal filed a motion for expedited consideration yesterday. The details of proposed schedules (at pp. 14-15) make little sense, but it appears that Kaardal is asking for the petition to be considered at the May 9 or 16 conference. By rule, the respondents have until May 9 to respond.

A/C Priv MCL 15.243(1)(g)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Monday, April 29, 2024 at 4:57 PM
To: Osher, Daniel <osherd@michigan.gov>, Heather Meingast <meingasth@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>, Robert Cotter

Obtained by Judicial Watch, Inc. v. Michigan FOIA

<Robert@statesuniteddemocracy.org>
Subject: Keefer v. Biden (PA Kaardal case)--privileged

Hi Dan and Heather,

I hope you had a good weekend. On Friday, the Supreme Court docketed a petition for certiorari before judgment from Erick Kaardal on behalf of the group of Pennsylvania legislators he represents. (Docket is here.) The purported need for speed is that "individual state legislator standing is necessary to preserve the integrity of the 2024 federal elections." A/C Priv MCL 15.243(1)(g)

A/C Priv MCL 15.243(1)(g)

Responses from the state and federal respondents are due on **May 28**. As yet, there's no briefing schedule in the Third Circuit, nor has Kaardal sought an expedited schedule. A/C Priv MCL 15.243(1)(g)

A/C Priv MCL 15.243(1)(g)

We'll keep you apprised of developments. Please let me know if you have any questions or would like to discuss in the meantime.

Best,

Jonathan

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/15/2024 3:34:38 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Delta County press release

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

For immediate release

Delta County, [May 13th, 2024] — A group of Delta County citizens is looking into recent election results. Working closely with Election Integrity Force member Joanne Bakale, Citizens for Electoral Justice member Scott Augiuey, and former MI Legislator , Pat Colbeck, the group has identified certain statistical anomalies and suspicious voting ratios.

Suspicious Voting Ratios

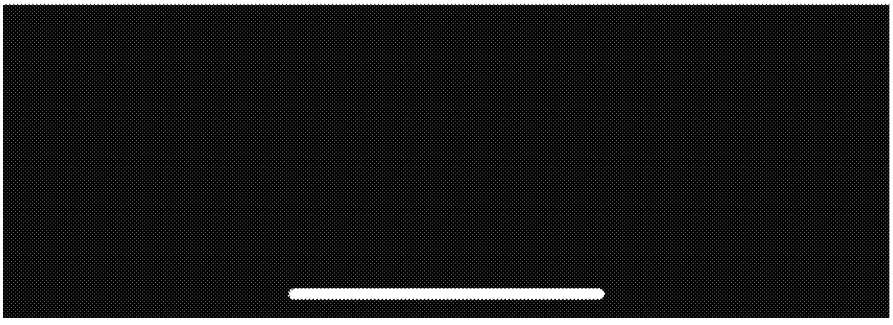
The statistical analysis reveals identical voting ratios for two districts. These ratios of exactly 2.64 are inconsistent with statistical probability and warrant further investigation. The Delta County Citizens aim to ensure the integrity of our electoral process by addressing these discrepancies and if irregularities are shown to exist, then resolve them.

In addition to canvassing, the Delta County Citizens are formally requesting a hand recount and a forensic audit of the results. This will allow experts to thoroughly examine the voting process used in local elections. Transparency and accountability are essential for maintaining public trust in our electoral system.

Delta County residents should be assured that these investigations are necessary and beneficial to the integrity of this process. We intend to secure confidence in our elections. The Delta County community will benefit from a secure and accountable electoral process. One in which we can all vote with confidence.

For media Inquirys please contact

Sethhakkola@hotmail.com



Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/15/2024 9:17:11 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Delta County press release

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Seth Hakkola, the person listed on the release as the contact is, I'm told, the son of one of the canvassers who voted against certification, Bonnie Hakkola.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Wednesday, May 15, 2024 at 11:34 AM
To: Heather Meingast <meingasth@michigan.gov>
Subject: Delta County press release

Obtained by Judicial Watch, Inc. v. Michigan FOIA

For immediate release

Delta County, [May 13th, 2024] — A group of Delta County citizens is looking into recent election results. Working closely with Election Integrity Force member Joanne Bakale, Citizens for Electoral Justice member Scott Anginey, and former MI Legislator , Pat Colbeck, the group has identified certain statistical anomalies and suspicious voting ratios.

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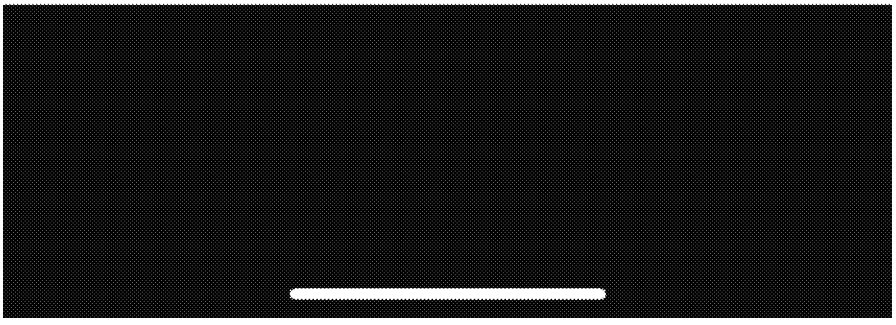
For media inquirys please contact

Sethhakkola@hotmail.com



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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/28/2024 7:45:31 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
Subject: Re: Call this week?

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In case this isn't on your radar. Event tomorrow in Detroit.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, May 28, 2024 at 1:26 PM
To: Osher, Daniel <OsherD@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Call this week?

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Me neither.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Tuesday, May 28, 2024 1:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Call this week?

Won't impact me!

Daniel Osher
Deputy Legal Counsel
Executive Office of Governor Gretchen Whitmer
(517) 242-0089

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, May 28, 2024 12:09 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Call this week?

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I know the Mackinac conference is this week. Will that affect our Thursday call?

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 6/7/2024 6:47:57 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Kaul to Action

Kaul to Action

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States United Democracy Center

States United Action

This Week in Democracy

- Wisconsin Attorney General **Josh Kaul** announced felony criminal charges against three former Trump advisors in connection with the **fake electors plot** in that state in 2020.

- The ethics board of the District of Columbia Bar recommended disbarment for former Trump lawyer **Rudy Giuliani.** The board said Giuliani **violated attorney conduct rules** in Pennsylvania when he sought to have that state's 2020 election results overturned.

- The publisher behind the movie "2000 Mules," which pushed a **widely disproven conspiracy theory** about ballot drop boxes, halted distribution of the film and apologized to a Georgia man falsely accused of election fraud. The movie's false claims were in circulation for

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two years.

- A federal judge ordered former Trump advisor **Steve Bannon** to report to prison July 1. Bannon was convicted of **contempt of Congress** in 2022 for refusing to provide documents and testimony to the House January 6 Select Committee.

Kaul to Action

This week proved that accountability for efforts to undermine our democracy isn't just about Donald Trump's criminal cases.

Wisconsin became the fifth state to announce criminal charges tied to the appointment of fake pro-Trump electors in 2020. Attorney General **Josh Kaul** vowed to protect "the integrity of our electoral process."

Kenneth Chesebro, an architect of the electors strategy across seven states lost by Trump, was charged with forgery, as were **Mike Roman** and **James Troupis.** Chesebro also faces charges in Georgia; Roman is charged in Georgia and Arizona.

Laws differ from state to state, and each set of fake electors carried out its scheme differently, so state officials have reached different conclusions about which charges to bring and against whom. (We broke it down, state by state, in April.)

Elsewhere in accountability news, **Rudy Giuliani** may be disbarred in the District of Columbia for his part in the 2020 plot in Pennsylvania. Just last week, **Jenna Ellis** had her law license suspended in Colorado for three years. Similar efforts are moving forward against **John Eastman** and **Jeffrey Clark,** and **Sidney Powell** faces calls for disbarment in Texas.

Protecting our elections means pushing for **accountability at every level,** not just for Trump but for everyone involved in attempts to undermine the will of the people.

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Wisconsin Attorney General Josh Kaul announces the charges this week.
(Wisconsin Attorney General via Facebook)

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In Georgia, the state Court of Appeals froze the criminal election interference case against former President Trump at least until October. The appeals court scheduled arguments for Oct. 4 on Trump's attempt to have Fulton County District Attorney Fani Willis disqualified. The trial judge previously ruled that Willis should not be disqualified. But the appeal almost certainly means Trump will not face trial in Georgia before the presidential election in November.

➟ **READ:** Our backgrounder on the Georgia case

In the News

- Roll Call: Election officials, retired lawmakers plead for more money to protect voting
- NBC News: Trump supporters try to dox jurors and post violent threats after his conviction
- The Guardian: Republican who refused to certify Georgia primary a member of election denialist group
- AZ Mirror: Lake lawyers await discipline for making false claims to AZ Supreme Court
- Michigan Advance: Benson shares outlook on election law and poll worker protections ahead of November election
- South Dakota Searchlight: Voters reject machine-counting ban in all three counties where it was on the ballot
- Wisconsin Examiner: Wisconsin AG Kaul files felony charges against Trump associates in fake elector scheme

Recommended Listening

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- Nevada Secretary of State Cisco Aguilar joined WBUR radio's "On Point" to discuss safeguarding the state's free and fair elections.

'We are underreacting to how serious this moment is'

On Point 47:17 Jun 5, 2024

Recommended Reading

The New York Times profiled a Republican clerk in Nevada who's standing up for the facts about her county's elections in the face of lies, conspiracy theories, and a recall effort.

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Cindy Elgan, the Esmeralda County clerk for two decades, faced a recall this spring.

A Republican Election Clerk vs. Trump Die-Hards in a World of Lies

Cindy Elgan has overseen elections in rural Nevada without incident for 20 years, but now even her neighbors wonder if she's part of "the deep state cabal."

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Your tax-exempt donation will support States United Democracy Center's work to empower the state and local leaders who safeguard our democracy.

Follow **States United** on LinkedIn, Facebook, and X to stay up to date!

About the States United Democracy Center

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit

About States United Action

States United Action is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit

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1101 17th St NW
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 6/11/2024 6:27:45 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: Quick chat Wednesday?

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Talk to you then.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, June 11, 2024 at 9:31 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Quick chat Wednesday?

Should work. Lets say 11:30.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, June 10, 2024 9:01 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Quick chat Wednesday?

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Hi Heather,

Is there a time you could talk to me and Dax on Wednesday between 11:30 and 2:30?

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 6/14/2024 6:32:24 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Sentence Structure

Sentence Structure

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States United Democracy Center

States United Action

This Week in Democracy

- Former **President Trump** completed a mandatory interview with New York probation officials ahead of his **sentencing** on July 11. A jury of everyday Americans convicted Trump last month of 34 felony counts related to falsifying business records.

- **Jim Marchant,** an Election Denier, lost the Republican primary for U.S. Senate in Nevada. He's one of several high-profile Election Deniers who **lost statewide elections** in 2022, then used their newfound platforms to launch campaigns in 2024.

➡ **EXPLORE:** ElectionDeniers.org

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- **James Troupis,** a lawyer facing a felony criminal forgery charge in connection with the **fake electors plot** in Wisconsin in 2020, was suspended from a state judicial ethics panel.

- **States United** published a resource to help election officials shore up their defenses against threats posed by **artificial intelligence.**

State of the States

In Arizona, the state Court of Appeals upheld more than $47,000 in sanctions against Mark Finchem for a baseless election challenge. Finchem lost the 2022 secretary of state's race by 120,000 votes, then challenged the result in a lawsuit that made unsupported claims of misconduct. A judge dismissed that lawsuit in December 2022 and later imposed the sanctions, finding that Finchem's challenge was "groundless and not brought in good faith."

In the News

- CNN: Officials in Arizona release Rudy Giuliani's mug shot after he pleaded not guilty in election subversion case

- Arizona Daily Star: Appeals Court says Kari Lake isn't entitled to rerun of election she lost

- The Detroit News: Matt DePerno, while facing charges, announces run for Michigan Supreme Court

- Nevada Current: Preference for mail ballots high, Nevada early voter turnout data show

- Nevada Current: Aguilar joins officials warning about threat of AI misinforming voters

Obtained by Judicial Watch, Inc. v. Michigan FOIA

- CBS News via KDKA: Pennsylvania moves to upgrade its mail-in voting process even as Trump objects to Pennsylvania's mail-in voting

- Wisconsin Public Radio: Attorney who oversaw Wisconsin fake electors scheme suspended from judicial ethics panel

Recommended Reading

For The Fulcrum, **Carah Whaley,** director of election protection for our partners at Issue One, writes about the resilience and "unwavering dedication" of election officials. We can all show our support by becoming poll workers, Whaley writes.

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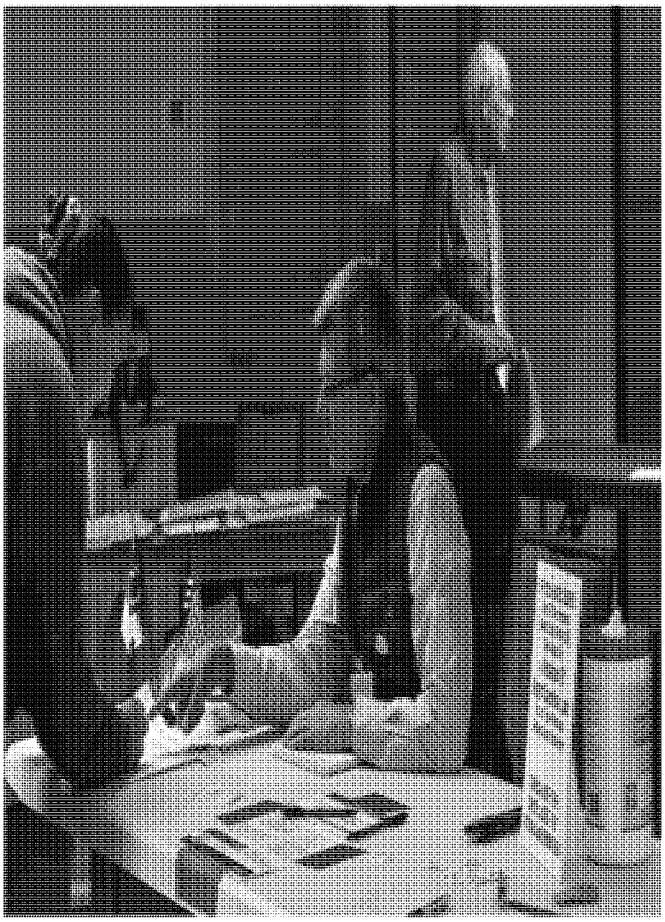
Election officials are heroes. Support them by becoming poll workers.

By Carah Whaley

June 05, 2024



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Washington, DC 20036

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From: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]
on behalf of Gabriel Moreno [Gabriel@statesuniteddemocracy.org]
Sent: 6/13/2024 6:53:04 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Craig Newby [cnewby@ag.nv.gov]; Kron Michael C [Michael.C.Kron@doj.oregon.gov]; Dax Goldstein [dax@statesuniteddemocracy.org]; Laena St Jules [LStJules@ag.nv.gov]; Christine Sun [christine@statesuniteddemocracy.org]; Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Eisenberg, Lisa E. [leisenberg@attorneygeneral.gov]; Lindsay.McKenzie@ag.ny.gov; Eric.Haren@ag.ny.gov; 'Thomson, Aimee' [aimeethomson@pa.gov]

Subject: FW: Connecting re: USPS (SUDC)
Location: Security MCL 15.243(1)(u)

Start: 6/17/2024 7:30:00 PM
End: 6/17/2024 8:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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From: Gabriel@statesuniteddemocracy.org
When: 2:30 PM - 3:00 PM June 17, 2024
Subject: Connecting re: USPS (SUDC)
Location: Security MCL 15.243(1)(u)

Gabriel Moreno is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting
Security MCL 15.243(1)(u)

Meeting ID: Security MCL 15.243(1)(u)
Passcode:

One tap mobile
Security MCL 15.243(1)(u)

Dial by your location
Security MCL 15.243(1)(u)

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Security MCL 15.243(1)(u)

Meeting ID
Passcode: Security MCL 15.243(1)(u)

Find your local number Security MCL 15.243(1)(u)

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From: Gabriel Moreno [Gabriel@statesuniteddemocracy.org]
Sent: 6/17/2024 4:21:30 PM
To: Craig Newby [cnewby@ag.nv.gov]; Kron Michael C [Michael.C.Kron@doj.oregon.gov]; Dax Goldstein [dax@statesuniteddemocracy.org]; Laena St Jules [LStJules@ag.nv.gov]; Christine Sun [christine@statesuniteddemocracy.org]; Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Eisenberg, Lisa E. [leisenberg@attorneygeneral.gov]; Lindsay.McKenzie@ag.ny.gov; Eric.Haren@ag.ny.gov; 'Thomson, Aimee' [aimeethomson@pa.gov]
CC: Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]

Subject: Canceled: Connecting re: USPS (SUDC)
Location: https://us02web.zoom.us/j/83617137447?pwd=vHh2wTYDhOfARZYBbwfn9m9jGRZ1HL.1

Start: 6/17/2024 7:30:00 PM
End: 6/17/2024 8:00:00 PM
Show Time As: Free

Importance: High

Recurrence: (none)

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We will be rescheduling this call for the coming weeks. Please be on the look out for my scheduling emails. Thank you!

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From: Brady, Mike (MDOS) [BradyM@michigan.gov]
Sent: 6/27/2024 1:58:34 PM
To: Amanda Carberry [amanda@statesuniteddemocracy.org]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Grossi, Christina [GrossiC1@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: RE: Bi-weekly Democracy Check-in

Good morning,

Unfortunately, I won't be able to join this morning's 10:30 AM check-in as I now have a conflicting obligation for the Secretary. I'm generally available this afternoon to touch base if there are specific questions for me.

Be well,

Michael J. Brady (he/his), *Chief Legal Director*
Secretary of State Jocelyn Benson
Michigan Department of State
mobile: 517.599.7343

-----Original Appointment-----
From: Amanda Carberry <amanda@statesuniteddemocracy.org>
Sent: Tuesday, January 16, 2024 10:39 AM
To: Amanda Carberry; Jonathan Williams; Robert Cotter; Zack Goldberg; Brady, Mike (MDOS); Grossi, Christina; Osher, Daniel; Meingast, Heather (AG)
Subject: Bi-weekly Democracy Check-in
When: Thursday, June 27, 2024 10:30 AM-11:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

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Microsoft Teams meeting

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Click here to join the meeting

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Passcode:
Download Teams | Join on the web

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Phone Conference ID: Security MCL 15.243(1)(u)
Find a local number | Reset PIN

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 6/26/2024 11:03:13 PM
To: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Murthy v. Missouri analysis
Attachments: Murthy v. Missouri Summary 6.26.24[80].docx; Murthy v. Missouri[85].pdf

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PRIVILEGED

Linus and Heather,

We wanted to update you on this morning's U.S. Supreme Court decision in *Murthy v. Missouri*. As you'll recall, the case was about whether the federal government improperly coerced social media platforms to take down election and COVID related mis and dis-information and thus violated the First Amendment. A complete summary is attached along with the opinion, but big picture, the Court held that the challengers—the state of Missouri and Louisiana as well as five individual social media users—lacked standing to sue because they failed to provide sufficient evidence of a direct injury.

The decision reverses the injunction that had been issued by the Fifth Circuit against the federal government, which barred a wide range of communications with the social media platforms. This means there is currently no injunction in place, but because the Court did not reach the merits, it did not address the merits of the First Amendment claim.

DPP MCL 15.243(1)(m)

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MURTHY, SURGEON GENERAL, ET AL. *v.* MISSOURI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23–411. Argued March 18, 2024—Decided June 26, 2024

Under their longstanding content-moderation policies, social-media platforms have taken a range of actions to suppress certain categories of speech, including speech they judge to be false or misleading. In 2020, with the outbreak of COVID–19, the platforms announced that they would enforce these policies against users who post false or misleading content about the pandemic. The platforms also applied misinformation policies during the 2020 election season. During that period, various federal officials regularly spoke with the platforms about COVID–19 and election-related misinformation. For example, White House officials publicly and privately called on the platforms to do more to address vaccine misinformation. Surgeon General Vivek Murthy issued a health advisory that encouraged the platforms to take steps to prevent COVID–19 misinformation "from taking hold." The Centers for Disease Control and Prevention alerted the platforms to COVID–19 misinformation trends and flagged example posts. The Federal Bureau of Investigation and Cybersecurity and Infrastructure Security Agency communicated with the platforms about election-related misinformation in advance of the 2020 Presidential election and the 2022 midterms.

Respondents are two States and five individual social-media users who sued dozens of Executive Branch officials and agencies, alleging that the Government pressured the platforms to censor their speech in violation of the First Amendment. Following extensive discovery, the District Court issued a preliminary injunction. The Fifth Circuit affirmed in part and reversed in part. The court held that both the state plaintiffs and the individual plaintiffs had Article III standing to seek injunctive relief. On the merits, the court held that the Government

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Syllabus

entities and officials, by "coerc[ing]" or "significantly encourag[ing]" the platforms' moderation decisions, transformed those decisions into state action. The court then modified the District Court's injunction to state that the defendants shall not coerce or significantly encourage social-media companies to suppress protected speech on their platforms.

Held: Neither the individual nor the state plaintiffs have established Article III standing to seek an injunction against any defendant. Pp. 8–29.

(a) Article III's "case or controversy" requirement is "fundamental" to the "proper role" of the Judiciary. *Raines* v. *Byrd*, 521 U. S. 811, 818. A proper case or controversy exists only when at least one plaintiff "establish[es] that [she] ha[s] standing to sue," *ibid.*—*i.e.*, that she has suffered, or will suffer, an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling," *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409. Here, the plaintiffs' theories of standing depend on the *platforms'* actions—yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts. Instead, they seek to enjoin the *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future.

The one-step-removed, anticipatory nature of the plaintiffs' alleged injuries presents two particular challenges. First, it is a bedrock principle that a federal court cannot redress "injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42. Second, because the plaintiffs request forward-looking relief, they must face "a real and immediate threat of repeated injury." *O'Shea* v. *Littleton*, 414 U. S. 488, 496. Putting these requirements together, the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant. Here, at the preliminary injunction stage, they must show that they are likely to succeed in carrying that burden. On the record in this case, that is a tall order. Pp. 8–10.

(b) The plaintiffs' primary theory of standing involves their "direct censorship injuries." Pp. 10–26.

(1) The Court first considers whether the plaintiffs have demonstrated traceability for their past injuries. Because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value. The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation. And while the record reflects that the Government defendants played a role in at least some of the

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platforms' moderation choices, the evidence indicates that the platforms had independent incentives to moderate content and often exercised their own judgment. The Fifth Circuit, by attributing every platform decision at least in part to the defendants, glossed over complexities in the evidence. The Fifth Circuit also erred by treating the defendants, plaintiffs, and platforms each as a unified whole. Because "standing is not dispensed in gross," *TransUnion LLC* v. *Ramirez*, 594 U. S. 413, 431, "plaintiffs must demonstrate standing for each claim they press" against each defendant, "and for each form of relief they seek," *ibid.* This requires a threshold showing that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff's speech on that topic. Complicating the plaintiffs' effort to demonstrate that each platform acted due to Government coercion, rather than its own judgment, is the fact that the platforms began to suppress the plaintiffs' COVID–19 content before the defendants' challenged communications started. Pp. 10–14.

(2) The plaintiffs fail, by and large, to link their past social-media restrictions and the defendants' communications with the platforms. The state plaintiffs, Louisiana and Missouri, refer only to action taken by Facebook against a Louisiana state representative's post about children and the COVID–19 vaccine. But they never say when Facebook took action against the official's post—a critical fact in establishing a causal link. Nor have the three plaintiff doctors established a likelihood that their past restrictions are traceable to either the White House officials or the CDC. They highlight restrictions imposed by Twitter and LinkedIn, but point only to Facebook's communications with White House officials. Plaintiff Jim Hoft, who runs a news website, experienced election-related restrictions on various platforms. He points to the FBI's role in the platforms' adoption of hacked-material policies and claims that Twitter restricted his content pursuant to those policies. Yet Hoft's declaration reveals that Twitter took action according to its own rules against posting private, intimate media without consent. Hoft does not provide evidence that his past injuries are likely traceable to the FBI or CISA. Plaintiff Jill Hines, a healthcare activist, faced COVID–19-related restrictions on Facebook. Though she makes the best showing of all the plaintiffs, most of the lines she draws are tenuous. Plus, Facebook started targeting her content before almost all of its communications with the White House and the CDC, thus weakening the inference that her subsequent restrictions are likely traceable to Government-coerced enforcement of Facebook's policies. Even assuming Hines can eke out a showing of traceability, the past is relevant only insofar as it predicts the future. Pp. 14–21.

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Syllabus

(3) To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them. The plaintiffs who have not pointed to any past restrictions likely traceable to the Government defendants (*i.e.*, everyone other than Hines) are ill suited to the task of establishing their standing to seek forward-looking relief. But even Hines, with her superior showing on past harm, has not shown enough to demonstrate likely future harm at the hands of these defendants. On this record, it appears that the frequent, intense communications that took place in 2021 between the Government defendants and the platforms had considerably subsided by 2022, when Hines filed suit. Thus it is "no more than conjecture" to assume that Hines will be subject to Government-induced content moderation. *Los Angeles* v. *Lyons*, 461 U. S. 95, 108.

The plaintiffs' counterarguments are unpersuasive. First, they argue that they suffer "continuing, present adverse effects" from their past restrictions, as they must now self-censor on social media. *O'Shea*, 414 U. S., at 496. But the plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U. S., at 416. Second, the plaintiffs suggest that the platforms continue to suppress their speech according to policies initially adopted under Government pressure. But the plaintiffs have a redressability problem. Without evidence of continued pressure from the defendants, the platforms remain free to enforce, or not to enforce, their policies—even those tainted by initial governmental coercion. And the available evidence indicates that the platforms have continued to enforce their policies against COVID–19 misinformation even as the Federal Government has wound down its own pandemic response measures. Enjoining the Government defendants, therefore, is unlikely to affect the platforms' content-moderation decisions. Pp. 21–27.

(c) The plaintiffs next assert a "right to listen" theory of standing. The individual plaintiffs argue that the First Amendment protects their interest in reading and engaging with the content of other speakers on social media. This theory is startlingly broad, as it would grant all social-media users the right to sue over *someone else's* censorship—at least so long as they claim an interest in that person's speech. While the Court has recognized a "First Amendment right to receive information and ideas," the Court has identified a cognizable injury only where the listener has a concrete, specific connection to the speaker. *Kleindienst* v. *Mandel*, 408 U. S. 753, 762. Attempting to satisfy this requirement, the plaintiffs emphasize that hearing unfettered speech

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on social media is critical to their work as scientists, pundits, and activists. But they do not point to any specific instance of content moderation that caused them identifiable harm. They have therefore failed to establish an injury that is sufficiently "concrete and particularized." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. The state plaintiffs assert a sovereign interest in hearing from their citizens on social media, but they have not identified any specific speakers or topics that they have been unable to hear or follow. And States do not have third-party "standing as *parens patriae* to bring an action against the Federal Government" on behalf of their citizens who have faced social-media restrictions. *Haaland* v. *Brackeen*, 599 U. S. 255, 295. Pp. 27–28.

83 F. 4th 350, reversed and remanded.

BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAGAN, KAVANAUGH, and JACKSON, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 23–411

VIVEK H. MURTHY, SURGEON GENERAL, ET AL., PETITIONERS *v.* MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 26, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

During the 2020 election season and the COVID–19 pandemic, social-media platforms frequently removed, demoted, or fact checked posts containing allegedly false or misleading information. At the same time, federal officials, concerned about the spread of "misinformation" on social media, communicated extensively with the platforms about their content-moderation efforts.

The plaintiffs, two States and five social-media users, sued dozens of Executive Branch officials and agencies, alleging that they pressured the platforms to suppress protected speech in violation of the First Amendment. The Fifth Circuit agreed, concluding that the officials' communications rendered them responsible for the private platforms' moderation decisions. It then affirmed a sweeping preliminary injunction.

The Fifth Circuit was wrong to do so. To establish standing, the plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek. Because no plaintiff has carried that burden, none has standing to seek a preliminary injunction.

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I

A

With their billions of active users, the world's major social-media companies host a "staggering" amount of content on their platforms. *Twitter, Inc.* v. *Taamneh*, 598 U. S. 471, 480 (2023). Yet for many of these companies, including Facebook, Twitter, and YouTube, not everything goes.[1] Under their longstanding content-moderation policies, the platforms have taken a range of actions to suppress certain categories of speech. They place warning labels on some posts, while deleting others. They also "demote" content so that it is less visible to other users. And they may suspend or ban users who frequently post content that violates platform policies.

For years, the platforms have targeted speech they judge to be false or misleading. For instance, in 2016, Facebook began fact checking and demoting posts containing misleading claims about elections. Since 2018, Facebook has removed health-related misinformation, including false claims about a measles outbreak in Samoa and the polio vaccine in Pakistan. Likewise, in 2019, YouTube announced that it would "demonetize" channels that promote anti-vaccine messages.

In 2020, with the outbreak of COVID–19, the platforms announced that they would enforce their policies against users who post false or misleading content about the pandemic. As early as January 2020, Facebook deleted posts it deemed false regarding "cures," "treatments," and the effect of "physical distancing." 60 Record on Appeal 19,035 (Record). And it demoted posts containing what it described as "conspiracy theories about the origin of the virus." *Id.*, at

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[1] Since the events of this suit, Twitter has merged into X Corp. and is now known as X. Facebook is now known as Meta Platforms. For the sake of clarity, we will refer to these platforms as Twitter and Facebook, as they were known during the vast majority of the events underlying this suit.

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19,036. Twitter and YouTube began applying their policies in March and May 2020, respectively. Throughout the pandemic, the platforms removed or reduced posts questioning the efficacy and safety of mask wearing and the COVID–19 vaccine, along with posts on related topics.

The platforms also applied their misinformation policies during the 2020 Presidential election season. Facebook, in late 2019, unveiled measures to counter foreign interference campaigns and voter suppression efforts. One month before the election, multiple platforms suppressed a report about Hunter Biden's laptop, believing that the story originated from a Russian hack-and-leak operation. After the election, the platforms took action against users or posts that questioned the integrity of the election results.

Over the past few years, various federal officials regularly spoke with the platforms about COVID–19 and election-related misinformation. Officials at the White House, the Office of the Surgeon General, and the Centers for Disease Control and Prevention (CDC) focused on COVID–19 content, while the Federal Bureau of Investigation (FBI) and the Cybersecurity and Infrastructure Security Agency (CISA) concentrated on elections.

White House. In early 2021, and continuing primarily through that year, the Director of Digital Strategy and members of the COVID–19 response team interacted with the platforms about their efforts to suppress vaccine misinformation. They expressed concern that Facebook in particular was "one of the top drivers of vaccine hesitancy," due to the spread of allegedly false or misleading claims on the platform. App. 659–660. Thus, the officials peppered Facebook (and to a lesser extent, Twitter and YouTube) with detailed questions about their policies, pushed them to suppress certain content, and sometimes recommended policy changes. Some of these communications were more aggressive than others. For example, the director of Digital Strategy, frustrated that Facebook had not removed a particular

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post, complained: "[L]ast time we did this dance, it ended in an insurrection." *Id.*, at 698. Another official, unhappy with Facebook's supposed lack of transparency about its vaccine misinformation problems, wrote: "Internally we have been considering our options on what to do about it." *Id.*, at 657. Publicly, White House communications officials called on the platforms to do more to address COVID–19 misinformation—and, perhaps as motivation, raised the possibility of reforms aimed at the platforms, including changes to the antitrust laws and 47 U. S. C. §230.

Surgeon General. In July 2021, Surgeon General Vivek Murthy issued a health advisory on misinformation. The advisory encouraged platforms to "[r]edesign recommendation algorithms to avoid amplifying misinformation," "[i]mpose clear consequences for accounts that repeatedly violate platform policies," and "[p]rovide information from trusted and credible sources to prevent misconceptions from taking hold." 3 Record 662. At a press conference to announce the advisory, Surgeon General Murthy argued that the platforms should "operate with greater transparency and accountability." 2 *id.*, at 626. The following year, the Surgeon General issued a "Request for Information," seeking, among other things, reports on each platform's "COVID–19 misinformation policies." Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID–19 Pandemic Request for Information (RFI), 87 Fed. Reg. 12714 (Mar. 7, 2022).

CDC. Like the White House, the CDC frequently communicated with the platforms about COVID–19 misinformation. In early 2020, Facebook reached out to the agency, seeking authoritative information about the virus that it could post on the platform. The following year, the CDC's communications expanded to other platforms, including Twitter and YouTube. The CDC hosted meetings and sent reports to the platforms, alerting them to misinformation

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trends and flagging example posts. The platforms often asked the agency for fact checks on specific claims.

FBI and CISA. These agencies communicated with the platforms about election-related misinformation. They hosted meetings with several platforms in advance of the 2020 Presidential election and the 2022 midterms. The FBI alerted the platforms to posts containing false information about voting, as well as pernicious foreign influence campaigns that might spread on their sites. Shortly before the 2020 election, the FBI warned the platforms about the potential for a Russian hack-and-leak operation. Some companies then updated their moderation policies to prohibit users from posting hacked materials. Until mid-2022, CISA, through its "switchboarding" operations, forwarded third-party reports of election-related misinformation to the platforms. These communications typically stated that the agency "w[ould] not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use this information." 72 Record 23,223.

B

Respondents are two States and five individual social-media users. They were the plaintiffs below, and for the sake of narrative clarity, we will refer to them as "plaintiffs" in this opinion. (Likewise, we will refer to the Government individuals and agencies as "defendants" rather than petitioners.) The individual plaintiffs—three doctors, the owner of a news website, and a healthcare activist—allege that various platforms removed or demoted their COVID–19 or election-related content between 2020 and 2023. The States, Missouri and Louisiana, claim that the platforms have suppressed the speech of state entities and officials, as well as their citizens' speech.

Though the platforms restricted the plaintiffs' content, the plaintiffs maintain that the Federal Government was

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behind it. Acting on that belief, the plaintiffs sued dozens of Executive Branch officials and agencies, alleging that they pressured the platforms to censor the plaintiffs' speech in violation of the First Amendment. The States filed their complaint on May 5, 2022. The next month, they moved for a preliminary injunction, seeking to stop the defendants from "taking any steps to demand, urge, encourage, pressure, or otherwise induce" any platform "to censor, suppress, remove, de-platform, suspend, shadow-ban, de-boost, restrict access to content, or take any other adverse action against any speaker, content, or viewpoint expressed on social media." 1 *id.*, at 253. The individual plaintiffs joined the suit on August 2, 2022.

After granting extensive discovery, the District Court issued a preliminary injunction. *Missouri* v. *Biden*, 680 F. Supp. 3d 630, 729 (WD La. 2023). The court held that officials at the White House, the Surgeon General's Office, the CDC, the FBI, and CISA likely "coerced" or "significantly encouraged" the platforms "to such extent that the[ir content-moderation] decision[s] should be deemed to be the decisions of the Government." *Id.*, at 694 (internal quotation marks omitted). It enjoined those agencies, along with scores of named and unnamed officials and employees, from taking actions "for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-medial platforms." *Missouri* v. *Biden*, 2023 WL 5841935, *1–*2 (WD La., July 4, 2023).[2]

Following a grant of panel rehearing, the Fifth Circuit affirmed in part and reversed in part. *Missouri* v. *Biden*, 83

[2] The District Court also enjoined the National Institute of Allergy and Infectious Diseases (NIAID) and the State Department, along with their officials and employees. 680 F. Supp. 3d, at 700–701, 704–705. The Fifth Circuit removed these entities and individuals from the injunction, however, so they are not before us. *Missouri* v. *Biden*, 83 F. 4th 350, 391 (2023).

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F. 4th 350 (2023). It first held that the individual plaintiffs had Article III standing to seek injunctive relief, reasoning that the social-media companies had suppressed the plaintiffs' speech in the past and were likely to do so again in the future, *id.*, at 367–369, and that both of these injuries were "traceable to government-coerced enforcement" of the platform's policies and "redressable by an injunction against the government officials," *id.*, at 373. The court also concluded that the States had standing, both because the platforms had restricted the posts of individual state officials and because the States have the "right to listen" to their citizens on social media. *Id.*, at 371–372.

On the merits, the Fifth Circuit explained that "a private party's conduct may be state action if the government coerced or significantly encouraged it." *Id.*, at 380 (citing *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982); emphasis deleted). To identify coercion, it asked whether "the government compelled the [private party's] decision by . . . intimating that some form of punishment will follow a failure to comply." 83 F. 4th, at 380. The court explained that the Government significantly encourages a private party's choice when it exercises "active, meaningful control, whether by entanglement in the party's decision-making process or direct involvement in carrying out the decision itself." *Id.*, at 377.[3]

Applying those tests, the Fifth Circuit determined that White House officials, in conjunction with the Surgeon General's Office, likely both coerced *and* significantly encouraged the platforms to moderate content. *Id.*, at 388. The court concluded that the same was true for the FBI. *Ibid.* It held that the CDC and CISA significantly encouraged (but did not coerce) the platforms' moderation decisions.

[3] Because we do not reach the merits, we express no view as to whether the Fifth Circuit correctly articulated the standard for when the Government transforms private conduct into state action.

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Id., at 389, 391.

The Fifth Circuit agreed with the District Court that the equities favored the plaintiffs. *Id.*, at 392–394. It then modified the District Court's injunction to state that the defendants, and their employees and agents, shall not "'coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech.'" *Id.*, at 397. The court did not limit the injunction to the platforms that the plaintiffs use or the topics that the plaintiffs wish to discuss, explaining that the harms stemming from the defendants' conduct "impac[t] every social-media user." *Id.*, at 398.

The federal agencies and officials applied to this Court for emergency relief. We stayed the injunction, treated the application as a petition for a writ of certiorari, and granted the petition. 601 U. S. ___ (2023).

II

We begin—and end—with standing. At this stage, neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant. We therefore lack jurisdiction to reach the merits of the dispute.

A

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." The "case or controversy" requirement is "'fundamental to the judiciary's proper role in our system of government.'" *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997) (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)). Federal courts can only review statutes and executive actions when necessary "to redress or prevent actual or imminently threatened injury to persons caused by . . . official violation of law." *Summers* v. *Earth Island Institute*, 555

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U. S. 488, 492 (2009). As this Court has explained, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006).

A proper case or controversy exists only when at least one plaintiff "establish[es] that [she] ha[s] standing to sue." *Raines*, 521 U. S., at 818; *Department of Commerce* v. *New York*, 588 U. S. 752, 766 (2019). She must show that she has suffered, or will suffer, an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409 (2013) (internal quotation marks omitted). These requirements help ensure that the plaintiff has "such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction." *Summers*, 555 U. S., at 493 (internal quotation marks omitted).

The plaintiffs claim standing based on the "direct censorship" of their own speech as well as their "right to listen" to others who faced social-media censorship. Brief for Respondents 19, 22. Notably, both theories depend on the *platform's* actions—yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts. They seek to enjoin *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future.

The one-step-removed, anticipatory nature of their alleged injuries presents the plaintiffs with two particular challenges. *First*, it is a bedrock principle that a federal court cannot redress "injury that results from the independent action of some third party not before the court." *Simon*, 426 U. S., at 41–42. In keeping with this principle, we have "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U. S., at 413. Rather

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than guesswork, the plaintiffs must show that the third-party platforms "will likely react in predictable ways" to the defendants' conduct. *Department of Commerce*, 588 U. S., at 768. *Second*, because the plaintiffs request forward-looking relief, they must face "a real and immediate threat of repeated injury." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974); see also *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur" (internal quotation marks omitted)). Putting these requirements together, the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant. On this record, that is a tall order.

Before we evaluate the plaintiffs' different theories, a few preliminaries: The plaintiff "bears the burden of establishing standing as of the time [s]he brought th[e] lawsuit and maintaining it thereafter." *Carney* v. *Adams*, 592 U. S. 53, 59 (2020). She must support each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992). At the preliminary injunction stage, then, the plaintiff must make a "clear showing" that she is "likely" to establish each element of standing. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 22 (2008) (emphasis deleted). Where, as here, the parties have taken discovery, the plaintiff cannot rest on "mere allegations," but must instead point to factual evidence. See *Lujan*, 504 U. S., at 561 (internal quotation marks omitted).

B

1

The plaintiffs' primary theory of standing involves their

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"direct censorship injuries." They claim that the restrictions they have experienced in the past on various platforms are traceable to the defendants and that the platforms will continue to censor their speech at the behest of the defendants. So we first consider whether the plaintiffs have demonstrated traceability for their past injuries.

Here, a note of caution: If the plaintiffs were seeking compensatory relief, the traceability of their past injuries would be the whole ball game. But because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value. See *O'Shea*, 414 U. S., at 495–496 ("Past exposure to illegal conduct" can serve as evidence of threatened future injury but "does not in itself show a present case or controversy regarding injunctive relief"). If a plaintiff demonstrates that a particular Government defendant was behind her past social-media restriction, it will be easier for her to prove that she faces a continued risk of future restriction that is likely to be traceable to that same defendant. Conversely, if a plaintiff cannot trace her past injury to one of the defendants, it will be much harder for her to make that showing. See *Clapper*, 568 U. S., at 411. In the latter situation, the plaintiff would essentially have to build her case from scratch, showing why she has some newfound reason to fear that one of the named defendants will coerce her chosen platform to restrict future speech on a topic about which she plans to post—in this case, either COVID–19 or the upcoming election. Keep in mind, therefore, that the past is relevant only insofar as it is a launching pad for a showing of imminent future injury.

The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation. The District Court made none. Nor did the Fifth Circuit, which approached standing at a high level of generality. The platforms, it reasoned, "have engaged in censorship of certain viewpoints on

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key issues," while "the government has engaged in a years-long pressure campaign" to ensure that the platforms suppress those viewpoints. 83 F. 4th, at 370. The platforms' "censorship decisions"—including those affecting the plaintiffs—were thus "likely attributable at least in part to the platforms' reluctance to risk" the consequences of refusing to "adhere to the government's directives." *Ibid.*

We reject this overly broad assertion. As already discussed, the platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct. In fact, the platforms, acting independently, had strengthened their pre-existing content-moderation policies before the Government defendants got involved. For instance, Facebook announced an expansion of its COVID–19 misinformation policies in early February 2021, before White House officials began communicating with the platform. And the platforms continued to exercise their independent judgment even after communications with the defendants began. For example, on several occasions, various platforms explained that White House officials had flagged content that did not violate company policy. Moreover, the platforms did not speak only with the defendants about content moderation; they also regularly consulted with outside experts.

This evidence indicates that the platforms had independent incentives to moderate content and often exercised their own judgment. To be sure, the record reflects that the Government defendants played a role in at least some of the platforms' moderation choices. But the Fifth Circuit, by attributing *every* platform decision at least in part to the defendants, glossed over complexities in the evidence.[4]

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[4]The Fifth Circuit relied on the District Court's factual findings, many of which unfortunately appear to be clearly erroneous. The District Court found that the defendants and the platforms had an "efficient report-and-censor relationship." *Missouri* v. *Biden*, 680 F. Supp. 3d 630,

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The Fifth Circuit also erred by treating the defendants, plaintiffs, and platforms each as a unified whole. Our decisions make clear that "standing is not dispensed in gross." *TransUnion LLC* v. *Ramirez*, 594 U. S. 413, 431 (2021). That is, "plaintiffs must demonstrate standing for each claim that they press" against each defendant, "and for each form of relief that they seek." *Ibid.* Here, for every defendant, there must be at least one plaintiff with standing to seek an injunction. This requires a certain threshold showing: namely, that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff's speech on that topic.

Heeding these conditions is critically important in a sprawling suit like this one. The plaintiffs faced speech restrictions on different platforms, about different topics, at

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715 (WD La. 2023). But much of its evidence is inapposite. For instance, the court says that Twitter set up a "streamlined process for censorship requests" after the White House "bombarded" it with such requests. *Ibid.*, n. 662 (internal quotation marks omitted). The record it cites says nothing about "censorship requests." See App. 639–642. Rather, in response to a White House official asking Twitter to remove an impersonation account of President Biden's granddaughter, Twitter told the official about a portal that he could use to flag similar issues. *Ibid.* This has nothing to do with COVID–19 misinformation. The court also found that "[a] drastic increase in censorship . . . directly coincided with Defendants' public calls for censorship and private demands for censorship." 680 F. Supp. 3d, at 715. As to the "calls for censorship," the court's proof included statements from Members of Congress, who are not parties to this suit. *Ibid.*, and n. 658. Some of the evidence of the "increase in censorship" reveals that Facebook worked with the CDC to update its list of removable false claims, but these examples do not suggest that the agency "demand[ed]" that it do so. *Ibid.* Finally, the court, echoing the plaintiffs' proposed statement of facts, erroneously stated that Facebook agreed to censor content that did not violate its policies. *Id.*, at 714, n. 655. Instead, on several occasions, Facebook explained that certain content did not qualify for *removal* under its policies but did qualify for other forms of moderation.

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different times. Different groups of defendants communicated with different platforms, about different topics, at different times. And even where the plaintiff, platform, time, content, and defendant line up, the links must be evaluated in light of the platform's independent incentives to moderate content. As discussed, the platforms began to suppress the plaintiffs' COVID–19 content before the defendants' challenged communications started, which complicates the plaintiffs' effort to demonstrate that each platform acted due to "government-coerced enforcement" of its policies, 83 F. 4th, at 370 (emphasis deleted), rather than in its own judgment as an "'independent acto[r],'" *Lujan*, 504 U. S., at 562. With these factors in mind, we proceed to untangle the mass of the plaintiffs' injuries and Government communications.

2

The plaintiffs rely on allegations of past Government censorship as evidence that future censorship is likely. But they fail, by and large, to link their past social-media restrictions to the defendants' communications with the platforms. Thus, the events of the past do little to help any of the plaintiffs establish standing to seek an injunction to prevent future harms.

Louisiana and Missouri. The state plaintiffs devote minimal attention to restriction of their own social-media content, much less to a causal link between any such restriction and the actions of any Government defendant. They refer only to Facebook's "flagg[ing] . . . and deboost[ing]" of a Louisiana state representative's post about children and the COVID–19 vaccine. Brief for Respondents 20; App. 635–636. We need not decide whether an injury to

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a state representative counts as an injury to the State, because evidence of causation is lacking.[5] The States assert only that in November 2021, Facebook, "as a result of [its] work [with the CDC]," updated its policies "to remove additional false claims about the COVID–19 vaccine for children." 37 Record 11,457. But they never say when Facebook took action against the official's post—and a causal link is possible only if the removal occurred *after* Facebook's communication with the CDC. There is therefore no evidence to support the States' allegation that Facebook restricted the state representative pursuant to the CDC-influenced policy.

Jayanta Bhattacharya, Martin Kulldorff, and Aaron Kheriarty. These plaintiffs are doctors who questioned the wisdom of then-prevailing COVID–19 policies, including lockdowns and mask and vaccine mandates. Each faced his first social-media restriction in 2020, before the White House and the CDC entered discussions with the relevant platforms. Plaintiffs highlight restrictions imposed by Twitter and LinkedIn, starting in 2021, on Dr. Kulldorff's posts about natural immunity. They also point out that Twitter restricted the visibility of Dr. Kheriarty's posts about vaccine safety and efficacy, as well as the ethics surrounding vaccine mandates. Attempting to show causation, the plaintiffs emphasize that in January 2022, Facebook reported to White House officials that it had recently demoted one post advocating for natural immunity over vaccine immunity. But neither the timing nor the platforms line up (nor, in Dr. Kheriarty's case, does the content), so the plaintiffs cannot show that these restrictions were traceable to the White House officials. In fact, there is no record evidence that White House officials ever communicated at all

[5]The Fifth Circuit held that States "sustain a direct injury when the social-media accounts of state officials are censored due to federal coercion." 83 F. 4th, at 372. Because the State failed to show that its official was censored, we need not express a view on this theory.

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with LinkedIn.

Drs. Bhattacharya and Kulldorff claim that, after disagreeing with the CDC and other federal health officials, they faced a "relentless covert campaign of social-media censorship." App. 585 (emphasis deleted). They refer to the platforms' suppression of the Great Barrington Declaration, their coauthored report calling for an end to lockdowns. But their declarations do not suggest that anyone at the CDC was involved; rather, they point to officials at the National Institutes of Health and the NIAID. Those entities are not before us. With nothing else to show, Drs. Bhattacharya, Kulldorff, and Kheriarty have not established a likelihood that their past restrictions are traceable to either the White House officials or the CDC.

Jim Hoft. Both Hoft and his news website, "The Gateway Pundit," experienced election and COVID–19-related restrictions on various platforms. Hoft tries to demonstrate his standing to sue only the FBI and CISA, which means that only the suppression of his election-related posts is relevant. (As already discussed, the record contains no evidence that either the FBI or CISA engaged with the platforms about the pandemic.) First, Hoft points to the FBI's role in the platforms' adoption of hacked-material policies. And he claims that Twitter, in December 2020, censored content about the Hunter Biden laptop story under such a policy. The post was titled: "Where's Hunter? How is Hunter Celebrating the New Year? New Photos of Hunter Biden Pushing Drugs on Women Emerge." Hoft's own declaration reveals that Twitter acted according to its "rules against posting or sharing privately produced/distributed intimate media of someone without their express consent." *Id.*, at 608. Hoft provides no evidence that Twitter adopted a policy against posting private, intimate content in response to the FBI's warnings about hack-and-leak operations. Plus, it was Hoft's brother, Joe Hoft, who posted this tweet; Twitter therefore suspended *Joe* Hoft's account. It is

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unclear why Jim Hoft would have standing to sue for his brother's injury.

Hoft claims that his content appears on a CISA document tracking posts that various entities had flagged for the platforms as misinformation. The spreadsheet shows that a private entity, the Election Integrity Partnership—*not* CISA—alerted Twitter to an unidentified article from the Gateway Pundit. And the spreadsheet does not reveal whether Twitter removed or otherwise suppressed that post. This evidence does not support the conclusion that Hoft's past injuries are likely traceable to the FBI or CISA.

Jill Hines. Of all the plaintiffs, Hines makes the best showing of a connection between her social-media restrictions and communications between the relevant platform (Facebook) and specific defendants (CDC and the White House). That said, most of the lines she draws are tenuous, particularly given her burden of proof at the preliminary injunction stage—recall that she must show that her restrictions are *likely* traceable to the White House and the CDC.

A healthcare activist, Hines codirects "Health Freedom Louisiana," a group that advocated against COVID–19 mask and vaccine mandates. In October 2020—before the start of communications with the White House and the bulk of communications with the CDC—Facebook began to reduce the reach of Hines' and Health Freedom's pages. Hines tries to connect Facebook's subsequent actions against her to both the White House officials and the CDC.

First, Facebook "deplatformed" (*i.e.*, deleted) one of Health Freedom's groups in July 2021. The last post in the group asked members to contact state legislators about health freedom legislation. Three months earlier, a White House official sent Facebook several "suggestions" that were "circulating around the building and informing thinking," including that the platform should "end group recom-

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mendations for groups with a history of COVID–19 or vaccine misinformation." 54 Record 16,870–16,871. A week later, Facebook replied that it had "already removed all health groups from our recommendation feature." App. 716. It is hard to know what to make of this. Facebook reported that it had *already* acted, which tends to imply that Facebook made its decision independently of the White House. Moreover, Facebook and the White House communicated about removing groups from recommendation features, not deleting them altogether—further weakening the inference that Facebook was implementing White House policy rather than its own.[6]

Next, in April 2023, Facebook gave Hines a warning after she reposted content from Robert F. Kennedy, Jr. Two years earlier, White House officials had pushed Facebook to remove the accounts of the "disinformation dozen," 12 people (including Kennedy) supposedly responsible for a majority of COVID–19-related misinformation. Hines tries to link the warning she received to this earlier White House pressure. Again, though, the link is weak. There is no evidence that the White House asked Facebook to censor every user who *reposts* a member of the disinformation dozen, nor did Facebook change its policies to do so. Facebook's 2023 warning to Hines bears only a tangential relationship to the White House's 2021 directive to Facebook.

Hines traces her remaining restrictions to the CDC. Beginning in October 2020, Facebook fact checked Hines' posts about pregnant women taking the COVID–19 vaccine,

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[6] Hines tries to link this restriction to the Surgeon General's Office as well, suggesting that the White House and Surgeon General together pressured Facebook. But the record reveals that a White House official sent the relevant email, and Facebook responded only to White House officials. The Surgeon General's Office was seemingly uninvolved. Thus, Hines cannot demonstrate that her past restriction is traceable to the Surgeon General's Office. The plaintiffs do not attempt to draw any other connections between their restrictions and the Surgeon General's Office.

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along with posts including data from the Vaccine Adverse Event Reporting System (VAERS). And in March 2021, the CDC flagged several misinformation trends for Facebook, including claims related to pregnancy and VAERS data. Because Hines does not provide dates for the fact checks, we cannot know whether the CDC could be responsible.

In May 2022, Facebook restricted Hines' account for posting an article discussing increased rates of myocarditis in teenagers following vaccination. A little over a year earlier, the CDC warned Facebook against claims of "unsubstantiated links to new [vaccine] side effects," including "'irritab[ility],'" "'auto-immune issues, infertility,'" and "'neurological damage including lowered IQ.'" 54 Record 17,042–17,043 (emphasis deleted). There is no evidence that the CDC ever listed myocarditis as an unsubstantiated side effect—but because it is an alleged side effect, it at least falls under the same umbrella as the CDC's communication. Health Freedom's February 2023 violation, by contrast, was for posting that vaccine manufacturers would not compensate those with vaccine-related injuries—a topic that bears little resemblance to the content that the CDC flagged.

In April 2023, Hines received violations for posts about children and the vaccine. In November 2021, Facebook worked with the CDC to update its policies to remove additional false claims including that "'the COVID vaccine is not safe for kids.'" 37 *id.*, at 11,457. It is not clear that either of Hines' posts violated the CDC-influenced policy against false claims related to children and the vaccine. One simply referred to the World Health Organization's COVID–19 vaccine recommendations for children, and the other discussed the role of children within the "predatory" pharmaceutical industry. App. 789–790. Given the loose match between the policy and the posts, it is hard to call it "likely" that Facebook was enforcing the CDC's preferences

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rather than its own.[7]

With one or two potentially viable links, Hines makes the best showing of all the plaintiffs. Still, Facebook was targeting her pages before almost all of its communications with the White House and the CDC, which weakens the inference that her subsequent restrictions are likely traceable to "government-coerced enforcement" of Facebook's policies, 83 F. 4th, at 370 (emphasis deleted), rather than to Facebook's independent judgment.[8] Even assuming, however,

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[7] The dissent does not dispute the Court's assessment of these asserted links. Instead, the dissent draws links that Hines herself has not set forth, often based on injuries that Hines never claimed. Compare *post*, at 19–20, with Brief for Respondents 19–20; App. 628–632. For instance, the dissent says that in May 2021, Facebook began demoting content from accounts that repeatedly shared misinformation, purportedly due to White House pressure. *Post*, at 10, 19. Because Facebook frequently fact checked Hines' posts, the dissent simply assumes (without citing Hines' declarations) that her content was subsequently hidden from her friends' feeds. *Post*, at 19. Likewise, pointing to an August 2021 policy change, the dissent concludes that the mid-July 2021 deplatforming of one of Hines' groups rendered her other pages "non-recommendable." *Ibid.* Hines, however, never claimed as much—and the *plaintiffs* bear the burden to establish standing by setting forth "specific facts." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992) (internal quotation marks omitted). It is especially important to hold the plaintiffs to their burden in a case like this one, where the record spans over 26,000 pages and the lower courts did not make any specific causation findings. As the Seventh Circuit has memorably put it, "[j]udges are not like pigs, hunting for truffles buried [in the record]." *Gross* v. *Cicero*, 619 F. 3d 697, 702 (2010) (internal quotation marks omitted).

[8] By acknowledging the real possibility that Facebook acted independently in suppressing Hines' content, we are not applying a "new and heightened standard," as the dissent claims. *Post*, at 20. The whole purpose of the traceability requirement is to ensure that "in fact, the asserted injury was the consequence of the defendants' actions," rather than of "the independent action" of a third party. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 42, 45 (1976). Nor is our analysis inconsistent with *Department of Commerce* v. *New York*, 588 U. S. 752 (2019). See *post*, at 19. There, the plaintiffs, including several States, challenged the Secretary of Commerce's decision to reinstate a

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that Hines has eked out a showing of traceability for her past injuries, the past is relevant only insofar as it predicts the future. And this weak record gives her little momentum going forward.

3

To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them. To carry that burden, the plaintiffs must proffer evidence that the defendants' "allegedly wrongful behavior w[ould] *likely* occur or continue."

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citizenship question on the census. 588 U. S., at 761, 764. They argued that this question would make noncitizens less likely to respond to the census, leading to an inaccurate population count and the concomitant loss of congressional seats and federal funding. *Id.*, at 766–767. The plaintiffs' injuries thus depended on the actions of third parties. *Id.*, at 767–768. The District Court found that noncitizens had historically responded at lower rates than citizens to previous versions of the census (and other surveys) that included a citizenship question and that noncitizens were disproportionately likely to stop responding to those questionnaires once they reached the citizenship question. *New York* v. *United States Dept. of Commerce*, 351 F. Supp. 3d 502, 578–579 (SDNY 2019). Crediting those findings, this Court concluded that the plaintiffs "met their burden of showing that third parties will likely react in predictable ways to the citizenship question." *Department of Commerce*, 588 U. S., at 768. The dissent suggests that it "would have been difficult for [the plaintiffs] to determine which noncitizen households failed to respond to the census because of a citizenship question and which had other reasons." *Post*, at 20. But the evidence made clear that the *citizenship question* drove noncitizens' lower response rates; the District Court made no findings about noncitizens' response rates to the census generally. Here, by contrast, the evidence is murky. Facebook targeted Hines' posts (and others like hers) before the White House entered the picture, meaning that Facebook had independent incentives to restrict Hines' content. It is therefore difficult to say that the White House was responsible (even in part) for all of Hines' later restrictions—*especially* absent clear links between White House content-moderation requests to Facebook and Facebook's actions toward Hines. Cf. *post*, at 21.

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Friends of the Earth, Inc. v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 190 (2000). At the preliminary injunction stage, the plaintiffs must show that they are likely to succeed in carrying that burden. See *Winter*, 555 U. S., at 22. But without proof of an ongoing pressure campaign, it is entirely speculative that the platforms' future moderation decisions will be attributable, even in part, to the defendants.

The plaintiffs treat the defendants as a monolith, claiming broadly that "'the governmen[t]'" continues to communicate with the platforms about "'content-moderation issues.'" Brief for Respondents 29 (quoting 83 F. 4th, at 369). But we must confirm that *each* Government defendant continues to engage in the challenged conduct, which is "coercion" and "significant encouragement," not mere "communication." Plus, the plaintiffs have only explicitly identified an interest in speaking about COVID–19 or elections—so the defendants' discussions about content-moderation issues must focus on those topics.

We begin with the plaintiffs who have not pointed to any past restrictions likely traceable to the Government defendants. This failure to establish traceability for past harms—which can serve as evidence of expected future harm—"substantially undermines [the plaintiffs'] standing theory." *Clapper*, 568 U. S., at 411. These plaintiffs (*i.e.,* everyone other than Hines) are thus particularly ill suited to the task of establishing their standing to seek forward-looking relief.

Take Hoft, the only plaintiff who has expressed interest in speaking about elections (and thus the only plaintiff with potential standing to sue the FBI and CISA). The FBI's challenged conduct was ongoing at the time of the complaint, as the agency worked with the platforms during the 2022 midterm election season. Still, Hoft must rely on a "speculative chain of possibilities" to establish a likelihood of future harm traceable to the FBI. *Id.*, at 414. Hoft's fu-

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ture posts (presumably about the 2024 Presidential election) must contain content that falls within a misinformation trend that the FBI has identified or will identify in the future. The FBI must pressure the platforms to remove content within that category. The platform must then suppress Hoft's post, and it must do so at least partly in response to the FBI, rather than in keeping with its own content-moderation policy. Hoft cannot satisfy his burden with such conjecture. CISA, meanwhile, stopped switchboarding in mid-2022, and the Government has represented that it will not resume operations for the 2024 election. Especially in light of his poor showing of traceability in the past, Hoft has failed to demonstrate likely future injury at the hands of the FBI or CISA—so the injunction against those entities cannot survive.

The doctors and the state plaintiffs, who focus on COVID–19 content, have a similarly uphill battle vis-à-vis the White House, the Surgeon General's Office, and the CDC. Hines, with her superior showing on past harm, is in a slightly better position to demonstrate likely future harm at the hands of these defendants. Still, she has not shown enough.

Starting with the White House and Surgeon General's Office, the vast majority of their public and private engagement with the platforms occurred in 2021, when the pandemic was still in full swing. By August 2022, when Hines joined the case, the officials' communications about COVID–19 misinformation had slowed to a trickle. Publicly, the White House Press Secretary made two statements in February and April 2022. First, she said that the platforms should continue "call[ing] out misinformation and disinformation." 3 Record 758. Two months later, she spoke generally about §230 and antitrust reform, but did not mention content moderation or COVID–19 misinformation. In March 2022, the Surgeon General issued a voluntary "Request for Information" from the platforms about

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their misinformation policies.[9]

Privately, Facebook sent monthly "Covid Insights" reports to officials in the White House and the Surgeon General's Office, at least until July 2022. These reports contained information about the top 100 vaccine-related posts in the United States, including whether Facebook took action against any of them. In June, Facebook asked if it should continue sending these reports, as it had stopped seeing "problematic vaccine related" content in the top posts. 50 *id.*, at 15,645–15,646. The official replied that, though he would "normally say we are good to discontinue," the reports would be helpful "as we start to ramp up . . . vaccines" for children under five. *Id.*, at 15,645. The record contains no other evidence of private contact with respect to COVID–19 misinformation.

On this record, it appears that the frequent, intense communications that took place in 2021 had considerably subsided by 2022. (Perhaps unsurprisingly, given the changed state of the pandemic.) It is thus very difficult for Hines to show that she faces future harm that is traceable to officials in the White House and the Surgeon General's Office. Recall the Fifth Circuit's reasoning regarding traceability for past harms: In the face of a governmental "pressure campaign," the "platforms' censorship decisions were likely attributable at least in part to [their] reluctance to risk the adverse legal or regulatory consequences that could result from a refusal to adhere to the government's directives." 83 F. 4th, at 370. But in the months leading up to this suit, these officials issued no directives and threatened no consequences. They only asked for information about the most popular vaccine-related posts. Hines does not allege that her content has fallen, or is likely to fall, in that category.

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[9] According to a declaration submitted by the Surgeon General's Chief of Staff, no one in that office met with the platforms to discuss their submissions "or otherwise had substantive communications with social media companies about the RFI." 61 Record 19,480.

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In these circumstances, Hines cannot rely on "the predictable effect of Government action on the decisions of third parties"; rather, she can only "speculat[e] about the decisions of third parties." *Department of Commerce*, 588 U. S., at 768. It is "no more than conjecture" to assume that Hines will be subject to White House-induced content moderation. *Los Angeles* v. *Lyons*, 461 U. S. 95, 108 (1983). Hines (along with the other plaintiffs) has therefore failed to establish a likelihood of future injury traceable to the White House or the Surgeon General's Office. Likewise, the risk of future harm traceable to the CDC is minimal. The CDC stopped meeting with the platforms in March 2022. Thereafter, the platforms sporadically asked the CDC to verify or debunk several claims about vaccines. But the agency has not received any such message since the summer of 2022.[10]

The plaintiffs' counterarguments do not persuade. *First*, they argue that they suffer "continuing, present adverse effects" from their past restrictions, as they must now self-censor on social media. *O'Shea*, 414 U. S., at 496. But the plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U. S., at 416. And as we explained, the plaintiffs have not shown that they are likely to face a risk of future censorship traceable to the *defendants*. Indeed, even before the defendants entered the scene, the plaintiffs "had a similar incentive to engage in" self-censorship, given the platforms' independent content moderation. *Id.*, at 417. So it is "difficult

[10]The dissent claims that the future injury prong is satisfied because Facebook continued to censor Hines at the time of her complaint and thereafter. *Post*, at 17. But the dissent gives short shrift to the key point: By the time Hines filed suit in August 2022, the White House was no longer engaged in any sort of "pressure campaign" toward Facebook. (Note that the dissent, in its 10-page recounting of the record, devotes only one paragraph to the events of 2022. *Post*, at 14.) Thus, when Hines sued, it was unlikely that Facebook's actions were fairly traceable to the White House at the time—or would be going forward.

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to see how" the plaintiffs' self-censorship "can be traced to" the defendants. *Ibid.*

Second, the plaintiffs and the dissent suggest that the platforms continue to suppress their speech according to policies initially adopted under Government pressure. *Post*, at 21. That may be true. But the plaintiffs have a redressability problem. "To determine whether an injury is redressable," we "consider the relationship between 'the judicial relief requested' and the 'injury' suffered." *California* v. *Texas*, 593 U. S. 659, 671 (2021). The plaintiffs assert several injuries—their past social-media restrictions, current self-censorship, and likely social-media restrictions in the future. The requested judicial relief, meanwhile, is an injunction stopping certain Government agencies and employees from coercing or encouraging the platforms to suppress speech. A court *could* prevent these Government defendants from interfering with the platforms' independent application of their policies. But without evidence of continued pressure from the defendants, it appears that the platforms remain free to enforce, or not to enforce, those policies—even those tainted by initial governmental coercion. The platforms are "not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced." *Lujan*, 504 U. S., at 569 (plurality opinion); see also *Haaland* v. *Brackeen*, 599 U. S. 255, 293–294 (2023).

Indeed, the available evidence indicates that the platforms have enforced their policies against COVID–19 misinformation even as the Federal Government has wound down its own pandemic response measures. For instance, Hines reports that Facebook imposed several restrictions on her vaccine-related posts in the spring of 2023. Around the same time, in April 2023, President Biden signed a joint resolution that ended the national COVID–19 emergency. See Pub. L. 118–3, 137 Stat. 6. The next month, the White House disbanded its COVID–19 Response Team, which was

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responsible for many of the challenged communications in this case. Enjoining the Government defendants, therefore, is unlikely to affect the platforms' content-moderation decisions.[11]

C

We conclude briefly with the plaintiffs' "right to listen" theory. The individual plaintiffs claim an interest in reading and engaging with the content of other speakers on social media. The First Amendment, they argue, protects that interest. Thus, the plaintiffs assert injuries based on the restrictions that countless other social-media users have experienced.

This theory is startlingly broad, as it would grant all social-media users the right to sue over *someone else's* censorship—at least so long as they claim an interest in that person's speech. This Court has "never accepted such a boundless theory of standing." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 99 (2013). While we have recognized a "First Amendment right to 'receive information and ideas,'" we

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[11] As with traceability, the dissent is wrong to claim that we are applying a "new and elevated standard for redressability." *Post*, at 22. Far from holding plaintiffs to a "certainty" standard, *ibid.*, we simply conclude that an injunction against the Government defendants is *unlikely* to stop the platforms from suppressing the plaintiffs' speech. And while traceability and redressability are "'*often* "flip sides of the same coin,"'" *post*, at 22 (quoting *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 380 (2024); emphasis added), that is not *always* the case. Facebook might continue to remove Hines' posts under a policy that it adopted at the White House's behest (thus satisfying traceability). But if the White House officials have already abandoned their pressure campaign, enjoining them is unlikely to prompt Facebook to stop enforcing the policy (thus failing redressability). Finally, by invoking *Massachusetts* v. *EPA*, it is the *dissent* that applies a new and loosened standard for redressability. *Post*, at 22. In that case, we explained that *state* plaintiffs are "entitled to special solicitude" when it comes to standing, and we conducted our analysis accordingly. 549 U. S. 497, 520 (2007). That "special solicitude" does not apply to Jill Hines, an individual.

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have identified a cognizable injury only where the listener has a concrete, specific connection to the speaker. *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). For instance, in *Mandel*, we agreed that a group of professors had a First Amendment interest in challenging the visa denial of a person they had invited to speak at a conference. *Id.*, at 762–765. And in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, we concluded that prescription-drug consumers had an interest in challenging the prohibition on advertising the price of those drugs. 425 U. S. 748, 756–757 (1976).

Attempting to satisfy this requirement, the plaintiffs emphasize that hearing unfettered speech on social media is critical to their work as scientists, pundits, and activists. But they do not point to any specific instance of content moderation that caused them identifiable harm. They have therefore failed to establish an injury that is sufficiently "concrete and particularized." *Lujan*, 504 U. S., at 560.

The state plaintiffs, claiming their own version of the "right to listen" theory, assert a sovereign interest in hearing from their citizens on social media. See 83 F. 4th, at 372–373. But this theory suffers from the same flaws as the individual plaintiffs' theory. The States have not identified any specific speakers or topics that they have been unable to hear or follow.

The States cite this supposed sovereign injury as a basis for asserting third-party standing on behalf of "the citizens they would listen to." Brief for Respondents 30. But "[t]his argument is a thinly veiled attempt to circumvent the limits on *parens patriae* standing." *Brackeen*, 599 U. S., at 295, n. 11. Namely, States do not have "'standing as *parens patriae* to bring an action against the Federal Government.'" *Id.*, at 295.

The States, like the individual plaintiffs, have failed to establish a likelihood of standing.

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The plaintiffs, without any concrete link between their injuries and the defendants' conduct, ask us to conduct a review of the years-long communications between dozens of federal officials, across different agencies, with different social-media platforms, about different topics. This Court's standing doctrine prevents us from "exercis[ing such] general legal oversight" of the other branches of Government. *TransUnion*, 594 U. S., at 423–424. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 23–411

VIVEK H. MURTHY, SURGEON GENERAL, ET AL., PETITIONERS *v.* MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 26, 2024]

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

This case involves what the District Court termed "a far-reaching and widespread censorship campaign" conducted by high-ranking federal officials against Americans who expressed certain disfavored views about COVID–19 on social media. *Missouri* v. *Biden*, 680 F. Supp. 3d 630, 729 (WD La. 2023). Victims of the campaign perceived by the lower courts brought this action to ensure that the Government did not continue to coerce social media platforms to suppress speech. Among these victims were two States, whose public health officials were hampered in their ability to share their expertise with state residents; distinguished professors of medicine at Stanford and Harvard; a professor of psychiatry at the University of California, Irvine School of Medicine; the owner and operator of a news website; and Jill Hines, the director of a consumer and human rights advocacy organization. All these victims simply wanted to speak out on a question of the utmost public importance.

To protect their right to do so, the District Court issued a preliminary injunction, App. 278–285, and the Court of Appeals found ample evidence to support injunctive relief. See *Missouri* v. *Biden*, 83 F. 4th 350 (CA5 2023).

If the lower courts' assessment of the voluminous record is correct, this is one of the most important free speech cases

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to reach this Court in years. Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government, see *Snyder* v. *Phelps*, 562 U. S. 443, 451–452 (2011), and speech that advances humanity's store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts, see *United States* v. *Alvarez*, 567 U. S. 709, 751 (2012) (ALITO, J., dissenting).

The speech at issue falls squarely into those categories. It concerns the COVID–19 virus, which has killed more than a million Americans.[1] Our country's response to the COVID–19 pandemic was and remains a matter of enormous medical, social, political, geopolitical, and economic importance, and our dedication to a free marketplace of ideas demands that dissenting views on such matters be allowed. I assume that a fair portion of what social media users had to say about COVID–19 and the pandemic was of little lasting value. Some was undoubtedly untrue or misleading, and some may have been downright dangerous. But we now know that valuable speech was also suppressed.[2] That is what inevitably happens when entry to

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[1] Centers for Disease Control and Prevention, Deaths by Week and State, https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm (last accessed June 21, 2024).

[2] This includes information about the origin of the COVID–19 virus. When the pandemic began, Facebook began demoting posts supporting the theory that the virus leaked from a laboratory. See Interim Staff Report of the House Judiciary Committee, The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech To Censor Americans, True Information, and Critics of the Biden Administration, p. 398 (May 1, 2024) (Committee Report), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Censorship-Industrial-Complex-WH-Report_Appendix.pdf. "In February 2021, in response to . . . tense conversations with the new Administration," Facebook changed its policy to instead remove posts about the lab leak theory wholesale. *Ibid.*; accord, *id.*, at 463 (Facebook executive explained that the platform removed these posts "[b]ecause we were

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the marketplace of ideas is restricted.

Of course, purely private entities like newspapers are not subject to the First Amendment, and as a result, they may publish or decline to publish whatever they wish. But government officials may not coerce private entities to suppress speech, see *National Rifle Association of America* v. *Vullo*, 602 U. S. 175 (2024), and that is what happened in this case.

The record before us is vast. It contains evidence of communications between many different government actors and a variety of internet platforms, as well as evidence regarding the effects of those interactions on the seven different plaintiffs. For present purposes, however, I will focus on (a) just a few federal officials (namely, those who worked either in the White House or the Surgeon General's office), (b) only one of the most influential social media platforms, Facebook, and (c) just one plaintiff, Jill Hines, because if any of the plaintiffs has standing, we are obligated to reach the merits of this case. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 52, n. 2 (2006).

With the inquiry focused in this way, here is what the

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under pressure from the administration and others to do more and it was part of the 'more' package"). But since then, both the Federal Bureau of Investigation and the Department of Energy have found that the theory is probably correct. See, *e.g.*, A. Kaur & D. Diamond, FBI Director Says Covid–19 "Most Likely" Originated From Lab Incident, Washington Post (Feb. 28, 2023), https://www.washingtonpost.com/nation/2023/02/28/fbi-director-christopher-wray-wuhan-lab; J. Herb & N. Bertrand, US Energy Department Assesses Covid–19 Likely Resulted From Lab Leak, Furthering US Intel Divide Over Virus Origin, CNN (Feb. 27, 2023), https://www.cnn.com/2023/02/26/politics/covid-lab-leak-wuhan-china-intelligence/index.html. Facebook reversed its policy, and Mark Zuckerberg expressed regret that the platform had ever removed the posts: "This seems like a good reminder that when we compromise our standards due to pressure from an administration in either direction, we'll often regret it later." Committee Report 398.

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record plainly shows. For months in 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID–19-related speech. Not surprisingly, Facebook repeatedly yielded. As a result Hines was indisputably injured, and due to the officials' continuing efforts, she was threatened with more of the same when she brought suit. These past and threatened future injuries were caused by and traceable to censorship that the officials coerced, and the injunctive relief she sought was an available and suitable remedy. This evidence was more than sufficient to establish Hines's standing to sue, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561–562 (1992), and consequently, we are obligated to tackle the free speech issue that the case presents. The Court, however, shirks that duty and thus permits the successful campaign of coercion in this case to stand as an attractive model for future officials who want to control what the people say, hear, and think.

That is regrettable. What the officials did in this case was more subtle than the ham-handed censorship found to be unconstitutional in *Vullo*, but it was no less coercive. And because of the perpetrators' high positions, it was even more dangerous. It was blatantly unconstitutional, and the country may come to regret the Court's failure to say so. Officials who read today's decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by. That is not a message this Court should send.

In the next section of this opinion, I will recount in some detail what was done by the officials in this case, but in considering the coercive impact of their conduct, two prominent facts must be kept in mind.

First, social media have become a leading source of news

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for many Americans,[3] and with the decline of other media, their importance may grow.

Second, internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources. If a President dislikes a particular newspaper, he (fortunately) lacks the ability to put the paper out of business. But for Facebook and many other social media platforms, the situation is fundamentally different. They are critically dependent on the protection provided by §230 of the Communications Decency Act of 1996, 47 U. S. C. §230, which shields them from civil liability for content they spread. They are vulnerable to antitrust actions; indeed, Facebook CEO Mark Zuckerberg has described a potential antitrust lawsuit as an "existential" threat to his company.[4] And because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests.

For these and other reasons,[5] internet platforms have a powerful incentive to please important federal officials, and the record in this case shows that high-ranking officials

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[3] See, *e.g.*, J. Liedke & L. Wang, News Platform Fact Sheet, Pew Research Center (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet; A. Watson, Most Popular Platforms for Daily News Consumption in the United States as of August 2022, by Age Group, Statista (Jan. 4, 2024), https://www.statista.com/statistics/717651/most-popular-news-platforms.

[4] C. Newton, Read the Full Transcript of Mark Zuckerberg's Leaked Internal Facebook Meetings, The Verge (Oct. 1, 2019), https://www.theverge.com/2019/10/1/20892354/mark-zuckerberg-full-transcript-leaked-facebook-meetings.

[5] For pending or potential legislation affecting internet platforms, see Congressional Research Service, C. Cho, L. Zhu, & K. Busch, Defining and Regulating Online Platforms (Aug. 25, 2023), https://crsreports.congress.gov/product/pdf/R/R47662/11.

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skillfully exploited Facebook's vulnerability. When Facebook did not heed their requests as quickly or as fully as the officials wanted, the platform was publicly accused of "killing people" and subtly threatened with retaliation.

Not surprisingly these efforts bore fruit. Facebook adopted new rules that better conformed to the officials' wishes, and many users who expressed disapproved views about the pandemic or COVID–19 vaccines were "deplatformed" or otherwise injured.

I

A

I begin by recounting the White House-led campaign to coerce Facebook. The story starts in early 2021, when White House officials began communicating with Facebook about the spread of misinformation about COVID–19 on its platform. Their emails started as questions, *e.g.*, "Can you also give us a sense of misinformation that might be falling outside of your removal polices?" 10 Record 3397. But when the White House did not get the results it wanted, its questions quickly turned to virtual demands. And sometimes, those statements were paired with explicit references to potential consequences.

We may begin this account with an exchange that occurred in March 2021, when the Washington Post reported that Facebook was conducting a study that examined whether posts on the platform questioning COVID–19's severity or the vaccines' efficacy dissuaded some Americans from being vaccinated.[6] The study noted that Facebook's rules permitted some of this content to circulate. Rob Flaherty, the White House Director of Digital Strategy, promptly emailed Facebook about the report. The subject

[6] E. Dwoskin, Massive Facebook Study on Users' Doubt in Vaccines Finds a Small Group Appears To Play a Big Role in Pushing the Skepticism, Washington Post (Mar. 14, 2021), https://www.washingtonpost.com/technology/2021/03/14/facebook-vaccine-hesitancy-qanon.

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line of his email contained this accusation: "You are hiding the ball." 30 *id.*, at 9366. Flaherty noted that the White House was "gravely concerned that [Facebook] is one of the top drivers of vaccine hesitancy," and he demanded to know how Facebook was trying to solve the problem. *Id.*, at 9365. In his words, "we want to know that you're trying, we want to know how we can help, and we want to know that you're not playing a shell game with us when we ask you what is going on." *Ibid.*

Andy Slavitt, the White House Senior Advisor for the COVID–19 Response, chimed in with similar complaints. "[R]elative to othe[r]" platforms, he said, "interactions with Facebook are not straightforward" even though the misinformation problems there, in his view, were "worse." *Id.*, at 9364. According to Slavitt, the White House did not believe that Facebook was "trying to solve the problem," so he informed Facebook that "[i]nternally we have been considering our options on what to do about it." *Ibid.*

Facebook responded apologetically to this and other missives. It acknowledged that "[w]e obviously have work to do to gain your trust." *Id.*, at 9365. And after a follow-up conversation, the platform promised Flaherty and Slavitt that it would adopt additional policies to "reduc[e] virality of vaccine hesitancy content." *Id.*, at 9369. In particular, Facebook promised to "remove [any] Groups, Pages, and Accounts" that "disproportionately promot[e] . . . sensationalized content" about the risks of vaccines, even though it acknowledged that user stories about their experiences and those of family members or friends were "ofte[n] true." *Ibid.* Facebook also promised to share additional data with the White House, *ibid.*, but Flaherty was not fully satisfied. He said that the additional data Facebook offered was not "going to get us the info we're looking for," but "it shows to me that you at least understand the ask." *Id.*, at 9368.

In April, Flaherty again demanded information on the

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"actions and changes" Facebook was taking "to ensure you're not making our country's vaccine hesitancy problem worse." *Id.*, at 9371. To emphasize his urgency, Flaherty likened COVID–19 misinformation to misinformation that led to the January 6 attack on the Capitol. *Ibid.* Facebook, he charged, had helped to "increase skepticism" of the 2020 election, and he claimed that "an insurrection . . . was plotted, in large part, on your platform." *Ibid.* He added: "I want some assurances, based in data, that you are not doing the same thing again here." *Ibid.* Facebook was surprised by these remarks because it "thought we were doing a better job" communicating with the White House, but it promised to "more clearly respon[d]" in the future. *Ibid.*

The next week, Facebook officers spoke with Slavitt and Flaherty about reports of a rare blood clot caused by the Johnson & Johnson vaccine. *Id.*, at 9385. The conversation quickly shifted when the White House noticed that one of the most-viewed vaccine-related posts from the past week was a Tucker Carlson video questioning the efficacy of the Johnson & Johnson vaccine. *Id.*, at 9376, 9388. Facebook informed the White House that the video did not "qualify for removal under our policies" and thus would be demoted instead, *ibid.*, but that answer did not please Flaherty. "How was this not violative?" he queried, and "[w]hat exactly is the rule for removal vs demoting?" *Id.*, at 9387. Then, for the second time in a week, he invoked the January 6 attack: "Not for nothing, but last time we did this dance, it ended in an insurrection." *Id.*, at 9388. When Facebook did not respond promptly, he made his demand more explicit: "These questions weren't rhetorical." *Id.*, at 9387.

If repeated accusations that Facebook aided an insurrection did not sufficiently convey the White House's displeasure, Flaherty and Slavitt made sure to do so by phone.[7] In

[7] Notes recounting these calls were released by the House Judiciary Committee after the District Court entered the preliminary injunction

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one call, both officials chided Facebook for not being "straightforward" and not "play[ing] ball." Committee Report 141–142. Flaherty also informed Facebook that he was reporting on the COVID–19 misinformation problem to the President. *Id.*, at 136.

After a second call, a high-ranking Facebook executive perceived that Slavitt was "outraged—not too strong a word to describe his reaction"—that the platform had not removed a fast-spreading meme suggesting that the vaccines might cause harm. *Id.*, at 295. The executive had "countered that removing content like that would represent a significant incursion into traditional boundaries of free expression in the US," but Slavitt was unmoved, in part because he presumed that other platforms "would never accept something like this." *Ibid.*

A few weeks later, White House Press Secretary Jen Psaki was asked at a press conference about Facebook's decision to keep former President Donald Trump off the platform. See Press Briefing by Press Secretary Jen Psaki and Secretary of Agriculture Tom Vilsack (May 5, 2021) (hereinafter May 5 Press Briefing).[8] Psaki deflected that question but took the opportunity to call on platforms like Facebook to "'stop amplifying untrustworthy content . . . , especially related to COVID–19, vaccinations, and elections.'" 78 Record 25170. In the same breath, Psaki reminded the platforms that President Biden "'supports . . . a robust anti-trust program.'" *Id.*, at 25171 (emphasis deleted); May 5 Press Briefing.

Around this same time, Flaherty and Slavitt were interrogating Facebook on the mechanics of its content-moderation rules for COVID–19 misinformation. 30 Record

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and were published in a Committee Report. See Committee Report; Fed. Rule Evid. 201.

[8] https://www.whitehouse.gov/briefing-room/press-briefings/2021/05/05/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-agriculture-tom-vilsack-may-5-2021.

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9391, 9397. Flaherty also forwarded to Facebook a "COVID–19 Vaccine Misinformation Brief" that had been drafted by outside researchers and was "informing thinking" in the White House on what Facebook's policies should be. 52 *id.*, at 16186. This document recommended that Facebook strengthen its efforts against misinformation in several ways. It recommended the adoption of "progressively severe penalties" for accounts that repeatedly posted misinformation, and it proposed that Facebook make it harder for users to find "anti-vaccine or vaccine-hesitant propaganda" from other users. *Ibid.* Facebook declined to adopt some of these suggestions immediately, but it did "se[t] up more dedicated monitoring for [COVID] vaccine content" and adopted a policy of "stronger demotions [for] a broader set of content." 30 *id.*, at 9396.

The White House responded with more questions. Acknowledging that he sounded "like a broken record," Flaherty interrogated Facebook about "how much content is being demoted, and how effective [Facebook was] at mitigating reach, and how quickly." *Id.*, at 9395. Later, Flaherty chastised Facebook for failing to prevent some vaccine-hesitant content from showing up through the platform's search function. *Id.*, at 9400. "'[R]emoving bad information from search' is one of the easy, low-bar things you guys do to make people like me think you're taking action," he said. *Id.*, at 9399. "If you're not getting *that* right, it raises even more questions about the higher bar stuff." *Ibid.* A few weeks after this latest round of haranguing, Facebook expanded penalties for individual Facebook accounts that repeatedly shared content that fact-checkers deemed misinformation; henceforth, all of those individuals' posts would show up less frequently in their friends' news feeds. See 9 *id.*, at 2697; Facebook, Taking Action Against People Who Repeatedly Share Misinformation

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(May 26, 2021).[9]

Perhaps the most intense period of White House pressure began a short time later. On July 15, Surgeon General Vivek Murthy released an advisory titled "Confronting Health Misinformation." 78 Record 25171, 25173. Dr. Murthy suggested, among other things, algorithmic changes to demote misinformation and additional consequences for misinformation "'super-spreaders.'" U. S. Public Health Service, Confronting Health Misinformation: The U. S. Surgeon General's Advisory on Building a Healthy Information Environment 12 (2021).[10] Dr. Murthy also joined Psaki at a press conference, where he asked the platforms to take "much, much more . . . aggressive action" to combat COVID–19 misinformation "because it's costing people their lives." Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy (July 15, 2021).[11]

At the same press conference, Psaki singled out Facebook as a primary driver of misinformation and asked the platform to make several changes. Facebook "should provide, publicly and transparently, data on the reach of COVID–19 [and] COVID vaccine misinformation." *Ibid.* It "needs to move more quickly to remove harmful, violative posts." *Ibid.* And it should change its algorithm to promote "quality information sources." *Ibid.* These recommendations echoed Slavitt's and Flaherty's private demands from the preceding months—as Psaki herself acknowledged. The White House "engage[s] with [Facebook] regularly," she said, and Facebook "certainly understand[s] what our asks

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[9] https://about.fb.com/news/2021/05/taking-action-against-people-who-repeatedly-share-misinformation.

[10] https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf.

[11] https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021.

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are." *Ibid.* Apparently, the White House had not gotten everything it wanted from those private conversations, so it was turning up the heat in public.

Facebook responded by telling the press that it had partnered with the White House to counter misinformation and that it had "removed accounts that repeatedly break the rules" and "more than 18 million pieces of COVID misinformation." 78 Record 25174. But at another press briefing the next day, Psaki said these efforts were "[c]learly not" sufficient and expressed confidence that Facebook would "make decisions about additional steps they can take." See *id.*, at 25175; Press Briefing by Press Secretary Jen Psaki (July 16, 2021).[12]

That same day, President Biden told reporters that social media platforms were "'killing people'" by allowing COVID-related misinformation to circulate. 78 Record 25174, 25212. At oral argument, the Government suggested that the President later disclaimed any desire to hold the platforms accountable for misinformation, Tr. of Oral Arg. 34–35, but that is not so. The President's so-called clarification, like many other statements by Government officials, called on "'Facebook'" to "'do something about the misinformation'" on its platform. B. Klein, M. Vazquez, & K. Collins, Biden Backs Away From His Claim That Facebook Is 'Killing People' by Allowing COVID Misinformation, CNN (July 19, 2021).[13]

And far from disclaiming potential regulatory action, the White House confirmed that it had *not* "'taken any options off the table.'" *Ibid.* In fact, the day after the President's supposed clarification, the White House Communications Director commended the President for "speak[ing] very aggressively" and affirmed that platforms "certainly . . .

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[12] https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021.

[13] https://www.cnn.com/2021/07/19/politics/joe-biden-facebook/index.html.

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should be held accountable" for publishing misinformation. 61 Record 19400–19401. Indeed, she said that the White House was "reviewing" whether §230 should be amended to open the platforms to suit. *Id.*, at 19400.

Facebook responded quickly. The same day the President made his "killing people" remark, the platform reached out to Dr. Murthy to determine "the scope of what the White House expects from us on misinformation going forward." 9 *id.*, at 2690. The next day, Facebook asked officials about how to "get back to a good place" with the White House. 30 *id.*, at 9403. And soon after, Facebook sent an email saying that it "hear[d]" the officials' "call for us to do more," and promptly assured the White House that it would comply. 9 *id.*, at 2706. In spite of the White House's inflammatory rhetoric, Facebook at all times went out of its way to strike a conciliatory tone. Only two days after the President's remark—and before his supposed clarification—Facebook assured Dr. Murthy that, though "it's not great to be accused of killing people," Facebook would "find a way to deescalate and work together collaboratively." *Id.*, at 2713.

Concrete changes followed in short order. In early August, the Surgeon General's Office reached out to Facebook for "an update of any new/additional steps you are taking with respect to health misinformation in light of " the July 15 advisory. *Id.*, at 2703. In response, Facebook informed the Surgeon General that it would soon "expan[d] [its] COVID policies to further reduce the spread of potentially harmful content." *Id.*, at 2701.

White House-Facebook conversations about misinformation did not end there. In September, the Wall Street Journal wrote about the spread of misinformation on Facebook, and Facebook preemptively reached out to the White House to clarify. 8 *id.*, at 2681. Flaherty asked (again) for information on "how big the problem is, what solutions you're implementing, and how effective they've been." *Ibid.*

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Then in October, the Washington Post published yet another story suggesting that Facebook knew more than it let on about the spread of misinformation. Flaherty emailed the link to Facebook with the subject line: "not even sure what to say at this point." *Id.*, at 2676. And the Surgeon General's Office indicated both publically and privately that it was disappointed in Facebook. See @Surgeon_General, X (Oct. 29, 2021) (accusing Facebook of "lacking . . . transparency and accountability");[14] 9 Record 2708. Facebook offered to speak with both the White House and the Surgeon General's Office to assuage concerns. 8 *id.*, at 2676.

Interactions related to COVID–19 misinformation continued until at least June 2022. *Id.*, at 2663. At that point, Facebook proposed discontinuing its reports on misinformation, but assured the White House that it would be "happy to continue, or to pick up at a later date, . . . if we hear from you that this continues to be of value." *Ibid.* Flaherty asked Facebook to continue reporting on misinformation because the Government was preparing to roll out COVID–19 vaccines for children under five years old and, "[o]bviously," that rollout "ha[d] the potential to be just as charged" as other vaccine-related controversies. *Ibid.* Flaherty added that he "[w]ould love to get a sense of what you all are planning here," and Facebook agreed to provide information for as long as necessary. *Ibid.*

What these events show is that top federal officials continuously and persistently hectored Facebook to crack down on what the officials saw as unhelpful social media posts, including not only posts that they thought were false or misleading but also stories that they did not claim to be literally false but nevertheless wanted obscured. See, *e.g.*, 30 *id.*, at 9361, 9365, 9369, 9385–9388. And Facebook's reactions to these efforts were not what one would expect from

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[14] https://twitter.com/Surgeon_General/status/1454181191494606854.

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an independent news source or a journalistic entity dedicated to holding the Government accountable for its actions. Instead, Facebook's responses resembled that of a subservient entity determined to stay in the good graces of a powerful taskmaster. Facebook told White House officials that it would "work . . . to gain your trust." *Id.*, at 9365. When criticized, Facebook representatives whimpered that they "thought we were doing a better job" but promised to do more going forward. *Id.*, at 9371. They pleaded to know how they could "get back to a good place" with the White House. *Id.*, at 9403. And when denounced as "killing people," Facebook responded by expressing a desire to "work together collaboratively" with its accuser. 9 *id.*, at 2713; 78 *id.*, at 25174. The picture is clear.

B

While all this was going on, Jill Hines and others were subjected to censorship. Hines serves as the co-director of Health Freedom Louisiana, an organization that advocated against vaccine and mask mandates during the pandemic. Over the course of the pandemic—and while the White House was pressuring Facebook—the platform repeatedly censored Hines's speech.

For instance, in the summer and fall of 2021, Facebook removed two groups that Hines had formed to discuss the vaccine. 4 *id.*, at 1313–1315. In January 2022, Facebook restricted posts from Hines's personal page "for 30 days . . . for sharing the image of a display board used in a legislative hearing that had Pfizer's preclinical trial data on it." *Id.*, at 1313. In late May, Facebook restricted Hines for 90 days for sharing an article about "increased emergency calls for teens with myocarditis following [COVID] vaccination." *Id.*, at 1313–1314. Hines's public pages, Reopen Louisiana and Health Freedom Louisiana, were subjected to similar treatment. Facebook's disciplinary actions meant that both public pages suffered a drop in viewership; as Hines put it,

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"Each time you build viewership up [on a page], it is knocked back down with each violation." *Id.*, at 1314. And from February to April 2023, Facebook issued warnings and violations for several vaccine-related posts shared on Hines's personal and public pages, including a post by Robert F. Kennedy, Jr., and an article entitled "'Some Americans Shouldn't Get Another COVID-19 Vaccine Shot, FDA Says.'" 78 *id.*, at 25503–25506. The result was that "[n]o one else was permitted to view or engage with the[se] post[s]." *Id.*, at 25503.

II

Hines and the other plaintiffs in this case brought this suit and asked for an injunction to stop the censorship campaign just described. To maintain that suit, they needed to show that they (1) were imminently threatened with an injury in fact (2) that is traceable to the defendants and (3) that could be redressed by the court. *Lujan,* 504 U. S., at 560–561; *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974). Hines satisfied all these requirements.

A

Injury in fact. Because Hines sought and obtained a preliminary injunction, it was not enough for her to show that she had been injured in the past. Instead, she had to identify a "real and immediate threat of repeated injury" that existed at the time she sued—that is, on August 2, 2022. *O'Shea*, 414 U. S., at 496; see also *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 191 (2000); *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824).

The Government concedes that Hines suffered past injury, but it claims that she did not make the showing needed to obtain prospective relief. See Brief for Petitioners 17. Both the District Court and the Court of Appeals rejected this argument and found that Hines had shown that

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she was likely to be censored in the future. 680 F. Supp. 3d, at 713; 83 F. 4th, at 368–369. We have previously examined such findings under the "clearly erroneous" test. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 77 (1978). But no matter what test is applied, the record clearly shows that Hines was still being censored when she sued—and that the censorship continued thereafter. See *supra*, at 15–16. That was sufficient to establish the type of injury needed to obtain injunctive relief. *O'Shea*, 414 U. S., at 496; see also *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 51 (1991).

B

Traceability. To sue the White House officials, Hines had to identify a "causal connection" between the actions of those officials and her censorship. *Bennett* v. *Spear*, 520 U. S. 154, 169 (1997). Hines did not need to prove that it was *only* because of those officials' conduct that she was censored. Rather, as we held in *Department of Commerce* v. *New York*, 588 U. S. 752 (2019), it was enough for her to show that one predictable effect of the officials' action was that Facebook would modify its censorship policies in a way that affected her. *Id.*, at 768.

Hines easily met that test, and her traceability theory is at least as strong as the State of New York's in the *Department of Commerce* case. There, the State claimed that it would be hurt by a census question about citizenship. The State predicted that the question would dissuade some noncitizen households from complying with their legal duty to complete the form, and it asserted that this in turn *could* cause the State to lose a seat in the House of Representatives, as well as federal funds that are distributed on the basis of population. *Id.*, at 766–767. Although this theory depended on illegal conduct by third parties and an attenuated chain of causation, the Court found that the State had established traceability. It was enough, the Court held,

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that the failure of some aliens to respond to the census was "likely attributable" to the Government's introduction of a citizenship question. *Id.*, at 768.

This is not a demanding standard, and Hines made the requisite showing—with room to spare. Recall that officials from the White House and Surgeon General's Office repeatedly hectored and implicitly threatened Facebook to suppress speech expressing the viewpoint that Hines espoused. See *supra*, at 6–15. Censorship of Hines was the "predictable effect" of these efforts. *Department of Commerce*, 588 U. S., at 768. Or, to put the point in different terms, Facebook would "likely react in predictable ways" to this unrelenting pressure. *Ibid.*

This alone was sufficient to show traceability, but here there is even more direct proof. On numerous occasions, the White House officials successfully pushed Facebook to tighten its censorship policies, see *supra*, at 7, 10, 13, and those policies had implications for Hines.[15] First, in March

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[15]The Court discounts this evidence because Hines did not draw the same links in her briefing. See *ante,* at 20, n. 7. But we have an "independent obligation" to assess standing, *Summers* v. *Earth Island Institute*, 555 U. S. 488, 499 (2009), and a "virtually unflagging obligation" to exercise our jurisdiction if standing exists, *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976). "[A] case like this one, where the record spans over 26,000 pages" and the plaintiffs have provided numerous facts, deserves some scrutiny before we simply brush standing aside. *Ante,* at 20, n. 7.

As it happens, Hines has said enough to establish standing. First, she says that, at the behest of the White House, Facebook announced new measures to combat misinformation about COVID–19 and the vaccines. Second, she says that her Facebook pages fell under those policies. Third, she says that she suffered the penalties imposed by Facebook, such as demotion of her posts and pages. See 4 Record 1315; 78 *id.*, at 25503. She may not explicitly say that the policy changes caused the penalties she experienced. But what theory makes more sense—that a user falling within Facebook's amended policies was censored under those policies or that something else caused her injury?

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2021, the White House pressured Facebook into implementing a policy of removing accounts that "disproportionately promot[e] . . . sensationalized content" about vaccines. *Supra*, at 7. Later that year, Facebook removed two of Hines's groups, which posted about vaccines. *Supra*, at 15. And when Hines sued in August 2022, she reported that her personal page was "currently restricted" for sharing vaccine-related content and, thus, that she was "under constant threat of being completely deplatformed." 4 Record 1314.

Second, in May, Facebook told Slavitt that it would "se[t] up more dedicated monitoring" of vaccine content and apply demotions to "a broader set of content." *Supra*, at 10. Then, a few weeks later, Facebook also increased demotions of posts by individual Facebook accounts that repeatedly shared misinformation. *Ibid.* Hines says that she was repeatedly fact-checked for posting about the vaccines, see *supra*, at 15–16; 4 Record 1314, so these policy changes apparently increased the risk that posts from her personal account would have been hidden from her friends' Facebook feeds.

Third, in response to the July 2021 comments from the White House and the Surgeon General, Facebook made more changes. *Supra*, at 13. And from the details Hines provides about her posting history, this policy change would have affected her. For one thing, Facebook "rendered 'non-recommendable'" any page linked to another account that had been "removed" for spreading misinformation about COVID–19. 9 Record 2701. Hines says that two of her groups were removed for alleged COVID misinformation around this time. *Supra*, at 15; 4 Record 1315. So under the new policy, her other pages would apparently be non-recommendable. Perhaps for this reason, though Hines attempted to convince members of her deplatformed group to migrate to a substitute group, only about a quarter of its membership made the move before the substitute group too was removed. *Ibid.*

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For another, Facebook "increas[ed] the strength of [its] demotions for COVID and vaccine-related content that third party fact checkers rate[d] as 'Partly False' or 'Missing Context.'" 9 *id.*, at 2701. And Facebook "ma[de] it easier to have Pages/Groups/Accounts demoted for sharing COVID and vaccine-related misinformation by . . . counting content removals" under Facebook's COVID–19 policies "towards their demotion threshold." *Ibid.* Under this new policy, Facebook would now consider Hines's "numerous" community standards violations, 4 *id.*, at 1314, when determining whether to make her posts less accessible to other users. So, for instance, when Hines received several citations in early 2023, this amendment would have governed Facebook's decision to "downgrad[e] the visibility of [her] posts in Facebook's News Feed (thereby limiting its reach to other users)." 78 *id.*, at 25503. The record here amply shows traceability.

The Court reaches the opposite conclusion by applying a new and heightened standard. The Court notes that Facebook began censoring COVID–19-related misinformation before officials from the White House and the Surgeon General's Office got involved. *Ante*, at 20; see also Brief for Petitioners 18. And in the Court's view, that fact makes it difficult to untangle Government-caused censorship from censorship that Facebook might have undertaken anyway. See *ante*, at 20. That may be so, but in the *Department of Commerce* census case, it also would have been difficult for New York to determine which noncitizen households failed to respond to the census because of a citizenship question and which had other reasons. Nevertheless, the Court did not require New York to perform that essentially impossible operation because it was clear that a citizenship question would dissuade at least *some* noncitizen households from responding. As we explained, "Article III 'requires no more than *de facto* causality,'" so a showing that a citizenship question affected some aliens sufficed. *Department of*

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Commerce, 588 U. S., at 768.

Here, it is reasonable to infer (indeed, the inference leaps out from the record) that the efforts of the federal officials affected at least some of Facebook's decisions to censor Hines. All of Facebook's demotion, content-removal, and deplatforming decisions are governed by its policies.[16] So when the White House pressured Facebook to amend some of the policies related to speech in which Hines engaged, those amendments necessarily impacted some of Facebook's censorship decisions. Nothing more is needed. What the Court seems to want are a series of ironclad links—from a particular coercive communication to a particular change in Facebook's rules or practice and then to a particular adverse action against Hines. No such chain was required in the *Department of Commerce* case, and neither should one be demanded here.

In addition to this heightened linkage requirement, the Court argues that Hines lacks standing because the threat of future injury dissipated at some point during summer 2022 when the officials' pressure campaign tapered off. *Ante,* at 25, n. 10. But this argument errs in two critical respects. First, the *effects* of the changes the officials coerced persisted. Those changes controlled censorship decisions before and after Hines sued.

Second, the White House threats did not come with expiration dates, and it would be silly to assume that the threats lost their force merely because White House officials opted not to renew them on a regular basis. Indeed, the record suggests that Facebook did not feel free to chart its own course when Hines sued; rather, the platform had promised to continue reporting to the White House and remain responsive to its concerns for as long as the officials requested. *Supra,* at 14.

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[16] See Meta, Policies, https://transparency.meta.com/policies (last accessed June 19, 2024).

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In short, when Hines sued in August 2022, there was still a link between the White House and the injuries she was presently suffering and could reasonably expect to suffer in the future. That is enough for traceability.

C

Redressability. Finally, Hines was required to show that the threat of future injury she faced when the complaint was filed "likely would be redressed" by injunctive relief. *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 380 (2024). This required proof that a preliminary injunction would reduce Hines's "risk of [future] harm . . . *to some extent*." *Massachusetts* v. *EPA*, 549 U. S. 497, 526 (2007) (emphasis added). And as we recently explained, "[t]he second and third standing requirements—causation and redressability—are often 'flip sides of the same coin.'" *Alliance for Hippocratic Medicine*, 602 U. S., at 380. Therefore, "[i]f a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Id.*, at 381.

Hines easily satisfied that requirement. For the reasons just explained, there is ample proof that Hines's past injuries were a "predictable effect" of the Government's censorship campaign, and the preliminary injunction was likely to prevent the continuation of the harm to at least "some extent." *Massachusetts* v. *EPA*, 549 U. S., at 526.

The Court disagrees because Facebook "remain[s] free to enforce . . . even those [policies] tainted by initial governmental coercion." *Ante*, at 26. But as with traceability, the Court applies a new and elevated standard for redressability, which has never required plaintiffs to be "*certain*" that a court order would prevent future harm. *Larson* v. *Valente*, 456 U. S. 228, 243–244, n. 15 (1982). In *Massachusetts* v. *EPA*, for example, no one could say that the relief sought—reconsideration by the EPA of its decision not to regulate the emission of greenhouse gases—would actually

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remedy the Commonwealth's alleged injuries, such as the loss of land due to rising sea levels. The Court's decision did not prevent the EPA from adhering to its prior decision, 549 U. S., at 534–535, and there was no way to know with any degree of certainty that any greenhouse gas regulations that the EPA might eventually issue would prevent the oceans from rising. Yet the Court found that the redressability requirement was met.

Similarly, in *Department of Commerce*, no one could say with any certainty that our decision barring a censorship question from the 2020 census questionnaire would prevent New York from losing a seat in the House of Representatives, 588 U. S., at 767, and in fact that result occurred despite our decision. S. Goldmacher, New York Loses House Seat After Coming Up 89 People Short on Census, N. Y. Times, Apr. 26, 2021.[17]

As we recently proclaimed in *FDA* v. *Alliance for Hippocratic Medicine*, Article III standing is an important component of our Constitution's structural design. See 602 U. S., at 378–380. That doctrine is cheapened when the rules are not evenhandedly applied.

* * *

Hines showed that, when she sued, Facebook was censoring her COVID-related posts and groups. And because the White House prompted Facebook to amend its censorship policies, Hines's censorship was, at least in part, caused by the White House and could be redressed by an injunction against the continuation of that conduct. For these reasons, Hines met all the requirements for Article III standing.

III

I proceed now to the merits of Hines's First Amendment

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[17] https://www.nytimes.com/2021/04/26/nyregion/new-york-census-congress.html.

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claim.[18] Government efforts to "dictat[e] the subjects about which persons may speak," *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978), or to suppress protected speech are "'presumptively unconstitutional,'" *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830 (1995). And that is so regardless of whether the Government carries out the censorship itself or uses a third party "'to accomplish what . . . is constitutionally forbidden.'" *Norwood* v. *Harrison*, 413 U. S. 455, 465 (1973).

As the Court held more than 60 years ago in *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963), the Government may not coerce or intimidate a third-party intermediary into suppressing someone else's speech. *Id.*, at 67. Earlier this Term, we reaffirmed that important principle in *National Rifle Association* v. *Vullo*, 602 U. S., at 187–191. As we said there, "a government official cannot do indirectly what she is barred from doing directly," *id.*, at 190, and while an official may forcefully attempt to persuade, "[w]hat she cannot do . . . is use the power of the State to punish or suppress disfavored expression," *id.*, at 188.

In *Vullo*, the alleged conduct was blunt. The head of the state commission with regulatory authority over insurance companies allegedly told executives at Lloyd's directly and in no uncertain terms that she would be "'less interested'" in punishing the company's regulatory infractions if it ceased doing business with the National Rifle Association. *Id.*, at 183. The federal officials' conduct here was more

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[18] To obtain a preliminary injunction, Hines was required to establish that she is likely to succeed on the merits, that she would otherwise suffer irreparable harm, and that the equities cut in her favor. *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). In a First Amendment case, the equities are bound up in the merits. See *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). So I focus on Hines's likelihood of success.

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subtle and sophisticated. The message was delivered piecemeal by various officials over a period of time in the form of aggressive questions, complaints, insistent requests, demands, and thinly veiled threats of potentially fatal reprisals. But the message was unmistakable, and it was duly received.

The principle recognized in *Bantam Books* and *Vullo* requires a court to distinguish between permissible persuasion and unconstitutional coercion, and in *Vullo*, we looked to three leading factors that are helpful in making that determination: (1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced. 602 U. S., at 189–190, and n. 4, 191–194. In this case, all three factors point to coercion.

A

I begin with the authority of the relevant officials—high-ranking White House officials and the Surgeon General. High-ranking White House officials presumably speak for and may have the ability to influence the President, and as discussed earlier, a Presidential administration has the power to inflict potentially fatal damage to social media platforms like Facebook. See *supra*, at 5. Facebook appreciates what the White House could do, and President Biden has spoken openly about that power—as he has every right to do. For instance, he has declared that the "policy of [his] Administration [is] to enforce the antitrust laws to meet the challenges posed by . . . the rise of the dominant Internet platforms," and he has directed the Attorney General and other agency heads to "enforce the antitrust laws . . . vigorously." Promoting Competition in the American Economy, Executive Order No. 14036, 3 CFR 609 (2021).[19] He has

[19] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-

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also floated the idea of amending or repealing §230 of the Communications Decency Act. See, *e.g.*, B. Klein, White House Reviewing Section 230 Amid Efforts To Push Social Media Giants To Crack Down on Misinformation, CNN (July 20, 2021)[20]; R. Kern, White House Renews Call To 'Remove' Section 230 Liability Shield, Politico (Sept. 8, 2022).[21]

Previous administrations have also wielded significant power over Facebook. In a data-privacy case brought jointly by the Department of Justice and the Federal Trade Commission, Facebook was required "to pay an unprecedented $5 billion civil penalty," which is "among the largest civil penalties ever obtained by the federal government." Press Release, Dept. of Justice, Facebook Agrees To Pay $5 Billion and Implement Robust New Protections of User Information in Settlement of Data-Privacy Claims (July 24, 2019).[22]

A matter that may well have been prominent in Facebook's thinking during the period in question in this case was a dispute between the United States and the European Union over international data transfers. In 2020, the Court of Justice of the European Union invalidated the mechanism for transferring data between the European Union and United States because it did not sufficiently protect EU citizens from Federal Government surveillance. *Data Protection Comm'r* v. *Facebook Ireland Limited*, Case C–311/18 (2020). The EU-U. S. conflict over data privacy hindered Facebook's international operations, but Facebook could

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economy.

[20] https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html.

[21] https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771.

[22] https://www.justice.gov/opa/pr/facebook-agrees-pay-5-billion-and-implement-robust-new-protections-user-information.

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not "resolve [the conflict] on its own." N. Clegg & J. Newstead, Our Response to the Decision on Facebook's EU-US Data Transfers, Meta (May 22, 2023).[23] Rather, the platform relied on the White House to negotiate an agreement that would preserve its ability to maintain its trans-Atlantic operations. K. Mackrael, EU Approves Data-Transfer Deal With U. S., Averting Potential Halt in Flows, Wall Street Journal, July 10, 2023.[24]

It is therefore beyond any serious dispute that the top-ranking White House officials and the Surgeon General possessed the authority to exert enormous coercive pressure.

B

1

Second, I turn to of the officials' communications with Facebook, which possess all the hallmarks of coercion that we identified in *Bantam Books* and *Vullo*. Many of the White House's emails were "phrased virtually as orders," *Bantam Books*, 372 U. S., at 68, and the officials' frequent follow-ups ensured that they were understood as such, *id.*, at 63. To take a few examples, after Flaherty read an article about content causing vaccine hesitancy, he demanded "to know that [Facebook was] trying" to combat the issue and "to know that you're not playing a shell game with us when we ask you what is going on." 30 Record 9365; see *supra*, at 7. The next month, he requested "assurances, based in data," that Facebook was not "making our country's vaccine hesitancy problem worse." 30 Record 9371; see *supra*, at 7–8. A week after that, he questioned Facebook about its policies "for removal vs demoting," and when the platform did not

[23] https://about.fb.com/news/2023/05/our-response-to-the-decision-on-facebooks-eu-us-data-transfers.

[24] https://www.wsj.com/articles/eu-approves-data-transfer-deal-with-u-s-averting-potential-halt-in-flows-7a149c9.

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promptly respond, he added: "These questions weren't rhetorical." 30 Record 9387; see *supra*, at 8. When Facebook provided the White House with some data it asked for, Flaherty thanked Facebook for demonstrating "that you at least understand the ask." 30 Record 9368; see *supra*, at 7.

Various comments during the July pressure campaign likewise reveal that the White House and the Surgeon General's Office expected compliance. At the press conference announcing the Surgeon General's recommendations related to misinformation, Psaki noted that the White House "engage[s] with [Facebook] regularly," and Facebook "certainly understand[s] what our asks are." *Supra*, at 11. The next day, she expressed confidence that Facebook would "make decisions about additional steps they can take." 78 Record 25175; see *supra*, at 12. And eventually, the Surgeon General's Office prompted Facebook for "an update of any new/additional steps you are taking with respect to health misinformation in light of" the July 15 advisory. 9 Record 2703; see *supra*, at 13.

These demands were coupled with "thinly veiled threats" of legal consequences. *Bantam Books*, 372 U. S., at 68. Three instances stand out. Early on, when the White House first expressed skepticism that Facebook was effectively combatting misinformation, Slavitt informed the platform that the White House was "considering our options on what to do about it." 30 Record 9364; see *supra*, at 7. In other words, if Facebook did not "solve" its "misinformation" problem, the White House might unsheathe its potent authority. 30 Record 9364.

The threat was made more explicit in May, when Psaki paired a request for platforms to "'stop amplifying untrustworthy content'" with a reminder that President Biden "'supports . . . a robust anti-trust program.'" 78 *id.*, at 25170–25171 (emphasis deleted); May 5 Press Briefing; see also *supra*, at 9. The Government casts this reference to legal consequences as a defense of individual Americans

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against censorship by the platforms. See Reply Brief 9. But Psaki's full answer undermines that interpretation. Immediately after noting President Biden's support for antitrust enforcement, Psaki added, "So his view is that there's more that needs to be done to ensure that this type of . . . life-threatening information is not going out to the American public." May 5 Press Briefing. The natural interpretation is that the White House might retaliate if the platforms allowed free speech, not if they suppressed it.

Finally, in July, the White House asserted that the platforms "should be held accountable" for publishing misinformation. 61 Record 19400; see *supra*, at 11–13. The totality of this record—constant haranguing, dozens of demands for compliance, and references to potential consequences—evince "a scheme of state censorship." *Bantam Books*, 372 U. S., at 72.

2

The Government tries to spin these interactions as fairly benign. In its telling, Flaherty, Slavitt, and other officials merely "asked the platforms for information" and then "publicly and privately criticized the platforms for what the officials perceived as a . . . failure to live up to the platforms' commitments." Brief for Petitioners 31. References to consequences, the Government claims, were "fleeting and general" and "cannot plausibly be characterized as coercive threats." *Id.*, at 32.

This characterization is not true to what happened. Slavitt and Flaherty did not simply *ask* Facebook for information. They browbeat the platform for months and made it clear that if it did not do more to combat what they saw as misinformation, it might be called to account for its shortcomings. And as for the supposedly "fleeting" nature of the numerous references to potential consequences, death threats can be very effective even if they are not delivered every day.

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The Government also defends the officials' actions on the ground that "[t]he President and his senior aides are entitled to speak out on such matters of pressing public concern." Reply Brief 11. According to the Government, the officials were simply using the President's "bully pulpit" to "inform, persuade, and protect the public." Brief for Petitioners 5, 24.

This argument introduces a new understanding of the term "bully pulpit," which was coined by President Theodore Roosevelt to denote a President's excellent (*i.e.*, "bully"[25]) position (*i.e.*, his "pulpit") to persuade the public.[26] But Flaherty, Slavitt, and other officials who emailed and telephoned Facebook were not speaking to the public from a figurative pulpit. On the contrary, they were engaged in a covert scheme of censorship that came to light only after the plaintiffs demanded their emails in discovery and a congressional Committee obtained them by subpoena. See Committee Report 1–2. If these communications represented the exercise of the bully pulpit, then everything that top federal officials say behind closed doors to any private citizen must also represent the exercise of the President's bully pulpit. That stretches the concept beyond the breaking point.

In any event, the Government is hard-pressed to find any prior example of the use of the bully pulpit to threaten censorship of private speech. The Government cites four instances in which past Presidents commented publicly about the performance of the media. President Reagan lauded the media for "tough reporting" on drugs. Reagan Presidential Library & Museum, Remarks to Media Executives at a

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[25] Webster's International Dictionary of the English Language 191 (1902).

[26] See D. Goodwin, The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism, pp. xi–xii (2013) (Goodwin).

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White House Briefing on Drug Abuse (Mar. 7, 1988).[27] But he never threatened to do anything to media outlets that were soft on the issue of drugs. President Theodore Roosevelt "lambasted 'muck-raking' journalists" as "'one of the most potent forces for evil'" and encouraged journalists to speak truth, rather than slander. Brief for Petitioners 24 (quoting The American Presidency Project, Remarks at the Laying of the Cornerstone of the Office Building of the House of Representatives (Apr. 14, 1906)).[28] But his comment did not threaten any action against the muckrakers, see Goodwin 480–487, and it is unclear what he could have done to them. President George W. Bush denounced pornography as "debilitating" for "communities, marriages, families, and children." Presidential Proclamation No. 7725, 3 CFR 129 (2003 Comp.). But he never threatened to take action against pornography that was not "obscene" within the meaning of our precedents.

The Government's last example is a 1915 speech in which President Wilson deplored false reporting that the Japanese were using Turtle Bay, California, as a naval base. The American Presidency Project, Address at the Associated Press Luncheon in New York City (Apr. 20, 1915).[29] Speaking to a gathering of reporters, President Wilson proclaimed: "We ought not to permit that sort of thing to use up the electrical energy of the [telegraph] wires, because its energy is malign, its energy is not of the truth, its energy is mischief." *Ibid.* Wilson's comment is best understood as metaphorical and hortatory, not as a legal threat. And in any event, it is hard to see how he could have brought about censorship of telegraph companies because the Mann-

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[27] https://www.reaganlibrary.gov/archives/speech/remarks-media-executives-white-house-briefing-drug-abuse.

[28] https://www.presidency.ucsb.edu/documents/remarks-the-laying-the-cornerstone-the-office-building-the-house-representatives-the-man.

[29] https://www.presidency.ucsb.edu/documents/address-the-associated-press-luncheon-new-york-city.

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Elkins Act, enacted in 1910, deemed them to be common carriers, and that meant that they were obligated to transmit all messages regardless of content. See 36 Stat. 544–545; T. Wu, A Brief History of American Telecommunications Regulation, in 5 Oxford International Encyclopedia of Legal History 95 (2007). Thus, none of these examples justifies the conduct at issue here.

C

Finally, Facebook's responses to the officials' persistent inquiries, criticisms, and threats show that the platform perceived the statements as something more than mere recommendations. Time and time again, Facebook responded to an angry White House with a promise to do better in the future. In March, Facebook attempted to assuage the White House by acknowledging "[w]e obviously have work to do to gain your trust." 30 Record 9365. In April, Facebook promised to "more clearly respon[d] to [White House] questions." *Id.*, at 9371. In May, Facebook "committed to addressing the defensive work around misinformation that you've called on us to address." 9 *id.*, at 2698. In July, Facebook reached out to the Surgeon General after "the President's remarks about us" and emphasized its efforts "to better understand the scope of what the White House expects from us on misinformation going forward." *Id.*, at 2690. And of course, as we have seen, Facebook repeatedly changed its policies to better address the White House's concerns. See *supra*, at 7, 10, 13.

The Government's primary response is that Facebook occasionally declined to take its suggestions. Reply Brief 11; see, *e.g.*, *supra*, at 10. The implication is that Facebook must have chosen to undertake *all* of its anti-misinformation efforts entirely of its own accord.

That is bad logic, and in any event, the record shows otherwise. It is true that Facebook voluntarily undertook *some* anti-misinformation efforts and that it declined to make

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some requested policy changes. But the interactions recounted above unmistakably show that the White House was insistent that Facebook should do more than it was doing on its own, see, *e.g.*, *supra*, at 11–12, and Facebook repeatedly yielded—even if it did not always give the White House everything it wanted.

Internal Facebook emails paint a clear picture of subservience. The platform quickly realized that its "handling of [COVID] misinformation" was "importan[t]" to the White House, so it looked for ways "to be viewed as a trusted, transparent partner" and "avoid . . . public spat[s]." Committee Report 181, 184, 188. After the White House blamed Facebook for aiding an insurrection, the platform realized that it was at a "crossroads . . . with the White House." *Id.*, at 294. "Given what is at stake here," one Facebook employee proposed reevaluating the company's "internal methods" to "see what further steps we may/may not be able to take." *Id.*, at 295. This reevaluation led to one of Facebook's policy changes. See *supra*, at 8–10.

Facebook again took stock of its relationship with the White House after the President's accusation that it was "killing people." Internally, Facebook saw little merit in many of the White House's critiques. One employee labeled the White House's understanding of misinformation "completely unclear" and speculated that "it's convenient for them to blame us" "when the vaccination campaign isn't going as hoped." Committee Report 473. Nonetheless, Facebook figured that its "current course" of "in effect explaining ourselves more fully, but not shifting on where we draw the lines," is "a recipe for protracted and increasing acrimony with the [White House]." *Id.*, at 573. "Given the bigger fish we have to fry with the Administration," such as the EU-U. S. dispute over "data flows," that did not "seem like a great place" for Facebook-White House relations "to be." *Ibid.* So the platform was motivated to "explore some moves that we can make to show that we are trying to be

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responsive." *Ibid.* That brainstorming resulted in the August 2021 rule changes. See *supra*, at 13, 19–20.

In sum, the officials wielded potent authority. Their communications with Facebook were virtual demands. And Facebook's quavering responses to those demands show that it felt a strong need to yield.

For these reasons, I would hold that Hines is likely to prevail on her claim that the White House coerced Facebook into censoring her speech.

* * *

For months, high-ranking Government officials placed unrelenting pressure on Facebook to suppress Americans' free speech. Because the Court unjustifiably refuses to address this serious threat to the First Amendment, I respectfully dissent.

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 6/28/2024 9:32:15 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: This Week in Democracy

This Week in Democracy

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

States United Democracy Center | States United Action

This Week in Democracy

- **CNN** hosted the first presidential debate of the year between **President Biden** and former **President Trump.** When the questions turned to democracy, Trump lied about the Jan. 6 attack and **refused to commit to accepting the results of the November election.** Biden, at a Friday rally in North Carolina, acknowledged the post-debate reaction to his performance and emphasized that this election is about larger issues. "The choice in this election is simple," he said. "Donald Trump will destroy our democracy."

- The **U.S. Supreme Court** on Friday ruled that one of the charges levied against hundreds of Jan. 6 defendants—including Trump—should be **reconsidered by a lower court.** The charges will not be immediately dismissed but could affect both ongoing and

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previously decided cases.

- The **U.S. Supreme Court** denied **Steve Bannon's** request to delay the prison sentence he is facing after being convicted for defying a subpoena from the House Jan. 6 Committee. He must **report to prison** by July 1.

- In New York, Justice **Juan Merchan** partially lifted Trump's gag order. The former president can now talk about the jury and witnesses in his **criminal hush money trial** but is still barred from disclosing the identities of individual jurors. Trump is also prohibited from commenting about court staff, prosecutors, or their families. The order will remain in effect until Trump's sentencing, which is scheduled for July 11.

- **States United** released an updated guide to social media platforms' **policies about election mis- and disinformation.** The **U.S. Supreme Court** ruled on Wednesday that the government can contact social media companies to request that misinformation be removed.

➞ **READ:** Our guide to social media policies

Celebrating Pride Month

During Pride Month, we recognize that LGBTQ+ Americans' contributions in our communities, at the ballot box, and in elected office are vital to our democracy.

This year, for the first time ever, there is at least one out LGBTQ+ elected official in every state and Washington, D.C., according to recent research. And 94 percent of LGBTQ+ registered voters said they were either "definitely" or "probably" going to vote this November, according to a March survey.

Our democracy is at its best when all of us, no matter who we love or how we identify, can make our voice heard. A more inclusive democracy is something we can all take pride in.

In the News

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- PBS NewsHour: How right-wing disinformation is fueling conspiracy theories about the 2024 election

- The Washington Post: Pro-Trump extremists are sure he will win. That could be dangerous.

- The Washington Post: Trump allies test a new strategy for blocking election results

- The Washington Post (Opinion): Election denialism isn't gone. Trump's backers are probing for weaknesses.

- The New York Times: Trump Allies Begin First Line of Attack Against Arizona Election Case

- Arizona's Family: Arizona GOP official threatens to lynch Maricopa County Recorder Stephen Richer

- Arizona Mirror: Another attempt by Lake and Finchem to revive their tabulator case was dismissed

- The Detroit News: Ex-Michigan GOP chair asks Court of Appeals to overturn her ouster

- Votebeat Pennsylvania: Right-wing group targets errors in Pennsylvania voter registration records

- Nevada Current: Appeal not Nevada attorney general's only option for pursuing fake electors

Recommended Reading

Joyce Vance, a former U.S. Attorney and member of States United's Bipartisan Advisory Board, interviewed States United CEO **Joanna Lydgate** for the latest installment of Five Questions, a special feature of her newsletter, Civil Discourse. The two discussed Project 2025, Trump's plan to remake the federal government if he wins. You can read the conversation here and subscribe to Civil Discourse for more here.

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States United DEMOCRACY CENTER

Five Questions about Project 2025 with Joanna Lydgate, CEO of States United

From Civil Discourse with Joyce Vance

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From: Madeline Breeden [madeline@statesuniteddemocracy.org]
on behalf of Janae Steggall [janae@statesuniteddemocracy.org]
Sent: 1/2/2025 2:11:54 PM
To: Brady, Mike (MDOS) [BradyM@michigan.gov]; Caroline Chambers [caroline@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]; Grossi, Christina [GrossiC1@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; Katherine Reisner [katie@statesuniteddemocracy.org]; Zoe Chernicoff [Zoe@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]; Anderson, Christina (MDOS) [AndersonC42@michigan.gov]; Benander, Angela (MDOS) [BenanderA1@michigan.gov]; Hardmon, Cheri (MDOS) [HardmonC@michigan.gov]; Edevbie, Aghogho (MDOS) [EdevbieA@michigan.gov]; Craine, Khyla (MDOS) [CraineK@michigan.gov]; El-Sulayman, Halima (MDOS) [ElSulaymanH1@michigan.gov]; Caroline O'Leary [carolineo@statesuniteddemocracy.org]; Barbara (AG) [teszlewiczb@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Rollow, Jake (MDOS) [RollowJ@michigan.gov]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Sharon Song [sharon@statesuniteddemocracy.org]; Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]; Banghart-Linn1@michigan.gov; Nassim Alisobhani [nassim@statesuniteddemocracy.org]; Edward Medrano [edward@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Madeline Breeden [madeline@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]; Bush, Kimberly (AG) [BushK2@michigan.gov]; Wimmer, Daniel (AG) [WimmerD2@michigan.gov]; Leddy, Robert [LeddyR@michigan.gov]; Lizzie Ulmer [lizzie@statesuniteddemocracy.org]
CC: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]

Subject: Canceled: Research Update
Location: Microsoft Teams Meeting

Start: 1/2/2025 5:00:00 PM
End: 1/2/2025 5:30:00 PM
Show Time As: Free

Importance: High

Recurrence: (none)

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Pulling down today's meeting!

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From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 1/3/2025 8:25:03 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Mike Check

Mike Check

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States United Democracy Center

States United Action

This Week in Democracy

- **Mike Johnson** survived a close vote and held on to his job as House speaker. Today is the opening day of the **119th Congress**, which includes some members who are making history.

➞ **EXPLORE:** Election Denial in Congress

- The new Congress will gather for a joint session next Monday to **count the electoral votes** and certify **Donald Trump's** presidential victory. The day will mark four years since the Jan. 6, 2021, Capitol attack, when the peaceful transfer of power was interrupted.

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- Strict **security protections** will be in place for the electoral count, former President **Jimmy Carter's** state funeral on Jan. 9, and Trump's inauguration on Jan. 20. Law enforcement leaders reassured the public about those protections after the terror attack in New Orleans.

- The bipartisan leaders of the House committee that investigated the 2021 Capitol attack, Rep. **Bennie Thompson** and former Rep. **Liz Cheney,** were awarded the Presidential Citizens Medal, one of the country's **highest civilian honors.**

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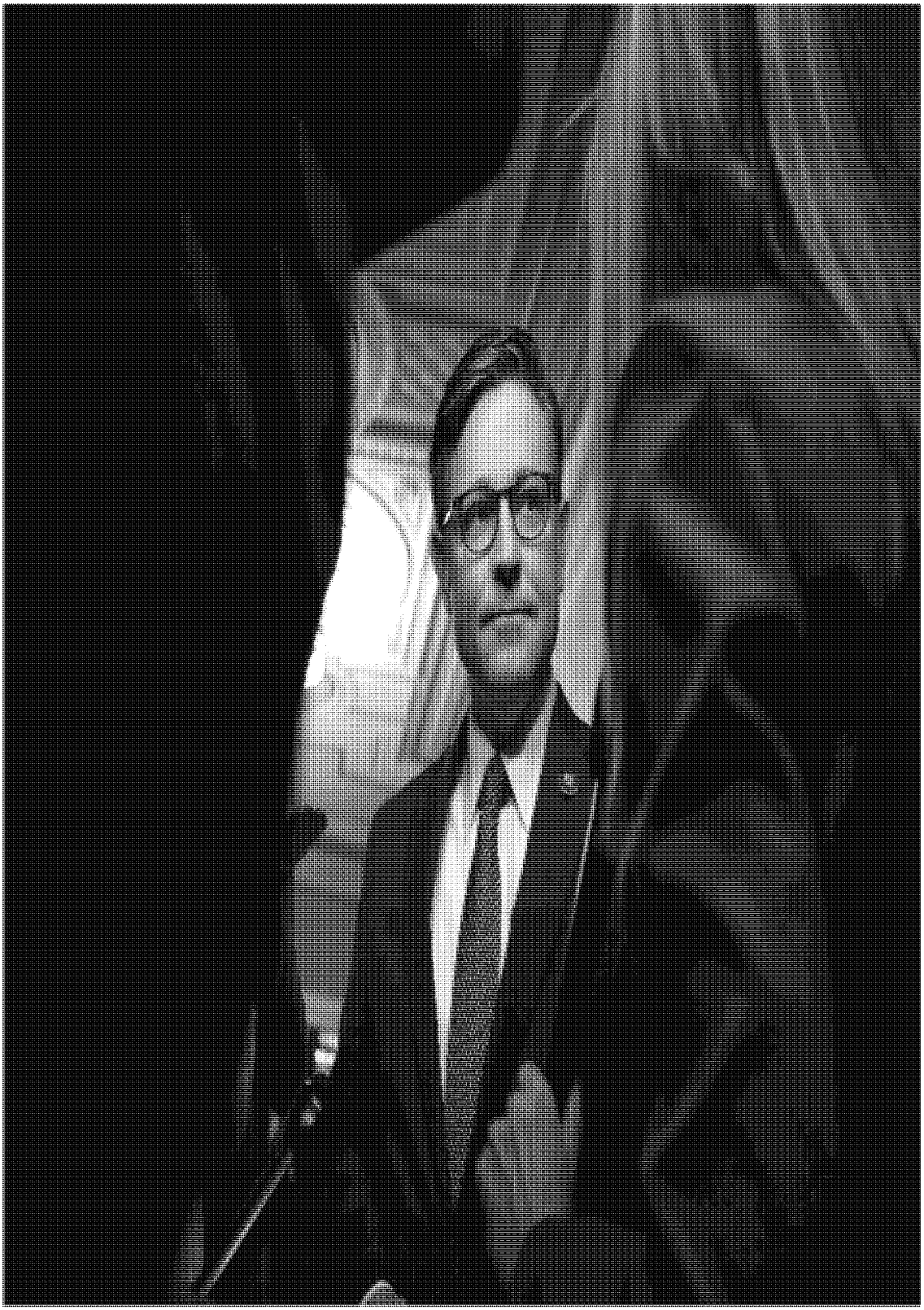

Speaker Mike Johnson (Justin Sullivan/Getty Images)

State of the States

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In Pennsylvania, a court sided with the Commonwealth in a dispute over one county's handling of its voting machines. In 2021, two Fulton County commissioners allowed an outside vendor to examine the county's voting machines, part of a fruitless attempt to find fraud in the 2020 election. The state's top election official later decertified the machines, citing security concerns, and notified the county that the outside inspection had broken state law. The Commonwealth Court ruled this week that the Commonwealth has the power to prohibit counties from allowing unauthorized outside access to voting equipment.

In the News

- The New York Times: Giuliani, Slow to Hand Over Assets, Appears in Court to Answer to Judge
- NBC News: Trump's criminal cases fading away, but some legal perils still loom in 2025
- NBC Washington: D.C. tightens security after New Orleans attack, before Carter funeral and inauguration
- The Guardian: What did U.S. election officials learn about our democracy from 2024's vote?
- WSB: Georgia election law's provisions on unhoused voters, absentee ballot storage take effect
- The Associated Press: Arizona official who delayed county's 2022 election certification didn't have immunity, court says
- AP: Court sides with state over Pennsylvania county's handling of voting machines after 2020 election
- ABC News: Special counsel Jack Smith withdraws from appeal of classified docs case against Trump's co-defendants

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Donate

Your tax-exempt donation will support States United Democracy Center's work to empower the state and local leaders who safeguard our democracy.

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About the States United Democracy Center

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit statesunited.org.

About States United Action

States United Action is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit statesunitedaction.org.

Our mailing address is:
States United Democracy Center
1101 17th St NW
Suite 250
Washington, DC 20036

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Sent: 9/19/2023 6:32:26 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: admissions
Attachments: 20230919143003.pdf

Let me know if these are ok.

H

From: MeingastH@michigan.gov <MeingastH@michigan.gov>
Sent: Tuesday, September 19, 2023 2:30 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Scan To Me

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ATTACHMENT TO PETITION FOR ADMISSION / E-FILING REGISTRATION

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

APPLICANT/REGISTRANT NAME: Jonathan L. Williams

DATED

SIGNATURE OF APPLICANT/REGISTRANT

STATEMENT OF SPONSORING ATTORNEY
IN SUPPORT OF PETITION FOR ADMISSION

[To be completed only if applying for admission] Statement of a sponsoring attorney of the Bar of this court, stating when the sponsoring attorney was admitted to practice in this court, under what circumstances the attorney has known the applicant, that the attorney knows the applicant to be of good character and reputation, and that the attorney believes the applicant to be well qualified as a member of the Bar of this court. For applicants residing in another state, the sponsor may be a judge of a court of record of that state, or a federal judge.

I was admitted to practice in this Court on March 10, 2000. I have known Mr. Williams for approximately one year in connection with his work on election- and other government-related areas of law. I know Mr. Williams to be of good character and reputation and believe him to be well qualified as a member of the Bar of this Court.

Heather Meingast
SPONSORING ATTORNEY'S NAME

Heather S. Meingast
SIGNATURE OF SPONSORING ATTORNEY OR JUDGE

9-19-23
DATED

P55439
STATE BAR I.D. NO.

☐ I am newly admitted to the State Bar of _____ and request a waiver of the sponsorship requirement. [One year or less from time of application.] No other waivers will be granted except in extraordinary circumstances.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Declaration of Sponsor

Sponsor Information	
Full Name:	Heather S. Meingast
Firm Name:	Michigan Department of the Attorney General
Street Address:	525 West Ottawa Street
Apartment or Suite:	
City, State and Zip:	Lansing, MI 48906
Country:	USA
Phone Number:	517-335-7659
Email Address:	MeingastH@michigan.gov

Please select the reason this Declaration of Sponsor is being submitted.
If neither reason applies, this form is NOT required and should NOT be submitted to the Court.

☑ *Oath performed remotely via telephone or video conference –LR 83.20(d)(4).*	☐ *Declaration of Disciplinary Issues – LR 83.20(c)(2).*

Declaration

I, the above-named sponsor, state that:

a) I am currently a member in good standing of the bar of this Court.

b) That I have known the applicant, Jonathan L. Williams, personally for 1 years 0 months.

c) That the applicant has engaged in the practice of law as follows:

Mr. Williams has practiced law for 14 years, with a focus on litigation and government-related law.

d) The applicant is of good character and reputation and is qualified to practice as a member of the bar of this Court.

I declare under penalty of perjury that the above is true and correct.

Heather S Meingast — 9-19-23

Signature of Sponsor — Date

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/18/2023 6:12:59 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Michigan law on unqualified presidential candidates

Thanks!

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 18, 2023 9:15 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Michigan law on unqualified presidential candidates

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Hi Heather,

This memo is a companion to the memo on disqualification under the Fourteenth Amendment that I shared with you Friday. Please let me know if you'd like to discuss. We'd be happy to develop any of these issues further and assist defense of any litigation related to these issues.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Sent: 9/22/2023 7:00:14 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Call re Wk Prod MCL 15.243(1)(h) -PRIVILEGED

Ok, sounds good.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 22, 2023 2:59 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Call re Wk Prod MCL 15.243(1)(h) --PRIVILEGED

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I'll call you then. Teams is not behaving for me lately.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, September 22, 2023 at 2:58 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Call re Wk Prod MCL 15.243(1)(h) -PRIVILEGED

How about 2:30?

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 22, 2023 2:55 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Call re Wk Prod MCL 15.243(1)(h) RIVILEGED

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Hi Heather,

Today's gotten away from me. Is there a good time Monday to talk abou Wk Prod MCL 15.243(1)(h) Wk Prod MCL 15.243(1)(h) I'm available any time other than 1130-1230 and 130-2. Have a great weekend!

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/25/2023 6:47:24 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: Castro v Benson & Trump - pro se complaint filed 8/31
Attachments: 20230831 Verified Cmplnt.pdf

Importance: High

From: Meingast, Heather (AG)
Sent: Tuesday, September 19, 2023 4:56 PM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; McInerney, Jenny (MDOS) <McInerneyJ1@michigan.gov>; Bourbonais, Lori (MDOS) <bourbonaisl@michigan.gov>; Schaar, Meghan (MDOS) <SchaarM1@michigan.gov>; Lillie, Erin (MDOS) <LillieE@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Castro v Benson & Trump - pro se complaint filed 8/31
Importance: High

Hi All,

DPP MCL 15.243(1)(m)

Heather

From: AG-NOI <AG-NOI@michigan.gov>
Sent: Tuesday, September 19, 2023 4:20 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>
Subject: FW: Copies of Complaints per MCL 600.6434 (case 23-000114-MZ through 23-000123-MP)

From: Angela Davis <ADavis@courts.mi.gov>
Sent: Thursday, September 7, 2023 11:07 AM
To: AG-NOI <AG-NOI@michigan.gov>
Subject: Copies of Complaints per MCL 600.6434 (case 23-000114-MZ through 23-000123-MP)

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Good Afternoon,

Attached are recently processed complaints that were filed in the Court of Claims.

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Please note that case #23-000117-MZ is purposefully omitted as the complaint was never filed in this matter. Also, cases #23-000118-MK and #23-000121-MZ are transfer cases. A copy of the complaint in each case when they are received by the Court of Claims.

Have a nice day,

Angela

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STATE OF MICHIGAN
COURT OF CLAIMS

JOHN ANTHONY CASTRO
12 Park Place, Mansfield, TX 76063

Plaintiff,

v.

SECRETARY OF STATE, JOCELYN BENSON
430 W. Allegan Street, Richard H. Austin Building - 4th Floor, Lansing, MI 48918

DONALD J. TRUMP
1100 S. Ocean Blvd, Palm Beach, FL 33480

Defendants.

Case No. 23-000122-MZ

Brock A. Swartzle

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

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VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

TO THE HONORABLE COURT:

Plaintiff, JOHN ANTHONY CASTRO, appearing *pro se*, files this Complaint for Injunctive Relief against Defendants Secretary of State and Donald John Trump and alleges as follows:

I. CLAIM FOR RELIEF

SHORT & PLAIN STATEMENT SHOWING JURISDICTION

1. Because this cause of action seeks injunctive relief against the Secretary of State in the officer holder's official capacity, this Court has jurisdiction.

PARTIES

2. Plaintiff John Anthony Castro is a U.S. citizen and Republican primary presidential candidate (Candidate FEC ID Number P40007320) for the 2024 Presidential Election who currently resides at 12 Park Place in Mansfield, Texas.

3. Defendant Secretary of State is a representative of the state being sued in official capacity. Secretary of State can be found at 430 W. Allegan Street, Richard H. Austin Building - 4th Floor, Lansing, MI 48918.

4. Defendant Donald John Trump is a U.S. citizen and Republican primary presidential candidate (Candidate FEC ID Number P80001571) for the 2024 Presidential Election who currently resides at 1100 South Ocean Boulevard in West Palm Beach, Florida.

5. Defendant Donald John Trump is a nominal defendant.

SHORT & PLAIN STATEMENT SHOWING ENTITLEMENT TO RELIEF

6. Section 3 of the 14th Amendment creates an implied cause of action for a fellow candidate to obtain relief for a political competitive injury by challenging another candidate's constitutional eligibility on the grounds that they engaged in or provided "aid or comfort" to an

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insurrection.

7. On September 29, 2020, then Commander-in-Chief of the United States Armed Forces issued an executive military order to a paramilitary organization known as the Proud Boys that was led by Chairman Enrique Tarrio.

8. On January 6, 2021, after witnessing a large group of Trump supporters violently attacking the United States Capitol to prevent the lawful certification of the 2020 election results with the goal of unlawfully compelling Donald John Trump's inauguration on January 20, 2021 (hereafter referred to as the "January 6th Insurrection"), Defendant Donald John Trump stated on live television, "we love you, you're very special" to the insurrectionists. Defendant Donald John Trump provided the insurrectionists with comfort in the form of words of sympathy.

9. On January 29, 2022, Defendant Donald John Trump publicly stated, "If I run and if I win, we will treat those people from January 6 fairly. We will treat them fairly. And if it requires pardons, we will give them pardons." Defendant Donald John Trump promised the insurrectionists aid in the form of executive pardons for their criminal attempt to unlawfully overturn the 2020 election results.

10. On May 4, 2023, Proud Boys Chairman Enrique Tarrio was convicted of Seditious Conspiracy. Sedition and Insurrection are synonymous terms. In effect, Enrique Tarrio, the individual to whom Defendant Donald John Trump issued an executive military order, was convicted of conspiracy to commit an insurrection.

11. Based on these instances and other acts of ratification of the acts of and sympathy with the convicted criminals of the January 6th Insurrection, Defendant Donald John Trump provided "aid or comfort" to an insurrection in violation of Section 3 of the

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14th Amendment to the U.S. Constitution and is, therefore, constitutionally ineligible to pursue or hold any public office in the United States.

12. Because Plaintiff is a fellow FEC-registered Republican primary candidate, Plaintiff will suffer an injury that may be redressed by the judiciary with injunctive relief.

DEMAND FOR RELIEF

13. Plaintiff John Anthony Castro asks this Court to issue an injunction preventing Defendant Secretary of State from accepting and/or processing Defendant Donald John Trump's ballot access documentation, including, but not limited to, nominating papers and nominating petitions.

14. Plaintiff requests any other relief he may be entitled to at law or equity.

II. MORE DEFINITIVE STATEMENTS AND ANALYSES

15. The framers of Section 3 of the 14th Amendment intended the constitutional provision to be both self-executing and to provide a cause of action. More specifically, the Union sought to punish the insurrectionary Confederacy by making their ability to hold public office unconstitutional. The framers did this with the specific intent of removing the more politically popular insurrectionists from the ballot since they violated their oaths of allegiance to the U.S. Constitution and the use of peaceful political mechanisms to non-violently resolve disputes.

PLAINTIFF'S STANDING TO BRING SUIT

16. To establish standing, a plaintiff must show that it has suffered an "injury in fact caused by the challenged conduct and redressable through relief sought from the court."[1]

17. The U.S. Court of Appeals for the D.C. Circuit has explained that political competitor standing is akin to economic competitor standing, whereby a plaintiff has standing to

[1] *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005) (citation omitted).

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challenge a government action that benefits a plaintiff's competitor to the detriment of the plaintiff.[2] Political competitor standing, however, is only available to plaintiffs who can show that they "personally compete[] in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit."[3] The D.C. Circuit has also held that if a plaintiff can show he is a "direct and current competitor," then competitor standing must be recognized as a matter of established case law.[4] Courts have recognized that a "candidate—as opposed to individual voters and political action groups—would theoretically have standing based upon a 'competitive injury'" if he could show that "he personally competes in the same arena with the same party."[5]

18. John Anthony Castro registered as a candidate with the Federal Election Commission and is directly and currently competing against Donald J. Trump for the Republican nomination for the Presidency of the United States. As such, Plaintiff meets all of the criteria for standing.

19. A fellow primary candidate, whose injury would be competitive injury in the form of a diminution of votes and/or fundraising, has judicial standing to sue a candidate he or she believes is ineligible to hold office.[6]

20. Plaintiff will suffer a concrete competitive injury if the constitutionally

---

[2] *See Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005).
[3] *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (internal quotation marks omitted); *see also Fulani v. Brady*, 935 F.2d 1324, 1327-28 (D.C. Cir. 1991) (holding that presidential candidate did not have "competitor standing" to challenge CPD's tax-exempt status where the candidate was not eligible for tax-exempt status); *Hassan v. FEC*, 893 F. Supp. 2d 248, 255 (D.D.C. 2012), *aff'd*, No. 12-5335, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013) ("Plaintiff cannot show that he personally competes in the same arena with candidates who receive funding under the Fund Act because he has not shown that he is or imminently will be eligible for that funding.").
[4] *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002)
[5] *Hassan v. FEC*, 893 F. Supp. 2d 248, 255 n.6 (D.D.C. 2012) (emphases added) (quoting *Gottlieb*, 143 F.3d at 621)
[6] *See Fulani v. League*, 882 F.2d 621 (2d Cir. 1989).

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ineligible Defendant Donald John Trump is permitted to appear on the ballot.[7] If the judiciary permits Defendant Donald John Trump to appear on the ballot, this will siphon off millions of votes to a constitutionally ineligible candidate in violation of Section 3 of the 14th Amendment to the U.S. Constitution. There is no question this political competitive injury is traceable to the actual competitor, Donald J. Trump.

21. Plaintiff understands that the competitor standing doctrine recognizes "parties suffer constitutional injury in fact when agencies… otherwise allow increased competition."[8] In accordance with the D.C. Circuit's ruling in *Mendoza v. Perez*, Plaintiff will suffer a constitutional injury in fact sufficient to confer Article III standing.[9]

22. When Section 3 of the 14th Amendment was adopted, it was specifically designed to ensure that non-insurrectionists did not have to politically compete with the more popular pro-insurrectionist politicians in the South. It was specifically designed to remove overwhelming popular pro-insurrectionists from the ballot. As such, Plaintiff is not simply within the zone of interests; Plaintiff is the precise type of person Section 3 of the 14th Amendment sought to protect.

23. Although the U.S. Supreme Court arguably abolished the doctrine of prudential standing in *Lexmark*,[10] Plaintiff satisfies prudential standing in that his injury is particularized and concrete, he satisfies Article III standing, and he is within the zone of interests sought to be protected by Section 3 of the 14th Amendment to the U.S. Constitution.[11]

24. Allowing Defendant Donald John Trump to appear on the ballot would constitute unlawful state action in violation of Section 3 of the 14th Amendment of the United States

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[7] *See McConnell v. FEC*, 540 U.S. 93, 107, *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).
[8] *See Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014) (citing to *La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); *Sherley v. Sebelius*, 610 F.3d 69, 72–73 (D.C. Cir. 2010)).
[9] *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014)
[10] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)
[11] *Public Citizen v. FEC*, 788 F.3d 312 (DC Cir. 2015).

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Constitution.[12]

RELEVANT LAW & LEGAL ANALYSIS

25. Defendant Donald John Trump is a declared candidate for the Republican nomination for the Presidency of the United States for the 2024 election season.

26. Article II, Section 1 of the United States Constitution states that any person who enters the Office of the President of the United States of America shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

27. Since the founding of our nation, those who assume civil or military positions under federal or state law are required to take an oath and thereby state that they will defend the Constitution of the United States against all enemies, foreign and *domestic.*

28. Taking the side of a foreign enemy is covered by the Treason Clause in Article III, Section 3, Clause 1 of the United States Constitution. It states: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid *and* Comfort."

29. The Anti-Insurrection Qualification Clause in Section 3 of the 14th Amendment of the United States Constitution covers taking the side of a *domestic* enemy.

Anti-Insurrection Qualification Clause

30. Section 3 of the 14th Amendment of the United States Constitution is best described as the Anti-Insurrection Qualification Clause. It establishes that, in order to be eligible to hold any office in the United States, a person must have never violated an Oath

[12] *See Citizens for Resp. & Ethics in Washington v. Trump*, 939 F.3d 131, 143 (2d Cir. 2019).

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of Office, which always includes a pledge to support the United States Constitution.

31. The Anti-Insurrection Qualification Clause in Section 3 of the 14th Amendment of the United States Constitution states that "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have *engaged in* insurrection or rebellion against the same, or given *aid or comfort* to the enemies thereof. But Congress may by a vote of two-thirds of *each* House, remove such disability."

Amendment XIV, Section 3, Clause 1

32. Clause 1 of Section 3 of the 14th Amendment of the United States Constitution reads: "No person shall… hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath… to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

33. The word "engaged" for the purpose of Section 3 of the 14th Amendment "implies, and was intended to imply, a voluntary effort to assist the Insurrection… And further, the… action must spring from [a] want of sympathy with the insurrectionary movement."[13]

34. As the U.S. Supreme Court has articulated, "[w]ithout a statutory definition, [one must] turn to the phrase's plain meaning."[14]

35. Merriam-Webster's Dictionary defines an "insurrection" to be "an act or instance

[13] *See U.S. v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871).
[14] *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (thereafter referencing Merriam-Webster's Collegiate Dictionary for the plain meaning of a term).

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of revolting against civil authority or an established government." An instance is "a step, stage, or situation viewed as part of a process or series of events." Participation in the early or late stages of an event still constitute "an instance." This would apply to the wife of United States Supreme Court Justice Clarence Thomas, Virginia Thomas, requiring Justice Thomas' mandatory recusal under 28 U.S.C. § 455, which Plaintiff asserts herein to preserve for appeal.

36. Of the term "revolting," Merriam-Webster says "to renounce… subjection." Renounce is to "refuse to follow, obey, or recognize." Subjection is being "placed under authority." Thus, an insurrection include all stages of the event wherein at *at least one stage* there was a refusal to recognize the authority of an established governmental body, such as the United States Senate and its ceremonial reading of the certified election results and engaging in violence to undermine *both* that process and the United States Constitution.

37. Defendant Donald John Trump summoned the mob to our nation's Capitol, organized and assembled the mob, allowed weapons in the crowd by ordering security to let them pass, radicalized the mob with incendiary rhetoric, ordered them to march to the Capitol, refused to make public statements to denounce the violence and call off the mob for 187 minutes, and when it became clear that the mob had failed to use violence to prevent the certification of the election results, then and only then, did former President Donald J. Trump order the mob to go home, but not before saying "we love you" and calling the violent mob "very special" after they had violently attacked the United States Capitol. All of these instances were part of the overall January 6 Insurrection in which Donald J. Trump was directly and irrefutably involved.

38. Clause 1 of Section 3 of the 14th Amendment to the United States

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Constitution declares that anyone deemed to have engaged in insurrection are "enemies." However, less focus is given to the fact that Section 3 similarly disqualifies those who have given "aid or comfort" to insurrectionists.

39. "Aid or comfort may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position."[15]

40. There is a distinction between domestic "aid or comfort" to insurrectionists and foreign "aid and comfort" to invaders. This was highlighted by President Andrew Johnson's comments to a New Hampshire delegation that "Treason is a crime and must be punished as a crime… It must not be excused as an unsuccessful rebellion."[16] It was later reasoned that if "insurrection and levying war was accepted as treason, hundreds of thousands of men, most of them youths, were guilty of the offense that carried a mandatory sentence of death by hanging."[17] "To the Congress, the old law was unworkable for the [Civil War]… [thus, on] July 31, 1861, Congress passed a law which provided that anyone found guilty of conspiracy to overthrow the United States Government or to interfere with the operation of its laws shall be guilty of a high crime."[18]

41. "The offenses for which exclusion from office is denounced are not merely engaging in insurrection… but the giving of aid or comfort to their enemies."[19] In that case, Judge Chase, whom himself was balancing his need for impartiality with his desire to pursue the Presidency, insinuated that the inclusion of the "aid or comfort" disqualifier in Section 3 of the 14th Amendment applied only in the context of a foreign invasion or war. Judge Chase was an

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[15] *McKee v. Young*, 2 Bart. El. Cas. 422 (1868).
[16] *See* J.G. Randall, *The Civil War and Reconstruction 707* (1937) (first omission in original).
[17] *See* Jonathan Truman Dorris, *Pardon and Amnesty Under Lincoln and Johnson – The Restoration of the Confederates to Their Rights and Privileges 1861-1898*, at 4 (1953).
[18] *See* C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 Akron L. Rev. 1165, 1165 (2009).
[19] *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869).

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abolitionist but still an ambitious and aspiring politician who considered campaigning for the Presidency and did not want to upset the South by declaring that the reference in Section 3 to "enemies" applied to the insurrectionists and rebels that fought for the Confederacy. Giving "aid and comfort" to foreign enemies was already covered by the Treason Clause in Article III, Section 3, Clause 1 of the United States Constitution. Section 3 of the 14th Amendment, being a post-civil war amendment, was referring solely to *domestic* enemies that engaged in insurrection or rebellion against the United States and had previously given an oath to support the Constitution; thereby only targeting higher-level officials that are required to take oaths.

42. This is supported by the fact that the "final version of Section 3 reflected a refinement of the radicals' philosophy of formal equality. Opposition to the broader House proposal arose in part from the widespread view that many Confederate soldiers, even if not conscripted, had little real choice but to join the Southern cause. In that light, the final version of Section 3 was not less punitive so much as it was more targeted. Whereas the House version promised to affect the rank and file, the Senate version would reach only the senior leadership. Moreover, the Senate version was, in important ways, harsher than the House version. The House measure would have sunset in 1870 and applied only to federal elections. By contrast, the final version [of Section 3] permanently rendered virtually the entire political leadership of the South ineligible for office, both state and federal. The final version of Section 3 thus reflected a nuanced view: as compared with felons, Confederate officials were more deserving of punishment and Southern foot

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soldiers were less so."[20]

43. Every federal, state, and local public official that offered words of encouragement, show of sympathy, or expression of support for or defense of, the January 6 Insurrection must, pursuant to Section 3 of the 14th Amendment to the United States Constitution, be declared ineligible to hold any civil or military office in the United States at the federal, state, or local level.

Amendment XIV, Section 3, Clause 2

44. Clause 2 of Section 3 of the 14th Amendment to the United States Constitution reads: "Congress may, by a vote of two-third of *each* House, remove such disability." (*Emphasis added*).

45. Plaintiff emphasizes the Constitution's use of the term "each" since there appears to be widespread misconception that only the U.S. House of Representatives is needed to remove the disqualifying disability, which stems from the 1868 case of *Butler*.[21] Therefore, if 290 members of the U.S. House of Representatives and 67 members of the U.S. Senate vote to remove the disqualifying disability, a person otherwise ineligible to hold office under Section 3 of the 14th Amendment could hold office. In today's political climate, this is impossible.

46. It is also critical to anticipatorily highlight that a Presidential pardon does not remove this disability since the United States Constitution provides that only Congress may lift the disability. This is contrary to an old, outdated, and clearly biased Attorney General Opinion from Southern Confederate Augustus Garland that attempted to limit its scope; it inexplicably ignored the term "each" and suggested a presidential pardon could remove the qualification

[20] *See* Richard M. Re, Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 Yale L.J. 1584, 1622–23 (2012); *also see* Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 259 (1988).
[21] *See Butler*, 2 Bart. El. Cas. 461 (1868).

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disability notwithstanding the Constitution's clear and exclusive reservation and delegation of that power solely to Congress.[22]

Scope of Amendment XIV

47. The disqualification applies to both civil and military positions at both the federal and state level, which has been judicially determined to even include a local constable position.[23]

48. "There can be no office which is not either legislative, judicial, or executive [covered by Section 3 of the 14th Amendment because]… it embraces every office… [and] it was passed to punish those high in authority… for their bad faith toward the government they had sworn [in their oath of office] to support."[24]

49. "The amendment applies to all the states of the Union, to all offices under the United States or under any state, and to all persons in the category of prohibition, and for all time present and future."[25] It is a lifetime ban from public office.

50. As mentioned before, Section 3 of the 14th Amendment is merely an Anti-Insurrection Qualification Clause. It was not intended to be a punishment for someone who engaged in an insurrection or gave aid or comfort to insurrectionists any more than the Natural Born Citizen qualification clause is punitive. If you are not a natural born citizen of the United States, you cannot hold the Office of the Presidency. If you violated your oath of office by engaging in an insurrection, you cannot hold the Office of the Presidency. It's a mere qualification for the office.

Enforcement of Amendment XIV

[22] *See Lawton's Case*, 18 Op.Atty.Gen. 149 (1885).
[23] *See U.S. v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871).
[24] *Id.*
[25] *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869).

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51. In an attempt to neutralize Section 3 of the 14th Amendment, some commentators dating as far back as 1868 developed the legal theory that this provision of the United States Constitution was unenforceable without enabling legislation. Such a suggestion is legally baseless, patently frivolous, and wholly without merit.

52. In fact, it was the President of the Confederacy, Jefferson Davis, who, in 1868, contended that Section 3 *was* self-executing and, therefore, barred his criminal trial for treason. *See Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87 (2021). Moreover, it was Judge Chase who agreed in Jefferson Davis' criminal trial that Section 3 was self-executing; thereby implicating the prohibition against Double Jeopardy.[26] Shortly thereafter, however, Justice Chase reversed his position and declared that Section 3 was not self-executing when a black criminal defendant challenged his conviction on the grounds that the judge presiding over his trial fought for the Confederacy and was, therefore, ineligible to preside over his trial rendering his guilty verdict null and void.[27] Following these irreconcilable rulings from a clearly biased Justice Chase who could not make up his mind, Congress decided to act on its own by enacting Section 3 enforcement statutes and, shortly thereafter, federal prosecutors began bringing actions to oust ineligible officials, including half of the Tennessee Supreme Court.[28] Congress' enactment of legislation was not an admission that Section 3 was not self-executing; it was to avoid the lunacy of a clearly biased, conflicted, and politically active Chief Justice that could not perform the functions of his office in a neutral, intellectual, fair, and impartial manner.

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[26] *See Case of Davis*, 7 F. Cas. 63, 90, 92-94, (C.C.D. Va. 1867) (No. 3,621a) (describing Davis' argument and the Government's response); *Id.* at 102 (noting the Chief Justice's view).
[27] *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).
[28] *See Act of May 31*, 1870 (First Ku Klux Klan Act), ch. 114, § 14, 16 Stat. 140, 143; id. at § 15 (imposing criminal penalties for knowing Section Three violations); Sam D. Elliott, When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870, 49 Tenn B.J. 20 (2013).

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53. In 1871, Amos Powell was indicted, via an enabling statute making it a *crime* to knowingly violate Section 3 of the 14th Amendment, "for accepting the office of sheriff when disqualified from holding office by the 14th Amendment… [and the] indictment charged that the defendant knowingly accepted office under the state of North Carolina, to which he was ineligible under the provisions of the 3d section of the 14th Amendment."[29] In other words, to attach criminal penalties, enabling legislation is absolutely required since Section 3 of the 14th Amendment makes no reference to criminal penalties.

54. Congress has jurisdiction to expel or exclude its own members that it determines have violated Section 3 of the 14th Amendment.[30] However, it is unclear whether Congress can unilaterally impose said disability on the Executive Branch since that could be deemed an encroachment on a separate branch of the federal government. Nevertheless, a Congressional finding of liability would certainly aid the judiciary's fact-finding mission.

55. Historically, the neutral finder of fact and arbiter of law has been the judiciary. Consistent with our principles of federalism and separation of powers, it is more likely that the judiciary and, in particular, the United States Supreme Court would be the only authority that the drafters of Section 3 could have possibly envisioned as being the most competent and legitimate body to determine whether an individual is ineligible under the Anti-Insurrection Qualification Clause.

[29] *See U.S. v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871).
[30] *See Powell v. McCormack*, 395 U.S. 486 (1969).

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Respectfully submitted

August 31, 2023.

By /s/John Anthony Castro

JOHN ANTHONY CASTRO
12 Park Place
Mansfield, TX 76063
Tel. (202) 594 - 4344
J.Castro@JohnCastro.com
PLAINTIFF *PRO SE*

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VERIFICATION

I, John Anthony Castro, declare as follows:

1. I am the plaintiff in the present case, a U.S. citizen, and an FEC-registered Republican primary presidential candidate (Candidate FEC ID Number P40007320) for the 2024 Presidential Election.

2. I intend to appear on the 2024 Republican primary ballot in this state.

3. I have personal first-hand knowledge of all of the factual matters set forth in this document, and, if called upon to testify or give oral arguments, I would competently do so.

4. Pursuant to 28 U.S.C. § 1746 and state, I verify under penalty of perjury that the entirety of the foregoing document is true and correct.

Executed on August 31, 2023.

/s/ John Anthony Castro
John Anthony Castro

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TrueFiling Case Initiation - Summons and Complaint

Case Title: JOHN ANTHONY CASTRO V. SECRETARY

Case Type: MZ

Case Description: Other Damage Suits: All other claims not otherwise coded

Party 1 (Plaintiff)

Name: John Anthony Castro **Phone:** (202) 594-4344

Address: 12 Park Place

City: Mansfield **State:** Texas **Zip:** 76063

Party is Pro Se

Party 2 (Defendant)

Business: Secretary of State Jocelyn Benson **Phone:** (888) 767-6424

Address: 430 W. Allegan Street Richard H. Austin Building - 4th Floor

City: Lansing **State:** Michigan **Zip:** 48918

Party is Pro Se

Party 3 (Defendant)

Name: Donald John Trump **Phone:**

Address: 1100 South Ocean Boulevard

City: Palm Beach **State:** Florida **Zip:** 33480

Party is Pro Se

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STATE OF MICHIGAN
COURT OF CLAIMS

Bundle Cover Sheet

Lower Court:	L Ct No.:	COC No.:
		TEMP-C8QJ3H9S

Case Title:
JOHN ANTHONY CASTRO v. SECRETARY OF STATE JOCELYN BENSON

Priority:	Filing Option:
NONE	File Only

Filer Information

Filer
John Anthony Castro
12 Park Place
Mansfield, TX 76063

J.Castro@JohnCastro.com

Attorney
John Anthony Castro, PRO PER()
12 Park Place
Mansfield, TX 76063

J.Castro@JohnCastro.com

Filing Summary

Filing Type	Filing Name		Fee
Summons and Complaint	Complaint for Injunctive Relief		$150.00
		eFiling System Fee:	$25.00
		NON-REFUNDABLE Automated Payment Service Fee:	$5.25
		Total:	**$180.25**

Alternate Payment Reason: None

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The document(s) listed above were electronically filed with the Michigan Court of Claims.

TEMP-C8QJ3H9S-35902702

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/19/2023 6:44:07 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: **Wk Prod MCL 15.243(1)(h)** PRIVILEGED

Jonathan, the memo refers to a 9/15/23 memo. Do I have that somewhere already?

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 15, 2023 3:30 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: **Wk Prod MCL 15.243(1)(h)** -- PRIVILEGED

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Heather,

A/C Priv MCL 15.243(1)(g)

Please let me know if you have any questions or would like to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/25/2023 7:29:37 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Castro v Benson & Trump - pro se complaint filed 8/31

A/C Priv MCL 15.243(1)(g)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 25, 2023 3:23 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: **Wk Prod MCL 15.243(1)(h)**

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, September 25, 2023 at 2:47 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: Castro v Benson & Trump - pro se complaint filed 8/31

From: Meingast, Heather (AG)
Sent: Tuesday, September 19, 2023 4:56 PM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; McInerney, Jenny (MDOS) <McInerneyJ1@michigan.gov>; Bourbonais, Lori (MDOS) <bourbonaisl@michigan.gov>; Schaar, Meghan (MDOS) <SchaarM1@michigan.gov>; Lillie, Erin (MDOS) <LillieE@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Castro v Benson & Trump - pro se complaint filed 8/31
Importance: High

Hi All,

Attached is a pro se complaint filed by a Texas resident, purportedly a GOP presidential candidate, seeking to bar the Secretary from placing Trump on the ballot. This was filed awhile ago so it does not seem like he intends or understands that it needs to be served, but perhaps its still in the mail. The Court of Claims provided us the attached copy.

Heather

From: AG-NOI <AG-NOI@michigan.gov>
Sent: Tuesday, September 19, 2023 4:20 PM

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To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>
Subject: FW: Copies of Complaints per MCL 600.6434 (case 23-000114-MZ through 23-000123-MP)

From: Angela Davis <ADavis@courts.mi.gov>
Sent: Thursday, September 7, 2023 11:07 AM
To: AG-NOI <AG-NOI@michigan.gov>
Subject: Copies of Complaints per MCL 600.6434 (case 23-000114-MZ through 23-000123-MP)

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Good Afternoon,

Attached are recently processed complaints that were filed in the Court of Claims.

Please note that case #23-000117-MZ is purposefully omitted as the complaint was never filed in this matter. Also, cases #23-000118-MK and #23-000121-MZ are transfer cases. A copy of the complaint in each case when they are received by the Court of Claims.

Have a nice day,

Angela

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/28/2023 2:22:51 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: Detroit News article

fyi

From: Bush, Kimberly (AG) <BushK2@michigan.gov>
Sent: Thursday, September 28, 2023 10:05 AM
To: Sherman, Ann (AG) <ShermanA@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: Fwd: Detroit News article

I believe we haven't been served yet, but can you confirm?

Thx!

From: LeBlanc, Elizabeth <eleblanc@detroitnews.com>
Sent: Thursday, September 28, 2023 10:03 AM
To: Wimmer, Daniel (AG) <WimmerD2@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: Detroit News article

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Hi, Danny and Kim.
Eleven state lawmakers are filing suit today in federal district court challenging the voting rights petition initiatives that were approved by voters in 2018 and 2022. They're arguing the citizen-led initiative infringes on state and U.S. constitutional language that gives the Legislature the sole authority to create election law. Would the AG's office like to respond at all?
Thanks for any help you're able to provide,
Beth

Beth LeBlanc
Detroit News Lansing Bureau
eleblanc@detroitnews.com
810.730.9781

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/29/2023 10:45:46 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Free Speech for People 14.3 complaint

We were served today as well.

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 29, 2023 3:38 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Free Speech for People 14.3 complaint

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Free Speech for People, which has filed lawsuits to disqualify Trump in several states, sued Secretary Benson today in the Court of Claims. Complaint attached. According to paragraph 313, Benson "has both the authority and responsibility to determine whether a candidate for office is ineligible to appear on the ballot for the presidential nomination primary or the general election" under MCL 614a(1). That provision is the one requiring the Secretary to "issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a."

Please let me know if we can be of any assistance (beyond the memos we provided) or if you'd like to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/28/2023 7:14:12 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Complaint

I just checked a bit ago, thanks.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 3:06 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Complaint

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We just got the complaint, if you don't have it yet.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/4/2023 8:34:39 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 Litigation Update
Attachments: response01 pl mtn expedite.pdf

Jonathan, I filed a response opposing Davis's motion to expedite at least until a reasonable time.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 5:43 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 Litigation Update

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather,

Please find attached a litigation tracker which provides descriptions and status updates of cases filed around the country involving the Disqualification Clause of the 14th Amendment. We will endeavor to send an updated tracker weekly and will indicate changes from the previous week on the tracker. Please let us know if you are aware of any updates that we are missing!

Below is a summary of relevant cases/filings from the past week:

Colorado:

- On Friday, September 22, in *Anderson v. Griswold*, state district court Judge Sarah Wallace issued a Protective Order banning threats and intimidation on all parties, the lawyers, the judge and her staff.
- On the same day, President Trump filed two Motions to Dismiss: One First Amendment Motion based on the Colorado Anti-SLAPP statute and one based on standing and the Colorado statutory scheme. President Trump indicated he would file an additional Motion to Dismiss on September 28 addressing 14.3 structural arguments.
- The Colorado Republican Committee also filed a Motion to Dismiss raising First Amendment arguments, statutory arguments, and arguments related to 14.3.

Michigan:

- On September 15, activist Robert Davis filed a pro se civil action to require Secretary of State Jocelyn Benson to exclude Trump from the Michigan primary ballot.
- On September 19, Davis filed an Emergency Motion for an Expedited Hearing and Expedited Briefing.
- Secretary Benson was served on September 22.

Minnesota:

- In *Growe v. Simon*, on September 27, 2023, Secretary Simon filed a responsive pleading indicating he takes no position on the merits but agrees with the Petitioners that the current proceeding is the proper process to determine Trump's eligibility. Secretary Simon requested that the issue be decided no later than January 5, 2024.
- Several groups and individuals filed motions for leave to file amicus briefs including CREW, Bruce Ackerman, Derek Muller, the Constitutional Accountability Center, and the RNC.
- Oral Arguments are scheduled for November 2.

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Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

No. 22-000128-MM

HON. JAMES ROBERT REDFORD

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,

Defendant.

Robert Davis, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)(
313.523.PII MCL 15.243
PII MCL 15.243(1)(a)t@gmail.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

---/

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR EXPEDITED HEARING AND EXPEDITED BRIEFING SCHEDULE

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: September 29, 2023

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INTRODUCTION

This Court should deny Plaintiff Robert Davis's emergency motion for expedited relief in this case to the extent he is seeking relief by October 3, 2023. Defendant Secretary of State Jocelyn Benson has not had sufficient time to review the pleadings in this case or to respond adequately to Davis's motion. Further, Davis's claims suffer from ripeness issues that do not support the current request for expedited relief. While the Secretary does not necessarily oppose a reasonably expedited schedule in this matter, the current request for relief by October 3 should be denied.

COUNTER-STATEMENT OF FACTS

In his complaint for declaratory relief, Plaintiff Robert Davis seeks relief on multiple counts, but only Counts I through IV are the subject of his motion to expedite.

In Count I, Davis seeks a declaration that Secretary Benson must schedule and hold the 2024 presidential primary election on March 12, 2024, rather than on February 27, 2024, as required by MCL 168.613a(1), as amended by Public Act 2 of 2023. (Comp, ¶¶ 7-41.)[1] Public Act 2 amended MCL 168.613a to change the date for holding the presidential primary to the fourth Tuesday in February, rather than the second Tuesday in March. See 2023 PA 2[2]; MCL 168.613a, as amended. As

---

[1] Davis has made a similar claim against the Secretary in Court of Claims Case No. 28-000128-MB, which remains pending.

[2] The legislative history for Public Act 2 is available at Michigan Legislature - Senate Bill 0013 (2023).

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Davis notes in his brief, the Act did not receive immediate effect.[3] Under article 4, § 27 of the Michigan Constitution, unless immediate effect is given an act, it shall not take effect until 90 days from the end of session, often referred to as sine die. Const 1963, art 4, § 27. This means that Public Act 2 will take effect 90 days from when the Legislature ends its regular session. But when the Legislature will end its current session is unknown. Typically, the Legislature adjourns sometime in December making sine die sometime in March. If the Legislature adjourns earlier, then sine die is earlier as well. So, at this point the effective date of Public Act 2 is unknown. Obviously, if the Legislature does not adjourn in time to make Public Act 2 effective in time to hold a February presidential primary, the primary will be conducted in March as required by the existing version of MCL 168.613a.

But given the fact that Public Act 2 could become effective, the Secretary has prepared for that eventuality by computing deadlines for the presidential primary based on the amendment but noting that these deadlines could be adjusted if Public Act 2 does not become effective in time to conduct the primary.[4]

In Count II, Davis seeks mandamus relief to compel the Secretary to hold the presidential primary in March consistent with the declaration he seeks in Count I. (Compl, ¶¶ 42-55.)

---

[3] *Id.*

[4] See Calendar of election dates available at Election Calendar of Dates (michigan.gov), and guidance for presidential candidates for 2024 at Ballot-Access-Information-for-Presidential-Candidates.pdf (michigan.gov).

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In Count III, Davis seeks a declaration that Secretary Benson has a legal duty under article 11, § 1 of the Michigan Constitution and case law to determine whether a presidential candidate meets eligibility requirements to run for the office of U.S. President. (Compl, ¶¶ 56-90.) Specifically, Davis alleges that the Secretary has the authority to make a determination that former President Donald Trump is ineligible to run as candidate for President in 2024 pursuant to the insurrection clause in the Fourteenth Amendment to the U.S. Constitution. (*Id.*)[5]

As noted in Davis's complaint, the Secretary is required to issue a "list of the individuals generally advocated by the national news media to be potential candidates" for each major political party's nomination by 4:00 p.m. on **November 10, 2023**. See MCL 168.614a(1). Thereafter, the state chairperson of each major political party must file a "list of individuals whom they consider to be potential presidential candidates for that political party" with the Secretary of State no later than 4:00 p.m. on **November 14, 2023**. See MCL 168.614a(2). All names of the candidates will then be placed on the presidential primary ballot unless a candidate withdraws. MCL 168.615a.

In Count IV, Davis seeks mandamus relief to compel the Secretary to issue the declaratory ruling previously requested by Davis declaring that former

---

[5] Section 3 of the Fourteenth Amendment provides, in part that "[n]o person shall be a[n] . . . elector of President and Vice-President, or hold any office, civil or military, under the United States. . . who, having previously taken an oath, . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

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President Trump is ineligible to run as a candidate for U.S. President in Michigan. (Compl, ¶¶ 91-104.)

Davis filed his complaint against Secretary Benson on September 15, 2023, and emergency motion for declaratory relief on September 18, 2023.[6] He then filed an emergency motion for an expedited hearing and briefing schedule on September 19, 2023.[7] But Plaintiff did not serve his complaint and motions until September 22, 2023.[8] In his "emergency motion for expedited hearing and expedited briefing schedule for plaintiff's 9/18/2023 emergency motion for declaratory judgment, writ of mandamus, and order to show cause for Counts I-IV of verified complaint", filed September 19, Davis requests that this Court decide his motions "within the next 14 days," which would be by October 3, 2023. (9/19/23 Motion, p 3.)

ARGUMENT

I. This Court should deny Davis's September 19, 2023, emergency motion for an expedited hearing and briefing schedule to the extent it seeks relief by October 3, 2023.

Davis purportedly seeks declaratory relief under MCR 2.605, which permits this Court to "order a speedy hearing of an action for declaratory relief." MCR 2.605(D). Secretary Benson does not oppose a reasonably expedited determination of this action, but she does object to any request for relief by October 3, 2023.

---

[6] See register of actions for Case No. 23-000128-MB, available at RegisterOfActions (michigan.gov)

[7] *Id.*

[8] *Id.*

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Defendant Benson was only served with the pleadings in this case on September 22, 2023. Neither she, nor her staff, nor the undesigned counsel have had sufficient time to thoroughly review Davis's filings and requests for relief. Further, the undersigned counsel already had and have deadlines to comply with in other cases, including other election-related cases, that make responding before or by October 3, 2023, impossible.

Further, while it is true that election cases are generally accorded expedited treatment as Davis states, (9/19/23 Motion, PDF p 4), Davis's claim that a decision in this matter is somehow needed by October 3 is entirely overstated.

First, as noted above with respect to Counts I and II, the effective date of Public Act 2 is controlled by the Constitution, and at this time it is unknown when the Act will become effective since it is unclear when the Legislature will adjourn. Thus, Davis's claim does not appear ripe. Indeed, without that information, expedited relief could not be granted anyway.

Second, with respect to Counts III and IV, candidates for the 2024 presidential primary will not even be formally identified by the Secretary and major political parties until November 10 and November 14, respectively. While it seems likely that former President Trump will be identified as a candidate, and if listed as a candidate would not withdraw, that cannot be known for certain yet. So, Davis's claims again suffer from ripeness issues. And regardless, ballot printing for the presidential primary would not begin until sometime in early January 2024 (if the primary is actually held on February 27, 2024, which it may or may not be.)

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Again, the Secretary does not oppose a reasonably expedited briefing and hearing schedule in this matter (setting aside the ripeness issues), but relief by October 3, 2023, is not necessary or warranted under the facts of this case to date.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant Secretary of State Jocelyn Benson respectfully requests that this Honorable Court enter an order denying Plaintiff's September 19, 2023, "emergency motion for expedited hearing and expedited briefing schedule for plaintiff's 9/18/2023 emergency motion for declaratory judgment, writ of mandamus, and order to show cause for Counts I-IV of verified complaint," together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: September 29, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on September 29, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/2/2023 5:48:21 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Sample FOIA lawsuits
Attachments: 2023-002835-CZ - COMPLAINT-PETITION FILED - CIVIL - 8-24-2023.pdf; 2023-002837-CZ - COMPLAINT-PETITION FILED - CIVIL - 8-24-2023.pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

FILED by Macomb County Circuit Court
8/23/2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

Michael Lewis Butz

Plaintiff,

vs.

Case No.: 2023-002835-CZ
James M. Maceroni

Cathy LaFontaine, Clerk, Township of Richmond and Township of Richmond, a Michigan Municipal Corporation.

Defendants.

Michael Lewis Butz - Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1
586-596-PII MCL 15.2

COMPLAINT-VIOLATION OF FREEDOM OF INFORMATION ACT AND VIOLATIONS OF FEDERAL AND STATE LAW(S)

NOW COMES Michael Lewis Butz and states the following by way of complaint:

1. Michael Lewis Butz as plaintiff and a resident of the County of Macomb files this complaint pursuant to the Michigan Freedom of Information Act (MCLA 15.231, et. seq.).
2. The Township of Richmond is a Michigan municipal corporation and Defendant Cathy LaFontaine is the Clerk for said Township. Ms. LaFontaine is sued in her official capacity as Clerk of Defendant Township.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

3. At all times relevant hereto, Defendant Lafontaine was acting on behalf of the State of Michigan and the Township of Richmond and in her official capacity.

4. This action is specifically authorized by statute, MCLA 15.235 and MCLA 15.240.

5. On May 2, 2003, Plaintiff filed a written request with Defendant Township and Defendant LaFontaine. The request was filed pursuant to the Michigan Freedom of Information Act and the purpose of filing the request was to obtain public records. Plaintiff sought extract files from the electronic poll books for all registrants for all voting precincts for elections on November 8, 2022 and May 2, 2023. Plaintiff agreed that some of the information contained in the poll books were exempt from disclosure and asked that this information be redacted prior to disclosure. [1]

6. On May 15, 2023, Defendants responded to the request, denying same. Defendants cited exemptions under MCLA 15.243(1)(y) and MCLA 15.243(1)(z), specifically security and safety of persons and systems, including the electoral process.

7. The specific information sought by Plaintiff, including election returns and the poll lists, are required to be delivered to the clerk of the township or city, as the case may be, and shall be by him filed in his office, MCLA 168.810. The electronic poll book poll list must be carefully preserved and may be destroyed after the expiration of 2

[1] . A copy of the freedom of information request is attached.

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years following the primary or election at which the same were used, MCLA 168.811.

8. The information sought including registration records, must be open for public inspection, MCLA 168.516.

9. In addition to the provisions of the Michigan Freedom of Information Act. (MCLA 15.231, et. seq., MCLA 750.492 requires public officials, after request to permit inspection of the official records of said public office. Failure to do so is a violation of Michigan Law.

10. The public election records and information sought for any election with a federal candidate on the ballot are required by Federal Law to be maintained and preserved for a period of twenty-two (22) months, 52 USC 20701 and destruction or concealment of election records is a crime, 52 USC 20702.

11. The Defendants have failed to comply with the freedom of information act and Plaintiff's request by failing to separate the (alleged) exempt materials from the nonexempt materials and failed to describe the materials exempted, MCLA 15.244.

12. Plaintiff is entitled to production of the item(s) requested and none of the material(s), document(s) and things requested are exempt from disclosure.

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13. Plaintiff seeks prompt judicial review of the denial(s), MCLA 15.235(8), here the burden is on the Defendants to sustain the denial(s), MCLA 15.240(4).

14. Defendants did not comply with Michigan Statute, specifically, MCLA 5.235(2)(d) and the time requirements imposed thereunder.

15. Defendants violated the provisions of the Michigan Freedom of Information ct, subjecting Defendants to the sanctions imposed under the act.

Wherefore, Plaintiff requests a hearing at the earliest practicable date and expedited in every way, MCL 15.240(5) Plaintiff also requests an order issued from this court providing for immediate production of the requested items, things and documents. Plaintiff also requests court costs, fees and punitive damages for the wrongful failure to disclose that which has been requested.

Michael Lewis Butz, Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1) [redacted], MI PII MCL 15.243(1)
586/596 PII MCL 15.243(1)

Dated: 8/23/2023

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Exhibit 1:

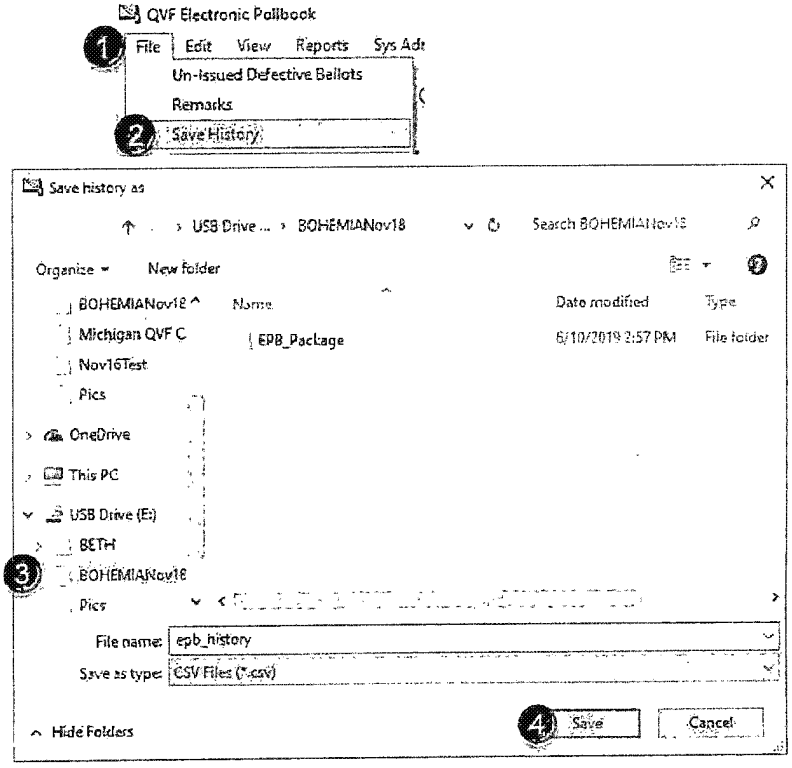
Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

1. Click File
2. Click Save History
3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\
4. Click Save

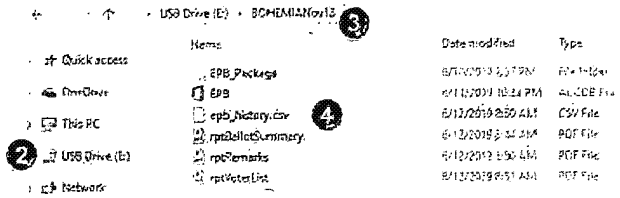


Obtained by Judicial Watch, Inc. v. Michigan FOIA

Ensure Files are on Flash Drive

To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB_Backup	Access file
EPB_History	CSV file
rptBallotSummary	PDF file
rptRemarks	PDF file
rptVoterList	PDF file

The EPB_History.CSV file is what is being requested

You may also see the following files in your folder:

File Name	File Type
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

FILED by Macomb County Circuit Court
8/24/2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

Michael Lewis Butz

Plaintiff,

vs.

Case No.: 2023-002837-CZ

Kristi Pozzi, Clerk, Township of Macomb and Township of Macomb, a Michigan Municipal Corporation.

RICHARD L. CARETTI

Defendants.

Michael Lewis Butz - Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)(a)
586-596 PII MCL 15.24

COMPLAINT-VIOLATION OF FREEDOM OF INFORMATION ACT AND VIOLATIONS OF FEDERAL AND STATE LAW(S)

NOW COMES Michael Lewis Butz and states the following by way of complaint:

1. Michael Lewis Butz as plaintiff and a resident of the County of Macomb files this complaint pursuant to the Michigan Freedom of Information Act (MCLA 15.231, et. seq.).
2. The Township of Macomb is a Michigan municipal corporation and Defendant Kristi Pozzi is the Clerk for said Township. Ms. Pozzi is sued in her official capacity as Clerk of Defendant Township.
3. At all times relevant hereto, Defendant Pozzi was acting on behalf of the State of Michigan and the Township of Macomb and in her official capacity.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

4. This action is specifically authorized by statute, MCLA 15.235 and MCLA 15.240.

5. On May 2, 2003, Plaintiff filed a written request with Defendant Township and Defendant Pozzi. The request was filed pursuant to the Michigan Freedom of Information Act and the purpose of filing the request was to obtain public records. Plaintiff sought extract files from the electronic poll books for all registrants for all voting precincts for elections on November 8, 2022 and May 2, 2023. Plaintiff agreed that some of the information contained in the poll books were exempt from disclosure and asked that this information be redacted prior to disclosure. [1]

6. On June 6, 2023, Defendants responded to the request, denying same. Defendants cited exemptions under MCLA 15.243(1)(y) and MCLA 15.243(1)(z), specifically disclosure would constitute information relating to cybersecurity plans, assessments or vulnerabilities and a general threat to Michigan's electoral process. Defendants specifically cited MCLA 15.243(1)(y) and MCLA 15.243(1)(z).

7. The specific information sought by Plaintiff, including election returns and the poll lists, are required to be delivered to the clerk of the township or city, as the case may be, and shall be by him filed in his office, MCLA 168.810. The electronic poll book poll list must be carefully preserved and may be destroyed after the expiration of 2

[1]. A copy of the freedom of information request is attached.

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years following the primary or election at which the same were used, MCLA 168.811.

8. The information sought including registration records, must be open for public inspection, MCLA 168.516.

9. In addition to the provisions of the Michigan Freedom of Information Act. (MCLA 15.231, et. seq., MCLA 750.492 requires public officials, after request to permit inspection of the official records of said public office. Failure to do so is a violation of Michigan Law.

10. The public election records and information sought for any election with a federal candidate on the ballot are required by Federal Law to be maintained and preserved for a period of twenty-two (22) months, 52 USC 20701 and destruction or concealment of election records is a crime, 52 USC 20702.

11. The Defendants have failed to comply with the freedom of information act and Plaintiff's request by failing to separate the (alleged) exempt materials from the nonexempt materials and failed to describe the materials exempted, MCLA 15.244.

12. Plaintiff is entitled to production of the item(s) requested and none of the material(s), document(s) and things requested are exempt from disclosure.

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13. Plaintiff seeks prompt judicial review of the denial(s), MCLA 15.235(8), here the burden is on the Defendants to sustain the denial(s), MCLA 15.240(4).

14. Defendants did not comply with Michigan Statute, specifically, MCLA 5.235(2)(d) and the time requirements imposed thereunder.

15. Defendants violated the provisions of the Michigan Freedom of Information ct, subjecting Defendants to the sanctions imposed under the act.

Wherefore, Plaintiff requests a hearing at the earliest practicable date and expedited in every way, MCL 15.240(5) Plaintiff also requests an order issued from this court providing for immediate production of the requested items, things and documents. Plaintiff also requests court costs, fees and punitive damages for the wrongful failure to disclose that which has been requested.

Michael Lewis Butz, Plaintiff

PII MCL 15.243(1)(a)

PII MCL 15.243(1) [redacted], MI PII MCL 15.243(1)

586/596-PII MCL 15.24[redacted]

Dated: 8/23/2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Michael Butz [redacted]@gmail.com>

Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

1 message

Michael Butz <[redacted]@gmail.com> Tue, May 2, 2023 at 3:10 PM
To: elections@macomb-mi.gov
Bcc: Mercede Scargall <mercede.scargall@gmail.com>, Michelle Franzen <mfranzen86@yahoo.com>, Melissa Pehlis <mptorch@gmail.com>, Brian <brian_c1959@yahoo.com>, Scott Aughney <seaof7@gmail.com>, Joanne Bakale <Joanne.electioninfo@gmail.com>, Sue Vandeberghe <lacybell1958@gmail.com>

Good morning,

Attached is a FOIA request for your jurisdiction's Electronic Poll Book raw data files for the elections concluding November 8, 2022 and May 2, 2023 along with relevant supporting documents:

- MCL 168.509gg
- MCL 168.813
- 52 USC Chapter 207

Please don't hesitate to contact me with any questions or concerns.

Sincerely,

Michael Butz

4 attachments

52 USC Chapter 207.pdf
96K

mcl-168-811.pdf
7K

mcl-168-509gg.pdf
8K

(Macomb) Butz Michael Lewis - Clerk Letter - EPB-FOIA Request - 20230502r.pdf
270K

Obtained by Judicial Watch, Inc. v. Michigan FOIA

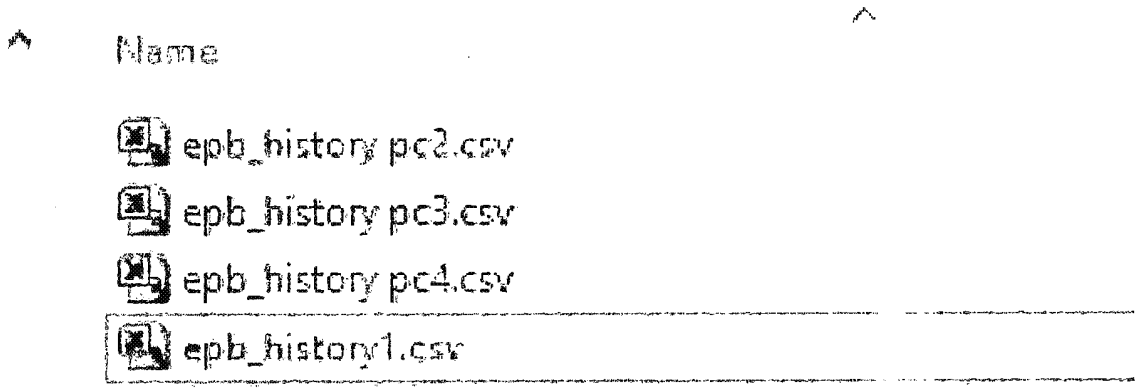
May 2, 2023

Macomb Township Clerk's Office
Attn: Kristi Pozzi

Re: Freedom of Information Act ("FOIA") Request

Dear Kristi Pozzi:

Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023. These files should be in .CSV or .XLS format and typically have a file name beginning with "EPB_History" (see below screenshot).



Please note that these files likely contain the full birthdate (month, day and year) and driver's license number of the registrants in your jurisdiction, which is exempt from FOIA release (MCL 168.509gg). Therefore, please open the copy of the digital file(s), remove or redact the birth month, birth day and drivers license number information, and save your changes before sending the file(s) to me. If you are able to retain the year of birth for the registrants as is permissible per MCL 168.509gg, it will be greatly appreciated.

Instructions on how to locate the requested information is available on pages 40-41 of the Electronic Poll Book Refresh Manual provided by the Michigan Board of Elections. These pages are included in Exhibit 1 below for your convenience.

Once the above redactions have been made, there should be no other FOIA exempt information in the EPB digital records requested. I am not requesting any software or information which would somehow be deemed proprietary. I am only requesting public record information as is my right.

Please note that the EPB .CSV files are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 USC 207) and a state minimum of 24 months (MCL 168.811).

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I prefer to receive the requested information via email as a file attachment. If email is unavailable, please contact me to coordinate an alternative method to fulfill my FOIA request since I would be happy to bring a USB drive to your office so that you or your staff can copy the file(s) to.

Please don't hesitate to contact me if you have any questions.

Thank you.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243
586.596.4945
PII MCL 15.243(1)(a)@gmail.com

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Exhibit 1:

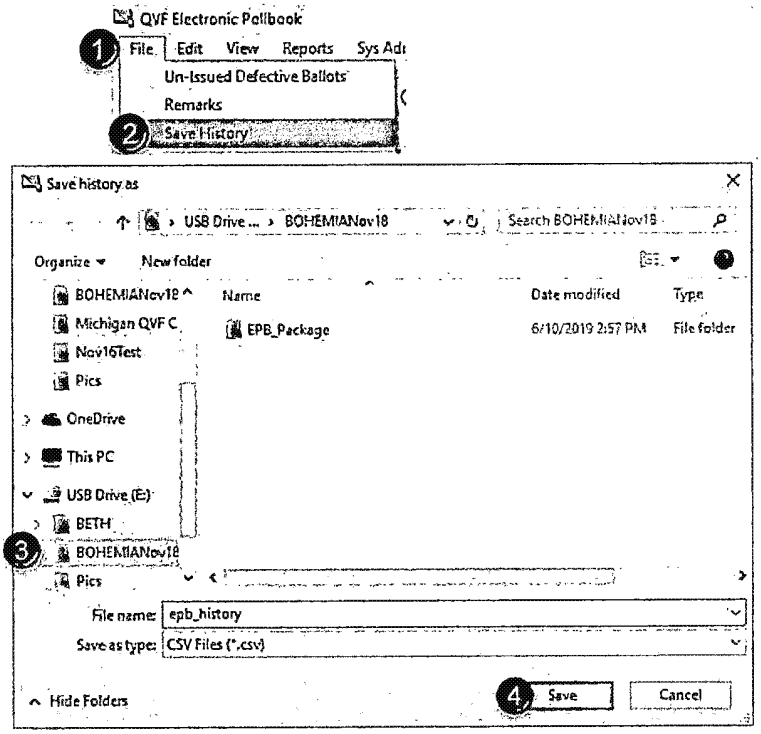
Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

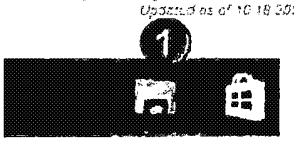
1. Click File
2. Click Save History
3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\
4. Click Save



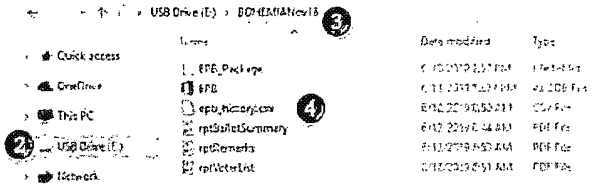
Obtained by Judicial Watch, Inc. v. Michigan FOIA

Ensure Files are on Flash Drive



To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB Back Up	ACCDB file
EPB_History	CSV file
rptBallot Summary	PDF file
rptRemarks	PDF file
rptVoter List	PDF file

The EPB_History.CSV file is what is being requested

You may also see the following files in your folder:

File Name	File Type
EPB_Package	File Folder
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Michael Butz [redacted]@gmail.com>

RE: Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

1 message

Elections <elections@macomb-mi.gov> Wed, May 10, 2023 at 4:30 PM
To: Michael Butz [redacted]@gmail.com>

Attached please find an update regarding your request.

Roger W. Cardamone, MiPMC, CMC

Macomb Township Deputy Clerk

(586) 992-0710

cardamoner@macomb-mi.gov

www.macomb-mi.gov

MACOMB TOWNSHIP

The information contained in this e-mail, including any attachment(s), is intended only for the named recipient(s). If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts you may have made, and notify us immediately by return e-mail. Thank you.

From: Michael Butz [redacted]@gmail.com>
Sent: Tuesday, May 2, 2023 3:11 PM
To: Elections <elections@macomb-mi.gov>
Subject: Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

Good morning,

Attached is a FOIA request for your jurisdiction's Electronic Poll Book raw data files for the elections concluding November 8, 2022 and May 2, 2023 along with relevant supporting documents:

- MCL 168.509gg
- MCL 168.813
- 52 USC Chapter 207

Please don't hesitate to contact me with any questions or concerns.

Sincerely,

Obtained by Judicial Watch, Inc. v. Michigan | OAG

Michael Butz

2023-066 Notice to Extend Response Time.pdf
1405K

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Township: Keep original and provide copy, along with Public Summary, to requestor at no charge.

Macomb Township, Michigan
54111 Broughton Road
Macomb, MI 48042
586-992-0710

Extension Form

Notice to Extend Response Time for FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 2023-066 Date Received: 5/3/2023
Date of This Notice: 5/10/2023
(Please Print or Type)

Check if received via: ☒ Email ☐ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____
Date discovered in junk/spam folder: _____

Name	Michael Lewis Butz	Phone	586.596 [redacted]
Firm/Organization		Fax	
Street	[redacted]	Email	[redacted]@gmail.com
City	[redacted]	State MI	Zip [redacted]

Request for: ☒ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis
Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☒ Email to address above
☐ Deliver on digital media provided by the township: _____

Record(s) You Requested: (Listed here or see attached copy of original request) Request attached.

We are extending the date to respond to your FOIA request for no more than 10 business days, until 5/24/2023 (*month, day, year*).
Only one extension may be taken per FOIA request. If you have any questions regarding this extension, contact FOIA Coordinator at foia@macomb-mi.gov

Estimated Time Frame to Provide Records: 5/24/2023 (*days or date*)
The time frame estimate is nonbinding upon the township, but the township is providing the estimate in good faith. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.

Reason for Extension:

☐ **1.** The township needs to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to your request. Specifically, the township must:

☐ **2.** The township needs to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the township office. Specifically, the township must coordinate documents from the following locations:

☒ **3.** Other (describe): Due to the complexity of your request, a 10 business day extension is necessary. We are continuing to investigate and research issues involving whether a request would create an exposure to the operating system resulting in injury. We are also reviewing our methods and capabilities in responding, including likely time involved.

Signature of FOIA Coordinator: [signature] **Date:** 5/10/2023

(Created by Michigan Townships Association, April 2015)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

2023-066 May 3, 2023

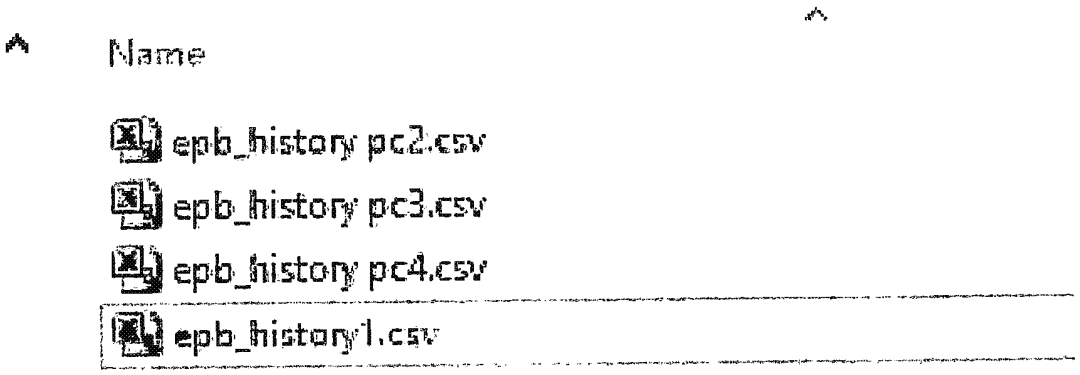
May 2, 2023

Macomb Township Clerk's Office
Attn: Kristi Pozzi

Re: Freedom of Information Act ("FOIA") Request

Dear Kristi Pozzi:

Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023. These files should be in .CSV or .XLS format and typically have a file name beginning with "EPB_History" (see below screenshot).



Please note that these files likely contain the full birthdate (month, day and year) and driver's license number of the registrants in your jurisdiction, which is exempt from FOIA release (MCL 168.509gg). Therefore, please open the copy of the digital file(s), remove or redact the birth month, birth day and drivers license number information, and save your changes before sending the file(s) to me. If you are able to retain the year of birth for the registrants as is permissible per MCL 168.509gg, it will be greatly appreciated.

Instructions on how to locate the requested information is available on pages 40-41 of the Electronic Poll Book Refresh Manual provided by the Michigan Board of Elections. These pages are included in Exhibit 1 below for your convenience.

Once the above redactions have been made, there should be no other FOIA exempt information in the EPB digital records requested. I am not requesting any software or information which would somehow be deemed proprietary. I am only requesting public record information as is my right.

Please note that the EPB .CSV files are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 USC 207) and a state minimum of 24 months (MCL 168.811).

Obtained by Judicial Watch, Inc. v. Michigan FOIA

I prefer to receive the requested information via email as a file attachment. If email is unavailable, please contact me to coordinate an alternative method to fulfill my FOIA request since I would be happy to bring a USB drive to your office so that you or your staff can copy the file(s) to.

Please don't hesitate to contact me if you have any questions.

Thank you.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a),
PII MCL 15.243(1)(a), MI PII MCL 15.24
586.596 PII MCL 15
PII MCL 15.243(1) @gmail.com

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Exhibit 1:

Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

1. Click File
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3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

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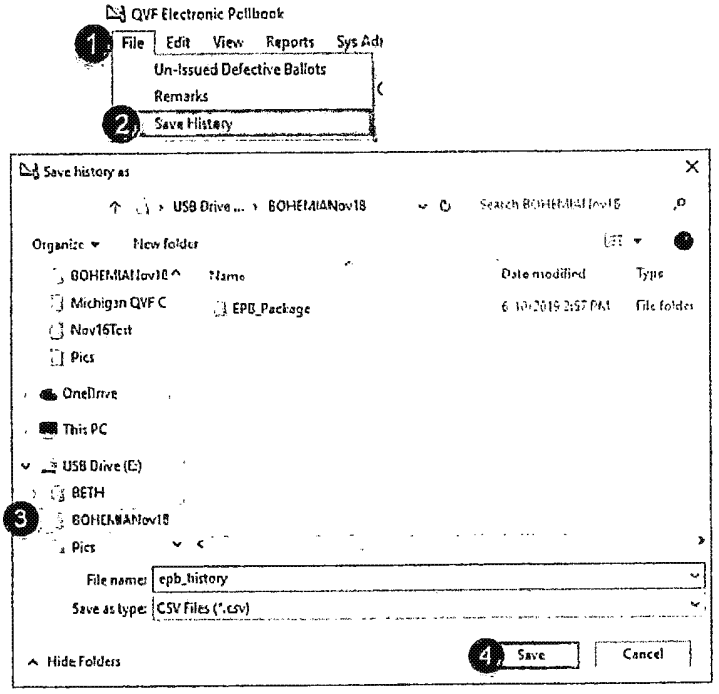
4. Click Save



Obtained by Judicial Watch, Inc. v. Michigan FOIA

Ensure Files are on Flash Drive

To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
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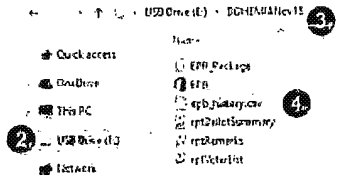

4. You must have the following files:

File Name	File Type
EPB_Backup	ACCDB file
EPB_History	CSV file
rptBallot Summary	PDF file
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rptVoter List	PDF file

The EPB_History.CSV file is what is being requested

You may also see the following files in your folder:

File Name	File Type
EPB_Package	File Folder
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Michael Butz [redacted]@gmail.com>

RE: FOIA Request for Electronic Poll Book public records for 11/8/2022 and 5/2/2023

1 message

Elections <elections@macomb-mi.gov> Tue, Jun 6, 2023 at 4:23 PM
To: Michael Butz [redacted]@gmail.com>

Attached please find the Township's response to your request for records.

Roger W. Cardamone, MiPMC, CMC

Macomb Township Deputy Clerk

(586) 992-0710 ext. 3

cardamoner@macomb-mi.gov

www.macomb-mi.gov

MACOMB TOWNSHIP

The information contained in this e-mail, including any attachment(s), is intended only for the named recipient(s). If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts you may have made, and notify us immediately by return e-mail. Thank you.

From: Michael Butz [redacted]r@gmail.com>
Sent: Saturday, May 13, 2023 5:58 PM
To: Elections <elections@macomb-mi.gov>
Subject: FOIA Request for Electronic Poll Book public records for 11/8/2022 and 5/2/2023

Greetings,

I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for your jurisdiction for the November 8, 2022 and May 2, 2023 elections. As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.

Below are the specific data elements requested:

Obtained by Judicial Watch, Inc. v. Michigan FOIA

1. Voter full name (First, Middle, Last, Suffix)
2. Voter ID
3. Voter number
4. Voter ballot number
5. Date/time of poll book record entry
6. Voter ballot type
7. Voter school district code
8. Voter birth year
9. Precinct
10. Action Description
    a. Issue Regular ballot
    b. Record AV Ballot
    c. UNDO: Issue Regular Ballot
    d. Spoil Ballot
    e. Add standalone remark
    f. Other?
11. Is Undone (True or False)
12. Unlisted voter name (if applicable)

This request includes absentee voter counting boards within your jurisdiction.

I recognize that the Electronic Pollbook contains personal information that is exempt from disclosure per MCL168.509gg such as driver's license number, day of birth and month of birth. Please redact this information as is required in fulfilling this request.

Please understand that I have no desire to obtain any details relating to cybersecurity plans, cyber security methods, voting software coding, voting software infrastructure, voting software configuration or anything else specific to voting software in use for these elections with this specific FOIA request. I seek only the information contained within the Electronic Poll Book related to the elections for November 8, 2022 and May 2, 2023.

Don't hesitate to contact me if it is necessary to refine or clarify this request any further.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Please be advised that I have carbon copied additional persons on this request.

Sincerely,

Michael Lewis Butz

PII MCL 15.243(1)(a)

PII MCL 15.243(1)(a), MI PII MCL 15.243(1)

(586) 596-PII MCL 15.24

PII MCL 15.243(1)(a)@gmail.com

M ReplyForward

2023-075 Response.pdf
1486K

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Township: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

Macomb Township, Michigan
54111 Broughton Road
Macomb, MI 48042
Phone: (586) 992-0710

Denial Form

Notice of Denial of FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 2023-075 Date Received: 5/15/2023
Date of This Notice: 6/6/2023
(Please Print or Type)

Check if received via: ☒ Email ☐ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____
Date discovered in junk/spam folder: _____

Name	Michael Lewis Butz	Phone	586.596.[redacted]
Firm/Organization		Fax	
Street	[redacted]	Email	[redacted]@gmail.com
City	[redacted]	State MI	Zip [redacted]

Request for: ☒ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☒ Email to address above
☐ Deliver on digital media provided by the township: _____

Record(s) You Requested: *(Listed here or see attached copy of original request)* See attached.

☒ **All** **OR** ☐ **Part** of your request for records has been denied. Please refer to this form for an explanation. If you have any questions regarding this denial, contact FOIA Coordinator at foia@macomb-mi.gov

Reason for Denial:

☒ **1. Exempt from Disclosure:** This item is exempt from disclosure under FOIA Section 13, Subsection 15.249(y) & 15.243(z) *(insert number)*, because: See attached.

☐ **2. Record Does Not Exist:** This item does not exist under the name provided in your request or by another name reasonably known to the township. A certificate that the public record does not exist under the name given is attached. If you believe this record does exist, provide a description that will enable us to locate the record: _____

☐ **3. Redaction:** A portion of the requested record had to be separated or deleted (redacted) as it is exempt under FOIA Section 13, Subsection _____ *(insert number)*, because: _____

A brief description of the information that had to be separated or deleted: _____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10 of the Michigan Freedom of Information Act, MCL 15.240, to appeal this denial to the township board or to commence an action in the Circuit Court to compel disclosure of the requested records if you believe they were wrongfully withheld from disclosure. If, after judicial review, the court determines that the township has not complied with MCL 15.235 in making this denial and orders disclosure of all or a portion of a public record, you have the right to receive attorneys' fees and damages as provided in MCL 15.240. (*See back of this form for additional information on your rights.*)

Signature of FOIA Coordinator: [signature] **Date:** 6/6/2023

(Created by Michigan Townships Association, April 2015)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240.amended Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

History: 1976, Act 442, Eff. Apr. 13, 1977;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. 1996, Act 553, Eff. Mar. 31, 1997 ;-- Am. 2014, Act 563, Eff. July 1, 2015

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Notice of Denial
FOIA 2023-075
Michael Lewis Butz

On November 14, 2022, Lori Bourbonais circulated an email to clerks advising, "Clerks must not publicly release data or files that would reveal the software design or data architecture of the electronic poll book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss, or destruction." She also advised that previous requests for electronic poll books (EPB) data were not disclosed on the basis that they constituted, "cyber security plans, assessments, or vulnerabilities," exempt from disclosure.

Additionally, Ms. Bourbonais sent further communication to clerks and election directors on May 10, 2023 with the following directive, "We are aware that clerks have recently received additional requests for epollbook (epb) data. Requests for epb data must be directed to the Bureau, to ensure that sensitive information related to both individual voters and the epb are removed before public disclosure of otherwise available information. As stated in our November 14, 2022 email, clerks must not publicly release data or files that would reveal the software design or data architecture of the epb, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. The requested file contains proprietary software information, security feature information, and personal identifiable information for voters."

"The disclosure of security and technical information is exempt from FOIA and may not be properly redacted if the file is produced by an individual clerk instead of the Bureau. Additionally, the file contains sensitive information regarding your epb laptop(s) that might require you to purchase a new laptop for each precinct if you disclose this information to a 3rd party. The disclosure of sensitive information compromises the integrity of Michigan's elections and may warrant referral for investigation."

If you receive a FOIA request for epb data, the requestor can be directed to the county clerk for paper pollbook copies or to BOE for the log file or voter history."

Your request insists that the extract files as you describe be furnished. It is the opinion of the State that disclosing the extract files even with the redaction of certain personal information as required by statute involves disclosure of records or information of measures designed to protect the security or safety of persons or property or the confidentiality, integrity, or availability of information systems as described under MCL 15.243(y). Additionally, the State has advised, which we cannot dispute, that such data revelation could result in a person becoming a victim of a cyber security incident, or the disclosure of cyber security related practices, procedures, methods, results, organizational information, system infrastructure, hardware or software as described in exemption MCL 15.243(z).

Obtained by Judicial Watch, Inc. v. Michigan FOIA

2023-075 May 15, 2023

Roger Cardamone

From: Michael Butz <[redacted]@gmail.com>
Sent: Saturday, May 13, 2023 5:58 PM
To: Elections
Subject: FOIA Request for Electronic Poll Book public records for 11/8/2022 and 5/2/2023

Greetings,

I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for your jurisdiction for the November 8, 2022 and May 2, 2023 elections. As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.

Below are the specific data elements requested:

1. Voter full name (First, Middle, Last, Suffix)
2. Voter ID
3. Voter number
4. Voter ballot number
5. Date/time of poll book record entry
6. Voter ballot type
7. Voter school district code
8. Voter birth year
9. Precinct
10. Action Description
    a. Issue Regular ballot
    b. Record AV Ballot
    c. UNDO: Issue Regular Ballot
    d. Spoil Ballot
    e. Add standalone remark
    f. Other?
11. Is Undone (True or False)
12. Unlisted voter name (if applicable)

This request includes absentee voter counting boards within your jurisdiction.

I recognize that the Electronic Pollbook contains personal information that is exempt from disclosure per MCL168.509gg such as driver's license number, day of birth and month of birth. Please redact this information as is required in fulfilling this request.

Please understand that I have no desire to obtain any details relating to cybersecurity plans, cyber security methods, voting software coding, voting software infrastructure, voting software configuration or anything else specific to voting software in use for these elections with this specific FOIA request. I seek only the information contained within the Electronic Poll Book related to the elections for November 8, 2022 and May 2, 2023.

Don't hesitate to contact me if it is necessary to refine or clarify this request any further.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Please be advised that I have carbon copied additional persons on this request.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1
(586) 596-PII MCL 15.24
PII MCL 15.243(1)(a)@gmail.com

M ReplyForward

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Township: Keep original and provide copy, along with Public Summary, to requestor at no charge.

Macomb Township, Michigan
54111 Broughton Road
Macomb, MI 48042
586-992-0710

Extension Form

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Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: 2023-075 Date Received: 5/15/2023
Date of This Notice: 5/22/2023

Check if received via: ☒ Email ☐ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____

Name	Michael Lewis Butz	Phone	586.596.[redacted]
Firm/Organization		Fax	
Street	[redacted]	Email	[redacted]@gmail.com
City	[redacted]	State MI Zip	[redacted]

(Please Print or Type)

Date discovered in junk/spam folder: _____

Request for: ☒ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis
Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☒ Email to address above
☐ Deliver on digital media provided by the township: _____

Record(s) You Requested: (Listed here or see attached copy of original request) See attached.

We are extending the date to respond to your FOIA request for no more than 10 business days, until 6/6/2023 (*month, day, year*).
Only one extension may be taken per FOIA request. If you have any questions regarding this extension, contact FOIA Coordinator at foia@macomb-mi.gov

Estimated Time Frame to Provide Records: June 6, 2023 (*days or date*)
The time frame estimate is nonbinding upon the township, but the township is providing the estimate in good faith. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.

Reason for Extension:

☐ **1.** The township needs to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to your request. Specifically, the township must:

☐ **2.** The township needs to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the township office. Specifically, the township must coordinate documents from the following locations:

☒ **3.** Other (describe): Due to the complexity of your request, a 10 business day extension is necessary. We are continuing to investigate and research issues involving whether a request would create an exposure to the operating system resulting in injury. We are also reviewing our methods and capabilities in responding, including likely time involved.

Signature of FOIA Coordinator: [signature] **Date:** 5/22/2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/5/2023 3:57:12 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 Litigation Update

I do not have Davis's suit against Wayne County at this time. DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 5, 2023 10:24 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 14.3 Litigation Update

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Makes good sense to me. Thanks for keeping us updated so we can keep our tracker up to date.

Do you happen to have a copy of Robert Davis's lawsuit against the Wayne County Election Commission?

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, October 4, 2023 at 4:36 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 14.3 Litigation Update

Jonathan, I filed a response opposing Davis's motion to expedite at least until a reasonable time.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 5:43 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 Litigation Update

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather,

Please find attached a litigation tracker which provides descriptions and status updates of cases filed around the country involving the Disqualification Clause of the 14th Amendment. We will endeavor to send an updated tracker weekly and will indicate changes from the previous week on the tracker. Please let us know if you are aware of any updates that we are missing!

Below is a summary of relevant cases/filings from the past week:

Colorado:

Obtained by Judicial Watch, Inc. v. Michigan FOIA

- On Friday, September 22, in *Anderson v. Griswold*, state district court Judge Sarah Wallace issued a Protective Order banning threats and intimidation on all parties, the lawyers, the judge and her staff.
- On the same day, President Trump filed two Motions to Dismiss: One First Amendment Motion based on the Colorado Anti-SLAPP statute and one based on standing and the Colorado statutory scheme. President Trump indicated he would file an additional Motion to Dismiss on September 28 addressing 14.3 structural arguments.
- The Colorado Republican Committee also filed a Motion to Dismiss raising First Amendment arguments, statutory arguments, and arguments related to 14.3.

Michigan:

- On September 15, activist Robert Davis filed a pro se civil action to require Secretary of State Jocelyn Benson to exclude Trump from the Michigan primary ballot.
- On September 19, Davis filed an Emergency Motion for an Expedited Hearing and Expedited Briefing.
- Secretary Benson was served on September 22.

Minnesota:

- In *Growe v. Simon*, on September 27, 2023, Secretary Simon filed a responsive pleading indicating he takes no position on the merits but agrees with the Petitioners that the current proceeding is the proper process to determine Trump's eligibility. Secretary Simon requested that the issue be decided no later than January 5, 2024.
- Several groups and individuals filed motions for leave to file amicus briefs including CREW, Bruce Ackerman, Derek Muller, the Constitutional Accountability Center, and the RNC.
- Oral Arguments are scheduled for November 2.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/11/2023 4:21:55 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: RE: Davis & LaBrant 14th amendment cases - scheduling order

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 11, 2023 12:09 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Davis & LaBrant 14th amendment cases - scheduling order

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Will get these to you today.

Separately, Elias Law Group just moved to intervene in *Lindsey v. Whitmer* on behalf of various clients and submitted this proposed motion to dismiss, which generally tracks the issues identified in last week's memo. Not sure if you're getting these filings since the complaint doesn't appear to have been served yet.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 10, 2023 at 2:51 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Davis & LaBrant 14th amendment cases - scheduling order

DPP MCL 15.243(1)(m)

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, October 10, 2023 2:46 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Re: Davis & LaBrant 14th amendment cases - scheduling order

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Wk Prod MCL 15.243(1)(h)

Obtained by Judicial Watch, Inc. v. Michigan FOIA
DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 10, 2023 at 1:33 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Davis & LaBrant 14th amendment cases - scheduling order

Gearing up, see attached.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/10/2023 5:33:08 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Davis & LaBrant 14th amendment cases - scheduling order
Attachments: 2023100923 Expedited Sch Ord.pdf

Gearing up, see attached.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

Case No. 23-000128-MB

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,

Hon. James Robert Redford

Defendant.
_____/

EXPEDITED SCHEDULING ORDER

In this matter, 23-000128-MB, plaintiff Robert Davis has filed a complaint and moves on an emergency basis for a declaratory judgment, a writ of mandamus, and an order to show cause on Counts I through IV of the verified complaint. Counts I through IV of the complaint relate, specifically, to Davis's claims that (1) defendant cannot enforce 2023 PA 2 by changing the 2024 presidential primary date from March 12, 2024 to February 27, 2024; and (2) defendant has a legal duty under Article 11, § 1 of the Michigan Constitution and MCL 24.263 to determine whether potential presidential candidate Donald J. Trump is ineligible to run for the office of president of the United States under § 3 of the Fourteenth Amendment to the United States Constitution.

Davis has moved for an expedited hearing schedule and requests a decision on the motion for a declaratory judgment, writ of mandamus, and order to show cause by October 3, 2023. Defendant responds that relief is not required by that date, but indicates her willingness to agree to a reasonably expedited scheduling order.

In 23-000137-MZ, plaintiffs Robert LaBrant, et al. have filed and served on defendant a complaint that also relates to Donald J. Trump's eligibility for the office of President of the United States.

IT IS ORDERED:

1. Davis's motion for an expedited hearing and decision by October 3, 2023 is DENIED. However, the parties are on notice that the Court will expedite this matter and this case together with *LaBrandt, et al. v Jocelyn Benson*, 23-000137-MZ, a case in which plaintiffs have filed and served on defendant a complaint that also relates to Donald J. Trump's eligibility for the office of President of the United States will take priority on the Court's docket.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

2. In this matter, 23-000128-MB, defendant shall respond to the motion for a declaratory judgment, writ of mandamus, and order to show cause by **5:00 p.m. on October 16, 2023**. In addition to any other issues to be discussed, defendant's response shall address:

a. Whether defendant has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue;

b. Whether § 3 of the Fourteenth Amendment to the United States Constitution applies to the offices of President and Vice President and to candidates for those offices;

c. Whether § 3 of the Fourteenth Amendment to the United States Constitution precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3 or both;

d. Whether § 3 of the Fourteenth Amendment to the United States Constitution is self-executing;

e. Any state or federal cases interpreting or applying § 3 of the Fourteenth Amendment to the United States Constitution to candidates for office or persons serving in an office, including any cases currently involving potential presidential candidate Donald J. Trump;

f. The possible application of the 1872 Amnesty Act to the instant case.

3. If defendant's response to the complaint includes a motion, then plaintiff shall file any response to the motion by **October 23, 2023.**

4. All reply briefs are due by **5:00 p.m. on October 30, 2023**.

5. Plaintiff shall provide courtesy copies of the complaint and all other documents filed to date in the case including this order on Donald J. Trump or his current campaign committee by **5:00 p.m. on October 10, 2023.** Plaintiffs shall confirm by affidavit the timely provision of these courtesy copies no later than **5:00 p.m. on October 11, 2023.**

6. Donald J. Trump and/or his presidential campaign is invited to seek amicus curiae involvement in this matter and *LaBrandt, et al. v Jocelyn Benson*, 23-000137-MZ. If he does so, then his brief is due by **5:00 p.m. on October 23, 2023.**

7. After review of the briefing, the Court will determine whether a hearing is necessary and will inform the parties if a hearing is to be scheduled.

IT IS SO ORDERED.

Date: October 9, 2023

James Robert Redford
Judge, Court of Claims

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/12/2023 9:35:21 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 Litigation Tracker

Do you have time for a quick call right now?

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 12, 2023 5:32 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 14.3 Litigation Tracker

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Been there!

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Thursday, October 12, 2023 5:31:06 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 14.3 Litigation Tracker

I'm sure you did, I just keep misplacing emails 😊

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 12, 2023 5:03 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 14.3 Litigation Tracker

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Let me know if you have any trouble with the attachment. It should have been on the previous email.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, October 12, 2023 at 4:53 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 14.3 Litigation Tracker

Thanks, do you have a PDF of the Baude article? My computer is not letting me download it.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 12, 2023 4:32 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 Litigation Tracker

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Privileged

Heather,

Please find attached the 14.3 Litigation Tracker for this week with updates highlighted.

Some things of note:

Colorado:

- In *Anderson v. Griswold*, briefing continues on the motions to dismiss ahead of the 5-day hearing scheduled October 30.

Michigan

- In *Davis v. Benson* and *La Brant v. Benson, the* Michigan Court of Claims issued a scheduling order expediting the cases and requiring Secretary Benson to respond by 5 p.m. on 10/16 addressing both her authority and whether 14.3 applies to Trump. Trump is invited to file an amicus brief by 10/23.

Minnesota

- In *Growe v. Simon*, briefing continues ahead of the November 2 oral argument

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/8/2022 4:44:50 PM
To: Caroline Chambers [caroline@statesuniteddemocracy.org]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: ISD report

Thanks!

Heather

From: Caroline Chambers <caroline@statesuniteddemocracy.org>
Sent: Thursday, September 8, 2022 12:34 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: ISD report

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Hi Heather -
Attached is the ISD report we discussed.

Caroline Chambers | **Senior Advisor**
States United Democracy Center
202-365-2521 | @statesunited
caroline@statesuniteddemocracy.org

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Sent: 10/15/2023 11:12:24 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: DRAFT Davis brief
Attachments: Davis 23-128 Resp to Show Cause.docx

Importance: High

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/15/2023 11:16:57 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: DRAFT Davis brief

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Sunday, October 15, 2023 7:16 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Davis brief

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Will take a look this evening.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Sunday, October 15, 2023 7:12:24 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/15/2023 11:24:49 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: DRAFT Davis brief
Attachments: Litigation Tracker Exhibit (002).docx

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Sunday, October 15, 2023 7:16 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Davis brief

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Will take a look this evening.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Sunday, October 15, 2023 7:12:24 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/16/2023 11:38:21 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: RE: DRAFT Davis brief

Ok sounds good.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Sunday, October 15, 2023 11:07 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Victoria Bassetti <victoria@statesuniteddemocracy.org>
Subject: Re: DRAFT Davis brief

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Copying Vic this time.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Sunday, October 15, 2023 at 11:06 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Davis brief

Hi Heather,

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Sunday, October 15, 2023 at 7:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/16/2023 4:04:26 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Wk Prod MCL 15.243(1)(h)

Thanks a bunch.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, October 16, 2023 11:31 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: FW: Wk Prod MCL 15.243(1)(h)

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Heather: DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

From: Marina Eisner <Marina@statesuniteddemocracy.org>
Date: Monday, October 16, 2023 at 10:37 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Re: Wk Prod MCL 15.243(1)(h)

DPP MCL 15.243(1)(m)

Marina Eisner (she/her) | Counsel
States United Democracy Center
301.580.4000 | @statesunited
marina@statesuniteddemocracy.org

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Monday, October 16, 2023 at 9:32 AM
To: Marina Eisner <Marina@statesuniteddemocracy.org>
Subject: Wk Prod MCL 15.243(1)(h)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Wk Prod MCL 15.243(1)(h)

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Wk Prod MCL 15.243(1)(h)

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Sent: 10/16/2023 4:06:44 PM
To: Victoria Bassetti [victoria@statesuniteddemocracy.org]; Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

From: Victoria Bassetti <victoria@statesuniteddemocracy.org>
Sent: Monday, October 16, 2023 10:16 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Davis brief

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DPP MCL 15.243(1)(m)

-- Victoria

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Sunday, October 15, 2023 at 11:06 PM
To: Heather Meingast <meingasth@michigan.gov>, Victoria Bassetti <victoria@statesuniteddemocracy.org>
Subject: Re: DRAFT Davis brief

Copying Vic this time.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Sunday, October 15, 2023 at 11:06 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Davis brief

Hi Heather,

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Sunday, October 15, 2023 at 7:12 PM

Obtained by Judicial Watch, Inc. v. Michigan FOIA

To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/19/2023 5:18:38 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Subpoena
Attachments: Jocelyn Benson TRIAL_subpoena_witness_.pdf

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF GEORGIA, FULTON COUNTY

SUBPOENA FOR THE ATTENDANCE OF WITNESS

PURSUANT TO O.C.G.A. § 24-13-21

TO: Secretary of State Jocelyn Benson

YOU ARE HEREBY COMMANDED, that laying all other business aside, you be and appear before the Superior Court of Fulton County, Fulton County Courthouse, 136 Pryor Street SW, Atlanta, Georgia 30303, to be held on ***October 23, 2023, at 9:00 A.M. in Courtroom 5A***, to be sworn as a witness for the State of Georgia and to give testimony in the case of State of Georgia vs. Donald John Trump et al., Fulton County Superior Court Case No. 23SC188947.

You are placed on "on call" status until you are released from this subpoena by the Court, and you will receive at least 48 hours' notice before your presence is required under the terms of this subpoena.

HEREIN FAIL NOT, under the penalty of law by authority of the Hon. Scott McAfee, Judge, Superior Court of Fulton County, Georgia, this 16th day of October 2023.

Ché Alexander
Clerk of Superior Court
(404) 613-5313

Subpoena issued by:

/s/ Grant Rood
Grant Rood
GA Bar No. 955552
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street, 3rd Floor
Atlanta, Georgia 30303
(404) 612-4981

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/19/2023 4:15:38 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Challenger case - resounding loss in O'Halloran & DeVisser
Attachments: O'Halloran & DeVisser opinion.pdf

DPP MCL 15.243(1)(m)

Heather

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Obtained by Judicial Watch, Inc. v. Michigan FOIA
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STATE OF MICHIGAN

COURT OF APPEALS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs-Appellees,

v

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,

Defendants-Appellants

FOR PUBLICATION
October 19, 2023
9:15 a.m.

No. 363503
Court of Claims
LC No. 22-000162-MZ

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellees,

v

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,

Defendants-Appellants.

No. 363505
Court of Claims
LC No. 22-000164-MZ

Before: BOONSTRA, P.J., and BORRELLO and FEENEY, JJ.

PER CURIAM.

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This consolidated appeal concerns various challenges by plaintiffs[1] to a manual defendants published in May 2022 providing instructions to election challengers and poll challengers. The manual was not published as a formal administrative rule under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. As the trial court, the Court of Claims observed at the opening of its opinion, "[a]n executive branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases." Not only do we agree with this observation, we also agree with the trial court's resolution on the issues now challenged on appeal. Accordingly, we affirm.

The May 2022 manual, titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers," is the latest version of a manual that defendants have published for the past 20 years, with the most recent version having been published in October 2020. The manual provides instructions[2] for election challengers and poll watchers. Plaintiffs filed these cases challenging various provisions in the manual. Plaintiffs include elections challengers for the November 2022 general election, two candidates for the Legislature, the Michigan Republican Party, and the Republican National Committee.

The trial court summarized the facts underlying this case as follows:

> Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq.*, permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual"). . . .

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[1] As did the trial court, when necessary to distinguish between the two sets of plaintiffs, we shall refer to the plaintiffs in Docket No. 363503 as the "O'Halloran plaintiffs" and those in Docket No. 363505 as the "DeVisser plaintiffs." When no such distinction is necessary, they shall collectively be referred to simply as "plaintiffs."

[2] The introductory paragraph of the manual describes its purpose as follows:

> This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

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On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request . . . a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(O).

. . . [T]his Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition . . . .

. . . Defendants . . . assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories. . . .

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA.

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The trial court issued its extensive opinion and order on October 20, 2022.[3] Ultimately, the trial court granted some but not all of the relief plaintiffs requested. Plaintiffs have not appealed and challenged the denial of that relief. While the trial court rejected some of what it described as "broad, sweeping" requests for relief, it did identify five specific areas where plaintiffs were entitled to relief: (1) the credential-form requirement, (2), communication with election inspectors other than the "challenger liaison," (3) the prohibition on recording "impermissible challenges," (4) the prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities, and (5) appointment of challengers on election day. On appeal, defendants do not challenge the last category. Accordingly, we consider the first four and, like the trial court, shall look to each in turn.

There are two primary issues present in this case. First, whether the challenged provisions in the manual are consistent with Michigan Election Law, MCL 168.1 *et seq.*, or are in conflict with the statute. And, second, whether defendants needed to promulgate those provisions, even if authorized by statute, by a formal rule as required by the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, which the manual was not. While a rule promulgated in accordance with the APA has the force of law, *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020), other pronouncements do not, *Twp of Hopkins v State Boundary Comm'n*, 340 Mich App 669, 689; 988 NW2d 1 (2022). As explained in *Hopkins*:

> The APA "applies to all agencies and agency proceedings not expressly exempted." MCL 24.313. An "agency" is defined as a "state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203(2). There is no dispute that the Commission is a state agency. The APA defines a "rule" to include "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency ...." MCL 24.207. A "rule" does not include a "guideline" "that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). The APA prescribes how

[3] On November 3, 2022, the Supreme Court ordered that "the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court." *DeVisser v Secretary of State*, 510 Mich 994; 981 NW2d 30 (2022); *O'Halloran v Secretary of State*, 510 Mich 970; 981 NW2d 149 (2022). Two Justices separately concurred, and two dissented, in lengthy separate statements. *DeVisser*, 510 Mich at 994-1018; *O'Halloran*, 510 Mich at 970-994.

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> agencies adopt guidelines, MCL 24.224 and MCL 24.225 and specifies that "[a]n agency shall not adopt a guideline in lieu of a rule," MCL 24.226. [340 Mich App at 689.]

Moreover, an administrative rule cannot conflict with a statute. *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 161; 975 NW2d 52 (2021) ("an administrative agency is not empowered to change law enactive by the Legislature. . . .When an administrative rule conflicts with a statute, the statute controls"). Because this case involves an interpretation of a statute, we review the trial court's decision de novo. *Slis*, 332 Mich App at 335.

Const 1963, art 2, § 4(2) continues to provide[4] as follows:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. . . .

According to MCL 168.21, "[t]he secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." Further, under MCL 168.31(1), the Secretary "shall do all of the following":

> (a) Subject to subsection (2),[5] issue instructions and promulgate rules pursuant to the administrative procedures act . . . for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations

[4] The recent amendment of Const 1963, art 2, § 4(1) only expressly recognizes that the right to vote includes the right to be free from impositions of unreasonable burdens in doing so. The new provisions neither added anything to existing authority as concerns the extent to which the Secretary of State may issue binding authority without recourse to APA rulemaking, nor otherwise call for reading the pertinent provisions of the Election Law in a different light. Accordingly, the constitutional amendment of which the amicus curiae makes issue does not obviate the need to review the decision below on its merits under then-existing law.

[5] Subsection (2) requires the Secretary of State to "promulgate rules establishing uniform standards for state and local nominating, recall, and ballot question petition signatures."

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in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.

* * *

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

* * *

(h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.

* * *

(n) Create an election day dispute resolution team that has regional representatives of the department of state, which team shall appear on site, if necessary.

Nondelegation Doctrine

Although neither the trial court nor the parties have framed their positions in terms of nondelegation doctrine, to the extent that defendants suggest that their prerogative to issue "instructions . . . for the conduct of elections" under MCL 168.31(1)(a) authorizes them to issue any new requirement without following APA rule procedures simply by calling it an instruction, that doctrine is implicated.

Our state Constitution includes the following provision: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. Thus, our Constitution prohibits the Legislature from delegating its lawmaking powers to the executive branch. The "essential purpose" of the doctrine is "to protect the public from misuses of the delegated power." *Blue Cross & Blue Shield v Governor*, 422 Mich 1, 51; 367 NW2d 1 (1985). The Legislature may, however, authorize an administrative agency to exercise certain powers when fulfilling its legislatively created duties and responsibilities. See, e.g., *Mich Central R Co v Mich R Comm*, 160 Mich 355, 361-368; 125 NW 549 (1910); *G F Redmond & Co v Mich Securities Comm*, 222 Mich 1, 192 NW 688 (1923). The test for determining whether the Legislature has properly authorized such agency action is whether the Legislature has prescribed "standards . . . as reasonably precise as the subject matter requires or permits" when granting regulatory or rulemaking authority to an administrative agency. *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25, 27 (1956).

One legal commentator has concluded that "Michigan decisions" provide "no clear rule as to when a legislative rule must be promulgated or, for that matter, whether a rule is legislative or interpretative." McKim, III, *The Sometimes Dubious Efficacy of Michigan Department of*

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Treasury "Rules," "Revenue Administrative Bulletins," "Letter Rulings," "Questions and Answers" and Other Publications, 60 Tax Law 1019, 1048 (2007).

Although we are aware of no authority that stands for the proposition that the Legislature may not delegate to the executive branch the authority to issue a rule, as defined by MCL 24.207, without requiring the APA's rulemaking procedures, we proceed in our review while keenly mindful of the nondelegation doctrine and the caselaw calling for adherence to APA procedures in particular.

Rulemaking

The APA defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207. The APA further states that "[a]n agency shall not adopt a guideline in lieu of a rule." MCL 24.226. "An agency's failure to follow the process outlined in the APA renders a rule invalid." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015), lv den 499 Mich 887 (2016). "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002).

After setting forth the general definition of an administrative "rule," MCL 24.207 sets forth a list of things that do not constitute such rules, including the following:

> (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
>
> * * *
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

"[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *American Federation of State, Co & Mun Employees v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996).

Defendants argue that the challenged instructions fall under the "permissive statutory power" exception to the definition of "rule" set forth in MCL 24.207(j). In support, defendants cite *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19; 703 NW2d 822 (2005), and *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980).

In *By Lo Oil*, 267 Mich App at 47, this Court recited that "Subsection 7(j) excepts administrative action from the APA's definition of 'rule' when the Legislature has either explicitly

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or implicitly authorized the action in question," and concluded that the agency's use of an administrative bulletin to determine certain tax liability came under that exception because the pertinent statute "explicitly required the department to 'prescribe' the invoice required . . . and did not mandate the department to do so pursuant to the procedural requirements of the APA."

In *Hinderer*, 95 Mich App at 727, this Court approved an agency's use of a "lag budgeting system" for reducing benefits for a recipient of the Aid to Families with Dependent Children program, which was not promulgated as an APA rule, on the ground that the agency was statutorily empowered to "adopt . . . a budgetary method of the director's own choosing."

Defendants assert that the Secretary of State's duty under MCL 168.31(1)(a) to "issue instructions and promulgate rules . . . for the conduct of elections" includes the legislative authority "to issue instructions rather than rules" as an exception to the requirement that administrative rules be promulgated in accord with the APA. The trial court held that "the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not." In fact, defendants' position would leave them at liberty to issue binding regulations at will, without ever having to adhere to the notice-and-hearing requirements of the APA. MCL 168.31(1)(a) preserves the distinction between mere instructions and APA rules, thus calling on the defendants to respect that distinction and issue each kind of regulation with the degree of formality that is required.

The question, then, for each of the four contested facets of the May 2022 Manual at issue is whether the challenged regulation comports with the Election Law, and, if so, whether it constitutes a sufficient extension of that enabling law that its validity depends on promulgation as an APA rule.

The credential form requirement.

MCL 168.732 requires that election challenges possess written credentials:

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

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Defendants have created a form that challengers are purportedly required to use to establish their credentials. Specifically, on pages 4-5 of the manual,[6] it states:

> This authority, also known as the Michigan Challenger Credential Card, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger.

The trial court noted that this appears to be a new requirement and that in the past the political parties issued their own credential forms to challengers. The trial court further stated that it did not take issue with having a uniform credential form, but ultimately concluded that the Secretary lacks the authority to require that challengers use defendants' form:

> [O]ur Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168. 732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The trial court did acknowledge that the Secretary of State can certainly create a form for the challengers' convenience. As the trial court observed,

> our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law—nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

[6] All references to the manual are from the version appended as an exhibit to the trial court's October 20, 2022 opinion.

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We agree with the trial court. The Legislature has neither required nor authorized the creation of a mandatory form. Indeed, given that the Legislature has set forth the requirements for challenger credentialing, nothing more may be added.[7]

The requirement that communication only be with the "Challenger Liaison."

On page five of the manual, defendants create the position of "Challenger Liaison," who is one of the election inspectors. On the top of page six, the manual it states in bold print: "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.**" This directive is reinforced later on the page with this statement: "Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." The restriction is again repeated on page 21. According to the manual, a violation of this or any other instruction or a direction given by an election inspector results in a warning being issued and a repeat violation may result in the challenger's ejection.

The trial court concluded that this requirement was inconsistent with the statute:

> Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.
>
> The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly,

[7] We do note some apparent contradiction in the trial court's opinion. It states that "defendants cannot, in the absence of a promulgated rule, add a fourth" requirement. [10/20/20 Opinion and Order, p 15.] This would imply that defendants could, if it had promulgated a rule, establish the requirement. It later states that mandatory use of defendants' uniform challenger credential form "violates the Michigan Election Law and APA." But if it would violate the election statute, then it would seem to follow that defendants could not require the use of the form even if it did promulgate a rule. In any event, at this point we need not engage in an extensive analysis of this point as defendants have not promulgated this as a rule.

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> the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location. [Emphasis in original.]

MCL 168.733(1) provides in pertinent part:

> The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:
>
> * * *
>
> (e) Bring to *an* election inspector's attention any of the following . . . .

As the trial court stated, the statute itself authorizes a challenger to bring a matter to the attention of "an election inspector," not a "challenger liaison." We agree with the trial court that it may be beneficial to designate one of the election inspectors as the challenger liaison to serve as a central point of contact for the challengers. But the statute does not grant defendants the authority to require that a challenger only bring matters to such a liaison and, perhaps more importantly, the statute explicitly authorizes challengers to communicate with any election inspector. Defendants' attempt to restrict that right is a violation of the statute.

The prohibition on recording "impermissible challenges."

This issue involves a restriction in the manual on what challenges may be made. The manual explains the process for making a challenge:

> A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.
>
> An impermissible challenge, as explained below, need not be noted in the poll book.

The manual defines an "impermissible challenge" as:

> Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:
>
> • Challenges made to something other than a voter's eligibility or an election process;
>
> • Challenges made without a sufficient basis, as explained below; and

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• Challenges made for a prohibited reason.

The manual then states that while an election inspector is not required to note an impermissible challenge in the poll books, they may do so. In fact, it "encourages" an inspector to note the content of the impermissible challenge and any warning given to the challenger. If a challenger makes multiple impermissible challenges, the inspector is encouraged to note the content and number of such challenges. The manual then states in bold type: "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**"

MCL 168.727(2) outlines the duties of an election inspector when a challenge is made:

> (2) Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:
>
> (a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.
>
> (b) Make a written report including all of the following information:
>
> (i) All election disparities or infractions complained of or believed to have occurred.
>
> (ii) The name of the individual making the challenge.
>
> (iii) The time of the challenge.
>
> (iv) The name, telephone number, and address of the challenged individual.
>
> (v) Other information considered appropriate by the election inspector.
>
> (c) Retain the written report created under subdivision (b) and make it a part of the election record.
>
> (d) Inform a challenged elector of his or her rights under section 729.

As the trial court noted, the statute does not use the terms "permissible" and "impermissible" in describing challenges.[8] Nor does it require the documentation of only "permissible" challenges. It requires the documentation of all challenges, permissible or impermissible. Accordingly, the trial court concluded that

> to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election

[8] MCL 168.727(3) does state that a "challenger shall not make a challenge indiscriminately and without good cause." And it also provides that an "individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." But it does not excuse such improper challenges from being documented.

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> inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

The trial court did conclude the statutory documentation requirement only extends to challenges regarding voter qualification and that defendants have the discretion to adopt a recordkeeping system regarding challenges not involving voter rights, i.e., for a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c).

The trial court also addressed the prohibition on making repeated impermissible challenges and it resulting in the challenger's removal. MCL 168.733(3) provides a basis for expulsion of a challenger: "Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board." The statute does not authorize defendants to adopt a rule providing other reasons for expulsion. Accordingly, unless the repeated "impermissible" challenges rise to the level of disorderly conduct, we agree with the trial court that there is no basis in law for the challenger's expulsion.

The prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities.

The final provision of the manual that the trial court found problematic is the restriction on electronic devices in the ACVB: "No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day."[9] A challenger in violation of this rule may be ejected from the AVCB facility.

The trial court found statutory authority regarding restrictions on communicating certain information, but not on a ban of the possession of electronic devises:

> Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does not categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices.

The trial court then noted that the Legislature had plenty of opportunity in recent amendments to the election statute to include such a restriction, but did not do so:

> MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and

[9] The manual does permit challengers at polling places to possess electronic devices, with some restriction on their use. The prohibition on possessing one only applies to an ACVB.

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> other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—I.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168. 765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021) ("When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

In sum, use of an electronic device to communicate information regarding the processing or tallying of votes is prohibited, under pain of a felony conviction, but the mere possession of an electronic device is not permitted under Michigan's election law. While the cautious approach is, as the trial court points out, for a challenger or poll watcher to simply leave their electronic device outside the room, the statute simply does not require it. As the trial court stated, "[p]rohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language." We agree.

Defendants have broad authority to issue binding non-rule instructions on election workers, but not on challengers or other outside observers. Election workers, including inspectors, conduct operations that come under the authority of the Secretary of State, and thus while doing so are effectively the Secretary's subordinates. Accordingly, instructions directed at such subordinates are not directives of "general applicability" for purposes of the definition of "rule" under MCL 24.207. Defendants are thus free to issue binding instructions applicable to election workers without resort to the APA's formal rulemaking procedures. In contrast, election challengers, by the nature of the office, are outsiders standing ready to raise objections to how elections are conducted. Instructions directed at the latter thus go beyond defendants' immediate scope of inherent supervisory authority and instead function as regulations of general applicability, which for that reason must be issued as properly promulgated APA rules. Defendants may issue mere instructions that are binding on election workers who operate as defendants' employees and subordinates, but regulations targeting election challengers or poll watchers reach beyond defendants' general supervisory scope and must be promulgated as APA rules.

In conclusion, the relief that the trial court granted with respect to these issues is "that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order." For the reasons stated above, we

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are not persuaded that the trial court erred in granting this relief, and defendants shall comply with the trial court's decree.

Affirmed. Plaintiffs may tax costs.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Kathleen A. Feeney

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/17/2023 7:14:54 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Davis filings from yesterday
Attachments: answer01 complaint Davis 23-128.pdf; brief01 exhibits.pdf; brief01 resp & part MSD Davis 23-128.pdf; Brief, MSD Davis, Trump, Final.pdf; Motion for Summary, Davis, Trump.pdf; Motion to Intervene, Davis, Trump.pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

No. 23-000128-MM

HON. JAMES ROBERT REDFORD

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,

Defendant.

Robert Davis, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a) Michigan PII MCL 15.243(1
313.523 PII MCL 15.243
PII MCL 15.243(1)(a)@gmail.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S ANSWER TO VERIFIED COMPLAINT

Defendant Secretary of State Jocelyn Benson, through her attorneys, answers Plaintiff's Verified Complaint as follows:

I. PARTIES

1. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

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2. Admitted.

3. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

II. JURISDICTION

4. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

5. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

6. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

III. CAUSES OF ACTION

COUNT I

Declaratory Judgment Declaring That Defendant Secretary of State Cannot Enforce Public Act 2 of 2023, Which Changed The Date of The 2024 Presidential Primary From March 12, 2024 to February 27, 2024, And Further Declare That the *Current* Version of MCL 168.613a Controls And Thus, The 2024 Presidential Primary Election Must Be Held On March 12, 2024.

7. Defendant incorporates by reference her responses to the previous paragraphs.

8. Defendant neither admits nor denies the allegations in this paragraph concerning the complaint for the reason that it speaks for itself.

9. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

10. Admitted.

11. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

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12. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

13. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

14. Admitted.

15. Defendant neither admits nor denies the allegations in this paragraph concerning the website for the reason that it speaks for itself.

16. Defendant neither admits nor denies the allegations in this paragraph concerning the website for the reason that it speaks for itself.

17. Denied.

18. Defendant admits that the publication referenced was published and that it identifies the primary date as February 27, 2024. In further answer, Defendant notes that the publication advises that "these procedures are subject to change by the State Legislature, presidential candidates interested in participating in Michigan's February 27, 2024 primary election or November 5, 2024 general election are encouraged to consults our website, Michigan.gov/Elections, for updates."

19. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

20. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

21. Defendant neither admits nor denies the allegations in this paragraph concerning the email for the reason that it speaks for itself.

22. Admitted.

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23. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

24. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

25. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

26. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

27. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

28. Admitted.

29. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

30. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

31. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

32. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations

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asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

33. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

34. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

35. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

36. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

37. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

38. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

39. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

40. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

41. Denied.

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COUNT II

Writ of Mandamus Compelling Defendant Secretary of State To Enforce The *Current* Version of MCL 168.615a of Michigan Election Law and Compel Defendant Secretary of State To Hold The 2024 Presidential Primary Election On March 12, 2024.

42. Defendant incorporates by reference her responses to the previous paragraphs.

43. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

44. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

45. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

46. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

47. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

48. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

49. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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50. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

51. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

52. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

53. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

54. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

55. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

COUNT III

Declaratory Judgment Declaring The Defendant Secretary of State Has A Legal Duty Under Mich. Const. 1963, art. 11, §1 and Michigan Case Law To Determine Whether A Presidential Candidate Satisfies The Eligibility Requirements To Run For President of the United States As Set Forth Under The United States Constitution.

56. Defendant incorporates by reference her responses to the previous paragraphs.

57. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

58. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

59. Defendant neither admits nor denies the allegations in this paragraph concerning the email for the reason that it speaks for itself.

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60. Admitted.

61. Defendant denies that Plaintiff's declaratory ruling request was "meritorious." In further, answer Defendant neither admits nor denies the allegations in this paragraph concerning the letter for the reason that it speaks for itself.

62. Defendant neither admits nor denies the allegations in this paragraph concerning the email for the reason that it speaks for itself.

63. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

64. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

65. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

66. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

67. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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68. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

69. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

70. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

71. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

72. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

73. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

74. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

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75. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

76. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

77. Defendant neither admits nor denies the allegations in this paragraph concerning the constitutional provision for the reason that it speaks for itself.

78. Admitted.

79. Defendant admits that she was administered the oath of office on January 1, 2023.

80. Admitted.

81. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

82. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

83. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

84. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

85. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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86. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

87. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

88. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

89. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

90. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

COUNT IV

Writ of Mandamus Compelling Defendant Secretary of State To Decide The Merits and Issue A Decision On Plaintiff's August 28, 2023 Request For Declaratory Ruling Concerning Former President Trump's Possible Disqualification Under Section 3 of the Fourteenth Amendment of the United States Constitution.

91. Defendant incorporates by reference her responses to the previous paragraphs.

92. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

93. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

94. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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95. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

96. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

97. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

98. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

99. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

100. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

101. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

102. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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103. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

104. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

COUNT V

Declaratory Judgment Declaring Defendant Secretary of State Was Required To Compel With MCL 15.51, Which Required The Defendant Secretary of State To File A $25,000 Bond Within 20 Days of Assuming Office.

105. Defendant incorporates by reference her responses to the previous paragraphs.

106. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

107. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

108. Admitted.

109. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

110. Defendant admits that she was administered the oath of office on January 1, 2023.

111. Denied.

112. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

113. Defendant neither admits nor denies the allegations in this paragraph concerning the FOIA request for the reason that it speaks for itself.

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114. Admitted.

115. Admitted.

116. Defendant neither admits nor denies the allegations in this paragraph concerning the application for quo warranto for the reason that it speaks for itself.

117. Defendant neither admits nor denies the allegations in this paragraph concerning the letter denying the application for quo warranto for the reason that it speaks for itself.

118. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

119. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

120. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

121. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

122. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

123. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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124. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

125. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

COUNT VI

Writ of Mandamus Compelling Defendant Secretary of State To Promulgate Rules In Accordance With APA By January 1, 2024 To Implement The Provisions of MCL 168,759a(17).

126. Defendant incorporates by reference her responses to the previous paragraphs.

127. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

128. Defendant neither admits nor denies the allegations in this paragraph concerning the statute for the reason that it speaks for itself.

129. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

130. Denied.

131. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs.

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132. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

133. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

134. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

135. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

136. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

137. Defendant neither admits nor denies the allegations contained in this paragraph for lack of sufficient information or knowledge to form a belief about the truth of the allegations asserted and thus leaves Plaintiff to his proofs. In further answer, Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

138. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

139. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

140. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

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141. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

142. Defendant neither admits nor denies Plaintiff's allegations in this paragraph as they are legal conclusions which require no response.

AFFIRMATIVE DEFENSES

1. The Michigan Election Law does not empower the Secretary of State to unilaterally determine a presidential candidate ineligible for the presidential primary or general election under the circumstances alleged in this complaint.

2. Defendant reserves the right to raise defenses or assert other matters revealed by its continuing investigation and discovery, including all defenses available under MCR 2.111, 2.112, 2.113, 2.114, 2.115, and 2.116.

3. Plaintiff's claims are moot where the Secretary has already undertaken the action sought to be compelled through mandamus.

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: October 16, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on October 16, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

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EXHIBIT 1

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2023 Fourteenth Amendment Disqualification Cases

Active Cases

(As of 10/11/2023)

Alaska

Case	Description
Castro vs. Dahlstrom 23-cv-00011 U.S. District Court, District of Alaska	On September 29, 2023, John A. Castro, a Republican presidential candidate, filed a pro se civil action against Alaska Lieutenant Governor Nancy Dahlstrom and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Alaska according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Arizona

Case	Description
Castro v. Fontes 2:23-cv-01865 U.S. District Court, District of Arizona	On September 5, 2023, Castro filed a pro se civil action against Arizona Secretary of State Adrian Fontes and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Arizona according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro filed a TRO that the court converted to a preliminary injunction. A preliminary injunction hearing is scheduled for October 31, 2023.

California

Case	Description
Clark v. Weber 2:23-cv-07489 U.S. District Court, Central	On September 9, 2023, a Complaint for Declaratory and Injunctive Relief was filed on behalf of a California voter, identified as A.W. Clark, against California Secretary of State Shirley Weber. The complaint seeks declaratory relief that Donald J. Trump is "disqualified, prohibited, and barred from the office of president of the United States" and injunctive relief to bar Weber from placing Trump's name on any ballot in California

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District of California	under Section 3 of the Fourteenth Amendment of the U.S. Constitution. Yagman argues that Trump "engaged in insurrection and/or rebellion," citing his role in the Jan. 6, 2021 attack on the U.S. Capitol. Plaintiff filed a preliminary injunction motion on September 22, 2023. On October 2, 2023 the court issued an order to show cause as to why the complaint shouldn't be dismissed for lack of subject matter jurisdiction.
Castro v. Weber 2:23-cv-02172 U.S. District Court, Eastern District of California	On October 2, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Shirley Weber and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in California according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Colorado

Case	Description
Anderson v. Griswold District Court, City and County of Denver 2023CV32577 U.S. District Court, District of Colorado 1:23-cv-02291	On September 6, 2023, Colorado voters filed suit against Secretary of State Jena Griswold and Donald J. Trump, alleging that Trump's involvement in the Jan. 6, 2021 attack on the capitol qualifies as an insurrection and consequently disqualifies him as a candidate for the office of president under Section 3 of the Fourteenth Amendment. The petitioners further assert that C.R.S. § 1-4-1204(4), § 1-1-113(1), § 13-51-105, and C.R.C.P. 57(a) enjoin the Colorado Secretary of State from granting Trump access to the ballot for any election in the state. The petition was filed by Citizens for Responsibility and Ethics in Washington (CREW), a government ethics watchdog. The Colorado Republican Committee has intervened in the lawsuit. Trump removed the case to federal court, but the case was quickly remanded and is now in state court in Colorado. The parties are briefing several motions to dismiss and a five-day hearing is scheduled on October 30, 2023. The court denied President Trump's anti-SLAPP motion to dismiss.

Connecticut

Case	Description
Castro v. Thomas 3:23-cv-01238	On September 21, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Stephanie Thomas and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in

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U.S. District Court, District of Connecticut	Connecticut according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro also filed an Emergency Motion for Temporary Restraining Order and Expedited Motion for Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits.

Delaware

Case	Description
Castro v. Albence et al. 1:23-cv-01068 U.S. District Court, District of Delaware	On September 28, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against State Election Commissioner Anthony Albence and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Delaware according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Florida

Case	Description
Castro v. Trump U.S. District Court, Southern District of Florida 9:23-cv-80015-AMC U.S. Court of Appeals, 11th Circuit 23-12111	On January 6, 2023, Castro filed a civil action against Donald J. Trump in the Southern District of Florida. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Florida according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On February 16, 2023, Trump filed a motion to dismiss. On June 26, 2023, U.S. District Judge Aileen Cannon dismissed the case based on standing and ripeness. Castro filed an appeal, which is pending before the 11th Circuit. Castro also filed a petition for cert before judgment with the U.S. Supreme Court that seeks a ruling on the standing issue. On October 2, 2023, the Supreme Court denied Castro's petition for a writ of certiorari.

Kansas

Case	Description
Castro v. Schwab 6:23-cv-01184	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Scott Schwab and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to

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U.S. District Court, District of Kansas	insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Kansas according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Massachusetts

Case	Description
Castro v. Galvin 1:23-cv-12121 U.S. District Court, District of Massachusetts	On September 18, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State William Francis Galvin and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Massachusetts according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 25, 2023, Castro filed an Emergency Motion for Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on The Merits.

Michigan

Case	Description
Castro v. Benson 23-000122-MZ Michigan Court of Claims	On August 31, 2023, Castro filed a Verified Complaint for Injunctive Relief against Secretary of State Jocelyn Benson and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Michigan according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.
Davis v. Benson 23-000128-MB Michigan Court of Claims	On September 15, 2023, activist Robert Davis filed a civil action to require Secretary of State Jocelyn Benson to exclude Donald J. Trump from the Michigan primary ballot. In his complaint, Davis acknowledges that state statutes do not grant her such authority, instead arguing that her obligation to "support the Constitution of the United States" requires her to exclude unqualified candidates from the primary ballots. On September 19, Davis filed an Emergency Motion for Expedited Hearing & Briefing.
Davis v. Wayne County Election Commission 23-012484-AW	On September 27, 2023, Robert Davis filed a civil action against the Wayne County Election Commission, which is responsible for printing ballots for the county. Davis argues that the commission has the "legal duty" to remove Donald J. Trump from the ballot under Section 3 of the Fourteenth Amendment of the Constitution. The commission, which includes the treasurer, clerk, and chief probate judge for Wayne County, has already stated that it does not plan to make any decisions on this matter.

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Wayne County Circuit Court	
LaBrant vs. Benson 23-000137-MZ Michigan Court of Claims	On September 29, 2023, Free Speech for People filed a complaint on behalf of four Michigan voters for a Declaratory Judgment and a Permanent Injunction asking that the Michigan Court of Claims enjoin Secretary of State Jocelyn Benson from including Donald J. Trump on the primary and general ballots in 2024. The complaint states that the events of January 6, 2021, qualify as an insurrection and that Trump's actions and lack of intervention in the matter satisfy the provisions of Section 3 of the Fourteenth Amendment, which would disqualify Trump from holding the office in the future.

Minnesota

Case	Description
Growe v. Simon A23-1354 Minnesota Supreme Court	On September 12, 2023, Free Speech for People filed a petition on behalf of Minnesota voters against Secretary of State Steve Simon arguing that Donald J. Trump is disqualified from holding public office under Section 3 of the Fourteenth Amendment. The case was filed directly with the Minnesota Supreme Court under a state law that allows voters to directly petition to the state supreme court to disqualify a candidate. The petition argues that the events of January 6, 2021 qualify as an insurrection, that the effort to unlawfully overthrow the results of the 2020 election constitute a rebellion, and that Trump was "engaged" in both efforts despite not personally participating in storming the Capitol. The Republican Party of Minnesota has intervened in the case. The parties are briefing the issues ahead of oral argument scheduled on November 2, 2023.

Montana

Case	Description
Castro v. Jacobsen 6:2023-cv-00062 U.S. District Court, District of Montana	On September 11, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Montana Secretary of State Christi Jacobsen and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Montana according to Section Three of the Fourteenth Amendment of the U.S. Constitution. On September 18, 2023, Castro filed an Emergency Application for a TRO and an Expedited PI Hearing, which the court denied for failure to serve. President Trump filed a motion to dismiss.

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New Hampshire

Case	Description
Castro v. Scanlan 1:23-cv-00416 U.S. District Court, District of New Hampshire	On September 5, 2023, Castro, filed a Verified Complaint for Declaratory and Injunctive Relief against New Hampshire Secretary of State David Scanlan and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Hampshire according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro filed an Emergency Application for a Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits. President Trump filed a motion to dismiss. The court will hold a hearing on jurisdictional issues on October 20, 2023.

New Jersey

Case	Description
Castro v. Way 3:23-20929-GC U.S. District Court, District of New Jersey	On October 3rd, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against New Jersey Secretary of State Tahesha Way and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Jersey according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

New Mexico

Case	Description
Castro v. Toulouse Oliver 1:2023-cv-00766 U.S. District Court, District of New Mexico	On September 8, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against New Mexico Secretary of State Maggie Toulouse Oliver and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Mexico according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. The court issued an order to show cause why the claims should not be dismissed for jurisdictional issues.

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New York

Case	Description
Castro v. New York State Board of Elections 23-cv-01223 U.S. District Court, Northern District of New York	On October 2nd, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against the New York State Board of Elections and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New York according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Nevada

Case	Description
Castro v. Aguilar 2:23-cv-01387 U.S. District Court, District of Nevada	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Nevada Secretary of State Francisco V. Aguilar and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Nevada according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. President Trump filed a motion to dismiss which is in the briefing stage.

Pennsylvania

Case	Description
Castro v. Schmidt Commonwealth Court of Pennsylvania Supreme Court of Pennsylvania	On August 30, 2023, Castro filed a Complaint against Pennsylvania Secretary of the Commonwealth Al Schmidt and Donald J. Trump in Pennsylvania Commonwealth Court seeking an injunction to prevent Schmidt from accepting ballot access documents for Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Pennsylvania according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 6, 2023, Castro filed a Complaint in the Middle District of PA. He voluntarily dismissed the federal case on September 27, 2023.

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U.S. District Court, Middle District of Pennsylvania 1:23-cv-01468	
Stilp v. Trump 1:23-cv-1489 U.S. District Court, Middle District of Pennsylvania	On September 7, 2023, Pennsylvania resident Gene Stilp filed a pro se Complaint and Request for Declaratory Relief against Donald J. Trump. The complaint raises the question of whether Trump should be barred from running and removed from the Pennsylvania primary ballot under Section Three of the Fourteenth Amendment of the U.S. Constitution. Stilp argues that Trump need not have committed violence for his actions to be considered taking part in "insurrection" and notes that participants in the events of January 6, 2021 have testified that they "acted at the direction of Donald Trump."

Rhode Island

Case	Description
Castro v. Amore et al. 1:23-cv-00405 U.S. District Court, District of Rhode Island	On October 3, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Rhode Island Secretary of State Gregg Amore and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Rhode Island according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

South Carolina

Case	Description
Castro v. SC Election Commission, 3:23-cv-04501	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against the South Carolina Election Commission and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in South Carolina according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 19, 2023, Castro filed an Emergency Motion for Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with A Preliminary Bench Trial on the Merits. The Magistrate Judge issued a Report and Recommendation recommending the court deny the motion based on failure to show

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U.S. District Court, District of South Carolina	immediate irreparable injury. The South Carolina Election Commission and President Trump filed motions to dismiss which are in the briefing stage.

Vermont

Case	Description
Castro v. Copeland-Hanzas et al. 2:23-cv-00453 U.S. District Court, District of Vermont	On October 2, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Vermont Secretary of State Sarah Copeland-Hanzas and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Vermont according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On October 11, 2023, the court denied Castro's motion for a TRO and noted it would still consider the request for a preliminary injunction.

Virginia

Case	Description
Perry-Bey v. Trump 1:23-cv-1165 U.S. District Court, Eastern District of Virginia	On August 31, 2023, Virginia citizens and civil rights activists Roy L. Perry-Bey and Carlos A. Howard filed a Complaint for Declaratory Relief to determine whether Donald J. Trump is eligible to participate as a presidential candidate in the Virginia Republican Party Primary election or the general election. The complaint argues that Trump's actions with regard to the January 6, 2021 breach of the U.S. Capitol disqualify him as a viable candidate under Section Three of the Fourteenth Amendment of the Constitution. Plaintiff Howard filed a Motion for Judgment which the court denied.

West Virginia

Case	Description
Castro v. Warner 2:23-cv-00598	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against West Virginia Secretary of State Andrew Warner and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in West Virginia according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

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U.S. District Court, Southern District of West Virginia	Castro filed an emergency application for a TRO and expedited preliminary injunction hearing. Motions to dismiss have been filed by President Trump and Defendant-Intervenor the West Virginia Republican Party.

Wisconsin

Case	Description
Castro v. WEC 2023-cv-002288 Wisconsin Circuit Court, Dane County	On August 31, 2023, Castro filed a Verified Complaint for Injunctive Relief against the Wisconsin Elections Commission and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Wisconsin according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Wyoming

Case	Description
Castro	No record of a filing for this case so far but referenced in the press.

Dismissed Cases

District of Columbia

Case	Description
Castro v. Federal Election Commission U.S. District Court, District of Columbia 22-2176 D.C. Circuit Court of Appeals	On July 25, 2022, Castro filed a pro se civil action for declaratory and injunctive relief against the FEC. The complaint cites the Federal Election Campaign Act, 52 U.S.C. § 30109, and the Administrative Procedure Act, 5 U.S.C. § 706, for "unlawful agency delay" to argue that the FEC must enforce Donald J. Trump completing official filing as a candidate with the FEC (now moot), and that, once submitted, the FEC should deny Trump's candidacy form pursuant to Section 3 of the Fourteenth Amendment of the U.S. Constitution. The court dismissed the complaint on December 6, 2022 for lack of standing, finding the FEC has no jurisdiction to reject candidacy filings, among other reasons. On December 7, 2022, Castro appealed. On April 10, 2023, the court granted the FEC's motion for summary affirmance.

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Florida

Caplan v. Trump 0:23-cv-61628-RLR U.S. District Court, Southern District of Florida	On August 24, 2023, Lawrence A. Caplan, a Florida lawyer, filed a civil action against Donald J. Trump in the Southern District of Florida. Caplan argues that Trump's candidacy violates Section 3 of the Fourteenth Amendment due to the "aid or comfort" he provided to January 6th insurrectionists. On August 31, 2023, the court issued a sua sponte order dismissing the lawsuit due to lack of standing.

Idaho

Case	Description
Castro v. McGrane 1:23-cv-00393 U.S. District Court, District of Idaho	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Phil McGrane and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Idaho according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/03/23 - Notice of Dismissal filed by Plaintiff 10/04/23 - Order of Dismissal

Maine

Case	Description
Castro v. Bellows 1:23-cv-00335 U.S. District Court, District of Maine	On September 5, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Shenna Bellows and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Maine according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/03/23- Notice of Dismissal Filed by Plaintiff

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New Hampshire

Castro v. Trump 217-2023-cv-00462 Merrimack County Superior Court	On August 27, 2023, Castro filed a civil action against Secretary of State David Scanlan and Donald J. Trump, seeking an injunction against Scanlan. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the 2024 primary ballot in New Hampshire according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Secretary Scanlan held a press conference on September 13, 2023 stating that the Secretary of State does not have the power to withhold a candidate based on 14.3. 9/24/23: Motion for Voluntary Non-Suit 10/5/23: Case dismissed

North Carolina

Case	Description
Castro v. Bell 5:23-cv-00496 U.S. District Court, Eastern District of North Carolina	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Karen Brinson Bell, the executive director of the North Carolina State Board of Elections, and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in North Carolina according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/2/23: Notice of Dismissal filed by Plaintiff

Oklahoma

Case	Description
Castro v. Ziriax 5:2023-cv-00781 U.S. District Court, Western District of Oklahoma	On September 6, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Paul Ziriax, Secretary of the Oklahoma State Election Board, and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Oklahoma according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 9/29/23: Notice of Dismissal filed by Plaintiff

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Utah

Case	Description
Castro v. Henderson 2:23-cv-00617 U.S. District Court, District of Utah	On September 6, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Utah Lt. Gov. Deirdre Henderson and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Utah according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 9/27/23: Notice of Dismissal filed by Plaintiff

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EXHIBIT 2

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NEW YORK UNIVERSITY
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IS THE PRESIDENT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF SECTION 3 OF THE FOURTEENTH AMENDMENT?

Josh Blackman* **& Seth Barrett Tillman****

INTRODUCTION

On January 13, 2021, the House of Representatives voted to impeach then-President Donald J. Trump for inciting an insurrection.[1] The sole impeachment article invoked Section 3 of the Fourteenth Amendment.[2] But the House's impeachment article

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[1] H.R. Res. 24, 117th Cong. (2021) (as introduced in the House on Jan. 1, 2021) [https://perma.cc/DS5F-SCQD].

[2] *Id.*

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elided over a critical threshold question: Was Trump covered by Section 3? The structure of Section 3 of the Fourteenth Amendment is a bit complicated. To assist our analysis, we distinguish the four elements with different typefaces (underline, **bold**, *italics*, and SMALL CAPS), and number them out of order:

> [3] No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, [1] **having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States**, [2] *shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.* [4] BUT CONGRESS MAY BY A VOTE OF TWO-THIRDS OF EACH HOUSE, REMOVE SUCH DISABILITY.[3]

First, the jurisdictional element, [1], specifies which positions are subject to Section 3: a "person . . . who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States."[4]

Second, the offense element, [2], defines the conduct prohibited by Section 3. It regulates the conduct of a person satisfying the jurisdictional element who "shall have engaged in insurrection or rebellion against the same [the United States], or given aid or comfort to the enemies thereof."[5]

Third, the disqualification element, [3], defines the legal consequences or punishment that Section 3 provides. A person who

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[3] U.S. CONST. amend. XIV, § 3.
[4] *Id.*
[5] *Id.*

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satisfies the jurisdictional and offense elements of Section 3 shall not be "a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state."[6] The phrase "office . . . under the United States" in the disqualification element is distinguishable from the phrase "officer of the united States" in the jurisdictional element.

FOURTH, the amnesty element, [4], allows Congress to terminate the disqualification or disability: "Congress may by a vote of two-thirds of each House, remove such disability."[7]

This article does not focus on the offense element [2] and the amnesty element [4]. Rather, to determine whether former-President Trump was disqualified pursuant to Section 3, we will focus on the jurisdictional element [1] and the disqualification element [3].

Section 3's jurisdictional element applies to exactly four defined categories of state and federal positions. President Trump clearly does not fit into three of these categories. Trump never swore an oath as a "member of Congress," "a member of any state legislature," or an "executive or judicial officer of any state."[8] Indeed, Trump was the only President in American history to have never held prior state or federal, civilian or military, public office. Therefore, the only way for Section 3's jurisdictional element to cover President Trump would be if he falls into the fourth category: he took an oath to support the Constitution as an "officer of the United States." Trump only swore one constitutional oath: as President of the United States.[9] In short, for President Trump to be subject to Section 3 disqualification, he must have violated the offense element *and* fit within the jurisdictional element. And in order to fit within the

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[6] *Id.*

[7] *Id.*

[8] *Donald Trump*, THE WHITE HOUSE [https://perma.cc/BHR3-DZ3M].

[9] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath). *See, e.g.*, Brian Duignan, *Donald Trump/president of the United States*, ENCYCLOPEDIA BRITANNICA (Aug. 17, 2021) [https://perma.cc/2X7V-K8RN].

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jurisdictional element, the President must be an "officer of the United States" for purposes of Section 3.

The House's impeachment article, however, did not address this threshold issue. It stated:

> [S]ection 3 of the 14th Amendment to the Constitution prohibits *any person* who has "engaged in insurrection or rebellion against" the United States from "hold[ing] any office . . . under the United States."[10]

In fact, Section 3 does not apply to "any person" or even "any person" who committed the conduct provided for in the offense element. Here, the House seemed to assume that the phrase "officer of the United States" was equivalent to the phrase "any person." Perhaps the House assumed that a President is an "officer of the United States." Still, the House's position was not entirely clear.

After the Senate trial, Trump was not convicted. Therefore, he could not be disqualified from holding future office pursuant to the Impeachment Disqualification Clause.[11] But even after Trump's acquittal, efforts to disqualify the former President based on Section 3 continue. For example, there is a pending concurrent resolution that would find "President Donald J. Trump 'as an *officer of the United States* . . . engaged in insurrection or rebellion against the [United States], or g[ave] aid or comfort to the enemies thereof,' making him ineligible for future office . . . ."[12] This resolution assumed that the President is an "officer of the United States."

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[10] *See* H.R. Res. 24, *supra* note 1, at 3:2-6 (emphasis added).

[11] U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . .").

[12] H.R. Con. Res. 3, 117th Cong. (2021) (emphasis added), https://www.congress.gov/bill/117th-congress/house-concurrent-resolution/3/text [https://perma.cc/7JZP-E23D] ("Censuring President Donald J. Trump for attempting to overturn the results of the 2020 Presidential election through unlawful means and for inciting insurrection").

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We disagree. There is some good reason to think the President is not an "officer of the United States." President Trump, who swore only one constitutional oath, does not fall within Section 3's jurisdictional element. Therefore, he cannot be disqualified pursuant to this provision.

This article will proceed in six parts. Part I will contend that the phrases "officer of the United States" and "office . . . under the United States" in Section 3 refer to different categories of positions. Part II will analyze the phrase "officer of the United States," which is used in the Constitution of 1788 and in Section 3 of the Fourteenth Amendment. Part III will show that the meaning of the phrase "officer of the United States" did not drift from 1788 through 1868. In both eras, there is substantial evidence that the President was not considered an "officer of the United States." Part IV will recount longstanding Executive Branch opinions, which affirmed that elected officials like the President are not "officers of the United States." Part V will respond to recent arguments suggesting that the President is an "officer of the United States" for purposes of Section 3. Part VI will chart how the courts, and not Congress, will likely have the final say about whether President Trump is subject to Section 3 of the Fourteenth Amendment.

I. THE PHRASES "OFFICER OF THE UNITED STATES" AND "OFFICE ... UNDER THE UNITED STATES" IN SECTION 3 REFER TO DIFFERENT CATEGORIES OF POSITIONS

Section 3 of the Fourteenth Amendment refers to two textually distinct groups of officers and offices: an "officer of the United States" and an "Office . . . under the United States." These phrases also appear in the Constitution of 1788. The Oath or Affirmation Clause refers to "officers of the United States." And the phrase "Office . . . under the United States" appears in the Elector Incompatibility Clause and Impeachment Disqualification Clause. We have long argued that these two phrases, which appear in the

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Constitution of 1788, have distinct, albeit related meanings.[13] We also think these two phrases, as used in Section 3, have different meanings. Indeed, the very fact that Section 3's text uses both of these phrases, and does so in the very same sentence, provides some substantial evidence that the two phrases do not have identical meanings. Moreover, there is some textual overlap between the Constitution of 1788 and Section 3. We draw three inferences from this textual overlap. First, we think the better view is that the jurisdictional element of Section 3 was modeled after the structure and language of the Oath or Affirmation Clause. Second, we think the better view is that the disqualification element of Section 3 was modeled after the structure and language of the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause. Third, we think the better view is that the Framers imported the meaning of "officer of the United States" and "office . . . under the United States" from the Constitution of 1788 to Section 3's jurisdictional element and disqualification element, respectively.

A. WE SHOULD PRESUME THAT THE DIFFERENT TYPES OF OFFICES REFERENCED IN THE SAME SENTENCE OF SECTION 3 HAVE DIFFERENT MEANINGS

The scope of Section 3 is complicated. Specifically, the jurisdictional element and the disqualification element, which appear in the same sentence, refer to different types of officers and offices. First, the jurisdictional element applies to a person who took an oath as an "officer of the United States." Second, the

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[13] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. (forthcoming 2021) [hereinafter Tillman & Blackman, *Offices*] [https://perma.cc/B7AM-E83B] (discussing taxonomy); Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and offices*, WASH. POST (Sept. 25, 2017) [hereinafter Blackman & Tillman, *Emoluments*] [https://perma.cc/7K3C-ANSM].

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disqualification element mandates that disqualification extends to "any office . . . under the United States."[14] Had the framers used the same phrase twice in the same sentence—for example, both elements applied to "officer[s] of the United States"—we would reasonably conclude that those phrases have the same meaning. This reasoning follows from the presumption of *intrasentence uniformity*: where the same language is used in the same sentence, we presume that language is used uniformly.[15]

However, Section 3 uses different phrases in the same sentence. Here, the presumption should be the converse. The better conclusion is that when the same sentence in the Constitution uses two different phrases—here, referring to different categories of offices and officers—we should presume that the Framers intended to convey two different meanings.[16] This latter principle can be called the presumption of *intrasentence non-uniformity*: where different language is used in the same sentence, we presume that the language is not used uniformly. Given this presumption, the phrases "officer of the United States" and "office . . . under the United States" would have different meanings.

The Constitution of 1788 also juxtaposes these same two categories of officers in the same sentence. Consider the third paragraph of Article VI:

> [1] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial *Officers*, both *of the United States* and of

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[14] The ellipses refer to three words the Framers placed after *office* but before *under*: "civil or military."

[15] *See, e.g.*, Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2002) (defending "a presumption of intrasentence uniformity in constitutional, statutory, and regulatory interpretation").

[16] *See, e.g., id.* at 1172 ("It is far better to use two different words in a sentence when we mean to convey two different meanings."); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) ("It is hardly to be presumed that the variation in the [Constitution's] language could have been accidental.").

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> the several States, shall be bound by Oath or Affirmation, to support this Constitution; [2] but no religious Test shall ever be required as a Qualification to any *Office or public Trust under the United States.*[17]

First, the Oath or Affirmation Clause, which appears before the semicolon, applies to "all executive and judicial Officers . . . of the United States." Second, the Religious Test Clause, which appears after the semicolon, refers to "any Office . . . under the United States." [18] The same sentence references two textually distinct categories of officers and offices.

There is some evidence that the two types of "officers" and "offices" in Article VI refer to different categories of positions. During the drafting process, the Framers revised the Religious Test Clause to clarify what type of offices it applied to. Earlier, a draft provision referred to "any office or public trust under *the authority of* the United States."[19] Later, the Committee of Style revised that draft to "any office or public trust under the United States." [20] The committee removed the phrase "the authority of." [21] This revision provides some evidence that the Framers in 1787 paid reasonably careful attention to the way the Constitution used "office"- and

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[17] U.S. CONST. art. VI (emphasis added).

[18] The Religious Test Clause also applies to a "public trust under the United States." U.S. CONST. art. VI, cl. 3. *See* Tillman & Blackman, *Offices*, *supra* note 13, at 1 (finding that the phrase "public trust under the United States" includes "federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties"—a category that would include presidential electors).

[19] PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2005) (noting that "[t]he Committee of Style rephrased the language by eliminating the words 'the authority of'" from the draft Religious Test Clause).

[20] *Id. See generally* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 47 n.275, 87 n.492 (2021) (discussing revisions made to "office"- and "officer"-language in the Succession Clause, Impeachment Clause, and Religious Test Clause).

[21] *See* ROFES, *supra* note 19.

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"officer"-language. One cannot presume that the various phrases using "office" and "officer" were used indiscriminately. There is no record of commensurate efforts by the Committee of Style or the Committee of Detail to textually align or harmonize the phrases "Officer[] . . . of the United States" and "Office . . . under the United State" which both appear in the same sentence of Article VI. Given the Framers' careful attention to such details, we conclude that the two different phrases were used to refer to different types of offices.[22]

We think the same presumption of *intrasentence non-uniformity* should likewise extend to Section 3. The phrase "officer of the United States" in the jurisdictional element has a different meaning from the phrase "office . . . under the United States" in the disqualification element. Our position regarding Section 3 is supported by the similar usage in Article VI. Both the text of Section 3 and Article VI use textually distinct language: "officer of the United States" and "office . . . under the United States." And we should presume these phrases referred to different positions.

The Framers of the Constitution of 1788 made many other changes to "office"- and "officer"-language in provisions of the draft constitution. For example, in the Succession Clause, the phrase "officer of the United States" was changed to "officer."[23] In the Impeachment Clause, the phrase "[President, Vice President,] and *other* Civil officers of the U.S." was changed to "President, Vice President, and Civil Officers of the U.S."[24] And in its final form, the Impeachment Clause became: "President, Vice President, and *all* civil Officers of the United States." The Framers changed the word that preceded "Civil Officers of the United States" from "other" to "all." This and other similar alterations to the draft constitution's "office"- and "officer"-language were significant. First, these revisions show

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[22] Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

[23] *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 532 and 535 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS], *with id.* at 573 and 599. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 nn.16-18 (1995).

[24] *Compare* 2 FARRAND'S RECORDS, *supra* note 23, at 545 & 552, *with id.* at 600.

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that this language was not modified indiscriminately. The Framers paid careful attention to the words they chose. Second, the use of "other" in the draft constitution shows that at a preliminary stage, the Framers used language affirmatively stating that the President and Vice President were "Officers of the United States." But the draft constitution's use of "other" was, in fact, rejected in favor of "all." The better inference, arising in connection with the actual Constitution of 1788, is that the President and Vice President are not "Officers of the United States." Joseph Story stated this position in his *Commentaries on the Constitution.*[25] The Framers also made complex changes to the "officer"-language in the Appointments Clause.[26]

These precise, surgical textual changes cannot be described as random. All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office . . . under the United States" in Section 3 of the Fourteenth Amendment.

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[25] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, and Co. 1833) ("[The Impeachment Clause] says, 'the president, vice-president, and *all civil officers* (not all *other* civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion, that the[] [President and Vice President] were enumerated, as *contradistinguished* from, rather than as included in the description of, civil officers *of* the United States." (latter two emphases added)).

[26] 2 FARRAND'S RECORDS, *supra* note 23, at 177, 181–82; Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 472 (2018) (citing 1 FARRAND'S RECORDS, *supra* note 23, at 20–22, 20 n.10); 2 FARRAND'S RECORDS, *supra* note 23, at 614.

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B. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE JURISDICTIONAL ELEMENT OF SECTION 3 AND THE OATH OR AFFIRMATION CLAUSE

We do not think that the language used in Section 3 was drafted from a blank slate. Indeed, there is some overlap between Section 3 and provisions from the Constitution of 1788. The Framers of Section 3's jurisdictional element likely drew its language from the text of the 1788 Oath or Affirmation Clause in Article VI. Therefore, the meaning of the phrase "Officers of the United States" in Article VI should inform the meaning of "officer of the United States" in Section 3's jurisdictional element.

Compare these two provisions, which each refer to four types of positions. Once again, we have used different typefaces (underline, **bold**, *italics*, and SMALL CAPS) to distinguish the four categories.

Oath or Affirmation Clause (1788)	Jurisdictional Element of Section 3 (1868)
"[1] The Senators and Representatives before mentioned, and the [2] **Members of the several State Legislatures**, and [3] *all executive and judicial Officers, both of the United States* and [4] OF THE SEVERAL STATES, shall be bound by Oath or Affirmation, to support this Constitution"	"No person . . . who having previously taken an oath, [1] as a member of Congress, or as [3] *an officer of the United States*, or as a [2] **member of any state legislature**, or as [4] AN EXECUTIVE OR JUDICIAL OFFICER OF ANY STATE, to support the Constitution of the United States. . . ."

Both provisions reference the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] **members of the state legislatures**, [3] *executive and judicial officers of the United States*, and [4] EXECUTIVE AND JUDICIAL OFFICERS OF THE STATES.

There are substantial similarities between the Oath or Affirmation Clause and Section 3's jurisdictional element. This overlap is not surprising. Article VI already imposed an oath on

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many positions in the federal and state governments. It would make sense for the Framers of the Fourteenth Amendment to use that same grouping of people to identify those subject to disqualification. We think it reasonable to infer that the jurisdictional element of Section 3 was modeled after the Oath or Affirmation Clause of Article VI.

There are slight variations between the Oath or Affirmation Clause and Section 3's jurisdictional element. And these alterations support our position that the Framers took care when writing "office"- and "officer"-language. They did not simply copy the language in its entirety, but instead made careful revisions.

The first category was changed from "the Senators and Representatives before mentioned" to "member of Congress." These phrases are not identical. The category of "member[s] of Congress" is narrower than the category of "Senators and Representatives." Not all Senators and Representatives become members. Senators and Representatives begin their terms as *members-elect* from the date of the start of their two-year or six-year constitutional terms. Customarily, prior to the start of their terms, a Senator or Representative—that is, a member-elect—travels to the Capitol and presents bona fide credentials or a certificate of election. But such a member-elect does not become a member until his house organizes and accepts him as a member.[27]

The distinction between a member-elect and a member affects the timing of when officer-holders in the Executive Branch or Judicial Branch transition to Congress. For example, the Incompatibility Clause bars "a member of either House" from holding "any Office under the United States." But this restriction only applies to actual *members*, and not *members-elect*. Therefore, when a member-elect begins the two-year or six-year constitutional term to which he was

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[27] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); *id.* art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

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elected, but before he is accepted as a member, he could *still* hold a position in the Executive Branch or Judicial Branch. But in order to be accepted as a member, the member-elect must resign his executive-branch or judicial-branch office. These sorts of disputes are not hypothetical. In 1818, the House of Representatives drew this distinction when it accepted the credentials of a federal-office holder who simultaneously served as member-elect, but had not yet become a member.[28] In 1788, 1818, and 1868, and today, the Constitution's "office"- and "officer"-language mattered and continues to matter.

The **second category** was tweaked from "Members of the several State Legislatures" to "member of any state legislature." Here, we do not see any material change. There may have been some linguistic preference for the phrase "any state" over the phrase "several states" followed by a plural noun. The Framers of Section 3 likewise changed the phrase "executive and judicial Officers . . . of the *several states*" to "an executive or judicial officer of *any state*." The Constitution of 1788 used the phrase "several states" in seven clauses,[29] and the phrase

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[28] *See, e.g.*, 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 499, at 624–27 (1907) [https://perma.cc/B5V8-XFD6] ("After a careful consideration of the status of a Member-elect the House decided that such an one was not affected by the constitutional requirement that an officer . . . shall not be a Member.").

[29] U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the *several States*." (emphasis added)); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the *several States* . . . ." (emphasis added)); *id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the *several States*, and with the Indian Tribes" (emphasis added)); *id.* art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the *several States* . . . ." (emphasis added)); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the *several States*." (emphasis added)); *id.* art. V ("The Congress . . . on the Application of the Legislatures of two thirds of the *several States*, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the *several States* . . . ." (emphasis added)); *id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the *several State* Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." (emphasis added)).

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"any state" in six provisions.[30] It may be that the phrase "any state" referred to specific conduct that occurred in only one state. And the phrase "several states" referred to general conduct that could recur in multiple states. The Framers also used the phrase "each state" in eight provisions to similar effect as "any state."[31] The Privileges and Immunities Clause of Article VI, which refers to both "each state" and "several states," illustrates this usage: "The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the

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[30] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from *any State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." (emphasis added)); *id.* art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from *any State*." (emphasis added)); *id.* art. I, § 10, cl. 2 ("[T]he net Produce of all Duties and Imposts, laid by *any State* on Imports or Exports, shall be for the Use of the Treasury of the United States . . . . " (emphasis added)); *id.* art. III, § 2, cl. 3 ("[B]ut when not committed within *any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed." (emphasis added)); *id.* art. IV, § 2, cl. 3 ("A Person charged in *any State* with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State . . . ." (emphasis added)); *id.* art. IV, § 3, cl. 1 ("[N]or *any State* be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." (emphasis added)).

[31] U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in *each State* shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." (emphasis added)); *id.* art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but *each State* shall have at Least one Representative." (emphasis added)); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years."); *id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in *each State* by the Legislature thereof." (emphasis added)); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); *id.* art. II, § 1, cl. 3 ("But in chusing the President, the Votes shall be taken by States, the Representation from *each State* having one Vote." (emphasis added)); *id.* art. IV, § 1, ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* art. IV, § 2 ("The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the several States." (emphasis added)).

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several States."[32] It appears that the Fourteenth Amendment used "any state" and "several states" to the same effect.[33]

The *third category* was changed from "all executive and judicial Officers . . . of the United States" to "an officer of the United States."

The FOURTH ELEMENT was changed from "all executive and judicial Officers . . . of the several States" to "an executive or judicial officer of any state."

These third and fourth revisions show the care with which the Framers approached the "officer"-language in Section 3. Article VI of the 1788 Constitution refers broadly to "all executive and judicial Officers, both of the United States and of the several States." In a single clause, the Framers lumped together a wide variety of federal and state offices. This clause applied to "all executive and judicial Officers . . . of the United States" and "all executive and judicial Officers . . . of the several states."

In our view, it was unnecessary to specify that the "Officers of the United States" had to be "executive and judicial" officers. In light of the Appointments Clause, "Officers of the United States" could *only* be appointed to the executive and judicial branches. Appointed positions in the legislative branch—such as the Clerk of the House of Representatives and the Secretary of the Senate—are not appointed pursuant to the Appointments Clause. They are not "Officers of the United States." And they do not take an oath pursuant to Article VI.[34] However, Article VI also provided the oath for state officeholders. And each state had different governmental structures, which could change. It would have been arduous to draft a single federal constitutional provision that could reflect the varied state

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[32] U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

[33] *Compare* U.S. CONST. amend. XIV, § 1 ("[N]or shall *any State* deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added)), *with id.* § 2 ("Representatives shall be apportioned among the several States according to their respective numbers . . . .").

[34] *See also* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995) ("No constitutional oath is required of legislative officers, like the Clerk of the House or the Secretary of the Senate . . . .").

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constitutional structures regarding offices and officers. To provide some guidance to the state, Article VI clarified which types of state officers were covered: executive officers and judicial officers. Members of state legislatures are expressly covered by the Article VI oath requirement, but appointed positions in state legislatures are not covered.

In 1868, the Framers of Section 3's jurisdictional element departed from the structure of Article VI: they decoupled the state officers from the federal officers. Section 3 still specifies the types of state officers covered: "an executive or judicial officer of any state." Again, this provision accounts for the wide range of state government officeholders. And, now that state and federal provisions were textually decoupled, there was no need to specify that "Officers of the United States" had to be in the executive and judicial branches. Rather, the Appointments Clause defines the scope of the "Officers of the United States": appointed positions in the executive and judicial branches.[35]

This history supports a reasonable inference: the 1788 and 1868 Framers took some care when drafting "office"- and "officer"-language. These phrases were not used indiscriminately. Rather, in 1868, there was some deliberate effort to modify the extant 1788 language.

C. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE DISQUALIFICATION ELEMENT OF SECTION 3 AND THE ELECTOR INCOMPATIBILITY CLAUSE, THE INCOMPATIBILITY CLAUSE, AND THE IMPEACHMENT DISQUALIFICATION CLAUSE

In the Constitution of 1788, the phrase "Office . . . under the United States" is used in four provisions: the Elector Incompatibility

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[35] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

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Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the Foreign Emoluments Clause. In our view, the phrase "Office . . . under the United States" in each of these four provisions refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.[36] The phrase "office . . . under the United States" also appears in Section 3's disqualification element. In this Article, we take no position as to the meaning or scope of "office . . . under the United States" in Section 3, or whether that phrase in Section 3 included the President and Vice President. Instead, we use the Constitution of 1788 for a different purpose. The 1868 Framers of Section 3's disqualification element, who used the phrase "office . . . under the United States," were likely to have drawn that language from the similar language in the 1788 Constitution. Specifically, three of the four 1788 provisions share a similar structure with Section 3's disqualification element: holders of an "office . . . under the United States" are barred from some other position. The fourth provision, the Foreign Emoluments Clause, is structurally different; it does not impose any disqualifications.

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[36] *See id.*

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Compare the disqualification element of Section 3 with the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause:

Elector Incompatibility Clause (1788)	Incompatibility Clause (1788)	Impeachment Disqualification Clause (1788)	Disqualification Element of Section 3 (1868)
"no [1] Senator or Representative, or [2] **Person holding an Office of Trust or Profit under the United States**, shall be appointed an Elector."	"no [2] **Person holding any Office under the United States**, shall be a Member of either House during his Continuance in Office."	"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to [2] **hold and enjoy any Office of honor, Trust or Profit under the United States**"	"No person shall be a [1] Senator or Representative in Congress, or [3] *elector of President and Vice President*, or [2] **hold any office, civil or military, under the United States**, or [4] UNDER ANY STATE . . . ."

The disqualification element of Section 3, like the Elector Incompatibility clause, applies to Senators and Representatives. To be precise, Section 3 extends disqualification to "a Senator or Representative *in Congress*." The phrase "in Congress" may have been added to clarify that disqualification did not extend to state legislators, who may have the same formal title: senators and representatives. In 1878, a prominent commentator observed, without equivocation, that members of state legislatures are not "officers under any State" for purposes of Section 3's disqualification element.[37] This subtle addition, "in Congress," demonstrates that the

[37] *See* John Randolph Tucker, *General Amnesty*, 106 N. AM. REV. 53, 55 (1878) ("[I]t is clear that a member of a State Legislature is not a civil or military officer under any State, any more than a member of Congress is a civil or military officer under the United States . . . .") [https://perma.cc/JJM6-PBQG].

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Framers of Section 3 took care with respect to "office"-language. They did not use these terms indiscriminately.

The Elector Incompatibility Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the disqualification element of Section 3 all apply to any "office . . . under the United States."[38] The Impeachment Disqualification Clause empowered the Senate to disqualify a person from "hold[ing] and enjoy[ing] any Office of honor, Trust or Profit under the United States." The Incompatibility Clause bars a "person holding any Office under the United States" from serving as a member of Congress. And the Elector Incompatibility Clause bars members of Congress, as well as a "Person holding an Office of Trust or Profit under the United States" from serving as presidential electors. In light of these textual overlaps, it is reasonable to infer that the Framers of Section 3's disqualification element may have relied on the three provisions of the 1788 Constitution that barred certain officials from holding certain positions. And it is also reasonable to infer that the Framers of Section 3 used the phrase "office . . . under the United States" to have a different meaning than the phrase "officers of the United States."

The disqualification element of Section 3 departs from the provisions of the 1788 Constitution that use the phrase "office . . . under the United States" in two regards. First, the disqualification element of section 3 refers to an "elector of President and Vice President." This category of position does not appear in the Elector Incompatibility Clause—with good reason. It would be nonsensical to bar an elector from serving as an elector. But it would make sense to disqualify former confederates from serving as presidential electors. The Incompatibility Clause, which governs members of

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[38] Here, the ellipses refer to different words placed after *office* but before *under*: i.e., "of Trust or Profit" in the Elector Incompatibility Clause; "of honor, Trust or Profit" in the Impeachment Disqualification Clause; and "civil or military" in Section 3 of the Fourteenth Amendment. By contrast, no ellipsis is necessary for the Incompatibility Clause, which simply uses "office under the United States."

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Congress, also does not refer to electors. There was no need to list electors in the Incompatibility Clause because the Elector Incompatibility Clause already expressly barred Senators and Representatives from serving as electors. We think that a person disqualified under the Impeachment Disqualification Clause could serve as an elector. In our view, an elector is a "public trust under the United States," as that phrase is used in the Religious Test Clause, but does not hold an "Office . . . under the United States."[39]

Second, Section 3's disqualification element extends to "any office . . . under any state." The Elector Incompatibility Clause does not bar state officeholders from serving as electors. Indeed, to this day, it is common for state officeholders to serve as electors. Likewise, the Impeachment Disqualification Clause does not bar a disqualified person from holding state office. And the text of the Incompatibility Clause does not expressly bar a person who holds a state position from also serving in Congress. Indeed, a Governor could appoint himself to fill a Senate vacancy, and concurrently serve as both Governor and Senator without violating the plain text of the Incompatibility Clause.[40] The Fourteenth Amendment was novel in that the *national* constitution disqualified former confederates from serving in *state* governments. However, the disqualification element does not specify whether Section 3 disqualification extends to state legislative, executive, or judicial positions. Nonetheless, in 1878 John Randolph Tucker stated that members of the state legislature are *not*

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[39] Josh Blackman & Seth Barrett Tillman, *What are Presidential Electors?*, REASON—VOLOKH CONSPIRACY (May 21, 2020) [https://perma.cc/66HF-YBBM].

[40] Several Governors appointed themselves to fill Senate vacancies, but they resigned their state positions. Ken Rudin, *When Governors Appoint Themselves To The Senate*, POLITICAL JUNKIE (Sept. 8, 2009) [https://perma.cc/H4YL-3S2A]. *See generally* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 219 & n.277 (2008) (affirming that joint member of congress and state officeholding is not regulated by the Constitution's Incompatibility Clause).

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covered by Section 3's disqualification element.[41] By contrast, the jurisdictional element, like the Oath or Affirmation Clause, does provide such specificity: both provisions refer to "executive or judicial officer of any state" as well as "a member of any state legislature." The disqualification element simply refers to "any office . . . under any state."

We are not aware of any legislative debates that explain why the Framers chose the precise words they did for the jurisdictional and disqualification elements of Section 3. But we can reasonably presume that these two elements were drawn from very similarly-worded provisions from the Constitution of 1788. And if the phrases "Officers of the United States" and "Office . . . under the United States" had different meanings in the Constitution of 1788, we can reasonably presume that the Framers of Section 3 also understood these phrases to have different meanings. Here, we take no position on what the phrase "office . . . under the United States" meant in the disqualification element of Section 3, and whether that phrase as used in Section 3 includes the President and Vice President. Rather, we focus on the meaning of the phrase "officer of the United States" in Section 3's jurisdictional element.

II. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF THE 1788 CONSTITUTION OR FOR SECTION 3 OF THE FOURTEENTH AMENDMENT

The phrase "Officers of the United States" is used in four provisions of the Constitution of 1788: the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.[42] (We discussed the fourth provision in Part I). In our view, the President is not an "officer of the United States" for

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[41] *See* Tucker, *supra* note 37.

[42] U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3; *id.* art. II, § 4; *id.* art. VI, cl. 3.

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purposes of these four provisions.[43] We discussed this taxonomy in September 2017:

> First, the Appointments Clause spells out with clarity that the president can nominate "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." . . . Second, the Impeachment Clause expressly provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment. ..." Story explained that the president and vice president's [express] enumeration in the Impeachment Clause in addition to "all civil Officers of the United States" shows that the president and vice president are not deemed "officers of the United States" themselves. Otherwise, the Framers would have stated that "all *other* civil officers" were subject to impeachment. [Third], the oaths clause specifically enumerates that "Senators and Representatives, and the Members of the several State Legislatures," as well as "all *executive and judicial* Officers, both of the United States and of the several States of the United States" were required to be "bound by Oath or Affirmation to, support this Constitution." . . . [Fourth], the commission clause provides that "*all* the officers of the United States" receive presidential commissions. *All* means *all*. This structure explains why appointed executive-branch and judicial-branch officers receive commissions, but there is no record of any elected official, whether a president, vice president or a member of Congress, ever receiving a [presidential] commission. The

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[43] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

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reason is simple: Elected officials like the president are not "Officers of the United States."[44]

Our position is consistent with recent Supreme Court precedent. In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[45] Rather, "Officers of the United States" are appointed exclusively pursuant to Article II, Section 2 procedures.[46] It follows from these premises that the President, who is an elected official, is not an "officer of the United States."

Of these four provisions, only the Impeachment Clause expressly applies to the President. However, by contrast, the jurisdictional element of Section 3 does not specifically mention the presidency. Instead of using express language akin to the Impeachment Clause, the jurisdictional element of Section 3 applies to: A "person . . . who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States."[47]

We think Section 3's "officer of the United States"-language was imported from the Oath or Affirmation Clause.[48] By using this phrasing, the Framers of Section 3 likely intended to import or adopt the settled meanings from that provision, whether or not they had given concrete thought to what that meaning was. "[W]hen 'a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"[49] Here, Section 3's jurisdictional element was "quite obviously

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[44] *See* Blackman & Tillman, *Emoluments*, *supra* note 13.

[45] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[46] *Id.* at 497.

[47] U.S. CONST. amend. XIV, § 3 (emphasis added).

[48] *See supra* Part I.B.

[49] United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

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modeled" on the Oath or Affirmation Clause.[50] The soil was transplanted, along with the tree's roots and branches.

The President is not expressly listed in the Oath or Affirmation Clause. Why? Because the President does not recite an oath pursuant to Article VI. Rather, the President recites an oath pursuant to the Presidential Oath Clause in Article II.[51] The fact that the President does not take his oath pursuant to Article VI provides further evidence that he is not an "officer[] . . . of the United States" as that phrase is used in the Oath or Affirmation Clause. And if the President is not covered by the Oath or Affirmation Clause of 1788, then the presumption should be that he is not covered by the substantially similar phrase "officer of the United States" used in the jurisdictional element of Section 3.

In 1788, the President was not an "officer of the United States." We contend that the phrase "officer of the United States" has the same meaning in Section 3 as it does in the Constitution of 1788: the elected President is not an "officer of the United States." And we have seen no substantial evidence showing that the meaning of "officer of the United States" drifted from 1788 to 1868.

III. THERE IS NO DIRECT, CLEAR, OR COMPELLING EVIDENCE THAT THE MEANING OF "OFFICER OF THE UNITED STATES" DRIFTED FROM 1788 TO 1868

Critics may argue that the meaning of the phrase "officer of the United States" in Section 3 is different from the meaning of the phrase "Officers of the United States" in the Constitution's original seven articles. In other words, there was some linguistic drift or slippage between the 1788 ratification of the Constitution and the 1868 ratification of the Fourteenth Amendment. Let's assume that the President is not an "officer[] of the United States" for purposes of the

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[50] *Id.*

[51] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath).

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1788 Constitution. Under that assumption, it is still possible that the President might be an "officer of the United States" for purposes of Section 3. Thus, a reader might take the limited position that the President is an "officer of the United States" for the purposes of Section 3's jurisdictional element.

This position is conceivable. Indeed, more than a decade ago, Tillman suggested that linguistic drift may have occurred with respect to this phrase between 1788 and 1868.[52] He wrote that "[t]he stretch of time between the two events [1788 and 1868] was more than half a century. . . . It is hardly surprising that in the post-bellum epoch new meanings *might* have accrued to older language. Such linguistic slippage is common."[53] Again, in this Article, we take no position on whether the President and Vice President hold an "office . . . under the United States" for the purposes of the disqualification element of Section 3 of the Fourteenth Amendment. But we do not think linguistic drift occurred with respect to the phrase "officer of the United States."[54]

Absent contrary evidence, the default presumption should be one of linguistic continuity, rather than a presumption of linguistic drift. In other words, the proponents of the view that Section 3's jurisdictional element applies to the presidency have the burden to prove two propositions. First, proponents must show that the particular linguistic drift involving the Constitution's "officer of the United States"-language had actually occurred. And second, proponents must show that Section 3's "officer of the United States"-language, in fact, drifted to include the presidency. In other words, even if the meaning shifted over time, it is not self-evident that the

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[52] *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019) (discussing linguistic drift); *see also* James C. Phillips & Josh Blackman, *Corpus Linguistics &* Heller, 56 WAKE FOREST L. REV. 609, 622 (2021).

[53] Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation 70 n.119 (Feb. 1, 2012) [https://perma.cc/5CSU-66A2] (unpublished manuscript) (emphasis added) (citing Jack Tsen-Ta Lee, *The Text Through Time*, 31 STATUTE L. REV. 217 (2010)).

[54] *See infra* Part III.

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shift would embrace the presidency. Both propositions must be proven.

We do not think either proposition can be proven. Rather, there is some good authority to reject the position that Section 3's "officer of the United States"-language extends to the presidency. First, *United States v. Mouat* (1888) strongly suggested that officers are appointed, and not elected. Second, *United States v. Hartwell* (1867) strongly suggested that officers are appointed, and not elected. Third, other contemporary sources—such as a treatise on election law and proceedings from an 1867 impeachment trial—further rebut arguments in favor of linguistic drift. In light of this evidence, the strongest position is that the meaning of "officer of the United States" did not drift between 1788 and 1868. The President was not an "officer of the United States" in 1788, and the President was not an "officer of the United States" in 1868.

A. *United States v. Mouat* rebuts arguments in favor of linguistic drift

The Supreme Court decided *United States v. Mouat* in 1888, two decades after the ratification of the Fourteenth Amendment.[55] *Mouat* interpreted a statute that used the phrase "officers of the United States."[56] It provided, in part, that "no credit shall be allowed to any of the disbursing *officers of the United States* for payment or allowances in violation of this provision."[57] This statute was enacted in June 1873, five years after the Fourteenth Amendment was ratified in 1868.

Justice Samuel Miller, who served on the Supreme Court during the ratification of the Fourteenth Amendment, wrote the majority opinion in *Mouat*. He grounded his understanding of the statutory

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[55] United States v. Mouat, 124 U.S. 303 (1888).
[56] *Id.* at 307.
[57] *Id.* at 305 (citing 18 Stat. 72) (emphasis added).

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phrase "Officers of the United States" in the Appointments Clause. Article II, Section 2 of the Constitution provides:

> The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[58]

Justice Miller concluded, "[u]nless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an *officer of the United States*."[59] In other words, if a person was not appointed pursuant to the paths identified in Article II, Section 2, then he is likely not an "officer of the United States." Moreover, the discussion in *Mouat* was not limited to appointed officers. Rather, the *Mouat* test governs all persons in "the service of the government." The President is in "the service of the government," but he is not appointed by a President, a court of law, or a department head; indeed, he is not appointed at all. Notwithstanding the process followed by presidential electors, the Constitution expressly states that the President "shall . . . be elected."[60] Under the rule in *Mouat*, the President is not "strictly speaking" an "officer of the United States." Here, *Mouat* strongly

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[58] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[59] *Mouat*, 124 U.S. at 307 (emphasis added).

[60] U.S. CONST. art. II, § 1, cl. 1; *see also id.* art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which *he shall have been elected*, and he shall not receive within that Period any other Emolument from the United States, or any of them." (emphasis added)).

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suggests that the meaning of the phrase "officers of the United States" remained stable from 1788 through 1868.

Mouat provides some probative evidence of the original public meaning of Section 3's "officer of the United States"-language. Justice Miller's opinion also provides some evidence rebutting any presumption of post-1788 linguistic drift with respect to the phrase "officer of the United States." Finally, *Mouat* rebuts the position that, circa 1868, the president was obviously, plainly, or clearly an "officer of the United States."

In short, *Mouat* makes the linguistic drift view very difficult to defend. For this argument to work, the meaning of "officer of the United States" must have drifted back and forth: (1) in 1788, the phrase did not include the presidency; (2) in 1868, the phrase did include the presidency; (3) but during the five year span between 1868 and 1873, the meaning of that phrase drifted back to its original 1788 meaning, such that the President was not an "officer of the United States." We find that proposed chronology implausible.

B. *United State v. Hartwell* rebuts arguments in favor of linguistic drift

United States v. Hartwell was decided contemporaneously with the ratification of the Fourteenth Amendment.[61] This case further refutes the possibility of linguistic drift. In *Hartwell*, a clerk in the Treasury Department was charged with embezzlement. The relevant 1846 statute applied to an "officer" who was "charged with the safe-keeping of the public money."[62] The defendant claimed that because he was not an "officer," the indictment was defective. The Supreme Court disagreed and found that he was an "officer." Justice Noah Swayne wrote the majority opinion. He offered a two-part definition of an office. First, "[a]n office is a public station, or employment,

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[61] United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867).
[62] *Id.* at 392 (citing 9 Stat. 59).

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conferred by the appointment of government."[63] Second, "[t]he term [office] embraces the ideas of tenure, duration, emolument, and duties."[64]

In *Hartwell*, the clerk "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."[65] The court did not expressly connect the term "officer" in the embezzlement statute with the phrase "officer of the United States" in the Appointments Clause. However, the court's discussion of the appointment being made by the head of the department suggests the two concepts were closely related—rightly so, in our view. *Hartwell*, like *Mouat*, understood officers to be appointed, and not elected. Eleven years later, the Court decided *United States v. Germaine*.[66] And the *Germaine* Court repeated *Hartwell*'s four-factor test.[67]

In the modern era, the Supreme Court has cited the second part of *Hartwell*'s test, as repeated in *Germaine*, to determine whether a position is a principal or inferior "officer of the United States."[68] But this second part of *Hartwell* was premised on the first part: an officer is "conferred by the appointment of government." Presidents are not

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[63] *Id.* at 393 (emphasis added).

[64] *Id.*

[65] *Id.* at 393–94.

[66] United States v. Germaine, 99 U.S. 508 (1878).

[67] *Id.*

[68] Morrison v. Olson, 487 U.S. 654, 672 (1988) ("In our view, these factors relating to the 'ideas of tenure, duration . . . and duties' of the independent counsel, are sufficient to establish that appellant is an 'inferior' officer in the constitutional sense." (citing *Germaine*, 99 U.S. at 511–12)); *cf. Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) (noting that the four-factor test from *Germaine* "was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an 'officer of the United States' (to which the criminal statute at issue applied) as opposed to a mere employee."). We agree with Justice Scalia. *See also* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018), [hereinafter Tillman & Blackman, *Mueller*] [https://perma.cc/XK32-Q3JW] ("*Germaine*'s four-factor test had nothing to do with whether a position was held by an . . . 'inferior' or 'principal' officer. *Germaine* concerned the distinction between an 'officer of the United States' and an 'employee of the United States.'").

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"appointed" by the "government." Presidents are "elected" by the people.[69] Chief Justice Roberts announced the same view in *Free Enterprise Fund*: "[t]he people do not vote for the 'Officers of the United States.'"[70]

From *Hartwell* to the present, the Supreme Court has consistently understood that "offices" and "officers" refer to appointed positions. These authorities place the President outside the scope of the phrase "officer of the United States" in Section 3.

C. OTHER CONTEMPORARY AUTHORITIES FURTHER REBUT ARGUMENTS IN FAVOR OF LINGUISTIC DRIFT

There is additional evidence that the phrase "officer of the United States" in Section 3 does not extend to the presidency. Furthermore, this evidence is roughly contemporaneous with the 1868 ratification of the Fourteenth Amendment. In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States."[71] Instead, Booth stated, the President is "part of the Government."[72]

Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one

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[69] *See supra* note 51 and accompany text (discussing the elected President).

[70] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010).

[71] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California); *see also id.* at 130 (reproducing May 25, 1876 statement of George Sewell Boutwell, Senator from Massachusetts, who stated: "[F]or according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers.").

[72] *Id.* at 145.

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branch of 'the Government.'"[73] In 1866, the Supreme Court observed that "the President is the executive department."[74] And more recently, the Supreme Court described the presidency in the same fashion: "The President is the only person who alone composes a branch of government."[75]

These sources tend to rebut any argument in favor of post-1788 linguistic drift with respect to the phrase "officer of the United States." Likewise, these sources provide some evidence that in the period following the Civil War, the phrase "officer of the United States" did not extend to elected positions, including the presidency. We do not suggest that there is no counter-authority. But until proponents of the view that Section 3's "officer of the United States"-language includes the presidency put forward evidence as probative as *Mouat* and *Hartwell*, we will maintain that the original public meaning did not shift between 1788 and 1868. The President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

IV. CONSISTENT WITH SUPREME COURT PRECEDENT, THE EXECUTIVE BRANCH HAS LONG CONTENDED THAT ELECTED OFFICIALS, LIKE THE PRESIDENT, ARE NOT "OFFICERS OF THE UNITED STATES"

The Executive Branch has long relied on Justice Miller's discussion of "Officers of the United States" in *Mouat*. In 1918, Attorney General Thomas Watt Gregory concluded that "[a]n assistant United States district attorney is not an employee of the United States within the meaning of the Federal Employees'

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[73] DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Philadelphia, J.B. Lippincott & Co. 1878).

[74] Mississippi v. Johnson, 71 U.S. 475, 500 (1866).

[75] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020).

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Compensation Act."[76] Citing *Mouat*, he assumed that if a "person in the service of the Government [is] not appointed by the President, a court, or a head of a department, *and not elect[ed]*," then he is not an officer, but "is an employee."[77] The Executive Branch has long taken the position that the phrase "Officers of the United States" does not extend beyond persons appointed pursuant to Article II, Section 2 procedures.

In 1943, Attorney General Francis Biddle cited *Mouat* for the proposition that "under the *Constitution* of the United States, *all* its officers were appointed by the President . . . or by a court of law, or the head of a department."[78] Biddle's reading of *Mouat* did not distinguish "officers of the United States" as used in the statute from "Officers of the United States" as used in the Constitution. And, Biddle reasoned that "all" officers must be *appointed*—not *elected*.

In 2007, an Office of Legal Counsel (OLC) memorandum echoed this position. Citing *Mouat*, the memorandum stated, "[i]t is true that an individual not properly appointed under the Appointments Clause cannot *technically* be an officer of the United States."[79] The modifier "technically" is significant. Here, OLC suggests that the Constitution uses the phrase "officer of the United States" in a technical sense. The Constitution does not use the phrase "officer of the United States" as a colloquialism. In other words, the Framers did not use the phrase "officer of the United States" as it is used in

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[76] Employee Compensation Act—Assistant United States Attorney, 31 U.S. Op. Atty. Gen. 201, 202 (1918) (citing United States v. Mouat, 124 U.S. 303, 307 (1888)) (emphasis added).

[77] *Id.* (emphasis added). *Buckley v. Valeo* also distinguished between an "officer of the United States" and an "employee of the United States." *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). *See also* Tillman & Blackman, *Mueller*, *supra* note 68 (concluding that under *Buckley v. Valeo*, Special Counsel Mueller was not an "officer of the United States," but a mere "employee of the United States").

[78] Prosecution of Claims by Members of War Price and Rationing Boards, 40 U.S. Op. Atty. Gen. 294, 296 (1943) (Biddle, A.G.) (emphasis added).

[79] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007) (emphasis added).

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common parlance—a position that performs services for the United States of America. Rather, the phrase "officer of the United States" was used in a technical fashion to refer to specific positions.

Indeed, *Mouat* recognized that the phrase "officer of the United States" was a technical term. The *Mouat* Court found that a "person in the service of the Government" "is not, *strictly speaking*, an officer of the United States" unless he "holds his place by virtue of an appointment. . . ."[80] This 2007 OLC opinion strongly supports our position: the President, who is elected and not appointed, cannot be an officer of the United States.

Other executive-branch opinions have reached a similar conclusion when interpreting "officer"-language in statutes or regulations. Future-Chief Justice William H. Rehnquist observed that federal courts do not extend general "officer"-language in statutes to the President, "unless there is a specific indication that Congress intended to cover the Chief Executive."[81] Future-Justice Antonin Scalia also embraced this position in an OLC opinion. He wrote, "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[82] These authorities, which are consistent with *Mouat*, *Hartwell*, and *Free Enterprise Fund*, provide further support for our position: the elected President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

V. ADVOCATES WHO ARGUE THAT THE PRESIDENT IS AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF

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[80] *Mouat*, 124 U.S. at 307 (emphasis added).

[81] Memorandum from William H. Rehnquist, Asst. Att'y Gen., to the Honorable Egil Krogh, Re: Closing of Government Offices in Memory of Former President Eisenhower, OLC, at 3 (Apr. 1, 1969) [https://perma.cc/P229-BAKL].

[82] Memorandum from Antonin Scalia, Asst. Att'y Gen, to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P., OLC, at 2 (Dec. 19, 1974) [https://perma.cc/GQA4-PJNN].

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SECTION 3 HAVE FAILED TO MEET THEIR BURDEN OF PERSUASION

Professor Gerard Magliocca wrote an analysis of Section 3 of the Fourteenth Amendment.[83] He cited our prior work suggesting that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.[84] Magliocca did not reach a firm position on this issue. But he acknowledged that "[i]f there is an attempt to apply Section Three to former President Trump for his role in the events of January 6, 2021, the issue of whether Section Three applies to him or to the presidency itself will surely be part of any ensuing litigation."[85]

Magliocca cited congressional debates about draft versions of the Fourteenth Amendment. These records suggest that some members of Congress thought the presidency was an "office . . . under the United States" for purposes of Section 3's disqualification element.[86] Other scholars reached similar conclusions. [87] This evidence, however, does not clearly control the threshold question presented by the jurisdictional element: is the President an "officer of the United States."

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[83] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. 87, 93 n.29 (2021).

[84] *Id.* (citing Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section Three of the Fourteenth Amendment*, REASON-VOLOKH CONSPIRACY (Jan. 20, 2021) [https://perma.cc/A45G-PCQJ]).

[85] *Id.*

[86] *Id.* at 93–94 (discussing, for example, statements of Rep. Morrill and Rep. Bingham).

[87] *See* Mark Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021) [https://perma.cc/26BG-W7Q7] ("In the absence of any statement even hinting the contrary, no Republican could have believed that traitors should not become members of Congress, but ought to be allowed to be President of the United States."); Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021) [https://perma.cc/FBS4-HFYN] ("But the framers of the 14th Amendment clearly thought that Section 3 covered the president."). Hemel seems to have conflated Section 3's jurisdictional and disqualification elements.

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Magliocca also made a purposivist argument. He wrote that "Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or a Senator but could be President."[88] In 2009, Professor Saikrishna Prakash made this same argument in response to an article by Tillman.[89] But these intuitions also concern the scope of Section 3's disqualification element. These intuitions do not squarely resolve the issue of whether a President was an "officer of the United States" for purposes of Section 3's jurisdictional element.

Advocates who argue that the President is an "officer of the United States" for purposes of the jurisdictional element have presented three broad arguments. First, advocates cite scattered sources that refer to the President as an "officer" or an "officer of the United States." Second, advocates hypothesize that the Framers of the Fourteenth Amendment may have feared a former President, who took one constitutional oath and later supported the Confederacy, being re-elected to the presidency. Third, advocates argue that Section 3's jurisdictional element should be read to cover as many positions as possible, and not exclude the presidency. In our view, these arguments fail to meet the burden of persuasion. Finally, if any doubt remains, the democracy canon supports excluding the president from the scope of Section 3's jurisdictional element. Let the people, and not partisan state election boards decide who can be the next President.

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[88] Magliocca, *supra* note 83, at 93–94.

[89] Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL'Y 143, 161 (2009) ("Jefferson Davis and Robert E. Lee could have served as President of the United States without a congressional waiver of the bar against oath-breaking confederates. Reading this Amendment to require a congressional waiver for former confederates serving as postmasters or corporals but to not require such a waiver when a turncoat wished to serve as President would be rather strange."). Prakash was responding to Tillman's argument that a sitting President could serve in the Senate. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009).

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A. SCATTERED REFERENCES TO THE PRESIDENT AS AN "OFFICER" ARE NOT SUFFICIENT TO OVERCOME THE EVIDENCE IN SUPPORT OF OUR READING OF SECTION 3'S JURISDICTIONAL ELEMENT

Myles S. Lynch wrote an article about Section 3 of the Fourteenth Amendment. He rejected the distinction we draw between an "office . . . under the United States" and an "officer of the United States."[90] And he contended that the President is *both* an "office . . . under the United States" and an "officer of the United States."[91] To support his thesis, Lynch cites three categories of evidence. First, he looks to language used in the 1862 loyalty oath statute. Second, he cited a circuit court decision from 1837. Third, he cites scattered references that the President is an "officer of the United States." These sources provide only minimal support for Lynch's position, and are not sufficient to overcome the evidence in support of our reading of Section 3's jurisdictional element.

1. The 1862 Loyalty Oath statute does not support the argument that the Presidency holds an "Office … under the United States" for purposes of Section 3's jurisdictional element

Lynch cited the 1862 loyalty oath statute to support his reading of Section 3.[92] The law required certain federal positions to swear they did not support people "engaged in armed hostility" against the

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[90] Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. (forthcoming 2021) (manuscript at 11) [https://perma.cc/6EYJ-TMQ2]. At present, Lynch has only posted a draft of his article to the Social Science Research Network. In this Article, we respond to what Lynch has posted online and to other materials he has cooperatively made available to us.

[91] *Id.* at 7.

[92] Act to Prescribe an Oath of Office, and for other Purposes, ch. 127, Pub. L. No. 37-127, 12 Stat. 502 (1862) (repealed 1868).

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United States.[93] Specifically, the law imposed an additional oath requirement on "every person elected or appointed to any *office of honor or profit under the government of the United States*, either in the civil, military or naval departments of the public service, *excepting the President of the United States*."[94] The statute used the phrase "office . . . under the government of the United States," which is similar, but not identical to the phrase "office . . . under the United States." Lynch drew an inference from this statute: if the President did not hold an "office . . . under the United States," then there would be no need to expressly exempt him. Therefore, Lynch reasoned, the presidency would be considered an "office . . . under the United States."

This inference might have some bearing on Section 3's disqualification element, which uses the phrase "office . . . under the United States." But this inference does not plainly affect the meaning of Article 3's jurisdictional element, which refers to an "officer of the United States." If "officer of the United States" has a different meaning than "office . . . under the United States" – the central thesis of this Article – then the 1862 oath statute does not shed much light on Section 3's jurisdictional element.

Even if you disagree with our thesis, there are other reasons to express caution about relying on the 1862 loyalty statute. This bill was very controversial. There was a vigorous congressional debate about the scope of the law's statutory language. In 1863, Senator Charles Sumner of Massachusetts put forward a resolution requiring all Senators to take the newly-prescribed loyalty oath.[95] Senator James Asheton Bayard, Jr. of Delaware, however, objected to the constitutionality of this resolution. Bayard, a former United States Attorney for Delaware, had authored an antebellum treatise on the

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[93] *Id.*

[94] *Id.* (emphasis added).

[95] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4]; Seth Barrett Tillman, *The Foreign Emoluments Clause – Where the Bodies are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 260 (2017) [hereinafter Tillman, *Bodies*].

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Constitution,[96] and chaired the Judiciary Committee in the 35th and 36th Congresses.[97] He questioned whether the statute's "office . . . under the United States"-language could reach members of Congress. Congress can mandate that *appointed* officers take an additional oath, beyond the ordinary oath prescribed by the Article VI Oath or Affirmation Clause, because Congress created those positions by statute. But in Bayard's view, Congress should not be able to add additional qualifications for *elected* positions that are created by the Constitution, such as members of Congress.[98] Bayard concluded that members of Congress did not hold an "Office . . . under the United States."[99] Bayard based his conclusion, in part, on a report prepared in 1793 by Secretary of the Treasury Alexander Hamilton.[100] After the debate, a majority of Senators disagreed with Bayard. Senator Sumner's resolution passed.[101] And Bayard, a three-term Senator, resigned in protest on a point of principle.[102] The loyalty oath would not last long. Congress repealed the statute in 1868, the same year the Fourteenth Amendment was ratified.[103]

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[96] *See* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Hogan & Thompson 1833). Bayard's treatise continues to be cited by the Supreme Court and in modern scholarship. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (quoting BAYARD); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 486 & n.263 (2017) (quoting BAYARD).

[97] *See Bayard, James Asheton, Jr. (1799–1880)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT [https://perma.cc/NW8G-FYMR]; *History of the District of Delaware*, UNITED STATES DEPARTMENT OF JUSTICE [https://perma.cc/NC5W-UZJZ].

[98] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4].

[99] *Id.*

[100] For the relevance of Bayard's speech and Hamilton's report, *see* Tillman, *Bodies*, *supra* note 95, at 259. Bayard was relying on an edited reproduction of Hamilton's original document—the reproduction was prepared in the 1830s.

[101] Tillman, *Bodies*, *supra* note 95, at 261.

[102] *Id.*

[103] *See generally The Senate's First Act—The Oath Act*, UNITED STATES SENATE [https://perma.cc/V9B7-A6VY] (discussing 1862 Ironclad Oath, and 1868 and 1884 repeal of that oath).

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There is one final reason why the loyalty oath poses special difficulties for Lynch. In his view, members of Congress do not hold "office[s] . . . under the United States."[104] But the 1862 statute, as understood by Senator Sumner, applied to members of Congress. In other words, Sumner viewed members of Congress as "office[s] . . . under the United States." This understanding of the statute undermines Lynch's position in regard to Section 3's jurisdictional element. Ultimately, Lynch may find himself in agreement with Bayard, who argued that members of Congress do not hold "office . . . under the United States." We think the better position is to look to other, and more on-point, sources to understand Section 3's jurisdictional element.[105]

2. Stokes v. Kendall *does not shed light on the meaning of Section 3's jurisdictional element*

Lynch cited a second source of authority to support his position that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element: *United States ex rel. Stokes v. Kendall*, a circuit court decision from 1837.[106] This dispute led to the Supreme Court's definitive statement of the president's duty to oversee his principal officers.[107]

During the John Quincy Adams administration, Stockton & Stokes received important carrier contracts to assist the Postal Service. That firm was loyal to Adams. Upon taking office in 1829, President Jackson refused any service from the firm. Amos Kendall was appointed postmaster general in 1835. He found that the Adams administration overpaid Stockton & Stokes in credits. Kendall sought to correct that error by eliminating the credits. Kendall wrote in his autobiography that when he raised the issue with President Jackson,

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[104] Lynch, *supra* note 90.

[105] *See supra* Parts II, III, and IV.

[106] United States *ex rel.* Stokes v. Kendall, 26 F. Cas. 702, 752 (C.C.D.C. 1837) (No. 15,517).

[107] Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

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Old Hickory "remitted the matter to [his] discretion."[108] Kendall knew what had to be done, and removed the credits from the ledgers.

Congress did not approve of the nonpayment. Rather, Congress passed a law requiring the solicitor of the Treasury Department to review the accounts, settle the differences, and order the postmaster general to apply the credits. After receiving the solicitor's judgment, Kendall paid out most of the credits, but withheld some that he believed to be outside the congressional edict. This act of defiance was purportedly done "by President Jackson's order."[109]

Stockton & Stokes continued to press its claims after President Martin Van Buren succeeded Jackson in 1837. The firm "called on the President, under his constitutional power to take care that the laws were faithfully executed, to require the postmaster general to execute this law, by giving them the further credit" to which they claimed entitlement.[110] The circuit court, per Chief Judge Cranch, issued a writ of mandamus compelling the postmaster general to apply the credits in full.[111] On appeal, the Supreme Court agreed, and held that the postmaster general must comply with positive congressional edicts, lest the duty to take care that the laws be faithfully executed become a "dispensing power."[112] On appeal, Chief Justice Taney wrote the majority opinion. The Court stated, "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution."[113] The Supreme Court has reiterated *Kendall*'s reasoning. The principles from that case are

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[108] AMOS KENDALL, AUTOBIOGRAPHY OF AMOS KENDALL 350 (William Sitckney, ed., Boston, Lee & Shepard Publishers 1872).

[109] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1836–1918, at 44 (1926).

[110] *Kendall*, 37 U.S. at 538.

[111] *United States ex rel. Stokes*, 26 F. Cas. at 702.

[112] *Kendall*, 37 U.S. at 608 (citing the Take Care Clause).

[113] *Id.* at 613.

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"fundamental and essential," and without them, "the administration of the government would be impracticable."[114]

Lynch cited a single sentence from Chief Judge Cranch's circuit court decision that used the phrase "officer of the United States." Lynch used that sentence to interpret the phrase "officer of the United States" in Section 3's jurisdictional element. But we think Lynch read *Kendall* out of context.

In his opinion, Cranch described the nature of the Postmaster General's role. He explained that the Postmaster General does not work at the President's absolute command. Rather, the Postmaster General "is responsible to the United States, and not to the president." [115] The President can only command the Postmaster General when, "express law, authorized to assign [to the President] duties over and above those specially prescribed by the legislature." [116] The Postmaster General is not an officer of the President. Rather, he is "the officer of the United States, and so called in the constitution, and in all the acts of congress which relate to such officers."[117]

Here, Cranch was not interpreting the phrase "officer of the United States" as used in the Appointments Clause or in any other constitutional provision. Cranch also was not interpreting how the phrase "officer of the United States" was used in any statute or other positive law. Rather, Cranch was making a broader point about our system of government: officers are responsible to the nation and its laws, and not to the President. Cranch explained, "the postmaster-general must judge for himself, and upon his own responsibility, not

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[114] United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 304 (1854). *See also* United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915); Texas v. United States, No. 6:21-CV-00016, 2021 WL 3683913, at *37 (S.D. Tex. Aug. 19, 2021) (citing Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy Rabkin as *Amici Curiae* Supporting Respondents at 5–6, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) [https://perma.cc/DXM2-VHJH]).

[115] *United States ex rel. Stokes*, 26 F. Cas. at 752.

[116] *Id.*

[117] *Id.*

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to the president, but to the United States, whose officer he is."[118] The Constitution "does not authorize the president to direct [the Postmaster] how he shall discharge"[119] his duties. In the very next sentence, Cranch wrote:

> The president himself, although called by the postmaster-general, in his answer, 'the highest representative of the majesty of the people, in this government,' is but an *officer of the United States*, the head of one of the departments into which the sovereign power of the nation is divided; and, as that is the executive department, he may, with propriety, be called the chief magistrate *of the United States*.[120]

Lynch cited this sentence as evidence that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element. We disagree. Cranch used the phrase "of the United States" here in the same way that he did with respect to the Postmaster General: The President is responsible to the nation and its laws. In using "officer of the United States"-language, Cranch was not interpreting either a statute or a constitutional provision. He was using this same language in a more colloquial, or even a philosophical sense.

Cranch was not making a precise statement about what constitutional language governs or includes the President. Rather, he juxtaposed "officer of the United States" and "chief magistrate of the United States." Cranch made a broader point about constitutional governance—with some well-positioned jabs at President Jackson.

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[118] *Id.*
[119] *Id.*
[120] *Id.*

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(Cranch, a Federalist, was the nephew of President John Adams, and was also President John Quincy Adams's cousin.[121])

This brief aside from a circuit court decision is a very thin reed on which to place the construction of Section 3, which was ratified three decades later. Indeed, no comparable language appears in Chief Justice Taney's Supreme Court decision. By contrast, *Free Enterprise Fund* was an Appointments Clause case where the scope of the Constitution's "Officers of the United States"-language was a live issue. Chief Justice Roberts wrote, "[t]he people do not vote for the 'Officers of the United States.'"[122] Moreover, *Mouat* and *Hartwell* provide far more authoritative support for the proposition that the President is not an "officer of the United States." We do not put much weight on this aside from *Kendall*.

3. Scattered references that suggest the President is an "officer of the United States" or an "officer" cannot establish the precise meaning of a phrase used in Section 3's jurisdictional element

Finally, Lynch cited scattered sources in which the President was referred to as an "officer of the United States." For example, in 1824, President James Monroe sent a communication to the Senate and House.[123] Monroe recounted an incident in which the Massachusetts Governor refused to call forth the state militia. The state executive argued that the state executive must consent to that request. Moreover, according to Monroe, the Governor argued that the militia

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[121] *See John Quincy Adams to Lucy Cranch, June 1, 1778*, FOUNDERS ONLINE (last visited Dec. 8, 2021) [https://perma.cc/E83G-8N6] ("Late in 1800 President John Adams, the husband of Cranch's aunt Abigail Smith Adams, appointed [William Cranch] a commissioner of the federal district, and early the next year he made him an assistant judge for the United States Circuit Court for the District of Columbia. . . . Despite Cranch's Federalist views, [Thomas Jefferson] named him chief justice for the circuit court, in which capacity he served until his death."); *id.* ("Only the immediately preceding letter from [John Quincy Adams] to his cousin William Cranch, Lucy's brother, has been found.").

[122] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[123] S. JOURNAL, 24th Cong., 1st Sess. 190 (1824) [https://perma.cc/CYY9-3WYC].

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"could not be commanded by a *regular officer of the United States*, or other officer than of the militia, *except by the President*, in person." In the very next sentence, Monroe wrote "this decision of the Executive of Massachusetts was repugnant to the constitution of the United States, and of dangerous tendency."

Lynch read this correspondence to suggest that the President is an "officer of the United States." That conclusion is not obvious, particularly because Monroe's statement was awkward. The construction of the sentence can be read in two different ways. First, that the President is an officer of the United States who can command the militia. Second, that the militia could be commanded by militia officers who are not "regular officers of the United States," but the President is a militia officer and not an "officer of the United States." This second reading is consistent with the Constitution's militia clause, which puts the state militias under presidential control in certain circumstances.[124]

We are not sure which reading is correct. We should be hesitant to put much weight on a poorly-crafted comment from President Monroe, which he used to assail the allegedly unconstitutional viewpoint of the Massachusetts Governor. And even if Lynch's reading were correct, Monroe was not interpreting how the phrase "officer of the United States" was used in Section 3 or any then-extant constitutional provision.

Lynch also cited an 1865 proclamation by President Andrew Johnson. It stated, "the President of the United States is, by the constitution, made commander-in-chief of the army and navy, as well as the chief civil officer."[125] Here, the phrase "chief civil officer"

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[124] U.S. CONST. art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

[125] *After Slavery: Educator Resources, 3. President Andrew Johnson Appoints William W. Holden Provisional Governor of North Carolina*, LOWCOUNTRY DIGIT. HIST. INITIATIVE [https://perma.cc/9Z63-9K8B].

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is distinct from the language used in Section 3's jurisdictional element: "officer of the United States."

There may be other scattered statements in records of congressional debates that refer to the President as an "officer of the United States." We don't doubt it. People in government and academics may use imprecise language to describe different types of offices and officers. And in everyday parlance, the President is an officer of the United States of America.[126] We have never said otherwise. We have never suggested that authority is not divided. However, these scattered references cannot establish the precise meaning of a phrase used in Section 3 and elsewhere in the Constitution.

B. FEARS OF A FORMER CONFEDERATE BECOMING PRESIDENT WOULD NOT CONTROL WHETHER A FORMER PRESIDENT, WHO TOOK ONLY THE PRESIDENTIAL OATH, COULD BE DISQUALIFIED

We acknowledge that there is a purposivist argument supporting the view that the President is an "officer of the United States" with respect to Section 3's jurisdictional element. Could it really be, the argument goes, that virtually every elected and appointed position in the federal and state governments would be encompassed by Section 3's jurisdictional element, but not the presidency? After all, a former President of the United States—John Tyler—actually was elected to the Confederate congress![127] Would the Framers really have exempted Tyler (or men like him) from disqualification? Professor Magliocca, citing the Tyler hypothetical, suggested that "the idea of an insurrectionist President was real, not

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[126] *See supra* Part IV (discussing Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007)).

[127] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

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a far-fetched hypothetical."[128] And John Breckinridge, who had served as Vice President of the United States under President Buchanan, later served as a general in the Confederate army.[129]

There is a pragmatic rationale that explains why the presidency was excluded from the jurisdictional element of Section 3. By the time the Fourteenth Amendment was ratified in 1868, there were no living Presidents that had supported the Confederacy. Tyler died in 1862.[130] Moreover, Tyler had served as Senator from Virginia. Had Tyler still been alive, he was unquestionably covered by Section 3's jurisdictional element.

The other four living former Presidents—Fillmore, Pierce, Buchanan, and Johnson—had not supported the Confederacy. And each of those four officials had previously served in Congress, so they were unquestionably covered by Section 3's jurisdictional element. Moreover, Breckinridge, the former Vice President of the United States who joined the Confederacy, had previously served as a U.S. Senator.[131] Therefore, he was already expressly covered by Section 3's jurisdictional element.

At the time the Fourteenth Amendment was ratified, there were zero former living U.S. Presidents and Vice Presidents who supported the Confederacy, and who would not otherwise fit within the express language used in Section 3's jurisdictional element. Thus, the Framers of the Fourteenth Amendment—whose focus was on past wrongdoing during the Civil War—had no pressing reason to draft Section 3's jurisdictional element to cover presidents. And we are not aware of any evidence that Section 3 was forward-looking,

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[128] Gerard N. Magliocca, *Section Three Questions Answered*, BALKINIZATION (Jan. 17, 2021, 7:19 PM) [https://perma.cc/Z4PE-Q8WJ].

[129] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

[130] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

[131] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

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and was drafted to disqualify future presidents who might participate in future insurrections.

We think the democracy canon provides further support for our position.[132] Professor Richard L. Hasen explains that under this canon, a provision of the Constitution that might be read to "limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor."[133] This presumption equally applies to the political candidate who wishes to run for an elected position. Given two reasonable readings of the phrase "officer of the United States" in Section 3, the democracy canon favors the reading that expands democratic choice. Under our approach, voters and electors can select the President of their choice. Under Lynch's reading of Section 3, voters and electors nationwide are permanently disenfranchised from selecting a presidential candidate. Indeed, they are disenfranchised from selecting a person who was already elected as President who seeks a second term. We should prefer the former reading, which is consistent with the democracy canon.

Even in the wake of January 6, 2021, we should not read Section 3's text through the lens of the transitory and felt needs of the moment. The original public meaning of the Fourteenth Amendment, including Section 3's jurisdictional element, was fixed more than 150 years ago.

Finally, from 1789 through 2016, all of the presidents and vice Presidents had previously taken a constitutional oath in some other government position. We do not think this pattern was coincidental. Historically, a person could only rise to the level of presidency following prior public service in state or federal governments. The only President who never held any other public office, and thus did not take any other constitutional oath prior to his inauguration, was Donald Trump. The question this article seeks to answer—is the President an "officer of the United States" for purposes of Section 3's

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[132] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).
[133] *Id.* at 71.

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jurisdictional element—is relevant for only one President in American history: Donald Trump.

C. SECTION 3'S JURISDICTIONAL ELEMENTS, WHICH EXCLUDES CERTAIN STATE AND FEDERAL POSITIONS, SHOULD NOT BE VIEWED AS A CATCHALL PROVISION

Section 3's jurisdictional element is not a catchall. It does not cover *all* state and federal positions. There are gaps in coverage. For example, the jurisdictional element extends to a "member of any state legislature," as well as "an executive or judicial officer of any state." But Section 3's jurisdictional element does not extend to *appointed* positions in the state legislature. For examples, clerks and secretaries of state legislatures, who later served in the Confederate government, could not be subject to disqualification.

The same analysis would likely extend to appointed congressional positions in the federal government, like the Clerk of the House of Representatives and the Secretary of the Senate. Section 3's jurisdictional element extends to an "officer of the United States." Appointed legislative positions do not fall in this category.

We find support for our position based on the Oath or Affirmation Clause, which in our view served as a model for Section 3's jurisdictional element.[134] The Oath or Affirmation Clause provides the oath for "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States."[135] Appointed congressional positions are not expressly referenced in Article VI.

If Section 3's jurisdictional element was modeled after the Oath or Affirmation Clause, we can presume that appointed congressional positions are not covered by Section 3. As a result, a House Clerk or

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[134] *See supra* Part I.B.
[135] U.S. CONST. art. VI, cl. 3.

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Secretary of the Senate, who took only one constitutional oath, and later joined the Confederate government, could not be disqualified. Section 3's jurisdictional element was not a catchall.

Likewise, Section 3's disqualification element is not a catchall. It did not bar a disqualified person from serving in state legislatures.[136] This omission was significant. After all, state legislators were central players as southern states declared their secession. Moreover, prior to the ratification of the Seventeenth Amendment, members of state legislatures chose their state's U.S. Senators.[137] The state legislatures also "prescribed" the rules for the "Times, Places and Manner of holding Elections for Senators and Representatives."[138] The decision to exclude state legislatures from Section 3's disqualification element had the potential to undermine Reconstruction.

Section 3, as a whole, had other glaring omissions. Disqualified persons could: (1) serve on state or federal juries; (2) serve as elected territorial officers; (3) serve as enlisted federal military or state militia personnel; (4) participate as national or state convention members under Article V; and many other positions. Section 3's jurisdictional and disqualification elements did not universally apply to every person who had supported the Confederacy.

None of the advocates for Section 3 disqualification of President Trump have advanced comprehensive arguments or marshaled systematic evidence that the President is an "officer of the United States." This position cannot simply be asserted or presumed, absent evidence. Advocates for Section 3 disqualification of President Trump have the burden of persuasion. They should rebut the evidence we have put forward in this article, and elsewhere.[139] And they must explain why the arguments and evidence they put forward

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[136] Tucker, *supra* note 37, at 54–56.

[137] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years.").

[138] U.S. CONST. art. I, § 4, cl. 1.

[139] *See* Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190 (2021) (discussing scope of disqualification element).

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carries the burden of persuasion notwithstanding contrary argument and evidence, and notwithstanding the democracy canon. And the evidence should be something more than personal intuitions or citations to the conclusory statements of other modern commentators asserting how the 1868 public *must* have understood the language of Section 3. Critically, these issues should be resolved before the next presidential election.

VI. THE COURTS, AND NOT CONGRESS, WILL LIKELY HAVE THE FINAL SAY OVER WHETHER PRESIDENT TRUMP CAN BE DISQUALIFIED UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT

In 2021, the Senate did not convict President Trump based on the sole article of impeachment. Therefore, the Senate had no need to squarely face the question of whether a Section 3 disqualification against Trump would bar him from holding the presidency in the future. Similarly, even if the Senate had convicted President Trump in impeachment proceedings, and voted to disqualify him under the Impeachment Disqualification Clause, the Senate would not finally resolve the scope of that disqualification. To be sure, had the Senate tried, convicted, and disqualified President Trump, members of Congress could have stated on the record that they were barring Trump from ever serving again as President.

Those statements, however, would not be dispositive of the constitutional issue. Rather, the situation would arise in a different context. Imagine that Trump seeks re-election in the future. Trump would submit a ballot petition to state and territorial boards of election. But that submission could be contested in adversarial proceedings. County-wide, multi-country, and state-wide boards of elections regularly hear challenges to candidates' ballot petitions. These suits are brought by voters or candidates seeking to keep a rival candidate off the ballot. In such circumstances, the candidate seeking his place on the ballot is the defendant.

In certain circumstances, a board of election might strike a candidate's ballot petition *sua sponte*. However, we think that a board

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would only do so where the petition is facially defective. For example, where a required document is entirely missing, or where the candidate's signature is missing, or where all required notarizations are absent, or where the petition itself makes admissions establishing that it is defective. We do not think a board *sua sponte* striking a ballot based on a novel reading of Section 3 would be consistent with established law. Nevertheless, it is also conceivable that a board of election might act *sua sponte* in making a Section 3 determination.[140]

It is also feasible that Congress will pass a concurrent or joint resolution to disqualify Trump under Section 3. At that juncture, boards of election would hear arguments presented through adversarial litigation. And the boards would be in a position to determine the effect (if any) of a Section 3 concurrent or joint resolution against President Trump's holding an "office . . . under the United States." Such a concurrent resolution is currently pending before the House.[141]

All of these determinations by election boards could be appealed to the courts. In all likelihood, it is not Congress, but the courts that would have the final say in resolving the scope—if any—of Section 3 disqualification imposed by the Senate or by both houses of Congress.

The courts may also be asked to resolve an appeal of a decision by an elections board in regard to a ballot-access dispute, which may involve these same issues. Additionally, even in the absence of any disqualification decision by the Senate or by Congress, an elections board might decide a Section 3-related ballot challenge. Specifically,

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[140] *See* Gerard Magliocca, *State Law and Section Three of the Fourteenth Amendment*, PRAWFSBLAWG (Aug. 26, 2021, 2:00 PM) [https://perma.cc/T2W9-5GYT] ("One possible scenario in 2023 goes something like this: Donald Trump declares that he is a candidate for President. Some state election officials rule that he is ineligible to run under Section 3. He sues and the constitutional issue is litigated. . . . . Of course, some states might decide to amend their election law to include Section 3 and thus eliminate the problem I've just described prior to 2023.").

[141] *See* H.R. Con. Res. 3, *supra* note 12.

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if a voter or rival candidate brings a ballot access challenge, the board may conclude that President Trump is *already* disqualified to serve as President. Likewise, in the absence of any disqualification decision by the Senate or by Congress, the courts may be asked to decide, in the first instance, whether President Trump was disqualified for purposes of Section 3.

There are many possible routes through which these issues might be litigated before boards of election, the courts, or both. Still, there is a common thread: If the President is not an "officer of the United States" as that phrase was used in Section 3's jurisdictional element, then President Trump cannot be disqualified pursuant to Section 3.

Finally, it was not clear that the House managers actually sought to disqualify Trump under the Impeachment Disqualification Clause, *as well as* under Section 3. During the 2021 proceedings the sole article of impeachment was opaque on this point. This lack of clarity was perhaps intentional. Or the imprecision could be attributed to the House's rushed drafting. We think the article of impeachment only referenced Section 3, in the context of efforts to define a substantive impeachable offense. We expected that President Trump's counsel would have argued that the text of the House's single article of impeachment did not give him fair notice that he faced Section 3 disqualification. But because Trump was never convicted by the Senate, the disqualification issue was never discussed in any detail.

Conclusion

The issue presented in this Article is not merely a theoretical one. There is a real chance that the fate of the 2024 presidential election could turn on whether President Trump is disqualified under Section 3.

Imagine that Donald Trump runs for re-election. Soon, election boards throughout the country hear ballot challenges. However, the rulings are inconsistent. Some boards may even conclude that Trump is already disqualified based on Section 3 of the Fourteenth

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Amendment, even absent any congressional or Senate resolution so deciding. Candidate Trump would be forced to take urgent appeals to the courts. And, in short order, the judiciary would have to resolve three pivotal questions. First, does President Trump fit within the jurisdictional element of Section 3: was he an "officer of the United States"? Second, does President Trump's conduct fit within the offense element: did he "engage[] in insurrection"? Third, does the disqualification element extend to the presidency: is the presidency an "office . . . under the United States"? And these questions would be promptly appealed to the Supreme Court.

If the Supreme Court agrees with us, and concludes that the President is not an "officer of the United States," then the case is over. Election boards that deemed Trump disqualified would be reversed. Trump could be listed on the ballot. The people, and not partisan election boards would select the next President.

However, if the Supreme Court disagrees with us, it would need to decide several other thorny issues. The Justices would be drawn into the maelstrom of January 6, 2021, and have to decide, as a matter of law, whether the President "engaged in insurrection." Here, abstention would not be a viable option. If the Court dismisses the case as a political question, election boards, and not the people, would decide the next presidency. States would face chaos if local election boards make different decisions. It is possible that within a given state, some counties would list Trump on the ballot and other counties would not. State supreme courts may not enforce uniform ballot procedures. This fragmented patchwork approach would be far more problematic than the selective recounts at issue in *Bush v. Gore*.

Perhaps the Supreme Court would leapfrog the offense element, and jump right to the disqualification element. If the presidency is not an "office . . . under the United States," then Trump could not be disqualified from the presidency. Thus, there is no need to decide if Trump "engaged in insurrection." In this article, we have made the case that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element. But we have been very careful to avoid resolving the scope of the phrase "office . . . under the United States" in the disqualification element. Suffice to say, in

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light of the possibility of linguistic drift from 1788 till 1868, we think this issue is contestable. And in the end, the Supreme Court would decide whether President Trump remains on the ballot.

In 2020, the U.S. Supreme Court was able to avoid resolving any of the major election disputes. But 2024 may be different. A Supreme Court ruling on this issue could make *Bush v. Gore* seem mild by comparison. There are many prudential reasons for the Court to avoid deciding whether Trump engaged in insurrection, or whether Trump can be—or perhaps was already—disqualified. The Court should can stay out of that MAGA thicket. A narrow finding that the President is not an "officer of the United States" ends the case. That opinion would be entirely consistent with Supreme Court authority from *Mouat* to *Free Enterprise Fund*. It would track the text of Section 3. It would be consistent with the Constitution of 1788. And, most importantly, it allows the people to elect the next President, and not the courts, much less partisan election boards.

We conclude that the President is not a Section 3 "officer of the United States." Donald Trump is not disqualified by Section 3, and can run for re-election.

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EXHIBIT 3

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude & Michael Stokes Paulsen

Abstract: Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This article corrects those mistakes by setting forth the full sweep and force of Section Three.

First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. *Second*, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. *Third*, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. *Fourth*, Section Three covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support as "aid or comfort." It covers a broad range of former offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude* & Michael Stokes Paulsen**

Introduction

"Section 3 has long since faded into history."
- Eric Foner[1]

Reports of Section Three's demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force, and has a broad substantive sweep.

Here is what it says:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War.

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** Distinguished University Chair and Professor of Law, University of St. Thomas Law School. We thank Frank Bowman, Steve Calabresi, Josh Chafetz, John Harrison, Ed Hartnett, Daniel Hemel, Brian Kalt, Myles Lynch, Gerard Magliocca, Michael McConnell, Derek Muller, Farah Peterson, Eric Posner, Micah Quigley, Richard Re, Michael L. Rosin, Stephen Sachs, Greg Sisk, Seth Barrett Tillman, and workshop participants at the University of Chicago Law School and University of St. Thomas Law School for helpful comments on the first draft of this article, T.J. Bowman, Nicole Catlin, Connie Gong, Sarah Leitner, James Marmaduke, Matt Phillips, and Georgios Sarris for valuable research assistance, and countless others for discussions about these issues—though not all of them gave aid or comfort to our conclusions.

[1] Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 85 (2019).

[2] U.S. Const. art. XIV, sec. 3.

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States in the South had purported (unconstitutionally)[3] to secede from the Union; they had purported to form the (so-called) "Confederate States of America" in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). The former Confederates who arrived in Washington included "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[4]

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective "reconstruction" of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in "insurrection or rebellion" against the U.S. constitutional authority or given "aid or comfort" to its enemies. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.[5] The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting

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[3] See infra note 231 and sources cited there.

[4] Akhil Reed Amar, America's Constitution: A Biography 377 (2005); see also Eric L. McKitrick, Andrew Johnson and Reconstruction 176-179 (1960); Allen C. Guelzo, Reconstruction: A Concise History 25 (2018).

[5] The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment.. 87 (2021); Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, Lawfare (Jan. 19, 2021), available at https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.

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and immediate incitement of a mob to attempt to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'etat. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an "insurrection" aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have foundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process and free speech? And if Section Three *does* apply—*to what and to whom?* What actions count as having "engaged in insurrection or rebellion" against the Constitution of the United States or having "given aid or comfort to the enemies thereof"? Which officials are covered by Section Three's exclusions?

This article attempts to answer these questions. It makes four key points (or clusters of points):

First. Section Three remains legally operative. It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

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Nor has Section Three somehow been "repealed" by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; Congressional amnesty is retrospective.

Second. Section Three is legally self-executing. That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to justiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,[6] is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them. Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden Ex Post Facto law or Bill of Attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

[6] 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

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This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or giving "aid or comfort" to "the enemies" might turn out to be in tension with the First Amendment's protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three's terms ("insurrection," "rebellion," "aid or comfort," "enemies") will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article's fourth and final group of points:

Fourth. Section Three's disqualification is sweeping in its terms. It disqualifies from future office-holding persons who "*engaged in*"—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms "*insurrection or rebellion*" or the giving of "*aid or comfort*" to "*enemies*" of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three's prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text's meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in insurrection or rebellion or giving aid or comfort to enemies of the lawful constitutional order.

I. Section Three is Legally Operative Today

A. The Generality and Presumptive Perpetuity of Constitutional Language

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The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."[7]

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.[8] It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral," way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and

[7] Eric Foner, Reconstruction, 1863-1877, at 260 (1988).
[8] Mark Graber, Punish Treason, Reward Loyalty: The Forgotten Fourteenth Amendment, Volume 1 (2023, University Press of Kansas).

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generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.[9]

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter that the drafts*men* of the amendment might not have had women "in mind" if women are covered by the meaning of the words they actually wrote and ratified.[10] Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.[11] The answers to each of these questions turn on the objective, original

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[9] See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. J. 1113, 1124-1148 (2004); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 Nw. U. L. Rev. 857, 872-883 (2009); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U Pa. L. Rev. 609, 624-625 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1456-1460 (2019). For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

[10] We have used such examples before. Paulsen, *Rules for Its Own*, supra note 9, at 901-902; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1421 n. 68 (2014); William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment* , 76 Stan. L. Rev. at 67-68 (forthcoming 2024).

[11] We have used this example before, too. Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 839-840 (1993); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2380-2381 (2015). See also Baude, Campbell, & Sachs, supra note 10, at 66.

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meaning of "privileges or immunities of citizens of the United States" and "equal protection of the laws," not whether the 1866 Congress and subsequent ratifiers had thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment's terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn't matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,[12] it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase "insurrection or rebellion.")[13] But in the end the question is what rule was enacted. If Section Three's rule fell short somehow, missing some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.[14]

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[12] Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section's application to the "late insurrection." Later versions dropped this limitation and generalized Section Three's application to "insurrection" and "rebellion." See Cong. Globe, 39th Cong., 1st Sess., at 2767-68, 2770 2869, 2921; see also Mark A. Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished chapter, forthcoming in The Forgotten Fourteenth Amendment, Volume 2, University Press of Kansas) (documenting this development).

[13] Infra Part IV.A.

[14] See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 908-909 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J. L. & Pub. Pol'y (forthcoming 2023) ("Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation."). For an extended discussion of the abuse of arguments

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Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is "old" does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.[15] There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as "the interest in sovereignty fades."[16] But in our view, this just shows what is wrong with such living constitutionalism.[17] The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.[18] But sometimes we wonder if this kind of denial is sneaking in to people's intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive as the day it was enacted.

B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)

But what about this? The second sentence of Section Three provides that Congress "may by vote of two-thirds of each House, remove such disability."[19] Just as the first sentence's disqualification is not limited specifically to the Civil War, neither is Congress's power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put

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from inconvenience, see infra Part II.C.2.a (discussing Chief Justice Chase's appalling opinion in *Griffin's Case*).

[15] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1486-1490 (1997) (discussing privilege against self-incrimination).

[16] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 58 (2015); see also Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295 (2008).

[17] See Baude & Sachs, *Grounding*, supra note 9, at 1487 (responding to Strauss).

[18] For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935) ("It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision cannot possibly apply to the present case").

[19] U.S. Const. amdt. XIV, sec. 3.

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more vividly: Can Congress, by two-thirds vote of each house, essentially "explode" Section Three—render it inoperative in the future, for all time?

These questions turn out not to be completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed "from all persons whomsoever"—except designated categories of individuals—all "political disabilities imposed" by Section Three.[20] Another (from 1898) further removed "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred."[21] And indeed, in a recent case (brought by then-Representative Madison Cawthorn) a federal judge relied on these statutes to conclude that Section Three was now legally dead.[22] Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?[23]

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 act. In 1872, after a period of case-by-case consideration of amnesty requests, Congress, as mentioned above, enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.[24] But what is most important is what it says. The statute reads, in full:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein),* That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-

[20] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[21] Act of June 6, 1898, ch. 389, 30 Stat. 432.
[22] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 889-892 (E.D. N.C. 2022) rev'd sub nom Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022). This argument, too, was made and rejected by the House during the exclusion of Victor Berger. 6 Cannon, supra note 18, at 55.
[23] The power in general of Congress by two-thirds vote of each House to remove Section Three's disability and the history of its exercise are the central themes of Professor Gerard Magliocca's excellent article, cited supra note 5.
[24] See generally Magliocca, *Amnesty*, supra note 5, at 112-120.

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> seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.[25]

The key words are "imposed" and "[hereby] removed." The words of the 1872 statute are used in the past tense: the statute *removed* disqualifications *imposed* by the Fourteenth Amendment—that is, disabilities that had already become legally effective. That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the district court's decision in the *Cawthorn* case: Congress in 1872 employed "the past-tense version" of the verb "impose," thus "indicating its intent to lift only those disabilities that had by then been 'imposed.'"[26] Moreover, the Fourth Circuit continued: "[t]he operative clause's principal verb—'removed'—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come."[27]

By contrast, the district court had faulted Congress for not being more explicit: Congress "could have limited the Act to remove Section 3's disabilities from 'persons currently subject to the disabilities' or 'persons against whom the disabilities were lodged' at the time (i.e., the 'Confederates') but did not do so."[28] Therefore, the district court concluded, by the "plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted."[29] With all due respect, the district court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the "all persons whomsoever" language and completely missed the other language that made clear the statute's past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish-American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances (and, one might add more cynically, at a time of rising Jim Crow sentiment)[30]—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

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[25] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[26] Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022).
[27] Id.
[28] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 891 (E.D. N.C. 2022) rev'd sub nom Carthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022).
[29] Id.
[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Cummings v. Richmond County Bd. of Ed. 175 U.S. 528 (1899). See also Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 195-201 (2015).

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.[31]

In one sense, that's about as categorical, across-the-board a disqualification-removal as one can imagine: *the* disability *imposed* by section three *is hereby removed.* Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses past-tense language: a disability (already) "imposed" is now being "removed" from its prior legal existence. What's more, the 1898 act says that the Section Three disqualification being removed was one "*heretofore incurred*." That is unmistakably backward-looking, past-occurrence language.

What might otherwise—that is, but for the clarity of the "heretofore incurred" language—give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as any and all extant ones, is the Act's reference to "*the* disability" imposed by Section Three. This singular reference might be taken to suggest that Section Three's disqualification was thought a one-time-only, single-shot, Civil War era occurrence.[32] If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was[33] (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress's constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress's constitutional power to remove Section Three's disqualification general and prospective, letting it remove Section Three's disqualification once and for all, including for future situations? We think not.

To be clear, we don't think there's anything inherently unthinkable or absurd about the idea of an "exploding" or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration

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[31] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[32] For instance, the D.C. Circuit's recess-appointments opinion in Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013) aff'd only on alternate grounds, 134 S.Ct. 2550 (2014), leaned heavily on "this difference between the word choice 'recess' and 'the Recess'," arguing that "[a]s a matter of cold, unadorned logic, it makes no sense to [say] that when the Framers said 'the Recess,' what they really meant was 'a recess.' This is not an insignificant distinction. In the end it makes all the difference." Id. But a majority of the Supreme Court did not share this view of the text. NLRB v. Noel Canning, 134 S.Ct. 2550, 2561 (2014).

[33] For the brief legislative history of the 1898 act, see 31 Cong. Rec. 5367-5419 (1898).

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date, even in an enduring Constitution. Article I's Slave Importation Clause, protecting the international slave trade, exploded after twenty years.[34] So too the initial allocation of representatives to states is written in to the text of the Constitution, even though it was then exploded by the subsequent census.[35] Other provisions of the Constitution set baseline rules that Congress has power to modify. Article I, section 4 does that with respect to state legislative power over congressional elections: "Congress may at any time by Law make or alter such Regulations."[36] Article III, section 2 does that with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."[37] The Twentieth Amendment, in Section 2, sets a default date of Congress's annual meeting.[38]

There's no reason why the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the provision's own extinction after a supermajority vote of Congress.[39] But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course, those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

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[34] U.S. Const. art. I, §9, cl. 1. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") For a scathing critique of the substance and purpose of this proviso, see, e.g., Paulsen & Paulsen, supra note 30, at 81-83.

[35] U.S. Const. art. I, § 2, cl.3.

[36] U.S. Const. art. I, § 4.

[37] U.S. Const. art. III, § 2, cl. 2.

[38] U.S. Const. amend. XX, §2.

[39] We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST – Academic Commentary, April 13, 2022, https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/. See also Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("'Congress has no power whatever to repeal a provision of the Constitution by a mere statute'") (quoting 6 Cannon, supra note 18, at 55).

This strikes us as not quite right: *If* Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

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The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." (*"But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "Remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.[40] This confirms that Congress's removal power therefore only comes into being when a legal disqualification has vested by virtue of the operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

* * *

All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect by U.S. political actors whose powers and duties are such as to call for application of Section Three as a rule of law? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

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[40] Dr. Webster's Complete Dictionary of the English Language 1116 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (defining "remove" as "To cause to change place; to move away from the position occupied; to displace") (quoted in Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022)).

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II. Section Three is Legally Self-Executing

Our second point is colossally important—a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient, rejected in the highest quarters, and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself, and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation-of-powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

A. Section Three as Automatic Legal Disqualification

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,[41] in doing so they put the cart before the horse. The horse is the Constitution, which is itself the "supreme law of the land."[42] Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. Section Three's language is language of automatic legal effect: "*No person shall be*" directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall

[41] But not ours! See Paulsen, McConnell, Bray and Baude, The Constitution of the United States (5th ed. 2022).
[42] U.S. Const. art. VI.

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be.[43] It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.[44] The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President. And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, section 2's requirements.[45] "*No Person shall be*" a U.S. Senator who does not meet Article I, section 3's requirements.[46] These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three of the Fourteenth Amendment parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.[47] None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist* ...," the Thirteenth Amendment provides.[48] The institution of slavery was *immediately, legally, constitutionally gone*.[49] The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.[50] But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative. Such a

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[43] We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 84 U. Chi. L. Rev. 203, 211 (1997) ("The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.")

[44] U.S. Const. art. II, §2, cl. 5 (emphasis added).

[45] U.S. Const. art. I, §2, cl. 2(emphasis added).

[46] U.S. Const. art. I, §3, cl. 3 (emphasis added).

[47] See Josh Chafetz, Democracy's Privileged Few 168 (2007).

[48] U.S. Const. amend. XIII §1 (emphasis added).

[49] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 48–53 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

[50] U.S. Const. amend. XIII §2 ("Congress shall have power to enforce this article by appropriate legislation.").

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position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment too. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three states directly operative rules of constitutional law: "No state shall," in Section One, and "No person shall" in Section Three.[51] Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks (for example) that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation "to enforce" the Thirteenth and Fourteenth Amendments' commands, pursuant to their grants of legislative power.[52] Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress's view of the law, and so on. The Civil Rights Act of 1866, the Ku Klux Klan Act of 1871 and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But, to repeat, the existence of an enforcement power does not mean that the Amendment's specific legal commands lack any independent, self-executing force.[53]

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing *quo warranto* civil suits brought by the United States to remove state officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.[54] But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction

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[51] U.S. Const. amdt XIV, sec. 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. Section Two, which alters Article I, section 2's rule for how Representatives "shall be apportioned," presents a more complicated case. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. In practice, Congress has ignored it, see Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 Hist. Meth. 57 (2013); Amar, America's Constitution, supra note 4, at 395; see also email from John Harrison to Akhil Reed Amar, quoted in id. at 611 n. 96, and it is hard to see how anybody else can realistically enforce it.

[52] U.S. Const. amdt. XIII, sec. 2; amdt. XIV, sec. 5.

[53] Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. Baude, Campbell, & Sachs, supra note 10, at 30-31, 63-64.

[54] Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§14, 15, 16 Stat. 140, 143. The criminal prohibition in Section 15 of the Act was repealed in the 1909 codification of the penal code, 35 Stat. 1088, 1153, § 341 (1909), and the quo warranto provision in Section 14 was repealed during the 1948 positive law codifications of Title 28 of the U.S. Code, see Act of June 25, 1948, ch. 646, § 39; see also Lynch, supra note 5, at 206 n. 365. Neither of these codifications was thought to make a substantive change by repealing these provisions, see generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1949); see also The United States Compiled Statutes, Title XIX, page 4459 (1916), which were

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for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.[55] Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[56]

Note the contrast. The Treason Clause defines an *offense* ("Treason . . . shall consist") but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification ("No person shall be"). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: "[C]onvict[ions] of treason" require two witnesses or a public confession; and "Congress shall have power to declare the punishment of treason." Section Three of the Fourteenth Amendment, by contrast enacts its standard and imposes its consequences all at once.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."[57] But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.[58] Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a

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thought obsolete by then. The repeals therefore certainly did not reflect a decision to preempt or preclude any *other* existing remedies for Section Three.

[55] Professor Magliocca concurs. Magliocca, *Amnesty*, supra note 5, at 106 & n.101 (noting that "enacting enforcement legislation does not imply that legislation is required" and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. See infra Part II.C.

[56] U. S. Const. art. III, sec. 3.

[57] U.S. Const. art. II, sec. 4.

[58] U.S. Const. art I, sec. 3 & sec. 4.

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noticeably different path.[59] Section Three does not call for treason *trials* or the *impeachment* of insurrections and rebels. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.[60] It immediately became "supreme Law of the Land." [61] Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.[62] It is pretty obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of "insurrection" and "rebellion" and so on—and these meanings are not quite as self-evident as "thirty-five years of age" (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*.

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[59] Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. For opponents, see Cong. Globe 39th Cong., 1st Sess., at 2900 (Senator Doolittle) (amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions"); id. at 2916 (Senator Doolittle); id. at 2940 (Senator Hendricks) (complaining about immediate consequences); for proponents, see id. at 2919 (Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct'); id. (they lost their "citizenship rights when they committed treason"); Cong. Globe 39th Cong., 1st Sess., App., at 228 (Senator Defrees); Cong. Globe, 39th Cong., 1st Sess. at 3036 (Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law); see generally infra Part III.A-B. See also Graber, supra note 12, at 26-27, 35-37 (documenting all of these discussions) .

[60] U.S. Const. art. V.

[61] U.S. Const. art. VI, cl. 2.

[62] See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, at 14 n.42 (Mar. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards"). On the other hand, the Constitution's *inhabitancy* requirement, has proved far from simple in practice. See Jack Maskell, Congressional Research Service, Qualifications of Members of Congress (Jan 15, 2015) at 13-18, https://sgp.fas.org/crs/misc/R41946.pdf. And there has been recent litigation about the requirement that the President be a "natural born citizen" as well. See Derek T. Muller, *"Natural Born" Disputes in the 2016 Election*, 85 Fordham L. Rev. 1097 (2016).

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Not all participation in insurrection or rebellion is open and notorious. More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.[63] The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.[64]

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non-sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions, maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

B. Who (All) Can (Must) Faithfully Apply and Enforce Section Three?

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But in principle: Section Three's disqualification rule may and must be followed—applied, honored, obeyed, enforced, carried out—by anyone whose job it is to figure out whether someone is legally qualified to office, just as with any of the Constitution's other qualifications.

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[63] Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J. L. Ethics & Pub Pol'y 497, 511-512 (2018).

[64] Cf. Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 839 (1993) (mocking constitutional interpretation that engages in "the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment"); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

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These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to "activate" Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

1. Seeking Office

a. by election

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state-law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on a primary or general election ballot.[65] Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.[66] Accordingly, such state actors can and must apply Section Three's disquali-

[65] To be sure, the centralized, government-administered ballot did not come to American until the late Nineteenth Century and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

[66] U.S. Const. art. VI, cl.2 ("This Constitution ... shall be the supreme Law of the Land"). See also U.S. Const. art. VI, cl.3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for "judicial review," as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); see also William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5-9 (2023).

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fication in carrying out their state-law responsibilities—just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[67]

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene's involvement in the events of January 6, 2021.[68] The judge proceeded under the theory that if January 6 was a constitutional "insurrection," and if Representative Greene had been part of it, she would be barred from office.[69] But it concluded that the challengers had failed to meet their burden of proof under state law: "In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took any action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021."[70] Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer's proposed findings that day.[71]

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene's claims failed on the merits.[72] While Greene's appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.[73] The

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[67] We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, section 5, powers to act as "Judge" of the "Elections, Returns, and Qualifications of its own Members" and refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitation. See also infra n. 96 and accompanying text.

[68] Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022).

[69] Id. at 5-6.

[70] Id. at 15. The January 3, 2021 cut-off is because that is the date that Representative Greene first took a constitutional oath. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a "coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol." Id. at 16.

[71] Final Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022).

[72] Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1320 (N.D. Ga. 2022).

[73] Greene v. Sec'y of State for Georgia, 52 F.4th 907, 909-910 (11th Cir. 2022).

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details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[74] In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots in to existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court's muddied reasoning in the Finchem-Gosar-Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."[75] This inference is mistaken—Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.[76]

Second, in some circumstances state law not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,[77] where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing

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[74] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[75] Id. at *1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in Griffin's Case, which we discuss at greater length presently. See infra Part II.C.2.d. The Arizona Supreme Court also made the additional suggestion that Article I, Section 5 gave Congress "exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members," id. We are skeptical of this point as well, see infra n. 96 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

[76] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); id. at 469- 470 (Scalia, J., concurring); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* (May 29, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807.

[77] 330 U.S. 386 (1947).

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in the Constitution or Laws of any State to the contrary notwithstanding."[78] And thus "the policy of the federal Act is the prevailing policy in every state."[79] A state cannot treat federal obligations the way it can treat foreign ones.

The Arizona Supreme Court's decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state "statute's scope is limited to challenges based upon 'qualifications . . . as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office."[80] If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three's dis-qualification is not a "qualification," that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified to office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. by appointment

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally this includes at a minimum whoever nominated the officer.[81] Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three.* And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.[82]

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[78] Id. at 391 (quoting U.S. Const. Art VI, sec. 2).

[79] Id. at 393. To be sure, *Testa* and especially subsequent cases expanding it have been subject to powerful criticisms as a matter of original meaning, see Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 78-83, 97-105 (2020); Haywood v. Drown, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

[80] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[81] For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, sec. 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 330, 333-334, 355-356 (2019).

[82] See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 914-918 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *Black*, supra note 81, at 355-356 (similar); see also Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105

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In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate's eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?[83]

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully-disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.[84]

For an example of how this process is supposed to work consider how the state of New Mexico removed commissioner Couy Griffin from state office.[85] Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and

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Yale L.J. 549, 562-570 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 658-660 (1970) (similar).

[83] Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See infra at II.C.

[84] Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See supra notes 72-73 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

[85] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

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ultimately joined in the January 6 insurrection against the Capitol. A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office. The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three. More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.[86]

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.[87] It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same "standing" limitations as the federal courts are. As a matter of federal law, the court had no trouble concluding that the events of January 6. 2021 were a constitutional "insurrection." And it had no trouble concluding that Griffin had engaged in that insurrection, both by "voluntarily aid[ing] the insurrectionists' cause by helping to mobilize and incite" the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.[88] The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three's disqualification in doing so.[89] Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

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[86] Id. at 46. The New Mexico Supreme Court dismissed Griffin's appeal on procedural grounds. NO. S-1-SC-39571 (N.M. Sup. Ct. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: an attempt to remove the state action to federal court, State ex rel. White v. Griffin, 2022 WL 1707187 (D.N.M. May 27, 2022) (denying removal because of plaintiffs' lack of Article III standing) and a separate parallel suit attempting to enjoin the state proceedings, Griffin v. White, 2022 WL 2315980 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

[87] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473, at 24-25 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[88] Id. at 35-38.

[89] The availability of a federal quo warranto action is curiously codified in the D.C. Code, §§ 16-3501-02. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. See Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984); Drake v. Obama, 664 F.3d 774, 784-785 (9th Cir. 2011); SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 81 (D.C. Cir. 2015), aff'd, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. Hill v. Mastriano, No. 22-2464, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022). See also Hill v. Perry, No. 22-2465, 2023 WL 3336648, at *1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

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But in general: wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.[90]

Finally and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.[91] A regulated entity can challenge the actions of an executive official who holds office improperly.[92] Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the "de facto officer doctrine," (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to "Judge of the Elections, Returns, and Qualifications" of "its own Members."[93] Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional

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[90] An officeholder who has engaged in insurrection or rebellion or given aid or comfort to enemies of the United States has surely committed a "high Crime or Misdemeanor" within the meaning of Article II, section 4's description of the scope of the impeachment and removal power. See generally Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 Harv. L. Rev. 689, 698-702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President's removal authority as Commander in Chief. Whether Congress could supplement that authority through appropriate legislation is an interesting question. See Zachary Price, *Congress's Power Over Military Offices*, 99 Tex. L. Rev. 291 (2021).

[91] Nguyen v. United States, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *Black*, supra note 81, at 346-47.

[92] Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 668 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487–88 (2010); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014); see also Baude, *Severability*, supra note 66, at 36-37.

[93] U.S. Const. art. I, sec. 5, cl. 1.

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backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,[94] that Congress cannot *create new* "Qualifications" and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house's judgment about whether the *existing, constitutional,* qualifications have been satisfied.[95]

Some have argued that each house's judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.[96] With respect, we do not agree with this argument. As a logical matter, each house's right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the "manner" of elections, which includes ballot eligibility.[97] In our view, the better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

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[94] 395 U.S. 486 (1969).

[95] See Powell, 395 U.S. at 520 n. 41 (reserving the possibility that Section Three disqualification is a qualification); see also P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 114-115 (1968) (cited in id. at n.41) (arguing that it is); Powell, 395 U.S. at 521 n.42 (noting that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). We emphasize that questions of interpretation and application of Section Three are not *in general* "political questions" that cannot be decided by federal courts, simply because they have political consequences. Where the Constitution supplies a rule, and the rule's application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the "Judge" of the "Elections, Returns, and Qualifications" of its own Members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

[96] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 594-598 (2015); see also Cawthorn v. Amalfi, 35 F.4th 245, 267-273, 282-284 (4th Cir. 2022) (Richardson, J., concurring); Greene v. Sec'y of State for Georgia, 52 F.4th 907, 912-916 (11th Cir. 2022) (Branch, J., concurring).

[97] U.S. Const. art. I, sec. 4. The same Clause also gives Congress the power to "make or alter" such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-275 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an attempt to impose a qualification *not contained in the Constitution*. E.g., *U.S. Term Limits*, 514 U.S. at 784, 787-788, 806-815. It

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The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[98] So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.[99] As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Additionally, Article I's Speech and Debate Clause provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."[100] This means that to the extent that the conduct that violates Section Three was a member of Congress's official statements or legislative actions,[101] each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three.

Federal judges hold their offices during "good Behaviour."[102] What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?[103] As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"[104] conduct meeting Section Three's standard disqualifies a federal judge from office.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is

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follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

[98] U.S. Const. art. I, sec. 5, cl. 2.

[99] There is some debate whether Congress can expel a member for conduct that occurred before being elected. See Chafetz, Democracy's Privileged Few, supra note 47, at 210-212 (recounting arguments on both sides but arguing that it can); Jack Maskell, Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 4-7 (2016) https://sgp.fas.org/crs/misc/RL31382.pdf (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

[100] U.S. Const. art. I, sec. 6, cl. 1.

[101] As we elaborate later, we think it is quite rare that such conduct could violate Section Three, even on its own terms.

[102] U.S. Const. art. III.

[103] Cf. Ex parte Milligan, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

[104] See supra note 90.

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that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1791 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).[105] Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?[106] Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. That eligibility question can be a part of a state's Article II election for electors just as much as any other state election.[107] Put simply: a state secretary of state (for example) might well possess state-law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility as well) to enforce Section Three.[108] In perhaps half the states, the question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.[109] But even working

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[105] Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 NYU J. L. & Liberty 18, 76-77 (2016).

[106] We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." We think that assumption is correct, and we will return to it in Part IV.B.

[107] See Hemel, *How-to Guide*, supra note 5; Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, supra note 96, at 599-608; see also Muller, Natural Born, supra note 62, at 1100-1106. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

[108] See Muller, *Scrutinizing*, supra note 96, at 579-580.

[109] Chiafolo v. Washington, 591 U.S. ___ (2020); see also Muller, supra note 96, at 580. We bracket the serious possibility that *Chiafolo* was wrongly decided. See, e.g., Mike Rappaport, The Originalist Disaster in *Chiafolo*, Law & Liberty (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-

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within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to arrange that their electors do not elect a constitutionally disqualified candidate, which should be reflected in their laws.

If the voters and presidential electors do select a disqualified candidate for the Presidency, we do not believe that Congress (or the Vice President) have the power to reject that candidate when the votes are counted in joint session. Whatever the extent of Congress's and the Vice President's authority to count the electoral votes, or determine the authenticity of submitted votes—i.e., was this the act of the electors of the state?—we do not believe that they have the authority to evaluate the decisions or actions of the electors themselves.[110] So if a properly selected elector submits a vote for a constitutionally disqualified individual it should still be *counted*.

Still, once those votes are counted, a disqualified candidate *does not become president*, even if he has the most votes. This is made explicit by the (self-executing) command of Section Three of the Twentieth Amendment, which sets the constitutional terms of a President's term. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."[111] The language thus specifically confirms the possibility of a failure to qualify, and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability.

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors" and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment. The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. On the other hand, it is less clear whether being *legally disqualified* from holding office makes the would-be President "unable to discharge the powers and duties of his office" within the meaning of the Twenty-fifth Amendment. (Structurally, the Twenty-fifth Amendment appears to relate to Article II, Section 1, paragraph 6, which deals with Presidential succession, rather than Article II, Section 1, paragraph 5, which deals with eligibility.) But in

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chiafalo/; Michael Stokes Paulsen, The Constitutional Power of the Electoral College, Public Discourse (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

[110] We take no position on many further details of this issue, including the relative interplay of the Electoral Count Reform Act, Pub.L. 117-328, Div. P, Title I, § 109(a) (Dec. 29, 2022) 136 Stat. 5238-5239, codified in relevant part at 3 U.S.C. 15(b) & (d)(2)(B)(ii), possible constitutional challenges to it, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1805 (2002); see also John Harrison, *Nobody for President*, 16 J.L & Pol. 699 (2000), interpretations of it, but see Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538 (2021), or the like.

[111] U.S. Const. amdt. XX, sec. 3. Cf, Muller, *Regularly Given*, supra note 110, at 1538 n.42.

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any event the Twenty-fifth Amendment question will usually be unimportant in practice, because it requires a two thirds vote of both houses, and the Vice President and many cabinet officials, and so it will usually be significantly easier to use the impeachment process instead.[112]

* * *

Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid or comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.[113] From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.[114] He might be removed by such a suit,[115] or might well choose to resign instead.[116] The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not

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[112] Brian Kalt, Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment (2019).

[113] See infra Part IV.C. for further discussion.

[114] For two relevant examples, see NMSA. 1978, sec. 44-3; W.V. Code sec. 53-2-1. In West Virginia, such a claim may be brought "[w]henever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested." Id. 53-2-2. For illustrative applications, see State ex rel. Zickefoose v. West, 145 W. Va. 498, 545 (1960); Wells v. Miller, 237 W. Va. 731 (2016).

[115] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[116] Resignation letter from West Virginia Delegate Derrick Evans to Governor Jim Justice (Jan. 9, 2021), available at https://s3.documentcloud.org/documents/20447012/derrick-evans-resignation-letter.pdf.

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difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

C. The Problem of Griffin's Case

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.[117] This precedent continues to cast a shadow over Section Three today.[118]

But there is a simple response to this small problem. *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate ground, under the so-called de facto officer doctrine, which we will discuss. But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.[119]

1. Background

Caesar Griffin, a black man, was charged in a Virginia state court with the crime of shooting with the intent to kill. Griffin was tried, convicted, and sentenced to prison. He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of his color."[120] Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not

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[117] In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

[118] See, e.g., Josh Blackman and S. B. Tillman, Opinion, "Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene," The New York Times, (Apr. 20, 2022); Tom Ginsburg, Aziz Huq, & David Landau, *The Law of Democratic Disqualification*, 111 Calif. L. Rev. at 16, 51 (forthcoming 2023) at https://ssrn.com/abstract=3938600.

[119] For other criticism of Griffin's Case, insightful as always, see Magliocca, *Amnesty*, supra note 5, at 102-108; Magliocca, *Foreground*, supra note 62, at 9-14.

[120] 11 F. Cas. at 22.

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conduct the trial with fairness and uprightness."[121] Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge Sheffey)[122] was legally disqualified by Section Three of the Fourteenth Amendment from serving.

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849. And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."[123] Thus "it is admitted," wrote Chase, that Judge Sheffey "was one of the persons to whom the prohibition to hold office pronounced by the amendment applied."[124]

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.[125] The sheriff appealed to the circuit court, which was held by Chase as circuit justice.[126]

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[121] Id. at 22.

[122] Cf. Will Baude, The deadly serious accusation of being a "so-called judge," Volokh Conspiracy, Wash. Post. (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ ("[T]o call him a 'so-called' judge is to hint that he is not really a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue").

[123] 11 F. Cas. at 22.

[124] Id. at 23.

[125] See Opinion of Judge Underwood in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870), at 462-466 (1875). We are indebted to Myles Lynch for locating this source.

[126] The procedural posture of this and several related cases are extremely confusing and reflect background machinations by both Judge Underwood and Chief Justice Chase: At the time, habeas was apparently available from the district court, or "at chambers," or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this, the unreviewable route, in another habeas case like Griffin's brought by Sally Anderson. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the cases in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. See Charles Fairman, Reconstruction and Reunion at 601-607; Letter from Chase to Underwood (Nov. 19, 1868) in 5 The Salmon P. Chase Papers 285-286 (1998); Letter from Chase to Underwood (Jan. 14, 1869) in id. at 292-293.

This background is briefly alluded to in the synopsis in *Griffin's Case* which explains that "[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme

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2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth Amendment did not exist.[127] The question was whether ratification of Section Three kicked him out. As Chase put it: "whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[128]

Chase said no, rejecting this as a "literal construction" [129] of Section Three. There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.[130] But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, can't possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, but also further impeached Chase's interpretation of Section Three. All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

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court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case." *Griffin's Case*, 11 F. Cas. at 7-8. But really, these circumstances are extraordinary. We take them up again below.

[127] Id. at 23.

[128] Id. at 18.

[129] Id. at 24.

[130] Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling *Virginia* government then gave its consent to the creation of a new Wheeling-based state of *West* Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as "Virginia." After Lee's surrender at Appomattox, Chase's opinion notes, the "government recognized by the United States was transferred from Alexandria to Richmond" and "became in fact what it was before in law, the government of the whole state." Id. at 18. Judge Sheffey was appointed under the authority of this government. (For the full story – and full formalist legal defense – of the validity of the legal fiction of "Virginia" giving its consent to the creation of a breakaway state of West Virginia, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 Calif. L. Rev. 291 (2002) For an argument that this aside was actually relevant to Chase's argument, see Magliocca, *Foreground*, supra note 62, at 10 n.30, discussed infra note 157.)

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a. "The argument from inconveniences, great as these"

The core of Chase's argument was that if Section Three were an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. "In the examination of questions of this sort," Chase wrote, "great attention is properly paid to the argument from inconvenience."[131] And here "the argument from inconveniences" was "great" in Chase's estimation— it was "of no light weight."[132]

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.[133] If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. "No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity."[134] Chase found this unthinkable: "It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states."[135]

Chase went on: not only did Section Three impose great "inconveniences" and "calamities," it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers from their offices—and ostensibly inconsistent with the "spirit" of prior constitutional principles, concerning due process, bills of attainder and ex post facto laws.[136] And besides, the specific remedy sought—vacating Griffin's conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase's interpretive driver: "Surely," Chase continued, "a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found."[137]

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[131] 11 F. Cas. at 24.
[132] Id. at 25.
[133] Chase also suggested that the problem was not completely limited to the Southern governments. Id. at 25 (observing that "[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government . . ." and that "it is not to be doubted that not a few among them" had previously taken a covered oath, and that "[p]robably some of these persons" had subsequently been elected to office).
[134] Id. at 25. Of course, Chase would undercut this conclusion later in the opinion. See infra Part II.C.
[135] 11 F. Cas. at 25.
[136] More on this point presently, Part II.C.2.c, and again Part III.
[137] 11 F. Cas. at 26.

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Chase tried to funnel these policy arguments into a rule of constitutional construction: "the argument from inconvenience."[138] This argument "it is true, can not prevail over plain words or clear reason," Chase acknowledged.[139] "But, on the other hand," he wrote, "a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference."[140]

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[141] Or as Chief Justice Marshall said in *United States v. Fisher*: "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[142] But Chase's canon was noticeably more aggressive: The supposedly more disruptive reading must "*never be preferred*" unless the text's terms "*absolutely* require" such preference.[143] That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase's analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the "literal" reading of the "terms of the instrument" as meaning exactly what they seem to say. As discussed above, the language of Section Three's prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase's opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text's language is somehow insufficiently clear to justify applying the "literal" meaning of its words. Indeed, even on Chase's own hyper-strict standard, the words of Section Three *do* "absolutely require" the conclusion that it, on its own, disqualifies covered rebels from office.

Second, Chase was too ready—far too ready—to find that following the ("literal") language of the document would produce (what *Chase* considered to be) great "inconveniences" or "mischief"— indeed, increase "calamities" already visited upon

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[138] Id. at 24.
[139] Id. at 24.
[140] Id. at 24.
[141] James Madison, Speech on Feb. 2, 1791, reprinted in Legislative and Documentary History of the Bank of the United States 39, 40 (photo. reprint 2008)
[142] United States v. Fisher, 2 Cranch (6 U.S.) 358, 386 (1805)
[143] 11 F. Cas. at 24 (emphasis added).

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the South. Chase emphasized the breadth of Section Three's language: it applied in all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply "to all persons in the category" and "for all time, present and future" (so?). And, taken seriously, this broad rule would, as noted, "annul all official acts" performed by disqualified officers, including judges. (Would it?)

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase's parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.[144]

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment. But because these arguments from inconvenience are the heart of Chase's opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase's construe-to-avoid-the-force-of-constitutional-language-whose-policy-consequences-you-dislike approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy "solutions" to texts they don't like. Chase's opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

b. The argument from "the intention of the people"

In places, Chase raises the inconvenience argument as an inquiry into the "intent" of the Framers: "What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?"[145] This at least sounds kind of

[144] As Judge Underwood had put it: "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Opinion of Judge Underwood, supra note 125, at 465.

[145] 11 F.Cas. at 24.

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like the question a judge should be asking—the original meaning of the constitutional provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase's framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.[146] And whatever evidence Chase might have that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say "coerced"—to ratify the Amendment as the price of regaining their representation in Congress.[147] Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed "intent" of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase was succumbing to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed "intent" of a written text. When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do.

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[146] See supra notes 9-14, sources cited there, and accompanying text.

[147] See generally, John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 461 (2001). For arguments that Congress's requiring states' ratification as condition of restored representation was entirely lawful and appropriate, see id; Kesavan & Paulsen, *West Virginia,* supra note 130, at 329; Amar, America's Constitution, supra note 4, at 364-380, see especially id. at 376-378. There is a different argument for ratification, the "loyal denominator" theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const. L. & Pub. Pol'y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 La. L. Rev. 47, 48 (2018). One of us has rejected this theory in prior writing, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,* 103 Yale L.J. 677, 709 (1993); see also Amar, supra note 4, at 378-380, and the other of us is inclined in the same direction.

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But it is easy for a judge to use this principle as an excuse for reading into the text his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. The argument that Section Three should not be read to depart from the "spirit" of prior constitutional law

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle, which in determining the construction of this amendment, is entitled to equal consideration."

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[148]

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once and without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.[149]

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

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[148] 11 F.Cas. at 25.

[149] Id. at 26.

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Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.[150] But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to "*forbid*[]" readings of a text "not *clearly* required" by its terms, that would "*bring it into conflict or disaccord*" with other provisions of the Constitution.[151] Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden.* Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in the judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.[152] If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did it would have the perverse effect of leaving Confederates who had *not* previously

[150] See infra, Part III.
[151] 11 F. Cas. at 25 (emphasis added).
[152] Id. at 26.

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taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.[153]

So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.[154] Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.[155] This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

d. The argument from the Section Five enforcement power

Having flailed to avoid the natural reading of Section Three, Chase finally offered his alternative, "reasonable construction":

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' [sic] ... The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.[156]

Section Five "qualifies" Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise "qualifies" Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into

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[153] See Case of Davis, 7 F. Cas. 63, 92, 95 (C.C.D. Va. 1867).

[154] Id. See Magliocca. *Amnesty*, supra note 5, at 100-102; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 293-300 (2017).

[155] Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. Id. at 293-296.

[156] 11 F. Cas. at 26.

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practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course of performing their assigned duties. But as noted above there is no reason why "proceedings" and "decisions" and "enforcement" with respect to Section Three's commands may not be conducted and carried out by these various state and federal actors, exercising their usual authority with respect to such matters.[157] It is simply not true that "these can only be provided by Congress." Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin's Case*, until Chase stopped him.

Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin's Case*.

3. *Griffin*'s Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."[158]

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

> In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge. . . .
>
> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in

[157] Magliocca also suggests that in the specific situation in Griffin's Case, state law may have been "unavailable for enforcement" of Section Three because "Virginia was an unreconstructed state and thus lacked the ordinary powers of a state" and "because Virginia did not yet recognize the Fourteenth Amendment's legitimacy" – in contrast with states such as North Carolina. Magliocca, *Foreground*, supra note 62, at 10 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the union.

[158] 11 F. Cas. at 27.

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> the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[159]

What is going on here? Chase describes an alternate ground for the case—"a judge de facto acting under color of office," which we would now call the "de facto officer doctrine"—explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs in to it the more dubious the whole opinion becomes.

First of all, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended. But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown. The de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.[160]

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,[161] fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with

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[159] 11 F. Cas. at 27.

[160] Accord, Magliocca, *Foreground*, supra note 62, at 11 n.25.

[161] See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.") https://founders.archives.gov/documents/Jefferson/98-01-02-3562; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1011-12 & n.39 (2003); Baude, Judgment Power, 96 Geo. L.J. 1807, 1823-24 (2008).

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reference to this and kindred cases in this district."[162] The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,[163] in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court."[164] Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.[165] Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"[166] fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out

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[162] 11 F. Cas. at 27.

[163] The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex Parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." Ex parte State of Virginia No. 11, 1868 WL 10951, 19 L. Ed. 153 (1868); Fairman, supra note 126, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course – not deputize the Chief Justice to go deliver some secret verdict in their stead.

[164] Fairman, supra note 126, at 607.

[165] Id.

[166] Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

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to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.[167] But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto judges in the saga surrounding *Hayburn's Case*.[168]

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."[169] On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack.[170] Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.[171] On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction.[172] The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.[173] Indeed, these technicalities were argued by the parties and they were the main subject

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[167] For many citations, see Griffin's Case, 11 F. Cas. at 18-21 (argument of counsel). For more, see also Reply and Response Brief for the United States, Financial Oversight and Management Board for Puerto Rico v. Aurelius (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121) at 27-47; and Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

[168] Baude, Severability, supra note 66, at 12 (discussing Yale Todd).

[169] For statements like this, see Ball v. United States, 140 U.S. 118, 128-129 (1891) ("was judge de facto if not de jure, and his acts as such are not open to collateral attack."); see also Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 910, 919 (1963); but see id. at 910 & n. 9 (suggesting that a suit is collateral whenever the officer "is not a party," including on "writ of error").

[170] All three cases cited by Chase in Griffin's Case, 11 F. Cas. at 27, can be characterized this way. Taylor v. Skrine, 5 S.C.L. 516, 3 Brev. 516 (1815) deals with a writ of execution and observes that "no objections were made to his authority at the time the decree was given." State v. Bloom, 17 Wis. 521 (1863) relies entirely on In re Boyle 9 Wis. 264 (1859) which is a habeas case holding that the "right to hold the offices cannot be inquired into in a collateral proceeding of this kind," id. at 267. And People v. Bangs, 24 Ill. 184., 187 (1860) distinguishes a "direct proceeding" from one where the doctrine applied.

[171] For statements like this, see *McDowell v. United States, 159 U.S. 596, 598* (1895) ("presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment."); see also Note, *The De Facto Officer Doctrine*, at 918 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).

[172] But see In re Boyle, cited supra note 170 (distinguishing "the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offence").

[173] In the Supreme Court's most recent de facto officer doctrine case, Ryder v. United States, 515 U.S. 177 (1995), it split the difference, holding the doctrine inapplicable because the case was on direct

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of Judge Underwood's opinion below.[174] Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

* * *

There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

III. Section Three Supersedes, Qualifies, or Satisfies Prior Constitutional Provisions

Our third proposition is logically and methodologically straightforward but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.[175] Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition—there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, unAmerican (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong: dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments change the Constitution. It thus should be unsurprising—indeed, it is in the very nature of constitutional amendments—that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment*

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review *and* the challenge was constitutional. In the more recent case of Financial Oversight and Management Board for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1666 (2020), it avoided the issue because it found the appointments lawful.

[174] See Opinion of Judge Underwood, supra note 125, at 463-466.

[175] See supra Part III.C.2.c.; see also Ginsburg, Huq, & Landau, supra note 118, at 18 (suggesting that a self-executing interpretation, "while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns" and for that reason an "alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced").

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supersedes prior law precisely to the extent that it departs from the prior rules. This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms, understood in their natural sense and accounting for any terms of art or specialized usages of words, departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote. When this occurs, the courts must determine the "meaning and operation" of the two provisions.

Hamilton articulated two principles for doing so, which work as a complementary pair. "So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done"—there's the first of the pair, but Hamilton's sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair: "where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first." This was, Hamilton continued, "a mere rule of construction," but it was an appropriate one, "consonant to truth and propriety," consistently recognized by courts as interpreters of law: that, as "between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference."[176]

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority—and proceeded to derive the proposition customarily called "judicial review."[177] But that is not the interpretive question here. Here, the key point is precisely Hamilton's lead-in proposition: that, as between "interfering" acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same

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[176] See The Federalist No. 78 (I. Kramnick ed. 1987) at 439 (Hamilton). These rules were well-established in American and English law. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 235-244 (2000)

[177] See The Federalist No. 78, supra note 176, at 439-440 (Hamilton) ("But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.")

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legal status: By the terms of Article V, constitutional amendments are "valid to all Intents and Purposes, as Part of this Constitution," when adopted.[178] Thus, where We, the People, have adopted a new constitutional text "interfering" with or departing from prior constitutional provisions, the last-in-time enacted prevails to the extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights in a sense qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent of a conflict between those powers and the subsequently enumerated rights.[179] Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.[180]

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"[181] does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the preexisting lawmaking process.[182] A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original apportionment

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[178] U.S. Const. art. V.

[179] On the relationship between rights and powers, see William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1821-1822 (2013); Jud Campbell, The Invention of First Amendment Federalism, 97 Tex. L. Rev. 517, 561-67 (2019).

[180] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[181] U.S. Const. amdt XIV, sec. 5.

[182] See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 19 (2017) (offering the examples in this paragraph).

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rules including the notorious Three-fifths Clause.[183] Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies an earlier-enacted constitutional provisions with which the new provision conflicts, Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.[184]

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex post Facto Clause. *To the extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—*to the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the

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[183] See U.S. Const. amdt. XIV, sec. 2; U.S. Const. art. I, sec. 3. By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

[184] Indeed, for what it is worth, the legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. Cong. Globe, 39th Cong. 1st Sess. at 2915 (Sen. Doolittle) (complaining that Section Three was an "ex post facto provision, a bill of attainder"); id. at 2890 (Sen. Cowen) (bill of attainder); id. at App 241 (Sen. Davis) (Section Three "is in the nature of both a bill of attainder and an ex post facto law"); id. at 2940 (Sen. Hendricks) (ex post facto); id. at 2916; see also id. at 2467 (Rep. Boyer) (criticizing earlier version of Section Three as "a bill of attainder or ex post facto law"). These charges were generally premised on the view – with which proponents of the amendment evidently agreed, see id. at 3036 (Sen. Henderson) – that Section Three would preempt these earlier rules to the extent of a direct conflict. Though at one point Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. Id. at App. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it"); see also id. at 3146. See also Graber, supra note 12, at 26-31, 36-37 (documenting this history).

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correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think that these various prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible; and it is, for the most part, fairly possible to do so. But to the legitimate extent of any conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

A. Bills of Attainder

A bill of attainder is the legislative infliction of punishment on specific people without a trial.[185] It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a "bill"—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an "attainder" either—in that it is not at all clear that it inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-second Amendment is surely not inflicting a "punishment" when it precludes the President from running for a third term.[186] Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of 20th-century "red scare" cases[187] and perhaps more relevantly in a pair of immediate post-Civil War-era loyalty cases: In *Cummings v. Missouri*[188] and *Ex Parte Garland*,[189] the Supreme Court invalidated state and federal oath requirements that required an "Ironclad Oath" from anybody holding a range of positions, both public and private. That oath was really a *past*-loyalty-requirement, requiring people to swear that they had not supported the confederacy or

[185] See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177 (2011).
[186] U.S. Const. amdt. XXII. But see Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from office many be punishment, as in cases of conviction upon impeachment.").
[187] United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
[188] 71 U.S. 277 (1866).
[189] 71 U.S. 333 (1866).

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the like.[190] The Court concluded that these requirements were effectively bills of attainder—and also ex post facto laws—and held them unconstitutional.

Even if one takes these precedents at face value it does not follow that Section Three would similarly be a bill of attainder. First, the "Ironclad Oath" laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[191] Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.[192] Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the majority opinion emphasized this fact, explicitly noting that neither case involved qualifications for public office.[193] Second, because both cases focused on the retroactive effect of the laws,[194] neither case's reasoning would seem applicable to Section Three in post-Civil-War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.[195]

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin,* Chief Justice Chase).[196] Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.[197] In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

B. Ex Post Facto Laws

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[190] For much more detailed discussion of the federal "Ironclad Oath" see infra Part IV.A.4.b.i.
[191] Garland, 71 U.S. at 377.
[192] Cummings, 71 U.S. at 319.
[193] Garland, 71 U.S. at 378.
[194] Cummings, 71 U.S. at 327 ("They are aimed at past acts, and not future acts."); Garland, at 377 ("In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed").
[195] See supra Part I.B.
[196] Garland, 71 U.S. at 382. *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment) and an especially weak case for the relevance of past loyalty to engaging in religious occupation.
[197] For a somewhat lighthearted explication of this principle – and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 Const. Comm. 285 (2007).

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Article I also forbids both the state and federal governments from enacting an "Ex Post Facto" law.[198] An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.[199] True, as applied to actions done before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the "spirit" of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

Indeed, we have this on especially good authority, as this very question has been asked and answered in the past. The Eleventh Amendment, as noted above, had the effect of cutting off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III. In *Hollingsworth v. Virginia*, the Court then confronted the question whether the Amendment was retroactive, cutting off suits pending when the Amendment became law. The plaintiffs argued in the U.S. Supreme Court against retroactivity, because "[t]he spirit of the constitution," forbade "the mischief of an ex post facto Constitution."[200] Indeed, this argument mirrored precisely the arguments for narrow construction we have seen above: "It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution."[201] But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.[202] As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions covered by the revised constitutional rules.

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[198] U.S. Const. art. I, §§9 & 10.

[199] To be sure, there are revisionist arguments that the Ex Post Facto clause itself extends to retroactive civil laws too. See Eastern Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. Cummings, 71 U.S. at 326-332; Garland, 71 U.S. at 377-368. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis

[200] 3 U.S. at 378-80 (arguments of counsel).

[201] Id.

[202] Id. at 382. See Baude & Sachs, *Eleventh Amendment*, supra note 9, at 626-627.

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C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property without due process of law," which in many circumstances requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First of all, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege, a public trust, to be vested with the power of the people. And though it is a closer case, the same thing may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation. It does not protect *public* rights.[203] It has been argued that in England, offices *were* understood as vested rights of property, and occasionally early American courts said so as well.[204] But that was not the better rule in America. Treating offices as property did not fit well with republican principles,[205] and by 1900 the Supreme Court could rightly state: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such."[206]

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.[207] So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin's Case*. But in our view this objection is sufficiently answered by the terms of Section Three itself. Perhaps the reason that Section

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[203] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565-593 (2007); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1540-1547 (2020).

[204] Jed Shugerman, *Freehold Offices vs. "Despotic Displacement": Why "Executive Power" Did Not Include Removal* (July 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119; Hoke v. Henderson, 15 NC 1 (1833).

[205] See Jane Manners & Lev Menand, *The Three Permissions*, 121 Colum. L. Rev. 1, 20 (2021) ("In revolutionary America, the idea of offices as property was roundly rejected"); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1824 n. 157 (2006) ("A more republican conception of government meant a more republican conception of offices.").

[206] Taylor & Marshall v. Beckham, 178 U.S. 548 (1900).

[207] See supra notes 48-50 and accompanying text.

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Three only applies to holding office and not voting, and only applies to prior office-holders, who have previously sworn a constitutional oath—indeed, these limitations are the only ways in which Section Three's scope was appreciably narrowed during the drafting process—is that we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would seem to disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warranto suits, state and federal judicial review, congressional adjudications, and so on. Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels.[208] Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

D. The Ominous Question: Section Three and the First Amendment

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

This question begets more questions: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding *of Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal disabilities imposed by Section Three take over, as a matter of the proper understanding of Section Three?

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[208] See generally supra Part II.B.

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There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as properly understood as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example[209] but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of "engage in insurrection" and "aid or comfort"—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, and under modern doctrine, that would mean the very stringent test of *Brandenburg v. Ohio*?[210] Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.[211] First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three's terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today's liberal understandings.[212])

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[209] See infra Part IV.C.2.

[210] 395 U.S. 444 (1969).

[211] Federalist No. 78, supra note 176 ("So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.").

[212] For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools,* 85 Minn. L. Rev. 1917, 1919-1922 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see for starters, Adam Griffin, *First Amendment Originalism: The Original Law and A Theory of Legal Change as Applied to The Freedom of Speech and of The Press*, 17 First Amend. L. Rev. 91 (2019); Jud Campbell, *Natural Rights*

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The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is "speech integral to criminal conduct."[213] And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.[214] Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning "incitement." Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous "clear and present danger" test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) "*directed to*" (ii) triggering or inciting (iii) "*imminent*" lawless action (presumably including acts of insurrection or rebellion) and (iv) "likely" to produce such action.[215] That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court's relatively recent decision in *Holder v. Humanitarian Law Project*[216] recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides "material support" to a foreign organization engaged in or committed to terrorist violence against the nation. The Court concluded that because the "interest in combating terrorism is an urgent objective of the highest order," the Congress could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly*

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and the First Amendment, 117 Yale L. J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 Yale L. J. 861 (2022). (We will cease further digression on this point.)

[213] United States v. Hansen, 599 U.S. __, at 18-19 (2023); United States v. Williams, 553 U.S. 285, 297 (2008); Giboney v. New Ice Storage, 336 U.S. 490 (1949); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-993, 1007-1008 (2016).

[214] Volokh, supra note 213, at 1011-1015.

[215] 395 U.S. at 447. This standard is elaborated in Hess v. Indiana, 414 U.S. 105, 108-109 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). Additionally, Bond v. Floyd, 385 U.S. 116 (1966) rejected the idea that there is a lower First Amendment standard of incitement when a state legislature is excluding an elected member under state law, id. at 132-135; see also Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974) (same principle applies to ballot access).

[216] 561 U.S. 1 (2010).

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further terrorist conduct. While this decision is hedged by multiple limiting principles,[217] it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having "engaged in insurrection" or provided "aid or comfort" to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that "he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it,"— that he was "warring upon the Military."[218] It is conceivable (though we do not prejudge the point) that Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army "unto the death" and stating that anybody who volunteered for the Union army "ought and I believe will be shot down before he leaves the State."[219] This exclusion was part of the backdrop of Section Three's enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion "was entirely unconstitutional" and "plainly violative of the First Amendment."[220] If that was so before Section Three's enactment, does Section Three make it otherwise?[221]

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during

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[217] The Court emphasized that "only material support coordinated with or under the direction of a designated foreign terrorist organization" was banned; "independent advocacy" was "not covered." Id. at 31-32. Additionally, the law only applied to *foreign* organizations.

[218] President Abraham Lincoln to Erastus Corning and others (June 12, 1863), in Abraham Lincoln, Speeches and Writings, 1859-1965, at 454, 459 (Don Fehrenbacher, ed. 1989). See infra notes 269-277 and accompanying text.

[219] See infra notes 270-278, and 343-348 and accompanying text.

[220] Lynch, supra note 5, at 197-198.

[221] See Lynch, supra note 5, at 198 ("Had Section 3 been ratified by this point, these concerns would be assuaged.")

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this Great War," and excluded in part on that basis.[222] (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on grounds of judicial bias.)[223] Another scholar of the incident writes that "Under a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however under the interpretation prevailing at the time, they probably were."[224] What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.[225] But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.[226]

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger; but insurrection and rebellion are dangers too—all too real dangers, as recent events have shown. Where exactly that line is drawn by the Constitution, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three's general terms triggering disqualification from future office—"insurrection," "rebellion," "engaged in," "given aid or comfort to"—and of who all is included under Section Three's ban. To that set of important questions we turn next.

IV. Section Three's Substantive Disqualification is Sweeping

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[222] Chafetz, supra note 47, at 190; Lynch, supra note 5, at 211-213; 6 Cannon, supra note 18, at 52-63.
[223] Berger v. United States, 255 U.S. 22 (1921). During the initial exclusion, when Berger's conviction was on appeal, the House Committee announced "that it would not be governed by the action of the judge and jury at the Chicago trial," but would review the evidence and legal questions for itself. 6 Cannon, supra note 18, at 54. But curiously, after the convictions were reversed the House allowed Berger to sit in the sixty-eighth through seventieth Congresses. Lynch, supra note 5, at 213.
[224] Chafetz, supra note 47, at 191.
[225] In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. See infra note 359.
[226] Federalist No. 78, supra note 176, at 439.

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We come at last to the heart of the beast: the substance of Section Three's prohibition. We begin (in Subpart A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having "engaged in" "insurrection" or "rebellion" against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given "aid or comfort" to "enemies" of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms' core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a "sure shipwreck,"[227] to borrow Susan Morse's phrase—of unquestionably disqualifying conduct falling within the core of Section Three's meaning: for example, declaring unilateral secession from lawful constitutional government; or the taking up of arms against government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three's terms—ordinary expression of political dissent as well as even ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in subpart A.

We then turn more briefly (in subpart B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—*are covered* by Section Three's ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three's disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.

Finally (in Subpart C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president's willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat for re-election and, instead, his (and others') attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de

[227] Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

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facto political coup d'etat against the regime of lawful constitutional government, constitute engaging in "insurrection or rebellion against the Constitution of the United States"? We think the answer is *yes*.

Whether called a "rebellion," an attempted coup d'etat seeking to displace lawful government authority under the Constitution, or an "insurrection," instigating, inciting and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—such conduct is covered by Section Three, and is disqualifying. If those are indeed the facts concerning Donald Trump's (and others') efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting "insurrection" or "rebellion" (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave "aid or comfort" (approval, encouragement, support) to enemies might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three's meaning, those judgments are entitled to full legal effect.

A. Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted by the Civil War Congress (both the 1862 "Ironclad" oath and the Second Confiscation Act), and the significant mid-Civil-War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, including the Insurrection Act of 1795 as amended, and an important series of exclusions from Congress itself, as well as the relevant legislative history of Section Three, and a few scattered post-enactment applications of Section Three itself.

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1. Working definitions

We begin by offering working definitions of the terms *insurrection* and *rebellion* and of what might constitute "engaging in" such conduct or giving "aid or comfort" to enemies under Section Three.

Insurrection is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect*. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government*. Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."[228] Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases*, in 1863: "Insurrection against a government may or may not culminate in an organized rebellion."[229]

Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means*. (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime's authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself*. The South's attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States by the states asserting the right to secede. Likewise, an attempted coup d'etat is arguably also a species of rebellion—an effort to displace, replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

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[228] 10 Documentary History of the Ratification of the Constitution 1296 (Statement of Madison) ("A riot did not come within the legal definition of an insurrection").
[229] 2 Black (67 U.S.) 635, 667 (1863).

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The term *rebellion* can also imply a competing claim to legitimacy. "Rebellion" thus seems to carry a stronger political-claim-of-right valence than does "insurrection."[230] Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South's secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d'etat, or declaration of independence, or secession, is claimed to be a "vindication" or "restoration" of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person's or group's alleged wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as "rebellion" but restoration. Mistake of law is no defense to a coup d'etat. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession as an act for the vindication of its believed rights.[231] That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by*

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[230] Though it is possible that this connotation is anachronistic. See infra note 252.

[231] For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see James M. McPherson, Battle Cry of Freedom: The Civil War Era 234-236 (1988) (summarizing Southern constitutional and political theories); Daniel Farber, Lincoln's Constitution 57-91 (2003) (emphasizing arguments of states' rights to interposition, nullification, and secession generally); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame. L. Rev. 1227, 1270-1277 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. Am. Hist. 5-53 (June 1978) (providing detailed history of constitutional and political arguments over the nature of Union and the validity of secession); David P. Currie, The Constitution in Congress: Descent into the Maelstrom 1829-1861, at 228-237 (2005) (discussing and evaluating the constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see generally 2 Abraham Lincoln, Speeches & Writings, 1859-1865: Speeches, Letters, Miscellaneous Writings, Presidential Messages & Proclamations, at 217-218 (First Inaugural Address, March 4, 1861); id. at 254-258, 260-261 (Message to Congress, July 4, 1861); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi. L. Rev. 691, 703-715 (2004) (reviewing Daniel Farber, Lincoln's Constitution) (distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, supra note 130, at 303-311 (same). For further background, see generally William W. Freehling, The Road to Disunion: Secessionists at Bay 1776-1854 (1990), and for a comprehensive exposition of the Southern view, see Alexander M. Stephens, A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results (1867). As a clarification: we use the term "secession" here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory.

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force—and thus may occupy some ground not covered by the word "insurrection" (which, we have suggested, must be forcible). There are such things as "bloodless coups": actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.[232]

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861[233] preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws. The secession ordinances might still immediately constitute acts of "rebellion," even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together—acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs (as they obviously did with the Civil War)—and it becomes difficult to distinguish "insurrection" from "rebellion." The overlap of the two terms in theory becomes complete in practice.

In the end, however, we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that "insurrection" and "rebellion," in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

So much for our working definitions of "insurrection" and "rebellion." What does it mean to have "engaged in" such conduct? We believe one has "engaged" in

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[232] Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political coup d'etat – an act of "rebellion" if judged by the pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance, and subsequently legalized by its own success. See generally Paulsen & Paulsen, supra note 30, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub Pol'y 818, 821, 844, 850 (2015). But cf. Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation 1760-1840, at 164-165 (2021) (emphasizing the states' retention of sovereignty under the Articles and the idea that states might thus properly exit that regime, legally, on the theory that the Articles had become a breached treaty).

[233] The seceding states adopted their secession resolutions by state "conventions," purporting to parallel the process by which the states ratified the Constitution. See McPherson, supra note 231, at 234-284 (describing secession actions of ten states that purported to secede from the Union). The secession ordinances of the South were self-consciously styled after the Declaration of Independence, which was obviously an act of formal legal rebellion.

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insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of* such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has "engaged in" such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.[234] (There is obvious overlap here with the closely related concept of having given "aid or comfort" to the nation's enemies, which we discuss presently.)

Of course, there are also important limits to how far the concept of having "engaged in" insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have "engaged in" insurrection or rebellion. An exception to this limitation might exist where a person possesses an affirmative duty to speak or act. Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three's terms.

Then there is the related question of what constitutes having given "*aid or comfort*" to "the *enemies thereof.*" This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion "*or*" having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.[235]

In many cases, giving "aid or comfort" to enemies will be similar to the kind of conduct that counts as having "engaged in" insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term "aid or comfort" reinforces and emphasizes Section Three's coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section

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[234] This working definition of having "engaged in" wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with "assistance" including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). Federal criminal law today is to similar effect. 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). We think it is also generally supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1108 (2017). That said, the context of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See text accompanying infra note 425.

[235] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.")

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Three's "aid or comfort" language, even where it might be debatable whether to characterize such conduct as directly "engag[ing] in" insurrection or rebellion.

Additionally, while Section Three uses some language paralleling that contained in the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. "Insurrection" and "rebellion" are their own things, distinct from "treason." While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within Section Three. So even if "aid or comfort" in Section Three connotes the same type of assistance-and-embrace principles as "Aid and Comfort" in Article III's Treason Clause,[236] the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal-law conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.)

Finally, aid or comfort to whom? "[T]he enemies thereof." Before the Civil War, some might have limited the term "enemies" to those owing allegiance to a foreign power,[237] but that is not plausibly true of Section Three. Rather, Section Three covers enemies both foreign *and domestic*. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War,[238] and it seems clear from the political context of Section Three that it likewise treats domestic enemies as enemies. Indeed, it is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text.

What is less clear is how to define the foreign and domestic enemies covered by Section Three. The most straightforward option, which strikes us as the more likely one, is that "enemies" essentially cross-references the domestic rebels and insurrectionists just described earlier in the sentence (as well as more traditional foreign enemies, of course). On this straightforward reading, Section Three would cover a domestic officeholder who directly engages in insurrection or rebellion, or who gives aid or comfort to others who do so (or, of course, one who gives aid or comfort to foreign enemies). This straightforward reading is also consistent with the operation of another 1862 statute, the Second Confiscation Act.[239] That said, we cannot rule out another narrower possibility, that "enemies" is limited to those with whom the US are effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war.[240] This would create a more complicated two-track system

[236] See infra note 258.
[237] See Lynch, supra note 5, at 174 (discussing United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254)).
[238] See infra Part IV.A.4.b.i.
[239] See infra Part IV.A.4.b.ii.
[240] See Lynch, supra note 5, at 173-178 for more discussion.

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where Section Three covers all insurrections and rebellions, as well as "aid or comfort" to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out.[241]

Our sense of the whole—of Section Three's substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called "insurrection" or "rebellion"; and whether a covered individual is thought to have "engaged in" such activity or given "aid or comfort" to "enemies," Section Three's disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

Finally, let us reiterate one consequence of Section Three's breadth and capaciousness. Because Section Three's terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held "unconstitutional" by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.[242] It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of

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[241] What is the referent of "enemies *thereof*"? Does "thereof" refer to enemies of the *United States* or enemies of *the Constitution of* the United States? We think this replicates the question of what "*the same*" refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (Does "insurrection or rebellion *against the same*" refer to insurrection or rebellion against "*the United States*"?) On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing; either one is capable of being considered an instance of the other. Whatever the answer, it should be the same for both—"against the same" and "thereof" refer to the same thing. Our best guess is that it is "the United States."

[242] See, e.g., Paulsen, *Rules for Its Own*, supra note 9, at 858 (arguing that where constitutional language states a general principle, "actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable"); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 995 (2008) (arguing that "textual imprecision or generality often admits of a range of choices" and that the correct constitutional answer in such circumstances "is that the legislature must be permitted to choose from options within that range"; thus, "the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted"); Kesavan & Paulsen, *Secret Drafting History*, supra note 9, at 1129-30 n.54 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law*

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other branches only because, and only to the extent to, they deviate from the Constitution's meaning. It is classically illustrated by the Court's reasoning in *M'Culloch v. Maryland*,[243] which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.

And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

2. Contemporaneous Dictionary Definitions

As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective*, *original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. (We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning: it can serve as a kind of operational, practical concordance that may "define" terms more precisely in their application than can a cold dictionary definition.)

Nineteenth century dictionaries contain definitions of "insurrection" and "rebellion" that substantially corroborate our working definitions. Webster defined "insurrection" as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state."[244] Rebellion was "[a]n open and avowed renunciation of the authority of the government to which one owes allegiance."[245]

Is, 83 Geo. L.J. 217, 333 (1994); Baude & Sachs, Law of Interpretation, supra note 234, at 1120 (describing "the presumption of constitutionality" as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

[243] 17 U.S. (4 Wheat.) 316 (1819),

[244] 1 Noah Webster, American Dictionary of the English Language 111 (1828, photoreprint 1993) ("Insurrection"); see also Dr. Webster's Complete Dictionary of the English Language 702 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (similar); 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (similar).

[245] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also Webster's (Porter 1864), supra note 244, at 1094 (similar); 2 Boag, supra note 244, at 319 (similar).

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Importantly, Webster also noted several distinctions between these and other terms. In defining rebellion, he distinguished an insurrection as "a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government," while a rebellion was a more categorical "attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."[246] And in defining insurrection, Webster noted that insurrection is "equivalent to sedition, except that sedition expresses a less extensive rising of citizens."[247] This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that "[i]nsurrection may be, but is not necessarily, rebellion"[248] and that despite these technical distinctions, "[i]nsurrection is however used with latitude as to comprehend either sedition or rebellion."[249] This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, John Bouvier's Law Dictionary in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion,* and *aid and comfort*. "INSURRECTION" was defined simply as "[a] rebellion of citizens or subjects of a country against its government."[250] "REBELLION" is correspondingly defined: "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*"[251] Bouvier's thus treated "insurrection" and "rebellion" as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government but not clearly distinguishing between them.[252]

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[246] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 1 Boag, supra note 244, at 727; 2 id. at 319 (similar).

[247] 1 Webster (1828), supra note 244, at 111 ("Insurrection"). For comparison, Webster defined "Sedition" as: "A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . ." 2 Webster (1828), supra note 244, at 66 ("Sedition").

[248] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 2 Boag, supra note 244, at 319 (similar).

[249] 1 Webster (1828), supra note 244, at 111. Daniel Hemel argues that "Webster's definition of 'insurrection' seems implausibly broad for Section 3 purposes." See Hemel, How-to Guide, supra note 5.

[250] "Insurrection" in 1 John Bouvier. A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 729-730 (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[251] "Rebellion" in 2 Bouvier (1868), supra note 250, at 415 (emphasis added).

[252] See also Joseph Worcester, A Dictionary of the English Language 764, 1190 (1860) (generally equating insurrection and rebellion). Elsewhere in this edition, Bouvier drew a distinction in connotation between "REBEL" and "INSURGENT," suggesting that "rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the

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Bouvier's dictionary also offers an instructive definition of "AID AND COMFORT" as "[h]elp, support, assistance, counsel, encouragement." The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

> The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act ...[253]

This tends to confirm our broad construction of "aid or comfort" as encompassing many kinds of intentional support, akin to the common law.

3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or near) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation "Intratextualism.")[254] Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.[255]

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tyranny of constitute authorities," and thus that "[t]he colonists who opposed the tyranny of the English government were insurgents, not rebels." "Insurgent" and "Rebel" in 1 Bouvier (1868), supra note 250, at 729; 2 id. at 415.

In a much later edition, Bouvier's drew a distinction between *insurrection* and *rebellion* as two different varieties of "actual and open resistance to [government] authority." *Insurrection* was "an actual uprising against the government" while *rebellion* "goes beyond insurrection in aim" and attempts actually to overthrow the government authority in question. "Insurrection" and "Rebellion," in 2 Bouvier's Law Dictionary & Concise Encycl. (Rawles Rev., 1897). Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as "contemporarily authoritative." Lynch, supra note 5, at 167 n. 80.

[253] "Aid and Comfort" in 1 Bouvier (1868), supra note 250, at 107.

[254] Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999).

[255] *M'Culloch*, 17 U.S. at 413-414. In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word "necessary" was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen, Marbury, supra note 66, at 2711; see also Michael Stokes Paulsen, *The Plausibility of Personhood,* 74 Ohio St. L. J. 13, 33 n. 72 (2013).

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Might the Constitution's other usages of terms that also appear in Section Three serve as such markers of meaning for "insurrection" and "rebellion," and "aid or comfort" to enemies, as those terms are used in Section Three? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel Invasions."[256] The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or invasion the public Safety may require it."[257] In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid and comfort" to enemies—borrows the nearly identical language of the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.[258] Moreover, in the 1860s, the pairing of "aid" and/or "comfort" had be-

[256] U.S. Const. art. I, §8 cl. 15.

[257] U.S. Const. art. I, §9 cl. 2.

[258] Perhaps the most notable U.S. treason case to date was Ex parte Bollman, in which Chief Justice Marshall delivered an opinion for the Court granting habeas to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American (then-)southwest and attempt to form his own independent nation. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part because of Article III's text ("only in levying war") with a relatively broad construction of complicity. Thus on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason," id. at 126, but on the other hand, "if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." Id. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: first, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, that though they might not qualify as treason, remain great and culpable legal wrongs; second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose; third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman*'s construction was sufficiently established to be read in to Section Three itself, it was cited occasionally in the 1860s Congress. See, e.g., 37th Congress 2nd Session Cong. Globe 414 (1862)

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come ubiquitous in legal and public discourse as a general allegation of improper assistance, making it still less clear that it was perfectly coterminous with the law of the Treason Clause.[259]

Finally, the words "insurrection" and "rebellion" also appear elsewhere in the Fourteenth Amendment itself, but again in ways that give little external light on Section Three. A person's "participation in *rebellion*" is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state's representation as a consequence.[260] Section Four of the amendment prohibits payment of debts or obligations "incurred in aid of *insurrection* or *rebellion*."[261] These neighboring sections use slightly different phrases for the behavior they cover ("participation" and "engaged in"; "aid or comfort" and "in aid of"), but it is difficult to say if the variations are meaningful.

4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms "insurrection," "rebellion," and "engaging in," as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in the landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, "insurrection" or "rebellion." A wide range of actions supportive of secession appears to have constituted "engaging in" or giving "aid or comfort" to rebellion or insurrection.

This leads us to what we think an obvious "sure shipwreck"[262] for understanding Section Three's terms. Whatever else "insurrection or rebellion" might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned: first, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly "seceded" state governments and their confederation into the "Confederate States of America"; and second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting

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(statement of Sen. Sumner) (citing *Bollman* passage quoted above during the proceedings to expel Senator Jesse Bright for writing a letter to Jefferson Davis).

[259] See Harold Holzer, Lincoln and the Power of the Press: The War for Public Opinion 361 (2014) (referring to the phrase "aid and comfort to the enemy" (by the press) as "that catch-basin phrase again.").

[260] U.S. Const. amdt. XIV, sec. 2.

[261] U.S. Const. amdt. XIV, sec. 4.

[262] Morse, supra note 227.

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either secession or armed resistance to U.S. authority constituted "engaging in" or giving "aid or comfort to" the Union's enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. President Lincoln

An extremely important contemporaneous source for understanding the public constitutional meaning of "insurrection" and "rebellion" in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating "secession" as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln's view, a "war" between the United States and another sovereign.[263] It was not subject to Congress's Article I, section 8, *clause 11* power to "declare War," but was rather an illegal *rebellion*—a "giant insurrection"—to be suppressed by executive authority pursuant to Congress's Article I, section 8, *clause 15* power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[264]

Consider just a few prominent and illustrative statements: In his First Inaugural Address, on March 4, 1861, Lincoln, after setting forth arguments that "no State upon its own mere motion can lawfully get out of the Union," concluded that "acts of violence within any State or States against the authority of the United States" are "*insurrectionary or revolutionary, according to circumstances.*"[265] Following the attack on Fort Sumter, Lincoln's April 15, 1861 proclamation calling forth the militia

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[263] On Lincoln's understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war) see sources cited in note 231. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L. Rev. 807, 814-823 (2006).

[264] Compare U.S. Const. art. I, §8, cl. 11 (Declare War Clause) with U.S. Const. art. I, §8, cl. 15 (power "to provide for calling forth" the Militia for law execution and to suppress insurrections"). Congress's exercise of this power – the Insurrection Acts of 1795 and 1807 – is discussed infra Part IV.A.5.a.

[265] Abraham Lincoln, First Inaugural Address (March 4, 1861), IV Complete Works of Lincoln ("CWL") 262, 265.

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similarly characterized the attack as fitting the statutory definition of *insurrection*.[266] And in his July 4, 1861 Message to Congress, Lincoln labelled the South's purported secession a "*giant insurrection*" and, vividly, as "*rebellion* ... sugar coated." The "so-called 'Confederate States'" had formed an "*insurrectionary* government."[267] In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, section 9, clause 2 of the Constitution, which used exactly that language of "rebellion."[268] Lincoln's use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators, no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion*.

Two years later, at the height of the war, Lincoln returned to the characterization of the South's actions as "rebellion" (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio Congressman Clement Vallandigham, a notorious racist and prominent "Copperhead" pro-South, anti-Union northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the propriety of the Union's war effort.

Lincoln distinguished law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: "Ours is *a case of Rebellion*—so called by the resolutions before me—in fact, *a clear, flagrant, and gigantic case of Rebellion*." And that, Lincoln concluded, was what allowed suspension of habeas corpus.[269] In the course of his argument, Lincoln described rebellion as "*sudden and extensive uprisings against the government*."[270] This is a useful description that supports our working definition: Rebellion is an "uprising." It is something more than mere protest. It is, often, "sudden." It is "extensive." It is directed "against the government." *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham's actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy

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[266] Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), IV CWL 331, 332.

[267] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), IV CWL 421, 427-428, 432-437.

[268] Id. at 429-431 (emphasis added).

[269] U.S. Const. art. I, §9, cl. 2.

[270] Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), VI CWL 260, 264 (emphasis added).

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cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, "under cover of 'Liberty of speech,' 'Liberty of the press,' and 'Habeas corpus,'" rebel sympathizers "hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways."[271] Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied "cover" for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person's refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a "man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy." He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now "occupying the very highest places in the rebel war service," such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[272] Lincoln's position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.[273] In a colorful metaphor, Lincoln ventured:

> I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the

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[271] Id. at 263.

[272] Id. at 265.

[273] In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those distinguishing pure speech from speech linked to prohibited *conduct*; recognizing limits on speech posing a danger of inciting to crime or lawlessness; recognizing "compelling interest" overrides in exceptional circumstances, including for reasons of national security or military secrecy; finding that government's motives and purposes for a particular action may matter to its lawfulness; and noting where an incidental limitation on expression leaves open alternative channels for expression of the same message. See Paulsen, *Civil War, supra* note 231, at 698-702 & n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment's freedom of speech).

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> right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.[274]

Lincoln also stressed a distinction between speech directed at criticism of the government's political policy—fully protected by the freedom of speech—and expression more or less directly aimed at harming the military's recruitment and war effort. If Vallandigham had been arrested merely because he was "damaging the political prospects of the administration" or "the personal interests of the general," that would be one thing, Lincoln observed. "[I]f there was no other reason for the arrest, then I concede that the arrest was wrong." But as Lincoln understood it, the arrest "was made for a very different reason"—that Vallandigham was "laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Vallandigham was, in short, "warring upon the military." He who "dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle." Desertion was punishable by death, of course. In a famous line, Lincoln asked, rhetorically "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[275] Lincoln's answer was no: "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy." [276]

Lincoln continued: "If I be wrong on this question of constitutional power," he added, "my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them -- in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security."[277]

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action.

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[274] Letter to Corning (June 12, 1863), VI CWL at 267. (*Emetics* referred to a medicine or substance used to induce vomiting.)
[275] Letter to Corning, VI CWL at 266.
[276] Id. at 266-67.
[277] Id. at 267.

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Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms "insurrection or rebellion," and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct, *all* constituted forms of support for and participation in "insurrection" or "rebellion." And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions of the post-war status of persons who had participated in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.[278]

b. Congress

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: We think two specific enactments of Congress during the Civil War are especially probative of the understandings of "insurrection" and "rebellion" and of what conduct was publicly understood to constitute having "engaged in" or given assistance to rebellion. First, there is the so-called "Ironclad Oath," adopted

[278] Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as "the rebellion." Annual Message to Congress (Dec. 8, 1863), VII CWL at 51 In his accompanying offer of amnesty and pardon, in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the "rebellion" that "now exists whereby the loyal State governments of several States have for a long time been subverted" (id. at 53), to "said rebellion and treason" (id. at 54), to "said rebellion" (id.) and to persons who had provided "aid" to the "rebellion" in various forms. Interestingly, Lincoln *excepted* from his offer of forgiveness – in language that would seem to presage the similar terms of Section Three – "all who have left judicial stations under the United States to aid the rebellion" and "all who resigned commissions in the army or navy in the United States, and afterwards aided the rebellion." Id. at 55. Lincoln also left to the respective houses of Congress the exclusive judgment "whether members sent to Congress from any State shall be admitted to seats."

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on July 2, 1862 as the oath one must be able to swear in order to hold federal office.[279] Second, there is the "Second Confiscation Act," adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting "rebellion" or "insurrection."[280] These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

i. The Ironclad Oath

Congress adopted The Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.[281] The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.[282] It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath's list of never-have-I-evers particularly instructive. Here's the oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

> I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor attempted to exercise the functions of any office whatever,* under any authority or pretended authority in hostility to the United States; that I have [4] *not yielded a*

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[279] 12 Stat. 502.

[280] 12 Stat. 589 (1862). 12 Stat. 627 (1862).

[281] 23 Stat. 21 (1884). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, 15 Stat. 85 (1868), and in 1871 it added that anybody "who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution" yet would otherwise "not be able on account of his participation in the late rebellion to take" the Ironclad Oath, could take the forward-looking oath instead, 16 Stat. 412 (1871). These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

[282] For this reason, Lincoln famously wrote: "On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*." Endorsement of Abraham Lincoln in Letter from R.M. Edwards to Edwin Stanton, February 5, 1864, 7 Lincoln Papers 169.

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> *voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-evers would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms, of course. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution* . . . hostile or inimical" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: What the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.[283]

ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act." Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"[284]

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.[285] The Second Confiscation Act was long and vigorously debated in Congress, much discussed in the press and in public discourse, objected to by many on constitutional grounds, and nearly vetoed by President Lincoln.[286] Enactment of the Second Confiscation Act gave rise to very public pressure

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[283] The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the oath to its own members, during and after the enactment of Section Three. These applications are detailed infra Part IV.A.5.b.

[284] 12 Stat. 589 (1862). See also 12 Stat. 627 (1862) ("explanatory" joint resolution).

[285] An earlier act had provided for forfeiture more specifically of property or slaves actually *used* in service of rebellion. 12 Stat. 319 (Aug. 6, 1861).

[286] See generally David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1185-1195 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an "explanatory" joint resolution (which Lincoln signed together with the bill). Lincoln nonetheless appended his original draft veto message setting forth his objections. For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of

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on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order. The Second Confiscation Act was a big deal. [287]

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime, and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who "*engaged in*," "*incite[d]*," "*set on foot*," or "*assist[ed]*" "*rebellion*" or "*insurrection*" or who had "*given aid or comfort*" to rebellion or done acts "*aiding and abetting*" rebellion. The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

Specifically: Section 2 made it a new crime, distinct from treason, to "*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*" or to "*give aid or comfort thereto*" or to "*engage in, or give aid and comfort to*," any "*existing rebellion or insurrection.*"[288] It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with "rebellion or insurrection." Those terms are described as involving acts "against

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action in signing it but nonetheless appending his objections, see id. at 1193-1194; Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War 105-106 (2007) (noting Lincoln's initial concern that the act would violate Article III's limitations on the punishment for treason and the objections of others that the act was a bill of attainder); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 215-217 (2010). For Lincoln's July 17, 1862 message to Congress, detailing his objections, see V Complete Works of Lincoln 328-331.

[287] A month after the Act had been adopted, Horace Greeley published a scathing editorial titled "The Prayer of Twenty Millions," in which he demanded that Lincoln "EXECUTE THE LAWS" faithfully with specific reference to the Second Confiscation Act. Greeley condemned Lincoln's "mistaken deference to Rebel Slavery" and his failure to rebuke his generals for having "habitually disregarded" the Confiscation Act. Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and "widely reprinted," defending his course of action. V Complete Works of Lincoln 388-389; see Holzer, supra note 259, at 400-401. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual *authority* for his proclamation). V Complete Works of Lincoln at 434-435 (stating that "attention is hereby called to" provisions of the act but relying for authority on his powers as executive and military Commander in Chief). See also Foner, Fiery Trial, supra note 286, at 215 (noting that "the Second Confiscation Act embodied a major shift in national policy").

[288] 12 Stat. 589, 590. (emphasis added). Section 2 provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act's disqualification from *federal* office, *id.*, as well. 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). Needless to say, a prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

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the authority of the United States, or the laws thereof" (a formulation closely conforming to our working definitions). Section 2 imposes criminal liability on persons who "incite" such acts; who "set on foot" such acts; who "assist" such acts; who in any other way "engage in" such conduct; or who "give aid and comfort to" such conduct. All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section 3 of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."[289] Section 5 directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who "shall hereafter *assist and give aid and comfort to* such rebellion."[290] Officeholding in a rebel government or military was *per se* blameworthy participation; but general giving of assistance or aid or comfort also qualified as participation in rebellion. Section 6 provided a further authorization for seizure of the property of any person not already mentioned who, "being *engaged in* armed *rebellion* against the government of the United States, or *aiding* or abetting such *rebellion*," and, after sixty days' notice issued by the President, did not "cease to *aid, countenance, and abet such rebellion*, and return to his allegiance to the United States."[291] Section 7 and Section 8 provided for in rem proceedings against property "found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto,*" in which case it "shall be condemned as *enemies'* property."[292] And Section 9 famously emancipated slaves of persons "who shall hereafter be *engaged in rebellion*" against the Union or who "shall *in any way give aid or comfort thereto.*"[293] Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: "engaged in," "rebellion," "aid or comfort," "abet," "countenance," "enemies."

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time. For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located. At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning those areas.[294] Similarly, as a practical matter, criminal prosecutions of rebels for

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[289] 12 Stat. 589, 590.
[290] Id. (emphasis added.)
[291] Id. at 591.
[292] Id.
[293] Id.
[294] See McPherson, supra note 231, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of "*in rem* proceedings by district courts that were of course not functioning in the rebellious states"); Foner, Fiery Trial, supra note 286, at 215 ("For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold

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treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.)[295] The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act's specific policies. The administration, according to one scholar, "chose not to implement the law vigorously."[296] Attorney General Bates "exerted no more than a minimal effort to make the first and second confiscation acts work."[297] And the Act's section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln's far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander in Chief power.

But in some ways the lack of enforcement cases is beside our point here, which concerns the Act's prominence in national discussions and its pervasive use of terms, phrases, and concepts—rebellion, insurrection, engage in, aid or comfort—that would reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation we think helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three's terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. The Supreme Court's decision in *The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.[298] There, the majority upheld the constitutionality of Lincoln's unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports. In a truly landmark decision, the Supreme Court held that the President's war powers (including the power to impose a blockade) were triggered immediately, as soon as the South's rebellion took the form of organized military resistance to the authority of the U.S. government. The President's power to

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under its provisions."). See also Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-1862, at 238 (2005) (remarking that "[t]he confiscation bill that finally emerged was neither sweeping nor enforceable" though opining that "if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.").

[295] See Eric L. McKitrick, Andrew Johnson and Reconstruction 141-152 (1960).

[296] John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 55 (2005).

[297] Id. at 72; see also James G. Randall, Constitutional Problems Under Lincoln 288-292 (1926) (describing minimal enforcement of the Second Confiscation Act).

[298] 67 U.S. (2 Black) 635 (1863).

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wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held. A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections" but "sprung forth suddenly ... in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[299]

The Court's decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution's allocation of war powers. At the time, the case had other hugely consequential implications: the principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln's constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.[300] The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court's usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government: "*Insurrection* against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government," the majority said.[301] A civil war "becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[302] Where a rebellion has come to possess certain military characteristics, the "party in rebellion" might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an '*insurrection*' by one side, and the insurgents be considered as rebels or traitors."[303]

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on "rebellion." A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

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[299] Id. at 668-669; see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J. 149, 177-180 (2004).
[300] Paulsen, *Emancipation*, supra 263, at, 814-823.
[301] 67 U.S. at 666 (emphasis added).
[302] Id. at 666
[303] Id. at 668.

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The Prize Cases also held that persons engaged in insurrection or rebellion could be treated as "*enemies*" (as well as traitors) for legal purposes. Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in "commerce" that "supplies" rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner. Even "neutral" powers' shipping could be seized when it violated a blockade: "Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as "enemies' property."'"[304]

The Prize Cases' treatment of the concepts of insurrection and rebellion, of who constituted "enemies," and of what actions constituted support for rebellion, would have been very much part of the legal culture of the day and provides important legal background as to how these terms would have been understood at the time of the drafting of Section Three of the Fourteenth Amendment, just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to "the lawful authority of the Government," with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—"insurrection," "rebellion," and what it meant to "engage in" or provide "aid or comfort" to enemies—highly probative of Section Three's original public meaning. President Lincoln, repeatedly and insistently; Congress, pointedly and consistently; and the Supreme Court, decisively, used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more

[304] Id. at 674 (quoting 3 Wash. C.C.R. 183). That said, the Court also cautioned that " 'enemies' property" was "a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law." Id. at 674. The point that, in a military context, property could be treated as "enemies' property" irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation: even though Lincoln's proclamation purported to free the slaves of *all* persons in rebel-controlled territory – including slaves held by persons claiming to be loyal to the Union – such "property" constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *Emancipation*, supra note 263. See generally John Fabian Witt, Lincoln's Code (2012).

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general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

5. Other Extant Statutory Sources and Notorious Examples

a. The Insurrection Acts (and Insurrections Generally)

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as well as its other war powers over the army and navy. The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach; the forms and degree of opposition to government authority that were believed to trigger the statutes' application; and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

The 1795 act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections." But it also applied to repel invasions and to enforce federal law. Together, these were the three circumstances where Congress had the power to provide for calling out the militia.[305] Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the government thereof."[306] Section Two allowed the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[307] Section Two encompasses insurrections against the United States.[308] (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call out the army and navy in similar circumstances: "in all cases of insurrection, or obstruction to the

[305] U.S. Const. art. I, sec. 8, cl. 15.
[306] 2 Stat. 424 (1795), sec. 1.
[307] Id. sec. 2. (emphasis added).
[308] That said, because Section Two is supported by *both* Congress's power to "suppress Insurrections" *and* its power "to execute the Laws of the Union," U.S. Const. art. I, sec. 8, cl. 15. it could encompass instances of law enforcement that do not rise to the level of a constitutional "insurrection."

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laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary ..." The 1807 act thus carried forward and repeated the 1795 act's understanding of insurrection.[309]

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe "*rebellion*." It allowed the President to call forth the militia "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . ."[310]

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation; it entails "combinations" or "assemblages," acting together, to "oppose[s]" or "obstruct" the ability of government to "execute" the law, in numbers "too powerful" to be suppressed by the usual means of law enforcement.[311]

Moreover, several famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding "insurrection" or "rebellion." Consider just a few.

The "Whiskey Rebellion" was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilleries. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their

[309] 2 Stat. 443 (1807).

[310] 12 Stat. 281 (1861).

[311] Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, supra note 5, at 168, 214-215. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President's proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection; but it is not an insurrection only because he proclaims it one.

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duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).[312]

We believe the "Whiskey Rebellion" would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.[313] Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.[314] In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an "insurrection" or "rebellion."

"Fries Rebellion," in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.[315] President John Adams invoked the 1795 Act to suppress the "insurrection," as he called it,[316] which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters. In at least one instance, armed opponents of the government successfully freed prisoners from federal custody. The Adams administration's suppression of the insurrection led to widely publicized treason prosecutions[317] of leaders and instigators of the unlawful resistance, including John Fries. As with the Whiskey Rebellion, Fries Rebellion was characterized by

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[312] See generally Elkins & McKitrick, The Age of Federalism 461-474 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties – including tarring and feathering, whipping, surrounding of officials' homes by armed mobs, and kidnapping and coerced repudiation of federal authority); see also Ron Chernow, Alexander Hamilton 468-478 (2004) (similar); Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 43-68 (1988) (documenting the resistance and military response).

[313] To be sure, one scholar of the Acts suggests that "[i]t may have been dubious whether actions of the Whiskey Rebellion farmers truly rose to the level of insurrection," and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, at 161 n. 46; see also Coakley, supra note 312, at 67 (suggesting that to "characterize the . . . affair as a 'riot' and the participants as 'rioters'" is "far closer to the truth"). But later sources called it at least an insurrection, see infra note 314, and this goes to show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government.

[314] See 1 Francis Wharton. State Trials of the United States during the Administrations of Washington and Adams 102-184 (1849) (describing "The Trials of the Western Insurgents"); Townsend Ward, The Insurrection of the Year 1794, in the western counties of Pennsylvania (J.B. Lippincott 1858); H.M. Brackenridge, History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection (W.S. Haven, 1859).

[315] Coakley, supra note 312, 69-77.

[316] John Adams, Proclamation on Insurrection in Pennsylvania, 12 March 1799, https://founders.archives.gov/documents/Adams/99-02-02-3377.

[317] These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed "insurrection," describing it as a "rising of any body of the people" and arguing that it qualified as treason because "an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States." Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800). See also 1 Wharton, supra note 314, at 458-609 (describing these proceedings as "The Trial of the Northampton Insurgents").

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concerted acts of forcible interference with federal officials' ability to perform their duties under law.[318]

Nat Turner's Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.[319] But it surely would have been a classic illustration of at least an "insurrection" and perhaps even a "*rebellion*"—a concerted uprising seeking forcibly to overturn the legal order and thwart government's ability to execute the law. A published report of Turner's own account called it both an insurrection[320] and in one instance an "open rebellion."[321] This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked "the 'higher law' doctrine" to openly harbor freed slaves to the point that President Millard Fillmore "threatened to send in federal troops."[322] In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland. This was denounced as an "act of insurrection," and this time President Fillmore did call out federal troops.[323] In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.[324] And of course John

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[318] As with the Whiskey Rebellion, these events show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See also Elkins & McKitrick at 696-700 (questioning "whether the circumstances really called for military force of any kind").

[319] Federal troops were used to suppress this and other slave rebellions, but "without following the legal procedures laid down in the statutes of 1795 and 1807." Coakley, supra note 312, at 92-94. Coakley suggests that this the failure to go through the Insurrection Acts reflected "the universal dread of slave revolts" at the time and the fact that "t]he slaves had no political constituency." Id. at 94.

[320] See The Confessions of Nat Turner, The Leader of the Late Insurrection in Southampton, VA, as fully and voluntarily made to Thomas R. Gray, at 3, 5, 7, 20, 22 (1831) (calling it "insurrection"); see also Thomas Wentworth Higginson, Nat Turner's Insurrection, 8 Atlantic Monthly 173 (1861)

[321] See Turner, supra note 320, at 3 ("The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves") (emphases added).

[322] See McPherson, supra note 231, at 81-84; Cf. Coakley, supra note 312, at 130-131 (noting debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

[323] McPherson, supra note 231, at 84-85. See also Thomas Slaughter, Bloody Dawn: The Christian Riot and Racial Violence in the Antebellum North (1991); and cf. id. at ix ("The line between riot and rebellion was shifting during the antebellum period.").

[324] See generally H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (2006) (describing resistance, in the mid-to-late1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

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Brown's fateful raid on Harper's Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.[325] These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection* nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr's Rebellion, in Rhode Island, in 1841-1842 which led to the Supreme Court's 1849 decision in *Luther v. Borden*.[326] There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter). The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government. The practical result of the decision—relevant to our inquiry– was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "*insurrection*" against the rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force"[327] and as having attempted "to assert the authority of [the Dorr government] by force,"[328] as amounting to having "engaged in the insurrection."[329] The Court also referred to the government's actions as having been designed to suppress that "insurrection."[330] The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.[331] While these

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[325] McPherson, supra note 231, 202-208. Federal troops helped suppress this insurrection and rebellion too. See Coakley, supra note 312, at 193 ("This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities.").

[326] Luther v. Borden, 58 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see Coakley, supra note 312, at 119-127.

[327] Luther, 58 U.S. (7 How.) at 8.

[328] Id. at 37

[329] Id. at 46

[330] Id. at 45.

[331] By this time, the Act had been amended yet again. See 17 Stat. 13, 14-15 (1871), §§ 3-4.

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events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection" as displayed by important usage within a few years of adoption of the Fourteenth Amendment. Briefly summarized: In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus, among other actions) to secure order in dealing with the Ku Klux Klan.[332] In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous "Colfax Massacre" of April 13, 1873, in which a white mob attacked and massacred perhaps 150 black citizens who had been defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government. President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.[333] Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d'etat that had overthrown the Republican governor by force.[334] Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of the capital—New Orleans at the time. (The conflict lasted until 1877, when Reconstruction was abandoned by the national government and white supremacists took full control of the state.) In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.[335] Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.[336] And in 1876, in South Carolina, Grant invoked the Insurrection Act to protect the gubernatorial election process from white supremacist groups.[337] Common to each of these instances during the Grant administration was

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[332] Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871); http://www.presidency.ucsb.edu/ws/?pid=70253; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871); for background see Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 Harv. Nat'l Sec. J. 537, 613-14 (2014); Lou Falkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872, at 39-49 (1996).

[333] Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) http://www.presidency.ucsb.edu/ws/index.php?pid=70364

[334] Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) http://www.presidency.ucsb.edu/ws/index.php?pid=70422

[335]Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), http://www.presidency.ucsb.edu/ws/?pid=70459.

[336] Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874) http://www.presidency.ucsb.edu/ws/?pid=70420.

[337] Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876) http://www.presidency.ucsb.edu/ws/?pid=70542.

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the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shays' Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or perhaps given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. The Congressional Exclusion Debates

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."[338] Moreover, several of these proceedings occurred right around the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.[339]

[338] Lynch, supra note 5, at 196. Lynch ably and accurately describes the most important such cases. See id. at 196-201, 207-210. We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

[339] See generally 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, pp. 431-486 (1907).

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First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy, during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.[340] A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."[341] Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."[342]

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility" to the Government or provided "aid or comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort."

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."[343] It also involved an incident of pure *speech* as disqualifying a member-elect from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

> *Editors Louisville Courier:*
>
> My attention has been called to the following paragraph, which appeared in your paper of this date:
>
> "JOHN YOUNG BROWN'S POSITION.– This gentleman, in reply to some searching interrogatories put to him by Governor Helm,

[340] Id. §448 at 442.
[341] Id. at 443 (emphasis added).
[342] Id.
[343] Id. at 445.

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said, in reference to the call of the President for four regiments of volunteers to march against the South—

'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*"

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.[344]

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. This became a precedent for the House's subsequent actions in other cases. The standard applied—whether the facts, "proved by clear and satisfactory testimony," showed that an individual had, by an "act or speech ... overt and public ... done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion"—had been satisfied by Brown's letter.[345]

Similarly, in March 1868, the House excluded John D. Young under this standard. Young's case also involved speech. The Young case involved numerous expressions of support and sympathy for the South and against the Union, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."[346] But Young's case was overdetermined, because there was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with* the open acts of 'aid and comfort to the enemies of the United States,'" established that he could not "'honestly and truly take the oath,'"[347] and the full House agreed.

[344] Quoted in id. at §449, p. 445.
[345] Id. at §449, pp. 443, 448.
[346] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[347] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).

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The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was opposed to "voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.[348]

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson, who had served as a state court judge in the eastern region of Tennessee during the Confederate regime; and Representative-elect R.R. Butler, who had retained his seat in the state legislature during secession, while opposing it—the respective house ultimately admitted the applicant to his seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.[349]

A potentially broad understanding of "aid or comfort" also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.[350] What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son $100 on the way out the door. The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son's taking up arms against the United States and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas's treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan's Treasury Secretary because he disagreed with the President's decision to send federal reinforcements to

[348] Id. at §453, p. 459.
[349] Id. at §453, 455, pp. 459-461, 462-465. In Butler's case, two-thirds of both houses voted him amnesty. Id. at 464-465. In Patterson's case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it, id. at 46, but perhaps that is okay, if application of the Ironclad Oath, to members of Congress, is a function of each house's *separate* power to make rules governing its proceedings. U.S. Const. art. I §5.
[350] Hinds' at §§457, 458 at pp. 465-470.

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Charleston Harbor.[351] Either theory of Thomas's exclusion suggests that "aid or comfort" to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one's son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia's sixth district, but the House committee found that Christy, by his own admission, had given "aid, countenance, counsel, and encouragement" to persons in armed hostility against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath, and he was not seated.[352] In 1869, the House sat John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.[353] The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of two witnesses.[354] In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or the other, the House ultimately voted to table the issue, leaving Booker in office.[355] Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia house of

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[351] Hinds' at §459, pp. 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas's son "it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action."). See also Cong. Globe 40th Cong. 2nd Sess. at 1260-1262 (Feb. 19, 1868).

[352] Hinds' at §459, pp. 470-472. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment," id.

[353] Hinds' at §460, pp. 472-473.

[354] Congressional Globe, 41st Cong, 2nd Sess. pp. 5442-5447 (July 11, 1870). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states; but everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "No war exist[ed] at the time" and it was before "the policy of the Government had been announced." Id. at 5443 (Butler); see also id. at 5445 (Garfield). Nor could Rice be excluded solely because of his politics. See id. at 5445 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

[355] Hinds' at §461, pp. 474-475.

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delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters. Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.

Finally, in 1871, the Senate declined to seat Senator-elect Zebulon Vance from North Carolina.[356] The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.[357] If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.[358]

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But there was no bright line, for instance, protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces appears generally to have been thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.[359]

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[356] See generally Hinds' at §463, pp. 478-486.

[357] See generally Richard E. Yates, *Zebulon B. Vance: as War Governor of North Carolina*, 1862-1865, 3 J. Southern Hist. 43 (1937).

[358] Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress, Act of May 22, 1872, ch. 193, 17 Stat. 142; https://bioguide.congress.gov/search/bio/V000021. Cf. Franklin Ray Shirley, Zebulon Vance, Tarheel Spokesman 71 & 152 n. 36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance), but Congress then passed a private bill granting him individual amnesty. 17 Stat. 691 (June 10, 1872). Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1884. Magliocca, *Amnesty*, supra note 5, at 111 n. 126.

[359] Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See supra notes 222-224 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section

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6. Legislative History

There is only a little fruit to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress's debates over its various provisions and of state ratification debates. The Fourteenth Amendment's legislative history is famously voluminous, and Section Three—like the other "forgotten" sections of the Amendment (Section Two and Section Four)—was much more salient to the debates then than it is to today.[360] As briefly noted above, the legislative history supports the key propositions we have advanced earlier in this article—that Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction; that Section Three's disqualification was seen by proponents and opponents alike to be self-executing and automatic; and that Section Three was understood to supersede (or satisfy) prior constitutional limitations.[361]

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences: there appears to have been substantial agreement—by both opponents and proponents—that the provision would cover a broad range of activity supporting or assisting the South's efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding and, further, would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have "engaged in" insurrection or rebellion or given "aid or comfort" to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents simply thought such breadth appropriate, necessary, and valuable.[362]

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather

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Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

[360] See generally Graber, Volume 1, supra note 8.

[361] See supra notes 12, 59, & 184.

[362] See generally Graber Section Three manuscript, supra note 12.

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than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).[363] As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

7. Early Applications of Section Three

A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they still can be informative.[364] Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.[365]

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress by enacting new, republican, Reconstruction-compliant constitutions—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified

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[363] Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply – *e.g.*, only to persons who joined the Confederacy while still holding prior office under the U.S. Constitution; only to persons who had sworn oaths to the Constitution since 1851; only to persons who had not received presidential pardons; and only to persons who had *voluntarily* served the confederacy. Republican defenders of Section Three successfully opposed these proposed limitations on Section Three's scope, arguing that limiting the ban to persons who still held office under the Constitution when they joined the Confederacy would indulge the pretext that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. Cong. Globe, 39th Cong. 1st Sess. p. 2770 (statement of Sen. Howard). Republicans likewise rejected the proposed limitation to persons who had "voluntarily" assisted or participated in rebellion, because it would raise unnecessary and difficult proof problems and permit spurious claims of involuntary participation. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he "never entered into the rebellion voluntarily"! Cong. Globe, 39th Cong., 1st Sess. p. 2918 (statement of Sen. Willey).

[364] See, e.g., Baude, *Liquidation*, supra note 242, at 61-62; Paulsen, *Most Dangerous*, supra note 242, at 293, 303.

[365] Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three, see supra Part IV.A.5.b.

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under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state's constitutional convention.[366]

Andrew Johnson's attorney general, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.[367] Stanberry's opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and ex post facto in this context.[368] Even so, Stanberry's opinion found Section Three's definition of what constituted participation in rebellion to be quite broad:

> "*All those who*, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done *any overt act* for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."[369]

As to individuals, Stanberry also reiterated several times that *any* voluntary support, even if not violent, was covered and culpable. He found "it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,"[370] and added that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law."[371]

Subsequent cases took even broader positions. For instance, in the 1869 decision of Worthy v. Barrett, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court's reasoning on this issue was succinct but clear:

> What will amount to having engaged in the rebellion?
>
> (1st.) Holding any of these offices under the Confederate government.

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[366] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428, 429, sec. 5-6 (March 2., 1867).
[367] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867); Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 182 (1867).
[368] 12 Op. Att'y Gen. at 159-160. But see supra Part III.A-B (explaining why the constitutional ex post facto and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).
[369] Id. at 161-162 (emphasis added)
[370] Id. at 161.
[371] Id. at 165.

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> 2d Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.[372]

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.[373]

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation – Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring *quo warranto* actions to remove officials holding office "contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution" and to bring criminal prosecutions against person who "shall hereafter knowingly accept or hold" office in violation of Section Three.[374] In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell, for accepting an appointment as county sheriff despite being covered by Section Three.[375] Powell's alleged act of rebellion was having "furnished a substitute for himself to the Confederate army," and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.[376] This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

> [T]he word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will

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[372] Worthy v. Barrett, 63 N.C. 199, 203 (1869). The court also applied the Worthy rule to the even easier case of a county attorney who "took part in th[e] rebellion by serving in the Confederate army, voluntarily." In Re Tate, 63 N.C. 308 (1869).

[373] By contrast, Stanberry had concluded that officers who "discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion." 12 Op. Att'y Gen. 162.

[374] 16 Stat. 140, 142-143, sections 14 & 15. See supra note 54.

[375] United States v. Powell, 27 F. Cas. 605 (C.C.D.N.C 1871).

[376] Id. at 607.

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> excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant's action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.[377]

In other words, only great duress *and* pure heart would be a defense if one's conduct otherwise provided material support to the rebellion. Section Three's disqualification for having "engaged" in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee. the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.[378] Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee's purported secession, and traveling to Washington to attempt to represent the state in Congress.[379] While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.[380]

The other scattered discussion of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section Three's substantive disqualification—broad interpretations of insurrection, rebellion, "engaged in," and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was "a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States."[381] Other cases are consistent with similarly

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[377] Id. Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry. Id.

[378] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 Tenn. B.J. 20 (2013); see also Magliocca, *Amnesty*, supra note 5, at 109-110.

[379] For one fawning account of Nelson, see Oliver P. Temple, Notable Men of Tennessee From 1833 to 1875. at 166-215 (1912).

[380] Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, supra note 378.

[381] In re Griffin, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

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broad assumptions.[382] We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have "engage[d] in insurrection and rebellion," or given "aid or comfort" to "enemies" was understood to embrace an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, the sum total of evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of "insurrection" and "rebellion" to which they applied; and finally early practice enforcing Section Three—points in a consistent direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably broad understanding of what types of conduct constitute engaging in or perhaps giving aid or comfort to such movements.

B. What Prior Officeholders are Covered? What Future Offices are Barred?

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

> No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States or under any State ... [383]

[382] Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. Magliocca, *Amnesty*, supra note 5, at 109-110.
[383] U.S. Const. amdt. XIV, sec. 3.

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Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

> ... who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States ... [384]

We begin with a few observations.

First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.[385] Keep this in mind as we proceed: we think readers should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that "Senators and Representatives . . . Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."[386] Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will "faithfully execute the Office of President of the United States" and

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[384] Id.

[385] See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 Albany L. Rev. 671, 674-76 (1995). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. William Michael Treanor, *The Case of the Dishonest Scrivener: Guverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 20-24 (2021). Putting aside whether this story is really true, David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Governeur Morris as Dishonest Scrivener*, 120 Mich. L. Rev. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semi-colon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *West Virginia*, supra note 130, at 338-339 & n. 151.

[386] U.S. Const. art. VI, cl.3.

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"'to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'"[387]

Section Three's listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three's list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to "military" offices—including state military offices—whether or not they would be considered "executive" offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text's overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified.

With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, "triggering" clause): Section Three's disqualification attaches to persons who previously swore an oath to support the Constitution as:

> [i] a "*member*" of Congress, or as
> [ii] an "*officer* of" the United States, or as
> [iii] a "*member*" of any State legislature, or as
> [iv] an "*executive or judicial officer* of" any State.[388]

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[387] U.S. Const. art. II, §1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L. Rev. 1257, 1260-1267 (2004); on "to the best of my Ability," see William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303, 310 (2011).
[388] U.S. Const. amdt. XIV, sec. 3.

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These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

> [i] "a *Senator* or *Representative*" in Congress (paralleling "*member,*" a seemingly purely stylistic variation) or
> [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
> [iii] holding "*any office, civil or military,*" "under" either federal or state government (paralleling "officer" of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of "military" officers).

The description "civil" office, in the disqualified-from list seems designed to embrace the categories of "executive or judicial" officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a "civil" office within the language and design of Section Three, reading the word "office" in this context in an ordinary, non-technical sense.[389]

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for president and vice president (and clarifying "military"). The legislative positions in question are the relevant *elected* offices—*members* of the legislature, whether a state legislature or the federal Congress—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an "office" within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an "office," held by an "officer"—as opposed to non-officer, non-"office"-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?[390] Like-

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[389] Hemel, *How-to Guide*, supra note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from "civil" offices.); contra John Randolph Tucker, *General Amnesty*, 126 N. Am. Rev. 53, 54 (1878). None of this in our view affects the question whether a Member of Congress may properly be designated as an "Officer" to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995) with John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995).

[390] Serious scholarship has explored those questions with respect to the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

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wise, for the federal judicial branch, Article III judges and justices are plainly covered. (Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,[391] are presumably covered as well—as well as perhaps bankruptcy judges, magistrate judges and the like.)[392] Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive "office" held by "officers" (thus, perhaps, the special need for designation "military," to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* "under" the United States, is not properly classified as an "*officer of*" the United States.[393] On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this[394]—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three's consequences.

We do not buy it, for many reasons: First, it adopts precisely the type of "secret code" hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: an insurrectionist *President* is not covered by Section Three's disqualification (though nearly every other federal or state officeholder is); the President is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.[395]

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[391] 38 U.S. 230, 258 (1839) ("[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned"). To be clear, Hennen dealt with the clerk of court, not what we would now call a term judicial law clerk.

[392] That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III* 133 Harv. L. Rev. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly "officers" at all. Again, we leave this issue for another day.

[393] Josh Blackman & Seth Barrett Tillman, *Is The President An "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021).

[394] See, e.g., id. at 6, 17, 21.

[395] To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comm. 245 (1997); (suggesting the possibility that a straightforward reading of the constitutional text yields the "stupid" – and surely inadvertent – result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, Grounding, supra note 9, at 1468. But that does not mean we should close our eyes to plausibility and common sense, *especially* when the proposed textual reading is such a stretch. See also Paulsen, supra, Nothing But the Text, supra note 10, at 1439-1440 (noting cautions concerning use of the "absurdity" canon to

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Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times. It specifies the length of term for which the President "holds his Office," certain minimum qualifications for eligibility "to that Office," what happens upon the President's removal "from Office," or inability to discharge "the Powers and Duties of said Office," and the oath he shall take before entering "on the Execution of his Office."[396] If the Presidency is not an office, nothing is.

So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an "office *under*" the United States but is not an "officer *of*" the United States? This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer *"of"* the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause ("officer of") and the positions-disqualified clause ("office under")—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.[397] Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different prepositions: the Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.[398]

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deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

[396] See generally U.S. Const. Art. II.

[397] For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. Const. amdt. XIII, sec. 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amdt. XIC, sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); id. amdt. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *West Virginia*, supra note 130, at 348 (giving examples).

[398] One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (Jul. 28, 2016) https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare id. (foreign gifts to Washington) with Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

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Third, a variant of the Blackman-Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred.[399] "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?"[400] Johnson was complaining that these two officers *should* be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Maine interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'"[401] Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."[402]

The Blackman-Tillman argument is not *quite* the same, but it is the mirror image of Johnson's concern. Johnson's inquiry was whether a covered, insurrectionist nonetheless might become president. The Blackman-Tillman argument is that an insurrectionist president is not an "officer of" the United States whose prior position triggers Section Three's restrictions on future office. The Johnson-Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.[403] Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining

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Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. U.L. Rev. Colloquy 180, 190 (2013) (contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, supra this note (Hamilton's list) with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107 (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms); cf. Blackman & Tillman, supra note 393, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

[399] Cong. Globe, 39th Cong., 1st sess. at 2899 (1866)

[400] Id.

[401] Id.

[402] Id.

[403] Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate Congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, supra 393, at 45-46 (acknowledging this). While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification these incidents would have shown that to be a glaring and dangerous omission.

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textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds *"office under"* the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

If Blackman and Tillman maintain that the President does *not* hold "office under" the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold "office under" the United States, then they must maintain a sharp and crucial distinction between "office under" and "officer of." As Mark Graber has observed, this distinction was *also* contradicted by Section Three's framers: "[T]he members of the Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office 'under the United States' were officers 'of the United States.' During the debates over Section 3, no representative or senator alluded to the existence of a distinction between 'of' and 'under'. Representatives and senators often described the president as having an 'office under the United States' and being an 'officer of the United States.'"[404] If a secret code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman-Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text's many references to the office of the Presidency as an "office"; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned

[404] Mark Graber *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023). Professor Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'" In addition, "[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished between 'officers under' and 'officers of' or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; see also Lynch, supra note 5, at 158-160 (collecting authorities supporting the same point); Magliocca, *Foreground*, supra note 62, at 16 n. 48 ("My research . . . shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States").

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by the Radical Reconstruction Congress that drafted the Fourteenth Amendment; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the "under/of" difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or "triggering" language, insurrectionists who once served as President and Vice President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

C. The Attempted Overthrow of the 2020 Presidential Election

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020-2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

Taken as a whole, these actions represented an effort to prevent the lawful, regular, termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or perhaps given "aid or comfort" to those who did? We will consider those questions in turn.

1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any re-

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spect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020-2021, but let us first focus on the events of January 6, 2021.[405] These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[406] The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was in part coordinated, not merely a riot.[407] Some members of the group were armed,[408] and many used force to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.[409]

Furthermore, it seems that, as a whole, the group's goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power, by disrupting a necessary formal step in the constitutional process.[410] The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that

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[405] In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-000 (117th Cong., 2nd Sess.). Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally supra Part II.B.

[406] Supra Part IV.A.1. The fact that President Trump may have supported the insurrection, see infra II.C.2.b, does not change this. In our system the President is not "the government," and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

[407] See, e.g., January 6 Report, supra note 405, at 499-502, 530-531.

[408] Id. at 640-642.

[409] Id. at 646-647, 651-659.

[410] Id. at 502-510, 521-530.

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day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries' Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.[411] Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.[412]

Our assessment of the events of January 6, specifically, as an "insurrection" confirms the judgment made by public authorities: An act of Congress, to "award four congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,"[413] found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: "On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers."[414] Another finding noted the historic magni-

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[411] See supra Part IV.A.4.c.

[412] What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, amounted to "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course if there were any other insurrections against the United States, Section Three applies to them all.

[413] Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322.

[414] Id. sec. 1(1). In the state Section Three proceedings against Marjorie Taylor Greene, supra notes 68-73 and accompanying text, the hearing officer cited this statute to conclude "Congress has characterized the Invasion as an insurrection." Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SEC-STATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022). The hearing officer found it unnecessary to decide for himself, however, "Whether the Invasion of January 6 amounted to an insurrection." Id. at 18.

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tude and symbolic importance of that insurrection against democracy: "The desecration of the U.S. Capitol, which is the temple of American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation's history."[415] The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th.[416] The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th *was* an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.[417]

Finally, there is an additional possibility that we should see the events of January 6, 2021, as just one part of a broader "rebellion" against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

We acknowledge that applying the term "rebellion" to the events of 2020-2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an "*open and avowed renunciation of the authority* of the government," as Webster would have it, nor (outside of the insurrection of January 6) "*the taking up of arms*" or "*forcible* opposition" as Bouvier would have it.[418] It is not a perfect fit.

Nonetheless, consider the argument that the term "rebellion" could be used more broadly to describe a coup d'etat seeking to overthrow the constitutional order—including a so-called "bloodless" coup d'etat (where no force is used) and a successful "self-coup" of the bloodless variety[419] (where the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: 1. A military coup d'etat upending lawful government by use of force surely qualifies,

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[415] Pub. Law. 117-32, sec. 1(4).

[416] H. Res. 24 (117th Cong., 1st Sess. Jan 25, 2021).

[417] For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, supra note 62, at 23 n.65; Vlahoplus, supra note 404, at 1; Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539, 1622-25 (2022); see also Hemel, *How-to Guide*, supra note 5; Mark A. Graber, Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021, Lawfare (Sep. 26, 2022) at https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021.

[418] See supra Part IV.A.2.

[419] See generally Daniel J. Hemel, *Self-Coup and The Constitution*, 37 Const. Comm. (forthcoming 2023).

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constitutionally, as a "rebellion." It is literally an effort unlawfully to overthrow constitutional government, by force. 2. It follows that a military coup d'etat upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*. 3. A military coup d'etat by the *existing* regime—a "self-coup," would seem, legally, to be the same thing. In such a case the regime does not *seize* power, by show or threat of force; it *retains* power by show or threat of force. But it is logically identical to situations #1 and #2. 4. A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3. Indeed, it seems fair to say that situation #4 is merely an instance of situation #3. 5. The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020-2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.[420]

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.[421]

2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Additionally, perhaps, who might be said to have provided "aid or comfort" to those insurrectionists and rebels?*

As detailed at great—perhaps excruciating—length above, "engaged in" under Section Three is properly understood to embrace a broad range of willful participatory

[420] In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. See supra Part IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'etat (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

[421] For the sake of completeness, we add that we think the events of 2020-2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.

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conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as "insurrection" or "rebellion." And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving "aid or comfort" arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three's disqualification.[422]

Who, then, engaged in such behavior?

a. General Principles Concerning Culpable Participation

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual's voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Part II, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution's criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three's broad sweep, it is clear that at least two purported factual defenses are simply immaterial:

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported "insurrection" or "rebellion" because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to "stop the steal." The problem is that the premise is simply false. Decisionmakers can and should act on the well settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.[423]

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[422] See generally supra Part IV.A.

[423] See not only the January 6 Report, supra note 405, but also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson &

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Second, it likewise is no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South's secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.[424] Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual's wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.[425]

b. Section Three Disqualifies Donald Trump from Future Office

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the 2020 election and the events leading to the January 6 attack.

The case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential election result, calling it "stolen" and "rigged";[426] that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,[427] to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,[428] to assemble and induce others to submit bogus slates of competing state electors,[429] to persuade or pressure Congress to refuse to count electors' votes submitted by several states,[430] and finally, to pressure the

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Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022)*, https://lostnotstolen.org.

[424] This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., Counterman v. Colorado, 600 U.S. ___, at 4 n.2 (2023).

[425] Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted "insurrection"? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d'etat are not.

[426] And not that it matters, see supra Part IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, supra note 405, 100-01, 103-04, 203, 213, 789.

[427] Id. at 202-203, 263-265; see also id. at 223-231,

[428] Id. at 296-300.

[429] Id. at 341-354.

[430] Id. at 431.

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Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors' votes.[431]

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.[432] Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump's defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: "Big protest in D.C. on January 6th. Be there, will be wild!"[433] According to testimony amassed by the House's January 6th Commission, Trump's supporters interpreted this as a call to arms, sometimes literally.[434]

Then there are the events of January 6 specifically. When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to the Capitol to oppose what he had been calling the "steal" of the election. Trump reiterated his false claim that he had in fact won the election—"we won this election and we won it by a landslide"—but that the Democrats and the media had "stolen" the election and "rigged" a false outcome. "They rigged it like they've never rigged an election before," he charged. "Make no mistake, this election was stolen from you, from me and from the country. … This [is] the most corrupt election in the history, maybe of the world." The crowd was "gathered together in the heart of our nation's capital for one very, very basic and simple reason: To save our democracy." Trump called on the crowd to march on the Capitol. "Our country has had enough. We will not take it anymore and that's what this is all about. … We will stop the steal." He urged the assembled mass of thousands, some of whom Trump knew to be armed, to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[435]

Some might quibble that the speech is ambiguous.[436] Not all of Trump's rambling address called literally for the crowd to "fight." Some of his statements were

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[431] Id. at 441-458.
[432] Id. at 441-458.
[433] Quoted in id. at 499.
[434] Id. at 499-540.
[435] For the quotations in this paragraph, see "Transcript of Trump's Speech at Rally Before US Capitol Riot," Associated Press, (Jan. 13, 2021), available at https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27. See also id. ("And again, most people would stand there at 9 o'clock in the evening and say, 'I want to thank you very much,' and they go off to some other life. But I said something is wrong here, something is really wrong, can't have happened, and we fight. We fight like hell, and if you don't fight like hell you're not going to have a country anymore.").
[436] See Michael Conklin, *Capital Offense: Is Donald Trump Guilty of Inciting a Riot at the Capital?*, 15 U. St. Thomas J.L. & Pub. Pol'y 483 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 Const. Comm. at 2-3, 20-21 (forthcoming 2023).

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ambiguous and at one point he remarked that the crowd would be marching "peacefully and patriotically."[437] He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take "strong" and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump's speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.[438] It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steeled them to action, knew that they were ready to take immediate action, and directed them to take it.[439] But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standards of participation in and support for "insurrection or rebellion," and it qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.[440] First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had attacked the Capitol, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.[441] During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not "hav[ing] the courage to do what should have been done to protect our Country and our Constitution,"[442] a statement that the January 6th Commission concluded was "a statement that could

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[437] Transcript, supra note 435.

[438] 395 U.S. 444 (1969); compare Conklin, supra note 436, with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 Wake Forest L. Rev. 971 (2022); see also Rozenshtein & Shugerman, supra note 436, at 3 n.3 (citing these and other sources and describing this disagreement).

[439] As Rozenshtein and Shugerman also emphasize, "Trump's speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol," which they argue takes it outside of the Brandenburg framework for that reason. Rozenshtein & Shugerman, supra note 436, at 38.

[440] See supra Part III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

[441] January 6 Report, supra note 405, at 577-606.

[442] Donald J. Trump, Tweets of January 6, 2021, available at https://www.presidency.ucsb.edu/documents/tweets-january-6-2021

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only further enrage the mob" and that in fact apparently did so.[443] Once Trump finally *did*—after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.[444]

This culpable inaction—failing to intervene to stop an insurrection in progress, declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump's responsibility for the January 6 insurrection. Section Three reaches a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.[445] Sitting by and doing nothing—declining to act to arrest a violent uprising, despite possessing the material capacity and legal responsibility to intervene—might qualify. Additionally and equally important, Trump's deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd's reaction was all a big mistake or misunderstanding.

Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump "engaged in" the January 6 insurrection through both his actions and his inaction. Officials—administrators, courts, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office,

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,[446] then Trump's complicity is even more obvious—as the leader, motive force, and chief attempted perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump, having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d'etat against the Constitution and its system of elections and overturn the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes "rebellion" against the Constitution, Trump's overall

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[443] January 6 Report, supra note 405, at 577.

[444] Even as he urged peace in a video to the insurrectionists ("we can't play into the hands of these people. We have to have peace") he continued to express affection for them ("So go home. We love you. You're very special.") and to reiterate that the "election was stolen from us." Donald J. Trump, Videotaped Remarks During the Insurrection at the United States Capitol, at https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol. Later that night he tweeted: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Trump Tweets, supra note 442.

[445] Cf. notes 350-351 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

[446] See supra notes 418-420 and accompanying text.

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course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump "engaged in" "insurrection or rebellion" and gave "aid or comfort" to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

c. Beyond Trump

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many others who are or may be connected to either the insurrection of January 6 or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution's provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories:

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico, and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as Section Three contemplates.[447] They present the easiest case of "engag[ing] in . . . insurrection." Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.[448] Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and "was near the Capitol during the attack."[449] Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.[450] Trump Chief of

[447] See supra notes 85-88, 114-116 and accompanying text.
[448] See supra notes 68-80 and accompanying text.
[449] January 6 Report, supra note 405, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See supra note 89.
[450] January 6 Report, supra note 405, at 536, 577, 581, 593-594, 608; https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat

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Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also "directed that [Giuliani] be allowed to speak" to the crowd.[451] These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,[452] the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines, invalidate election results, and rerun the vote in swing states won by Biden.[453] Would-be Trump electors (some of whom came from state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.[454] Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.[455] At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid or comfort.[456] These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol, should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020-2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a

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[451] January 6 Report, supra note 405, at 533, 535-536.
[452] See supra notes 418-420 and accompanying text.
[453] January 6 Report, supra note 405, 222.
[454] January 6 Report, supra note 405, at 352-353. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.
[455] January 6 Report, supra note 405, at 50.
[456] Id. at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

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great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

Conclusion

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders and comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independently of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and officials from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should refuse to seat or expel that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress

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through the impeachment process, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's constitutional disqualifications is properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges exercising the judicial power to faithfully apply and enforce Section Three according to its terms.

No official should shrink from these duties. It would be wrong – indeed, arguably itself a breach of one's constitutional oath of office—to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one's own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing, and enforcing, the Constitution's commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, or resentment, or opposition, or retaliation. The Constitution is not optional and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.[457] The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-2021, who refused to abide by election results and instead sought to overthrow them.)[458]

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are "political questions." Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House's judgment, Section Three is enforceable by the judiciary *as well as* by other officials.[459] Section Three's terms embody rules and standards, enforceable as any other constitutional provision

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[457] See Magliocca, *Foreground*, supra note 62, at 14-24 (arguing at length that "the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment," and that it "elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three").

[458] See William Baude, *The Real Enemies of Democracy*, 109 Cal. L. Rev. 2407, 2418-20 (2021) ("The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.").

[459] Supra note 95.

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is enforceable. There is no freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, it is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country. Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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EXHIBIT 4

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Risk Specialists Companies Insurance Agency, Inc.
d/b/a RSCIA in NH, UT & VT
CA Surplus Lines License #: 0G29322
One Montgomery Tower
25th Floor
San Francisco, CA 94104-4505
(415) 836-2700

BINDER OF INSURANCE CONFIRMATION LETTER

September 29, 2023

MARIANA SALYER
ALLIANT INSURANCE SERVICES, INC.
18100 VON KARMAN AVENUE 10TH FLOOR
IRVINE, CA 92612

Insured: **THE STATE OF MICHIGAN**
DTMB Risk Management
525 West Allegan Street, Lansing, MI 48909

Insurance Carrier: **NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**
1271 AVE OF THE AMERICAS, FL 37, NEW YORK, NY, 10020-1304

Policy: **GOVERNMENT CRIME POLICY**
TAB #: 242935, SUBMISSION #: 683576840
POLICY #: 01-546-06-73
REPLACEMENT OF POLICY #: 1-590-71-05
POLICY PERIOD: FROM 10/01/2023 TO 10/01/2024

Dear MARIANA:

On behalf of National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter "Insurer"), I am pleased to confirm the binding of coverage in accordance with our agreement as set forth below and subject to the conditions set forth herein. Please review said Binder for accuracy and contact the Insurer **prior to the effective date** of policy coverage of any inaccuracy(ies) found within the issued Binder. If the Insurer does not hear from you prior to the effective date of policy coverage it will be understood that the Binder has been accepted as an accurate description of the agreed upon terms of coverage.

IMPORTANT POLICY ISSUANCE VERIFICATION

A policy will be issued with the name and address of the Insured exactly as referenced in the "Policy Information" Section of this Binder. If this information is inaccurate, please advise us immediately.

POLICY INFORMATION

INSURED: THE STATE OF MICHIGAN

INSURED'S ADDRESS: DTMB Risk Management 525 West Allegan Street
Lansing, MI 48909

TYPE OF POLICY: Government Crime Policy

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BASIC FORM: CR0026 (05/06)

INSURANCE COMPANY: National Union Fire Insurance Company of Pittsburgh, Pa.

POLICY NUMBER: 01-546-06-73

EFFECTIVE DATE: 10/01/2023 **EXPIRATION DATE:** 10/01/2024

Single Loss Coverage Forms	Limit of Liability	Single Loss Deductible
Employee Theft-Per Loss Coverage	$5,000,000	$500,000
Forgery or Alteration	$5,000,000	$500,000
Inside Premises-Theft of Money & Securities	$5,000,000	$500,000
Inside Premises-Robbery,Safe Burglary-Other Prop.	$5,000,000	$500,000
Outside the Premises	$5,000,000	$500,000
Computer Fraud	$5,000,000	$500,000
Money Orders and Counterfeit Paper Currency	$5,000,000	$500,000
Funds Transfer Fraud	$5,000,000	$500,000

Premium	$128,493
Commission	0.00 %

Total Amount due: $128,493

Important Conditions of Binder: See Below

ENDORSEMENTS

The following endorsements will be added to the basic policy:

#	Form #	Ed Dt	Title
1	CR0246	08/07	MICHIGAN CHANGES
2	MNSCPT		DELETE BONDED EMPLOYEES EXCLUSION
3	99758	08/08	NOTICE OF CLAIM (REPORTING BY E-MAIL)
4	113013	10/12	PROTECTED INFORMATION EXCLUSION
5	MNSCPT		DUTIES IN THE EVENT OF LOSS PROVISION AMENDED
6	119679	09/15	ECONOMIC SANCTIONS ENDORSEMENT
7	113024	10/12	INDIRECT OR CONSEQUENTIAL LOSS EXCLUSION
8	CR2512	08/07	INCLUDE TREASURER OR TAX COLLECTORS AS EMPLOYEES
9	CR2541	08/07	INCLUDE DESIGNATED PERSONS OR CLASSES OF PERSONS AS EMPLOYEES
10	MNSCPT		SCHEDULED PREMISES COVERAGE ENDORSEMENT

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11	CR2519	05/06	ADD FAITHFUL PERFORMANCE OF DUTY COVERAGE FOR GOVERNMENT EMPLOYEES
12	CR2520	08/07	ADD CREDIT, DEBIT OR CHARGE CARD FORGERY
13	CR2506	08/07	INCLUDE CHAIRPERSON AND MEMBERS OF SPECIFIED COMMITTEES AS EMPLOYEES
14	CR2508	08/07	INCLUDE SPECIFIED NON COMPENSATED OFFICERS AS EMPLOYEES
15	95442	08/07	PRIOR THEFT OR DISHONESTY
16	CR2022	08/07	INCLUDE DESIGNATED PERSON REQUIRED TO HAVE KNOWLEDGE OF LOSS (DISCOVERY FORM)
17	MNSCPT		NAMED INSURED-REVISED
18	116981	05/15	VENDOR THEFT COVERAGE ENDORSEMENT
19	CR 2505	03/00	INCLUDE LEASED WORKERS AS EMPLOYEES
20	143939	06/22	THIRD PARTY COVERAGE IDENTIFIED EMPLOYEE
21	120021	05/15	CONDITIONS AMENDED (SUBROGATION)
22	120271	08/15	BLANKET LOSS PAYEE (WHERE LEGALLY PERMISSIBLE)
23	136082	03/20	IMPERSONATION FRAUD COVERAGE GOVERNMENT CRIME DISCOVERY FORM - PRIMARY TO OTHER INSURANCE
24	132819	05/19	EXPENSES INCURRED TO ESTABLISH AMOUNT OF COVERED LOSS
25	95428	08/07	EMPLOYEE POST TERMINATION COVERAGE
26	95420	08/07	CANCELLATION OF POLICY AMENDED
27	101036	04/09	CANCELLATION AMENDATORY (RETURN PRO RATA)
28	141306	08/21	Cyberextortion Exclusion Resulting Directly
29	78859	10/01	FORMS INDEX ENDORSEMENT

CONDITIONS OF BINDER

When signed by the Insurer, the coverage described above is in effect from 12:01 AM of the Effective Date listed above to 12:01 AM of the Expiration Date listed above, pursuant to the terms, conditions and exclusions of the policy form listed above, any policy endorsements described above, and any modifications of such terms as described in this Binder section. Unless otherwise indicated, this Binder may be canceled prior to the Effective Date by the Insured, or by the Broker on the behalf of the Insured, by written notice to the Insurer or by the surrender of this Binder stating when thereafter such cancellation shall be effective. Unless otherwise indicated, this Binder may be canceled by the Insurer prior to the Effective Date by sending written notice to the Insured at the address shown above stating when, not less than thirty days thereafter, such cancellation shall be effective. Unless otherwise indicated, this Binder may be canceled by the Insurer or by the Insured on or after the Effective Date in the same manner and upon the same terms and conditions applicable to cancellation of the policy form listed above. Issuance by the Insurer and acceptance by or on the behalf of the Insured of the policy shall render this Binder void except as indicated below.

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A condition precedent to coverage afforded by this Binder is that no material change in the risk occurs and no submission is made to the Insurer of a claim or circumstances that might give rise to a claim between the date of this Binder indicated above and the Effective Date.

Please note this Binder contains only a general description of coverages provided. For a detailed description of the terms of a policy you must refer to the policy itself and the endorsements bound herein.

PREMIUM PAYMENT

Our accounting procedures require that payment be remitted within 30 days of the effective date of coverage or 15 days from the billing date, whichever is later.

We appreciate your compliance with this procedure.

We appreciate your business and hope that we can be of further service to you in the future.

Sincerely,

JUSTIN BAILEY
Regional Underwriting Manager

CC: Chris Marker
Vice President

If you have any questions regarding this policy, or for any other service needs, please contact our AIG Broker Services:

Monday-Friday 9:00 AM - 6:00 PM Eastern
Telephone: 1-877-TO-SERVE or (877)867-3783
E-mail: TOSERVE@aig.com
Fax: (800) 315-3896 *Raising the bar with commitment to quality*

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POLICYHOLDER NOTICE

Thank you for purchasing insurance from a member company of American International Group, Inc. (AIG). The AIG member companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by AIG member companies to brokers and independent agents in the United States by visiting our website at www.aig.com/producer-compensation or by calling 1-800-706-3102.

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NOTICE TO MICHIGAN INSUREDS

MICHIGAN DISCLAIMER
Michigan Senate Bill 1213
Exempt Commercial Policyholder

The following notice is being provided in compliance with Michigan Law:

This policy is exempt from the filing requirements of section 2236 of the insurance code of 1956, 1956 PA 218, MCL 500.2236.

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CRIME AND FIDELITY
CR DS 04 08 07
POLICY NUMBER:
01-590-71-05
REPLACEMENT OF
POLICY NUMBER:
01-701-60-50

GOVERNMENT CRIME POLICY DECLARATIONS

In Return For The Payment Of The Premium, And Subject To All The Terms And Conditions Of This Policy, We Agree With You To Provide The Insurance As Stated In This Policy.

Coverage Is Written:

☒ **Primary** ☐ **Excess** ☐ **Coindemnity** ☐ **Concurrent**

Company Name Area:	*National Union Fire Insurance Company of Pittsburgh, Pa.*
Producer Name Area:	*ALLIANT INSURANCE SERVICES, INC.* *18100 VON KARMAN AVENUE* *10TH FLOOR* *IRVINE, CA 92612*
Named Insured:	*THE STATE OF MICHIGAN*
	(including any Employee Welfare or Benefit Plans)
Mailing Address:	*DTMB Risk Management* *525 West Allegan Street* *Lansing, MI 48909*
	Policy Period
From:	*October 1, 2022*
To:	*October 1, 2023* 12:01 A.M. at your mailing address shown above.

Insurance Agreements	Limit of Insurance Per Occurrence	Deductible Amount Per Occurrence
1. Employee Theft - Per Loss Coverage	*$5,000,000*	*$500,000*
2. Employee Theft - Per Employee Coverage	*Not Covered*	*Not Covered*
3. Forgery Or Alteration	*$5,000,000*	*$500,000*
4. Inside The Premises - Theft Of Money And Securities	*$5,000,000*	*$500,000*
5. Inside The Premises - Robbery Or Safe Burglary Of Other Property	*$5,000,000*	*$500,000*
6. Outside The Premises	*$5,000,000*	*$500,000*
7. Computer Fraud	*$5,000,000*	*$500,000*
8. Funds Transfer Fraud	*$5,000,000*	*$500,000*
9. Money Orders And Counterfeit Money	*$5,000,000*	*$500,000*

If "Not Covered" is inserted above opposite any Insuring Agreement, such Insuring Agreement and any other reference thereto in this policy is deleted.

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POLICY NUMBER:
01-590-71-05
REPLACEMENT OF
POLICY NUMBER:
01-701-60-50

GOVERNMENT CRIME POLICY DECLARATIONS

Endorsements Forming Part Of This Policy When Issued:
#1,#2,#3,#4,#5,#6,#7,#8,#9,#10,#11,#12,#13,#14,#15,#16,#17,#18,#19,#20,#21,#22,#23,#24,#25,#26,#27,#28,#29

Cancellation Of Prior Insurance Issued By Us:
By acceptance of this Policy you give us notice cancelling prior policy Nos. *01-701-60-50;* **the cancellation to be effective at the time this Policy becomes effective.**

Premium: *$128,473*

Countersignature Of Authorized Representative

Name:

Title:

Signature:

Date:

IN WITNESS WHEREOF, the Insurer has caused this Policy to be signed by its President, Secretary and Authorized Representative. This Policy shall not be valid unless signed below at the time of issuance by an authorized representative of the insurer.

PRESIDENT

SECRETARY

AUTHORIZED REPRESENTATIVE

242935

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ENDORSEMENT# 2

This endorsement, effective *at 12:01AM October 01, 2022* forms a part of
Policy number: *01-590-71-05*
Issued to: *THE STATE OF MICHIGAN*

By: *National Union Fire Insurance Company of Pittsburgh, Pa.*

DELETE BONDED EMPLOYEES EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

GOVERNMENT CRIME POLICY

It is agreed that:

1. Clause D. Exclusions, paragraph 2. is hereby amended by deleting exclusion a. Bonded Employees in its entirety.

2. Nothing contained herein shall be held to vary, alter, waive or extend any of the terms, limitations, conditions, or provisions of the attached policy/bond other than as above stated.

AUTHORIZED REPRESENTATIVE

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END 002

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ENDORSEMENT# *11*

CRIME AND FIDELITY
CR 25 19 05 06

This endorsement, effective *12:01 am* *October 1, 2022* forms a part of policy number *01-590-71-05* issued to *THE STATE OF MICHIGAN*

by *National Union Fire Insurance Company of Pittsburgh, Pa.*

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADD FAITHFUL PERFORMANCE OF DUTY COVERAGE FOR GOVERNMENT EMPLOYEES

This endorsement modifies insurance provided under the following:

GOVERNMENT CRIME COVERAGE FORM
GOVERNMENT CRIME POLICY

and applies to the Insuring Agreements designated below:

SCHEDULE

	Insuring Agreement	Limit Of Insurance
☒	**Employee Theft - Per Loss Coverage**	*$5,000,000*
☐	**Employee Theft - Per Employee Coverage**	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

1. The following is added to the Employee Theft Insuring Agreement designated above:

We will pay for loss or damage to "money", "securities" and "other property" resulting directly from the failure of any "employee" to faithfully perform his or her duties as prescribed by law, when such failure has as its direct and immediate result a loss of your covered property. The most we will pay for loss arising out of any one "occurrence" is the Limit of Insurance shown in the Schedule. That Limit, is part of, not in addition to, the Limit of Insurance shown in the Declarations.

2. The following exclusions are added to Section **D.2. Exclusions:**

a. Loss resulting from the failure of any entity acting as a depository for your property or property for which you are responsible.

b. Damages for which you are legally liable as a result of:

(1) The deprivation or violation of the civil rights of any person by an "employee"; or

(2) The tortious conduct of an "employee", except the conversion of property of other parties held by you in any capacity.

3. The **Indemnification** Condition is replaced by the following:

We will indemnify any of your officials who are required by law to give bonds for the faithful performance of their duties against loss through the failure of any "employee" under the supervision of that official to faithfully perform his or her duties as prescribed by law, when such failure has as its direct and immediate result a loss of your covered property.

4. Part **(1)** of the **Termination As To Any Employee** Condition is replaced by the following:

(1) As soon as:

(a) You; or

(b) Any official or employee authorized to manage, govern or control your "employees" learn of any act committed by the "employee" whether before or after becoming employed by you which would constitute a loss covered under the terms of the Employee

END 011

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Theft Insuring Agreement, as amended by this endorsement.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

AUTHORIZED REPRESENTATIVE

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EXHIBIT 5

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Request For Rulemaking

Pending rule set #:

2022-64 ST

Department:

State

Bureau:

Elections & Campaign Finance

Title of rule set:

Electronic Return of Absent Voter Ballots by Eligible Voters

Rule number(s) or rule set range of numbers:

R 168.101 - R 168.159

Filing date:

Pending

Effective date:

Pending

Click on the link(s) below to download

RFR Form PDF HTML

RFR Form updated on: 11/21/2022 2:06:56 PM

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Michigan Office of Administrative Hearings and Rules

Administrative Rules Division (ARD)

MOAHR-Rules@michigan.gov

REQUEST FOR RULEMAKING (RFR)

1. Department:
State

2. Bureau:
Elections & Campaign Finance

3. Promulgation type:
Full Process

4. Title of proposed rule set:
Electronic Return of Absent Voter Ballots by Eligible Voters

5. Rule numbers or rule set range of numbers:
R 168.101 - R 168.159

6. Estimated time frame:
6 months

Name of person filling out RFR:
Jenny McInerney

E-mail of person filling out RFR:
McInerneyJ1@michigan.gov

Phone number of person filling out RFR:
517-331-7825

Address of person filling out RFR:
430 W. Allegan Street
Lansing, MI 48918

7. Describe the general purpose of these rules, including any problems the changes are intended to address.
To establish rules for the electronic return of voted ballots by eligible voters as specified in MCL 168.759a(17) and authorize an electronic portal to facilitate their return.

8. Please cite the specific promulgation authority for the rules (i.e. department director, commission, board, etc.).
"The secretary of state shall promulgate rules that establish policies and procedures for the electronic return of voted ballots by eligible members. The secretary of state may develop and maintain a secure web portal on the secretary of state's website to facilitate the electronic return of voted ballots by eligible members." MCL 168.759a(17).

A. Please list all applicable statutory references (MCLs, Executive Orders, etc.).
MCL 168.31(1)(a), MCL 168.32(1), MCL 168.37, MCL 168.759a(12), MCL 168.759a(13), MCL 168.759a(17).

B. Are the rules mandated by any applicable constitutional or statutory provision? If so, please explain.
Yes. 2022 PA 197 requires the Secretary of State (SOS) to promulgate rules that establish policies and procedures for the electronic return of voted ballots by eligible voters. Under PA 197, the rules must be promulgated no later than January 1, 2024 and must allow for the electronic return of voted ballots by eligible voters, as specified in MCL 168.759a(17), no later than the 2024 statewide presidential primary election.

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9. Please describe the extent to which the rules conflict with or duplicate similar rules, compliance requirements, or other standards adopted at the state, regional, or federal level.

The rules do not conflict with or duplicate similar rules, compliance requirements, or other standards adopted at the state, regional, or federal level. The proposed rules reflect and implement certain aspects of 2022 PA 197.

10. Is the subject matter of the rules currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda?

No

11. Are the rules listed on the department's annual regulatory plan as rules to be processed for the current year?

No

12. Will the proposed rules be promulgated under Section 44 of the Administrative Procedures Act, 1969 PA 306, MCL 24.244, or under the full rulemaking process?

Full Process

13. Please describe the extent to which the rules exceed similar regulations, compliance requirements, or other standards adopted at the state, regional, or federal level.

The rules would not exceed similar regulations, compliance requirements, or other standards adopted at the state, regional, or federal level. According to the National Conference of State Legislatures, at least seven states allow Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters to return a voted absentee/mail ballot through an online portal. Many states also allow return by fax or email.

14. Do the rules incorporate the recommendations received from the public regarding any complaints or comments regarding the rules? If yes, please explain.

This proposed rule has not been submitted to the public for comment.

15. If amending an existing rule set, please provide the date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors have changed the regulatory activity covered by the rules since the last evaluation.

This proposed rule does not amend a current rule.

16. Are there any changes or developments since implementation that demonstrate there is no continued need for the rules, or any portion of the rules?

This proposed rule does not amend a current rule.

17. Is there an applicable decision record (as defined in MCL 24.203(6) and required by MCL 24.239(2))? If so, please attach the decision record.

No

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STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

No. 23-000128-MM

HON. JAMES ROBERT REDFORD

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,

Defendant.

Robert Davis, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1
313.523.PII MCL 15.24
PII MCL 15.243(1)(a)@gmail.com

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---/

DEFENDANT SECRETARY OF STATE'S RESPONSE TO 9/18/23 EMERGENCY MOTION FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, AND ORDER TO SHOW CAUSE FOR COUNTS 1-IV OF VERIFIED COMPLAINT
AND
IN SUPPORT OF DEFENDANT'S 10/16/23 PARTIAL MOTION FOR SUMMARY DISPOSITION

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Dated: October 16, 2023

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INTRODUCTION

In his principal claim Plaintiff asks this Court to declare that the Secretary of State has a duty pursuant to her oath under article 11, § 1 of the Michigan Constitution to determine whether former President Donald Trump should be disqualified from appearing as a presidential candidate on Michigan's ballot under the "disqualification" clause of the Fourteenth Amendment. This Court should decline to grant such relief.

The Secretary takes her role as the State's chief elections officer with the utmost seriousness. And it is her duty to ensure that Michigan elections are conducted in accordance with the laws of this State and in a manner that preserves the purity and integrity of the process. The Secretary does not dispute that allowing an unqualified candidate to appear on the ballot undermines that very process. But the question is who has the authority to determine whether a candidate for President of the United States has engaged in insurrection and should be disqualified from seeking or holding that office under the federal Constitution.

Respectfully, the laws of this State have not conferred upon the Secretary the authority to determine a question of such magnitude, nor the process or procedure for even entertaining and resolving such a legal- and fact-dependent challenge. To be clear, the Secretary stands ready to fulfill her oath to uphold the state and federal Constitutions by complying with any order this Court or another issues in relation to the former President's eligibility to appear on Michigan's ballot. But until a court so decides, the Secretary takes no position on the federal constitutional issues raised in this case.

COUNTER-STATEMENT OF FACTS

In his complaint, Plaintiff Robert Davis seeks relief on multiple counts.

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Overview of Davis's claims

In Count I, Davis seeks a declaration that Secretary Benson must schedule and hold the 2024 presidential primary election on March 12, 2024, rather than on February 27, 2024, as required by MCL 168.613a(1), as amended by Public Act 2 of 2023. (Comp, ¶¶ 7-41.) As Davis notes in his filing, Public Act 2 of 2023 did not receive immediate effect.[1]

In Count II, Davis seeks mandamus relief to compel the Secretary to hold the presidential primary in March consistent with the declaration he seeks in Count I. (Compl, ¶¶ 42-55.)

In Count III, Davis seeks a declaration that Secretary Benson has a legal duty under article 11, § 1 of the Michigan Constitution to determine whether a presidential candidate meets eligibility requirements to run for President of the United States. (Compl, ¶¶ 56-90.) Specifically, Davis alleges that the Secretary has the authority to determine that former President Donald Trump is ineligible to run as candidate for President in 2024 pursuant to the disqualification clause in § 3 of the Fourteenth Amendment to the US Constitution. (*Id.*)

In Count IV, Davis seeks mandamus relief to compel the Secretary to issue the declaratory ruling previously requested by Davis declaring that former President Trump is ineligible to run as a candidate for President in Michigan. (Compl, ¶¶ 91-104.)

In Count V, Davis seeks a declaration that the Secretary of State was required to comply with MCL 15.51, which requires the filing of a bond within 20 days of assuming office. (Compl, ¶¶ 105-125.) Davis alleges that he submitted FOIA requests for the Secretary's bond and that no record was provided. (*Id.*)

[1] The legislative history for Public Act 2 is available at Michigan Legislature - Senate Bill 0013 (2023).

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And in Count VI, Davis seeks a writ of mandamus compelling the Secretary to promulgate rules pursuant to MCL 168.759a(17) regarding the electronic return of voted ballots by overseas military voters. (Comp, ¶¶ 126-142.) Public Act 197 of 2022 amended MCL 168.759a(13) to provide for the ability of military voters to return absent voter ballots electronically and required the Secretary of State to promulgate rules to provide for the process to do so. MCL 168.759a(17), as amended by 2022 PA 197.[2]

Procedural history

Davis filed his complaint against Secretary Benson on September 15, 2023, and the emergency motion for declaratory relief on September 18, 2023.[3] He then filed an emergency motion for an expedited hearing and briefing schedule on September 19, 2023.[4] But Davis did not serve his complaint and motions until September 22, 2023.[5] In his "emergency motion for expedited hearing and expedited briefing schedule for plaintiff's 9/18/2023 emergency motion for declaratory judgment, writ of mandamus, and order to show cause for Counts I-IV of verified complaint", Davis requested that this Court decide his motions "within the next 14 days," which would have been by October 3, 2023. (9/19/23 Motion, p 3.)

On September 29, 2023, the Secretary responded to the emergency motion for an expedited hearing, arguing that relief was not warranted by October 3, but that the Secretary did not oppose a reasonably expedited briefing schedule. (Def's 9/29/23 Response).

---

[2] The legislative history for Public Act 197 is available at Michigan Legislature - Senate Bill 0311 (2021).

[3] See register of actions for Case No. 23-000128-MB, available at RegisterOfActions (michigan.gov)

[4] *Id.*

[5] *Id.*

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On October 9, 2023, this Court entered an expedited scheduling order in which it denied Davis's request for relief by October 3, 2023, but ordered Defendant to respond to Davis's emergency motion and complaint by October 16, 2023. (10/9/23 Order.) The Court further stated that it was expediting the instant case along with another case, *LaBrant et al v Benson*, Court of Claims No. 23-000137-MZ, which raises similar claims regarding the eligibility of former President Trump to appear as a candidate for U.S President on the ballot in Michigan. (*Id.*) Defendant understands the Court's order to require responses to the *LaBrant* complaint by October 16, as well.

The Court further ordered the Plaintiffs in both cases to give notice to Mr. Trump of the cases and the Court's order. (*Id.*) And the Court ordered Defendant address six specific questions concerning application of the Fourteenth Amendment.

Election dates to consider

Under the existing statute, MCL 168.613a, the date of the presidential primary continues to be March 12, 2024. But, because it is possible that Public Act 2 of 2023 may become effective and change the date to February 27, 2024, the Secretary has been preparing for the February date.[6] Using the February date, absent voter ballots for the primary must be available to send out to military and overseas voters by January 13, 2024. MCL 168.759a.[7] To meet that date, the ballot must be finalized early in January so that county clerks have time to print and distribute ballots. MCL 168.713 (requiring county boards to deliver absent voter ballots to the county clerk at least 47 days before the primary election; MCL 168.714 (requiring county clerks

[6] See February 27, 2024, Presidential Primary Dates, available at Election Calendar of Dates (michigan.gov).

[7] *Id.*

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to deliver AV ballots to the township and city clerks at least 45 days before the primary election). This means that court proceedings and any appeals must conclude before that date to ensure the timely delivery of absent voter ballots.

STANDARDS FOR GRANTING DECLARATORY OR MANDAMUS RELIEF

Declaratory relief under MCR 2.605

A plaintiff seeking declaratory relief must meet the requirements of MCR 2.605, which provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ* (*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted).

"An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." 293 Mich App at 515 (citing *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55 (2000)). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted). "Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense*, 243 Mich App at 55.

But "[t]he language of MCR 2.605 is permissive rather than mandatory; thus, it rests with the sound discretion of the court whether to grant declaratory relief." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 126 (2006). This is true even if a case or

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controversy exists. *Allstate Ins Co v Hayes*, 442 Mich 56, 74 (1993) ("Assuming the existence of a case or controversy within the subject matter of the court, the determination to make such a declaration is ordinarily a matter entrusted to the sound discretion of the court.") (citation omitted). Further, "[o]ur Supreme Court has long recognized the necessity of having all interested parties before it in order to have a case that is appropriate for declaratory judgment." *Lansing Schools Educ Ass'n,* 293 Mich App at 516 (holding that plaintiffs failed to present an actual controversy where interested parties were missing from the case), citing *Central High Sch Athletic Ass'n v Grand Rapids*, 274 Mich 147, 153 (1936).

Mandamus relief

A writ of mandamus remains an extraordinary remedy and will only be issued where: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008), aff'd in result, 482 Mich 960 (2008), citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 668 (2005). "The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff." *White-Bey v Dept of Corrections*, 239 Mich App 221, 223 (1999); *Citizens Protecting Michigan's Constitution*, 324 Mich App at 584.

With respect to the elements of mandamus, "a clear, legal right" is "one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Univ Med Affiliates, PC v Wayne Co Executive,* 142 Mich App 135, 143 (1985) (quotation marks and citation omitted). "A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from

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uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Hayes v Parole Bd*, 312 Mich App 774, 782 (2015) (citation omitted). Michigan courts have identified only two circumstances in which a clear legal duty to act exists such that mandamus may compel performance of the duty: (1) when the act sought to be compelled is clearly ministerial, leaving no exercise of discretion or judgment, *Lickfeldt v Dept of Corrections,* 247 Mich App 299, 302 (2001); and (2) when the officer is charged with the duty to perform an act which requires the exercise of discretion. *Teasel v Dept of Mental Health*, 419 Mich 490, 410 (1984).

ARGUMENT

I. Secretary Benson's responses to the questions posed by the Court in its October 9, 2023, scheduling order.

The Court ordered Defendant Benson to address six specific questions relating to § 3 of the Fourteenth Amendment, including whether the Secretary is authorized to disqualify a candidate for President under that section. Because the Secretary has no authority to make such a determination, she has no official position as to the outcome of the related constitutional questions. Her responses to the questions below, other than to the first question, therefore do not advance an affirmative position.

A. Whether defendant has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue.

Although the Court's question refers to a "candidate" generally, the Secretary will address this question as if directed to candidates for the Office of President.

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to

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prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id.*

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 USC 1.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a*. . . . [Emphasis added.]

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And under subsection 614a(2), the chairpersons for the major political parties in Michigan file a list of candidates with the Secretary after she issues her list:

> Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.[8] MCL 168.615a ("Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.") (emphasis added). The winning candidates for each party are then certified by the Board of State Canvassers. MCL 168.616a. However, the names of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") But no

[8] A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2).

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language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91, 168.131, 168.161, 168.281, and has required these candidates to file "affidavit[s] of identity," which include a statement that a candidate "meets the constitutional and statutory qualifications for the office sought," MCL 168.558(1)-(2).[9] Candidates who fail to complete a certificate identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement, likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.").

There simply is no statute in the Michigan Election Law that imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature's drafting choice strongly suggests that the Secretary has neither the duty nor the

[9] There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

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authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) ("[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). And while the Secretary has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan's ballots, is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency,* 509 Mich 673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

In his pleadings, Davis argues that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they "swear (or affirm) that [they] will support the Constitution of the United States," requires the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. (Comp, ¶¶ 77-90.) But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a

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candidate for the Office of President from appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

The Secretary will certainly comply with any order entered by this Court or another that declares Mr. Trump eligible or ineligible to appear as a candidate for President on Michigan's ballots by reason of the Fourteenth Amendment. And in doing so, the Secretary will uphold the oath she took to support both the US Constitution and the Michigan Constitution.

For these reasons, the Secretary does not have an affirmative, legal duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot prior to a court's review of that constitutional question. And because that is so, Davis is not entitled to a declaration that the Secretary has such a duty, or to mandamus relief to compel her to perform such a duty.

B. Whether § 3 of the Fourteenth Amendment applies to the offices of President and Vice President and to candidates for those offices?

Section 3 of the Fourteenth Amendment provides:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold *any office*, civil or military, *under the United States*, or under any State, who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any

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> State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [US Const, Am XIV, § 3 (emphasis added).]

Again, the Secretary takes no position with respect to whether Mr. Trump should appear as a candidate in Michigan's presidential primary or general election, or whether he should be precluded from doing so under the Fourteenth Amendment.

The Court's question raises two, inter-related questions—does the office of President constitute "any office" "under the United States" from which a person may be disqualified from holding based on his engaging in insurrection. And was Mr. Trump "an officer of the United States" who previously took an oath to support the US Constitution for purposes of § 3 when he previously held the office of President. In a separate question, this Court also asked whether there were any state or federal cases interpreting or applying § 3 to candidates for office or persons serving in an office, including any cases currently involving Mr. Trump as potential presidential candidate.

Addressing this second question first, there are numerous cases pending throughout the United States in which the movants seek to disqualify Mr. Trump under § 3 of the Fourteenth Amendment.[10] A list of known cases is attached as Exhibit 1. Upon information and belief, none of the cases have yet resulted in a substantive determination by a court regarding the application of § 3 to Mr. Trump.[11] And several have been dismissed for lack of standing.

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[10] Most of the cases have been filed by John Anthony Castro, a purported presidential candidate from Texas. Castro filed a complaint against Secretary Benson and Donald J. Trump in the Court of Claims on August 31, 2023. See *Castro v Benson, et al*, Case No. 23-000122, however, the complaint has not been served.

[11] Cases worth monitoring currently include *Growe v Simon*, Minnesota Supreme Court Case No. A23-1354, and *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577. See Exhibit 1.

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(Exhibit 1, Case list.) As far as cases applying § 3 to other candidates, there are a few cases of recent vintage in which several candidates were challenged on that basis.

In *Hansen v Finchem*, the court determined that the plaintiffs could not use a state statute allowing challenges to candidates based upon their qualifications for office to disqualify the candidates under § 3 because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz May 9, 2022).

In *Rowan v Greene*, the Georgia Secretary of State affirmed an administrative hearing officer's determination that the plaintiffs failed to provide sufficient proof that Representative Marjorie Taylor Greene was not qualified to seek and hold public office. See No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022). See also *Greene v Raffensperger*, 599 F Supp 3d 1283, 1320 (ND Ga 2022) (refusing to enjoin the state proceedings where Greene failed to demonstrate that states were prohibited from enforcing § 3), *Greene v Sec'y of State for Georgia*, 52 F 4th 907, 909-910 (CA 11, 2022) (remanding for dismissal of case as moot).

In *Griffin v New Mexico ex rel White*, a quo warranto proceeding, a state court judge determined that § 3 applied to a county commissioner convicted of a crime in relation to the events on January 6, 2021, and the commissioner was removed from office. See No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept 6, 2022). The commissioner's appeal to the New Mexico Supreme Court was denied. *Griffin v New Mexico, ex rel White*, No. S-1-SC-39571 (NM Feb 16, 2023).

And in *Cawthorn v Circosta*, voters filed a challenge with the North Carolina State Board of Elections seeking to disqualify Representative Madison Cawthorne from the 2022 primary ballot, and Cawthorne filed suit in federal court seeking to bar the state board from considering

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the issue. 590 F Supp 3d 873, 891 (ED NC 2022). The District Court held that the 1872 Amnesty Act supported enjoining the state proceedings. *Id.* at 890-892. The Fourth Circuit Court of Appeals reversed, and no further litigation occurred as Cawthorne lost in the primary. *Cawthorn v Amalfi*, 35 F4th 245 (CA 4, 2022).

Given the dearth of cases, reference to recent law review articles may assist the Court.

In a 2021 article, the authors opine that the President of the United States is not an "officer of the United States" whose prior taking of an oath will trigger the disqualification from holding a covered office under § 3. See Josh Blackman & Seth Barrett Tillman, Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?, 15 NYU J L & Liberty 1 (2021), attached as Exhibit 2. In summary of what is a complex argument, the authors argue that the terms "officer of the United States" and "[o]ffice . . . under the United States" should be presumed to have different meanings in § 3 since the Framers used different wording within the same section. *Id.* at 7-10. They argue that the history of the Framers use of this different terminology in different sections of the Constitution, supports a presumption that "these phrases refer to different positions." *Id.* at 9. And that "the better inference . . . is that the President and Vice President are not 'Officers of the United States.'" *Id.* at 10.

> All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office ... under the United States" in Section 3 of the Fourteenth Amendment. [*Id.*]

The authors go on to expressly argue that the President is not an "officer of the United States" for purposes of the various provisions that use that language, including § 3, that there is no compelling evidence that the Framers intended something different in § 3, and that various cases and authorities support that conclusion. *Id.* at 21-33. The article then discounts various

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past authorities and arguments that suggest or reach different conclusions. *Id.* at 34-50. In their conclusion, the authors note that they chose not to resolve whether the President is an "office . . . under the United States," but that if the President is not an "officer of the United States," it "ends the case" for purposes of the application of § 3. *Id.* at 54.

Conversely, in a 2023 article, the authors reject the analysis in the Blackman and Tillman article that the President is not an "officer of the United States," and further conclude that the President is an "officer . . . under the United States" for purposes of both clauses in § 3. See William Baude & Michael Stokes Paulson, The Sweep and Force of Section Three, 172 U PA L REV ___ (forthcoming 2024), attached as Exhibit 3. These authors argue that the provisions of § 3 should be read:

> in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one. . . . Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside. [*Id.* at p 105 (footnote omitted).]

The authors further argue that the list of disqualification triggering offices in § 3 ("officer . . . of the United States") closely tracks the listing of offices in the Constitution's oath provisions, see art VI, cl 3, art II, § 1, cl 8, and that the list of offices from which a person is disqualified from ("offices . . . under the United States") builds on that list. *Id.* at 105-106. "Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application." *Id.* at 106. And "if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of

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those same positions[.]" *Id.* The argue that § 3's "project of office-listing" was to simply provide a comprehensive list of positions in both clauses. *Id.*

The authors reject the analysis of Blackman and Tillman as a technical and non-natural reading of the text that ultimately results in the implausible consequence that an insurrectionist President could hold the office of President, but that his prior holding of that office would not trigger disqualification. *Id.* at 108-109. They further note that a "variant" of that argument was refuted during congressional debates on § 3. (*Id.* at 110-111.)

There are certainly additional, relevant articles available, Defendant chose these as two recent competing viewpoints. It is also likely that the cases pending regarding Mr. Trump, see Exhibit 1, will result in additional discussions of whether § 3 applies to the Office pf President.

C. Whether § 3 precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3, or both.

Defendant Benson understands this question as asking whether § 3 is a qualification for seeking office, or whether it is a prohibition to holding office if elected, or whether it functions as both. Again, § 3 provides, in part, that "[n]o Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States[.]" (Emphasis added.)

This issue does not appear to have been the subject of significant litigation yet or academic discussion. But in the Arizona case discussed above in I.B, the Arizona Supreme Court held in its brief opinion that the state statute allowing candidate challenges could not be used to advance a claim under § 3 because its "scope is limited to challenges based upon 'qualifications . . . as prescribed by law.'" *Hansen*, 2022 WL 1468157 at * 1. The statute did not apply, the court reasoned, because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. *Id.*

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But in the Fourth Circuit's opinion in *Cawthorn*, also noted above in I.B, the Court stated in a footnote that it was "assuming without deciding" that the "disability" imposed by § 3 is a "qualification" for purposes of article I, § 5 of the US Constitution, 35 F4th at 257 n7, which provides that "Each House shall be the judge of . . . the qualifications of its own members[.]" US Const, art I, § 5. In the text the Fourth Circuit cited *Powell v McCormack*, 395 US 486 (1969), in which the US Supreme Court made a passing reference to § 3 but stated in a footnote that it was *not* deciding whether § 3 and other constitutional provisions properly constituted "qualifications." *Id.* at 520 n 41. See also *US Term Limits, Inc v Thornton*, 514 US 779, 788 n 2 (1995) (citing *Powell* and likewise not deciding the issue).

Also, in *Greene*, the District Court discussed the state's important regulatory interests in ensuring that only qualified candidates appear on the ballot and appeared to treat the disqualification component of § 3 as a qualification. 599 F Supp 3d at 1311-1312, 1316 ("On the current record, it appears that the Challenge Statute imposes minimal burdens through its process of ensuring that only candidates who meet the Constitution's minimum threshold requirements appear on the ballot — including candidates who are not disqualified by Section 3 of the Fourteenth Amendment.")

One author has discussed the possible timing of challenges to federal-office candidates under § 3, including the President, describing possible pre-election, post-election/pre-inauguration, and post-assumption of office challenges. See Myles S. Lynch, Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment, 30 Wm & Mary Bill Rts J 153, 189-194 (2021).[12]

[12] The Baude and Paulson article includes a discussion of the mode of enforcing § 3. See Exhibit 3, pp 22-35.

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It is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 functions as a qualification for seeking office or a prohibition from ultimately holding office.

D. Whether § 3 is self-executing.

The question of whether § 3 is self-executing appears to have proponents on both sides. Authors Baude and Paulson in their article, discussed above in I.B., argue that § 3 functions as an automatic, legal disqualification whenever its' conditions for disqualification are met, and thus needs no implementing legislation by Congress. (Exhibit 3, p 17.) They note that the federal Constitution is the supreme law of the land, and states what the law is. (*Id.*) "Section Three's language is language of automatic legal effect: '*No person shall be*' directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be." (*Id.*, pp 17-18.) The authors observe that this language is consistent with other self-executing "disqualification" sections, such as those in article I and article II, § 1, cl 5's requirement that "[n]o person . . . shall be eligible" to be President who does not meet the age requirement. (*Id.*, p 18.) As well as other provisions, like the Thirteenth Amendment (abolishing slavery) and other sections of the Fourteenth Amendment, such as the Equal Protection Clause. (*Id.*, pp 18-19.)

The authors recognize that Congress *can* enact legislation to enforce § 3, as it has in the past, but Congress need not do so where § 3 "was effective all along." (*Id.*, p 19-20.) They further contrast § 3's language with other provisions like the Constitution's impeachment provisions, which require implementation, whereas § 3 does not. (*Id.*, pp 20-21.) For these reasons, they conclude that § 3 "has legal force already," meaning it is self-executing. (*Id.*, p 22.)

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Blackman and Tillman, in a new article, advance a contrary view. See Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3, 28 TEX REV L & POL (forthcoming 2024).[13] Again, in summary of what is a complex argument, they argue that whether § 3 is self-executing ultimately depends on the manner enforcement is sought. (*Id.*, pp 18-20.) They note that many Article I qualification-type provisions have gone unenforced, whether at the federal or state level, which undermines Baude's and Paulson's argument that such provisions are self-executing without legislation intervention, and by extension their argument that § 3 is as well. (*Id.*, pp 25-37.) Turning to the Fourteenth Amendment, Blackman and Tillman acknowledge that § 1, which includes the due process and equal protection clauses, is generally considered self-executing. (*Id.*, pp 38-39.) But they say "the better question is in what fashion is Section 1 self-executing?" (*Id.* at p 39.) The authors argue, citing various precedents, that while a defensive ("shield") use of the constitutional constraints found in the Fourteenth Amendment is always permissible, the offensive ("sword") use of the Fourteenth Amendment's limitations, including those in § 3, is not. (*Id.* at pp 39-53.) Thus, in their view, § 3 would be not self-executing if used as a sword to disqualify a candidate.[14]

Secretary Benson is aware of only one recent case that has touched on whether § 3 is self-executing. In *Hansen*, the Arizona Supreme Court did not use the words self-executing, but it noted "that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress

[13] An abstract of the lengthy article as well as a download is available online at Sweeping and Forcing the President into Section 3 by Josh Blackman, Seth Barrett Tillman :: SSRN.

[14] Both Baude and Paulson and Blackman and Tillman spend time in their respective articles discussing the ramifications of US Supreme Court Justice Salmon Chase's decision as a circuit justice in *In re Griffin*, 11 F Cas 7 (CCD Va 1869), in which he determined § 3 required enabling legislation. For an additional viewpoint on this subject, the Court may wish to review Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const Comment 87, 100-108 (Spring 2021).

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the authority to devise the method to enforce the Disqualification Clause ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'), which suggests that ARS § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates." 2022 WL 1468157, at *1. As above, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 is self-executing.

E. Whether the 1872 Amnesty Act applies to the instant case.

In 1872, Congress enacted legislation related to § 3, which provides:

> [A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [Act of May 22, 1872, ch. 193, 17 Stat 142 (1872).]

And in 1898, Congress removed the disabilities from the previously excepted persons in the 1872 Act by enacting another law, providing that "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432.

In *Cawthorn*, discussed previously, the District Court agreed with Representative Cawthorn that the 1872 Act permanently removed the disabilities stated in § 3. *Cawthorne,* 590 F Supp 3d at 890. "The 1872 Act, by its plain language, removed '*all political disabilities* imposed by the third section of the fourteenth article of amendments of the Constitution of the United States *from all persons whomsoever.*' " *Id.* at 891 (emphasis in original). The court observed that Congress could have used language that clarified the act only applied to persons currently subject to § 3 but did not do so. *Id.* The District Court therefore enjoined any further proceedings against Cawthorne.

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But the Fourth Circuit reversed the District Court.

That Court concluded that the District Court erred "in construing the Act as a sweeping removal of all future Fourteenth Amendment disabilities." *Cawthorn*, 35 F.4th at 257. The Court determined that the lower court had read the Act incorrectly in that it did not prospectively relieve persons from disabilities in the future but was rather "'backward-looking'" because the language it employed ("imposed" and "removed") was in the "past tense." *Id.* at 258 (citations omitted). "Here, Congress employed the past-tense version, indicating its intent to lift only those disabilities that had by then been 'imposed.'" *Id.*, citing *Costello v INS*, 376 US 120, 123–24 (1964) (referring to the past participle in "have been" as a "use of the past tense" (quotation marks omitted)). The Court went on to conclude that this construction was consistent with the Act's history and context in dealing with "the hordes of former Confederates seeking forgiveness." *Id.* at 259 (citation omitted). The Court thus reversed and vacated the injunction and remanded for further proceedings. *Id.* at 261.

The District Court in New Mexico in the *Griffin* case agreed with the Fourth Circuit's analysis concerning the 1872 Act. See *Griffin*, 2022 WL 2132042 at * 2. And in a decision preceding the Fourth Circuit's decision, the Georgia District Court in the *Greene* case rejected the District Court's analysis in *Cawthorn.* See *Greene*, 599 F Supp 3d at 1315 ("Suffice it to say, the Court is skeptical. It seems much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under Section 3 had already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future.")

Again, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of the 1872 Act.

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II. Secretary Benson is entitled to summary disposition as to Counts I, II, V, and VI.

A. Standard of Review for Summary Disposition.

Summary disposition is proper under MCR 2.116(C)(8) if the plaintiff fails to state a claim on which relief can be granted. *Henry v Dow Chem Co,* 473 Mich 63, 71 (2005). A motion "under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332 (2001). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509 (2007).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206 (2012). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). A genuine issue of material fact exists when the record reveals an issue upon which reasonable minds might differ. *Id.*

B. Davis fails to state a claim upon which relief may be granted under Counts I and II where the date of the presidential primary is yet to be determined and where the date upon which the primary will be held is controlled by the Michigan Constitution.

Again, in Counts I and II, Davis seeks declaratory and mandamus relief to compel Secretary Benson to conduct the 2024 presidential primary election on March 12, 2024, rather than on February 27, 2024, as required by MCL 168.613a(1), as amended by Public Act 2 of 2023. (Comp, ¶¶ 7-55.) As Davis notes, that Act did not receive immediate effect.[15] Thus, he

[15] The legislative history for Public Act 2 is available at Michigan Legislature - Senate Bill 0013 (2023).

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argues the primary must be held on March 12, 2024. But Davis fails to plead an actual controversy to support his claims. *Lansing Sch Educ Ass'n*, 293 Mich App at 515 ("[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief.")

Under article 4, § 27 of the Michigan Constitution, unless immediate effect is given an act, it shall not take effect until 90 days from the end of session. Const 1963, art 4, § 27. This means that Public Act 2 will take effect on the 91st day following the end of the Legislature's regular session. But when the Legislature will adjourn its current session is unknown. Typically, the Legislature adjourns sometime in December making the effective date sometime in March. If the Legislature adjourns earlier, then the effective date is earlier as well. So, at this point the effective date of Public Act 2 is unknown. Obviously, if the Legislature does not adjourn in time to make Public Act 2 effective in time to hold a February presidential primary, the primary will be conducted in March as required by the existing version of MCL 168.613a. This result is compelled by the Constitution.

But given the fact that Public Act 2 *could* become effective if the Legislature were to adjourn early, the Secretary has prepared for that eventuality by advising local clerks and computing certain deadlines for the presidential primary based on the amendment but noting that these deadlines could be adjusted if Public Act 2 does not become effective in time to conduct the primary.[16] Indeed, had she not so prepared there would surely be claims that she had failed in her duties as chief elections officers. See MCL 168.21.

[16] See Calendar of election dates available at Election Calendar of Dates (michigan.gov), and guidance for presidential candidates for 2024 at Ballot-Access-Information-for-Presidential-Candidates.pdf (michigan.gov). The latter guidance was modified to more clearly reflect the impact of Public Act 2 of 2023.

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Where the effective date of Public Act 2 is unknown, but it is known that the primary will either be held on February 27 or March 12 pursuant to article 4, § 27 of the Constitution, there is no current controversy between Davis and the Secretary. There is no adverse interest between them necessitating the sharpening of the issues raised. *UAW*, 295 Mich App at 495. The Secretary will follow the Constitution, and she is entitled to a presumption that she will do so. See *United Sav Bank of Detroit v Sch Dist No. 5, Fractional, Redford & Livonia Tps, Wayne Cnty, & Farmington Twp, Oakland Cnty*, 280 Mich 419, 423 (1937) ("'There is always a presumption that official acts or duties have been properly performed, and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done[.]' ") (citation omitted).

For these reasons, Davis's request for declaratory relief must be denied, along with his claim for mandamus relief which is premised on his request for a declaratory judgment.

C. Secretary Benson is entitled to summary disposition in her favor with respect Count V where there can be no dispute that she has satisfied any applicable bond requirement.

In Count V, Davis seeks a declaration that Secretary Benson was required to comply with MCL 15.51, which requires the filing of a bond within 20 days of assuming office. (Compl, ¶¶ 105-125.) Davis believes the Secretary has not obtained the necessary bond because his FOIA requests did not result in the production of a copy of her bond. (*Id.*) This claim is without merit and is frivolous as well.

MCL 15.51 does impose a bond requirement for the Secretary of State:

> The secretary of state . . . shall be required within 20 days after entering upon the duties of [her] respective office[ ], to give bond[ ] to the people of the state of Michigan with 3 or more sureties to be approved by the state treasurer and attorney general . . . . The bond of the secretary of state shall be in the sum of $25,000.00 ….

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However, MCL 15.1 provides that all state officers and state employees required to obtain a bond are covered by a "blanket bond":

> *Notwithstanding the provisions of any other law*, officers . . . of all state departments . . . that are required by statute . . . to furnish bonds . . . shall be covered by a blanket bond or bonds as a departmental group or as a state group by corporate surety companies as approved by the director of the department of administration. . . . [Emphasis added.]

Under this section, the individual state officers and state employees with bond requirements are not required to secure individual bonds. The sections following § 1, MCL 15.2 through 15.4, discuss the obtaining of the blanket bond, and impose the requirement of obtaining the bond on what is now known as the Department of Management and Budget (DTMB). Thus, § 1 and the remaining provisions supersede any other statutes, including MCL 15.51. See MCL 15.5 ("This act supersedes all statutes, or parts of statutes, relating to amounts, terms and conditions, execution, approval and filing of surety bonds required of officers and employees of state departments and agencies, which are inconsistent with this act.") Meaning, Secretary Benson was not required to obtain her own, personal bond.

The DTMB satisfies these requirements through the State's Government Crime & Fidelity insurance policy, which is renewed yearly. (Exhibit 4, Excerpts of Insurance Policy.) Endorsement #2 removes the "bonded employees" exclusion from the policy, and Endorsement #11 indemnifies "all officials who are required by law to give bonds for the faithful performance of their duties." (*Id.*) Accordingly, any bond requirement imposed on the Secretary is satisfied through the coverage specifically provided for this purpose in the insurance policy.

Because there is no genuine issue of material fact that the Secretary's obligation has been met through DTMB's maintenance of the insurance policy, she is entitled to judgment as a matter of law on Count V.

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D. Secretary Benson is entitled to summary disposition in her favor with respect Count VI where there can be no dispute that she has initiated rulemaking relating to the electronic return of absent voter ballots by military voters.

Finally, in Count VI, Davis seeks a writ of mandamus compelling the Secretary to promulgate rules pursuant to MCL 168.759a(17) regarding the electronic return of voted ballots by military voters. (Comp, ¶¶ 126-142.) This claim is without merit and is frivolous as well.

Public Act 197 of 2022 amended MCL 168.759a to provide for the ability of overseas military voters to return absent voter ballots electronically, starting January 1, 2024. See MCL 168.759a, as amended by 2022 PA 197.[17] That amendment required the Secretary of State to promulgate rules to provide for the process of the return of such ballots by no later than January 1, 2024. MCL 168.759a(17), as amended by 2022 PA 197. In November 2022, the Secretary initiated a request for rulemaking regarding the electronic return of military ballots as required by § 759a(17), which request remains pending. (Exhibit 5, Request for Rulemaking.)[18] The Secretary has thus initiated rulemaking pursuant to § 759a(17), and the statute does not require rules until January 1, 2024.

However, since November 2022, bills have been introduced in the Legislature that would amend § 759a to expand who is eligible to electronically return a ballot,[19] and a bill has been introduced to postpone the start date for the return of electronically voted ballots to September 1, 2025, and to extend the time for the Secretary to promulgate rules until September 1, 2025. See

[17] The legislative history for Public Act 197 is available at Michigan Legislature - Senate Bill 0311 (2021).

[18] See also MDOS request for rulemaking, available at ARS Public - RFR Transaction (state.mi.us).

[19] See Senate Bill 177, which would expand it to include "overseas voters", available at Michigan Legislature - Senate Bill 0177 (2023). See also House Bill 4210, which would expand it to include spouses and dependents of overseas military voters, available at Michigan Legislature - House Bill 4210 (2023).

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House Bill 4210, amending MCL 168.759a(17).[20] Thus, who is covered by § 759a(13) and when the process for returning voted ballots electronically must be available has been in a state of flux.

Regardless, under the current version of § 759a(17), rules need not be promulgated until January 1, 2024.

As a result, even if Davis has a clear, legal right to have rules promulgated under § 759a(17), which is certainly debatable, and the Secretary has a clear, legal duty to promulgate rules under the current version of § 759a(17), she has not failed to perform this duty. She has initiated rulemaking and the rules are not required to be promulgated until January 1, 2024, which date has yet to pass. Davis's request for mandamus relief must therefore be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Secretary of State Jocelyn Benson respectfully requests that this Court resolve Plaintiff Robert Davis's emergency motion for declaratory judgment and mandamus relief consistent with the arguments made herein, and requests in addition that the Court grant summary disposition in her favor under MCR 2.116(C)(8) and (10) regarding Counts I, II, V and VI of the Complaint.

Respectfully submitted,

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[20] See House Bill 4210, available at Michigan Legislature - House Bill 4210 (2023). The bill passed the House on September 27, 2023, and is now in the Senate. (*Id.*) See also Senate Bill 470, which would likewise extend the date to September 1, 2025, available at Michigan Legislature - Senate Bill 0470 (2023).

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517.335.7659

Dated: October 16, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on October 16, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

ROBERT DAVIS

Plaintiff,

-vs-

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

Defendant,

-and-

DONALD J. TRUMP,

Proposed-Intervenor.
_____/

PROPOSED-INTERVENOR'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSTION

FILE NO.: 23-000128-MB

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INTRODUCTION

For the past several years, whether Donald J. Trump is suited to hold the Presidency has been the defining political controversy of our national life. Plaintiff now asks a state court to terminate further discourse and decide this question of nationwide importance without regard for America's voters and their elected representatives. This request is manifestly inappropriate. Both the federal Constitution and Michigan law place the resolution of this nonjusticiable political question where it belongs: the democratic process, in the hands of either Congress or the people of the United States. This Court may not use Section Three of the Fourteenth Amendment ("Section Three") to enjoin the Secretary of State of Michigan ("Sec. of State") from placing President Trump on the primary and general election ballots in the state.

The Complaint's many factual inaccuracies, gaps, and distortions largely fall under one overarching theme: Plaintiff has no evidence that President Trump intended or supported any violent or unlawful activity seeking to overthrow the government of the United States, either on January 6th or at any other time. On topic after topic, Plaintiff seeks to make up for the conspicuous absence of evidence by relying on innuendo, insinuation, and disdain for President Trump to win the day. Those are arguments for the American voters, not for this Honorable Court.

This Court should dismiss the Complaint for numerous reasons:

- First, this case presents a nonjusticiable political question that is constitutionally committed to Congress.
- Second, Plaintiffs lacks standing and/or a writ of mandamus is improper.
- Third, Congressional action is required to enforce Section Three because it is not self-executing when used to prohibit a candidate from standing for election.

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- Fourth, neither Plaintiffs nor the Sec. of State has the authority to enforce Section Three as Plaintiff desires.
- Fifth, the United States Constitution and Congress solely govern presidential qualifications.
- Sixth, the prohibitions of Section Three do not even apply to President Trump.
- Seventh, the conduct as alleged in the Complaint is not covered by Section Three.

For these reasons, this Court should dismiss the Complaint's claims as meritless, and remit Plaintiff's arguments to the political processes ordained by the Constitution.

STATEMENT OF FACTS

As to Plaintiff, Defendant, and Donald J. Trump, no facts have been properly pleaded. The only "facts" alleged in Plaintiff's Complaint are a mere recitation of news articles and political events.

STANDARD OF REVIEW

"Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court 'lacks jurisdiction of the subject matter.'" *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). "When determining if the trial court has subject-matter jurisdiction, [the] Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002).

For a motion brought pursuant to MCR 2.116(C)(8), this Honorable Court should review the pleadings to test the legal sufficiency of Plaintiff's claim. *Spiek v Department of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify Plaintiff's claim for relief. *Id.*

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A motion brought under MCR 2.116(C)(10) tests the factual support for a Plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The purpose of MCR 2.116(C)(10) is to 'avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law.'" *Kern v Kern-Koskela*, 320 Mich App 212, 223; 905 NW2d 453 (2017); *Maiden v Rozwood*, 461 Mich 109, 120-121; 596 NW2d 817 (1999). "Opinions, conclusory denials, unsworn averments and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *SSC Associates Limited Partnership v General Retirement System of City of Detroit*, 192 Mich App 360; 180 NW2d 275, 277 (1991).

ARGUMENT

I. Plaintiff's claims raise a nonjusticiable political question because a presidential candidate's qualifications are reserved for Congress and the voters to decide.

Federal and state courts presented with similar cases challenging the qualifications of presidential candidates have overwhelmingly held that they present nonjusticiable political questions the Constitution reserves for Congress and the voters. This Honorable Court should do likewise.

Political questions are nonjusticiable and therefore not cases or controversies. *Massachusetts v EPA*, 549 US 497, 516 (2007). The United States Supreme Court set out broad categories that should be considered nonjusticiable political questions in *Baker v Carr*, 369 US 186, 217 (1962):

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [and 6] the potentiality of

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> embarrassment from multifarious pronouncements by various departments on one question.

For its part, Michigan has also adopted a version of the political question doctrine applicable when the courts of this state must determine whether to decide questions of state law that may have been entrusted to coordinate branches of state government. *Makowski v Governor*, 299 Mich App 166, 829 NW2d 291 (2012). In approaching those questions, the courts of this State have generally considered the *Baker* factors, albeit taking into account the greater jurisdiction granted trial courts in this State as compared to their federal counterparts. *Id.* at 173. Here, the U.S. Constitution reserves exclusively to the United States Congress the power under Section Three to determine whether a person may take office.

Plaintiff asks this Court to strip Congress of its power to make that determination, including waiver of disqualification by a two-thirds vote, and to empower the Sec. of State with duties she does not have. Federal and state courts have overwhelmingly ruled that challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the deference due federal law under the Constitution's Supremacy Clause.

For example, numerous courts held that similar challenges to the qualifications of presidential candidates Barack Obama and John McCain presented nonjusticiable political questions. To wit, the Third Circuit held that a challenge to the qualifications of then-candidate Obama (based on his nationality) was a political question not within the province of the judiciary. *See Berg v Obama*, 586 F3d 234, 238 (3rd Cir 2009).

Multiple district courts reached the same conclusion. In *Grinols v Electoral College*, No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *5-7 (ED Cal, May 23, 2013), the Court

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dismissed a challenge to President Obama's qualifications for office.[1] There, the Court held that "the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. As such, the question presented by Plaintiff in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at *6. Likewise, in *Taitz v Democrat Party of Mississippi*, No 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss, Mar 31, 2015), the Court noted that the presidential electoral and qualification process "are entrusted to the care of the United States Congress, not this court" and that the Plaintiff's disqualification claims were therefore nonjusticiable.

In *Robinson v Bowen*, 567 F Supp 2d 1144 (ND Cal, 2008), the Court dismissed a case brought before the 2008 election seeking to remove Senator McCain from the ballot. After first holding that the plaintiff lacked standing, the Court rejected an attempt to fix that standing defect by adding Alan Keyes—a competing candidate—as a plaintiff, holding that it would be futile because:

> It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

[1] Although the *Grinols* plaintiff sought the removal of a sitting president rather than a presidential candidate, the court had previously refused to grant a temporary restraining order to prevent President Obama's re-election on political question grounds. *Grinols v Electoral Coll*, No 12-CV-02997-MCE-DAD, 2013 WL 211135, at *4 (ED Cal, Jan. 16, 2013).

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Id. at 1147.

Moreover, the Sec. of State has no authority to pre-judge a candidate's qualifications for office and strike a candidate from the ballot. The Sec. of State is required to issue a "list of the individuals generally advocated by the national news media to be potential candidates" for each major political party's nomination by 4:00 p.m. on November 10, 2023. *See* MCL 168.614a(1). Thereafter, the state chairperson of each major political party must file a "list of individuals whom they consider to be potential presidential candidates for that political party" with the Sec. of State no later than 4:00 p.m. on November 14, 2023. *See* MCL 168.614a(2). All names of the candidates will then be placed on the presidential primary ballot unless a candidate withdraws. MCL 168.615a.

The Sec. of State herself has admitted that she does not have the authority to refuse to place President Trump on or strike President Trump from the ballot. Even if express authority to pre-judge qualifications and strike a candidate from the ballot existed, the exercise of that authority would violate separation of powers:[2]

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress.

[2] "Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election a state's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, a state has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries." *Anderson v Celebrezze*, 460 US 780, 794-95 (1983).

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Strunk v New York State Bd. Of Elections, No 6500/11, 2012 WL 1205117, *12 (Sup Ct Kings County NY, Apr 11, 2012). The California Court of Appeals' language in *Keyes v Bowen*, 189 CalApp4th 647, 660 (2010), is also instructive:

> In any event, the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.

Id.; *accord, e.g., Jordan v Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super, Aug 29, 2012) ("I conclude that this court lacks subject matter jurisdiction. The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the US Constitution.")

If this court were to determine that President Trump had been involved in insurrection and that he could not be on the ballot, that decision would prevent Congress from fulfilling its constitutional obligations that occur when a presidential candidate is elected who is not qualified. The Constitution expressly provides that:

> If the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified … and the Congress may by law provide for the case wherein neither a President elect nor a vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

US Const, Am XX. Were it to enter the requested injunction or declaratory judgment preventing President Trump from appearing on the ballot, this Honorable Court would be interfering with this

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mechanism, responsibility for the operation of which the Constitution vests in Congress—and *only* in Congress. This case therefore presents a nonjusticiable political question.

II. Plaintiff lacks standing.

Plaintiff lacks standing to bring these lawsuits. The Michigan Supreme Court held:

> Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, **that will be detrimentally affected in a manner different from the citizenry at large** . . .

Lansing Schs Educ Ass'n v Lansing Bd of Educ, 487 Mich 349, 372; 792 NW2d 686, 700 (2010) (emphasis added).

Federal courts have widely held that individual voters lack standing to challenge the qualifications of presidential candidates.[3] In affirming the dismissal of a claim challenging President Obama's qualifications for office, the Third Circuit held that "a candidate's ineligibility . . . does not result in an injury in fact to voters." *Berg v Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

Plaintiff makes no allegation as to how they would be "detrimentally affected in a manner different from the citizenry at large" if Donald J. Trump is on the ballot. Further, they completely

[3] *See, e.g.*, *Hollander v. McCain*, 566 F.Supp.2d 63, 71 (D.N.H. 2008), *Cohen v. Obama*, 2008 WL 5191864, *1 (D.D.C., Dec. 11, 2008); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009); *Barnett v. Obama*, No. SACV09-0082 DOC(ANX), 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009) at *8, *order clarified*, No. SA CV 09-0082 DOC, 2009 WL 8557250 (C.D. Cal. Dec. 16, 2009), and *aff'd sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010); *Drake v. Obama*, 664 F.3d 774, 781-782 (9th Cir. 2011); *Sibley v. Obama*, 866 F.Supp.2d 17, 20 (D.D.C. 2012); *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885, at *10 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); and *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *20 (S.D. Miss. Mar. 31, 2015); *Const. Ass'n Inc. by Rombach v. Harris*, No. 20-CV-2379, 2021 WL 4442870, at *2 (S.D. Cal. Sept. 28, 2021), *aff'd*, No. 21-56287, 2023 WL 418639 (9th Cir. Jan. 26, 2023); *Booth v. Cruz*, No. 15-CV-518, 2016 WL 403153, at *2 (D.N.H. Jan. 20, 2016), *report and recommendation adopted*, 2016 WL 409698 (D.N.H. Feb. 2, 2016); *Fischer v. Cruz*, No. 16-CV-1224, 2016 WL 1383493, at *2 (E.D.N.Y. Apr. 7, 2016).

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fail to allege how Plaintiff, specifically, has been injured in any way. How could they? Plaintiff merely pleads that he is a voter and intends to vote in the next primary and election, a statement that could apply to any eligible voter in the United States. This is not sufficient to establish standing.

Michigan recognizes a narrow exception to the general standing requirements that only applies to actions for a writ of mandamus regarding election laws. The Court of Appeals recently held:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. "[I]n the absence of a statute to the contrary, ... a private person ... may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public."

Burton-Harris v Wayne Cnty Clerk, 337 Mich App 215, 225; 976 NW2d 30 (2021) (internal citation omitted). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016).

While the Davis Plaintiff does raise mandamus, his claim also fails. A plaintiff seeking a writ of mandamus has the burden of establishing four requirements:

> (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result.

Burton-Harris, 337 Mich App at 228.

First, Plaintiff does not have a "clear legal right" to the performance of Section Three of the Fourteenth Amendment because it is not self-executing as outlined below. When a "constitutional provision is not self-executing," Plaintiff "ha[s] no right to mandamus." *Muskegon Cnty v State*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360007); slip op at 6.

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Second, the Secretary of State has no legal duty to be the arbiter, enforcer, or adjudicator of Section Three as outlined below. Moreover, the Michigan Supreme Court held that when constitutional provisions "contemplate[] legislative action," they "may not be enforced by mandamus." *Bd of Educ of Detroit v Elliott*, 319 Mich 436, 443; 29 NW2d 902 (1947). In this case, it is the sole duty of Congress to adjudicate Section Three. Thus, mandamus is not available to Plaintiff.

Third, removing Donald J. Trump from the ballot is not a ministerial act. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Burton-Harris*, 337 Mich App at 228. Plaintiff's entire case is based upon a request to have the Sec. of State review statements, publications, news reports, debates, law review articles, and allegations of insurrection and apply this review to contested facts to make multiple determinations, including whether an "insurrection" occurred and, if so, whether President Trump "engaged" in it. Each requires an exceptional degree of "discretion or judgment" and would place the entire adjudication of Section Three and its implementation into the hands of a single elected official. These are the antithesis of "ministerial" determinations.

Since Donald J. Trump has never engaged in any actual acts of insurrection or rebellion, Plaintiff's entire request is that the Sec. of State review a smorgasbord of statements and speeches from Donald J. Trump and construe them to somehow collectively equate to an "insurrection." Plaintiff's request is the exact opposite of ministerial.

Fourth, Plaintiff does have another remedy: petition Congress. As outlined below, it is solely Congress that has the authority to make a determination under Section Three, not each state's Sec. of State. The proper means for Plaintiff to "achieve the same result" would be for him

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to request, through his elected representatives, that Congress adjudicate Section Three as it relates to Donald J. Trump.

Plaintiff fails all four elements of the mandamus test.[4] In summary, Plaintiff have suffered no injury, they have not demonstrated that they will suffer any injury that is different from the "citizenry at large," and they have failed to demonstrate that they meet the mandamus elements. Plaintiff's lawsuits must therefore be dismissed.

III. The Complaint further fails because the Fourteenth Amendment is not self-executing and nothing has occurred to disqualify President Trump.

Even if this case did not pose a political question (it does) and if Plaintiff had standing (he does not), it would still not succeed on the merits. Section Three is not self-executing, and, therefore, it cannot support a cause of action absent an authorizing statute. *See, e.g. Rosberg v Johnson*, No. 8:22CV384, 2023 WL 3600895, at *3 (D. Neb. May 23, 2023); *Secor v Oklahoma*, No. 16-CV-85-JED-PJC, 2016 WL 6156316, at *4 (N.D. OK Oct. 21, 2016). Section Five of the Fourteenth Amendment expressly states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *See also Hansen v Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz, May 9, 2022) ("Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause."); *see also, e.g., Ownbey v Morgan*, 256 US 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

A recent article by scholars Joshua Blackman and Seth Barrett Tillman summarizes the question of whether Section Three is self-executing as follows:

[4] Thus, even if the LaBrant Plaintiffs were permitted to amend their Complaint to add a request for mandamus, such a request would be futile.

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> In our American constitutional tradition there are two distinct senses of self-execution. First, as a shield—or a defense. And second, as a sword—or a theory of liability or cause of action supporting affirmative relief. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.
>
> For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised defensively. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, self-executing.
>
> In the second sense, the Constitution is used offensively–as a cause of action supporting affirmative relief. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract. Section 1983, including its statutory antecedents, *i.e.*, Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.
>
> Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing.[5]

Blackman and Tillman's article proceeds to analyze the question in depth and concludes that Section Three is not self-executing. Importantly, Blackman and Tillman's article has substantially refuted the Baude and Paulsen article cited by the Complaint. The strength of their arguments has caused Baude and Paulsen to substantially modify their own analysis. And Stephen Calabresi, a well-respected constitutional scholar and dean of the Northwestern University Law School, fully reversed his earlier agreement with Baude and Paulsen and has now concluded that Section Three

[5] Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 12, last viewed October 10, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 (emphasis in original; internal footnote omitted).

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does not prevent President Trump from serving as President.[6]

Ample precedent supports Blackman and Tillman's conclusion, as has been shown not only by Blackman and Tillman, but also by Kurt Lash, the leading scholarly authority on the Reconstruction Amendments, in his recent article.[7] During the debates on Section Three, Congressman Thaddeus Stevens twice argued that this section needed enabling legislation. On May 10, 1866 he argued that "if this amendment prevails, you must legislate to carry out many parts of it. . . . It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do."[8] On June 13, 1866, as the final speaker before the question was called, Congressman Stevens concluded his arguments to support Section Three by passionately arguing "let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions. I now, sir, ask for the question."[9]

During the ratification debates, on January 30, 1867, Thomas Chalfant spoke in opposition to the Fourteenth Amendment. One concern he had was that as the Amendment was written, Congress was the only tribunal that was permitted to judge whether someone had "given aid and comfort to the enemy during the rebellion."[10] This was unthinkable to Chalfant since the current

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[6] Prof. Steven G. Calabresi, Donald Trump Should be on the Ballot and Should Lose, https://reason.com/volokh/2023/09/16/steve-calabresi-donald-trump-should-be-on- the-ballot-and-should-lose/, last visited Sept. 29, 2023; *see also* Steven Calabresi, President Trump Can Not be Disqualified, Wall Street Journal, September 12, 2023.

[7] *See* Kurt Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment (Oct. 3, 2023), p. 37-43, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838.

[8] Cong. Globe, 39th Cong. 1st Sess., at 2544.

[9] Cong. Globe, 39th Cong. 1st Sess., at 3149.

[10] *See fn.* 3; *see also*, Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3, in the Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed.) (Harrisburg 1867).

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makeup of Congress was extremely hostile towards Southern leaders.[11] Chalfant argued that the only way rebel leaders would have a fair trial would be if "under the fifth section of this amendment . . . by appropriate legislation, for enforcing this amendment . . . . I can conceive of nothing, unless it be some act authorizing the appointment of a commission to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way."[12]

One year after ratification, Chief Justice Salmon P. Chase of the Supreme Court of the United States ruled that Section Three was not self-executing and that it could only be enforced through specific procedures prescribed by Congress or the United States Constitution. *In re Griffin*, 11 F Cas 7 (CCVa 1869). Chief Justice Chase reasoned that a different conclusion would have created an immediate and intractable national crisis. In response to this ruling, Congress almost immediately enacted legislation suggested by the Chief Justice.

In 1870, in response to Chief Justice Chase's ruling, Congress passed a law, entitled the "Enforcement Act," which allowed *federal* district attorneys (but not *state* election officials) authority to enforce Section Three. The Enforcement Act allowed U.S. district attorneys to seek writs of *quo warranto* from federal courts to remove from office people who were disqualified by Section Three and further provided for separate criminal trials of people who took office in violation of Section Three. Federal prosecutors immediately started exercising *quo warranto* authority, bringing charges against many rebel leaders.

These actions waned after a few years,[13] and the Amnesty Act of 1898 completely removed all Section Three disabilities incurred to that date. In 1925, the Enforcement Act was repealed entirely. (By then, nearly every participant in the Civil War had passed away.) A century later, in

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[11] *See* fn. 5 at 43.
[12] *Id.* at 43-44.
[13] *See* Amnesty Act of 1872 (removing most disqualifications in the manner provided by Section Three); Pres. Grant Proclamation 208 (suspending *quo warranto* prosecutions).

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2021, legislation was introduced in Congress to create a cause of action to remove individuals from office who were engaged in insurrection or rebellion, but that bill died in Congress.[14] Thus, there is no private right of action that allows individuals such as Plaintiff to enforce Section Three against President Trump.

Congressman Stevens's concluding remarks on the floor of Congress before passage of Section Three, Mr. Chalfant's arguments during the ratification of the Fourteenth Amendment, Chief Justice Chase's order, and the subsequent legislative history demonstrate that Section Three is not self-executing unless Congress takes action to make it so. Section Three does not give individual secretaries of state, state or federal courts, or individual plaintiffs the authority to remove a presidential candidate from the ballot.

Nor could it be otherwise. A successful challenge would create a patchwork of 51 state (and district) election laws and potentially conflicting orders and rulings that would contradict established precedent, constitutional tradition, and common sense. Given the structure of our presidential elections, under Plaintiff's theory a single state's courts or election officials—whether acting in good faith or for partisan ends—would effectively be able to decide a national election no matter how out of step they were with the rest of the nation and its voters. This is the exact crisis Chief Justice Chase feared and it is precisely why this question is reserved for a single, uniform, national decision by Congress.

IV. Fourteenth Amendment considerations.

States are preempted from creating additional qualifications for federal office. The Constitution lists the qualifications to be President. The Fourteenth Amendment prohibits individuals from *holding* offices under the United States; it does not prohibit them from being

[14] *See* H.R. 1405, 117th Cong. 2021.

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elected. States have not been delegated authority to create qualifications to run for President of the United States. Thus, Petitioners' requested relief is preempted.

Electing the President of the United States is a federal function. It arises under the Constitution as a consequence of the creation of the national government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say that it has reserved, what it never possessed." *US Term Limits, Inc v Thornton*, 514 US 779, 802 (1995) (citation omitted). Thus, states cannot exercise any power over federal elections unless they are delegated such powers by the Constitution. If this were not so, it would lead to the absurd result where each state could add their own set of required qualifications in order to run for President. *But see id.* at 805 (states do not have authority to add their own qualifications for federal office). Moreover, if a state does not possess the authority to alter presidential qualifications, it logically follows that each state does not have any right to adjudicate presidential qualifications. Instead, the proper place to adjudicate presidential qualifications is in Congress. This is consistent with courts' determinations, in the context of a political question analysis (addressed above), that the Constitution assigned to Congress the responsibility of determining whether a person is qualified to serve as President of the United States.

While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements. *Schaefer v Townsend*, 215 F3d 1031, 1038 (9th Cir 2000). States may not circumvent this limit by seeking to recast substantive restrictions as procedural ballot access conditions. *See US Term Limits*, 514 US at 829-835; *Schaefer*, 215 F3d at 1037-1039.

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Yet, that is precisely what Plaintiff seeks to have this Honorable Court do in this case. Plaintiff wants this Honorable Court to direct the state to exclude President Trump from the ballot based on a purported violation of Section Three of the 14th Amendment. But doing so would require the state to adjudicate qualifications for President of the United States that are not in the Constitution.

To see why this is, it is necessary to examine the text of the 14th amendment. The 14th Amendment does *not* prohibit individuals from being on the ballot for an office under the United States, being nominated for such office, or being elected to such office. It prohibits them from *holding* such office. US Const, am 14, § 3. This distinction matters because it speaks directly to *when* the requirements of Section Three are operative.

This distinction makes sense because even if there is a "disability" under section 3, it may be lifted by a two-thirds vote of each House. *Id.* Thus, even if someone is unquestionably disqualified under Section Three, they may still appear on the ballot and be elected by the people. Whether they are able to "hold" the office depends on whether Congress "remove[s] such disability." *See generally Smith v Moore*, 90 Ind 294, 303 (1883) (describing the distinction between restrictions on being *elected* versus *holding* an office, and noting "[u]nder [section 3] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan 52, 58 (1881) (analogizing to section 3 and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,'

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and if that be removed before the term begins, the election is made good, and the person may take the office.").

The Ninth Circuit's opinion in *Schaefer* further illustrates why this is important. In *Schaefer*, the court evaluated a California law that required candidates for Congress to satisfy a residency requirement at the time he or she filed his or her nomination papers. As in this case, California's law sought to implement a constitutional requirement, the requirement that a member of the House of Representatives be an inhabitant of the state in which he shall be chosen.[15] Nevertheless, the court determined that California's law was unconstitutional because it added qualifications that are not found in the Constitution. Timing was critical in reaching this conclusion. The Constitution provides that an individual must be an inhabitant of the state "when elected." *Id.* "When elected" is not "when nominated" because nonresident candidates could move into the State and "inhabit" it in the period between nomination and election. *Schaefer*, 215 F3d at 1037.

As explained above, the manner of counting electoral college votes is dictated by federal statute and the United States Constitution. *See e.g.*, 3 USC § 15. Further, "mechanisms exist under the Twelfth Amendment and 3 USC § 15 for any challenge to any candidate to be ventilated when electoral votes are counted," and that "the Twentieth Amendment provides guidance regarding how to proceed if a president-elect shall have failed to qualify." *Bowen*, 567 F Supp at 1146-47. Because federal constitutional and statutory law already governs presidential qualifications, federal law must reign supreme. Additionally, states may not add additional requirements for federal office beyond those listed in the Constitution, including eligibility requirements. *US Term Limits,* 514 US at 805. There is no precedent permitting a lone state to adjudicate a presidential

[15] US Const, art I, § 2, cl. 2.

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candidate's qualifications. Such a dispute must be addressed in Congress. Therefore, Plaintiff's claims must be dismissed.

V. The prohibitions of Section Three do not even apply to President Trump.

The plain text of Section Three identifies to whom it applies. Section Three states as follows:

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

US Const, am XIV, § 3 (emphasis added)

The phrase "Officers of the United States" does not include the President. *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?,* 15(1) NYU JL & LIBERTY 1 (2021). Shortly after ratification of Section Three:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Instead, Booth stated, the President is "part of the Government." Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'

Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3*, 28(2) TEX REV L & POL 112 (forthcoming circa Mar. 2024) (quoting David A. McKnight, The Electoral System of the United States: A Critical and Historical Exposition of its Fundamental Principles in the Constitution, and the of the Acts and Proceedings of Congress Enforcing it, 346 (Philadelphia, J.B. Lippincott & Co. 1878)).

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Recent precedent supports this history. Interpreting the Appointments Clause, the Supreme Court observed that "[t]he people do not vote for the 'Officers of the United States." *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 497-98 (2010) (quoting US Const, art II, § 2, cl 2). As noted by the Supreme Court in 2020, "Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments)." *Seila Law LLC v. CFPB*, 140 S Ct 2183, 2199 n. 3 (2020). Neither category includes the President.

Three provisions in the U.S. Constitution show that the President is not "an officer of the United States":

> First, presidents fall under the scope of the Impeachment Clause precisely because there is express language in the clause providing for presidential impeachments; the Impeachment Clause does not rely on general "office"- or "officer"-language to make presidents impeachable. We think this is the common convention with regard to drafting constitutional provisions. When a proscription is meant to control elected positions, those positions are expressly named, as opposed to relying on general "office"- and "officer"-language. Congress does not hide the Commander in Chief in mouseholes or even foxholes. For example, in 1969, future-Chief Justice William H. Rehnquist, then an Executive Branch attorney, addressed this sort of clear-statement principle. Statutes that refer to "officers of the United States," he wrote, generally "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Five years later, future-Justice Antonin Scalia, then also an Executive Branch attorney, reached a similar conclusion with regard to the Constitution's "office"-language. These Executive Branch precedents would counsel against deeming the President an "officer of the United States."
>
> Second, as to the Appointments Clause, which uses "Officers of the United States"-language, Presidents do not appoint themselves or their successors. The Supreme Court hears a never-ending stream of cases that ask if a particular position is a principal or inferior officer of the United States—even though the Appointments Clause does not even distinguish between those two types of positions. Where has the Court ever suggested that the President falls in the ambit of the Appointments Clause's "Officers of the United States"-language? . . .

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> And, finally, as to the Commissions Clause, which also uses "Officers of the United States"-language, Presidents do not commission themselves, their vice presidents, their successor presidents, or successor vice presidents.

Sweeping and Forcing the President Into Section 3, *supra* at 106-07.

And finally, the structure of Section Three itself shows that it does not apply to the office of the President.

> The second clause does not expressly list several categories of positions: *e.g.*, presidential electors, appointed officers of state legislatures, members of state constitutional conventions, and state militia officers. The first clause does not expressly list several categories of positions: *e.g.*, members of the state legislatures, and members of state constitutional conventions. Neither list expressly mentions the President and Vice President.

Id. at 115.

Moreover, Section Three applies only to those who have "previously taken an oath . . . to *support* the Constitution of the United States." US Const, am XIV, § 3. (emphasis added). Certain members of the federal and state governments take such an oath:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, *to support this Constitution* . . . .

US Const, art VI, cl 3 (emphasis added). But the President of the United States does not. The presidential oath instead reads:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and *will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.

US Const, art II, § 1, cl. 8 (emphasis added).

The difference between the oath to *support* the constitution (per Article VI) and the oath to *preserve, protect and defend* the constitution (per Article II) is a significant one. It establishes that the drafters of the Fourteenth Amendment did not understand the President to be an Officer of the

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United States. And taking an oath to support the Constitution further limits the class of people to whom Section Three applies. President Trump is not one of those people to whom Section Three applies.

Section Three's drafting is no accident, but rather rooted in the Framers' robust debate and careful wordsmithing. When Congress was debating the wording of Section Three, there was no individual who had *only* taken the Article II oath.[16] The words that both the Framers and the drafters of the Fourteenth Amendment chose must be given their proper meaning. *Martin v Hunter's Lessee*, 14 US 304, 334 (1816) ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental."). When drafting the Impeachment Clause, the Framers initially referred to the President, Vice President, and "other civil officers of the U.S." *See* 2 The Records of the Federal Convention of 1787, at 545 and 552 (Farrand ed., 1911). But upon further deliberation, the Framers changed the Impeachment Clause to remove the word "other." *Id.* at 600. This change shows that the Framers understood that the President was not one of the "other" officers of the United States—instead, the President is *outside* the category of "officers of the United States," and, therefore, falls outside the ambit of Section Three.

V. The prohibitions of Section Three do not even apply to the conduct as alleged in the Complaint.

The Complaint rests on misinterpreting Section Three to say what it does not. Plaintiff, over dozens of pages and paragraphs of salacious distraction, alleges that President Trump engaged in insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof' within the meaning of section 3 of the Fourteenth Amendment. But Plaintiff fails to plausibly allege that President Trump did either of those things.

[16] *See*, Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment, p. 4.

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A. The January 6th riot does not constitute an "insurrection" under Section Three.

Section Three speaks in terms of "insurrection" and "rebellion"—and these terms were not pulled out of thin air. Congress modeled Section Three partly on the original Constitution's Treason Clause, and partly on the Second Confiscation Act (enacted in 1862). The Confiscation Act punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto." 12 Stat. 589, 627 (1862); *see* 18 USC § 2383. Section Three similarly covers "insurrection or rebellion." US Const, am XIV, § 3. But unlike the Confiscation Act, Congress excluded from Section Three any penalty for inciting, assisting, or giving aid to insurrection. Section Three only penalizes those who "engaged" in it. *Id.*

Congress discussed the meaning of "insurrection" and "rebellion" at length in debates. Congress confirmed that insurrection and rebellion describe two types of treason—not lesser crimes. *See* 37 Cong. Globe 2d Session, 2173, 2189, 2190-91, 2164-2167 (1862). After ratification, Congress reinforced these same conclusions when debating enforcement of Section Three. 41 Cong Globe 2d Session, 5445-46 (1870). The Congress that had just drafted Section Three believed that someone committed "insurrection" or "rebellion" if he led uniformed troops in battle against the United States, but not if he or she merely voted to support secession with violent force, recruited for the Confederacy, provided wartime aid, or held offices in the rebel government. The drafters chose words that encompassed at least the main actors in that act of treason, but no more. They were not trying to legislate with an eye toward political riots. In the aftermath of the Civil War, these were imminently important distinctions.

One year after the Confiscation Act became law, Chief Justice Chase held that the Act prohibits only conduct that "amount[s] to treason within the meaning of the Constitution," not any

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lesser offense. *United States v Greathouse*, 26 F Cas 18, 21 (CCND Cal 1863). Not just any form of treason would do: the Act only covered treason that "consist[ed] in engaging in or assisting a rebellion or insurrection." *Id.* Writing in the same case, a second judge confirmed and clarified that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.* at 25.

Dictionaries of the time confirm this understanding. John Bouvier's 1868 legal dictionary defined "insurrection" as a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "taking up arms traitorously against the government." *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, GW Childs, 12th ed, rev and enl 1868).

So "insurrection," as understood at the time of the passage of the Fourteenth Amendment, meant the taking up of arms and waging war upon the United States. At the time of Section Three's enactment, the United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. As shown by the omission of the word "incitement" in Section Three, Congress did not intend that provision to encompass those who merely encouraged an insurrection, but instead limited its breadth to those who actively participated in one.

Plaintiff's entire case is based upon President Trump's alleged nexus to an "insurrection," but Plaintiff is short on any facts to show that the January 6th riots constituted one. *See Greathouse*, 26 F Cas at 21 and 25. Not one of the 1,000+ people charged in connection with the riot has so far even been charged—much less convicted—under 18 USC § 2383. *See United States v. Griffith*, 2023 WL 2043223, *6 n. 5 (D DC, Feb 16, 2023) (finding that "no defendant has been charged

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with [18 USC § 2383]); Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack*, New York Times (Aug 1, 2023).

Further, the Senate found President Trump not guilty of impeachment charges of insurrection brought by the 117th Congress. *See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H 24, 117th Cong (2021).[17] No court in the United States has found President Trump guilty under 18 USC § 2383. Not a single prosecutor has even filed an indictment against President Trump for an alleged rebellion or insurrection.

B. Mere words do not constitute "engaging" in insurrection.

Even so, Plaintiff fails to establish that President Trump "engaged" in insurrection. Plaintiff's core allegations fall well short. As explained above, the framers of the Fourteenth Amendment made a deliberate choice that Section Three should cover only actual "engage[ment] in" insurrection or rebellion (or assisting a foreign power), not advocating rebellion or insurrection. Mere words, unaccompanied by actions or legal effect, cannot meet that standard. That is especially the case here because President Trump's words and speeches cannot qualify as incitement under established First Amendment principles. *See Brandenburg v Ohio*, 395 US 444 (1969).

The same representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit antebellum advocacy for a future rebellion was not "engaging in insurrection" or providing "aid or comfort to the enem[y]." In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether Section Three disqualified a Representative-elect from Kentucky when, before the Civil War began, he had voted in the Kentucky legislature in favor of a resolution to "resist [any] invasion of the soil of the South at all

[17] The Senate's not guilty vote can be found at https://www.senate.gov/legislative /LIS/roll_call_votes/vote1171/vote_117_1_00059.htm (last visited on October 6, 2023).

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hazards." 41 Cong Globe, 2d Session, 5443 (1870). The House found that this was not disqualifying. *Id.* at 5447. Similarly, in 1870 the House also considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and stated in debate that Virginia should "if necessary, fight," but who after Virginia's actual secession "had been an outspoken Union man." *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907). The House found that this did not disqualify him under Section Three. *Id.* at 477-78. By contrast, the House *did* disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina." *Id.* at 481, 486. It is also important to note that it was Congress who made all of these determinations, not a state court. Plaintiff's allegations fall well-short of how Congress has understood and applied Section Three in practice.

C. Not only does "inciting" fall well short of "engaging," but Plaintiff's allegations also fall short of "inciting."

"[T]he free discussion of governmental affairs of course includes discussions of candidates, structures and forms of government, the manner in which government is operated, and all such matters relating to political processes." *Mills v Alabama*, 384 US 214, 218-19 (1966). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v San Francisco City Democratic Cent Comm*, 489 US 214, 223 (1989). There is no exception to this rule for allegedly disloyal speech. The Supreme Court considered the Georgia legislature's refusal to seat an elected candidate, on the ground that his strident criticisms of the Vietnam War "gave aid and comfort to the enemies of the United States" and were inconsistent with an oath to support the Constitution. *Bond v Floyd,* 385 US 116, 118-23

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(1966). The Court held that the candidate's speech was protected by the First Amendment and could not be grounds for disqualification. *Id.* at 133-37.

Thus, "dissenting political speech" remains "within the First Amendment's core," even where it is alleged to be "mere advocacy of illegal acts" or "advocacy of force or lawbreaking." *Counterman v Colorado*, 143 S Ct 2106, 2115, 2118 (2023). The Constitution values and protects such speech unless it qualifies as "advocacy of the use of force or law violation" that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 US at 447.

Under the *Brandenburg* test, Trump's comments did not come close to "incitement," let alone "engagement" in an insurrection. As the Sixth Circuit recognized in analyzing President Trump's public speech, "the fact that audience members reacted by using force does not transform Trump's protected speech into unprotected speech. Thus, where "Trump's speech . . . did not include a single word encouraging violence . . . the fact that audience members reacted by using force does not transform" it into incitement. *Nwanguma v Trump*, 903 F3d 604, 610 (6th Cir 2018). And as a D.C. Circuit judge remarked at argument last year, "you just print out the speech . . . and read the words . . . it doesn't look like it would satisfy the [*Brandenburg*] standard." Tr of Argument at 64:5-7 (Katsas, J.), *Blassingame v Trump*, No 22-5069 (DC Cir, Dec 7, 2022). After all, the Supreme Court, for instance, has concluded that a call to "take the f[***]ing streets later" does not meet the standard. *Hess v Indiana*, 414 US 105, 107 (1973); *accord Nwanguma*, 903 F3d at 611-12 (responding to a political protestor by repeatedly telling a crowd to "get 'em out of here" but "don't hurt 'em" was not incitement).

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President Trump's explicit instructions called for protesting "peacefully and patriotically,"[18] to "support our Capitol Police and law enforcement,"[19] to "[s]tay peaceful,"[20] and to "remain peaceful."[21] President Trump's calls for peace and patriotism notwithstanding, the courts have made clear that angry rhetoric falls far short of an implicit call for lawbreaking. None of President Trump's speeches that took place before January 6 can possibly meet *Brandenberg's* imminence requirement. It is utterly impossible to regard statements like "stand back and standby" as advocacy of immediate illegal conduct. "[A] state cannot constitutionally sanction advocacy of illegal action at some indefinite future time." *McCoy v Stewart*, 282 F3d 626, 631 (9th Cir 2002) (cleaned up).

Finally, and again as explained above, none of Plaintiff's allegations plausibly suggest that President Trump intended any acts of violence. Both his language and his actions show the contrary. He intended to inspire a protest to contest an election outcome. That is not insurrectionary or unlawful in any way. In fact, although the President expressly called for a walk down Pennsylvania Avenue "after" his speech, the Complaint affirmatively alleges that the attack on the Capitol began before the speech ended—indeed, that television broadcasts had cut away from the President's speech to cover the violence.

Nor do President Trump's comments during a debate months before January 6. On September 29, 2020, an hour into President Trump's debate with then-candidate Biden, the following exchange occurred:

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[18] Donald Trump Speech "Save America" Rally Transcript January 6, REV (Jan. 6, 2021) available at https://bit.ly/3GheZid; Brian Naylor, Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial, NPR (Feb. 10, 2021), https://n.pr/3G1K2ON.
[19] https://twitter.com/realDonaldTrump/status/1346904110969315332.
[20] *Id.*
[21] https://twitter.com/realDonaldTrump/status/1346912780700577792.

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> [Moderator Chris] WALLACE [to President Trump]: You have repeatedly criticized the Vice-President for not specifically calling out Antifa and other left-wing extremist groups. But are you willing, to-night, to condemn white supremacists and militia groups and to say that they need to stand down and not add to the violence in a number of these cities as we saw in Kenosha, and as we've seen in Port-land.
> TRUMP: Sure, I'm willing to do that.
> WALLACE: Are you prepared specifically to do it. Well go ahead, sir.
> TRUMP: I would say almost everything I see is from the left-wing not from the right wing.
> WALLACE: So what are you, what are you saying?
> TRUMP: I'm willing to do anything. I want to see peace.
> WALLACE: Well, do it, sir.
> [Vice President] BIDEN: Say it. Do it. Say it.
> TRUMP: You want to call them? What do you want to call them? Give me a name, give me a name, go ahead who would you like me to condemn.
> WALLACE: White supremacists and racists.
> BIDEN: Proud Boys.
> WALLACE: White supremacists and white militias.
> BIDEN: Proud Boys.
> TRUMP: Proud Boys, stand back and stand by. But I'll tell you what, I'll tell you what: somebody's got to do something about Antifa and the left because this is not a right wing problem this is a left-wing. This is a left-wing problem.[22]

As this context reveals, the "stand back and stand by" remark unambiguously referred to then-recent unrest in cities like Kenosha, Wisconsin and Portland, Oregon. Immediately before that remark, President Trump expressly agreed that his supporters "should not add to the violence in . . . these cities," and emphasized that he would "do anything" in order "to see peace." And immediately after the remark, President Trump reiterated that the violence was a "problem." His "stand back" statement emphasized that his supporters were not the ones who should "do

[22] *September 29, 2020 Debate Transcript*, The Commission on Presidential Debates, *available at* https://www.debates.org/voter-education/debate-transcripts/sep-tember-29-2020-debate-transcript/.

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something" about the problem. This cannot plausibly be interpreted as an endorsement of those groups, let alone of their future actions in response to an election that had not yet happened.

Were that not enough, other facts omitted by Plaintiff conclusively demonstrate that President Trump's "stand back and stand by" remark was condemning and not supporting illegal activity. The very next day, September 30, President Trump emphasized to a reporter that although he was not familiar with the Proud Boys, "***they have to stand down and let law enforcement do their work*** . . . . [W]hoever they are, they have to stand down. Let law enforcement do their work."[23] When asked again, he reiterated, "Look, law enforcement will do their work. They're gonna stand down. ***They have to stand down. Everybody***. . . . Whatever group you're talking about."[24]

Plaintiff's attempt to cast an off-the-cuff remark made in the second-half of a two-hour debate well before the General Election and the events of January 6th as a rallying cry is beyond absurd. As the full context clearly shows, the alleged recipient of the remarks was selected not by the then-Commander-in-Chief, but rather by candidate-Biden and moderator Chris Wallace. And the content itself was chosen not by the President, but—again—by Biden and Wallace.

D. "Aid or comfort to the Enem[y]" under Section Three requires assistance to a foreign power.

[23] *See* Video recording of President Trump's September 30, 2020, remarks available at https://youtu.be/Q8oyhvcOHk0?si=Hp6D0iJytKyUMdnM; *see also* September 30, 2020, Remarks by President Trump Before Marine One Departure (emphasis added), *available at* https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-093020/.

[24] *Id.*

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Section Three does not incorporate the Confiscation Act's criminalization of giving "aid or comfort" to a "rebellion or insurrection." *See supra* at 11-12. Instead, Section Three harkens back to the Treason Clause, which defines treason as "adhering to [the United States'] Enemies, giving them Aid and Comfort." US Const, Art III, § 3, cl.1.

The "enemies" prong of the Treason Clause almost exactly replicated a British statute defining treason. *See* 4 Blackstone, Commentaries on the Laws of England 82 (1769). But "enemies" referred only to "the subjects of foreign powers with whom we are at open war," not to "fellow subjects." *Id.* at 82-83. Blackstone was emphatic that "an enemy" was "always the subject of some foreign prince, and one who owes no allegiance to the crown of England." *Id.*

This was also the American view. Four years after the Constitution was ratified, Justice Wilson explained that "enemies" are "the citizens or subjects of foreign princes or states, with whom the United States are at open war." 2 *Collected Works of James Wilson* 1355 (1791). The 1910 version of *Black's Law Dictionary* agrees, defining "enemy" as "either the nation which is at war with another, or a citizen or subject of such nation." *Enemy*, Black's Law Dictionary (2d. Ed. 1910). At the outset of the Civil War, the Supreme Court recognized that the Confederate states should be "treated as enemies," under a similar definition of that word, because of their "claim[] to be acknowledged by the world as a sovereign state," and because the Confederacy claimed to be a *de facto* a foreign power that had "made war on" the United States. *The Prize Cases*, 67 US 635, 673-74 (1862). Section Three, enacted a few years later in response to the Civil War, referred to support for the Confederacy as "aid and comfort to . . . enemies," and treated "enemies" as foreign powers in a state of war with the United States.

On top of that, "aid and comfort to the enem[y]" involves only assisting a foreign government (or its citizens or subjects) in making war against the United States. Plaintiff does not,

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and cannot, allege that the January 6 attack involved any foreign power, or that the attackers constituted any sort of *de facto* foreign government.

CONCLUSION

For the reasons stated above, Proposed-Intervenor, Donald J. Trump, Inc., respectfully requests that Plaintiff's Complaint be dismissed with prejudice.

Respectfully submitted,

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman, Attorney for Proposed-Intervenor, Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
Stephen P. Kallman, Attorney for Proposed-Intervenor, Donald J. Trump

DHILLON LAW GROUP, INC.

DATED: October 16, 2023.

/s/ Michael Columbo
Michael Columbo, Attorney for Proposed-Intervenor, Donald J. Trump

DATED: October 16, 2023.

/s/ Mark P. Meuser
Mark P. Meuser, Attorney for Proposed-Intervenor, Donald J. Trump

DATED: October 16, 2023.

/s/ Zachary Kramer
Zachary Kramer, Attorney for Proposed-Intervenor, Donald J. Trump

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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

ROBERT DAVIS

Plaintiffs,

-vs-

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

Defendant,

-and-

DONALD J. TRUMP,

Proposed-Intervenor.
/

PROPOSED-INTERVENOR'S MOTION FOR SUMMARY DISPOSITION, AND PROOF OF SERVICE

FILE NO.: 23-000128-MB

HON. JAMES ROBERT REDFORD

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PROPOSED-INTERVENOR'S MOTION FOR SUMMARY DISPOSITION

NOW COMES the above-named Proposed-Intervenor, Donald J. Trump, by and through his legal counsel, and moves this Honorable Court for Summary Disposition pursuant to MCR 2.116(C)(4), 2.116(C)(8), and MCR 2.116(C)(10), for all the reasons as stated in the attached Brief in Support which are incorporated herein in full. Proposed-Intervenor sought concurrence for his motion pursuant to Local Rule 2.119(A)(2) on October 16, 2023. Concurrence was not received, thus necessitating this motion.

WHEREFORE, Proposed-Intervenor respectfully requests that this Honorable Court grant his Motion for Summary Disposition, dismiss Plaintiffs' Complaint in its entirety with prejudice, find Plaintiffs' Complaint to be frivolous, devoid of merit, and filed for the purpose of harassment, and grant all other relief as the Court deems just and appropriate.

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
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Attorney for Proposed-Intervenor,
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DHILLON LAW GROUP, INC.

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

DATED: October 16, 2023.

/s/ Mark P. Meuser
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Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Zachary Kramer
Zachary Kramer
Attorney for Proposed-Intervenor,
Donald J. Trump

PROOF OF SERVICE

David A. Kallman, hereby states and affirms that on the 16th day of October, 2023, he did serve a copy of Proposed-Intervenor's Motion for Summary Disposition, with Brief in Support, upon Plaintiffs' and Defendant's counsel listed above via MiFile.

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

ROBERT DAVIS

Plaintiff,

-vs-

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

Defendant,

-and-

DONALD J. TRUMP,

Proposed-Intervenor.
/

PROPOSED-INTERVENOR'S MOTION TO INTERVENE, BRIEF IN SUPPORT, AND PROOF OF SERVICE

FILE NO.: 23-000128-MB

HON. JAMES ROBERT REDFORD

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PROPOSED-INTERVENOR'S MOTION TO INTERVENE

NOW COMES the Proposed-Intervenor, Donald J. Trump ("President Trump"), by his undersigned legal counsel, bringing this Motion to Intervene pursuant to MCR 2.209, and in support of the motion, states the following:

1. Plaintiff is a resident and registered voter in Michigan intending to vote in the 2024 presidential primary and general elections.
2. Defendant is Jocelyn Benson, named in her official capacity as Secretary of State for her role in administering elections in the State of Michigan which includes causing the name of a presidential candidate to be printed on election ballots.
3. Proposed-Intervenor, President Trump, seeks to uphold his constitutional right to have his name placed on the Michigan presidential primary and general election ballots for the 2024 election.
4. In his complaint, Plaintiff seeks declaratory and mandamus relief that President Trump is disqualified, by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot and has no legal right to appear on the ballot. Plaintiff also seeks permanent injunctive relief preventing the Secretary [of State] from placing Trump on 2024 presidential primary or general election ballots.
5. By this motion, the Proposed-Intervenor requests he be allowed to intervene in this action as Intervening Party so that he may be afforded reasonable opportunity to present his arguments in opposition of Plaintiff's claims in order to protect his interests in this matter, and that he be added as an Intervening Party pursuant to MCR 2.209.

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6. To ensure that he has a sufficient opportunity for meaningful and helpful participation, the Proposed-Intervenor also requests that he be granted an opportunity to present oral arguments before your Honor.
7. Proposed-Intervenor sought concurrence for his motion pursuant to Local Rule 2.119(A)(2) on October 16, 2023. Mr. Davis and Defendant did not concur, thus necessitating this motion.
8. Donald J. Trump hereby requests that his Motion to Intervene be granted for all the reasons as stated in the attached Brief in Support which are incorporated herein in full.

WHEREFORE, Proposed-Intervenor respectfully requests that this Honorable Court grant his Motion to Intervene, and grant all other relief as the Court deems just and appropriate.

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
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Donald J. Trump

DHILLON LAW GROUP, INC.

DATED: October 16, 2023.

/s/ Michael Columbo
Michael Columbo
Attorney for Proposed-Intervenor,
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DATED: October 16, 2023.

/s/ Mark P. Meuser
Mark P. Meuser
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Donald J. Trump

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DATED: October 16, 2023.

/s/ Zachary Kramer
Zachary Kramer
Attorney for Proposed-Intervenor,
Donald J. Trump

BRIEF IN SUPPORT

A. Jurisdiction.

While the Court of Claims is a Court of limited jurisdiction pursuant to MCL 600.6419, Donald J. Trump ("President Trump") must be permitted to intervene in this matter to protect his interests and constitutional rights as outlined below and in the companion Motion for Summary Disposition (which is fully incorporated herein). Permitting this matter to proceed without allowing President Trump to be a party could deprive him of the typical rights of a party, such as the ability to file motions or an appeal.

Donald J. Trump's name is mentioned throughout the complaint including in the prayer for relief. This entire matter is about President Trump, his alleged statements, and his alleged political activities. To adjudicate the effect of Donald J. Trump's speech and his ability to be on the ballot without President Trump being a party would violate his constitutional rights, including, but not limited to, his First Amendment free speech rights[1] and his Due Process rights. US Const, am I and XIV. These constitutional interests would override any statutory limitations.

The Michigan Supreme Court held that "due process requires-at a minimum-that a person whose interests might be affected by government action be given notice and a meaningful opportunity to be heard before the government acts. *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). "Additional[] requirements may be necessary depending on three considerations: the private interest that will be affected, the risk of erroneous deprivation of such

[1] For further analysis of Donald J. Trump's First Amendment rights, see Proposed-Intervenor's companion Motion for Summary Disposition, which is fully incorporated herein.

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interest through the procedures used, and the probable value of additional or substitute procedural safeguards." *Id.*

In order to preserve President Trump's rights and objections for a possible appeal or federal court action, he is requesting to intervene in this matter.

B. President Trump Is Entitled to Intervene as of Right.

The Prospective Intervening Party has a right to intervene in this action pursuant to MCR 2.209(A)(3), which permits a party's right to timely intervene as follows:

> "when the applicant claims an interest relating to the … transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Put simply, MCR 2.209(A)(3) "allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties." *Estes v Titus*, 481 Mich 573, 583; 751 NW2d 493 (2008). "[A] person may intervene by right in an action on timely application when that person asserts an interest in the subject of the action 'and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *Kuhlgert v Mich State Univ*, 328 Mich App 357, 378; 937 NW2d 716 (2019). The "rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612 (2009) (citing *Precision Pipe & Supply Inc v Meram Constr Inc*, 195 Mich App 153, 156 (1992)).

1. President Trump's motion to intervene is timely.

A motion is timely if it is "asserted within a reasonable time," an inherently contextual standard. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976); see also *Cameron v EMW*

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Women's Surgical Ctr, PSC, 142 S Ct 1002, 1012 (2022) (timeliness under federal intervention rules "is to be determined from all the circumstances").[2] Although Michigan courts have not enumerated the specific factors that should be analyzed in determining timeliness, courts have generally found that "a right to intervene should be asserted within a reasonable time." *D'Agostini*, 396 Mich at 188. First, this motion is timely. Plaintiff sued on September 15, 2023 and this motion is being filed before any issues have been decided or any procedural Rubicons have been crossed. There has been very little activity in the case, and Trump's intervention will not prejudice any party.

President Trump's motion to intervene in this case is timely. This motion is being made in a matter of days since becoming aware of this litigation. Therefore, President Trump's motion is timely and will not impact or delay future proceedings.

2. President Trump has a sufficient interest affected by the disposition of this case.

President Trump has a sufficient interest in this case, and "the disposition of the action may as a practical matter impair or impede [his] ability to protect [his] interest." *Precision Pipe & Supply*, 195 Mich App at 156 quoting MCR 2.209(A)(3).

President Trump is the frontrunner for the Republican nomination and has an overwhelming interest in defending constitutional challenges to his eligibility to appear on election ballots. And no party has a greater interest in ensuring Secretary Benson places his name on the ballots in Michigan than President Trump. Donald J. Trump has also exercised his First Amendment rights to freedom of association and speech and Fourteenth Amendment Due Process rights under the United States Constitution to campaign for the right to be on the primary and

[2] "Because of the similarity of the state and Federal provisions," the Michigan Supreme Court "deem[s] it proper to look to the Federal courts for guidance" in applying the intervention rules. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976).

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general election ballots in 2024. He has a strong interest in securing his access to those ballots and in clarifying the state of the law on Section Three of the Fourteenth Amendment and whether it is constitutional for a Secretary of State to interpret the same and cause for a candidate to remain off the election ballots.

At the Constitutional Convention of 1787, James Madison observed that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt, and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect."[3]

States have "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v Celebrezze*, 460 US 780, 795 (1983). Plaintiff's request that this Court declare that Donald J. Trump is disqualified from holding the office of President of the United States and enjoin the Secretary of State from including Donald J. Trump on the ballot in Michigan. Plaintiff's request will have an effect on voters beyond Michigan's boundaries. Plaintiff's request is not targeted at "protect[ing] the integrity and reliability of the electoral process itself." *Id.* at 788, n 9. It does not ensure that "some sort of order, rather than chaos" accompanies the election. *Cook v Gralike*, 531 US 510, 524 (2001). And it does not require some minimum level of support before a presidential candidate can be put on the ballot. *Anderson*, 460 US at 788, n 9. Plaintiff's requested relief is therefore improper, and President Trump has a sufficient interest in this matter to intervene.

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[3] *The Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787*, as reported by James Madison, Revised and arranged by Jonathan Elliot, (1876) Vol. V., p. 404

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3. President Trump's interests are not represented by any existing party.

There is no other party in this matter who can adequately represent Donald J. Trump's interests because the sole defendant is a state official who does not share his personal interest in ensuring he gains lawful access to the primary and general election ballots in 2024. For the sake of completeness, Plaintiff will not adequately represent President Trump's interests. "The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008) (emphasis added and citations omitted).

A party seeking intervention isn't required to definitively prove that its interests are inadequately represented. Instead, "the concern of inadequate representation of interests need only exist." *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001). "[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties may be inadequate." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969); *Kamp v Cannon Twp*, 115 Mich App 726, 731-732; 321 NW2d 690 (1982) (citations omitted) ("The proposed intervenors satisfied the second requirement by establishing that their representation is or may be inadequate.") The possibly-inadequate-representation rule "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini v City of Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976), quoting *Trbovich v United Mine Workers of Am*, 404 US 528, 538 n 10; 92 S Ct 603; 30 L Ed 2d 686 (1972).

The interests of the Secretary of State are clearly different from that of President Trump.

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Here, President Trump's interests are in the maintenance of his own rights and that of the American people who wish to see him on the ballot for the upcoming elections. In the wake of political persecution through various prosecutions by multiple state actors, Secretary Benson, an active member of the opposing major political party, has publicly weighed in with her views on Trump and her fear of a repeat of the 2020 election. In fact, her many public comments demonstrate her extreme and incurable bias against President Trump. For instance,

- During an interview with Cynthia McFadden of NBC News, Jocelyn Benson said, "Even **the president himself** had **called on me to be arrested** and **tried for treason, potentially executed**."[4]

- During an interview with Erik Meers, founder of uPolitics, Jocelyn Benson said:

> "There's kind of a good side and a bad side to the impact of having a **former president spread lies about not just our election administration and procedures, but those who administer them like myself**. […] All of that said, of course, **his attacks** and those of his most ardent followers, has created this strain on our work. Whether it's actual violence, or threats of violence, or harassment and requests for duplicative meaningless information, a lot of the misinformation has metastasized […] and **until there's real accountability for those who are spreading these lies, from the former president** on down, we're going to continue to see these tactics…"[5]

- In response to Oliver Darcy's January 25, 2023 article, *Meta says it wont's punish Trump for attacking the 2020 election results. But the 2024 vote is a different story*, Jocelyn Benson tweeted, "@Meta: **Trump's baseless, false attacks on the 2020 election** still generate **harassment & violent threats aimed at election officials** across the country, on both sides of the aisle. Your decision will lead to more harm aimed at us & our families."[6]

- In a tweet referring to Donald J. Trump, Jocelyn Benson said, "Pledging to pardon individuals convicted of using violence, force and threats to overturn the results of a legitimate presidential election shows **you have no respect for the rule of law** or the will

[4] *Transcript: The ReidOut*, NBC NEWS (May 19, 2022, 7:00 PM EST), https://www.msnbc.com/transcripts/reidout/transcript-reidout-5-19-22-n1295603
[5] Erik Meers, *Mich. Sec. of State Jocelyn Benson Pt. 2: Fighting Trump's Election Lies*, UPOLITICS (Oct. 25, 2022), https://www.youtube.com/watch?v=dk07z4YwIBo
[6] Jocelyn Benson (@JocelynBenson), Twitter (Jan. 26, 2023, 7:44 AM), https://twitter.com/JocelynBenson/status/1618590577217441795

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of the people."[7]

- In linking to a Washington Post article about Trump and his advisors titled *Justice Dept. asking about 2020 fraud claims as well as fake electors*, Jocelyn Benson tweeted, "I know for years how many have rightfully demanded accountability for **those who abused and misused the legal system** to overturn a legitimate presidential election. And while the moral arc of the universe may be long … it bends towards justice."[8]

- During an interview with MSNBC's Nicolle Wallace, Jocelyn Benson had this exchange:

> WALLACE: "Certainly the evidence developed by the Select Committee leaves nothing to the imagination—**this was a Trump-directed coup** […] The legal architecture was fleshed out by John Eastman. And t**hey knew it was both illegal and it violated the Electoral Count Act and unconstitutional** [...] Do you, from where you're sitting, have any doubt that the evidence, if Jack Smith wishes to pursue it, **will take this plot all the way to Trump's doorstep**?"
>
> BENSON: "I think the evidence certainly shows **a direct line between the former president**, the phone calls, the pressure that he himself we know exerted on everyone from lawmakers in the State of Michigan, to local county certification boards. So, the line is there. Of course, the public speeches that you just showed earlier as well demonstrate that. So, **I think his involvement is clear**, and every drop of new evidence that emerges in the public arena only underscores that."[9]

- While interviewed by Victor Shi and Jill Wine-Banks on the "iGen Politics" podcast, Jocelyn Benson had the following exchange:

> SHI: "We come here […] less than a week after your State's Attorney General, Dana Wessel, issue indictments against 16 fake electors from 2020. Tell us more about what they're charged with and just how significant this is for our accountability nationwide."
>
> BENSON: "Yeah it's really a big deal […] These felony charges

[7] Jocelyn Benson (@JocelynBenson), Twitter (May 25, 2023, 7:09 PM), https://twitter.com/JocelynBenson/status/1661872120521998337
[8] Jocelyn Benson (@JocelynBenson), Twitter (Jul. 6, 2023, 11:26 AM), https://twitter.com/JocelynBenson/status/1676975791517646849
[9] *Deadline: White House*, MSNBC (Jul. 13, 2023, 4:10 PM EST), https://www.rawstory.com/direct-line-evidence-trump/

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that were filed against 16 individuals who allegedly, knowingly sought to defraud the government, the state and federal government, through submitting fake electoral vote certificates, with the goal of undoing the actual legitimate elector certificates, and having their fake elector certificates submitted to Congress on, what was January 6th, 2021. So, it was part of really, a national coordinated effort, to undo the will of the people simply because they, and others in their political party, as well as the **former president** were unhappy with the outcome of the election. So, as we now begin to enter the 2024 cycle it's really important that we see accountability and justice **for those who were part of this nationally coordinated effort** and this actionable plan to subvert the will of the people in the last presidential election because **if we don't see these types of charges brought and indictments** and accountability and in the legal process **then we have to prepare especially those of us as election administrators for a repeat of these actions again**."

WINE-BANKS: "How high up do you think the fraud goes? […] Do you know of any evidence that would link it […] directly to […] **the former president**?"

BENSON: "Yeah, I mean there have been some publicly disclosed pieces of evidence, voicemails from the **Trump** campaign to state officials and the like, we know there were meetings, we know Rudy Giuliani himself was in the state of Michigan a few days before the electors officially met, and testified before a sham legislative hearing about-with false claims of election fraud […] I have a lot of confidence in the investigators in our state to get to the bottom of, and make all the connections, and I'm grateful that folks at the federal level are looking at this too because they could make those similar connections. But I do think to me, **it's important to seek full accountability**, but not just put this on the shoulders of one person, the **former president**. We know certainly, **he was a central piece** to a lot of different things, and **hence the indictments** that you see pre and post this moment, percolating. But that said, there were a number of other it would seem co-conspirators at every level, and I think when we talk about accountability, we have to see full accountability for everyone who was involved, in **this really unprecedented, un-American scheme to overturn a presidential election, because** a small group of people, including **the former president**, were unhappy with the results."

WINE-BANKS: "**The big lie continues repeatedly having not just Trump but all of his acolytes** saying the election was stolen […] It also seems to me that there was a **targeted effort in Michigan in** certain counties and that those counties were **counties with heavy**

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> **minority populations**. Is that a correct interpretation of where the targeting was?"
>
> BENSON: "Yeah. Sure […] It was the urban center where communities of color were concentrated where you saw initially the attempts to call out fraud, you know, falsely were targeted. Again, **when you don't have any evidence of fraud then […] go towards the minority communities and start using racism to sow seeds of doubt**. Which was clearly the strategy and then they began picking apart other things."[10]

- In an X (formerly Twitter) post after Trump and his allies were indicted for the events on January 6, 2020, Jocelyn Benson said, "Feeling vindicated. Grateful for the rule of law and those who enforce it." [11]

- In an X post on August 3, 2023, Jocelyn Benson said, "**Trump** allegedly led a national scheme to overturn the results of a legitimate presidential election. But his plot would only succeed with willing co-conspirators in the states. That's why the state charges against those in Michigan who signed fake electoral votes are so critical."[12]

- Again, on August, 3, 2023, Jocelyn Benson went on X to post, "If 'I'm being arrested for you' is Trump-speak for 'I'm being arrested for trying to nullify millions of your votes' then yeah, I guess that tracks."[13]

It is clear there is a real possibility Secretary Benson will undermine President Trump's interests in this action. Her inherent views and posture, and desire to avoid a feared repeat of the inconveniences she had to endure because of challenges made in the 2020 election will certainly keep her from advocating for President Trump's interests, namely that he appear on the ballots. Her mind is already made up.

Based on the above, President Trump more than satisfies this "minimal" burden and he

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[10] Victor Shi and Jill Wine-Banks, *Defending Democracy with Jocelyn Benson*, IGEN POLITICS (Jul. 25, 2023), https://www.youtube.com/watch?v=EYvbK51VMmk

[11] Jocelyn Benson (@JocelynBenson), Twitter (Aug. 2, 2023, 8:49 AM), https://twitter.com/JocelynBenson/status/1686720760570605569

[12] Jocelyn Benson (@JocelynBenson), Twitter (Aug.3, 2023, 9:57 AM), https://twitter.com/JocelynBenson/status/1687100474552688642

[13] Jocelyn Benson (@JocelynBenson), Twitter (Aug.3, 2023, 4:11 PM), https://twitter.com/JocelynBenson/status/1687194481773125632

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"certainly has an interest in defending" against lawsuits seeking to stop him from appearing on the primary and general election ballots in Michigan. Therefore, President Trump should not be forced to trust and hope that Defendant will adequately represent his interests.

C. President Trump Also Meets the Standard for Permissive Intervention.

In addition to being entitled to intervene as of right, President Trump also meets the standard for permissive intervention. Such intervention is appropriate when: (1) the application is timely; (2) the applicant's claim or defense has a common question of law or fact with the main action; and (3) there will be no prejudice or delay to the original parties. See *Dean v Dep't of Corrections*, 208 Mich App 144, 150 (1994) citing MCR 2.209(B). These elements have been satisfied.

First, President Trump's motion is timely as explained above. Second, President Trump's claims and defenses surround the common question of law related to his First Amendment rights to freedom of association and speech and Fourteenth Amendment Due Process rights to campaign to be on the Michigan primary and general election ballots in 2024—the very rights being threatened by the relief sought by Plaintiff. Finally, President Trump's intervention will not result in any prejudice or delay. President Trump moved to intervene promptly after Plaintiff filed his complaint. As with intervention as of right, President Trump readily meets the requirements for permissive intervention.

CONCLUSION

Donald J. Trump's name is mentioned throughout Plaintiff's complaint and in Plaintiff's prayer for relief. Nonetheless, Plaintiff failed to name him as a Defendant or as an interested party to the litigation. If this Court were to grant Plaintiff's relief, it would impede President Trump's ability to protect his interest. For all the reasons stated above, Proposed-Intervenor, Donald J. Trump, respectfully requests that his Motion to Intervene be granted.

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Respectfully submitted,

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
Stephen P. Kallman
Attorney for Proposed-Intervenor,
Donald J. Trump

DHILLON LAW GROUP, INC.

DATED: October 16, 2023.

/s/ Michael Columbo
Michael Columbo
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Mark P. Meuser
Mark P. Meuser
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Zachary Kramer
Zachary Kramer
Attorney for Proposed-Intervenor,
Donald J. Trump

PROOF OF SERVICE

David A. Kallman, hereby states and affirms that on the 16th day of October, 2023, he did serve a copy of Proposed-Intervenor's Motion to Intervene, with Brief in Support, upon Plaintiff's and Defendant's counsel listed above via MiFile.

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/19/2023 5:36:29 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: LaBrant & Davis orders
Attachments: 20231018 2nd Expedited Sch Ord.pdf; 20231018 2nd Expedited Sch Ord.pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

Case No. 23-000128-MB

JOCELYN BENSON, in her official capacity, as the duly elected Secretary of State

Hon. James Robert Redford

Defendant.
_____/

SECOND

EXPEDITED SCHEDULING ORDER

In this matter, 23-000128-MB, former President Donald J. Trump has filed a motion to intervene under MCR 2.209(A)(3) and (B). On October 17, 2023, plaintiff filed a response in opposition to the proposed intervenor's motion to intervene. Plaintiff has also filed an emergency motion to strike the proposed motion to intervene, to strike proposed intervenor's concurrent motion and brief for summary disposition, and for costs pursuant to MCR 2.625, on the ground that the Court does not have jurisdiction over intervenor as a private individual.

In keeping with the Court's decision to expedite the hearing schedule in this case, any objection or response to plaintiff's response and motion by proposed intervenor Donald Trump is due by 4:00 p.m. Monday, October 23, 2023. The Court also notes that it has held in its expedited scheduling order of October 9, 2023 that Donald J. Trump and/or his presidential campaign is invited to seek amicus curiae involvement in both this matter and in *LaBrandt, et al. v Jocelyn*

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Benson, 23-000137-MZ, and if he does so, then his brief is due on or before 5:00 p.m. on October 23, 2023.

In addition, any other responses by the parties to the motion to intervene or to plaintiff's October 17, 2023 motions are due on or before 4:00 p.m. on October 23, 2023.

All parties are directed until further order of the Court to serve counsel for proposed intervenors any pleadings that have been filed to date that have not yet been filed and any further pleadings filed.

The parties are advised that should oral argument be ordered in this matter it will likely take place Monday, November 6, 2023, commencing at 9:00 a.m. and being completed by 12:00 p.m., in the City of Grand Rapids, in the Michigan Court of Appeals Courtroom located in the State of Michigan Building, 350 Ottawa, N.W., Grand Rapids, Michigan 49503.

Further scheduling orders will be issued as the Court determines they are needed and appropriate.

IT IS SO ORDERED.

Date: October 18th, 2023

Hon. James Robert Redford
Judge, Court of Claims

Court of Claims
State of Michigan

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STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

Case No. 23-000137-MZ

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

Hon. James Robert Redford

Defendant.
_____/

SECOND

EXPEDITED SCHEDULING ORDER

In this matter, 23-000137-MZ, former President Donald J. Trump has filed a motion to intervene under MCR 2.209(A)(3) and (B).

In keeping with the Court's decision to expedite the hearing schedule in this case, any objection or response by the parties to the motion to intervene is due on or before 4:00 p.m. on October 23, 2023.

The Court also notes that it has held in its expedited scheduling order of October 9, 2023, that Donald J. Trump and/or his presidential campaign is invited to seek amicus curiae involvement in both this matter and in *Davis v Jocelyn Benson*, 23-000128-MB, and if he does so, then his brief is due on or before 5:00 p.m. on October 23, 2023.

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All parties are directed until further order of the Court to serve counsel for proposed intervenors any pleadings that have been filed to date that have not yet been filed and any further pleadings filed.

The parties are advised that should oral argument be ordered in this matter it will likely take place Monday, November 6, 2023, commencing at 1:00 p.m. and being completed by 4:00 p.m., in the City of Grand Rapids, in the Michigan Court of Appeals Courtroom located in the State of Michigan Building, 350 Ottawa, N.W., Grand Rapids, Michigan 49503.

Further scheduling orders will be issued as the Court determines they are needed and appropriate.

IT IS SO ORDERED.

Date: October 18th, 2023

James Robert Redford
Judge, Court of Claims

Court of Claims
State of Michigan

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/17/2023 7:16:05 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: LaBrant filings from yesterday
Attachments: brief01 exhibits (1).pdf; brief01 memo of law LaBrant.pdf; Brief, MSD LaBrant, Trump, Final.pdf; Motion for Summary, LaBrant, Trump.pdf; Motion to Intervene, LaBrant, Trump.pdf

Heather S. Meingast, Division Chief
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EXHIBIT 1

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2023 Fourteenth Amendment Disqualification Cases

Active Cases

(As of 10/11/2023)

Alaska

Case	Description
Castro vs. Dahlstrom 23-cv-00011 U.S. District Court, District of Alaska	On September 29, 2023, John A. Castro, a Republican presidential candidate, filed a pro se civil action against Alaska Lieutenant Governor Nancy Dahlstrom and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Alaska according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Arizona

Case	Description
Castro v. Fontes 2:23-cv-01865 U.S. District Court, District of Arizona	On September 5, 2023, Castro filed a pro se civil action against Arizona Secretary of State Adrian Fontes and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Arizona according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro filed a TRO that the court converted to a preliminary injunction. A preliminary injunction hearing is scheduled for October 31, 2023.

California

Case	Description
Clark v. Weber 2:23-cv-07489 U.S. District Court, Central	On September 9, 2023, a Complaint for Declaratory and Injunctive Relief was filed on behalf of a California voter, identified as A.W. Clark, against California Secretary of State Shirley Weber. The complaint seeks declaratory relief that Donald J. Trump is "disqualified, prohibited, and barred from the office of president of the United States" and injunctive relief to bar Weber from placing Trump's name on any ballot in California

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District of California	under Section 3 of the Fourteenth Amendment of the U.S. Constitution. Yagman argues that Trump "engaged in insurrection and/or rebellion," citing his role in the Jan. 6, 2021 attack on the U.S. Capitol. Plaintiff filed a preliminary injunction motion on September 22, 2023. On October 2, 2023 the court issued an order to show cause as to why the complaint shouldn't be dismissed for lack of subject matter jurisdiction.
Castro v. Weber 2:23-cv-02172 U.S. District Court, Eastern District of California	On October 2, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Shirley Weber and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in California according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Colorado

Case	Description
Anderson v. Griswold District Court, City and County of Denver 2023CV32577 U.S. District Court, District of Colorado 1:23-cv-02291	On September 6, 2023, Colorado voters filed suit against Secretary of State Jena Griswold and Donald J. Trump, alleging that Trump's involvement in the Jan. 6, 2021 attack on the capitol qualifies as an insurrection and consequently disqualifies him as a candidate for the office of president under Section 3 of the Fourteenth Amendment. The petitioners further assert that C.R.S. § 1-4-1204(4), § 1-1-113(1), § 13-51-105, and C.R.C.P. 57(a) enjoin the Colorado Secretary of State from granting Trump access to the ballot for any election in the state. The petition was filed by Citizens for Responsibility and Ethics in Washington (CREW), a government ethics watchdog. The Colorado Republican Committee has intervened in the lawsuit. Trump removed the case to federal court, but the case was quickly remanded and is now in state court in Colorado. The parties are briefing several motions to dismiss and a five-day hearing is scheduled on October 30, 2023. The court denied President Trump's anti-SLAPP motion to dismiss.

Connecticut

Case	Description
Castro v. Thomas 3:23-cv-01238	On September 21, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Stephanie Thomas and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in

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U.S. District Court, District of Connecticut	Connecticut according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro also filed an Emergency Motion for Temporary Restraining Order and Expedited Motion for Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits.

Delaware

Case	Description
Castro v. Albence et al. 1:23-cv-01068 U.S. District Court, District of Delaware	On September 28, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against State Election Commissioner Anthony Albence and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Delaware according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Florida

Case	Description
Castro v. Trump U.S. District Court, Southern District of Florida 9:23-cv-80015-AMC U.S. Court of Appeals, 11th Circuit 23-12111	On January 6, 2023, Castro filed a civil action against Donald J. Trump in the Southern District of Florida. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Florida according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On February 16, 2023, Trump filed a motion to dismiss. On June 26, 2023, U.S. District Judge Aileen Cannon dismissed the case based on standing and ripeness. Castro filed an appeal, which is pending before the 11th Circuit. Castro also filed a petition for cert before judgment with the U.S. Supreme Court that seeks a ruling on the standing issue. On October 2, 2023, the Supreme Court denied Castro's petition for a writ of certiorari.

Kansas

Case	Description
Castro v. Schwab 6:23-cv-01184	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Scott Schwab and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to

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U.S. District Court, District of Kansas	insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Kansas according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Massachusetts

Case	Description
Castro v. Galvin 1:23-cv-12121 U.S. District Court, District of Massachusetts	On September 18, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State William Francis Galvin and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Massachusetts according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 25, 2023, Castro filed an Emergency Motion for Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on The Merits.

Michigan

Case	Description
Castro v. Benson 23-000122-MZ Michigan Court of Claims	On August 31, 2023, Castro filed a Verified Complaint for Injunctive Relief against Secretary of State Jocelyn Benson and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Michigan according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.
Davis v. Benson 23-000128-MB Michigan Court of Claims	On September 15, 2023, activist Robert Davis filed a civil action to require Secretary of State Jocelyn Benson to exclude Donald J. Trump from the Michigan primary ballot. In his complaint, Davis acknowledges that state statutes do not grant her such authority, instead arguing that her obligation to "support the Constitution of the United States" requires her to exclude unqualified candidates from the primary ballots. On September 19, Davis filed an Emergency Motion for Expedited Hearing & Briefing.
Davis v. Wayne County Election Commission 23-012484-AW	On September 27, 2023, Robert Davis filed a civil action against the Wayne County Election Commission, which is responsible for printing ballots for the county. Davis argues that the commission has the "legal duty" to remove Donald J. Trump from the ballot under Section 3 of the Fourteenth Amendment of the Constitution. The commission, which includes the treasurer, clerk, and chief probate judge for Wayne County, has already stated that it does not plan to make any decisions on this matter.

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Wayne County Circuit Court	
LaBrant vs. Benson 23-000137-MZ Michigan Court of Claims	On September 29, 2023, Free Speech for People filed a complaint on behalf of four Michigan voters for a Declaratory Judgment and a Permanent Injunction asking that the Michigan Court of Claims enjoin Secretary of State Jocelyn Benson from including Donald J. Trump on the primary and general ballots in 2024. The complaint states that the events of January 6, 2021, qualify as an insurrection and that Trump's actions and lack of intervention in the matter satisfy the provisions of Section 3 of the Fourteenth Amendment, which would disqualify Trump from holding the office in the future.

Minnesota

Case	Description
Growe v. Simon A23-1354 Minnesota Supreme Court	On September 12, 2023, Free Speech for People filed a petition on behalf of Minnesota voters against Secretary of State Steve Simon arguing that Donald J. Trump is disqualified from holding public office under Section 3 of the Fourteenth Amendment. The case was filed directly with the Minnesota Supreme Court under a state law that allows voters to directly petition to the state supreme court to disqualify a candidate. The petition argues that the events of January 6, 2021 qualify as an insurrection, that the effort to unlawfully overthrow the results of the 2020 election constitute a rebellion, and that Trump was "engaged" in both efforts despite not personally participating in storming the Capitol. The Republican Party of Minnesota has intervened in the case. The parties are briefing the issues ahead of oral argument scheduled on November 2, 2023.

Montana

Case	Description
Castro v. Jacobsen 6:2023-cv-00062 U.S. District Court, District of Montana	On September 11, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Montana Secretary of State Christi Jacobsen and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Montana according to Section Three of the Fourteenth Amendment of the U.S. Constitution. On September 18, 2023, Castro filed an Emergency Application for a TRO and an Expedited PI Hearing, which the court denied for failure to serve. President Trump filed a motion to dismiss.

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New Hampshire

Case	Description
Castro v. Scanlan 1:23-cv-00416 U.S. District Court, District of New Hampshire	On September 5, 2023, Castro, filed a Verified Complaint for Declaratory and Injunctive Relief against New Hampshire Secretary of State David Scanlan and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Hampshire according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Castro filed an Emergency Application for a Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits. President Trump filed a motion to dismiss. The court will hold a hearing on jurisdictional issues on October 20, 2023.

New Jersey

Case	Description
Castro v. Way 3:23-20929-GC U.S. District Court, District of New Jersey	On October 3rd, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against New Jersey Secretary of State Tahesha Way and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Jersey according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

New Mexico

Case	Description
Castro v. Toulouse Oliver 1:2023-cv-00766 U.S. District Court, District of New Mexico	On September 8, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against New Mexico Secretary of State Maggie Toulouse Oliver and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New Mexico according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. The court issued an order to show cause why the claims should not be dismissed for jurisdictional issues.

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New York

Case	Description
Castro v. New York State Board of Elections 23-cv-01223 U.S. District Court, Northern District of New York	On October 2nd, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against the New York State Board of Elections and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in New York according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Nevada

Case	Description
Castro v. Aguilar 2:23-cv-01387 U.S. District Court, District of Nevada	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Nevada Secretary of State Francisco V. Aguilar and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Nevada according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. President Trump filed a motion to dismiss which is in the briefing stage.

Pennsylvania

Case	Description
Castro v. Schmidt Commonwealth Court of Pennsylvania Supreme Court of Pennsylvania	On August 30, 2023, Castro filed a Complaint against Pennsylvania Secretary of the Commonwealth Al Schmidt and Donald J. Trump in Pennsylvania Commonwealth Court seeking an injunction to prevent Schmidt from accepting ballot access documents for Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Pennsylvania according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 6, 2023, Castro filed a Complaint in the Middle District of PA. He voluntarily dismissed the federal case on September 27, 2023.

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U.S. District Court, Middle District of Pennsylvania 1:23-cv-01468	
Stilp v. Trump 1:23-cv-1489 U.S. District Court, Middle District of Pennsylvania	On September 7, 2023, Pennsylvania resident Gene Stilp filed a pro se Complaint and Request for Declaratory Relief against Donald J. Trump. The complaint raises the question of whether Trump should be barred from running and removed from the Pennsylvania primary ballot under Section Three of the Fourteenth Amendment of the U.S. Constitution. Stilp argues that Trump need not have committed violence for his actions to be considered taking part in "insurrection" and notes that participants in the events of January 6, 2021 have testified that they "acted at the direction of Donald Trump."

Rhode Island

Case	Description
Castro v. Amore et al. 1:23-cv-00405 U.S. District Court, District of Rhode Island	On October 3, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Rhode Island Secretary of State Gregg Amore and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Rhode Island according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

South Carolina

Case	Description
Castro v. SC Election Commission, 3:23-cv-04501	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against the South Carolina Election Commission and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in South Carolina according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On September 19, 2023, Castro filed an Emergency Motion for Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with A Preliminary Bench Trial on the Merits. The Magistrate Judge issued a Report and Recommendation recommending the court deny the motion based on failure to show

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U.S. District Court, District of South Carolina	immediate irreparable injury. The South Carolina Election Commission and President Trump filed motions to dismiss which are in the briefing stage.

Vermont

Case	Description
Castro v. Copeland-Hanzas et al. 2:23-cv-00453 U.S. District Court, District of Vermont	On October 2, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Vermont Secretary of State Sarah Copeland-Hanzas and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Vermont according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. On October 11, 2023, the court denied Castro's motion for a TRO and noted it would still consider the request for a preliminary injunction.

Virginia

Case	Description
Perry-Bey v. Trump 1:23-cv-1165 U.S. District Court, Eastern District of Virginia	On August 31, 2023, Virginia citizens and civil rights activists Roy L. Perry-Bey and Carlos A. Howard filed a Complaint for Declaratory Relief to determine whether Donald J. Trump is eligible to participate as a presidential candidate in the Virginia Republican Party Primary election or the general election. The complaint argues that Trump's actions with regard to the January 6, 2021 breach of the U.S. Capitol disqualify him as a viable candidate under Section Three of the Fourteenth Amendment of the Constitution. Plaintiff Howard filed a Motion for Judgment which the court denied.

West Virginia

Case	Description
Castro v. Warner 2:23-cv-00598	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against West Virginia Secretary of State Andrew Warner and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in West Virginia according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

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U.S. District Court, Southern District of West Virginia	Castro filed an emergency application for a TRO and expedited preliminary injunction hearing. Motions to dismiss have been filed by President Trump and Defendant-Intervenor the West Virginia Republican Party.

Wisconsin

Case	Description
Castro v. WEC 2023-cv-002288 Wisconsin Circuit Court, Dane County	On August 31, 2023, Castro filed a Verified Complaint for Injunctive Relief against the Wisconsin Elections Commission and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Wisconsin according to Section 3 of the Fourteenth Amendment of the U.S. Constitution.

Wyoming

Case	Description
Castro	No record of a filing for this case so far but referenced in the press.

Dismissed Cases

District of Columbia

Case	Description
Castro v. Federal Election Commission U.S. District Court, District of Columbia 22-2176 D.C. Circuit Court of Appeals	On July 25, 2022, Castro filed a pro se civil action for declaratory and injunctive relief against the FEC. The complaint cites the Federal Election Campaign Act, 52 U.S.C. § 30109, and the Administrative Procedure Act, 5 U.S.C. § 706, for "unlawful agency delay" to argue that the FEC must enforce Donald J. Trump completing official filing as a candidate with the FEC (now moot), and that, once submitted, the FEC should deny Trump's candidacy form pursuant to Section 3 of the Fourteenth Amendment of the U.S. Constitution. The court dismissed the complaint on December 6, 2022 for lack of standing, finding the FEC has no jurisdiction to reject candidacy filings, among other reasons. On December 7, 2022, Castro appealed. On April 10, 2023, the court granted the FEC's motion for summary affirmance.

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22-5323	

Florida

Caplan v. Trump 0:23-cv-61628-RLR U.S. District Court, Southern District of Florida	On August 24, 2023, Lawrence A. Caplan, a Florida lawyer, filed a civil action against Donald J. Trump in the Southern District of Florida. Caplan argues that Trump's candidacy violates Section 3 of the Fourteenth Amendment due to the "aid or comfort" he provided to January 6th insurrectionists. On August 31, 2023, the court issued a sua sponte order dismissing the lawsuit due to lack of standing.

Idaho

Case	Description
Castro v. McGrane 1:23-cv-00393 U.S. District Court, District of Idaho	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Phil McGrane and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Idaho according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/03/23 - Notice of Dismissal filed by Plaintiff 10/04/23 - Order of Dismissal

Maine

Case	Description
Castro v. Bellows 1:23-cv-00335 U.S. District Court, District of Maine	On September 5, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Secretary of State Shenna Bellows and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Maine according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/03/23- Notice of Dismissal Filed by Plaintiff

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New Hampshire

Castro v. Trump 217-2023-cv-00462 Merrimack County Superior Court	On August 27, 2023, Castro filed a civil action against Secretary of State David Scanlan and Donald J. Trump, seeking an injunction against Scanlan. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the 2024 primary ballot in New Hampshire according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. Secretary Scanlan held a press conference on September 13, 2023 stating that the Secretary of State does not have the power to withhold a candidate based on 14.3. 9/24/23: Motion for Voluntary Non-Suit 10/5/23: Case dismissed

North Carolina

Case	Description
Castro v. Bell 5:23-cv-00496 U.S. District Court, Eastern District of North Carolina	On September 7, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Karen Brinson Bell, the executive director of the North Carolina State Board of Elections, and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in North Carolina according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 10/2/23: Notice of Dismissal filed by Plaintiff

Oklahoma

Case	Description
Castro v. Ziriax 5:2023-cv-00781 U.S. District Court, Western District of Oklahoma	On September 6, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Paul Ziriax, Secretary of the Oklahoma State Election Board, and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Oklahoma according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 9/29/23: Notice of Dismissal filed by Plaintiff

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Utah

Case	Description
Castro v. Henderson 2:23-cv-00617 U.S. District Court, District of Utah	On September 6, 2023, Castro filed a Verified Complaint for Declaratory and Injunctive Relief against Utah Lt. Gov. Deirdre Henderson and Donald J. Trump. Castro argues that Trump provided "aid or comfort" to insurrectionists on January 6, 2021, and that he should be prevented from appearing on the ballot in Utah according to Section 3 of the Fourteenth Amendment of the U.S. Constitution. 9/27/23: Notice of Dismissal filed by Plaintiff

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EXHIBIT 2

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IS THE PRESIDENT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF SECTION 3 OF THE FOURTEENTH AMENDMENT?

Josh Blackman* **& Seth Barrett Tillman****

INTRODUCTION

On January 13, 2021, the House of Representatives voted to impeach then-President Donald J. Trump for inciting an insurrection.[1] The sole impeachment article invoked Section 3 of the Fourteenth Amendment.[2] But the House's impeachment article

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[1] H.R. Res. 24, 117th Cong. (2021) (as introduced in the House on Jan. 1, 2021) [https://perma.cc/DS5F-SCQD].

[2] *Id.*

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elided over a critical threshold question: Was Trump covered by Section 3? The structure of Section 3 of the Fourteenth Amendment is a bit complicated. To assist our analysis, we distinguish the four elements with different typefaces (underline, **bold**, *italics*, and SMALL CAPS), and number them out of order:

> [3] No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, [1] **having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States**, [2] *shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.* [4] BUT CONGRESS MAY BY A VOTE OF TWO-THIRDS OF EACH HOUSE, REMOVE SUCH DISABILITY.[3]

First, the jurisdictional element, [1], specifies which positions are subject to Section 3: a "person . . . who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States."[4]

Second, the offense element, [2], defines the conduct prohibited by Section 3. It regulates the conduct of a person satisfying the jurisdictional element who "shall have engaged in insurrection or rebellion against the same [the United States], or given aid or comfort to the enemies thereof."[5]

Third, the disqualification element, [3], defines the legal consequences or punishment that Section 3 provides. A person who

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[3] U.S. CONST. amend. XIV, § 3.
[4] *Id.*
[5] *Id.*

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satisfies the jurisdictional and offense elements of Section 3 shall not be "a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state."[6] The phrase "office . . . under the United States" in the disqualification element is distinguishable from the phrase "officer of the united States" in the jurisdictional element.

FOURTH, the amnesty element, [4], allows Congress to terminate the disqualification or disability: "Congress may by a vote of two-thirds of each House, remove such disability."[7]

This article does not focus on the offense element [2] and the amnesty element [4]. Rather, to determine whether former-President Trump was disqualified pursuant to Section 3, we will focus on the jurisdictional element [1] and the disqualification element [3].

Section 3's jurisdictional element applies to exactly four defined categories of state and federal positions. President Trump clearly does not fit into three of these categories. Trump never swore an oath as a "member of Congress," "a member of any state legislature," or an "executive or judicial officer of any state."[8] Indeed, Trump was the only President in American history to have never held prior state or federal, civilian or military, public office. Therefore, the only way for Section 3's jurisdictional element to cover President Trump would be if he falls into the fourth category: he took an oath to support the Constitution as an "officer of the United States." Trump only swore one constitutional oath: as President of the United States.[9] In short, for President Trump to be subject to Section 3 disqualification, he must have violated the offense element *and* fit within the jurisdictional element. And in order to fit within the

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[6] *Id.*

[7] *Id.*

[8] *Donald Trump*, THE WHITE HOUSE [https://perma.cc/BHR3-DZ3M].

[9] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath). *See, e.g.*, Brian Duignan, *Donald Trump/president of the United States*, ENCYCLOPEDIA BRITANNICA (Aug. 17, 2021) [https://perma.cc/2X7V-K8RN].

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jurisdictional element, the President must be an "officer of the United States" for purposes of Section 3.

The House's impeachment article, however, did not address this threshold issue. It stated:

> [S]ection 3 of the 14th Amendment to the Constitution prohibits *any person* who has "engaged in insurrection or rebellion against" the United States from "hold[ing] any office . . . under the United States."[10]

In fact, Section 3 does not apply to "any person" or even "any person" who committed the conduct provided for in the offense element. Here, the House seemed to assume that the phrase "officer of the United States" was equivalent to the phrase "any person." Perhaps the House assumed that a President is an "officer of the United States." Still, the House's position was not entirely clear.

After the Senate trial, Trump was not convicted. Therefore, he could not be disqualified from holding future office pursuant to the Impeachment Disqualification Clause.[11] But even after Trump's acquittal, efforts to disqualify the former President based on Section 3 continue. For example, there is a pending concurrent resolution that would find "President Donald J. Trump 'as an *officer of the United States* . . . engaged in insurrection or rebellion against the [United States], or g[ave] aid or comfort to the enemies thereof,' making him ineligible for future office . . . ."[12] This resolution assumed that the President is an "officer of the United States."

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[10] *See* H.R. Res. 24, *supra* note 1, at 3:2-6 (emphasis added).

[11] U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . .").

[12] H.R. Con. Res. 3, 117th Cong. (2021) (emphasis added), https://www.congress.gov/bill/117th-congress/house-concurrent-resolution/3/text [https://perma.cc/7JZP-E23D] ("Censuring President Donald J. Trump for attempting to overturn the results of the 2020 Presidential election through unlawful means and for inciting insurrection").

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We disagree. There is some good reason to think the President is not an "officer of the United States." President Trump, who swore only one constitutional oath, does not fall within Section 3's jurisdictional element. Therefore, he cannot be disqualified pursuant to this provision.

This article will proceed in six parts. Part I will contend that the phrases "officer of the United States" and "office . . . under the United States" in Section 3 refer to different categories of positions. Part II will analyze the phrase "officer of the United States," which is used in the Constitution of 1788 and in Section 3 of the Fourteenth Amendment. Part III will show that the meaning of the phrase "officer of the United States" did not drift from 1788 through 1868. In both eras, there is substantial evidence that the President was not considered an "officer of the United States." Part IV will recount longstanding Executive Branch opinions, which affirmed that elected officials like the President are not "officers of the United States." Part V will respond to recent arguments suggesting that the President is an "officer of the United States" for purposes of Section 3. Part VI will chart how the courts, and not Congress, will likely have the final say about whether President Trump is subject to Section 3 of the Fourteenth Amendment.

I. THE PHRASES "OFFICER OF THE UNITED STATES" AND "OFFICE ... UNDER THE UNITED STATES" IN SECTION 3 REFER TO DIFFERENT CATEGORIES OF POSITIONS

Section 3 of the Fourteenth Amendment refers to two textually distinct groups of officers and offices: an "officer of the United States" and an "Office . . . under the United States." These phrases also appear in the Constitution of 1788. The Oath or Affirmation Clause refers to "officers of the United States." And the phrase "Office . . . under the United States" appears in the Elector Incompatibility Clause and Impeachment Disqualification Clause. We have long argued that these two phrases, which appear in the

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Constitution of 1788, have distinct, albeit related meanings.[13] We also think these two phrases, as used in Section 3, have different meanings. Indeed, the very fact that Section 3's text uses both of these phrases, and does so in the very same sentence, provides some substantial evidence that the two phrases do not have identical meanings. Moreover, there is some textual overlap between the Constitution of 1788 and Section 3. We draw three inferences from this textual overlap. First, we think the better view is that the jurisdictional element of Section 3 was modeled after the structure and language of the Oath or Affirmation Clause. Second, we think the better view is that the disqualification element of Section 3 was modeled after the structure and language of the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause. Third, we think the better view is that the Framers imported the meaning of "officer of the United States" and "office . . . under the United States" from the Constitution of 1788 to Section 3's jurisdictional element and disqualification element, respectively.

A. WE SHOULD PRESUME THAT THE DIFFERENT TYPES OF OFFICES REFERENCED IN THE SAME SENTENCE OF SECTION 3 HAVE DIFFERENT MEANINGS

The scope of Section 3 is complicated. Specifically, the jurisdictional element and the disqualification element, which appear in the same sentence, refer to different types of officers and offices. First, the jurisdictional element applies to a person who took an oath as an "officer of the United States." Second, the

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[13] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. (forthcoming 2021) [hereinafter Tillman & Blackman, *Offices*] [https://perma.cc/B7AM-E83B] (discussing taxonomy); Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and offices*, WASH. POST (Sept. 25, 2017) [hereinafter Blackman & Tillman, *Emoluments*] [https://perma.cc/7K3C-ANSM].

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disqualification element mandates that disqualification extends to "any office . . . under the United States."[14] Had the framers used the same phrase twice in the same sentence—for example, both elements applied to "officer[s] of the United States"—we would reasonably conclude that those phrases have the same meaning. This reasoning follows from the presumption of *intrasentence uniformity*: where the same language is used in the same sentence, we presume that language is used uniformly.[15]

However, Section 3 uses different phrases in the same sentence. Here, the presumption should be the converse. The better conclusion is that when the same sentence in the Constitution uses two different phrases—here, referring to different categories of offices and officers—we should presume that the Framers intended to convey two different meanings.[16] This latter principle can be called the presumption of *intrasentence non-uniformity*: where different language is used in the same sentence, we presume that the language is not used uniformly. Given this presumption, the phrases "officer of the United States" and "office . . . under the United States" would have different meanings.

The Constitution of 1788 also juxtaposes these same two categories of officers in the same sentence. Consider the third paragraph of Article VI:

> [1] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial *Officers*, both *of the United States* and of

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[14] The ellipses refer to three words the Framers placed after *office* but before *under*: "civil or military."

[15] *See, e.g.*, Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2002) (defending "a presumption of intrasentence uniformity in constitutional, statutory, and regulatory interpretation").

[16] *See, e.g., id.* at 1172 ("It is far better to use two different words in a sentence when we mean to convey two different meanings."); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) ("It is hardly to be presumed that the variation in the [Constitution's] language could have been accidental.").

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> the several States, shall be bound by Oath or Affirmation, to support this Constitution; [2] but no religious Test shall ever be required as a Qualification to any *Office or public Trust under the United States.*[17]

First, the Oath or Affirmation Clause, which appears before the semicolon, applies to "all executive and judicial Officers . . . of the United States." Second, the Religious Test Clause, which appears after the semicolon, refers to "any Office . . . under the United States." [18] The same sentence references two textually distinct categories of officers and offices.

There is some evidence that the two types of "officers" and "offices" in Article VI refer to different categories of positions. During the drafting process, the Framers revised the Religious Test Clause to clarify what type of offices it applied to. Earlier, a draft provision referred to "any office or public trust under *the authority of* the United States."[19] Later, the Committee of Style revised that draft to "any office or public trust under the United States." [20] The committee removed the phrase "the authority of." [21] This revision provides some evidence that the Framers in 1787 paid reasonably careful attention to the way the Constitution used "office"- and

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[17] U.S. CONST. art. VI (emphasis added).

[18] The Religious Test Clause also applies to a "public trust under the United States." U.S. CONST. art. VI, cl. 3. *See* Tillman & Blackman, *Offices*, *supra* note 13, at 1 (finding that the phrase "public trust under the United States" includes "federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties"—a category that would include presidential electors).

[19] PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2005) (noting that "[t]he Committee of Style rephrased the language by eliminating the words 'the authority of'" from the draft Religious Test Clause).

[20] *Id. See generally* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 47 n.275, 87 n.492 (2021) (discussing revisions made to "office"- and "officer"-language in the Succession Clause, Impeachment Clause, and Religious Test Clause).

[21] *See* ROFES, *supra* note 19.

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"officer"-language. One cannot presume that the various phrases using "office" and "officer" were used indiscriminately. There is no record of commensurate efforts by the Committee of Style or the Committee of Detail to textually align or harmonize the phrases "Officer[] . . . of the United States" and "Office . . . under the United State" which both appear in the same sentence of Article VI. Given the Framers' careful attention to such details, we conclude that the two different phrases were used to refer to different types of offices.[22]

We think the same presumption of *intrasentence non-uniformity* should likewise extend to Section 3. The phrase "officer of the United States" in the jurisdictional element has a different meaning from the phrase "office . . . under the United States" in the disqualification element. Our position regarding Section 3 is supported by the similar usage in Article VI. Both the text of Section 3 and Article VI use textually distinct language: "officer of the United States" and "office . . . under the United States." And we should presume these phrases referred to different positions.

The Framers of the Constitution of 1788 made many other changes to "office"- and "officer"-language in provisions of the draft constitution. For example, in the Succession Clause, the phrase "officer of the United States" was changed to "officer."[23] In the Impeachment Clause, the phrase "[President, Vice President,] and *other* Civil officers of the U.S." was changed to "President, Vice President, and Civil Officers of the U.S."[24] And in its final form, the Impeachment Clause became: "President, Vice President, and *all* civil Officers of the United States." The Framers changed the word that preceded "Civil Officers of the United States" from "other" to "all." This and other similar alterations to the draft constitution's "office"- and "officer"-language were significant. First, these revisions show

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[22] Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

[23] *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 532 and 535 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS], *with id.* at 573 and 599. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 nn.16-18 (1995).

[24] *Compare* 2 FARRAND'S RECORDS, *supra* note 23, at 545 & 552, *with id.* at 600.

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that this language was not modified indiscriminately. The Framers paid careful attention to the words they chose. Second, the use of "other" in the draft constitution shows that at a preliminary stage, the Framers used language affirmatively stating that the President and Vice President were "Officers of the United States." But the draft constitution's use of "other" was, in fact, rejected in favor of "all." The better inference, arising in connection with the actual Constitution of 1788, is that the President and Vice President are not "Officers of the United States." Joseph Story stated this position in his *Commentaries on the Constitution.*[25] The Framers also made complex changes to the "officer"-language in the Appointments Clause.[26]

These precise, surgical textual changes cannot be described as random. All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office . . . under the United States" in Section 3 of the Fourteenth Amendment.

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[25] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, and Co. 1833) ("[The Impeachment Clause] says, 'the president, vice-president, and *all civil officers* (not all *other* civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion, that the[] [President and Vice President] were enumerated, as *contradistinguished* from, rather than as included in the description of, civil officers *of* the United States." (latter two emphases added)).

[26] 2 FARRAND'S RECORDS, *supra* note 23, at 177, 181–82; Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 472 (2018) (citing 1 FARRAND'S RECORDS, *supra* note 23, at 20–22, 20 n.10); 2 FARRAND'S RECORDS, *supra* note 23, at 614.

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B. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE JURISDICTIONAL ELEMENT OF SECTION 3 AND THE OATH OR AFFIRMATION CLAUSE

We do not think that the language used in Section 3 was drafted from a blank slate. Indeed, there is some overlap between Section 3 and provisions from the Constitution of 1788. The Framers of Section 3's jurisdictional element likely drew its language from the text of the 1788 Oath or Affirmation Clause in Article VI. Therefore, the meaning of the phrase "Officers of the United States" in Article VI should inform the meaning of "officer of the United States" in Section 3's jurisdictional element.

Compare these two provisions, which each refer to four types of positions. Once again, we have used different typefaces (underline, **bold**, *italics*, and SMALL CAPS) to distinguish the four categories.

Oath or Affirmation Clause (1788)	Jurisdictional Element of Section 3 (1868)
"[1] The Senators and Representatives before mentioned, and the [2] **Members of the several State Legislatures**, and [3] *all executive and judicial Officers, both of the United States* and [4] OF THE SEVERAL STATES, shall be bound by Oath or Affirmation, to support this Constitution"	"No person . . . who having previously taken an oath, [1] as a member of Congress, or as [3] *an officer of the United States*, or as a [2] **member of any state legislature**, or as [4] AN EXECUTIVE OR JUDICIAL OFFICER OF ANY STATE, to support the Constitution of the United States. . . ."

Both provisions reference the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] **members of the state legislatures**, [3] *executive and judicial officers of the United States*, and [4] EXECUTIVE AND JUDICIAL OFFICERS OF THE STATES.

There are substantial similarities between the Oath or Affirmation Clause and Section 3's jurisdictional element. This overlap is not surprising. Article VI already imposed an oath on

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many positions in the federal and state governments. It would make sense for the Framers of the Fourteenth Amendment to use that same grouping of people to identify those subject to disqualification. We think it reasonable to infer that the jurisdictional element of Section 3 was modeled after the Oath or Affirmation Clause of Article VI.

There are slight variations between the Oath or Affirmation Clause and Section 3's jurisdictional element. And these alterations support our position that the Framers took care when writing "office"- and "officer"-language. They did not simply copy the language in its entirety, but instead made careful revisions.

The first category was changed from "the Senators and Representatives before mentioned" to "member of Congress." These phrases are not identical. The category of "member[s] of Congress" is narrower than the category of "Senators and Representatives." Not all Senators and Representatives become members. Senators and Representatives begin their terms as *members-elect* from the date of the start of their two-year or six-year constitutional terms. Customarily, prior to the start of their terms, a Senator or Representative—that is, a member-elect—travels to the Capitol and presents bona fide credentials or a certificate of election. But such a member-elect does not become a member until his house organizes and accepts him as a member.[27]

The distinction between a member-elect and a member affects the timing of when officer-holders in the Executive Branch or Judicial Branch transition to Congress. For example, the Incompatibility Clause bars "a member of either House" from holding "any Office under the United States." But this restriction only applies to actual *members*, and not *members-elect*. Therefore, when a member-elect begins the two-year or six-year constitutional term to which he was

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[27] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); *id.* art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

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elected, but before he is accepted as a member, he could *still* hold a position in the Executive Branch or Judicial Branch. But in order to be accepted as a member, the member-elect must resign his executive-branch or judicial-branch office. These sorts of disputes are not hypothetical. In 1818, the House of Representatives drew this distinction when it accepted the credentials of a federal-office holder who simultaneously served as member-elect, but had not yet become a member.[28] In 1788, 1818, and 1868, and today, the Constitution's "office"- and "officer"-language mattered and continues to matter.

The **second category** was tweaked from "Members of the several State Legislatures" to "member of any state legislature." Here, we do not see any material change. There may have been some linguistic preference for the phrase "any state" over the phrase "several states" followed by a plural noun. The Framers of Section 3 likewise changed the phrase "executive and judicial Officers . . . of the *several states*" to "an executive or judicial officer of *any state*." The Constitution of 1788 used the phrase "several states" in seven clauses,[29] and the phrase

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[28] *See, e.g.*, 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 499, at 624–27 (1907) [https://perma.cc/B5V8-XFD6] ("After a careful consideration of the status of a Member-elect the House decided that such an one was not affected by the constitutional requirement that an officer . . . shall not be a Member.").

[29] U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the *several States*." (emphasis added)); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the *several States* . . . ." (emphasis added)); *id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the *several States*, and with the Indian Tribes" (emphasis added)); *id.* art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the *several States* . . . ." (emphasis added)); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the *several States*." (emphasis added)); *id.* art. V ("The Congress . . . on the Application of the Legislatures of two thirds of the *several States*, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the *several States* . . . ." (emphasis added)); *id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the *several State* Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." (emphasis added)).

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"any state" in six provisions.[30] It may be that the phrase "any state" referred to specific conduct that occurred in only one state. And the phrase "several states" referred to general conduct that could recur in multiple states. The Framers also used the phrase "each state" in eight provisions to similar effect as "any state."[31] The Privileges and Immunities Clause of Article VI, which refers to both "each state" and "several states," illustrates this usage: "The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the

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[30] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from *any State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." (emphasis added)); *id.* art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from *any State*." (emphasis added)); *id.* art. I, § 10, cl. 2 ("[T]he net Produce of all Duties and Imposts, laid by *any State* on Imports or Exports, shall be for the Use of the Treasury of the United States . . . . " (emphasis added)); *id.* art. III, § 2, cl. 3 ("[B]ut when not committed within *any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed." (emphasis added)); *id.* art. IV, § 2, cl. 3 ("A Person charged in *any State* with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State . . . ." (emphasis added)); *id.* art. IV, § 3, cl. 1 ("[N]or *any State* be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." (emphasis added)).

[31] U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in *each State* shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." (emphasis added)); *id.* art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but *each State* shall have at Least one Representative." (emphasis added)); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years."); *id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in *each State* by the Legislature thereof." (emphasis added)); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); *id.* art. II, § 1, cl. 3 ("But in chusing the President, the Votes shall be taken by States, the Representation from *each State* having one Vote." (emphasis added)); *id.* art. IV, § 1, ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* art. IV, § 2 ("The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the several States." (emphasis added)).

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several States."[32] It appears that the Fourteenth Amendment used "any state" and "several states" to the same effect.[33]

The *third category* was changed from "all executive and judicial Officers . . . of the United States" to "an officer of the United States."

The FOURTH ELEMENT was changed from "all executive and judicial Officers . . . of the several States" to "an executive or judicial officer of any state."

These third and fourth revisions show the care with which the Framers approached the "officer"-language in Section 3. Article VI of the 1788 Constitution refers broadly to "all executive and judicial Officers, both of the United States and of the several States." In a single clause, the Framers lumped together a wide variety of federal and state offices. This clause applied to "all executive and judicial Officers . . . of the United States" and "all executive and judicial Officers . . . of the several states."

In our view, it was unnecessary to specify that the "Officers of the United States" had to be "executive and judicial" officers. In light of the Appointments Clause, "Officers of the United States" could *only* be appointed to the executive and judicial branches. Appointed positions in the legislative branch—such as the Clerk of the House of Representatives and the Secretary of the Senate—are not appointed pursuant to the Appointments Clause. They are not "Officers of the United States." And they do not take an oath pursuant to Article VI.[34] However, Article VI also provided the oath for state officeholders. And each state had different governmental structures, which could change. It would have been arduous to draft a single federal constitutional provision that could reflect the varied state

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[32] U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

[33] *Compare* U.S. CONST. amend. XIV, § 1 ("[N]or shall *any State* deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added)), *with id.* § 2 ("Representatives shall be apportioned among the several States according to their respective numbers . . . .").

[34] *See also* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995) ("No constitutional oath is required of legislative officers, like the Clerk of the House or the Secretary of the Senate . . . .").

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constitutional structures regarding offices and officers. To provide some guidance to the state, Article VI clarified which types of state officers were covered: executive officers and judicial officers. Members of state legislatures are expressly covered by the Article VI oath requirement, but appointed positions in state legislatures are not covered.

In 1868, the Framers of Section 3's jurisdictional element departed from the structure of Article VI: they decoupled the state officers from the federal officers. Section 3 still specifies the types of state officers covered: "an executive or judicial officer of any state." Again, this provision accounts for the wide range of state government officeholders. And, now that state and federal provisions were textually decoupled, there was no need to specify that "Officers of the United States" had to be in the executive and judicial branches. Rather, the Appointments Clause defines the scope of the "Officers of the United States": appointed positions in the executive and judicial branches.[35]

This history supports a reasonable inference: the 1788 and 1868 Framers took some care when drafting "office"- and "officer"-language. These phrases were not used indiscriminately. Rather, in 1868, there was some deliberate effort to modify the extant 1788 language.

C. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE DISQUALIFICATION ELEMENT OF SECTION 3 AND THE ELECTOR INCOMPATIBILITY CLAUSE, THE INCOMPATIBILITY CLAUSE, AND THE IMPEACHMENT DISQUALIFICATION CLAUSE

In the Constitution of 1788, the phrase "Office . . . under the United States" is used in four provisions: the Elector Incompatibility

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[35] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

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Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the Foreign Emoluments Clause. In our view, the phrase "Office . . . under the United States" in each of these four provisions refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.[36] The phrase "office . . . under the United States" also appears in Section 3's disqualification element. In this Article, we take no position as to the meaning or scope of "office . . . under the United States" in Section 3, or whether that phrase in Section 3 included the President and Vice President. Instead, we use the Constitution of 1788 for a different purpose. The 1868 Framers of Section 3's disqualification element, who used the phrase "office . . . under the United States," were likely to have drawn that language from the similar language in the 1788 Constitution. Specifically, three of the four 1788 provisions share a similar structure with Section 3's disqualification element: holders of an "office . . . under the United States" are barred from some other position. The fourth provision, the Foreign Emoluments Clause, is structurally different; it does not impose any disqualifications.

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[36] *See id.*

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Compare the disqualification element of Section 3 with the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause:

Elector Incompatibility Clause (1788)	Incompatibility Clause (1788)	Impeachment Disqualification Clause (1788)	Disqualification Element of Section 3 (1868)
"no [1] Senator or Representative, or [2] **Person holding an Office of Trust or Profit under the United States**, shall be appointed an Elector."	"no [2] **Person holding any Office under the United States**, shall be a Member of either House during his Continuance in Office."	"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to [2] **hold and enjoy any Office of honor, Trust or Profit under the United States**"	"No person shall be a [1] Senator or Representative in Congress, or [3] *elector of President and Vice President*, or [2] **hold any office, civil or military, under the United States**, or [4] UNDER ANY STATE . . . ."

The disqualification element of Section 3, like the Elector Incompatibility clause, applies to Senators and Representatives. To be precise, Section 3 extends disqualification to "a Senator or Representative *in Congress*." The phrase "in Congress" may have been added to clarify that disqualification did not extend to state legislators, who may have the same formal title: senators and representatives. In 1878, a prominent commentator observed, without equivocation, that members of state legislatures are not "officers under any State" for purposes of Section 3's disqualification element.[37] This subtle addition, "in Congress," demonstrates that the

[37] *See* John Randolph Tucker, *General Amnesty*, 106 N. AM. REV. 53, 55 (1878) ("[I]t is clear that a member of a State Legislature is not a civil or military officer under any State, any more than a member of Congress is a civil or military officer under the United States . . . .") [https://perma.cc/JJM6-PBQG].

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Framers of Section 3 took care with respect to "office"-language. They did not use these terms indiscriminately.

The Elector Incompatibility Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the disqualification element of Section 3 all apply to any "office . . . under the United States."[38] The Impeachment Disqualification Clause empowered the Senate to disqualify a person from "hold[ing] and enjoy[ing] any Office of honor, Trust or Profit under the United States." The Incompatibility Clause bars a "person holding any Office under the United States" from serving as a member of Congress. And the Elector Incompatibility Clause bars members of Congress, as well as a "Person holding an Office of Trust or Profit under the United States" from serving as presidential electors. In light of these textual overlaps, it is reasonable to infer that the Framers of Section 3's disqualification element may have relied on the three provisions of the 1788 Constitution that barred certain officials from holding certain positions. And it is also reasonable to infer that the Framers of Section 3 used the phrase "office . . . under the United States" to have a different meaning than the phrase "officers of the United States."

The disqualification element of Section 3 departs from the provisions of the 1788 Constitution that use the phrase "office . . . under the United States" in two regards. First, the disqualification element of section 3 refers to an "elector of President and Vice President." This category of position does not appear in the Elector Incompatibility Clause—with good reason. It would be nonsensical to bar an elector from serving as an elector. But it would make sense to disqualify former confederates from serving as presidential electors. The Incompatibility Clause, which governs members of

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[38] Here, the ellipses refer to different words placed after *office* but before *under*: i.e., "of Trust or Profit" in the Elector Incompatibility Clause; "of honor, Trust or Profit" in the Impeachment Disqualification Clause; and "civil or military" in Section 3 of the Fourteenth Amendment. By contrast, no ellipsis is necessary for the Incompatibility Clause, which simply uses "office under the United States."

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Congress, also does not refer to electors. There was no need to list electors in the Incompatibility Clause because the Elector Incompatibility Clause already expressly barred Senators and Representatives from serving as electors. We think that a person disqualified under the Impeachment Disqualification Clause could serve as an elector. In our view, an elector is a "public trust under the United States," as that phrase is used in the Religious Test Clause, but does not hold an "Office . . . under the United States."[39]

Second, Section 3's disqualification element extends to "any office . . . under any state." The Elector Incompatibility Clause does not bar state officeholders from serving as electors. Indeed, to this day, it is common for state officeholders to serve as electors. Likewise, the Impeachment Disqualification Clause does not bar a disqualified person from holding state office. And the text of the Incompatibility Clause does not expressly bar a person who holds a state position from also serving in Congress. Indeed, a Governor could appoint himself to fill a Senate vacancy, and concurrently serve as both Governor and Senator without violating the plain text of the Incompatibility Clause.[40] The Fourteenth Amendment was novel in that the *national* constitution disqualified former confederates from serving in *state* governments. However, the disqualification element does not specify whether Section 3 disqualification extends to state legislative, executive, or judicial positions. Nonetheless, in 1878 John Randolph Tucker stated that members of the state legislature are *not*

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[39] Josh Blackman & Seth Barrett Tillman, *What are Presidential Electors?*, REASON—VOLOKH CONSPIRACY (May 21, 2020) [https://perma.cc/66HF-YBBM].

[40] Several Governors appointed themselves to fill Senate vacancies, but they resigned their state positions. Ken Rudin, *When Governors Appoint Themselves To The Senate*, POLITICAL JUNKIE (Sept. 8, 2009) [https://perma.cc/H4YL-3S2A]. *See generally* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 219 & n.277 (2008) (affirming that joint member of congress and state officeholding is not regulated by the Constitution's Incompatibility Clause).

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covered by Section 3's disqualification element.[41] By contrast, the jurisdictional element, like the Oath or Affirmation Clause, does provide such specificity: both provisions refer to "executive or judicial officer of any state" as well as "a member of any state legislature." The disqualification element simply refers to "any office . . . under any state."

We are not aware of any legislative debates that explain why the Framers chose the precise words they did for the jurisdictional and disqualification elements of Section 3. But we can reasonably presume that these two elements were drawn from very similarly-worded provisions from the Constitution of 1788. And if the phrases "Officers of the United States" and "Office . . . under the United States" had different meanings in the Constitution of 1788, we can reasonably presume that the Framers of Section 3 also understood these phrases to have different meanings. Here, we take no position on what the phrase "office . . . under the United States" meant in the disqualification element of Section 3, and whether that phrase as used in Section 3 includes the President and Vice President. Rather, we focus on the meaning of the phrase "officer of the United States" in Section 3's jurisdictional element.

II. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF THE 1788 CONSTITUTION OR FOR SECTION 3 OF THE FOURTEENTH AMENDMENT

The phrase "Officers of the United States" is used in four provisions of the Constitution of 1788: the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.[42] (We discussed the fourth provision in Part I). In our view, the President is not an "officer of the United States" for

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[41] *See* Tucker, *supra* note 37.

[42] U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3; *id.* art. II, § 4; *id.* art. VI, cl. 3.

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purposes of these four provisions.[43] We discussed this taxonomy in September 2017:

> First, the Appointments Clause spells out with clarity that the president can nominate "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." . . . Second, the Impeachment Clause expressly provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment. ..." Story explained that the president and vice president's [express] enumeration in the Impeachment Clause in addition to "all civil Officers of the United States" shows that the president and vice president are not deemed "officers of the United States" themselves. Otherwise, the Framers would have stated that "all *other* civil officers" were subject to impeachment. [Third], the oaths clause specifically enumerates that "Senators and Representatives, and the Members of the several State Legislatures," as well as "all *executive and judicial* Officers, both of the United States and of the several States of the United States" were required to be "bound by Oath or Affirmation to, support this Constitution." . . . [Fourth], the commission clause provides that "*all* the officers of the United States" receive presidential commissions. *All* means *all*. This structure explains why appointed executive-branch and judicial-branch officers receive commissions, but there is no record of any elected official, whether a president, vice president or a member of Congress, ever receiving a [presidential] commission. The

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[43] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

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reason is simple: Elected officials like the president are not "Officers of the United States."[44]

Our position is consistent with recent Supreme Court precedent. In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[45] Rather, "Officers of the United States" are appointed exclusively pursuant to Article II, Section 2 procedures.[46] It follows from these premises that the President, who is an elected official, is not an "officer of the United States."

Of these four provisions, only the Impeachment Clause expressly applies to the President. However, by contrast, the jurisdictional element of Section 3 does not specifically mention the presidency. Instead of using express language akin to the Impeachment Clause, the jurisdictional element of Section 3 applies to: A "person . . . who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States."[47]

We think Section 3's "officer of the United States"-language was imported from the Oath or Affirmation Clause.[48] By using this phrasing, the Framers of Section 3 likely intended to import or adopt the settled meanings from that provision, whether or not they had given concrete thought to what that meaning was. "[W]hen 'a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"[49] Here, Section 3's jurisdictional element was "quite obviously

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[44] *See* Blackman & Tillman, *Emoluments*, *supra* note 13.

[45] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[46] *Id.* at 497.

[47] U.S. CONST. amend. XIV, § 3 (emphasis added).

[48] *See supra* Part I.B.

[49] United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

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modeled" on the Oath or Affirmation Clause.[50] The soil was transplanted, along with the tree's roots and branches.

The President is not expressly listed in the Oath or Affirmation Clause. Why? Because the President does not recite an oath pursuant to Article VI. Rather, the President recites an oath pursuant to the Presidential Oath Clause in Article II.[51] The fact that the President does not take his oath pursuant to Article VI provides further evidence that he is not an "officer[] . . . of the United States" as that phrase is used in the Oath or Affirmation Clause. And if the President is not covered by the Oath or Affirmation Clause of 1788, then the presumption should be that he is not covered by the substantially similar phrase "officer of the United States" used in the jurisdictional element of Section 3.

In 1788, the President was not an "officer of the United States." We contend that the phrase "officer of the United States" has the same meaning in Section 3 as it does in the Constitution of 1788: the elected President is not an "officer of the United States." And we have seen no substantial evidence showing that the meaning of "officer of the United States" drifted from 1788 to 1868.

III. THERE IS NO DIRECT, CLEAR, OR COMPELLING EVIDENCE THAT THE MEANING OF "OFFICER OF THE UNITED STATES" DRIFTED FROM 1788 TO 1868

Critics may argue that the meaning of the phrase "officer of the United States" in Section 3 is different from the meaning of the phrase "Officers of the United States" in the Constitution's original seven articles. In other words, there was some linguistic drift or slippage between the 1788 ratification of the Constitution and the 1868 ratification of the Fourteenth Amendment. Let's assume that the President is not an "officer[] of the United States" for purposes of the

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[50] *Id.*

[51] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath).

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1788 Constitution. Under that assumption, it is still possible that the President might be an "officer of the United States" for purposes of Section 3. Thus, a reader might take the limited position that the President is an "officer of the United States" for the purposes of Section 3's jurisdictional element.

This position is conceivable. Indeed, more than a decade ago, Tillman suggested that linguistic drift may have occurred with respect to this phrase between 1788 and 1868.[52] He wrote that "[t]he stretch of time between the two events [1788 and 1868] was more than half a century. . . . It is hardly surprising that in the post-bellum epoch new meanings *might* have accrued to older language. Such linguistic slippage is common."[53] Again, in this Article, we take no position on whether the President and Vice President hold an "office . . . under the United States" for the purposes of the disqualification element of Section 3 of the Fourteenth Amendment. But we do not think linguistic drift occurred with respect to the phrase "officer of the United States."[54]

Absent contrary evidence, the default presumption should be one of linguistic continuity, rather than a presumption of linguistic drift. In other words, the proponents of the view that Section 3's jurisdictional element applies to the presidency have the burden to prove two propositions. First, proponents must show that the particular linguistic drift involving the Constitution's "officer of the United States"-language had actually occurred. And second, proponents must show that Section 3's "officer of the United States"-language, in fact, drifted to include the presidency. In other words, even if the meaning shifted over time, it is not self-evident that the

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[52] *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019) (discussing linguistic drift); *see also* James C. Phillips & Josh Blackman, *Corpus Linguistics &* Heller, 56 WAKE FOREST L. REV. 609, 622 (2021).

[53] Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation 70 n.119 (Feb. 1, 2012) [https://perma.cc/5CSU-66A2] (unpublished manuscript) (emphasis added) (citing Jack Tsen-Ta Lee, *The Text Through Time*, 31 STATUTE L. REV. 217 (2010)).

[54] *See infra* Part III.

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shift would embrace the presidency. Both propositions must be proven.

We do not think either proposition can be proven. Rather, there is some good authority to reject the position that Section 3's "officer of the United States"-language extends to the presidency. First, *United States v. Mouat* (1888) strongly suggested that officers are appointed, and not elected. Second, *United States v. Hartwell* (1867) strongly suggested that officers are appointed, and not elected. Third, other contemporary sources—such as a treatise on election law and proceedings from an 1867 impeachment trial—further rebut arguments in favor of linguistic drift. In light of this evidence, the strongest position is that the meaning of "officer of the United States" did not drift between 1788 and 1868. The President was not an "officer of the United States" in 1788, and the President was not an "officer of the United States" in 1868.

A. *United States v. Mouat* rebuts arguments in favor of linguistic drift

The Supreme Court decided *United States v. Mouat* in 1888, two decades after the ratification of the Fourteenth Amendment.[55] *Mouat* interpreted a statute that used the phrase "officers of the United States."[56] It provided, in part, that "no credit shall be allowed to any of the disbursing *officers of the United States* for payment or allowances in violation of this provision."[57] This statute was enacted in June 1873, five years after the Fourteenth Amendment was ratified in 1868.

Justice Samuel Miller, who served on the Supreme Court during the ratification of the Fourteenth Amendment, wrote the majority opinion in *Mouat*. He grounded his understanding of the statutory

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[55] United States v. Mouat, 124 U.S. 303 (1888).
[56] *Id.* at 307.
[57] *Id.* at 305 (citing 18 Stat. 72) (emphasis added).

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phrase "Officers of the United States" in the Appointments Clause. Article II, Section 2 of the Constitution provides:

> The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[58]

Justice Miller concluded, "[u]nless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an *officer of the United States*."[59] In other words, if a person was not appointed pursuant to the paths identified in Article II, Section 2, then he is likely not an "officer of the United States." Moreover, the discussion in *Mouat* was not limited to appointed officers. Rather, the *Mouat* test governs all persons in "the service of the government." The President is in "the service of the government," but he is not appointed by a President, a court of law, or a department head; indeed, he is not appointed at all. Notwithstanding the process followed by presidential electors, the Constitution expressly states that the President "shall . . . be elected."[60] Under the rule in *Mouat*, the President is not "strictly speaking" an "officer of the United States." Here, *Mouat* strongly

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[58] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[59] *Mouat*, 124 U.S. at 307 (emphasis added).

[60] U.S. CONST. art. II, § 1, cl. 1; *see also id.* art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which *he shall have been elected*, and he shall not receive within that Period any other Emolument from the United States, or any of them." (emphasis added)).

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suggests that the meaning of the phrase "officers of the United States" remained stable from 1788 through 1868.

Mouat provides some probative evidence of the original public meaning of Section 3's "officer of the United States"-language. Justice Miller's opinion also provides some evidence rebutting any presumption of post-1788 linguistic drift with respect to the phrase "officer of the United States." Finally, *Mouat* rebuts the position that, circa 1868, the president was obviously, plainly, or clearly an "officer of the United States."

In short, *Mouat* makes the linguistic drift view very difficult to defend. For this argument to work, the meaning of "officer of the United States" must have drifted back and forth: (1) in 1788, the phrase did not include the presidency; (2) in 1868, the phrase did include the presidency; (3) but during the five year span between 1868 and 1873, the meaning of that phrase drifted back to its original 1788 meaning, such that the President was not an "officer of the United States." We find that proposed chronology implausible.

B. *United State v. Hartwell* rebuts arguments in favor of linguistic drift

United States v. Hartwell was decided contemporaneously with the ratification of the Fourteenth Amendment.[61] This case further refutes the possibility of linguistic drift. In *Hartwell*, a clerk in the Treasury Department was charged with embezzlement. The relevant 1846 statute applied to an "officer" who was "charged with the safe-keeping of the public money."[62] The defendant claimed that because he was not an "officer," the indictment was defective. The Supreme Court disagreed and found that he was an "officer." Justice Noah Swayne wrote the majority opinion. He offered a two-part definition of an office. First, "[a]n office is a public station, or employment,

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[61] United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867).
[62] *Id.* at 392 (citing 9 Stat. 59).

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conferred by the appointment of government."[63] Second, "[t]he term [office] embraces the ideas of tenure, duration, emolument, and duties."[64]

In *Hartwell*, the clerk "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."[65] The court did not expressly connect the term "officer" in the embezzlement statute with the phrase "officer of the United States" in the Appointments Clause. However, the court's discussion of the appointment being made by the head of the department suggests the two concepts were closely related—rightly so, in our view. *Hartwell*, like *Mouat*, understood officers to be appointed, and not elected. Eleven years later, the Court decided *United States v. Germaine*.[66] And the *Germaine* Court repeated *Hartwell*'s four-factor test.[67]

In the modern era, the Supreme Court has cited the second part of *Hartwell*'s test, as repeated in *Germaine*, to determine whether a position is a principal or inferior "officer of the United States."[68] But this second part of *Hartwell* was premised on the first part: an officer is "conferred by the appointment of government." Presidents are not

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[63] *Id.* at 393 (emphasis added).

[64] *Id.*

[65] *Id.* at 393–94.

[66] United States v. Germaine, 99 U.S. 508 (1878).

[67] *Id.*

[68] Morrison v. Olson, 487 U.S. 654, 672 (1988) ("In our view, these factors relating to the 'ideas of tenure, duration . . . and duties' of the independent counsel, are sufficient to establish that appellant is an 'inferior' officer in the constitutional sense." (citing *Germaine*, 99 U.S. at 511–12)); *cf. Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) (noting that the four-factor test from *Germaine* "was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an 'officer of the United States' (to which the criminal statute at issue applied) as opposed to a mere employee."). We agree with Justice Scalia. *See also* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018), [hereinafter Tillman & Blackman, *Mueller*] [https://perma.cc/XK32-Q3JW] ("*Germaine*'s four-factor test had nothing to do with whether a position was held by an . . . 'inferior' or 'principal' officer. *Germaine* concerned the distinction between an 'officer of the United States' and an 'employee of the United States.'").

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"appointed" by the "government." Presidents are "elected" by the people.[69] Chief Justice Roberts announced the same view in *Free Enterprise Fund*: "[t]he people do not vote for the 'Officers of the United States.'"[70]

From *Hartwell* to the present, the Supreme Court has consistently understood that "offices" and "officers" refer to appointed positions. These authorities place the President outside the scope of the phrase "officer of the United States" in Section 3.

C. OTHER CONTEMPORARY AUTHORITIES FURTHER REBUT ARGUMENTS IN FAVOR OF LINGUISTIC DRIFT

There is additional evidence that the phrase "officer of the United States" in Section 3 does not extend to the presidency. Furthermore, this evidence is roughly contemporaneous with the 1868 ratification of the Fourteenth Amendment. In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States."[71] Instead, Booth stated, the President is "part of the Government."[72]

Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one

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[69] *See supra* note 51 and accompany text (discussing the elected President).

[70] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010).

[71] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California); *see also id.* at 130 (reproducing May 25, 1876 statement of George Sewell Boutwell, Senator from Massachusetts, who stated: "[F]or according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers.").

[72] *Id.* at 145.

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branch of 'the Government.'"[73] In 1866, the Supreme Court observed that "the President is the executive department."[74] And more recently, the Supreme Court described the presidency in the same fashion: "The President is the only person who alone composes a branch of government."[75]

These sources tend to rebut any argument in favor of post-1788 linguistic drift with respect to the phrase "officer of the United States." Likewise, these sources provide some evidence that in the period following the Civil War, the phrase "officer of the United States" did not extend to elected positions, including the presidency. We do not suggest that there is no counter-authority. But until proponents of the view that Section 3's "officer of the United States"-language includes the presidency put forward evidence as probative as *Mouat* and *Hartwell*, we will maintain that the original public meaning did not shift between 1788 and 1868. The President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

IV. CONSISTENT WITH SUPREME COURT PRECEDENT, THE EXECUTIVE BRANCH HAS LONG CONTENDED THAT ELECTED OFFICIALS, LIKE THE PRESIDENT, ARE NOT "OFFICERS OF THE UNITED STATES"

The Executive Branch has long relied on Justice Miller's discussion of "Officers of the United States" in *Mouat*. In 1918, Attorney General Thomas Watt Gregory concluded that "[a]n assistant United States district attorney is not an employee of the United States within the meaning of the Federal Employees'

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[73] DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Philadelphia, J.B. Lippincott & Co. 1878).

[74] Mississippi v. Johnson, 71 U.S. 475, 500 (1866).

[75] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020).

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Compensation Act."[76] Citing *Mouat*, he assumed that if a "person in the service of the Government [is] not appointed by the President, a court, or a head of a department, *and not elect[ed]*," then he is not an officer, but "is an employee."[77] The Executive Branch has long taken the position that the phrase "Officers of the United States" does not extend beyond persons appointed pursuant to Article II, Section 2 procedures.

In 1943, Attorney General Francis Biddle cited *Mouat* for the proposition that "under the *Constitution* of the United States, *all* its officers were appointed by the President . . . or by a court of law, or the head of a department."[78] Biddle's reading of *Mouat* did not distinguish "officers of the United States" as used in the statute from "Officers of the United States" as used in the Constitution. And, Biddle reasoned that "all" officers must be *appointed*—not *elected*.

In 2007, an Office of Legal Counsel (OLC) memorandum echoed this position. Citing *Mouat*, the memorandum stated, "[i]t is true that an individual not properly appointed under the Appointments Clause cannot *technically* be an officer of the United States."[79] The modifier "technically" is significant. Here, OLC suggests that the Constitution uses the phrase "officer of the United States" in a technical sense. The Constitution does not use the phrase "officer of the United States" as a colloquialism. In other words, the Framers did not use the phrase "officer of the United States" as it is used in

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[76] Employee Compensation Act—Assistant United States Attorney, 31 U.S. Op. Atty. Gen. 201, 202 (1918) (citing United States v. Mouat, 124 U.S. 303, 307 (1888)) (emphasis added).

[77] *Id.* (emphasis added). *Buckley v. Valeo* also distinguished between an "officer of the United States" and an "employee of the United States." *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). *See also* Tillman & Blackman, *Mueller*, *supra* note 68 (concluding that under *Buckley v. Valeo*, Special Counsel Mueller was not an "officer of the United States," but a mere "employee of the United States").

[78] Prosecution of Claims by Members of War Price and Rationing Boards, 40 U.S. Op. Atty. Gen. 294, 296 (1943) (Biddle, A.G.) (emphasis added).

[79] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007) (emphasis added).

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common parlance—a position that performs services for the United States of America. Rather, the phrase "officer of the United States" was used in a technical fashion to refer to specific positions.

Indeed, *Mouat* recognized that the phrase "officer of the United States" was a technical term. The *Mouat* Court found that a "person in the service of the Government" "is not, *strictly speaking*, an officer of the United States" unless he "holds his place by virtue of an appointment. . . ."[80] This 2007 OLC opinion strongly supports our position: the President, who is elected and not appointed, cannot be an officer of the United States.

Other executive-branch opinions have reached a similar conclusion when interpreting "officer"-language in statutes or regulations. Future-Chief Justice William H. Rehnquist observed that federal courts do not extend general "officer"-language in statutes to the President, "unless there is a specific indication that Congress intended to cover the Chief Executive."[81] Future-Justice Antonin Scalia also embraced this position in an OLC opinion. He wrote, "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[82] These authorities, which are consistent with *Mouat*, *Hartwell*, and *Free Enterprise Fund*, provide further support for our position: the elected President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

V. ADVOCATES WHO ARGUE THAT THE PRESIDENT IS AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF

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[80] *Mouat*, 124 U.S. at 307 (emphasis added).

[81] Memorandum from William H. Rehnquist, Asst. Att'y Gen., to the Honorable Egil Krogh, Re: Closing of Government Offices in Memory of Former President Eisenhower, OLC, at 3 (Apr. 1, 1969) [https://perma.cc/P229-BAKL].

[82] Memorandum from Antonin Scalia, Asst. Att'y Gen, to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P., OLC, at 2 (Dec. 19, 1974) [https://perma.cc/GQA4-PJNN].

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SECTION 3 HAVE FAILED TO MEET THEIR BURDEN OF PERSUASION

Professor Gerard Magliocca wrote an analysis of Section 3 of the Fourteenth Amendment.[83] He cited our prior work suggesting that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.[84] Magliocca did not reach a firm position on this issue. But he acknowledged that "[i]f there is an attempt to apply Section Three to former President Trump for his role in the events of January 6, 2021, the issue of whether Section Three applies to him or to the presidency itself will surely be part of any ensuing litigation."[85]

Magliocca cited congressional debates about draft versions of the Fourteenth Amendment. These records suggest that some members of Congress thought the presidency was an "office . . . under the United States" for purposes of Section 3's disqualification element.[86] Other scholars reached similar conclusions. [87] This evidence, however, does not clearly control the threshold question presented by the jurisdictional element: is the President an "officer of the United States."

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[83] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. 87, 93 n.29 (2021).

[84] *Id.* (citing Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section Three of the Fourteenth Amendment*, REASON-VOLOKH CONSPIRACY (Jan. 20, 2021) [https://perma.cc/A45G-PCQJ]).

[85] *Id.*

[86] *Id.* at 93–94 (discussing, for example, statements of Rep. Morrill and Rep. Bingham).

[87] *See* Mark Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021) [https://perma.cc/26BG-W7Q7] ("In the absence of any statement even hinting the contrary, no Republican could have believed that traitors should not become members of Congress, but ought to be allowed to be President of the United States."); Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021) [https://perma.cc/FBS4-HFYN] ("But the framers of the 14th Amendment clearly thought that Section 3 covered the president."). Hemel seems to have conflated Section 3's jurisdictional and disqualification elements.

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Magliocca also made a purposivist argument. He wrote that "Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or a Senator but could be President."[88] In 2009, Professor Saikrishna Prakash made this same argument in response to an article by Tillman.[89] But these intuitions also concern the scope of Section 3's disqualification element. These intuitions do not squarely resolve the issue of whether a President was an "officer of the United States" for purposes of Section 3's jurisdictional element.

Advocates who argue that the President is an "officer of the United States" for purposes of the jurisdictional element have presented three broad arguments. First, advocates cite scattered sources that refer to the President as an "officer" or an "officer of the United States." Second, advocates hypothesize that the Framers of the Fourteenth Amendment may have feared a former President, who took one constitutional oath and later supported the Confederacy, being re-elected to the presidency. Third, advocates argue that Section 3's jurisdictional element should be read to cover as many positions as possible, and not exclude the presidency. In our view, these arguments fail to meet the burden of persuasion. Finally, if any doubt remains, the democracy canon supports excluding the president from the scope of Section 3's jurisdictional element. Let the people, and not partisan state election boards decide who can be the next President.

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[88] Magliocca, *supra* note 83, at 93–94.

[89] Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL'Y 143, 161 (2009) ("Jefferson Davis and Robert E. Lee could have served as President of the United States without a congressional waiver of the bar against oath-breaking confederates. Reading this Amendment to require a congressional waiver for former confederates serving as postmasters or corporals but to not require such a waiver when a turncoat wished to serve as President would be rather strange."). Prakash was responding to Tillman's argument that a sitting President could serve in the Senate. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009).

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A. SCATTERED REFERENCES TO THE PRESIDENT AS AN "OFFICER" ARE NOT SUFFICIENT TO OVERCOME THE EVIDENCE IN SUPPORT OF OUR READING OF SECTION 3'S JURISDICTIONAL ELEMENT

Myles S. Lynch wrote an article about Section 3 of the Fourteenth Amendment. He rejected the distinction we draw between an "office . . . under the United States" and an "officer of the United States."[90] And he contended that the President is *both* an "office . . . under the United States" and an "officer of the United States."[91] To support his thesis, Lynch cites three categories of evidence. First, he looks to language used in the 1862 loyalty oath statute. Second, he cited a circuit court decision from 1837. Third, he cites scattered references that the President is an "officer of the United States." These sources provide only minimal support for Lynch's position, and are not sufficient to overcome the evidence in support of our reading of Section 3's jurisdictional element.

1. The 1862 Loyalty Oath statute does not support the argument that the Presidency holds an "Office … under the United States" for purposes of Section 3's jurisdictional element

Lynch cited the 1862 loyalty oath statute to support his reading of Section 3.[92] The law required certain federal positions to swear they did not support people "engaged in armed hostility" against the

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[90] Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. (forthcoming 2021) (manuscript at 11) [https://perma.cc/6EYJ-TMQ2]. At present, Lynch has only posted a draft of his article to the Social Science Research Network. In this Article, we respond to what Lynch has posted online and to other materials he has cooperatively made available to us.

[91] *Id.* at 7.

[92] Act to Prescribe an Oath of Office, and for other Purposes, ch. 127, Pub. L. No. 37-127, 12 Stat. 502 (1862) (repealed 1868).

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United States.[93] Specifically, the law imposed an additional oath requirement on "every person elected or appointed to any *office of honor or profit under the government of the United States*, either in the civil, military or naval departments of the public service, *excepting the President of the United States*."[94] The statute used the phrase "office . . . under the government of the United States," which is similar, but not identical to the phrase "office . . . under the United States." Lynch drew an inference from this statute: if the President did not hold an "office . . . under the United States," then there would be no need to expressly exempt him. Therefore, Lynch reasoned, the presidency would be considered an "office . . . under the United States."

This inference might have some bearing on Section 3's disqualification element, which uses the phrase "office . . . under the United States." But this inference does not plainly affect the meaning of Article 3's jurisdictional element, which refers to an "officer of the United States." If "officer of the United States" has a different meaning than "office . . . under the United States" – the central thesis of this Article – then the 1862 oath statute does not shed much light on Section 3's jurisdictional element.

Even if you disagree with our thesis, there are other reasons to express caution about relying on the 1862 loyalty statute. This bill was very controversial. There was a vigorous congressional debate about the scope of the law's statutory language. In 1863, Senator Charles Sumner of Massachusetts put forward a resolution requiring all Senators to take the newly-prescribed loyalty oath.[95] Senator James Asheton Bayard, Jr. of Delaware, however, objected to the constitutionality of this resolution. Bayard, a former United States Attorney for Delaware, had authored an antebellum treatise on the

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[93] *Id.*

[94] *Id.* (emphasis added).

[95] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4]; Seth Barrett Tillman, *The Foreign Emoluments Clause – Where the Bodies are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 260 (2017) [hereinafter Tillman, *Bodies*].

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Constitution,[96] and chaired the Judiciary Committee in the 35th and 36th Congresses.[97] He questioned whether the statute's "office . . . under the United States"-language could reach members of Congress. Congress can mandate that *appointed* officers take an additional oath, beyond the ordinary oath prescribed by the Article VI Oath or Affirmation Clause, because Congress created those positions by statute. But in Bayard's view, Congress should not be able to add additional qualifications for *elected* positions that are created by the Constitution, such as members of Congress.[98] Bayard concluded that members of Congress did not hold an "Office . . . under the United States."[99] Bayard based his conclusion, in part, on a report prepared in 1793 by Secretary of the Treasury Alexander Hamilton.[100] After the debate, a majority of Senators disagreed with Bayard. Senator Sumner's resolution passed.[101] And Bayard, a three-term Senator, resigned in protest on a point of principle.[102] The loyalty oath would not last long. Congress repealed the statute in 1868, the same year the Fourteenth Amendment was ratified.[103]

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[96] *See* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Hogan & Thompson 1833). Bayard's treatise continues to be cited by the Supreme Court and in modern scholarship. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (quoting BAYARD); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 486 & n.263 (2017) (quoting BAYARD).

[97] *See Bayard, James Asheton, Jr. (1799–1880)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT [https://perma.cc/NW8G-FYMR]; *History of the District of Delaware*, UNITED STATES DEPARTMENT OF JUSTICE [https://perma.cc/NC5W-UZJZ].

[98] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4].

[99] *Id.*

[100] For the relevance of Bayard's speech and Hamilton's report, *see* Tillman, *Bodies*, *supra* note 95, at 259. Bayard was relying on an edited reproduction of Hamilton's original document—the reproduction was prepared in the 1830s.

[101] Tillman, *Bodies*, *supra* note 95, at 261.

[102] *Id.*

[103] *See generally The Senate's First Act—The Oath Act*, UNITED STATES SENATE [https://perma.cc/V9B7-A6VY] (discussing 1862 Ironclad Oath, and 1868 and 1884 repeal of that oath).

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There is one final reason why the loyalty oath poses special difficulties for Lynch. In his view, members of Congress do not hold "office[s] . . . under the United States."[104] But the 1862 statute, as understood by Senator Sumner, applied to members of Congress. In other words, Sumner viewed members of Congress as "office[s] . . . under the United States." This understanding of the statute undermines Lynch's position in regard to Section 3's jurisdictional element. Ultimately, Lynch may find himself in agreement with Bayard, who argued that members of Congress do not hold "office . . . under the United States." We think the better position is to look to other, and more on-point, sources to understand Section 3's jurisdictional element.[105]

2. Stokes v. Kendall *does not shed light on the meaning of Section 3's jurisdictional element*

Lynch cited a second source of authority to support his position that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element: *United States ex rel. Stokes v. Kendall*, a circuit court decision from 1837.[106] This dispute led to the Supreme Court's definitive statement of the president's duty to oversee his principal officers.[107]

During the John Quincy Adams administration, Stockton & Stokes received important carrier contracts to assist the Postal Service. That firm was loyal to Adams. Upon taking office in 1829, President Jackson refused any service from the firm. Amos Kendall was appointed postmaster general in 1835. He found that the Adams administration overpaid Stockton & Stokes in credits. Kendall sought to correct that error by eliminating the credits. Kendall wrote in his autobiography that when he raised the issue with President Jackson,

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[104] Lynch, *supra* note 90.

[105] *See supra* Parts II, III, and IV.

[106] United States *ex rel.* Stokes v. Kendall, 26 F. Cas. 702, 752 (C.C.D.C. 1837) (No. 15,517).

[107] Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

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Old Hickory "remitted the matter to [his] discretion."[108] Kendall knew what had to be done, and removed the credits from the ledgers.

Congress did not approve of the nonpayment. Rather, Congress passed a law requiring the solicitor of the Treasury Department to review the accounts, settle the differences, and order the postmaster general to apply the credits. After receiving the solicitor's judgment, Kendall paid out most of the credits, but withheld some that he believed to be outside the congressional edict. This act of defiance was purportedly done "by President Jackson's order."[109]

Stockton & Stokes continued to press its claims after President Martin Van Buren succeeded Jackson in 1837. The firm "called on the President, under his constitutional power to take care that the laws were faithfully executed, to require the postmaster general to execute this law, by giving them the further credit" to which they claimed entitlement.[110] The circuit court, per Chief Judge Cranch, issued a writ of mandamus compelling the postmaster general to apply the credits in full.[111] On appeal, the Supreme Court agreed, and held that the postmaster general must comply with positive congressional edicts, lest the duty to take care that the laws be faithfully executed become a "dispensing power."[112] On appeal, Chief Justice Taney wrote the majority opinion. The Court stated, "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution."[113] The Supreme Court has reiterated *Kendall*'s reasoning. The principles from that case are

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[108] AMOS KENDALL, AUTOBIOGRAPHY OF AMOS KENDALL 350 (William Sitckney, ed., Boston, Lee & Shepard Publishers 1872).

[109] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1836–1918, at 44 (1926).

[110] *Kendall*, 37 U.S. at 538.

[111] *United States ex rel. Stokes*, 26 F. Cas. at 702.

[112] *Kendall*, 37 U.S. at 608 (citing the Take Care Clause).

[113] *Id.* at 613.

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"fundamental and essential," and without them, "the administration of the government would be impracticable."[114]

Lynch cited a single sentence from Chief Judge Cranch's circuit court decision that used the phrase "officer of the United States." Lynch used that sentence to interpret the phrase "officer of the United States" in Section 3's jurisdictional element. But we think Lynch read *Kendall* out of context.

In his opinion, Cranch described the nature of the Postmaster General's role. He explained that the Postmaster General does not work at the President's absolute command. Rather, the Postmaster General "is responsible to the United States, and not to the president." [115] The President can only command the Postmaster General when, "express law, authorized to assign [to the President] duties over and above those specially prescribed by the legislature." [116] The Postmaster General is not an officer of the President. Rather, he is "the officer of the United States, and so called in the constitution, and in all the acts of congress which relate to such officers."[117]

Here, Cranch was not interpreting the phrase "officer of the United States" as used in the Appointments Clause or in any other constitutional provision. Cranch also was not interpreting how the phrase "officer of the United States" was used in any statute or other positive law. Rather, Cranch was making a broader point about our system of government: officers are responsible to the nation and its laws, and not to the President. Cranch explained, "the postmaster-general must judge for himself, and upon his own responsibility, not

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[114] United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 304 (1854). *See also* United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915); Texas v. United States, No. 6:21-CV-00016, 2021 WL 3683913, at *37 (S.D. Tex. Aug. 19, 2021) (citing Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy Rabkin as *Amici Curiae* Supporting Respondents at 5–6, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) [https://perma.cc/DXM2-VHJH]).

[115] *United States ex rel. Stokes*, 26 F. Cas. at 752.

[116] *Id.*

[117] *Id.*

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to the president, but to the United States, whose officer he is."[118] The Constitution "does not authorize the president to direct [the Postmaster] how he shall discharge"[119] his duties. In the very next sentence, Cranch wrote:

> The president himself, although called by the postmaster-general, in his answer, 'the highest representative of the majesty of the people, in this government,' is but an *officer of the United States*, the head of one of the departments into which the sovereign power of the nation is divided; and, as that is the executive department, he may, with propriety, be called the chief magistrate *of the United States*.[120]

Lynch cited this sentence as evidence that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element. We disagree. Cranch used the phrase "of the United States" here in the same way that he did with respect to the Postmaster General: The President is responsible to the nation and its laws. In using "officer of the United States"-language, Cranch was not interpreting either a statute or a constitutional provision. He was using this same language in a more colloquial, or even a philosophical sense.

Cranch was not making a precise statement about what constitutional language governs or includes the President. Rather, he juxtaposed "officer of the United States" and "chief magistrate of the United States." Cranch made a broader point about constitutional governance—with some well-positioned jabs at President Jackson.

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[118] *Id.*
[119] *Id.*
[120] *Id.*

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(Cranch, a Federalist, was the nephew of President John Adams, and was also President John Quincy Adams's cousin.[121])

This brief aside from a circuit court decision is a very thin reed on which to place the construction of Section 3, which was ratified three decades later. Indeed, no comparable language appears in Chief Justice Taney's Supreme Court decision. By contrast, *Free Enterprise Fund* was an Appointments Clause case where the scope of the Constitution's "Officers of the United States"-language was a live issue. Chief Justice Roberts wrote, "[t]he people do not vote for the 'Officers of the United States.'"[122] Moreover, *Mouat* and *Hartwell* provide far more authoritative support for the proposition that the President is not an "officer of the United States." We do not put much weight on this aside from *Kendall*.

3. Scattered references that suggest the President is an "officer of the United States" or an "officer" cannot establish the precise meaning of a phrase used in Section 3's jurisdictional element

Finally, Lynch cited scattered sources in which the President was referred to as an "officer of the United States." For example, in 1824, President James Monroe sent a communication to the Senate and House.[123] Monroe recounted an incident in which the Massachusetts Governor refused to call forth the state militia. The state executive argued that the state executive must consent to that request. Moreover, according to Monroe, the Governor argued that the militia

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[121] *See John Quincy Adams to Lucy Cranch, June 1, 1778*, FOUNDERS ONLINE (last visited Dec. 8, 2021) [https://perma.cc/E83G-8N6] ("Late in 1800 President John Adams, the husband of Cranch's aunt Abigail Smith Adams, appointed [William Cranch] a commissioner of the federal district, and early the next year he made him an assistant judge for the United States Circuit Court for the District of Columbia. . . . Despite Cranch's Federalist views, [Thomas Jefferson] named him chief justice for the circuit court, in which capacity he served until his death."); *id.* ("Only the immediately preceding letter from [John Quincy Adams] to his cousin William Cranch, Lucy's brother, has been found.").

[122] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[123] S. JOURNAL, 24th Cong., 1st Sess. 190 (1824) [https://perma.cc/CYY9-3WYC].

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"could not be commanded by a *regular officer of the United States*, or other officer than of the militia, *except by the President*, in person." In the very next sentence, Monroe wrote "this decision of the Executive of Massachusetts was repugnant to the constitution of the United States, and of dangerous tendency."

Lynch read this correspondence to suggest that the President is an "officer of the United States." That conclusion is not obvious, particularly because Monroe's statement was awkward. The construction of the sentence can be read in two different ways. First, that the President is an officer of the United States who can command the militia. Second, that the militia could be commanded by militia officers who are not "regular officers of the United States," but the President is a militia officer and not an "officer of the United States." This second reading is consistent with the Constitution's militia clause, which puts the state militias under presidential control in certain circumstances.[124]

We are not sure which reading is correct. We should be hesitant to put much weight on a poorly-crafted comment from President Monroe, which he used to assail the allegedly unconstitutional viewpoint of the Massachusetts Governor. And even if Lynch's reading were correct, Monroe was not interpreting how the phrase "officer of the United States" was used in Section 3 or any then-extant constitutional provision.

Lynch also cited an 1865 proclamation by President Andrew Johnson. It stated, "the President of the United States is, by the constitution, made commander-in-chief of the army and navy, as well as the chief civil officer."[125] Here, the phrase "chief civil officer"

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[124] U.S. CONST. art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

[125] *After Slavery: Educator Resources, 3. President Andrew Johnson Appoints William W. Holden Provisional Governor of North Carolina*, LOWCOUNTRY DIGIT. HIST. INITIATIVE [https://perma.cc/9Z63-9K8B].

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is distinct from the language used in Section 3's jurisdictional element: "officer of the United States."

There may be other scattered statements in records of congressional debates that refer to the President as an "officer of the United States." We don't doubt it. People in government and academics may use imprecise language to describe different types of offices and officers. And in everyday parlance, the President is an officer of the United States of America.[126] We have never said otherwise. We have never suggested that authority is not divided. However, these scattered references cannot establish the precise meaning of a phrase used in Section 3 and elsewhere in the Constitution.

B. FEARS OF A FORMER CONFEDERATE BECOMING PRESIDENT WOULD NOT CONTROL WHETHER A FORMER PRESIDENT, WHO TOOK ONLY THE PRESIDENTIAL OATH, COULD BE DISQUALIFIED

We acknowledge that there is a purposivist argument supporting the view that the President is an "officer of the United States" with respect to Section 3's jurisdictional element. Could it really be, the argument goes, that virtually every elected and appointed position in the federal and state governments would be encompassed by Section 3's jurisdictional element, but not the presidency? After all, a former President of the United States—John Tyler—actually was elected to the Confederate congress![127] Would the Framers really have exempted Tyler (or men like him) from disqualification? Professor Magliocca, citing the Tyler hypothetical, suggested that "the idea of an insurrectionist President was real, not

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[126] *See supra* Part IV (discussing Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007)).

[127] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

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a far-fetched hypothetical."[128] And John Breckinridge, who had served as Vice President of the United States under President Buchanan, later served as a general in the Confederate army.[129]

There is a pragmatic rationale that explains why the presidency was excluded from the jurisdictional element of Section 3. By the time the Fourteenth Amendment was ratified in 1868, there were no living Presidents that had supported the Confederacy. Tyler died in 1862.[130] Moreover, Tyler had served as Senator from Virginia. Had Tyler still been alive, he was unquestionably covered by Section 3's jurisdictional element.

The other four living former Presidents—Fillmore, Pierce, Buchanan, and Johnson—had not supported the Confederacy. And each of those four officials had previously served in Congress, so they were unquestionably covered by Section 3's jurisdictional element. Moreover, Breckinridge, the former Vice President of the United States who joined the Confederacy, had previously served as a U.S. Senator.[131] Therefore, he was already expressly covered by Section 3's jurisdictional element.

At the time the Fourteenth Amendment was ratified, there were zero former living U.S. Presidents and Vice Presidents who supported the Confederacy, and who would not otherwise fit within the express language used in Section 3's jurisdictional element. Thus, the Framers of the Fourteenth Amendment—whose focus was on past wrongdoing during the Civil War—had no pressing reason to draft Section 3's jurisdictional element to cover presidents. And we are not aware of any evidence that Section 3 was forward-looking,

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[128] Gerard N. Magliocca, *Section Three Questions Answered*, BALKINIZATION (Jan. 17, 2021, 7:19 PM) [https://perma.cc/Z4PE-Q8WJ].

[129] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

[130] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

[131] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

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and was drafted to disqualify future presidents who might participate in future insurrections.

We think the democracy canon provides further support for our position.[132] Professor Richard L. Hasen explains that under this canon, a provision of the Constitution that might be read to "limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor."[133] This presumption equally applies to the political candidate who wishes to run for an elected position. Given two reasonable readings of the phrase "officer of the United States" in Section 3, the democracy canon favors the reading that expands democratic choice. Under our approach, voters and electors can select the President of their choice. Under Lynch's reading of Section 3, voters and electors nationwide are permanently disenfranchised from selecting a presidential candidate. Indeed, they are disenfranchised from selecting a person who was already elected as President who seeks a second term. We should prefer the former reading, which is consistent with the democracy canon.

Even in the wake of January 6, 2021, we should not read Section 3's text through the lens of the transitory and felt needs of the moment. The original public meaning of the Fourteenth Amendment, including Section 3's jurisdictional element, was fixed more than 150 years ago.

Finally, from 1789 through 2016, all of the presidents and vice Presidents had previously taken a constitutional oath in some other government position. We do not think this pattern was coincidental. Historically, a person could only rise to the level of presidency following prior public service in state or federal governments. The only President who never held any other public office, and thus did not take any other constitutional oath prior to his inauguration, was Donald Trump. The question this article seeks to answer—is the President an "officer of the United States" for purposes of Section 3's

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[132] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).
[133] *Id.* at 71.

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jurisdictional element—is relevant for only one President in American history: Donald Trump.

C. SECTION 3'S JURISDICTIONAL ELEMENTS, WHICH EXCLUDES CERTAIN STATE AND FEDERAL POSITIONS, SHOULD NOT BE VIEWED AS A CATCHALL PROVISION

Section 3's jurisdictional element is not a catchall. It does not cover *all* state and federal positions. There are gaps in coverage. For example, the jurisdictional element extends to a "member of any state legislature," as well as "an executive or judicial officer of any state." But Section 3's jurisdictional element does not extend to *appointed* positions in the state legislature. For examples, clerks and secretaries of state legislatures, who later served in the Confederate government, could not be subject to disqualification.

The same analysis would likely extend to appointed congressional positions in the federal government, like the Clerk of the House of Representatives and the Secretary of the Senate. Section 3's jurisdictional element extends to an "officer of the United States." Appointed legislative positions do not fall in this category.

We find support for our position based on the Oath or Affirmation Clause, which in our view served as a model for Section 3's jurisdictional element.[134] The Oath or Affirmation Clause provides the oath for "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States."[135] Appointed congressional positions are not expressly referenced in Article VI.

If Section 3's jurisdictional element was modeled after the Oath or Affirmation Clause, we can presume that appointed congressional positions are not covered by Section 3. As a result, a House Clerk or

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[134] *See supra* Part I.B.
[135] U.S. CONST. art. VI, cl. 3.

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Secretary of the Senate, who took only one constitutional oath, and later joined the Confederate government, could not be disqualified. Section 3's jurisdictional element was not a catchall.

Likewise, Section 3's disqualification element is not a catchall. It did not bar a disqualified person from serving in state legislatures.[136] This omission was significant. After all, state legislators were central players as southern states declared their secession. Moreover, prior to the ratification of the Seventeenth Amendment, members of state legislatures chose their state's U.S. Senators.[137] The state legislatures also "prescribed" the rules for the "Times, Places and Manner of holding Elections for Senators and Representatives."[138] The decision to exclude state legislatures from Section 3's disqualification element had the potential to undermine Reconstruction.

Section 3, as a whole, had other glaring omissions. Disqualified persons could: (1) serve on state or federal juries; (2) serve as elected territorial officers; (3) serve as enlisted federal military or state militia personnel; (4) participate as national or state convention members under Article V; and many other positions. Section 3's jurisdictional and disqualification elements did not universally apply to every person who had supported the Confederacy.

None of the advocates for Section 3 disqualification of President Trump have advanced comprehensive arguments or marshaled systematic evidence that the President is an "officer of the United States." This position cannot simply be asserted or presumed, absent evidence. Advocates for Section 3 disqualification of President Trump have the burden of persuasion. They should rebut the evidence we have put forward in this article, and elsewhere.[139] And they must explain why the arguments and evidence they put forward

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[136] Tucker, *supra* note 37, at 54–56.

[137] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years.").

[138] U.S. CONST. art. I, § 4, cl. 1.

[139] *See* Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190 (2021) (discussing scope of disqualification element).

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carries the burden of persuasion notwithstanding contrary argument and evidence, and notwithstanding the democracy canon. And the evidence should be something more than personal intuitions or citations to the conclusory statements of other modern commentators asserting how the 1868 public *must* have understood the language of Section 3. Critically, these issues should be resolved before the next presidential election.

VI. THE COURTS, AND NOT CONGRESS, WILL LIKELY HAVE THE FINAL SAY OVER WHETHER PRESIDENT TRUMP CAN BE DISQUALIFIED UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT

In 2021, the Senate did not convict President Trump based on the sole article of impeachment. Therefore, the Senate had no need to squarely face the question of whether a Section 3 disqualification against Trump would bar him from holding the presidency in the future. Similarly, even if the Senate had convicted President Trump in impeachment proceedings, and voted to disqualify him under the Impeachment Disqualification Clause, the Senate would not finally resolve the scope of that disqualification. To be sure, had the Senate tried, convicted, and disqualified President Trump, members of Congress could have stated on the record that they were barring Trump from ever serving again as President.

Those statements, however, would not be dispositive of the constitutional issue. Rather, the situation would arise in a different context. Imagine that Trump seeks re-election in the future. Trump would submit a ballot petition to state and territorial boards of election. But that submission could be contested in adversarial proceedings. County-wide, multi-country, and state-wide boards of elections regularly hear challenges to candidates' ballot petitions. These suits are brought by voters or candidates seeking to keep a rival candidate off the ballot. In such circumstances, the candidate seeking his place on the ballot is the defendant.

In certain circumstances, a board of election might strike a candidate's ballot petition *sua sponte*. However, we think that a board

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would only do so where the petition is facially defective. For example, where a required document is entirely missing, or where the candidate's signature is missing, or where all required notarizations are absent, or where the petition itself makes admissions establishing that it is defective. We do not think a board *sua sponte* striking a ballot based on a novel reading of Section 3 would be consistent with established law. Nevertheless, it is also conceivable that a board of election might act *sua sponte* in making a Section 3 determination.[140]

It is also feasible that Congress will pass a concurrent or joint resolution to disqualify Trump under Section 3. At that juncture, boards of election would hear arguments presented through adversarial litigation. And the boards would be in a position to determine the effect (if any) of a Section 3 concurrent or joint resolution against President Trump's holding an "office . . . under the United States." Such a concurrent resolution is currently pending before the House.[141]

All of these determinations by election boards could be appealed to the courts. In all likelihood, it is not Congress, but the courts that would have the final say in resolving the scope—if any—of Section 3 disqualification imposed by the Senate or by both houses of Congress.

The courts may also be asked to resolve an appeal of a decision by an elections board in regard to a ballot-access dispute, which may involve these same issues. Additionally, even in the absence of any disqualification decision by the Senate or by Congress, an elections board might decide a Section 3-related ballot challenge. Specifically,

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[140] *See* Gerard Magliocca, *State Law and Section Three of the Fourteenth Amendment*, PRAWFSBLAWG (Aug. 26, 2021, 2:00 PM) [https://perma.cc/T2W9-5GYT] ("One possible scenario in 2023 goes something like this: Donald Trump declares that he is a candidate for President. Some state election officials rule that he is ineligible to run under Section 3. He sues and the constitutional issue is litigated. . . . . Of course, some states might decide to amend their election law to include Section 3 and thus eliminate the problem I've just described prior to 2023.").

[141] *See* H.R. Con. Res. 3, *supra* note 12.

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if a voter or rival candidate brings a ballot access challenge, the board may conclude that President Trump is *already* disqualified to serve as President. Likewise, in the absence of any disqualification decision by the Senate or by Congress, the courts may be asked to decide, in the first instance, whether President Trump was disqualified for purposes of Section 3.

There are many possible routes through which these issues might be litigated before boards of election, the courts, or both. Still, there is a common thread: If the President is not an "officer of the United States" as that phrase was used in Section 3's jurisdictional element, then President Trump cannot be disqualified pursuant to Section 3.

Finally, it was not clear that the House managers actually sought to disqualify Trump under the Impeachment Disqualification Clause, *as well as* under Section 3. During the 2021 proceedings the sole article of impeachment was opaque on this point. This lack of clarity was perhaps intentional. Or the imprecision could be attributed to the House's rushed drafting. We think the article of impeachment only referenced Section 3, in the context of efforts to define a substantive impeachable offense. We expected that President Trump's counsel would have argued that the text of the House's single article of impeachment did not give him fair notice that he faced Section 3 disqualification. But because Trump was never convicted by the Senate, the disqualification issue was never discussed in any detail.

Conclusion

The issue presented in this Article is not merely a theoretical one. There is a real chance that the fate of the 2024 presidential election could turn on whether President Trump is disqualified under Section 3.

Imagine that Donald Trump runs for re-election. Soon, election boards throughout the country hear ballot challenges. However, the rulings are inconsistent. Some boards may even conclude that Trump is already disqualified based on Section 3 of the Fourteenth

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Amendment, even absent any congressional or Senate resolution so deciding. Candidate Trump would be forced to take urgent appeals to the courts. And, in short order, the judiciary would have to resolve three pivotal questions. First, does President Trump fit within the jurisdictional element of Section 3: was he an "officer of the United States"? Second, does President Trump's conduct fit within the offense element: did he "engage[] in insurrection"? Third, does the disqualification element extend to the presidency: is the presidency an "office . . . under the United States"? And these questions would be promptly appealed to the Supreme Court.

If the Supreme Court agrees with us, and concludes that the President is not an "officer of the United States," then the case is over. Election boards that deemed Trump disqualified would be reversed. Trump could be listed on the ballot. The people, and not partisan election boards would select the next President.

However, if the Supreme Court disagrees with us, it would need to decide several other thorny issues. The Justices would be drawn into the maelstrom of January 6, 2021, and have to decide, as a matter of law, whether the President "engaged in insurrection." Here, abstention would not be a viable option. If the Court dismisses the case as a political question, election boards, and not the people, would decide the next presidency. States would face chaos if local election boards make different decisions. It is possible that within a given state, some counties would list Trump on the ballot and other counties would not. State supreme courts may not enforce uniform ballot procedures. This fragmented patchwork approach would be far more problematic than the selective recounts at issue in *Bush v. Gore*.

Perhaps the Supreme Court would leapfrog the offense element, and jump right to the disqualification element. If the presidency is not an "office . . . under the United States," then Trump could not be disqualified from the presidency. Thus, there is no need to decide if Trump "engaged in insurrection." In this article, we have made the case that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element. But we have been very careful to avoid resolving the scope of the phrase "office . . . under the United States" in the disqualification element. Suffice to say, in

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light of the possibility of linguistic drift from 1788 till 1868, we think this issue is contestable. And in the end, the Supreme Court would decide whether President Trump remains on the ballot.

In 2020, the U.S. Supreme Court was able to avoid resolving any of the major election disputes. But 2024 may be different. A Supreme Court ruling on this issue could make *Bush v. Gore* seem mild by comparison. There are many prudential reasons for the Court to avoid deciding whether Trump engaged in insurrection, or whether Trump can be—or perhaps was already—disqualified. The Court should can stay out of that MAGA thicket. A narrow finding that the President is not an "officer of the United States" ends the case. That opinion would be entirely consistent with Supreme Court authority from *Mouat* to *Free Enterprise Fund*. It would track the text of Section 3. It would be consistent with the Constitution of 1788. And, most importantly, it allows the people to elect the next President, and not the courts, much less partisan election boards.

We conclude that the President is not a Section 3 "officer of the United States." Donald Trump is not disqualified by Section 3, and can run for re-election.

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EXHIBIT 3

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude & Michael Stokes Paulsen

Abstract: Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This article corrects those mistakes by setting forth the full sweep and force of Section Three.

First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. *Second*, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. *Third*, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. *Fourth*, Section Three covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support as "aid or comfort." It covers a broad range of former offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude* & Michael Stokes Paulsen**

Introduction

"Section 3 has long since faded into history."
- Eric Foner[1]

Reports of Section Three's demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force, and has a broad substantive sweep.

Here is what it says:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War.

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[1] Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 85 (2019).

[2] U.S. Const. art. XIV, sec. 3.

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States in the South had purported (unconstitutionally)[3] to secede from the Union; they had purported to form the (so-called) "Confederate States of America" in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). The former Confederates who arrived in Washington included "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[4]

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective "reconstruction" of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in "insurrection or rebellion" against the U.S. constitutional authority or given "aid or comfort" to its enemies. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.[5] The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting

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[3] See infra note 231 and sources cited there.

[4] Akhil Reed Amar, America's Constitution: A Biography 377 (2005); see also Eric L. McKitrick, Andrew Johnson and Reconstruction 176-179 (1960); Allen C. Guelzo, Reconstruction: A Concise History 25 (2018).

[5] The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment.. 87 (2021); Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, Lawfare (Jan. 19, 2021), available at https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.

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and immediate incitement of a mob to attempt to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'etat. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an "insurrection" aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have foundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process and free speech? And if Section Three *does* apply—*to what and to whom?* What actions count as having "engaged in insurrection or rebellion" against the Constitution of the United States or having "given aid or comfort to the enemies thereof"? Which officials are covered by Section Three's exclusions?

This article attempts to answer these questions. It makes four key points (or clusters of points):

First. Section Three remains legally operative. It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

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Nor has Section Three somehow been "repealed" by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; Congressional amnesty is retrospective.

Second. Section Three is legally self-executing. That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to justiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,[6] is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them. Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden Ex Post Facto law or Bill of Attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

[6] 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

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This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or giving "aid or comfort" to "the enemies" might turn out to be in tension with the First Amendment's protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three's terms ("insurrection," "rebellion," "aid or comfort," "enemies") will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article's fourth and final group of points:

Fourth. Section Three's disqualification is sweeping in its terms. It disqualifies from future office-holding persons who "*engaged in*"—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms "*insurrection or rebellion*" or the giving of "*aid or comfort*" to "*enemies*" of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three's prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text's meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in insurrection or rebellion or giving aid or comfort to enemies of the lawful constitutional order.

I. Section Three is Legally Operative Today

A. The Generality and Presumptive Perpetuity of Constitutional Language

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The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."[7]

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.[8] It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral," way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and

[7] Eric Foner, Reconstruction, 1863-1877, at 260 (1988).
[8] Mark Graber, Punish Treason, Reward Loyalty: The Forgotten Fourteenth Amendment, Volume 1 (2023, University Press of Kansas).

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generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.[9]

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter that the drafts*men* of the amendment might not have had women "in mind" if women are covered by the meaning of the words they actually wrote and ratified.[10] Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.[11] The answers to each of these questions turn on the objective, original

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[9] See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. J. 1113, 1124-1148 (2004); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 Nw. U. L. Rev. 857, 872-883 (2009); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U Pa. L. Rev. 609, 624-625 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1456-1460 (2019). For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

[10] We have used such examples before. Paulsen, *Rules for Its Own*, supra note 9, at 901-902; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1421 n. 68 (2014); William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment* , 76 Stan. L. Rev. at 67-68 (forthcoming 2024).

[11] We have used this example before, too. Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 839-840 (1993); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2380-2381 (2015). See also Baude, Campbell, & Sachs, supra note 10, at 66.

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meaning of "privileges or immunities of citizens of the United States" and "equal protection of the laws," not whether the 1866 Congress and subsequent ratifiers had thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment's terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn't matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,[12] it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase "insurrection or rebellion.")[13] But in the end the question is what rule was enacted. If Section Three's rule fell short somehow, missing some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.[14]

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[12] Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section's application to the "late insurrection." Later versions dropped this limitation and generalized Section Three's application to "insurrection" and "rebellion." See Cong. Globe, 39th Cong., 1st Sess., at 2767-68, 2770 2869, 2921; see also Mark A. Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished chapter, forthcoming in The Forgotten Fourteenth Amendment, Volume 2, University Press of Kansas) (documenting this development).

[13] Infra Part IV.A.

[14] See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 908-909 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J. L. & Pub. Pol'y (forthcoming 2023) ("Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation."). For an extended discussion of the abuse of arguments

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Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is "old" does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.[15] There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as "the interest in sovereignty fades."[16] But in our view, this just shows what is wrong with such living constitutionalism.[17] The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.[18] But sometimes we wonder if this kind of denial is sneaking in to people's intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive as the day it was enacted.

B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)

But what about this? The second sentence of Section Three provides that Congress "may by vote of two-thirds of each House, remove such disability."[19] Just as the first sentence's disqualification is not limited specifically to the Civil War, neither is Congress's power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put

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from inconvenience, see infra Part II.C.2.a (discussing Chief Justice Chase's appalling opinion in *Griffin's Case*).

[15] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1486-1490 (1997) (discussing privilege against self-incrimination).

[16] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 58 (2015); see also Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295 (2008).

[17] See Baude & Sachs, *Grounding*, supra note 9, at 1487 (responding to Strauss).

[18] For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935) ("It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision cannot possibly apply to the present case").

[19] U.S. Const. amdt. XIV, sec. 3.

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more vividly: Can Congress, by two-thirds vote of each house, essentially "explode" Section Three—render it inoperative in the future, for all time?

These questions turn out not to be completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed "from all persons whomsoever"—except designated categories of individuals—all "political disabilities imposed" by Section Three.[20] Another (from 1898) further removed "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred."[21] And indeed, in a recent case (brought by then-Representative Madison Cawthorn) a federal judge relied on these statutes to conclude that Section Three was now legally dead.[22] Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?[23]

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 act. In 1872, after a period of case-by-case consideration of amnesty requests, Congress, as mentioned above, enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.[24] But what is most important is what it says. The statute reads, in full:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein),* That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-

[20] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[21] Act of June 6, 1898, ch. 389, 30 Stat. 432.
[22] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 889-892 (E.D. N.C. 2022) rev'd sub nom Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022). This argument, too, was made and rejected by the House during the exclusion of Victor Berger. 6 Cannon, supra note 18, at 55.
[23] The power in general of Congress by two-thirds vote of each House to remove Section Three's disability and the history of its exercise are the central themes of Professor Gerard Magliocca's excellent article, cited supra note 5.
[24] See generally Magliocca, *Amnesty*, supra note 5, at 112-120.

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> seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.[25]

The key words are "imposed" and "[hereby] removed." The words of the 1872 statute are used in the past tense: the statute *removed* disqualifications *imposed* by the Fourteenth Amendment—that is, disabilities that had already become legally effective. That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the district court's decision in the *Cawthorn* case: Congress in 1872 employed "the past-tense version" of the verb "impose," thus "indicating its intent to lift only those disabilities that had by then been 'imposed.'"[26] Moreover, the Fourth Circuit continued: "[t]he operative clause's principal verb—'removed'—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come."[27]

By contrast, the district court had faulted Congress for not being more explicit: Congress "could have limited the Act to remove Section 3's disabilities from 'persons currently subject to the disabilities' or 'persons against whom the disabilities were lodged' at the time (i.e., the 'Confederates') but did not do so."[28] Therefore, the district court concluded, by the "plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted."[29] With all due respect, the district court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the "all persons whomsoever" language and completely missed the other language that made clear the statute's past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish-American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances (and, one might add more cynically, at a time of rising Jim Crow sentiment)[30]—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

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[25] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[26] Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022).
[27] Id.
[28] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 891 (E.D. N.C. 2022) rev'd sub nom Carthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022).
[29] Id.
[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Cummings v. Richmond County Bd. of Ed. 175 U.S. 528 (1899). See also Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 195-201 (2015).

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.[31]

In one sense, that's about as categorical, across-the-board a disqualification-removal as one can imagine: *the* disability *imposed* by section three *is hereby removed.* Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses past-tense language: a disability (already) "imposed" is now being "removed" from its prior legal existence. What's more, the 1898 act says that the Section Three disqualification being removed was one "*heretofore incurred*." That is unmistakably backward-looking, past-occurrence language.

What might otherwise—that is, but for the clarity of the "heretofore incurred" language—give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as any and all extant ones, is the Act's reference to "*the* disability" imposed by Section Three. This singular reference might be taken to suggest that Section Three's disqualification was thought a one-time-only, single-shot, Civil War era occurrence.[32] If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was[33] (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress's constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress's constitutional power to remove Section Three's disqualification general and prospective, letting it remove Section Three's disqualification once and for all, including for future situations? We think not.

To be clear, we don't think there's anything inherently unthinkable or absurd about the idea of an "exploding" or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration

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[31] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[32] For instance, the D.C. Circuit's recess-appointments opinion in Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013) aff'd only on alternate grounds, 134 S.Ct. 2550 (2014), leaned heavily on "this difference between the word choice 'recess' and 'the Recess'," arguing that "[a]s a matter of cold, unadorned logic, it makes no sense to [say] that when the Framers said 'the Recess,' what they really meant was 'a recess.' This is not an insignificant distinction. In the end it makes all the difference." Id. But a majority of the Supreme Court did not share this view of the text. NLRB v. Noel Canning, 134 S.Ct. 2550, 2561 (2014).

[33] For the brief legislative history of the 1898 act, see 31 Cong. Rec. 5367-5419 (1898).

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date, even in an enduring Constitution. Article I's Slave Importation Clause, protecting the international slave trade, exploded after twenty years.[34] So too the initial allocation of representatives to states is written in to the text of the Constitution, even though it was then exploded by the subsequent census.[35] Other provisions of the Constitution set baseline rules that Congress has power to modify. Article I, section 4 does that with respect to state legislative power over congressional elections: "Congress may at any time by Law make or alter such Regulations."[36] Article III, section 2 does that with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."[37] The Twentieth Amendment, in Section 2, sets a default date of Congress's annual meeting.[38]

There's no reason why the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the provision's own extinction after a supermajority vote of Congress.[39] But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course, those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

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[34] U.S. Const. art. I, §9, cl. 1. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") For a scathing critique of the substance and purpose of this proviso, see, e.g., Paulsen & Paulsen, supra note 30, at 81-83.

[35] U.S. Const. art. I, § 2, cl.3.

[36] U.S. Const. art. I, § 4.

[37] U.S. Const. art. III, § 2, cl. 2.

[38] U.S. Const. amend. XX, §2.

[39] We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST – Academic Commentary, April 13, 2022, https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/. See also Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("'Congress has no power whatever to repeal a provision of the Constitution by a mere statute'") (quoting 6 Cannon, supra note 18, at 55).

This strikes us as not quite right: *If* Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

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The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." (*"But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "Remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.[40] This confirms that Congress's removal power therefore only comes into being when a legal disqualification has vested by virtue of the operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

* * *

All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect by U.S. political actors whose powers and duties are such as to call for application of Section Three as a rule of law? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

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[40] Dr. Webster's Complete Dictionary of the English Language 1116 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (defining "remove" as "To cause to change place; to move away from the position occupied; to displace") (quoted in Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022)).

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II. Section Three is Legally Self-Executing

Our second point is colossally important—a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient, rejected in the highest quarters, and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself, and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation-of-powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

A. Section Three as Automatic Legal Disqualification

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,[41] in doing so they put the cart before the horse. The horse is the Constitution, which is itself the "supreme law of the land."[42] Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. Section Three's language is language of automatic legal effect: "*No person shall be*" directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall

[41] But not ours! See Paulsen, McConnell, Bray and Baude, The Constitution of the United States (5th ed. 2022).
[42] U.S. Const. art. VI.

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be.[43] It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.[44] The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President. And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, section 2's requirements.[45] "*No Person shall be*" a U.S. Senator who does not meet Article I, section 3's requirements.[46] These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three of the Fourteenth Amendment parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.[47] None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist* ...," the Thirteenth Amendment provides.[48] The institution of slavery was *immediately, legally, constitutionally gone*.[49] The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.[50] But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative. Such a

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[43] We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 84 U. Chi. L. Rev. 203, 211 (1997) ("The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.")

[44] U.S. Const. art. II, §2, cl. 5 (emphasis added).

[45] U.S. Const. art. I, §2, cl. 2(emphasis added).

[46] U.S. Const. art. I, §3, cl. 3 (emphasis added).

[47] See Josh Chafetz, Democracy's Privileged Few 168 (2007).

[48] U.S. Const. amend. XIII §1 (emphasis added).

[49] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 48–53 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

[50] U.S. Const. amend. XIII §2 ("Congress shall have power to enforce this article by appropriate legislation.").

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position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment too. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three states directly operative rules of constitutional law: "No state shall," in Section One, and "No person shall" in Section Three.[51] Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks (for example) that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation "to enforce" the Thirteenth and Fourteenth Amendments' commands, pursuant to their grants of legislative power.[52] Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress's view of the law, and so on. The Civil Rights Act of 1866, the Ku Klux Klan Act of 1871 and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But, to repeat, the existence of an enforcement power does not mean that the Amendment's specific legal commands lack any independent, self-executing force.[53]

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing *quo warranto* civil suits brought by the United States to remove state officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.[54] But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction

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[51] U.S. Const. amdt XIV, sec. 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. Section Two, which alters Article I, section 2's rule for how Representatives "shall be apportioned," presents a more complicated case. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. In practice, Congress has ignored it, see Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 Hist. Meth. 57 (2013); Amar, America's Constitution, supra note 4, at 395; see also email from John Harrison to Akhil Reed Amar, quoted in id. at 611 n. 96, and it is hard to see how anybody else can realistically enforce it.

[52] U.S. Const. amdt. XIII, sec. 2; amdt. XIV, sec. 5.

[53] Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. Baude, Campbell, & Sachs, supra note 10, at 30-31, 63-64.

[54] Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§14, 15, 16 Stat. 140, 143. The criminal prohibition in Section 15 of the Act was repealed in the 1909 codification of the penal code, 35 Stat. 1088, 1153, § 341 (1909), and the quo warranto provision in Section 14 was repealed during the 1948 positive law codifications of Title 28 of the U.S. Code, see Act of June 25, 1948, ch. 646, § 39; see also Lynch, supra note 5, at 206 n. 365. Neither of these codifications was thought to make a substantive change by repealing these provisions, see generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1949); see also The United States Compiled Statutes, Title XIX, page 4459 (1916), which were

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for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.[55] Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[56]

Note the contrast. The Treason Clause defines an *offense* ("Treason . . . shall consist") but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification ("No person shall be"). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: "[C]onvict[ions] of treason" require two witnesses or a public confession; and "Congress shall have power to declare the punishment of treason." Section Three of the Fourteenth Amendment, by contrast enacts its standard and imposes its consequences all at once.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."[57] But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.[58] Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a

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thought obsolete by then. The repeals therefore certainly did not reflect a decision to preempt or preclude any *other* existing remedies for Section Three.

[55] Professor Magliocca concurs. Magliocca, *Amnesty*, supra note 5, at 106 & n.101 (noting that "enacting enforcement legislation does not imply that legislation is required" and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. See infra Part II.C.

[56] U. S. Const. art. III, sec. 3.

[57] U.S. Const. art. II, sec. 4.

[58] U.S. Const. art I, sec. 3 & sec. 4.

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noticeably different path.[59] Section Three does not call for treason *trials* or the *impeachment* of insurrections and rebels. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.[60] It immediately became "supreme Law of the Land." [61] Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.[62] It is pretty obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of "insurrection" and "rebellion" and so on—and these meanings are not quite as self-evident as "thirty-five years of age" (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*.

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[59] Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. For opponents, see Cong. Globe 39th Cong., 1st Sess., at 2900 (Senator Doolittle) (amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions"); id. at 2916 (Senator Doolittle); id. at 2940 (Senator Hendricks) (complaining about immediate consequences); for proponents, see id. at 2919 (Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct'); id. (they lost their "citizenship rights when they committed treason"); Cong. Globe 39th Cong., 1st Sess., App., at 228 (Senator Defrees); Cong. Globe, 39th Cong., 1st Sess. at 3036 (Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law); see generally infra Part III.A-B. See also Graber, supra note 12, at 26-27, 35-37 (documenting all of these discussions) .

[60] U.S. Const. art. V.

[61] U.S. Const. art. VI, cl. 2.

[62] See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, at 14 n.42 (Mar. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards"). On the other hand, the Constitution's *inhabitancy* requirement, has proved far from simple in practice. See Jack Maskell, Congressional Research Service, Qualifications of Members of Congress (Jan 15, 2015) at 13-18, https://sgp.fas.org/crs/misc/R41946.pdf. And there has been recent litigation about the requirement that the President be a "natural born citizen" as well. See Derek T. Muller, *"Natural Born" Disputes in the 2016 Election*, 85 Fordham L. Rev. 1097 (2016).

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Not all participation in insurrection or rebellion is open and notorious. More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.[63] The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.[64]

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non-sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions, maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

B. Who (All) Can (Must) Faithfully Apply and Enforce Section Three?

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But in principle: Section Three's disqualification rule may and must be followed—applied, honored, obeyed, enforced, carried out—by anyone whose job it is to figure out whether someone is legally qualified to office, just as with any of the Constitution's other qualifications.

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[63] Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J. L. Ethics & Pub Pol'y 497, 511-512 (2018).

[64] Cf. Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 839 (1993) (mocking constitutional interpretation that engages in "the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment"); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

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These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to "activate" Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

1. Seeking Office

a. by election

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state-law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on a primary or general election ballot.[65] Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.[66] Accordingly, such state actors can and must apply Section Three's disquali-

[65] To be sure, the centralized, government-administered ballot did not come to American until the late Nineteenth Century and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

[66] U.S. Const. art. VI, cl.2 ("This Constitution ... shall be the supreme Law of the Land"). See also U.S. Const. art. VI, cl.3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for "judicial review," as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); see also William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5-9 (2023).

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fication in carrying out their state-law responsibilities—just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[67]

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene's involvement in the events of January 6, 2021.[68] The judge proceeded under the theory that if January 6 was a constitutional "insurrection," and if Representative Greene had been part of it, she would be barred from office.[69] But it concluded that the challengers had failed to meet their burden of proof under state law: "In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took any action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021."[70] Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer's proposed findings that day.[71]

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene's claims failed on the merits.[72] While Greene's appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.[73] The

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[67] We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, section 5, powers to act as "Judge" of the "Elections, Returns, and Qualifications of its own Members" and refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitation. See also infra n. 96 and accompanying text.

[68] Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022).

[69] Id. at 5-6.

[70] Id. at 15. The January 3, 2021 cut-off is because that is the date that Representative Greene first took a constitutional oath. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a "coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol." Id. at 16.

[71] Final Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022).

[72] Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1320 (N.D. Ga. 2022).

[73] Greene v. Sec'y of State for Georgia, 52 F.4th 907, 909-910 (11th Cir. 2022).

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details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[74] In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots in to existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court's muddied reasoning in the Finchem-Gosar-Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."[75] This inference is mistaken—Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.[76]

Second, in some circumstances state law not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,[77] where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing

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[74] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[75] Id. at *1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in Griffin's Case, which we discuss at greater length presently. See infra Part II.C.2.d. The Arizona Supreme Court also made the additional suggestion that Article I, Section 5 gave Congress "exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members," id. We are skeptical of this point as well, see infra n. 96 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

[76] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); id. at 469- 470 (Scalia, J., concurring); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* (May 29, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807.

[77] 330 U.S. 386 (1947).

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in the Constitution or Laws of any State to the contrary notwithstanding."[78] And thus "the policy of the federal Act is the prevailing policy in every state."[79] A state cannot treat federal obligations the way it can treat foreign ones.

The Arizona Supreme Court's decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state "statute's scope is limited to challenges based upon 'qualifications . . . as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office."[80] If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three's dis-qualification is not a "qualification," that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified to office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. by appointment

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally this includes at a minimum whoever nominated the officer.[81] Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three.* And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.[82]

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[78] Id. at 391 (quoting U.S. Const. Art VI, sec. 2).

[79] Id. at 393. To be sure, *Testa* and especially subsequent cases expanding it have been subject to powerful criticisms as a matter of original meaning, see Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 78-83, 97-105 (2020); Haywood v. Drown, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

[80] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[81] For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, sec. 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 330, 333-334, 355-356 (2019).

[82] See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 914-918 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *Black*, supra note 81, at 355-356 (similar); see also Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105

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In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate's eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?[83]

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully-disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.[84]

For an example of how this process is supposed to work consider how the state of New Mexico removed commissioner Couy Griffin from state office.[85] Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and

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Yale L.J. 549, 562-570 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 658-660 (1970) (similar).

[83] Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See infra at II.C.

[84] Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See supra notes 72-73 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

[85] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

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ultimately joined in the January 6 insurrection against the Capitol. A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office. The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three. More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.[86]

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.[87] It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same "standing" limitations as the federal courts are. As a matter of federal law, the court had no trouble concluding that the events of January 6. 2021 were a constitutional "insurrection." And it had no trouble concluding that Griffin had engaged in that insurrection, both by "voluntarily aid[ing] the insurrectionists' cause by helping to mobilize and incite" the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.[88] The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three's disqualification in doing so.[89] Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

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[86] Id. at 46. The New Mexico Supreme Court dismissed Griffin's appeal on procedural grounds. NO. S-1-SC-39571 (N.M. Sup. Ct. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: an attempt to remove the state action to federal court, State ex rel. White v. Griffin, 2022 WL 1707187 (D.N.M. May 27, 2022) (denying removal because of plaintiffs' lack of Article III standing) and a separate parallel suit attempting to enjoin the state proceedings, Griffin v. White, 2022 WL 2315980 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

[87] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473, at 24-25 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[88] Id. at 35-38.

[89] The availability of a federal quo warranto action is curiously codified in the D.C. Code, §§ 16-3501-02. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. See Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984); Drake v. Obama, 664 F.3d 774, 784-785 (9th Cir. 2011); SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 81 (D.C. Cir. 2015), aff'd, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. Hill v. Mastriano, No. 22-2464, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022). See also Hill v. Perry, No. 22-2465, 2023 WL 3336648, at *1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

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But in general: wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.[90]

Finally and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.[91] A regulated entity can challenge the actions of an executive official who holds office improperly.[92] Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the "de facto officer doctrine," (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to "Judge of the Elections, Returns, and Qualifications" of "its own Members."[93] Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional

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[90] An officeholder who has engaged in insurrection or rebellion or given aid or comfort to enemies of the United States has surely committed a "high Crime or Misdemeanor" within the meaning of Article II, section 4's description of the scope of the impeachment and removal power. See generally Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 Harv. L. Rev. 689, 698-702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President's removal authority as Commander in Chief. Whether Congress could supplement that authority through appropriate legislation is an interesting question. See Zachary Price, *Congress's Power Over Military Offices*, 99 Tex. L. Rev. 291 (2021).

[91] Nguyen v. United States, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *Black*, supra note 81, at 346-47.

[92] Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 668 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487–88 (2010); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014); see also Baude, *Severability*, supra note 66, at 36-37.

[93] U.S. Const. art. I, sec. 5, cl. 1.

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backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,[94] that Congress cannot *create new* "Qualifications" and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house's judgment about whether the *existing, constitutional,* qualifications have been satisfied.[95]

Some have argued that each house's judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.[96] With respect, we do not agree with this argument. As a logical matter, each house's right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the "manner" of elections, which includes ballot eligibility.[97] In our view, the better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

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[94] 395 U.S. 486 (1969).

[95] See Powell, 395 U.S. at 520 n. 41 (reserving the possibility that Section Three disqualification is a qualification); see also P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 114-115 (1968) (cited in id. at n.41) (arguing that it is); Powell, 395 U.S. at 521 n.42 (noting that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). We emphasize that questions of interpretation and application of Section Three are not *in general* "political questions" that cannot be decided by federal courts, simply because they have political consequences. Where the Constitution supplies a rule, and the rule's application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the "Judge" of the "Elections, Returns, and Qualifications" of its own Members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

[96] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 594-598 (2015); see also Cawthorn v. Amalfi, 35 F.4th 245, 267-273, 282-284 (4th Cir. 2022) (Richardson, J., concurring); Greene v. Sec'y of State for Georgia, 52 F.4th 907, 912-916 (11th Cir. 2022) (Branch, J., concurring).

[97] U.S. Const. art. I, sec. 4. The same Clause also gives Congress the power to "make or alter" such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-275 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an attempt to impose a qualification *not contained in the Constitution*. E.g., *U.S. Term Limits*, 514 U.S. at 784, 787-788, 806-815. It

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The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[98] So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.[99] As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Additionally, Article I's Speech and Debate Clause provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."[100] This means that to the extent that the conduct that violates Section Three was a member of Congress's official statements or legislative actions,[101] each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three.

Federal judges hold their offices during "good Behaviour."[102] What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?[103] As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"[104] conduct meeting Section Three's standard disqualifies a federal judge from office.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is

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follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

[98] U.S. Const. art. I, sec. 5, cl. 2.

[99] There is some debate whether Congress can expel a member for conduct that occurred before being elected. See Chafetz, Democracy's Privileged Few, supra note 47, at 210-212 (recounting arguments on both sides but arguing that it can); Jack Maskell, Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 4-7 (2016) https://sgp.fas.org/crs/misc/RL31382.pdf (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

[100] U.S. Const. art. I, sec. 6, cl. 1.

[101] As we elaborate later, we think it is quite rare that such conduct could violate Section Three, even on its own terms.

[102] U.S. Const. art. III.

[103] Cf. Ex parte Milligan, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

[104] See supra note 90.

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that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1791 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).[105] Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?[106] Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. That eligibility question can be a part of a state's Article II election for electors just as much as any other state election.[107] Put simply: a state secretary of state (for example) might well possess state-law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility as well) to enforce Section Three.[108] In perhaps half the states, the question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.[109] But even working

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[105] Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 NYU J. L. & Liberty 18, 76-77 (2016).

[106] We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." We think that assumption is correct, and we will return to it in Part IV.B.

[107] See Hemel, *How-to Guide*, supra note 5; Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, supra note 96, at 599-608; see also Muller, Natural Born, supra note 62, at 1100-1106. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

[108] See Muller, *Scrutinizing*, supra note 96, at 579-580.

[109] Chiafolo v. Washington, 591 U.S. ___ (2020); see also Muller, supra note 96, at 580. We bracket the serious possibility that *Chiafolo* was wrongly decided. See, e.g., Mike Rappaport, The Originalist Disaster in *Chiafolo*, Law & Liberty (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-

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within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to arrange that their electors do not elect a constitutionally disqualified candidate, which should be reflected in their laws.

If the voters and presidential electors do select a disqualified candidate for the Presidency, we do not believe that Congress (or the Vice President) have the power to reject that candidate when the votes are counted in joint session. Whatever the extent of Congress's and the Vice President's authority to count the electoral votes, or determine the authenticity of submitted votes—i.e., was this the act of the electors of the state?—we do not believe that they have the authority to evaluate the decisions or actions of the electors themselves.[110] So if a properly selected elector submits a vote for a constitutionally disqualified individual it should still be *counted*.

Still, once those votes are counted, a disqualified candidate *does not become president*, even if he has the most votes. This is made explicit by the (self-executing) command of Section Three of the Twentieth Amendment, which sets the constitutional terms of a President's term. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."[111] The language thus specifically confirms the possibility of a failure to qualify, and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability.

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors" and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment. The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. On the other hand, it is less clear whether being *legally disqualified* from holding office makes the would-be President "unable to discharge the powers and duties of his office" within the meaning of the Twenty-fifth Amendment. (Structurally, the Twenty-fifth Amendment appears to relate to Article II, Section 1, paragraph 6, which deals with Presidential succession, rather than Article II, Section 1, paragraph 5, which deals with eligibility.) But in

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chiafalo/; Michael Stokes Paulsen, The Constitutional Power of the Electoral College, Public Discourse (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

[110] We take no position on many further details of this issue, including the relative interplay of the Electoral Count Reform Act, Pub.L. 117-328, Div. P, Title I, § 109(a) (Dec. 29, 2022) 136 Stat. 5238-5239, codified in relevant part at 3 U.S.C. 15(b) & (d)(2)(B)(ii), possible constitutional challenges to it, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1805 (2002); see also John Harrison, *Nobody for President*, 16 J.L & Pol. 699 (2000), interpretations of it, but see Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538 (2021), or the like.

[111] U.S. Const. amdt. XX, sec. 3. Cf, Muller, *Regularly Given*, supra note 110, at 1538 n.42.

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any event the Twenty-fifth Amendment question will usually be unimportant in practice, because it requires a two thirds vote of both houses, and the Vice President and many cabinet officials, and so it will usually be significantly easier to use the impeachment process instead.[112]

* * *

Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid or comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.[113] From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.[114] He might be removed by such a suit,[115] or might well choose to resign instead.[116] The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not

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[112] Brian Kalt, Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment (2019).

[113] See infra Part IV.C. for further discussion.

[114] For two relevant examples, see NMSA. 1978, sec. 44-3; W.V. Code sec. 53-2-1. In West Virginia, such a claim may be brought "[w]henever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested." Id. 53-2-2. For illustrative applications, see State ex rel. Zickefoose v. West, 145 W. Va. 498, 545 (1960); Wells v. Miller, 237 W. Va. 731 (2016).

[115] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[116] Resignation letter from West Virginia Delegate Derrick Evans to Governor Jim Justice (Jan. 9, 2021), available at https://s3.documentcloud.org/documents/20447012/derrick-evans-resignation-letter.pdf.

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difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

C. The Problem of Griffin's Case

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.[117] This precedent continues to cast a shadow over Section Three today.[118]

But there is a simple response to this small problem. *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate ground, under the so-called de facto officer doctrine, which we will discuss. But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.[119]

1. Background

Caesar Griffin, a black man, was charged in a Virginia state court with the crime of shooting with the intent to kill. Griffin was tried, convicted, and sentenced to prison. He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of his color."[120] Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not

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[117] In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

[118] See, e.g., Josh Blackman and S. B. Tillman, Opinion, "Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene," The New York Times, (Apr. 20, 2022); Tom Ginsburg, Aziz Huq, & David Landau, *The Law of Democratic Disqualification*, 111 Calif. L. Rev. at 16, 51 (forthcoming 2023) at https://ssrn.com/abstract=3938600.

[119] For other criticism of Griffin's Case, insightful as always, see Magliocca, *Amnesty*, supra note 5, at 102-108; Magliocca, *Foreground*, supra note 62, at 9-14.

[120] 11 F. Cas. at 22.

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conduct the trial with fairness and uprightness."[121] Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge Sheffey)[122] was legally disqualified by Section Three of the Fourteenth Amendment from serving.

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849. And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."[123] Thus "it is admitted," wrote Chase, that Judge Sheffey "was one of the persons to whom the prohibition to hold office pronounced by the amendment applied."[124]

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.[125] The sheriff appealed to the circuit court, which was held by Chase as circuit justice.[126]

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[121] Id. at 22.

[122] Cf. Will Baude, The deadly serious accusation of being a "so-called judge," Volokh Conspiracy, Wash. Post. (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ ("[T]o call him a 'so-called' judge is to hint that he is not really a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue").

[123] 11 F. Cas. at 22.

[124] Id. at 23.

[125] See Opinion of Judge Underwood in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870), at 462-466 (1875). We are indebted to Myles Lynch for locating this source.

[126] The procedural posture of this and several related cases are extremely confusing and reflect background machinations by both Judge Underwood and Chief Justice Chase: At the time, habeas was apparently available from the district court, or "at chambers," or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this, the unreviewable route, in another habeas case like Griffin's brought by Sally Anderson. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the cases in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. See Charles Fairman, Reconstruction and Reunion at 601-607; Letter from Chase to Underwood (Nov. 19, 1868) in 5 The Salmon P. Chase Papers 285-286 (1998); Letter from Chase to Underwood (Jan. 14, 1869) in id. at 292-293.

This background is briefly alluded to in the synopsis in *Griffin's Case* which explains that "[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme

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2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth Amendment did not exist.[127] The question was whether ratification of Section Three kicked him out. As Chase put it: "whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[128]

Chase said no, rejecting this as a "literal construction" [129] of Section Three. There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.[130] But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, can't possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, but also further impeached Chase's interpretation of Section Three. All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

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court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case." *Griffin's Case*, 11 F. Cas. at 7-8. But really, these circumstances are extraordinary. We take them up again below.

[127] Id. at 23.

[128] Id. at 18.

[129] Id. at 24.

[130] Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling *Virginia* government then gave its consent to the creation of a new Wheeling-based state of *West* Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as "Virginia." After Lee's surrender at Appomattox, Chase's opinion notes, the "government recognized by the United States was transferred from Alexandria to Richmond" and "became in fact what it was before in law, the government of the whole state." Id. at 18. Judge Sheffey was appointed under the authority of this government. (For the full story – and full formalist legal defense – of the validity of the legal fiction of "Virginia" giving its consent to the creation of a breakaway state of West Virginia, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 Calif. L. Rev. 291 (2002) For an argument that this aside was actually relevant to Chase's argument, see Magliocca, *Foreground*, supra note 62, at 10 n.30, discussed infra note 157.)

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a. "The argument from inconveniences, great as these"

The core of Chase's argument was that if Section Three were an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. "In the examination of questions of this sort," Chase wrote, "great attention is properly paid to the argument from inconvenience."[131] And here "the argument from inconveniences" was "great" in Chase's estimation— it was "of no light weight."[132]

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.[133] If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. "No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity."[134] Chase found this unthinkable: "It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states."[135]

Chase went on: not only did Section Three impose great "inconveniences" and "calamities," it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers from their offices—and ostensibly inconsistent with the "spirit" of prior constitutional principles, concerning due process, bills of attainder and ex post facto laws.[136] And besides, the specific remedy sought—vacating Griffin's conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase's interpretive driver: "Surely," Chase continued, "a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found."[137]

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[131] 11 F. Cas. at 24.
[132] Id. at 25.
[133] Chase also suggested that the problem was not completely limited to the Southern governments. Id. at 25 (observing that "[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government . . ." and that "it is not to be doubted that not a few among them" had previously taken a covered oath, and that "[p]robably some of these persons" had subsequently been elected to office).
[134] Id. at 25. Of course, Chase would undercut this conclusion later in the opinion. See infra Part II.C.
[135] 11 F. Cas. at 25.
[136] More on this point presently, Part II.C.2.c, and again Part III.
[137] 11 F. Cas. at 26.

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Chase tried to funnel these policy arguments into a rule of constitutional construction: "the argument from inconvenience."[138] This argument "it is true, can not prevail over plain words or clear reason," Chase acknowledged.[139] "But, on the other hand," he wrote, "a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference."[140]

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[141] Or as Chief Justice Marshall said in *United States v. Fisher*: "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[142] But Chase's canon was noticeably more aggressive: The supposedly more disruptive reading must "*never be preferred*" unless the text's terms "*absolutely* require" such preference.[143] That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase's analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the "literal" reading of the "terms of the instrument" as meaning exactly what they seem to say. As discussed above, the language of Section Three's prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase's opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text's language is somehow insufficiently clear to justify applying the "literal" meaning of its words. Indeed, even on Chase's own hyper-strict standard, the words of Section Three *do* "absolutely require" the conclusion that it, on its own, disqualifies covered rebels from office.

Second, Chase was too ready—far too ready—to find that following the ("literal") language of the document would produce (what *Chase* considered to be) great "inconveniences" or "mischief"— indeed, increase "calamities" already visited upon

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[138] Id. at 24.
[139] Id. at 24.
[140] Id. at 24.
[141] James Madison, Speech on Feb. 2, 1791, reprinted in Legislative and Documentary History of the Bank of the United States 39, 40 (photo. reprint 2008)
[142] United States v. Fisher, 2 Cranch (6 U.S.) 358, 386 (1805)
[143] 11 F. Cas. at 24 (emphasis added).

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the South. Chase emphasized the breadth of Section Three's language: it applied in all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply "to all persons in the category" and "for all time, present and future" (so?). And, taken seriously, this broad rule would, as noted, "annul all official acts" performed by disqualified officers, including judges. (Would it?)

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase's parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.[144]

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment. But because these arguments from inconvenience are the heart of Chase's opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase's construe-to-avoid-the-force-of-constitutional-language-whose-policy-consequences-you-dislike approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy "solutions" to texts they don't like. Chase's opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

b. The argument from "the intention of the people"

In places, Chase raises the inconvenience argument as an inquiry into the "intent" of the Framers: "What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?"[145] This at least sounds kind of

[144] As Judge Underwood had put it: "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Opinion of Judge Underwood, supra note 125, at 465.

[145] 11 F.Cas. at 24.

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like the question a judge should be asking—the original meaning of the constitutional provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase's framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.[146] And whatever evidence Chase might have that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say "coerced"—to ratify the Amendment as the price of regaining their representation in Congress.[147] Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed "intent" of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase was succumbing to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed "intent" of a written text. When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do.

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[146] See supra notes 9-14, sources cited there, and accompanying text.

[147] See generally, John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 461 (2001). For arguments that Congress's requiring states' ratification as condition of restored representation was entirely lawful and appropriate, see id; Kesavan & Paulsen, *West Virginia,* supra note 130, at 329; Amar, America's Constitution, supra note 4, at 364-380, see especially id. at 376-378. There is a different argument for ratification, the "loyal denominator" theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const. L. & Pub. Pol'y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 La. L. Rev. 47, 48 (2018). One of us has rejected this theory in prior writing, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,* 103 Yale L.J. 677, 709 (1993); see also Amar, supra note 4, at 378-380, and the other of us is inclined in the same direction.

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But it is easy for a judge to use this principle as an excuse for reading into the text his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. The argument that Section Three should not be read to depart from the "spirit" of prior constitutional law

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle, which in determining the construction of this amendment, is entitled to equal consideration."

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[148]

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once and without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.[149]

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

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[148] 11 F.Cas. at 25.

[149] Id. at 26.

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Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.[150] But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to "*forbid*[]" readings of a text "not *clearly* required" by its terms, that would "*bring it into conflict or disaccord*" with other provisions of the Constitution.[151] Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden.* Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in the judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.[152] If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did it would have the perverse effect of leaving Confederates who had *not* previously

[150] See infra, Part III.
[151] 11 F. Cas. at 25 (emphasis added).
[152] Id. at 26.

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taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.[153]

So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.[154] Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.[155] This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

d. The argument from the Section Five enforcement power

Having flailed to avoid the natural reading of Section Three, Chase finally offered his alternative, "reasonable construction":

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' [sic] ... The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.[156]

Section Five "qualifies" Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise "qualifies" Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into

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[153] See Case of Davis, 7 F. Cas. 63, 92, 95 (C.C.D. Va. 1867).

[154] Id. See Magliocca. *Amnesty*, supra note 5, at 100-102; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 293-300 (2017).

[155] Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. Id. at 293-296.

[156] 11 F. Cas. at 26.

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practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course of performing their assigned duties. But as noted above there is no reason why "proceedings" and "decisions" and "enforcement" with respect to Section Three's commands may not be conducted and carried out by these various state and federal actors, exercising their usual authority with respect to such matters.[157] It is simply not true that "these can only be provided by Congress." Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin's Case*, until Chase stopped him.

Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin's Case*.

3. *Griffin*'s Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."[158]

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

> In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge. . . .
>
> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in

[157] Magliocca also suggests that in the specific situation in Griffin's Case, state law may have been "unavailable for enforcement" of Section Three because "Virginia was an unreconstructed state and thus lacked the ordinary powers of a state" and "because Virginia did not yet recognize the Fourteenth Amendment's legitimacy" – in contrast with states such as North Carolina. Magliocca, *Foreground*, supra note 62, at 10 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the union.

[158] 11 F. Cas. at 27.

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> the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[159]

What is going on here? Chase describes an alternate ground for the case—"a judge de facto acting under color of office," which we would now call the "de facto officer doctrine"—explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs in to it the more dubious the whole opinion becomes.

First of all, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended. But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown. The de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.[160]

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,[161] fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with

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[159] 11 F. Cas. at 27.

[160] Accord, Magliocca, *Foreground*, supra note 62, at 11 n.25.

[161] See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.") https://founders.archives.gov/documents/Jefferson/98-01-02-3562; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1011-12 & n.39 (2003); Baude, Judgment Power, 96 Geo. L.J. 1807, 1823-24 (2008).

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reference to this and kindred cases in this district."[162] The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,[163] in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court."[164] Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.[165] Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"[166] fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out

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[162] 11 F. Cas. at 27.

[163] The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex Parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." Ex parte State of Virginia No. 11, 1868 WL 10951, 19 L. Ed. 153 (1868); Fairman, supra note 126, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course – not deputize the Chief Justice to go deliver some secret verdict in their stead.

[164] Fairman, supra note 126, at 607.

[165] Id.

[166] Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

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to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.[167] But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto judges in the saga surrounding *Hayburn's Case*.[168]

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."[169] On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack.[170] Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.[171] On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction.[172] The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.[173] Indeed, these technicalities were argued by the parties and they were the main subject

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[167] For many citations, see Griffin's Case, 11 F. Cas. at 18-21 (argument of counsel). For more, see also Reply and Response Brief for the United States, Financial Oversight and Management Board for Puerto Rico v. Aurelius (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121) at 27-47; and Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

[168] Baude, Severability, supra note 66, at 12 (discussing Yale Todd).

[169] For statements like this, see Ball v. United States, 140 U.S. 118, 128-129 (1891) ("was judge de facto if not de jure, and his acts as such are not open to collateral attack."); see also Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 910, 919 (1963); but see id. at 910 & n. 9 (suggesting that a suit is collateral whenever the officer "is not a party," including on "writ of error").

[170] All three cases cited by Chase in Griffin's Case, 11 F. Cas. at 27, can be characterized this way. Taylor v. Skrine, 5 S.C.L. 516, 3 Brev. 516 (1815) deals with a writ of execution and observes that "no objections were made to his authority at the time the decree was given." State v. Bloom, 17 Wis. 521 (1863) relies entirely on In re Boyle 9 Wis. 264 (1859) which is a habeas case holding that the "right to hold the offices cannot be inquired into in a collateral proceeding of this kind," id. at 267. And People v. Bangs, 24 Ill. 184., 187 (1860) distinguishes a "direct proceeding" from one where the doctrine applied.

[171] For statements like this, see *McDowell v. United States, 159 U.S. 596, 598* (1895) ("presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment."); see also Note, *The De Facto Officer Doctrine*, at 918 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).

[172] But see In re Boyle, cited supra note 170 (distinguishing "the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offence").

[173] In the Supreme Court's most recent de facto officer doctrine case, Ryder v. United States, 515 U.S. 177 (1995), it split the difference, holding the doctrine inapplicable because the case was on direct

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of Judge Underwood's opinion below.[174] Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

* * *

There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

III. Section Three Supersedes, Qualifies, or Satisfies Prior Constitutional Provisions

Our third proposition is logically and methodologically straightforward but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.[175] Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition—there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, unAmerican (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong: dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments change the Constitution. It thus should be unsurprising—indeed, it is in the very nature of constitutional amendments—that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment*

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review *and* the challenge was constitutional. In the more recent case of Financial Oversight and Management Board for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1666 (2020), it avoided the issue because it found the appointments lawful.

[174] See Opinion of Judge Underwood, supra note 125, at 463-466.

[175] See supra Part III.C.2.c.; see also Ginsburg, Huq, & Landau, supra note 118, at 18 (suggesting that a self-executing interpretation, "while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns" and for that reason an "alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced").

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supersedes prior law precisely to the extent that it departs from the prior rules. This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms, understood in their natural sense and accounting for any terms of art or specialized usages of words, departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote. When this occurs, the courts must determine the "meaning and operation" of the two provisions.

Hamilton articulated two principles for doing so, which work as a complementary pair. "So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done"—there's the first of the pair, but Hamilton's sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair: "where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first." This was, Hamilton continued, "a mere rule of construction," but it was an appropriate one, "consonant to truth and propriety," consistently recognized by courts as interpreters of law: that, as "between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference."[176]

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority—and proceeded to derive the proposition customarily called "judicial review."[177] But that is not the interpretive question here. Here, the key point is precisely Hamilton's lead-in proposition: that, as between "interfering" acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same

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[176] See The Federalist No. 78 (I. Kramnick ed. 1987) at 439 (Hamilton). These rules were well-established in American and English law. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 235-244 (2000)

[177] See The Federalist No. 78, supra note 176, at 439-440 (Hamilton) ("But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.")

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legal status: By the terms of Article V, constitutional amendments are "valid to all Intents and Purposes, as Part of this Constitution," when adopted.[178] Thus, where We, the People, have adopted a new constitutional text "interfering" with or departing from prior constitutional provisions, the last-in-time enacted prevails to the extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights in a sense qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent of a conflict between those powers and the subsequently enumerated rights.[179] Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.[180]

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"[181] does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the preexisting lawmaking process.[182] A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original apportionment

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[178] U.S. Const. art. V.

[179] On the relationship between rights and powers, see William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1821-1822 (2013); Jud Campbell, The Invention of First Amendment Federalism, 97 Tex. L. Rev. 517, 561-67 (2019).

[180] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[181] U.S. Const. amdt XIV, sec. 5.

[182] See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 19 (2017) (offering the examples in this paragraph).

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rules including the notorious Three-fifths Clause.[183] Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies an earlier-enacted constitutional provisions with which the new provision conflicts, Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.[184]

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex post Facto Clause. *To the extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—*to the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the

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[183] See U.S. Const. amdt. XIV, sec. 2; U.S. Const. art. I, sec. 3. By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

[184] Indeed, for what it is worth, the legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. Cong. Globe, 39th Cong. 1st Sess. at 2915 (Sen. Doolittle) (complaining that Section Three was an "ex post facto provision, a bill of attainder"); id. at 2890 (Sen. Cowen) (bill of attainder); id. at App 241 (Sen. Davis) (Section Three "is in the nature of both a bill of attainder and an ex post facto law"); id. at 2940 (Sen. Hendricks) (ex post facto); id. at 2916; see also id. at 2467 (Rep. Boyer) (criticizing earlier version of Section Three as "a bill of attainder or ex post facto law"). These charges were generally premised on the view – with which proponents of the amendment evidently agreed, see id. at 3036 (Sen. Henderson) – that Section Three would preempt these earlier rules to the extent of a direct conflict. Though at one point Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. Id. at App. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it"); see also id. at 3146. See also Graber, supra note 12, at 26-31, 36-37 (documenting this history).

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correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think that these various prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible; and it is, for the most part, fairly possible to do so. But to the legitimate extent of any conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

A. Bills of Attainder

A bill of attainder is the legislative infliction of punishment on specific people without a trial.[185] It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a "bill"—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an "attainder" either—in that it is not at all clear that it inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-second Amendment is surely not inflicting a "punishment" when it precludes the President from running for a third term.[186] Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of 20th-century "red scare" cases[187] and perhaps more relevantly in a pair of immediate post-Civil War-era loyalty cases: In *Cummings v. Missouri*[188] and *Ex Parte Garland*,[189] the Supreme Court invalidated state and federal oath requirements that required an "Ironclad Oath" from anybody holding a range of positions, both public and private. That oath was really a *past*-loyalty-requirement, requiring people to swear that they had not supported the confederacy or

[185] See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177 (2011).
[186] U.S. Const. amdt. XXII. But see Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from office many be punishment, as in cases of conviction upon impeachment.").
[187] United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
[188] 71 U.S. 277 (1866).
[189] 71 U.S. 333 (1866).

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the like.[190] The Court concluded that these requirements were effectively bills of attainder—and also ex post facto laws—and held them unconstitutional.

Even if one takes these precedents at face value it does not follow that Section Three would similarly be a bill of attainder. First, the "Ironclad Oath" laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[191] Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.[192] Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the majority opinion emphasized this fact, explicitly noting that neither case involved qualifications for public office.[193] Second, because both cases focused on the retroactive effect of the laws,[194] neither case's reasoning would seem applicable to Section Three in post-Civil-War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.[195]

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin,* Chief Justice Chase).[196] Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.[197] In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

B. Ex Post Facto Laws

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[190] For much more detailed discussion of the federal "Ironclad Oath" see infra Part IV.A.4.b.i.
[191] Garland, 71 U.S. at 377.
[192] Cummings, 71 U.S. at 319.
[193] Garland, 71 U.S. at 378.
[194] Cummings, 71 U.S. at 327 ("They are aimed at past acts, and not future acts."); Garland, at 377 ("In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed").
[195] See supra Part I.B.
[196] Garland, 71 U.S. at 382. *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment) and an especially weak case for the relevance of past loyalty to engaging in religious occupation.
[197] For a somewhat lighthearted explication of this principle – and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 Const. Comm. 285 (2007).

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Article I also forbids both the state and federal governments from enacting an "Ex Post Facto" law.[198] An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.[199] True, as applied to actions done before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the "spirit" of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

Indeed, we have this on especially good authority, as this very question has been asked and answered in the past. The Eleventh Amendment, as noted above, had the effect of cutting off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III. In *Hollingsworth v. Virginia*, the Court then confronted the question whether the Amendment was retroactive, cutting off suits pending when the Amendment became law. The plaintiffs argued in the U.S. Supreme Court against retroactivity, because "[t]he spirit of the constitution," forbade "the mischief of an ex post facto Constitution."[200] Indeed, this argument mirrored precisely the arguments for narrow construction we have seen above: "It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution."[201] But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.[202] As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions covered by the revised constitutional rules.

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[198] U.S. Const. art. I, §§9 & 10.

[199] To be sure, there are revisionist arguments that the Ex Post Facto clause itself extends to retroactive civil laws too. See Eastern Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. Cummings, 71 U.S. at 326-332; Garland, 71 U.S. at 377-368. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis

[200] 3 U.S. at 378-80 (arguments of counsel).

[201] Id.

[202] Id. at 382. See Baude & Sachs, *Eleventh Amendment*, supra note 9, at 626-627.

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C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property without due process of law," which in many circumstances requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First of all, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege, a public trust, to be vested with the power of the people. And though it is a closer case, the same thing may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation. It does not protect *public* rights.[203] It has been argued that in England, offices *were* understood as vested rights of property, and occasionally early American courts said so as well.[204] But that was not the better rule in America. Treating offices as property did not fit well with republican principles,[205] and by 1900 the Supreme Court could rightly state: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such."[206]

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.[207] So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin's Case*. But in our view this objection is sufficiently answered by the terms of Section Three itself. Perhaps the reason that Section

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[203] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565-593 (2007); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1540-1547 (2020).

[204] Jed Shugerman, *Freehold Offices vs. "Despotic Displacement": Why "Executive Power" Did Not Include Removal* (July 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119; Hoke v. Henderson, 15 NC 1 (1833).

[205] See Jane Manners & Lev Menand, *The Three Permissions*, 121 Colum. L. Rev. 1, 20 (2021) ("In revolutionary America, the idea of offices as property was roundly rejected"); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1824 n. 157 (2006) ("A more republican conception of government meant a more republican conception of offices.").

[206] Taylor & Marshall v. Beckham, 178 U.S. 548 (1900).

[207] See supra notes 48-50 and accompanying text.

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Three only applies to holding office and not voting, and only applies to prior office-holders, who have previously sworn a constitutional oath—indeed, these limitations are the only ways in which Section Three's scope was appreciably narrowed during the drafting process—is that we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would seem to disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warranto suits, state and federal judicial review, congressional adjudications, and so on. Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels.[208] Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

D. The Ominous Question: Section Three and the First Amendment

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

This question begets more questions: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding *of Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal disabilities imposed by Section Three take over, as a matter of the proper understanding of Section Three?

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[208] See generally supra Part II.B.

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There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as properly understood as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example[209] but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of "engage in insurrection" and "aid or comfort"—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, and under modern doctrine, that would mean the very stringent test of *Brandenburg v. Ohio*?[210] Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.[211] First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three's terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today's liberal understandings.[212])

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[209] See infra Part IV.C.2.

[210] 395 U.S. 444 (1969).

[211] Federalist No. 78, supra note 176 ("So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.").

[212] For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools,* 85 Minn. L. Rev. 1917, 1919-1922 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see for starters, Adam Griffin, *First Amendment Originalism: The Original Law and A Theory of Legal Change as Applied to The Freedom of Speech and of The Press*, 17 First Amend. L. Rev. 91 (2019); Jud Campbell, *Natural Rights*

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The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is "speech integral to criminal conduct."[213] And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.[214] Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning "incitement." Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous "clear and present danger" test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) "*directed to*" (ii) triggering or inciting (iii) "*imminent*" lawless action (presumably including acts of insurrection or rebellion) and (iv) "likely" to produce such action.[215] That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court's relatively recent decision in *Holder v. Humanitarian Law Project*[216] recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides "material support" to a foreign organization engaged in or committed to terrorist violence against the nation. The Court concluded that because the "interest in combating terrorism is an urgent objective of the highest order," the Congress could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly*

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and the First Amendment, 117 Yale L. J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 Yale L. J. 861 (2022). (We will cease further digression on this point.)

[213] United States v. Hansen, 599 U.S. __, at 18-19 (2023); United States v. Williams, 553 U.S. 285, 297 (2008); Giboney v. New Ice Storage, 336 U.S. 490 (1949); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-993, 1007-1008 (2016).

[214] Volokh, supra note 213, at 1011-1015.

[215] 395 U.S. at 447. This standard is elaborated in Hess v. Indiana, 414 U.S. 105, 108-109 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). Additionally, Bond v. Floyd, 385 U.S. 116 (1966) rejected the idea that there is a lower First Amendment standard of incitement when a state legislature is excluding an elected member under state law, id. at 132-135; see also Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974) (same principle applies to ballot access).

[216] 561 U.S. 1 (2010).

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further terrorist conduct. While this decision is hedged by multiple limiting principles,[217] it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having "engaged in insurrection" or provided "aid or comfort" to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that "he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it,"— that he was "warring upon the Military."[218] It is conceivable (though we do not prejudge the point) that Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army "unto the death" and stating that anybody who volunteered for the Union army "ought and I believe will be shot down before he leaves the State."[219] This exclusion was part of the backdrop of Section Three's enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion "was entirely unconstitutional" and "plainly violative of the First Amendment."[220] If that was so before Section Three's enactment, does Section Three make it otherwise?[221]

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during

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[217] The Court emphasized that "only material support coordinated with or under the direction of a designated foreign terrorist organization" was banned; "independent advocacy" was "not covered." Id. at 31-32. Additionally, the law only applied to *foreign* organizations.

[218] President Abraham Lincoln to Erastus Corning and others (June 12, 1863), in Abraham Lincoln, Speeches and Writings, 1859-1965, at 454, 459 (Don Fehrenbacher, ed. 1989). See infra notes 269-277 and accompanying text.

[219] See infra notes 270-278, and 343-348 and accompanying text.

[220] Lynch, supra note 5, at 197-198.

[221] See Lynch, supra note 5, at 198 ("Had Section 3 been ratified by this point, these concerns would be assuaged.")

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this Great War," and excluded in part on that basis.[222] (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on grounds of judicial bias.)[223] Another scholar of the incident writes that "Under a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however under the interpretation prevailing at the time, they probably were."[224] What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.[225] But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.[226]

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger; but insurrection and rebellion are dangers too—all too real dangers, as recent events have shown. Where exactly that line is drawn by the Constitution, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three's general terms triggering disqualification from future office—"insurrection," "rebellion," "engaged in," "given aid or comfort to"—and of who all is included under Section Three's ban. To that set of important questions we turn next.

IV. Section Three's Substantive Disqualification is Sweeping

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[222] Chafetz, supra note 47, at 190; Lynch, supra note 5, at 211-213; 6 Cannon, supra note 18, at 52-63.
[223] Berger v. United States, 255 U.S. 22 (1921). During the initial exclusion, when Berger's conviction was on appeal, the House Committee announced "that it would not be governed by the action of the judge and jury at the Chicago trial," but would review the evidence and legal questions for itself. 6 Cannon, supra note 18, at 54. But curiously, after the convictions were reversed the House allowed Berger to sit in the sixty-eighth through seventieth Congresses. Lynch, supra note 5, at 213.
[224] Chafetz, supra note 47, at 191.
[225] In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. See infra note 359.
[226] Federalist No. 78, supra note 176, at 439.

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We come at last to the heart of the beast: the substance of Section Three's prohibition. We begin (in Subpart A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having "engaged in" "insurrection" or "rebellion" against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given "aid or comfort" to "enemies" of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms' core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a "sure shipwreck,"[227] to borrow Susan Morse's phrase—of unquestionably disqualifying conduct falling within the core of Section Three's meaning: for example, declaring unilateral secession from lawful constitutional government; or the taking up of arms against government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three's terms—ordinary expression of political dissent as well as even ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in subpart A.

We then turn more briefly (in subpart B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—*are covered* by Section Three's ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three's disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.

Finally (in Subpart C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president's willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat for re-election and, instead, his (and others') attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de

[227] Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

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facto political coup d'etat against the regime of lawful constitutional government, constitute engaging in "insurrection or rebellion against the Constitution of the United States"? We think the answer is *yes*.

Whether called a "rebellion," an attempted coup d'etat seeking to displace lawful government authority under the Constitution, or an "insurrection," instigating, inciting and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—such conduct is covered by Section Three, and is disqualifying. If those are indeed the facts concerning Donald Trump's (and others') efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting "insurrection" or "rebellion" (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave "aid or comfort" (approval, encouragement, support) to enemies might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three's meaning, those judgments are entitled to full legal effect.

A. Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted by the Civil War Congress (both the 1862 "Ironclad" oath and the Second Confiscation Act), and the significant mid-Civil-War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, including the Insurrection Act of 1795 as amended, and an important series of exclusions from Congress itself, as well as the relevant legislative history of Section Three, and a few scattered post-enactment applications of Section Three itself.

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1. Working definitions

We begin by offering working definitions of the terms *insurrection* and *rebellion* and of what might constitute "engaging in" such conduct or giving "aid or comfort" to enemies under Section Three.

Insurrection is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect*. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government*. Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."[228] Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases*, in 1863: "Insurrection against a government may or may not culminate in an organized rebellion."[229]

Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means*. (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime's authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself*. The South's attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States by the states asserting the right to secede. Likewise, an attempted coup d'etat is arguably also a species of rebellion—an effort to displace, replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

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[228] 10 Documentary History of the Ratification of the Constitution 1296 (Statement of Madison) ("A riot did not come within the legal definition of an insurrection").
[229] 2 Black (67 U.S.) 635, 667 (1863).

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The term *rebellion* can also imply a competing claim to legitimacy. "Rebellion" thus seems to carry a stronger political-claim-of-right valence than does "insurrection."[230] Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South's secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d'etat, or declaration of independence, or secession, is claimed to be a "vindication" or "restoration" of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person's or group's alleged wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as "rebellion" but restoration. Mistake of law is no defense to a coup d'etat. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession as an act for the vindication of its believed rights.[231] That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by*

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[230] Though it is possible that this connotation is anachronistic. See infra note 252.

[231] For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see James M. McPherson, Battle Cry of Freedom: The Civil War Era 234-236 (1988) (summarizing Southern constitutional and political theories); Daniel Farber, Lincoln's Constitution 57-91 (2003) (emphasizing arguments of states' rights to interposition, nullification, and secession generally); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame. L. Rev. 1227, 1270-1277 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. Am. Hist. 5-53 (June 1978) (providing detailed history of constitutional and political arguments over the nature of Union and the validity of secession); David P. Currie, The Constitution in Congress: Descent into the Maelstrom 1829-1861, at 228-237 (2005) (discussing and evaluating the constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see generally 2 Abraham Lincoln, Speeches & Writings, 1859-1865: Speeches, Letters, Miscellaneous Writings, Presidential Messages & Proclamations, at 217-218 (First Inaugural Address, March 4, 1861); id. at 254-258, 260-261 (Message to Congress, July 4, 1861); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi. L. Rev. 691, 703-715 (2004) (reviewing Daniel Farber, Lincoln's Constitution) (distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, supra note 130, at 303-311 (same). For further background, see generally William W. Freehling, The Road to Disunion: Secessionists at Bay 1776-1854 (1990), and for a comprehensive exposition of the Southern view, see Alexander M. Stephens, A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results (1867). As a clarification: we use the term "secession" here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory.

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force—and thus may occupy some ground not covered by the word "insurrection" (which, we have suggested, must be forcible). There are such things as "bloodless coups": actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.[232]

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861[233] preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws. The secession ordinances might still immediately constitute acts of "rebellion," even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together—acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs (as they obviously did with the Civil War)—and it becomes difficult to distinguish "insurrection" from "rebellion." The overlap of the two terms in theory becomes complete in practice.

In the end, however, we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that "insurrection" and "rebellion," in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

So much for our working definitions of "insurrection" and "rebellion." What does it mean to have "engaged in" such conduct? We believe one has "engaged" in

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[232] Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political coup d'etat – an act of "rebellion" if judged by the pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance, and subsequently legalized by its own success. See generally Paulsen & Paulsen, supra note 30, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub Pol'y 818, 821, 844, 850 (2015). But cf. Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation 1760-1840, at 164-165 (2021) (emphasizing the states' retention of sovereignty under the Articles and the idea that states might thus properly exit that regime, legally, on the theory that the Articles had become a breached treaty).

[233] The seceding states adopted their secession resolutions by state "conventions," purporting to parallel the process by which the states ratified the Constitution. See McPherson, supra note 231, at 234-284 (describing secession actions of ten states that purported to secede from the Union). The secession ordinances of the South were self-consciously styled after the Declaration of Independence, which was obviously an act of formal legal rebellion.

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insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of* such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has "engaged in" such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.[234] (There is obvious overlap here with the closely related concept of having given "aid or comfort" to the nation's enemies, which we discuss presently.)

Of course, there are also important limits to how far the concept of having "engaged in" insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have "engaged in" insurrection or rebellion. An exception to this limitation might exist where a person possesses an affirmative duty to speak or act. Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three's terms.

Then there is the related question of what constitutes having given "*aid or comfort*" to "the *enemies thereof.*" This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion "*or*" having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.[235]

In many cases, giving "aid or comfort" to enemies will be similar to the kind of conduct that counts as having "engaged in" insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term "aid or comfort" reinforces and emphasizes Section Three's coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section

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[234] This working definition of having "engaged in" wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with "assistance" including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). Federal criminal law today is to similar effect. 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). We think it is also generally supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1108 (2017). That said, the context of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See text accompanying infra note 425.

[235] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.")

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Three's "aid or comfort" language, even where it might be debatable whether to characterize such conduct as directly "engag[ing] in" insurrection or rebellion.

Additionally, while Section Three uses some language paralleling that contained in the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. "Insurrection" and "rebellion" are their own things, distinct from "treason." While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within Section Three. So even if "aid or comfort" in Section Three connotes the same type of assistance-and-embrace principles as "Aid and Comfort" in Article III's Treason Clause,[236] the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal-law conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.)

Finally, aid or comfort to whom? "[T]he enemies thereof." Before the Civil War, some might have limited the term "enemies" to those owing allegiance to a foreign power,[237] but that is not plausibly true of Section Three. Rather, Section Three covers enemies both foreign *and domestic*. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War,[238] and it seems clear from the political context of Section Three that it likewise treats domestic enemies as enemies. Indeed, it is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text.

What is less clear is how to define the foreign and domestic enemies covered by Section Three. The most straightforward option, which strikes us as the more likely one, is that "enemies" essentially cross-references the domestic rebels and insurrectionists just described earlier in the sentence (as well as more traditional foreign enemies, of course). On this straightforward reading, Section Three would cover a domestic officeholder who directly engages in insurrection or rebellion, or who gives aid or comfort to others who do so (or, of course, one who gives aid or comfort to foreign enemies). This straightforward reading is also consistent with the operation of another 1862 statute, the Second Confiscation Act.[239] That said, we cannot rule out another narrower possibility, that "enemies" is limited to those with whom the US are effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war.[240] This would create a more complicated two-track system

[236] See infra note 258.
[237] See Lynch, supra note 5, at 174 (discussing United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254)).
[238] See infra Part IV.A.4.b.i.
[239] See infra Part IV.A.4.b.ii.
[240] See Lynch, supra note 5, at 173-178 for more discussion.

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where Section Three covers all insurrections and rebellions, as well as "aid or comfort" to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out.[241]

Our sense of the whole—of Section Three's substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called "insurrection" or "rebellion"; and whether a covered individual is thought to have "engaged in" such activity or given "aid or comfort" to "enemies," Section Three's disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

Finally, let us reiterate one consequence of Section Three's breadth and capaciousness. Because Section Three's terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held "unconstitutional" by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.[242] It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of

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[241] What is the referent of "enemies *thereof*"? Does "thereof" refer to enemies of the *United States* or enemies of *the Constitution of* the United States? We think this replicates the question of what "*the same*" refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (Does "insurrection or rebellion *against the same*" refer to insurrection or rebellion against "*the United States*"?) On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing; either one is capable of being considered an instance of the other. Whatever the answer, it should be the same for both—"against the same" and "thereof" refer to the same thing. Our best guess is that it is "the United States."

[242] See, e.g., Paulsen, *Rules for Its Own*, supra note 9, at 858 (arguing that where constitutional language states a general principle, "actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable"); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 995 (2008) (arguing that "textual imprecision or generality often admits of a range of choices" and that the correct constitutional answer in such circumstances "is that the legislature must be permitted to choose from options within that range"; thus, "the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted"); Kesavan & Paulsen, *Secret Drafting History*, supra note 9, at 1129-30 n.54 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law*

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other branches only because, and only to the extent to, they deviate from the Constitution's meaning. It is classically illustrated by the Court's reasoning in *M'Culloch v. Maryland*,[243] which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.

And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

2. Contemporaneous Dictionary Definitions

As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective*, *original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. (We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning: it can serve as a kind of operational, practical concordance that may "define" terms more precisely in their application than can a cold dictionary definition.)

Nineteenth century dictionaries contain definitions of "insurrection" and "rebellion" that substantially corroborate our working definitions. Webster defined "insurrection" as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state."[244] Rebellion was "[a]n open and avowed renunciation of the authority of the government to which one owes allegiance."[245]

Is, 83 Geo. L.J. 217, 333 (1994); Baude & Sachs, Law of Interpretation, supra note 234, at 1120 (describing "the presumption of constitutionality" as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

[243] 17 U.S. (4 Wheat.) 316 (1819),

[244] 1 Noah Webster, American Dictionary of the English Language 111 (1828, photoreprint 1993) ("Insurrection"); see also Dr. Webster's Complete Dictionary of the English Language 702 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (similar); 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (similar).

[245] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also Webster's (Porter 1864), supra note 244, at 1094 (similar); 2 Boag, supra note 244, at 319 (similar).

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Importantly, Webster also noted several distinctions between these and other terms. In defining rebellion, he distinguished an insurrection as "a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government," while a rebellion was a more categorical "attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."[246] And in defining insurrection, Webster noted that insurrection is "equivalent to sedition, except that sedition expresses a less extensive rising of citizens."[247] This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that "[i]nsurrection may be, but is not necessarily, rebellion"[248] and that despite these technical distinctions, "[i]nsurrection is however used with latitude as to comprehend either sedition or rebellion."[249] This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, John Bouvier's Law Dictionary in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion,* and *aid and comfort*. "INSURRECTION" was defined simply as "[a] rebellion of citizens or subjects of a country against its government."[250] "REBELLION" is correspondingly defined: "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*"[251] Bouvier's thus treated "insurrection" and "rebellion" as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government but not clearly distinguishing between them.[252]

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[246] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 1 Boag, supra note 244, at 727; 2 id. at 319 (similar).

[247] 1 Webster (1828), supra note 244, at 111 ("Insurrection"). For comparison, Webster defined "Sedition" as: "A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . ." 2 Webster (1828), supra note 244, at 66 ("Sedition").

[248] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 2 Boag, supra note 244, at 319 (similar).

[249] 1 Webster (1828), supra note 244, at 111. Daniel Hemel argues that "Webster's definition of 'insurrection' seems implausibly broad for Section 3 purposes." See Hemel, How-to Guide, supra note 5.

[250] "Insurrection" in 1 John Bouvier. A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 729-730 (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[251] "Rebellion" in 2 Bouvier (1868), supra note 250, at 415 (emphasis added).

[252] See also Joseph Worcester, A Dictionary of the English Language 764, 1190 (1860) (generally equating insurrection and rebellion). Elsewhere in this edition, Bouvier drew a distinction in connotation between "REBEL" and "INSURGENT," suggesting that "rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the

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Bouvier's dictionary also offers an instructive definition of "AID AND COMFORT" as "[h]elp, support, assistance, counsel, encouragement." The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

> The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act ...[253]

This tends to confirm our broad construction of "aid or comfort" as encompassing many kinds of intentional support, akin to the common law.

3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or near) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation "Intratextualism.")[254] Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.[255]

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tyranny of constitute authorities," and thus that "[t]he colonists who opposed the tyranny of the English government were insurgents, not rebels." "Insurgent" and "Rebel" in 1 Bouvier (1868), supra note 250, at 729; 2 id. at 415.

In a much later edition, Bouvier's drew a distinction between *insurrection* and *rebellion* as two different varieties of "actual and open resistance to [government] authority." *Insurrection* was "an actual uprising against the government" while *rebellion* "goes beyond insurrection in aim" and attempts actually to overthrow the government authority in question. "Insurrection" and "Rebellion," in 2 Bouvier's Law Dictionary & Concise Encycl. (Rawles Rev., 1897). Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as "contemporarily authoritative." Lynch, supra note 5, at 167 n. 80.

[253] "Aid and Comfort" in 1 Bouvier (1868), supra note 250, at 107.

[254] Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999).

[255] *M'Culloch*, 17 U.S. at 413-414. In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word "necessary" was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen, Marbury, supra note 66, at 2711; see also Michael Stokes Paulsen, *The Plausibility of Personhood,* 74 Ohio St. L. J. 13, 33 n. 72 (2013).

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Might the Constitution's other usages of terms that also appear in Section Three serve as such markers of meaning for "insurrection" and "rebellion," and "aid or comfort" to enemies, as those terms are used in Section Three? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel Invasions."[256] The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or invasion the public Safety may require it."[257] In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid and comfort" to enemies—borrows the nearly identical language of the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.[258] Moreover, in the 1860s, the pairing of "aid" and/or "comfort" had be-

[256] U.S. Const. art. I, §8 cl. 15.

[257] U.S. Const. art. I, §9 cl. 2.

[258] Perhaps the most notable U.S. treason case to date was Ex parte Bollman, in which Chief Justice Marshall delivered an opinion for the Court granting habeas to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American (then-)southwest and attempt to form his own independent nation. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part because of Article III's text ("only in levying war") with a relatively broad construction of complicity. Thus on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason," id. at 126, but on the other hand, "if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." Id. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: first, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, that though they might not qualify as treason, remain great and culpable legal wrongs; second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose; third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman*'s construction was sufficiently established to be read in to Section Three itself, it was cited occasionally in the 1860s Congress. See, e.g., 37th Congress 2nd Session Cong. Globe 414 (1862)

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come ubiquitous in legal and public discourse as a general allegation of improper assistance, making it still less clear that it was perfectly coterminous with the law of the Treason Clause.[259]

Finally, the words "insurrection" and "rebellion" also appear elsewhere in the Fourteenth Amendment itself, but again in ways that give little external light on Section Three. A person's "participation in *rebellion*" is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state's representation as a consequence.[260] Section Four of the amendment prohibits payment of debts or obligations "incurred in aid of *insurrection* or *rebellion*."[261] These neighboring sections use slightly different phrases for the behavior they cover ("participation" and "engaged in"; "aid or comfort" and "in aid of"), but it is difficult to say if the variations are meaningful.

4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms "insurrection," "rebellion," and "engaging in," as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in the landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, "insurrection" or "rebellion." A wide range of actions supportive of secession appears to have constituted "engaging in" or giving "aid or comfort" to rebellion or insurrection.

This leads us to what we think an obvious "sure shipwreck"[262] for understanding Section Three's terms. Whatever else "insurrection or rebellion" might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned: first, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly "seceded" state governments and their confederation into the "Confederate States of America"; and second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting

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(statement of Sen. Sumner) (citing *Bollman* passage quoted above during the proceedings to expel Senator Jesse Bright for writing a letter to Jefferson Davis).

[259] See Harold Holzer, Lincoln and the Power of the Press: The War for Public Opinion 361 (2014) (referring to the phrase "aid and comfort to the enemy" (by the press) as "that catch-basin phrase again.").

[260] U.S. Const. amdt. XIV, sec. 2.

[261] U.S. Const. amdt. XIV, sec. 4.

[262] Morse, supra note 227.

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either secession or armed resistance to U.S. authority constituted "engaging in" or giving "aid or comfort to" the Union's enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. President Lincoln

An extremely important contemporaneous source for understanding the public constitutional meaning of "insurrection" and "rebellion" in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating "secession" as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln's view, a "war" between the United States and another sovereign.[263] It was not subject to Congress's Article I, section 8, *clause 11* power to "declare War," but was rather an illegal *rebellion*—a "giant insurrection"—to be suppressed by executive authority pursuant to Congress's Article I, section 8, *clause 15* power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[264]

Consider just a few prominent and illustrative statements: In his First Inaugural Address, on March 4, 1861, Lincoln, after setting forth arguments that "no State upon its own mere motion can lawfully get out of the Union," concluded that "acts of violence within any State or States against the authority of the United States" are "*insurrectionary or revolutionary, according to circumstances.*"[265] Following the attack on Fort Sumter, Lincoln's April 15, 1861 proclamation calling forth the militia

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[263] On Lincoln's understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war) see sources cited in note 231. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L. Rev. 807, 814-823 (2006).

[264] Compare U.S. Const. art. I, §8, cl. 11 (Declare War Clause) with U.S. Const. art. I, §8, cl. 15 (power "to provide for calling forth" the Militia for law execution and to suppress insurrections"). Congress's exercise of this power – the Insurrection Acts of 1795 and 1807 – is discussed infra Part IV.A.5.a.

[265] Abraham Lincoln, First Inaugural Address (March 4, 1861), IV Complete Works of Lincoln ("CWL") 262, 265.

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similarly characterized the attack as fitting the statutory definition of *insurrection*.[266] And in his July 4, 1861 Message to Congress, Lincoln labelled the South's purported secession a "*giant insurrection*" and, vividly, as "*rebellion* ... sugar coated." The "so-called 'Confederate States'" had formed an "*insurrectionary* government."[267] In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, section 9, clause 2 of the Constitution, which used exactly that language of "rebellion."[268] Lincoln's use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators, no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion*.

Two years later, at the height of the war, Lincoln returned to the characterization of the South's actions as "rebellion" (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio Congressman Clement Vallandigham, a notorious racist and prominent "Copperhead" pro-South, anti-Union northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the propriety of the Union's war effort.

Lincoln distinguished law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: "Ours is *a case of Rebellion*—so called by the resolutions before me—in fact, *a clear, flagrant, and gigantic case of Rebellion*." And that, Lincoln concluded, was what allowed suspension of habeas corpus.[269] In the course of his argument, Lincoln described rebellion as "*sudden and extensive uprisings against the government*."[270] This is a useful description that supports our working definition: Rebellion is an "uprising." It is something more than mere protest. It is, often, "sudden." It is "extensive." It is directed "against the government." *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham's actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy

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[266] Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), IV CWL 331, 332.

[267] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), IV CWL 421, 427-428, 432-437.

[268] Id. at 429-431 (emphasis added).

[269] U.S. Const. art. I, §9, cl. 2.

[270] Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), VI CWL 260, 264 (emphasis added).

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cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, "under cover of 'Liberty of speech,' 'Liberty of the press,' and 'Habeas corpus,'" rebel sympathizers "hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways."[271] Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied "cover" for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person's refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a "man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy." He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now "occupying the very highest places in the rebel war service," such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[272] Lincoln's position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.[273] In a colorful metaphor, Lincoln ventured:

> I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the

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[271] Id. at 263.

[272] Id. at 265.

[273] In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those distinguishing pure speech from speech linked to prohibited *conduct*; recognizing limits on speech posing a danger of inciting to crime or lawlessness; recognizing "compelling interest" overrides in exceptional circumstances, including for reasons of national security or military secrecy; finding that government's motives and purposes for a particular action may matter to its lawfulness; and noting where an incidental limitation on expression leaves open alternative channels for expression of the same message. See Paulsen, *Civil War, supra* note 231, at 698-702 & n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment's freedom of speech).

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> right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.[274]

Lincoln also stressed a distinction between speech directed at criticism of the government's political policy—fully protected by the freedom of speech—and expression more or less directly aimed at harming the military's recruitment and war effort. If Vallandigham had been arrested merely because he was "damaging the political prospects of the administration" or "the personal interests of the general," that would be one thing, Lincoln observed. "[I]f there was no other reason for the arrest, then I concede that the arrest was wrong." But as Lincoln understood it, the arrest "was made for a very different reason"—that Vallandigham was "laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Vallandigham was, in short, "warring upon the military." He who "dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle." Desertion was punishable by death, of course. In a famous line, Lincoln asked, rhetorically "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[275] Lincoln's answer was no: "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy." [276]

Lincoln continued: "If I be wrong on this question of constitutional power," he added, "my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them -- in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security."[277]

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action.

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[274] Letter to Corning (June 12, 1863), VI CWL at 267. (*Emetics* referred to a medicine or substance used to induce vomiting.)
[275] Letter to Corning, VI CWL at 266.
[276] Id. at 266-67.
[277] Id. at 267.

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Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms "insurrection or rebellion," and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct, *all* constituted forms of support for and participation in "insurrection" or "rebellion." And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions of the post-war status of persons who had participated in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.[278]

b. Congress

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: We think two specific enactments of Congress during the Civil War are especially probative of the understandings of "insurrection" and "rebellion" and of what conduct was publicly understood to constitute having "engaged in" or given assistance to rebellion. First, there is the so-called "Ironclad Oath," adopted

[278] Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as "the rebellion." Annual Message to Congress (Dec. 8, 1863), VII CWL at 51 In his accompanying offer of amnesty and pardon, in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the "rebellion" that "now exists whereby the loyal State governments of several States have for a long time been subverted" (id. at 53), to "said rebellion and treason" (id. at 54), to "said rebellion" (id.) and to persons who had provided "aid" to the "rebellion" in various forms. Interestingly, Lincoln *excepted* from his offer of forgiveness – in language that would seem to presage the similar terms of Section Three – "all who have left judicial stations under the United States to aid the rebellion" and "all who resigned commissions in the army or navy in the United States, and afterwards aided the rebellion." Id. at 55. Lincoln also left to the respective houses of Congress the exclusive judgment "whether members sent to Congress from any State shall be admitted to seats."

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on July 2, 1862 as the oath one must be able to swear in order to hold federal office.[279] Second, there is the "Second Confiscation Act," adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting "rebellion" or "insurrection."[280] These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

i. The Ironclad Oath

Congress adopted The Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.[281] The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.[282] It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath's list of never-have-I-evers particularly instructive. Here's the oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

> I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor attempted to exercise the functions of any office whatever,* under any authority or pretended authority in hostility to the United States; that I have [4] *not yielded a*

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[279] 12 Stat. 502.

[280] 12 Stat. 589 (1862). 12 Stat. 627 (1862).

[281] 23 Stat. 21 (1884). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, 15 Stat. 85 (1868), and in 1871 it added that anybody "who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution" yet would otherwise "not be able on account of his participation in the late rebellion to take" the Ironclad Oath, could take the forward-looking oath instead, 16 Stat. 412 (1871). These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

[282] For this reason, Lincoln famously wrote: "On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*." Endorsement of Abraham Lincoln in Letter from R.M. Edwards to Edwin Stanton, February 5, 1864, 7 Lincoln Papers 169.

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> *voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-evers would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms, of course. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution* . . . hostile or inimical" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: What the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.[283]

ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act." Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"[284]

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.[285] The Second Confiscation Act was long and vigorously debated in Congress, much discussed in the press and in public discourse, objected to by many on constitutional grounds, and nearly vetoed by President Lincoln.[286] Enactment of the Second Confiscation Act gave rise to very public pressure

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[283] The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the oath to its own members, during and after the enactment of Section Three. These applications are detailed infra Part IV.A.5.b.

[284] 12 Stat. 589 (1862). See also 12 Stat. 627 (1862) ("explanatory" joint resolution).

[285] An earlier act had provided for forfeiture more specifically of property or slaves actually *used* in service of rebellion. 12 Stat. 319 (Aug. 6, 1861).

[286] See generally David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1185-1195 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an "explanatory" joint resolution (which Lincoln signed together with the bill). Lincoln nonetheless appended his original draft veto message setting forth his objections. For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of

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on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order. The Second Confiscation Act was a big deal. [287]

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime, and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who "*engaged in*," "*incite[d]*," "*set on foot*," or "*assist[ed]*" "*rebellion*" or "*insurrection*" or who had "*given aid or comfort*" to rebellion or done acts "*aiding and abetting*" rebellion. The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

Specifically: Section 2 made it a new crime, distinct from treason, to "*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*" or to "*give aid or comfort thereto*" or to "*engage in, or give aid and comfort to*," any "*existing rebellion or insurrection.*"[288] It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with "rebellion or insurrection." Those terms are described as involving acts "against

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action in signing it but nonetheless appending his objections, see id. at 1193-1194; Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War 105-106 (2007) (noting Lincoln's initial concern that the act would violate Article III's limitations on the punishment for treason and the objections of others that the act was a bill of attainder); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 215-217 (2010). For Lincoln's July 17, 1862 message to Congress, detailing his objections, see V Complete Works of Lincoln 328-331.

[287] A month after the Act had been adopted, Horace Greeley published a scathing editorial titled "The Prayer of Twenty Millions," in which he demanded that Lincoln "EXECUTE THE LAWS" faithfully with specific reference to the Second Confiscation Act. Greeley condemned Lincoln's "mistaken deference to Rebel Slavery" and his failure to rebuke his generals for having "habitually disregarded" the Confiscation Act. Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and "widely reprinted," defending his course of action. V Complete Works of Lincoln 388-389; see Holzer, supra note 259, at 400-401. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual *authority* for his proclamation). V Complete Works of Lincoln at 434-435 (stating that "attention is hereby called to" provisions of the act but relying for authority on his powers as executive and military Commander in Chief). See also Foner, Fiery Trial, supra note 286, at 215 (noting that "the Second Confiscation Act embodied a major shift in national policy").

[288] 12 Stat. 589, 590. (emphasis added). Section 2 provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act's disqualification from *federal* office, *id.*, as well. 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). Needless to say, a prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

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the authority of the United States, or the laws thereof" (a formulation closely conforming to our working definitions). Section 2 imposes criminal liability on persons who "incite" such acts; who "set on foot" such acts; who "assist" such acts; who in any other way "engage in" such conduct; or who "give aid and comfort to" such conduct. All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section 3 of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."[289] Section 5 directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who "shall hereafter *assist and give aid and comfort to* such rebellion."[290] Officeholding in a rebel government or military was *per se* blameworthy participation; but general giving of assistance or aid or comfort also qualified as participation in rebellion. Section 6 provided a further authorization for seizure of the property of any person not already mentioned who, "being *engaged in* armed *rebellion* against the government of the United States, or *aiding* or abetting such *rebellion*," and, after sixty days' notice issued by the President, did not "cease to *aid, countenance, and abet such rebellion*, and return to his allegiance to the United States."[291] Section 7 and Section 8 provided for in rem proceedings against property "found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto,*" in which case it "shall be condemned as *enemies'* property."[292] And Section 9 famously emancipated slaves of persons "who shall hereafter be *engaged in rebellion*" against the Union or who "shall *in any way give aid or comfort thereto.*"[293] Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: "engaged in," "rebellion," "aid or comfort," "abet," "countenance," "enemies."

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time. For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located. At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning those areas.[294] Similarly, as a practical matter, criminal prosecutions of rebels for

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[289] 12 Stat. 589, 590.
[290] Id. (emphasis added.)
[291] Id. at 591.
[292] Id.
[293] Id.
[294] See McPherson, supra note 231, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of "*in rem* proceedings by district courts that were of course not functioning in the rebellious states"); Foner, Fiery Trial, supra note 286, at 215 ("For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold

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treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.)[295] The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act's specific policies. The administration, according to one scholar, "chose not to implement the law vigorously."[296] Attorney General Bates "exerted no more than a minimal effort to make the first and second confiscation acts work."[297] And the Act's section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln's far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander in Chief power.

But in some ways the lack of enforcement cases is beside our point here, which concerns the Act's prominence in national discussions and its pervasive use of terms, phrases, and concepts—rebellion, insurrection, engage in, aid or comfort—that would reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation we think helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three's terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. The Supreme Court's decision in *The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.[298] There, the majority upheld the constitutionality of Lincoln's unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports. In a truly landmark decision, the Supreme Court held that the President's war powers (including the power to impose a blockade) were triggered immediately, as soon as the South's rebellion took the form of organized military resistance to the authority of the U.S. government. The President's power to

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under its provisions."). See also Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-1862, at 238 (2005) (remarking that "[t]he confiscation bill that finally emerged was neither sweeping nor enforceable" though opining that "if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.").

[295] See Eric L. McKitrick, Andrew Johnson and Reconstruction 141-152 (1960).

[296] John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 55 (2005).

[297] Id. at 72; see also James G. Randall, Constitutional Problems Under Lincoln 288-292 (1926) (describing minimal enforcement of the Second Confiscation Act).

[298] 67 U.S. (2 Black) 635 (1863).

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wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held. A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections" but "sprung forth suddenly ... in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[299]

The Court's decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution's allocation of war powers. At the time, the case had other hugely consequential implications: the principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln's constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.[300] The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court's usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government: "*Insurrection* against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government," the majority said.[301] A civil war "becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[302] Where a rebellion has come to possess certain military characteristics, the "party in rebellion" might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an '*insurrection*' by one side, and the insurgents be considered as rebels or traitors."[303]

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on "rebellion." A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

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[299] Id. at 668-669; see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J. 149, 177-180 (2004).
[300] Paulsen, *Emancipation*, supra 263, at, 814-823.
[301] 67 U.S. at 666 (emphasis added).
[302] Id. at 666
[303] Id. at 668.

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The Prize Cases also held that persons engaged in insurrection or rebellion could be treated as "*enemies*" (as well as traitors) for legal purposes. Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in "commerce" that "supplies" rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner. Even "neutral" powers' shipping could be seized when it violated a blockade: "Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as "enemies' property."'"[304]

The Prize Cases' treatment of the concepts of insurrection and rebellion, of who constituted "enemies," and of what actions constituted support for rebellion, would have been very much part of the legal culture of the day and provides important legal background as to how these terms would have been understood at the time of the drafting of Section Three of the Fourteenth Amendment, just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to "the lawful authority of the Government," with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—"insurrection," "rebellion," and what it meant to "engage in" or provide "aid or comfort" to enemies—highly probative of Section Three's original public meaning. President Lincoln, repeatedly and insistently; Congress, pointedly and consistently; and the Supreme Court, decisively, used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more

[304] Id. at 674 (quoting 3 Wash. C.C.R. 183). That said, the Court also cautioned that " 'enemies' property" was "a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law." Id. at 674. The point that, in a military context, property could be treated as "enemies' property" irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation: even though Lincoln's proclamation purported to free the slaves of *all* persons in rebel-controlled territory – including slaves held by persons claiming to be loyal to the Union – such "property" constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *Emancipation*, supra note 263. See generally John Fabian Witt, Lincoln's Code (2012).

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general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

5. Other Extant Statutory Sources and Notorious Examples

a. The Insurrection Acts (and Insurrections Generally)

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as well as its other war powers over the army and navy. The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach; the forms and degree of opposition to government authority that were believed to trigger the statutes' application; and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

The 1795 act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections." But it also applied to repel invasions and to enforce federal law. Together, these were the three circumstances where Congress had the power to provide for calling out the militia.[305] Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the government thereof."[306] Section Two allowed the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[307] Section Two encompasses insurrections against the United States.[308] (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call out the army and navy in similar circumstances: "in all cases of insurrection, or obstruction to the

[305] U.S. Const. art. I, sec. 8, cl. 15.
[306] 2 Stat. 424 (1795), sec. 1.
[307] Id. sec. 2. (emphasis added).
[308] That said, because Section Two is supported by *both* Congress's power to "suppress Insurrections" *and* its power "to execute the Laws of the Union," U.S. Const. art. I, sec. 8, cl. 15. it could encompass instances of law enforcement that do not rise to the level of a constitutional "insurrection."

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laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary ..." The 1807 act thus carried forward and repeated the 1795 act's understanding of insurrection.[309]

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe "*rebellion*." It allowed the President to call forth the militia "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . ."[310]

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation; it entails "combinations" or "assemblages," acting together, to "oppose[s]" or "obstruct" the ability of government to "execute" the law, in numbers "too powerful" to be suppressed by the usual means of law enforcement.[311]

Moreover, several famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding "insurrection" or "rebellion." Consider just a few.

The "Whiskey Rebellion" was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilleries. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their

[309] 2 Stat. 443 (1807).

[310] 12 Stat. 281 (1861).

[311] Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, supra note 5, at 168, 214-215. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President's proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection; but it is not an insurrection only because he proclaims it one.

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duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).[312]

We believe the "Whiskey Rebellion" would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.[313] Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.[314] In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an "insurrection" or "rebellion."

"Fries Rebellion," in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.[315] President John Adams invoked the 1795 Act to suppress the "insurrection," as he called it,[316] which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters. In at least one instance, armed opponents of the government successfully freed prisoners from federal custody. The Adams administration's suppression of the insurrection led to widely publicized treason prosecutions[317] of leaders and instigators of the unlawful resistance, including John Fries. As with the Whiskey Rebellion, Fries Rebellion was characterized by

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[312] See generally Elkins & McKitrick, The Age of Federalism 461-474 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties – including tarring and feathering, whipping, surrounding of officials' homes by armed mobs, and kidnapping and coerced repudiation of federal authority); see also Ron Chernow, Alexander Hamilton 468-478 (2004) (similar); Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 43-68 (1988) (documenting the resistance and military response).

[313] To be sure, one scholar of the Acts suggests that "[i]t may have been dubious whether actions of the Whiskey Rebellion farmers truly rose to the level of insurrection," and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, at 161 n. 46; see also Coakley, supra note 312, at 67 (suggesting that to "characterize the . . . affair as a 'riot' and the participants as 'rioters'" is "far closer to the truth"). But later sources called it at least an insurrection, see infra note 314, and this goes to show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government.

[314] See 1 Francis Wharton. State Trials of the United States during the Administrations of Washington and Adams 102-184 (1849) (describing "The Trials of the Western Insurgents"); Townsend Ward, The Insurrection of the Year 1794, in the western counties of Pennsylvania (J.B. Lippincott 1858); H.M. Brackenridge, History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection (W.S. Haven, 1859).

[315] Coakley, supra note 312, 69-77.

[316] John Adams, Proclamation on Insurrection in Pennsylvania, 12 March 1799, https://founders.archives.gov/documents/Adams/99-02-02-3377.

[317] These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed "insurrection," describing it as a "rising of any body of the people" and arguing that it qualified as treason because "an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States." Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800). See also 1 Wharton, supra note 314, at 458-609 (describing these proceedings as "The Trial of the Northampton Insurgents").

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concerted acts of forcible interference with federal officials' ability to perform their duties under law.[318]

Nat Turner's Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.[319] But it surely would have been a classic illustration of at least an "insurrection" and perhaps even a "*rebellion*"—a concerted uprising seeking forcibly to overturn the legal order and thwart government's ability to execute the law. A published report of Turner's own account called it both an insurrection[320] and in one instance an "open rebellion."[321] This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked "the 'higher law' doctrine" to openly harbor freed slaves to the point that President Millard Fillmore "threatened to send in federal troops."[322] In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland. This was denounced as an "act of insurrection," and this time President Fillmore did call out federal troops.[323] In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.[324] And of course John

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[318] As with the Whiskey Rebellion, these events show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See also Elkins & McKitrick at 696-700 (questioning "whether the circumstances really called for military force of any kind").

[319] Federal troops were used to suppress this and other slave rebellions, but "without following the legal procedures laid down in the statutes of 1795 and 1807." Coakley, supra note 312, at 92-94. Coakley suggests that this the failure to go through the Insurrection Acts reflected "the universal dread of slave revolts" at the time and the fact that "t]he slaves had no political constituency." Id. at 94.

[320] See The Confessions of Nat Turner, The Leader of the Late Insurrection in Southampton, VA, as fully and voluntarily made to Thomas R. Gray, at 3, 5, 7, 20, 22 (1831) (calling it "insurrection"); see also Thomas Wentworth Higginson, Nat Turner's Insurrection, 8 Atlantic Monthly 173 (1861)

[321] See Turner, supra note 320, at 3 ("The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves") (emphases added).

[322] See McPherson, supra note 231, at 81-84; Cf. Coakley, supra note 312, at 130-131 (noting debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

[323] McPherson, supra note 231, at 84-85. See also Thomas Slaughter, Bloody Dawn: The Christian Riot and Racial Violence in the Antebellum North (1991); and cf. id. at ix ("The line between riot and rebellion was shifting during the antebellum period.").

[324] See generally H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (2006) (describing resistance, in the mid-to-late1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

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Brown's fateful raid on Harper's Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.[325] These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection* nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr's Rebellion, in Rhode Island, in 1841-1842 which led to the Supreme Court's 1849 decision in *Luther v. Borden*.[326] There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter). The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government. The practical result of the decision—relevant to our inquiry– was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "*insurrection*" against the rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force"[327] and as having attempted "to assert the authority of [the Dorr government] by force,"[328] as amounting to having "engaged in the insurrection."[329] The Court also referred to the government's actions as having been designed to suppress that "insurrection."[330] The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.[331] While these

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[325] McPherson, supra note 231, 202-208. Federal troops helped suppress this insurrection and rebellion too. See Coakley, supra note 312, at 193 ("This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities.").

[326] Luther v. Borden, 58 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see Coakley, supra note 312, at 119-127.

[327] Luther, 58 U.S. (7 How.) at 8.

[328] Id. at 37

[329] Id. at 46

[330] Id. at 45.

[331] By this time, the Act had been amended yet again. See 17 Stat. 13, 14-15 (1871), §§ 3-4.

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events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection" as displayed by important usage within a few years of adoption of the Fourteenth Amendment. Briefly summarized: In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus, among other actions) to secure order in dealing with the Ku Klux Klan.[332] In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous "Colfax Massacre" of April 13, 1873, in which a white mob attacked and massacred perhaps 150 black citizens who had been defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government. President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.[333] Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d'etat that had overthrown the Republican governor by force.[334] Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of the capital—New Orleans at the time. (The conflict lasted until 1877, when Reconstruction was abandoned by the national government and white supremacists took full control of the state.) In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.[335] Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.[336] And in 1876, in South Carolina, Grant invoked the Insurrection Act to protect the gubernatorial election process from white supremacist groups.[337] Common to each of these instances during the Grant administration was

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[332] Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871); http://www.presidency.ucsb.edu/ws/?pid=70253; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871); for background see Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 Harv. Nat'l Sec. J. 537, 613-14 (2014); Lou Falkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872, at 39-49 (1996).

[333] Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) http://www.presidency.ucsb.edu/ws/index.php?pid=70364

[334] Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) http://www.presidency.ucsb.edu/ws/index.php?pid=70422

[335]Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), http://www.presidency.ucsb.edu/ws/?pid=70459.

[336] Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874) http://www.presidency.ucsb.edu/ws/?pid=70420.

[337] Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876) http://www.presidency.ucsb.edu/ws/?pid=70542.

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the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shays' Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or perhaps given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. The Congressional Exclusion Debates

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."[338] Moreover, several of these proceedings occurred right around the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.[339]

[338] Lynch, supra note 5, at 196. Lynch ably and accurately describes the most important such cases. See id. at 196-201, 207-210. We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

[339] See generally 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, pp. 431-486 (1907).

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First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy, during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.[340] A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."[341] Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."[342]

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility" to the Government or provided "aid or comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort."

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."[343] It also involved an incident of pure *speech* as disqualifying a member-elect from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

> *Editors Louisville Courier:*
>
> My attention has been called to the following paragraph, which appeared in your paper of this date:
>
> "JOHN YOUNG BROWN'S POSITION.– This gentleman, in reply to some searching interrogatories put to him by Governor Helm,

[340] Id. §448 at 442.
[341] Id. at 443 (emphasis added).
[342] Id.
[343] Id. at 445.

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said, in reference to the call of the President for four regiments of volunteers to march against the South—

'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*"

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.[344]

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. This became a precedent for the House's subsequent actions in other cases. The standard applied—whether the facts, "proved by clear and satisfactory testimony," showed that an individual had, by an "act or speech ... overt and public ... done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion"—had been satisfied by Brown's letter.[345]

Similarly, in March 1868, the House excluded John D. Young under this standard. Young's case also involved speech. The Young case involved numerous expressions of support and sympathy for the South and against the Union, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."[346] But Young's case was overdetermined, because there was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with* the open acts of 'aid and comfort to the enemies of the United States,'" established that he could not "'honestly and truly take the oath,'"[347] and the full House agreed.

[344] Quoted in id. at §449, p. 445.
[345] Id. at §449, pp. 443, 448.
[346] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[347] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).

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The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was opposed to "voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.[348]

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson, who had served as a state court judge in the eastern region of Tennessee during the Confederate regime; and Representative-elect R.R. Butler, who had retained his seat in the state legislature during secession, while opposing it—the respective house ultimately admitted the applicant to his seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.[349]

A potentially broad understanding of "aid or comfort" also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.[350] What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son $100 on the way out the door. The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son's taking up arms against the United States and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas's treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan's Treasury Secretary because he disagreed with the President's decision to send federal reinforcements to

[348] Id. at §453, p. 459.
[349] Id. at §453, 455, pp. 459-461, 462-465. In Butler's case, two-thirds of both houses voted him amnesty. Id. at 464-465. In Patterson's case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it, id. at 46, but perhaps that is okay, if application of the Ironclad Oath, to members of Congress, is a function of each house's *separate* power to make rules governing its proceedings. U.S. Const. art. I §5.
[350] Hinds' at §§457, 458 at pp. 465-470.

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Charleston Harbor.[351] Either theory of Thomas's exclusion suggests that "aid or comfort" to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one's son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia's sixth district, but the House committee found that Christy, by his own admission, had given "aid, countenance, counsel, and encouragement" to persons in armed hostility against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath, and he was not seated.[352] In 1869, the House sat John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.[353] The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of two witnesses.[354] In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or the other, the House ultimately voted to table the issue, leaving Booker in office.[355] Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia house of

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[351] Hinds' at §459, pp. 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas's son "it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action."). See also Cong. Globe 40th Cong. 2nd Sess. at 1260-1262 (Feb. 19, 1868).

[352] Hinds' at §459, pp. 470-472. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment," id.

[353] Hinds' at §460, pp. 472-473.

[354] Congressional Globe, 41st Cong, 2nd Sess. pp. 5442-5447 (July 11, 1870). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states; but everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "No war exist[ed] at the time" and it was before "the policy of the Government had been announced." Id. at 5443 (Butler); see also id. at 5445 (Garfield). Nor could Rice be excluded solely because of his politics. See id. at 5445 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

[355] Hinds' at §461, pp. 474-475.

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delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters. Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.

Finally, in 1871, the Senate declined to seat Senator-elect Zebulon Vance from North Carolina.[356] The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.[357] If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.[358]

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But there was no bright line, for instance, protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces appears generally to have been thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.[359]

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[356] See generally Hinds' at §463, pp. 478-486.

[357] See generally Richard E. Yates, *Zebulon B. Vance: as War Governor of North Carolina*, 1862-1865, 3 J. Southern Hist. 43 (1937).

[358] Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress, Act of May 22, 1872, ch. 193, 17 Stat. 142; https://bioguide.congress.gov/search/bio/V000021. Cf. Franklin Ray Shirley, Zebulon Vance, Tarheel Spokesman 71 & 152 n. 36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance), but Congress then passed a private bill granting him individual amnesty. 17 Stat. 691 (June 10, 1872). Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1884. Magliocca, *Amnesty*, supra note 5, at 111 n. 126.

[359] Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See supra notes 222-224 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section

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6. Legislative History

There is only a little fruit to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress's debates over its various provisions and of state ratification debates. The Fourteenth Amendment's legislative history is famously voluminous, and Section Three—like the other "forgotten" sections of the Amendment (Section Two and Section Four)—was much more salient to the debates then than it is to today.[360] As briefly noted above, the legislative history supports the key propositions we have advanced earlier in this article—that Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction; that Section Three's disqualification was seen by proponents and opponents alike to be self-executing and automatic; and that Section Three was understood to supersede (or satisfy) prior constitutional limitations.[361]

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences: there appears to have been substantial agreement—by both opponents and proponents—that the provision would cover a broad range of activity supporting or assisting the South's efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding and, further, would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have "engaged in" insurrection or rebellion or given "aid or comfort" to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents simply thought such breadth appropriate, necessary, and valuable.[362]

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather

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Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

[360] See generally Graber, Volume 1, supra note 8.

[361] See supra notes 12, 59, & 184.

[362] See generally Graber Section Three manuscript, supra note 12.

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than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).[363] As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

7. Early Applications of Section Three

A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they still can be informative.[364] Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.[365]

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress by enacting new, republican, Reconstruction-compliant constitutions—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified

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[363] Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply – *e.g.*, only to persons who joined the Confederacy while still holding prior office under the U.S. Constitution; only to persons who had sworn oaths to the Constitution since 1851; only to persons who had not received presidential pardons; and only to persons who had *voluntarily* served the confederacy. Republican defenders of Section Three successfully opposed these proposed limitations on Section Three's scope, arguing that limiting the ban to persons who still held office under the Constitution when they joined the Confederacy would indulge the pretext that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. Cong. Globe, 39th Cong. 1st Sess. p. 2770 (statement of Sen. Howard). Republicans likewise rejected the proposed limitation to persons who had "voluntarily" assisted or participated in rebellion, because it would raise unnecessary and difficult proof problems and permit spurious claims of involuntary participation. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he "never entered into the rebellion voluntarily"! Cong. Globe, 39th Cong., 1st Sess. p. 2918 (statement of Sen. Willey).

[364] See, e.g., Baude, *Liquidation*, supra note 242, at 61-62; Paulsen, *Most Dangerous*, supra note 242, at 293, 303.

[365] Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three, see supra Part IV.A.5.b.

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under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state's constitutional convention.[366]

Andrew Johnson's attorney general, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.[367] Stanberry's opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and ex post facto in this context.[368] Even so, Stanberry's opinion found Section Three's definition of what constituted participation in rebellion to be quite broad:

> "*All those who*, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done *any overt act* for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."[369]

As to individuals, Stanberry also reiterated several times that *any* voluntary support, even if not violent, was covered and culpable. He found "it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,"[370] and added that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law."[371]

Subsequent cases took even broader positions. For instance, in the 1869 decision of Worthy v. Barrett, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court's reasoning on this issue was succinct but clear:

> What will amount to having engaged in the rebellion?
>
> (1st.) Holding any of these offices under the Confederate government.

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[366] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428, 429, sec. 5-6 (March 2., 1867).
[367] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867); Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 182 (1867).
[368] 12 Op. Att'y Gen. at 159-160. But see supra Part III.A-B (explaining why the constitutional ex post facto and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).
[369] Id. at 161-162 (emphasis added)
[370] Id. at 161.
[371] Id. at 165.

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> 2d Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.[372]

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.[373]

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation – Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring *quo warranto* actions to remove officials holding office "contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution" and to bring criminal prosecutions against person who "shall hereafter knowingly accept or hold" office in violation of Section Three.[374] In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell, for accepting an appointment as county sheriff despite being covered by Section Three.[375] Powell's alleged act of rebellion was having "furnished a substitute for himself to the Confederate army," and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.[376] This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

> [T]he word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will

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[372] Worthy v. Barrett, 63 N.C. 199, 203 (1869). The court also applied the Worthy rule to the even easier case of a county attorney who "took part in th[e] rebellion by serving in the Confederate army, voluntarily." In Re Tate, 63 N.C. 308 (1869).

[373] By contrast, Stanberry had concluded that officers who "discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion." 12 Op. Att'y Gen. 162.

[374] 16 Stat. 140, 142-143, sections 14 & 15. See supra note 54.

[375] United States v. Powell, 27 F. Cas. 605 (C.C.D.N.C 1871).

[376] Id. at 607.

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> excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant's action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.[377]

In other words, only great duress *and* pure heart would be a defense if one's conduct otherwise provided material support to the rebellion. Section Three's disqualification for having "engaged" in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee. the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.[378] Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee's purported secession, and traveling to Washington to attempt to represent the state in Congress.[379] While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.[380]

The other scattered discussion of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section Three's substantive disqualification—broad interpretations of insurrection, rebellion, "engaged in," and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was "a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States."[381] Other cases are consistent with similarly

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[377] Id. Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry. Id.

[378] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 Tenn. B.J. 20 (2013); see also Magliocca, *Amnesty*, supra note 5, at 109-110.

[379] For one fawning account of Nelson, see Oliver P. Temple, Notable Men of Tennessee From 1833 to 1875. at 166-215 (1912).

[380] Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, supra note 378.

[381] In re Griffin, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

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broad assumptions.[382] We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have "engage[d] in insurrection and rebellion," or given "aid or comfort" to "enemies" was understood to embrace an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, the sum total of evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of "insurrection" and "rebellion" to which they applied; and finally early practice enforcing Section Three—points in a consistent direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably broad understanding of what types of conduct constitute engaging in or perhaps giving aid or comfort to such movements.

B. What Prior Officeholders are Covered? What Future Offices are Barred?

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

> No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States or under any State ... [383]

[382] Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. Magliocca, *Amnesty*, supra note 5, at 109-110.
[383] U.S. Const. amdt. XIV, sec. 3.

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Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

> ... who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States ... [384]

We begin with a few observations.

First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.[385] Keep this in mind as we proceed: we think readers should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that "Senators and Representatives . . . Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."[386] Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will "faithfully execute the Office of President of the United States" and

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[384] Id.

[385] See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 Albany L. Rev. 671, 674-76 (1995). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. William Michael Treanor, *The Case of the Dishonest Scrivener: Guverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 20-24 (2021). Putting aside whether this story is really true, David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Governeur Morris as Dishonest Scrivener*, 120 Mich. L. Rev. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semi-colon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *West Virginia*, supra note 130, at 338-339 & n. 151.

[386] U.S. Const. art. VI, cl.3.

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"'to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'"[387]

Section Three's listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three's list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to "military" offices—including state military offices—whether or not they would be considered "executive" offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text's overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified.

With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, "triggering" clause): Section Three's disqualification attaches to persons who previously swore an oath to support the Constitution as:

> [i] a "*member*" of Congress, or as
> [ii] an "*officer* of" the United States, or as
> [iii] a "*member*" of any State legislature, or as
> [iv] an "*executive or judicial officer* of" any State.[388]

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[387] U.S. Const. art. II, §1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L. Rev. 1257, 1260-1267 (2004); on "to the best of my Ability," see William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303, 310 (2011).
[388] U.S. Const. amdt. XIV, sec. 3.

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These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

> [i] "a *Senator* or *Representative*" in Congress (paralleling "*member,*" a seemingly purely stylistic variation) or
> [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
> [iii] holding "*any office, civil or military,*" "under" either federal or state government (paralleling "officer" of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of "military" officers).

The description "civil" office, in the disqualified-from list seems designed to embrace the categories of "executive or judicial" officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a "civil" office within the language and design of Section Three, reading the word "office" in this context in an ordinary, non-technical sense.[389]

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for president and vice president (and clarifying "military"). The legislative positions in question are the relevant *elected* offices—*members* of the legislature, whether a state legislature or the federal Congress—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an "office" within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an "office," held by an "officer"—as opposed to non-officer, non-"office"-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?[390] Like-

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[389] Hemel, *How-to Guide*, supra note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from "civil" offices.); contra John Randolph Tucker, *General Amnesty*, 126 N. Am. Rev. 53, 54 (1878). None of this in our view affects the question whether a Member of Congress may properly be designated as an "Officer" to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995) with John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995).

[390] Serious scholarship has explored those questions with respect to the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

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wise, for the federal judicial branch, Article III judges and justices are plainly covered. (Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,[391] are presumably covered as well—as well as perhaps bankruptcy judges, magistrate judges and the like.)[392] Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive "office" held by "officers" (thus, perhaps, the special need for designation "military," to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* "under" the United States, is not properly classified as an "*officer of*" the United States.[393] On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this[394]—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three's consequences.

We do not buy it, for many reasons: First, it adopts precisely the type of "secret code" hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: an insurrectionist *President* is not covered by Section Three's disqualification (though nearly every other federal or state officeholder is); the President is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.[395]

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[391] 38 U.S. 230, 258 (1839) ("[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned"). To be clear, Hennen dealt with the clerk of court, not what we would now call a term judicial law clerk.

[392] That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III* 133 Harv. L. Rev. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly "officers" at all. Again, we leave this issue for another day.

[393] Josh Blackman & Seth Barrett Tillman, *Is The President An "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021).

[394] See, e.g., id. at 6, 17, 21.

[395] To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comm. 245 (1997); (suggesting the possibility that a straightforward reading of the constitutional text yields the "stupid" – and surely inadvertent – result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, Grounding, supra note 9, at 1468. But that does not mean we should close our eyes to plausibility and common sense, *especially* when the proposed textual reading is such a stretch. See also Paulsen, supra, Nothing But the Text, supra note 10, at 1439-1440 (noting cautions concerning use of the "absurdity" canon to

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Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times. It specifies the length of term for which the President "holds his Office," certain minimum qualifications for eligibility "to that Office," what happens upon the President's removal "from Office," or inability to discharge "the Powers and Duties of said Office," and the oath he shall take before entering "on the Execution of his Office."[396] If the Presidency is not an office, nothing is.

So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an "office *under*" the United States but is not an "officer *of*" the United States? This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer *"of"* the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause ("officer of") and the positions-disqualified clause ("office under")—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.[397] Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different prepositions: the Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.[398]

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deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

[396] See generally U.S. Const. Art. II.

[397] For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. Const. amdt. XIII, sec. 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amdt. XIC, sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); id. amdt. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *West Virginia*, supra note 130, at 348 (giving examples).

[398] One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (Jul. 28, 2016) https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare id. (foreign gifts to Washington) with Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

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Third, a variant of the Blackman-Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred.[399] "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?"[400] Johnson was complaining that these two officers *should* be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Maine interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'"[401] Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."[402]

The Blackman-Tillman argument is not *quite* the same, but it is the mirror image of Johnson's concern. Johnson's inquiry was whether a covered, insurrectionist nonetheless might become president. The Blackman-Tillman argument is that an insurrectionist president is not an "officer of" the United States whose prior position triggers Section Three's restrictions on future office. The Johnson-Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.[403] Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining

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Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. U.L. Rev. Colloquy 180, 190 (2013) (contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, supra this note (Hamilton's list) with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107 (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms); cf. Blackman & Tillman, supra note 393, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

[399] Cong. Globe, 39th Cong., 1st sess. at 2899 (1866)

[400] Id.

[401] Id.

[402] Id.

[403] Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate Congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, supra 393, at 45-46 (acknowledging this). While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification these incidents would have shown that to be a glaring and dangerous omission.

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textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds *"office under"* the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

If Blackman and Tillman maintain that the President does *not* hold "office under" the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold "office under" the United States, then they must maintain a sharp and crucial distinction between "office under" and "officer of." As Mark Graber has observed, this distinction was *also* contradicted by Section Three's framers: "[T]he members of the Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office 'under the United States' were officers 'of the United States.' During the debates over Section 3, no representative or senator alluded to the existence of a distinction between 'of' and 'under'. Representatives and senators often described the president as having an 'office under the United States' and being an 'officer of the United States.'"[404] If a secret code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman-Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text's many references to the office of the Presidency as an "office"; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned

[404] Mark Graber *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023). Professor Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'" In addition, "[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished between 'officers under' and 'officers of' or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; see also Lynch, supra note 5, at 158-160 (collecting authorities supporting the same point); Magliocca, *Foreground*, supra note 62, at 16 n. 48 ("My research . . . shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States").

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by the Radical Reconstruction Congress that drafted the Fourteenth Amendment; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the "under/of" difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or "triggering" language, insurrectionists who once served as President and Vice President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

C. The Attempted Overthrow of the 2020 Presidential Election

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020-2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

Taken as a whole, these actions represented an effort to prevent the lawful, regular, termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or perhaps given "aid or comfort" to those who did? We will consider those questions in turn.

1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any re-

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spect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020-2021, but let us first focus on the events of January 6, 2021.[405] These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[406] The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was in part coordinated, not merely a riot.[407] Some members of the group were armed,[408] and many used force to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.[409]

Furthermore, it seems that, as a whole, the group's goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power, by disrupting a necessary formal step in the constitutional process.[410] The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that

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[405] In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-000 (117th Cong., 2nd Sess.). Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally supra Part II.B.

[406] Supra Part IV.A.1. The fact that President Trump may have supported the insurrection, see infra II.C.2.b, does not change this. In our system the President is not "the government," and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

[407] See, e.g., January 6 Report, supra note 405, at 499-502, 530-531.

[408] Id. at 640-642.

[409] Id. at 646-647, 651-659.

[410] Id. at 502-510, 521-530.

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day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries' Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.[411] Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.[412]

Our assessment of the events of January 6, specifically, as an "insurrection" confirms the judgment made by public authorities: An act of Congress, to "award four congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,"[413] found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: "On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers."[414] Another finding noted the historic magni-

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[411] See supra Part IV.A.4.c.

[412] What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, amounted to "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course if there were any other insurrections against the United States, Section Three applies to them all.

[413] Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322.

[414] Id. sec. 1(1). In the state Section Three proceedings against Marjorie Taylor Greene, supra notes 68-73 and accompanying text, the hearing officer cited this statute to conclude "Congress has characterized the Invasion as an insurrection." Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SEC-STATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022). The hearing officer found it unnecessary to decide for himself, however, "Whether the Invasion of January 6 amounted to an insurrection." Id. at 18.

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tude and symbolic importance of that insurrection against democracy: "The desecration of the U.S. Capitol, which is the temple of American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation's history."[415] The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th.[416] The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th *was* an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.[417]

Finally, there is an additional possibility that we should see the events of January 6, 2021, as just one part of a broader "rebellion" against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

We acknowledge that applying the term "rebellion" to the events of 2020-2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an "*open and avowed renunciation of the authority* of the government," as Webster would have it, nor (outside of the insurrection of January 6) "*the taking up of arms*" or "*forcible* opposition" as Bouvier would have it.[418] It is not a perfect fit.

Nonetheless, consider the argument that the term "rebellion" could be used more broadly to describe a coup d'etat seeking to overthrow the constitutional order—including a so-called "bloodless" coup d'etat (where no force is used) and a successful "self-coup" of the bloodless variety[419] (where the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: 1. A military coup d'etat upending lawful government by use of force surely qualifies,

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[415] Pub. Law. 117-32, sec. 1(4).

[416] H. Res. 24 (117th Cong., 1st Sess. Jan 25, 2021).

[417] For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, supra note 62, at 23 n.65; Vlahoplus, supra note 404, at 1; Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539, 1622-25 (2022); see also Hemel, *How-to Guide*, supra note 5; Mark A. Graber, Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021, Lawfare (Sep. 26, 2022) at https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021.

[418] See supra Part IV.A.2.

[419] See generally Daniel J. Hemel, *Self-Coup and The Constitution*, 37 Const. Comm. (forthcoming 2023).

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constitutionally, as a "rebellion." It is literally an effort unlawfully to overthrow constitutional government, by force. 2. It follows that a military coup d'etat upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*. 3. A military coup d'etat by the *existing* regime—a "self-coup," would seem, legally, to be the same thing. In such a case the regime does not *seize* power, by show or threat of force; it *retains* power by show or threat of force. But it is logically identical to situations #1 and #2. 4. A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3. Indeed, it seems fair to say that situation #4 is merely an instance of situation #3. 5. The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020-2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.[420]

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.[421]

2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Additionally, perhaps, who might be said to have provided "aid or comfort" to those insurrectionists and rebels?*

As detailed at great—perhaps excruciating—length above, "engaged in" under Section Three is properly understood to embrace a broad range of willful participatory

[420] In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. See supra Part IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'etat (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

[421] For the sake of completeness, we add that we think the events of 2020-2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.

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conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as "insurrection" or "rebellion." And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving "aid or comfort" arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three's disqualification.[422]

Who, then, engaged in such behavior?

a. General Principles Concerning Culpable Participation

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual's voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Part II, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution's criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three's broad sweep, it is clear that at least two purported factual defenses are simply immaterial:

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported "insurrection" or "rebellion" because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to "stop the steal." The problem is that the premise is simply false. Decisionmakers can and should act on the well settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.[423]

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[422] See generally supra Part IV.A.

[423] See not only the January 6 Report, supra note 405, but also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson &

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Second, it likewise is no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South's secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.[424] Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual's wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.[425]

b. Section Three Disqualifies Donald Trump from Future Office

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the 2020 election and the events leading to the January 6 attack.

The case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential election result, calling it "stolen" and "rigged";[426] that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,[427] to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,[428] to assemble and induce others to submit bogus slates of competing state electors,[429] to persuade or pressure Congress to refuse to count electors' votes submitted by several states,[430] and finally, to pressure the

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Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022)*, https://lostnotstolen.org.

[424] This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., Counterman v. Colorado, 600 U.S. ___, at 4 n.2 (2023).

[425] Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted "insurrection"? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d'etat are not.

[426] And not that it matters, see supra Part IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, supra note 405, 100-01, 103-04, 203, 213, 789.

[427] Id. at 202-203, 263-265; see also id. at 223-231,

[428] Id. at 296-300.

[429] Id. at 341-354.

[430] Id. at 431.

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Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors' votes.[431]

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.[432] Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump's defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: "Big protest in D.C. on January 6th. Be there, will be wild!"[433] According to testimony amassed by the House's January 6th Commission, Trump's supporters interpreted this as a call to arms, sometimes literally.[434]

Then there are the events of January 6 specifically. When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to the Capitol to oppose what he had been calling the "steal" of the election. Trump reiterated his false claim that he had in fact won the election—"we won this election and we won it by a landslide"—but that the Democrats and the media had "stolen" the election and "rigged" a false outcome. "They rigged it like they've never rigged an election before," he charged. "Make no mistake, this election was stolen from you, from me and from the country. … This [is] the most corrupt election in the history, maybe of the world." The crowd was "gathered together in the heart of our nation's capital for one very, very basic and simple reason: To save our democracy." Trump called on the crowd to march on the Capitol. "Our country has had enough. We will not take it anymore and that's what this is all about. … We will stop the steal." He urged the assembled mass of thousands, some of whom Trump knew to be armed, to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[435]

Some might quibble that the speech is ambiguous.[436] Not all of Trump's rambling address called literally for the crowd to "fight." Some of his statements were

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[431] Id. at 441-458.
[432] Id. at 441-458.
[433] Quoted in id. at 499.
[434] Id. at 499-540.
[435] For the quotations in this paragraph, see "Transcript of Trump's Speech at Rally Before US Capitol Riot," Associated Press, (Jan. 13, 2021), available at https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27. See also id. ("And again, most people would stand there at 9 o'clock in the evening and say, 'I want to thank you very much,' and they go off to some other life. But I said something is wrong here, something is really wrong, can't have happened, and we fight. We fight like hell, and if you don't fight like hell you're not going to have a country anymore.").
[436] See Michael Conklin, *Capital Offense: Is Donald Trump Guilty of Inciting a Riot at the Capital?*, 15 U. St. Thomas J.L. & Pub. Pol'y 483 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 Const. Comm. at 2-3, 20-21 (forthcoming 2023).

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ambiguous and at one point he remarked that the crowd would be marching "peacefully and patriotically."[437] He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take "strong" and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump's speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.[438] It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steeled them to action, knew that they were ready to take immediate action, and directed them to take it.[439] But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standards of participation in and support for "insurrection or rebellion," and it qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.[440] First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had attacked the Capitol, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.[441] During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not "hav[ing] the courage to do what should have been done to protect our Country and our Constitution,"[442] a statement that the January 6th Commission concluded was "a statement that could

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[437] Transcript, supra note 435.

[438] 395 U.S. 444 (1969); compare Conklin, supra note 436, with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 Wake Forest L. Rev. 971 (2022); see also Rozenshtein & Shugerman, supra note 436, at 3 n.3 (citing these and other sources and describing this disagreement).

[439] As Rozenshtein and Shugerman also emphasize, "Trump's speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol," which they argue takes it outside of the Brandenburg framework for that reason. Rozenshtein & Shugerman, supra note 436, at 38.

[440] See supra Part III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

[441] January 6 Report, supra note 405, at 577-606.

[442] Donald J. Trump, Tweets of January 6, 2021, available at https://www.presidency.ucsb.edu/documents/tweets-january-6-2021

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only further enrage the mob" and that in fact apparently did so.[443] Once Trump finally *did*—after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.[444]

This culpable inaction—failing to intervene to stop an insurrection in progress, declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump's responsibility for the January 6 insurrection. Section Three reaches a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.[445] Sitting by and doing nothing—declining to act to arrest a violent uprising, despite possessing the material capacity and legal responsibility to intervene—might qualify. Additionally and equally important, Trump's deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd's reaction was all a big mistake or misunderstanding.

Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump "engaged in" the January 6 insurrection through both his actions and his inaction. Officials—administrators, courts, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office,

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,[446] then Trump's complicity is even more obvious—as the leader, motive force, and chief attempted perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump, having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d'etat against the Constitution and its system of elections and overturn the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes "rebellion" against the Constitution, Trump's overall

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[443] January 6 Report, supra note 405, at 577.

[444] Even as he urged peace in a video to the insurrectionists ("we can't play into the hands of these people. We have to have peace") he continued to express affection for them ("So go home. We love you. You're very special.") and to reiterate that the "election was stolen from us." Donald J. Trump, Videotaped Remarks During the Insurrection at the United States Capitol, at https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol. Later that night he tweeted: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Trump Tweets, supra note 442.

[445] Cf. notes 350-351 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

[446] See supra notes 418-420 and accompanying text.

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course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump "engaged in" "insurrection or rebellion" and gave "aid or comfort" to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

c. Beyond Trump

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many others who are or may be connected to either the insurrection of January 6 or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution's provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories:

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico, and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as Section Three contemplates.[447] They present the easiest case of "engag[ing] in . . . insurrection." Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.[448] Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and "was near the Capitol during the attack."[449] Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.[450] Trump Chief of

[447] See supra notes 85-88, 114-116 and accompanying text.
[448] See supra notes 68-80 and accompanying text.
[449] January 6 Report, supra note 405, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See supra note 89.
[450] January 6 Report, supra note 405, at 536, 577, 581, 593-594, 608; https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat

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Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also "directed that [Giuliani] be allowed to speak" to the crowd.[451] These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,[452] the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines, invalidate election results, and rerun the vote in swing states won by Biden.[453] Would-be Trump electors (some of whom came from state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.[454] Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.[455] At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid or comfort.[456] These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol, should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020-2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a

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[451] January 6 Report, supra note 405, at 533, 535-536.
[452] See supra notes 418-420 and accompanying text.
[453] January 6 Report, supra note 405, 222.
[454] January 6 Report, supra note 405, at 352-353. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.
[455] January 6 Report, supra note 405, at 50.
[456] Id. at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

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great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

Conclusion

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders and comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independently of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and officials from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should refuse to seat or expel that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress

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through the impeachment process, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's constitutional disqualifications is properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges exercising the judicial power to faithfully apply and enforce Section Three according to its terms.

No official should shrink from these duties. It would be wrong – indeed, arguably itself a breach of one's constitutional oath of office—to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one's own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing, and enforcing, the Constitution's commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, or resentment, or opposition, or retaliation. The Constitution is not optional and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.[457] The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-2021, who refused to abide by election results and instead sought to overthrow them.)[458]

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are "political questions." Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House's judgment, Section Three is enforceable by the judiciary *as well as* by other officials.[459] Section Three's terms embody rules and standards, enforceable as any other constitutional provision

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[457] See Magliocca, *Foreground*, supra note 62, at 14-24 (arguing at length that "the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment," and that it "elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three").

[458] See William Baude, *The Real Enemies of Democracy*, 109 Cal. L. Rev. 2407, 2418-20 (2021) ("The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.").

[459] Supra note 95.

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is enforceable. There is no freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, it is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country. Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendant.
_____/

No. 23-000137-MZ

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DEFENDANT SECRETARY OF STATE'S MEMORANDUM OF LAW PURSUANT TO THE COURT'S OCTOBER 9, 2023, SCHEDULING ORDER ORDERING DEFENDANT TO ADDRESS SPECIFIC QUESTIONS

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On September 29, 2023, Plaintiffs Robert LaBrant, Andrew Bradway, Noah Murphy, and William Nowling filed the instant Complaint against Defendant Secretary of State Jocelyn Benson. In Count I of their complaint, Plaintiffs request that the Court enter a declaratory judgment declaring that former President Donald Trump is ineligible to be placed on Michigan's presidential primary or general election ballot because he is disqualified under § 3 of the Fourteenth Amendment. (Comp, ¶¶ 316-319.) In Count II, Plaintiffs request that the Court enjoin the Secretary from placing Mr. Trump on Michigan's presidential or general election ballots. (*Id.*, ¶¶ 320-322.)

A similar case was filed by Robert Davis on September 15, 2023. See *Davis v Benson*, Court of Claims Case No. 23-000128.

On October 9, 2023, this Court entered an expedited scheduling order in both cases. The Court stated that it was expediting the instant case along with the *Davis* case, No. 23-00028-MZ. Defendant understands the Court's order to require responses in both cases by October 16, 2023.

In response to Plaintiffs' complaint, Defendant Benson has filed an answer. However, in the Court's scheduling order, it ordered Defendant to respond to six specific questions. Consistent with that order Secretary Benson submits the instant memorandum of law.

ARGUMENT

I. Secretary Benson's responses to the questions posed by the Court in its October 9, 2023, scheduling order.

The Court ordered Defendant Benson to address six specific questions relating to § 3 of the Fourteenth Amendment, including whether the Secretary is authorized to disqualify a candidate for President under that section. Because the Secretary has no authority to make such a determination, she has no official position as to the outcome of the related constitutional

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questions. Her responses to the questions below, other than to the first question, therefore, do not advance an affirmative position.

A. Whether Defendant has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue.

Although the Court's question refers to a "candidate" generally, the Secretary will address this question as if directed to candidates for the Office of President.

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id.*

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 USC 1.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch

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officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a*. . . . [Emphasis added.]

And under subsection 614a(2), the chairpersons for the major political parties in Michigan file a list of candidates with the Secretary after she issues her list:

> Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.[1] MCL 168.615a ("Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.") (emphasis added). The winning candidates for each party are then certified by the Board of State Canvassers. MCL 168.616a. However, the names

[1] A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2).

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of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") But no language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91, 168.131, 168.161, 168.281, and has required these candidates to file "affidavit[s] of identity," which include a statement that a candidate "meets the constitutional and statutory qualifications for the office sought," MCL 168.558(1)-(2).[2] Candidates who fail to complete a certificate identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement,

[2] There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

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likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.").

There simply is no statute in the Michigan Election Law that imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature's drafting choice strongly suggests that the Secretary has neither the duty nor the authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) ("[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). And while the Secretary has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan's ballots, is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency,* 509 Mich

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673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

It has been suggested that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they "swear (or affirm) that [they] will support the Constitution of the United States," obligates the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a candidate for the Office of President from appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

The Secretary will certainly comply with any order entered by this Court or another that declares Mr. Trump eligible or ineligible to appear as a candidate for President on Michigan's ballots by reason of the Fourteenth Amendment. And in doing so, the Secretary will uphold the oath she took to support both the US Constitution and the Michigan Constitution.

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For these reasons, the Secretary does not have an affirmative, legal duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot prior to a court's review of that constitutional question.

B. Whether § 3 of the Fourteenth Amendment applies to the offices of President and Vice President and to candidates for those offices?

Section 3 of the Fourteenth Amendment provides:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold *any office*, civil or military, *under the United States*, or under any State, who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [US Const, Am XIV, § 3 (emphasis added).]

Again, the Secretary takes no position with respect to whether Mr. Trump should appear as a candidate in Michigan's presidential primary or general election, or whether he should be precluded from doing so under the Fourteenth Amendment.

The Court's question raises two, inter-related questions—does the office of President constitute "any office" "under the United States" from which a person may be disqualified from holding based on his engaging in insurrection. And was Mr. Trump "an officer of the United States" who previously took an oath to support the US Constitution for purposes of § 3 when he previously held the office of President. In a separate question, this Court also asked whether there were any state or federal cases interpreting or applying § 3 to candidates for office or persons serving in an office, including any cases currently involving Mr. Trump as potential presidential candidate.

Addressing this second question first, there are numerous cases pending throughout the United States in which the movants seek to disqualify Mr. Trump under § 3 of the Fourteenth

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Amendment.[3] A list of known cases is attached as Exhibit 1. Upon information and belief, none of the cases have yet resulted in a substantive determination by a court regarding the application of § 3 to Mr. Trump.[4] And several have been dismissed for lack of standing. (Exhibit 1, Case list.) As far as cases applying § 3 to other candidates, there are a few cases of recent vintage in which several candidates were challenged on that basis.

In *Hansen v Finchem*, the court determined that the plaintiffs could not use a state statute allowing challenges to candidates based upon their qualifications for office to disqualify the candidates under § 3 because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz May 9, 2022).

In *Rowan v Greene*, the Georgia Secretary of State affirmed an administrative hearing officer's determination that the plaintiffs failed to provide sufficient proof that Representative Marjorie Taylor Greene was not qualified to seek and hold public office. See No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022). See also *Greene v Raffensperger*, 599 F Supp 3d 1283, 1320 (ND Ga 2022) (refusing to enjoin the state proceedings where Greene failed to demonstrate that states were prohibited from enforcing § 3), *Greene v Sec'y of State for Georgia*, 52 F 4th 907, 909-910 (CA 11, 2022) (remanding for dismissal of case as moot).

In *Griffin v New Mexico ex rel White*, a quo warranto proceeding, a state court judge determined that § 3 applied to a county commissioner convicted of a crime in relation to the

[3] Most of the cases have been filed by John Anthony Castro, a purported presidential candidate from Texas. Castro filed a complaint against Secretary Benson and Donald J. Trump in the Court of Claims on August 31, 2023. See *Castro v Benson, et al*, Case No. 23-000122, however, the complaint has not been served.

[4] Cases worth monitoring currently include *Growe v Simon*, Minnesota Supreme Court Case No. A23-1354, and *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577. See Exhibit 1.

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events on January 6, 2021, and the commissioner was removed from office. See No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept 6, 2022). The commissioner's appeal to the New Mexico Supreme Court was denied. *Griffin v New Mexico, ex rel White*, No. S-1-SC-39571 (NM Feb 16, 2023).

And in *Cawthorn v Circosta*, voters filed a challenge with the North Carolina State Board of Elections seeking to disqualify Representative Madison Cawthorne from the 2022 primary ballot, and Cawthorne filed suit in federal court seeking to bar the state board from considering the issue. 590 F Supp 3d 873, 891 (ED NC 2022). The District Court held that the 1872 Amnesty Act supported enjoining the state proceedings. *Id.* at 890-892. The Fourth Circuit Court of Appeals reversed, and no further litigation occurred as Cawthorne lost in the primary. *Cawthorn v Amalfi*, 35 F4th 245 (CA 4, 2022).

Given the dearth of cases, reference to recent law review articles may assist the Court.

In a 2021 article, the authors opine that the President of the United States is not an "officer of the United States" whose prior taking of an oath will trigger the disqualification from holding a covered office under § 3. See Josh Blackman & Seth Barrett Tillman, Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?, 15 NYU J L & Liberty 1 (2021), attached as Exhibit 2. In summary of what is a complex argument, the authors argue that the terms "officer of the United States" and "[o]ffice . . . under the United States" should be presumed to have different meanings in § 3 since the Framers used different wording within the same section. *Id.* at 7-10. They argue that the history of the Framers use of this different terminology in different sections of the Constitution, supports a presumption that "these phrases refer to different positions." *Id.* at 9. And that "the better inference . . . is that the President and Vice President are not 'Officers of the United States.'" *Id.* at 10.

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> All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office ... under the United States" in Section 3 of the Fourteenth Amendment. [*Id.*]

The authors go on to expressly argue that the President is not an "officer of the United States" for purposes of the various provisions that use that language, including § 3, that there is no compelling evidence that the Framers intended something different in § 3, and that various cases and authorities support that conclusion. *Id.* at 21-33. The article then discounts various past authorities and arguments that suggest or reach different conclusions. *Id.* at 34-50. In their conclusion, the authors note that they chose not to resolve whether the President is an "office . . . under the United States," but that if the President is not an "officer of the United States," it "ends the case" for purposes of the application of § 3. *Id.* at 54.

Conversely, in a 2023 article, the authors reject the analysis in the Blackman and Tillman article that the President is not an "officer of the United States," and further conclude that the President is an "officer . . . under the United States" for purposes of both clauses in § 3. See William Baude & Michael Stokes Paulson, The Sweep and Force of Section Three, 172 U PA L REV ___ (forthcoming 2024), attached as Exhibit 3. These authors argue that the provisions of § 3 should be read:

> in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one. . . . Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside. [*Id.* at p 105 (footnote omitted).]

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The authors further argue that the list of disqualification triggering offices in § 3 ("officer . . . of the United States") closely tracks the listing of offices in the Constitution's oath provisions, see art VI, cl 3, art II, § 1, cl 8, and that the list of offices from which a person is disqualified from ("offices . . . under the United States") builds on that list. *Id.* at 105-106. "Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application." *Id.* at 106. And "if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions[.]" *Id.* The argue that § 3's "project of office-listing" was to simply provide a comprehensive list of positions in both clauses. *Id.*

The authors reject the analysis of Blackman and Tillman as a technical and non-natural reading of the text that ultimately results in the implausible consequence that an insurrectionist President could hold the office of President, but that his prior holding of that office would not trigger disqualification. *Id.* at 108-109. They further note that a "variant" of that argument was refuted during congressional debates on § 3. (*Id.* at 110-111.)

There are certainly additional, relevant articles available, Defendant chose these as two recent competing viewpoints. It is also likely that the cases pending regarding Mr. Trump, see Exhibit 1, will result in additional discussions of whether § 3 applies to the Office pf President.

C. Whether § 3 precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3, or both.

Defendant Benson understands this question as asking whether § 3 is a qualification for seeking office, or whether it is a prohibition to holding office if elected, or whether it functions as both. Again, § 3 provides, in part, that "[n]o Person shall be a Senator or Representative in

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Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States[.]" (Emphasis added.)

This issue does not appear to have been the subject of significant litigation yet or academic discussion. But in the Arizona case discussed above in I.B, the Arizona Supreme Court held in its brief opinion that the state statute allowing candidate challenges could not be used to advance a claim under § 3 because its "scope is limited to challenges based upon 'qualifications . . . as prescribed by law.'" *Hansen*, 2022 WL 1468157 at * 1. The statute did not apply, the court reasoned, because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. *Id.*

But in the Fourth Circuit's opinion in *Cawthorn*, also noted above in I.B, the Court stated in a footnote that it was "assuming without deciding" that the "disability" imposed by § 3 is a "qualification" for purposes of article I, § 5 of the US Constitution, 35 F4th at 257 n7, which provides that "Each House shall be the judge of . . . the qualifications of its own members[.]" US Const, art I, § 5. In the text the Fourth Circuit cited *Powell v McCormack*, 395 US 486 (1969), in which the US Supreme Court made a passing reference to § 3 but stated in a footnote that it was *not* deciding whether § 3 and other constitutional provisions properly constituted "qualifications." *Id.* at 520 n 41. See also *US Term Limits, Inc v Thornton*, 514 US 779, 788 n 2 (1995) (citing *Powell* and likewise not deciding the issue).

Also, in *Greene*, the District Court discussed the state's important regulatory interests in ensuring that only qualified candidates appear on the ballot and appeared to treat the disqualification component of § 3 as a qualification. 599 F Supp 3d at 1311-1312, 1316 ("On the current record, it appears that the Challenge Statute imposes minimal burdens through its process of ensuring that only candidates who meet the Constitution's minimum threshold requirements

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appear on the ballot — including candidates who are not disqualified by Section 3 of the Fourteenth Amendment.")

One author has discussed the possible timing of challenges to federal-office candidates under § 3, including the President, describing possible pre-election, post-election/pre-inauguration, and post-assumption of office challenges. See Myles S. Lynch, Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment, 30 Wm & Mary Bill Rts J 153, 189-194 (2021).[5]

It is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 functions as a qualification for seeking office or a prohibition from ultimately holding office.

D. Whether § 3 is self-executing.

The question of whether § 3 is self-executing appears to have proponents on both sides. Authors Baude and Paulson in their article, discussed above in I.B., argue that § 3 functions as an automatic, legal disqualification whenever its' conditions for disqualification are met, and thus needs no implementing legislation by Congress. (Exhibit 3, p 17.) They note that the federal Constitution is the supreme law of the land, and states what the law is. (*Id.*) "Section Three's language is language of automatic legal effect: '*No person shall be*' directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be." (*Id.*, pp 17-18.) The authors observe that this language is consistent with other self-executing "disqualification" sections, such as those in article I and article II, § 1, cl 5's requirement that "[n]o person . . . shall be eligible" to be President who does not meet the age

[5] The Baude and Paulson article includes a discussion of the mode of enforcing § 3. See Exhibit 3, pp 22-35.

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requirement. (*Id.*, p 18.) As well as other provisions, like the Thirteenth Amendment (abolishing slavery) and other sections of the Fourteenth Amendment, such as the Equal Protection Clause. (*Id.*, pp 18-19.)

The authors recognize that Congress *can* enact legislation to enforce § 3, as it has in the past, but Congress need not do so where § 3 "was effective all along." (*Id.*, p 19-20.) They further contrast § 3's language with other provisions like the Constitution's impeachment provisions, which require implementation, whereas § 3 does not. (*Id.*, pp 20-21.) For these reasons, they conclude that § 3 "has legal force already," meaning it is self-executing. (*Id.*, p 22.)

Blackman and Tillman, in a new article, advance a contrary view. See Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3, 28 TEX REV L & POL (forthcoming 2024).[6] Again, in summary of what is a complex argument, they argue that whether § 3 is self-executing ultimately depends on the manner enforcement is sought. (*Id.*, pp 18-20.) They note that many Article I qualification-type provisions have gone unenforced, whether at the federal or state level, which undermines Baude's and Paulson's argument that such provisions are self-executing without legislation intervention, and by extension their argument that § 3 is as well. (*Id.*, pp 25-37.) Turning to the Fourteenth Amendment, Blackman and Tillman acknowledge that § 1, which includes the due process and equal protection clauses, is generally considered self-executing. (*Id.*, pp 38-39.) But they say "the better question is in what fashion is Section 1 self-executing?" (*Id.* at p 39.) The authors argue, citing various precedents, that while a defensive ("shield") use of the constitutional constraints found in the

[6] An abstract of the lengthy article as well as a download is available online at Sweeping and Forcing the President into Section 3 by Josh Blackman, Seth Barrett Tillman :: SSRN.

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Fourteenth Amendment is always permissible, the offensive ("sword") use of the Fourteenth Amendment's limitations, including those in § 3, is not. (*Id.* at pp 39-53.) Thus, in their view, § 3 would be not self-executing if used as a sword to disqualify a candidate.[7]

Secretary Benson is aware of only one recent case that has touched on whether § 3 is self-executing. In *Hansen*, the Arizona Supreme Court did not use the words self-executing, but it noted "that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'), which suggests that ARS § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates." 2022 WL 1468157, at *1. As above, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 is self-executing.

E. Whether the 1872 Amnesty Act applies to the instant case.

In 1872, Congress enacted legislation related to § 3, which provides:

> [A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [Act of May 22, 1872, ch. 193, 17 Stat 142 (1872).]

And in 1898, Congress removed the disabilities from the previously excepted persons in the 1872 Act by enacting another law, providing that "the disability imposed by section three of

[7] Both Baude and Paulson and Blackman and Tillman spend time in their respective articles discussing the ramifications of US Supreme Court Justice Salmon Chase's decision as a circuit justice in *In re Griffin*, 11 F Cas 7 (CCD Va 1869), in which he determined § 3 required enabling legislation. For an additional viewpoint on this subject, the Court may wish to review Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const Comment 87, 100-108 (Spring 2021).

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the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432.

In *Cawthorn*, discussed previously, the District Court agreed with Representative Cawthorn that the 1872 Act permanently removed the disabilities stated in § 3. *Cawthorne,* 590 F Supp 3d at 890. "The 1872 Act, by its plain language, removed '*all political disabilities* imposed by the third section of the fourteenth article of amendments of the Constitution of the United States *from all persons whomsoever.*' " *Id.* at 891 (emphasis in original). The court observed that Congress could have used language that clarified the act only applied to persons currently subject to § 3 but did not do so. *Id.* The District Court therefore enjoined any further proceedings against Cawthorne.

But the Fourth Circuit reversed the District Court.

That Court concluded that the District Court erred "in construing the Act as a sweeping removal of all future Fourteenth Amendment disabilities." *Cawthorn*, 35 F.4th at 257. The Court determined that the lower court had read the Act incorrectly in that it did not prospectively relieve persons from disabilities in the future but was rather "'backward-looking'" because the language it employed ("imposed" and "removed") was in the "past tense." *Id.* at 258 (citations omitted). "Here, Congress employed the past-tense version, indicating its intent to lift only those disabilities that had by then been 'imposed.'" *Id.*, citing *Costello v INS*, 376 US 120, 123–24 (1964) (referring to the past participle in "have been" as a "use of the past tense" (quotation marks omitted)). The Court went on to conclude that this construction was consistent with the Act's history and context in dealing with "the hordes of former Confederates seeking forgiveness." *Id.* at 259 (citation omitted). The Court thus reversed and vacated the injunction and remanded for further proceedings. *Id.* at 261.

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The District Court in New Mexico in the *Griffin* case agreed with the Fourth Circuit's analysis concerning the 1872 Act. See *Griffin*, 2022 WL 2132042 at * 2. And in a decision preceding the Fourth Circuit's decision, the Georgia District Court in the *Greene* case rejected the District Court's analysis in *Cawthorn.* See *Greene*, 599 F Supp 3d at 1315 ("Suffice it to say, the Court is skeptical. It seems much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under Section 3 had already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future.")

Again, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of the 1872 Act.

Respectfully submitted,

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PROOF OF SERVICE

Heather S. Meingast certifies that on October 16, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

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

Plaintiffs,

-vs-

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

Defendant,

and

DONALD J. TRUMP,

Proposed-Intervenor.

_____/

PROPOSED-INTERVENOR'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

FILE NO.: 23-000137-MZ

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INTRODUCTION

For the past several years, whether Donald J. Trump is suited to hold the Presidency has been the defining political controversy of our national life. Plaintiffs now ask a state court to terminate further discourse and decide this question of nationwide importance without regard for America's voters and their elected representatives. This request is manifestly inappropriate. Both the federal Constitution and Michigan law place the resolution of this nonjusticiable political question where it belongs: the democratic process, in the hands of either Congress or the people of the United States. This Court may not use Section Three of the Fourteenth Amendment ("Section Three") to enjoin the Secretary of State of Michigan ("Sec. of State") from placing President Trump on the primary and general election ballots in the state.

The Complaint's many factual inaccuracies, gaps, and distortions largely fall under one overarching theme: Plaintiffs have no evidence that President Trump intended or supported any violent or unlawful activity seeking to overthrow the government of the United States, either on January 6th or at any other time. On topic after topic, Plaintiffs seek to make up for the conspicuous absence of evidence by relying on innuendo, insinuation, and disdain for President Trump to win the day. Those are arguments for the American voters, not for this Honorable Court.

This Court should dismiss the Complaint for numerous reasons:

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- First, this case presents a nonjusticiable political question that is constitutionally committed to Congress.
- Second, Plaintiffs lack standing and/or a writ of mandamus is improper.
- Third, Congressional action is required to enforce Section Three because it is not self-executing when used to prohibit a candidate from standing for election.
- Fourth, neither Plaintiffs nor the Sec. of State has the authority to enforce Section Three as Plaintiff desires.
- Fifth, the United States Constitution and Congress solely govern presidential qualifications.
- Sixth, the prohibitions of Section Three do not even apply to President Trump.
- Seventh, the conduct as alleged in the Complaint is not covered by Section Three.

For these reasons, this Court should dismiss the Complaint's claims as meritless, and remit Plaintiffs' arguments to the political processes ordained by the Constitution.

STATEMENT OF FACTS

As to Plaintiffs, Defendant, and Donald J. Trump, no facts have been properly pleaded. The only "facts" alleged in Plaintiffs' Complaint are a mere recitation of news articles and political events.

STANDARD OF REVIEW

"Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court 'lacks jurisdiction of the subject matter.'" *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). "When determining if the trial court has subject-matter jurisdiction, [the] Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002).

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For a motion brought pursuant to MCR 2.116(C)(8), this Honorable Court should review the pleadings to test the legal sufficiency of Plaintiffs' claim. *Spiek v Department of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify Plaintiff's claim for relief. *Id.*

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiffs' claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The purpose of MCR 2.116(C)(10) is to 'avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law.'" *Kern v Kern-Koskela*, 320 Mich App 212, 223; 905 NW2d 453 (2017); *Maiden v Rozwood*, 461 Mich 109, 120-121; 596 NW2d 817 (1999). "Opinions, conclusory denials, unsworn averments and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *SSC Associates Limited Partnership v General Retirement System of City of Detroit*, 192 Mich App 360; 180 NW2d 275, 277 (1991).

ARGUMENT

I. Plaintiff's claims raise a nonjusticiable political question because a presidential candidate's qualifications are reserved for Congress and the voters to decide.

Federal and state courts presented with similar cases challenging the qualifications of presidential candidates have overwhelmingly held that they present nonjusticiable political questions the Constitution reserves for Congress and the voters. This Honorable Court should do likewise.

Political questions are nonjusticiable and therefore not cases or controversies. *Massachusetts v EPA*, 549 US 497, 516 (2007). The United States Supreme Court set out broad categories that should be considered nonjusticiable political questions in *Baker v Carr*, 369 US 186, 217 (1962):

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> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [and 6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

For its part, Michigan has also adopted a version of the political question doctrine applicable when the courts of this state must determine whether to decide questions of state law that may have been entrusted to coordinate branches of state government. *Makowski v Governor*, 299 Mich App 166, 829 NW2d 291 (2012). In approaching those questions, the courts of this State have generally considered the *Baker* factors, albeit taking into account the greater jurisdiction granted trial courts in this State as compared to their federal counterparts. *Id.* at 173. Here, the U.S. Constitution reserves exclusively to the United States Congress the power under Section Three to determine whether a person may take office.

Plaintiffs ask this Court to strip Congress of its power to make that determination, including waiver of disqualification by a two-thirds vote, and to empower the Sec. of State with duties she does not have. Federal and state courts have overwhelmingly ruled that challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the deference due federal law under the Constitution's Supremacy Clause.

For example, numerous courts held that similar challenges to the qualifications of presidential candidates Barack Obama and John McCain presented nonjusticiable political questions. To wit, the Third Circuit held that a challenge to the qualifications of then-candidate Obama (based on his nationality) was a political question not within the province of the judiciary. *See Berg v Obama*, 586 F3d 234, 238 (3rd Cir 2009).

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Multiple district courts reached the same conclusion. In *Grinols v Electoral College*, No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *5-7 (ED Cal, May 23, 2013), the Court dismissed a challenge to President Obama's qualifications for office.[1] There, the Court held that "the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at *6. Likewise, in *Taitz v Democrat Party of Mississippi*, No 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss, Mar 31, 2015), the Court noted that the presidential electoral and qualification process "are entrusted to the care of the United States Congress, not this court" and that the plaintiffs' disqualification claims were therefore nonjusticiable.

In *Robinson v Bowen*, 567 F Supp 2d 1144 (ND Cal, 2008), the Court dismissed a case brought before the 2008 election seeking to remove Senator McCain from the ballot. After first holding that the plaintiff lacked standing, the Court rejected an attempt to fix that standing defect by adding Alan Keyes—a competing candidate—as a plaintiff, holding that it would be futile because:

> It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for

[1] Although the *Grinols* plaintiff sought the removal of a sitting president rather than a presidential candidate, the court had previously refused to grant a temporary restraining order to prevent President Obama's re-election on political question grounds. *Grinols v Electoral Coll*, No 12-CV-02997-MCE-DAD, 2013 WL 211135, at *4 (ED Cal, Jan. 16, 2013).

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> allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. at 1147.

Moreover, the Sec. of State has no authority to pre-judge a candidate's qualifications for office and strike a candidate from the ballot. The Sec. of State is required to issue a "list of the individuals generally advocated by the national news media to be potential candidates" for each major political party's nomination by 4:00 p.m. on November 10, 2023. *See* MCL 168.614a(1). Thereafter, the state chairperson of each major political party must file a "list of individuals whom they consider to be potential presidential candidates for that political party" with the Sec. of State no later than 4:00 p.m. on November 14, 2023. *See* MCL 168.614a(2). All names of the candidates will then be placed on the presidential primary ballot unless a candidate withdraws. MCL 168.615a.

As Plaintiffs concede in Paragraph 311 of their Complaint, the Sec. of State herself has admitted that she does not have the authority to refuse to place President Trump on or strike President Trump from the ballot.

Even if express authority to pre-judge qualifications and strike a candidate from the ballot existed, the exercise of that authority would violate separation of powers:[2]

[2] "Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election a state's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, a state has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries." *Anderson v Celebrezze*, 460 US 780, 794-95 (1983).

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> If a state court were to involve itself in the eligibility of a candidate to hold the office of President, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress.

Strunk v New York State Bd. Of Elections, No 6500/11, 2012 WL 1205117, *12 (Sup Ct Kings County NY, Apr 11, 2012). The California Court of Appeals' language in *Keyes v Bowen*, 189 CalApp4th 647, 660 (2010), is also instructive:

> In any event, the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.

Id.; *accord, e.g., Jordan v Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super, Aug 29, 2012) ("I conclude that this court lacks subject matter jurisdiction. The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the US Constitution.")

If this court were to determine that President Trump had been involved in insurrection and that he could not be on the ballot, that decision would prevent Congress from fulfilling its constitutional obligations that occur when a presidential candidate is elected who is not qualified. The Constitution expressly provides that:

> If the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified … and the Congress may by law provide for the case wherein neither a President elect nor a vice President elect shall have qualified, declaring who shall then act as President, or the manner in

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> which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

US Const, Am XX. Were it to enter the requested injunction or declaratory judgment preventing President Trump from appearing on the ballot, this Honorable Court would be interfering with this mechanism, responsibility for the operation of which the Constitution vests in Congress—and *only* in Congress. This case therefore presents a nonjusticiable political question.

II. Plaintiffs lack standing.

Plaintiffs lack standing to bring these lawsuits. The Michigan Supreme Court held:

> Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, **that will be detrimentally affected in a manner different from the citizenry at large** . . .

Lansing Schs Educ Ass'n v Lansing Bd of Educ, 487 Mich 349, 372; 792 NW2d 686, 700 (2010) (emphasis added).

Federal courts have widely held that individual voters lack standing to challenge the qualifications of presidential candidates.[3] In affirming the dismissal of a claim challenging President Obama's qualifications for office, the Third Circuit held that "a candidate's

[3] *See, e.g.*, *Hollander v. McCain*, 566 F.Supp.2d 63, 71 (D.N.H. 2008), *Cohen v. Obama*, 2008 WL 5191864, *1 (D.D.C., Dec. 11, 2008); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009); *Barnett v. Obama*, No. SACV09-0082 DOC(ANX), 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009) at *8, *order clarified*, No. SA CV 09-0082 DOC, 2009 WL 8557250 (C.D. Cal. Dec. 16, 2009), and *aff'd sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010); *Drake v. Obama*, 664 F.3d 774, 781-782 (9th Cir. 2011); *Sibley v. Obama*, 866 F.Supp.2d 17, 20 (D.D.C. 2012); *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885, at *10 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); and *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *20 (S.D. Miss. Mar. 31, 2015); *Const. Ass'n Inc. by Rombach v. Harris*, No. 20-CV-2379, 2021 WL 4442870, at *2 (S.D. Cal. Sept. 28, 2021), *aff'd*, No. 21-56287, 2023 WL 418639 (9th Cir. Jan. 26, 2023); *Booth v. Cruz*, No. 15-CV-518, 2016 WL 403153, at *2 (D.N.H. Jan. 20, 2016), *report and recommendation adopted*, 2016 WL 409698 (D.N.H. Feb. 2, 2016); *Fischer v. Cruz*, No. 16-CV-1224, 2016 WL 1383493, at *2 (E.D.N.Y. Apr. 7, 2016).

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ineligibility . . . does not result in an injury in fact to voters." *Berg v Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

Plaintiffs make no allegation as to how they would be "detrimentally affected in a manner different from the citizenry at large" if Donald J. Trump is on the ballot. Further, they completely fail to allege how Plaintiffs, specifically, have been injured in any way. How could they? Plaintiffs merely plead that they are voters and intend to vote in the next primary and election, a statement that could apply to any eligible voter in the United States. This is not sufficient to establish standing.

Michigan recognizes a narrow exception to the general standing requirements that only applies to actions for a writ of mandamus regarding election laws. The Court of Appeals recently held:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. "[I]n the absence of a statute to the contrary, ... a private person ... may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public."

Burton-Harris v Wayne Cnty Clerk, 337 Mich App 215, 225; 976 NW2d 30 (2021) (internal citation omitted). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016).

The LaBrant (et al) Plaintiffs have not made any claim for mandamus and have instead only requested declaratory and injunctive relief, which are not exceptions to the general standing doctrine. Thus, they have no claim to this narrow exception and their complaint must be dismissed on its face.

While the Davis Plaintiff does raise mandamus, his claim also fails. A plaintiff seeking a writ of mandamus has the burden of establishing four requirements:

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> (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result.

Burton-Harris, 337 Mich App at 228.

First, none of the Plaintiffs have a "clear legal right" to the performance of Section Three of the Fourteenth Amendment because it is not self-executing as outlined below. When a "constitutional provision is not self-executing," Plaintiffs "have no right to mandamus." *Muskegon Cnty v State*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360007); slip op at 6.

Second, the Secretary of State has no legal duty to be the arbiter, enforcer, or adjudicator of Section Three as outlined below. Moreover, the Michigan Supreme Court held that when constitutional provisions "contemplate[] legislative action," they "may not be enforced by mandamus." *Bd of Educ of Detroit v Elliott*, 319 Mich 436, 443; 29 NW2d 902 (1947). In this case, it is the sole duty of Congress to adjudicate Section Three. Thus, mandamus is not available to Plaintiffs.

Third, removing Donald J. Trump from the ballot is not a ministerial act. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Burton-Harris*, 337 Mich App at 228. Plaintiffs' entire case is based upon a request to have the Sec. of State review statements, publications, news reports, debates, law review articles, and allegations of insurrection and apply this review to contested facts to make multiple determinations, including whether an "insurrection" occurred and, if so, whether President Trump "engaged" in it. Each requires an exceptional degree of "discretion or judgment" and would place the entire adjudication of Section Three and its implementation into the hands of a single elected official. These are the antithesis of "ministerial" determinations.

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Since Donald J. Trump has never engaged in any actual acts of insurrection or rebellion, Plaintiffs' entire request is that the Sec. of State review a smorgasbord of statements and speeches from Donald J. Trump and construe them to somehow collectively equate to an "insurrection." Plaintiffs' request is the exact opposite of ministerial.

Fourth, Plaintiffs do have another remedy: petition Congress. As outlined below, it is solely Congress that has the authority to make a determination under Section Three, not each state's Sec. of State. The proper means for Plaintiffs to "achieve the same result" would be for them to request, through their elected representatives, that Congress adjudicate Section Three as it relates to Donald J. Trump.

Plaintiffs fail all four elements of the mandamus test.[4] In summary, Plaintiffs have suffered no injury, they have not demonstrated that they will suffer any injury that is different from the "citizenry at large," and they have failed to demonstrate that they meet the mandamus elements. Plaintiffs' lawsuits must therefore be dismissed.

III. The Complaint further fails because the Fourteenth Amendment is not self-executing and nothing has occurred to disqualify President Trump.

Even if this case did not pose a political question (it does) and if Plaintiffs had standing (they do not), it would still not succeed on the merits. Section Three is not self-executing, and, therefore, it cannot support a cause of action absent an authorizing statute. *See, e.g. Rosberg v Johnson*, No. 8:22CV384, 2023 WL 3600895, at *3 (D. Neb. May 23, 2023); *Secor v Oklahoma*, No. 16-CV-85-JED-PJC, 2016 WL 6156316, at *4 (N.D. OK Oct. 21, 2016). Section Five of the Fourteenth Amendment expressly states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *See also*

[4] Thus, even if the LaBrant Plaintiffs were permitted to amend their Complaint to add a request for mandamus, such a request would be futile.

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Hansen v Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz, May 9, 2022) ("Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause."); *see also*, *e.g., Ownbey v Morgan*, 256 US 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

A recent article by scholars Joshua Blackman and Seth Barrett Tillman summarizes the question of whether Section Three is self-executing as follows:

> In our American constitutional tradition there are two distinct senses of self-execution. First, as a shield—or a defense. And second, as a sword—or a theory of liability or cause of action supporting affirmative relief. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.
>
> For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised defensively. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, self-executing.
>
> In the second sense, the Constitution is used offensively–as a cause of action supporting affirmative relief. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract. Section 1983, including its statutory antecedents, *i.e.*, Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.
>
> Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing.[5]

[5] Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 12, last viewed October 10, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 (emphasis in original; internal footnote omitted).

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Blackman and Tillman's article proceeds to analyze the question in depth and concludes that Section Three is not self-executing. Importantly, Blackman and Tillman's article has substantially refuted the Baude and Paulsen article cited by the Complaint. The strength of their arguments has caused Baude and Paulsen to substantially modify their own analysis. And Stephen Calabresi, a well-respected constitutional scholar and dean of the Northwestern University Law School, fully reversed his earlier agreement with Baude and Paulsen and has now concluded that Section Three does not prevent President Trump from serving as President.[6]

Ample precedent supports Blackman and Tillman's conclusion, as has been shown not only by Blackman and Tillman, but also by Kurt Lash, the leading scholarly authority on the Reconstruction Amendments, in his recent article.[7] During the debates on Section Three, Congressman Thaddeus Stevens twice argued that this section needed enabling legislation. On May 10, 1866 he argued that "if this amendment prevails, you must legislate to carry out many parts of it. . . . It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do."[8] On June 13, 1866, as the final speaker before the question was called, Congressman Stevens concluded his arguments to support Section Three by passionately arguing "let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions. I now, sir, ask for the question."[9]

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[6] Prof. Steven G. Calabresi, Donald Trump Should be on the Ballot and Should Lose, https://reason.com/volokh/2023/09/16/steve-calabresi-donald-trump-should-be-on- the-ballot-and-should-lose/, last visited Sept. 29, 2023; *see also* Steven Calabresi, President Trump Can Not be Disqualified, Wall Street Journal, September 12, 2023.

[7] *See* Kurt Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment (Oct. 3, 2023), p. 37-43, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838.

[8] Cong. Globe, 39th Cong. 1st Sess., at 2544.

[9] Cong. Globe, 39th Cong. 1st Sess., at 3149.

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During the ratification debates, on January 30, 1867, Thomas Chalfant spoke in opposition to the Fourteenth Amendment. One concern he had was that as the Amendment was written, Congress was the only tribunal that was permitted to judge whether someone had "given aid and comfort to the enemy during the rebellion."[10] This was unthinkable to Chalfant since the current makeup of Congress was extremely hostile towards Southern leaders.[11] Chalfant argued that the only way rebel leaders would have a fair trial would be if "under the fifth section of this amendment . . . by appropriate legislation, for enforcing this amendment . . . . I can conceive of nothing, unless it be some act authorizing the appointment of a commission to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way."[12]

One year after ratification, Chief Justice Salmon P. Chase of the Supreme Court of the United States ruled that Section Three was not self-executing and that it could only be enforced through specific procedures prescribed by Congress or the United States Constitution. *In re Griffin*, 11 F Cas 7 (CCVa 1869). Chief Justice Chase reasoned that a different conclusion would have created an immediate and intractable national crisis. In response to this ruling, Congress almost immediately enacted legislation suggested by the Chief Justice.

In 1870, in response to Chief Justice Chase's ruling, Congress passed a law, entitled the "Enforcement Act," which allowed *federal* district attorneys (but not *state* election officials) authority to enforce Section Three. The Enforcement Act allowed U.S. district attorneys to seek writs of *quo warranto* from federal courts to remove from office people who were disqualified by Section Three and further provided for separate criminal trials of people who took office in

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[10] *See fn.* 3; *see also*, Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3, in the Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed.) (Harrisburg 1867).
[11] *See* fn. 5 at 43.
[12] *Id.* at 43-44.

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violation of Section Three. Federal prosecutors immediately started exercising *quo warranto* authority, bringing charges against many rebel leaders.

These actions waned after a few years,[13] and the Amnesty Act of 1898 completely removed all Section Three disabilities incurred to that date. In 1925, the Enforcement Act was repealed entirely. (By then, nearly every participant in the Civil War had passed away.) A century later, in 2021, legislation was introduced in Congress to create a cause of action to remove individuals from office who were engaged in insurrection or rebellion, but that bill died in Congress.[14] Thus, there is no private right of action that allows individuals such as Plaintiff to enforce Section Three against President Trump.

Congressman Stevens's concluding remarks on the floor of Congress before passage of Section Three, Mr. Chalfant's arguments during the ratification of the Fourteenth Amendment, Chief Justice Chase's order, and the subsequent legislative history demonstrate that Section Three is not self-executing unless Congress takes action to make it so. Section Three does not give individual secretaries of state, state or federal courts, or individual plaintiffs the authority to remove a presidential candidate from the ballot.

Nor could it be otherwise. A successful challenge would create a patchwork of 51 state (and district) election laws and potentially conflicting orders and rulings that would contradict established precedent, constitutional tradition, and common sense. Given the structure of our presidential elections, under Plaintiffs' theory a single state's courts or election officials—whether acting in good faith or for partisan ends—would effectively be able to decide a national election no matter how out of step they were with the rest of the nation and its voters. This is the exact

[13] *See* Amnesty Act of 1872 (removing most disqualifications in the manner provided by Section Three); Pres. Grant Proclamation 208 (suspending *quo warranto* prosecutions).
[14] *See* H.R. 1405, 117th Cong. 2021.

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crisis Chief Justice Chase feared and it is precisely why this question is reserved for a single, uniform, national decision by Congress.

IV. Fourteenth Amendment considerations.

States are preempted from creating additional qualifications for federal office. The Constitution lists the qualifications to be President. The Fourteenth Amendment prohibits individuals from *holding* offices under the United States; it does not prohibit them from being elected. States have not been delegated authority to create qualifications to run for President of the United States. Thus, Petitioners' requested relief is preempted.

Electing the President of the United States is a federal function. It arises under the Constitution as a consequence of the creation of the national government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say that it has reserved, what it never possessed." *US Term Limits, Inc v Thornton*, 514 US 779, 802 (1995) (citation omitted). Thus, states cannot exercise any power over federal elections unless they are delegated such powers by the Constitution. If this were not so, it would lead to the absurd result where each state could add their own set of required qualifications in order to run for President. *But see id.* at 805 (states do not have authority to add their own qualifications for federal office). Moreover, if a state does not possess the authority to alter presidential qualifications, it logically follows that each state does not have any right to adjudicate presidential qualifications. Instead, the proper place to adjudicate presidential qualifications is in Congress. This is consistent with courts' determinations, in the context of a political question analysis (addressed above), that the Constitution assigned to Congress the responsibility of determining whether a person is qualified to serve as President of the United States.

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While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements. *Schaefer v Townsend*, 215 F3d 1031, 1038 (9th Cir 2000). States may not circumvent this limit by seeking to recast substantive restrictions as procedural ballot access conditions. *See US Term Limits*, 514 US at 829-835; *Schaefer*, 215 F3d at 1037-1039.

Yet, that is precisely what Plaintiffs seek to have this Honorable Court do in this case. Plaintiffs want this Honorable Court to direct the state to exclude President Trump from the ballot based on a purported violation of Section Three of the 14th Amendment. But doing so would require the state to adjudicate qualifications for President of the United States that are not in the Constitution.

To see why this is, it is necessary to examine the text of the 14th amendment. The 14th Amendment does *not* prohibit individuals from being on the ballot for an office under the United States, being nominated for such office, or being elected to such office. It prohibits them from *holding* such office. US Const, am 14, § 3. This distinction matters because it speaks directly to *when* the requirements of Section Three are operative.

This distinction makes sense because even if there is a "disability" under section 3, it may be lifted by a two-thirds vote of each House. *Id.* Thus, even if someone is unquestionably disqualified under Section Three, they may still appear on the ballot and be elected by the people. Whether they are able to "hold" the office depends on whether Congress "remove[s] such disability." *See generally Smith v Moore*, 90 Ind 294, 303 (1883) (describing the distinction between restrictions on being *elected* versus *holding* an office, and noting "[u]nder [section 3] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit

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persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan 52, 58 (1881) (analogizing to section 3 and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office.").

The Ninth Circuit's opinion in *Schaefer* further illustrates why this is important. In *Schaefer*, the court evaluated a California law that required candidates for Congress to satisfy a residency requirement at the time he or she filed his or her nomination papers. As in this case, California's law sought to implement a constitutional requirement, the requirement that a member of the House of Representatives be an inhabitant of the state in which he shall be chosen.[15] Nevertheless, the court determined that California's law was unconstitutional because it added qualifications that are not found in the Constitution. Timing was critical in reaching this conclusion. The Constitution provides that an individual must be an inhabitant of the state "when elected." *Id.* "When elected" is not "when nominated" because nonresident candidates could move into the State and "inhabit" it in the period between nomination and election. *Schaefer*, 215 F3d at 1037.

As explained above, the manner of counting electoral college votes is dictated by federal statute and the United States Constitution. *See e.g.*, 3 USC § 15. Further, "mechanisms exist under the Twelfth Amendment and 3 USC § 15 for any challenge to any candidate to be ventilated when electoral votes are counted," and that "the Twentieth Amendment provides guidance regarding

[15] US Const, art I, § 2, cl. 2.

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how to proceed if a president-elect shall have failed to qualify." *Bowen*, 567 F Supp at 1146-47. Because federal constitutional and statutory law already governs presidential qualifications, federal law must reign supreme. Additionally, states may not add additional requirements for federal office beyond those listed in the Constitution, including eligibility requirements. *US Term Limits,* 514 US at 805. There is no precedent permitting a lone state to adjudicate a presidential candidate's qualifications. Such a dispute must be addressed in Congress. Therefore, Plaintiffs' claims must be dismissed.

V. The prohibitions of Section Three do not even apply to President Trump.

The plain text of Section Three identifies to whom it applies. Section Three states as follows:

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

US Const, am XIV, § 3 (emphasis added)

The phrase "Officers of the United States" does not include the President. *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?,* 15(1) NYU JL & LIBERTY 1 (2021). Shortly after ratification of Section Three:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Instead, Booth stated, the President is "part of the Government." Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'

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Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3*, 28(2) TEX REV L & POL 112 (forthcoming circa Mar. 2024) (quoting David A. McKnight, The Electoral System of the United States: A Critical and Historical Exposition of its Fundamental Principles in the Constitution, and the of the Acts and Proceedings of Congress Enforcing it, 346 (Philadelphia, J.B. Lippincott & Co. 1878)).

Recent precedent supports this history. Interpreting the Appointments Clause, the Supreme Court observed that "[t]he people do not vote for the 'Officers of the United States." *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 497-98 (2010) (quoting US Const, art II, § 2, cl 2). As noted by the Supreme Court in 2020, "Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments)." *Seila Law LLC v. CFPB*, 140 S Ct 2183, 2199 n. 3 (2020). Neither category includes the President.

Three provisions in the U.S. Constitution show that the President is not "an officer of the United States":

> First, presidents fall under the scope of the Impeachment Clause precisely because there is express language in the clause providing for presidential impeachments; the Impeachment Clause does not rely on general "office"- or "officer"-language to make presidents impeachable. We think this is the common convention with regard to drafting constitutional provisions. When a proscription is meant to control elected positions, those positions are expressly named, as opposed to relying on general "office"- and "officer"-language. Congress does not hide the Commander in Chief in mouseholes or even foxholes. For example, in 1969, future-Chief Justice William H. Rehnquist, then an Executive Branch attorney, addressed this sort of clear-statement principle. Statutes that refer to "officers of the United States," he wrote, generally "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Five years later, future-Justice Antonin Scalia, then also an Executive Branch attorney, reached a similar conclusion with regard to the Constitution's "office"-language. These Executive Branch precedents would counsel against deeming the President an "officer of the United States."

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> Second, as to the Appointments Clause, which uses "Officers of the United States"-language, Presidents do not appoint themselves or their successors. The Supreme Court hears a never-ending stream of cases that ask if a particular position is a principal or inferior officer of the United States—even though the Appointments Clause does not even distinguish between those two types of positions. Where has the Court ever suggested that the President falls in the ambit of the Appointments Clause's "Officers of the United States"-language? . . .
>
> And, finally, as to the Commissions Clause, which also uses "Officers of the United States"-language, Presidents do not commission themselves, their vice presidents, their successor presidents, or successor vice presidents.

Sweeping and Forcing the President Into Section 3, *supra* at 106-07.

And finally, the structure of Section Three itself shows that it does not apply to the office of the President.

> The second clause does not expressly list several categories of positions: *e.g.*, presidential electors, appointed officers of state legislatures, members of state constitutional conventions, and state militia officers. The first clause does not expressly list several categories of positions: *e.g.*, members of the state legislatures, and members of state constitutional conventions. Neither list expressly mentions the President and Vice President.

Id. at 115.

Moreover, Section Three applies only to those who have "previously taken an oath . . . to *support* the Constitution of the United States." US Const, am XIV, § 3. (emphasis added). Certain members of the federal and state governments take such an oath:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, *to support this Constitution* . . . .

US Const, art VI, cl 3 (emphasis added). But the President of the United States does not. The presidential oath instead reads:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– I do solemnly swear (or affirm) that I will faithfully execute the

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> Office of President of the United States, and *will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.

US Const, art II, § 1, cl. 8 (emphasis added).

The difference between the oath to *support* the constitution (per Article VI) and the oath to *preserve, protect and defend* the constitution (per Article II) is a significant one. It establishes that the drafters of the Fourteenth Amendment did not understand the President to be an Officer of the United States. And taking an oath to support the Constitution further limits the class of people to whom Section Three applies. President Trump is not one of those people to whom Section Three applies.

Section Three's drafting is no accident, but rather rooted in the Framers' robust debate and careful wordsmithing. When Congress was debating the wording of Section Three, there was no individual who had *only* taken the Article II oath.[16] The words that both the Framers and the drafters of the Fourteenth Amendment chose must be given their proper meaning. *Martin v Hunter's Lessee*, 14 US 304, 334 (1816) ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental."). When drafting the Impeachment Clause, the Framers initially referred to the President, Vice President, and "other civil officers of the U.S." *See* 2 The Records of the Federal Convention of 1787, at 545 and 552 (Farrand ed., 1911). But upon further deliberation, the Framers changed the Impeachment Clause to remove the word "other." *Id.* at 600. This change shows that the Framers understood that the President was not one of the "other" officers of the United States—instead, the President is *outside* the category of "officers of the United States," and, therefore, falls outside the ambit of Section Three.

V. The prohibitions of Section Three do not even apply to the conduct as alleged in the Complaint.

[16] *See*, Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment, p. 4.

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The Complaint rests on misinterpreting Section Three to say what it does not. Plaintiffs, over dozens of pages and hundreds of paragraphs of salacious distraction, allege that President Trump "'engaged in insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof' within the meaning of section 3 of the Fourteenth Amendment." [Complaint at ¶¶305; *see also* 285-309.] But Plaintiffs fail to plausibly allege that President Trump did either of those things.

A. The January 6th riot does not constitute an "insurrection" under Section Three.

Section Three speaks in terms of "insurrection" and "rebellion"—and these terms were not pulled out of thin air. Congress modeled Section Three partly on the original Constitution's Treason Clause, and partly on the Second Confiscation Act (enacted in 1862). The Confiscation Act punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto." 12 Stat. 589, 627 (1862); *see* 18 USC § 2383. Section Three similarly covers "insurrection or rebellion." US Const, am XIV, § 3. But unlike the Confiscation Act, Congress excluded from Section Three any penalty for inciting, assisting, or giving aid to insurrection. Section Three only penalizes those who "engaged" in it. *Id.*

Congress discussed the meaning of "insurrection" and "rebellion" at length in debates. Congress confirmed that insurrection and rebellion describe two types of treason—not lesser crimes. *See* 37 Cong. Globe 2d Session, 2173, 2189, 2190-91, 2164-2167 (1862). After ratification, Congress reinforced these same conclusions when debating enforcement of Section Three. 41 Cong Globe 2d Session, 5445-46 (1870). The Congress that had just drafted Section Three believed that someone committed "insurrection" or "rebellion" if he led uniformed troops in battle against the United States, but not if he or she merely voted to support secession with violent force,

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recruited for the Confederacy, provided wartime aid, or held offices in the rebel government. The drafters chose words that encompassed at least the main actors in that act of treason, but no more. They were not trying to legislate with an eye toward political riots. In the aftermath of the Civil War, these were imminently important distinctions.

One year after the Confiscation Act became law, Chief Justice Chase held that the Act prohibits only conduct that "amount[s] to treason within the meaning of the Constitution," not any lesser offense. *United States v Greathouse*, 26 F Cas 18, 21 (CCND Cal 1863). Not just any form of treason would do: the Act only covered treason that "consist[ed] in engaging in or assisting a rebellion or insurrection." *Id.* Writing in the same case, a second judge confirmed and clarified that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.* at 25.

Dictionaries of the time confirm this understanding. John Bouvier's 1868 legal dictionary defined "insurrection" as a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "taking up arms traitorously against the government." *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, GW Childs, 12th ed, rev and enl 1868).

So "insurrection," as understood at the time of the passage of the Fourteenth Amendment, meant the taking up of arms and waging war upon the United States. At the time of Section Three's enactment, the United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. As shown by the omission of the word "incitement" in Section Three, Congress did not intend that provision to encompass those who

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merely encouraged an insurrection, but instead limited its breadth to those who actively participated in one.

Plaintiffs' entire case is based upon President Trump's alleged nexus to an "insurrection," but Plaintiff is short on any facts to show that the January 6th riots constituted one. *See Greathouse*, 26 F Cas at 21 and 25. Not one of the 1,000+ people charged in connection with the riot has so far even been charged—much less convicted—under 18 USC § 2383. *See United States v. Griffith*, 2023 WL 2043223, *6 n. 5 (D DC, Feb 16, 2023) (finding that "no defendant has been charged with [18 USC § 2383]); Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack*, New York Times (Aug 1, 2023).

Further, the Senate found President Trump not guilty of impeachment charges of insurrection brought by the 117th Congress. *See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H 24, 117th Cong (2021).[17] No court in the United States has found President Trump guilty under 18 USC § 2383. Not a single prosecutor has even filed an indictment against President Trump for an alleged rebellion or insurrection.

B. Mere words do not constitute "engaging" in insurrection.

Even so, Plaintiffs fail to establish that President Trump "engaged" in insurrection. Plaintiffs' core allegations fall well short. As explained above, the framers of the Fourteenth Amendment made a deliberate choice that Section Three should cover only actual "engage[ment] in" insurrection or rebellion (or assisting a foreign power), not advocating rebellion or insurrection. Mere words, unaccompanied by actions or legal effect, cannot meet that standard. That is especially the case here because President Trump's words and speeches cannot qualify as

[17] The Senate's not guilty vote can be found at https://www.senate.gov/legislative /LIS/roll_call_votes/vote1171/vote_117_1_00059.htm (last visited on October 6, 2023).

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incitement under established First Amendment principles. *See Brandenburg v Ohio*, 395 US 444 (1969).

The same representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit antebellum advocacy for a future rebellion was not "engaging in insurrection" or providing "aid or comfort to the enem[y]." In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether Section Three disqualified a Representative-elect from Kentucky when, before the Civil War began, he had voted in the Kentucky legislature in favor of a resolution to "resist [any] invasion of the soil of the South at all hazards." 41 Cong Globe, 2d Session, 5443 (1870). The House found that this was not disqualifying. *Id.* at 5447. Similarly, in 1870 the House also considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and stated in debate that Virginia should "if necessary, fight," but who after Virginia's actual secession "had been an outspoken Union man." *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907). The House found that this did not disqualify him under Section Three. *Id.* at 477-78. By contrast, the House *did* disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina." *Id.* at 481, 486. It is also important to note that it was Congress who made all of these determinations, not a state court. Plaintiffs' allegations fall well-short of how Congress has understood and applied Section Three in practice.

C. Not only does "inciting" fall well short of "engaging," but Plaintiffs allegations also fall short of "inciting."

"[T]he free discussion of governmental affairs of course includes discussions of candidates, structures and forms of government, the manner in which government is operated, and

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all such matters relating to political processes." *Mills v Alabama*, 384 US 214, 218-19 (1966). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v San Francisco City Democratic Cent Comm*, 489 US 214, 223 (1989). There is no exception to this rule for allegedly disloyal speech. The Supreme Court considered the Georgia legislature's refusal to seat an elected candidate, on the ground that his strident criticisms of the Vietnam War "gave aid and comfort to the enemies of the United States" and were inconsistent with an oath to support the Constitution. *Bond v Floyd,* 385 US 116, 118-23 (1966). The Court held that the candidate's speech was protected by the First Amendment and could not be grounds for disqualification. *Id.* at 133-37.

Thus, "dissenting political speech" remains "within the First Amendment's core," even where it is alleged to be "mere advocacy of illegal acts" or "advocacy of force or lawbreaking." *Counterman v Colorado*, 143 S Ct 2106, 2115, 2118 (2023). The Constitution values and protects such speech unless it qualifies as "advocacy of the use of force or law violation" that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 US at 447.

Under the *Brandenburg* test, Trump's comments did not come close to "incitement," let alone "engagement" in an insurrection. As the Sixth Circuit recognized in analyzing President Trump's public speech, "the fact that audience members reacted by using force does not transform Trump's protected speech into unprotected speech. Thus, where "Trump's speech . . . did not include a single word encouraging violence . . . the fact that audience members reacted by using force does not transform" it into incitement. *Nwanguma v Trump*, 903 F3d 604, 610 (6th Cir 2018). And as a D.C. Circuit judge remarked at argument last year, "you just print out the speech . . . and read the words . . . it doesn't look like it would satisfy the [*Brandenburg*] standard." Tr of

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Argument at 64:5-7 (Katsas, J.), *Blassingame v Trump*, No 22-5069 (DC Cir, Dec 7, 2022). After all, the Supreme Court, for instance, has concluded that a call to "take the f[***]ing streets later" does not meet the standard. *Hess v Indiana*, 414 US 105, 107 (1973); *accord Nwanguma*, 903 F3d at 611-12 (responding to a political protestor by repeatedly telling a crowd to "get 'em out of here" but "don't hurt 'em" was not incitement).

President Trump's explicit instructions called for protesting "peacefully and patriotically,"[18] to "support our Capitol Police and law enforcement,"[19] to "[s]tay peaceful,"[20] and to "remain peaceful."[21] President Trump's calls for peace and patriotism notwithstanding, the courts have made clear that angry rhetoric falls far short of an implicit call for lawbreaking. None of President Trump's speeches that took place before January 6 can possibly meet *Brandenberg's* imminence requirement. It is utterly impossible to regard statements like "stand back and standby" as advocacy of immediate illegal conduct. [Complaint at ¶ 41.] "[A] state cannot constitutionally sanction advocacy of illegal action at some indefinite future time." *McCoy v Stewart*, 282 F3d 626, 631 (9th Cir 2002) (cleaned up).

Finally, and again as explained above, none of Plaintiffs' allegations plausibly suggest that President Trump intended any acts of violence. Both his language and his actions show the contrary. He intended to inspire a protest to contest an election outcome. That is not insurrectionary or unlawful in any way. In fact, although the President expressly called for a walk down Pennsylvania Avenue "after" his speech, the Complaint affirmatively alleges that the attack on the

[18] Donald Trump Speech "Save America" Rally Transcript January 6, REV (Jan. 6, 2021) available at https://bit.ly/3GheZid; Brian Naylor, Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial, NPR (Feb. 10, 2021), https://n.pr/3G1K2ON.
[19] https://twitter.com/realDonaldTrump/status/1346904110969315332.
[20] *Id.*
[21] https://twitter.com/realDonaldTrump/status/1346912780700577792.

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Capitol began before the speech ended—indeed, that television broadcasts had cut away from the President's speech to cover the violence. (Complaint at ¶¶ 169, 205.)

Nor do President Trump's comments during a debate months before January 6. On September 29, 2020, an hour into President Trump's debate with then-candidate Biden, the following exchange occurred:

> [Moderator Chris] WALLACE [to President Trump]: You have repeatedly criticized the Vice-President for not specifically calling out Antifa and other left-wing extremist groups. But are you willing, to-night, to condemn white supremacists and militia groups and to say that they need to stand down and not add to the violence in a number of these cities as we saw in Kenosha, and as we've seen in Port-land.
> TRUMP: Sure, I'm willing to do that.
> WALLACE: Are you prepared specifically to do it. Well go ahead, sir.
> TRUMP: I would say almost everything I see is from the left-wing not from the right wing.
> WALLACE: So what are you, what are you saying?
> TRUMP: I'm willing to do anything. I want to see peace.
> WALLACE: Well, do it, sir.
> [Vice President] BIDEN: Say it. Do it. Say it.
> TRUMP: You want to call them? What do you want to call them? Give me a name, give me a name, go ahead who would you like me to condemn.
> WALLACE: White supremacists and racists.
> BIDEN: Proud Boys.
> WALLACE: White supremacists and white militias.
> BIDEN: Proud Boys.
> TRUMP: Proud Boys, stand back and stand by. But I'll tell you what, I'll tell you what: somebody's got to do something about Antifa and the left because this is not a right wing problem this is a left-wing. This is a left-wing problem.[22]

[22] *September 29, 2020 Debate Transcript*, The Commission on Presidential Debates, *available at* https://www.debates.org/voter-education/debate-transcripts/sep-tember-29-2020-debate-transcript/.

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As this context reveals, the "stand back and stand by" remark unambiguously referred to then-recent unrest in cities like Kenosha, Wisconsin and Portland, Oregon. Immediately before that remark, President Trump expressly agreed that his supporters "should not add to the violence in . . . these cities," and emphasized that he would "do anything" in order "to see peace." And immediately after the remark, President Trump reiterated that the violence was a "problem." His "stand back" statement emphasized that his supporters were not the ones who should "do something" about the problem. This cannot plausibly be interpreted as an endorsement of those groups, let alone of their future actions in response to an election that had not yet happened.

Were that not enough, other facts omitted by Plaintiffs conclusively demonstrate that President Trump's "stand back and stand by" remark was condemning and not supporting illegal activity. The very next day, September 30, President Trump emphasized to a reporter that although he was not familiar with the Proud Boys, "***they have to stand down and let law enforcement do their work*** . . . . [W]hoever they are, they have to stand down. Let law enforcement do their work."[23] When asked again, he reiterated, "Look, law enforcement will do their work. They're gonna stand down. ***They have to stand down. Everybody***. . . . Whatever group you're talking about."[24]

Plaintiffs' attempt to cast an off-the-cuff remark made in the second-half of a two-hour debate well before the General Election and the events of January 6th as a rallying cry is beyond absurd. As the full context clearly shows, the alleged recipient of the remarks was selected not by

[23] *See* Video recording of President Trump's September 30, 2020, remarks available at https://youtu.be/Q8oyhvcOHk0?si=Hp6D0iJytKyUMdnM; *see also* September 30, 2020, Remarks by President Trump Before Marine One Departure (emphasis added), *available at* https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-093020/.

[24] *Id.*

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the then-Commander-in-Chief, but rather by candidate-Biden and moderator Chris Wallace. And the content itself was chosen not by the President, but—again—by Biden and Wallace.

D. "Aid or comfort to the Enem[y]" under Section Three requires assistance to a foreign power.

Section Three does not incorporate the Confiscation Act's criminalization of giving "aid or comfort" to a "rebellion or insurrection." *See supra* at 11-12. Instead, Section Three harkens back to the Treason Clause, which defines treason as "adhering to [the United States'] Enemies, giving them Aid and Comfort." US Const, Art III, § 3, cl.1.

The "enemies" prong of the Treason Clause almost exactly replicated a British statute defining treason. *See* 4 Blackstone, Commentaries on the Laws of England 82 (1769). But "enemies" referred only to "the subjects of foreign powers with whom we are at open war," not to "fellow subjects." *Id.* at 82-83. Blackstone was emphatic that "an enemy" was "always the subject of some foreign prince, and one who owes no allegiance to the crown of England." *Id.*

This was also the American view. Four years after the Constitution was ratified, Justice Wilson explained that "enemies" are "the citizens or subjects of foreign princes or states, with whom the United States are at open war." 2 *Collected Works of James Wilson* 1355 (1791). The 1910 version of *Black's Law Dictionary* agrees, defining "enemy" as "either the nation which is at war with another, or a citizen or subject of such nation." *Enemy*, Black's Law Dictionary (2d. Ed. 1910). At the outset of the Civil War, the Supreme Court recognized that the Confederate states should be "treated as enemies," under a similar definition of that word, because of their "claim[] to be acknowledged by the world as a sovereign state," and because the Confederacy claimed to be a *de facto* a foreign power that had "made war on" the United States. *The Prize Cases*, 67 US 635, 673-74 (1862). Section Three, enacted a few years later in response to the Civil War, referred

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to support for the Confederacy as "aid and comfort to . . . enemies," and treated "enemies" as foreign powers in a state of war with the United States.

On top of that, "aid and comfort to the enem[y]" involves only assisting a foreign government (or its citizens or subjects) in making war against the United States. Plaintiffs do not, and cannot, allege that the January 6 attack involved any foreign power, or that the attackers constituted any sort of *de facto* foreign government.

CONCLUSION

For the reasons stated above, Proposed-Intervenor, Donald J. Trump, Inc., respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

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David A. Kallman, Attorney for Proposed-Intervenor, Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
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/s/ Zachary Kramer
Zachary Kramer, Attorney for Proposed-Intervenor, Donald J. Trump

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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

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

Plaintiffs,

-vs-

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

Defendant,

and

DONALD J. TRUMP,

Proposed-Intervenor.
_____/

PROPOSED-INTERVENOR'S MOTION FOR SUMMARY DISPOSITION AND PROOF OF SERVICE

FILE NO.: 23-000137-MZ

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PROPOSED-INTERVENOR'S MOTION FOR SUMMARY DISPOSITION

NOW COMES the above-named Proposed-Intervenor, Donald J. Trump, by and through his legal counsel, and moves this Honorable Court for Summary Disposition pursuant to MCR 2.116(C)(4), 2.116(C)(8), and MCR 2.116(C)(10), for all the reasons as stated in the attached Brief in Support which are incorporated herein in full. Proposed-Intervenor sought concurrence for his motion pursuant to Local Rule 2.119(A)(2) on October 16, 2023. Concurrence was not received, thus necessitating this motion.

WHEREFORE, Proposed-Intervenor respectfully requests that this Honorable Court grant his Motion for Summary Disposition, dismiss Plaintiffs' Complaint in its entirety with prejudice, find Plaintiffs' Complaint to be frivolous, devoid of merit, and filed for the purpose of harassment, and grant all other relief as the Court deems just and appropriate.

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

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DATED: October 16, 2023.

/s/ Zachary Kramer
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Attorney for Proposed-Intervenor,
Donald J. Trump

PROOF OF SERVICE

David A. Kallman, hereby states and affirms that on the 16th day of October, 2023, he did serve a copy of Proposed-Intervenor's Motion for Summary Disposition, with Brief in Support, upon Plaintiffs' and Defendant's counsel listed above via MiFile.

DATED: October 16, 2023.

/s/ David A. Kallman
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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

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

Plaintiffs,

-vs-

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

Defendant,

and

DONALD J. TRUMP,

Proposed-Intervenor.
_____/

PROPOSED-INTERVENOR'S MOTION TO INTERVENE, BRIEF IN SUPPORT, AND PROOF OF SERVICE

FILE NO.: 23-000137-MZ

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PROPOSED-INTERVENOR'S MOTION TO INTERVENE

NOW COMES the Proposed-Intervenor, Donald J. Trump ("President Trump"), by his undersigned legal counsel, bringing this Motion to Intervene pursuant to MCR 2.209, and in support of the motion, states the following:

1. Plaintiffs are residents and registered voters in Michigan intending to vote in the 2024 presidential primary and general elections.
2. Defendant is Jocelyn Benson, named in her official capacity as Secretary of State for her role in administering elections in the State of Michigan which includes causing the name of a presidential candidate to be printed on election ballots.
3. Proposed-Intervenor, President Trump, seeks to uphold his constitutional right to have his name placed on the Michigan presidential primary and general election ballots for the 2024 election.
4. In their complaint, Plaintiffs seek declaratory relief that President Trump is "disqualified, by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot and has no legal right to appear on the ballot." LaBrant Compl. at 319, 321. Plaintiffs also seeks "permanent injunctive relief

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preventing the Secretary [of State] from placing Trump on 2024 presidential primary or general election ballots." LaBrant Compl. at 322.

5. By this motion, the Proposed-Intervenor requests he be allowed to intervene in this action as Intervening Party so that he may be afforded reasonable opportunity to present his arguments in opposition of Plaintiffs' claims in order to protect his interests in this matter, and that he be added as an Intervening Party pursuant to MCR 2.209.
6. To ensure that he has a sufficient opportunity for meaningful and helpful participation, the Proposed-Intervenor also requests that he be granted an opportunity to present oral arguments before your Honor.
7. Proposed-Intervenor sought concurrence for his motion pursuant to Local Rule 2.119(A)(2) on October 16, 2023. Defendant did not concur, and Proposed-Intervenor is awaiting a response from Plaintiffs, thus necessitating this motion.
8. Donald J. Trump hereby requests that his Motion to Intervene be granted for all the reasons as stated in the attached Brief in Support which are incorporated herein in full.

WHEREFORE, Proposed-Intervenor respectfully requests that this Honorable Court grant his Motion to Intervene, and grant all other relief as the Court deems just and appropriate.

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Proposed-Intervenor,
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DATED: October 16, 2023.

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/s/ Zachary Kramer
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Donald J. Trump

BRIEF IN SUPPORT

A. Jurisdiction.

While the Court of Claims is a Court of limited jurisdiction pursuant to MCL 600.6419, Donald J. Trump ("President Trump") must be permitted to intervene in this matter to protect his interests and constitutional rights as outlined below and in the companion Motion for Summary Disposition (which is fully incorporated herein). Permitting this matter to proceed without allowing President Trump to be a party could deprive him of the typical rights of a party, such as the ability to file motions or an appeal.

Donald J. Trump's name is mentioned 354 times in the complaint including three times in the prayer for relief. This entire matter is about President Trump, his alleged statements, and his alleged political activities. To adjudicate the effect of Donald J. Trump's speech and his ability to be on the ballot without President Trump being a party would violate his constitutional rights,

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including, but not limited to, his First Amendment free speech rights[1] and his Due Process rights. US Const, am I and XIV. These constitutional interests would override any statutory limitations.

The Michigan Supreme Court held that "due process requires-at a minimum-that a person whose interests might be affected by government action be given notice and a meaningful opportunity to be heard before the government acts. *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). "Additional[] requirements may be necessary depending on three considerations: the private interest that will be affected, the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards." *Id.*

In order to preserve President Trump's rights and objections for a possible appeal or federal court action, he is requesting to intervene in this matter.

B. President Trump Is Entitled to Intervene as of Right.

The Prospective Intervening Party has a right to intervene in this action pursuant to MCR 2.209(A)(3), which permits a party's right to timely intervene as follows:

> "when the applicant claims an interest relating to the … transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Put simply, MCR 2.209(A)(3) "allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties." *Estes v Titus*, 481 Mich 573, 583; 751 NW2d 493 (2008). "[A] person may intervene by right in an action on timely application when that person asserts an interest in the subject of the action 'and is so situated that the

[1] For further analysis of Donald J. Trump's First Amendment rights, see Proposed-Intervenor's companion Motion for Summary Disposition, which is fully incorporated herein.

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disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *Kuhlgert v Mich State Univ*, 328 Mich App 357, 378; 937 NW2d 716 (2019). The "rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612 (2009) (citing *Precision Pipe & Supply Inc v Meram Constr Inc*, 195 Mich App 153, 156 (1992)).

1. President Trump's motion to intervene is timely.

A motion is timely if it is "asserted within a reasonable time," an inherently contextual standard. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976); see also *Cameron v EMW Women's Surgical Ctr, PSC*, 142 S Ct 1002, 1012 (2022) (timeliness under federal intervention rules "is to be determined from all the circumstances").[2] Although Michigan courts have not enumerated the specific factors that should be analyzed in determining timeliness, courts have generally found that "a right to intervene should be asserted within a reasonable time." *D'Agostini*, 396 Mich at 188. First, this motion is timely. Plaintiffs sued on September 29, 2023 and this motion is being filed just seventeen (17) days later, before any issues have been decided or any procedural Rubicons have been crossed. There has been very little activity in the case, and Trump's intervention will not prejudice any party.

President Trump's motion to intervene in this case is timely. This motion is being made in a matter of days since becoming aware of this litigation. Therefore, President Trump's motion is timely and will not impact or delay future proceedings.

2. President Trump has a sufficient interest affected by the disposition of this case.

[2] "Because of the similarity of the state and Federal provisions," the Michigan Supreme Court "deem[s] it proper to look to the Federal courts for guidance" in applying the intervention rules. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976).

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President Trump has a sufficient interest in this case, and "the disposition of the action may as a practical matter impair or impede [his] ability to protect [his] interest." *Precision Pipe & Supply*, 195 Mich App at 156 quoting MCR 2.209(A)(3).

President Trump is the frontrunner for the Republican nomination and has an overwhelming interest in defending constitutional challenges to his eligibility to appear on election ballots. And no party has a greater interest in ensuring Secretary Benson places his name on the ballots in Michigan than President Trump. Donald J. Trump has also exercised his First Amendment rights to freedom of association and speech and Fourteenth Amendment Due Process rights under the United States Constitution to campaign for the right to be on the primary and general election ballots in 2024. He has a strong interest in securing his access to those ballots and in clarifying the state of the law on Section Three of the Fourteenth Amendment and whether it is constitutional for a Secretary of State to interpret the same and cause for a candidate to remain off the election ballots.

At the Constitutional Convention of 1787, James Madison observed that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt, and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect."[3]

States have "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v Celebrezze*, 460 US 780, 795 (1983). Plaintiff's request that this

[3] *The Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787*, as reported by James Madison, Revised and arranged by Jonathan Elliot, (1876) Vol. V., p. 404

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Court declare that Donald J. Trump is disqualified from holding the office of President of the United States and enjoin the Secretary of State from including Donald J. Trump on the ballot in Michigan. Plaintiff's request will have an effect on voters beyond Michigan's boundaries. Plaintiff's request is not targeted at "protect[ing] the integrity and reliability of the electoral process itself." *Id.* at 788, n 9. It does not ensure that "some sort of order, rather than chaos" accompanies the election. *Cook v Gralike*, 531 US 510, 524 (2001). And it does not require some minimum level of support before a presidential candidate can be put on the ballot. *Anderson*, 460 US at 788, n 9. Plaintiffs' requested relief is therefore improper, and President Trump has a sufficient interest in this matter to intervene.

3. President Trump's interests are not represented by any existing party.

There is no other party in this matter who can adequately represent Donald J. Trump's interests because the sole defendant is a state official who does not share his personal interest in ensuring he gains lawful access to the primary and general election ballots in 2024. For the sake of completeness, none of the Plaintiffs will adequately represent President Trump's interests. "The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008) (emphasis added and citations omitted).

A party seeking intervention isn't required to definitively prove that its interests are inadequately represented. Instead, "the concern of inadequate representation of interests need only exist." *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001). "[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties may be inadequate." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969); *Kamp v Cannon Twp*, 115 Mich App 726,

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731-732; 321 NW2d 690 (1982) (citations omitted) ("The proposed intervenors satisfied the second requirement by establishing that their representation is or may be inadequate.") The possibly-inadequate-representation rule "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini v City of Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976), quoting *Trbovich v United Mine Workers of Am*, 404 US 528, 538 n 10; 92 S Ct 603; 30 L Ed 2d 686 (1972).

The interests of the Secretary of State are clearly different from that of President Trump. Here, President Trump's interests are in the maintenance of his own rights and that of the American people who wish to see him on the ballot for the upcoming elections. In the wake of political persecution through various prosecutions by multiple state actors, Secretary Benson, an active member of the opposing major political party, has publicly weighed in with her views on Trump and her fear of a repeat of the 2020 election. In fact, her many public comments demonstrate her extreme and incurable bias against President Trump. For instance,

- During an interview with Cynthia McFadden of NBC News, Jocelyn Benson said, "Even **the president himself** had **called on me to be arrested** and **tried for treason, potentially executed**."[4]

- During an interview with Erik Meers, founder of uPolitics, Jocelyn Benson said:

> "There's kind of a good side and a bad side to the impact of having a **former president spread lies about not just our election administration and procedures, but those who administer them like myself**. […] All of that said, of course, **his attacks** and those of his most ardent followers, has created this strain on our work. Whether it's actual violence, or threats of violence, or harassment and requests for duplicative meaningless information, a lot of the misinformation has metastasized […] and **until there's real accountability for those who are spreading these lies, from the former president** on down, we're going to continue to see these

[4] *Transcript: The ReidOut*, NBC NEWS (May 19, 2022, 7:00 PM EST), https://www.msnbc.com/transcripts/reidout/transcript-reidout-5-19-22-n1295603

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tactics…"[5]

- In response to Oliver Darcy's January 25, 2023 article, *Meta says it wont's punish Trump for attacking the 2020 election results. But the 2024 vote is a different story*, Jocelyn Benson tweeted, "@Meta: **Trump's baseless, false attacks on the 2020 election** still generate **harassment & violent threats aimed at election officials** across the country, on both sides of the aisle. Your decision will lead to more harm aimed at us & our families."[6]

- In a tweet referring to Donald J. Trump, Jocelyn Benson said, "Pledging to pardon individuals convicted of using violence, force and threats to overturn the results of a legitimate presidential election shows **you have no respect for the rule of law** or the will of the people."[7]

- In linking to a Washington Post article about Trump and his advisors titled *Justice Dept. asking about 2020 fraud claims as well as fake electors*, Jocelyn Benson tweeted, "I know for years how many have rightfully demanded accountability for **those who abused and misused the legal system** to overturn a legitimate presidential election. And while the moral arc of the universe may be long … it bends towards justice."[8]

- During an interview with MSNBC's Nicolle Wallace, Jocelyn Benson had this exchange:

> WALLACE: "Certainly the evidence developed by the Select Committee leaves nothing to the imagination—**this was a Trump-directed coup** […] The legal architecture was fleshed out by John Eastman. And t**hey knew it was both illegal and it violated the Electoral Count Act and unconstitutional** [...] Do you, from where you're sitting, have any doubt that the evidence, if Jack Smith wishes to pursue it, **will take this plot all the way to Trump's doorstep**?"
>
> BENSON: "I think the evidence certainly shows **a direct line between the former president**, the phone calls, the pressure that he himself we know exerted on everyone from lawmakers in the State of Michigan, to local county certification boards. So, the line is there. Of course, the public speeches that you just showed earlier as well demonstrate that. So, **I think his involvement is clear**, and every drop of new evidence that emerges in the public arena only

[5] Erik Meers, *Mich. Sec. of State Jocelyn Benson Pt. 2: Fighting Trump's Election Lies*, UPOLITICS (Oct. 25, 2022), https://www.youtube.com/watch?v=dk07z4YwIBo
[6] Jocelyn Benson (@JocelynBenson), Twitter (Jan. 26, 2023, 7:44 AM), https://twitter.com/JocelynBenson/status/1618590577217441795
[7] Jocelyn Benson (@JocelynBenson), Twitter (May 25, 2023, 7:09 PM), https://twitter.com/JocelynBenson/status/1661872120521998337
[8] Jocelyn Benson (@JocelynBenson), Twitter (Jul. 6, 2023, 11:26 AM), https://twitter.com/JocelynBenson/status/1676975791517646849

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underscores that."[9]

- While interviewed by Victor Shi and Jill Wine-Banks on the "iGen Politics" podcast, Jocelyn Benson had the following exchange:

> SHI: "We come here […] less than a week after your State's Attorney General, Dana Wessel, issue indictments against 16 fake electors from 2020. Tell us more about what they're charged with and just how significant this is for our accountability nationwide."
>
> BENSON: "Yeah it's really a big deal […] These felony charges that were filed against 16 individuals who allegedly, knowingly sought to defraud the government, the state and federal government, through submitting fake electoral vote certificates, with the goal of undoing the actual legitimate elector certificates, and having their fake elector certificates submitted to Congress on, what was January 6th, 2021. So, it was part of really, a national coordinated effort, to undo the will of the people simply because they, and others in their political party, as well as the **former president** were unhappy with the outcome of the election. So, as we now begin to enter the 2024 cycle it's really important that we see accountability and justice **for those who were part of this nationally coordinated effort** and this actionable plan to subvert the will of the people in the last presidential election because **if we don't see these types of charges brought and indictments** and accountability and in the legal process **then we have to prepare especially those of us as election administrators for a repeat of these actions again**."
>
> WINE-BANKS: "How high up do you think the fraud goes? […] Do you know of any evidence that would link it […] directly to […] **the former president**?"
>
> BENSON: "Yeah, I mean there have been some publicly disclosed pieces of evidence, voicemails from the **Trump** campaign to state officials and the like, we know there were meetings, we know Rudy Giuliani himself was in the state of Michigan a few days before the electors officially met, and testified before a sham legislative hearing about-with false claims of election fraud […] I have a lot of confidence in the investigators in our state to get to the bottom of, and make all the connections, and I'm grateful that folks at the federal level are looking at this too because they could make those similar connections. But I do think to me, **it's important to seek**

[9] *Deadline: White House*, MSNBC (Jul. 13, 2023, 4:10 PM EST), https://www.rawstory.com/direct-line-evidence-trump/

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> **full accountability**, but not just put this on the shoulders of one person, the **former president**. We know certainly, **he was a central piece** to a lot of different things, and **hence the indictments** that you see pre and post this moment, percolating. But that said, there were a number of other it would seem co-conspirators at every level, and I think when we talk about accountability, we have to see full accountability for everyone who was involved, in **this really unprecedented, un-American scheme to overturn a presidential election, because** a small group of people, including **the former president**, were unhappy with the results."
>
> WINE-BANKS: "**The big lie continues repeatedly having not just Trump but all of his acolytes** saying the election was stolen […] It also seems to me that there was a **targeted effort in Michigan in** certain counties and that those counties were **counties with heavy minority populations**. Is that a correct interpretation of where the targeting was?"
>
> BENSON: "Yeah. Sure […] It was the urban center where communities of color were concentrated where you saw initially the attempts to call out fraud, you know, falsely were targeted. Again, **when you don't have any evidence of fraud then […] go towards the minority communities and start using racism to sow seeds of doubt**. Which was clearly the strategy and then they began picking apart other things."[10]

- In an X (formerly Twitter) post after Trump and his allies were indicted for the events on January 6, 2020, Jocelyn Benson said, "Feeling vindicated. Grateful for the rule of law and those who enforce it." [11]

- In an X post on August 3, 2023, Jocelyn Benson said, "**Trump** allegedly led a national scheme to overturn the results of a legitimate presidential election. But his plot would only succeed with willing co-conspirators in the states. That's why the state charges against those in Michigan who signed fake electoral votes are so critical."[12]

- Again, on August, 3, 2023, Jocelyn Benson went on X to post, "If 'I'm being arrested for you' is Trump-speak for 'I'm being arrested for trying to nullify millions of your votes' then yeah, I guess that tracks."[13]

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[10] Victor Shi and Jill Wine-Banks, *Defending Democracy with Jocelyn Benson*, IGEN POLITICS (Jul. 25, 2023), https://www.youtube.com/watch?v=EYvbK51VMmk

[11] Jocelyn Benson (@JocelynBenson), Twitter (Aug. 2, 2023, 8:49 AM), https://twitter.com/JocelynBenson/status/1686720760570605569

[12] Jocelyn Benson (@JocelynBenson), Twitter (Aug.3, 2023, 9:57 AM), https://twitter.com/JocelynBenson/status/1687100474552688642

[13] Jocelyn Benson (@JocelynBenson), Twitter (Aug.3, 2023, 4:11 PM),

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It is clear there is a real possibility Secretary Benson will undermine President Trump's interests in this action. Her inherent views and posture, and desire to avoid a feared repeat of the inconveniences she had to endure because of challenges made in the 2020 election will certainly keep her from advocating for President Trump's interests, namely that he appear on the ballots. Her mind is already made up.

Based on the above, President Trump more than satisfies this "minimal" burden and he "certainly has an interest in defending" against lawsuits seeking to stop him from appearing on the primary and general election ballots in Michigan. Therefore, President Trump should not be forced to trust and hope that Defendant will adequately represent his interests.

C. President Trump Also Meets the Standard for Permissive Intervention.

In addition to being entitled to intervene as of right, President Trump also meets the standard for permissive intervention. Such intervention is appropriate when: (1) the application is timely; (2) the applicant's claim or defense has a common question of law or fact with the main action; and (3) there will be no prejudice or delay to the original parties. See *Dean v Dep't of Corrections*, 208 Mich App 144, 150 (1994) citing MCR 2.209(B). These elements have been satisfied.

First, President Trump's motion is timely as explained above. Second, President Trump's claims and defenses surround the common question of law related to his First Amendment rights to freedom of association and speech and Fourteenth Amendment Due Process rights to campaign to be on the Michigan primary and general election ballots in 2024—the very rights being threatened by the relief sought by Plaintiffs. Finally, President Trump's intervention will not result

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https://twitter.com/JocelynBenson/status/1687194481773125632

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in any prejudice or delay. President Trump moved to intervene promptly after Plaintiffs filed their complaint. As with intervention as of right, President Trump readily meets the requirements for permissive intervention.

CONCLUSION

Donald J. Trump's name is mentioned 354 times in Plaintiffs' complaint and three of those times in Plaintiffs' prayer for relief. Nonetheless, Plaintiffs failed to name him as a Defendant or as an interested party to the litigation. If this Court were to grant Plaintiffs' relief, it would impede President Trump's ability to protect his interest. For all the reasons stated above, Proposed-Intervenor, Donald J. Trump, respectfully requests that his Motion to Intervene be granted.

Respectfully submitted,

KALLMAN LEGAL GROUP, PLLC

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Stephen P. Kallman
Stephen P. Kallman
Attorney for Proposed-Intervenor,
Donald J. Trump

DHILLON LAW GROUP, INC.

DATED: October 16, 2023.

/s/ Michael Columbo
Michael Columbo
Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Mark P. Meuser
Mark P. Meuser

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Attorney for Proposed-Intervenor,
Donald J. Trump

DATED: October 16, 2023.

/s/ Zachary Kramer
Zachary Kramer
Attorney for Proposed-Intervenor,
Donald J. Trump

PROOF OF SERVICE

David A. Kallman, hereby states and affirms that on the 16th day of October, 2023, he did serve a copy of Proposed-Intervenor's Motion to Intervene, with Brief in Support, upon Plaintiffs' and Defendant's counsel listed above via MiFile.

DATED: October 16, 2023.

/s/ David A. Kallman
David A. Kallman (P34200)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/20/2023 9:17:21 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Brater testimony

Thanks!

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, October 20, 2023 3:52 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Brater testimony

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

Mike asked me to send you the transcript of Jonathan Brater's testimony in the Eastman trial.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/9/2022 5:24:54 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: AZ voting machine/decertification lawsuit
Attachments: 7 Opinion & Order denying mtn for TRO.pdf

DPP MCL 15.243(1)(m)

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 9, 2022 12:40 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: AZ voting machine/decertification lawsuit

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Friday, September 9, 2022 at 11:59 AM
To: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: AZ voting machine/decertification lawsuit

DPP MCL 15.243(1)(m)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON ICKES, *et al.*, Plaintiffs,	)	
	)	No. 1:22-cv-817
-v-	)	
	)	Honorable Paul L. Maloney
GRETCHEN WHITMER and JOCELYN BENSON, Defendants.	)	

OPINION AND ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs filed this lawsuit challenging the certification of Michigan's 2020 presidential election results.[1] Along with their complaint, Plaintiffs filed a motion for a temporary restraining order. (ECF No. 2.) Plaintiffs ask the Court to restrain Defendant Gretchen Whitmer and Jocelyn Benson, and those acting in concert with them, from destroying any records relating to the 2020 presidential election. Upon careful review of the motion for emergency relief, the Court will deny the request for a temporary restraining order.

I.

Decisions regarding a temporary restraining order are within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). Under Rule 65, a court may issue a temporary restraining order, without notice to the adverse

[1] Plaintiffs filed their complaint on Friday, September 2, 2022, at 6:47 p.m. Plaintiffs filed a second complaint at 7:10 p.m. An amended complaint supersedes the original complaint, which becomes a nullity. *See Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014) (citing 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1476 (3d ed. 2010)); *Drake v. City of Detroit*, 266 F. App'x 444, 448 (6th Cir. 2008). Where necessary, the Court references the second filed complaint.

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party, only if two conditions are met. Fed. R. Civ. P. 65(b)(1). First, the moving party must establish specific facts through an affidavit or a verified complaint or affidavit showing that an immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition to the motion. Fed. R. Civ. P. 65(b)(1)(A). Second, the counsel for the moving party must certify in writing any efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b)(1)(B). In addition, the court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361 (citation omitted). The four factors are not prerequisites that must be met but are interrelated concerns that must be balanced together. *See Northeast Ohio Coalition for Homeless and Serv. Emps. Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Our United States Supreme Court cautions that temporary restraining orders are extraordinary and drastic remedies that may be issued only under "stringent restrictions" and their limited availability "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438-39 (1974).

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II.

A.

Rule 65(b)(1)(A) imposes two requirements on the party seeking a temporary restraining order. First, the party must identify an irreparable harm that will occur before the opposing party can be heard in opposition to the motion. Second, the party must attest to the veracity of the facts establishing irreparable harm either by affidavit or through a verified complaint.

The Court concludes Plaintiffs have not met the requirements contained in Rule 65(b)(1)(A). Plaintiffs titled their pleading "Verified Complaint" (ECF No. 3 PageID.46) but failed to include a signature from any plaintiff and also failed to include a statement indicating that the allegations in the complaint are made under penalty of perjury. *See* 28 U.S.C. § 1746; *Williams v. Browman*, 981 F.2d 901, 904-05 (6th Cir. 1992); *accord Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) ("But, a verified complaint is not just a pleading; it is also the equivalent of an affidavit . . . because it 'contains factual allegations that if included in an affidavit or deposition would be considered evidence, and not merely assertion.'") (citation omitted); *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 994-95 (8th Cir. 2001) (stating that "a complaint signed and dated as true under penalty of perjury satisfies the requirements of a verified complaint, 28 U.S.C. § 1746.").

Attached to their motion, Plaintiffs filed two affidavits. Attorney Russell Newman filed one affidavit. (ECF No. 2-2 PageID.38-39.) Counsel does not make any allegations about an irreparable harm that will occur before Defendants can be heard in opposition to the motion. Plaintiffs also attached an affidavit from Plaintiff Ken Beyer. (ECF No. 2-3

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PageID.40.) Beyer attests that Michigan law requires the preservation of election records. (*Id.* ¶ 4.) He attests that he sought election records through FOIA requests and that some records have not been provided and some have been reported lost or deleted or destroyed or are otherwise unattainable without a court order. (*Id.* ¶ 5.) Beyer does not allege, under penalty of perjury, that Defendants will destroy election records before they can be heard in opposition to this motion.

B.

In their factual allegations, Plaintiffs summarize concerns about the certification of voting machines used in Michigan for the November 2020 election. Plaintiffs allege that no county in Michigan used a properly certified electronic voting system. (ECF No. 3 Compl. ¶ 53 PageID.55.) Plaintiffs conclude, therefore, that the electronic voting systems that were used violated Michigan law and the election is void *ab initio* and should not have been certified.

Plaintiffs describe their claim as arising under the First, Ninth and Fourteenth Amendments and explains that they have a "constitutional right to vote for the candidate of [their] choice, [and] also the constitutional right not to have [their] vote diluted, canceled out, and/or nullified by the counting of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent and/or unverifiable votes." (ECF No. 3 Comp. ¶ 104 PageID.63.) Plaintiffs allege, because Defendants failed to properly certify the voting machines used in the State of Michigan for the November 2020 election, their votes were diluted, canceled out, and/or nullified. (*Id.* ¶ 106.) And, Plaintiffs allege that if the information and data required to be preserved for 22 months under 52 U.S.C. §

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20701 is destroyed, it will be impossible to demonstrate the failure of certification of voting machines. (*Id.* ¶ 107 PageID.64.)

The Court concludes Plaintiffs are not likely to succeed on the merits of their claim. First, Plaintiffs have only a generalized grievance that would be common among all people who cast a vote in the November 2022 election and not a particularized, individual injury. Consequently, Plaintiffs likely do not have standing to raise this concern about machines used in the November 2022 election or the possible destruction of records. *See Pirtle v. Nago*, No. 22-381, 2022 WL 3915570, at *3-*4 (D. Haw. Aug. 31, 2022). Second, Plaintiffs likely cannot establish an Equal Protection claim. On the facts alleged in the complaint, all ballots cast in Michigan were treated equally, albeit by allegedly uncertified voting machines. Plaintiffs were able to cast a ballot for their electors of choice and their votes were counted. Plaintiff have not pled facts to show that their votes were canceled, diluted or nullified. Third, 52 U.S.C. 20701 likely does not create a private right of action. *See Fox v. Lee*, No. 4:18cv529, 2019 WL 13141701, at *1 (N.D. Fla. Apr. 2, 2019); *see also Soudelier v. Dept. of State Louisiana*, No. 22-2436, 2022 WL 3686422, at *1 (E.D. La. Aug. 25, 2022) (citing *Fox*); *Pirtle,* 2022 WL 3915570, at *3 (citing *Fox* and *Soudelier*). Likely, the Attorney General or his or her representative may enforce the requirements of § 20701. *See Fox*, 2019 WL 13141701 at *1; *see also* 52 U.S.C. § 20703. Fourth, Plaintiffs may not have sued the correct parties. Under Michigan statute, City and county clerks or the Board of County Canvassers appear to have responsibility for retaining election records, not the Governor or the Secretary of State. *See* Mich. Comp. Laws § 168.810a. Plaintiff have not alleged any practice or policy of either Defendant directing county officials to destroy election records.

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The Court also finds that Plaintiffs have not established an irreparable harm that will occur before Defendants can be heard in opposition. At best, Plaintiffs allege in the complaint that the time required by statute to preserve records ended on September 4, 2022. That allegation does not, however, establish that Defendants will begin to destroy records as soon as the retention requirement passes. In addition, even if the federal statute, 52 U.S.C. § 20701 provides for a twenty-two month retention period, state law requires the retention of election records for two years. Mich. Comp. Laws § 168.811.

Having found that the first two factors weigh against granting ex parte relief, the Court need not consider the other two factors.

III.

Accordingly, the Court declines to grant Plaintiffs a temporary restraining order. Plaintiffs have not met the requirements for emergency ex parte injunctive relief because they did not attest, under penalty of perjury, to the veracity of the factual allegations necessary for the specific relief sought. Plaintiffs also have not demonstrated any imminent irreparable harm or a likelihood of success on the merits of their claims.

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ORDER

For the reasons provide in the accompanying Opinion, the Court **DENIES** Plaintiffs' motion for a temporary restraining order. (ECF No. 2.)

Plaintiffs must serve Defendants as soon as possible. Plaintiffs must file proof of service no later than Monday, September 12, 2022.

Having denied the request for a temporary restraining order, the Court will treat the motion as a request for a preliminary injunction. Defendants must file a response no later than Monday, September 19, 2022. Plaintiffs may file a reply by Monday, September 26, 2022. After reviewing the briefs, the Court may hold a hearing if necessary.

IT IS SO ORDERED.

Date: September 8, 2022

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/31/2023 8:59:09 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Michigan Trump cases - new scheduling order
Attachments: 20231031 Sch Ord.pdf

New order issued in our cases, hearing moved to 11/9 but definitely happening.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
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(517) 335-7659 (office)

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

Case No. 23-000128-MB

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,

Hon. James Robert Redford

Defendant.

_____/

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

Plaintiffs,

v

Case No. 23-000137-MZ

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

Hon. James Robert Redford

Defendant.

_____/

DONALD J. TRUMP,

Plaintiff,

v

Case No. 23-000151-MZ

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

Hon. James Robert Redford

Defendant.

_____/

SCHEDULING ORDER

Obtained by Judicial Watch, Inc. v. Michigan FOIA

1. The parties are advised these matters have not been consolidated at this time. They are each separate cases; but for purposes of efficiency and because these matters all relate to the Michigan 2024 presidential primary election, the matters—other than as will be indicated below—are being expedited.

2. The Court has previously issued multiple scheduling orders in Cases 23-000128-MB and 23-000137-MZ.

3. Case 23-000151-MZ was filed October 30, 2023. That matter was initially randomly assigned to Chief Judge Elizabeth L. Gleicher but has since been reassigned to Judge James Robert Redford. No previous scheduling orders have been issued in Case 23-000151-MZ.

4. The purpose of this order is to set forth, for the period of the next ten days, the deadlines that will apply and the hearings that will take place.

5. In Case 23-000151-MZ:

a. If defendant has been served with plaintiff's complaint by October 31, 2023:

i. Defendant's answer or otherwise responsive pleading is due by Thursday, November 2, 2023, at 4:00 p.m.

ii. Plaintiff's reply, if any, to defendant's answer or otherwise responsive pleading is due by Monday, November 6, 2023, at 4:00 p.m.

b. If defendant has not been served with plaintiff's complaint by October 31, 2023:

i. Defendant's answer or otherwise responsive pleading is due by Monday, November 6, 2023, at 4:00 p.m.

ii. Plaintiff's reply, if any, to defendant's answer or otherwise responsive pleading is due by Wednesday, November 8, 2023, at 12:00 p.m.

c. Any amicus curiae submission in Case 23-000151-MZ must not exceed twenty (20) pages in length and must be submitted by Tuesday, November 7, 2023, at 4:00 p.m., with copies served on all parties in Cases 23-000128-MB, 23-000137-MZ, and 23-000151-MZ.

6. Regarding hearings on motions, oral arguments, and other proceedings in open court:

a. The Court acknowledges in Cases 23-000128-MB and 23-000137-MZ, in its October 18, 2023 order, it advised the parties oral argument, if any, would likely take place Monday, November 6, 2023.

b. In light of subsequent pleadings and the filing of Case 23-000151-MZ, the Court concludes it is no longer prudent to proceed on Monday, November 6, 2023.

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7. The Court orders that sessions in open court will take place in all three matters on Thursday, November 9, 2023, at the Michigan Court of Appeals courtroom, State of Michigan Building, 350 Ottawa, NW, Grand Rapids, Michigan, as follows:

A. In Case 23-000128-MB, the case will be called at 8:30 a.m., and the matter will be scheduled for two hours, during which the Court will consider any administrative or scheduling matters and will hear oral arguments on any matters then pending.

i. Plaintiff's counsel shall be provided thirty (30) minutes in total to present argument.

ii. Defendant's counsel shall be provided thirty (30) minutes in total to present argument.

iii. Amicus curiae filer Donald J. Trump's counsel shall be provided thirty (30) minutes in total to present argument

iv. Defendant's counsel shall argue first, followed by plaintiff's counsel, followed by amicus curiae filer Trump's counsel. Defendant's counsel may present five (5) minutes of rebuttal argument if preserved.

B. In Case 23-000137-MZ, the case will be called at 11:30 a.m., and the matter will be scheduled for two hours during which the Court will consider any administrative or scheduling matters and will hear oral arguments on any matters then pending.

i. Plaintiffs' counsel shall be provided thirty (30) minutes in total to present argument.

ii. Defendant's counsel shall be provided thirty (30) minutes in total to present argument.

iii. Amicus curiae filer Donald J. Trump's counsel shall be provided thirty (30) minutes in total to present argument.

iv. Defendant's counsel shall argue first, followed by plaintiffs' counsel, followed by amicus curiae filer Trump's counsel. Defendant's counsel may present five (5) minutes of rebuttal argument if preserved.

C. In Case 23-000151-MZ, the case will be called at 2:00 p.m., and the matter will be scheduled for ninety (90) minutes during which the Court will consider any administrative or scheduling matters and will hear oral arguments on any matters then pending.

i. Plaintiff's counsel shall be provided thirty (30) minutes in total to present argument.

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ii. Defendant's counsel shall be provided thirty (30) minutes in total to present argument.

iii. Plaintiff's counsel shall argue first, followed by defendant's counsel. Plaintiff's counsel may be allowed rebuttal argument, but this will be determined on November 9, 2023.

8. The Court notes, in Case 23-000128-MB, plaintiff filed an amended complaint on October 23, 2023. The parties are advised, in Case 23-000128-MB:

a. Counts V, VII, and VIII of plaintiff's proposed Amended Complaint, filed October 23, 2023, WILL NOT BE ADDRESSED ON AN EXPEDITED BASIS. All ordinary and normal schedules and deadlines related to cases in the Michigan Court of Claims shall apply to Counts V, VII, and VIII.

b. The Court will not be addressing Counts V, VII, and VIII in any interim or dispositive orders in this matter until the Court issues interim or dipositive orders in Counts I-IV and VI of plaintiff's Amended Complaint.

9. In-person attendance is appreciated for the court hearings. If parties and counsel are unable to attend in-person, the Court will make available attendance via Zoom.

10. The Court acknowledges that this expedited order will require much additional work and effort by the attorneys of record and the pro se litigant involved in these matters. The Court thanks all counsel and the pro se litigant for their efforts undertaken thus far in these matters and in their efforts to move forward in accordance with this order.

IT IS SO ORDERED.

Date: October 31, 2023

James Robert Redford
Judge, Court of Claims

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/1/2023 3:58:32 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Michigan Trump cases - new scheduling order

We accepted service on Monday.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 1, 2023 10:45 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Michigan Trump cases - new scheduling order

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Thanks. Was Benson served yesterday?

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 31, 2023 at 4:59 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Michigan Trump cases - new scheduling order

New order issued in our cases, hearing moved to 11/9 but definitely happening.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/30/2023 7:42:23 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: Butz v Zelmanski et al - motion to intervene filed yesterday
Attachments: mot01 mtn intervene Butz.pdf; brief01 mtn intervene Butz.pdf; answer01 complaint Butz.pdf; mot01 exhibits01.pdf

Importance: High

From: Meingast, Heather (AG)
Sent: Friday, October 27, 2023 10:57 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; Bourbonais, Lori (MDOS) <bourbonaisl@michigan.gov>; McInerney, Jenny (MDOS) <McInerneyJ1@michigan.gov>; Schaar, Meghan (MDOS) <SchaarM1@michigan.gov>; Lillie, Erin (MDOS) <LillieE@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Butz v Zelmanski et al - motion to intervene filed yesterday
Importance: High

Hi All,

We filed the motion to intervene in the lead FOIA case, Butz v Zelmanski, which is the City of Roseville defendants. The hearing on our motion is November 13 at 10:30 a.m. by Zoom. Will keep you posted.

Heather

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STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

SECRETARY OF STATE JOCELYN BENSON'S MOTION TO INTERVENE AS PARTY DEFENDANT

Michael Lewis Butz, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)
586.596.PII MCL 15.243

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SECRETARY OF STATE JOCELYN BENSON'S MOTION TO INTERVENE AS PARTY DEFENDANT

Secretary of State Jocelyn Benson, by her attorneys, moves this Court to allow her to intervene as a Defendant in this matter and in support of her motion states as follows:

SUMMARY OF PLAINTIFF'S CLAIMS

1. On or about August 23, 2023, Plaintiff Michael Butz filed the instant complaint against Jennifer Zelmanski, Clerk for the City of Roseville, and the City of Roseville (City Defendants), alleging a violation under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

2. Plaintiff's claims stem from a May 2, 2023, FOIA request to City Defendants in which Plaintiff requested "a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023." (Compl, FOIA request, PDF page 8.)

3. Plaintiff requested that the files "be in .CSV or .XLS format." (*Id.*) In making his request, Plaintiff acknowledged that certain information was exempt from disclosure under MCL 168.509gg, including full dates of birth and driver's license information. (Compl, FOIA request, PDF page 8.) Plaintiff asserted that "there should be no other FOIA exempt information in the EPB digital records requested," and that he was not "requesting any software or information which somehow be deemed proprietary." (*Id.*)

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4. Plaintiff asserted in his request that the "EPB .CSV files are an original record and a component of the electronic voting system audit trail," and that "these digital records should be retained" for the applicable federal and state retention periods. *Id.*, citing 52 USC 20701 and MCL 168.811.

5. On May 23, 2023, the City Defendants "denied all portions" of Plaintiff's request pursuant to direction provided by the Secretary of State's Bureau or Elections (Bureau):

> Per the Michigan Bureau of Elections, Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. **MCL 15.243(1)(y).** In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." **MCL 15.243(1)(z).**
>
> Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. **MCL 168.509gg.** Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.
>
> Please contact the Macomb County Clerk for the paper pollbook copies or the Michigan Bureau of Elections for the log file or voter history.

(Compl, 5/23/23 Letter, attached at PDF page 15.) As stated in the denial letter, it is the Bureau's position that the release of the information requested by Plaintiff in the manner sought would result in the release of information exempted from disclosure under MCL 15.243(1)(y) and/or (z) of the FOIA.

6. On June 5, 2023, Plaintiff appealed the denial of his request, which was affirmed on June 13, 2023. (City Defendants' Motion to Consolidate, ¶ 1, Ex D.)

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7. In his Complaint, Plaintiff alleges City Defendants failed to comply with the FOIA by failing to separate exempt from non-exempt materials and by failing to describe the materials exempted. (Compl, ¶ 11.)

8. He alleges that he is entitled to production of the records he sought and that none of the records requested "are exempt from disclosure." (*Id.*, ¶ 12.) Plaintiff requests that the Court order the production of the requested records and award him costs and fees. (Compl, p 4.)

9. Notably, on May 13, 2023, Plaintiff sent a similar FOIA request to the Department of State, Bureau of Elections, for *all* jurisdictions in Macomb County, (Ex 1, 5/13/23 FOIA request):

> I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for each voting jurisdiction within Macomb County for the November 8, 2022 and May 2, 2023 elections. As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.
>
> Below are the specific data elements requested:
> 1. Voter full name (First, Middle, Last, Suffix)
> 2. Voter ID
> 3. Voter number
> 4. Voter ballot number
> 5. Date/time of poll book record entry
> 6. Voter ballot type
> 7. Voter school district code
> 8. Voter birth year
> 9. Precinct
> 10. Action Description
>   a. Issue Regular ballot
>   b. Record AV Ballot
>   c. UNDO: Issue Regular Ballot
>   d. Spoil Ballot
>   e. Add standalone remark

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f. Other?
11. Is Undone (True or False)
12. Unlisted voter name (if applicable)

10. On September 6, 2023, Plaintiff was provided with all responsive, nonexempt information in the Bureau's possession. (Ex 2, 9/6/23 email.)

INTERESTS OF INTERVENOR SECRETARY OF STATE

11. Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2).

12. The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9.

13. Section 21 of the Michigan Election Law makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Further, under § 31, the Secretary "shall do all of the following": "(a). . . issue instructions . . . for the conduct of elections . . . in accordance with the laws of this state," and "(b) [a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(a)-(b).

14. These sections provide the Secretary with broad authority to issue instructions, directions, and advice for the proper conduct of elections and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See, e.g., *Hare v Berrien Co Bd of Election Commr's*, 373 Mich

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526, 531 (1964) (local election board had "duty to follow" the Secretary of State's "instructions" under MCL 168.31); MCL 168.931(1)(h) ("A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.")

15. The federal Help America Vote Act (HAVA) of 2002 provides that "each State . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, . . . computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State. . . ." 52 USC 21083(a)(1)(A). Section 21083(a)(1)(A)(viii) provides that "the computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State."

16. Michigan complied with these requirements long ago when it created the qualified voter file (QVF) as the State's computerized statewide voter registration list. MCL 168.509m(1)(a), 168.509o, 168.509p, 168.509q, 168.509r.

17. MCL 168.509o provides that the "secretary of state shall direct and supervise the establishment and maintenance of a statewide qualified voter file. The secretary of state shall establish the technology to implement the qualified voter file."

18. MCL 168.509r similarly provides that "the secretary of state shall establish and maintain the computer system and programs necessary to the operation of the

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qualified voter file," and that the secretary of state "shall allow each county, city, or township access to the qualified voter file."

19. MCL 168.509p provides for what features the QVF must have, and MCL 168.509q provides for what information must be contained in the QVF.

20. These statutes demonstrate that the QVF, the computer systems and programs used to operate the QVF, the data within the QVF, and who may access the QVF and how they may do so, are under the Secretary's direction and supervision.

21. And as part of her duty to supervise and maintain the QVF, the Secretary and the Bureau of Elections are continually monitoring the security of the system and looking for ways to enhance security measures. (Ex 3, QVF Report, p 6.)

22. MCL 168.668b(1) provides that "[e]ach city or township shall use the electronic poll book software developed by the [state] bureau of elections in each election precinct in the city or township on election day to process voters and generate election precinct reports."

23. Before election day, the cities and townships "shall download the electronic poll book software from the [QVF] software." MCL 168.668b(2)-(3).

24. The electronic pollbooks are then used to process voters and generate precinct reports on election day for that particular election. MCL 168.735. See also Ex 3, pp 3-4.

25. Because the electronic poll books contain software and data downloaded from the QVF, such as a list of registered voters for the jurisdiction, they include sensitive information, such as a voter's date of birth. MCL 168.509q.

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26. Before a subsequent election, local clerks are directed to print a paper copy of the poll book contents for retention under state schedules, MCL 168.799a(4), MCL 168.811, R. 168.790(18)-(19), and federal law, 52 USC 20701, and to then delete the electronic pollbook software and associated files for the previous election from the poll book because it contains personal information and so that the old file is not accidentally accessed during the next election.

27. This is permissible because, even assuming certain electronic records should be retained, the laws do not require that officials retain a record in multiple formats. See, e.g., 52 USC 20701 (requiring election officials to retain, for twenty-two months from the date of an election for federal office, "all records and papers which come into [the officer's] possession relating to any application, registration . . . or other act requisite to voting in such election[.]") Because the voter information from the electronic pollbook is saved in paper form, state and federal retention laws are satisfied.

28. The FOIA Act gives people the right to request copies or to inspect "public records" in the possession of a public body as that term is defined in the Act. See MCL 15.232(i), 15.233(1).

29. The Legislature has expressly provided that certain personal information contained in the QVF is exempt from production in response to a FOIA request. See MCL 168.509gg(1)-(2) (exempting day and month of birth, driver's license or personal identification number, telephone number, digitized signature, and last four digits of social security number).

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30. The Legislature has also provided for specific exemptions in response to requests for public records under the FOIA Act. See MCL 15.243(1)-(2).

31. Relevant here, subsection 13(1) exempts from disclosure:

> (y) Records or information of measures designed to protect the security . . . or the confidentiality, integrity, or availability of information systems . . . including, but not limited to . . . cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of . . . property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.
>
> (z) Information that would identify . . . or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software. [MCL 15.243(1)(y), (z).]

32. FOIA requests similar to Plaintiff's, although perhaps not as precise, began circulating in 2022 and continued into 2023.

33. In reviewing these FOIA requests for electronic poll book data, the Bureau determined that the production of the requested information in the manner requested by the local clerks would result in the release of sensitive information entitled to exemption under subsection 13(1)(y) and (z).

34. Again, the Secretary of State exercises supervisory control over local clerks in the performance of their election-related duties, MCL 168.21, which duties include safeguarding election-related information. Further, she exercises this control, in part, through the issuance of directions and instructions to these officials. MCL 168.31(1)(a)-(b).

35. Pursuant to this authority, the Bureau of Elections sent a communication to all clerks on November 14, 2022, advising the clerks to consult with their attorneys

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about the FOIA requests and the application of exemptions, including subsections 13(1)(y) and (z). (Ex 4, 11/22/22 email). The communication noted that the Bureau had not disclosed this information pursuant to those exemptions. (*Id.*)

36. However, because FOIAs continued to be made to jurisdictions, and the Bureau became aware that a few jurisdictions provided records in response to these requests, it was compelled to send another communication to all clerks reminding them that sensitive data must not be disclosed and that these requests should be re-directed to the Bureau:

> We are aware that clerks have recently received additional requests for epollbook (epb) data. Requests for epb data must be directed to the Bureau, to ensure that sensitive information related to both individual voters and the epb are removed before public disclosure of otherwise available information. As stated in our November 14, 2022 email (link below for your convenience), clerks must not publicly release data or files that would reveal the software design or data architecture of the epb, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. The requested file contains proprietary software information, security feature information, and personal identifiable information for voters. [Ex 5, 5/10/23 email.]

37. The Bureau noted that disclosure of the information could compromise the electronic poll books:

> The disclosure of security and technical information is exempt from FOIA and may not be properly redacted if the file is produced by an individual clerk instead of the Bureau. Additionally, the file contains sensitive information regarding your epb laptop(s) that might require you to purchase a new laptop for each precinct if you disclose this information to a 3rd party. The disclosure of sensitive information compromises the integrity of Michigan's elections and may warrant referral for investigation.
>
> If you receive a FOIA request for epb data, the requestor can be directed to the county clerk for paper pollbook copies or to BOE for the log file or voter history. [*Id.*]

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38. Upon information and belief, most jurisdictions, including those sued by Plaintiff, followed the Bureau's directions and denied the FOIA requests for the electronic poll book data.

39. The Secretary, as the chief election officer, has an interest in Plaintiff's claims that the officials whom she supervises, and who were instructed by the Bureau to decline to produce the requested data, wrongfully withheld this information in response to Plaintiff's FOIA requests.

40. As demonstrated above, the QVF, the software systems and programs used to operate the QVF, the data within the QVF, and who may access that data, are under the Secretary's direction and supervision.

41. The same is true when software and data from the QVF is downloaded into the electronic poll books used by the cities and townships to conduct elections on election day.

42. The Secretary has a duty to ensure the security and integrity of elections in Michigan. This includes taking action to prohibit unauthorized individuals from obtaining access to software design or data architecture of the electronic poll book, and where the requested files contain proprietary software information, and security feature information.

43. Plaintiff continues to maintain he has a right to the production of this sensitive information under the FOIA Act. But instead of pursuing claims against the Secretary, who is the gatekeeper of this information, Plaintiff instead seeks to compel the production of this information through the officials the Secretary

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supervises. As a result, the Secretary is compelled to seek intervention in this matter.

STANDARDS FOR GRANTING INTERVENTION

44. MCR 2.209(A) and (B) govern intervention and provide, in relevant part:

> (A) Intervention of Right. On timely application a person has a right to intervene in an action . . . .
>
> (3) when the applicant claims an interest relating to the . . . transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. . . .
>
> (B) Permissive Intervention. On timely application a person may intervene in an action . . . .
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

45. MCR 2.209(A)(3) "should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612 (2009). However, "MCR 2.209(A)(3) and (B) both condition intervention on timely application." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 379 (2019). A party seeking to intervene must be diligent. See *Sch Dist of Ferndale v Royal Oak Twp Sch Dist No 8*, 293 Mich 1, 11 (1940). That is, "[g]enerally, a right to intervene should be asserted within a reasonable time[.]" *Karrip v Cannon Twp*, 115 Mich App 726, 731 (1982).

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46. For purposes of MCR 209(A)(3), the court rule permitting intervention should be liberally construed "to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492 (1996). "[T]he concern of inadequate representation of interests need only exist; inadequacy of representation need not be definitely established. Where this concern exists, the rules of intervention should be construed liberally in favor of intervention." *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 762 (2001).

47. The Secretary is entitled to intervene as of right or should be granted permissive intervention in this case.

48. Here, the Secretary plainly has an interest in the transaction that is the subject of this case and is so situated that the disposition of the action may impair or impede her ability to protect that interest, and her interests will not be adequately represented by the City Defendants.

49. The City Defendants properly denied Plaintiff's FOIA request consistent with the Bureau's directions, and the Secretary anticipates that the City Defendants will vigorously defend their denial in this case.

50. However, the case will likely turn on the application of the exemptions invoked under MCL 15.243(1)(y) and (z). Because the software and programming of the QVF and the electronic poll books is designed and maintained by staff at the Department of State with support from the Department of Technology, Management and Budget, the City Defendants will not have access to information

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or potential witnesses to support a defense that the FOIA exemptions were properly invoked in this case.

51. The Secretary, of course, has access to this information and witnesses and thus is in a better position to defend against the claims in this case than the City Defendants.

52. Regarding permissive intervention, the Secretary's defenses to this litigation will share at least some common questions of law or fact with the City Defendants. Indeed, the Secretary will likely make several of the same arguments the City Defendants make that Plaintiff's FOIA request was properly denied.

53. As for timing, the Secretary has been diligent in bringing her motion. While the Secretary was aware of this case and the other consolidated cases, had received some of the pleadings, and was monitoring the cases, for practical and logistical reasons the Secretary determined it was best to wait to intervene until the motion to consolidate the cases was resolved and a lead case determined.

54. This Court granted consolidation in an order dated October 2, 2023, and the Secretary's instant motion to intervene comes a mere __ days following that order.

55. Further, no dispositive motions have been filed and no discovery has commenced in this case. Permitting the Secretary to intervene at this juncture will not delay the case or prejudice the named parties.

56. The Secretary sought concurrence in the instant motion to intervene from the City Defendants, who concur in the motion. The Secretary sought concurrence from

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Plaintiff via email on October 26, 2023; however, Plaintiff had not yet responded to this request by the time of filing.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Secretary of State Jocelyn Benson respectfully requests that the Court enter an order granting her motion to intervene as a Defendant in this matter under MCR 2.209(A) or (B).

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Proposed Intervenor-Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

Dated: October 26, 2023

PROOF OF SERVICE

On October 26, 2023, I electronically filed the foregoing papers with the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Heather S. Meingast
Heather S. Meingast (P55439)
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Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN SUPPORT OF MOTION TO INTERVENE AS PARTY DEFENDANT

Michael Lewis Butz, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)(a)
586.596. PII MCL 15.243

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Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

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SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN SUPPORT OF MOTION TO INTERVENE AS PARTY DEFENDANT

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Secretary of State Jocelyn Benson, by her attorneys, moves this Court to allow her to intervene as a Defendant in this matter for the reasons stated in the accompanying motion.

Secretary of State Jocelyn Benson respectfully requests that the Court enter an order granting her emergency motion to intervene as a Defendant in this matter under MCR 2.209(A) or (B).

/s/Heather S. Meingast
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Dated: October 26, 2023

PROOF OF SERVICE

On October 26, 2023, I electronically filed the foregoing papers with the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Heather S. Meingast
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Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

and

JOCELYN BENSON,

Intervenor-Defendant.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

INTERVENOR-DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S ANSWER TO COMPLAINT

Michael Lewis Butz, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)
586.596.PII MCL 15.243

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_____/

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INTERVENOR-DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S ANSWER TO COMPLAINT

Proposed Intervenor-Defendant Secretary of State Jocelyn Benson, by her attorneys, answers Plaintiff's Complaint as follows:

1. Defendant neither admits nor denies paragraph 1 being without sufficient information to form a reasonable belief thereto.

2. Admitted.

3. Defendant neither admits nor denies paragraph 3 being without sufficient information to form a reasonable belief thereto.

4. Defendant neither admits nor denies paragraph 4 as the allegations are legal conclusions which require no response.

5. Defendant neither admits nor denies paragraph 5 the letter speaks for itself.

6. Defendant neither admits nor denies paragraph 6 being without sufficient information to form a reasonable belief thereto.

7. Defendant neither admits nor denies paragraph 7 as the allegations are legal conclusions which require no response.

8. Defendant neither admits nor denies paragraph 8 as the allegations are legal conclusions which require no response.

9. Defendant neither admits nor denies paragraph 9 as the allegations are legal conclusions which require no response.

10. Defendant neither admits nor denies paragraph 10 as the allegations are legal conclusions which require no response.

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

11. Defendant neither admits nor denies paragraph 11 as the allegations are legal conclusions which require no response.

12. Denied.

13. Defendant neither admits nor denies paragraph 13 as the allegations are legal conclusions which require no response.

14. Defendant neither admits nor denies paragraph 14 as the allegations are legal conclusions which require no response.

15. Denied.

AFFIRMATIVE DEFENSES

1. Failure to state a claim upon which relief may be granted. Plaintiff has failed to plead a basis for entitlement to records requested and has mischaracterized duties owed pursuant to applicable statutes.

2. Exemptions preclude entitlement to records under MCL 15.243(1)(y) and (z).

3. That no proper claim is asserted for violations of State or Federal retention requirements and such statutes further provide no remedy for enforcement by Plaintiff.

4. Plaintiff's claims are moot, having received the information requested from the Secretary of State's Bureau of Elections.

5. Defendant reserves the right to amend and add further affirmative defenses as may be disclosed through further investigation and discovery.

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Intervenor-Defendant Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: October 26, 2023

PROOF OF SERVICE

On October 26, 2023, I electronically filed the foregoing papers with the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Heather S. Meingast
Heather S. Meingast

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

SECRETARY OF STATE JOCELYN BENSON'S EXHIBITS TO 10/26/2023 MOTION TO INTERVENE AS PARTY DEFENDANT

SECRETARY OF STATE JOCELYN BENSON'S EXHIBITS TO 10/26/2023 MOTION TO INTERVENE AS PARTY DEFENDANT

EXHIBITS TO MOTION

Respectfully submitted,

/s/ Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Proposed Intervenor-Defendant Benson
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Dated: October 27, 2023

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PROOF OF SERVICE

On October 27, 2023, I electronically filed the foregoing papers with the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Heather S. Meingast

Heather S. Meingast (P55439)
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Assistant Attorney General
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Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 1

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

MDOS-FOIA

From: Michael Butz <mbutzsr@gmail.com>
Sent: Saturday, May 13, 2023 5:29 PM
To: MDOS-FOIA; foia@macombgov.org
Subject: FOIA Request for Electronic Poll Book public records for 11/8/2022 and 5/2/2023 Elections

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Greetings,

I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for each voting jurisdiction within Macomb County for the November 8, 2022 and May 2, 2023 elections. As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.

Below are the specific data elements requested:

1. Voter full name (First, Middle, Last, Suffix)
2. Voter ID
3. Voter number
4. Voter ballot number
5. Date/time of poll book record entry
6. Voter ballot type
7. Voter school district code
8. Voter birth year
9. Precinct
10. Action Description
    a. Issue Regular ballot
    b. Record AV Ballot
    c. UNDO: Issue Regular Ballot
    d. Spoil Ballot
    e. Add standalone remark
    f. Other?
11. Is Undone (True or False)
12. Unlisted voter name (if applicable)

This request includes absentee voter counting boards within Macomb County.

I recognize that the Electronic Pollbook contains personal information that is exempt from disclosure per MCL168.509gg such as driver's license number, day of birth and month of birth. Please redact this information as is required in fulfilling this request.

Please understand that I have no desire to obtain any details relating to cybersecurity plans, cyber security methods, voting software coding, voting software infrastructure, voting software configuration

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

or anything else specific to voting software in use for these elections with this specific FOIA request. I seek only the information contained within the Electronic Poll Book related to the elections for November 8, 2022 and May 2, 2023.

Don't hesitate to contact me if it is necessary to refine or clarify this request any further.

Please be advised that I have carbon copied additional persons on this request.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(
(586) 596PII MCL 15.243(1)
PII MCL 15.243(1)(a)@gmail.com

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 2

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

FREEDOM OF INFORMATION ACT NOTICE

September 6, 2023

Michael Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1

Via Email: PII MCL 15.243(1)(a) ***@gmail.com***

Michael Butz:

The Michigan Department of State (Department) has finished processing your request for records received via email on May 13, 2023, made pursuant to the Michigan Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231 *et seq*. A request sent electronically is considered received on the business day following its transmission; here, May 15, 2023, with an extension sent for a due date of June 5, 2023. MCL 15.235(1). This notice is issued in response to your request, a copy of which is enclosed and incorporated herein.

Your request seeks *"...Electronic Poll Book for each voting jurisdiction within Macomb County on November 8, 202 and May 2, 2023"*.

The Department has received your full non-refundable processing fee in the amount of **$193.72**. The information is provided on the enclosed encrypted flashdrive. The password will be sent separately.

If you have any questions, please contact me. The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/sos, under the "FOIA" tab at the bottom of the page.

Sincerely,

Sherri Hines

Sherri Hines
FOIA Coordinator
Bureau of Elections
BOERegulatory@michigan.gov

Enclosures

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Freedom of Information Act Detailed Itemization of Fees

FINAL

Date: September 6, 2023 **Request ID: 628**

Michael Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1
PII MCL 15.243(1)(a)@gmail.com

PAID

Cashier: Please email *BOERegulatory@michigan.gov* when fees are received.

DESCRIPTION	QUANITY	UNIT COST	AMOUNT
Labor costs* to search, locate, and examine** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	2	$55.09	$ 110.18
Labor costs* to search, locate, and examine** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	1	$33.33	$33.33
Labor costs* for review and separation of exempt from non-exempt material**	0.5	$55.09	$ 27.55
Non-paper physical media - encrypted flash drive	1	$6.00	$ 6.00
Duplication and publication (copying, scanning, etc.)		$0.10	$ -
Labor costs* to duplicate or publish** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	0.5	$33.33	$ 16.67
Mailing padded pouch and postage		$9.90	$ -
SUBTOTAL			$ 193.72
DEPOSIT RECEIVED			$ 193.72
TOTAL BALANCE DUE			$ -

Make check payable to State of Michigan and mail to: Michigan Department of State, Cashier Unit, 7064 Crowner Drive, Lansing, MI 48918

*Labor costs will be calculated using the lowest paid Department employee capable of each task. If more than one hourly rate is used, each will be listed on other copies of this form.

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EXHIBIT 3

Document received by the MI Macomb 16th Circuit Court.

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Michigan Qualified Voter File
2023 Report to Legislature

Introduction

Michigan election law (MCL 168.509n) requires the Secretary of State to submit a report on the status of the Qualified Voter File (QVF) to the State Legislature each odd-numbered year. The report must include:

1) "Information on the efficiency and effectiveness of the Qualified Voter File as a voter registration system."

2) "Any recommendations of the Secretary of State for amendments to this act to increase the efficiency and effectiveness of the Qualified Voter File as a voter registration system."

This report provides a status update on QVF voter registration system elements. Michigan's election officials have now used the QVF system for 16 full federal election cycles. The productive partnership of state and local election officials has allowed the QVF to evolve beyond the initial implementing legislation's high expectations of an interactive statewide voter file, to a diverse election administration module used to support both election official and voter needs, along with legally mandated changes and new security protocols.

Background: The Michigan Qualified Voter File

Legislation to create the QVF was enacted to enhance the security and integrity of Michigan's voter registration system and to provide procedural uniformity and cost savings throughout the state. The National Voter Registration Act of 1993 greatly heightened the need for a statewide voter registration system as Michigan's cities and townships were required to absorb increased voter registration file maintenance costs, cope with new and highly detailed voter registration file maintenance procedures and confront a sharp increase in unnecessary voter registration transactions due to overlapping voter registration programs.

PA 441 of 1994 required the Secretary of State to establish and maintain a statewide Qualified Voter File (QVF) system. Placed in operation in 1998, the QVF is a distributed database that ties Michigan's city and township clerks to a fully automated, interactive statewide voter registration file to achieve a wide variety of significant advantages including the following: 1) the elimination of duplicate voter registration records in the state; 2) the streamlining of the state's voter registration record maintenance process; 3) the elimination of registration forwarding errors; and 4) the elimination of duplicative voter registration processing tasks. The QVF is Michigan's sole voter registration system and is used to conduct every election in Michigan.

Each voter registration transaction (including existing registrations with a change of address) executed in a Secretary of State Branch Office is electronically forwarded to the appropriate local election official. A digitized version of the voter's signature is also electronically transmitted into the QVF and is available to the appropriate election official.

The QVF has long been nationally recognized for the innovation and efficiency of its design. Michigan's Qualified Voter File system was cited as a "best practice" in managing voter registration records under the Caltech/MIT Voting Technology Project (*Voting What Is What Could Be*; released July 2001) and was highlighted as an "outstanding model" under the report issued by the National Commission on Federal Election Reform (*To Assure Pride and Confidence in the Electoral Process*; released August 2001).

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Michigan's QVF system served as the inspiration for the statewide voter registration system requirements enacted under the Help America Vote Act of 2002 (HAVA). All states were required to create voter registration systems with QVF functionality.

Current Status of the QVF Application

Beginning in 2013, the Bureau of Elections (BOE) began drafting requirements for a new QVF System (referred to as QVF Refresh) to make the distinction between the original QVF (Legacy) and the new system. QVF Refresh was a complete re-write of the original QVF Legacy system. Following a long period of requirements gathering, the Bureau of Elections (BOE) began working collaboratively with the Department of Management, Technology, and Budget (DTMB) to begin the development work of modernizing the voter registration system into a new language and on a real-time, web-based platform.

In late 2017, the clerk-facing portion of the development was complete, and the new Refresh software was piloted by a small advisory group of clerks. Upon the successful completion of the pilot, the new voter registration system was rolled out statewide beginning in February of 2018. Refresh modernized the voter registration system utilizing much of the original QVF functionality, with numerous enhancements requested by local election officials. Most notably, the new system was built in a normalized structure which updates data in real time (the prior system was updated nightly in batch mode).

During the 2018 election year, QVF Refresh was used by approximately 75% of all jurisdictions as their voter registration system in the State of Michigan. The remaining clerks chose to use QVF Legacy for the 2018 election cycle one last time. Since the 2020 election year, every Michigan election official has used the QVF Refresh system to manage the elections conducted in their respective jurisdictions.

In 2019 and 2020, QVF was further updated to implement multiple changes brought by the legislative enactment of online voter registration and the passage of statewide proposal 2018-3. The major focus for this system update was to implement changes in voter registration deadlines, including the implementation of Election Day registration. A focused training program was also developed and delivered on these changes, which were implemented for elections in the 2019-2020 election cycle. In both the 2019-2020 and 2021-2022 election cycles, BOE implemented performance upgrades to allow QVF to handle a higher volume of usage and data requests.

Currently, BOE is working to update QVF with functionality for a Permanent Ballot list, the ability to provide electronic notification for ballot tracking, and the creation of an early voting Electronic Poll Book to accommodate requirements of Proposal 22-2.

QVF Software, Equipment, and Support

The QVF application provides support for the diverse user needs of 1,520 jurisdictions and 83 counties within the state.

- *QVF Software:* All clerks and their staff are provided with secure access to the QVF to ensure that they can administer elections and maintain their voter registrations following a state-provided training class instructing users on the software. While most clerks perform their own voter registration updates and maintenance tasks, some cooperatively work with their county clerk who takes the responsibility for updating the records. All Secretary of State branch office voter registration transactions are electronically transmitted to the local jurisdiction's "inbox" located in the software. Transactions initiated directly through the clerks' offices and other voter registration programs (e.g., third-party voter registration drives, main in voter registrations) are manually entered into the software.

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- *County and Local Jurisdiction QVF Equipment*: The state originally provided all 83 counties and 296 of Michigan's largest cities and townships (voting age population (VAP) over 5,000) with QVF hardware. Later, jurisdictions not in the original group requested access to the QVF with the understanding that they would provide their own equipment and maintenance for their equipment. As the original state-delivered equipment has aged and been decommissioned, counties and jurisdictions are now maintaining, upgrading, and purchasing their own equipment. The decommissioning process of the state provided equipment was completed in 2023. Jurisdictions who originally provided their own equipment continue to upgrade it as is necessary. BOE is continuing to develop alternative emergency contingency plans in the event of equipment or technical failure.

- *QVF Help Desk Technical Support:* Technical support is provided to clerks by a dedicated staff team in BOE, the Training & Election Assistance Support team. This team's primary focus is to support the QVF through a variety of methods including phone calls and emails; training programs delivered through our online eLearning system, videos, and in-person instruction utilizing hands-on learning. The team travels to a variety of locations across the state to provide training and support clerks and their staff in the use of the QVF. Additional cross-training has also occurred within BOE to expand the staff support available, which has added a tremendous value in the ability of BOE to support all users of the application and accommodate their diverse needs. The development of additional training programs and resources is underway to accommodate the requirements of Proposal 22-2. BOE anticipates the need for increased staffing resources to support QVF users with 22-2 requirements.

Voter Registration Applications Derived from the QVF System

- *Michigan Voter Information Center:* The Michigan Voter Information Center website (MVIC – www.michigan.gov/vote) is the primary information source for Michigan voters related to voter registration and voting. In 2019 and 2020, MVIC underwent modernized design improvements that offered a simpler and more user-friendly look while also containing all of the most pertinent information voters need related to the voting process. Additionally, mapping tools were modernized to assist voters in finding their clerk's office and/or polling location. MVIC functionality includes clerks' regular business and pre- election weekend office hours when voters can register in-person with the clerk (a new requirement of Proposal 2018-3). For the elections conducted in 2020, MVIC also included the locations and hours of satellite clerk office locations. Data presented on the website is fully populated by the QVF system. For elections conducted in 2022, MVIC included locations for absent voter ballot drop boxes. This functionality will be continued and expanded now that all jurisdictions must maintain absent voter ballot drop boxes. BOE also anticipates that MVIC will provide information for early voting locations. New MVIC functionality allows voters to update or cancel their voter registration if they have received a National Voter Registration Act notice. In addition, a preview of ballots is now available.

  The public-facing website continues to provide answers for voters and the general public on a host of questions related to voter registration and elections. This is a valuable resource for a variety of voter questions including voter registration status, clerk contact and location information, the voter's polling location address and map, the voter's absent voter (AV) ballot request and delivery status, and a preview of the voter's unique ballot sample for upcoming elections, among other information.

- *Electronic Poll Book (EPB):* BOE created an electronic version of the standard Poll Book for use in precincts on Election Day using QVF data. The EPB combines the precinct list and poll book into a single computer application that runs on a standard laptop, which is not connected to the Internet in the precinct on Election Day. The EPB allows precinct workers to scan a voter's driver's license which brings up the voter's record. In a single action, the precinct worker confirms the voter's qualifications to vote, issues a ballot and updates

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voting history. At the end of the day, the EPB automatically summarizes data (ballots, issues, ballots cast, etc.) and creates a voter list; functions which greatly assist precinct workers in completing their precinct canvass on Election Night. The EPB automates voter processing and assists precinct workers through the process which adds efficiencies and accuracy to the former manual process.

The Bureau of Elections used available HAVA funds to purchase EPB laptops for jurisdictions. PA 614 of 2018 requires all jurisdictions to use the EPB system for all elections. The QVF Refresh version was used statewide beginning with the August 2019 election. The EPB software was also rewritten to interact directly with the new QVF Refresh application and has been modernized to further guide and assist clerks. In advance of 2022 elections, BOE implemented additional security features for EPB software and equipment. BOE is developing an updated version of the EPB software to accommodate the needs of Early Voting.

- *Online Voter Registration*: The Bureau of Elections implemented online voter registration in 2019. To use the online voter registration portal, voters must have a Michigan driver's license or state ID. Eligible users enter their information into the online voter registration portal on MVIC. If the user is already registered to vote, QVF populates the online voter registration portal with the voter's current registration information and the voter has the opportunity to update the voter's registration address. If the user is not currently registered, the user has the opportunity to register to vote. The voter registration information is automatically added to or updated in QVF.

  As part of online voter registration implementation, the Bureau of Elections developed an application programming interface (API) that allows organizations conducting voter registration drives to collect voter registrations electronically and submit them to the online voter registration portal. To be registered, the application must contain all required fields including driver's license or state ID number and last four digits of social security number. Organizations can also obtain custom URLs that allow them to direct individuals to the online voter registration portal so the applicant may complete the applications there. Use of either tool requires an agreement to comply with required security and data standards.

- *Automatic Voter Registration*: Automatic voter registration was enacted in Proposal 2018-3. Under automatic voter registration, SOS customers are registered to vote as part of driver's license and state ID transactions unless they affirmatively decline to be registered. QVF automatically receives registration information, including signature, electronically as part of qualifying transactions.

File Maintenance Measures

Voter file maintenance is typically more active in odd years. Federal law prohibits systematic voter list maintenance within 90 days of a federal election, leaving few windows of time to conduct this maintenance prior to primary and general federal elections, especially in presidential election years with a separate presidential primary. In 2023, significant voter list maintenance has been conducted. Nearly 100,000 registrations were cancelled in March 2023 because the voter no longer lives at the registration address. Either these individuals surrendered a Michigan driver's license to another state, or an election official received election mail returned as undeliverable or other information giving reason to believe the voter had changed their address. These records belonged to voters who had previously been sent notices and who had not voted in at least two federal election cycles. Additional voter list maintenance has been conducted that will result in a substantial number of additional cancellations after the 2024 election. There are approximately 400,000 voter registrations currently slated for cancellation in 2025. This number is higher than prior years because the Department of State sent election mail to every registered voter in 2020, and for those whose mail was returned as undeliverable, the state sent a notice of cancellation prior to the 2022 election. No statewide election mailing had been conducted in the previous decade. In connection with these efforts,

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the Bureau of Elections is increasing utilization of MVIC, providing more information to voters and the public about the voter cancellation process and providing mechanisms by which voters who have received cancellation notices can respond.

- *Out of State (OOS) Voter Notices:* Beginning in 2012, BOE began handling the federally-required voter notice program when the Department receives information that a voter may have moved to another state. Previously, local jurisdictions were responsible for noticing the voter at their Michigan address and then marking the QVF software according to the response from the voter. As voters apply for a driver's license in another state, they surrender their Michigan license; once notified by another state, Michigan's driver's license file is marked with an indicator that the voter has applied for a license out of state. This information is then transmitted to the QVF file, which is then used to generate notices to these voters, asking them to confirm their voter registration status in Michigan. Voters who confirm they still reside in Michigan for voting purposes remain registered to vote, while voters who confirm they have moved out of state have their registrations cancelled.

  Records are marked accordingly, depending on whether the voter confirms their residency for voter registration purposes in Michigan or another state, or, if after the passage of at least two federal elections without any voter activity, these records are marked as canceled. In 2021, MVIC functionality expanded to allow a voter to respond to this notice either online or via mail.

- *ERIC Program:* Changes to state law enacted in 2018 (PA 126 of 2018) authorized and required the Department of State to participate in a recognized multistate program to assist in the verification of voter registration data. In early 2019, the Department became a participating member of the Electronic Registration Information Center (ERIC) Program, currently a 29-state partnership that uses a secure data-matching tool to share data between states and improve the accuracy and efficiency of state voter registration systems. In 2020, the Department utilized this program to communicate with eligible but unregistered voters to provide them the opportunity to register to vote. In 2021, the Department is using ERIC data to identify voters who appear to have registered in other states. The voters will be sent a confirmation notice and, if they do not respond, cancelled after two federal election cycles, in the same manner as voters who received out of state voter notices.

- *Election Mail Returned Undeliverable*: Election mail returned by the U.S. Postal Service as undeliverable serves as initial reliable information that a voter has moved, which can be used to begin the process of cancelling a voter after notice and the required waiting period. Election officials use election mail (such as a notice of a new precinct assignment) that has been returned as undeliverable to initiate the voter cancellation process. For absent voter ballot applications sent by the Bureau of Elections and returned as undeliverable, clerks have the option of sending notices themselves or requesting that the Bureau of Elections send the notices on their behalf.

- *Inactive Voter File:* In August of 2012, changes to the Michigan Election Law, specifically MCL 168.509r, were enacted for the purpose of creating an Inactive Voter File (IVF) within the QVF. The Inactive File includes voters who have not voted in six or more years and those who have not responded to a confirmation notice from the state or local jurisdiction. Local election officials are authorized to use totals of active voters only when revising precinct boundaries (i.e., a single precinct may not contain more than 2,999 active registered voters) and when ordering ballots for statewide elections – both of which may result in cost savings for local jurisdictions. Note: Inactive voters still show up on precinct lists and are eligible to vote.

- *Deceased Voters*: Voters who die are identified and removed from the QVF in a variety of ways. The Michigan Department of State uses death data from the U.S. Social Security Administration and Michigan Department of Health and Human Services to cancel voter

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registration records. The Department also received death data through the ERIC program. County clerks have long used death records to identify registered voters who have died and provide this information to local clerks; legislation passed in 2022 updated this process to allow county clerks to add this information to the QVF for review and cancellation by local clerks. City and Township clerks may also cancel voter registrations of deceased individuals based on personal knowledge such as an obituary or notification from next of kin. Since 2019, more than 400,000 registrations of deceased individuals have been cancelled.

Security

- When the QVF software was introduced in 2018, it was designed with increased security measures in mind to ensure that the voter registration system is protected to the highest degree. Notable changes were built into the development of the new system to increase security with respect to establishing authorized users, user access privileges and procedures, user roles, edits/controls, troubleshooting, and communication of technical system details, among other things.

- The QVF system is continually monitored and protected at several levels, with assistance from DTMB and the State's cyber security office. Additionally, the Department has worked with DTMB and other outside experts to fully assess the QVF system for potential security vulnerabilities, including penetration testing. Ongoing plans are in place to continue to assess and monitor the QVF, to identify and resolve any emerging security vulnerabilities.

- Additional efforts are underway to continually communicate with and train local election officials on current and updated security requirements and cybersecurity best practices. Utilizing federal HAVA funds, the Department has conducted cybersecurity vulnerability assessments of major election system components along with election security training exercises and workshops with local election officials.

- In the 2019-2020 election cycle, the Bureau of Elections began implementing Multi-Factor Authentication (MFA) for QVF users. All QVF users must now use MFA when logging into QVF. Users have the option of using a built-in security token on a smartphone or using a physical MFA token.

QVF Communication and Collaboration with County and Local Election Administrators

- *News Updates:* The Bureau of Elections offers weekly communications to election administrators statewide with regular updates on the Qualified Voter File. All software updates and key election administration issues are communicated regularly through this method.

- *Release Notes:* The latest software release notes are communicated regularly in the software under a heading of "Release Notes" for easy accessibility and secure reference by our users. The Bureau maintains a running list of the history of software releases over the course of the months and years for their reference.

- *QVF Training:* The QVF reference manual with accompanying videos are also placed directly in the software for quick and secure reference by users. Short videos were also produced which provide quick and easy reference for users as they interact with the software and perform specific processes. During the COVID-19 pandemic, the Bureau of Elections also developed an online QVF training module to replace in-person training.

- *Banners and Smart Banners:* General banners are displayed in the QVF software and are listed at the top of every screen when there is a quick message that needs to be communicated to all users. In addition, Smart Banners are displayed to specific groups of

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users to communicate reminders that apply to only certain groups.

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- *Email:* BOE also communicates information to clerks by utilizing their official email address, especially where small subgroups need to be communicated to directly.

- *QVF Clerk Advisory Group:* The Bureau of Elections works collaboratively with a QVF Clerk Advisory Group to obtain regular feedback, ensure that the software functionality and performance is streamlined and remains a beneficial program to assist them throughout the voter registration and election administration processes. The Bureau works regularly with this group of clerks to gain their feedback and understand their needs as the Bureau provides new functionality or improves existing software processes. In-person meetings of this group were discontinued due to COVID, but the Bureau has begun soliciting input as part of Proposal 22-2 implementation and plans to expand this process going forward.

QVF System Support in the Bureau of Elections

The Bureau of Elections has a team dedicated to the QVF application for software support, maintenance, and the educational and training needs of our election officials and staff. Software developers maintain, enhance, and modernize the complex QVF software as required by law, requested by the election community, and scheduled as improvements. The Training & Election Assistance team and other BOE staff dedicated to data analytics duties and maintenance of the statewide street index (used to assign specific voting districts to voters) assist QVF users, resolve data issues, and ensure the integrity of QVF data is optimized.

- *Software Maintenance and Development:* BOE staff involved in software maintenance and development work collaboratively with DTMB, as well as contracted vendors, to ensure that the QVF keeps pace with user needs, emerging security needs, technological innovations, and changes in the governing laws. These staff continue to have primary responsibility for the ongoing improvements and maintenance of the QVF system.

- *Training & Election Assistance:* In addition to the technical support described above, the Training & Election Assistance team trains clerks in a variety of ways throughout the state. The entire training curriculum was revamped in late 2017 and early 2018 to include hands-on instruction with scenarios so that users can better experience the software. Additionally, the training model was changed from only small, in-person training classes in Lansing, to presentation-style classes held throughout the state that can accommodate much larger groups. The Training & Election Assistance team offers continuous QVF hands-on training throughout Michigan utilizing computer labs generally held at state facilities, intermediate school districts or community colleges. The Bureau also provides users with an "Interest Tracker" function in the online eLearning center where clerks can communicate their individual training needs, find preferred locations and dates, and sign up for training sessions that best fit their needs. The Training & Election Assistance team will be overhauling and expanding the training curriculum to include software changes because of Prop 22-2 and other enhancements.

  The Training & Election Assistance team has also begun providing support at the various clerk association conferences, such as the Michigan Township Association and the Michigan Association of Municipal Clerks, who meet multiple times yearly. Through these venues, QVF support staff can serve multiple clerks in both group and individual sessions, sometimes over multiple days. Often, these sessions can be more targeted based on the clerks' requests and the latest and most pertinent updates to the system.

- *Data and Programs Support:* A dedicated Data and Programs support team is responsible for researching and reconciling voter data issues and maintaining the integrity of the QVF data. Their efforts consist of working with data generated from both the SOS branch offices and from local jurisdictions entering

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information. They also analyze and report on various data configurations derived from the QVF and provide informational reports to the clerk community and other interested parties.

- *Street Index Maintenance*: Bureau of Elections Staff has the responsibility for updating and maintaining the QVF street index. The QVF street index is the backbone of the statewide voter registration system, and it maintains all official street names and their corresponding address ranges, zip codes, and election geography. The Bureau is currently researching the impacts of updating the current tabular street index model with a geospatial environment.

- *Redistricting and the County Commissioner District Tool:* In 2022, Bureau of Elections Staff worked with clerks to update QVF statewide to reflect changes to State House, State Senate, U.S. Congress, County Clerk, precinct, and numerous other types of districts. This was a very large-scale undertaking conducted on a compressed timetable because of the delay in U.S. census data. There are approximately 3 million distinct addresses for approximately 8 million registered voters in QVF. If any voter's district assignment or number for any office or district was changed, the record needed to be updated. To accomplish this task, BOE dedicated substantial task resources and leveraged technological solutions, including the use of batch data updates, and leveraging geospatial data where available. BOE also developed a county commission redistricting tool to allow counties to update their commission districts more quickly, accurately, and effectively.

Legislative Recommendations

The Department of State is mindful of bills currently pending in the State Legislature that would impact the operations of the Qualified Voter File. The Department's views on specific legislation have been communicated to legislators through the Department's legislative liaison.

With regard to the specific issues of voter registration and the QVF, the Department recommends legislation to address the following issues:

- Methods of contacting and eventually cancelling the registrations of inactive voters who have not otherwise been identified through a surrendered driver's license, the ERIC program, returned mail, or a death record. The Department has supported legislation to notify and initiate voter cancellation of voters who have not cast ballots for 20 years, provided adequate notice is provided and implementation is practical.

- Methods of contacting and correcting (or otherwise eventually cancelling the registrations of) voters whose registration records contain a "placeholder birthdate" because the voter's actual birthdate is not known. The Department has supported legislation to notify and correct, or otherwise initiate voter cancellation of, voters for whom the birthdate is unknown, provided adequate notice is provided and implementation is practical.

- Providing ongoing funding for security measures to ensure the integrity of the QVF, including periodic security upgrades and multifactor authentication. Currently this work is being funding using federal HAVA grants, but these are one-time grants and similar funding is not guaranteed going forward.

- Elimination of the requirement of a physical voter Master Card. This requirement is outdated, and the information can be maintained electronically.

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- Updating the size requirements of the Voter Identification Cards to allow for easier printing to a standard size card. This will ease the challenges face by local clerks, their IT staff, BOE, and DTMB staff for troubleshooting printing problems.

- Providing the additional funding and staffing necessary for the BOE to achieve the following:

    - Implementation, testing, and training of election officials on a new application to accommodate constitutionally required early voting.
    - Implementation, testing, and training of election officials on new QVF procedures to support constitutionally required early voting.
    - Fully staff and support up to 30 Election Days with the addition of early voting.

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EXHIBIT 4

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Bourbonais, Lori (MDOS)

From: Bourbonais, Lori (MDOS)
Sent: Monday, November 14, 2022 1:17 PM
To: Bourbonais, Lori (MDOS)
Subject: Recent FOIA Requests

Clerks,

We are aware that clerks have received a request for the following:

"1. An electronic copy of the Qualified Voter File (QVF) extract for all precincts completed on Monday November 7, 2022 and loaded to the electronic pollbooks.

2. The historical electronic pollbook flash drive for all voting precincts in the jurisdiction for the election concluding November 8, 2022. (This is likely in a CSV – comma separated value format).

3. An electronic copy of the Qualified Voter File extract for all precincts completed as soon as the November midterm election voter history is uploaded to the QVF which must be within 7 days pursuant to MCL 168.813."

Before responding to these FOIA requests, you should consult with your city or township attorney regarding the requests and exemptions that may apply including those contained in MCL 15.243(1)(y) and (z). Under FOIA, you may shield sensitive information from disclosure. Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(y). In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z).

Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

Please note that certain specific data derived from the qualified voter file electronic pollbook is subject to disclosure under FOIA, including the lists of registered voters from the Qualified Voter File and the paper printout of the electronic pollbook generated on election night. If members of the public are interested in verifying the names of individuals registered to vote on a certain date or included in the electronic pollbook, they may obtain this information by submitting a FOIA for publicly available records.

Additionally, we are aware that clerks received FOIA requests for a copy of or the opportunity to view tabulator tapes. While the tapes are a public record that can be provided, they are election records that should remain secured until security is released after the final canvass and certification, recounts, and audits. Once you are notified that security has been released in your jurisdiction, you can fulfill these requests.

Lori A. Bourbonais, Director
Election Administration Division

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EXHIBIT 5

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Michigan Secretary of State
To: Benander, Angela (MDOS); DelRio, Irene (MDOS); Wimmer, Tracy (MDOS); Doyle, Michael (MDOS); Lawens, Nelson (MDOS); Dwyer, Brendan (MDOS); Hardmon, Cheri (MDOS); Kiersnowski, Aneta (MDOS); Diljak, Mark (MDOS); Culpepper-Ravey, Candace (MDOS); Starkey, Shawn (MDOS); Bourbonais, Lori (MDOS); Reinhardt, Sarah (MDOS)
Subject: Courtesy Copy: Recent FOIA Requests
Date: Wednesday, May 10, 2023 4:37:16 PM

This is a courtesy copy of an email bulletin sent by Lori Bourbonais.

This bulletin was sent to the following groups of people:

Subscribers of Clerks (1686 recipients)

Clerks and Election Directors,

We are aware that clerks have recently received additional requests for epollbook (epb) data. Requests for epb data must be directed to the Bureau, to ensure that sensitive information related to both individual voters and the epb are removed before public disclosure of otherwise available information. As stated in our November 14, 2022 email (link below for your convenience), clerks must not publicly release data or files that would reveal the software design or data architecture of the epb, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. The requested file contains proprietary software information, security feature information, and personal identifiable information for voters.

The disclosure of security and technical information is exempt from FOIA and may not be properly redacted if the file is produced by an individual clerk instead of the Bureau. Additionally, the file contains sensitive information regarding your epb laptop(s) that might require you to purchase a new laptop for each precinct if you disclose this information to a 3rd party. The disclosure of sensitive information compromises the integrity of Michigan's elections and may warrant referral for investigation.

If you receive a FOIA request for epb data, the requestor can be directed to the county clerk for paper pollbook copies or to BOE for the log file or voter history.

- November 14 2022 email.pdf

Lori A. Bourbonais, Director
Election Administration Division
Michigan Bureau of Elections

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/1/2023 5:43:02 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: do you have a few minutes to talk today?

Yes.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 1, 2023 1:41 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: do you have a few minutes to talk today?

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Call you in 5 minutes?

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, November 1, 2023 at 1:37 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: do you have a few minutes to talk today?

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/9/2023 12:02:24 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: MN decision on 14th amendment disqualification

Thanks!

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 8, 2023 5:48 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: MN decision on 14th amendment disqualification

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Hi Heather,

As you may have seen, the Minnesota Supreme Court today rejected an attempt to prohibit Trump from appearing on the Republican primary ballot. The order is attached. An opinion will follow.

The court's rationale is consistent with your argument that the court of claims can reject the petitioners' claims based on the Secretary's lack of power to exclude candidates for lack of qualifications to hold office.

The court concluded that petitioners have standing and their claims are ripe. However, the court held that pursuant to Minnesota's statutory scheme, the presidential nomination primary is an internal party election and the political parties alone determine the candidates on the ballot. Because there is no state statute that prohibits a major political party from placing an ineligible candidate on the ballot, there is no error to correct. Accordingly, the court dismissed the claim without addressing the federal constitutional issue.

Please let us know if you'd like more information or to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [MeingastH@michigan.gov]
Sent: 11/10/2023 8:01:41 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Re: Nice job yesterday

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, November 10, 2023 2:24:31 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Nice job yesterday

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Very interested to see how the judge rules.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [MeingastH@michigan.gov]
Sent: 11/18/2023 12:26:40 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Re: Tracker

Thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, November 17, 2023 7:04 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Tracker

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Yes. Will send it shortly. Here is the just issued CO decision determining that Trump can appear on the primary ballot there. I sent to Mike per his request.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, November 17, 2023 at 5:11 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Tracker

Hi Jonathan, has the team updated the tracker sheet since my last copy, I think that was on 10/30 or something like that.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/22/2023 3:23:03 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Colorado OA

Thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 22, 2023 10:16 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Colorado OA

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FYI, the Colorado Supreme Court set oral argument for 12/6 in the Trump case there.
Have a happy Thanksgiving!

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/22/2023 8:13:59 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Colorado OA

Also I have a board meeting Monday, so cannot do our meeting that morning.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 22, 2023 10:16 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Colorado OA

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

FYI, the Colorado Supreme Court set oral argument for 12/6 in the Trump case there.
Have a happy Thanksgiving!

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/4/2023 2:35:31 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: Check-in

Sounds good, thanks.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

-----Original Appointment-----
From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, December 4, 2023 9:35 AM
To: Meingast, Heather (AG)
Cc: Zack Goldberg; Robert Cotter
Subject: Canceled: Check-in
When: Monday, December 11, 2023 10:30 AM-11:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting
Importance: High

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Zack and I are sick, so let's cancel today. Heather: feel free to reach out if there's anything time-sensitive to discuss.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/1/2023 6:02:44 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 10/25 CO court order
Attachments: LaBrant Ltr to Court re Updates (PDF).pdf; Supplemental Authority, LaBrant, Trump.pdf

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 1, 2023 1:54 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 10/25 CO court order

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This order from Colorado addresses political question, self-execution, and some other issues.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Michigan's Trusted Law Firm
GOODMAN ACKER P.C.

Good Decision

**BARRY J. GOODMAN
TIM SULOLLI
JORDAN B. ACKER
***BRADLEY M. PERI
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AMANDA B. WARNER

RONITA BAHRI
MICHELLE T. AARON
J. SCOTT FANZINI
NICOLE M. McCARTHY
JOSHUA C. MAYOWSKI
ROWAN E. CONYBEARE

**ALSO ADMITTED IN FL
***ALSO ADMITTED IN NY

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October 31, 2023

Michigan Court of Claims
c/o Clerk's Office
Hall of Justice
925 W. Ottawa Street
P.O. Box 30022
Lansing, MI 48909
cclerksoffice@courts.mi.gov

RE: *LaBrant v Benson*
Court of Claims No. 23-000137-MZ

Dear Clerk,

Plaintiffs in the above captioned-case write to alert Judge Redford to a decision issued on October 25, 2023, by the Colorado District Court denying Donald Trump's motion to dismiss the Complaint in *Anderson v Griswold*, 2023-CV-32577 (attached). Several conclusions in that decision are relevant to the matter before this Court.

First, the Colorado Court denied Trump's motion to dismiss based on the political question doctrine. Specifically, Trump argued that the Constitution reserves to Congress the decision as to whether a candidate is qualified. The Court evaluated the existing case law, the text of the Constitution, and 3 USC 15, and declined to dismiss on the basis of the political question doctrine. This is relevant to Plaintiffs' arguments at 1 to 6 of their Brief in Opposition to Trump's Motion for Summary Disposition.

Second, the Colorado Court denied Trump's motion to dismiss based on Trump's assertion that the Fourteenth Amendment is not self-executing. This is relevant to Plaintiffs' arguments at 8 to 19 of their Brief in Opposition to Trump's Motion for Summary Disposition.

Third, the Colorado Court denied Trump's motion to dismiss based on federal preemption. No party has raised that issue in this case, but it reinforces the conclusion that decision of this issue is not committed to Congress.

Fourth, the Colorado Court determined that the issue of whether Section 3 of the Fourteenth Amendment applies to a President, and the issue of whether Trump engaged in an insurrection, would be decided at the evidentiary hearing set to begin on October 30, 2023, in Colorado.

Sincerely,

Mark Brewer

SOUTHFIELD • MAIN OFFICE
17000 WEST TEN MILE ROAD, SECOND FLOOR • SOUTHFIELD, MICHIGAN 48075 • PHONE 248.483.5000 • FAX 248.483.3131

GRAND RAPIDS
1500 E BELTLINE AVE SE, SUITE 235 • GRAND RAPIDS, MICHIGAN 49506 • PHONE 616.582.7225

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

DATE FILED: October 25, 2023 8:38 AM
CASE NUMBER: 2023CV32577

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN **v.** **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP **and** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	**Δ COURT USE ONLY Δ** Case No.: 2023CV32577 Division: 209

ORDER RE: DONALD J. TRUMP'S MOTION TO DISMISS FILED SEPTEMBER 29, 2023

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 29, 2023. Having considered the parties' briefing, the relevant legal authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

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I. LEGAL STANDARD

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as "documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Denver Post*, 255 P.3d at 1088.

II. ANALYSIS

In his Motion to Dismiss, Intervenor Trump makes the following arguments: (1) the question before the Court is a non-justiciable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from

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judging presidential qualifications; (4) Section 3 of the Fourteenth Amendment does not apply to Intervenor Trump; (5) the Petition fails to state a claim that violence constituted an insurrection or President Trump engaged in an insurrection; and (6) the case should be moved to Washington, D.C. under Colorado's *forum non conveniens* statute.

a. Non-Justiciable Political Question

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia,* 19 U.S. 264, 404 (1821)). A case "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United* States, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) In such a case, the United States Supreme Court has held that a court lacks the authority to decide the dispute before it. *Zivotofsky*, 566 U.S. at 195. This exception is narrow. *Id.* A court cannot avoid its responsibility to enforce a specific statutory right because the issues have political implications. *Id.* at 196.

In this case, Intervenor Trump argues that the U.S. Constitution reserves exclusively to the U.S. Congress the decision as to whether a candidate is unqualified under Section 3 of the Fourteenth Amendment.[1] He does not argue the second basis

[1] Intervenor Trump claims that Courts have dismissed "*every* Section Three challenge brought against President Trump—and every other federal candidate or officeholder—arising from the events of January 6, 2021." Intervenor Trump, however, cites nary a case. Presumably, this is because those cases have been dismissed for lack of federal standing. In this case, C.R.S. § 1-1-113 clearly gives Petitioners standing.

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under the political question doctrine—that a Court is incapable of resolving the question—nor could he. Instead, Intervenor Trump argues the U.S. Constitution reserves exclusively for the United States Congress the power under Section 3 of the Fourteenth Amendment to determine whether a party may take office. In doing so, Intervenor Trump relies on cases that address the question of whether various Presidential candidates (Barack Obama, John McCain, and Ted Cruz) were natural born citizens. He does not cite a case holding that the question before this Court (whether a candidate is barred under Section 3 of the Fourteenth Amendment) is barred under the political question doctrine.

i. Intervenor Trump's Cases

Intervenor Trump cites the Third Circuit in *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) for the proposition that the question of whether Barack Obama was a natural born citizen was a non-justiciable political question outside the province of the judiciary. The Court in *Berg* makes no such holding. Instead, when describing the history of the case, the Third Circuit states, "[w]e also denied that motion, reiterating Berg's apparent lack of standing and also stating that Berg's lawsuit seemed to present a non-justiciable political question." *Id.* This Court does not have this order in front of it, in which the Third Circuit apparently stated, "the lawsuit seemed to present a non-justiciable political question." *Id.* However, even if it did, it appears that whatever the Third Circuit did say regarding the political question doctrine was *dicta*.

In addition to *Berg*, Intervenor Trump cites a series of trial court opinions, and one California appellate opinion, some published, some unpublished, that largely hold

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or state in *dicta* that the plaintiffs' claims are likely also barred under the political question doctrine as a question committed to a coordinate political department. The Court addresses the cases Intervenor Trump cites below.

In *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145 (N.D. Cal. 2008), an elector pledged to a third-party candidate filed a motion for preliminary injunction seeking to remove John McCain from the ballot because he was allegedly not a natural born citizen. The Court denied the motion for preliminary injunction because the plaintiff was not likely to succeed on the merits. *Id.* at 1146. The Court then noted that Article II of the Constitution prescribes the number of presidential electors to which each state is entitled, and the Twelfth Amendment prescribes the manner in which the electors shall elect the President. *Id.* The Court examined 3 U.S.C. § 15 which directs that Congress "shall open, count, and record the electoral votes" and provides a mechanism for objections. *Id.* at 1147. Finally, it turned to the Twentieth Amendment which provides instructions on how to proceed if a president elect fails to qualify. *Id.* Having looked at these various constitutional provisions and statutes, the *Robinson* Court then concluded, without invoking the political question doctrine, that "[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course." *Id.* The course it referred to was a 3 U.S.C. § 15 objection to a candidate and the Twentieth Amendment procedures addressing a failure to qualify. The idea, however, of Court intervention after "Congressional processes have run their course" is directly contrary to a holding that this is a political question—where there is no judicial review permitted.

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In *Kerchner v. Obama*, 669 F.Supp.2d 477, 479-80 (D. N.J. 2009), two citizens brought actions against various government officials, including the U.S. Congress, alleging President Obama was not a natural born citizen and seeking to compel Congress to hold hearings, conduct investigations, and take certain actions following said investigations. The Court held the plaintiffs did not have Article III standing. *Id.* at 483. In a footnote, the Court noted that even if there was standing, the case likely fell into "the category of generalized grievances that are most appropriately handled by the legislative branch." *Id.* at n. 5. It continued that "it appears that Plaintiffs have raised claims that are likewise barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department," citing to Article II, Section 1 of the U.S. Constitution and the Twelfth Amendment, Section 3. *Id.*

Keyes v. Bowen, 117 Cal.Rptr.3d 207 (Cal. Ct. App. 2010) is the only appellate court opinion cited that has addressed the issue. There, the appellate court held the Secretary of State had no duty to investigate presidential eligibility and extensively cited *Robinson, supra*, for the proposition that "presidential qualification issues are best resolved in Congress." *Keyes*, 117 Cal.Rptr.3d at 216.

Of the cases Intervenor Trump relies on, the Court in *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE-DAD, 2013 WL 2294885 (E.D. Cal. May 23, 2013) (unpublished), *aff'd*, 622 F.App'x 624 (9th Cir. 2015) had the most extensive analysis. First, it noted that the "natural born citizen" requirement does not designate which branch should address whether the candidate is qualified. *Id.* at *6. It further noted Article II, Section 1 of the Constitution establishes that the Electoral College elects the

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President. *Id.* It then pointed out that "[t]he Twelfth Amendment empowers the President of the Senate to preside over the meeting between the House of Representatives and the Senate in which the President of the Senate counts the electoral votes." *Id.* According to the Court, "[t]he Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the Unites States [sic]." *Id.* Finally, the Court pointed out that "the Twenty-Fifth Amendment provides for removal of the President should he be unfit to serve." *Id.* Based on those provisions, the Court held "the Constitution make[s] clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States." *Id.*

In *Strunk v. New York State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (unreported disposition), *aff'd*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015) the Court held the framework for the Electoral College and its voting procedures for President and Vice President is found in Article II, Section 1 of the Constitution. More specifically, the Court noted that 3 U.S.C. § 15 dictates "the counting of electoral votes and the process for objecting" to votes. *Id.* According to the Court, "[n]o objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made." *Id.*

Finally, in *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (unpublished), the Court, relying on *Keyes* and *Grinols, supra*, held "this court can find no authority in the Constitution

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which would permit it to determine that a sitting president is unqualified for office or a president-elect in unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government."

ii. Petitioners' Cases

Petitioners primarily cite *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016),[2] *aff'd*, 134 A.3d 51 (Pa. 2016), *cert. denied*, 580 U.S. 867 (2016). There, the Court reviewed Article II, Section 1 and the Twelfth Amendment of the United States Constitution which set forth the procedure by which a person is elected to the office of the President. *Id.* at 650. The Court in *Elliot* described Article II, Section 1 and the Twelfth Amendment as accomplishing the following:

1. vested in the legislatures of the several states, not Congress, the power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled."
2. commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation's seat of government.
3. commanded, upon receipt, the President of the Senate open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives.
4. provide that only in the case of a tie, or the absence of a majority, does the Constitution allow Congress to choose the President and Vice President.

Id. (quoting U.S. CONST. art. II, § 1, cl. 2).

After reviewing the various constitutional provisions that supposedly support the Court dismissing the case due to the political question doctrine, the Court in *Elliot* concluded that the Constitution does not vest the Electoral College with the power to

[2] The Pennsylvania Commonwealth Court is an appellate court that also has original jurisdiction to hear election cases.

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determine eligibility of a presidential candidate. *Id.* at 650-51. The Court similarly concluded that Congress has no control over the process other than deciding the day on which electors "'give their votes.'" *Id.* at 651 (quoting U.S. CONST. amend. XII). The Court then compared the provisions regarding Presidential eligibility with those regarding the eligibility of Congress where the U.S. Constitution clearly vests in Congress the power to determine the eligibility of its own members. *Id.* The Court concluded that because the Constitution does not vest any entity of the federal government with the power to ensure that only persons who are constitutionally eligible become the President, that determination is reserved for the Courts. *Id.*

The only other case the Petitioners cite that squarely addresses this issue is *Williams v. Cruz*, OAL Dkt. No. STE 5016-16, pp. 4-5 (N.J. Off. of Admin. Law Apr. 12, 2016), a New Jersey administrative law decision where the judge examined the various Constitutional provisions and held:

> While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship . . . Congress is not afforded any similar role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to the Congress.

iii. Analysis

Intervenor Trump argues the weight of the law favors a holding that the political question doctrine precludes judicial review, and that Petitioner can only cite "two idiosyncratic state cases that never received appellate review."[3] The Petitioners, on the

[3] The Pennsylvania Supreme Court affirmed the decision in *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016).

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other hand, argue nothing in the Constitution commits to Congress and the Electoral College the exclusive power to determine presidential qualifications and that Intervenor Trump's cases are distinguishable because in none of those cases did the plaintiffs bring pre-election suits in state court under a state law authorizing ballot access challenges.

The Court agrees with Intervenor Trump that the weight of cases have held that challenges to an individual's qualifications to be President are barred by the political question doctrine. The Court, however, agrees with Petitioners that most of the cases Intervenor Trump cites involved post-election attempts to remove former President Obama from office and that there is at least some distinction between ballot access cases and removing a sitting President. Further, most of the cases concluding that the political question doctrine applies did so with very little analysis of what the constitutional provisions they rely on provide. For that reason, the Court looks to the specific provisions to determine if they meet the "textually demonstrable constitutional commitment of the issue to a coordinate political department" standard. *Baker*, 369 U.S. at 217.

ARTICLE II OF THE U.S. CONSTITUTION

U.S. CONST. art. II, § 1, cl. 2 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This clause vests the States authority to appoint electors. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to

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determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 3 provides:

> The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

This clause directs that the Electors shall meet and certify a list of whom the Electors voted for and transmit it to the President of the Senate. The President of the Senate shall the open the Certificates and count them. It also outlines what happens if there is a tie. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

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U.S. CONST. art. II, § 1, cl. 4 provides: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

This clause says that Congress sets the date that the Electors meet to certify their votes. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 5 provides:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

While this clause sets out certain constitutional qualifications, it says nothing regarding what branch of the government shall determine if the candidate meets those eligibility qualifications.

U.S. CONST. art. II, § 1, cl. 6 provides:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This clause addresses what happens when a President is removed and does not address who determines whether a candidate for President or President-elect meets eligibility qualifications.

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THE TWELFTH AMENDMENT

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

The Twelfth Amendment modifies Article II, Section 1, Clause 3 and makes it clear that the President and Vice President are chosen separately but together. If there

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is no majority or a tie for President, the House of Representatives chooses the President. In the interim, the newly elected Vice President will serve as President. While the Twelfth Amendment references the "constitutional disability of the President" and that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President," the Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for president or a President-elect is constitutionally ineligible.

SECTION 3 OF THE TWENTIETH AMENDMENT

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX, § 3.

This provision addresses what happens if the President-elect dies or fails to qualify. It also allows Congress to make law to provide for the case when neither the President-elect nor the Vice President-elect qualify. *Robinson*, 567 F.Supp.2d at 1147; *Keyes*, 117 Cal.Rptr.3d at 216; and *Grinols*, 2013 WL 2294885 at *6 cite the Twentieth Amendment for the proposition that it empowers Congress to create a procedure if neither the President-elect nor Vice President-elect qualifies to serve as President of the United States. *See Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905, 911 (E.D. Cal.

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2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) ("Section 3 [of the Twentieth Amendment] was intended to provide for a then-unprovided for contingency: the selection and succession of the presidency in the event that the president elect, vice president elect, or both could not assume office" (citing 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable))). And Congress did just that when it passed the Presidential Succession Act of 1947, 3 U.S.C. § 19. What Congress has not done is provide for any process to determine whether a President qualifies and what entity is supposed to make that determination. Further, nothing in the text of the Amendment commits to Congress the exclusive authority to render judgment on a presidential candidate's fitness to be placed on the ballot. *See Lindsay*, 750 F.3d at 1065 ("nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president" (emphasis in original)). However, unlike the other Constitutional provisions relied on by the decisions Intervenor Trump relies on, section 3 of the Twentieth Amendment does include the word "qualify" and suggests that someone or something has decided whether a President qualifies to be President. It is for this reason that the Court has asked the Parties to provide the Court with testimony regarding the historical meaning and interpretation of this Amendment, if such evidence exists.

3 U.S.C. § 15

Finally, the decisions Intervenor Trump cites rely heavily on 3 U.S.C. § 15 for the proposition that there is an objection process when the electoral college votes are counted and that it is during this process that the objections to the qualifications of a

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President should be made. *Robinson*, 567 F.Supp.2d at 1147 ("It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify"); *Keyes*, 117 Cal.Rptr.3d at 216 (quoting *Robinson, supra*); *Strunk*, 2012 WL 1205117 at *12 ("the counting of electoral votes and the process for objecting for the 2009 Presidential election is found in 3 USC § 15. . . . This required the meeting of the joint session of Congress to count the 2008 electoral votes. . . . No objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made. This is the exclusive means to resolve objections to the electors' selection of a President or a Vice President"); *Taitz*, 2015 WL 11017373 at *13 (noting that the *Keyes* Court cited the Twelfth Amendment and 3 U.S.C. § 15 when it "stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy"); *see also Oines v. Ritchie*, Dkt. No. A12-1765 (Minn. Oct. 18, 2012) (citing *Keyes* in support of the conclusion that 3 U.S.C. § 15 provides the avenue for challenging constitutional qualifications of presidential candidates).

Congress, however, amended 3 U.S.C. § 15 in 2022. As amended, 3 U.S.C. § 15(d)(2)(B)(ii) provides: "The only grounds for objections shall be as follows: (I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1). (II) The vote of one or more electors has not been regularly given."

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As such, it appears that Congress has disavowed any ability it once had to consider objections other than the two listed above—including any regarding the constitutional qualifications of the President-elect.

SECTION 3 OF THE FOURTEENTH AMENDMENT

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

U.S. CONST. amend. XIV, § 3.

This provision clearly gives Congress the ability to remove a constitutional disability should a person be disqualified under Section Three of the Fourteenth Amendment. However, it says nothing regarding what government body would adjudicate or determine such disability in the first instance.[4] The Court notes, however, it would be strange for Congress to be the only entity that is empowered to determine the disability and then also the entity that is empowered to remove it.

[4] Intervenor Trump argues that "Section Three itself contains an exclusive grant of jurisdiction to Congress." The argument is that if this Court were to disqualify Intervenor Trump from being a candidate, it would strip Congress of the ability to remove the disability. The Court disagrees. If this Court were to disqualify Intervenor Trump, there would be nothing standing in the way of Congress immediately removing that disability. In fact, there is nothing standing in Congress's way of removing the disability prior to Secretary Griswold or this Court determining whether Intervenor Trump is disqualified in the first instance.

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The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong "textually demonstrable commitment" necessary for the Court to find the matter nonjusticiable. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members"); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a "textually demonstrable commitment" to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

The Court will, however, revisit this ruling when it makes a final ruling following the hearing set to begin October 30, 2023 to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. *Baker*, 369 U.S. at 198 ("In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.")

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b. Whether the Fourteenth Amendment Is Self-Executing

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues "Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing Plaintiffs to bring such a claim in court." Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response causing the authors "to substantially modify their own analysis" and for a well-respected constitutional scholar, Steven Calabresi, to reverse his position on the matter. The Court has reviewed the modifications of the Baude and Paulsen law review article and the modifications do not in any way reverse their positions. Further, the retraction from Calabresi had nothing to do with whether Section Three was self-executing but was rather based on whether Section Three applies to Presidents. This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions.

Intervenor Trump argues there is "[a]mple precedent" supporting Blackman and Tillman's conclusion that Section Three was not self-executing. But the only precedent cited is *In re Griffin*, 11 F.Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit.

The Petitioners, on the other hand, argue that whether Section 3 is self-executing is irrelevant because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action. The Court agrees. To the extent that the Court ultimately

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holds that C.R.S. § 1-4-1204 allows the Court to order Secretary Griswold to exclude a candidate under the Fourteenth Amendment, the Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation. *See, e.g., State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3 challenge under state *quo warranto* law); *Worthy v. Barrett*, 63 N.C. 199, 200-01 (1869) (adjudicating Section 3 challenge as *mandamus* action), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869) (adjudicating Section 3 challenge as *mandamus* action); *State ex rel. Sandlin v. Watkins*, 21 La.Ann. 631, 632 (La. 1869) (adjudicating Section 3 challenge under state *quo warranto* law); *Rowan v. Greene*, Dkt. No. 2222582-OSAH-SECSTATE-CE-57- Beaudrot (Ga. Off. Admin. Hr'gs May 6, 2022) (state administrative Section 3 challenge).[5]

[5] Intervenor Trump argues that none of the cited cases are relevant as such cases "relied upon state laws patterned after Section Three that applied to state officials." Not so. In these cases, state law provided the procedural avenue for challenging a candidate's fitness for office, but the substantive question remained qualification under the Fourteenth Amendment, not merely a state law patterned after Section Three. *See Griffin*, 2022 WL 4295619 at *16 ("The Court therefore concludes that . . . Mr. Griffin became disqualified under Section Three of the Fourteenth Amendment"); *Worthy*, 63 N.C. at 200 (procedural statute in question "provides that no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State" (internal quotation omitted)); *Tate*, 63 N.C. at 309 (applying the rule in *Worthy* to bar County Attorneys from office, to wit: "We are of the opinion that he is disqualified from holding office under the 14th Amendment of the Constitution of the United States"); *Sandlin*, 21 La.Ann. at 631-33 (in *quo warranto* proceeding brought under "the intrusion act (No. 156, acts of 1868)," qualification of candidate was assessed under both the "eligibility act, No. 39, of the acts of the State Legislature of 1868, and the third Section of the Fourteenth Amendment to the Constitution of the United States." Supreme Court of Louisiana held that the eligibility act was not applicable to the proceeding, and that "[t]he inquiry in this case is, has the defendant, under the provisions of the fourteenth amendment to the Constitution of the United States and those of the act of Congress of twenty-fifth June, 1868 [re-admitting secessionist states to the Union, requiring compliance with Section 3 of the Fourteenth Amendment], the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District.").

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c. Whether Federal Preemption Applies

Intervenor Trump argues that federal law has preempted the States from governing ballot access for presidential candidates.

Under the field preemption doctrine, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

> [Congressional] intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In support of this argument, Trump cites the Twelfth Amendment, the Twentieth Amendment, and 3 U.S.C. § 15 for the proposition that federal law occupies the field.

Based on the discussion above regarding the political question doctrine, it is unclear to the Court that there is any mechanism under federal law to determine whether a candidate for President or President-elect meets the eligibility requirements let alone a framework of regulation so pervasive that Congress left no room for the States to supplement it. The Court declines to dismiss this action based on the field preemption doctrine.

d. Whether Section Three of the Fourteenth Amendment Applies to a President

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

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e. Whether President Trump Engaged in an Insurrection

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

f. Forum Selection Clause

Lastly, Intervenor Trump seeks dismissal of the action based on the forum. Colorado law sets out five requirements which all must be met to dismiss on *forum non conveniens* grounds. Pursuant to C.R.S. § 13- 20-1004(1), they are:

1. "The claimant or claimants are not residents of the state of Colorado." C.R.S. § 13-20-1004(1)(a). Here, all Petitioners are Colorado Residents.

2. "An alternative forum exists." C.R.S. § 13-20-1004(1)(b). Intervenor Trump has not identified a viable alternative forum. The three forums he suggests are: (1) Congress—but as discussed above, there is no mechanism by which a Colorado elector can object to Intervenor Trump's qualification to Congress; (2) Criminal Prosecution—Intervenor Trump provides no explanation about how the Petitioners can seek criminal prosecution against Intervenor Trump in Washington, D.C.; and (3) Federal Court in Washington, D.C. But, as Intervenor Trump acknowledges, the Petitioners do not have standing in Federal Court. No adequate alternative forum, therefore, has been identified.

3. "The injury or damage alleged to have been suffered occurred outside of the state of Colorado." C.R.S. § 13-20-1004(1)(c). The alleged injury, in this case, is having an ineligible candidate on the ballot. That injury will occur in Colorado.

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4. "A substantial portion of the witnesses and evidence is outside the state of Colorado." C.R.S. § 13-20-1004(1)(d). Here, Intervenor Trump concludes this is the case but has not put forth any specific witness that he'd like to attend that is unavailable at trial.

5. "There is a significant possibility that Colorado law will not apply to some or all of the claims." C.R.S. § 13-20-1004(1)(e). There is no doubt that Colorado election law will play a significant part in any decision this Court renders.

As Intervenor Trump acknowledges, except in the "most unusual circumstances," a resident plaintiff's choice of forum is honored. *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 374 (Colo. 1976). In fact, Colorado courts have "extremely limited discretion under this doctrine to dismiss an action filed by a resident plaintiff." *Cox v. Sage Hosp. Res., LLC*, 413 P.3d 302, 304 (Colo. App. 2017). Here, the Petitioners all reside in Colorado and have exercised their right to object to Intervenor Trump's name being placed onto the ballot under C.R.S. § 1-1-113 and C.R.S. § 1-4-1204. While Trump argues that they are nominal plaintiffs, he fails to explain who the actual plaintiffs are in this matter.

In short, Intervenor Trump's motion under the *forum non conveniens* statute fails because he has not articulated why this is a "most unusual circumstance," nor has he offered an alternative forum or identified witnesses he cannot call because they won't come to Colorado. Rather, it appears that he is simply objecting to the C.R.S. § 1-1-113 process.

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III. CONCLUSION

For all the above reasons, the Court DENIES Intervenor Trump's Motion to Dismiss, filed September 29, 2023.

DATED: October 25, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge

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October 30, 2023

Clerk of the Court
Michigan Court of Claims

Re: ***LaBrant et al v. Benson***
Court of Claims No. 23-000137-MZ

NOTICE OF SUPPLEMENTAL AUTHORITY

Dear Clerk:

Counsel for Donald J. Trump is supplying the attached supplemental authority because this Honorable Court requested information regarding similar cases from around the country. The United States District Court of New Hampshire issued a Memorandum Order on October 27, 2023, in *Castro v New Hampshire Secretary of State David M. Scanlan, and Donald J. Trump*, (23-cv-416-JL) (see attached). The Court denied Mr. Castro's Motion for Preliminary Injunction and granted Donald J. Trump's Motion to Dismiss.

Sincerely,

/s/ David A. Kallman
David A. Kallman
Attorney for Donald J. Trump

DAK/spk

Enclosure(s)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

John Anthony Castro

v.

Civil No. 23-cv-416-JL
Opinion No. 2023 DNH 137

New Hampshire Secretary of State,
David M. Scanlan, and Donald J. Trump

MEMORANDUM ORDER

This case presents jurisdictional issues of standing and justiciability that the court must resolve before addressing the merits of the plaintiff's claim. Plaintiff John Anthony Castro seeks an injunction barring the New Hampshire Secretary of State from placing former President Donald J. Trump's name on the New Hampshire Republican Presidential primary ballot, on the ground that Trump is ineligible to serve as president under Section 3 of the Fourteenth Amendment of the U.S. Constitution.[1] Castro named the Secretary as a defendant and Trump as a nominal defendant.[2] The defendants argue that the case should be dismissed because Castro does not have standing to seek the requested relief, and his claim raises a nonjusticiable political question.

After reviewing the parties' filings and holding an evidentiary hearing and oral argument on October 20, 2023, the court finds that it lacks jurisdiction to consider Castro's request for injunctive relief. Castro has not established that he has or will suffer

[1] While Castro is appearing pro se in this litigation, he represents that he has two law degrees. He also represents that he is not a member of the bar in any state or jurisdiction.

[2] For ease of reference, the court refers to both Trump and the Secretary as defendants throughout this Order.

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a political competitive injury arising from Trump's participation in the New Hampshire Republican Presidential primary. Thus, Castro has not carried his burden to show that he has standing to bring his claim. Further, even if Castro had standing, the court is inclined to find, consistent with the weight of authority, that Castro's claim raises a nonjusticiable political question. The court accordingly denies Castro's motion for a preliminary injunction and dismisses the case.

I. Background

Castro "asks this Court to issue an injunction preventing Defendant Secretary of State from accepting and/or processing Defendant Donald John Trump's ballot access documentation, including, but not limited to nominating papers and nominating petitions."[3] As grounds for relief, Castro alleges that Trump "provided 'aid or comfort' to an insurrection in violation of Section 3 of the [Fourteenth] Amendment to the U.S. Constitution and is, therefore, constitutionally ineligible to pursue or hold any public office in the United States."[4] Castro also alleges that Trump is a "nominal" defendant; he brings no claim requesting relief against Trump.[5]

[3] Compl. (doc. no. 1) at ¶ 16. Because Trump has now filed his declaration as a candidate in the New Hampshire primary and paid the filing fee, Castro's claim for injunctive relief may have become moot. Assuming, without deciding, that an injunction could stop the Secretary from "accepting and/or processing" Trump's "ballot access documentation," the court proceeds to address the other jurisdictional issues, which are determinative.

[4] Id. at 5 (emphasis in original).

[5] Id. at ¶ 5.

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Shortly after filing a complaint in this court on September 5, 2023, Castro filed a motion for an expedited preliminary injunction, on September 17.[6] A few weeks later, the court granted the New Hampshire Republican State Committee's motion to intervene in the case. The court then held an evidentiary hearing and oral argument on October 20, to address jurisdictional issues prior to considering the merits of Castro's claim.[7] Castro, counsel for the defendants, and counsel for the intervenor attended and participated in the hearing. Castro, the Secretary, and Trump also filed witness lists, exhibit lists, and proposed findings of fact and rulings of law.

The following facts are agreed to or based on the evidence (testimony, exhibits, and stipulations) presented at the hearing, as noted. Castro has declared his candidacy for the New Hampshire Republican Presidential primary and paid the filing fee.[8] Castro has also declared his candidacy in the Nevada Republican Presidential primary.[9] Trump has now (five days after the hearing) also declared his candidacy in the New Hampshire Republican Presidential primary and paid the filing fee.

Castro and the defendants stipulated to the following description of Castro's campaign in New Hampshire:

> Presently, Plaintiff's campaign has no serious prospect of getting any New Hampshire delegates to the Republican National Convention, nor any

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[6] See Motion for Preliminary Injunction (doc no. 6).

[7] Summary Order (doc. no. 20); Procedural Order (doc. no. 36).

[8] Pl. ex. 1.

[9] Pl. ex. 2.

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> significant number of votes that would otherwise have gone to Donald Trump, nor any appreciable share of donations that otherwise would have gone to Donald Trump; as of right now.[10]

Castro further acknowledges that he is, at best, a "longshot Republican Presidential candidate."[11] Trump introduced evidence of Castro's filings with the Federal Election Commission, which show that Castro's campaign has no contributions and no expenditures.[12] Further, Castro's campaign has not run or purchased any advertising in New Hampshire or any other state.[13]

During the hearing, Trump called Michael Dennehy to testify as an expert witness regarding Castro's campaign in New Hampshire and the effects, if any, of Trump's participation in the New Hampshire Presidential primary on Castro's prospects as a candidate. Dennehy has worked as a political consultant and strategist for over three decades and has a consulting firm in New Hampshire, Dennehy & Bouley.[14] He has served in a variety of positions in Republican politics, including as a committeeman on

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[10] Stipulation (doc. no. 53) at ¶ 12.

[11] Id. at ¶ 4.

[12] Castro's FEC Filings (Trump Exs. 2, 4-6). Castro testified that he would correct and update the FEC filings to show expenditures for his filing fees and other litigation expenses, including his expenses incurred in this case.

[13] See Oct. 20, 2023 Hearing Tr. (doc. no. 58) at 54:19-24 (Castro Testimony) ("Q. So your campaign hasn't run any advertisements in New Hampshire; is that right? A. Not as of now, correct. Q. Okay. And it hasn't run any advertisements in any other state, correct? A. Correct. Yes."); Stipulation (doc. no. 53) at ¶ 10 ("Plaintiff's campaign is not yet running any advertisements in New Hampshire. Plaintiff's campaign strategy is to postpone advertising until the right moment.").

[14] See Oct. 20, 2023 Hearing Tr. (doc. no. 58) at 26:6-17 (Dennehy testimony).

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the Republican National Committee, Executive Director of the New Hampshire Republican Party, and a political director and campaign manager in several Republican political campaigns.[15] The parties agreed to the admissibility of Dennehy's opinion testimony under Federal Rule of Evidence 702, and Castro cross-examined Dennehy.

Dennehy opined that Castro has no chance of winning a delegate in the New Hampshire Presidential primary election.[16] In explaining this opinion, Dennehy enumerated a number of observations regarding Castro's campaign. He testified that "polling data" on Castro was "nonexistent"[17]; to his knowledge, and consistent with Castro's admissions, Castro has no advertisements, campaign office, or employees in New Hampshire[18]; and Castro's campaign website is "amateur" and "incomplete."[19] Dennehy also testified that the presence or absence of Trump on the primary ballot in New Hampshire would not affect Castro's chances in that election "[b]ecause there is no activity to [Castro's] campaign."[20]

Castro testified at the hearing and was cross-examined by Trump's counsel as well. In response to questions from Trump's counsel, Castro could not identify any New

[15] See id. at 27:10-28:1 (Dennehy testimony).

[16] See id. at 33:12-19, 37:3-13 (Dennehy testimony).

[17] Id. at 31:13 (Dennehy testimony).

[18] See id. at 35:15-36:23 (Dennehy testimony).

[19] Id. at 34:5-6 (Dennehy testimony).

[20] Id. at 38:1-6 (Dennehy testimony).

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Hampshire voter to whom he has spoken for purposes of his campaign (although he testified that he had "[d]iscussions with voters").[21] He also confirmed that his FEC filings show that his campaign has no contributors, other than himself, and almost no money.[22] Castro also agreed that a primary goal of his candidacy is to establish the impermissibility of Trump's presidency, and that he has filed 27 lawsuits seeking to keep Trump's name off of the ballot in various states.[23]

II. Applicable legal standard

"Federal courts, as courts of limited jurisdiction, may not presume the existence of subject matter jurisdiction, but rather, must appraise their own authority to hear and determine particular cases." Watchtower Bible & Tract Soc. of N.Y., Inc. v. Colombani, 712 F.3d 6, 10 (1st Cir. 2013); accord United States v. Rivera-Rodríguez, 75 F.4th 1, 13 (1st Cir. 2023). The party who asserts jurisdiction bears the burden of establishing that it exists by a preponderance of the evidence. Woo v. Spackman, 988 F.3d 47, 53 (1st Cir. 2021); U.S. ex rel. Ondis v. City of Woonsocket, 587 F.3d 49, 54 (1st Cir. 2009).

[21] See id. at 58:11-21 (Castro testimony).

[22] See id. at 61:2-63:15 (Castro testimony).

[23] See id. at 68:24-69:6, 71:14-21 (Castro testimony); see also Stipulation (doc. no. 53) at ¶ 16 ("One of many goals of this campaign is for Plaintiff to demonstrate his legal ingenuity, ability to effectuate a national litigation strategy with minimal resources (i.e. guerrilla lawfare), and demonstrate executive leadership capabilities.").

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III. Analysis

The defendants challenge Castro's claim on two jurisdictional grounds—lack of standing and nonjusticiability under the political question doctrine. The court considers standing first and then turns to the issue of justiciability.

A. Standing

"Under Article III of the Constitution, a plaintiff needs a 'personal stake' in the case." Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023) (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)). More specifically, "the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and that is likely to be redressed by the lawsuit." Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Also, "[a]n inquiry into standing must be based on the facts as they existed when the action was commenced." Ramírez v. Sánchez Ramos, 438 F.3d 92, 97 (1st Cir. 2006). Nevertheless, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." Webb v. Injured Workers Pharm., LLC, 72 F.4th 365, 372 (1st Cir. 2023) (quoting TransUnion, 141 S. Ct. at 2210). The injury, however, must be "concrete and particularized" and "not conjectural or hypothetical." Lujan, 504 U.S. at 560.

The plaintiff bears the burden of establishing standing. TransUnion, 141 S. Ct. at 2207. To carry that burden, the plaintiff must satisfy the three-part standing test against each defendant "with the manner and degree of evidence required at the successive stages

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of the litigation." Webb, 72 F.4th at 371-72 (quoting TransUnion, 141 S. Ct. at 2208); see also Disability Rts. S.C. v. McMaster, 24 F.4th 893, 900 (4th Cir. 2022); Sierra Club, Inc. v. Granite Shore Power LLC, No. 19-CV-216-JL, 2019 WL 8407255, at *4 (D.N.H. Sept. 13, 2019). Here, where the court has held an evidentiary hearing on the jurisdictional issues including standing, Castro bears the burden to establish by a preponderance of the evidence that he has standing to litigate his claim. ForUsAll, Inc. v. U.S. Dep't of Labor, --- F. Supp. 3d ---, 2023 WL 5559682, at *3 (D.D.C. Aug. 2, 2023) (the plaintiff bears the burden of showing standing by a preponderance of the evidence (citing Lujan, 504 U.S. at 561)).

In attempting to satisfy his burden, Castro invokes the theory of competitor standing. This theory arose in the context of the commercial marketplace, specifically when government-imposed restrictions put certain market participants at a competitive disadvantage.[24] Katin v. Nat'l Real Est. Info. Servs., Inc., No. 07-10882-DPW, 2009 WL 929554, at *4 (D. Mass. Mar. 31, 2009). "In discrete contexts, courts have extended competitor standing to the political marketplace." AB PAC v. Fed. Election Comm'n, No. 22-2139(TJK), 2023 WL 4560803, at *4 (D.D.C. July 17, 2023) (citing Shays v.

[24] During the hearing, Castro relied heavily on the decision in New World Radio, Inc. v. F.C.C. to support his theory of competitor standing. 294 F.3d 164 (D.C. Cir. 2002). In that case, the plaintiff challenged the Federal Communications Commission's decision to allow another company to renew its license for a radio station. The plaintiff asserted that the FCC's action brought that company "one step closer to competing with, and therefore economically injuring," the plaintiff's Washington, D.C. radio station. Id. at 170. The New World court concluded that the plaintiff lacked competitor standing in part because the FCC's action was, "at most, the first step in the direction of future competition." Id. at 172 (competitor standing is "premised on the petitioner's status as a direct and current competitor whose bottom line may be adversely affected by the challenged government action") (emphasis in original). Neither the facts, the reasoning, nor the holding of New World support Castro's position.

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FEC, 414 F.3d 76, 83-89, 92 (D.C. Cir. 2005) (candidates) and Natural Law Party of U.S. v. FEC,111 F. Supp. 2d 33, 45-46 (D.D.C. 2000) (political parties)); see also Schulz v. Williams, 44 F.3d 48, 53 (2d Cir. 1994) (political parties); Fulani v. Hogsett, 917 F.2d 1028, 1030 (7th Cir. 1990) (same); Nelson v. Warner, 472 F. Supp. 3d 297, 303-04 (S.D. W.Va. 2020) (finding competitor standing because a statute that prescribed the ballot order of candidates harmed plaintiff's electoral prospects).

In particular, courts have found a competitive injury in the political context where the plaintiff is subjected to "the burden of being forced to compete under the weight of a state-imposed disadvantage." Mecinas v. Hobbs, 30 F.4th 890, 899 (9th Cir. 2022). For example, in Shays v. FEC, the District of Columbia Circuit Court of Appeals concluded that "when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." 414 F.3d at 87; see also Mecinas, 30 F.4th at 898 (holding that that a ballot-order statute created an illegally structured competitive environment that supported standing).

Outside of state-imposed disadvantages in elections, "courts have [also] held that a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." Hollander v. McCain, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (citing Tex. Dem. Party v. Benkiser, 459 F.3d 582, 586-87 & n.4 (5th Cir. 2006); Schulz, 44 F.3d at 53; and Fulani, 917 F.2d at 1030 and noting Gottlieb v. FEC, 143 F.3d 618, 622 (D.C.Cir.1998) (distinguishing voters who challenge candidate's

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eligibility)). Having traced the general contours of the relevant standing theories, the court now assesses Castro's evidence as to each of the three elements of standing, beginning with his purported injury, and then turning to traceability and redressability, which are analyzed together.

Injury. To demonstrate an injury as a political competitor, a plaintiff must show that he has "a chance of prevailing in the election." Grinols v. Electoral College, No. 12-cv-2997-MCE, 2013 WL 2294885, at *8 (E.D. Calif. May 23, 2013). That is, the plaintiff must "truly [be] in competition" with the allegedly ineligible candidate. Liberty Legal Found. v. Nat'l Dem. Party of the USA, Inc., 875 F. Supp. 2d 791, 800-01 (W.D. Tenn. 2012) (finding no political competitor standing for plaintiffs challenging President Obama's eligibility to run for president, where neither plaintiff "alleged that he is a Tennessee political party's nominee for the office, that his name will appear on the ballot for Tennessee's general election in November, that he is campaigning in the state of Tennessee, that any registered voter in Tennessee intends to cast a vote for him, or that President Obama's presence on the ballot will in any way injure either candidate's campaign.").

Castro makes no attempt to demonstrate that he is actually competing with Trump for votes and contributions, as required under the operative competitor standing theory. The evidence shows that Castro has not campaigned in New Hampshire or elsewhere. Castro has not provided any evidence suggesting that he has voters or contributors in New Hampshire or elsewhere, or that he will benefit from voter or contributor defections

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from Trump to himself.[25] To the contrary, he acknowledges that he will not win any delegates in the primary. Consistent with this, Dennehy opined (without serious challenge) that Castro cannot win a single delegate in the New Hampshire primary, and he has no campaign activity.

The weaknesses in Castro's theory of competitive injury do not stop there. His claimed injury is also speculative, as it depends on what voters and contributors—independent, third parties—may do if Trump's name is not listed on the New Hampshire primary ballot. Castro provides no evidence that any Trump supporter would support Castro under that circumstance. By contrast, Trump provided Dennehy's opinion that no Trump supporters would switch allegiance to Castro if Trump does not appear on the ballot. An injury based on speculation about the decisions of independent actors does not confer standing. See Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 379 (W.D. Pa. 2020) (holding that it would not "endorse standing theories that rest on speculation about the decisions of independent actors" (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013)).

[25] Castro's testimony at the hearing about his media coverage, which is not supported by any substantiating evidence, is not persuasive. The court has no way of knowing whether the purported media coverage focused on Castro as a candidate actually seeking the Republican nomination for president, or as a litigant seeking to disqualify Trump. The evidence in this case suggests the latter, and not the former, and does not support standing. Dennehy testified at length about the extent of media coverage that would be necessary to make Castro a viable candidate, and there is no dispute that Castro has not received that type of attention. Further, even if Castro were able to attract substantial media attention in the future, standing depends on the circumstances that existed when Castro filed his complaint and cannot be based on subsequent events.

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Further, the evidence indicates that Castro is creating his own injury in order to manufacture standing to challenge Trump's eligibility to run for president. Indeed, by his own admission, Castro declared as a candidate and paid the filing fee to show the impermissibility of Trump's presidency. He asserts that one of his goals in the campaign is "to demonstrate his legal ingenuity, ability to effectuate a national litigation strategy with minimal resources (i.e. guerrilla lawfare), and demonstrate executive leadership capabilities."[26] This practice of manufacturing standing to pursue a cause through litigation is not supported by the law. See Equal Means Equal v. Ferriero, 3 F.4th 24, 30 (1st Cir. 2021); accord Elizabeth Cady Stanton Tr. v. Neronha, --- F. Supp. 3d ---, 2023 WL 6387874, at *5 (D.R.I. Sept. 8, 2023); see also Webb, 72 F.4th at 373 (holding that "plaintiff could not manufacture standing by incurring mitigation costs in the absence of an impending harm").

In sum, the evidence demonstrates that Castro is not competing and will not compete with Trump to win the New Hampshire primary, and for that reason, he is not a political competitor in the primary. Contrary to Castro's contention, he does not have a cognizable injury simply because his name is on the New Hampshire primary ballot, and he cannot manufacture standing by declaring his candidacy and paying the fee. For all of these reasons, Castro has not shown that he is suffering or would suffer an actual, competitive injury if Trump's name is listed on the New Hampshire Presidential primary ballot.

[26] Stipulation (doc. no. 53) at ¶ 16.

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Traceability and redressability. The traceability element of standing, "essentially a causation element of Article III standing, requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm." Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc., 958 F.3d 38, 47 (1st Cir. 2020) (cleaned up). While some indirect causation may be sufficient, "[t]he Supreme Court has cautioned against courts finding that a plaintiff's injury is fairly traceable to a defendant's conduct where the plaintiff alleges a causal chain dependent on actions of third parties." Id. at 48. The redressability element, in turn, requires proof that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561 (1992); accord Dep't of Educ. v. Brown, 600 U.S. 551, 561 (2023). In many cases, traceability and redressability are addressed together as "two sides of a causation coin." Brookline Opportunities, LLC v. Town of Brookline, --- F. Supp. 3d ---, 2023 WL 4405659 at *5 n.8 (D.N.H. July 7, 2023) (quoting Dynalantic Corp. v. Dep't of Def., 115 F.3d 1012, 1017 (D.C. Cir. 1997)).

Because Castro has not shown a concrete and particularized injury, which is essential to carry his burden of establishing standing, the court need not address the traceability and redressability elements. Nevertheless, the court takes this opportunity to note that, even if Castro could establish an injury, he cannot meet the traceability and redressability requirements for standing.

Castro is seeking injunctive relief barring the Secretary from placing Trump's name on the New Hampshire Presidential primary ballot. This remedy would not redress Castro's purported injury because Dennehy testified, and Castro acknowledges, that

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Trump's absence from the primary ballot would not affect the number of votes or contributions Castro would receive. Further, even if the Secretary refused to accept Trump's declaration of candidacy, as Castro requests, Trump could appear on completed ballots as a write-in candidate and still compete for and receive votes. Finally, the Secretary is not causing Trump's campaign to be active in New Hampshire and cannot stop its activities here. In other words, Trump's campaign activities and presence on the ballot are traceable to Trump, but not to the Secretary.

Finally, Castro seeks no relief from Trump in the complaint, and he seeks no restraint against Trump in his motion for injunctive relief. He simply names Trump as a "nominal" defendant. In the absence of any relief to redress his alleged injury, Castro lacks standing to maintain this lawsuit, even if he can show a competitive injury. Castro's motion for injunctive relief is thus denied, and his complaint dismissed, for lack of standing.

B. Political question doctrine

The defendants also argue that Castro's claim should be dismissed because it turns on a nonjusticiable political question—Mr. Trump's eligibility to run for and serve as president. The political question doctrine bars courts from adjudicating issues that are "entrusted to one of the political branches or involve[ ] no judicially enforceable rights." Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (internal citations omitted). The nonjusticiability of political questions is "essentially a function of the separation of powers" of the federal government. Baker v. Carr, 369 U.S. 186, 217 (1962).

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In Baker v. Carr, the Supreme Court described six circumstances that can give rise to a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The Baker Court held that, "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." Id.

The defendants contend that Castro's claim triggers the first Baker formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

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For example, in Robinson v. Bowen, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F. Supp. 2d 1144, 1145 (N.D. Cal. 2008). The Robinson Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The Robinson Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes.[27] Id. at 1147. The Robinson Court reasoned that

[27] Castro contends that the Robinson Court's reasoning is no longer valid insofar as it relied on the Electoral Count Act's objection process to support its conclusion. He claims, without elaboration, that the Act was revised in 2022 "to limit objections only on the basis that either electors were not lawfully certified or that the vote count was irregular[.]" Castro's Supp. Resp. to Defs.' Mot. to Dismiss (doc. no. 44) at 3. Castro is correct that the Electoral Count Act was revised in 2022, after the Robinson order was issued, but, to the extent that he is arguing that this amendment limited the grounds for objections, that does not appear to be the case.

Both versions of the statute use the same terms to describe two exclusive grounds for objections to electoral votes. The amended version of the Act states that "[t]he only grounds for objections shall be as follows: (I) [t]he electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1) [and] (II) [t]he vote of one or more electors has not been regularly given." 3 U.S.C. § 15(d)(2)(B)(ii). The Act further provides that objections may only be "sustained by separate concurring votes of each House." Id. § 15(d)(2)(C). Prior to the amendment, the Act provided that all objections must be submitted for consideration to the Senate and House of Representatives, and "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to . . . shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." 62 Stat. 675 (1948) (current version at 3 U.S.C. § 15). Castro does not argue, nor does it appear to the court, that the relevant terms—"lawfully certified" and "regularly given"—took on new meaning through the amendment process, thereby materially altering the grounds for objections to electoral votes.

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> it is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. . . . Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. (citing Texas v. United States, 523 U.S. 296, 300-02 (1998)).

Similarly, in Grinols v. Electoral Coll., the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1. The Grinols Court denied the motion largely because it found the plaintiffs' claim "legally untenable." Id. at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." Id. at *4.

Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., Kerchner v. Obama, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs'

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constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F.3d 204 (3d Cir. 2010); Taitz v. Democrat Party of Mississippi, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); Jordan v. Secretary of State Sam Reed, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash. Super. Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any. To the contrary, Castro agrees that his claim may raise a political question that precludes jurisdiction, but he quibbles (without reason) about the timing of this jurisdictional effect. Castro asserts that the cases that the defendants cite were initiated or decided after the political parties held their national conventions to select presidential nominees. According to Castro, this circumstance alone "proves that the political question doctrine applies only after the major political parties hold their conventions and submit the nomination paperwork to the state for placement on the general election ballot."[28] Even if Castro's factual premise regarding

[28] Castro's Supp. Resp. to Defs.' Mot. to Dismiss (doc. no. 44) at 3-4 (emphasis in original).

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the timing of the cases and decisions is accurate—a conclusion that the court does not and need not draw—Castro's argument is wholly underdeveloped and unsubstantiated. Castro does not point to any factual or legal authority to support the notion that the political question doctrine, and the separation-of-powers principle at its core, simply lay dormant until after the national conventions, and the court finds no reasoned basis for such a conclusion.

In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications.[29] Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine.

[29] It bears noting that courts dealing with this justiciability question have not undertaken a searching analysis of the text and history of, for example, the Electoral Count Act and the Twentieth Amendment, which potentially impact the proper application of the political question doctrine. As Castro has not referred to, much less argued for, the inapplicability of the doctrine on these grounds, this court deems these arguments waived, and declines to engage them. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

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IV. Conclusion

For the reasons stated above, Castro's motion for a preliminary injunction[30] is DENIED, Trump's motion to dismiss[31] is GRANTED, and the case is dismissed.

SO ORDERED.

Joseph N. Laplante
United States District Judge

October 27, 2023

cc: John Anthony Castro, pro se
Brendan Avery O'Donnell, Esq.
Richard J. Lehmann, Esq.
David Warrington, Esq.
Jonathan Mark Shaw, Esq.
Mark Meuser, Esq.
Bryan K. Gould, Esq.
Morgan Tanafon, Esq.

[30] Doc. no. 6.

[31] Doc. no. 31.

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To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: still reading
Attachments: MI 14.3 decision.msg; 23-000151-MZ Donald Trump v Jocelyn Benson.msg; 23-000137-MZ Robert Labrant v Jocelyn Benson.msg; 23-000128-MB Robert Davis v Jocelyn Benson.msg

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Albro, Lisa (AG) [AlbroL@michigan.gov]
Subject: MI 14.3 decision

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Hi Heather (and Lisa),

I'm seeing that Judge Redford rejected the attempt to keep Trump off the ballot. Would you mind sending along the order when you have a chance?

Thanks!

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
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Good afternoon,

Attached please find the Order regarding the above mentioned case

Court of Claims

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STATE OF MICHIGAN

COURT OF CLAIMS

DONALD J. TRUMP,

Plaintiff,

v

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

Defendant.
_____/

OPINION AND ORDER

Case No. 23-000151-MZ

Hon. James Robert Redford

OPINION AND ORDER DENYING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF

In the instant case, 23-000151-MZ, plaintiff comes before the Court seeking declaratory and injunctive relief to:

> 1. Declare that the Secretary of State has neither an affirmative duty nor the authority under Michigan law to refuse to include Donald J. Trump as a candidate for President on either Michigan's presidential primary or general election ballots;
>
> 2. Declare that the Secretary has no authority to exclude Donald J. Trump from the Michigan primary or general election ballots under federal law;
>
> 3. Enjoin the Secretary from refusing to place Donald J. Trump on the Michigan primary ballot on the basis that he is disqualified under Section 3 of the Fourteenth Amendment.[1]

[1] An argument has been made to the Court that it does not have jurisdiction to grant plaintiff's request for declaratory and injunctive relief because plaintiff's complaint has relied on federal law, 28 USC 2201, in reference to his prayers for relief. Plaintiff has briefly cited this federal statute in the titles of the counts in the complaint. However, in ¶ 6 of the complaint, plaintiff maintains

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The Secretary has responded and agrees with plaintiff's first assertion regarding the primary ballot. She has also stated that she has no opinion with respect to the second and third request for declaratory judgment.

For the reasons which will be set forth below the Court concludes:

1. Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take, such that the Secretary has neither the affirmative duty nor the authority to separately decide whether Donald J. Trump will be placed on the Michigan presidential primary ballot on the grounds that he is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution.

2. The question of whether Donald J. Trump is ineligible from being placed on the 2024 Michigan presidential primary ballot because he is disqualified from serving under Section 3 of the Fourteenth Amendment presents a political question that is nonjusticiable at the present time.

3. The question of whether Donald J. Trump is qualified or disqualified from appearing on the 2024 general election ballot in Michigan is not ripe for adjudication at this time.

The Court will therefore:

1. GRANT plaintiff's request for a declaration that the Secretary of State does not have a clear legal duty, or the authority, under Michigan law, to determine whether plaintiff is disqualified from being placed on the Michigan presidential primary ballot in 2024 because of a Section 3 disqualification.

2. DENY plaintiff's request to declare the duties or authority of the Secretary with respect to the 2024 general election at this time.

3. GRANT plaintiff's request for a declaration that the Secretary of State does not have the authority to determine under federal constitutional law whether plaintiff may be

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that the Court has jurisdiction over this matter under MCR 600.6419 and MCR 2.605. Plaintiff's specific requests for relief in the body of the complaint do not rely on federal law. In keeping with the well-established rule courts to "look beyond mere procedural labels and read the allegations in a complaint as a whole to ascertain the nature of a claim", *Khan v City of Flint*, 490 Mich 851, 853; 800 NW2d 600 (2011), the Court finds that plaintiff's complaint properly seeks relief pursuant to Michigan law such that this Court has jurisdiction.

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disqualified under Section 3 of the Fourteenth Amendment from appearing on the 2024 Michigan presidential primary ballot because the Court finds that the question of Section 3 disqualification is a nonjusticiable, political one.

4. DENY any request for declaratory or injunctive relief to the extent plaintiff requests that the Court order the Secretary to place plaintiff on the 2024 presidential primary ballot, or enjoin the Secretary from refusing to do so, on the basis that plaintiff is not disqualified from serving under Section 3.

5. DENY any similar request for declaratory or injunctive relief with respect to the 2024 general election at this time.[2]

I. STANDARD OF REVIEW

MCR 2.605, which affords the Court the power to enter a declaratory judgment, "incorporates the doctrines of standing, ripeness, and mootness." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495, 815 NW2d 132 (2012). MCL 2.605(A)(1) provides "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." To obtain declaratory relief, plaintiff must thus show that he is an interested party and allege a "case of actual controversy" within the jurisdiction of the court. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Michigan v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). A court "is not precluded from reaching issues before actual injuries or losses have occurred," but there still must be "a present legal controversy, not one that is merely hypothetical or anticipated in the future." *Id.* The bar for standing is lowered

[2] The Court thanks and acknowledges the parties' and all amicus curiae filers' thoughtful and comprehensive submissions received by the Court.

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in cases concerning election laws, but even in election cases, a party may not bring a declaratory-judgment action on the basis that "*might* affect his or her interests in the future" or because "they only want instruction going forward." *Id.* at 587-588 (emphasis added). In addition, in determining whether a present controversy exists, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). See also *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).[3]

II. HISTORICAL INFORMATION

A. BRIEF BACKGROUND OF THE UNITED STATES CONSTITUTION

On September 17, 1787, the Constitution of the United States was agreed upon in the Constitutional Convention and transmitted to Congress by George Washington, the President of the Constitutional Convention. See Myers, *History Of The Printed Archetype Of The Constitution Of The United States Of America,* 11 Green Bag 2d 217 (2008). The Constitution was thereafter transmitted to the several states for consideration on September 28, 1787. See *id.* Following ratification by the states, March 4, 1789, was selected as the date upon which the operation of the government under the Constitution would commence.

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[3] The Court notes there are three cases that seek relief related to the 2024 Michigan Presidential primary election: *Davis v Benson et al.*, 23-000128-MB, *LaBrant et al. v Benson,* 23-000137-MZ, and *Trump v Benson*, 23-000151-MZ. Because the cases are not consolidated and to facilitate immediate and individual appellate review of each opinion and order if desired by a litigant, while the Court may discuss some aspects of other cases in each opinion and order, the Court will seek to set forth the entire basis of the Court's rulings in each individual opinion and order, recognizing that there will be some redundancy in the respective cases.

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The Constitution has Seven Articles which generally address the following:

Article I	The Legislature
Article II	The Executive
Article III	The Judiciary
Article IV	The Relationships between the Federal Government & States, Creation of New States
Article V	The Amendment Process
Article VI	The Supremacy Clause and the Oath required of persons holding certain offices to support the Constitution
Article VII	The Ratification Process for the United States Constitution

On September 25, 1789, Congress transmitted twelve proposed Amendments to the Constitution to the states, ten of which were adopted and became the Bill of Rights, effective December 15, 1791. Since its adoption, in total, the Constitution has been amended 27 times. See US Const, Am I-XXVII. Of these amendments, the following specifically address the office of the President: the XII, XX, XXII, XXIII, and XXV. The XII, XIV and XXIII Amendments also, *inter alia*, address the office of presidential electors.

B. POST-BILL OF RIGHTS & PRE-CIVIL WAR AMENDMENTS

The Eleventh Amendment, ratified February 7, 1795, placed certain limits on the judicial power unrelated to the matter at bar. The Twelfth Amendment, ratified June 15, 1804, set forth the process by which electors would vote for President and Vice President.

C. CIVIL WAR

In November 1860, Abraham Lincoln was elected the Sixteenth President of the United States. Between December 20, 1860 and June 8, 1861, 11 states voted to secede from the United States.

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On February 8, 1861, the Constitution for the Provisional Government of the Confederate States of America was adopted.[4] Jefferson Davis was selected to be Provisional President of the Confederate States of America on February 18, 1861.[5] On March 11, 1861, the Constitution of the Confederate States of America was adopted.[6]

On April 12, 1861, the federal enclave and military reservation at Fort Sumter, South Carolina was bombarded by cannon fire. On April 9, 1865, at Appomattox Court House, Virginia, the Army of Northern Virginia surrendered to the Union Army.

D. THE THIRTEENTH, FOURTEENTH & FIFTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

THE CIVIL WAR AMENDMENTS

The Thirteenth Amendment, ratified December 6, 1865, abolished slavery. US Const, Am XIII.

The Fourteenth Amendment, ratified July 9, 1868, contains five sections including Section 3, the subject of this case, referred to as the Insurrection Clause. US Const, Am XIV.

The Fifteenth Amendment was ratified February 3, 1870, and prohibited states from denying the right to vote on the basis of race, color, or previous condition of servitude. US Const, Am XV.

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[4] Yale Law School, Lillian Goldman Law Library, The Avalon Project https://avalon.law.yale.edu/19th_century/csa_csapro.asp, accessed November 13, 2023.

[5] https://www.britannica.com/biography/Jefferson-Davis, accessed November 10, 2023.

[6] Yale Law School, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/19th_century/csa_csa.asp, accessed November 13, 2023.

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III. ANALYSIS

A. PLAINTIFF'S ALLEGATIONS

Plaintiff filed his complaint October 30, 2023. The complaint alleges that the Michigan Secretary of State has no affirmative duty, nor the authority to separately determine whether plaintiff may be disqualified from being placed on the Michigan presidential primary ballot of 2024 because of the allegations that plaintiff's actions or instances of inaction, before, during, and after January 6, 2021, make him ineligible to stand for election for the office of President of the United States, on the basis of Section 3 of the Fourteenth Amendment to the United States Constitution. Plaintiff further alleges that he is entitled to declaratory and injunctive relief, and his placement on the 2024 primary and general election ballots, on the ground that "[q]uestions of constitutional qualifications are political questions reserved for Congress, not the Secretary of State; Section Three of the Fourteenth Amendment is not self-executing and there is no implementing legislation; Section Three of the Fourteenth Amendment does not apply to the President; any disqualification under Section Three does not apply until an individual holds office, not merely when he or she seeks nomination or election to office, and President Trump did not engage in an insurrection as those terms are used in Section Three of the Fourteenth Amendment."

B. LEGAL ANALYSIS

1. THE SECRETARY OF STATE DOES NOT HAVE A CLEAR LEGAL DUTY OR THE AUTHORITY UNDER THE MICHIGAN CONSTITUTION OR MCL 168.614a AND 168.615a TO DECIDE THE MERITS AND ISSUE A DECISION ON PLAINTIFF'S POSSIBLE DISQUALIFICATION FOR OFFICE UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT

The instant case is one of three related election cases in which the Court has been asked to determine whether Donald J. Trump may be excluded from the 2024 Michigan primary ballot on the ground that his alleged actions before, during, and after the events of January 6, 2021, at the

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United States Capitol in Washington D.C. result in his disqualification from serving as President under Section 3 of the Fourteenth Amendment.

In case 23-000128-MB, *Davis v Benson et al.*, among the issues raised by the plaintiff were requests for declaratory and mandamus relief seeking to have the Court declare that the Secretary has a clear affirmative duty under Mich Const 1963, art 11, §1 and MCL 24.263 to decide the merits and issue a decision with respect to whether Donald J. Trump is precluded from running for office or being placed on the Michigan presidential primary ballot of 2024. As discussed in detail in the Court's opinion for 23-000128-MB, the Court in that case found that the plaintiff had not shown that the Secretary has the affirmative, mandatory, duty under MCL 24.263 to determine whether a presidential primary candidate may be disqualified under Section 3 of the Fourteenth Amendment. The Court has also concluded that the Secretary does not have authority to decide Section 3 disqualification for the presidential primary ballot, because the 1963 Michigan Constitution and statutes prescribe eligibility to be placed on the Michigan presidential primary ballot; agencies, administrative agencies such as the Secretary of State generally do not have the power to determine constitutional questions; and the prudential constraints of the processes involved in making the legal or factual determinations that would be needed to be made concerning the application of Section 3 are such that the Secretary has no administrative process adequate to make these determinations. Accordingly, the Court has denied the plaintiff's request for declaratory and mandamus relief.

In 23-000137-MZ, *LaBrant v Benson*, the plaintiffs argued that Donald J. Trump is disqualified from office under Section 3, such that the Court is required to enjoin the Secretary from placing him on the 2024 Michigan presidential primary ballot. As discussed in further detail in the opinion for 23-000137-MZ, the Court held that Michigan's Constitution of 1963, art 2, § 4

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and MCL 168.614a and 168.615a prescribe the manner in which a person may have their name placed on the Michigan presidential primary ballot and in so doing directs the actions the Secretary shall take, such that the plaintiffs in that case have not shown that the Court may impose further qualifications on those who seek to be listed on the presidential primary ballot. The Court also held in that case that the number of steps involved in any candidate becoming a political party's candidate for President, in addition to the requirement that the candidate win the general election, show that declaratory relief is not proper, at least at this time. The Court has further held that the question of whether Donald J. Trump is precluded from holding office under Section 3 of the Fourteenth Amendment is a political question that is nonjusticiable at the present time.

In the instant case, plaintiff has raised substantially similar questions in his requests for relief. In accordance with its opinions in 23-000128-MB and 23-000137-MZ, the Court first finds that the Secretary does not have authority to decide Section 3 disqualification, because the 1963 Michigan Constitution and statutes prescribe eligibility to be placed on the Michigan presidential primary ballot; administrative agencies such as the Secretary of State generally do not have the power to determine constitutional questions; and the prudential constraints of the processes involved in making the legal or factual determinations that would be needed to be made concerning the application of Section 3 are such that the Secretary has no administrative process adequate to make these determinations.

The statutory steps currently involved in any candidate being placed on the Michigan presidential primary ballot demonstrate that the Secretary does not have authority to determine disqualification under Section 3 with respect to an individual who is running for President. This is because the 1963 Michigan Constitution grants the power to the Michigan Legislature to regulate

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elections under Const 1963, art 2, § 4(2) and because the Legislature has specifically delineated the process by which an individual is to be placed on a presidential primary ballot.

Const 1963, art 2, § 4(2) provides the Michigan Legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature in turn has prescribed the process and eligibility for a presidential candidate to be placed on the primary ballot in the mandatory requirements set out in MCL 168.614a and MCL 168.615a. MCL 168.614a(1) requires that

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state *shall* issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section [MCL 168.613a]. The secretary of state *shall* make the list issued under this subsection available to the public on an internet website maintained by the department of state. (Emphasis added).[7]

MCL 168.614a(2) provides for the state chairperson of each political party to then file a list of individuals whom they consider to be potential presidential candidates for that party and requires the Secretary to make that list available to the public. MCL 168.615a then requires the Secretary to place the candidates so identified on the presidential primary ballot unless a candidate

[7] The Court notes, at oral argument on November 9, 2023 in this case and cases 23-000128-MB and 23-000137-MZ, the attorney for the Secretary of State indicated that, in accordance with the Michigan Court Rules regarding deadlines that fall upon a weekend or legal holiday, the issuance of the list of individuals described in MCL 168.614a(1) would be transmitted on Monday, November 13, 2023 instead of Friday November 10, 2023, because November 10, 2023 was the State of Michigan Holiday in observance of Veteran's Day.

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withdraws. "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under [MCL 168.614a] to be printed on the appropriate presidential primary ballot for that political party." MCL168.615a(1) (Emphasis added).

Under those requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. However, the ultimate decision is made by the respective political party, with the consent of the listed candidates.[8] Given this comprehensive statutory scheme, there is no role for the Secretary to impose additional qualifications to be placed on the presidential primary ballot. [9]

The Court is further persuaded by the analysis of the Minnesota Supreme Court in its November 8, 2023 order in *Growe et al v Simon*, ___ NW2d ___ (Minn, 2023). As in the instant case, petitioners in *Growe* asked the Court to determine that Donald Trump was disqualified from holding the office of President under Section 3, and requested that the Court direct the Minnesota Secretary of State to exclude him from Minnesota's March 5, 2024 primary ballot and from the 2024 general election ballot.

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[8] The Court notes for candidates seeking to be placed on the presidential primary ballot in Michigan, if not included in the process outlined above and as provided by MCL 168.614a, may seek ballot access through a nominating petition process set forth in MCL 168.15a(2).

[9] Similarly, this is the reason that this Court will not order the Secretary of State to simply place former President Trump on the primary ballot. The relevant statutory provisions contain the only way provided by the Legislature for a candidate to be placed on the ballot.

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The Court first determined, as the Court does here, that any question concerning Donald Trump's placement on the general election ballot is not ripe, or "about to occur" as required for relief under Minn Stat 204B. Turning to the question of disqualification to be placed on the primary ballot, the Court discussed the steps involved in placing candidates on the presidential primary ballot. Similar to the steps in the instant case, Minnesota's procedure involves placement on the ballot after the Chair of the Republican Party of Minnesota provides his name to the Minnesota Secretary of State.

The Court determined that, although the Minnesota Secretary of State and administration officials "administer the mechanics of the election," primary elections are designed as an aid to the respective political parties in choosing their nominees at the national conventions:

> The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn. Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, slip op pp 2-3].

Similarly, in Michigan, the procedures outlined in MCL 168.614a and MCL 168.615a provide the specific and explicit mechanism by which the Secretary of State is to place candidates

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on the 2024 Michigan presidential primary ballot. They are designed to assist the parties in determining their respective presidential candidates, and the Legislature has not provided any prohibition as to who may be placed on such ballots, irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected.

In addition, as discussed in 23-000128-MB, Michigan courts have repeatedly held that administrative agencies such as the Secretary of State generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 710; 938 NW2d 855 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642; 298 NW2d 841 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159; 22 NW2d 252 (1946). Thus, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, the Court agrees with the Secretary that she has no authority to determine this constitutional question.

The Court also agrees that the Secretary simply has no administrative process for making the legal or factual determinations that would need to be made concerning the application of Section 3 of the Fourteenth Amendment. As the Secretary notes, there is no statutory vehicle that provides either an individual with the right to initiate such an action administratively or for the participation of the impacted candidate, who would be entitled to due process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283, 1294-1295 (ND Ga 2022) (discussing the plaintiff's due-process concerns in a case involving disqualification under Section 3).

Accordingly, the Court holds that the Secretary does not have a clear legal duty, or the authority, under Michigan law, to determine whether plaintiff is disqualified from being placed on the Michigan presidential primary ballot in 2024 because of a Section 3 disqualification

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However, the Court notes that, with respect to plaintiff's concurrent request that this Court declare that the Secretary has no authority to determine whether plaintiff is disqualified from being placed on the 2024 general election ballot, such a claim is not ripe, as it rests upon "contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282. See also *Thomas*, 473 US at 580-581. Many of the same considerations with respect to the Secretary's duty or ability to decide the issues raised about plaintiff's alleged Section 3 disability will arguably remain the same with respect to his placement on the 2024 general election ballot. However, at this time, even if plaintiff wins the Michigan Republican primary, he would still have to prevail in primary challenges in the other states and win the vote at the Republican National Convention to become the national Republican candidate. This process is subject to the influence of outside events such that the Court will not reach the issue of plaintiff's eligibility to be placed on the Michigan general election ballot at this time.

2. POLITICAL QUESTION

With respect to plaintiff's second and third requests above, the inquiry into whether Donald J. Trump is disqualified from being placed on the Michigan presidential primary ballot because he is disqualified from serving under Section 3 of the Fourteenth Amendment presents a political question that is nonjusticiable at the present time.

Section 3 of the Fourteenth Amendment of the United States Constitution states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the

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> United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 5 of the Fourteenth Amendment of the United States Constitution states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In determining whether to apply the political-question doctrine, the Supreme Court identified six factors relevant to the political-question doctrine in the 1962 case, *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [*Id.* at 217.]

With respect to factor 1 concerning who has the responsibility of making a factual determination of whether a person can serve under Section 3, the well-thought-out analysis and conclusion in *Castro v New Hampshire Secretary of State*, ____ F Supp 3d ___ (D NH, 2023) (Docket No. 23-CV-416-JL, issued October 27, 2023) is helpful. This was a similar case to the matter at bar in which the plaintiff sought an injunction barring the New Hampshire Secretary of State from placing former President Trump's name on the New Hampshire Republican primary ballot because of an alleged disqualification under Section 3.

After discussing whether the plaintiff had standing, and setting out the *Baker* factors, the *Castro* Court provided the following analysis:

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The defendants contend that Castro's claim triggers the first *Baker* formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

For example, in *Robinson v Bowen*, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F Supp 2d 1144, 1145 (ND Cal 2008). The *Robinson* Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The *Robinson* Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes. *Id.* at 1147. The *Robinson* Court reasoned that

> It is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process . . . . Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. (citing *Texas v United States*, 523 US 296, 300-02, 118 S Ct 1257, 140 L Ed 2d 406 (1998)).

Similarly, in *Grinols v Electoral Coll*, the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1. The *Grinols* Court denied the motion largely because it found the plaintiffs' claim "legally untenable." *Id.* at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President.

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> As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at * 4.
>
> Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., *Kerchner v Obama*, 669 F Supp 2d 477, 483 n 5 (D NJ 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs' constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F3d 204 (3d Cir 2010); *Taitz v Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); *Jordan v Secretary of State Sam Reed*, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").
>
> Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any.
>
> * * *
>
> In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications. Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine. [*Castro*, slip op pp 7-9 (footnotes omitted).]

The Court agrees with the above analysis. Additionally, the actions of those to whom Section 3's disqualification provision applied and Congress's post-civil war responses to the various problems with the way "disabilities" were initially removed support the conclusion that Congress is primarily responsible for taking actions to effectuate Section 3.

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The Fourteenth Amendment was ratified July 9, 1868. After this, the 1872 General Amnesty Act and the Amnesty Act of 1898 were passed.

The 1872 General Amnesty Act provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [17 Stat 142]

The 1872 law cleared over 150,000 former Confederate troops who had taken part in the American Civil War. See Heritage Library, <https://heritagelib.org/amnesty-act-of-1872#>, accessed November 10, 2023

Subsequently, Congress removed the Section 3 disability from those remaining individuals, enacting the Amnesty Act of 1898. This Act provides, "[t]hat the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, ch 389; 30 Stat 432.

That Congress could remove the Section 3 bar to serving, at least with respect to individuals barred at that time,[10] by enacting a law to "remove" the disability, en masse, even to those who could be said to be barred from service, but had not yet personally sought such relief, itself indicates that Congress not only had the power to remove the disability when asked by a specific

[10] The Court notes that there is disagreement over whether the enactment of the Amnesty Act was also intended to apply prospectively to future individuals who would otherwise be barred from holding office under Section 3. However, the Court need not reach that issue at this time.

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candidate, but also possesses the broader "proactive" power to decide how to apply Section 3 in the first instance.

Arguments have been made that Congress's only role with respect to Section 3 is to remove a disability only after the judicial branch has determined that the individual cannot serve. For example, in *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued October 25, 2023, slip op p 17, the court stated that Congress "has disavowed any ability it once had to consider objections other than [those in 3 USC 15(d)(2)(B)(*ii*), when 1) "the electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)", or 2) "where the vote of one or more electors has not been regularly given."] including any regarding the constitutional qualifications of the President-elect." However, Section 5 of the Fourteenth Amendment explicitly provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." The fact that Congress may have, at least for the moment, decided not to address this question prior to judicial intervention does not change the fact that they have the power to do so, and have certainly done so in the past.

With respect to the remaining factors set out in *Baker*, the Court notes that factors 2, 4, 5, and 6 apply to the instant case.

In Bradley and Posner, *The Real Political Question Doctrine*, Stanford Law Review, Vol. 75 (2023), the authors discuss how the "prudential" concerns in the *Baker* factors play into the use of the doctrine. Notably, two United States Supreme Court decisions after *Baker* support an analysis that some questions fall within the doctrine, at least in part, because of the related prudential concerns of causing "chaos", see *Nixon v United States*, 506 US 224, 236; 113 S Ct 732; 122 L Ed 2d 1 (1993), or because the courts would be pulled into recurring and highly partisan

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disputes, such as in the instant case, see *Rucho v Common Cause*, ___ US ___; 139 S Ct 2484, 2507; 204 L Ed 2d 931 (2019).

In *Nixon*, a case involving former United States District Judge Walter L. Nixon's impeachment trial before the Senate, the Court held that a challenge to the Senate's use of a committee to receive evidence during an impeachment trial, similar to the way congressional committees investigated early Section 3 cases, raised a political question. The impeached judge in *Nixon* argued that the Senate's use of the committee was inconsistent with the Constitutional requirement that the Senate "try" impeachment cases. However, as discussed in *The Real Political Question Doctrine*, pp 1070-1072, the Court found that the first *Baker* factor applied even though the Constitution did not specify that the Senate had exclusive authority to decide the relevant trial procedures to be used for impeachments. *Nixon*, 506 US at 228-229. Its reason for doing so involved prudential concerns. In reaching its conclusion, the Court specifically tied the first and second factors together, and held "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* After its analysis of Article I, § 3, cl 6, the Court further held that the "chaos" involved in attempting to fashion relief supported the finding of a political question. In doing so, this case provides support for the premise that attempting to resolve the question of whether former President Trump appears on the Michigan primary ballot, or any other ballot, is nonjusticiable.

> In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker v Carr*, 369 US, at 210, 82 S Ct, at 706. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to

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> months, or perhaps years, of chaos." 290 US App DC, at 427, 938 F2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim? [*Nixon*, 506 US at 236.]

See also *id.* at 253 (Souter, J., concurring in the judgment) (discussing that one significant consideration was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question", and stating, "As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government." (citation omitted)).

In *Rucho*, Chief Justice Roberts wrote for the majority:

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 177; 2 L Ed 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v Jubelirer*, 541 US 267, 277; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.* [*Rucho*, 139 S Ct at 2494.]

Rucho involved a request to intervene in light of a complaint alleging partisan gerrymandering by Republicans in North Carolina and Democrats in Maryland. The Supreme Court held that the challenges raised a political question. *Id.* at 2506-2507. The Court emphasized the difficulty that courts would have with resolving such claims using a "limited and precise rationale" that was also "clear, manageable, and politically neutral." *Id.* at 2498 (quotation marks

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and citation omitted). The Court found that intervention in "heated partisan issues" required such constraints, *id.*, because "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (quotations and citations omitted). The Court also noted that the circumstances were such that "the Constitution provides no basis whatever to guide the exercise of judicial discretion." *Id.* at 2506. With respect to the caution against becoming embroiled in recurring and highly partisan districting disputes, the Court further held:

> [I]ntervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. [*Id.* at 2507.]

The instant case presents potential for running afoul of these principles. In the companion case of 23-000128-MB, the Secretary has included in Exhibit 1, a list of active and recently dismissed state and federal cases, each involving former President Trump. There are 37 cases on the Secretary's list, and it does not include either of the companion cases currently before this Court. Should this trend continue, it is conceivable that there could be 50 state cases, and a number of concurrent federal ones, each with a judicial officer or officers who "even when proceeding with best intentions," have the potential to issue partial or even totally conflicting opinions on the basis of a significant number of potentially dispositive issues. Some of these cases, such as

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Anderson, are already proceeding to trial.[11] Prior to the United States Supreme Court's intervention, none of these opinions, or factual findings, are binding on any other court.

The questions involved are by their nature political. The number of cases presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly "expose the political life of the country to months, or perhaps years, of chaos." Moreover, there is no "limited and precise rationale" to guide this Court and the others that is also "clear, manageable, and politically neutral." Because the cases involve the office of the President, such confusion and lack of finality will be more pronounced. See *Nixon*, 506 US at 236.

In determining if a question is justiciable, it is worthwhile to consider what the judiciary is asked to determine. In this case, some questions while complex, are nonetheless straightforward and embrace traditional means of legal decision-making. Is a specific office sought covered? Has a person taken a previous oath that is applicable?

Others are far more nuanced and complex. This Court recognizes the judiciary does not avoid questions because they are nuanced, complex, or difficult; however, when applying the *Baker* principles and standards, it seems appropriate as applied to this case to ask:

What is an insurrection or a rebellion? What is it to engage in it or to give aid and comfort to the enemies of the Constitution?

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[11] The Court notes, *Anderson* and *Castro* discussed above reached opposite conclusions with respect to whether the question is justiciable. This Court agrees with the *Castro* Court that it is not.

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Does it require a war of 1,458 days with 620,000 killed and battles throughout the land? [12] Could it be based on actions of physical violence, lawlessness, destruction, interruption of legislative sessions all of which take place on a single day even if allegedly supported by and aided by speeches and comments and actions and inactions by an individual before, during, and after that day? Could it be a political speech that some may argue encourages or incites others to act in ways they believe results in moral culpability on the part of the speaker for physical violence?

The short answer is—there are as many answers and gradations of answers to each of these proffered examples as there are people called upon to decide them.

The inappropriateness of the judicial branch resolving these questions, tendered by Section 3 of the Fourteenth Amendment, includes that the judicial action of removing a candidate from the presidential ballot and prohibiting them from running essentially strips Congress of its ability to "by a vote of two-thirds of each House, remove such a disability." Also, it takes the decision of whether there was a rebellion or insurrection and whether or not someone participated in it from the Congress, a body made up of elected representatives of the people of every state in the nation, and gives it to but one single judicial officer, a person who no matter how well intentioned, evenhanded, fair and learned, cannot in any manner or form possibly embody the represented qualities of every citizen of the nation–as does the House of Representatives and the Senate. Nor

[12] American Battlefield Trust https://www.battlefields.org/learn/articles/civil-war-casualties, accessed November 13, 2023.

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is that judicial officer provided the "power to enforce, by appropriate legislation, the provisions of this article," Section 5. [13]

In summary, the question of whether plaintiff is precluded from holding the office of President because of a Section 3 disqualification presents a nonjusticiable political question that is left to Congress to decide.

With respect to plaintiff's specific requests for relief, the Court agrees that the Secretary of State has no authority to determine under federal constitutional law whether plaintiff or other presidential candidates may be disqualified under Section 3 of the Fourteenth Amendment from appearing on the 2024 Michigan presidential primary ballot. However, the Court will DENY plaintiff's request for declaratory or injunctive relief to the extent plaintiff requests that the Court order the Secretary to place plaintiff on the primary ballot because he is not disqualified from serving under Section 3, as such a question is a nonjusticiable political one. The Court further DENIES any similar request for relief with respect to the 2024 general election ballot, because

[13]Plaintiffs in companion case 23-000137-MZ have argued that the chaos created by permitting Mr. Trump to run, and become the President-elect, prior to having Congress adjudicate whether he is disqualified under Section 3, would be far worse than that which is presently occurring. Because the Constitution contains direction on what will occur should a President-elect fail to qualify for office (see XX Amendment, Sec. 3) or is unable to discharge the duties of his office (See Amendment XXV, Sec. 4) this Court, respectfully disagrees. As unsettling as such a process could be, it is the process provided for in the Constitution and is preferable to potentially having 50 or more separate trials or evidentiary hearings, which will undoubtably rely on nonstandard definitions of "insurrection or rebellion" or what constitutes providing "aid and comfort" to an "enemy" of the United States, where the results could then be completely contradictory and which would then have to survive the various state appellate processes-all in the extremely short time before the various state primaries. Also, the Court respectfully finds plaintiff's argument that the United States Supreme Court would then be able to manage subsequent appeals and ultimately determine these issues in time for the effective administration of various primary elections is speculative.

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such a claim is not ripe at this time. *Thomas*, 473 US at 580-581; *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282.

IV. CONCLUSION

For each of the reasons discussed above, the Court GRANTS plaintiff's request for a declaration that the Secretary of State does not have a clear legal duty, or the authority, under Michigan law, to determine whether plaintiff is disqualified from being placed on the Michigan presidential primary ballot in 2024 because of a Section 3 disqualification.

With respect to plaintiff's requests for relief under federal law, the Court finds that the question of Section 3 disqualification is a nonjusticiable, political one. The Court therefore GRANTS plaintiff's request for a declaration that the Secretary of State has no authority to determine under federal constitutional law whether plaintiff or other presidential candidates may be disqualified under Section 3 of the Fourteenth Amendment from appearing on the 2024 Michigan presidential primary ballot. However, the Court DENIES any request for declaratory or injunctive relief to the extent plaintiff requests that the Court order the Secretary to place plaintiff on the 2024 primary ballot, or enjoin the Secretary from refusing to do so, on the basis that plaintiff is not disqualified from serving under Section 3.

The Court further DENIES any similar request for declaratory or injunctive relief with respect to the 2024 general election because any question about plaintiff's qualifications with respect to the general election is not currently ripe for review.

IT IS SO ORDERED.

This is a final order and closes this case.

Date: November 14, 2023

James Robert Redford

Hon. James Robert Redford
Judge, Court of Claims

Court of Claims
State of Michigan

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From: COC Clerks Office [CClerksOffice@courts.mi.gov]
Sent: 11/14/2023 7:35:44 PM
To: 'mbrewer@goodmanacker.com' [mbrewer@goodmanacker.com]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Grill, Erik (AG) [GrillE@michigan.gov]; 'steve@kallmanlegal.com' [steve@kallmanlegal.com]; David Kallman [dave@kallmanlegal.com]; 'brianne@theusconstitution.org' [brianne@theusconstitution.org]; 'anickelhoff@michlabor.legal' [anickelhoff@michlabor.legal]; 'prescott@sppplaw.com' [prescott@sppplaw.com]; 'anickelhoff@michlabor.legal' [anickelhoff@michlabor.legal]; 'brianne@theusconstitution.org' [brianne@theusconstitution.org]; 'mnelson@wnj.com' [mnelson@wnj.com]; 'danjh1234@yahoo.com' [danjh1234@yahoo.com]; 'cspies@dickinsonwright.com' [cspies@dickinsonwright.com]
Subject: 23-000137-MZ Robert Labrant v Jocelyn Benson
Attachments: 20231114 Opin Ord.pdf

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Good afternoon,

Attached please find the Order regarding the above mentioned case

Court of Claims

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STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendant.
_____/

OPINION AND ORDER

Case No. 23-000137-MZ

Hon. James Robert Redford

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

In the instant case, 23-000137-MZ, plaintiffs come before the Court seeking declaratory and injunctive relief to:

1. Declare Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;

2. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election and;

3. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024 general election as a candidate for the office of President of the United States.

For the reasons which will be set forth below the Court holds:

1. Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take.

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2. The Fourteenth Amendment arguments of plaintiffs present a political question that is nonjusticiable at the present time. [1]

The Court will therefore DENY plaintiffs' prayer for declaratory relief and for a permanent injunction as relates to the Michigan primary election ballot for 2024. [2]

I. STANDARD OF REVIEW

MCR 2.605, which affords the Court the power to enter a declaratory judgment, "incorporates the doctrines of standing, ripeness, and mootness." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). MCL 2.605(A)(1) provides, "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." To obtain declaratory relief, a plaintiff must thus show that he is an interested party and allege a "case of actual controversy" within the jurisdiction of the court. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). A court "is not precluded from reaching issues before actual injuries or losses have occurred," but there still must be "a present legal

[1] The Court thanks and acknowledges the parties', proposed intervenor's, and all amicus curiae filers' thoughtful and comprehensive submissions received by the Court.

[2] The Court notes there are three cases that seek relief related to the 2024 Michigan presidential primary election: *Davis v Benson et al.*, 23-000128-MB, *LaBrant et al. v Benson,* 23-000137-MZ, and *Trump v Benson*, 23-000151-MZ. Because the cases are not consolidated and to facilitate immediate and individual appellate review of each opinion and order if desired by a litigant, while the Court may discuss some aspects of other cases in each opinion and order, the Court will seek to set forth the entire basis of the Court's rulings in each individual opinion and order, recognizing that there will be some redundancy in the respective cases.

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controversy, not one that is merely hypothetical or anticipated in the future." *Id.* The bar for standing is lowered in cases concerning election laws, but even in election cases, a party may not bring a declaratory-judgment action on the basis that they "*might* affect his or her interests in the future" or because "they only want instruction going forward." *Id.* at 587-588 (emphasis added). In addition, in determining whether a present controversy exists, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). See also *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

II. HISTORICAL INFORMATION

A. BRIEF BACKGROUND OF THE UNITED STATES CONSTITUTION

On September 17, 1787, the Constitution of the United States was agreed upon in the Constitutional Convention and transmitted to Congress by George Washington, the President of the Constitutional Convention. See Myers, *History Of The Printed Archetype Of The Constitution Of The United States Of America,* 11 Green Bag 2d 217 (2008). The Constitution was thereafter transmitted to the several states for consideration on September 28, 1787. See *id.* Following ratification by the states, March 4, 1789, was selected as the date upon which the operation of the government under the Constitution would commence.

The Constitution has Seven Articles which generally address the following:

Article I	The Legislature
Article II	The Executive
Article III	The Judiciary
Article IV	The Relationships between the Federal Government & States, Creation of New States

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Article V The Amendment Process

Article VI The Supremacy Clause and the Oath required of persons holding certain offices to support the Constitution

Article VII The Ratification Process for the United States Constitution

On September 25, 1789, Congress transmitted twelve proposed Amendments to the Constitution to the states, ten of which were adopted and became the Bill of Rights, effective December 15, 1791. Since its adoption, in total, the Constitution has been amended 27 times. See US Const, Am I-XXVII. Of these amendments, the following specifically address the office of the President: the XII, XX, XXII, XXIII, and XXV. The XII, XIV and XXIII Amendments also, *inter alia*, address the office of presidential electors.

B. POST-BILL OF RIGHTS & PRE-CIVIL WAR AMENDMENTS

The Eleventh Amendment, ratified February 7, 1795, placed certain limits on the judicial power unrelated to the matter at bar. The Twelfth Amendment, ratified June 15, 1804, set forth the process by which electors would vote for President and Vice President.

C. CIVIL WAR

In November 1860, Abraham Lincoln was elected the Sixteenth President of the United States. Between December 20, 1860 and June 8, 1861, 11 states voted to secede from the United States.

On February 8, 1861, the Constitution for the Provisional Government of the Confederate States of America was adopted.[3] Jefferson Davis was selected to be Provisional President of the

[3] Yale Law School, Lillian Goldman Law Library, The Avalon Project https://avalon.law.yale.edu/19th_century/csa_csapro.asp, accessed November 13, 2023.

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Confederate States of America on February 18, 1861.[4] On March 11, 1861, the Constitution of the Confederate States of America was adopted.[5]

On April 12, 1861, the federal enclave and military reservation at Fort Sumter, South Carolina was bombarded by cannon fire. On April 9, 1865, at Appomattox Court House, Virginia, the Army of Northern Virginia surrendered to the Union Army.

D. THE THIRTEENTH, FOURTEENTH & FIFTEENTH AMENDMENTS TO THE U.S. CONSTITUTION
THE CIVIL WAR AMENDMENTS

The Thirteenth Amendment, ratified December 6, 1865, abolished slavery. US Const, Am XIII.

The Fourteenth Amendment, ratified July 9, 1868, contains five sections including Section 3, the subject of this case, referred to as the Insurrection Clause. US Const, Am XIV.

The Fifteenth Amendment was ratified February 3, 1870, and prohibited states from denying the right to vote on the basis of race, color, or previous condition of servitude. US Const, Am XV.

III. ANALYSIS

A. PLAINTIFFS' ALLEGATIONS

Plaintiffs filed their complaint September 29, 2023. The complaint alleges actions and instances of inaction by Donald J. Trump, before, during, and after January 6, 2021, that plaintiffs

[4] https://www.britannica.com/biography/Jefferson-Davis, accessed November 10, 2023.

[5] Yale Law School, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/19th_century/csa_csa.asp, accessed November 13, 2023.

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allege make him ineligible to stand for election for the office of President of the United States, on the basis of Section 3 of the Fourteenth Amendment to the United States Constitution.

B. LEGAL ANALYSIS

1. MICHIGAN'S CONSTITUTION AND STATUTES PRESCRIBE ELIGIBILITY TO BE PLACED ON THE MICHIGAN PRESIDENTIAL PRIMARY BALLOT

The Court finds that the statutory steps currently involved in any candidate being placed on the Michigan presidential primary ballot demonstrate that plaintiffs cannot show that they are entitled to a declaratory judgment with respect to an individual who is running in the Michigan primary election for the office of President. This is because the 1963 Michigan Constitution grants the power to the Michigan Legislature to regulate elections under Const 1963, art 2, § 4(2) and because the Legislature has specifically delineated the process by which an individual is to be placed on a presidential primary ballot.

Const 1963, art 2, § 4(2) provides the Michigan Legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature in turn has prescribed the process and eligibility for a presidential candidate to be placed on the primary ballot in the mandatory requirements set out in MCL 168.614a and MCL 168.615a. MCL 168.614a(1) requires:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state *shall* issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section [MCL 168.613a]. The secretary of state *shall* make the list issued under this subsection available to the

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> public on an internet website maintained by the department of state. [Emphasis added.][6]

MCL 168.614a(2) provides for the state chairperson of each political party to then file a list of individuals whom they consider to be potential presidential candidates for that party and requires the Secretary to make that list available to the public. MCL 168.615a then requires the Secretary to place the candidates so identified on the presidential primary ballot unless a candidate withdraws. "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under [MCL 168.614a] to be printed on the appropriate presidential primary ballot for that political party." MCL168.615a(1) (Emphasis added).

Under those requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. However, the ultimate decision is made by the respective political party, with the consent of the listed candidates.[7] Given this comprehensive statutory scheme, there are substantial questions whether plaintiffs' complaint,

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[6] The Court notes, at oral argument on November 9, 2023, in this case and Cases 23-000128-MB and 23-000151-MZ, the attorney for the Secretary of State indicated that, in accordance with the Michigan Court Rules regarding deadlines that fall upon a weekend or legal holiday, the issuance of the list of individuals described in MCL 168.614a(1) would be transmitted on Monday, November 13, 2023, instead of Friday, November 10, 2023, because November 10, 2023, was the state of Michigan holiday in observance of Veteran's Day.

[7] The Court notes that candidates seeking to be placed on the presidential primary ballot in Michigan, if not included in the process outlined above and as provided by MCL 168.614a, may seek ballot access through a nominating petition process set forth in MCL 168.15a(2).

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taken in the light most favorable to plaintiffs, supports a conclusion that other qualifications to be placed on the presidential primary ballot may be imposed by the Court. [8]

The Court is further persuaded by the analysis of the Minnesota Supreme Court in its November 8, 2023 order in *Growe et al. v Simon*, ___ NW2d ___ (Minn, 2023). As in the instant case, petitioners in *Growe* asked the Court to determine that Donald Trump was disqualified from holding the office of President under Section 3, and requested that the Court direct the Minnesota Secretary of State to exclude him from Minnesota's March 5, 2024 primary ballot and from the 2024 general election ballot.

The Court first determined, as the Court does here, that any question concerning Donald Trump's placement on the general election ballot is not ripe, or "about to occur" as required for relief under Minn Stat 204B. Turning to the question of disqualification to be placed on the primary ballot, the Court discussed the steps involved in placing candidates on the presidential primary ballot. Similar to the steps in the instant case, Minnesota's procedure involves placement on the ballot after the Chair of the Republican Party of Minnesota provides his name to the Minnesota Secretary of State.

The Court determined that, although the Minnesota Secretary of State and administration officials "administer the mechanics of the election," primary elections are designed as an aid to the respective political parties in choosing their nominees at the national conventions:

> The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other

[8] Similarly, this is among the reasons that this Court will not order the Secretary to place former President Trump on the primary ballot. The relevant statutory provisions contain the only way set out by the Legislature for a candidate to be placed on the ballot.

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> states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn. Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, slip op pp 2-3].

Similarly, in Michigan, the procedures outlined in MCL 168.614a and MCL 168.615a provide the specific and explicit mechanism by which the Secretary of State is to place candidates on the 2024 Michigan presidential primary ballot. They are designed to assist the parties in determining their respective presidential candidates, and the Legislature has not provided any prohibition as to who may be placed on such ballots, irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected.

In addition, the sheer number of steps involved in any candidate becoming a political party's candidate for President, in addition to the requirement that the candidate wins the general election, show that declaratory relief is not proper, at least at this time.

The Michigan Republican Party must list Mr. Trump as a Republican primary candidate in Michigan. Should they do so, he would then have to win said primary, which may well be affected by outside events that have occurred by that time. If he wins the Michigan primary, he would still have to prevail in primary challenges in the other states and win the vote at the Republican National

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Convention to become the national Republican candidate. This process, too, is subject to the influence of outside events. Even if he prevails at that stage, he must win the general election.

If he does so, and his right to be seated as President is challenged and he is found to be under the Section 3 disability, he could then petition Congress to have that disability removed. Congress, by Section 3 of the Fourteenth Amendment, may remove the disability with a two-thirds vote of both Houses. As discussed, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282. Whether former President Trump even becomes the President-elect is such a future event that plaintiffs cannot demonstrate that their request for a declaratory judgment is ripe at this time.

2. POLITICAL QUESTION

An additional reason the Court concludes that plaintiffs cannot receive the relief of preventing former President Trump from being placed on the primary ballot—should he satisfy Michigan's process of determining who should be listed as a candidate—is that a claim such as that raised by plaintiffs turns on a nonjusticiable political question.

Section 3 of the Fourteenth Amendment of the United States Constitution states:

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

Section 5 of the Fourteenth Amendment of the United States Constitution states:

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> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In determining whether to apply the political-question doctrine, the Supreme Court identified six factors relevant to the political-question doctrine in the 1962 case, *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [*Id.* at 217.]

With respect to factor 1 concerning who has the responsibility of making a factual determination of whether a person can serve under Section 3, the well-thought-out analysis and conclusion in *Castro v New Hampshire Sec'y of State*, ____ F Supp 3d ___ (D NH, 2023) (Docket No. 23-CV-416-JL, issued October 27, 2023) is helpful. This was a similar case to the matter at bar in which the plaintiff sought an injunction barring the New Hampshire Secretary of State from placing former President Trump's name on the New Hampshire Republican primary ballot because of an alleged disqualification under Section 3.

After discussing whether the plaintiff had standing, and setting out the *Baker* factors, the *Castro* Court provided the following analysis:

> The defendants contend that Castro's claim triggers the first *Baker* formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual

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assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

For example, in *Robinson v Bowen*, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F Supp 2d 1144, 1145 (ND Cal 2008). The *Robinson* Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The *Robinson* Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes. *Id.* at 1147. The *Robinson* Court reasoned that

> It is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process . . . . Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. (citing *Texas v United States*, 523 US 296, 300-02, 118 S Ct 1257, 140 L Ed 2d 406 (1998)).

Similarly, in *Grinols v Electoral Coll*, the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1. The *Grinols* Court denied the motion largely because it found the plaintiffs' claim "legally untenable." *Id.* at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at * 4.

Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., *Kerchner v Obama*, 669 F Supp 2d 477, 483 n 5 (D

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NJ 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs' constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F3d 204 (3d Cir 2010); *Taitz v Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); *Jordan v Secretary of State Sam Reed*, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any.

* * *

In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications. Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine. [*Castro*, slip op pp 7-9 (footnotes omitted).]

The Court agrees with the above analysis. Additionally, the actions of those to whom Section 3's disqualification provision applied and Congress's post-civil war responses to the various problems with the way "disabilities" were initially removed support the conclusion that Congress is primarily responsible for taking actions to effectuate Section 3.

The Fourteenth Amendment was ratified July 9, 1868. After this, the 1872 General Amnesty Act and the Amnesty Act of 1898 were passed.

The 1872 General Amnesty Act provided:

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> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [17 Stat 142]

The 1872 law cleared over 150,000 former Confederate troops who had taken part in the American Civil War. See Heritage Library, <https://heritagelib.org/amnesty-act-of-1872#>, accessed November 10, 2023

Subsequently, Congress removed the Section 3 disability from those remaining individuals, enacting the Amnesty Act of 1898. This Act provides, "[t]hat the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, ch 389; 30 Stat 432.

That Congress could remove the Section 3 bar to serving, at least with respect to individuals barred at that time,[9] by enacting a law to "remove" the disability, en masse, even to those who could be said to be barred from service, but had not yet personally sought such relief, itself indicates that Congress not only had the power to remove the disability when asked by a specific candidate, but also possesses the broader "proactive" power to decide how to apply Section 3 in the first instance.

Arguments have been made that Congress's only role with respect to Section 3 is to remove a disability only after the judicial branch has determined that the individual cannot serve. For

[9] The Court notes that there is disagreement over whether the enactment of the Amnesty Act was also intended to apply prospectively to future individuals who would otherwise be barred from holding office under Section 3. However, the Court need not reach that issue at this time.

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example, in *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued October 25, 2023, slip op p 17, the Court stated that Congress "has disavowed any ability it once had to consider objections other than [those in 3 USC 15(d)(2)(B)(*ii*), when 1) "the electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)", or 2) "where the vote of one or more electors has not been regularly given."] including any regarding the constitutional qualifications of the President-elect." However, Section 5 of the Fourteenth Amendment explicitly provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." The fact that Congress may have, at least for the moment, decided not to address this question prior to judicial intervention does not change the fact that they have the power to do so, and have certainly done so in the past.

With respect to the remaining factors set out in *Baker*, the Court notes that factors 2, 4, 5, and 6 apply to the instant case.

In Bradley and Posner, *The Real Political Question Doctrine*, Stanford Law Review, Vol. 75 (2023), the authors discuss how the "prudential" concerns in the *Baker* factors play into the use of the doctrine. Notably, two United States Supreme Court decisions after *Baker* support an analysis that some questions fall within the doctrine, at least in part, because of the related prudential concerns of causing "chaos", see *Nixon v United States*, 506 US 224, 236; 113 S Ct 732; 122 L Ed 2d 1 (1993), or because the courts would be pulled into recurring and highly partisan disputes, such as in the instant case, see *Rucho v Common Cause*, ___ US ___; 139 S Ct 2484, 2507; 204 L Ed 2d 931 (2019).

In *Nixon*, a case involving former United States District Judge Walter L. Nixon's impeachment trial before the Senate, the Court held that a challenge to the Senate's use of a

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committee to receive evidence during an impeachment trial, similar to the way congressional committees investigated early Section 3 cases, raised a political question. The impeached judge in *Nixon* argued that the Senate's use of the committee was inconsistent with the Constitutional requirement that the Senate "try" impeachment cases. However, as discussed in *The Real Political Question Doctrine*, pp 1070-1072, the Court found that the first *Baker* factor applied even though the Constitution did not specify that the Senate had exclusive authority to decide the relevant trial procedures to be used for impeachments. *Nixon*, 506 US at 228-229. Its reason for doing so involved prudential concerns. In reaching its conclusion, the Court specifically tied the first and second factors together, and held "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* After its analysis of Article I, § 3, cl 6, the Court further held that the "chaos" involved in attempting to fashion relief supported the finding of a political question. In doing so, this case provides support for the premise that attempting to resolve the question of whether former President Trump appears on the Michigan primary ballot, or any other ballot, is nonjusticiable.

> In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker v Carr*, 369 US, at 210, 82 S Ct, at 706. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." 290 US App DC, at 427, 938 F2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to

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> create an additional judgeship if the seat had been filled in the interim? [*Nixon*, 506 US at 236.]

See also *id.* at 253 (Souter, J., concurring in the judgment) (discussing that one significant consideration was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question", and stating, "As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government." (citation omitted)).

In *Rucho*, Chief Justice Roberts wrote:

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 177, 2 L Ed. 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v Jubelirer*, 541 US 267, 277; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.* [*Rucho*, 139 S Ct at 2494.]

Rucho involved a request to intervene in light of a complaint alleging partisan gerrymandering by Republicans in North Carolina and Democrats in Maryland. The Supreme Court held that the challenges raised a political question. *Id.* at 2506-2507. The Court emphasized the difficulty that courts would have with resolving such claims using a "limited and precise rationale" that was also "clear, manageable, and politically neutral." *Id.* at 2498 (quotation marks and citation omitted). The Court found that intervention in "heated partisan issues" required such constraints, *id.*, because "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (quotations and citations omitted). The Court also noted that

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the circumstances were such that "the Constitution provides no basis whatever to guide the exercise of judicial discretion." *Id.* at 2506. With respect to the caution against becoming embroiled in recurring and highly partisan districting disputes, the Court further held:

> [I]ntervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. [*Id.* at 2507.]

The instant case presents the potential for running afoul of these principles. In the companion case of 23-000128-MB, the Secretary has included in Exhibit 1, a list of active and recently dismissed state and federal cases, each involving former President Trump. There are 37 cases on the Secretary's list, and it does not include either of the companion cases currently before this Court. Should this trend continue, it is conceivable that there could be 50 state cases, and a number of concurrent federal ones, each with a judicial officer or officers who "even when proceeding with best intentions," have the potential to issue partial or even totally conflicting opinions on the basis of a significant number of potentially dispositive issues. Some of these cases, such as *Anderson*, are already proceeding to trial.[10] Prior to the United States Supreme Court's intervention, none of these opinions, or factual findings, are binding on any other court.

The questions involved are by their nature political. The number of cases presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly "expose the political life of the country to months, or perhaps years, of chaos." Moreover, there

[10] The Court notes, *Anderson* and *Castro* discussed above reached opposite conclusions with respect to whether the question is justiciable. This Court agrees with the *Castro* Court that it is not.

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is no "limited and precise rationale" to guide this Court and the others that is also "clear, manageable, and politically neutral." Because the cases involve the office of the President, such confusion and lack of finality will be more pronounced. *Nixon*, 506 US at 236.

In determining if a question is justiciable, it is worthwhile to consider what the judiciary is asked to determine. In this case, some questions while complex, are nonetheless straightforward and embrace traditional means of legal decision-making. Is a specific office sought covered? Has a person taken a previous oath that is applicable?

Others are far more nuanced and complex. This Court recognizes the judiciary does not avoid questions because they are nuanced, complex, or difficult; however, when applying the *Baker* principles and standards, it seems appropriate in this case to ask:

What is an insurrection or a rebellion? What is it to engage in it or to give aid and comfort to the enemies of the Constitution?

Does it require a war of 1,458 days with 620,000 killed and battles throughout the land? [11] Could it be based on actions of physical violence, lawlessness, destruction, interruption of legislative sessions all of which take place on a single day even if allegedly supported by and aided by speeches and comments and actions and inactions by an individual before, during, and after that day? Could it be a political speech that some may argue encourages or incites others to act in ways they believe results in moral culpability on the part of the speaker for physical violence?

[11] American Battlefield Trust https://www.battlefields.org/learn/articles/civil-war-casualties, accessed November 13, 2023.

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The short answer is–there are as many answers and gradations of answers to each of these proffered examples as there are people called upon to decide them.

The inappropriateness of the judicial branch resolving these questions, tendered by Section 3 of the Fourteenth Amendment, includes that the judicial action of removing a candidate from the presidential ballot and prohibiting them from running essentially strips Congress of its ability to "by a vote of two-thirds of each House, remove such a disability." Also, it takes the decision of whether there was a rebellion or insurrection and whether or not someone participated in it from the Congress, a body made up of elected representatives of the people of every state in the nation, and gives it to but one single judicial officer, a person who no matter how well intentioned, evenhanded, fair and learned, cannot in any manner or form possibly embody the represented qualities of every citizen of the nation–as does the House of Representatives and the Senate. Nor is that judicial officer provided the "power to enforce, by appropriate legislation, the provisions of this article," Section 5. [12]

[12]Plaintiffs argue that the chaos created by permitting Mr. Trump to run, and become the President-elect, prior to having Congress adjudicate whether he is disqualified under Section 3, would be far worse than that which is presently occurring. Because the Constitution contains direction on what will occur should a President-elect fail to qualify for office (see US Const, Am XX, § 3) or is unable to discharge the duties of his office (see US Const, Am XXV, § 4), this Court respectfully disagrees. As unsettling as such a process could be, it is the process provided for in the Constitution and is preferable to potentially having 50 or more separate trials or evidentiary hearings, which will undoubtably rely on nonstandard definitions of "insurrection or rebellion" or what constitutes providing "aid and comfort" to an "enemy" of the United States, where the results could then be completely contradictory and which would then have to survive the various state appellate processes—all in the extremely short time before the various state primaries. Also, the Court respectfully finds plaintiffs' argument that the United States Supreme Court would then be able to manage subsequent appeals and ultimately determine these issues in time for the effective administration of various primary elections speculative.

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IV. CONCLUSION

For each of the reasons discussed above, the Court DENIES declaratory relief to plaintiffs in 23-000137-MZ.

IT IS SO ORDERED.

This is a final order and closes this case.

Date: November 14, 2023

Hon. James Robert Redford
Judge, Court of Claims

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Good afternoon,

Attached please find the Order regarding the above mentioned case

Court of Claims

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

JOCELYN BENSON, in her official capacity, as the duly elected Secretary of State, JULIE DALE, in her official capacity as Assistant General Counsel of Third Judicial Circuit Court of Michigan, and RICHARD LYNCH, in his official capacity as General Counsel of Third Judicial Circuit Court of Michigan,

Defendants.
_____/

OPINION AND ORDER

Case No. 23-000128-MB

Hon. James Robert Redford

OPINION AND ORDER DENYING IN PART PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF AND FOR A WRIT OF MANDAMUS, GRANTING THE SECRETARY OF STATE'S MOTION FOR SUMMARY DISPOSITION ON COUNTS I, II, AND VI IN PLAINTIFF'S AMENDED COMPLAINT UNDER MCR 2.116(C)(8), AND HOLDING NEW COUNTS V, VII, and VIII IN ABEYANCE

In this matter, 23-000128-MB, plaintiff filed an initial complaint as well as an emergency motion for declaratory judgment, a writ of mandamus, and an order to show cause on September 15, 2023, requesting that the Court:

> 1. Declare that the Secretary of State cannot enforce the current version of MCL 168.613a, which was recently amended by 2023 PA 2, and issue an order of mandamus directing the Secretary to comply with the preamendment version of the statute;
>
> 2. Issue a writ of mandamus compelling the Secretary of State to promulgate rules pursuant to MCL 168.759a(17) regarding the electronic return of voted ballots by overseas military voters; and,

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3. Declare that the Secretary of State has a clear legal duty under Mich Const 1963, art 11, § 1 and MCL 24.263 to decide the merits and issue a decision on plaintiff's August 28, 2023 request for declaratory ruling with respect to the question whether Donald J. Trump is precluded from running for office or being placed on the Michigan presidential primary ballot of 2024 on the ground that he is prohibited from doing so under the proscriptions of Section 3 of the Fourteenth Amendment of the United States Constitution.[1]

The Secretary has responded and has moved for partial summary disposition under MCR 2.116(C)(8) and (10) regarding Counts I, II, V, and VI of the initial complaint. She has also requested that the Court resolve plaintiff's emergency motion for declaratory judgment and mandamus relief consistent with the Secretary's arguments. As such, the Court will also resolve plaintiff's requests for declaratory relief and mandamus in Count's III and IV of his amended complaint. The Court will address the counts for which the Secretary has requested summary disposition first.[2]

For the reasons which will be set forth below the Court concludes:

1. Because the 2023 session of the Michigan Legislature has ended at 12:00 p.m. on November 14, 2023, plaintiff's requests in Count I and Count II of his complaint are now MOOT.

2. Contrary to plaintiff's arguments, the Secretary of State has begun to promulgate rules pursuant to MCL 168.759a(17) regarding the electronic return of voted ballots by overseas military voters. Thus, the claim that the Secretary has failed to act is not ripe because there is no present controversy, such that mandamus is not an available remedy at this time.

---

[1] Plaintiff filed an amended complaint on October 23, 2023. Counts I, II, III, IV, and VI remain the same. Because plaintiff has abandoned Count V of his initial complaint, the Court GRANTS the Secretary's concurrent request for summary disposition with respect to this count under MCR 2.116(C)(8) as MOOT. As discussed in the Court's prior scheduling order, the instant opinion does not resolve the claims raised in Counts V, VII, and VIII of the amended complaint.

[2] The Court again thanks and acknowledges the parties', proposed intervenor's, and all amicus curiae filers' thoughtful and comprehensive submissions received by the Court.

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3. Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take, such that the Secretary has neither the affirmative duty nor the authority to separately decide whether Donald J. Trump will be placed on the Michigan primary ballot on the grounds that he is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution.[3]

I. STANDARD OF REVIEW

Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005) "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). A motion under MCR 2.116(C)(8) may only be granted "where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (quotation marks and citation omitted).

[3] The Court notes there are three cases that seek relief related to the 2024 Michigan presidential primary election: *Davis v Benson et al.*, 23-000128-MB, *LaBrant et al. v Benson,* 23-000137-MZ, and *Trump v Benson*, 23-000151-MZ. Because the cases are not consolidated and to facilitate immediate and individual appellate review of each opinion and order if desired by a litigant, while the Court may discuss some aspects of other cases in each opinion and order, the Court will seek to set forth the entire basis of the Court's rulings in each individual opinion and order, recognizing that there will be some redundancy in the respective cases.

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MCR 2.605, which affords the Court the power to enter a declaratory judgment, "incorporates the doctrines of standing, ripeness, and mootness." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). MCL 2.605(A)(1) provides "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." To obtain declaratory relief, a plaintiff must show that he is an interested party and allege a "case of actual controversy" within the jurisdiction of the court. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). A court "is not precluded from reaching issues before actual injuries or losses have occurred," but there still must be "a present legal controversy, not one that is merely hypothetical or anticipated in the future." *Id.* The bar for standing is lowered in cases concerning election laws, but even in election cases, a party may not bring a declaratory-judgment action on the basis that the issue "*might* affect his or her interests in the future" or because "they only want instruction going forward." *Id.* at 587-588 (emphasis added). In addition, in determining whether a present controversy exists, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). See also *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

Respecting plaintiff's concurrent request for mandamus, "mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting*

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Michigan's Constitution v Sec'y of State, 324 Mich App 561, 583; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018). "To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). "A clear legal right is a right clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Attorney General v Bd Of State Canvassers*, 318 Mich App 242, 249; 896 NW2d 485 (2016) (quotation marks and citation omitted). "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted); See also *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016). Accordingly, a writ of mandamus is generally inappropriate if the act sought to be performed involves judgment or the exercise of discretion. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248; 829 NW2d 335 (2013).[4] The plaintiff has the

[4] The Court recognizes that our Supreme Court in *Teasel v Dep't of Mental Health*, 419 Mich 390; 355 NW2d 75 (1984), provided that "the writ will lie to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion." *Id.* at 410. However, the Court also affirmed that the writ "will not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies" and clarified that "[s]tated otherwise, mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Id.* The Court further explained:

> The [mandamus] power [of the judiciary] is not one to create a duty where none existed before or to mandate action where the decision whether to act is discretionary. Rather, the power is the constitutional power of a circuit court to

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burden of demonstrating entitlement "to the extraordinary remedy of a writ of mandamus." *Citizens Protecting Michigan's Constitution*, 324 Mich App at 584. For purposes of resolving plaintiff's request in Count II, plaintiff must also demonstrate that the request for mandamus is ripe. See *Coates v Attorney General*, 120 Mich App 816, 827; 328 NW2d 113 (1982), mod 126 Mich App 370; 337 NW2d 343 (1983) (holding that issuance of mandamus would be premature against an official who has not yet refused to perform their duty.) See also *Davis v Indep Citizens Redistricting Comm*, 508 Mich 935; 963 NW2d 600 (2021) (Zahra, J. (concurring)).

II. ANALYSIS

A. COUNTS I AND II

In Counts I and II, plaintiff seeks declaratory and mandamus relief to essentially compel the Secretary of State to conduct the 2024 presidential primary election on March 12, 2024, rather than on February 27, 2024, as required by the current version of MCL 168.613a(1), which was recently amended by 2023 PA 2. However, in light of the fact that the Legislature has ended its 2023 session on November 14, 2023, at 12:00 p.m., plaintiff's claims for relief are MOOT.

> direct, upon the complaint of an aggrieved party, that a duty imposed by law upon the executive department of government to make a decision according to legislatively established criteria be carried out. Were it otherwise, our citizens would be powerless to compel their public servants to conduct the business of government—to make a decision, whether good or bad, but some decision, based upon the legislatively established criteria where the duty to *make* a decision is clear. [*Id.* at 412.]

In other words, while an agency may not wholly avoid compliance with a statutory mandate on the ground that it retains some discretion as to the particular method of compliance, the court will not impose a mandatory duty where none exists under the relevant statute, and mandamus will not lie to compel the agency to use its judgment or discretion to act in a particular manner. Such an exercise of judgment or discretion is not "ministerial."

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2023 PA 2 was passed on February 1, 2023. It did not, however, garner the two-thirds vote of each House necessary to be given immediate effect under Const 1963, art 4, § 27. As such, it will not take effect "until the expiration of 90 days from the end of the session at which it was passed". *Id.* In his previously filed pleadings, plaintiff maintained that according to the then-current legislative calendar, the session was not scheduled to end until December 14, 2023, or December 21, 2023. However, plaintiff has presented nothing to support a claim that the Legislature may not choose a different end date, which it has now done, such that the current version of MCL 168.613a(1) will take effect before February 27, 2024. Under the existing statute, MCL 168.613a, the date of the presidential primary continues to be March 12, 2024. However, as the Secretary was aware, at the time it was passed, it was possible that 2023 PA 2 might become effective and change the date to February 27, 2024. As such, the Secretary issued an "Election Calendar of Dates" and a pamphlet, "Ballot Access Information for Presidential Candidates Seeking Office in 2024," both of which clearly indicated the possibility that the current version of MCL 168.613a would remain in effect, but was also designed to prepare county clerks and others to comply with the earlier election date.

Because the Legislature voted to end the 2023 legislative session on November 14, 2023, and has adjourned *sine die*, Const 1963, art 4, § 27 will now apply.

This section provides:

> No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.

As a result, the changes indicated will become effective on February 13, 2024. Thus, the primary date will now be February 27, 2024. Plaintiff's argument that the Secretary's actions in

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disseminating the calendar and information pamphlets were unlawful are now MOOT. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Accordingly, because this issue is MOOT, the Court GRANTS summary disposition to the Secretary of State with respect to plaintiff's request for declaratory and mandamus relief in Counts I and II of his complaint.

B. COUNT VI

In Count VI of his complaint, plaintiff seeks a writ of mandamus compelling the Secretary of State to promulgate rules pursuant to MCL 168.759a(17) regarding the electronic return of voted ballots by overseas military voters. Public Act 197 of 2022 amended MCL 168.759a(13) to provide for the ability of military voters to return absent voter ballots electronically and required the Secretary of State to promulgate rules to provide for the process to do so. MCL 168.759a(17), as amended by 2022 PA 197.

Plaintiff seeks mandamus on the ground that "[t]o date, the Defendant Secretary of State has FAILED to begin to promulgate rules in accordance with the APA to implement MCL 168.759a(17)." Plaintiff further contends that the duties of the Secretary under the statute are ministerial. In support of her claim for relief, the Secretary has presented a November 2022 request for rulemaking using the Department of Licensing and Regulatory Affairs Administrative Rulemaking System.

> MCL 168.759a(13) provides in relevant part for the ability of military voters to return absent voter ballots electronically. MCL 168.759a(17), as amended by 2022 PA 197, requires the Secretary of State to promulgate rules "pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328" to facilitate the process of return of voting ballots by these voters. Currently, MCL

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> 168.759a(17) requires that these rules be promulgated by January 1, 2024: The secretary of state shall promulgate rules that establish policies and procedures for the electronic return of voted ballots by eligible members. In promulgating rules that establish the policies and procedures for the electronic return of voted ballots by eligible members, the secretary of state shall require an eligible member to use a United States Department of Defense verified electronic signature, as that term is defined in [MCL168.18a], so that the identity of the eligible member can be verified utilizing those policies and procedures. A member who is unable or unwilling to provide a United States Department of Defense verified electronic signature is not eligible to electronically return a voted ballot. The secretary of state shall take reasonable steps to ensure the integrity and secrecy of voted ballots returned electronically. The secretary of state may develop and maintain a secure web portal on the secretary of state's website to facilitate the electronic return of voted ballots by eligible members. Only the secretary of state or the secretary of state's duly authorized agent, a city or township clerk, the clerk's deputy clerk, or a sworn member of the clerk's staff is authorized to access the secure web portal on the secretary of state's website. No later than January 1, 2024, the secretary of state shall promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to implement this subsection, and the secretary of state must allow for the electronic return of voted ballots by eligible members starting no later than the 2024 statewide presidential primary election. As used in this subsection, "eligible member" means a member of a uniformed service on active duty or a member of the merchant marine, as described in subsection (6) or (13).

Following the passage of 2023 Senate Bill 470, MCL 168.759a(17) has been amended by 2023 PA 193 to provide for additional time for the Secretary to act. It now provides that the rules be promulgated by September 1, 2025. However, as with the changes to MCL 168.613a, the changes to MCL 168.759a(17) were not given immediate effect. Thus, unlike the recent changes to MCL 168.613a(1), the current date in MCL 168.759a(17) giving the Secretary until January 1, 2024 to promulgate the rules remains the same, because although the Legislature voted to end its current 2023 legislative session on November 14, 2023 and has adjourned *sine die*, Const 1963, art 4, § 27 will now apply such that the effective date of the changes will not be until February 13, 2024. Thus, the Court will analyze this issue using the current January 1, 2024 date.

At this time, neither party has presented the Court with the complete set of proposed rules. Nor has either party even argued that the complete rules have been proposed. As the Secretary

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notes, she has presented a "Request for Rulemaking" to the Michigan Office of Administrative Hearings and Rules. The Court, therefore, agrees with the Secretary that, to the extent that a declaratory ruling is sought to compel the Secretary to begin the rulemaking process, she has done so. Nor is mandamus appropriate where the Secretary has not refused to perform her statutory duties. *Coates*, 120 Mich App at 827.

In his response to the Secretary's motion for summary disposition, plaintiff takes issue with the fact that the Secretary has not yet complied with the requirement of a regulatory impact statement as required under MCL 24.245(3). He also argues that the Secretary has not complied with the Administrative Procedures Act because the Secretary has not yet sent the rules for public comment as required under MCL 24.241. However, the request for rulemaking clearly states that the rules will be promulgated under the full rulemaking process. Although the request also states that the proposed rules have not been submitted to the public for comment, plaintiff has not shown that they will not be submitted once they are promulgated. Nor has plaintiff demonstrated that the Secretary will fail to meet the current deadline. As such, the Court GRANTS summary disposition to the Secretary of State under MCL 2.116(C)(8) with respect to Count VI.

C. COUNTS III AND IV

Plaintiff argues that the Secretary of State has a clear legal duty under Const 1963, art 11, § 1 and MCL 24.263 to decide the merits and issue a decision on plaintiff's August 28, 2023 request for declaratory ruling related to the qualification or possible disqualification of Donald J. Trump to be a candidate for President of the United States under Section 3 of the Fourteenth Amendment. The Court disagrees.

MCL 24.263 provides:

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> On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

In terms of the issuance of a writ of mandamus, the permissive language in MCL 24.263 severely undercuts plaintiff's arguments. As discussed above, a writ of mandamus requires a clear legal duty to perform the specific duty sought and that such act is ministerial. *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 518.

In this case, plaintiff alleges that the Secretary has violated a statutory mandate; i.e., that the Secretary is statutorily required to "issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency" under MCL 24.263. However, the permissive language of MCL 24.263 does not mandate a duty to issue a declaratory ruling under the statute; it leaves the decision to do so in the hands of the agency, here the Secretary of State. This is simply not the case where an "officer charged with a duty to take action in the matter" has failed to do so.

In this way, the permissive language in MCL 24.263 stands in sharp contrast to the mandatory requirements in MCL 168.614a and MCL 168.615a. MCL 168.614a(1) requires:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state *shall* issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section [MCL 168.613a]. The secretary of state *shall* make the list issued under this subsection available to the

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> public on an internet website maintained by the department of state. [Emphasis added.][5]

MCL 168.614a(2) provides for the state chairperson of each political party to then file a list of individuals whom they consider to be potential presidential candidates for that party and requires the Secretary to make that list available to the public. MCL 168.615a then requires the Secretary to place the candidates so identified on the presidential primary ballot unless a candidate withdraws. "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under [MCL 168.614a] to be printed on the appropriate presidential primary ballot for that political party." MCL 168.615a(1) (Emphasis added).

Under those requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. Were the Secretary to choose to not provide such a list, *Teasel* would permit the Court to order that she do so, despite the fact that the exercise of this act necessarily involves the exercise of her discretion. However, these requirements stand in sharp contrast to the permissive language of MCL 24.263.

Further, Michigan courts have repeatedly held that administrative agencies such as the Secretary of State generally do not have the power to determine constitutional questions.

---

[5] The Court notes, at oral argument on November 9, 2023, in this case and Cases 23-000137-MZ and 23-000151-MZ, the attorney for the Secretary of State indicated that, in accordance with the Michigan Court Rules regarding deadlines that fall upon a weekend or legal holiday, the issuance of the list of individuals described in MCL 168.614a(1) would be transmitted on Monday, November 13, 2023, instead of Friday, November 10, 2023, because November 10, 2023, was the state of Michigan holiday in observance of Veteran's Day.

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Bauserman v Unemployment Ins Agency, 509 Mich 673, 710; 938 NW2d 855 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642; 298 NW2d 841 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159; 22 NW2d 252 (1946). Plaintiff points to no statutory authority granted by our Legislature to the Secretary empowering her with any authority to answer. Thus, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for president are qualified and eligible to serve, the Court agrees with the Secretary that she has no authority to determine this constitutional question. Plaintiff, therefore, has failed to show that the Secretary has a clear legal duty to decide whether a candidate would be prevented from serving if elected.

Nor are any actions the Secretary of State might choose to take under MCL 24.263 to determine whether a candidate may be placed on the ballot in any way "ministerial." Were the Court to require the Secretary of State to decide whether former President Trump be placed on the primary ballot, the Secretary would then be forced to engage in factual determinations and constitutional interpretation. Such acts are not ministerial but would require the exercise of both discretion and judgment. Thus, plaintiff has not shown that the action taken by the Secretary would be ministerial.

The Court also agrees that the Secretary simply has no administrative process for making the legal or factual determinations that would need to be made concerning the application of Section 3 of the Fourteenth Amendment. As the Secretary notes, there is no statutory vehicle that provides either an individual with the right to initiate such an action administratively or for the participation of the impacted candidate, who would be entitled to due process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283, 1294-1295 (ND Ga 2022) (discussing the plaintiff's due-

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process concerns in a case involving disqualification under Section 3). Plaintiff has also not shown or argued that the Secretary could take testimony in order to resolve these issues.

Plaintiff also argues that to the extent that MCL 168.615a prohibits the Secretary of State from removing a presidential candidate from a presidential primary or general election ballot on the ground that the candidate cannot serve under Section 3 of the Fourteenth Amendment, MCL 168.615a is unconstitutional under Const 1963, art 11, § 1. The Court notes that "[s]tatues are presumed to be constitutional, and a statute is to be construed in a constitutional manner unless the unconstitutionality of the statute is facially obvious." *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007) (quotation and citations omitted).

Const 1963, art 11, § 1 provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

Plaintiff's focus on the language of Const 1963, art 11, § 1 is not persuasive. He has not shown that the general obligation in this section for the Secretary of State to support the Constitution specifically equates to a mandatory constitutional duty to decide the qualifications for someone seeking office in Michigan or whether the person can serve if elected. Article 11, § 1 also does not confer such power to do so.

As noted by the Secretary, Const 1963, art 2, § 4(2) specifically provides to the Legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of

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the elective franchise, and to provide for a system of voter registration and absentee voting." And while the Michigan Court of Appeals has held that the Secretary of State has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in Const 1963, art 2, § 4, *Davis v Sec'y of State*, 333 Mich App 588, 591, 601; 963 NW2d 653 (2020), nothing in that article supports plaintiff's position that the Secretary has the authority to modify the statutory process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary or general election. To the extent that Const 1963, art 11, § 1 generally applies, the Court would still remain constrained by the long-standing Michigan precedent that the Secretary has no power to determine constitutional questions. *Bauserman*, 509 Mich at 710; *Dation*, 314 Mich at 159; *Dickerson*, 99 Mich App at 641-642. Thus, if a specific question exists whether a candidate should be placed on a ballot, it is the Legislature that is tasked with providing statutory guidance to the Secretary, which it has not done.

Because plaintiff has not demonstrated a clear legal duty pursuant to MCL 24.263, that any action taken under the statute would be ministerial, or that MCL 168.615a is unconstitutional, the Court DENIES plaintiff's request for mandamus or a declaration that the Secretary has the duty to decide whether a candidate is precluded from serving pursuant to Section 3 of the Fourteenth Amendment.

III. CONCLUSION

For each of the reasons discussed above, the Court GRANTS the Secretary of State's motion for summary disposition with respect to Counts I and II of plaintiff's complaint under MCR 2.116(C)(8) as MOOT. The Court GRANTS the Secretary's motion for summary disposition of Count VI under MCR 2.116(C)(8). The Court also DENIES plaintiff's requests for relief with respect to Counts III and IV.

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In accordance with the Court's October 31, 2023 scheduling order, Counts V, VII, and VIII of plaintiff's amended complaint are HELD IN ABEYANCE.

This is not a final order and does not close the case.

Date: November 14, 2023

Hon. James Robert Redford
Judge, Court of Claims

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/25/2023 6:49:11 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Attachments: 20230915 Sums Cmplt.pdf; Emergency Motion for declaratory judgment mandamus order to show cause against SOS Benson re presidential primary.pdf; Index exhibits Davis verified complaint and emergency motion mandamus declaratory judgement Benson.pdf

Importance: High

From: Meingast, Heather (AG)
Sent: Tuesday, September 19, 2023 4:27 PM
To: AG-HeadsUpExec <AG-HeadsUpExec@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Importance: High

Hi Dana,

Robert Davis has filed an action in the Court of Claims seeking declaratory and mandamus relief against the Secretary. The first four counts deal with resolving which date the presidential primary must be held on (new February date or old March date), and whether the Secretary has the authority to disqualify Trump from the presidential primary ballot (or possible any other ballot) due to his alleged ineligibility under the 14th Amendment's insurrection clause. In his other two counts, he alleges the Secretary did not file the required bond before taking office and he seeks to compel the Secretary to promulgate rules for the electronic processing of military and overseas ballots. See MCL 168.759a(17). DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

He has not served the Secretary yet. Davis is trying to expedite briefing and a hearing on the complaint, at least as to the Trump related counts. We will keep you posted.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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Approved, SCAO | Original - Court 1st copy - Defendant | 2nd copy - Plaintiff 3rd copy - Return

STATE OF MICHIGAN		CASE NO.
Court of Claims — JUDICIAL DISTRICT / JUDICIAL CIRCUIT / COUNTY PROBATE	**SUMMONS**	23- -MM

Court address
Court of Claims, Hall of Justice, 925 W. Ottawa St., P.O. Box 30185 Lansing, MI 48909

Court telephone no.
517-373-0807

Plaintiff's name(s), address(es), and telephone no(s).		Defendant's name(s), address(es), and telephone no(s).
Robert Davis, pro se PII MCL 15.243(1)(a) [redacted], MI PII MCL 15.24 (313) 52[redacted] [redacted]@gmail.com	v	JOCELYN BENSON 430 W. Allegan Lansing, Michigan 48933
Plaintiff's attorney, bar no., address, and telephone no. SAME AS ABOVE		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- ☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- ☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
- ☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- ☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
- ☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- ☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
		Jerome W. Zimmer Jr.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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SUMMONS
Case No. 23- -MM

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

☐ **OFFICER CERTIFICATE**

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)

OR

☐ **AFFIDAVIT OF PROCESS SERVER**

Being first duly sworn, I state that I am a legally competent adult, and I am not a party or an officer of a corporate party (MCR 2.103[A]), and that: (notarization required)

☐ I served personally a copy of the summons and complaint,
☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,

together with _____
List all documents served with the summons and complaint

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare under the penalties of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	**$**

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ (Attachments)

_____ on _____ (Day, date, time)

_____ on behalf of _____.
Signature

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,
Plaintiff,

Case No. 23- **-MM**
Hon.

v

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,
Defendant.

_____/

ROBERT DAVIS
Plaintiff, *pro se*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(a)
(313) 52[redacted]
PII MCL 15.243(1)(a) gmail.com

_____/

There is no other cause of action between the same or similar parties arising out of the same transaction or occurrence

ELECTION-RELATED MATTER

VERIFIED COMPLAINT

NOW COMES, Plaintiff, ROBERT DAVIS ("Plaintiff" or "Plaintiff Davis"), in his own proper person and complaint, and for his Verified Complaint ("**Complaint**"), states the following:

I. PARTIES

1. Plaintiff, Robert Davis ("**Plaintiff**" or "**Plaintiff Davis**"), is a resident and registered voter of the city of Highland Park, County

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of Wayne, State of Michigan. Plaintiff, as a duly registered voter of the state of Michigan, desires and intends on voting in the 2024 Presidential Primary Election whether it's held in February 2024 or March 2024.

2. Defendant, Jocelyn Benson ("**Defendant Secretary of State**"), is the duly elected Secretary of State for the State of Michigan. Pursuant to Mich.Const. 1963, art. V, §§ 3, 21, Defendant Secretary of State is a state officer that heads the principal department, the Department of State, which is in the executive branch of state government. Pursuant to MCL 168.21 of Michigan Election Law, Defendant Secretary of State is the "chief elections" officer of the state that has "supervisory control over local election officials in the performance of their duties under the provisions of" Michigan Election Law.
3. That an actual controversy exists between the parties named herein.

II. JURISDICTION

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4. Pursuant to MCL §600.6419(1) of the Revised Judicature Act, this Court has *exclusive* jurisdiction over all of the claims pled and alleged in Plaintiff's Complaint against the Defendant.

5. The Defendant Secretary of State is deemed to be the "state or any of its departments or officers" as this phrase is defined by MCL §600.6419(7) of the Revised Judicature Act.

6. In accordance with MCL §600.6434(2) of the Revised Judicature Act, this Complaint has been verified by the Plaintiff. **(See last page of the Complaint)**.

III. CAUSES OF ACTION

COUNT I

Declaratory Judgment Declaring That Defendant Secretary of State Cannot Enforce Public Act 2 of 2023, Which Changed The Date of The 2024 Presidential Primary From March 12, 2024 to February 27, 2024, And Further Declare That The *Current* Version of MCL 168.613a Controls And Thus, The 2024 Presidential Primary Election Must Be Held On March 12, 2024.

7. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

8. For this count, pursuant to MCR 2.605, Plaintiff seeks the entry of a declaratory judgment against the Defendant Secretary of State.

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9. Pursuant to MCR 2.605, an actual controversy exists between the Plaintiff and the Defendant Secretary of State.

10. On February 1, 2023, Governor Gretchen Whitmer signed into law Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law, changing the date of the Presidential Primary Election from the second Tuesday in March in each presidential election year to the fourth Tuesday in February beginning in 2024.[1]

11. The ***current*** version of MCL 168.613a of Michigan Election Law, ***currently*** provides:

> (1) **A statewide presidential primary election shall be conducted under this act on the second Tuesday in March in each presidential election year.**
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election shall be conducted under the provisions of this act that govern the conduct of general primary elections. (emphasis supplied).

[1] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=getObject&objectName=2023-SB-0013

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12. Importantly, however, MCL 168.613a(1), as amended by Public Act 2 of 2023, would read as follows:

> (1) **A statewide presidential primary election must be conducted under this act on February 27, 2024**, and on the fourth Tuesday in February in each presidential election year after 2024. (emphasis supplied).

13. However, Public Act 2 of 2023 was **NOT** given immediate effect. Rather, the effective date of Public Act 2 of 2023 is "*sine die*", which means Public Act 2 of 2023 does **NOT** become effective "until the 91st day after final adjournment of the 2023 Regular Session." **(See Public Act 2 of 2023 attached)**.

14. As of the date of the filing of this complaint, **it's unknown when the final adjournment of the 2023 Regular Session of the Michigan Legislature will be.**

15. According to the Michigan Legislature's website, the Michigan House of Representatives' 2023 Regular Session is **NOT** scheduled to adjourn **until December 21, 2023.**[2] **(See Michigan House of Representatives' 2023 Session Schedule attached)**.

[2] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=SessionSchedules

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16. Similarly, according to the Michigan Legislature's website, the Michigan Senate's 2023 Regular Session is **NOT** scheduled to adjourn **until December 14th or 21st, 2023**.[3]

17. Even though the Michigan Legislature's 2023 Regular Session has **NOT** adjourned, the Defendant Secretary of State has nonetheless taken the extraordinary and unlawful step of enforcing Public Act 2 of 2023 ***before*** **its effective date**.

18. In June 2023, the Defendant Secretary of State published an election manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office In 2024", which was disseminated to all local county, city and township clerks informing them that the 2024 Presidential Primary Election was going to be held on February 27, 2024 and **NOT** March 12, 2024.[4] **(See Defendant Secretary of State's June 2023 Presidential Primary Election Manual attached)**.

[3] See https://www.senate.michigan.gov/schedules/maincalendar.html

[4] See file:///D:/SOS%20Benson%20June%202023%20Ballot%20Access%20Information%20for%20Presidential%20Candidates%20for%2

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19. "Under MCL 168.31, local election officials must follow the Secretary of State's instructions regarding the conduct of elections." *Davis v Secretary of State,* 333 Mich.App. 588, ___; 963 NW2d 653, 658 (2020), citing *Secretary of State v. Berrien Co. Bd. of Election Comm'rs,* 373 Mich. 526, 530-531, 129 N.W.2d 864 (1964).

20. Therefore, all local county, city and townships are mandated to follow the directives and mandates set forth in the Defendant Secretary of State's June 2023 election manual governing the 2024 Presidential Primary Election, which requires the 2024 Presidential Primary Election to be held on February 27, 2024 and **NOT** March 12, 2024.

21. Confused by the Defendant Secretary of State's unlawful actions and conduct, on September 11, 2023, Plaintiff sent the Defendant Secretary of State and the State Director of Elections an email respectfully requesting clarity as to when the 2024 Presidential Primary Election would be held. (**See Plaintiff's September 11, 2023 Email to Defendant attached**).

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22. However, neither the Defendant Secretary of State nor the State Director of Elections responded to Plaintiff's September 11, 2023 email.

23. As a duly registered and qualified voter of the state of Michigan, Plaintiff desires and intends to vote by absentee ballot in the 2024 Presidential Primary Election whether it's held on February 27, 2024 or March 12, 2024.

24. Pursuant to MCL 168.615c of Michigan Election Law, Plaintiff, as a registered voter, has the statutory right to participate and vote in either the Democratic or Republican Presidential Primary Election provided Plaintiff "shall indicate in writing, on a form prescribed by the secretary of state, which political party ballot he.... Wishes to vote when appearing at a presidential election."

25. However, it's imperative that the Defendant Secretary of State properly administers and enforces ***valid*** provisions of Michigan Election Law that are ***currently*** in effect.

26. Plaintiff, as a registered voter, who intends on and desires to vote in the 2024 Presidential Primary Election by absentee ballot,

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has the constitutional and statutory right to know the **correct** date of the 2024 Presidential Primary Election.

27. Plaintiff is concerned that if the 2024 Presidential Primary Election is held on the "wrong" date in violation of operational Michigan law in effect at the time, Plaintiff's vote will not be counted and will be subject to challenge in post-election *quo warranto* litigation.

28. As noted, Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law by changing the date of the Presidential Primary Election from March 12, 2024 to February 27, 2024, was **NOT** given immediate effect and does **NOT** become effective until the "91st day after final adjournment of the 2023 Regular Session".

29. "It is axiomatic that a statute becomes ***operational only upon its effective date.***" *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich. 1, 12; 740 NW2d 444 (2007). (emphasis supplied).

30. Mich.Const.1963 "art. 4, §27 prevents this act from taking effect ***until ninety days after the adjournment of the***

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Legislature which passed it." *Frey v Dep't of Mgmt & Budget*, 429 Mich. 315, 340; 414 NW2d 873 (1987). (emphasis supplied).

31. Therefore, Defendant Secretary of State **cannot** enforce the provisions of Public Act 2 of 2023, which moves the date of the 2024 Presidential Primary Election to February 27, 2024, "until ninety days after the adjournment of the Legislature which passed it." *Frey*, 429 Mich. at 340. (emphasis supplied).

32. Under the ***current*** version of MCL 168.759(2) of Michigan Election Law, Plaintiff, as a duly registered voter of the state of Michigan, has the statutory right "at any time during the 75 days before an election, but not later than 8p.m. on the day of an election," to "apply for an absent voter ballot".

33. Additionally, MCL 168.759a(5) of Michigan Election Law requires that "not later than 45 days before an election, a county, city, or township clerk shall electronically transmit or mail as appropriate an absent voter ballot to each absent uniformed services voter or overseas voter who applied for an absent voter ballot 45 days or more before the election."

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34. Because Public Act 2 of 2023 is ***currently*** **NOT** in effect or operational, **none** of the statutory deadlines for absentee ballots set forth under MCL 168.759(2) and 168.759a(5) can be met and/or satisfied by the Defendant Secretary of State for a February 27, 2024 Presidential Primary Election date.

35. Moreover, MCL 168.648 of Michigan Election Law requires the Defendant Secretary of State, "at least 60 days and not more than 90 days preceding any regular state or district primary or election, shall send to the county clerk of each county a notice inwriting of such primary or election, specifying in such notice the federal, state, and district offices for which candidates are to be nominated or elected, as well as any constitutional amendments and questions to be submitted thereat."

36. The notice requirement under MCL 168.648 of Michigan Election Law also **cannot** be met for a February 27, 2024 Presidential Primary Election date because Public Act 2 of 2023 does **NOT** become effective until the "91st day after final adjournment of the 2023 Regular Session", which has **NOT** occurred.

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37. As noted, the final adjournment of the 2023 Regular Session is ***currently*** not scheduled to occur until sometime in late December 2023.

38. Defendant Secretary of State does **not** have the constitutional nor statutory legal authority to enforce a law that has **NOT** become operational in accordance with Mich.Const. 1963, art. 4, §27.

39. "As a single executive heading a principal department, the Secretary of State shall 'perform duties prescribed by law.' Const. 1963, art. 5, § 9." *Davis v Secretary of State*, 333 Mich.App. 588, ___; 963 NW2d 653, 658 (2020).

40. Here, the Defendant Secretary of State has a constitutional duty to only enforce those laws that are ***currently*** in effect.

41. Accordingly, the Defendant Secretary of State's 2023 Election Manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office in 2024" must be declared **VOID** and **UNENFORCEABLE** because it unlawfully directs local county, city, and township clerks to enforce Public Act 2 of 2023, which changes the date of the 2024 Presidential Primary

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Election to February 27, 2024, and Public Act 2 of 2023 is ***currently*** **NOT operational or in effect.**

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a declaratory judgment declaring that Defendant Secretary of State cannot enforce the provisions of Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law by changing the date of the 2024 Presidential Primary Election to February 27, 2024, because Public Act 2 of 2023 is *currently* not in effect and does not become operational until the 91st day after final adjournment of the 2023 Regular Session.

b. Enter a declaratory judgment declaring that the ***current*** version of MCL 168.613a of Michigan Election Law controls and thus, the 2024 Presidential Primary Election shall be held on March 12, 2024.

c. Enter a declaratory judgment declaring that the Defendant Secretary of State shall inform all registered voters, presidential candidates, and local county, city, and township clerks that the 2024 Presidential Primary Election shall be held on March 12, 2024.

d. Enter a declaratory judgment declaring Defendant Secretary of State's June 2023 election manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office in 2024" **VOID** and **UNENFORCEABLE.**

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e. Award Plaintiff his court costs.

f. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT II

Writ of Mandamus Compelling Defendant Secretary of State To Enforce The *Current* Version of MCL 168.615a of Michigan Election Law and Compel Defendant Secretary of State To Hold The 2024 Presidential Primary Election On March 12, 2024.

42. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

43. For this count, pursuant to MCR 3.305, Plaintiff seeks the entry of a writ of mandamus against the Defendant Secretary of State compelling the Defendant Secretary of State to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and compel the Defendant to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

44. If this Honorable Court declares and determines that the Defendant Secretary of State ***currently*** lacks the constitutional and statutory legal authority to enforce the provisions of Public

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Act 2 of 2023, which does **not** become effective until the "91st day after final adjournment of the 2023 Regular Session", and that the Defendant Secretary of State has a constitutional and statutory legal duty to enforce the provisions of the ***current*** version of MCL 168.613a, entry of a writ of mandamus is most appropriate.

45. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017).

46. Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa*, 333 Mich App 422, 435; 960 NW2d 166 (2020).

47. Whether a writ issues is within the discretion of the court. *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

48. In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty

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of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

49. Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law.

50. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and to compel the Defendant Secretary of State to scheduled and hold the 2024 Presidential Primary Election on March 12, 2024.

51. "A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa*, ____Mich.App.____, _____; _____NW2d_____ (2023)(Docket No.365488, issued April 21,2023), slip op at p 12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

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52. The Defendant Secretary of State has a clear legal duty under the Mich.Const. 1963, art. 4, §27; art. 5, §9 to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

53. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget*, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

54. The duties of the Defendant Secretary of State under the ***current*** version of MCL 168.615a and Mich.Const.1963, art. 4, §27; art. 5, §9 are ministerial.

55. Lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to enforce the provisions of the ***current*** version of MCL 168.613a and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

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WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a writ of mandamus compelling the Defendant Secretary of State to enforce the provisions of the *current* version of MCL 168.613a of Michigan Election Law and compel the Defendant Secretary of State to schedule and hold the 2024 Presidential Primary Election on March 12, 2023.
b. Enter a writ of mandamus compelling the Defendant Secretary of State to inform all registered voters, presidential candidates, and all local county, city, and township clerks that the 2024 Presidential Primary Election shall be held on March 12, 2023.

c. Enter an order requiring the Defendant Secretary of State to show cause why a writ of mandamus should not be issued.

d. Award Plaintiff his court costs.

e. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT III

Declaratory Judgment Declaring The Defendant Secretary of State Has A Legal Duty Under Mich.Const.1963, art. 11, §1 and Michigan Case Law To Determine Whether A Presidential Candidate Satisfies The Eligibility Requirements To Run For President of the United States As Set Forth Under The United States Constitution.

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56. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

57. For this count, pursuant to MCR 2.605, Plaintiff seeks the entry of a declaratory judgment against the Defendant Secretary of State.

58. Pursuant to MCR 2.605, an actual controversy exists between the Plaintiff and the Defendant Secretary of State.

59. On August 28, 2023, Plaintiff sent, via email, Defendant Secretary of State a written request for declaratory ruling declaring former President Donald Trump ("Former President" or "Trump") ineligible to have his name printed on the 2024 Presidential Primary Election ballot as a candidate for President for the Republican Party because Trump is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution. **(See Plaintiff's August 28, 2023 Request for Declaratory Ruling attached)**.

60. On September 12, 2023, the Defendant Secretary of State, through the State Director of Elections, Jonathan Brater, issued Plaintiff a written response **DENYING** Plaintiff's request for a

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declaratory ruling declaring Trump ineligible under Section 3 of the Fourteenth Amendment. **(See Defendant Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached).**

61. The Defendant Secretary of State DENIED Plaintiff's meritorious request for a declaratory ruling because "[u]nder the Election Law, the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is 'disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution.'" **(See Defendant Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached).**

62. MCL 24.263 of the Administrative Procedures Act ("APA") provides:

> ***On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency.*** An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from

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> prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. (emphasis supplied).

63. Plaintiff is certainly an "interested person" because as a duly registered voter of the state of Michigan, Plaintiff desires and intends to vote by absentee ballot in the 2024 Presidential Primary Election whether it's held in February 2024 or March 2024.

64. Additionally, Plaintiff is an "interested person" because Plaintiff will not only be voting in the 2024 Presidential Primary Election, but Plaintiff will be voting for and supporting a Republican presidential candidate, that is **NOT** Trump, in the 2024 Presidential Primary Election.

65. Plaintiff believes that if an otherwise ineligible candidate, like Trump, is allowed to have their name appear on the 2024 Presidential Primary Election ballot, the presidential candidate Plaintiff is planning on voting for in the 2024 Republican Presidential Primary Election will lose votes, and Plaintiff will suffer imminent irreparable harm as a result.

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66. Although Plaintiff is not a registered Republican, MCL 168.615c of Michigan Election Law grants Plaintiff the statutory legal right to vote in the Republican Presidential Primary Election provided that Plaintiff "shall indicate in writing, on a form prescribed by the secretary of state, which political party ballot he…wishes to vote when appearing at a presidential election."

67. Michigan's Presidential Primary Election is an "open" primary. See MCL 168.615c.

68. Plaintiff fears that if an otherwise ineligible presidential candidate, such as Trump, is allowed to unlawfully appear on the 2024 Presidential Primary Election ballot, Plaintiff's Republican presidential candidate of choice will lose votes and thus, Plaintiff will suffer irreparable harm.

69. Since Trump is undeniably the current leading candidate to capture the Republican nomination for President, if Trump is allowed to have his name appear on the 2024 Presidential Primary Election ballot despite his ineligibility under Section 3 of the Fourteenth Amendment of the United States Constitution,

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Trump will undeniably take votes away from Plaintiff's Republican presidential candidate of choice.

70. This constitutes irreparable harm that Plaintiff will suffer because of the loss of votes for Plaintiff's preferred candidate of choice for the Republican presidential nomination, which Plaintiff intends on voting for and supporting in the 2024 Presidential Primary Election.

71. MCL 168.614a and 168.615a of Michigan Election Law govern the Defendant Secretary of State's statutory duties to print the names of presidential candidates on the 2024 Presidential Primary Election ballot.

72. MCL 168.614a of Michigan Election Law provides:

> (1) **Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a.** The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.
>
> (2) **Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each**

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political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. The secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.

(3) **After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.** (emphasis supplied).

73. MCL 168.615a provides, in pertinent part, the following:

> (1) **Except as otherwise provided in this section, *the secretary of state shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed* on the appropriate presidential primary ballot for that political party.** A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state indicating his or her party preference if different than the party preference contained in the secretary of state notification and the secretary of state shall cause that presidential candidate's name to be printed on the appropriate presidential primary ballot for that political party. If the affidavit of a presidential candidate indicates that the candidate has no political party preference or indicates a political party preference for a political party other than a political party for which a presidential primary election will be held under section 613a, the secretary of state shall not cause that presidential candidate's name to be printed

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> on a ballot for the presidential primary election. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state specifically stating that "(candidate's name) is not a presidential candidate", and the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot. A presidential candidate shall file an affidavit described in this subsection with the secretary of state no later than 4 p.m. on the second Friday in December of the year before the presidential election year or the affidavit is considered void. (emphasis supplied).

74. Pursuant to MCL 168.615a(1) of Michigan Election Law, the Defendant Secretary of State "shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party."

75. Therefore, because Trump is undoubtedly the leading presidential candidate for the Republican nomination according to some of the most-recent and published national polls and because the Chair of the Michigan Republican Party, Karmo, has stated publicly that she would be submitting Trump's name to the Defendant Secretary of State to appear on the 2024 Presidential Primary Election ballot, pursuant to MCL 168.615a(1), Defendant

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Secretary of State would appear to be obligated to print Trump's name on the 2024 Presidential Primary Election ballot.

76. However, contrary to Defendant Secretary of State's flawed and erroneous determination, Defendant Secretary of State is constitutionally obligated to determine whether a presidential candidate is eligible in accordance with the qualification requirements set forth under the United States Constitution.

77. Mich.Const.1963, art. 11, §1 provides:

> **All officers, legislative, executive** and judicial, **before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability.** No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust. (emphasis supplied).

78. As noted, the Defendant Secretary of State is an elected executive that heads a principal department of the executive branch of state government. See Mich.Const.1963, art. 5, §3.

79. Pursuant to Mich.Const.1963, art. 11, §1 and MCL 168.80 of Michigan Election Law, Defendant Secretary of State was

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administered the aforementioned constitutional oath of office on January 1, 2023.

80. By taking the constitutional oath of office required under Mich.Const.1963, art. 11, §1, Defendant Secretary of State swore or affirmed that she would "***support the Constitution of the United States*** and the constitution of this state[.]" (emphasis supplied).

81. Defendant Secretary of State would violate her constitutional oath of office if she permitted a presidential candidate to appear on the 2024 Presidential Primary Election ballot if they failed to satisfy the requirements set forth under the United States Constitution.

82. By way example, if a potential presidential candidate was **not** a natural born citizen as required under Article II, §1, Clause 5 of the United States Constitution and evidence was provided to the Defendant Secretary of State proving that said presidential candidate was not a natural born citizen, Mich.Const.1963, art. 11, §1 would require the Defendant Secretary of State **NOT** to

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print said presidential candidate's name on a presidential primary election ballot.

83. Similarly, if a potential presidential candidate was 30 years old and did not meet the age requirement as set forth under Article II, §1, Clause 5 of the United States Constitution, and evidence was provided to the Defendant Secretary of State proving that the presidential candidate was 30 years old, Mich.Const.1963, art. 11, §1 would require the Defendant Secretary of State **NOT** to print the name of said presidential candidate on a presidential primary election ballot.

84. Because Defendant Secretary of State took an oath to "support the Constitution of the United States", Defendant Secretary of State has a constitutional duty to properly "enforce" the provisions of the United States Constitution.

85. Certainly, Defendant Secretary of State would NOT be "supporting" the United States Constitution if she permits a presidential candidate to knowingly violate any provisions of the United States Constitution.

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86. Here, Plaintiff provided the Defendant Secretary of State with ample evidence that Trump was disqualified as a presidential candidate under Section 3 of the Fourteenth Amendment of the United States Constitution. (**See Plaintiff's August 28, 2023 Request for Declaratory Ruling attached**).

87. Section 3 of the Fourteenth Amendment of the United States Constitution provides additional eligibility requirements for a person to qualify as a presidential candidate.

88. However, because the Defendant Secretary of State erroneously believed and concluded that because "the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is 'disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution"', Defendant was somehow prohibited from making such a determination.

89. As noted, Mich.Const.1963, art. 11, §1 grants Defendant Secretary of State the constitutional authority to decide whether a presidential candidate satisfies the eligibility requirements set

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forth under the United States Constitution because Defendant swore an oath to "***support*** the Constitution of the United States."

90. To the extent that MCL 168.615a prohibits the Defendant Secretary of State from removing and/or keeping the name of a presidential candidate off a presidential primary and/or general election ballot that has not satisfied the eligibility requirements set forth under the United States Constitution, MCL 168.615a is unconstitutional under Mich.Const.1963, art. 11, §1.

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a declaratory judgment declaring Mich.Const.1963, art. 11, §1 and the oath of office administered to all state elected officials under said constitutional provision grant Defendant Secretary of State the constitutional authority to determine whether a presidential candidate has satisfied the eligibility and/or disqualification requirements to run for President of the United States as set forth under the United States Constitution.

b. Enter a declaratory judgment declaring MCL 168.615a(1) unconstitutional for it contravenes and violates Mich.Const.1963, art. 11, §1, but only to the extent that it prohibits Defendant Secretary of State from removing and/or

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preventing the name of a presidential candidate from appearing on a presidential primary and/or general election ballot as a presidential candidate if they have not satisfied the eligibility and/or disqualification requirements set forth under the United States Constitution to qualify as a candidate for President of the United States.

c. Enter a declaratory judgment declaring Defendant Secretary of State has a constitutional legal duty to determine the merits of Plaintiff's August 28, 2023 request for declaratory ruling concerning the possible disqualification of former President Donald Trump under Section 3 of the Fourteenth Amendment of the United States Constitution and issue a ruling well-in-advance of the certification deadline set forth under MCL 168.614a and 168.615a.

d. Enter an injunction enjoining the Defendant Secretary of State from printing the name of Donald Trump on any presidential primary and/or general election ballots until such time as the Defendant Secretary of State decides the merits and issues a decision on Plaintiff's August 28, 2023 request for declaratory ruling concerning the possible disqualification of former President Trump under Section 3 of the Fourteenth Amendment of the United States Constitution.

e. Award Plaintiff his court costs.

f. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT IV

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Writ of Mandamus Compelling Defendant Secretary of State To Decide The Merits and Issue A Decision On Plaintiff's August 28, 2023 Request For Declaratory Ruling Concerning Former President Trump's Possible Disqualification Under Section 3 of the Fourteenth Amendment of the United States Constitution.

91. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

92. For this count, pursuant to MCR 3.305, Plaintiff seeks the entry of a writ of mandamus against the Defendant Secretary of State compelling the Defendant Secretary of State to decide the merits and issue a decision on Plaintiff's August 28, 2023 Request for declaratory ruling well-in-advance of the certification deadlines set forth under MCL 168.614a and 168.615a.

93. If this Honorable Court declares and determines the Defendant Secretary of State has the constitutional legal duty and authority to determine whether a presidential candidate satisfies the qualification and/or disqualification requirements set forth under the United States Constitution, entry of a writ of mandamus is most appropriate.

94. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017).

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95. Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa*, 333 Mich App 422, 435; 960 NW2d 166 (2020).

96. Whether a writ issues is within the discretion of the court. *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

97. In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

98. Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law.

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99. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State to decide the merits and issue a decision on Plaintiff's August 28, 2023 request for declaratory ruling concerning whether Trump is disqualified under Section 3 of the Fourteenth Amendment.

100. "A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa*, ___Mich.App.___, ____; ____NW2d____ (2023)(Docket No.365488, issued April 21,2023), slip op at p 12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

101. The Defendant Secretary of State has a clear legal duty under the Mich.Const. 1963, art. 11, §1 and MCL 24.263 to decide the merits and issue a decision on Plaintiff's August 28, 2023 request for declaratory ruling.

102. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of*

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Technology, Mgmt, & Budget, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

103. The duties of the Defendant Secretary of State under Mich.Const.1963, art. 11, §1 and MCL 24.263 of the APA are ministerial.

104. Lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to decide the merits and issue a decision with respect to Plaintiff's August 28, 2023 request for declaratory ruling.

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a writ of mandamus compelling the Defendant Secretary of State to decide the merits and issue a decision with respect to Plaintiff's August 28, 2023 request for declaratory ruling concerning Trump's possible disqualification under Section 3 of the Fourteenth Amendment and compelling Defendant Secretary of State to issue said decision well-in-advance of the certification deadlines set forth under MCL 168.614a and MCL 168.615a.

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b. Enter an order requiring the Defendant Secretary of State to show cause why a writ of mandamus should not be issued.

c. Award Plaintiff his court costs.

d. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT V

Declaratory Judgment Declaring Defendant Secretary of State Was Required To Comply With MCL 15.51, Which Required The Defendant Secretary of State To File A $25,000 Bond Within 20 Days of Assuming Office.

105. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

106. For this count, pursuant to MCR 2.605, Plaintiff seeks the entry of a declaratory judgment against the Defendant Secretary of State.

107. Pursuant to MCR 2.605, an actual controversy exists between the Plaintiff and the Defendant Secretary of State.

108. In November 2022, the Defendant Secretary of State was re-elected to the office of Secretary of State to serve a four-year term commencing at Noon on January 1, 2023.

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109. Pursuant to MCL 168.80, the Defendant Secretary of State "before entering upon the duties of his office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, ***and shall give bond in the amount and manner prescribed by law***, and shall deposit said oath and bond with the secretary of state, ***except that any person elected to the office of secretary of state shall deposit said oath and bond with the attorney general.***" MCL 168.80. (emphasis supplied).

110. On January 1, 2023, before entering upon the duties of the office of Secretary of State, the Defendant Secretary of State was administered the constitutional oath of office in accordance with MCL 168.80 of Michigan Election Law and Mich.Const.1963, art. 11, §1.

111. Although Defendant Secretary of State timely took the constitutional oath of office, Defendant Secretary of State failed to timely file a bond in accordance with MCL 15.51.

112. MCL 15.51 provides:

> ***The secretary of state*** and deputy secretary of state of this state, and the private secretary and executive clerk of

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the governor of this state, ***shall be required within 20 days after this act takes effect, and their successors in office shall be required within 20 days after entering upon the duties of their respective offices, to give bonds to the people of the state of Michigan with 3 or more sureties to be approved by the state treasurer and attorney general,*** conditioned for the faithful discharge of their official duties, and for the safe and lawful custody and disposition of the money and property of this state that may be entrusted to them or come within their control.

The bond of the secretary of state shall be in the sum of $25,000.00, that of the deputy secretary of state shall be in the sum of $20,000.00, and the bonds of the private secretary and the executive clerk of the governor shall be each in the sum of $5,000.00. ***The bonds of the secretary of state and deputy secretary of state shall be filed and kept in the office of the state treasurer,*** and those of the private secretary and executive clerk shall be filed and kept in the office of the secretary of state. (emphasis supplied).

113. On March 26, 2023, Plaintiff submitted a request under Michigan's Freedom of Information Act ("FOIA") to the Department of Treasury and the Department of State respectfully requesting "[c]opies of any and all bonds Secretary of State Jocelyn Benson filed with the State Treasurer's office in January, February, or March 2023 to cover her term of office commencing January 1, 2023." **(See Plaintiff's March 26, 2023 FOIA request attached).**

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114. On April 3, 2023, Carla Robert, FOIA Coordinator for the Department of Treasury, issued a written response, via email, to Plaintiff's March 26, 2023 FOIA request and advised the Plaintiff that his March 26, 2023 FOIA request was DENIED because "[t]o the best of the undersigned's knowledge, information, and belief, **no such records as you describe, or by any other name reasonably known, exist in Treasury**." **(See Carla Robert's April 3, 2023 Response to Plaintiff's March 26, 2023 FOIA request attached).**

115. On that same day, April 3, 2023, Adam Fracassi, FOIA Coordinator for the Department of State, issued a written response, via email, to Plaintiff's March 26, 2023 FOIA request and advised the Plaintiff that his March 26, 2023 FOIA request was DENIED "on the basis on my certification that **the Department does not possess records responsive to your request**." **(See State Bureau of Elections April 3, 2023 Response to Plaintiff's March 26, 2023 FOIA request attached).**

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116. Pursuant to MCR 3.306(B)(3), on August 8, 2023, Plaintiff submitted an application to the Michigan Attorney General requesting the Michigan Attorney General to institute and initiate quo warranto proceedings to oust and remove the Defendant Secretary of State from office for her apparent failure to timely file a $25,000 bond in accordance with MCL 15.51. (**See Plaintiff's August 8, 2023 Application for Attorney General To Initiate Quo warranto Proceedings attached**).

117. On August 15, 2023, the Michigan Attorney General, through her Chief Deputy, Fadwa Hammoud, issued a written denial of Plaintiff's request for the Attorney General to institute quo warranto proceedings. (**See Attorney General's August 15, 2023 Denial Letter attached**).

118. Although the Attorney General denied Plaintiff's request to institute and initiate quo warranto proceedings to oust the Defendant Secretary of State from office, pursuant to MCR 3.306(B)(3) and MCL 600.4501, Plaintiff has the right to proceed on his own to institute quo warranto proceedings against Defendant Secretary of State.

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119. Pursuant to MCR 3.306(A)(1), because Defendant Secretary of State is a "state officer, any quo warranto proceeding seeking to oust and remove her from office must be filed in the Court of Appeals as an original proceeding. See *Williams v Lansing Bd. of Ed.*, 69 Mich App 654, 660-661; 245 NW2d 365 (1976); see also *In re Servaas*, 484 Mich. 634; 774 N.W.2d 46 (2009) (opinion by WEAVER, J.)

120. Plaintiff Davis is prepared to proceed with initiating quo warranto proceedings in the Michigan Court of Appeals against the Defendant Secretary of State, however, Plaintiff needs a declaration and clarification from this Honorable Court that Defendant Secretary of State was required to comply with the provisions of MCL 15.51, which requires the Defendant Secretary of State to file a $25,000 bond.

121. Plaintiff was told privately nearly a month or so ago by a high-level employee of the state government that the bond requirement set forth under MCL 15.51 did not apply to the Defendant Secretary of State.

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122. Additionally, neither the Department of Treasury nor the Department of State had any record of any bond being filed by the Defendant Secretary of State.

123. Because Plaintiff has received conflicting information, Plaintiff needs this Honorable Court to provide clarification and direction as to proper application of MCL 15.51 before Plaintiff proceeds with filing and instituting quo warranto proceedings in the Court of Appeals to oust and remove the Defendant Secretary of State from office.

124. If this Honorable Court declares that Defendant Secretary of State was required to comply with the provisions of MCL 15.51, Plaintiff will proceed with initiating quo warranto proceedings in the Court of Appeals to oust the Defendant Secretary of State from office.

125. However, if this Honorable Court declares that Defendant Secretary of State was not required to comply with the provisions of MCL 15.51, Plaintiff will not proceed with initiating quo warranto proceedings in the Court of Appeals to oust the Defendant Secretary of State from office.

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WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a declaratory judgment declaring Defendant Secretary of State was required to comply with MCL 15.51, which requires the Defendant Secretary of State to file a $25,000 bond within 20 days of assuming office.

b. Enter a declaratory judgment declaring Defendant Secretary of State is not exempt from the requirement of MCL 15.51.

c. Enter a declaratory judgment declaring Defendant Secretary of State failed to comply with the provisions and requirements of MCL 15.51 when the Defendant Secretary of State assumed office for her second term commencing at Noon on January 1, 2023.

d. Award Plaintiff his court costs.

e. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT VI

Writ of Mandamus Compelling Defendant Secretary of State To Promulgate Rules In Accordance With APA By January 1, 2024 To Implement The Provisions of MCL 168.759a(17).

126. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

127. For this count, pursuant to MCR 3.305, Plaintiff seeks the entry of a writ of mandamus against the Defendant Secretary of

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State compelling the Defendant Secretary of State to promulgate rules in accordance with the Administrative Procedures Act ("APA") by January 1, 2024 to implement the provisions of MCL 168.759a(17).

128. MCL 168.759a(17) states:

> (17) **The secretary of state *shall promulgate rules* that establish policies and procedures for the electronic return of voted ballots by eligible members.** In promulgating rules that establish the policies and procedures for the electronic return of voted ballots by eligible members, the secretary of state shall require an eligible member to use a United States Department of Defense verified electronic signature, as that term is defined in section 18a, so that the identity of the eligible member can be verified utilizing those policies and procedures. A member who is unable or unwilling to provide a United States Department of Defense verified electronic signature is not eligible to electronically return a voted ballot. The secretary of state shall take reasonable steps to ensure the integrity and secrecy of voted ballots returned electronically. The secretary of state may develop and maintain a secure web portal on the secretary of state's website to facilitate the electronic return of voted ballots by eligible members. Only the secretary of state or the secretary of state's duly authorized agent, a city or township clerk, the clerk's deputy clerk, or a sworn member of the clerk's staff is authorized to access the secure web portal on the secretary of state's website. ***No later than January 1, 2024, the secretary of state shall promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to implement this subsection*, and the secretary of state must allow for the electronic return of voted ballots by eligible members**

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> **starting no later than the 2024 statewide presidential primary election.** As used in this subsection, "eligible member" means a member of a uniformed service on active duty or a member of the merchant marine, as described in subsection (6) or (13). (emphasis supplied).

129. To date, the Defendant Secretary of State has FAILED to promulgate rules in accordance with the APA to implement MCL 168.759a(17).

130. In fact, to date, the Defendant Secretary of State has FAILED to begin or commence the process to promulgate rules in accordance with the APA to implement MCL 168.759a(17).

131. An elections specialist or employee of the State Bureau of Elections advised Plaintiff that they were not aware of any plans for the Defendant Secretary of State to promulgate rules in accordance with the APA to implement the provisions of MCL 168.759a(17).

132. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017).

133. Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa*, 333 Mich App 422, 435; 960 NW2d 166 (2020).

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134. Whether a writ issues is within the discretion of the court. *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

135. In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

136. Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law.

137. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State

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to promulgate rules in accordance with the APA by January 1, 2024 to properly implement the provisions of MCL 168.759a.

138. "A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa*, ___Mich.App.___, ____; ____NW2d____ (2023)(Docket No.365488, issued April 21,2023), slip op at p 12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

139. The Defendant Secretary of State has a clear legal duty under MCL 168.759a to implement rules in accordance with the APA by January 1, 2024 to properly implement the provisions of MCL 168.759a.

140. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget*, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

141. The duties of the Defendant Secretary of State under MCL 168.759a(17) are ministerial.

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142. Lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to enforce the provisions of MCL 168.759a(17).

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a writ of mandamus compelling the Defendant Secretary of State to promulgate rules in accordance with the APA before January 1, 2024 to implement the provisions of MCL 168.759a(17).
b. Enter an order requiring the Defendant Secretary of State to show cause why a writ of mandamus should not be issued.
c. Award Plaintiff his court costs.
d. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

Dated: September 15, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(a)
(313) 523-PII MCL 15.243(1)
PII MCL 15.243(1)(a)@gmail.com

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VERIFIED COMPLAINT

I, ROBERT DAVIS, a natural person, being first duly sworn and deposed, and under the penalty of perjury, hereby declare and verify that to the best of my knowledge, information, and belief, all of the allegations and facts alleged and pled in each of the foregoing numbered paragraphs in this verified complaint are true and correct.

FURTHER AFFIANT SAYETH NOT.

ROBERT DAVIS

Subscribed and sworn to before me

On this 15th day of September, 2023

Desiree Brengman

NOTARY Public Signature

State of Michigan, County of Macomb

My Commission Expires 05-08-2024

Acting in the County of Oakland

DESIREE BRENGMAN
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF MACOMB
My Commission Expires May 08, 2024
Acting in the County of Oakland

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STATE OF MICHIGAN
COURT OF CLAIMS

Bundle Cover Sheet

Lower Court: | **L Ct No.:** | **COC No.:** TEMP-HPXC991M

Case Title:
ROBERT DAVIS v. JOCELYN BENSON

Priority:
NONE

Filing Option:
File Only

Filer Information

Filer
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Filing Summary

Filing Type	Filing Name	Fee
Summons and Complaint	Davis signed and notarized verified complaint against SOS Benson re Trump and presidential primary election	$150.00
	eFiling System Fee:	$25.00
Other	Unsigned summons for Jocelyn Benson Davis election case re Trump and presidential primary election	$0.00
	NON-REFUNDABLE Automated Payment Service Fee:	$5.25
	Total:	**$180.25**

Alternate Payment Reason: None

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The document(s) listed above were electronically filed with the Michigan Court of Claims.

TEMP-HPXC991M-36289395

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,
Plaintiff,

Case No. 23-000128-MB
Hon. James Robert Redford

v

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,
Defendant.
_____/

ROBERT DAVIS
Plaintiff, *pro se*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a) MI PII MCL 15.243(1)(
(313) 523-PII MCL 15.243
PII MCL 15.243(1)(a)@gmail.com
_____/

PLAINTIFF'S 9/18/2023 EMERGENCY MOTION FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, AND ORDER TO SHOW CAUSE FOR COUNTS I-IV OF VERIFIED COMPLAINT ONLY.

NOW COMES, Plaintiff ROBERT DAVIS, in his own proper person, and for his 9/18/2023 Emergency Motion for Declaratory Judgment, Writ of Mandamus, and Order to Show Cause Counts I-IV of Verified Complaint ONLY ("Emergency Motion"), states the following:

I. Concurrence

Prior to filing the instant Emergency Motion, Plaintiff sought concurrence from Assistant Attorney Generals Heather Meingast and Eric Grill, but concurrence was not timely received, necessitating the filing of this Emergency Motion.

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II. Necessity for Emergency and Expedited Hearing and Order To Show Cause

This election-related matter will undoubtedly impact the timely printing of the ballots for the 2024 Presidential Primary Election, as well as the timely certification of Presidential candidates for each major political party. See MCL 168.614a and 168.615a.

The merits of this election-related appeal **need to be determined and decided within the next 14 days!** Our Supreme Court and Court of Appeals have recognized the importance of election-related cases and has so required that election-related cases are heard in an expedited manner. See *Scott v Director of Elections*, 490 Mich 888, 889; 804 NW2d 119 (2011); *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 196-96 (1989). Moreover, our Supreme Court routinely grant expedited consideration in election law matters. See, e.g., *League of Women Voters v Secy of State*, 505 Mich 931 (2019); *Martin v Secy of State*, 482 Mich 956 (2008); *Saginaw Co Democratic Party v Saginaw Co Bd of Election Com'rs*, 470 Mich 882 (2004); see also *House of Representatives v Governor*, 943 NW2d 365, 369 (Mich 2020) (Clement, J, concurring) ("[T]he cases in which we most often direct expedited review are election cases in which the parties have externally imposed deadlines they must satisfy to submit paperwork or print ballot.")

Additionally, MCR 7.213(C)(4) requires the Court of Appeals to expedite appeals from all cases involving election-related issues. MCR 7.213(C)(4) provides in relevant part: "precedence shall be given to: ***appeals from all cases involving election issues***, including, but not limited to, recall elections and petitions

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disputes[ ]". (emphasis supplied). See *Jones v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued June 2, 2021 (Docket No. 357264) (The Court granted plaintiff/appellant's motion to expedite the appeal because it involved candidates who were improperly certified by a local city clerk appear on the ballot for an impending city primary election).

Plaintiff's instant lawsuit clearly is an "election-related" matter that MCR 7.213(C)(4) clearly requires the Court of Appeals and Supreme Court to give "precedence" to. See *Scott v Director of Elections*, 490 Mich 888, 889 (2011). Accordingly, Plaintiff respectfully requests this Honorable Court to **GRANT** expedited consideration and review of Plaintiff's instant Emergency Motion so that a decision on the merits can be **issued within the next 14 days! A separate brief in support of the instant Emergency Motion will be filed.**

III. Parties

1. Plaintiff, Robert Davis ("**Plaintiff" or "Plaintiff Davis**"), is a resident and registered voter of the city of Highland Park, County of Wayne, State of Michigan. Plaintiff, as a duly registered voter of the state of Michigan, desires and intends on voting in the 2024 Presidential Primary Election whether it's held in February 2024 or March 2024.
2. Defendant, Jocelyn Benson ("**Defendant Secretary of State**"), is the duly elected Secretary of State for the State of Michigan. Pursuant to Mich.Const. 1963, art. V, §§ 3, 21, Defendant Secretary of State is a state officer that heads the principal department, the Department of State, which is in the

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executive branch of state government. Pursuant to MCL 168.21 of Michigan Election Law, Defendant Secretary of State is the "chief elections" officer of the state that has "supervisory control over local election officials in the performance of their duties under the provisions of" Michigan Election Law.

3. That an actual controversy exists between the parties named herein.

IV. Jurisdiction

4. Pursuant to MCL §600.6419(1) of the Revised Judicature Act, this Court has *exclusive* jurisdiction over all of the claims pled and alleged in Plaintiff's Complaint against the Defendant.
5. The Defendant Secretary of State is deemed to be the "state or any of its departments or officers" as this phrase is defined by MCL §600.6419(7) of the Revised Judicature Act.
6. In accordance with MCL §600.6434(2) of the Revised Judicature Act, the Complaint has been verified by the Plaintiff. (**See last page of the Complaint**).

V. Causes Of Action

COUNT I

Declaratory Judgment Declaring That Defendant Secretary of State Cannot Enforce Public Act 2 of 2023, Which Changed The Date of The 2024 Presidential Primary From March 12, 2024 to February 27, 2024, And Further Declare That The *Current* Version of MCL 168.613a Controls And Thus, The 2024 Presidential Primary Election Must Be Held On March 12, 2024.

7. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

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8. For this count, pursuant to MCR 2.605, Plaintiff seeks the entry of a declaratory judgment against the Defendant Secretary of State.

9. Pursuant to MCR 2.605, an actual controversy exists between the Plaintiff and the Defendant Secretary of State.

10. On February 1, 2023, Governor Gretchen Whitmer signed into law Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law, changing the date of the Presidential Primary Election from the second Tuesday in March in each presidential election year to the fourth Tuesday in February beginning in 2024.[1]

11. The ***current*** version of MCL 168.613a of Michigan Election Law, ***currently*** provides:

> (1) **A statewide presidential primary election shall be conducted under this act on the second Tuesday in March in each presidential election year**.
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election shall be conducted under the provisions of this act that govern the conduct of general primary elections. (emphasis supplied).

12. Importantly, however, MCL 168.613a(1), as amended by Public Act 2 of 2023, would read as follows:

> (1) **A statewide presidential primary election must be conducted under this act on February 27, 2024**, and on the fourth

[1] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=getObject&objectName=2023-SB-0013

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> Tuesday in February in each presidential election year after 2024. (emphasis supplied).

13. However, Public Act 2 of 2023 was **NOT** given immediate effect. Rather, the effective date of Public Act 2 of 2023 is "*sine die*", which means Public Act 2 of 2023 does **NOT** become effective "until the 91st day after final adjournment of the 2023 Regular Session." (**See Public Act 2 of 2023 attached**).
14. As of the date of the filing of this complaint, **it's unknown when the final adjournment of the 2023 Regular Session of the Michigan Legislature will be.**
15. According to the Michigan Legislature's website, the Michigan House of Representatives' 2023 Regular Session is **NOT** scheduled to adjourn **until December 21, 2023**.[2] (**See Michigan House of Representatives' 2023 Session Schedule attached**).
16. Similarly, according to the Michigan Legislature's website, the Michigan Senate's 2023 Regular Session is **NOT** scheduled to adjourn **until December 14th or 21st, 2023**.[3]
17. Even though the Michigan Legislature's 2023 Regular Session has **NOT** adjourned, the Defendant Secretary of State has nonetheless taken the

[2] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=SessionSchedules

[3] See https://www.senate.michigan.gov/schedules/maincalendar.html

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extraordinary and unlawful step of enforcing Public Act 2 of 2023 ***before*** **its effective date**.

18. In June 2023, the Defendant Secretary of State published an election manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office In 2024", which was disseminated to all local county, city and township clerks informing them that the 2024 Presidential Primary Election was going to be held on February 27, 2024 and **NOT** March 12, 2024.[4] (**See Defendant Secretary of State's June 2023 Presidential Primary Election Manual attached**).

19. "Under MCL 168.31, local election officials must follow the Secretary of State's instructions regarding the conduct of elections." *Davis v Secretary of State*, 333 Mich.App. 588, ___; 963 NW2d 653, 658 (2020), citing *Secretary of State v. Berrien Co. Bd. of Election Comm'rs,* 373 Mich. 526, 530-531, 129 N.W.2d 864 (1964).

20. Therefore, all local county, city and townships are mandated to follow the directives and mandates set forth in the Defendant Secretary of State's June 2023 election manual governing the 2024 Presidential Primary Election, which requires the 2024 Presidential Primary Election to be held on February 27, 2024 and **NOT** March 12, 2024.

[4] See file:///D:/SOS%20Benson%20June%202023%20Ballot%20Access%20Information%20for%20Presidential%20Candidates%20for%2

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21. Confused by the Defendant Secretary of State's unlawful actions and conduct, on September 11, 2023, Plaintiff sent the Defendant Secretary of State and the State Director of Elections an email respectfully requesting clarity as to when the 2024 Presidential Primary Election would be held. (**See Plaintiff's September 11, 2023 Email to Defendant attached**).
22. However, neither the Defendant Secretary of State nor the State Director of Elections responded to Plaintiff's September 11, 2023 email.
23. As a duly registered and qualified voter of the state of Michigan, Plaintiff desires and intends to vote by absentee ballot in the 2024 Presidential Primary Election whether it's held on February 27, 2024 or March 12, 2024.
24. Pursuant to MCL 168.615c of Michigan Election Law, Plaintiff, as a registered voter, has the statutory right to participate and vote in either the Democratic or Republican Presidential Primary Election provided Plaintiff "shall indicate in writing, on a form prescribed by the secretary of state, which political party ballot he…. Wishes to vote when appearing at a presidential election."
25. However, it's imperative that the Defendant Secretary of State properly administers and enforces ***valid*** provisions of Michigan Election Law that are ***currently*** in effect.
26. Plaintiff, as a registered voter, who intends on and desires to vote in the 2024 Presidential Primary Election by absentee ballot, has the constitutional and

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statutory right to know the **correct** date of the 2024 Presidential Primary Election.

27. Plaintiff is concerned that if the 2024 Presidential Primary Election is held on the "wrong" date in violation of operational Michigan law in effect at the time, Plaintiff's vote will not be counted and will be subject to challenge in post-election *quo warranto* litigation.

28. As noted, Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law by changing the date of the Presidential Primary Election from March 12, 2024 to February 27, 2024, was **NOT** given immediate effect and does **NOT** become effective until the "91st day after final adjournment of the 2023 Regular Session".

29. "It is axiomatic that a statute becomes ***operational only upon its effective date***." *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich. 1, 12; 740 NW2d 444 (2007). (emphasis supplied).

30. Mich.Const.1963 "art. 4, §27 prevents this act from taking effect ***until ninety days after the adjournment of the Legislature which passed it***." *Frey v Dep't of Mgmt & Budget*, 429 Mich. 315, 340; 414 NW2d 873 (1987). (emphasis supplied).

31. Therefore, Defendant Secretary of State **cannot** enforce the provisions of Public Act 2 of 2023, which moves the date of the 2024 Presidential Primary Election to February 27, 2024, "until ninety days after the adjournment of the Legislature which passed it." *Frey*, 429 Mich. at 340. (emphasis supplied).

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32. Under the ***current*** version of MCL 168.759(2) of Michigan Election Law, Plaintiff, as a duly registered voter of the state of Michigan, has the statutory right "at any time during the 75 days before an election, but not later than 8p.m. on the day of an election," to "apply for an absent voter ballot".
33. Additionally, MCL 168.759a(5) of Michigan Election Law requires that "not later than 45 days before an election, a county, city, or township clerk shall electronically transmit or mail as appropriate an absent voter ballot to each absent uniformed services voter or overseas voter who applied for an absent voter ballot 45 days or more before the election."
34. Because Public Act 2 of 2023 is ***currently*** **NOT** in effect or operational, **none** of the statutory deadlines for absentee ballots set forth under MCL 168.759(2) and 168.759a(5) can be met and/or satisfied by the Defendant Secretary of State for a February 27, 2024 Presidential Primary Election date.
35. Moreover, MCL 168.648 of Michigan Election Law requires the Defendant Secretary of State, "at least 60 days and not more than 90 days preceding any regular state or district primary or election, shall send to the county clerk of each county a notice inwriting of such primary or election, specifying in such notice the federal, state, and district offices for which candidates are to be nominated or elected, as well as any constitutional amendments and questions to be submitted thereat."

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36. The notice requirement under MCL 168.648 of Michigan Election Law also **cannot** be met for a February 27, 2024 Presidential Primary Election date because Public Act 2 of 2023 does **NOT** become effective until the "91st day after final adjournment of the 2023 Regular Session", which has **NOT** occurred.

37. As noted, the final adjournment of the 2023 Regular Session is ***currently*** not scheduled to occur until sometime in late December 2023.

38. Defendant Secretary of State does **not** have the constitutional nor statutory legal authority to enforce a law that has **NOT** become operational in accordance with Mich.Const. 1963, art. 4, §27.

39. "As a single executive heading a principal department, the Secretary of State shall 'perform duties prescribed by law.' Const. 1963, art. 5, § 9." *Davis v Secretary of State*, 333 Mich.App. 588, ___; 963 NW2d 653, 658 (2020).

40. Here, the Defendant Secretary of State has a constitutional duty to only enforce those laws that are ***currently*** in effect.

41. Accordingly, the Defendant Secretary of State's 2023 Election Manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office in 2024" must be declared **VOID** and **UNENFORCEABLE** because it unlawfully directs local county, city, and township clerks to enforce Public Act 2 of 2023, which changes the date of the 2024 Presidential Primary Election to February 27, 2024, and Public Act 2 of 2023 is ***currently*** **NOT operational or in effect.**

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WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a declaratory judgment declaring that Defendant Secretary of State cannot enforce the provisions of Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law by changing the date of the 2024 Presidential Primary Election to February 27, 2024, because Public Act 2 of 2023 is *currently* not in effect and does not become operational until the 91st day after final adjournment of the 2023 Regular Session.

b. Enter a declaratory judgment declaring that the ***current*** version of MCL 168.613a of Michigan Election Law controls and thus, the 2024 Presidential Primary Election shall be held on March 12, 2024.

c. Enter a declaratory judgment declaring that the Defendant Secretary of State shall inform all registered voters, presidential candidates, and local county, city, and township clerks that the 2024 Presidential Primary Election shall be held on March 12, 2024.

d. Enter a declaratory judgment declaring Defendant Secretary of State's June 2023 election manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office in 2024" **VOID** and **UNENFORCEABLE.**

e. Award Plaintiff his court costs.

f. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT II

Writ of Mandamus Compelling Defendant Secretary of State To Enforce The *Current* Version of MCL 168.615a of Michigan Election Law and Compel Defendant Secretary of State To Hold The 2024 Presidential Primary Election On March 12, 2024.

42. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

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43. For this count, pursuant to MCR 3.305, Plaintiff seeks the entry of a writ of mandamus against the Defendant Secretary of State compelling the Defendant Secretary of State to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and compel the Defendant to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

44. If this Honorable Court declares and determines that the Defendant Secretary of State ***currently*** lacks the constitutional and statutory legal authority to enforce the provisions of Public Act 2 of 2023, which does **not** become effective until the "91st day after final adjournment of the 2023 Regular Session", and that the Defendant Secretary of State has a constitutional and statutory legal duty to enforce the provisions of the ***current*** version of MCL 168.613a, entry of a writ of mandamus is most appropriate.

45. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017).

46. Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa*, 333 Mich App 422, 435; 960 NW2d 166 (2020).

47. Whether a writ issues is within the discretion of the court. *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*,

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472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

48. In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

49. Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law.

50. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and to compel the Defendant Secretary of State to scheduled and hold the 2024 Presidential Primary Election on March 12, 2024.

51. "A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa*, ___Mich.App.___, ____; ____NW2d____ (2023)(Docket No.365488, issued April 21,2023), slip op at p 12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

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52. The Defendant Secretary of State has a clear legal duty under the Mich.Const. 1963, art. 4, §27; art. 5, §9 to enforce the ***current*** version of MCL 168.615a of Michigan Election Law and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

53. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget*, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

54. The duties of the Defendant Secretary of State under the ***current*** version of MCL 168.615a and Mich.Const.1963, art. 4, §27; art. 5, §9 are ministerial.

55. Lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to enforce the provisions of the ***current*** version of MCL 168.613a and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a writ of mandamus compelling the Defendant Secretary of State to enforce the provisions of the ***current*** version of MCL 168.613a of Michigan Election Law and compel the Defendant Secretary of State to schedule and hold the 2024 Presidential Primary Election on March 12, 2023.

b. Enter a writ of mandamus compelling the Defendant Secretary of State to inform all registered voters, presidential candidates, and all

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local county, city, and township clerks that the 2024 Presidential Primary Election shall be held on March 12, 2023.

c. Enter an order requiring the Defendant Secretary of State to show cause why a writ of mandamus should not be issued.

d. Award Plaintiff his court costs.

e. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

COUNT III

Declaratory Judgment Declaring The Defendant Secretary of State Has A Legal Duty Under Mich.Const.1963, art. 11, §1 and Michigan Case Law To Determine Whether A Presidential Candidate Satisfies The Eligibility Requirements To Run For President of the United States As Set Forth Under The United States Constitution.

56. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

57. For this count, pursuant to MCR 2.605, Plaintiff seeks the entry of a declaratory judgment against the Defendant Secretary of State.

58. Pursuant to MCR 2.605, an actual controversy exists between the Plaintiff and the Defendant Secretary of State.

59. On August 28, 2023, Plaintiff sent, via email, Defendant Secretary of State a written request for declaratory ruling declaring former President Donald Trump ("Former President" or "Trump") ineligible to have his name printed on the 2024 Presidential Primary Election ballot as a candidate for President for the Republican Party because Trump is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution. (**See Plaintiff's August 28, 2023 Request for Declaratory Ruling attached**).

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60. On September 12, 2023, the Defendant Secretary of State, through the State Director of Elections, Jonathan Brater, issued Plaintiff a written response **DENYING** Plaintiff's request for a declaratory ruling declaring Trump ineligible under Section 3 of the Fourteenth Amendment. (**See Defendant Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached**).

61. The Defendant Secretary of State DENIED Plaintiff's meritorious request for a declaratory ruling because "[u]nder the Election Law, the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is 'disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution.'" (**See Defendant Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached**).

62. MCL 24.263 of the Administrative Procedures Act ("APA") provides:

> ***On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency***. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. (emphasis supplied).

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63. Plaintiff is certainly an "interested person" because as a duly registered voter of the state of Michigan, Plaintiff desires and intends to vote by absentee ballot in the 2024 Presidential Primary Election whether it's held in February 2024 or March 2024.

64. Additionally, Plaintiff is an "interested person" because Plaintiff will not only be voting in the 2024 Presidential Primary Election, but Plaintiff will be voting for and supporting a Republican presidential candidate, that is **NOT** Trump, in the 2024 Presidential Primary Election.

65. Plaintiff believes that if an otherwise ineligible candidate, like Trump, is allowed to have their name appear on the 2024 Presidential Primary Election ballot, the presidential candidate Plaintiff is planning on voting for in the 2024 Republican Presidential Primary Election will lose votes, and Plaintiff will suffer imminent irreparable harm as a result.

66. Although Plaintiff is not a registered Republican, MCL 168.615c of Michigan Election Law grants Plaintiff the statutory legal right to vote in the Republican Presidential Primary Election provided that Plaintiff "shall indicate in writing, on a form prescribed by the secretary of state, which political party ballot he…wishes to vote when appearing at a presidential election."

67. Michigan's Presidential Primary Election is an "open" primary. See MCL 168.615c.

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68. Plaintiff fears that if an otherwise ineligible presidential candidate, such as Trump, is allowed to unlawfully appear on the 2024 Presidential Primary Election ballot, Plaintiff's Republican presidential candidate of choice will lose votes and thus, Plaintiff will suffer irreparable harm.

69. Since Trump is undeniably the current leading candidate to capture the Republican nomination for President, if Trump is allowed to have his name appear on the 2024 Presidential Primary Election ballot despite his ineligibility under Section 3 of the Fourteenth Amendment of the United States Constitution, Trump will undeniably take votes away from Plaintiff's Republican presidential candidate of choice.

70. This constitutes irreparable harm that Plaintiff will suffer because of the loss of votes for Plaintiff's preferred candidate of choice for the Republican presidential nomination, which Plaintiff intends on voting for and supporting in the 2024 Presidential Primary Election.

71. MCL 168.614a and 168.615a of Michigan Election Law govern the Defendant Secretary of State's statutory duties to print the names of presidential candidates on the 2024 Presidential Primary Election ballot.

72. MCL 168.614a of Michigan Election Law provides:

> (1) **Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a.** The secretary of state shall make the list issued under this subsection

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available to the public on an internet website maintained by the department of state.
(2) **Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party.** The secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.
(3) **After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election**. (emphasis supplied).

73. MCL 168.615a provides, in pertinent part, the following:

(1) **Except as otherwise provided in this section, *the secretary of state shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed* on the appropriate presidential primary ballot for that political party.** A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state indicating his or her party preference if different than the party preference contained in the secretary of state notification and the secretary of state shall cause that presidential candidate's name to be printed on the appropriate presidential primary ballot for that political party. If the affidavit of a presidential candidate indicates that the candidate has no political party preference or indicates a political party preference for a political party other than a political party for which a presidential primary election will be held under section 613a, the secretary of state shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state specifically stating that "(candidate's name) is not a presidential candidate", and the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot. A presidential candidate shall file an affidavit described in this subsection with the secretary of state no later than 4 p.m. on the second Friday in December of the year

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before the presidential election year or the affidavit is considered void. (emphasis supplied).

74. Pursuant to MCL 168.615a(1) of Michigan Election Law, the Defendant Secretary of State "shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party."

75. Therefore, because Trump is undoubtedly the leading presidential candidate for the Republican nomination according to some of the most-recent and published national polls and because the Chair of the Michigan Republican Party, Karmo, has stated publicly that she would be submitting Trump's name to the Defendant Secretary of State to appear on the 2024 Presidential Primary Election ballot, pursuant to MCL 168.615a(1), Defendant Secretary of State would appear to be obligated to print Trump's name on the 2024 Presidential Primary Election ballot.

76. However, contrary to Defendant Secretary of State's flawed and erroneous determination, Defendant Secretary of State is constitutionally obligated to determine whether a presidential candidate is eligible in accordance with the qualification requirements set forth under the United States Constitution.

77. Mich.Const.1963, art. 11, §1 provides:

> **All officers, legislative, executive** and judicial, **before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according**

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> **to the best of my ability**. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust. (emphasis supplied).

78. As noted, the Defendant Secretary of State is an elected executive that heads a principal department of the executive branch of state government. See Mich.Const.1963, art. 5, §3.

79. Pursuant to Mich.Const.1963, art. 11, §1 and MCL 168.80 of Michigan Election Law, Defendant Secretary of State was administered the aforementioned constitutional oath of office on January 1, 2023.

80. By taking the constitutional oath of office required under Mich.Const.1963, art. 11, §1, Defendant Secretary of State swore or affirmed that she would "***support the Constitution of the United States*** and the constitution of this state[.]" (emphasis supplied).

81. Defendant Secretary of State would violate her constitutional oath of office if she permitted a presidential candidate to appear on the 2024 Presidential Primary Election ballot if they failed to satisfy the requirements set forth under the United States Constitution.

82. By way example, if a potential presidential candidate was **not** a natural born citizen as required under Article II, §1, Clause 5 of the United States Constitution and evidence was provided to the Defendant Secretary of State proving that said presidential candidate was not a natural born citizen, Mich.Const.1963, art. 11, §1 would require the Defendant Secretary of State

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NOT to print said presidential candidate's name on a presidential primary election ballot.

83. Similarly, if a potential presidential candidate was 30 years old and did not meet the age requirement as set forth under Article II, §1, Clause 5 of the United States Constitution, and evidence was provided to the Defendant Secretary of State proving that the presidential candidate was 30 years old, Mich.Const.1963, art. 11, §1 would require the Defendant Secretary of State **NOT** to print the name of said presidential candidate on a presidential primary election ballot.

84. Because Defendant Secretary of State took an oath to "support the Constitution of the United States", Defendant Secretary of State has a constitutional duty to properly "enforce" the provisions of the United States Constitution.

85. Certainly, Defendant Secretary of State would **NOT** be "supporting" the United States Constitution if she permits a presidential candidate to knowingly violate any provisions of the United States Constitution.

86. Here, Plaintiff provided the Defendant Secretary of State with ample evidence that Trump was disqualified as a presidential candidate under Section 3 of the Fourteenth Amendment of the United States Constitution. (**See Plaintiff's August 28, 2023 Request for Declaratory Ruling attached**).

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87. Section 3 of the Fourteenth Amendment of the United States Constitution provides additional eligibility requirements for a person to qualify as a presidential candidate.

88. However, because the Defendant Secretary of State erroneously believed and concluded that because "the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is 'disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution'", Defendant was somehow prohibited from making such a determination.

89. As noted, Mich.Const.1963, art. 11, §1 grants Defendant Secretary of State the constitutional authority to decide whether a presidential candidate satisfies the eligibility requirements set forth under the United States Constitution because Defendant swore an oath to "***support*** the Constitution of the United States."

90. To the extent that MCL 168.615a prohibits the Defendant Secretary of State from removing and/or keeping the name of a presidential candidate off a presidential primary and/or general election ballot that has not satisfied the eligibility requirements set forth under the United States Constitution, MCL 168.615a is unconstitutional under Mich.Const.1963, art. 11, §1.

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

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a. Enter a declaratory judgment declaring Mich.Const.1963, art. 11, §1 and the oath of office administered to all state elected officials under said constitutional provision grant Defendant Secretary of State the constitutional authority to determine whether a presidential candidate has satisfied the eligibility and/or disqualification requirements to run for President of the United States as set forth under the United States Constitution.

b. Enter a declaratory judgment declaring MCL 168.615a(1) unconstitutional for it contravenes and violates Mich.Const.1963, art. 11, §1, but only to the extent that it prohibits Defendant Secretary of State from removing and/or preventing the name of a presidential candidate from appearing on a presidential primary and/or general election ballot as a presidential candidate if they have not satisfied the eligibility and/or disqualification requirements set forth under the United States Constitution to qualify as a candidate for President of the United States.

c. Enter a declaratory judgment declaring Defendant Secretary of State has a constitutional legal duty to determine the merits of Plaintiff's August 28, 2023 request for declaratory ruling concerning the possible disqualification of former President Donald Trump under Section 3 of the Fourteenth Amendment of the United States Constitution and issue a ruling well-in-advance of the certification deadline set forth under MCL 168.614a and 168.615a.

d. Enter an injunction enjoining the Defendant Secretary of State from printing the name of Donald Trump on any presidential primary and/or general election ballots until such time as the Defendant Secretary of State decides the merits and issues a decision on Plaintiff's August 28, 2023 request for declaratory ruling concerning the possible disqualification of former President Trump under Section 3 of the Fourteenth Amendment of the United States Constitution.

e. Award Plaintiff his court costs.

f. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

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COUNT IV

Writ of Mandamus Compelling Defendant Secretary of State To Decide The Merits and Issue A Decision On Plaintiff's August 28, 2023 Request For Declaratory Ruling Concerning Former President Trump's Possible Disqualification Under Section 3 of the Fourteenth Amendment of the United States Constitution.

91. Plaintiff incorporates, repeats and realleges the foregoing allegations as though they were fully set forth and stated herein.

92. For this count, pursuant to MCR 3.305, Plaintiff seeks the entry of a writ of mandamus against the Defendant Secretary of State compelling the Defendant Secretary of State to decide the merits and issue a decision on Plaintiff's August 28, 2023 Request for declaratory ruling well-in-advance of the certification deadlines set forth under MCL 168.614a and 168.615a.

93. If this Honorable Court declares and determines the Defendant Secretary of State has the constitutional legal duty and authority to determine whether a presidential candidate satisfies the qualification and/or disqualification requirements set forth under the United States Constitution, entry of a writ of mandamus is most appropriate.

94. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017).

95. Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa*, 333 Mich App 422, 435; 960 NW2d 166 (2020).

96. Whether a writ issues is within the discretion of the court. *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

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> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

97. In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

98. Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law.

99. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State to decide the merits and issue a decision on Plaintiff's August 28, 2023 request for declaratory ruling concerning whether Trump is disqualified under Section 3 of the Fourteenth Amendment.

100. "A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa*, ___Mich.App.___, ____; ____NW2d____ (2023)(Docket No.365488, issued April 21,2023), slip op at p

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12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

101. The Defendant Secretary of State has a clear legal duty under the Mich.Const. 1963, art. 11, §1 and MCL 24.263 to decide the merits and issue a decision on Plaintiff's August 28, 2023 request for declaratory ruling.

102. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget*, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

103. The duties of the Defendant Secretary of State under Mich.Const.1963, art. 11, §1 and MCL 24.263 of the APA are ministerial.

104. Lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to decide the merits and issue a decision with respect to Plaintiff's August 28, 2023 request for declaratory ruling.

WHEREFORE, Plaintiff Robert Davis prays and requests this Honorable Court enters judgment and grants the following relief against the Defendant Secretary of State as follows:

a. Enter a writ of mandamus compelling the Defendant Secretary of State to decide the merits and issue a decision with respect to Plaintiff's August 28, 2023 request for declaratory ruling concerning Trump's possible disqualification under Section 3 of the Fourteenth Amendment and compelling Defendant Secretary of

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State to issue said decision well-in-advance of the certification deadlines set forth under MCL 168.614a and MCL 168.615a.

b. Enter an order requiring the Defendant Secretary of State to show cause why a writ of mandamus should not be issued.

c. Award Plaintiff his court costs.

d. Enter an order awarding whatever other equitable relief the Court deems appropriate at the time of final judgment.

Dated: September 18, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff
180 Eason
Highland Park, MI 48203
(313) 523-7118
Davisrobert854@gmail.com

CERTIFICATE OF SERVICE

I, ROBERT DAVIS, certify that the foregoing document(s) was filed and served via the Court's electronic case filing and noticing system, MiFile, this 18th day of September, 2023, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

Dated: September 18, 2023

Respectfully submitted,
/s/ ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)
(313) 523 PII MCL 15.243(1

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,
Plaintiff,

Case No. 23-000128-MB
Hon. James Robert Redford

v

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,
Defendant.
_____/

ROBERT DAVIS
Plaintiff, *pro se*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)
(313) 523 PII MCL 15.243(1)
PII MCL 15.243(1)(a)@gmail.com
_____/

INDEX OF EXHIBITS FOR VERIFIED COMPLAINT AND EMERGENCY MOTION FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS AND ORDER TO SHOW CAUSE

Exhibit A- **Public Act 2 of 2023**

Exhibit B- **Michigan House of Representatives' 2023 Legislative Session Schedule**

Exhibit C- **Secretary of State's June 2023 Presidential Primary Election Manual**

Exhibit D- **Robert Davis' September 11, 2023 Email to SOS Benson re date of 2024 Presidential Primary Election**

Exhibit E- **Robert Davis' August 28, 2023 Request to SOS Benson for Declaratory Ruling re Trump Disqualification**

Exhibit F- **SOS Benson's September 12, 2023 Response Denying Robert Davis' August 28, 2023 Request for Declaratory Ruling**

Exhibit G- **Robert Davis' March 26, 2023 FOIA Request to Department of Treasury and Department of State**

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Exhibit H- Department of Treasury's April 3, 2023 Response to Davis' March 26, 2023 FOIA request

Exhibit I- SOS Benson and Department of State's April 3, 2023 Response to Davis' March 26, 2023 FOIA request

Exhibit J- Robert Davis' August 8, 2023 Application to AG Nessel To Initiate Quo warranto proceedings against SOS Benson

Exhibit K- AG Nessel's August 15, 2023 Denial Letter

Dated: September 18, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(
(313) 523 PII MCL 15.243(1
PII MCL 15.243(1)(a)@gmail.com

CERTIFICATE OF SERVICE

I, ROBERT DAVIS, certify that the foregoing document(s) was filed and served via the Court's electronic case filing and noticing system, MiFile, this 18th day of September, 2023, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

Dated: September 18, 2023

Respectfully submitted,
/s/ ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(
(313) 523- PII MCL 15.243

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EXHIBIT A

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Act No. 2
Public Acts of 2023
Approved by the Governor
February 1, 2023
Filed with the Secretary of State
February 1, 2023
EFFECTIVE DATE: Sine Die
(91st day after final adjournment of the 2023 Regular Session)

STATE OF MICHIGAN
102ND LEGISLATURE
REGULAR SESSION OF 2023

Introduced by Senator Moss

ENROLLED SENATE BILL No. 13

AN ACT to amend 1954 PA 116, entitled "An act to reorganize, consolidate, and add to the election laws; to provide for election officials and prescribe their powers and duties; to prescribe the powers and duties of certain state departments, state agencies, and state and local officials and employees; to provide for the nomination and election of candidates for public office; to provide for the resignation, removal, and recall of certain public officers; to provide for the filling of vacancies in public office; to provide for and regulate primaries and elections; to provide for the purity of elections; to guard against the abuse of the elective franchise; to define violations of this act; to provide appropriations; to prescribe penalties and provide remedies; and to repeal certain acts and all other acts inconsistent with this act," by amending section 613a (MCL 168.613a), as amended by 2015 PA 1.

The People of the State of Michigan enact:

Sec. 613a. (1) A statewide presidential primary election must be conducted under this act on February 27, 2024, and on the fourth Tuesday in February in each presidential election year after 2024.

(2) A political party that received 5% or less of the total vote cast nationwide for the office of President of the United States in the last presidential election shall not participate in the presidential primary election.

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(3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election must be conducted under the provisions of this act that govern the conduct of general primary elections.

Secretary of the Senate

Clerk of the House of Representatives

Approved_____

Governor

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EXHIBIT B

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MICHIGAN HOUSE OF REPRESENTATIVES

ABRAHAM AIYASH

MAJORITY FLOOR LEADER

JANUARY

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2023 SESSION SCHEDULE

Session:
Tuesday - 1:30 PM
Wednesday - 1:30 PM
Thursday - NOON

Exceptions:
September 7 - 1:30 PM
September 20 - 10 AM
Tentative December 19-21

12 - gray box - Session Day
12 - border box - State Holiday

Ramadan - March 22
Passover - April 6-13
Easter - April 9
Vaisakhi - April 14
Laylat al-Qadr - April 18
Eid-ul-Fitr - April 21
Eid al-Adha - June 29
Rosh Hashanah - Sept. 15-17
Yom Kippur - Sept. 24-25
Diwali - Nov. 12

8.10.23

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EXHIBIT C

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Ballot Access Information for Presidential Candidates Seeking Office in 2024

Michigan election law governs the ballot access procedures for candidates who seek the office of U.S. President. As these procedures are subject to change by the State Legislature, presidential candidates interested in participating in Michigan's February 27, 2024 primary election or November 5, 2024 general election are encouraged to consult our website, Michigan.gov/Elections, for updates.

February 27, 2024 Presidential Primary

Michigan's February 27, 2024 Presidential Primary is limited to eligible candidates who affiliate with the two major political parties, the Democratic and Republican Parties. MCL 168.613a. The Secretary of State is required to issue a "list of the individuals generally advocated by the national news media to be potential candidates" for each major political party's nomination by 4:00 p.m. on November 10, 2023. MCL 168.614a(1). Thereafter, the state chairperson of each major political party must file a "list of individuals whom they consider to be potential presidential candidates for that political party" with the Secretary of State no later than 4:00 p.m. on November 14, 2023. MCL 168.614a(2).

The Secretary of State shall make both lists available to the public and shall notify the candidates identified on each list of the provisions of the Michigan election law that govern the Presidential Primary. MCL 168.614a(3). Candidates identified on either list who wish to participate in Michigan's Presidential Primary are not required to do anything further in order to secure a place on the ballot. MCL 168.615a(1). The ballot will include each major party's candidates appearing on either list and an option for voters to select "uncommitted." MCL 168.615a(3).

A person identified on either the Secretary of State's or party chairperson's candidate listing may withdraw from Michigan's Presidential Primary or designate a different political party by filing an affidavit with the Secretary of State no later than 4:00 p.m. on December 8, 2023 stating that:

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- "(Candidate's name) is not a presidential candidate." In these circumstances, the Secretary of State will not allow the candidate's name to be printed on the February 27, 2024 Primary Ballot; or
- The candidate's party preference is different than the party listed in the Secretary of State's notice to the candidate. In these circumstances, the Secretary of State will: (1) cause the candidate's name to be printed on the appropriate primary ballot, if the preferred party is a major political party, or (2) not permit the candidate's name to be printed on the presidential primary ballot if the candidate's preferred party is not a major political party. MCL 168.615a(1).

An individual who is **not** listed as a potential presidential candidate by the Secretary of State or a state party chairperson who wishes to appear on Michigan's Presidential Primary ballot must file a nominating petition with the Secretary of State no later than 4:00 p.m. on December 8, 2023. MCL 168.615a(2). Petitions cannot be circulated prior to October 1, 2023. *Id.* The number of valid signatures required on a nominating petition for a candidate is "not less than ½ of 1% of the total votes cast in the state at the previous presidential election for the presidential candidate of the political party for which the individual is seeking nomination." *Id.* However, the total shall not exceed 1,000 times the total number of congressional districts. The minimum number of valid signatures required on a nominating petition for both Democratic and Republican Party candidates is 13,000. *Id.*

November 5, 2024 General Election

The November general election ballot will combine the major party presidential nominees, presidential nominees named by the minor parties qualified to appear on Michigan's general election ballot, and presidential candidates who choose to run without political party affiliation. Write-in candidates who seek the office of U.S. President are also eligible to participate in the general election.

Presidential Candidates Affiliated with a Major Party

The names and addresses of the Democratic and Republican Parties' nominees for offices of president and vice-president must be certified by the chairperson and the secretary of the party's state central committee to the

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Secretary of State within one business day after the conclusion of the party's state convention or national convention (whichever is later).

In addition, the chairperson and secretary of the party's state central committee must forward to the Secretary of State a certificate containing the names and addresses of the party's presidential electors. (The qualifications that candidates for presidential elector must satisfy are described below.) The certificate must be hand-delivered or sent to the Secretary of State by certified or registered mail within one business day after the conclusion of the party's state convention. (MCL 168.42, 591, and 686).

Presidential Candidates Affiliated with a Minor Party

For minor parties who are qualified to appear on the general election ballot in Michigan[1], the names and addresses of the party's nominees for the offices of president and vice-president must be certified by the chairperson and secretary of the party's state central committee to the Secretary of State within one business day after the conclusion of the party's state convention or national convention (whichever is later).

In addition, the chairperson and secretary of the party's state central committee must forward to the Department of State, Bureau of Elections a certificate containing the names and addresses of the party's presidential electors. (The qualifications that candidates for presidential elector must satisfy are described below.) The certificate must be hand-delivered or sent to the Secretary of State by certified or registered mail within one business day after the conclusion of the party's state convention. (MCL 168.42 and 686).

A political party may appear on the general election ballot in Michigan by virtue of the voter support accorded the party at the last general election or by filing a "new political party" petition. For further information on the procedures which govern political party ballot access, see the publication, New Political Party Qualification (January 2019).

[1] The minor political parties currently qualified to appear on the November 2024 General Election ballot are: Libertarian, U.S. Taxpayers, Green, Natural Law, and Working Class parties.

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Presidential Candidates without Political Party Affiliation

A presidential candidate without political party affiliation must submit a qualifying petition bearing a sufficient number of valid signatures, the name and address of his or her running mate, and the names and addresses of his or her presidential electors. The qualifying petition must be filed no later than 4:00 p.m. on July 18, 2024. MCL 168.590c. The name and address of the candidate's running mate and the names and addresses of his or her presidential electors must be filed no later than August 31, 2024. MCL 168.590d. All documents must be filed with the Department of State's Bureau of Elections.

- The minimum number of valid signatures required on the qualifying petition is 12,000; up to 60,000 signatures can be submitted to cover the minimum number of valid signatures required. MCL 168.544f. Of the signatures submitted on the petition, there must be at least 100 signatures from each of at least ½ of the congressional districts in the state. MCL 168.590b.
- Any signatures appearing on the qualifying petition which are dated more than 180 days prior to the date the petition is filed are invalid. MCL 168.590b.
- A candidate who wishes to withdraw his or her petition must submit a written notice of withdrawal to the Department of State's Bureau of Elections no later than 4:00 p.m. on July 21, 2024. MCL 168.590c.
- A person who files a qualifying petition cannot appear on the ballot as a partisan candidate for any office for the remainder of the calendar year. MCL 168.590g. In addition, a person who files a partisan nominating petition or filing fee as a candidate of a political party or who is nominated by a political party convention, committee or caucus and accepts the nomination cannot file a qualifying petition for the remainder of the calendar year. MCL 168.692a.

Write-in Candidates for President

Write-in votes cast for a candidate for president are tallied and certified as votes for the candidate's presidential electors only if the candidate forwards

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the name of his or her running mate, a list of presidential electors and a "Declaration of Intent" form to the Department of State's Bureau of Election by August 31, 2024. Write-in votes cast for an individual seeking the office of U.S. President who fails to file all of the required documents are not counted. MCL 168.590d.

Presidential Electors: Qualifications and Eligibility

- A presidential candidate's slate of electors must equal the number of U.S. House members and U.S. Senators elected in Michigan.
- Michigan election law, MCL 168.41, provides the following:

> No person shall be eligible to be an elector of president and vice-president who shall not have been a citizen of the United States for at least 10 years and a resident and registered elector of the congressional district for an elector representing a congressional district, or of the state, for an elector representing the state at large for at least 1 year prior to the election. No senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector, as provided in section 1 of article 2 of the United States constitution.

Additional Information

If you have questions regarding the information presented here, please contact this office. Answers to your questions will also be found in the Michigan election law, which may be viewed at legislature.mi.gov.

Michigan Department of State
Bureau of Elections
P.O. Box 20126
Lansing, MI 48901-0726
Phone: (517) 335-3234 or (800) 292-5973
Fax: (517) 335-3235
Email: Elections@Michigan.gov
Web: Michigan.gov/Elections

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EXHIBIT D

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Date of 2024 Presidential Primary Elections and Questions Relating to 2024 Presidential Primary Elections

Inbox
Search for all messages with label Inbox
Remove label Inbox from this conversation

R

Robert Davis <PII MCL 15.243(1)(a)@gmail.com> Mon, Sep 11, 7:30 AM (7 days ago)

to Jonathan, Heather, MDOS-BOERegulatory, Adam, Amy, Lori, Lisa, Margaret

Dear Director Brater, Asst. Attorney Gen. Meingast, Ms. Lovegrove, and Mr. Fracassi:

As a registered voter of this great state, I desire to participate and vote in the 2024 presidential primary election. However, there seems to be some confusion as to the date in which the 2024 presidential primary election will be held. Will the 2024 presidential primary election be held in February 2024 or March 2024?

Additionally, there is some confusion as to whether a particular major political party can forgo participation in a presidential primary election in this state and instead, hold a caucus or convention to nominate its preferred presidential candidate.

Accordingly, by the close of business, today, September 11, 2023, please provide answers to these two very simple questions:

1. Will the 2024 presidential primary election be held in February 2024 or March 2024?
2. Can a major political party choose to forgo participating in a presidential primary election and instead, hold a caucus or convention to nominate its preferred presidential candidate?

Please send all responses to this inquiry to this email address. If answers to the foregoing questions are provided on your website, please direct me to the specific link. **Also, please be advised that failure to respond by the deadline set forth herein (close of business today 9/11/23) will constitute a denial of my request for clarification and direction.**

I will await your response and please acknowledge receipt of this written request with a reply email.

Respectfully submitted,
Robert Davis
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(

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EXHIBIT E

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August 28, 2023

Michigan Department of State
Bureau of Elections
Richard H. Austin Building-1st Floor
430 West Allegan
Lansing, MI 48933

Re: Request for Declaratory Ruling Pursuant to MCL 24.263 Concerning Disqualification of Former U.S. President Donald J. Trump From Appearing On Any Presidential Primary and/or General Election Ballot As Presidential Candidate For He Is Barred Under Section 3 of the Fourteenth Amendment of The United States Constitution.

Dear SOS Benson, Director Brater and Mr. Fracassi:

Please accept this letter and the exhibits attached hereto as a request for a declaratory ruling pursuant to MCL 24.263 regarding former U.S. President Donald J. Trump's ("Trump") disqualification from appearing on any presidential primary and/or general election in the state of Michigan due to his apparent ineligibility to assume and/or run for the office of President pursuant to Section 3 of the Fourteenth Amendment of the United States Constitution.

Considering the facts of this request are undisputed and are relatively straightforward, and the need to allow adequate time for any legal challenges prior to any presidential primary election for 2024, I

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am respectfully requesting that Secretary of State Jocelyn Benson ("SOS Benson") and the Department of State issue a declaratory ruling expeditiously in accordance with the Administrative Procedure Act (APA) and that said declaratory ruling be **issued within 14 calendar days** of receipt of this request.

Law and Legal Analysis

1. Section 3 of the Fourteenth Amendment of the United States Constitution Bars Trump Candidacy For President for the 2024 Election.

On November 15, 2022, former President Trump announced "that he will seek the Republican presidential nomination in 2024."[1] Since his announcement, Trump's presidential campaign has raised tens of millions of dollars for his presidential campaign. In fact, recent published media reports indicate that Trump's presidential campaign "has raised $7.1 million since Thursday when he was booked at the Fulton County Jail in Georgia on charges that he illegally schemed to overturn the 2020 election in the state and became the first former president in U.S. history to ever have a mug shot taken."[2]

[1] See https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid/index.html

[2] See https://abcnews.go.com/US/wireStory/trump-campaign-reports-raising-7-million-after-georgia-102592711

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Presidential primary and general elections for the state of Michigan are governed by Michigan Election Law, being MCL 168.1, *et.seq*. MCL 168.613a, as amended, of Michigan Election Law provides:

> (1) A statewide presidential primary election must be conducted under this act on February 27, 2024, and on the fourth Tuesday in February in each presidential election year after 2024.
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of President of the United States in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election must be conducted under the provisions of this act that govern the conduct of general primary elections.

MCL 168.614a of Michigan Election Law further provides:

> (1) **Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a.** The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.
> (2) Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, **the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party.** The

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> secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.
>
> (3) After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.

Surprisingly, MCL 168.615a of Michigan Election Law, "mandates" and "requires" the Secretary of State to print the name of any presidential candidate identified and notified as a "potential" presidential candidate under MCL 168.614a. MCL 168.615a(1) of Michigan Election Law provides, in relevant part:

> Except as otherwise provided in this section, **the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a *to be printed on the appropriate presidential primary ballot for that political party*.** [emphasis supplied].

MCL 168.615a(1) uses the mandatory term "shall". It is well-settled in Michigan jurisprudence that the "use of the word 'shall' indicates a mandatory and imperative directive." *Burton v Reed City Hospital Corp.*, 471 Mich. 745, 752; 691 NW2d 424 (2005). Therefore, pursuant to MCL 168.615a(1), the Secretary of State would be "mandated" and "required" to print Trump's name on any presidential primary election ballot in Michigan for the 2024 presidential election

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because Trump is currently the leading candidate for the Republican presidential nomination. According to an Emerson College poll released in early August 2023, current President Joe Biden and former President Trump were statistically tied in the battle ground state of Michigan.[3]

However, Section 3 of the Fourteenth Amendment of the United States Constitution disqualifies and bars former President Trump from serving and/or running for the Presidency of the United States.

Disqualification Under Section 3 of the Fourteenth Amendment of the United States Constitution

Section 3 of the Fourteenth Amendment of the United States Constitution provides:

> **Section 3**
>
> **No person shall be a** Senator or Representative in Congress, **or elector of President and Vice-President, or hold any office, civil or military, under the United States**, or under any State, **who, having previously taken an oath**, as a member of Congress, **or as an officer of the United States**, or as a member of any State legislature, or as an executive or judicial officer of any State, **to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.** But Congress may by a vote of two-thirds of each House, remove such disability. [emphasis supplied].

[3] See https://thehill.com/homenews/campaign/4136457-biden-trump-tied-in-michigan-ahead-of-2024-election-poll/

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As noted in the scholarly article published in The Atlantic, which was authored by former U.S Court of Appeals Judge J. Michael Luttig and Harvard Law Professor Emeritus Laurence Tribe:

> The disqualification clause operates independently of any such criminal proceedings and, indeed, also independently of impeachment proceedings and of congressional legislation," they wrote. "The clause was designed to operate directly and immediately upon those who betray their oaths to the Constitution, whether by taking up arms to overturn our government or by waging war on our government by attempting to overturn a presidential election through a bloodless coup.

And for the reasons stated and set forth in the University of Penn Law Review Article entitled: "The Sweep and Force of Section Three", whose arguments shall be incorporated by reference herein, former President Trump is disqualified from the Presidency because he has "given aid or comfort to the enemies". The University of Penn Law Review Article authored by distinguished conservative attorneys, William Baude & Michael Stokes Paulsen, thoroughly sets forth the legal arguments that support the disqualification of Trump from the Presidency under Section 3 of the Fourteenth Amendment. A copy of William Baude & Michael Stokes Paulsen's Law Review Article is attached hereto for the Department of State to review and analyze.

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Recently, former President Trump attended and hosted a fundraiser at his Bedminister, N.J., golf club that benefited the Patriot Freedom Project, the controversial nonprofit that supports those criminally charged in the Jan. 6, 2021 attack on the U.S. Capitol.[4] Trump's financial support of those individuals criminally charged in the January 6, 2023 attack ono the U.S. Capitol is further evidence of Trump's "aid" and "comfort" of individuals who have been deemed "enemies" of the Unites States.

In addition to Trump's financial support for the "insurrectionists", "[c]onsider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent

[4] https://www.dailymail.co.uk/news/article-12437995/Donald-Trump-attends-fundraising-dinner-January-6-defendants-arrest.html

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Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021."[5]

All of the foregoing actions committed by former President Trump disqualifies him for the Presidency under Section 3 of the Fourteenth Amendment of the United States Constitution. Although former President Trump arguably has millions of supporters nationwide and here in the state of Michigan, as the United States Supreme Court observed, "[i]t does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office." *Timmons v Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). It is well-settled that "**a state has an interest, if not a duty to protect the integrity of its political processes from** frivolous or ***fraudulent candidacies***." *Bullock v Carter*, 405 U.S. 134, 145 (1972) (emphasis supplied).

Many Trump supporters, and even former President Trump himself, have previously asserted the ***frivolous argument*** that

[5] See p 111 of "The Sweep and Force of Section Three", 172 U. PA. L. REV. (forthcoming 2024) William Baude & Michael Stokes Paulsen, a copy of which is attached.

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Trump's disqualification under Section 3 of the Fourteenth Amendment would violate former President Trump and his supporters constitutional right to vote for the candidate of their choice. **However, that argument simply lacks merit and is outright frivolous!** "That a particular induvial may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Timmons v Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). Furthermore, "the [Supreme] Court has never recognized a fundamental right to express one's political views through candidacy." *Carver v Dennis*, 104 F.3d 847, 851 (6th Cir. 1997). Contrary to popular belief, "**running for office is not a 'fundamental right'**[.]" *Zielasko v State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989)(quoting *Bullock v Carter*, 405 U.S. 134, 142-143 (1972)) (emphasis supplied). "The [United States] Supreme Court has made clear that a candidate does not have a fundamental right to appear on the ballot." *Corrigan v City of Newaygo*, 55 F.3d 1211, 1214 (6th Cir. 1995) (citing *Bullock v Carter*, 405 U.S. 134, 142-143 (1972)).

In addition to the binding legal precedent established by the United States Supreme Court and federal appellate courts, our

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Michigan Court of Appeals has also adopted similar legal precedent with respect to a candidate's lack of a constitutional right to appear on the ballot. As our Michigan Court of Appeals correctly concluded and determined in *Barrow v Detroit Election Commission*, 301 Mich.App. 404, ___; 836 NW2d 498, 511 (2013), which resulted in the leading candidate for Mayor of the city of Detroit being removed from the primary election ballot:

> "[T]**here is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot.** Indeed, voters have the right to expect that the candidates appearing on ballots have met the requirements..."[*Barrow*, 301 Mich.App. at ___; 836 NW2d at 511.] (emphasis supplied).

Here, the constitutional rights of Trump supporters in the state of Michigan will **NOT** be violated in any respect with the disqualification of Trump under Section 3 of the Fourteenth Amendment because "**there is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot.**" *Barrow*, 301 Mich.App. at ___; 836 NW2d at 511. (emphasis supplied).

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CONCLUSION

WHEREFORE, for the foregoing reasons and for the reasons set forth in the University of Penn Law Review Article, "The Sweep and Force of Section Three", 172 U. PA. L. REV. (forthcoming 2024), authored by William Baude & Michael Stokes Paulsen, Complainant/Petitioner Robert Davis respectfully requests the Department of State and the Secretary of State issue a declaratory ruling in accordance with the Administrative Procedures Act (APA) and Michigan Election Law declaring former President Trump ineligible and disqualified to have his name printed on any presidential election ballot in Michigan in 2024 because Trump is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution. Complainant/Petitioner Robert Davis further requests that said declaratory ruling be issued expeditiously **within 14 calendar days from receipt of this request.**

Dated: August 28, 2023

Respectfully submitted,

/s/ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Complainant/Petitioner
Davisrobert854@gmail.com

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EXHIBIT F

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
BUREAU OF ELECTIONS
LANSING

September 12, 2023

Robert Davis
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)

Dear Mr. Davis:

The Michigan Bureau of Elections (Bureau) is in receipt of your request for a declaratory ruling requesting the Department of State declare "former President Trump ineligible and disqualified to have his name printed on any presidential election ballot in Michigan in 2024."

Under the Administrative Procedures Act, "[o]n request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency[.]" MCL 24.263. An "interested person" for purposes of Section 63 "means a person who is affected by the applicability of the statute to an actual state of facts." *Forner v Dep't of Licensing and Regulatory Affairs*, 2019 WL 3941453 at * 5 (Mich Ct App, August 20, 2019).

The Michigan Election Law regulates the process for obtaining ballot access as a presidential candidate. MCL 168.1, *et seq*. Under the Election Law, the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is "disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution."

Accordingly, even assuming the request meets the requirements of Section 63, the Bureau declines to issue a declaratory ruling.

Sincerely,

Jonathan Brater, Director of Elections
Michigan Bureau of Elections

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT G

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Fracassi, Adam (MDOS)

From: Robert Davis [redacted]@gmail.com>
Sent: Sunday, March 26, 2023 5:53 PM
To: Robert, Carla M. (Treasury); Fracassi, Adam (MDOS); MDOS-BOERegulatory
Cc: Meingast, Heather (AG)
Subject: FOIA Request for Copy of Bond Filed By Secretary of State Jocelyn Benson in 2023 for term of office commencing January 1, 2023

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Ms. Robert and Mr. Fracassi,
Pursuant to Michigan's Freedom of Information Act (FOIA), I am respectfully requesting copies of the following public documents:
1. Copies of any and all bonds Secretary of State Jocelyn Benson filed with the State Treasurer's office in January, February, or March 2023 to cover her term of office commencing January 1, 2023.

Please send all written responses to this FOIA request to this email request. Also, please confirm receipt of this FOIA request with a reply email.

Respectfully submitted,
Robert Davis
[redacted]
[redacted], MI [redacted]

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT H

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

RE: FOIA Request for Copy of Bond Filed By Secretary of State Jocelyn Benson in 2023 for term of office commencing January 1, 2023 (Davis)

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R

Robert, Carla M. (Treasury) <RobertC@michigan.gov> Mon, Apr 3, 2:46 PM

to me, Ashley

Mr. Robert Davis
[redacted], MI
c/o: [redacted]@gmail.com

Dear Mr. Davis:

This notice responds to your March 26, 2023, email (below), received in the Department of Treasury (Treasury) on March 27, 2023, requesting information under the Freedom of Information Act (FOIA) MCL 15.231 *et seq.*

You have requested that which you describe as "Copies of any and all bonds Secretary of State Jocelyn Benson filed with the State Treasurer's office in January, February, or March 2023 to cover her term of office commencing January 1, 2023."

Your request is denied. To the best of the undersigned's knowledge, information, and belief, no such records as you describe, or by any other name reasonably known, exist in Treasury.

As to the denial of the FOIA request, Treasury is obligated to inform the requester that, under section 10 of the FOIA, MCL 15.240, it may do the following:

1. Appeal this decision in writing to the State Treasurer, Michigan Department of Treasury, P.O. Box 30716, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons the requester believes the denial should be reversed. Treasury must respond to the appeal within 10 business days of its receipt. Under unusual circumstances, the time for response to an appeal may be extended by 10 business days.

2. File an action in the Court of Claims within 180 days after the date of the final determination to deny the request. If the requester prevails in such an action, the court

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

is to award reasonable attorney fees, where applicable, costs, and disbursements, and possible damages.

Treasury's FOIA procedures and guidelines can be accessed at: Michigan Department of Treasury Freedom of Information Act Procedures and Guidelines.

Sincerely,

Carla M. Robert
FOIA Coordinator
Executive Office/Communications
Michigan Department of Treasury

From: Robert Davis <PII MCL 15.243(1)(a)@gmail.com>
Sent: Sunday, March 26, 2023 5:53 PM
To: Robert, Carla M. (Treasury) <RobertC@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; MDOS-BOERegulatory <MDOS-BOERegulatory@michigan.gov>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: FOIA Request for Copy of Bond Filed By Secretary of State Jocelyn Benson in 2023 for term of office commencing January 1, 2023

Ms. Robert and Mr. Fracassi,

Pursuant to Michigan's Freedom of Information Act (FOIA), I am respectfully requesting copies of the following public documents:
1. Copies of any and all bonds Secretary of State Jocelyn Benson filed with the State Treasurer's office in January, February, or March 2023 to cover her term of office commencing January 1, 2023.

Please send all written responses to this FOIA request to this email request. Also, please confirm receipt of this FOIA request with a reply email.

Respectfully submitted,
Robert Davis
PII MCL 15.243(1)(a)
PII MCL 15.2[illegible]k, MI PII MCL 15.243(1)(

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT I

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Your Recent Request FOIA

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M

MDOS-BOERegulatory <MDOS-BOERegulatory@michigan.gov> Mon, Apr 3, 2:01 PM

to me

Mr. Davis:

The Michigan Department of State (Department) is in receipt of your March 26, 2023 request for records submitted under the state Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231 et seq. This notice is issued in response to your request, a copy of which is attached and is incorporated herein.

Your request for "Copies of any and all bonds Secretary of State Jocelyn Benson filed with the State Treasurer's office in January, February, or March 2023 to cover her term of office commencing January 1, 2023" is denied on the basis on my certification that the Department does not possess records responsive to your request.

With respect to the denial of your request, under FOIA (MCL 15.240) you may do one of the following:

1. Appeal this decision in writing to the Secretary of State's designated appeals officer:

Secretary of State Jocelyn Benson
Attn: Michael J. Brady
Legal Services Administration
Michigan Department of State
P.O. Box 30204
Lansing, Michigan 48918

The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the denial should be reversed. The Department must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for a response may be extended by 10 business days.

2. File an action in the appropriate court within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs and disbursement, and possible damages.

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Should you have any further questions, please do not hesitate to contact me. The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/sos, under the "FOIA" tab at the bottom of the page.

Thank you,

Bureau of Elections, *Regulatory Section*
Michigan Department of State
Secretary of State Jocelyn Benson
P.O. Box 20126
Lansing, Michigan 48901

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EXHIBIT J

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ROBERT DAVIS
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(a)
(313) 523-PII MCL 15.243(1)

August 8, 2023

Honorable Michigan Attorney General Dana Nessel
P.O. Box 30212
Lansing, MI 48909
Sent via email (Boothj2@michigan.gov; meingastth@michigan.gov; KanadyJ1@michigan.gov)

Re: Application/Petition To Institute Quo Warranto Proceedings Against Michigan Secretary of State Jocelyn Benson.

Dear Attorney General Nessel:

Pursuant to Michigan Court Rule ("MCR") 3.306(B)(3), as a resident and registered voter of the city of Highland Park, County of Wayne, State of Michigan, I am submitting this written application/petition respectfully requesting for you, in your official capacity as Michigan Attorney General, to institute *quo warranto* proceedings in a court of competent jurisdiction against Michigan Secretary of State Jocelyn Benson in accordance with MCL §§ 600.4501, 600.4505, 600.4515, and MCR 3.306(B)(1)(b).

According to the official election results from the November 8, 2022 general election, which were certified by the State Board of

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Canvassers, Jocelyn Benson was re-elected to a four-year term to serve as Secretary of State for the state of Michigan commencing January 1, 2023. However, for the reasons stated below, Jocelyn Benson's office shall be declared vacant in accordance with MCL 201.3(7) because she neglected to timely file her bond within the time and manner prescribed by MCL 15.51 of Michigan Election Law. See *Davis v Emergency Manager*, 491 Mich. 899; 810 NW2d 555 (2012); *Davis v Wheeler*, 483 Mich. 949; 766 NW2d 808 (2009).

LAW AND LEGAL ANALYSIS

It is undisputed that Jocelyn Benson was elected to the office of Secretary of State in the November 8, 2022 general election. It is undisputed that in accordance with MCL xxx, Jocelyn Benson was timely sworn in and subscribed to the constitutional oath of office However, Jocelyn Benson, to date, has failed to file a bond in the sum of $25,000 with the state treasurer as required under MCL 15.51.

MCL 201.3(7) provides:

> Every office shall become vacant, on the happening of any of the following events, before the expiration of the term of such office:
>
> 7. His refusal ***or neglect*** to take his oath of office, ***or to give, or renew any official bond, or to deposit such*** oath,

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> ***or bond, in the manner and within the time prescribed by law***. (emphasis supplied).

MCL 15.51 governs the bond that is required of the secretary of state and deputy secretary of state. MCL 15.51 provides, in relevant part:

> ***The secretary of state*** and deputy secretary of state of this state, and the private secretary and executive clerk of the governor of this state, ***shall be required*** within 20 days after this act takes effect, ***and their successors in office shall be required*** **within 20 days after entering upon the duties of their respective offices, to give bonds to the people of the state of Michigan with 3 or more sureties to be approved by the state treasurer and attorney general**, conditioned for the faithful discharge of their official duties, and for the safe and lawful custody and disposition of the money and property of this state that may be entrusted to them or come within their control.
>
> ***The bond of the secretary of state shall be in the sum of $25,000.00,*** that of the deputy secretary of state shall be in the sum of $20,000.00, and the bonds of the private secretary and the executive clerk of the governor shall be each in the sum of $5,000.00. ***The bonds of the secretary of state and deputy secretary of state shall be filed and kept in the office of the state treasurer***, and those of the private secretary and executive clerk shall be filed and kept in the office of the secretary of state. (emphasis supplied).

Pursuant to the clear and unambiguous language of MCL 15.51, Jocelyn Benson was required to deposit and file a bond in the amount of $25,000 with the state treasurer "within 20 days after entering upon the duties of their respective office[]". In response to a request made

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under Michigan's Freedom of Information Act (FOIA), the Department of Treasurer indicated that no such bond was filed with the state treasurer by Jocelyn Benson. Accordingly, pursuant to MCL 201.3(7), because Jocelyn Benson did not timely file a bond in the amount of $25,000 with the state treasurer within 20 days of assuming the office of Secretary of State, her office shall be declared vacant.

Accordingly, in accordance with MCR 3.306(3)(a), I hereby offer to provide you and/or your office with a bond and/or any and all other security you may deem necessary to indemnify the state against all costs and expenses of the action. Although I am submitting this written communication requesting that you bring forth a *quo warranto* action in the appropriate court of competent jurisdiction on this matter, the Michigan Court Rules and MCL 600.4501 permit me the opportunity to bring forth an action on my own upon your refusal.

Therefore, I hereby state that I prefer to bring this action myself considering the more serious cases your office is inundated with. I believe I can provide this case with the attention it needs. Accordingly, **I respectfully request that you provide a written denial as quickly as possible** so that I can petition the appropriate court

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expeditiously pursuant to MCR 3.306(3)(b) and MCL §§ 600.4501, 600.4505 and 600.4515.

Dated: August 8, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(a)
(313) 523-PII MCL 15.243(1
PII MCL 15.243(1)(a)@gmail.com

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EXHIBIT K

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

August 15, 2023

via email only – PII MCL 15.243(1)(a)*4@gmail.com*

Robert Davis
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(

Dear Mr. Davis:

This letter is in response to your August 8, 2023, letter requesting the Attorney General institute a quo warranto action against Secretary of State Jocelyn Benson.

Under MCL 600.4501, the "attorney general shall bring an action for quo warranto when the facts clearly warrant the bringing of that action." While we have carefully reviewed your letter, we are not persuaded that the circumstances warrant participation by this office via quo warranto proceedings at this time.

The Attorney General, therefore, declines to institute the quo warranto action you have requested.

Sincerely,

Fadwa Hammoud

Fadwa Hammoud
Chief Deputy

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/1/2023 10:27:23 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: 14.3 case status--privileged

Ugh, hope you feel better. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, December 1, 2023 5:12 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: 14.3 case status--privileged

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Heather,

Thanks for much for the update and insight. Sorry for the slow response. PHI MCL 15.243(1)(l)

PHI MCL 15.243(1)(l) Hoping for a quick recovery. Have a great weekend!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, December 1, 2023 at 12:54 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: 14.3 case status--privileged

Hi Jonathan,

I have attached a few things. Your recitation below is correct. (Attached the order too). However, Davis did file an emergency app for leave in his case now, COA No. 368795. My response to that is due 9 a.m. on Monday.

On the bypass, Trump filed motion to intervene. No orders or calls from the clerk to me in the bypass application. On the docket my answer to that is due 12/14, unless they ask for something earlier, which the court wont since they know COA is expediting. They will just deny the bypass application and LaBrant can appeal from the COA's opinion.

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H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, December 1, 2023 12:03 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: 14.3 case status--privileged

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Hi Heather,

I hope you're doing well DPP MCL 15.243(1)(m)
DPP MCL 15.243(1)(m)

The COA expedited the cases. Appellants' briefs have been filed. The Secretary's brief is due on 12/6. Replies are due by 12/8, and the case will be submitted on the briefs. DPP MCL 15.243(1)(m)
DPP MCL 15.243(1)(m)

Brewer filed a pass-through motion in the state supreme court DPP MCL 15.243(1)(m)
DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/1/2023 5:54:06 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: 14.3 case status--privileged
Attachments: pls brief on appeal.pdf; FILED AND TIME STAMPED--Davis Brief on Appeal Wayne County Election Commission and Trump.pdf; order expediting appeal.pdf; Emergency Application for Leave to Appeal.pdf

Hi Jonathan,

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H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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Sent: Friday, December 1, 2023 12:03 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: 14.3 case status--privileged

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DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

Brewer filed a pass-through motion in the state supreme court. DPP MCL 15.243(1)(m)
DPP MCL 15.243(1)(m)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants,

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

v

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

Defendant-Appellee,

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

and

DONALD J. TRUMP,

Intervening Appellee.
_____/

ROBERT DAVIS,

Plaintiff-Appellant,

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

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee.
_____/

BRIEF ON APPEAL OF PLAINTIFFS-APPELLANTS LaBRANT ET AL.

ORAL ARGUMENT REQUESTED

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
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BASIS OF JURISDICTION

On November 14, 2023, the Court of Claims issued an Opinion and Order denying Plaintiffs-Appellants' request for declaratory relief. The Opinion and Order appealed from is attached hereto as Exhibit 1. This Court has jurisdiction over Plaintiffs-Appellants' appeal as of right under MCR 7.203(A)(1).

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Claims wrongfully deprive Plaintiffs-Appellants of their right as voters to have only eligible candidates on the presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: No.

Intervening Appellee's Answer: No.

2. Did the Court of Claims incorrectly hold that this case involving the eligibility of a candidate to appear on the presidential ballot was not ripe?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: Unknown.

Intervening Appellee's Answer: No.

3. Did the Court of Claims improperly apply the political question doctrine in finding that the courts have no role in deciding the eligibility of presidential candidates to appear on Michigan's presidential primary ballot?

Plaintiffs-Appellants' Answer: Yes.

Defendant-Appellee's Answer: Unknown.

Intervening Appellee's Answer: No.

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CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

The material facts concerning Trump's ineligibility to be a candidate under Section 3 of the Fourteenth Amendment are set forth in Plaintiffs-Appellants' Verified Complaint for Declaratory Judgment and Permanent Injunction, attached hereto as Exhibit 2.

The presidential primary election calendar is as follows. On November 13, 2023, Defendant-Appellee Benson issued her list of candidates for the February 27, 2024 presidential primary, which included Trump. Additional candidates could be added by the political parties by November 14, 2023, or by petition until December 8, 2023. Ballots must be ready for overseas and military voters 45 days before the February 27, 2024 primary, or by January 13, 2024.

B. Proceedings

Plaintiffs-Appellants filed their Verified Complaint on September 29, 2023, in the Court of Claims seeking an expedited Court order:

> 1. Declaring that Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;
>
> 2. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election;
>
> 3. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024, general election as a candidate for the office of Present of the United States[.]

Compl, Prayer for Relief (Ex 2, p 94).

Trump moved to intervene as a defendant, which was denied. However, his proposed motion to dismiss and brief in support were essentially treated as *amicus curiae* pleadings and were considered by the Court of Claims. Trump's lawyers were also granted the same amount of time as the parties to argue on the merits at the November 9, 2023 hearing. After the hearing in

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this and two related cases on November 9, 2023, the Court of Claims issued an Opinion and Order on November 14, 2023, denying Plaintiffs-Appellants requested relief.

An appeal was filed in the Court of Appeals on November 15, 2023. On November 16, 2023, Plaintiffs-Appellants filed an Emergency Bypass Application with the Michigan Supreme Court, Docket No. 166373, which is pending before that Court. On November 20, 2023, Donald Trump's Motion to Intervene as Appellee was granted in this case. On November 22, 2023, the Court of Appeals consolidated this case, Docket No. 368628, with *Davis v Wayne Co Election Comm*, Docket No. 368615.

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INTRODUCTION

Donald Trump is constitutionally disqualified from running for and serving as President of the United States because he engaged in rebellion and insurrection against the Constitution that he swore an oath to defend.

The Court of Claims incorrectly dismissed this case seeking to bar Trump from the 2024 Michigan presidential primary and general election ballots. It did so by ignoring the right of Michigan voters to have only eligible candidates appear on the ballot, improperly finding the case not ripe, and misapplying the political question doctrine on the basis of overruled case law and discredited analysis, while ignoring the clear authority demonstrating that Section 3 can and must be enforced by state courts.

The Court of Claims should be promptly reversed, and the case remanded for an evidentiary hearing on the question of whether Trump violated Section 3 of the Fourteenth Amendment.

STANDARD OF REVIEW

When considering declaratory judgment actions, questions of law are reviewed de novo. *Reed-Pratt v Detroit City Clerk*, 339 Mich App 510, 516; 984 NW2d 794 (2021) (*per curiam*). Such questions of law include the interpretation or application of statutory and constitutional provisions. *Moses, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 411; 716 NW2d 278 (2006).

ARGUMENT

THE COURT OF CLAIMS SHOULD BE REVERSED.

I. TRUMP IS DISQUALIFIED FROM OFFICE UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT.

The interpretation and application of the Fourteenth Amendment's Disqualification Clause involves legal issues of major significance to Michigan's and the country's jurisprudence:

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

US Const, Am XIV, § 3.

Trump satisfies every condition of Section 3 to be disqualified from the Michigan presidential primary ballot, as we now demonstrate.

A. Trump Took An Oath "As An Officer Of The United States" To Support The Constitution.

On January 20, 2017, Trump swore the presidential oath of office required by Article II, Section 1 of the Constitution: "I, Donald John Trump, do solemnly swear that I will faithfully execute the Office of President of the United States, and will do my best of my Ability preserve, protect, and defend the Constitution of the United States."

Trump took that oath as an "Officer of the United States" under Section 3 because the President is an officer of the United States.

1. Plain Meaning.

The plain meaning of "Officer of the United States" includes the President because the Constitution explicitly designates the presidency as an "Office," describing it as such no fewer than 25 times and the plain meaning of "officer" is one who holds an office. *See* Bailey, *An Universal Etymological English Dictionary* (20th ed, 1763) ("[O]ne who is in an Office."); *see also United States v Maurice*, 26 F Cas 1211, 1214 (CCD Va, 1823) ("[H]e who performs the

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duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.").

This plain meaning is widely used today by the United States Supreme Court and the executive branch in referring to the President as an officer. *See, e g, Nixon v Fitzgerald*, 457 US 731, 750; 102 S Ct 2690; 73 L Ed 2d 349 (1982) (referring to president as "the chief constitutional officer of the Executive Branch"); *Cheney v US Dist Court for DC*, 541 US 913, 916; 124 S Ct 1391; 158 L Ed 2d 225 (2004) (referring to "the President and other officers of the Executive"); *Motions Sys Corp v Bush*, 437 F3d 1356, 1368 (CA Fed, 2006) (*per curiam*) (Gajarsa, J., concurring in part and concurring in the judgment) (cataloguing multiple presidential executive orders wherein the president refers to himself as an "officer"); *id* at 1371–1372 ("The Constitution repeatedly designates the Presidency as an 'Office,' which surely suggests that its occupant is, by definition, an 'officer.'").

2. Common Understanding And Contemporaneous Interpretation.

By the 1860s—the relevant period for ascertaining the original meaning of the Fourteenth Amendment—"officer of the United States" was commonly understood to include the President, and the original public understanding of Section 3 applied to an insurrectionist ex-president. Intuitively, someone who takes a constitutionally required oath to "preserve, protect and defend" the Constitution before he can "enter on the Execution of His Office," US Const, art II, § 1, cl 8, is, in plain language, an "officer of the United States." Presidents, members of Congress, Supreme Court justices, and the public referred to the President this way.

Before the Civil War, both common usage and judicial opinions described the president as an "officer of the United States." As early as 1789, congressional debate referred to the president as "the *supreme Executive officer* of the United States." 1 Annals of Congress 487–488 (Joseph

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Gales ed, 1789) (Rep. Boudinot); *cf* The Federalist No. 69 (Hamilton) (Rossiter ed, 1961), p 422 ("The President of the United States would be an officer elected by the people . . . ."). Chief Judge Cranch wrote in 1837 that "[t]he president himself . . . is but an officer of the United States." *United States ex rel Stokes v Kendall*, 26 F Cas 702, 752 (CCDDC, 1837), *aff'd Kendall v United States*, 37 US 524; 9 L Ed 1181 (1838).

By the 1860s, this usage was firmly entrenched. *See* Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud (forthcoming 2024), pp 18–20; Chicago Tribune (January 14, 1864), p 3, col 3 ("The President is an officer of the United States . . . ."). On the eve of the Civil War, President Buchanan called himself "the chief executive officer under the Constitution of the United States." *Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 18; *see also* Cong Globe, 37th Cong, 2d Sess (1862), p 431 (Sen. Davis) (referring to President Lincoln as "the chief executive officer of the United States"). In a series of widely reprinted 1865 official proclamations that reorganized the governments of former Confederate states, President Andrew Johnson referred to himself as the "chief civil executive officer of the United States."[1]

This usage continued throughout the Thirty-Ninth Congress, which enacted the Fourteenth Amendment, *e g,* Cong Globe, 39th Cong, 1st Sess (1866), p 335 (Sen. Guthrie), 775 (Rep. Conkling) (quoting Attorney General Speed), 915 (Sen. Wilson), 2551 (Sen. Howard) (quoting President Johnson), and during its two-year ratification period, *see, e g, Mississippi v Johnson*, 71 US (4 Wall) 475, 480; 18 L Ed 437 (1866) (counsel labeling the president the "chief executive

[1] Andrew Johnson, Proclamation No. 135 (May 29, 1865); Proclamation No. 136 (June 13, 1865); Proclamation No. 138 (June 17, 1865); Proclamation No. 139 (June 17, 1865); Proclamation No. 140 (June 21, 1865); Proclamation No. 143 (June 30, 1865); Proclamation No. 144 (July 13, 1865), *all reprinted in* 8 *A Compilation of the Messages and Papers of the President*, 3510–3514, 3516–3523, 3524–3529 (James D. Richardson ed, 1897).

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officer of the United States"); Cong Globe, 39th Cong, 2d Sess (1867), p 335 (Sen. Wade) (calling president "the executive officer of the United States"); Cong Globe, 40th Cong, 2d Sess (1868), p 513 (Rep. Bingham) (calling the president the "executive officer of the United States"). It is clear that the original public meaning of the phrase in Section 3 necessarily included the president as an "officer of the United States."

An insurrectionist ex-president was hardly inconceivable. Former President John Tyler joined the Confederacy. Had he lived long enough to seek public office after the war, no reasonable interpretation of Section 3 would hold that his disqualification would turn on the fact that he also happened to serve as a *less powerful* covered official in the House.

The general public continued to characterize the president as an "officer of the United States" during President Johnson's impeachment, which overlapped with the Fourteenth Amendment's ratification period. *See, e g,* Cincinnati Commercial (April 18, 1868), p 4, col 4 (ridiculing the "absurd conclusion," drawn from "splitting constitutional hairs," that the president is not an officer of the United States); Louisville Courier-Journal (April 15, 1868), p 1, col 1 (conceding that it is "accepted doctrine[]" that "the President of the United States is an officer of the United States").

It is clear that the original public meaning of the phrase in Section 3 necessarily included the president as an "officer of the United States." Nor was the term considered a technical term of art that excluded the president. If it were, then it would be defined as such in contemporary legal dictionaries—it is not.

B. Trump Seeks Election To "An Office . . . Under The United States."

The 1787 Constitution and antebellum (1803) Twelfth Amendment repeatedly label the presidency an "office." *See, e g,* US Const, art II, § 1, cl 1. The antebellum Constitution repeatedly

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uses that term in *eligibility* provisions. *See, e g, id* § 1, cl 5 ("No Person . . . shall be eligible to the *Office* of President . . . ." (emphasis added)); US Const, Am XII ("[N]o person constitutionally ineligible to the *office* of President . . . ." (emphasis added)). The Constitution as a whole refers to the presidency as an "Office" 25 times.

The congressional debates over Section 3 specifically recognized that the presidency, as an office, is indeed covered by Section 3. Senator Johnson was initially confused by the specific enumeration of certain offices:

> I do not see but that any one of those gentlemen [ex-Confederates] may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.

Cong Globe, 39th Cong, 1st Sess (1866), p 2899. But Senator Morrill interrupted him:

> Let me call the Senator's attention to the words "or hold any office, civil or military, under the United States."

Id. Senator Johnson acknowledged there was "no doubt" he had been wrong, and that he had been "misled by noticing the specific exclusion in the case of Senators and Representatives." *Id*.

During the ratification period, the public debated the merits of Section 3 itself by raising the prospect of Jefferson Davis becoming president. *See Insurrection, Disqualification, and the Presidency*, 13 Brit J Am Legal Stud at 7–10; *see also, e g, Democratic Duplicity*, Indianapolis Daily Journal (July 12, 1866), p 2, col 1 (three days after congressional enactment, explaining that Section 3's opponents believed "that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT"). This debate would have been pointless if the presidency was not covered.

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C. Trump Engaged In Both Insurrection And Rebellion Against The Constitution Of The United States.

1. The January 6 Insurrection Was An "Insurrection" Under Section 3.[2]

a. An "Insurrection" Under Section 3 Is Combined, Forcible Resistance To Federal Authority Or The Constitution Itself.

Nineteenth-century definitions of "insurrection" converge on key elements. *See* Baude & Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U Pa L Rev (forthcoming 2024), pp 63–93 (canvassing definitions and usage). These elements are "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," *id* at 64, or "a) an assemblage, b) actual resistance to a federal law, c) force or intimidation, and d) a public purpose," Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, Univ Md Sch of Law Legal Studies Research Paper No. 2023-16 (October 3, 2023), p 24, available at https://ssrn.com/abstract=4591133; *see also Webster's Dictionary* (1830) ("[C]ombined resistance to . . . lawful authority . . . , with intent to the denial thereof[.]"); Bouvier, *Bouvier's Law Dictionary* (15th ed, 1883) (defining "insurrection" as "rebellion," and "rebellion" as "[t]he taking up arms traitorously against the government[; t]he forcible opposition and resistance to the laws and process lawfully issued"); *The Prize Cases (The Amy Warwick)*, 67 US (2 Black) 635, 666; 17 L Ed 459 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Allegheny Co v Gibson's Son & Co*, 90 Pa 397, 417 (1879) ("A rising against . . . authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt[.]"); President Lincoln, *Instructions for the Government of Armies*

[2] Additionally, the entire course of conduct leading up to January 6, 2021, constituted a "rebellion." *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 115–116.

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of the United States in the Field, General Orders No. 100 (April 24, 1863), art 149 ("Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.").

The term as used in Section 3 is informed by previous insurrections against the United States, such as the Whiskey, Shays', and Fries Insurrections, which did *not* involve vast columns of uniformed troops, military equipment, or hundreds of deaths. *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 88–90; Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (US Army Center of Military History, 1996) (recounting well-known antebellum insurrections that involved loosely organized, lightly-armed groups and few deaths). Yet the Framers and interpreters of Section 3 explicitly cited them as precedent. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2534 (Rep. Eckley) (discussing approvingly the expulsions of representatives who supported the "small" Whiskey Insurrection); *see also* 12 US Att'y Gen Op, p 160 (opining that, in similarly-worded statute, "[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection . . . in the United States").[3]

To qualify as an insurrection, the uprising must be "so formidable as for the time being to defy the authority of the United States." *In re Charge to Grand Jury*, 62 F 828, 830 (ND Ill, 1894). No minimum level of violence or armament is required. *See id* ("It is not necessary that there should be bloodshed[.]"); *see also Case of Fries*, 9 F Cas 924, 930 (CCD Pa, 1800) ("[M]ilitary weapons (as guns and swords . . .) are not necessary to make such insurrection . . . because numbers

[3] Section 3's phrase "insurrection or rebellion against *the same*" is best read as an insurrection against "the Constitution of the United States" (i.e., to block exercise of core constitutional functions of the federal government), but can also be read as an insurrection against "the United States." The January 6 insurrection satisfies both readings, so the distinction does not matter here.

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may supply the want of military weapons, and other instruments may effect the intended mischief."). Even a failed attack with no chance of success can qualify as an insurrection. *See Charge to Grand Jury*, 62 F at 830 ("[I]t is not necessary that its dimensions should be so portentous as to insure probable success[.]").[4]

b. The January 6 Insurrection Satisfies All These Criteria.

The January 6 insurrection was an uprising against the United States (or against the Constitution of the United States) that sought to stop the peaceful transfer of power. Compl, ¶¶ 6, 24 (Ex 2, pp 28, 31). It defied the authority of the United States by seizing the U.S. Capitol and preventing Congress from fulfilling its duty to certify the results of a presidential election. Though their success was short-lived, the insurrectionists claim distinctions that past insurrectionists cannot: their violent seizure of the Capitol obstructed an essential constitutional procedure. *See id* ¶ 202 (Ex 2, p 68). Even the Confederates never attacked the heart of the nation's capital, prevented a peaceful and orderly presidential transition of power, or captured the U.S. Capitol. *Id* ¶¶ 198–202 (Ex 2, pp 67–68).

Multiple people died and 140 law enforcement officers were injured, some severely. *Id* ¶ 245 (Ex 2, p 75). The attack was as violent as the Whiskey and Shays' Insurrections, to which the Disqualification Clause was understood to apply. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2534. Insurrectionists overwhelmed civil authorities and viciously attacked the Capitol police. Compl, ¶¶ 179–202 (Ex 2, pp 64–68). Military and other federal agencies had to be called in by then-Vice President Pence, after Trump refused. *Id* ¶ 238 (Ex 2, pp 73–74). Congress, then-President Trump's own Department of Justice, federal courts, and even Trump's defense lawyer

[4] Modern jurisprudence agrees. *See Home Ins Co of NY v Davila*, 212 F2d 731, 736 (CA 1, 1954) (an insurrection "is no less an insurrection because the chances of success are forlorn").

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have all categorized January 6 as an "insurrection." *See id* ¶¶ 246–255 (Ex 2, pp 75–79).[5]

Most recently, a Colorado court, after a five-day bench trial in which Trump was a party, concluded that the events of January 6, 2021, constituted an insurrection under Section 3 of the Fourteenth Amendment. *See Anderson v Griswold*, order of the Colorado District Court, issued November 17, 2023 (Docket No. 2023-CV-32577), ¶¶ 225–244 (Ex 6, pp 216–221).

2. Trump's Misconduct Constituted "Engage[ment]" In The Insurrection.

a. Under The Governing Worthy-Powell *Standard, Any Voluntary Effort To Assist The Insurrection Constitutes Engagement.*

All four courts to construe "engage" under Section 3—two in the 1860s, two last year—have articulated the same standard. Under this *Worthy-Powell* standard, to "engage" in insurrection or rebellion means to provide voluntary assistance, either by service or contribution (except charitable contributions). *See United States v Powell*, 27 F Cas 605, 607 (CCD NC, 1871) (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); *Worthy v Barrett*, 63 NC 199, 203 (1869) (defining "engage" as "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary"), *app dis Worthy v Comm'rs*, 76 US (9 Wall) 611; 19 L Ed 565 (1869); *see also In re Tate*, 63 NC 308 (1869) (applying *Worthy*); 12 US Att'y Gen Op, pp 161–62 ("engage" includes "persons who . . . have done any overt act for the purpose

[5] The fact that the Senate's impeachment trial for incitement to insurrection only resulted in 57 votes to convict is irrelevant. First, more evidence is now available than the Senate had in 2021, partly due to Trump's efforts to conceal his involvement. Second, 22 Senators expressly based their vote to acquit on their belief that the Senate lacked jurisdiction to try a former official, and either criticized him or stated no view on the merits. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (February 15, 2021), https://bit.ly/3uUZA1A. A clear majority, and a likely two-thirds majority, of Senators agreed that Trump is guilty of incitement to insurrection.

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of promoting the rebellion"). Both 2022 decisions adopted the *Worthy-Powell* standard to construe "engage" under Section 3. *See New Mexico ex rel White v Griffin*, opinion of the First Judicial District Court of New Mexico, issued September 6, 2022 (Docket No. D-101-cv-2022-00473), p 34, *app dis* order of the New Mexico Supreme Court, issued November 16, 2022 (Docket No. S-1-SC-39571), *cert filed* May 18, 2023; *Rowan v Greene*, initial decision of the Georgia Office of State Admin Hearings, issued May 6, 2022 (Docket No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot) (*Rowan I*), pp 13–14 (Ex 3, pp 110–111). No court has ever used a different standard under Section 3.

Engagement does not require that an individual personally commit violence. *See Powell*, 27 F Cas at 607 (defendant paid to avoid serving in Confederate Army); *Worthy*, 63 NC at 203 (defendant simply served as county sheriff); *Rowan I*, p 13 (Ex 3, p 110); *White*, p 35; 12 US Att'y Gen Op, p 161 ("[P]ersons may have engaged in rebellion without having actually levied war or taken arms[.]"). Indeed, Jefferson Davis—the president of the Confederacy—never fired a shot and Section 3 clearly applied to him.

It is possible—and for leaders, even likely—to engage in insurrection via speech through order-giving or incitement. "[M]arching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Rowan I*, p 14 (Ex 3, p 111). With regard to incitement, "[d]isloyal sentiments . . . would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." 12 US Att'y Gen Op, pp 182, 205; *see also Charge to Grand Jury*, 62 F at 830 ("When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force

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that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent.").[6]

The First Amendment does not preclude disqualification based on speech. First, Section 3 is not a statute subject to First Amendment review. It is a coequal provision of the Constitution—in fact, a later-enacted and more specific provision. *See The Sweep and Force of Section Three*, 172 U Pa L Rev at 57–61. By analogy, although all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, Article VI of the Constitution requires legislators to take an oath to protect the Constitution. *See* US Const, art VI. They cannot use the First Amendment as a shield to avoid taking this oath; Article VI controls. *See Bond v Floyd*, 385 US 116, 132; 87 S Ct 339; 17 L Ed 2d 235 (1966). Likewise, the First Amendment does not protect Trump from disqualification. Section 3 controls.

Second, even if Section 3 were subject to First Amendment protections, those protections would not extend to speech that qualifies as engagement in insurrection. First, Section 3 proscribes disqualification from office and does not criminalize speech. If Congress may statutorily prohibit federal employees from taking active part in political campaigns, *see US Civil Serv Comm'n v Nat'l Ass'n of Letter Carriers*, 413 US 548, 550, 556; 93 S Ct 2880; 37 L Ed 2d 796 (1973), then *the Constitution itself* can disqualify from office individuals who engage in rebellion against the United States or its Constitution. And not all speech is protected by the First Amendment. *Virginia v Black*, 538 US 343, 358–359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). Language that incites and

[6] That the 1862 Second Confiscation Act criminalized a longer list of verbs is irrelevant. *See* 12 Stat 589, 590 (1862). No evidence suggests that Congress's decision to streamline this statutory verbiage meant to *exclude* incitement or other forms of engagement. *See McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819) (denying that Constitution must "partake of the prolixity of a legal code").

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is likely to incite imminent lawless action or furthers a crime is unprotected, *Brandenburg v Ohio*, 395 US 444, 447; 89 S Ct 1827; 23 L Ed 2d 430 (1969), as are criminal plans or conspiracy, *see Giboney v Empire Storage & Ice Co*, 336 US 490, 502; 69 S Ct 684; 93 L Ed 834 (1949). The First Amendment is no bar to Section 3 disqualification, and speech that qualifies as engagement in insurrection is not protected by the First Amendment.

Nor does Section 3 require charging or conviction of any crime. *See, e g, Rowan I*, pp 13–14 (Ex 3, pp 110–111); *White*, p 26; *Powell*, 27 F Cas at 607 (defendant not charged with any prior crime); *Worthy*, 63 NC at 203 (same); *In re Tate*, 63 NC 308 (same); Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary 87, 98–99 (2021) (describing 1868 special congressional action to enforce Section 3 and remove Georgia legislators, none of whom had been charged criminally); *The Sweep and Force of Section Three*, 172 U Pa L Rev at 68, 83–84.[7] Indeed, the vast majority of ex-Confederates—including Worthy, most candidates-elect that Congress excluded, and the thousands who petitioned Congress for amnesty—were never charged with, or convicted of, any crimes.

In the Court of Claims, Trump did not cite the *Worthy-Powell* standard—the *only* judicial definition of "engage" under Section 3. Instead, he relied on two inapposite House exclusion cases. *See* Trump's Br in Supp of Mot for Summ Disposition, p 27 (citing, without naming, cases of John M. Rice and Lewis McKenzie). The cases did not turn, as Trump suggested below, on whether their speech qualified as engagement in insurrection. Rather, the House did not exclude them

[7] Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress instead imposed criminal penalties for those who held office in defiance of Section 3. *See* Act of May 31, 1870, ch 114, § 15, 16 Stat 140, 143.

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because, although they advocated for secession months before it started, Rice and McKenzie both took *immediate active efforts to defeat the insurrection once it began*.[8]

In fact, the House's exclusion practice was generous to men who repudiated initial disloyalty by immediately disavowing and fighting the insurrection, but strict to men who remained silent or supportive once the insurrection was underway. In its *first* Section 3 adjudication, "recognized by the House as of the highest importance," the House excluded John Young Brown for advocating forcible resistance to federal authority in a letter to the editor. 1 Hinds, *Hinds' Precedents of the House of Representatives of the United States*, ch 14, § 449 (1907), pp 445–446; *see also id* § 458, p 469 (excluding Philip Thomas, who gave "aid and comfort" by *allowing* his son to join Confederate Army and giving him $100); *id* § 451, p 452 (explaining in John D. Young case that "'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position").[9] Crucially, the House's exclusion practice demonstrates the importance of an individual's conduct *during* the insurrection. That standard does not support Trump.

b. Trump Spearheaded The Insurrection Through Words And Actions.

Plaintiffs-Appellants' complaint extensively recites Trump's involvement in the insurrection, in a detailed timeline that lays out his culpability. In fact, nine federal judges have

[8] *See* Cong Globe, 41st Cong, 2nd Sess, (1870), pp 5442, 5445 (Rice actively dissuaded "whole companies of men" from joining the Confederate Army and induced them to fight for the Union); *Hinds' Precedents*, ch 14, § 462, p 477 (McKenzie changed his mind *before* Virginia seceded and became "an outspoken Union man").

[9] Trump's argument that "aid or comfort" is restricted to *foreign* enemies, Trump's Br, p 32, is an outdated, antebellum view. The concept of a "domestic" enemy became part of American constitutional thinking no later than 1862, when Congress enacted the Ironclad Oath to "support and defend the Constitution of the United States, against all *enemies, foreign and domestic*." 12 Stat 502 (1862) (emphases added).

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ascribed responsibility for the January 6 insurrection to Trump. Compl, ¶¶ 259–260 (Ex 2, pp 81–83).

In the Court of Claims, Trump picked and chose decontextualized examples of his conduct to evade responsibility for the whole, including citing a case decided two years before the insurrection. *See* Trump's Br, pp 28–31, *citing Nwanguma v Trump*, 903 F3d 604, 610 (CA 6, 2018). But taken in context, his speech and actions establish that he purposefully engaged in insurrection both before and during the violent assault on the Capitol. A federal court has already held that Trump's Ellipse speech constituted incitement—notwithstanding his wink-and-nod passing parenthetical about "peacefully" marching on the Capitol. *See* Compl, ¶ 258 (Ex 2, pp 80–81), *quoting Thompson v Trump*, 590 F Supp 3d 46, 104, 118 (DDC, 2022).[10] Some of his speech constituted overt acts:

> [I]n certain circumstances words can constitute an "overt act," just as words may constitute an "overt act" under the Treason Clause, *e.g., Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948) (enumerating examples, such as conveying military intelligence to the enemy), or for purposes of conspiracy law, *e.g., United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) (even "constitutionally protected speech may nevertheless be an overt act in a conspiracy charge").

Rowan I, p 14 (Ex 3, p 111). "[M]arching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the *Worthy-Powell* standard." *Id.* That is *precisely* what Trump gave.

[10] Even if First Amendment doctrine governed Section 3 (it does not), a federal court has held that key Trump statements were "plausibly words of incitement not protected by the First Amendment." *Thompson*, 590 F Supp 3d at 115. And a federal court has found many of Trump's communications with his attorney to satisfy the crime/fraud exception to privilege doctrines. *See Eastman v Thompson*, 636 F Supp 3d 1078 (CD Cal, 2022), *app dis* ___ F4th ___ (CA 9, 2022) (Docket No. 22-56013), *cert den* ___ US ___; ___ S Ct ___; 217 L Ed 2d 113 (2023) (Docket No. 22-1138); *Eastman v Thompson*, 594 F Supp 3d 1156 (CD Cal, 2022).

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Trump "summoned the attackers to Washington, D.C. to 'be wild' . . . ; ensured that his armed and angry supporters were able to bring their weapons; incited them against Vice President Pence, Congress, the certification of electoral votes, and the peaceful transfer of power." Compl, ¶ 303 (Ex 2, p 90). He ordered the attackers to march on the Capitol. Once the insurrection was underway, he actively aided and encouraged the insurrection to continue, *id* ¶¶ 208–219 (Ex 2, pp 69–71), and deliberately refused to take steps to suppress or mitigate it, *id* ¶¶ 207–233 (Ex 2, pp 69–73). Trump knew of, consciously disregarded the risk of, or specifically intended *all* of it. *Id* ¶ 302 (Ex 2, pp 89–90).

The Colorado trial court—the only court in the country to specifically address this issue—found that Trump "engaged" in the insurrection. *Anderson*, ¶¶ 245–298 (Ex 6, pp 222–245) ("Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump's speech."). Numerous other federal courts have explicitly recognized Trump's key role in facilitating or causing the insurrection.

D. Section 3 Is Self-Executing.

1. State Courts Do Not Need Congressional Permission To Enforce The Fourteenth Amendment.

a. State Courts Are Obligated To Adjudicate Federal Constitutional Questions.

State courts *must* apply the Constitution; they need not and cannot wait for congressional approval. *See* US Const, art VI, cl 2 (the United States Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). Long before the Fourteenth Amendment, the Supreme Court confirmed that state courts are competent to adjudicate questions under the United States Constitution. *See Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 339–342; 4 L Ed 97 (1816); *see also Robb v Connolly*, 111 US 624, 637; 4 S Ct 544; 28 L Ed 542

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(1884) (constitutional enforcement lies "[u]pon the State courts, equally with the courts of the Union").

b. State Courts Routinely Adjudicate Fourteenth Amendment Claims Without Federal Statutory Authorization.

When plaintiffs in state court civil actions raise federal constitutional claims, courts do not wait for Congress to authorize consideration of the claims. *See Testa v Katt*, 330 US 386, 389; 67 S Ct 810; 91 L Ed 967 (1947) (holding that, when federal law applies to a cause of action, state courts must apply it). Instead, state courts review the constitutional claims on their merits. Indeed, state courts began adjudicating Fourteenth Amendment claims—including claims seeking affirmative relief—soon after the Amendment's passage, without special authorization from Congress. *See, e g, Van Valkenburg v Brown*, 43 Cal 43 (1872). Today, state courts routinely enforce the Fourteenth Amendment without citing any "authorizing" federal statute. *See, e g, Crego v Coleman*, 463 Mich 248; 615 NW2d 218 (2000); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524; 273 NW2d 829 (1979).[11]

2. Nothing In The Fourteenth Amendment Says Section 3 Requires Federal Legislation.

a. Section 3 States A Direct Prohibition, Not An Authorization.

Section 3 states the disqualification as a direct prohibition: "*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, *or hold* any office" if they previously took an oath as a covered official and then engaged in insurrection or rebellion. "It lays down a rule by saying what shall be. It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself." *The Sweep and*

[11] State courts decide Fourteenth Amendment defenses and claims under 42 USC 1983, but as illustrated here, they also decide *affirmative* Fourteenth Amendment civil claims absent legislation.

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Force of Section Three, 172 U Pa L at 17–18. Its language parallels other qualification clauses in the Constitution, which direct that "[n]o person shall be" a Representative, Senator, President, or Vice President if they do not meet age, citizenship, and residency requirements, and which do not require federal legislation. *See* US Const, art I, § 2, cl 2 and § 3, cl 3; art II, § 1, cl 5; Am XII.

Section 3's prohibitory language also parallels the self-executing language of Section 1. No federal legislation is needed to enforce the Due Process Clause or Equal Protection Clause in state court. *See* US Const, Am XIV, § 1. Indeed, the drafters intended to constitutionalize these protections for the specific purpose that they would *not* depend on the whims of Congress. *See*, *e g,* Cong Globe, 39th Cong, 1st Sess, p 1095 (1866) (Rep. Hotchkiss) (arguing for constitutional protections because "[w]e may pass laws here to-day, and the next Congress may wipe them out"). Likewise, Congress did not leave Section 3 to the whims of the bare majority of "the next Congress"; rather, Section 3 applies unless and until *two-thirds* of each chamber grants amnesty.

Section 3's self-executing prohibition stands in sharp contrast to constitutional provisions that *authorize* congressional action without establishing a mandatory rule or prohibition. For example, Article I authorizes Congress "[t]o provide for the Punishment of counterfeiting." US Const, art I, § 8, cl 6. That mere authorization neither prohibits counterfeiting, nor establishes a punishment. *See also* US Const, art III, § 3 (defining treason and authorizing Congress to establish the punishment). Authorizing language typically uses formulations such as Congress "may" "by Law" act, *e g, id* § 2, cl 3; *id* § 4, cl 1–2, or that Congress "shall have Power" to do something, *e g, id* § 8; US Const, art III, § 3, cl 2; US Const, art IV, § 3, cl 2. Similarly, the Impeachment Clause defines impeachable offenses, US Const, art II, § 4, but the Constitution leaves the decision to impeach or convict to the House and Senate, US Const, art I, § 2, cl 5; *id* § 3, cl 6.

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In contrast, Section 3 enacts its own disqualification and, like Section 1, sets no requirement of congressional action before a state may implement it. The only exclusive role Section 3 confers upon Congress is to *waive* disqualification, which it has not done for Trump.

b. Section 5's Authorization Of Congressional Legislation Does Not Make Section 3 Unenforceable Without Similar Legislation.

Section 5 authorizes, but does not require, federal legislation. US Const, Am XIV, § 5. Indeed, as the United States Supreme Court recognized in 1883—in analyzing the scope of Congress's enforcement power under Section 5—"the Fourteenth [Amendment], is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 US 3, 20; 3 S Ct 18; 27 L Ed 835 (1883). Section 5 applies to the entire Fourteenth Amendment. If Section 5 meant states could not adjudicate questions under Section 3 without congressional legislation, then it would *also* mean states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation. Yet courts in every state routinely do. Section 3, like Section 1, also is enforceable in state court even without federal legislation.

3. History Confirms That States May Enforce Section 3 Without Special Federal Legislation.

Nothing in Section 3's original public meaning—in congressional debates, state ratification debates, or public discussion—supports the argument that congressional action is required for enforcement. To the contrary, the crucial period between ratification in July 1868 and May 1870,

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when the first federal enforcement legislation passed, confirms that virtually everyone involved understood that Section 3 applied without special federal legislation.[12]

a. Congress Assumed Section 3 Took Immediate Effect.

Congress enacted the Fourteenth Amendment in 1866, and state ratification was perfected in July 1868. If Congress—which passed a dizzying array of constitutional amendments and Reconstruction acts within months of each other—had thought that Section 3 required special federal legislation, then it would have promptly passed such a law. Yet Congress did not pass a federal statute providing for government enforcement of Section 3 until May 1870.[13]

Prior to May 1870, Congress also enacted many private bills granting ex-Confederates amnesty from Section 3, which would have been unnecessary if Section 3 required enforcement legislation.[14] Congress understood that, absent amnesty, states could directly enforce Section 3 without federal legislation to bar those individuals from holding office.

In the Court of Claims, Trump relied on two badly out-of-context quotes from Representative Thaddeus Stevens. *See* Trump's Br, p 14. Stevens' May 10, 1866 quote pertained to a *different* proposed constitutional provision, a version of Section 3 that would have banned *all* ex-Confederates (including conscripts and private citizens) from *voting* until 1870. *See* Cong Globe, 39th Cong, 1st Sess (1866), p 2460. Stevens admitted that this voter-disenfranchisement draft would require implementing legislation. *Id* at 2544. But Congress abandoned that draft—partly due to that very concern—and substituted *the current* Section 3, which avoided that

[12] For more on why Section 3 is self-executing, see *The Sweep and Force of Section 3*, 172 U Pa L Rev at 17–49.
[13] *See* Act of May 31, 1870, ch 114, § 14, 16 Stat 140, 143 (repealed 1948).
[14] Examples of amnesty acts can be found at 16 Stat 632 (April 1, 1870); 16 Stat 614–630 (March 7, 1870); 16 Stat 613 (December 18, 1869); 16 Stat 607–613 (December 14, 1869); 15 Stat 436 (1869).

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problem. *See id* at 2869. Stevens' June 13, 1866 quote does not pertain to Section 3 at all, but to "enabling acts, which shall do justice to the freedmen and enjoin enfranchisement." *Id* at 3149.

b. The Public Knew Section 3 Took Immediate Effect.

Private amnesty bills required an affirmative request by the disqualified individuals. *See* 2 Blaine, *Twenty Years of Congress: From Lincoln to Garfield* (Norwich: Henry Bill Publishing Co, 1886), p 512. To avoid being excluded from office by state law and courts, thousands of ex-Confederates began requesting amnesty as early as 1868, two years before federal enforcement legislation, and both national party platforms that year addressed amnesty. *See Amnesty and Section Three of the Fourteenth Amendment*, 36 Const Commentary at 112. If these individuals could only be excluded through non-existent federal legislation, they would have had nothing to gain, and much to lose, by putting their fates in the hands of Congress.

Trump relied below on the remarks of Pennsylvania State Representative Thomas Chalfant. Trump's Br, p 15. But Chalfant *opposed* the Fourteenth Amendment—his remarks on Section 3 concluded with a rant accusing amendment supporters of "degrad[ing] the ballot-box by permitting the negro to participate in your elections," and warned of "the curses of a nation" if the amendment were adopted[15]—and is not a reliable source on its meaning.

c. Reconstruction-Era State Constitutions Confirm That Section 3 Requires No Special Federal Legislation.

Three contemporaneous state constitutions ratified by ex-Confederate states confirm that disqualification is imposed by Section 3 itself and does not require further congressional action. For example, the Florida Constitution of 1868 provides:

[15] *Appendix to the Daily Legislative Record, Containing the Debates on the Several Important Bills Before the Legislature of 1867* (George Bergner, ed) (Harrisburg, Pa, 1867), LXXXII (January 30, 1867), LXXXIII (February 6, 1867).

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> Any person debarred from holding office in the State of Florida by the third section of the fourteenth Article of the proposed amendment to the Constitution of the United States . . . is hereby debarred from holding office in this state; *Provided*, That whenever such disability from holding office be removed from any person by the Congress of the United States, the removal of such disability shall also apply to this State . . . .

Fla Const 1868, art XVI, § 1; *accord* SC Const 1868, art VIII, § 2 (similar); Tex Const 1869, art VI, § 1 (similar).

On Trump's view, these pre-1870 constitutional provisions were meaningless when enacted. But that is absurd. Rather, these pre-1870 constitutions necessarily recognized that disqualification was imposed by the Constitution itself.

d. Reconstruction-Era State Courts Used State Law In Civil Cases To Enforce Section 3 Without Special Federal Legislation.

The practice of multiple state courts during the Reconstruction era demonstrates that they enforced Section 3 without federal legislation, as well. *See Worthy*, 63 NC at 200 (holding that sheriff-elect was disqualified under Section 3). The *Worthy* Court said nothing about needing a federal statute to enforce Section 3. Instead, the court quoted a *state* statute providing that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Art. XIV, shall qualify under this act or hold office in this State." *See id*; *see also In re Tate*, 63 NC at 309 (citing *Worthy* as controlling authority). That same year, the Louisiana Supreme Court adjudicated a state official's Section 3 eligibility. *Louisiana ex rel Downes v Towne*, 21 La 490, 492 (1869). While the court concluded that Downes was not disqualified, the court did not question its authority to decide the issue absent congressional legislation.

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4. The Only Case Demanding Federal Legislation To Enforce Section 3 Is Erroneous Or, At Minimum, Does Not Apply To Functional State Governments.

Trump cannot rely on *Griffin's Case*, 11 F Cas 7 (CCD Va, 1869), to support his claim that state courts are unable to enforce Section 3 without specific congressional action. Caesar Griffin, a Black man, was convicted in the then-unreconstructed state of Virginia. *Id* at 22. In a federal habeas petition challenging his conviction, he argued only that the Virginia judge presiding over his trial was disqualified under Section 3. *Id* at 22–23. Chief Justice Chase, acting as Circuit Justice, presided over a two-judge panel, hearing Griffin's challenge. *See id* at 22. Chase rejected the petition, opining that Section 3 required federal enforcement legislation. *Id* at 22, 26. His decision has been described as "confused and confusing," *see Cawthorn v Amalfi*, 35 F4th 245, 278 n 16 (2022) (Richardson, J., concurring in the judgment), and cannot support this claim for several reasons.

First, *Griffin's Case* cannot overcome the plain meaning of Section 3. In fact, Chief Justice Chase acknowledged that the "literal construction"—what today would be called plain meaning—of Section 3 would disqualify the Virginia judge. *Griffin's Case*, 11 F Cas at 24. Instead, he claimed that applying its "literal construction" would be a "great inconvenience," given the "calamities which have already fallen upon the people of these [ex-Confederate] states." *Id* at 24–25.[16] Prioritizing his policy preferences, he opined that Section 3 must be read narrowly to avoid "bring[ing] it into conflict or disaccord with the other provisions of the constitution." *Id* at 25. But this analysis nullifies the purpose of constitutional amendments. *See The Sweep and Force of*

[16] Judge Underwood, in the district court opinion that Chief Justice Chase reversed in *Griffin's Case*, wrote, "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." *The Sweep and Force of Section 3*, 172 U Pa L Rev at 40 n 144 (citation omitted).

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Section 3, 172 U Pa L Rev at 43 ("*Of course* constitutional amendments change prior constitutional law. That is their purpose and function.").

Griffin's Case noted that "[t]o accomplish this ascertainment [of who is disqualified] and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." 11 F Cas at 26. Chief Justice Chase never considered or explained why *state* court could not provide such proceedings. Instead, Chief Justice Chase summarily concluded that "these can only be provided for by congress." *Id.* Even if that is true in federal court, it does not explain why a state court would need federal legislation to enforce the Fourteenth Amendment.

Chief Justice Chase also relied on Section 5. *Id* at 26. But Section 5 does not deprive states of their inherent authority and obligation to enforce the United States Constitution. Chief Justice Chase further asserted that the exclusive role for Congress in removing disqualifications "gives to [C]ongress absolute control of the whole operation of the amendment." *Id.* But this reasoning cannot be squared with Section 3's text. The drafters conspicuously granted exclusive authority to Congress only to *remove* the disqualification and gave Congress no role in the *disqualification itself*. Section 3's disqualification requirement, like other Fourteenth Amendment requirements, may (and must) be enforced by state courts with or without congressional action.

Second, *Griffin's Case* contradicts a different Virginia circuit case that Chief Justice Chase himself had *just* decided, ruling there that Section 3 *was* self-executing, when that (opposite) position benefited an ex-Confederate. In the treason prosecution of Jefferson Davis, Chief Justice

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Chase concluded that Section 3 *was* self-enforcing.[17] *See Case of Davis*, 7 F Cas 63, 90, 102 (CCD Va, 1871); *Cawthorn*, 35 F4th at 278 n 16 ("These contradictory holdings . . . draw both cases into question and make it hard to trust Chase's interpretation."); *see also Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const Commentary at 100–108 (providing a detailed analysis of *Davis* and *Griffin's Case*). *Griffin's Case* did not attempt to reconcile these conflicting views.[18]

Third, Chief Justice Chase was not an unbiased adjudicator. In June 1868, he told a newspaper interviewer that Section 3 should be removed from the Fourteenth Amendment, or if not, then "a general amnesty" was "absolutely necessary."[19] His *Griffin's Case* decision appears to reflect his personal opposition to Section 3 as "too harsh on former Confederate officials." *See Cawthorn*, 35 F4th at 278 n 16 (quotation omitted). And it was immediately denounced.[20]

Fourth, *Griffin's Case* was substantially disregarded. *See Louisiana ex rel Sandlin v Watkins*, 21 La 631, 633 (1861) (four months after *Griffin's Case*, stating that "we are far from assenting to" the proposition that Section 3 required federal legislation, and ruling him

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[17] Chief Justice Chase suggested Davis's lawyers should argue that Section 3 disqualification was the *exclusive* sanction for ex-Confederates. *See Cawthorn*, 35 F4th at 278 n 16; *see also* Nicoletti, *Secession On Trial: The Treason Prosecution of Jefferson Davis* (Cambridge: Cambridge University Press, 2017), pp 294–296. After a pardon relieved Davis of criminal liability, Chief Justice Chase "instructed the reporter to record him as having been of opinion . . . that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment . . . ." *Case of Davis*, 7 F Cas at 102.

[18] Chief Justice Chase's divergent rulings cannot be reconciled by a post hoc distinction (never offered by Chase) between raising Section 3 as a *defense* ("shield") to a criminal prosecution and as an *affirmative* argument ("sword") in a habeas petition. Neither the ex-Confederates who petitioned Congress for amnesty nor the members of Congress who considered their requests ever recognized this theoretical distinction.

[19] NY Herald (June 3, 1868), p 3, col 3.

[20] *See, e g,* The Daily Republican (June 2, 1869), p 1, col 1–2 (decision "is of far greater consequence and if possible more odious, than . . . the Dred Scott case"); The Sentinel (May 17, 1869), p 1, col 1 (decision lets Congress "disregard and annul the entire [Constitution]"). In further repudiation, the provisional governor of Virginia pardoned Griffin three weeks after the decision. *See* Rockingham Register (May 20, 1869), p 2, col 3.

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disqualified); *Downes*, 21 La at 492 (after *Griffin's Case*, adjudicating Section 3 claim on the merits). And Congress—presumably understanding that Section 3 was not just enforceable but *was actually being enforced*—continued passing amnesty bills after *Griffin's Case*. *See supra* n 14.

Finally, if it has any precedential value (as a decision by a circuit court with jurisdiction only over Virginia), it should be limited given its unusual context. In 1869, Virginia was an unreconstructed state with a provisional government operating under the control of a Union Army General and lacking the powers of ordinary state governments. *Griffin's Case*, 11 F Cas at 26–27; First Military Reconstruction Act, ch 153, 14 Stat 428–430 (1867). The Court's conclusion that "proceedings, evidence, decisions, and enforcements of decisions . . . can only be provided for by [C]ongress," *Griffin's Case*, 11 F Cas at 26, is arguably defensible if limited to that context. Put differently, Virginia was treated more like a federal territory, with limited autonomy. Moreover, Virginia ratified the Fourteenth Amendment *after* Chief Justice Chase decided *Griffin's Case*. So, Section 3 proceedings there could, for unique historical reasons, "only be provided for by Congress."[21]

5. Recent Decisions Regarding The January 2021 Insurrection Recognize Section 3 Enforcement Without Special Federal Legislation.

Since January 6, 2021, state courts have applied Section 3 to the January 2021 insurrection. In 2022, a New Mexico state court applied Section 3 under the state *quo warranto* statute and removed a county commissioner from office for engaging in insurrection. *See White*, Docket No. D-101-CV-2022-00473. Similarly, Georgia adjudicated a Section 3 ballot challenge against

[21] Alternatively, Chief Justice Chase claims he consulted *ex parte* with the full United States Supreme Court prior to judgment, who "unanimously concur[red] in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, . . . can not be properly discharged upon habeas corpus." *Griffin's Case*, 11 F Cas at 27; *see also The Sweep and Force of Section Three*, 172 U Pa L Rev at 45–49. That narrower ruling obviates the remainder of *Griffin's Case*, and is (if anything) the relevant precedent.

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Representative Marjorie Taylor Greene. *See Rowan I* (Ex 3). While the administrative law judge overseeing the state proceeding (like the Louisiana Supreme Court in *Downes*) found there was insufficient evidence to establish that Greene personally engaged in insurrection, he followed *Worthy* and adjudicated the Section 3 question on the merits. Neither the administrative law judge, nor the state courts on appellate review, *see Rowan v Raffensperger*, order of the Superior Court of Georgia, issued July 25, 2022 (Docket No. 2022-CV-364778) (Ex 4), nor the federal court that rejected Greene's efforts to enjoin the state proceeding, *see Greene v Raffensperger*, 599 F Supp 3d 1283 (ND Ga, 2022), questioned the state's authority to adjudicate and enforce Section 3. *See, e g, id* at 1319 ("Plaintiff has pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements.").[22] Most recently, the Colorado District Court rejected Trump's argument that Section 3 is not self-executing. *Anderson v Griswold*, order of the Colorado District Court, issued October 25, 2023 (Docket No. 2023-CV-32577), pp 19–20 (Ex 5, pp 144–145).

These decisions comport with the holding of Judge (now Justice) Gorsuch that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v Colorado*, 495 F Appx 947, 948 (CA 10, 2012); *Greene*, 599 F Supp 3d at 1319 (finding that the state's "legitimate interest includes enforcing existing constitutional requirements [including Section 3] to ensure that candidates meet the threshold requirements for office").

[22] In one Arizona decision, though one county trial judge determined that Section 3 is not self-executing (among other findings), the state supreme court affirmed on a technical question of Arizona election law and expressly *declined* to decide or endorse the county judge's constitutional theory. *See Hansen v Finchem*, order of the Arizona Supreme Court, issued May 9, 2022 (Docket No. CV-22-0099-AP/EL).

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Nothing materially differentiates Section 3 from other constitutional qualifications for office, nor other questions under the United States Constitution that state courts routinely adjudicate.

II. THE COURT OF CLAIMS DECISION WAS WRONG.

A. Michigan Voters Have A Right To Have Only Eligible Candidates On The Ballot.

The Court of Claims concluded that the Secretary of State and the political parties have the exclusive authority to determine which candidates appear on the presidential primary ballot, and that individual voters, such as Plaintiffs-Appellants, cannot challenge the qualification of those candidates in court. Opinion & Order, pp 6–9 (Ex 1, pp 7–10).

That erroneous conclusion ignores the well-established *right* of voters to not only challenge the ballot access of ineligible candidate in court but the voters' right to have only eligible candidates on primary and general election ballots.

In *Barrow v City of Detroit Election Comm'n*, 301 Mich App 404; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013), the Court of Appeals recognized and enforced (in that case, by mandamus) the clear legal right of voters to have only eligible candidates on a primary election ballot. *Id* at 412. The Supreme Court and other Court of Appeals decisions have reaffirmed and applied that principle. In *Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019), the Supreme Court cited *Barrow* with approval for the proposition that ineligible candidates cannot appear on the ballot. *Id* at 879. To that same effect are other Court of Appeals decisions. *See, e g, Sheffield v Detroit City Clerk*, 337 Mich App 492, 507; 976 NW2d 95 (2021), *rev'd on other grounds* 508 Mich 851; 962 NW2d 157 (2021) (citing *Barrow* and *Berdy* for the proposition that ineligible candidates *must* be removed from the ballot); *Burton-Harris v Wayne Co Clerk*, 337 Mich App

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215, 233–234; 976 NW2d 30 (2021) (*per curiam*), *vacated in part on other grounds* 508 Mich 985; 966 NW2d 349 (2021) (disqualified candidate must be removed from the ballot).

The Court of Claims erred in not even citing, let alone addressing, this well-established right of voters to go to court to ensure that candidates are eligible to be listed on the ballot.

This Michigan case law also negates the Court of Claims' reliance on *Growe v Simon*, order of the Minnesota Supreme Court, issued November 8, 2023 (Docket No. A23-1354) (Ex 7). In *Growe*, the Minnesota Supreme Court interpreted the Minnesota candidacy challenge statute, an entirely different body of law than Michigan's *Barrow-Berdy* line of cases. Thus, the Court of Claims' reliance on *Growe* is completely misplaced.

Furthermore, the Court of Claims' statements that primaries are merely "designed as an aid of the respective political parties" and "designed to assist the parties in determining their respective presidential candidates," Opinion & Order, pp 8–9 (Ex 1, pp 9–10), misunderstands the constitutional significance of primary (including presidential primary) elections. The United States Supreme Court has long rejected, in the white primary cases, the idea that the Fourteenth Amendment does not apply to primary votes. *See Nixon v Herndon*, 273 US 536, 540–541; 47 S Ct 446; 71 L Ed 759 (1927) (Fourteenth Amendment applies to primary elections); *see also Smith v Allwright*, 321 US 649, 661–662; 64 S Ct 757; 88 L Ed 987 (1944) (same for Fifteenth Amendment).

The soundness of allowing voters to challenge candidate qualifications is easily illustrated. If the Democratic Party put forward the name of Barack Obama as a candidate, would the Secretary of State be obligated to put his name on the presidential primary ballot despite his obvious disqualification under the two-term limit for President of the Twenty-Second Amendment? Of course not, and if she did, then Michigan voters under *Barrow-Berdy* could challenge his

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eligibility. The same would be true if the Republican Party put George W. Bush on the list, or if a political party put forth an underage or otherwise disqualified presidential candidate. Voters have the right to challenge those ineligible candidates and have them barred from the ballot.

The Court of Claims erred in prohibiting Plaintiff-Appellant voters from challenging Trump's eligibility for the presidential primary ballot. They have the clear legal right to do so.

B. The Case Is Ripe For Decision Before The February 27, 2024 Presidential Primary.

In an attempt to bolster its conclusions that Plaintiffs-Appellants have no cause of action, the Court of Claims also engaged in a superficial ripeness analysis that concluded that Plaintiffs-Appellants' claim is not "ripe at this time." Order & Opinion, pp 9–10 (Ex 1, pp 10–11).

This analysis is based on a mischaracterization of Plaintiffs-Appellants' complaint. In the complaint, they challenge Trump's eligibility to appear on the *primary election* ballot, now less than three months away, with ballots being printed by mid-January, less than two months away.

The ripeness "analysis" of the Court of Claims focused on speculation about *post-primary* events: Will Trump win the Michigan primary? Will he win the Republican nomination? Will he win the general election? *Id.* All of that speculation is irrelevant to the question of whether this challenge to his eligibility to be on the *primary election* ballot is ripe now. The challenge is clearly ripe. There are no "contingent future events" between now and the primary. Secretary Benson has put Trump on her eligibility list and repeatedly declared that she will not remove him without a court order. Unless the Michigan courts act, Trump will be on the primary ballot.

This case is ripe.

C. The Political Question Doctrine Does Not Apply.

The "narrow" political question doctrine does not bar states from adjudicating presidential candidates' constitutional qualifications. *See Zivotofsky ex rel Zivotofsky v Clinton*, 566 US 189,

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195; 132 S Ct 1421; 182 L Ed 2d 423 (2012). The doctrine "is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Rather, a court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 US at 194, *quoting Cohens v Virginia*, 19 US (6 Wheat) 264, 404; 5 L Ed 527 (1821). And the political question doctrine does not apply simply because a presidential election is involved. *See McPherson v Blacker*, 146 US 1, 23; 13 S Ct 3; 36 L Ed 869 (1892) ("It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature . . . . But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising . . . .").

Baker identified six relevant factors, but recent Supreme Court precedent focuses on two: (1) whether the issue is textually committed to another branch of government, or (2) lacks judicially manageable standards for resolution. *See Rucho v Common Cause*, 588 US ___; 139 S Ct 2484, 2494; 204 L Ed 931 (2019) (citing only second factor); *Zivotofsky*, 566 US at 195 (citing only first two factors).

1. Appointment Of Presidential Electors Is Committed To States, Not Congress.

The Constitution's Electors Clause textually commits to the *states* plenary power to appoint presidential electors in the manner they choose. *See* US Const, art II, § 1, cl 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); *Moore v Harper*, 600 US 1, 37; 143 S Ct 2065; 216 L Ed 2d 729 (2023) ("[I]n choosing Presidential electors, the Clause 'leaves it to the legislature exclusively to define the method of effecting the

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object.'") (citation omitted); *Chiafalo v Washington*, 591 US ___; 140 S Ct 2316, 2324; 207 L Ed 2d 761 (2020) (Electors Clause gives states "far-reaching authority over presidential electors"). A state's plenary power to choose electors includes conditioning appointment of electors on their candidate's meeting constitutional criteria. Muller, *Scrutinizing Federal Election Qualifications*, 90 Ind L J 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications.").

But the Constitution does not expressly commit any such power to Congress. To the contrary, while Article I explicitly authorizes and directs Congress to *judge qualifications* of incoming *Senators and Representatives*, US Const, art I, § 5, cl 1 ("Each House shall be the Judge of the . . . Qualifications of its own Members . . . ."), neither Article II nor any other constitutional provision explicitly authorizes—let alone directs—Congress to judge the qualifications of presidents or presidential candidates. The Twelfth Amendment authorizes Congress to *count electoral votes*; it does not explicitly authorize Congress to *judge presidential qualifications. See* US Const, Am XII. Similarly, the Twentieth Amendment provides a contingency procedure "if the President elect shall have failed to qualify," but does not textually commit the question of candidate eligibility to Congress. US Const, Am XX.

Even if Congress holds some unwritten implicit residual authority to judge presidential candidate qualifications, that implicit authority is certainly not *exclusive*. *See Scrutinizing Federal Electoral Qualifications*, 90 Ind L J at 605 ("Unlike the robust history of the power of the legislature to adjudicate the qualifications of its own members and the textual language ensuring that each house of Congress is the 'sole' judge of the qualifications of its members, the power of

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Congress to examine the qualifications of executive candidates is, at the very best, debatable, and certainly not exclusive.").

Leading appellate precedents confirm this. In 2012, then-Judge (now Justice) Gorsuch, writing for the Tenth Circuit, "expressly reaffirm[ed] [that] a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F Appx at 948. Justice Gorsuch's conclusion cannot be reconciled with the theory that *only Congress* may decide whether a presidential candidate is constitutionally eligible. In 2014, the Ninth Circuit joined the Tenth Circuit in explicitly rejecting the idea that the Constitution commits presidential candidate determinations exclusively to Congress:

> *[N]othing in the Twentieth Amendment states or implies that Congress has the exclusive authority to pass on the eligibility of candidates for president.* The amendment merely grants Congress the authority to determine how to proceed *if* neither the president elect nor the vice president elect is qualified to hold office, a problem for which there was previously no express solution. . . . Candidates may, of course, become ineligible to serve after they are elected (but before they start their service) due to illness or other misfortune. Or, a previously unknown ineligibility may be discerned after the election. The Twentieth Amendment addresses such contingencies. *Nothing in its text or history suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot.*

Lindsay v Bowen, 750 F3d 1061, 1065 (CA 9, 2014) (emphasis in original and added). In 2016, the Pennsylvania Commonwealth Court expressly rejected applicability of the political question doctrine, noting that the "touchstone in determining whether the political question doctrine applies is whether the resolution of the question has been textually committed to one or the other political branches of the federal government" and concluding, after close analysis of Article II and the Twelfth Amendment, that "determination of the eligibility of a person to serve as President has

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not been textually committed to Congress." *Elliott v Cruz*, 137 A3d 646, 650–651 (Pa Commw, 2016), *aff'd* 635 Pa 212; 134 A3d 51 (2016).

The Court of Claims did not cite *Lindsay*, *Hassan*, *Elliott*, or any of the other authorities confirming that states may, under Article II of the Electors Clause, condition appointment of electors on presidential candidates meeting federal constitutional qualifications. *See* Pls' Br in Opp to Trump's Mot for Summ Disposition, pp 1–3 (citing authorities). Instead, the Court of Claims relied almost entirely on a case filed by a pro se plaintiff in which the court noted that it could not find applicable authority. *See* Opinion & Order, pp 11–13 (Ex 1, pp 12–14); *Castro v NH Secretary of State*, ___ F Supp 3d ___ (D NH, 2023) (Docket No. 23-cv-416-JL), *aff'd on other grounds Castro v Scanlan*, ___ F4th ___ (CA 1, 2023) (Docket No. 23-1902) (affirming on the basis of federal standing rules and explicitly declining to affirm the district court's political question doctrine ruling).[23] Lacking such relevant authority, the *Castro* Court instead relied on superseded and irrelevant cases and applied a flawed and discredited legal analysis to reach a legally erroneous conclusion, all of which the Court of Claims below quoted verbatim and adopted in toto with no independent analysis:

- *Robinson v Bowen*, 567 F Supp 2d 1144 (ND Cal 2008), was superseded by *Lindsay*, 750 F3d 1061.
- *Grinols v Electoral College*, order of the United States District Court for the Eastern District of California, issued May 23, 2013 (Docket No. 12-CV-02997-MCE-DAD), a post-election case seeking to annul the results of the electoral vote, was superseded by *Lindsay*, 750 F3d 1061, then affirmed solely on mootness. *See Grinols v Electoral College*, 622 F Appx 624 (CA 9, 2015).
- *Kerchner v Obama*, 669 F Supp 2d 477 (D NJ, 2009), a post-election case demanding President Obama prove his qualifications for the office he already

[23] The First Circuit affirmed *Castro* solely on the basis of standing. It said, "[w]e confine our analysis, however, to the issue of standing," noting the "limited nature of the arguments that [Castro] ma[de] about the more generally consequential political question issue" and that "like the Supreme Court, '[o]ur court has been similarly sparing in its reliance on the political question doctrine.'" *Castro*, ___ F4th at ___; slip op at 13 (citation omitted).

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held, was affirmed solely for lack of Article III standing. *See Kerchner v Obama*, 612 F3d 204, 209 n 3 (CA 3, 2010).

- *Taitz v Democrat Party of Miss*, opinion and order of the United States District Court for the Southern District of Mississippi, issued March 31, 2015 (Docket No. 12-CV-280-HTW-LRA), was a post-election case seeking to *remove* President Obama from office.

The *Castro* Court concluded its analysis: "Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any." Opinion & Order, p 13, *quoting Castro*, ___ F Supp 3d at ___; slip op at 7–9 (Ex 1, p 14). But *Lindsay*, *Hassan*, and *Elliott* are precisely that authority; in particular, *Lindsay* supersedes *Robinson* and *Grinols*; *Hassan* was written by a current Supreme Court Justice; and *Elliott*, unlike the cases *Castro* cited, was a state court ballot access challenge like this. *See also Ankeny v Governor of Ind*, 916 NE2d 678 (Ind App, 2009) (adjudicating presidential candidate's qualifications); *Purpura v Obama*, unpublished per curiam opinion of the Superior Court of New Jersey, issued May 31, 2012 (Docket No. A-4478-11T3) (similar); Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L Rev 1097, 1103–1106 (2016) (collecting multiple similar cases).[24]

The Court of Claims also stated that Section 3 adjudication is uniquely committed to Congress. *See* Opinion & Order, pp 14–15 (Ex 1, pp 15–16). But the only role that Section 3 commits to Congress is *removing* disqualification, which it may only do by a two-thirds vote of each House. *See* US Const, Am XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability."). And the Court of Claims' reference to Section 5 of the Fourteenth Amendment, which says that "Congress shall have the power to enforce, by appropriate

[24] The *Castro* Court's failure to find, cite, and apply the relevant and (still valid) authority is explained, in part, by the fact that the case was litigated by a pro se plaintiff who failed to provide the court with that authority. Here, Plaintiffs-Appellants cited and discussed all of the relevant authority in their briefing below; the Court's failure to even cite (or apparently consider) it is inexplicable.

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legislation, the provisions of this article," proves far too much. Section 5 applies to Section 1 and Section 3 equally. Congress's power to enact additional legislation under Section 5 does not mean that all Section 1 Equal Protection Clause or Due Process Clause claims are non-justiciable political questions—no one thinks that. Likewise, Congress's power to enact additional legislation under Section 5 does not mean that all Section 1 claims are non-justiciable political questions. In any case, as is explained at length above, the Court's conclusion that only Congress can enforce Section 3 is contrary to the text, structure, and history of section 3, as well as longstanding (and recent) practice and precedent.

2. Section 3 Involves Judicially Manageable Standards.

The Court below suggested that Section 3 lacks judicially discoverable or manageable standards because courts cannot ascertain "[w]hat is an insurrection or a rebellion" or "[w]hat is it to engage in it or to give aid and comfort to the enemies of the Constitution." Opinion & Order, p 19 (Ex 1, p 20). But interpreting constitutional text, and applying that text to (sometimes disputed) facts, are precisely what courts do.

The meanings of the phrases "engage," "aid or comfort," and "insurrection or rebellion" are judicially discoverable, just as the meanings of "due process of law" and "equal protection of the laws" are judicially discoverable. In fact, the key framer of the Fourteenth Amendment explained during congressional debates *precisely how* to construe these terms. Asked during debate to define "due process of law," Representative John Bingham replied: "[T]he courts have settled that long ago, and the gentleman can go and read their decisions." Cong Globe, 39th Cong, 1st Sess 1089 (1866).

The same logic applies to the phrases in Section 3 that the trial court claimed were incapable of judicial interpretation. For example, the terms "insurrection" and "rebellion" were

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interpreted and defined repeatedly by courts and law dictionaries before and after the Civil War; the court may "go and read their decisions." *See supra* Part I.C.1.a. In fact, some of the hypothetical questions the trial court raised as supposedly unanswerable—*e.g.*, "[d]oes it require a war of 1,458 days with 620,000 killed and battles throughout the land?," Opinion & Order, p 19 (Ex 1, p 20)—were explicitly asked and answered with reference to past (far smaller) insurrections, such as the Whiskey, Shays', and Fries Insurrections. *See* Cong Globe, 39th Cong, 1st Sess (1866) p 2534 (Rep. Eckley) (explicitly citing the "small in comparison" Whiskey Insurrection as precedent); *The Reconstruction Acts*, 12 US Att'y Gen Op, p 160 (opining that, in similarly-worded statute, "[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection . . . in the United States"). One state court has already applied these judicial precedents to construe "insurrection" under Section 3. *See White*, pp 17–19 (finding that January 2021 insurrection met the standard).

Likewise, the judicial interpretation of "engage" under Section 3 has been settled for 150 years. All four courts to construe "engage" under Section 3—two in the 1860s, two last year—have relied on the same *Worthy-Powell* standard. *See supra* Part I.C.2.a.

The fact that these terms from the constitutional text have been judicially interpreted and applied during Reconstruction and today refutes the trial court's conclusion that they are incapable of judicial interpretation or application.

3. Prudential Factors Do Not Divest The Court Of Jurisdiction.

None of *Baker*'s final three factors apply here.

First, there is no "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 US at 217. The branch of government due respect here is the Michigan Legislature, which has plenary power to

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appoint presidential electors, and has chosen to vest the Michigan courts with jurisdiction to hear challenges to candidate eligibility. The process of determining the president proceeds in steps, and at different stages, a different branch of government leads. In the first stage—where we are now—the states have plenary authority under Article II to appoint electors. *See* US Const, art II. After the electors have cast their votes, Congress will then take the lead in *counting* the votes. *See* US Const, Am XII. Michigan's use of a judicial process to help ensure that it appoints electors only for presidential candidates who are constitutionally eligible does not disrespect Congress.

Nor would a court exercising its authority to enforce Section 3's disability and limit the ballot to constitutionally qualified candidates "strip Congress of its ability to by a vote of two thirds of each House, remove such a disability," as the Court below insisted. *See* Opinion & Order, p 20 (Ex 1, p 21). Congress could have exercised its authority to remove the disability any time since January 6, 2021; it has not. To date, Congress has taken no such action and Trump has not even requested it. Cmpl, ¶ 277 (Ex 2, p 86). And no action by this Court or any other will "strip" Congress of that authority: Congress, if it so chose, could remove the disability tomorrow, or immediately after any court rules Trump ineligible to appear on the ballot, thereby enabling Trump to appear on the ballot notwithstanding his engagement in insurrection. Further, the remote and speculative possibility that Congress *might* at some future date grant Trump amnesty by a two-thirds vote of each chamber does not divest Michigan of its power to condition the appointment of electors. That theoretical possibility is purely speculative, and Michigan courts do not take action based on such speculation. *See, e g, Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 n 15; 753 NW2d 595 (2008) (no injunctive relief where injury is speculative or conjectural); *Wayne Co Employees Retirement Sys v Charter Co of Wayne*, 301 Mich App 1, 70 n 38; 836 NW2d 279 (2013) ("[T]his position is so speculative and tenuous that we refuse to apply it[.]"), *vacated*

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in part on other grounds, 497 Mich 36; 859 NW2d 678 (2014). *Compare, e g,* Michigan's constitutional prohibition on officeholding for former officials who have been convicted of certain felonies. *See* Const 1963, art XI, § 8. The governor could, in theory, pardon a convicted felon. *See* Const 1963, art V, § 14. But the mere theoretical possibility that a governor *might* do this does not mean that convicted felons may appear on ballots and run for office notwithstanding the prohibition. Likewise, the fanciful speculation that two-thirds of both houses might grant Trump amnesty does not prevent Michigan from exercising its plenary power to appoint electors in the manner directed by its legislature, which includes this challenge procedure.

Second, there is no "unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 US at 217, nor did the Court below explain how there could be at this stage. *After* electors have been appointed, such a need might arise. But this case arises nearly a year before the date set for the appointment of electors. No political decision has been made; nor is one expected any time soon.

Third, there is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id*. As a preliminary matter, if Michigan or any other state rules that Trump is disqualified under Section 3, he may appeal that decision to the United States Supreme Court, which can render a final decision. And crucially, "various departments" does not mean "various state courts." State courts *regularly* rule on questions that could also be decided by courts in other states; no one would claim, for example, that Michigan courts cannot decide a First or Second Amendment question merely because California or Texas courts might rule differently. Rather, state courts interpret and apply the United States Constitution to their best ability, subject to appeal to the United States Supreme Court. The trial court's suggestion that the United States Supreme Court is incapable of resolving a fast-track election dispute, *see* Opinion & Order, p 20

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(Ex 1, p 21), is belied by the Court's history of rapid decisions on contested constitutional election issues. *See, e g, Bush v Gore*, 531 US 98; 121 S Ct 525; 148 L Ed 2d 388 (2000) (argued December 11, 2000, and decided the next day).

* * *

This case involves the application of the Fourteenth Amendment to a specific set of facts. It involves weighty issues of nationwide interest, but so do many other cases considered by Michigan courts. Its resolution may have political consequences, but so do many other cases considered by Michigan courts. And as the United States Supreme Court explained, the political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker*, 369 US at 217. Article II of the United States Constitution grants Michigan the power to appoint its electors in the manner directed by the legislature; the legislature has empowered its courts to hear this challenge; nothing in the Constitution says otherwise. The case does not fall under the political question doctrine and the courts must decide it.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Plaintiffs-Appellants ask that the Court:

1. Reverse the Court of Claims; and

2. Remand to the Court of Claims to conduct an evidentiary hearing on Trump's eligibility under the Disqualification Clause to be placed on the Michigan presidential primary ballot.

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I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 13,339.

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Proof of Service

The undersigned certifies that on November 30, 2023, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
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STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT DAVIS,
Plaintiff-Appellant,
v
WAYNE COUNTY ELECTION COMMISSION,
Defendant-Appellee,
and
DONALD J. TRUMP,
Intervening Defendant-Appellee.
_____/

COA Docket No.368615
L.C. Case No. 23-012484-AW

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PLAINTIFF-APPELLANT ROBERT DAVIS' BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED****

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STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court err by granting Intervening Defendant Donald Trump's motion for summary disposition under MCR 2.116(C)(8)?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	NO
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

II. Did the trial court err by denying Plaintiff-Appellant Robert Davis' motion for declaratory judgment?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	NO
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

III. Does the Defendant-Appellee Wayne County Election Commission have the statutory legal duty under MCL 168.559 and 168.689 of Michigan Election Law to approve the printing of the official ballots for the state of Michigan's 2024 Presidential primary election for the County of Wayne?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	YES
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

IV. Does the Defendant-Appellee Wayne County Election Commission have the statutory legal duty under MCL 168.689 of Michigan Election Law to determine whether the presidential candidates were "properly certified" by the Secretary of State to appear on the official ballots for the 2024 Presidential primary election for the County of Wayne?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	NO
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

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STATEMENT OF QUESTIONS PRESENTED (CONT.)

V. Does the Defendant-Appellee Wayne County Election Commission have the statutory legal duty under MCL 168.567 of Michigan Election Law to correct any errors that may be present on the 2024 Presidential primary election ballot for the County of Wayne?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	YES
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

VI. Did Plaintiff-Appellant Robert Davis have standing to seek declaratory relief under MCR 2.605 against the Defendant-Appellee Wayne County Election Commission?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	YES
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	DID NOT ANSWER

VII. Was the trial court bound to follow this Court's holding in *Southeastern Michigan Fair Budget Coalition v Killeen*, 153 Mich.App. 370; 395 NW2d 325 (1986)?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	YES
Intervening Defendant-Appellee Answers:	NO
Trial Court Answers:	NO

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STATEMENT OF APPELLATE JURISDICTION

Pursuant to MCR 7.203(A)(1) and MCR 7.204, Plaintiff-Appellant Robert Davis timely filed an appeal of right from the trial court's November 13, 2023 Opinion and Order, which is a final order under MCR 7.203(A)(1). (**See November 13, 2023 final order attached**).

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STATEMENT OF FACTS/PROCEDURAL POSTURE OF CASE

The facts in this case are undisputed!

On August 28, 2023, Plaintiff-Appellant Robert Davis ("Plaintiff" or "Plaintiff Davis") sent, via email, **nonparty** Secretary of State a written request for declaratory ruling declaring former President Donald Trump ("Former President" or "Trump") ineligible to have his name printed on the 2024 Presidential Primary Election ballot as a candidate for President for the Republican Party because Trump is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution. (**See Plaintiff's August 28, 2023 Request for Declaratory Ruling attached**).

On September 12, 2023, nonparty Secretary of State, through the State Director of Elections, Jonathan Brater, issued Plaintiff a written response **DENYING** Plaintiff's request for a declaratory ruling declaring Trump ineligible under Section 3 of the Fourteenth Amendment. (**See Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached**). The Secretary of State DENIED Plaintiff's meritorious request for a declaratory ruling because "[u]nder the Election Law, the Legislature did not expressly authorize the Secretary of State to make eligibility determinations as to whether a candidate for president is 'disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution.'" (**See Secretary of State's September 12, 2023 Response Denying Plaintiff's Request attached**).

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MCL 24.263 of the Administrative Procedures Act ("APA") provides:

> ***On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency***. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. (emphasis supplied).

Plaintiff is certainly an "interested person" because as a duly registered voter of the state of Michigan, Plaintiff desires and intends to vote by absentee ballot in the 2024 Presidential Primary Election whether it's held in February 2024 or March 2024. Additionally, Plaintiff is an "interested person" because Plaintiff will not only be voting in the 2024 Presidential Primary Election, but Plaintiff will be voting for and supporting a Republican presidential candidate, that is **NOT** Trump, in the 2024 Presidential Primary Election. Plaintiff believes that if an otherwise ineligible candidate, like Trump, is allowed to have their name appear on the 2024 Presidential Primary Election ballot, the presidential candidate Plaintiff is planning on voting for in the 2024 Republican Presidential Primary Election will lose votes, and Plaintiff will suffer imminent irreparable harm as a result.

Although Plaintiff is not a registered Republican, MCL 168.615c of Michigan Election Law grants Plaintiff the statutory legal right to vote in the Republican Presidential Primary Election provided that Plaintiff "shall indicate in writing, on a

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form prescribed by the secretary of state, which political party ballot he…wishes to vote when appearing at a presidential election." Michigan's Presidential Primary Election is an "open" primary. See MCL 168.615c.

Since Trump is undeniably the current leading candidate to capture the Republican nomination for President, if Trump is allowed to have his name appear on the 2024 Presidential Primary Election ballot despite his purported ineligibility under Section 3 of the Fourteenth Amendment of the United States Constitution, Trump will undeniably take votes away from Plaintiff's Republican presidential candidate of choice. This would arguably constitute irreparable harm that Plaintiff will suffer because of the loss of votes for Plaintiff's preferred candidate of choice for the Republican presidential nomination, which Plaintiff intends on voting for and supporting in the 2024 Presidential Primary Election.

On September 27, 2023, Plaintiff filed a single-count complaint in the Third Circuit (Wayne) Court seeking declaratory relief against the Defendant-Appellee Wayne County Election Commission. Contemporaneously, Plaintiff also filed an emergency motion for declaratory judgment. (**See Register of Actions**). The trial court initially set a hearing date of October 30, 2023 for Plaintiff's emergency motion for declaratory judgment. (**See Register of Actions**). Prior to Plaintiff filing this lawsuit, representatives of the Defendant-Appellee Wayne County Election Commission advised Plaintiff that they lacked the statutory authority to determine whether any of the presidential candidates that were to be "certified" by the Secretary of State were in fact "properly certified" by the Secretary of State.

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(**See Complaint**). Plaintiff was further advised by representatives of the Defendant-Appellee Wayne County Election Commission that they would **NOT** be making any decisions that conflict with the list of names provided them by the Secretary of State. (**See Complaint**).

However, on the eve of the October 30th hearing, on October 27, 2023, Intervening Defendant-Appellee Donald Trump ("Trump") filed a motion to intervene as a defendant in this case. (**See Register of Actions).** During the October 30, 2023 hearing, Plaintiff and counsel for Defendant-Appellee Wayne County Election Commission agreed to Trump's intervention as a party defendant. (**See Trial Court Order permitting Trump's Intervention**). During the October 30, 2023 hearing, counsel for Trump advised the trial court that he would also be filing motions for stay and for summary disposition. Accordingly, the trial court rescheduled the hearing for Plaintiff's emergency motion for declaratory judgment to be heard on November 7, 2023 so that Trump's motions for stay and for summary disposition could be argued simultaneously.

On November 7, 2023, the trial court heard arguments with respect to Plaintiff's emergency motion for declaratory judgment and Trump's motions for stay and summary disposition. On November 13, 2023, the trial court issued its opinion and order denying Plaintiff's emergency motion for declaratory judgment and granting Trump's motion for summary disposition and denying his motion for stay.

This emergency appeal then ensued!

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ARGUMENT

Pursuant To MCL 168.559 and 168.689 of Michigan Election Law, The Defendant Wayne County Election Commission Has The Statutory Legal Duty To Authorize The Printing of Official Ballots for the 2024 Presidential Primary Election For The County of Wayne.

A. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

Similarly, "[q]uestions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014), quoting *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013) (quotation marks omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC,* 499 Mich. 544, 552, 886 N.W.2d 113 (2016); see also *In re Ingham Co Treasurer for Foreclosure,* 331 Mich App 74, 78; 951 NW2d 85 (2020) ("A court by definition abuses its discretion when it makes an error of law.")

Lastly, this case also presents a question of statutory interpretation of MCL 168.559 and 168.689 of Michigan Election Law. Questions of statutory interpretation are also reviewed de novo. *In re MCI Telecommunications,* 460 Mich. 396, 413, 596 N.W.2d 164 (1999).

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B. LAW AND LEGAL ANALYSIS

On page 7 of the trial court's November 13, 2023 opinion and order, the trial court erroneously concluded:

> Notably, MCL 168.689 does not specifically address the preparation and printing of primary election ballots, which are addressed in Michigan Election Law Chapter XXlV. Regardless, to the extent Plaintiff seeks a declaratory judgment imposing legal duties on the Election Commission under MCL 168.689 beyond the scope of the plain language of that statute, he has failed to state a claim for which relief may be granted.

(**See p 7 of Trial Court's November 13, 2023 opinion and order attached**).

Contrary to the trial court's erroneous holding, under the plain language of MCL 168.559 and 168.689 of Michigan Election Law, the Defendant Wayne County Election Commission has the "**exclusive**" statutory legal duty to authorize the printing of the official ballots for the 2024 Presidential primary election for the County of Wayne.

The printing of the official ballots for the 2024 Presidential primary election is governed by MCL 168.613a, MCL 168.559 and MCL 168.689 of Michigan Election Law. The ***current*** version of MCL 168.613a[1] of Michigan Election Law, **which is in effect**, provides:

> (1) **A statewide presidential primary election shall be conducted under this act on the second Tuesday in March in each presidential election year.**

[1] Public Act 2 of 2023 was passed by the Michigan Legislature on February 1, 2023, which amends MCL 168.613a(1) by changing the date of the presidential primary election from March 12, 2024 to February 27, 2024. However, the Michigan Legislature did **NOT give Public Act 2 of 2023 immediate effect** under Mich.Const.1963, art. 4, §27. As such, Public Act 2 of 2023 will **NOT** take effect "until the expiration of 90 days from the end of the session at which it was passed," which will be **February 13, 2024**. *Id.* This effective date is determined based upon the Michigan Legislature adjourning *sine die* on November 14, 2023 at 12 p.m.

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> (2) A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, **the statewide presidential primary election shall be conducted under the provisions of this act that govern the conduct of general primary elections. [**emphasis supplied.]

MCL 168.559 of Michigan Election Law provides:

> It ***shall* be the *duty of the board of election commissioners of each county in this state to prepare and furnish the necessary official primary election ballots***, **except for city offices**, which may be required for use by the electors of any political party at the August primary. [emphasis supplied.]

MCL 168.689 of Michigan Election law further provides in relevant part:

> ***The board of election commissioners of each county shall prepare the official ballots for use at any state***, district or county ***election held therein***, and shall have printed a sufficient number of ballots **containing the names of all candidates *properly certified*** to said board of election commissioners…. [emphasis supplied.]

MCL 168.2(g) of Michigan Election Law defines the term "election" to mean: "an election or ***primary election at which the electors of this state*** or of a subdivision of this state ***choose or nominate by ballot an individual for public office*** or decide a ballot question lawfully submitted to them." (emphasis supplied).

MCL 168.7 of Michigan Election Law defines the terms "primary" or "primary election" to mean: "a primary election held for the purpose of deciding by ballot who shall be the nominee for the offices named I this act, or for the election by ballot of delegates to political conventions." (emphasis supplied).

It is well-settled that "[w]hen a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich. 29, 35; 729 NW2d 488

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(2007). Therefore, the statutory definitions provided in MCL 168.2(g) and MCL 168.7 of Michigan Election Law for the terms of "election", "primary" or "primary election" control.

The plain language of MCL 168.613a, 168.559 and 168.689 of Michigan Election Law is abundantly clear that the 2024 Presidential primary election is a "statewide" election in which the Defendant Wayne County Election Commission has the statutory legal duty to authorize the printing of the official ballots for said presidential primary election for the County of Wayne. "[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v. Recca,* 492 Mich. 169, 177, 821 N.W.2d 520 (2012) (quotation marks and citation omitted). "Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *Menard Inc. v. Dep't of Treasury,* 302 Mich.App. 467, 472, 838 N.W.2d 736 (2013).

In fact, contrary to the trial court's erroneous holding, it is well settled in Michigan jurisprudence that the Defendant Wayne County Election Commission has the "***exclusive***" authority to authorize the printing of the ballots for an election within their jurisdiction. "It is well established that it is the **province of the election commission.... to approve and furnish the ballots to be used in an election**." *Barrow v Detroit Election Comm'n*, 305 Mich.App. 649, ____; 854 NW2d 489, 501 (2014) (emphasis supplied). And, as this Court further noted and

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recognized, "MCL 168.560 prohibits the counting of ballots ***not furnished by the election commission***[.]" *Id.* (emphasis supplied)[2].

Therefore, reading the various provisions of Michigan Election Law together, it is clear that under MCL 168.559 and 168.689, the Defendant Wayne County Election Commission has the statutory legal duty to authorize the printing of the official ballots for the 2024 Presidential primary election for the County of Wayne, which the Defendant Wayne County Election Commission **does NOT dispute**!

Accordingly, the portion of the trial court's November 13, 2023 opinion and order, which erroneously held that MCL 168.689 of Michigan Election Law "does not specifically address the preparation and printing of primary election ballots," must be **VACATED** and **REVERSED**.

2. Trump's Motion for Summary Disposition Under MCR 2.116(C)(8) Should Have Been DENIED By The Trial Court Because Plaintiff's Complaint Thoroughly Pled and Alleged A Claim For Declaratory Relief Under MCR 2.605.

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Dell v. Citizens Ins. Co. of America,* 312 Mich. App. 734, 739, 880 N.W.2d 280 (2015) (quotation marks and

[2] MCL 168.560 provides: "Ballots other than those furnished by the board of election commissioners, according to the provisions of this act, shall not be used, cast, or counted in any election precinct at any election. The size of all official ballots shall be as the board of election commissioners prescribes."

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citations omitted). However, a party may not support a motion under MCR 2.116(C)(8) with documentary evidence such as affidavits or depositions. *Patterson v. Kleiman,* 447 Mich. 429, 432, 526 N.W.2d 879 (1994).

Here, Plaintiff's one-count complaint for declaratory relief thoroughly pled and alleged that an "actual controversy" existed between Plaintiff and Defendant Wayne County Election Commission because of the Defendant Wayne County Election Commission's refusal to "independently" determine whether the presidential candidates were "***properly certified***" by the Secretary of State as required under MCL 168.689. See *Southeastern Michigan Fair Budget Coalition v Killeen*, 153 Mich.App. 370; 395 NW2d 325 (1986). Additionally, Plaintiff's one-count complaint properly pled and alleged that under the plain language of MCL 168.689, the Defendant Wayne County Election Commission had the statutory legal duty to authorize the printing of the official ballots for the 2024 Presidential primary election for the County of Wayne. (**See Complaint**).

"**[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment**." *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.,* 487 Mich. 349, 372; 792 N.W.2d 686 (2010) (emphasis supplied). MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

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"An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Lansing Sch Ed Ass'n v Lansing Bd of Ed* (On Remand), 293 Mich App 506, 515; 810 NW2d 95 (2011). "[D]eclaratory relief is designed to give litigants access to courts to preliminarily determine their rights." *Detroit v Michigan*, 262 Mich App 542, 550-551; 686 NW2d 514 (2004) (emphasis added). "**Further, it is well established that declaratory actions may be brought to determine issues of statutory construction**." *Farish v Dept. of Talen and Economic Development*, 336 Mich.App. 433, ___; 971 NW2d 1, 12 (2021) (emphasis supplied).

The "actual controversy" requirement is met when "a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Mich Assoc of Home Builders v City of Troy,* 504 Mich 204, 225; 934 NW2d 713 (2019). Although the trial court may not resolve hypothetical issues under the guise of a declaratory judgment, declaratory relief may be granted before actual injury or loss occurs. *UAW,* 295 Mich App at 495.

"The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Rose v State Farm Mut Auto Ins Co,* 274 Mich App 291, 294; 732 NW2d 160 (2006). "The purpose of a declaratory judgment is to definitively

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declare the parties' rights and duties, to guide their future conduct and relations, and to preserve their legal rights." *Barrow v Detroit Election Comm,* 305 Mich App 649, 662; 854 NW2d 489 (2014).

Here, Plaintiff properly pled and alleged that the Defendant Wayne County Election Commission decided and concluded that it lacked the statutory legal authority under MCL 168.689 of Michigan Election Law to "independently" determine whether presidential candidates were "***properly certified***" by the Secretary of State to appear on the 2024 presidential primary election ballot. (**See Complaint**). Notably, the Defendant Wayne County Election Commission did **NOT** dispute or rebut any of the factual allegations pled in Plaintiff's complaint in writing or at oral argument. (**See Defendant Wayne County Election Commission's Response to Plaintif's Emergency Motion**).

As noted above, the trial court clearly erred by concluding that MCL 168.689 of Michigan Election "does not specifically address the preparation and printing of primary election ballots, which are addressed in Michigan Election Law Chapter XXIV" and "to the extent Plaintiff seeks a declaratory judgment imposing legal duties on the Election Commission under MCL 168.689 beyond the scope of the plain language of that statute, he has failed to state a claim for which relief may be granted." (See p 7 of Trial Court's November 13, 2023 opinion and order).

The plain language of MCL 168.559 and 168.689 clearly empowers the Defendant Wayne County Election Commission with the statutory legal duty to authorize the printing of the official ballots for the 2024 Presidential primary

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election for the County of Wayne. "It is well established that it is the **province of the election commission.... to approve and furnish the ballots to be used in an election**." *Barrow v Detroit Election Comm'n*, 305 Mich.App. 649, ____; 854 NW2d 489, 501 (2014) (emphasis supplied). And, as this Court further noted and recognized, "MCL 168.560 prohibits the counting of ballots ***not furnished by the election commission***[.]" *Id.* (emphasis supplied).

Therefore, because MCL 168.689 of Michigan Election Law clearly grants the Defendant Wayne County Election Commission with "exclusive" authority to authorize the printing of the ballots, as Plaintiff properly pled and alleged in his complaint, summary disposition under MCL 2.116(C)(8) was improper because the claims alleged in Plaintiff's complaint were **NOT** "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," *Dell v. Citizens Ins. Co. of America*, 312 Mich. App. 734, 739, 880 N.W.2d 280 (2015), but rather, Plaintiff's complaint sufficiently pled and alleged a claim for declaratory relief under MCR 2.605. *Barrow v Detroit Election Comm*, 305 Mich App at 662.

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ARGUMENT

Pursuant to MCL 168.689 of Michigan Election Law, The Defendant Wayne County Election Commission Has The Statutory Legal Duty To Determine Whether The Presidential Candidates Were "*Properly Certified*" By The Secretary of State To Appear On The 2024 Presidential Primary Election Ballot In The County of Wayne and Pursuant To MCL 168.567, A Statutory Legal Duty To Correct Any Errors On Said Official Ballot.

A. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

Similarly, "[q]uestions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014), quoting *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013) (quotation marks omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC,* 499 Mich. 544, 552, 886 N.W.2d 113 (2016); see also *In re Ingham Co Treasurer for Foreclosure,* 331 Mich App 74, 78; 951 NW2d 85 (2020) ("A court by definition abuses its discretion when it makes an error of law.")

Lastly, this case also presents a question of statutory interpretation of MCL 168.559 and 168.689 of Michigan Election Law. Questions of statutory interpretation are also reviewed de novo. *In re MCI Telecommunications,* 460 Mich. 396, 413, 596 N.W.2d 164 (1999).

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B. LAW AND LEGAL ANALYSIS

The proper adjudication of the instant appeal requires this Court to properly interpret the statutory language of MCL 168.689 of Michigan Election Law.

Pursuant to MCL 168.689 of Michigan Election Law, the Defendant Wayne County Election Commission: "***shall prepare the official ballots for use at any state, district or county election held therein, and shall have printed a sufficient number of ballots containing the names of all candidates properly certified to said board of election commissioners***...." MCL 168.689.

Additionally, pursuant to MCL 168.567, the Defendant Wayne County Election Commission "***shall correct such errors as may be found in said ballots***, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk." (emphasis supplied).

In *Sau-Tuk Indus, Inc v Allegan County*, 316 Mich App 122, 136; 892 NW2d 33 (2016), this Court explained the rules for statutory interpretation:

> When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. If the language of a statute is unambiguous, we presume the Legislature intended the meaning expressed in the statute. A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. . . . When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law.

Courts "may not pick and choose what parts of a statute to enforce" but "must give effect to every word of a statute if at all possible so as not to render any part of

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the statute surplusage or nugatory." *Id.* at 143 (citations omitted). Courts "may not speculate regarding legislative intent beyond the words expressed in the statute." *Id.* at 145. "This Court reads the provisions of statutes reasonably and in context, and reads subsections of cohesive statutory provisions together." *Detroit Pub Schs v Conn*, 308 Mich App 234, 247-248; 863 NW2d 373 (2014) (citation omitted). When courts interpret statutes, they must first look to the specific statutory language to determine the intent of the Legislature, and if the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Univ'l Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003).

Applying these well-established principles of statutory construction, this Court, in *Southeastern Michigan Fair Budget Coalition v Killeen*, 153 Mich.App. 370; 395 NW2d 325 (1986) ("***SMFBC***"), interpreted the language of MCL 168.689 of Michigan Election Law and provided much-need clarity with respect to the statutory legal duty of the Defendant Wayne County Election Commission under MCL 168.689 to determine whether candidates have been "properly certified" by the certifying official ***prior*** to authorizing the printing of the ballots for a particular election.

This Court, in *SMFBC*, 153 Mich.App. at 377-378, correctly held:

> "While the language of the statute is not entirely clear, **we see no reason for the Legislature to distinguish between *candidates* who are to be "properly certified" and *constitutional amendments* or *other questions* which have to be so certified. We therefore construe the statute to require *candidates, constitutional amendments,* and *questions* for use at any state,**

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> **district or county election to be "properly" certified before they are entitled to placement on the ballot.** ***Since this statute is directed to the board of election commissioners, the use of the word "properly" evidences an intent of the Legislature that the board of county election commissioners not only determine that a proposed question is certified, but that it is indeed "properly" certified***. Accordingly, where it is apparent to the board of county election commissioners that the question is not entitled to placement on the ballot, it may refuse to place it thereon and leave the certifying body to its legal recourse. **We interpret "properly" in this context to mean that the election commissioners are required to determine that, on its face, the question is entitled to placement on the ballot**." [emphasis supplied].

Contrary to the trial court's erroneous ruling**, as a trial court, it was bound** to follow the holding in *SMFBC, supra,* because it is a published opinion of this Court that has **NOT** been vacated or reversed by another panel of this Court or our Supreme Court. It is well-settled in Michigan jurisprudence that published opinions of the Court of Appeals, regardless of their publication date, always have been binding on the trial courts. See *Andrusz v Andrusz*, 320 Mich.App. 445, 457 fn 2; 904 NW2d 636 (2017) (holding that "[p]ublished opinions of the Court of Appeals have always been binding on trial courts[.]") As our Supreme Court has explained, "**A decision by any panel of the Court of Appeal is, therefore, controlling statewide until contradicted by another panel of the Court of Appeals or reversed or overruled by this Court**." *Tebo v Havlik,* 418 Mich. 350, 362; 343 NW2d 181 (1984) (emphasis supplied).

In *People v Kroll*, 179 Mich.App. 423, 426; 446 NW2d 317 (1989), this Court explained a published opinion of the Court of Appeals has precedential effect under

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the rule of stare decisis. MCR 7.215(C)(2). As such, a trial court is constrained to follow a decision by any panel of this Court unless it is contradicted by another panel or overruled by our Supreme Court. *Kroll,* 179 Mich.App at 426, citing *In the Matter of Hague*, 412 Mich. 532, 552; 315 NW2d 524 (1982); *Moorehouse v Ambassador Ins. Co.,* 147 Mich.App. 412, 417; 383 NW2d 219 (1985).

To date, the holding in *SMFBC, supra*, has **NOT** been contradicted, vacated, or overruled by another panel of this Court or overruled by our Supreme Court. Therefore, the trial court remained bound to follow the holding in *SMFBC, supra.* See *Tebo v Havlik,* 418 Mich. 350, 362; 343 NW2d 181 (1984). Although the trial court was bound by the holding in *SMFBC, supra*, Plaintiff is mindful that under MCR 7.215(J)(1), this Court is not bound by the holding in *SMFBC, supra*, because it was decided and issued before November 1, 1990.

However, although this Court is "not strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990," this Court has nonetheless determined that **published opinions decided before November 1, 1990 "are nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases.**" *Woodring v Phoenix Ins Co.*, 325 Mich.App. 108, 114-115; 923 NW2d 607 (2018) (emphasis supplied); see also *David Krieger v Dept. Environmental Great Lakes and Energy and Depart. Of Nat. Resources*, ___Mich.App.___, ____ fn 16 (2023) (Docket No.359895); slip op at p 32, fn 16.

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It's also important to remind this Honorable Court that Government officers "**are creatures of the law and are bound to obey it**." *United States v Lee*, 106 U.S. (16 Otto) 196, 220 (1882) (emphasis supplied). "'The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.'" *Presnell v. Wayne [Co.] Bd. of Co. Rd. Comm'rs,* 105 Mich.App. 362, 368, 306 N.W.2d 516 (1981), quoting 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276, p. 327. Or as our Supreme Court has stated, **"[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority**." *Sittler v. Michigan College of Mining & Tech. Bd. of Control,* 333 Mich. 681, 687, 53 N.W.2d 681 (1952) (citations and punctuation omitted) (emphasis supplied). As such, "**[p]ublic officers have and can exercise only such powers as are conferred on them by law**...." *Id.* (citations and punctuation omitted) (emphasis supplied).

Guided by these well-settled legal principles, per this Court's holding in *SMFBC, supra*, the Defendant Wayne County Election Commission has a statutory legal duty under MCL 168.689 to make an "independent" determination as to whether the presidential candidates were "**properly certified**" by the Secretary of State before they authorize the printing of the ballots for the 2024 presidential primary election for the County of Wayne. *SMFBC*, 153 Mich.App. at 377-378.

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Lastly, it's important to remind the Court that Plaintiff's complaint did **NOT** seek the issuance of a writ of mandamus nor did Plaintiff's complaint seek the trial court to make a judicial determination with respect to whether Trump engaged in an insurrection in violation of Section 3 of the Fourteenth Amendment and moreover, Plaintiff's complaint did **NOT** seek a judicial determination with respect to whether Trump was disqualified under Section 3 of the Fourteenth Amendment. Rather, Plaintiff's one-count complaint **ONLY** sought declaratory relief against Defendant Wayne County Election Commission under MCR 2.605 and the proper interpretation of MCL 168.567 and 168.689 of Michigan Election Law as it relates to the statutory legal duties of the Defendant Wayne County Election Commission with respect to the current controversy.

As this Court is keenly aware, "[a] party is bound by [his or her] pleadings and **it is not permissible to litigate issues or claims that were not raised in the complaint**..." *Lenawee Co. v Wagley*, 301 Mich.App. 134, 160; 836 NW3d 193 (2013) (quotation marks and citations omitted) (emphasis supplied). **Therefore, Trump's arguments with respect to the application of Section 3 of the Fourteenth Amendment of the United States Constitution are irrelevant to this proceeding and shall be disregard** because Plaintiff's one-count complaint **only sought declaratory relief** against the Defendant Wayne County Election Commission and the proper interpretation of MCL 168.567 and 168.689 of Michigan Election Law as it relates to the Defendant Wayne County Election Commission's statutory legal duties with respect to the present controversy.

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1. Duty To Correct Errors Under MCL 168.567

Similarly, under MCL 168.567 of Michigan Election Law, the Defendant Wayne County Election Commission has the statutory legal duty to correct any errors that may be found on the 2024 Presidential primary election ballots for the County of Wayne.

MCL 168.567 of Michigan Election Law provides:

> ***The boards of election commissioners shall correct such errors as may be found in said ballots***, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk.

This Court, in *Berry v Garrett*, 316 Mich.App. 37; 890 NW2d 882 (2016), interpreted the language of MCL 168.567 and correctly held that MCL 168.567 requires the Election Commission to correct ballot errors, which includes the removal of the names of "***improperly***" certified candidates from the ballot. *Berry,* 316 Mich. App. at 44, 890 N.W.2d 882. Contrary to the trial court's holding, a "facial review" is not limited to the "four corners" of a document. Rather, it may require the Defendant Wayne County Election Commission to review "other" documents to ascertain whether a candidate was "properly" certified by the certifying officer. See *Reed-Pratt v Detroit City Clerk*, 339 Mich.App. 510; 984 NW2d 794 (2021).

By way of example, in *Reed-Pratt, supra*, the Detroit City Clerk and its City Election Commission had to refer to campaign finance documents maintained by the Wayne County Clerk to ascertain whether the campaign finance statement candidate Janee Ayers attested to in her affidavit of identity (AOI) was true or

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false. *Id.* This "review" went beyond the "face" and "four corners" of the AOI in order for the Detroit Election Commission to determine whether the AOI contained a "false" statement in violation of MCL 168.558(4) of Michigan Election Law. *Id.*

Therefore, in correcting errors that may be contained on the 2024 Presidential primary ballot, under MCL 168.567, the Defendant Wayne County Election Commission in conducting their review under MCL 168.689 to determine whether said presidential candidates were "properly" certified by the Secretary of State, may be required to refer to additional documents and documentary evidence not contained in the certification list provided by the Secretary of State.

Whether the Defendant Wayne County Election Commission's "review" is limited to a "facial" review as the trial court seems to suggest or whether the Defendant Wayne County Election Commission is permitted to refer to additional documents per this Court's holding in *Reed-Pratt*, it is abundantly clear that under MCL 168.567, the Defendant Wayne County Election Commission has the statutory authority to correct any errors on the presidential primary election ballot, which may include removing a presidential candidate's name that they determine was **NOT** "properly" certified by the Secretary of State.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant Robert Davis prays that this Honorable Court **VACATE** and **REVERSE** the trial court's November 13, 2023 opinion and order; **ENTER JUDGMENT** declaring that pursuant to MCL 168.559 and 168.689 of Michigan Election Law, the Defendant

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Wayne County Election Commission has the statutory legal duty to authorize the printing of the official ballots for the 2024 Presidential primary and general elections and all future presidential primary and general elections for the County of Wayne; **ENTER JUDGMENT** declaring that pursuant to MCL 168.689 of Michigan Election Law, the Defendant Wayne County Election Commission has the statutory legal duty to determine whether presidential candidates were "properly" certified by the Secretary of State to appear on the 2024 Presidential primary and/or general election ballots, and/or any future Presidential primary and/or general election ballots; **ENTER JUDGMENT** declaring that pursuant to MCL 168.567 of Michigan Election Law, the Defendant Wayne County Election Commission has the statutory legal duty to correct any errors that may be contained on any of the 2024 Presidential primary and/or general election ballots, and/or any future Presidential primary and/or general election ballots, which includes the duty to remove the name of a presidential candidate that is determined to have been "improperly" certified by the Secretary of State under MCL 168.689; and Plaintiff-Appellant further prays that this Honorable Court **GRANT** any other relief the Court deems necessary and appropriate pursuant to MCR 7.216(A)(7).

Dated: November 16, 2023

Respectfully submitted,
/s/ROBERT DAVIS
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this document. This brief uses **a 12-point proportional font** (Century Schoolbook), and **the word count for this brief is 7,036.**

Dated: November 16, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro se*

CERTIFICATE OF SERVICE

I, ROBERT DAVIS, certify that the foregoing document(s) was filed and served via the Court's electronic case filing and noticing system, MiFile, this 16th day of November, 2023, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

Dated: November 16, 2023

Respectfully submitted,

/s/ ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff-Appellant
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Court of Appeals, State of Michigan

ORDER

Anica Letica
Presiding Judge

Michael J. Riordan

Thomas C. Cameron
Judges

Robert Davis v Wayne County Election Commission; Robert Labrant v Secretary of State

Docket Nos. 368615; 368628

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

In Docket No. 368615, the motions for immediate consideration are GRANTED.

In Docket No. 368615, the motion to consolidate is GRANTED IN PART. This case is CONSOLIDATED with the claim of appeal filed in Docket No. 368628, *Robert Labrant v Secretary of State*.

The motions to expedite filed in Docket No. 368615 are GRANTED to the following extent: In Docket No. 368615, Appellees' briefs are due no later than 5:00 p.m. on December 6, 2023. Any reply briefs are due no later than 5:00 p.m. on December 8, 2023. No extensions of time or further briefing will be accepted.

In Docket No. 368628, on the Court's own motion pursuant to MCR 7.216(A)(7), the appeal is EXPEDITED. Appellants' brief is due no later than 5:00 p.m. on November 30, 2023. Appellees' briefs are due no later than 5:00 p.m. on December 8, 2023. Any reply briefs are due no later than 5:00 p.m. on December 8, 2023. No extensions of time or further briefing will be accepted.

The Clerk is directed to submit these consolidated appeals on the case call before this panel for decision on the briefs without oral argument on December 8, 2023.

Anica Letica
Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 22, 2023
Date

Jerome W. Zimmer Jr.
Chief Clerk

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT DAVIS,
Plaintiff-Appellant,

Court of Appeals Docket No._____
L.C. Case No. 23-000128-MB

v

JOCELYN BENSON, in her official capacity as the duly elected Secretary of State,
Defendant-Appellee,

and

JULIE DALE, in her official capacity as Assistant General Counsel of Third Judicial Circuit Court of Michigan, **and**
RICHARD LYNCH, in his official capacity as General Counsel of Third Judicial Circuit Court of Michigan,
Defendants.
_____/

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_____/

PLAINTIFF-APPELLANT ROBERT DAVIS' EMERGENCY APPLICATION FOR LEAVE TO APPEAL FROM THE PORTION OF COURT OF CLAIMS' NOVEMBER 14, 2023 OPINION AND ORDER DISMISSING COUNTS I AND II AS *MOOT* UNDER MCR 2.116(C)(8).

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STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court err by dismissing Counts I and II of Plaintiff's original and amended verified complaints as *moot* and granting Defendant Benson's motion for summary disposition under MCR 2.116(C)(8)?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	NO
Amicus Curiae Trump Answers:	NO
Trial Court Answers:	NO

II. Were Counts I and II of Plaintiff's original and amended verified complaints *moot* due to the Michigan Legislature adjourning *sine die* effective November 14, 2023 at Noon?

Plaintiff-Appellant Answers:	NO
Defendant-Appellee Answers:	YES
Amicus Curiae Trump Answers:	YES
Trial Court Answers:	YES

III. Did the trial court err by denying Plaintiff's motion for declaratory judgment and writ of mandamus with respect to Counts I and II of the original and amended verified complaints?

Plaintiff-Appellant Answers:	YES
Defendant-Appellee Answers:	NO
Amicus Curiae Trump Answers:	NO
Trial Court Answers:	NO

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STATEMENT OF APPELLATE JURISDICTION

Pursuant to MCR 7.205(A)(1)(a), Plaintiff-Appellant Robert Davis has timely filed this emergency application for leave to appeal the portion of the trial court's November 14, 2023 opinion and order dismissing as *moot* Counts I and II of Plaintiff's original and amended verified complaints. (**See November 14, 2023 opinion and order attached**). The trial court's November 14, 2023 opinion and order is **not** a "final order" as defined under MCR 7.202(6)(a) and thus, Plaintiff-Appellant seeks this Court to exercise its jurisdiction under MCR 7.205(A)(1)(a) with the timely filing of this emergency application for leave to appeal.

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STATEMENT OF FACTS/PROCEDURAL POSTURE OF CASE

The facts in this case are undisputed!

On February 1, 2023, Governor Gretchen Whitmer signed into law Public Act 2 of 2023, which amends MCL 168.613a of Michigan Election Law, changing the date of the Presidential Primary Election from the second Tuesday in March in each presidential election year to the fourth Tuesday in February beginning in 2024.[1]

However, the ***current*** version of MCL 168.613a of Michigan Election Law, which remains in effect, ***currently*** provides:

> (1) **A statewide presidential primary election shall be conducted under this act on the second Tuesday in March in each presidential election year**.
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election shall be conducted under the provisions of this act that govern the conduct of general primary elections. (emphasis supplied).

Importantly, however, MCL 168.613a(1), as amended by Public Act 2 of 2023, would read as follows:

> (1) **A statewide presidential primary election must be conducted under this act on February 27, 2024**, and on the fourth

[1] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=getObject&objectName=2023-SB-0013

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> Tuesday in February in each presidential election year after 2024. (emphasis supplied).

However, Public Act 2 of 2023 was **NOT** given immediate effect. Rather, the effective date of Public Act 2 of 2023 is "*sine die*", which means Public Act 2 of 2023 does **NOT** become effective "until the 91st day after final adjournment of the 2023 Regular Session." (**See Public Act 2 of 2023 attached**). As of the date of the filing of this lawsuit in the trial court, it was unknown when the final adjournment of the 2023 Regular Session of the Michigan Legislature will be. According to the Michigan Legislature's website, the Michigan House of Representatives' 2023 Regular Session is **NOT** scheduled to adjourn **until December 21, 2023**.[2] Similarly, according to the Michigan Legislature's website, the Michigan Senate's 2023 Regular Session is **NOT** scheduled to adjourn **until December 14th or 21st, 2023**.[3]

Despite the fact that Public Act 2 of 2023 had **NOT** gone into effect, the Defendant Secretary of State, nonetheless, in June 2023, the Defendant Secretary of State published an election manual entitled: "Ballot Access Information for Presidential Candidates Seeking Office In 2024", which was disseminated to all local county, city and township clerks informing them that the 2024 Presidential Primary Election was going to be held on February 27, 2024 and **NOT** March 12,

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[2] See https://www.legislature.mi.gov/(S(00vpef1jtzlkbv11ausondv3))/mileg.aspx?page=SessionSchedules

[3] See https://www.senate.michigan.gov/schedules/maincalendar.html

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2024.[4] (**See Defendant Secretary of State's June 2023 Presidential Primary Election Manual attached**).

Confused by the Defendant Secretary of State's unlawful actions and conduct, on September 11, 2023, Plaintiff sent the Defendant Secretary of State and the State Director of Elections an email respectfully requesting clarity as to when the 2024 Presidential Primary Election would be held. (**See Plaintiff's September 11, 2023 Email to Defendant attached**). However, neither the Defendant Secretary of State nor the State Director of Elections responded to Plaintiff's September 11, 2023 email. Plaintiff then filed this action in the Court of Claims.

On September 15, 2023, Plaintiff filed a six-count verified complaint against the Defendant Jocelyn Benson, in her official capacity as the duly elected Secretary of State for the state of Michigan. Contemporaneously, Plaintiff also filed an emergency motion for declaratory judgment, writ of mandamus and order to show cause with respect to Counts I-IV of the Verified Complaint. On September 19, 2023, Plaintiff filed an emergency motion to expedite briefing and hearing so that a decision on the merit could be issued by October 3, 2023.

On October 9, 2023, the trial court issued an "Expedited Scheduling Order", which denied Plaintiff's September 19, 2023 emergency motion for an expedited hearing and decision by October 3, 2023, but GRANTED Plaintiff's request to expedite briefing of this case. The trial court's October 9, 2023 Expedited

[4] See file:///D:/SOS%20Benson%20June%202023%20Ballot%20Access%20Information%20for%20Presidential%20Candidates%20for%2

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Scheduling Order also ordered the Defendant Secretary of State to "respond to the motion for a declaratory judgment, writ of mandamus, and order to show cause by 5:00 p.m. on October 16, 2023." The trial court's October 9, 2023 Expedited Scheduling further ordered that "[i]f defendant's response to the complaint includes a motion, then plaintiff shall file any response to the motion by October 23, 2023."

In accordance with the Court's October 9, 2023 Expedited Scheduling Order, on October 16, 2023, the Defendant Secretary of State filed a partial motion for summary disposition with respect to Counts I, II, V, and VI of the ***original*** complaint. On October 23, 2023, Plaintiff timely filed a response in opposition to Defendant Secretary of State's partial motion for summary disposition, and, pursuant to MCR 2.118(A)(1), Plaintiff also timely filed an Amended Verified Complaint adding additional claims for declaratory relief against the Defendant Secretary of State for purportedly violating various provisions of Michigan Election, Michigan Campaign Finance Act, and the Administrative Procedures Act. Plaintiff's Amended Verified Complaint also added additional claims for declaratory relief against new/added party defendants, Julie Dale and Richard Lynch. (**See Amended Verified Complaint**)

Notably, and most importantly, however, the Amended Verified Complaint did NOT alter, amend, add, or change any of the facts and/or allegations pled and alleged in the *original* complaint for Counts I-IV, and VI. The Amended Verified Complaint did, however, **abandon** Count V of the

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original complaint and thus, no relief can be granted with respect to Count V of the original complaint and it is deemed moot.

Therefore, the trial court **properly proceeded** with the "Expedited Hearing" that was rescheduled for November 9, 2023 at 8:30 a.m. on Plaintiff's Emergency Motion for Declaratory Judgment, Writ of Mandamus, and Order to Show Cause, as well as Defendant Secretary of State's Partial Motion for Summary Disposition with respect to Counts I, II, and VI of the original and amended verified complaints.[5]

On November 9, 2023, the trial court held a 5-hour hearing in three separate cases involving the eligibility of former president Donald Trump to appear on the 2024 Presidential primary election ballot.

However, while this matter was pending, the Michigan Legislature decided to adjourn the 2023 legislative session effective November 14, 2023 at Noon. Later that same day, on November 14, 2023, the trial court issued its opinion and order dismissing as moot Counts I and II of Plaintiff's original and amended verified complaints, denying Plaintiff's motion for declaratory relief with respect to Counts III and IV of Plaintiff's original and amended verified complaints, and dismissing Count VI of Plaintiff's original and amended verified complaints under MCR 2.116(C)(8). (**See November 14, 2023 opinion and order attached**).

This emergency appeal then ensued.

[5] As noted, the Amended Verified Complaint **abandoned** Count V pled and alleged in the ***original*** complaint.

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ARGUMENT
Trial Court Erred By Dismissing Counts I and II of Plaintiff's Original and Amended Complaints As *Moot* Due To The Michigan Legislature Adjourning *Sine Die* Effective November 14, 2023 At Noon.

A. STANDARD OF REVIEW

"The applicability of a legal doctrine, such as mootness, is a question of law which this Court reviews de novo." *T.M. v M.Z.,* 501 Mich. 312, 315; 916 NW2d 473 (2018) (quotation marks, alterations, and citation omitted). Similarly, "[t]his Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

Also, "[q]uestions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014), quoting *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013) (quotation marks omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC,* 499 Mich. 544, 552, 886 N.W.2d 113 (2016); see also *In re Ingham Co Treasurer for Foreclosure,* 331 Mich App 74, 78; 951 NW2d 85 (2020) ("A court by definition abuses its discretion when it makes an error of law.")

When reviewing a trial court's decision whether to issue a writ of mandamus, this Court reviews de novo the trial court's determination of the existence and extent of a duty. *Bay City v Bay Co Treasurer*, 292 Mich App 156, 164; 807 NW2d

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892 (2011). But this Court reviews a trial court's ultimate decision for an abuse of discretion. *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). Lastly, this Court also reviews de novo questions of constitutional and statutory interpretation, which present issues of law. *Frank v. Linkner,* 500 Mich. 133, 140, 894 N.W.2d 574 (2017); *Makowski v. Governor,* 495 Mich. 465, 470, 852 N.W.2d 61 (2014).

B. LAW AND LEGAL ANALYSIS

On page 2 of the trial court's November 14, 2023 opinion and order, the trial court erroneously concluded:

> Because the 2023 session of the Michigan Legislature has ended at 12:00 p.m. on November 14, 2023, plaintiff's requests in Count I and II of his complaint are now MOOT.
> **(See p 2 of the trial court's November 14, 2023 opinion and order attached**).

Contrary to the trial court's holding, the Michigan Legislature adjourning effective at 12 p.m. on November 14, 2023 did **NOT** render Counts I and II of Plaintiff's original and amended verified complaints *moot*. It is well-settled that "[t]his Court does not decide moot issues." *Garrett v Washington*, 314 Mich.App. 436, 449; 886 NW2d 762 (2016). And because "Michigan courts exist to decide actual cases and controversies," "[t]he question of mootness is a threshold isse that a court must address before it reaches the substantive issues of a case." *In re Tchakarova*, 328 Mich.App. 172, 178; 936 NW2d 863 (2019) (quotation marks and citation omitted).

It is "'universally understood…that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, …or a

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judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *Anway v Grand Rapids R. Co.*, 211 Mich. 592, 610; 179 NW 350 (1920) (internal quotation omitted). Mootness occurs when "'an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.'" *Barrow v Detroit Election Comm.*, 305 Mich.App. 649, 659; 854 NW2d 489 (2014).

Here, contrary to the trial court's holding, there was **NO** event that occurred "renders it impossible for the court to grant relief." *Barrow*, 305 Mich.App. at 659. The Michigan Legislature adjourning the 2023 legislative session effective November 14, 2023 at 12:00 p.m. did **NOT** render Counts I and II of Plaintiff's original and amended verified complaints **MOOT** because there remains an "actual controversy" as to the "***correct***" date for the 2024 Presidential primary election.

Declaratory Judgment Is Necessary To Declare The 2024 Presidential Primary Election Must Be Held On March 12, 2024 and NOT February 27, 2023.

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Dell v. Citizens Ins. Co. of America,* 312 Mich. App. 734, 739, 880 N.W.2d 280 (2015) (quotation marks and citations omitted). However, a party may not support a motion under MCR

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2.116(C)(8) with documentary evidence such as affidavits or depositions. *Patterson v. Kleiman,* 447 Mich. 429, 432, 526 N.W.2d 879 (1994).

"[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.,* 487 Mich. 349, 372; 792 N.W.2d 686 (2010). MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

"An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Lansing Sch Ed Ass'n v Lansing Bd of Ed* (On Remand), 293 Mich App 506, 515; 810 NW2d 95 (2011). "[D]eclaratory relief is designed to give litigants access to courts to preliminarily determine their rights." *Detroit v Michigan*, 262 Mich App 542, 550-551; 686 NW2d 514 (2004) (emphasis added). "**Further, it is well established that declaratory actions may be brought to determine issues of statutory construction**." *Farish v Dept. of Talen and Economic Development*, 336 Mich.App. 433, ___; 971 NW2d 1, 12 (2021) (emphasis supplied).

The "actual controversy" requirement is met when "a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Mich Assoc of Home Builders v City of Troy,* 504 Mich 204, 225; 934 NW2d 713 (2019). Although the trial court may not

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resolve hypothetical issues under the guise of a declaratory judgment, declaratory relief may be granted before actual injury or loss occurs. *UAW,* 295 Mich App at 495.

"The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Rose v State Farm Mut Auto Ins Co,* 274 Mich App 291, 294; 732 NW2d 160 (2006). "The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, to guide their future conduct and relations, and to preserve their legal rights." *Barrow v Detroit Election Comm,* 305 Mich App 649, 662; 854 NW2d 489 (2014).

Here, Plaintiff's original and amended verified complaints thoroughly pled and alleged that an "actual controversy" existed with respect to the "correct" date of the 2024 Presidential Primary Election. Even with the adjournment of the Michigan Legislature, an actual controversy clearly exists as a result of Defendant's public statements and actions of formally informing the general electorate and local election officials that the 2024 presidential primary election would be held in February 2024 rather than in March 2024, despite the fact that Public Act 2 of 2023 will **NOT go into effect until February 13, 2024**.

As noted, the ***current*** version of MCL 168.613a of Michigan Election Law, ***currently*** provides:

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> (1) **A statewide presidential primary election shall be conducted under this act on the second Tuesday in March in each presidential election year**.
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election shall be conducted under the provisions of this act that govern the conduct of general primary elections. (emphasis supplied).

As noted, MCL 168.613a(1) was amended with the enactment of Public Act 2 of 2023, which reads as follows:

> (1) **A statewide presidential primary election must be conducted under this act on February 27, 2024**, and on the fourth Tuesday in February in each presidential election year after 2024. (emphasis supplied).

However, Public Act 2 of 2023 was **NOT** given immediate effect. Rather, the effective date of Public Act 2 of 2023 is "*sine die*", which means Public Act 2 of 2023 does **NOT** become effective "until the 91st day after final adjournment of the 2023 Regular Session." (**See Public Act 2 of 2023 attached**). As noted, the Michigan Legislature adjourned effective November 14, 2023 at 12:00 p.m., which means Public Act 2 of 2023 will **NOT go into effect until February 13, 2024.**

This is problematic for the Defendant Secretary of State because the ballots for the 2024 Presidential Primary Election ***must*** be printed ***months prior*** to Public Act 2 of 2023 going into effect and thus, would require the Defendant Secretary of State to ***improperly*** enforce the provisions of Public Act 2 of 2023 ***before*** its effective date. Based upon ***current*** statutory deadlines to have the ballots, including overseas absentee ballots, printed timely for the 2024 Presidential

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primary election, local county election commissions would be required to print the ballots **before the 1st week of January 2024**.

However, "[i]t is axiomatic that a statute becomes ***operational only upon its effective date***." *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich. 1, 12; 740 NW2d 444 (2007). (emphasis supplied). Mich.Const.1963 "art. 4, §27 prevents this act from taking effect ***until ninety days after the adjournment of the Legislature which passed it***." *Frey v Dep't of Mgmt & Budget*, 429 Mich. 315, 340; 414 NW2d 873 (1987). (emphasis supplied).

Therefore, Defendant Secretary of State **cannot** enforce the provisions of Public Act 2 of 2023, which moves the date of the 2024 Presidential Primary Election to February 27, 2024, "until ninety days after the adjournment of the Legislature which passed it." *Frey*, 429 Mich. at 340. (emphasis supplied).

For example, under the ***current*** version of MCL 168.759(2) of Michigan Election Law, Plaintiff, as a duly registered voter of the state of Michigan, has the statutory right "at any time during the 75 days before an election, but not later than 8p.m. on the day of an election," to "apply for an absent voter ballot".

Additionally, MCL 168.759a(5) of Michigan Election Law requires that "not later than 45 days before an election, a county, city, or township clerk shall electronically transmit or mail as appropriate an absent voter ballot to each absent uniformed services voter or overseas voter who applied for an absent voter ballot 45 days or more before the election." Because Public Act 2 of 2023 is ***currently*** **NOT** in effect or operational, **none** of the statutory deadlines for absentee ballots set

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forth under MCL 168.759(2) and 168.759a(5) can be met and/or satisfied by the Defendant Secretary of State for a February 27, 2024 Presidential Primary Election date.

Moreover, MCL 168.648 of Michigan Election Law requires the Defendant Secretary of State, "at least 60 days and not more than 90 days preceding any regular state or district primary or election, shall send to the county clerk of each county a notice inwriting of such primary or election, specifying in such notice the federal, state, and district offices for which candidates are to be nominated or elected, as well as any constitutional amendments and questions to be submitted thereat."

The notice requirement under MCL 168.648 of Michigan Election Law also **cannot** be met for a February 27, 2024 Presidential Primary Election date because Public Act 2 of 2023 does **NOT** become **effective until February 13, 2024**. It would require the Defendant Secretary of State and local election officials to unlawfully enforce the provisions of Public Act 2 of 2023 prior to its effective date. However, as noted, "[i]t is axiomatic that a statute becomes ***operational only upon its effective date***." *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich. 1, 12; 740 NW2d 444 (2007). (emphasis supplied). Mich.Const.1963 "art. 4, §27 prevents this act from taking effect ***until ninety days after the adjournment of the Legislature which passed it***." *Frey v Dep't of Mgmt & Budget*, 429 Mich. 315, 340; 414 NW2d 873 (1987). (emphasis supplied).

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"As a single executive heading a principal department, the Secretary of State shall 'perform duties prescribed by law.' Const. 1963, art. 5, § 9." *Davis v Secretary of State*, 333 Mich.App. 588, ___; 963 NW2d 653, 658 (2020). Government officers "**are creatures of the law and are bound to obey it**." *United States v Lee*, 106 U.S. (16 Otto) 196, 220 (1882) (emphasis supplied). Here, the Defendant Secretary of State has a constitutional duty to only enforce those laws that are ***currently*** in effect.

The ***current*** version of MCL 168.613a(1), **which will remain in effect until February 13, 2024**, **MUST** be obeyed by the Defendant Secretary of State and the trial court's actions of sanctioning the premature enforcement of Public Act 2 of 2023 **cannot** be upheld. "Neither this Court nor the circuit court has authority to alter or amend the statutes enacted by the Legislature." *In re AST*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 362349), slip op at 3; see also *Charboneau v Beverly Enterprises, Inc*, 244 Mich App 33, 43; 625 NW2d 75 (2000) ("We are not a Legislature and not empowered to graft onto the statute a comprehensive scheme to accommodate a situation obviously not contemplated by the language that has been enacted.").

Mandamus Compelling Defendant Secretary of State To Hold 2024 Presidential Primary On March 12, 2024.

Count II of the ***original*** and ***amended*** verified complaints sought the entry of a writ of mandamus against the Defendant Secretary of State to compel the Defendant Secretary of State to enforce provisions of the ***current*** version of MCL

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168.613a of Michigan Election Law and compel the Defendant Secretary of State to schedule and hold the 2024 Presidential Primary Election on March 12, 2023.

Here, the Defendant Secretary of State has a constitutional duty to only enforce those laws that are ***currently*** in effect. Mandamus relates to the duties of public officials. *Vayda v County of Lake*, 321 Mich App 686, 700; 909 NW2d 874 (2017). Mandamus generally is a proper remedy to compel election-related duties. *Warren City Council v Buffa,* 333 Mich App 422, 435; 960 NW2d 166 (2020).

Whether a writ issues is within the discretion of the court. *Moore v Genesee Co,* 337 Mich App 723, 731; 976 NW2d 921 (2021). Specifically, plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Twp of Casco v Sec'y of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part).]

In a mandamus action, "a 'clear, legal right' is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget* (On Remand), __ Mich App __; __ NW2d __ (Docket No. 334663, issued December 22, 2022), slip op at 9 (citation omitted).

It is well-settled that "the bar for standing is lower when a case concerns election law[.]" *League of Women Voters of Mich. v. Secretary of State,* 506 Mich. 561, 587; 957 N.W.2d 731 (2020). As previously summarized by this Court:

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> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. *Deleeuw v. Bd. of State Canvassers,* 263 Mich. App. 497, 505-506, 688 N.W.2d 847 (2004). See also *Helmkamp v. Livonia City Council,* 160 Mich. App. 442, 445, 408 N.W.2d 470 (1987) ("[I]n the absence of a statute to the contrary, ... a private person ... may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public." [Quotation marks omitted.]). The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief. See *Citizens Protecting Michigan's Constitution* [*v. Secretary of State,* 280 Mich. App. 273, 282, 761 N.W.2d 210 (2008), aff'd in part 482 Mich. 960, 755 N.W.2d 157 (2008)] (permitting a ballot question committee to challenge a petition). [*Protect MI Constitution v. Secretary of State,* 297 Mich. App. 553, 566-567, 824 N.W.2d 299 (2012), rev'd on other grounds 492 Mich. 860, 819 N.W.2d 428 (2012) (first and second alterations in original).]

Thus, Plaintiff, as a duly registered voter of the state of Michigan, has standing to seek the proper enforcement of Michigan Election Law. Plaintiff, as a duly registered voter of the state of Michigan, has the constitutional and statutory legal right to seek the entry of a writ of mandamus to compel the Defendant Secretary of State to enforce the **current** version of MCL 168.613a of Michigan Election Law and to compel the Defendant Secretary of State to scheduled and hold the 2024 Presidential Primary Election on March 12, 2024.

"A clear legal duty is asserted to compel the enforcement of an act by a public official." *Warren City Council v Buffa,* ___Mich.App.___, ____; ____NW2d____ (2023)(Docket No.365488, issued April 21,2023), slip op at p 12, citing *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984).

The Defendant Secretary of State has a clear legal duty under the Mich.Const. 1963, art. 4, §27; art. 5, §9 to enforce the **current** version of MCL

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168.613a of Michigan Election Law and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Michigan Constitutional Government v Dep't of Technology, Mgmt, & Budget*, 508 Mich 48, 82; 972 NW2d 738 (2021) (quotation marks and citation omitted).

The duties of the Defendant Secretary of State under the **current** version of MCL 168.613a and Mich.Const.1963, art. 4, §27; art. 5, §9 are ministerial. And, lastly, Plaintiff has no other adequate remedy at law, other than the instant litigation, to compel the Defendant Secretary of State to enforce the provisions of the current version of MCL 168.613a and to schedule and hold the 2024 Presidential Primary Election on March 12, 2024.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant Robert Davis prays that this Honorable Court **VACATE** and **REVERSE** the portion of the trial court's November 14, 2023 opinion and order dismissing Counts I and II of Plaintiff's original and amended verified complaints as MOOT; **ENTER JUDGMENT** declaring that the ***current*** version of MCL 168.613a must be obeyed and enforced by the Defendant Secretary of State and further declare that the 2024 Presidential primary election must be held on March 12, 2024 in accordance with the ***current*** version of MCL 168.613a; **ENTER JUDGMENT** issuing a writ of

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mandamus compelling the Defendant Secretary of State to direct and advise local election officials to hold the 2024 Presidential primary election on March 12, 2024 in accordance with the ***current*** version of MCL 168.613a; and Plaintiff-Appellant further prays that this Honorable Court **GRANT** any other relief the Court deems necessary and appropriate pursuant to MCR 7.216(A)(7).

Dated: November 28, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro se*
Plaintiff-Appellant
PII MCL 15.243(1)(a)
[redacted], MI PII MCL 15.243(1)(
(313) 523-PII MCL 15.243

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this document. This brief uses **a 12-point proportional font** (Century Schoolbook), and **the word count for this brief is 5,542.**

Dated: November 28, 2023

Respectfully submitted,
/s/ROBERT DAVIS
ROBERT DAVIS, *Pro se*

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CERTIFICATE OF SERVICE

I, ROBERT DAVIS, certify that the foregoing document(s) was filed and served via the Court's electronic case filing and noticing system, MiFile, this 28th day of November, 2023, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

Dated: November 28, 2023

Respectfully submitted,

/s/ ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Plaintiff-Appellant
PII MCL 15.243(1)(a) [redacted], MI PII MCL 15.243(1)(
(313) 523 PII MCL 15.243(1

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Sent: 12/5/2023 10:28:36 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: New MI-relevant January 6 filing

Thanks, I just sent it to Mike. Will take a look.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
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Subject: New MI-relevant January 6 filing

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Hi Heather,

DPP MCL 15.243(1)(m)

Happy to discuss any questions you might have.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Heather S. Meingast, Division Chief
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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
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Thanks! Glad they didn't embrace the political question holding. **DPP MCL 15.243(1)(m)**

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Sent: Thursday, December 14, 2023 4:38:23 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Mich COA rules in LaBrant and Davis cases - affirmed

Hi Jonathan,

The opinion came out. The Court of Appeals affirmed for the most part but punted on political question doctrine.

Heather

Heather S. Meingast, Division Chief
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To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Mich COA rules in LaBrant and Davis cases - affirmed
Attachments: LaBrant & Davis (WCC) opinion.pdf

Importance: High

Hi Jonathan,

The opinion came out. The Court of Appeals affirmed for the most part but punted on political question doctrine.

Heather

Heather S. Meingast, Division Chief
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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DAVIS,

Plaintiff-Appellant,

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee

and

DONALD J. TRUMP,

Intervening Defendant-Appellee.

FOR PUBLICATION
December 14, 2023
9:35 a.m.

No. 368615
Wayne Circuit Court
LC No. 23-012484-AW

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

Plaintiffs-Appellants,

v

SECRETARY OF STATE,

Defendant-Appellee,

and

DONALD J. TRUMP,

Intervening Appellee.

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

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

In Docket No. 368615, plaintiff Robert Davis ("Davis"), as a registered voter, filed suit in the circuit court, asserting his intent to vote in the Republican primary and challenged the qualifications of former President Donald J. Trump ("Trump") to be placed on the ballot by defendant, the Wayne County Election Commission ("Commission"), and the resulting improper dilution of votes to other qualified candidates if emergency declaratory relief was not granted. Davis claimed that the United States Constitution and state election laws prevented Trump from being included on upcoming election ballots. The circuit court, assumed without deciding that Davis had standing, then determined that summary disposition was proper under MCR 2.116(C)(8) in favor of the Commission because it was not authorized to investigate the qualifications of a presidential candidate. In Docket No. 368628, Robert LaBrant, Andrew Bradway, Norah Murphy, and William Nowling ("plaintiffs") alleged that they were registered voters intending to vote in the 2024 presidential elections. In the Court of Claims, these plaintiffs filed suit against defendant Jocelyn Benson, Michigan's Secretary of State, also challenging Trump's qualification to be placed on the Michigan ballot in light of the United States Constitution and state election law. The Court of Claims denied the request for declaratory relief, deciding that state law determined the placement on an election ballot and that plaintiffs presented a political question that was not justiciable at that time. The actions were consolidated to advance the efficient administration of justice.[1] We address various arguments concerning the placement of Trump as a candidate on ballots for the upcoming 2024 Presidential Primary Election. The two lower courts, the Wayne Circuit Court, and the Court of Claims, rejected Davis's and plaintiffs' challenges in the underlying cases. We affirm in both cases.

I. FACTS

The background of these appeals lies in the United States Constitution. Section 3 of the Fourteenth Amendment of the United States Constitution, commonly referred to as the Insurrection Clause, states:

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

The crux of the cases before us involves Davis's and plaintiffs' claims that Trump engaged in insurrection and is thus subject to the disqualification under this section of the Fourteenth Amendment. The questions largely concern whether Trump may appear on the upcoming presidential primary ballot in Michigan. The underlying suits were brought by Davis and

[1] *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered November 22, 2023 (Docket Nos. 368615 and 368628).

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plaintiffs, registered voters, challenging Trump's qualifications to be placed on the ballot against defendants, the Wayne County Election Commission (the Commission) and the Secretary of State.

A. MICHIGAN ELECTION LAW

To put the present matters in context, there are multiple statutes that direct actions by county election commissions and the Secretary of State. These statutes emanate from Const 1963, art 2, § 4(2), which provides the Michigan Legislature with the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature has, in turn, enacted the Michigan Election Law, MCL 168.1 *et seq*. Relevant to this matter are several provisions concerning presidential primary elections, which are found in Chapter XXIV of the Michigan Election Law, MCL 168.531 *et seq*., and also MCL 168.689, a statute found in Chapter XXVIII of the Michigan Election Law, MCL 168.641 *et seq*., concerning the ballot preparation process by county election commissions.

MCL 168.614a explains the initial process for identifying candidates to be placed on presidential primary ballots:

> (1) Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a. The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.
>
> (2) Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. The secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.
>
> (3) After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.

MCL 168.615a(1) then explains the process for placing candidates on presidential primary ballots, a task given to the Secretary of State:

> Except as otherwise provided in this section, the secretary of state shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party. A presidential candidate notified by the secretary of state under

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> section 614a may file an affidavit with the secretary of state indicating his or her party preference if different than the party preference contained in the secretary of state notification and the secretary of state shall cause that presidential candidate's name to be printed on the appropriate presidential primary ballot for that political party. If the affidavit of a presidential candidate indicates that the candidate has no political party preference or indicates a political party preference for a political party other than a political party for which a presidential primary election will be held under section 613a, the secretary of state shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state specifically stating that "(candidate's name) is not a presidential candidate", and the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot. A presidential candidate shall file an affidavit described in this subsection with the secretary of state no later than 4 p.m. on the second Friday in December of the year before the presidential election year or the affidavit is considered void.[2]

The task of preparing and printing ballots for any state, district, or county election falls on county election commissions pursuant to MCL 168.689:

> The board of election commissioners of each county shall prepare the official ballots for use at any state, district or county election held therein, and shall have printed a sufficient number of ballots containing the names of all candidates properly certified to said board of election commissioners, and ballots for all proposed constitutional amendments or other questions to be submitted at such election to supply each election precinct in such county with a sufficient number for such precinct, and not less than 25% more than the total number of votes cast therein at the corresponding election held 4 years previous for the office which received the greatest number of votes.

B. THE LOWER COURT CASES

As noted, two underlying cases are now before us. Again, Docket No. 368615 arises out of a complaint filed by plaintiff, Robert Davis, in Wayne Circuit Court. This complaint, which named only the Commission as a defendant,[3] explained that Davis had requested that the Secretary of State issue a declaratory ruling deciding whether Trump was disqualified from appearing on the presidential primary ballot because he was allegedly disqualified under the Insurrection Clause. The complaint alleges that the Secretary of State had refused the request because the Secretary of State did not believe she had authority to make such a determination. Davis's complaint generally sought a declaration that, in the event the Secretary of State did certify Trump as a candidate for

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[2] While not relevant to these appeals, MCL 168.615a(2) also provides a process for those not included as potential candidates under MCL 168.614a to appear on the presidential primary ballot via nominating petitions.

[3] The circuit court allowed Trump to intervene as a defendant in the matter.

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the upcoming primary election, the Commission had a statutory duty under MCL 168.689 to "determine and declare" whether presidential candidates, including Trump, are disqualified from running for or holding office under the Insurrection Clause. Davis asked that the circuit court further enjoin the Commission from "printing any ballots for the 2024 Presidential Primary Election containing the name of any presidential candidate" whom it found disqualified under the Insurrection Clause. In other words, in the event the Secretary of State continued to refuse to determine whether Trump was disqualified under the Insurrection Clause, Davis asked that the Commission make that determination itself, and requested an order compelling the Commission to do so.[4] The Wayne Circuit Court granted summary disposition and denied the requested declaratory relief, concluding that the Commission had no such authority.

In the Court of Claims, plaintiffs Robert LaBrant, Andrew Bradway, Norah Murphy, and William Nowling filed suit seeking declaratory and injunctive relief against the Secretary of State. The complaint filed in that court contains voluminous allegations concerning Trump's actions before the 2020 Presidential Election, during the time between that election and January 6, 2021, and on January 6, 2021 itself. The complaint alleges that as a result of his actions, Trump "engaged in insurrection," and that as he had previously sworn an oath to support the Constitution of the United States on January 20, 2017, the date he was sworn in as the 45th President of the United States, and that Trump was "disqualified from holding 'any office, civil or military, under the United States.' " The complaint further alleges that Congress had not removed this disability, and that the office of President of the United States was an "office" contemplated by the Insurrection Clause. "Consequently, Donald J. Trump is disqualified from, and ineligible to hold, the office of President of the United States."

The complaint then addresses the Secretary of State's alleged errors. Plaintiffs explained that they, too, had requested the Secretary of State to exclude Trump from both the primary and general election ballots for the reasons explained. But the Secretary of State declined, taking the position that it was not the role of the Secretary of State to make such a determination. The complaint alleges that, contrary to the Secretary of State's position, the Secretary of State had "both the authority and responsibility to determine whether" Trump was eligible to appear on the primary and general election ballots pursuant to MCL 168.614a(1).

Count I of the complaint seeks relief in the form of a declaration that "Trump is disqualified by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot, and has no legal right to appear on that ballot. Plaintiffs are entitled to declaratory judgment to preserve their right to have only eligible presidential candidates on the ballot." Count II of the complaint seeks a permanent injunction against the Secretary of State, enjoining her from placing Trump on either the primary or general election ballots. In their request for relief, plaintiffs sought the following: (1) a declaration "that Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;" (2) a permanent injunction "enjoining the

[4] The complaint does not request that the circuit court itself make any determination regarding whether Trump was disqualified under the Insurrection Clause, a point Davis makes clear on appeal.

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Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election;" and (3) a permanent injunction "enjoining the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024, general election as a candidate for the office of President of the United States[.]"

The Court of Claims denied the requested relief without reaching the question whether Trump was disqualified by the Insurrection Clause. Rather, the Court of Claims held that Const 1963, art 2, § 4, MCL 168.614a, and MCL 168.615a direct the actions of the Secretary of State relevant to this matter. Relying on a decision of the Minnesota Supreme Court, which considered a similar challenge in that state, the Court of Claims explained that the presidential primary election is administered by the Secretary of State pursuant to MCL 168.614a and MCL 168.615a, but that the overall function of the primary election was to assist the political parties "in determining their respective presidential candidates . . . ." The Legislature had not crafted any specific prohibitions regarding whom could be placed on primary ballots, "irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected." Further, the number of steps involved in becoming a party's candidate for President, along with the fact that any such candidate would also have to win the general election, showed that "declaratory relief is not proper, at least at this time." And, the Court of Claims explained, even if Trump were to win the general election, Congress could remove any disability that might be created by the Insurrection Clause. The Court of Claims concluded: "Whether former President Trump even becomes the President-elect is such a future event that plaintiffs cannot demonstrate that their request for a declaratory judgment is ripe at this time."

As a separate, additional reason for concluding that "plaintiffs cannot receive the relief of preventing former President Trump from being placed on the primary ballot,"[5] the Court of Claims held that the case presented a nonjusticiable political question. The Court applied the six factors from *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 663 (1962), and concluded that it would be inappropriate for a judicial officer to determine whether Trump was disqualified from holding office under the Insurrection Clause. The Court of Claims held that, given the nature and number of questions that would need to be answered in order to determine whether Trump was disqualified, coupled with the fact that Congress could remove any such disability, it would be inappropriate for a single judicial officer to decide whether Trump was disqualified from holding office under the Insurrection Clause.

Davis filed his claim of appeal from the Wayne Circuit Court's decision on November 14, 2023, and the following day, the plaintiffs filed their claim of appeal from the Court of Claims decision.[6] This Court expedited both appeals and consolidated them on motion, and further

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[5] While the Court of Claims specifically referenced the presidential primary ballot, we perceive no reason why the Court of Claims' decision would not apply equally to plaintiffs' claims concerning the general election ballot or beyond.

[6] The plaintiffs to the Court of Claims matter also filed a bypass application in the Supreme Court, requesting that the Supreme Court review the matter before a decision by this Court pursuant to MCR 7.305(C)(1). On December 6, 2023, the Supreme Court denied the bypass application

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directed that the appeals be submitted on December 8, 2023, to this panel, without oral arguments. *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered November 22, 2023 (Docket Nos. 368615 and 368628). This Court has also permitted the filing of several amicus briefs.[7]

With this background in mind, we address the matters currently before this Court.

II. DOCKET NO. 368615 (WAYNE CIRCUIT COURT)

In Docket No. 368615, Davis appeals as of right a November 13, 2023 opinion and order which concludes that the Commission does not possess authority under the relevant statutes to investigate Trump's potential disqualification under Section 3 of the Fourteenth Amendment. Finding no error warranting reversal, we affirm.

A. STANDARD OF REVIEW

The circuit court decided the matter on summary disposition, granting summary disposition pursuant to MCR 2.116(C)(8). We review de novo a trial court's ruling on summary disposition. *Bailey v Antrim Co*, 341 Mich App 411, 421; 990 NW2d 372 (2022). As explained in *Bailey*:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*Id.* (quotation and italics omitted).]

As the matter ultimately concerns a request for certain declaratory rulings, we note that questions of law relevant to a request for a declaratory judgment are reviewed de novo, while the decision whether to grant declaratory relief is reviewed for an abuse of discretion. *Reed-Pratt v Detroit City Clerk*, 339 Mich App 510, 516; 984 NW2d 794 (2021).[8] Questions of statutory interpretation

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"because the Court [was] not persuaded that the questions presented should be reviewed by th[e] Court before consideration by the Court of Appeals." *LaBrant v Secretary of State*, ___ Mich ___ (2023) (Docket No. 166373).

[7] *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered December 4, 2023 (Docket Nos. 368615; 368628); *Davis v Wayne Co Election Comm*, unpublished orders of the Court of Appeals, entered December 8, 2023 (Docket Nos. 368615; 368628); *Davis v Wayne Co Election Comm*, unpublished orders of the Court of Appeals, entered December 12, 2023 (Docket Nos. 368615; 368628).

[8] Any factual findings underlying a decision whether to grant declaratory relief are reviewed for clear error on appeal. *Reed-Pratt*, 339 Mich App at 516. However, in this case, the questions are purely legal questions of statutory interpretation, and the motion was decided pursuant to MCR 2.116(C)(8), where all factual allegations stated in the complaint are accepted as true. There are thus no relevant factual determinations by the circuit court for this Court to review.

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are questions of law that we review de novo on appeal. *Moore v Genesee Co*, 337 Mich App 723, 727; 976 NW2d 921 (2021).

B. ANALYSIS

1. DUTY TO AUTHORIZE THE PRINTING OF BALLOTS

Davis first argues that the trial court erred to the extent that it has held that the Commission does not have the right to authorize the printing of ballots for the presidential primary election. This argument arises from the following statements, contained in the final page of the circuit court's opinion, addressing one of Davis's requests for a declaration:

> [Davis] asks the Court to "[e]nter a declaratory judgment declaring that pursuant to MCL 168.689, Defendant Wayne County Election Commission has a statutory duty to authorize the printing of the official ballots for the 2024 Presidential Primary Election." Notably, MCL 168.689 does not specifically address the preparation and printing of primary election ballots, which are addressed in Michigan Election Law Chapter XXIV. Regardless, to the extent [Davis] seeks a declaratory judgment imposing legal duties on the Election Commission under MCL 168.689 beyond the scope of the plain language of that statute, he has failed to state a claim for which relief may be granted.

Davis takes issue with the second sentence of this passage. He contends it means that the Commission does not, in fact, have the duty to authorize the printing of ballots for the upcoming presidential primary election.

As a general premise, it is true that MCL 168.689 authorizes, indeed requires, the Commission to do what the statute states: "prepare the official ballots for use" in Wayne County, and to "have printed a sufficient number of ballots containing the names of all candidates properly certified to said board of election commissioners," for "use at any state, district or county election held therein . . . ." There is no doubt that the upcoming presidential primary elections will be a state election. See MCL 168.2(g) (defining "election" as "an election or primary election at which the electors of this state or of a subdivision of this state choose or nominate by ballot an individual for public office . . ."); MCL 168.7 (defining the terms "primary" or "primary election" as "a primary election held for the purpose of deciding by ballot who shall be the nominee for the offices named in this act, or for the election by ballot of delegates to political conventions"). See also *Barrow v Detroit Election Comm*, 305 Mich App 649, 671; 854 NW2d 489 (2014) ("It is well established that it is the province of the election commission, not the city clerk, to approve and furnish the ballots to be used in an election").

However, we differ from Davis on the meaning of the circuit court's decision. The circuit court quotes verbatim from Davis's complaint on one form of the relief he seeks: a "declaratory judgment declaring that pursuant to MCL 168.689, Defendant Wayne County Election Commission has a statutory duty to authorize the printing of the official ballots for the 2024 Presidential Primary Election." The circuit court notes, correctly, that MCL 168.689 does not *itself* specifically reference primary election ballots. Rather, it is a general statute that, by its terms, applies to "any state, district or county election held therein . . . ." MCL 168.689. And, as the

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circuit court correctly explains, Chapter XXIV of the Michigan Election Law governs the processes for primary elections. The circuit court's analysis is accurate. It is not reasonable to read the circuit court's opinion as a holding that the Commission does not have a duty to print the presidential primary ballots for Wayne County.

But the court correctly notes that MCL 168.689 does not *itself* specifically discuss the preparation or printing of ballots for the presidential primary election. In other words, MCL 168.689 does not impose any duties concerning presidential primary elections that are different than the duties that are generally imposed for *all* elections contemplated by MCL 168.689. Beyond that, the court simply explains the obvious: that to the extent Davis sought a declaration that would impose duties that cannot be found in the plain language of MCL 168.689, he was not entitled to any such declaration. We fully agree with this assessment. "This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Barrow*, 305 Mich App at 663 (quotation marks and citation omitted). And, there is no indication that the Commission has any intent to refuse to prepare or have printed a sufficient number of ballots for the election, as is required by MCL 168.689. We find no error warranting reversal stemming from this portion of the circuit court's decision.

2. WHETHER THE COMPLAINT ALLEGES A CLAIM FOR DECLARATORY RELIEF

Davis's second argument is that his complaint states a cognizable claim for declaratory relief, and thus, it was error for the circuit court to grant summary disposition under MCR 2.116(C)(8). Generally, Davis argues that he has standing to bring such a claim because, the Wayne County Election Commission has a duty to independently determine whether presidential candidates are "properly" certified by the Secretary of State under MCL 168.689. He argues that his complaint adequately pleads the existence of an actual controversy sufficient to support a request for declaratory relief. Again, Davis misunderstands the circuit court's decision.

On this point, the circuit court's decision provided:

> In sum, under the plain language of MCL 168.689 and MCL 168.567, the Election Commission does not have the authority to investigate a presidential candidate's possible disqualification under Section 3 of the Fourteenth Amendment, or remove the name of a presidential candidate certified by the Secretary of State unless otherwise ordered by a court. Accordingly, Plaintiff's complaint for a declaratory judgment that the Election Commission has a statutory legal duty to undertake the aforementioned actions fails to state a claim for which relief may be granted, and he has failed to establish that he is entitled to an injunction that prevents the Election Commission from printing any ballots for the 2024 presidential primary election containing the name of anyone deemed disqualified under Section 3 of the Fourteenth Amendment.

The circuit court did not hold that Davis lacked standing to seek a declaration. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) ("[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment"). Nor did the circuit court, as Davis seems to suggest, hold that the

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controversy was not sufficiently ripe for Davis to seek a declaration. See *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006) ("The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants"). In fact, the circuit court specifically expressed that it did have jurisdiction over the complaint because the case was brought against local officials, seeking a declaratory judgment, which the court had the power to render under MCR 2.605.

The question decided below was whether Davis is entitled to the relief he seeks. The circuit court ultimately held that the Commission lacks authority to independently decide whether Trump or any other candidate is disqualified from the office of President of the United States under the Insurrection Clause, and that as such, Davis is not entitled to the relief sought in the complaint. For reasons discussed in the next section, we find no error in the circuit court's resolution of that question.[9]

3. THE ELECTION COMMISSION'S PURPORTED DUTY TO DETERMINE WHETHER TRUMP IS DISQUALIFIED UNDER THE INSURRECTION CLAUSE

The primary focus of Davis's circuit court action, and of his appeal, is whether the Commission has a duty, imposed by MCL 168.689, to determine whether Trump is disqualified from holding the office of President of the United States by Section 3 of the Fourteenth Amendment, and on that basis, then refuse to place his name on the primary ballot. Davis also suggests that MCL 168.567 could be a source from which to derive such authority.[10] Again finding no errors warranting relief, we affirm the circuit court's decision in this regard.

Davis's complaint argues that if the Secretary of State does place Trump on the ballot for the upcoming presidential primary election, the Commission must nonetheless independently determine whether Trump is disqualified under the Insurrection Clause and then refuse to authorize the printing of ballots including his name as a candidate if it determines that Trump is disqualified. Davis primarily relies on MCL 168.689, and in particular, the phrase "properly certified" in the statute:

> The board of election commissioners of each county shall prepare the official ballots for use at any state, district or county election held therein, and shall have

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[9] In his brief on appeal, Davis seems to argue that he is entitled to a declaration that the Commission has a duty to prepare and print the ballots—i.e., the question addressed in part II(B)(2) of this opinion. That basic duty was never in dispute, however. Thus, on this particular issue, there is no actual controversy, and thus, no ability to grant declaratory relief. MCR 2.605(A)(1).

[10] In the circuit court, Davis suggested that another source of authority to undertake such an investigation could be derived from 1963 Const, art 11, § 1, which requires the taking of an oath to support the Constitution of the United States. The circuit court rejected this challenge, and Davis has not raised the issue on appeal. It has thus been abandoned. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

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> printed a sufficient number of ballots containing the names of all candidates *properly certified* to said board of election commissioners, and ballots for all proposed constitutional amendments or other questions to be submitted at such election to supply each election precinct in such county with a sufficient number for such precinct, and not less than 25% more than the total number of votes cast therein at the corresponding election held 4 years previous for the office which received the greatest number of votes. [MCL 168.689 (emphasis added).]

We have previously addressed the meaning of the phrase, "properly certified," and whether it permits a county election commission to make an independent determination regarding whether a ballot question or candidate was "properly" certified. In *Southeastern Mich Fair Budget Coalition v Killeen*, 153 Mich App 370; 395 NW2d 325 (1986), the question was whether resolutions adopted by the Detroit City Council and certified for inclusion on an upcoming election ballot by the city clerk would appear on the ballot. The questions certified by the city clerk were advisory questions (i.e., questions asking the voters for advice about how the City Council should proceed in certain matters). *Id.* at 375-376. On the advice of counsel, the Board of Commissioners refused to place those questions on the ballot, believing that there was "no constitutional or statutory authority for placing the resolutions on the state general election ballot." *Id.* at 376.

The first question this Court answered was whether the Board of Commissioners had authority to refuse to place on the ballot an item that had been certified by the official authorized to make that certification. This Court examined MCL 168.689, and in particular, the phrase, "properly certified," to conclude that the Board of Commissioners had the authority to determine not only whether a candidate, constitutional amendment, or ballot question had been certified, but also whether any of those had been *properly* certified. *Id.* at 377-378. "Accordingly, where it is apparent to the board of county election commissioners that the question is not entitled to placement on the ballot, it may refuse to place it thereon and leave the certifying body to its legal recourse. We interpret 'properly' in this context to mean that the election commissioners are required to determine that, on its face, the question is entitled to placement on the ballot." *Id.* at 378.

The second question addressed by this Court was whether the advisory questions were, in fact, entitled to placement on the ballot. This Court first held that the questions posed were clearly advisory. *Id.* at 378. And, "they are advisory questions in the areas of federal military intervention in Central America and federal military spending, with respect to which the city council has no power to act officially." *Id.* at 378-379. This Court explained that, while no constitutional or statutory authority explicitly prohibited advisory questions, nothing in the relevant statutes represented the Legislature's authorization "to spend public funds in a straw vote in an area entirely outside the powers of the city council . . . ." *Id.* at 382. While an advisory question concerning an area in which the city council had authority to act might be proper, advisory questions concerning topics that clearly fell outside the scope of the city council's powers were not. *Id.* at 382-384. Thus, while advisory questions might be properly placed on the ballot as a general matter, the particular questions at issue could not be placed on the ballot. *Id.* at 384.

Davis argues that the trial court was compelled to follow *Southeastern Mich Fair Budget Coalition*, and particularly, its interpretation of the phrase "properly certified" in MCL 168.689. But there is no indication that the circuit court failed to do so. Indeed, the circuit court's decision

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cites and discusses the case, treating it as binding authority. And, the circuit court's ultimate holding is that the questions involved in the present matter do not involve the type of "facial" review contemplated by *Southeastern Mich Fair Budget Coalition*.[11]

There is no support for Davis's contention that the Wayne County Election Commission is authorized to independently determine whether Trump is disqualified under the Insurrection Clause and then refuse to authorize ballots including him as a candidate on that basis. Pursuant to *Southeastern Mich Fair Budget Coalition*, the duty at issue here is to "determine that, on its face, the [candidate] is entitled to placement on the ballot." *Southeastern Mich Fair Budget Coalition*, 153 Mich App at 378. This Court has implied that a "facial" review amounts to a ministerial review. See *Berry v Garrett*, 316 Mich App 37, 45; 890 NW2d 882 (2016) ("Rather, by doing nothing more than the ministerial task of completing a facial review of the affidavits [of identity], defendants would undertake to perform their clear legal duty under § 558(4) to 'not certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply' with § 558(2)"). And in *Southeastern Mich Fair Budget Coalition*, the review at issue was a purely legal matter, concerning the scope of the City Council's authority. *Southeastern Mich Fair Budget Coalition*, 153 Mich App at 382-384. The review in that case required no fact-finding and no investigation; it simply amounted to reviewing the proposed ballot questions and determining whether those questions were of a sort that were eligible to be placed on the ballot.

Here, in contrast to that case, Davis would have the Commission determine whether Trump is disqualified by the United States Constitution from holding the office of President of the United States, based on evidence that Davis states he plans to submit to the Commission, but which he has not clearly identified or made part of the record, that he believes proves that Trump engaged in acts of insurrection. Presumably, were this to take place, the Commission would act as both a fact-finder, tasked with reviewing whatever evidence Davis presents, requiring a factual determination regarding what that evidence shows,[12] while acting as constitutional law scholars, tasked with interpreting and applying a provision of the Fourteenth Amendment to the United

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[11] This Court is not bound to follow *Southeastern Mich Fair Budget Coalition*, given that it was decided before November 1, 1990. MCR 7.215(J)(1). But, we have held that, while this Court is not strictly obligated to follow "uncontradicted opinions from this Court decided before November 1, 1990," such decisions are "nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018). In this matter, we decline to expressly endorse the meaning ascribed to MCL 168.689 stated in *Southeastern Mich Fair Budget Coalition*. We need not decide whether that interpretation was correct because, for reasons to be explained, applying that interpretation of the statute ends with the conclusion that the Commission does not have a duty to investigate or determine whether Trump is disqualified from holding office under the Insurrection Clause.

[12] Whether Davis envisions any other party being able to submit evidence before the Commission is unclear. That, of course, could raise questions regarding the due process rights of those affected by any decision.

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States Constitution, the meaning of which is subject to significant debate. As the circuit court explained, the type of review Davis envisions would go far beyond the "face" of the matter.[13]

Davis also suggests that the authority to conduct such a review could be derived from MCL 168.567. This statute states: "The boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk." Davis cites *Berry* as support. That case, however, shows that the function of MCL 168.567 is not to authorize the type of investigation into the qualifications of a presidential candidate by a county election commission that Davis seeks. In *Berry*, this Court addressed a challenge to affidavits of identity filed by candidates for township trustee and township supervisor. *Berry*, 316 Mich App at 40. Both failed to state in their affidavits of identity their precinct number, a requirement stated in MCL 168.558(2). *Berry*, 316 Mich App at 40. This Court explained that under MCL 168.558(4), the defendants had a clear legal duty " 'not to certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply' with the requirement, under § 558(2), of duly including the precinct number where the candidate was registered to vote." *Berry*, 316 Mich App at 44, quoting MCL 168.558(4). This Court explained that because the defendants had failed to comply with their clear legal duty under MCL 168.558(4), they then had a clear legal duty to correct "such errors as may be found in the resulting, improper ballots" under MCL 168.567. *Berry*, 316 Mich App at 44.

In other words, MCL 168.567 is a mechanism by which boards of election commissioners must correct errors in ballots that are later found. Nothing in the plain language of the statute suggests or implies that it creates a duty to investigate a highly fact-intensive matter of constitutional law such as is presented by the instant case. Neither does MCL 168.689. And, as will be explained next in further detail in the following sections of this opinion, by placing Trump on the presidential primary ballot, the Secretary of State would be following her statutory mandates. Thus, there is no potential error to be corrected under MCL 168.567.

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[13] We note that in a suit filed in the state of Colorado, a trial court, after a five-day trial, concluded that Trump did engage in acts of insurrection. *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued November 17, 2023. Even so, that court declined to hold that Trump was disqualified from holding the office of President of the United States, concluding that the Insurrection Clause did not apply to the office of President of the United States. *Id.* The court's 102-page decision is currently on appeal to the Colorado Supreme Court.

We discuss this decision not because it binds this Court in any fashion, nor do we seek to express any opinion regarding whether the Colorado trial court's factual or legal conclusions were correct. Rather, we note this decision because it provides some context for the degree of review and types of determinations that would seem necessary before one could even begin to answer the question that Davis wishes to have the Commission answer in a purported "facial" review under MCL 168.689. And, one Justice of the Michigan Supreme Court has also indicated that, in order to resolve the issue, a substantial evidentiary hearing would be required. *LaBrant v Secretary of State*, ___ Mich ___ (2023) (Docket No. 166373) (WELCH, J., dissenting).

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Finding no errors in the decision of the Wayne Circuit Court, in Docket No. 368615, we affirm.

III. DOCKET NO. 368628 (COURT OF CLAIMS)

In Docket No. 368628, plaintiffs LaBrant, Bradway, Murphy, and Nowling appeal the Court of Claims order which denied these plaintiffs' request for declaratory and injunctive relief. We affirm.[14]

A. WHETHER TRUMP IS DISQUALIFIED UNDER THE INSURRECTION CLAUSE

First, plaintiffs assert that Trump is, in fact, disqualified from holding the office of President of the United States pursuant to the Insurrection Clause. Generally, they argue that the clause applies to the office of President of the United States, and that under the definition of "insurrection" plaintiffs would apply, Trump engaged in insurrection. They further argue that Trump's words and actions are not protected by the First Amendment. Plaintiffs add that the Insurrection Clause is self-executing and may be enforced by the judiciary. Multiple amici curiae briefs concerning these topics have also been filed.

The Court of Claims declined to reach any of these questions, instead deciding the matter on other grounds. We too decline to reach these issues because, given our analysis in the next section of this opinion, it is unnecessary to make any determinations regarding whether Trump engaged in insurrection or is actually disqualified from holding the office of President of the United States by the Fourteenth Amendment, at least at this time. See *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 527; 656 NW2d 212 (2002)("We will not reach constitutional issues if cases may be resolved on other grounds.").

B. RIPENESS AND RELATED ISSUES

Second, plaintiffs contend that the Court of Claims incorrectly held that the Secretary of State and political parties alone determine which individuals appear on the presidential primary ballot. Plaintiffs assert that voters in Michigan have a right to have only eligible candidates appear on ballots, and to raise eligibility challenges in the courts. They also argue that the matter is ripe, contrary to the Court of Claims' decision, because plaintiffs challenge Trump's placement on the ballot for the presidential primary election, an election that is only months away.

As this Court explained in *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545-546; 904 NW2d 192 (2017):

> MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other

[14] The standards of review applicable to this appeal are largely those identified in Section II(A) of this opinion. Other standards of review applicable to the Court of Claims' matter will be noted as relevant.

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legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion. *PT Today, Inc v Comm'r of Office Fin & Ins Servs*, 270 Mich App 110, 126; 715 NW2d 398 (2006).

When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). Thus, "the existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *PT Today, Inc*, 270 Mich App at 127. An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588–589; 267 NW2d 72 (1978). "It is not necessary that 'actual injuries or losses have occurred'; rather than 'plaintiffs plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised.' " *Kircher v City of Ypsilanti*, 269 Mich App 224, 227; 712 NW2d 738 (2005), quoting *Shavers*, 402 Mich at 589.

"MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). The "actual controversy" requirement "prevents a court from deciding hypothetical issues." *Id.* And that is the core concern addressed by the ripeness doctrine. "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. *A claim that rests on contingent future events is not ripe.*" *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013) (quotation marks and citations omitted; emphasis added). "Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern." *Id.* (quotation marks and citation omitted). Questions concerning ripeness are reviewed de novo on appeal. *Id.*

We begin by analyzing Michigan's statutory framework as it pertains to presidential primary elections. First, and as the Court of Claims explained, Michigan's statutory scheme makes clear that the Secretary of State's role in the context of presidential primary elections is limited. Only one portion of MCL 168.614a gives the Secretary of State a role in making any decisions at all. This statute begins by directing the Secretary of State to publish a list of individuals generally advocated by the national news media as potential presidential candidates. MCL 168.614a(1). Which sources to review (i.e., exactly what sources represent the "national news media") is not defined, and thus, it appears that the Secretary of State has some discretion to decide from which sources this list should be drawn.

But after that, the Secretary of State's actions are purely administrative. The chairperson of each political party ultimately identifies which candidates are to be placed on the primary ballot, and does so by filing a list of such candidates with the Secretary of State. MCL 168.614a(2). The Secretary of State then publishes that list on the internet. MCL 168.614a(2). The statute gives the Secretary of State no discretion or authority to alter that list, either by adding or removing candidates. Rather, the Secretary of State "*shall* make lists received under this subsection available

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to the public on an internet website maintained by the department of state." MCL 168.614a(2) (emphasis added). As is widely understood, the term "shall" represents a mandatory, and not discretionary, directive. See, e.g., *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 64; 968 NW2d 251 (2021) ("The term 'shall' indicates that conduct is mandatory").

The Secretary of State's next task is that she "shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election." MCL 168.614a(3). Again, there is no discretion, and no decisions to be made. Given the use of the word "shall," if an individual is included on a list of potential candidates filed by a party chairperson, the Secretary of State must provide this notification.

MCL 168.615a then explains the process for placing candidates on the presidential primary ballots. This statute, which is quoted in full at the outset of this opinion, begins with the sentence: "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party." MCL 168.615a(1) (emphasis added). Again, there is no discretion or indication of any decision-making authority. The statute goes on to explain that a notified presidential candidate may file an affidavit stating a different party affiliation, and directs that the Secretary of State "shall" then print that candidate's name on the appropriate primary ballot for that political party. MCL 168.615a(1). Or, if the presidential candidate files an affidavit that states they have no party affiliation, or that their party affiliation is with a party for which a primary will not be held, then the Secretary of State "shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election." MCL 168.615a(1). And, if the presidential candidate files an affidavit with the Secretary of State stating that they are not a presidential candidate, the Secretary of State "shall not have that presidential candidate's name printed on a presidential primary ballot." MCL 168.615a(1).

As is clear from the above, the Secretary of State's role in presidential primary elections is chiefly that of an administrator. In particular, when it comes to who is or is not placed on the primary ballot, the statutory scheme leaves nothing to the Secretary of State's discretion. As the Court of Claims explained, who to place on the primary ballot is determined by the political parties and the individual candidates.[15]

The Court of Claims relied on the Minnesota Supreme Court's resolution of a similar case in *Growe v Simon*, 997 NW2d 81 (Minn, 2023). There, the court determined that any claim regarding Trump's placement on the general election ballot was not ripe. But the court held that the petitioners' claim *was* ripe to the extent it asked the court to hold that Trump could not appear on the primary election ballot. *Id.* at 82. The court then explained that, with respect to this one ripe question, there was no potential error to correct:

> With respect to the only ripe issue before us at this time, we conclude that under section 204B.44, there is no "error" to correct here as to the presidential

[15] The only exception of sorts is that individuals who are not placed on the ballot as part of this process may, by a nominating petition process, gain access to the primary ballot. MCL 168.615a(2). But that process is not implicated here.

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> primary election if former President Trump's name is included on the presidential primary ballot after the Chair of the Republican Party of Minnesota provides his name to the Secretary of State, notwithstanding petitioners' claim that former President Trump is disqualified from holding office under Section 3 of the Fourteenth Amendment. The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn Stat § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 NW2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, 997 NW2d at 82-83.]

The *Growe* court's final paragraph explains:

> Because there is no error to correct here as to the presidential nomination primary, and petitioners' other claims regarding the general election are not ripe, the petition must be dismissed, but without prejudice as to petitioners bringing a petition raising their claims as to the general election. [*Growe*, 997 NW2d at 83.]

In this case, the Court of Claims held that as to the general election, the issue is not ripe, and we agree. Before Trump becomes a candidate in the general election, he would first have to prevail in the nationwide primary process, and then be nominated as the Republican Party's candidate for that office at the Republican National Convention. Given the very nature of those processes, the outcome at either of those steps is unknown at this time. To the extent plaintiffs seek an injunction prohibiting the Secretary of State from placing Trump on the general election ballot, the claim is not ripe for adjudication. *King*, 303 Mich App at 188.

Plaintiffs argue that their request for declaratory relief is ripe, and that the Court of Claims' ripeness analysis is flawed, because it mischaracterizes the complaint. According to plaintiffs, "they challenge Trump's eligibility to appear on the *primary election* ballot, now less than three months away . . . ." Thus, plaintiffs contend that the Court of Claims' speculation regarding

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whether Trump would win the primary election, become the Republican Party nominee, or win the general election is irrelevant. We disagree that the analysis as to the general election was irrelevant. Rather, the complaint specifically asks for an injunction prohibiting Trump from appearing on the general election ballot. As such, the Court of Claims did not mischaracterize the complaint or err by addressing that request.

We do agree with plaintiffs to the extent that they argue that their request for an injunction prohibiting the Secretary of State from placing Trump's name on the presidential primary ballot is ripe. While circumstances were different when this matter was filed, and when it was decided in the Court of Claims, at this point, absent judicial intervention of some sort, the Secretary of State will cause Trump's name to be placed on the presidential primary ballot, and that election will be held in the next few months.[16] This claim does not rest on contingencies or uncertainties; at this point in time, it rests on decided facts and the operation of certain statutes. But, like the Minnesota Supreme Court, we conclude that there is no error to be corrected concerning the presidential primary ballots because the Secretary of State must place Trump on this ballot, regardless of whether he would be disqualified from holding office by the Insurrection Clause.

As discussed previously, when it comes to Michigan's presidential primary, applicable statutes limit the Secretary of State's role to that of an administrator of what are internal party elections. There is virtually no discretion left to the Secretary of State in this process. The Secretary of State, rather, follows the directions of the political parties and the candidates themselves. The Secretary of State is *obligated* to place on the presidential ballot those individuals identified by the political parties, unless a candidate files an affidavit saying otherwise. MCL 168.615a(1). Nothing in this framework exhibits any decision-making to be had, at least by the Secretary of State. Michigan's statutes also contain no provisions that prohibit a candidate who is, or may be, disqualified from holding the office of President of the United States from appearing on the presidential primary ballot. In other words, nothing in the statutory framework prevents a political party from placing an individual on the presidential primary ballot who would be disqualified from holding the office, and nothing requires, or even implies, that the Secretary of State can refuse to place an individual on the presidential primary ballot for such reasons.

Contrast that with other areas in which the Legislature *has* incorporated eligibility requirements into Michigan law. See, e.g., MCL 168.51 (qualifications for the offices of Governor and Lieutenant Governor); MCL 168.71 (qualifications for the offices of Secretary of State and

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[16] The case was filed in late September 2023, before the Secretary of State published a list of individuals generally advocated in the national media as potential presidential candidates. But at this point, the Secretary of State has published that list, as well as the list of candidates identified by the political parties as candidates for President, which includes Trump. See <https://mielections.us/election/candlist/2024PPR_CANDLIST.html> (accessed December 14, 2023). The deadline for Trump to file an affidavit withdrawing his candidacy was Friday, December 8, 2023, at 4:00 p.m. See MCL 168.615a(1) (the date to file an affidavit to withdraw one's candidacy is by 4:00 p.m. on the second Friday in December—December 8, 2023, in this election cycle). Trump has not done so.

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Attorney General); MCL 168.91 (qualifications for the office of United States Senator); MCL 168.131 (qualifications to "be a Representative in Congress"); MCL 168.161 (qualifications for the offices of State Senator and Representative); and MCL 168.281 (qualifications for membership to the State Board of Education, Board of Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University). With each, there exists a mechanism for enforcement of these requirements before an election. Candidates for all of these offices, and many others, must file an affidavit of identity which includes a statement that the candidate "meets the constitutional and statutory qualifications for the office sought." MCL 168.558(1) and (2). And, pursuant to MCL 168.558(4), "An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section." Thus, candidates who file affidavits of identity containing false information are prohibited from appearing on the ballot. See *Reed-Pratt*, 339 Mich App at 517 (quotation marks and citation omitted) ("The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot"). This illustrates that when the Legislature wishes to require that election officers refuse to place ineligible candidates on the ballot, it has.

Yet, the Legislature has made plain that those seeking to run for the office of President of the United States are not required to file an affidavit of identity. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States"). The process for identifying presidential primary candidates stated in MCL 168.614a and MCL 168.615a likewise says nothing of a presidential primary candidate filing an affidavit of identity. As such, the enforcement mechanism of MCL 168.558(4) has no application. Rather, when it comes to the presidential primary election, the statutory framework is different. As explained, nothing in the statutory framework that controls the process for presidential primary elections confers any authority on the Secretary of State to make eligibility determinations or to refuse to place a candidate on that particular ballot based on an eligibility determination.

Plaintiffs argue that Michigan recognizes a "well-established right" held by the voters to have only eligible candidates appear on primary and general election ballots. Plaintiffs rely on *Barrow*, 301 Mich App at 404, and a number of other election cases that followed *Barrow*, as standing for this right.

We disagree. *Barrow* was a mandamus matter in which one candidate for mayor argued that another candidate for mayor was ineligible to appear on an August 2013 primary ballot. The eligibility challenge was based on residency requirements stated in the Detroit City Charter, and ultimately was controlled by the fact that the challenged candidate filed his nominating petitions ten days before the one-year anniversary of his registration as a voter in the City of Detroit. *Id.* at 407-409. In upholding the trial court's decision, this Court explained that it was "undisputed that defendants have the statutory duty to submit the names of the eligible candidates for the primary election, see MCL 168.323 and MCL 168.719." *Barrow*, 301 Mich App at 412. Thus, "[t]he inclusion or exclusion of a name on a ballot" was, in that case, "ministerial in nature," making mandamus a potentially appropriate remedy. *Id.* This Court reviewed the facts and the charter provisions at issue, and concluded that the candidate was ineligible to be placed on the

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ballot, as he was not a registered voter in the City of Detroit for a full year before filing to run for mayor. *Id.* at 417. This Court also addressed constitutional challenges made by the candidate, found those unavailing, and concluded that the candidate could not be placed on the ballot. *Id.* at 417-426.

Plaintiffs argue that *Barrow*, 301 Mich App at 412, stands for the proposition that voters have a "clear legal right . . . to have only eligible candidates on a primary election ballot." But *Barrow* does not stand for such a broad proposition. Rather, *Barrow* stands for the proposition that the defendant in that case, the Detroit Election Commission, had a clear legal duty, pursuant to statutes that do not control the outcome in this case, to place on the ballot only those candidates who were eligible to run in the mayoral primary race. For reasons explained previously, the statutes concerning the presidential primary contain no such right.

Plaintiffs cite other cases that have the same fault: *Berdy v Buffa*, 504 Mich 876 (2019) (concluding that some candidates were ineligible to run for city council under the local city charter, and thus, the city elections commission "had a clear legal duty to perform the ministerial act of removing the names of the challenged contestants from the ballots"); *Sheffield v Detroit City Clerk*, 337 Mich App 492; 976 NW2d 95 (2021), rev'd 508 Mich 851 (2021) (concerning whether the Detroit City Clerk was required to remove a proposal from an upcoming primary election on grounds that the proposed revised charter had not been approved by the Governor as required by MCL 117.22); *Burton-Harris v Wayne Co Clerk*, 337 Mich App 215; 976 NW2d 30 (2021), vacated in part, lv den in part 508 Mich 985 (2021) (concerning whether a candidate for county prosecutor made a false statement in an affidavit of identity and was thus precluded from appearing on the ballot pursuant to MCL 168.558(4)).[17] None of these cases involve the presidential primary or the statutes controlling that process, and they do not control the outcome in this matter.

Thus, we agree that plaintiffs' claims are not ripe to the extent they concern Trump's placement on the general election ballot, given all that must take place before that might occur. To the extent the claims concern the primary election ballot, while the claims may be ripe, there is no potential error. Even if Trump were disqualified from holding the office of President of the United States by the Insurrection Clause, nothing prevents the Michigan Republican Party from

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[17] We note that the Supreme Court's order in *Burton-Harris* vacated this Court's entire analysis except that portion considering whether the trial court had abused its discretion by denying a motion to intervene. *Burton-Harris v Wayne Co Clerk*, 508 Mich 985 (2021). Thus, any substantive statement potentially relevant to this matter that might be derived from this Court's decision in *Burton-Harris* was vacated. Indeed, the pages of this Court's decision cited by plaintiffs are found in Section IV of the opinion, a section that was specifically vacated by the Supreme Court. *Burton-Harris*, 508 Mich at 985. Similarly, where this Court's decision in *Sheffield* was reversed, albeit on the basis that MCL 117.22 did not grant the Governor "an unfettered veto in the charter revision process," *Sheffield v Detroit City Clerk*, 508 Mich 851; 962 NW2d 157, 159 (2021), this Court's statements in the majority opinion are perhaps of limited consequence. But even ignoring all that, the point is the same: these cases do not concern the presidential primary or the statutes controlling the administration of that election by the Secretary of State.

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identifying him as a candidate in the upcoming primary election. And, where the relevant statutes require the Secretary of State to place any candidate so identified on the presidential primary ballot, and confers no discretion to the Secretary of State to do otherwise, there is no error to correct.

Plaintiffs' complaint also requests a declaration that Trump is "disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States[.]" But a condition precedent to obtaining declaratory relief is the existence of an actual controversy, and where there is no actual controversy, there is no jurisdiction to grant declaratory relief. MCR 2.605(A); *Citizens for Common Sense in Gov't*, 243 Mich App at 55. An actual controversy exists where a declaratory judgment is needed to guide plaintiffs' future conduct, and requires plaintiffs to plead facts indicating an adverse interest necessitating the sharpening of the issues raised. *Van Buren Charter Twp*, 319 Mich App at 545.

As the Court of Claims recognized, it would be improper to decide whether to grant a declaration that Trump is disqualified from holding the office of President of the United States at this time. At the moment, the only event about to occur is the presidential primary election. But as explained, whether Trump is disqualified is irrelevant to his placement on that particular ballot. Thus, with respect to the presidential primary election, there is no actual controversy, as the only purported basis for removing Trump from the presidential primary ballot would not be a sufficient basis for removal of Trump's name from that ballot. Beyond that point in time, the request for a declaration that Trump is disqualified is not ripe. As explained, before Trump's potential disqualification from holding the office of President could become a relevant concern, he would minimally need to prevail in the primary process. That process has yet to begin, and whether Trump prevails in the primary process or becomes the Republican nominee for President are purely hypothetical questions at present. "[W]here the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't*, 243 Mich App at 55. With no actual controversy, the Court of Claims was without jurisdiction to issue a declaratory judgment.[18]

IV. CONCLUSION

In Docket No. 368615, we affirm the decision of the Wayne Circuit Court.

In Docket No. 368628, we affirm the decision of the Court of Claims.

A public question being involved, no costs may be taxed under MCR 7.219.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

[18] We need not, and do not, decide today at what point in the process such a claim would become ripe. It is enough to conclude that, given the current state of affairs, the request for declaratory relief stated in the complaint is not ripe. Similarly, we do not address the Court of Claims' conclusion that the question of whether Trump is disqualified by the Insurrection Clause is a nonjusticiable political question.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/17/2023 11:37:53 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: List maintenance letters--privileged
Attachments: NVRA MICHIGAN NOTICE OF VIOLATIONS.dotx; Michigan NVRA Letter.pdf

Here are the letters.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, December 15, 2023 1:34 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: List maintenance letters--privileged

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
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December 14, 2023

VIA USPS CERTIFIED MAIL AND EMAIL

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RE: Statutory Notice of Violations of 52 U.S.C. § 20507 in the state of Michigan

Dear Secretary Benson and Director Brater:

Please be advised that the America First Policy Institute ("AFPI"), through its Constitutional Litigation Partnership (CLP) Center, represents Frank Kozlowski, Mary Kozlowski, Nancy Hyde-Davis, Deanna Cypher, George Fisher, Jim Sanchez, and Barbara Bass, duly registered voters and citizens of the state of Michigan. They intend to vote for the U.S. President, U.S. Senate, U.S. House of Representatives, and for other offices and measures on the ballot in Michigan's 2024 federal elections. As Michigan voters with substantial interests in secure, free, and fair elections, they are writing with concerns about Michigan's voter registration rolls and list maintenance activities under the National Voter Registration Act ("NVRA").

As you are aware, the NVRA requires States to maintain an accurate and current voter registration roll for elections for federal office. 52 U.S.C. §20501(b)(4). Specifically, Section 8 of the NVRA obligates States to "conduct a general program that makes a reasonable effort to

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remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. 52 U.S.C. §20507(a)(4). And as the U.S. Supreme Court has recently confirmed, "federal law makes this removal mandatory." *See Husted v. A. Philip Randolph Institute,* 138 S. Ct. 1833, 1842 (2018).

In addition, the Help America Vote Act ("HAVA") mandates that States adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. 52 U.S.C. §21083(a)(2)(A). That is, States must "ensure that voter registration records in the State are accurate and are updated regularly," a process which must include making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* at §21083(a)(4). HAVA's list maintenance mandates also include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under State law due to felony conviction. *Id.* §21083(a)(2)(A)(ii)(I)-(II).

As the Secretary of State and Director of the Michigan Bureau of Elections, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA, for instance, requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. 52 U.S.C. §20509. Michigan law, to this end, designates the Secretary of State as the State's chief election officer, Mich. Comp. Laws §168.2,[1] and instructs the Director of Elections to "perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws." *Id.* at §*168.509n.* Michigan law further provides that "[t]he secretary of state is responsible for the coordination of the requirements imposed under this chapter, the national voter registration act of 1993, and the help America vote act of 2002." *Id.* at §168.509n. In addition, to ensure the accuracy and currency of official lists of eligible voters, Congress provided a public disclosure provision, which requires each State to make all records concerning the implementation of voter registration programs and activities available for public inspection. 52 U.S.C. §20507(i).

I. 27 Michigan counties have more registered active voters than voting-eligible citizens, and three have suspiciously high voter registration rates

Based on data gathered from the U.S. Census Bureau's 2022 American Community Survey of citizen voting age population, and the most up-to-date count of registered active voters available from the Michigan Secretary of State, Michigan has failed to meet its list maintenance obligations. Comparing the registered voter count to the Census Bureau Survey data reveals that the following counties in Michigan have suspiciously high voter registration rates (i.e., the

[1] As the chief election official for Michigan, the responsibility rests with you to coordinate and oversee the list maintenance activities of local and county election officials. 52 U.S.C. § 20509; *see also Scott v. Schedler,* 771 F.3d 831, 839 (5th Cir. 2014) (noting that "the NVRA's centralization of responsibility counsels against . . . buck passing"); *U.S. v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (noting that a State or chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted").

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number of voter registrations exceeds the number of citizens in the county who are old enough to register to vote):

Twenty-Seven Counties with greater than 100% voter registration:
Allegan (106%), Bay (104%), Berrien (113%), Calhoun (109%), Clinton (102%), Eaton (103%), Genesee (113%), Grand Traverse (106%), Jackson (100%), Kalamazoo (105%), Kent (107%), Lapeer (106%), Lenawee (102%), Livingston (106%), Macomb (106%), Marquette (101%), Midland (107%), Monroe (109%), Muskegon (107%), Oakland (110%), Ottowa (101%), Saginaw (107%), St. Clair (108%), Shiawassee (107%), Van Buren (112%), Washtenaw (114%), Wayne (111%).

Three Counties with more than 90% voter registration, in some cases, approaching 100% of their citizen voting-age populations registered to vote:
Ingham (98%), Ionia (92%), and Montcalm (98%).

These voter registration rates are abnormally, or in the case of twenty-seven counties with greater than 100% registration, impossibly, high. This constitutes strong evidence that Michigan's voter rolls are not being properly maintained in these counties. These rates also suggest that a jurisdiction is not removing voters who have died or who have moved elsewhere, as required by 52 U.S.C. § 20507(a)(4). By comparison, according to the U.S. Census Bureau, only **69.1%** of the citizen voting-age population was registered, nationwide, in the 2022 midterm elections;[2] **72.7%** in the November 2020 election;[3] and, **66.9%** in the November 2018 election;[4] In addition, Michigan's statewide voter registration rates of the citizen voting-age population for the 2018 midterm election was **55.4%** and **70.5%** for the 2020 presidential election. *See* [HYPERLINK "https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Results-and-Statistics/General-Voter-Reg-Turnout-Stats.pdf"].

II. Notice of Violation

Michigan's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2024 federal election, and signals to voters that elections in Michigan are not being properly safeguarded. As you know, the NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. §20510(b)(1)-(2). Therefore, our clients are writing to bring these violations to your attention and to respectfully ask that you

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[2] *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2022*, *Table 4, Reported Voting and Registration, for States: November 2022,* [https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html].

[3] *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020*, *Table 4, Reported Voting and Registration, for States: November 2020,* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

[4] *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2018, Table 4a, Reported Voting and Registration, for States: November 2018,* [HYPERLINK "https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html"]; *see also* U.S. Census Bureau, *Historical Reported Voting Rates, Table A-3b, Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2018,* [HYPERLINK "https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html"].

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take the necessary steps to bring the counties into compliance with the NVRA. If the violations we have identified herein are not corrected, our clients will have no choice but to file a lawsuit. **Because the ongoing violations are occurring within 120 days of an election for federal office, you may face federal litigation if the violations are not cured within 20 days of your receipt of this letter.** ***Id.*** **§20510(b)(2)**.

III. *Avoid Litigation*

We hope to avoid litigation and would welcome immediate efforts by your office to bring Michigan into compliance with Section 8. We ask that you evaluate your current list maintenance procedures and protocols to identify the cause of the compliance failures discussed in this letter. We also ask that you modify your current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law. Specifically, your list maintenance program must identify and remove the following categories of individuals from the official lists of eligible voters:

1. All persons who are ineligible to vote by reason of a change in residence;

2. Deceased individuals;

3. Persons who are presently incarcerated per state law;

4. All other ineligible voters.

We ask that you – and should they wish to respond separately, each named county – respond in writing within **20 days** of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake prior to the 2024 federal elections to bring Michigan into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, State, and local entities outlined herein. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election. In order to avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus necessitate legal action, you should be aware that the NVRA authorizes courts to award "reasonable attorney fees, including litigation expenses, and costs" to the prevailing party. 52 U.S.C. § 20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of Michigan's voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if Michigan fails to take

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the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

IV. Request for Meeting

Our representatives are available to meet with you via telephone or video, if needed, to discuss our research and a remedial plan within the next week. Please let us know which date(s) and time(s) you prefer. Should you need to contact us regarding this matter, please contact me at pnation@americafirstpolicy.com. Thank you for your prompt attention to this matter.

We look forward to your response.

Sincerely,

/s/ Patricia Nation
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December 8, 2023

Jocelyn Benson
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Jonathan Brater
Director, Michigan Bureau of Elections
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Dear Secretary Benson and Director Brater:

As you are aware, the National Voter Registration Act (NVRA) requires States to maintain an accurate and current voter registration roll for elections for federal office. Based on our analysis, Michigan is in violation of Section 8 of the NVRA. By comparing publicly available voter registration records with the U.S. Census Bureau's 2021 citizen voting age population data, we have determined that 55 counties have more registered active voters than adult citizens over the age of 18. We have identified another 23 counties that have voter registration rates that exceed 90 percent of adult citizens over the age of 18, a figure that far eclipses the voter registration rate nationwide in recent elections. This evidence shows that your office and county, city, and township clerks in these counties are not conducting appropriate list maintenance to ensure that the voter registration roll is accurate and current, as required by federal law.

Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. §20501(b)(3). Specifically, it enacted Section 8 "to ensure that accurate and current voter registration rolls are maintained." *Id.* §20501(b)(4). Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. After all, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Section 8 of the NVRA obligates States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. 52 U.S.C. §20507(a)(4). And as the U.S. Supreme Court

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has recently confirmed, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

As the Secretary of State and the Director of the Michigan Bureau of Elections, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. 52 U.S.C. §20509. Michigan law designates the Secretary of State as the State's chief election officer, Mich. Comp. Laws §168.21, and instructs the Director of Elections to "perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws." *Id.* at §168.32. Michigan law further provides that "[t]he secretary of state is responsible for the coordination of the requirements imposed under this chapter, the national voter registration act of 1993, and the help America vote act of 2002." *Id.* §168.509n.

In June 2020, a Michigan voter sued you, alleging that you failed to maintain accurate voter rolls. In January 2021, Secretary Benson announced that she slated 177,000 voter registrations for cancellation "because the state ha[d] reason to believe" that those voters had "moved away from the registration address." *See* Mich. Dept. of State, *Secretary Benson Continues to Bolster Election Security* (Jan. 28, 2021), perma.cc/H9WY-5HC2. She also promised to conduct additional list maintenance efforts. *Id.* In light of those announcements, the parties stipulated that the case be voluntarily dismissed. *See Daunt v. Benson*, No. 1:20-cv-00522, ECF No. 58 (W.D. Mich. Feb. 16, 2021).

Despite the Secretary's promises to conduct list maintenance, Michigan's voter rolls remain significantly bloated. This letter provides statutory notice that that the Republican National Committee, Jordan Jorritsma, and Emerson Silvernail, acting as a political party and registered Michigan voters with substantial interests in secure elections, will bring a lawsuit against you and, if appropriate, against officials in the counties named in this letter, if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law. *See Green v. Bell*, No. 321-cv-00493, 2023 WL 2572210, at *3 (W.D.N.C. Mar. 20, 2023). Furthermore, while we hope to avoid litigation, we still formally request that the Michigan Bureau of Elections and relevant officials within the 78 counties named in this letter (if they maintain separate records) act to preserve documents as required by Section 8(i) of the NVRA. 52 U.S.C. §20507(i)(1)-(2). This letter explains how we concluded that Michigan is violating Section 8 of the NVRA and the curative steps needed to avoid litigation.

I. The NVRA protects election integrity by requiring States take reasonable efforts to maintain accurate and current lists of registered active voters.

Michigan's voter registration list maintenance program must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. §20507(b)(1).

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Section 8 requires that States "remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant" to outside of his or her current voting jurisdiction. *Id.* §20507(4)(A)-(B).

Additionally, the Help America Vote Act (HAVA) mandates that States adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. *Id.* §21083(a)(2)(A). States must "ensure that voter registration records in the State are accurate and are updated regularly," a process which must include making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* §21083(a)(4). HAVA's list maintenance mandates include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under State law due to felony conviction. *Id.* §21083(a)(2)(A)(ii)(I)-(II).

As the chief election officials for Michigan, the responsibility rests with you to coordinate and oversee the list maintenance activities of local and county election officials. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) ("[T]he NVRA's centralization of responsibility counsels against … buck passing"); *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (explaining that a State or chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted"); *see also, e.g.*, Mich. Comp. Laws §§168.509n, 168.509o, 168.509r, 168.509ff, (setting forth requirements for the Secretary of State and clerks to maintain registration records).

II. Fifty-five Michigan counties have more registered active voters than voting-eligible citizens, and twenty-three others have suspiciously high rates of voter registration.

Based on data gathered from the U.S. Census Bureau's 2021 citizen voting age population data and the most up-to-date count of registered active voters available from the Michigan Bureau of Elections, Michigan is failing to meet its list maintenance obligations. Comparing the registered active voter count to the 2021 Census data reveals that these 55 counties have voter registration rates at or above 100 percent: Alcona (113%), Allegan (105%), Alpena (101%), Antrim (113%), Arenac (104%), Barry (103%), Benzie (109%), Berrien (101%), Calhoun (100%), Cass (100%), Charlevoix (106%), Cheboygan (104%), Clare (102%), Crawford (110%), Delta (104%), Dickinson (101%), Emmet (106%), Genesee (104%), Gladwin (103%), Grand Traverse (102%), Huron (100%), Iosco (104%), Iron (106%), Kalkaska (115%), Kent (101%), Keweenaw (115%), Lapeer (102%), Leelanau (110%), Livingston (104%), Mackinac (111%), Macomb (101%), Manistee (100%), Mason (104%), Menominee (101%), Midland (101%), Missaukee (106%), Monroe (101%), Montmorency (111%), Muskegon (102%), Newaygo (104%), Oakland (102%), Oceana (105%), Ogemaw (106%),

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Ontonagon (102%), Osceola (102%), Oscoda (112%), Otsego (112%), Presque Isle (107%), Roscommon (111%), Schoolcraft (108%), Shiawassee (102%), St. Clair (103%), Van Buren (103%), Wayne (102%), and Wexford (105%).

In other words, in these counties there are more registered voters than eligible voters. This impossible statistic shows that voter registration records are not being maintained. Meanwhile, 23 other counties across the State have voter registration rates of 90 percent or greater (in some cases, approaching 100 percent): Alger (95%), Baraga (95%), Bay (99%), Branch (96%), Clinton (99%), Eaton (98%), Gogebic (99%), Hillsdale (96%), Ionia (90%), Jackson (94%), Kalamazoo (95%), Lake (99%), Lenawee (95%), Luce (95%), Marquette (94%), Mecosta (90%), Montcalm (96%), Ottawa (99%), Saginaw (99%), Sanilac (98%), St. Joseph (98%), Tuscola (97%), and Washtenaw (94%).

These voter registration rates are abnormally or, in the case of counties with greater than 100 percent registration, impossibly high. This constitutes strong evidence that Michigan's voter rolls are not being properly maintained. According to the U.S. Census Bureau, only 69.1% of the citizen voting-age population was registered nationwide in the November 2022 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, for States: November 2022*, perma.cc/XQ3R-E4FT. Similarly, only 72.7% of the citizen voting-age population was registered nationwide in the November 2020 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration, for States: November 2020*, perma.cc/7BUT-ZLDA. The U.S. Census Bureau further reported that Michigan's statewide voter registration rates for the 2022 and 2020 elections were 77.1% and 73.8% of the citizen voting-age population, respectively. *Id.* Thus, these 78 counties are significant outliers, touting voter registration rates 17 to 46 percentage points higher than the national figures from 2022 and 2020, and 13 to 41 percentage points above the State figures for the same period. Discrepancies on this scale cannot be attributed to above-average voter participation and instead point to deficient list maintenance.

Michigan's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2024 federal election, and signals to voters that elections in Michigan are not being properly safeguarded.

III. Avoiding litigation

The NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. §20510(b)(1)-(2); *see Green*, 2023 WL at *1-*7. If the violations we have identified are not corrected within 90 days of receipt of this letter, we will have to file a lawsuit. *See* 52 U.S.C. §20510(b)(2).

We hope to avoid litigation and would welcome immediate efforts by your office to bring Michigan into compliance with Section 8. We ask that you evaluate your

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current list maintenance procedures and protocols to identify the cause of the compliance failures discussed in this letter. We also ask that you modify your current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law. Your list maintenance program must identify and remove these categories of individuals from the official lists of eligible voters:

1. All persons who are ineligible to vote by reason of a change in residence;
2. Deceased individuals;
3. Persons who are incarcerated;
4. All other ineligible voters.

We also ask that you, and should they want to respond separately, relevant officials from each named county, respond in writing within 45 days of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake before the 2024 general election to bring Michigan into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, State, and local entities outlined below. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election. To avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus require legal action, you should know that the NVRA authorizes courts to award "reasonable attorney fees, including litigation expenses, and costs" to the prevailing party. 52 U.S.C. §20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

IV. Preservation of records

We also ask that you act to preserve certain records as required under the NVRA, should they be needed in the future or for possible litigation. 52 U.S.C. §20507(i). These documents and records include, but are not limited to:

1. A copy of the most recent voter registration database for the State of Michigan and for each named county, including pertinent information on each voter (name, date of birth, home address, voter activity, and active or inactive status);
2. Internal communications and emails of the Michigan Bureau of Elections' office, applicable county boards of elections, and any divisions, bureaus, offices, third party agents, and contractors relating to voter list maintenance;

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3. All emails or other communications between the Michigan Bureau of Elections and local elections officials concerning their list maintenance activities, their duties to maintain accurate and current lists, and any consequences arising from a failure to do so;
4. All email or other communications between the Michigan Bureau of Elections and any State or federal offices and agencies, in which the Michigan Bureau of Elections seeks or obtains information about registered voters who have moved, been convicted and imprisoned, died, or are otherwise ineligible, for use in list maintenance activities; and
5. All email or other communications between the Michigan Bureau of Elections and any other State, as well as email and communications with the Electronic Registration Information Center, the American Association of Motor Vehicle Authorities, and the National Association for Public Health Statistics and Information Systems, regarding obtaining information about voters who are deceased or who have moved for use in list maintenance activities.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of Michigan's voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if Michigan fails to take the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

We look forward to your response.

Sincerely,

/s/ Thomas R. McCarthy

Gilbert C. Dickey
Tiffany H. Bates
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
gilbert@consovoymccarthy.com
tiffany@consovoymccarthy.com
conor@consovoymccarthy.com

Thomas R. McCarthy
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/12/2022 7:27:49 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Grossi, Christina (AG) [GrossiC@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: Challenger litigation

Sure, you can pass my info along.

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 12, 2022 2:34 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: Challenger litigation

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DPP MCL 15.243(1)(m)

From: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Date: Wednesday, October 12, 2022 at 12:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Christina Grossi <grossic@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: Challenger litigation

Hi Jonathan,

Attached are our filings and an amicus brief by the MDP.

Thanks,
Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 12, 2022 11:55 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Challenger litigation

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Good morning, Heather and Christina. When you have a moment, would you mind sending us yesterday's filing in the challenger guidance litigation in the Court of Claims? Thanks so much.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/28/2023 2:14:04 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Grill, Erik (AG) [GrillE@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: RE: Colorado 14.3 SCOTUS petition

Thanks Jonathan, I was just looking for it on SCOTUS. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, December 28, 2023 9:11 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Cc: Christine Sun <christine@statesuniteddemocracy.org>; Victoria Bassetti <victoria@statesuniteddemocracy.org>
Subject: Colorado 14.3 SCOTUS petition

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Privileged

Per the New York Times, Colorado Republican State Central Committee filed the attached cert petition, which is not yet docketed. Story here: https://www.nytimes.com/2023/12/27/us/colorado-supreme-court-trump.html?smid=nytcore-ios-share&referringSource=articleShare

In addition to the disqualification issue, the party raises a First Amendment issue about whether a state can exclude a nominee from a party's primary. Preliminarily, that issue seems not to be an issue the Court will be inclined to take up and insubstantial when the nominee is not qualified to hold office.

Trump does not appear to have filed yet.

DPP MCL 15.243(1)(m)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/27/2023 4:41:24 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: LaBrant et al v Benson - MSC denies leave

Well, I figured this would be the outcome, but you never know!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, December 27, 2023 11:32 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: LaBrant et al v Benson - MSC denies leave

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Thank you. A relief, I am sure.

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, December 27, 2023 8:56:34 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: LaBrant et al v Benson - MSC denies leave

Hi Jonathan,

See the link in the email below for the order denying leave. There was one dissent but she ultimately agreed with outcome. So, Trump stays on primary ballot.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: MSCProcessSupport <MSCProcessSupport@courts.mi.gov>
Sent: Wednesday, December 27, 2023 7:50 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: MI Supreme Court Order

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The Michigan Supreme Court has issued an order in No.166470, ROBERT LABRANT V SECRETARY OF STATE.

To view the order, click the link below.

- Order

Do not reply to this email. If you need assistance, please call the Supreme Court Clerk's Office at (517) 373-0120.

Clerk's Office
Michigan Supreme Court
Hall of Justice
925 W.Ottawa St.
P.O.Box 30052
Lansing, MI 48909

This message has been prepared on computer equipment and resources owned by the Michigan Supreme Court. It is subject to the terms and conditions of the Court's Computer Acceptable Use Policy.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/29/2023 4:45:27 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Grill, Erik (AG) [GrillE@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: Maine 14.3 decision--privileged

Thanks Jonathan.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, December 29, 2023 9:31 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Cc: Christine Sun <christine@statesuniteddemocracy.org>
Subject: Maine 14.3 decision--privileged

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Heather and Erik,

As you may have already seen, Maine Secretary of State Shenna Bellows determined yesterday that Donald Trump is disqualified from serving as president under the Fourteenth Amendment and therefore may not run in the presidential primary in Maine. (Unlike in Michigan, Maine law provides authority for the Secretary of State to make this kind of eligibility determination.) The 34-page ruling is attached and also available at https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf.

This decision supports the point contained in our outline that the Colorado Supreme Court's decision shows that there are serious legal arguments for disqualification and is likely to be persuasive to others. At pages 23-24, Secretary Bellows notes that the challengers "rely heavily on the proceedings in –and evidence from—the *Anderson* case. Much of that evidence is in the record here, and I find the reasoning of the Colorado Supreme Court compelling."

Maine law provides for review in the Superior Court (trial court) and then in the Law Court (the highest court). Trump's deadline to seek review in the Superior Court is January 2. Like the Colorado Supreme Court, Secretary Bellows provided that her ruling would be stayed pending review.

Please let us know if you have any questions or would like to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited

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jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/3/2024 5:16:29 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief
Attachments: Colorado SCOTUS amicus 1.3.23.docx

Importance: High

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/12/2022 4:12:07 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Grossi, Christina (AG) [GrossiC@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: Challenger litigation
Attachments: O'Halloran DeVisser 10.11.22 HSM exhibits.pdf; O'Halloran DeVisser 10.11.22 HSM.pdf; Amicus Brief O'Halloran v Benson.pdf

Hi Jonathan,

Attached are our filings and an amicus brief by the MDP.

Thanks,
Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 12, 2022 11:55 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Challenger litigation

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Good morning, Heather and Christina. When you have a moment, would you mind sending us yesterday's filing in the challenger guidance litigation in the Court of Claims? Thanks so much.

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EXHIBIT A

Document received by the MI Court of Claims.

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STATE OF MICHIGAN
COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State for the State of Michigan and JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections,

Defendants.

No. 22-000162-MZ

HON. BROCK A. SWARTZLE

AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

JOCELYN BENSON, in her official capacity as Secretary of State, and JONTHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

Ann M. Howard (P49379)
Attorney for O'Halloran Plaintiffs
26100 American Drive, #607
Southfield, Michigan 48034
248.752.0650
ahoward@annhowardlaw.com

Erik A. Grill (P64713)
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Robert L. Avers (P75396)
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350 South Main Street, Suite 300
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734.623.1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com

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AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

I, Jonathan Brater, being duly sworn, voluntarily state as follows:

1. I have been employed by the Secretary of State as Director of Elections since January 2, 2020 and in such capacity serve as Director of the Bureau of Elections (Bureau). See MCL 168.32.

2. I bring this affidavit in support of Defendants' response to order to show cause and in support of Defendants' motion for summary disposition. If called as a witness, I could testify truthfully and accurately as to the information contained within this declaration.

3. I am personally knowledgeable about provisions of the Michigan Election Law that govern absent voter ballots, election inspectors, election challengers, and the tabulation of ballots.

THE BUREAU'S AUTHORITY

4. Under the authority of the Secretary of State, the Bureau is required to issue instructions and promulgate rules for the conduct of elections, as well as advise and direct local election officials as to the proper methods of conducting elections, including instructions regarding election challenges and challengers. See MCL 168.31(1)(a)-(b).

5. The Bureau is required to publish and provide for use in each precinct a manual of instructions including specific instructions and procedures and forms for processing challenges. See MCL 168.31(1)(c).

6. The Bureau is required to prescribe and require uniform forms it considers advisable for use in the conduct of elections. See MCL 168.31(1)(e).

7. The Bureau is required to establish a curriculum for comprehensive training of all clerks and a comprehensive training curriculum of all precinct inspectors, including those applicable to challengers. See MCL 168.31(1)(j).

8. For decades, the Bureau has issued, produced, and updated instructions and forms under its authority to "issue instructions", "advise and direct local election officials as to the proper methods of conducting elections", publish a "manual of instructions that includes specific instructions on … procedures and forms for processing challenges", "prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections", and establish a training for election officials and election inspectors, found in the Election Law, rather than under the Bureau's separate authority to "promulgate rules pursuant to the administrative procedures act". See MCL 168.31.

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9. Collectively, these instructions and forms comprise hundreds, or even thousands, of pages of material, all of it updated periodically throughout each election cycle as needed. For example, the "Election administrator information" section of the Secretary of State website, found at Michigan.gov/sos/elections includes, among many other materials: a 48-page Ballot Production Standards document; a 57-page Election Inspectors' Procedure Manual; a 357-page Election Officials' Manual; a 13-page Post-election Audit Manual; a 26-page Recall Guide; a 94-page County Canvass Manual; and a 39-page Voting Equipment Test Procedure Manual. In addition to these documents and others posted on the Election administrator information website, the Bureau produces dozens of instructional materials that clerks review as part of their accreditation and continuing education requirements. See MCL 168.31(j)-(m).

10. The Bureau's instructions and forms apply the Michigan Election Law as well other legal authorities governing the conduct of elections in Michigan. When the Bureau provides instructions and training, and when it answers thousands of questions each election cycle from 1,603 clerks and their staff, the Bureau must regularly provide direction, advice, and guidance on methods of conducting elections where the method is not expressly and specifically described by a provision of the Election Law. Election administration is extremely complex, and in the course of multiple elections conducted in thousands of precincts each year, local election officials encounter innumerable combinations of possible scenarios with new situations and questions arising each election.

11. In its instructions, advice, and guidance, the Bureau does not attempt the impossible task of listing every possible scenario that could occur, but it does update its trainings and instructions to address issues that have occurred in recent elections. The Bureau does not provide instruction by merely restating verbatim the language of the Michigan Election Law in providing instructions to clerks; this would be of no help to election officials and would not fulfill the Bureau's responsibility to provide instruction, direction, and training to clerks on the proper method of conducting elections.

12. It would be impossible for the Bureau to promulgate rules under the Administrative Procedures Act, MCL 24.201 *et seq.*, each time it issues instructions, guidance, or direction on issues not expressly and specifically covered by a provision of the Michigan Election Law, and the Bureau has never attempted to do so. In addition to the time, delay, and material resources that would render rulemaking in each situation impossible for the Bureau, providing instruction only through rulemaking would also ignore the Bureau's separate responsibility to provide instruction, direction, and training to clerks on the proper method of conducting elections.

13. The Bureau issues general instructions and answers clerk questions; it does not control either the election-day operation or enforcement of election law in polling places or absent voter ballot processing facilities. The Bureau does not hire or supervise election inspectors or security personnel. These functions are fulfilled by the municipal clerks

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and those whom they deputize. The Bureau does regularly update its general training and instruction materials to account for questions that have been raised by clerks in recent elections.

14. The Bureau cannot and does not instruct clerks on the question of whether a particular individual's conduct—such as alleged repeated impermissible or indiscriminate challenges (MCL 168.727), or alleged abusive language toward election inspectors–is disorderly and requires removal from the polling place (MCL 168.678, MCL 168.733). Clerks and election inspectors must make this determination based on the factual scenario they encounter, the Michigan Election Law, and the Bureau's general instruction materials.

THE ELECTION CHALLENGER GUIDANCE DOCUMENT

15. Bureau instructions regarding challengers have been published in multiple different formats for many years.

16. The Bureau has produced a document called "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (Challenger Guidance) since at least 2003.

17. Chapter VIII of the Election Officials' Manual, regarding Absent Voter Ballot Election Day Processing, and Chapter XI, regarding Election Day Issues, both include instructions regarding challengers. This manual also fulfills part of the Bureau's responsibility to establish a curriculum for comprehensive training for all clerks. See MCL 168.31(j).

18. The Bureau's document entitled "Managing Your Precinct on Election Day: Election Inspectors' Procedure Manual" also includes instructions regarding challengers. This document is designed for use by election inspectors in precincts on Election Day and fulfills part of the Bureau's responsibility to publish and provide instructions for precincts, including instructions and procedures regarding challenges. See MCL 168.31(1)(c).

19. The Bureau includes instruction on challengers as part of its training and accreditation curriculum for all clerks as well as a "train the trainer" course it provides for county clerks and municipal clerks in larger jurisdictions, who conduct training of election inspectors. Both of these curricula and training are offered in person. This training fulfills part of the Bureau's responsibility to establish a curriculum for comprehensive training for all clerks. See MCL 168.31(1)(j).

20. The Challenger Guidance is published and circulated to help clerks, election inspectors, political parties, organizations, challengers and poll watchers understand the legal provisions that govern challengers and poll watchers on election day, and to instruct

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

clerks and election inspectors on the proper methods of processing challengers and managing challengers on election day.

21. Both the current and former version of the Challenger Guidance provides instruction to clerks, which they are required to follow in their enforcement of the Election Law. MCL 168.21, 168.31(1).

22. The May 2022 update to the Challenger Guidance included formatting changes and revisions to make the document easier to understand and read. This included rewriting of several sections, which was generally not intended to substantively change the instructions. It also included a larger font size and headers, a table of contents, and the consolidation of two prior documents into one.

23. Previously, two documents regarding challengers were published on the Secretary of State Elections Website. One was the prior version of the Challenger Guidance (12 pages, including a title page) and the other was an FAQ document entitled "The Challenge Process: Questions and Answers" (3 pages). The updated Challenger Guidance is 27 pages including a title page and 2-page table of contents. Accordingly, approximately 14 pages of substantive guidance were replaced with 24 pages of substantive guidance (with fewer words per page).

24. The May 2022 version of the Challenger Guidance was also updated to add or clarify instructions in response to several issues that occurred during the November 2020 general election. Many of these issues occurred at absent voter ballot processing facilities, most frequently at the Detroit facility. Until November 2020, challengers at absent voter ballot processing facilities were relatively uncommon, but the number of challengers at these locations increased significantly in that election.

25. The Challenger Guidance uses the term "absent voter ballot processing facilities" to describe the locations at which jurisdictions tabulate absent voter ballots (unless this is done at in-person precincts, which is common in small jurisdictions).

26. Many of the questions or conflicts that arose in 2020—and the difficulty clerks and their staff encountered in answering those questions—stemmed partially from a lack of clarity and precision in the Michigan Election Law; specifically, how challenger and challenge provisions apply in absent voter ballot processing facilities. The Michigan Election Law does not consistently apply in-person precinct provisions or requirements to absent voter ballot processing facilities.

27. In the Michigan Election Law, the term "absent voter counting board" is used simultaneously to refer to a single absent voter counting board corresponding to an individual in-person precinct, a station within a facility processing absent voter ballots for multiple in-person precincts, the entire facility at which all absent voter ballots are processed for a jurisdiction, and an entire facility at which combined absent voter ballots

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are processed for multiple jurisdictions in a county. The Michigan Election Law is not always specific as to which of these sub-definitions applies with regard to challengers. See MCL 168.569, 168.671, 168.679, 168.730, 168.733, 168.764d, 168.765a. Accordingly, the Challenger Guidance uses the phrase "absent voter ballot processing facility" for clarity.

28. Absent voter ballot processing facilities also differ from in-person precincts in other ways critical to the challenge process. Voters are not present at these facilities, and thus cannot be challenged or respond to questions. Voter eligibility is not verified by election inspectors at absent voter ballot processing facilities because the voter's eligibility has already been verified by the clerk. This differs from the process at in-person precincts, where the voter completes an application to vote and is verified by an election inspector in the electronic poll book. But with ballots tabulated at absent voter ballot processing facilities, the clerk has already reviewed the absent voter ballot envelope and checked the voter's signature and information against the Qualified Voter File before sending the envelope to the absent voter ballot processing facility, so absent voter ballot processing facility inspectors must merely verify that the envelope has been reviewed by the clerk by identifying the clerk's marking indicating the clerk has checked the envelope.

29. Additionally, there are sequestration provisions in effect at absent voter ballot processing facilities that do not apply in in-person precincts. Only certain individuals (not including challengers or election inspectors) may leave an absent voter ballot processing facility before the polls close, and individuals are prohibited from communicating information outside of the absent voter ballot processing facility. See MCL 168.765a(9)-(10).

30. In part because of these distinctions and the expanded presence of challengers at absent voter ballot processing facilities in November 2020, several points regarding the proper method of processing challengers and challenges required additional clarification. Accordingly, the Bureau updated the Challenger Guidance to address these points in May 2022.

THE ELECTION CHALLENGER CREDENTIAL FORM

31. In November 2020, there were several different political party and challenger organizations issuing credentials to challengers. This made it more difficult for election inspectors to determine if challengers possessed a valid credential signed by a party or verified challenger organization as required by the Michigan Election Law, particularly at the Detroit absent voter ballot processing facility where hundreds of challengers arrived well after processing had begun. See MCL 168.732. The Bureau also received reports that challengers were receiving credentials from multiple different entities or switching back and forth between entities, making the validity of the credential more difficult to track and verify.

32. The Bureau also received questions in both absent voter counting boards and in-person precincts about whether party logos printed on challenger credentials violated the

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Michigan Election Law prohibition on electioneering materials within 100 feet of a polling place entrance. See MCL 168.744.

33. The Bureau had previously not prescribed a uniform form to be used to demonstrate the signed authority challengers must present under MCL 168.732; however, because of these issues, the Bureau determined it was advisable to prescribe a uniform credential form to be used by the challenger authority to designate and assign credentials to its challengers. MCL 168.31(1)(c), (e).

34. The Bureau also received questions about whether credentials had to be on paper or could be presented in electronic form. The Challenger Guidance now specifies that the credential *can* be in electronic form and displayed on a mobile device and explains how this can be effectuated even if the challenger cannot use the device in an absent voter ballot processing facility.

ELECTION CHALLENGER APPOINTMENT

35. The Bureau received numerous reports that challengers present in polling places and absent voter ballot processing facilities, particularly those arriving in absent voter ballot processing facilities well after ballot processing had begun on Election Day, were not clearly associated with a single party or verified organization eligible to appoint challengers; did not have basic knowledge of the election processes, and were disrupting the orderly administration of polling places and absent voter ballot processing facilities in part because of their ignorance of basic election procedures. For example, challengers were attempting to repeatedly raise challenges about voter eligibility or complaining that absent voter ballot signatures were not being checked in the absent voter ballot processing facilities (they are not checked at the facility but rather by the clerk, as explained above). Reports of this nature occurred only rarely in past elections but were very common in November 2020, particularly from challengers appearing on or after election day at the Detroit absent voter ballot processing facility.

36. The apparent misunderstanding of election law and process was evident in statements made by attorneys in a letter sent to the Wayne County Clerk alleging that "apparent widespread fraud and irregularities" occurred in the 2020 election, and that they would "get to the bottom of it." Among the supposed fraud and irregularities were claims of "failure to verify signatures" (as noted, signatures are verified by the clerk, not by election inspectors at the absent voter ballot processing facility) and of "40,000 unidentified ballots arriving" (challengers apparently did not understand that ballots received by the clerk until 8 p.m. are delivered later, and that ballots are also used to duplicate military voters' ballots for tabulation). The letter also claimed the Detroit absent voter ballot processing facility had processed ballots for Wayne County, when it in fact processed ballots only for the city of Detroit. (Attachment A, Letter to Wayne County Clerk). These types of fundamental and basic misunderstandings of election

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processes can be avoided by properly educating challengers prior to their service on election day.

37. In past elections, parties and challenger organizations routinely appointed and trained challengers prior to election day. This general practice ensures challengers receive training on basic election procedures and standards of conduct before the election. The Challenger Guidance strongly encourages parties and organizations to train their challengers in advance of the election.

38. The Challenger Guidance also clarifies that there is no advance deadline to appoint challengers—challengers can be appointed up until Election Day. If a political party or organization inexplicably decides not to train or credential its challengers prior to election day, nothing in the Challenger Guidance prevents them from doing so — although as the November 2020 election demonstrated, unleashing untrained challengers on election workers and voters is irresponsible and inadvisable as it hindered an orderly election.

39. To the extent a party or challenger organization has concerns that the Challenger Guidance would prevent them from reassigning or relocating a previously trained and appointed challenger to a different precinct in the event of an unexpected illness or absence, it does not. The Challenger Credential Card does not require a date of appointment (just date of election), so the Challenger Guidance and form would not prevent a challenger from receiving a credential and entering a polling place or absent voter ballot processing facility.

IMPERMISSIBLE CHALLENGES

40. Challengers may make challenges to voters in a polling place, MCL 168.727, or to procedures in a polling place or absent voter ballot processing facility, MCL 168.733. Challenges must be based on a specific permitted reason that the challenger believes a voter is not eligible to vote or an election procedure is not being followed. Repeated baseless challenges may harass or delay voters or have the effect of improperly slowing down voting and election processes, interfering with an orderly polling place. See MCL 168.678, 168.727.

41. The Bureau has received reports of an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law. For this reason, the Challenger Guidance provides additional instruction on the proper method for election inspectors to handle baseless challenges. The Challenger Guidance explains that a challenge must be permissible (have a valid basis), at which point the challenge is either accepted or rejected. If the challenge does not have a valid basis, it is impermissible and need not be recorded each time it is made.

42. For example, at an absent voter ballot processing valid facility it is *permissible* to make a challenge that an election inspector is not reviewing the envelope to ensure the clerk has

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checked it; the challenge will be *accepted* or *rejected* depending upon whether the election inspector is actually reviewing the envelope. Conversely, it is *impermissible* to make a challenge that an election inspector is not checking the voter's signature against the Qualified Voter File, because this is not necessary or required at the processing facility. This guidance helps ensure all types of challenges are handled properly and in an orderly manner. See MCL 168.678, 168.727, 168.733. Nothing in the Challenger Guidance permits an election inspector from failing to record a challenge made with a permissible basis.

ELECTION CHALLENGER LIAISON

43. Clerks have authority to supervise election inspectors at polling places and absent voter processing facilities. Each precinct has a precinct chair, which is typically the most experienced or senior election inspector. MCL 168.674. In-person precincts also have an electronic pollbook inspector who is responsible for operating the electronic poll book. Election inspectors perform differing functions and have different levels of expertise.

44. Although challengers have the right to bring issues to the attention of election inspectors, the Michigan Election Law does not specifically state that they can do so by speaking to any election inspector at any time. MCL 168.733. Rather, consistent with clerks' authority to supervise election inspectors and election inspectors' mandate to maintain order at the polling place, MCL 168.678, the Challenger Guidance instructs that the proper method of handling challenges is to direct challengers to speak with a designated challenger liaison, who will be best equipped to answer and respond to all challenges correctly and consistently. The challenger liaison must respond to the challenge and nothing in the Challenger Guidance permits a challenger liaison from preventing a challenger from bringing an issue to the attention of an election inspector. Moreover, nothing in the Challenger Guidance prohibits clerks or election inspectors from determining that *all* election inspectors may serve in this liaison role or that challengers can speak to any election inspector, if that is what the clerk, precinct chair, or challenger liaison prefers. The Bureau's authority to issue this instruction is found in MCL 168.31(1)(c) ("procedures for processing . . . challenges").

CHALLENGER POSSESSION OF ELECTRONIC DEVICES

45. As with prior versions of the challenger guidance and other instructional materials, the 2022 Challenger Guidance explains that recording devices (including the recording functions of smart phones) may not be used in polling places or absent voter processing facilities. These prohibitions have long been in place to safeguard voter privacy, maintain an orderly polling place, and prevent voter intimidation. See Const 193, art 2, § 4, MCL 168.678, MCL 168.932.

46. Voters cast their ballots in open rooms within polling places. Voters have the right to a secret ballot and the right to vote without being intimidated. Recording devices capable

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of viewing voted ballots and recording voters interfere with both of these rights. Accordingly, the Bureau has long instructed clerks that these devices are not permitted in the polling place. The only exception is voters using a smartphone or camera to photograph their own voted ballot in the voting station, if the voter wishes to do so; this change was made as part of a settlement to a federal lawsuit (*Crookston v. Benson*, WD-Mich, Docket No. 1:16-cv-1109) challenging the prohibition on photography in the polling place.

47. At the absent voter ballot processing facility, voted ballots and envelopes with voter names are also present and visible. Thus, photographing or recording the processing of absent voter ballots could also result in voters' selections being revealed at these locations. In addition, phones are not permitted in the processing facility because of the sequestration provisions prohibiting communication outside the counting board, which apply to anyone present in a counting board aside from authorized individuals. MCL168.765a(9)-(10).

PUBLICATION AND DISTRIBUTION OF CHALLENGER GUIDANCE

48. The Challenger Guidance was updated in May 2022 to ensure the guidance could be reviewed and incorporated into clerk training materials, and so that parties, challenger organizations, and challengers would have access to the guidance well in advance of the August 2022 primary and November 2022 general election.

49. When the Challenger Guidance was updated in May 2022, it was published on the Secretary of State's public website. The updated Challenger Guidance, along with a link to the Challenger Credential Form was also announced in a Bureau of Elections News Update on May 25, 2022. (Attachment B, News Update).

50. I have reviewed the Complaint submitted in this case by Richard DeVisser, the Michigan Republican Party, and the Republican National Committee. The complaint contains a number of inaccuracies regarding the timing of the release of the guidance and the Party's awareness of the new document. The Complaint claims that new version of the Challenger Guidance was published "as late as July 4, 2022" (the Complaint notes that July 4, the date the Complaint provides, is within a month of the August Primary). But July 4 is a state holiday. In fact, the Challenger Guidance was published on the Secretary of State website and distributed in a News Update on May 25, 2022.

51. The Complaint also claims that the Plaintiffs "learned of one such rule change [the challenger credential form] on the evening of the August 2022 primary election." However, on May 31, 2022, Adam Fracassi, the Bureau of Elections Regulatory Manager, received a text message from Matthew Seifried, Elections Integrity Director for the Republican National Committee. The text message read, in part, "I just saw the updated guidance on poll challengers and poll watchers. Thank you and everyone at the

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Bureau of Elections for putting that together. Im [sic] in the process of developing our AVCB training and am going to reference it a lot." Mr. Seifried also asked about the location of the blank poll challenger credential card (which is posted online). (Attachment C, 5/31/22 Text Messages).

52. Furthermore, Adam Fracassi emailed John Inhulsen on July 26, 2022, explaining that he coordinates with parties on challenger issues and was seeking contact information regarding challenger coordination for the Republican Party. On August 1, 2022, Mr. Inhulsen responded providing contact information for himself and Paul Cordes. (Attachment D, 7/26/22 E-mails).

53. Based on the messages received from Mr. Seifried (on May 31, 2022) and Mr. Inhulsen (on August 1, 2022), the Bureau had no reason to believe the Michigan Republican Party or Republican National Committee had any concerns with the updated Challenger Guidance. (See Attachments C & D).

54. Then, on August 25, 2022, the Republican National Committee and the Michigan Republican Party sent a letter to the Bureau inquiring about the legal basis for the challenger credential form. The Attorney General's office responded to this letter on behalf of the Secretary on September 2, 2022.

55. The August 25, 2022 letter raised questions only about the challenger credential form. The Bureau did not learn of the Republican Party's concerns with other provisions of the Challenger Guidance until this lawsuit was filed on September 30, 2022—four months after the Challenger Guidance was released and the Republican National Committee contacted the Bureau confirming they had reviewed it, two months after the August 2022 primary, and five weeks after they received a response to their letter.

PREJUDICE CAUSED BY PLAINTIFFS' DELAY

56. This is an extremely busy time for the Bureau; absentee ballot voting is already underway and numerous deadlines for the administration of the November 8, 2022 election are occurring over the next month. There is limited time and resources available to respond to legal challenges to guidance that was published months earlier, and the Bureau's ability to respond to these legal challenges has been hindered by Plaintiffs' waiting to bring this action until the election was not only imminent but already underway.

57. The updated Challenger Guidance has already been incorporated into Bureau training provided to clerks in the Summer of 2022. Specifically, the Bureau conducted its biannual election cycle training, which are courses in person in locations across the state in May and June 2022, as well as in clerk accreditation trainings.

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58. Additionally, the Challenger Guidance was incorporated into the Election Procedures Manual used at polling places. This document has been printed and mailed to clerks across the state.

59. Although it would be possible to make changes to the online version of the Challenger Guidance and other training materials, the Bureau of Elections cannot publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date, and cannot conduct further in-person trainings in this short period before the election. Even if this were possible, clerks are no longer available to attend new training courses at this time. Changing training and manuals at this late date would also cause significant confusion among clerks and election inspectors.

60. Some clerks have already begun training their election inspectors for the upcoming election, so these inspectors would need to somehow be retrained on the changed procedures.

Dated: October 11, 2022

Jonathan Brater, Director of Elections
Department of State

Subscribed and sworn to before me
October 11, 2022.

Charles Walter Darnell

Print name exactly as it appears on application for commission as a notary public
Notary Public, State of Michigan, County of Washtenaw
My Commission Expires 05/23/2025
Acting in the County of Washtenaw

CHARLES WALTER DARNELL
Notary Public: Washtenaw County, MI
My Commission Expires May 23, 2025
Acting in The County of Washtenaw

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EXHIBIT A

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(202) 466-5964

November 5, 2020

Via email to: cgarrett@waynecounty.com

Cathy M. Garrett
Wayne County Clerk
2 Woodward Avenue
Detroit, MI 48226

Re: Preservation of Evidence

Dear Ms. Garrett:

We represent John James, candidate for U.S. Senate. It has come to our attention that due to apparent widespread fraud and irregularities, the absent voter ballots counted in Wayne County may be in question. The vote counts in Wayne County appear to be irregular, if not fraudulent. This letter places you on notice to preserve and not destroy *any* evidence related to the absent voter process in Wayne County.

We have received and documented hundreds of reports of irregularities that occurred during the processing of Wayne County absent voter ballots at the TCF Center in Detroit. The information we have received casts serious doubt on the validity of the results of the election. Irregularities range from challenger intimidation, lack of access, unsecure ballots, improper processing, failure to verify signatures, mismatched envelopes and ballots, ballot back-dating, failure to verify individuals in e-poll and supplemental poll books and even reports of nearly 40,000 unidentified ballots arriving at 3:45 AM on November 4. These incidents raise serious concerns over the sanctity of the electoral process in Wayne County. As a result, we expect investigations and recounts will occur. We will get to the bottom of it.

In light the egregious actions discussed above, we demand that you affirmatively preserve, and not destroy, delete, hide or misplace the following:

- Absent ballot requests
- E-poll books
- Supplemental poll books
- Ballot drop boxes
- Footage from all ballot drop box locations[1]

[1] Michigan law requires absent voter ballot drop boxes to be monitored by video. *See* Senate Bill 757 at 761d(4)(c) ("The city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop

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- All absent ballots, including those counted, challenged and provisional
- Personnel records
- Challenger sign in sheets
- Documents and materials of all kinds, without limitation regarding the absent voter process—from absent ballot request through the sealing of the ballot boxes and uploading of tabulations.

Further, we demand a list of every absent voter ballot drop box in Wayne County.

Thank you for your prompt attention to this matter. Please respond within 8 hours to confirm your compliance with these demands.

Sincerely,

Charles R. Spies
Robert Avers
Jessica Brouckaert

cc: Heather S. Meingast
Erik A. Grill
Assistant Attorneys General
Post Office Box 30736
Lansing, Michigan 48909

Jonathan Brater
Michigan Department of Elections
430 West Allegan Street
Lansing, MI 48933

Matthew Schneider
U.S. Attorney
Eastern District of Michigan
211 W. Fort Street, Suite 2001
Detroit, MI 48226

box."). Michigan law allows "challengers" to monitor the absentee ballot process and challenge ballots that do not meet Michigan's strict compliance with absent voting procedures. MCL 168.730-168.734 It is critical that election challengers have access to all recordings of all ballot drop-boxes so that they can aid in determining the propriety of ballots deposited in those boxes.

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EXHIBIT B

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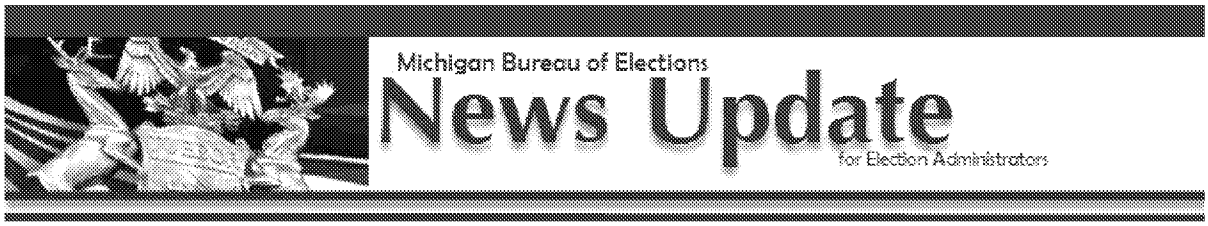
Michigan Secretary of State's Office

5/25/2022 News Update - Updated Challenger Document, Ballot Proof Approval, Election Geo and AV Impacts and more

Michigan Secretary of State sent this bulletin at 05/25/2022 09:02 AM EDT

Having trouble viewing this email? View it as a Web page.



Regular Edition News Update #2022-18

May 25, 2022

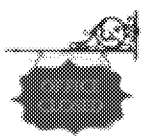
In this issue:

- Updated Challenger Document
- BOE Closed on Monday
- Ballot Proof Approval for August 2, 2022 Primary Election
- QVF Software Updates
- Election Security
- Redistricting Status Update
- Election Geo and AV Impacts
- Polling Location Assignments
- Redistricting Module Retirement

Updated Challenger Document

The Bureau of Elections' Appointment, Rights and Duties of Election Challengers and Poll Watchers document has been updated and is available on Michigan.gov/Elections. This document provides more detailed information for challengers, poll watchers, clerks, and election inspectors regarding the different types of challenges allowed and the steps to take when those challenges are made. It also provides guidance regarding challengers and poll watchers in Absent Voter Counting Boards. We will be printing the document in a booklet form for easier use in precincts. We will also add the booklets to the county order form in eLearning when they are available.

Additionally, we have provided a Michigan Challenger Credential Card on our website. Parties and



BOE Closed on Monday

The Bureau of Elections will be closed on Monday, May 30 in observance of Memorial Day.

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credentialling organizations should ensure the credentials issued to their challengers substantially comply with this form.

QVF Software Updates

- Mass AV now has an "Include: Perm Accessible" option to email the accessible app link to voters from QVF. Uncheck the voters for whom QVF does not have an email address on file before clicking "Send Accessible App"; an error message will show the voters who could not be emailed.
- Perm AV and Perm Accessible lists are now exclusive of one another. Uncheck one list to add a check to the other.
- AV Details & AV Scan now shows a secondary signature as well as the primary signature, when available.
- In AV Details, a ballot's sent or received date can be edited without having to the delete the ballot and re-enter with the corrected dates.
- In Voting History, changed the address to display "Legacy Address" for elections held prior to the launch of QVF Refresh

Election Security

Over the past few months many of our local clerks have received phishing emails from a malicious source. Fortunately, clerks have been diligent and able to identify these malicious emails, doing an excellent job of putting their election-security training to good use! It is critical to remain cyber-resilient. At the below link is a detailed infographic to assist with avoiding Phishing emails:

Ballot Proof Approval for August 2, 2022 Primary Election

If the Board of State Canvassers has certified the candidate list, the Bureau of Elections will accept ballots for conditional approval as to form for the August 2, 2022 election beginning on Tuesday, May 31, 2022. This is part of an effort to help counties, local jurisdictions and vendors have more lead time to have absent voter ballots available for voters starting 40 days before August 2. Ballot proofs should be submitted to Dave Tarrant at Tarrantd2@Michigan.gov. Please note that under the Michigan Constitution, the Michigan Legislature may add proposed constitutional amendments to the ballot as late as June 3. The BOE is not aware of any efforts to add constitutional amendments to the August ballot at this time but cannot guarantee that the Michigan Legislature will not do so. BOE approval of ballot format will therefore be conditional on no additional state-level measures being added to the ballot.

Once BOE approves the form of the ballot, it is imperative that county and local clerks employ a rigorous proofing process of the content of the ballot. That is especially important this year; while reprinting ballots because of errors is always problematic, it will likely be especially difficult and expensive this year because of shortages in paper supply. Important steps to take include:

- Counties and municipalities should establish points of contact and timelines for the review of ballots to ensure that every ballot style is reviewed by both the

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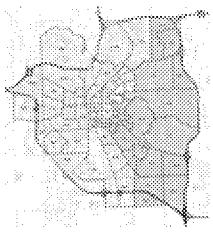
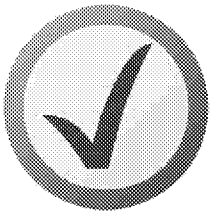
How to avoid Phishing Emails



Redistricting Status Update

All districts subject to redistricting in 2021 have been updated in QVF. This does not necessarily mean that every jurisdiction's redistricting is 100% complete at this time. Please review your jurisdiction's Street Index Report and Permanent Geography module to identify areas of concern and email questions to ElectionData@Michigan.gov. Redistricting-related questions should not be submitted through the standard "Street Change Requests" tool. The "Street Change Requests" tool is for new street segments, expanded house number ranges or school district assignment corrections. The Bureau will do its best to address these requests expeditiously as redistricting winds down.



Polling Location Assignments

Polling locations for the August Primary have been published to MVIC. Clerks should review precinct assignments in **both** the Precincts & Polling Locations and the Election Geography modules for accuracy. Any edits to polling locations moving forward for August and November will need to be committed in both modules of QVF. MVIC displays the polling location that is assigned in the Election Geography module.

- Lookup > Precincts and Polling Locations
- Elections > Election Geography

county and municipal clerk prior to printing.
- Counties should communicate with neighboring counties about any school district language in school districts that cross county lines.
- Carefully review your split precincts and any district numbers that have changed. Ensure you have accounted for all your ballot splits.
- Ensure all "vote for" numbers are correct.
- Make sure all local office partial terms are included on the ballot.

Election Geo & AV Impacts

The Bureau of Elections continues to review US Congressional, State House, State Senate, County Commissioner districts and precinct assignments, making corrections where necessary. During this time, changes may occur that impact your jurisdiction's election geography. Counting Boards and Ballot Style Aliases may be reset while making district corrections, so please be aware of the potential for these changes while processing absent voter ballot applications.

Redistricting Module Retirement

Clerk access to the Redistricting module will be removed soon. New requests can no longer be submitted through the module; however, any requests and files already submitted will be retained and accessed by Bureau staff.

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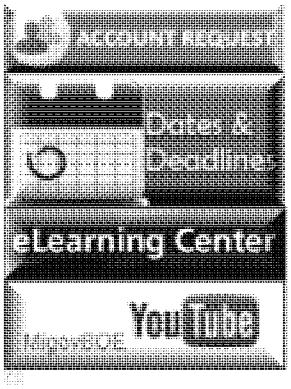
Helpful Links



Questions? Please contact the Bureau of Elections at 1-800-292-5973 or elections@michigan.gov.

The Bureau of Elections News Update will always be sent to the Clerk and Deputy Clerk email accounts. If other election administrators would like to receive this newsletter as well use the Subscribe link below to have it sent directly to another email account.

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EXHIBIT C

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Tue, May 31 at 6:35 PM

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Hey Adam. This is Matthew Seifried. I hope you're doing well and had a great Memorial Day weekend. I just saw the updated guidance on poll challengers and poll watchers. Thank you and everyone at the Bureau of Elections for putting that together. Im in the process of developing our AVCB training and am going to reference it a lot.

One question I do have is in regards to the blank poll challenger credential card. I couldn't find it on the SOS website. Are you able to send it to me or point me in the

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From: John Inhulsen
To: Fracassi, Adam (MDOS)
Cc: Paul Cordes
Subject: Re: Challenger Contact
Date: Monday, August 1, 2022 9:15:20 AM

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good morning, Adam!

Please have myself and Paul Corrdes down as contacts.

John Inhulsen
616.490.5121
john@inhulsenlaw.com

Paul Cordes
616.551.8326
pcordes@migop.org

John W. Inhulsen
Inhulsen Law PLC
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> On Jul 26, 2022, at 2:14 PM, Fracassi, Adam (MDOS) <FracassiA@michigan.gov> wrote:
>
> Hi John,
>
> As you know, election day is coming up. On each election day, I coordinate with both of the parties on challenger issues. As part of that, I typically reach out to the parties to seek contact information for whomever coordinates the challenger/poll watcher part on your respective sides. I'm seeking a name, email and phone number so if there is an issue with challengers in a particular precinct, I have a person to contact. I like to be able to contact directly as issues arise so we can attempt to resolve them as quickly as possible.
>
> If you could email me directly the individual that I can contact if any issues arise, I would greatly appreciate it.
>
> Thank you,
>
> Adam Fracassi, Manager

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Regulatory Section
Michigan Bureau of Elections
P.O. Box 20126
Lansing, Michigan 48901

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EXHIBIT B

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STATE OF MICHIGAN

COURT OF CLAIMS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN (also known as ABC OF MICHIGAN),

Plaintiff,

v

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET, a State Government Agency,

Defendant,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant.
_____/

OPINION AND ORDER

Case No. 22-000111-MZ

Hon. Douglas B. Shapiro

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan.

Pending before the Court is plaintiff's motion for a preliminary injunction and defendant's MCR 2.116(C)(4) and (C)(8) motion for summary disposition. Having reviewed the briefing and hearing arguments on September 20, 2022, the Court GRANTS defendant's motion for summary disposition and DISMISSES plaintiff's motion for a preliminary injunction as moot.

I. BACKGROUND

At issue in this matter is whether defendant, Department of Technology, Management & Budget (DTMB), lawfully established a prevailing-wage policy for contractors working on state

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projects several years after the repeal of the Prevailing Wage Act, MCL 408.551 *et seq.*, repealed by 2018 PA 171.

Before it was repealed in 2018, the Prevailing Wage Act provided, in relevant part, that

> [e]very contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [MCL 408.552, repealed by 2018 PA 171.]

The Prevailing Wage Act further required the contracting agent (the state entity) to have the commissioner (of the Department of Labor) determine the prevailing-wage rates and fringe-benefit rates for all classes of construction mechanics outlined in the proposed contract and to include a schedule of the rates within the specifications for the work. MCL 408.553, repealed by 2018 PA 171. The Prevailing Wage Act also made it a misdemeanor to violate the provisions of the statute. MCL 408.557, repealed by 2018 PA 171.

In June 2018, the Legislature approved a voter-initiated petition, under Const 1963, art 2, § 9, that repealed the Prevailing Wage Act. See 2018 PA 171. The repealer, which appears in 2018 PA 171, simply stated "408.551-408.588 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018." "Enacting section 2" of the repealer appropriated certain funds toward communicating the repeal of the Prevailing Wage Act to the public, and "[e]nacting section 3" contained a severability clause. The corresponding Compiler's Note stated, "Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State." The repealer did *not* restrict defendant from establishing its own

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prevailing-wage policy based on its authority to develop the terms of state contracts, as outlined in the Management and Budget Act, MCL 18.1101 *et seq*.

On October 7, 2021, Governor Gretchen Whitmer issued a press statement announcing that defendant would require contractors and subcontractors bidding on DTMB projects greater than $50,000 to pay their employees the prevailing wage in the region. At the time, the Governor's Office explained, "Michigan's repeal eliminated the state's prevailing-wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts." Thus, "[t]he move reinstates the prevailing wage requirement, which was repealed in June 2018, and ensures that any construction worker working on a state construction project receives a fair wage." Unlike a violation of the Prevailing Wage Act, violation of defendant's prevailing-wage policy does *not* constitute a crime.

Beginning with contracts initially posted for bidding after March 1, 2022, defendant required state contractors and subcontractors to pay the applicable prevailing wage. Defendant posted certain requirements and frequently asked questions for the prevailing-wage policy on its website, providing the following administrative guide citation:

> **1.3.13 Prevailing Wage**
>
> With the exception of lease build-outs, if a project greater than $50,000 involves employing construction mechanics (e.g., asbestos, hazardous material handling, boilermaker, carpenter, cement mason, electrician, office reconstruction and installation, laborer including cleaning debris, scraping floors, or sweeping floors in construction areas, etc.) and is sponsored or financed in whole or in part by State funds, state contractors must pay prevailing wage. [*Prevailing Wage for DTMB Construction Contracts—Administrative Guide Citation, Effective March 1, 2022*, available at https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information (last accessed October 7, 2022).]

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On July 21, 2022, plaintiff, a trade association representing approximately 900 construction and construction-related firms, sued in this Court for declaratory and injunctive relief, claiming that (1) defendant's prevailing-wage policy violated the separation-of-powers doctrine; (2) the prevailing-wage policy was not enacted in compliance with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*; and (3) defendant's conduct was an *ultra vires* exercise of legislative power. Plaintiff also moves for a preliminary injunction to enjoin enforcement of defendant's prevailing-wage policy, arguing that it is likely to prevail on the merits, and that its members will sustain irreparable financial harm without an injunction and if forced to pay a prevailing wage. Finally, plaintiff argues, an injunction would not harm defendant or the public because the injunction would return the contract-bidding process to the status quo between 2018 and 2022.

Defendant responded to the motion for a preliminary injunction and moved for summary disposition as its first response to the complaint. Defendant first argues, in its motion for summary disposition, that plaintiff lacks standing to sue and its claims are unripe. Next, defendant argues it did not violate separation of powers or commit an *ultra vires* act by establishing a prevailing-wage policy for DTMB contracts. The APA did not bind defendant because it was exercising a legislative grant of power when enacting the prevailing-wage policy. In its response to plaintiff's motion for a preliminary injunction, defendant adds that plaintiff failed to sue for nine months after Governor Whitmer's announcement, and nearly five months after defendant's prevailing-wage policy went into effect. Also, according to defendant, plaintiff's claim for irreparable harm

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remains speculative and is outweighed by the harm to local economies if defendant were prohibited from enforcing the prevailing-wage policy.[1]

The Court heard arguments on both motions on September 20, 2022, and the parties agreed that the Court may decide both motions simultaneously.

II. ANALYSIS

A. JUSTICIABILITY CHALLENGE

Defendant challenges plaintiff's standing to sue on behalf of its membership and the ripeness of its claims.[2] The Court disagrees with defendant's arguments and concludes that plaintiff's claims are justiciable.

---

[1] The Court permitted Michigan Building and Construction Trades Council to intervene as a defendant. Michigan Building and Construction Trades Council has concurred in defendant's response to plaintiff's motion for a preliminary injunction and in defendant's motion for summary disposition.

[2] Defendant requests summary disposition under MCR 2.116(C)(4) on the basis that plaintiff's claims are not justiciable. Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). " 'When viewing a motion under MCR 2.116(C)(4), [the] Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.' " *Id.* (citation omitted).

Defendant further argues that plaintiff has failed to state a claim for relief under MCR 2.116(C)(8). This motion tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 357838); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* The court will consider the factual allegations in the complaint as true, but may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

To the extent the Court is required to interpret the Management and Budget Act, the Court will examine the language of the statutes to determine the Legislature's intent. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "The Legislature is

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> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Groves v Dep't of Corrections*, 295 Mich App 1, 5; 811 NW2d 563 (2011) (alteration in original), citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*).]

The Court of Appeals has explained that the doctrine of ripeness is like the doctrine of standing in that both doctrines focus on the timing of the lawsuit. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). For a matter to be ripe, the plaintiff must have an actual injury to bring a claim, and cannot premise their lawsuit on a hypothetical injury. *Id.* at 554.

Defendants argue that plaintiff lacks standing to sue under the "disappointed bidder doctrine." As the Court of Appeals acknowledged in *Groves*, "Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process." *Groves*, 295 Mich App at 5. This is because a contract bidder lacks an expectancy interest in the public contract to be awarded. *Id.* at 5-6. The rationale behind the rule is that competitive bidding for public contracts is designed to benefit taxpayers and not the parties seeking the contracts. *Id.* at 7.

---

presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *Id.* As for the Prevailing Wage Act's repealer, 2018 PA 171, to the extent the Court is required to interpret its provisions, the court will do so in line with the intent of the electors who initiated the law. *DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020).

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The problem with defendant's theory is that plaintiff is not a disappointed bidder to a specific state contract. As plaintiff notes, each case defendant cites addressed a losing bidder's challenge to a state contract after it was made. See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 43-44; 821 NW2d 1 (2012) (the plaintiff, the lowest bidder, sued the defendant for tortious interference after a public body awarded a contract to the defendant, the second-lowest bidder); *Detroit v Wayne Circuit Judges*, 128 Mich 438, 438-439; 87 NW 376 (1901) (the city of Detroit accepted a bid to repave a street and the plaintiff, the lowest bidder, challenged the decision); *MCNA Ins Co v Dep't of Tech, Mgt & Budget*, 326 Mich App 740, 741-742; 929 NW2d 817 (2019) (the petitioner submitted a proposal in response to a state request for submissions and challenged the respondent's decision to accept another proposal); *Groves*, 295 Mich App at 4 (the plaintiff sued after another entity won a state-contract bid); and *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984) (laid-off police officers sued to get their jobs back after a change to the city budget). In this case, plaintiff is challenging defendant's authority to enforce the prevailing-wage policy—not its decision to enter into a specific contract. Thus, the disappointed bidder doctrine does not preclude plaintiff's lawsuit.

The Court looks, instead, to whether plaintiff has met the criteria to request declaratory relief under MCR 2.605. MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Defendant challenges whether there is an "actual controversy" in this matter, arguing that plaintiff's injury is purely hypothetical. It argues that plaintiff and its members have no special injury or right distinct from the public at large, which renders its claims unripe.

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The most relevant case on this topic is *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486; 815 NW2d 132 (2012) (*UAW*). In *UAW*, the plaintiff sued on behalf of its members to enjoin enforcement of a policy relating to the political candidacy of the defendant's employees. *Id.* at 489-492. The defendant argued there was no actual controversy, for standing purposes, because it had not yet applied the policy to any employees. *Id.* at 492. The Court of Appeals held that courts may not decide hypothetical (or unripe) issues, but clarified that a court may grant declaratory relief to guide or direct future conduct. *Id.* at 495. "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *Id.* (quotation marks and citation omitted). Thus, the Court concluded that even though the defendant had not yet acted on the policy, the plaintiff had standing to settle the issue before it ripened into a violation of the law. *Id.* at 496-497.

Likewise, although plaintiff does not allege that defendant has denied its members a contract based on the prevailing-wage requirements, the Court concludes that, as a representative for bidders on state contracts, plaintiff has demonstrated an adverse interest that is distinct from the public at large and that necessitates a sharpening of the issues at this juncture. Plaintiff's injury is not purely hypothetical because its members must alter their business practices to obtain a state-government contract. Plaintiff has standing to sue for declaratory relief, and its claim is ripe for this Court's review.

B. SEPARATION OF POWERS

Next, defendant argues that the prevailing-wage policy was a proper exercise of its discretionary authority under the Management and Budget Act. On this point, the Court agrees.

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Plaintiff's first challenge to defendant's authority to enact a prevailing-wage policy is on the basis of separation of powers. Article 3, § 2 of the Michigan Constitution provides for separation of powers among the three branches of government as follows: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Supreme Court has explained that " 'the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers.' " *Taxpayers of Mich against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007) (citation omitted). Rather, an overlap is permissible if " 'the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other . . . .' " *Id.* (citation omitted). Thus, the branches of government are not "wholly separate." *Id.* at 105-106 (quotation marks and citation omitted).

The separation-of-powers principle has led to the development of a standard known as the nondelegation doctrine. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). The nondelegation doctrine essentially prohibits the Legislature from delegating its power to either the executive branch or judicial branch, but permits the Legislature to obtain assistance from the other branches of government under certain circumstances. *Id.* By way of example, the Legislature may delegate a task to an executive-branch agency if the Legislature provides "sufficient standards" for the executive agency to follow, at which point the task becomes a proper exercise of executive power. *Id.* at 10 n 9.

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The Legislature has delegated certain powers to defendant in the Management and Budget Act. Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over the award, solicitation, and amendment of state contracts. The statute provides, "The department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2) (emphasis added).

With that said, the Legislature also gave defendant ample guidance to support its discretionary decision making, as required under the nondelegation doctrine. By way of example, the Legislature requires defendant to award a construction contract to the "responsive and responsible best value bidder." MCL 18.1241(4). The Legislature defined the term "responsive and responsible best value bidder" to mean the bidder who meets the following criteria:

> (a) A bidder who complies with all bid specifications and requirements.
>
> (b) A bidder who has been determined by the department to be responsible by the following criteria:
>
> (*i*) The bidder's financial resources.
>
> (*ii*) The bidder's technical capabilities.
>
> (*iii*) The bidder's professional experience.
>
> (*iv*) The bidder's past performance.
>
> (*v*) The bidder's insurance and bonding capacity.
>
> (*vi*) The bidder's business integrity.
>
> (c) A bidder who has been selected by the department through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state. Qualitative components may include, but are not limited to, all of the following:
>
> (*i*) Technical design.
>
> (*ii*) Technical approach.

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(*iii*) Quality of proposed personnel.

(*iv*) Management plans. [MCL 18.1241(4)(a)-(4)(c).]

By providing the above criteria, the Legislature provides defendant with "sufficient standards" to follow, making the Management and Budget Act a proper delegation of legislative power. But beyond providing the above standards, the Legislature does not regulate defendant's discretionary powers at the granular level. For example, when deciding the quality of proposed personnel, defendant has the discretion to determine what metrics it uses to measure the quality of the personnel, such as experiential background. Nor does the Legislature, provide detailed guidance on how to measure the bidder's business integrity, leaving the specifics of that decision to defendant as well. The Legislature also does not direct defendant on what materials to require as part of the "technical design" or the "technical approach."

The only case plaintiff cites to limit defendant's discretionary authority to award a state contract is *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), in which the Michigan Supreme Court held that a public body's exercise of discretion to accept or reject contract bids is only curtailed when necessary to prevent fraud, violation of trust, or an injustice. But plaintiff does not allege that defendant has acted with fraud or has committed a violation of trust. 2018 PA 171 simply repealed the Prevailing Wage Act without substituting any language in its place or providing any rationale for the repeal. See 2018 PA 171. The Court declines to read any prohibitions into the Prevailing Wage Act repealer that do not appear in, and cannot be implied from, the language of the statute. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 564; 741 NW2d 549 (2007) ("A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself.").

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The Court finds *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016), instructive in this context. In *Associated Builders*, the plaintiff alleged that the defendant (a municipality) lacked authority to adopt an ordinance regulating wages paid by third parties, even when the work was done on municipal contracts and through the use of municipal funds. *Id.* at 181. The Michigan Supreme Court, however, held that municipalities had broad constitutional powers over local concerns, which included the power to set terms for municipal contracts with third parties. *Id.* at 187-188. Thus, because the Michigan Constitution granted municipalities broad control over local concerns, and because there was no other source of law prohibiting the city of Lansing from setting a wage policy, Lansing's ordinance withstood the plaintiff's challenge. *Id.* at 189-190. Similarly, in this case, the Prevailing Wage Act repealer did not limit defendant's broad authority under the Management and Budget Act to enact policies relating to state contracts, including a prevailing-wage policy.

Had the Legislature wished to limit defendant's ability to set a prevailing wage, it could have done so through statute. The Local Government Labor Regulatory Limitation Act, MCL 123.1381 *et seq.*, expressly prohibits local governments from requiring employers to pay an employee a wage or benefit based on the prevailing wage in the locality. MCL 123.1386 provides, in relevant part, "A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality." The statute did not apply to state projects subject to the Prevailing Wage Act (which was still in effect at the time the Local Government Labor Regulatory Limitation Act was enacted). *Id.* The rationale for the Local Government Labor Regulatory Limitation Act was the Legislature's conclusion that "regulation of the employment relationship between a nonpublic employer and its employees is a matter of

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state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body." MCL 123.1382. This statute demonstrates that the Legislature knew how to limit another governmental body's ability to set a prevailing wage. The Legislature declined to do so here. And while plaintiff notes that the repeal of the Prevailing Wage Law was initiated by voter petition (not by proposed legislation), the Legislature could have proposed an alternative law for voter consideration that expressly prohibited prevailing wage. Or, now that the 2018 legislative session has expired, the Legislature could pass a new law at any time prohibiting defendant from establishing a prevailing-wage policy.

Finally, plaintiff argues that defendant's interpretation of its powers under the Management and Budget Act conflicts with certain prohibitions outlined in the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq*. The implication is that by violating the Fair and Open Competition in Governmental Construction Act, defendant has violated the separation-of-powers doctrine as well.

The purpose of Fair and Open Competition in Governmental Construction Act is to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants, and providing for fair and open competition best effectuates this intent." MCL 408.872.[3] Plaintiff cites MCL 408.875, which provides:

[3] As intervening-defendant notes, the Sixth Circuit has concluded that the Fair and Open Competition in Governmental Construction Act is proprietary—as opposed to regulatory—in nature. *Mich Bldg and Constr Trades Council v Snyder*, 729 F3d 572, 577 (CA 6, 2013).

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> Subject to section [MCL 408.878], a governmental unit awarding a contract on or after the effective date of the amendatory act that added [MCL 408.872] for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its behalf shall not, in any bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations in regard to that project or a related construction project.
>
> (b) Otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with 1 or more labor organizations in regard to that project or a related construction project.

Plaintiff argues that the prevailing-wage policy discriminates in favor of bidders who enter into collective bargaining agreements with unionized employees, in violation of MCL 408.875(b). It points to language in a Michigan Department of Labor and Economic Opportunity (LEO) document titled "DTMB Prevailing Wage Commercial Survey," which defendant used to set the prevailing-wage rates. Plaintiff argues that the survey violated the Fair and Open Competition in Governmental Construction Act because the survey directs prospective bidders, "It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form." But plaintiff does not cite the entirety of the provision.

The complete text of relevant provision in the commercial survey provides:

> Please provide prevailing wages and fringe benefits currently in effect under the applicable collective bargaining agreement, and under any applicable understandings associated with the agreement. List rates separately for each geographic area and, if applicable, for each size of project for which there are different rates in effect.
>
> On each rate sheet you complete, if there is only one pay rate in effect for a job classification, list that rate as the prevailing wage. If there is more than one pay

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> rate in effect, list as the prevailing wage the one that has been the most frequently or commonly paid during the 60 days prior to completing this Survey. In determining the most common or frequent wage, include the pay rates in effect in the area even if a collective bargaining agreement or understanding excludes those rates from prevailing wage projects.
>
> It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form.
>
> **Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding.**

Considering the survey as a whole, the language of the survey does not constitute a "bid specification," a "project agreement" or another "controlling document" as outlined in MCL 480.875. Rather, the survey is intended to assist defendant in establishing the prevailing wage in a given locality. There is no indication, from this document alone, that defendant has discriminated against (or intends to discriminate against) any specific bidder for refusing to enter into a collective-bargaining agreement. In fact, in another document titled *Informational Sheet: Prevailing Wages on DTMB Projects*, attached to plaintiff's complaint, defendant has explained, "Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled though surveys of collectively bargained agreements, a collective bargaining agreement is *not required* for contractors to be on or be awarded state projects." (Emphasis added.) The survey, in and of itself, does not violate the Fair and Open Competition in Governmental Construction Act or establish a separation-of-powers violation.

The bottom line is that plaintiff attempts to read language into the initiative petition repealing the Prevailing Wage Act that does not appear in the repealer. The voter-initiated law simply repealed the Prevailing Wage Act, without otherwise limiting defendant's authority under

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the Management and Budget Act. When the Prevailing Wage Act was repealed, the Management and Budget Act became the status quo. At present, the Management and Budget Act provides defendant with broad discretionary authority, which encompasses the ability to establish a prevailing-wage policy. Plaintiff has not pointed to a single source that denies defendant that discretion or prohibits defendant from setting a prevailing wage for construction contracts. For these reasons, defendant's implementation of a prevailing-wage policy does not violate separation of powers.

C. APA COMPLIANCE

Plaintiff next argues that defendant failed to follow the appropriate procedures to enact the prevailing-wage policy as a "rule" under the APA. Plaintiff further contends that when the Legislature repealed the Prevailing Wage Act, there was no longer an "executive agency actor" who had the power to make or enforce a prevailing-wage requirement. But the Management and Budget Act grants defendant broad discretionary authority relating to solicitation and award of state contracts. See MCL 18.1261(2). So defendant continued to serve as the executive agency actor with the power to set or enforce a prevailing-wage requirement.

Moreover, defendant does not claim that its prevailing-wage policy was a "rule" within the meaning of the APA. Rather, defendant's position is that the policy falls within an exception to the APA's rulemaking requirements, as outlined in MCL 24.207(j). MCL 24.207 defines the term "rule" to mean, in relevant part:

> an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

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In general, an administrative agency cannot rely on a guideline or policy in lieu of a rule promulgated under the APA. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 82; 678 NW2d 444 (2003). The APA requires agencies to follow certain procedures, including providing notice and holding a hearing. *Id.*, citing MCL 24.241 (outlining the notice and hearing requirements for a proposed rule). The failure to do so will render the rule invalid. *Id.*

But there are several exceptions. Defendant relies on the exception for "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). As the Court of Appeals has explained, "If an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption." *Pyke v Dep't of Social Servs*, 182 Mich App 619, 630; 453 NW2d 274 (1990). MCL 24.207(p) also excludes from the definition of rule "[t]he provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract."

The Court of Appeals explored a similar situation in *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56; 261 NW2d 206 (1977). In *Wolverine Lake*, both Commerce Township and the Village of Wolverine Lake submitted separate petitions to the State Boundary Commission (SBC) to incorporate their existing township and village. *Id.* at 57. The SBC granted Commerce Township's petition, denied Wolverine Lake's petition, and adjusted the boundaries for Commerce Township to include the Village of Wolverine Lake. *Id.* at 57-58.

Wolverine Lake challenged the decision, arguing that the SBC had adopted a "rule," without engaging in proper rulemaking procedures, that disfavored small cities in the metropolitan Detroit area. *Id.* at 58. The Court concluded, however, that the SBC exercised a permissive

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statutory power under MCL 123.1009, which provided the SBC with criteria when considering a petition for proposed incorporation. Like the Management and Budget Act, the statute at issue in *Wolverine Lake* did *not* expressly permit favoring larger communities, but allowed the SBC to consider certain factors, including "past and probable future urban growth," "probable future needs for services," "practicability of supplying such services," "the probable effect on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached," and "the financial ability of the incorporating municipality to maintain urban type services in the area." *Id.* at 59.

The Court concluded that, because the statutory criteria favored "future growth and ability to provide services," the SBC was bound to favor larger communities with an industrial-tax base. *Id.* Thus, the statute—not the SBC's internal policies--created the perceived bias against small communities. *Id.* at 59-60. See also *Hinderer v Dir, Mich Dep't of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980) (citing *Wolverine Lake* for the proposition that "if an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption").

Here, as discussed earlier, the Management and Budget Act grants defendant broad discretionary powers when awarding state contracts, but provides certain criteria for defendant to consider when awarding a contract to the responsive and responsible best-value bidder. Defendant's prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j). Additionally, the prevailing-wage policy applies to, and forms a term of, defendant's contracts with private entities. So the rulemaking exception outlined in MCL 24.207(p) applies in

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this circumstance as well.[4] Accordingly, defendant was not required to follow the APA's formal rulemaking process when enacting the prevailing-wage policy.

D. *ULTRA VIRES* ACTIVITY

Plaintiff also argues that the prevailing-wage policy was an *ultra vires* exercise of governmental power. An *ultra vires* activity is one that is "*not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). For the reasons discussed earlier, defendant did not engage in an *ultra vires* activity because its decision to implement a prevailing-wage policy was within its discretionary powers outlined in the Management and Budget Act.[5]

III. CONCLUSION

For these reasons, the Court GRANTS defendant's motion for summary disposition. Because the Court concludes that defendant is entitled to summary disposition, the Court need not

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[4] Even if the prevailing-wage policy were a "rule," MCL 24.264 provides that the validity of a rule may be determined in a declaratory-judgment action only if it impairs the legal rights or privileges of the plaintiff. Plaintiff's members have no legal right or privilege to obtain a state contract or to prohibit the state from considering their wages when granting a government contract. The outcome for plaintiff's members, if they fail to abide by the prevailing-wage policy, is the denial of a state contract; they are still eligible for local or private jobs.

[5] Plaintiff also cites the Michigan Supreme Court's recent decision in *People v Peeler*, ___ Mich ___; ___ NW2d ___ (2022) (Docket Nos. 163667, 163672, and 164191), for the position that "an administrative official [cannot] revive the content and meaning of a statute that has been specifically amended to remove that content." *Peeler* explored the exercise of a "one-man grand jury," as outlined in MCL 767.3 and MCL 767.4. *Id.* at ___; slip op at 2. The Court concluded that although the Legislature had initially permitted judges to issue indictments, it later amended the relevant statute to remove that authority. *Id.* at ___; slip op at 12. The Court held, therefore, that the statute did not permit a judicial indictment initiating a criminal prosecution. *Id.* at ___; slip op at 12-13, 15. Where this case differs from *Peeler* is the fact that the Legislature *has* provided defendant with broad discretionary powers in relation to the solicitation, award, amendment, cancellation, and appeal of state contracts. See MCL 18.1261(2). *Peeler* is inapplicable in this context.

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address the merits of plaintiff's motion for a preliminary injunction, which is DISMISSED AS MOOT.

This is a final order that dismisses the final claim and closes the case.

Date: October 10, 2022

Douglas B. Shapiro
Judge, Court of Claims

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STATE OF MICHIGAN
COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State for the State of Michigan and JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections,

Defendants.

No. 22-000162-MZ

HON. BROCK A. SWARTZLE

DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S RESPONSE TO ORDER TO SHOW CAUSE AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

JOCELYN BENSON, in her official capacity as Secretary of State, and JONTHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

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DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S RESPONSE TO ORDER TO SHOW CAUSE AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF FACTS

Pursuant to the Court's order, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater submit the instant response to the Court's order to show cause and in support of Defendants' motion for summary disposition.

A. History of the Challenger Guidance and Instructions

There have been several iterations of guidance and instructions issued by the Bureau of Elections concerning election challengers over at least the past 20 years. The Department first issued guidance on election challengers in 2003 or earlier. (DeVisser Compl, Ex A, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," September 2003). The Bureau revised its guidance multiple times, including in October of 2020. (*Id.*, Ex B, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," October 2020). After certain issues and disputes surrounding the 2020 election, the Bureau again revised its guidance in May of 2022 (the Challenger Guidance). (*Id.*, Ex C, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," May 2022). In addition to revising certain instructions, the 2022 version made formatting changes for readability—including larger type size and subject headings and a table of contents. (*Id.*, Ex C). Notably, the 2020 guidance included instructions restricting the use of video recording devices in polling places and prohibiting smart phones or tablets or laptops in absent voter counting boards (AVCBs). (*Id.*, Ex B, p 3, 6-7). These were not new to the Challenger Guidance issued in May 2022. (Compare *Id.,* DeVisser Compl, Ex C, p 9, 21).

B. Plaintiffs' Complaints and Procedural History

1. O'Halloran Complaint

On September 28, 2022, Plaintiffs Phillip M. O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (the O'Halloran Plaintiffs) filed a complaint against

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Secretary of State Benson and Director Brater. (O'Halloran Compl, p 1). Plaintiffs O'Halloran, Giacobazzi, and Cushman allege that they were each designated to be an election challenger during the August 2022 primary and will be again for the November 2022 election. (*Id.*, ¶23-24). Plaintiff Penny Crider is a candidate for the House of Representatives in the 17th District. (*Id.*, ¶28). Kenneth Crider is a candidate for State Senate in the 6th District. (*Id.*, ¶28).

The O'Halloran Complaint raises two counts. First, they allege a violation of MCL 168.733, based on their contention that the Bureau of Elections' May 2022 Challenger Guidance violates the rights of election challengers. (*Id.*, ¶56). Second, a violation of the administrative procedures act (APA) of 1969, 1969 PA 306, MCL 24.201 *et seq.*, based on their contention that several so-called "policy changes" included in the Challenger Guidance constituted "rules" that were not promulgated as required by the APA. (*Id.*, ¶75-83).

Each count appears to be based or focused on the following restrictions they understand to be included in the Challenger Guidance: (1) challengers may not speak with election inspectors who are not the challenger liaison or designee, make repeated impermissible challenges, use a device to make video or audio recordings in a polling place or AVCB, or possess a mobile phone other device capable of sending or receiving information at an AVCB between the opening and closing of polls on Election Day; (2) if a challenger acts in a way prohibited by these instructions or fails to follow a direction given by an election inspector the challenger will be warned or the warning will be waived if the conduct is so egregious that the challenger is immediately ejected. A challenger who repeatedly fails to follow instructions or directions may be ejected; (3) a challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote and appeals can only be adjudicated through the judicial process after Election Day; (4) when determining how many

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challengers each credentialling organization is allowed to have in an AVCB, clerks must balance the rights of challengers to meaningfully observe the process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility, and clerks may consider the number of processing teams and election inspectors, the number of tables or stations, the physical size and layout of the facility, and the number of rooms and areas used to process ballots within the facility. (*Id.*, ¶44, 53).

In their motion for emergency declaratory and injunctive relief, the O'Halloran Plaintiffs appear to narrow their challenges to the parts of the guidance concerning ejection of challengers failing to follow the instructions or directions issued by inspectors, speaking to inspectors who are not the designated challenger liaison, balancing how many challengers may be in the AVCB's, and challengers using audio or video recording devices in polling places, clerk's offices, or AVCB's. (O'Halloran 9/28/22 Brf, p 5-6, ¶8a-d.)

In addition, the O'Halloran Plaintiffs make allegations about supposed violations of O'Halloran and Giacobazzi's rights as challengers at the Detroit Huntington Place AVCB during the August 2022 primary. (*Id.*, ¶45-46). However, the allegations concerning their experiences at the City of Detroit's AVCB do not reference either Defendant. (*Id.*, ¶45-46). Also, as stated in the attached affidavit of Director Brater, the Bureau of Elections issues instructions to clerks and elections officials on the proper method of conducting elections but does *not* hire or directly supervise any election inspectors or security personnel. (Defs' Ex A, Brater Aff, ¶13).

The O'Halloran Plaintiffs request that this Court declare the Challenger Guidance rescinded, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from using the 2022 Challenger Guidance to train challengers or poll watchers, declare that the entirety of MCL 168.733 and 168.734 be added to Defendants'

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"updated version" of the Challenger Guidance; order that the "amendments and corrections" be implemented and distributed to all poll challengers and poll workers in advance of the November 8 general election, order that certain passages of the document be "amended" by removing language, and that, "the remainder of the document and other published election manuals be similarly audited and amended to attain strict compliance with lawful rule and statute instructions." (*Id.*, p 26-27). The O'Halloran Plaintiffs do not identify any other "election manuals" or documents they wish to be subject to any declaratory or injunctive relief.

2. DeVisser Complaint

On September 30, 2022, Plaintiffs Richard DeVisser, the Michigan Republican Party (MRP) and the Republican National Committee (RNC) ("the DeVisser Plaintiffs") filed a verified complaint against Secretary Benson and Director Brater. (DeVisser Complaint, p 1). DeVisser alleges that he is a registered voter and was appointed by MRP as an election challenger for the August 2022 primary election. (DeVisser Complaint, ¶8). MRP is a "major political party" as defined under MCL 168.16. (*Id.*, ¶7). RNC is a national political party with offices in Washington D.C. and alleges that it supports MRP and has contributed to Republican candidates in Michigan. (*Id.*, ¶9).

The DeVisser Complaint raises two counts. First, they allege a violation of the Election Law based on their contention that the Challenger Guidance is "directly inconsistent" with the Election Law. (*Id.*, ¶54). Second, they allege a violation of the APA, based on their contention that certain so-called "policy changes" included in the May 2022 guidance document constituted "rules" that were not promulgated as required by the APA. (*Id.*, ¶64).

Each count appears to be based or focused on the following "changes" in the May 2022 Challenger Guidance: (1) challenger credentials must be on a form provided by the Secretary of State, but Plaintiffs contend that because MCL 168.732 does not specifically allow the Secretary

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to prescribe a credential form, the Secretary cannot prescribe a form under her authority in MCL 168.31(1)(e) to prescribe election forms; (2) political parties may appoint challengers at any time until Election Day, but Plaintiffs contend that the guidance is not sufficiently clear in affirming that parties can wait until Election Day itself to train challengers and appoint challengers *during* Election Day; (3) challengers must present their challenges to a challenger liaison, but Plaintiffs insist the election law must be read to allow challengers to speak to any poll worker at any time, despite no such language appearing in the statute; (4) no electronic devices capable of sending or receiving information (phones, laptops, tablets, etc.) are permitted in AVCBs while ballots are being processed, and that challengers who bring such devices into the facility may be ejected—while Plaintiffs insist they must be allowed to possess communication devices even where certain communications outside the facility are prohibited, and must be allowed to use recording devices even where courts have already recognized the need to prevent recording to protect voter privacy; and (5) election inspectors need not record in the pollbook repeated challenges with no basis in law every single time they are made, while Plaintiffs contend that challengers must be given the power to make the same legally unsupported challenge repeatedly, and force election inspectors to record it every single time, even if the challenge is not supported by law or fact. (*Id.*, ¶30(a)-(e), 54, 64).

The DeVisser Plaintiffs request that this Court declare the May 2022 Challenger Guidance to be "inconsistent" with Michigan Election Law and unenforceable, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from implementing the Challenger Guidance in advance of the November general election, and order the Defendants to "reissue" the previous October 2020 guidance document. (*Id.*, p 22-23).

3. Consolidation and Response to Motion for Preliminary Injunction

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On October 3, 2022, this Court issued an order consolidating the O'Halloran and DeVisser complaints and directing the Defendants to show cause why the Court should not issue the relief sought by Plaintiffs on October 11, 2022.

STANDARD OF REVIEW

The decision to grant a request for declaratory relief is within a court's discretion presuming an actual controversy exists. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 126 (2006) ("The language of MCR 2.605 is permissive rather than mandatory[.]")

Summary disposition is proper under MCR 2.116(C)(8) if the plaintiff has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co,* 473 Mich 63, 71 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332 (2001).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206 (2012). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003).

I. The O'Halloran Complaint must be dismissed for lack of jurisdiction.

While the Legislature has wide discretion to confer rights of action onto private citizens to bring claims against the State, *Moulter v Grand Rapids*, 155 Mich 165 (1908); *McCahan v Brennan*, 492 Mich 730, 736 (2012), claims against the State must be brought consistent with the conditions imposed by the Court of Claims Act, MCL 600.6401 *et seq*. See *Okrie v State of*

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Mich, 306 Mich App 445, 448 (2014) (noting that the Court of Claims Act "reflects the state's waiver of sovereign immunity from suit and submission to a court's jurisdiction").

One such limitation is the signature and verification requirement contained in MCL 600.6431(1)–(2)(d), which provides that a "claim or notice" against the State "must contain all of the following . . . (d) *A signature and verification by the claimant before an officer authorized to administer oaths*. (Emphasis added.) "[T]he judiciary has no authority to restrict or amend" these conditions, *McCahan*, 492 Mich at 732, as "any relinquishment of sovereign immunity must be strictly interpreted," *Pohutski*, 465 Mich at 681. In other words, if a claimant fails to comply with MCL 600.6431, the claims against the State are barred by sovereign immunity. *Fairley v Dep't of Corrections*, 497 Mich 290, 297 (2015); see also *Rusha v Dep't of Corrections*, 307 Mich App 300, 307 (2014).

Here, the O'Halloran Complaint is not signed by any of the plaintiffs before an officer authorized to administer oaths.[1] Rather, each of the plaintiffs merely "signed" the complaint with a "/s/" typed electronic signature. (O'Halloran Comp, p 28). Defendants are unaware of any authority providing that such electronic signatures by plaintiffs constitute "signing" a complaint in compliance with the Court of Claims Act. Even if these electronic signatures were to be accepted, there is no question that these purported signatures were not signed before an officer authorized to administer oaths. Thus, the O'Halloran complaint must be dismissed. See *Fairley*, 497 Mich at 297, 299–300 (dismissing plaintiffs' claims because they did not comply with the signature and verification requirements of MCL 600.6431).

[1] With respect to the manner in which a document must be verified, the Supreme Court recently explained that "MCR 1.109(D)(3) specifies [the Court of Claims Act's] verification requirement. *Progress Michigan v Attorney General*, 506 Mich 74, 92 n 10 (2020).

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In addition to the signature requirement listed in MCL 600.6431(2)(d), § 6434 of the Court of Claims Act also provides that "[t]he complaint shall be verified." See *Progress Mich v Attorney General*, 506 Mich 74, 91 (2020) ("Even if MCL 600.6431 does not apply because defendant is not a 'state,' there is no question plaintiff was required to comply with MCL 600.6434."); see also *Reighard v Central Mich Univ*, unpublished per curiam decision of the Court of Appeals, issued May 26, 2022 (Docket Nos 358196, 358759), p 3 ("Even if MCL 600.6431 did not apply to defendant, MCL 600.6434 undisputedly would, and MCL 600.6434 also requires verification of the complaints.") Because the O'Halloran Plaintiffs failed to sign and verify their complaint in compliance with MCL 600.6434(2), their complaint must be dismissed without prejudice.

II. Plaintiffs' claims are barred by laches.

The defense of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v Schram*, 117 F2d 160 (CA 6, 1941). Courts apply laches in election cases. See e.g, *Detroit Unity Fund v Whitmer*, 819 F App'x 421, 422 (CA 6, 2020). An action may be barred by laches if: (1) the plaintiff delayed unreasonably in asserting their rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co v Central States, Southeast and Southwest Areas Pension Fund*, 206 F3d 680, 684 (CA 6, 2000). Laches applies in this case where both elements are satisfied.

Plaintiffs unreasonably delayed raising their claims before this Court. The O'Halloran Plaintiffs filed their action on September 28, 2022, while the DeVisser Plaintiffs filed their complaint on September 30, 2022. Both complaints were filed less than six weeks before the November 8, 2022 general election. But the Challenger Guidance they contest was published in May of 2022. (See DeVisser Compl, Ex C.) The DeVisser Plaintiffs suggest that the 2022 instructions may have been posted on the Secretary's site as late as July 4, 2022, (*Id.*, ¶24), but

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Plaintiffs previously acknowledged viewing the instructions as early as May 31, 2022. (Defs' Ex A, Brater Aff, ¶50-53). Any concerns about these instructions could – and should – have been raised far in advance of the election.

Further, as noted in the attached affidavit of Director Brater, MRP, one of the DeVisser Plaintiffs, wrote a letter on August 25, 2022 complaining of the credential instruction and demanding a response in five business days. (Defs' Ex A, Brater Aff, ¶54). Curiously, the MRP letter did not address any of the other challenges raised in this lawsuit. (DeVisser Compl, Ex G.) MRP was provided a response to its complaint about the challenger credentials on September 2, 2022. (DeVisser Compl, Ex G; Defs' Ex A, Brater Aff, ¶54). MRP took no action for a month before filing its complaint on September 30, 2022—four months after it initially acknowledged viewing the Challenger Guidance, (Defs' Ex A, Brater Aff, ¶50-53), three months after the primary election, and a month after receiving a response to the previous letter. As a result of their delay and the upcoming election, Defendants were permitted only 6 business days to respond to their legal arguments in the midst of an extremely busy period a month before the election.

Plaintiffs make no attempt to explain their delays in filing their respective suits. By Plaintiffs' admissions, these instructions were issued in May—five months ago. (See e.g. O'Halloran Compl, ¶1; DeVisser Compl, ¶24). Indeed, Plaintiffs DeVisser, O'Halloran, Giocobazzi, and Cushman allege that they served as election challengers in the August 2022 primary election. (O'Halloran Compl, ¶23; DeVisser Compl, ¶8.) That election took place after the May 2022 instructions were issued. But Plaintiffs now claim to have "recently learned" about the 2022 instructions relating to election challenges despite previously acknowledging seeing them in May 2022. (See DeVisser Compl, ¶2; (Defs' Ex A, Brater Aff, ¶50-53.)

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The Defendants have most certainly been prejudiced by Plaintiffs' delay. As of this filing, the election is 28 days away. See *Kay v Austin*, 621 F2d 809, 813 (CA 6, 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") The instructions Plaintiffs contest have been in place for five months and have been applied in one election already. Defendants' staff communicated with the DeVisser Plaintiffs multiple times prior to the August primary (Defs' Ex A, Brater Aff, ¶50-53), yet were not made aware of one of their concerns until the August 25, 2022 letter and of the remaining concerns a month after their response to that letter (*Id.*, ¶54). Clerks and election inspectors have, therefore, already learned and applied these instructions. (*Id.*, ¶57-60.) Plaintiffs seek to impose another change to the instructions less than a month before the election. Even reversing the instructions to a previous version at this point risks substantial confusion, error, and disruption during the election. (*Id.*, ¶59.)

Further still, the broader holding that Plaintiffs seek from this Court – that the Bureau of Elections can never issue binding instructions on clerks without promulgating a rule under the APA – would reverse decades of practice less than a month before a statewide election, with the Defendants being given a short time to mount their defense. (*Id.*, ¶8.) And should this Court rule against Defendants, there would be little to no opportunity for Defendants to seek relief in the appellate courts and still conduct an orderly election.

When a party seeks equitable relief, as Plaintiffs do, "[t]he equitable doctrine of laches shall also apply." MCL 600.5815. In Defendants' motion and in response to this Court's show-cause order, Defendants raise the defense of laches. "If a plaintiff has not exercised

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reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114 (2013). The doctrine is particularly applicable in election matters. See, e.g., *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357 (1972) ("The state has a compelling interest in the orderly process of elections."); *Purcell v Gonzalez*, 549 US 1, 5-6 (2006) (per curiam); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); see also MCL 691.1031 (creating a "rebuttable presumption of laches" if an action affecting an election is brought within 28 days of that election).

Plaintiffs unreasonably delayed in raising their claims before this Court, and the consequences of their delay has prejudiced Defendants. Plaintiffs' claims are, therefore, barred by the doctrine of laches and should be dismissed.

III. The challenger instructions are lawful and did not need to be promulgated as a rule.

As an initial matter, Plaintiffs have not established the existence of an actual controversy that would support declaratory relief. An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. *UAW v Central Michigan Univ Tr,* 295 Mich App 486, 495 (2012). "The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers v Attorney General*, 402 Mich 554, 588 (1978); *see also Genesis Ctr, PLC v Comm'r of Fin & Ins Servs*, 246 Mich App 531, 544 (2001). Here, Plaintiffs may well desire the instructions to be re-written to meet their preferences, but that is not the same as requiring a declaration to guide their future conduct. Simply put, Plaintiffs will still be able to appoint election challengers who will be able to make any challenges allowed under the law.

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Even assuming the existence of an actual controversy, the requirements of the APA do not apply to the instructions at issue here. Recognizing the need for flexibility in administering elections, the Legislature gave the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued the instructions here in accordance with the law just has previous Secretaries of State have done for decades. Because the instructions do not violate the Election Law and were not required to be promulgated as rules, Plaintiffs' requests for emergency declaratory and injunctive relief must be denied.

The requirements of the APA do not apply to the instructions at issue here. Recognizing the need for flexibility in administering elections, the Legislature gave the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued the instructions here in accordance with the law just has previous Secretaries of State have done for decades. Because the instructions do not violate the Election Law and were not required to be promulgated as rules, Plaintiffs' requests for emergency declaratory and injunctive relief must be denied.

A. The Legislature delegated the task of conducting elections to the Secretary of State and gave her broad authority to issue instructions, advice and directives.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). Consistent with that mandate, the Legislature enacted the Michigan Election Law (the Election Law), MCL 168.1 *et seq*. And the Legislature delegated the task of conducting proper elections to the Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9.

Section 21 of the Election Law makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Further, under § 31, the Secretary "shall do all of the following": "(a). . . *issue instructions* and promulgate rules . . . for the *conduct of elections*

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. . . in accordance with *the laws of this state*," and "(b) [a]dvise and direct local election officials as to *the proper methods of conducting elections*." MCL 168.31(1)(a)-(b) (emphasis added). The Secretary "shall" also "[p]ublish and furnish for the use in each election precinct before each state primary and election a *manual of instructions* that includes specific instructions on . . . *procedures and forms for processing challenges*[.]" MCL 168.31(1)(c) (emphasis added.) And she "shall" "[p]rescribe and require uniform forms . . . the secretary of state considers advisable for use in the conduct of elections[.]" MCL 168.31(1)(e).

These sections provide the Secretary with broad authority to issue instructions and directions for the proper conduct of elections and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See *Hare v Berrien Co Bd of Election Commr's*, 373 Mich 526, 531 (1964) (local election board had "duty to follow" the Secretary of State's "instructions" under MCL 168.31).

The Secretary's authority under these sections extends to all local election officials and to the places in which they perform their duties, including polling places and AVCBs. Polling places and AVCBs are established within election precincts. MCL 168.654. Section 662 states that each city and township "shall provide a suitable polling place in or for each precinct located in the city . . . or township for use at each election." MCL 168.662(1). Similarly, in a jurisdiction using AVCBs to process ballots, "that city or township shall establish an [AVCB] for each election day precinct in that city or township." MCL 168.765a(1). Thus, polling places and AVCBs function within an election precinct under the Secretary's supervision.

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The Secretary also has ultimate general supervisory authority over election inspectors.[2] Election inspectors have supervisory authority over polling places and AVCBs on Election Day. Section 678 provides that "[e]ach board of election inspectors shall possess full authority *to maintain peace, regularity and order* at its polling place, and *to enforce obedience to their lawful commands* during any . . . election[.]" MCL 168.678 (emphasis added). In turn, under § 21, the Secretary can direct election inspectors in the proper conduct of an election in their polling places and AVCBs. And the Secretary's authority to direct inspectors includes providing instructions on maintaining peace, regularity, and order at polling places. MCL 168.21, 168.31(1)(a)-(b). Such instructions provide the source for the "lawfulness" of any command given by an election inspector. In this way, the Secretary supervises, through general instruction, polling places and AVCBs.

As it pertains to the Secretary's specific authority to instruct clerks conducting elections under the Michigan Election Law as the Chief Election Officer, there is no simple dichotomy of mandatory "rule" and nonbinding "guidance" under the general provisions of the APA. Rather, the Secretary may, and frequently does, provide instructions to clerks on the proper methods of conducting elections consistent with the Election Law. Only when the Secretary establishes directives with policy determinations not found within the Michigan Election Law—which is not the case here—is rulemaking required.

B. The instructions are not required to be promulgated as rules under the APA.

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[2] Direct supervision of election inspectors is performed by the clerk. For Election Day, the city or township election commissioners must appoint at least three election inspectors to each election precinct or as many as are needed "for the efficient, speedy, and proper conduct of the election." MCL 168.674(1). This is true for the AVCBs in each precinct as well, and the inspectors appointed to AVCBs have the same authority as inspectors at in-person voting precincts. MCL 168.765a(1), (4).

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Under the APA, "rule" is defined as "(1) 'an agency regulation, statement, standard, policy, ruling, or instruction of general applicability,' (2) 'that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency[.]' " *Am Fed'n of State, Co & Mun Employees, AFL-CIO v Dept of Mental Health*, 452 Mich 1, 8 (1996), quoting MCL 24.207. Plaintiffs' complaints fail as a matter of law because the Secretary's Challenger Guidance is specifically excluded from the definition of "rule" under the APA. This is because the instructions fall under the "permissive statutory power" exclusion under MCL 24.207(j). Alternatively, the contested instructions are exempt from the definition of a "rule" under MCL 24.207(g) and (h).

1. The Secretary has permissive authority to issue instructions without promulgating them as a rule.

The "permissive statutory power" exception applies where "explicit or implicit authorization for the actions in question have been found." *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs,* 431 Mich 172, 187-188 (1988); see also *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 727 (1980) ("[I]f an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption."). The exception applies here for three reasons.

First, the enabling statute gives the Secretary discretion to either issue instructions or promulgate rules under the APA. The permissive power exception applies to statutory grants of authority that do not require an agency to be bound to the requirements of the APA.

For example, in *Michigan Trucking Association v Michigan Public Service Commission*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was invalid because it was not promulgated as a rule under the APA. 225 Mich App 424, 430-430 (1997). The statute at issue provided, at the time, that the

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PSC "will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article." MCL 479.43 (emphasis added). The Court of Appeals rejected plaintiffs' argument, finding that the order was issued in "an exercise of permissive statutory power," and was therefore "exempted from formal adoption and promulgation under the APA." *Id.* at 430. In reaching this conclusion, the Court emphasized that the statute "directly and explicitly authorize[d] the PSC to implement, either by rule or order," the safety rating system. *Id.*, citing MCL 479.43. See also *Pyke v Department of Social Services*, 182 Mich App 619 (1990) (concluding that permissive statutory power exclusion applied); *By Lo Oil Co v Department of Treasury*, 267 Mich App 19 (2005) (same); *Ann Arbor Transp Auth v Michigan Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002, (Docket No. 232163).

As in *Michigan Trucking*, because the Legislature has not tied the Secretary's authority to issue instructions and advise local election officials to the APA, the Challenger Guidance is not subject to the APA's rulemaking procedures.

Second, the plain language of MCL 168.31 shows that the Secretary has a choice between issuing instructions and promulgating rules. Like the statute in *Michigan Trucking*, the enabling statute for the Secretary provides permissive statutory power: "The secretary of state shall . . . *issue instructions* and *promulgate rules pursuant to the [APA]* . . . for the conduct of elections[.]" MCL 168.31(1)(a) (emphasis added). While the use of "shall" connotes mandatory action, the statutory language itself contemplates two different acts that the Secretary "shall do": either (1) issue instructions, or (2) promulgate rules.[3] Thus, § 31 does not mandate that the

[3] The statute's use of the word "and" does not require a different result. See, e.g., *Aikens v State Dep't of Conservation*, 387 Mich 495, 500 (1972) (internal quotations and citation omitted) (explaining that the "strict meaning [of the words "and" and "or"] is more readily departed from

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Secretary promulgate rules for the conduct of elections.[4] Rather, the Secretary, in her discretion, can *either* issue instructions *or* promulgate rules. MCL 168.31(1)(a). Here, the Secretary issued instructions.

This interpretation avoids rendering nugatory the word "instruction" in § 31(a). See, e.g., *Hanay v Dep't of Transp*, 497 Mich 45, 57 (2014) (courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."). And it is consistent with the structure of § 31, which only mandates that the Secretary promulgate rules in a certain area—petition signature gathering. MCL 168.31(2).

And ***third***, the Legislature provided permissive grants of authority when agencies may need to act quickly. For example, MCL 30.310 empowers the director of the Michigan State Police "*to issue orders* and promulgate rules and regulations for the purpose of administration and preparation of a *plan of civil defense for this state*[.]" (Emphasis added). This grant of permissive power makes sense since, when providing for the civil defense of the State, an agency or officer must be able to act quickly without the deliberate procedures required in the APA.

In enacting § 31, the Legislature similarly recognized that virtually all aspects of an election are time sensitive and that the Secretary has roughly 1,600 clerks to supervise in the conducting of elections, and provided her with flexibility—which rulemaking does not typically allow—to "issue instructions" separate from her authority to promulgate rules.

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than that of other words, and [the words can be] read in place of the other in deference to the meaning of the context").

[4] The Legislature's intent to give the separate power to instruct is demonstrated by the language in section 795a of the Election Law, which provides that the Secretary "shall *instruct* local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a *and the rules promulgated* pursuant to sections 794 to 799a." MCL 168.795a(8) (emphasis added).

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Finally, even assuming they were correctly decided,[5] *Davis v Benson*, Court of Claims Docket No 20-207-MZ, issued October 27, 2020, and *Genetski v Benson*, Court of Claims Docket No 20-216-MM, issued March 9, 2021, are not to the contrary. *Davis* concerned an instruction prohibiting firearms in polling places. The court determined such an instruction constituted a directive, with the binding force of law, based on a policy determination outside the election law. *Genetski*, meanwhile, involved a substantive policy determination about the standards clerks should use in determining whether signatures match. In those cases, the courts found the Secretary to be making policy determinations not found in the Election Law, hence the courts' determination that rulemaking was required.

That is not the case here, where the Secretary's instructions concern the proper methods of conducting elections and application of the Election Law to circumstances involving challengers. Indeed, the facts here are aligned with those in *Associated Builders & Contractors of Michigan v DTMB*, Court of Claims No 22-111-MZ, attached as Ex B. There the Court of Claims determined that DTMB's prevailing wage requirement was not a rule required to promulgated under the APA because the agency had permissive statutory authority to implement the policy in state contracts. (Defs' Ex B, ACB of Michigan, pp 16-19) ("Defendant's prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j).")

For these reasons, the Secretary's Challenger Guidance was properly issued as instructions and was not required to have been promulgated as a rule.

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[5] These Court of Claims decisions only bind the parties to the cases and thus are not binding precedent as to the parties here or on this Court.

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2. Alternatively, the challenger instructions are not "rules" under MCL 24.207(g) and (h).

Even if this Court were to conclude that the permissive power exception does not apply, the Challenger Guidance instructions do not constitute "rules" as that term has been defined and explained by the courts. Under MCL 24.207(g) a "rule" does not include "[a]n intergovernmental . . . memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." Similarly, under § 207(h), "rule" does *not* include "[a] form with instructions, an interpretive statement, a guideline,[6] an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 168.207(h).

Here, to the extent they pertain to the conduct of challengers and poll watchers, the May 2022 instructions fall readily into § 207(g) or 207(h), or both. The Challenger Guidance is principally explanatory, does not have the force and effect of law, and does not affect the rights of the public. The guidance summarizes the requirements of election law as it pertains to challengers and explains how clerks and election inspectors will enforce the law. See *Twp of Hopkins v State Boundary Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2022 (Docket No 355195), p 25; see also *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404 (1998)(explaining that APA rulemaking is necessary when establishing policies that "do not merely interpret or explain the statute or rules from which an agency derives its authority," but rather "establish the substantive standards implementing the program.") This is so because the May 2022 instructions are binding on *clerks* (not challengers)

[6] The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7).

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under the Secretary's authority as Chief Election Officer, MCL 168.21, to instruct clerks on the proper methods of conducting elections, MCL 168.31(1). In this respect, the circumstances in this case differ from those in *Twp of Hopkins*, where the administrative body had no similar authority to issue instructions.

Further, because the instructions are grounded in the Election Law – as set forth below – they do not suggest or permit deviation from the statutory authority on which they are based and prevent any official from being accused of handling any challenger disputes inconsistently or arbitrarily. *Id.* Thus, while clerks and election inspectors must follow the guidance, it likewise informs challengers in order that they understand the process and carry out their roles efficiently, correctly, and without confusion. *Id.*

a. The credential form

The DeVisser Plaintiffs claim that the Secretary's requirement for a specific credential form either violates the Election Law, MCL 168.732, because the Legislature has not specifically applied the Secretary's express authority to prescribe forms to this specific form, or alternatively the APA because the form needed to be promulgated as a rule even though the Election Law expressly authorizes the Secretary to prescribe forms without promulgating a rule under the APA. Plaintiffs are wrong on both fronts. Section 732 of the Election Law requires that challengers possess a signed (written) "authority" in order to serve as a challenger. MCL 168.732. As explained in the Secretary's September 2, 2022, response letter to the MRP, § 732 does not prescribe what form the "authority" should take, requiring only that it be "signed" by the requisite individual, include the "name of the challenger" and the "number of the precinct to which the challenger has been assigned." (DeVisser Compl, Ex G.)

Under the Election Law, the Secretary "shall" publish a manual that includes "forms for processing challenges" and she "shall" "[p]rescribe and require uniform forms" as she "considers

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advisable." MCL 168.31(1)(c), (e). After reports from the November 2020 election, the Secretary considered it advisable to prescribe and require a uniform credential form. The principal reasons for doing so are to ensure uniformity and consistency and to allow the challenger liaison to clearly identify challengers who have been issued a credential by an authorized entity that has reviewed the challenger instructions and provided required training to the challenger. (Defs' Ex A, Brater Aff, ¶31-33; DeVisser Compl, Ex G.) Mandating a uniform credential form does not conflict with § 732, which is silent as to the form of an "authority," and the new form does not need to be promulgated as a rule where the Secretary can "prescribe and require uniform forms" under § 31(1)(e). And "a form with instructions" is expressly *excluded* from the definition of a "rule." See MCL 24.207(h).

Accepting Plaintiffs' argument that the Secretary cannot prescribe a form, notwithstanding her express statutory authority to prescribe forms, unless the specific section of law describing the form also expressly grants her the authority to prescribe that form would render MCL 168.31(1)(e) meaningless, and would invalidate dozens of others forms the Secretary has prescribed in past years and decades including, among other things, paper voter registration forms (see MCL 168.497, which does not specifically provide for the Secretary to prescribe a paper voter registration form).

In any case, Plaintiffs have not explained why using a credential form prescribed by the Secretary of State, as opposed to their own template, harms them in any way. Plaintiffs point to only one example in which a challenger was not allowed to access a location on the basis of not having the prescribed credential, which Plaintiffs can remedy by simply using the publicly available credential form. In every other situation cited by Plaintiffs, their challengers were allowed to access the site.

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Because the instructions are consistent with the Election Law and are not a "rule" under § 207(h), Plaintiffs' claims as to the credential form are without merit and should be dismissed.

b. Appointment of challengers until Election Day

The DeVisser Plaintiffs interpret the challenger instructions as prohibiting the appointment of challengers on Election Day. However, the Challenger Guidance instructions say nothing about *prohibiting* appointments on Election Day. The instructions say only that "Political parties eligible to appear on the ballot may appoint or credential challengers at any time *until Election Day*." (DeVisser Compl, Ex C, p 1) (emphasis added). The word "until" does not exclude Election Day. (Defs' Ex A, Brater Aff, ¶ 38). The expectation is that political parties, like other organizations, will prepare ahead of time and not wait until the actual day of the election to train and appoint their challengers. (*Id.*, ¶ 37.)[7] Training is critical to prevent challengers from mistaking routine election procedures as apparent acts of fraud or conspiracy, which challengers did on numerous occasions during the November 2020 general election. (Defs' Ex A, Brater Aff, ¶ 35-36).

While political parties should prepare ahead of time, and generally do, challengers appointed on Election Day (for example, to replace challengers who become ill or otherwise unable to perform their role) will be accepted. (*Id.*, ¶ 39.) And, because MCL 168.730(1) provides that organizations may appoint challengers "at an election," and the names of organizations authorized to appoint challengers must be certified "[b]efore the opening of the

[7] Section 731(1) requires organizations other than the political parties to advise clerks "[n]ot less than 20 nor more than 30 days *before* an election" of their intention to appoint challengers. MCL 168.731(1) (emphasis added). And "[*b*]*efore the opening of the polls*, the clerk shall certify in writing to the board of election inspectors . . . the names of organizations and committees that are authorized . . . to appoint and keep challengers at the polling places[.]" MCL 168.731(3) (emphasis added.)

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polls," MCL 168.731(3), it follows that challengers generally may not be appointed *after* Election Day.

Moreover, Plaintiffs overstate their claim regarding their ability to appoint challengers at any time they choose, including on Election Day. While they allege that the Election Law provides no limit on when challengers may be appointed, MCL 168.730(1) provides that a party may appoint no more than 2 challengers to serve in a precinct "at any one time," and not more than one challenger to serve at an AVCB. A party's ability to appoint challengers at any time is thus inherently limited by statute to a specific number of persons at a specific precinct or AVCB at any one time.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the appointment of challengers are without merit and should be dismissed.

c. Election inspector challenger liaison

Both sets of Plaintiffs allege the instruction that challengers only communicate through and with the election inspector challenger liaison is unlawful. But MCL 168.733(1)(e) only provides that a challenger may bring certain issues "to an election inspector's attention"—it does *not* provide that a challenger may speak to any and all inspectors at any time. The May 2022 instruction absolutely provides for challengers to bring matters to an inspector's attention by bringing their challenge to the designated person. Simply put, the instruction merely outlines the process of raising a challenge and identifies a point of contact for challengers to ensure that challenges are received and addressed appropriately. The guidance helps ensure that challenges are brought to a person equipped to respond correctly and consistently. (Defs' Ex A, Brater Aff, ¶44.) As such, the instructions concerning the challenger liaison merely interpret and explain the process of making a challenge. *Twp of Hopkins, supra* at p 25.

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Further, and significantly, nothing in the May 2022 guidance prohibits clerks or election inspectors from determining that *all* election inspectors may serve in this liaison role or that challengers can speak to any election inspector, if that is what the clerk, precinct chair, or challenger liaison prefers. (Defs' Ex A, Brater Aff, ¶44.) As a result, Plaintiffs' concerns about not being able to speak to elections inspectors is speculative at this point, and it is far from certain that any of Plaintiffs' concerns would come to pass. Regardless, the instruction is not contrary to law. The Secretary is expressly authorized to "publish and furnish . . . a manual of instructions that includes specific instructions on . . . procedures . . . for processing challenges[.]" MCL 168.31(1)(c). Pursuant to that command, the contested instruction simply effectuates the language of § 733 by explaining the means for how a challenger should bring a challenge "to an election inspector's attention." MCL 168.733(1)(e).

In sum, Plaintiffs simply invent a requirement that does not exist in MCL 168.733(1)(e) and assert that challengers must be allowed to speak to any election inspector at any time about any type of challenge. In fact, clerks and election inspectors have authority to determine an orderly process by which challengers should bring these challenges to an election inspector's attention. MCL 168.678.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the challenger liaison instruction are without merit and should be dismissed.

d. Electronic device restrictions in AVCBs and polling places.

Both sets of Plaintiffs allege the instructions regarding the use of electronic devices, such as cell phones, at polling places and AVCBs are unlawful. These prohibitions are not new. (Defs' Ex A, Brater Aff, ¶45.) The Secretary of State has long issued instructions to poll

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challengers and watchers related to the possession of phones and other media devices. (*Id.*) Different restrictions apply in an AVCB and an in-person polling place.

With respect to AVCBs, "[e]lectronic devices are not permitted within the absent voter ballot processing facility." (DeVisser Compl, Ex C, p 5.) More specifically:

> No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day. A challenger who possesses such an electronic device in an absent voter ballot processing facility between the beginning of tallying and the close of polls may be ejected from the facility. [*Id.*, pp 9, 21.][8]

The only exception to this is that a challenger may use his or her phone to display credentials but must then secure the phone elsewhere outside the processing area. *Id.*, p 5.

Watchers and challengers serving at an in-person polling place, however, may "use electronic devices, so long as the device is not disruptive and so long as the device is not used to make video or audio recordings of the polling place." *Id.*, p 20.[9]

The complete ban inside AVCB facilities is grounded in statutes that prohibit the sharing of information learned at the AVCBs before the polls close. MCL 168.765a(9) requires that a "challenger, or any other person at an" AVCB "at any time after the processing of ballots has begun shall take and sign" the following "oath":

> "I (name of person taking oath) do solemnly swear (or affirm) that *I shall not communicate in any way any information relative to the processing or tallying of votes that may come to me while in this counting place until after the polls are closed.*". [Emphasis added.]

And MCL 168.765a(10) thereafter provides, in part:

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[8] The same instructions are given to election officials. See, p 3, Chapter 8, Absent Voter Ballot Election Day Processing, VIII_Absent_Voter_Counting_Boards.pdf (michigan.gov).

[9] The same instructions are included in the Bureau of Elections' Manual for Elections Inspectors. See, p 27, Managing Your Precinct on Election Day 2022 (michigan.gov). See also Election Officials' Manual, Chapter 11, Election Day Issues, October 2020, pp 38-40, XI_Election_Day_Issues.pdf (michigan.gov).

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> The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. . . . *A person . . . who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony.* [Emphasis added.]

The oath statute prohibits a challenger from "communicat[ing] in *any way* [for example, by text message, email, video, or an actual phone call] any information relative to the processing or tallying of votes that may come to [the challenger] while in [the] counting place until after the polls are closed." MCL 168.765a(9). And the penalty statute makes it a felony to disclose how any absent voter ballot was voted before the polls close. MCL 168.765a(10). Further, a watcher or challenger who refuses to abide by the electronic device prohibitions could be guilty of a misdemeanor under MCL 168.931(1)(h) ("A person shall not willfully . . . disobey a lawful instruction or order of the secretary of state as chief state election officer . . . or board of inspectors of election.")

AVCBs may commence processing and tabulating absent voter ballots by 7 a.m. on Election Day, and do not stop until all ballots are tabulated. MCL 168.765a(8). Because electronic devices like cell phones, smartwatches, tablets, etc, make it easy to communicate information from within an AVCB, they pose a threat to the security of the information present at AVCBs, most significantly in what direction absent voter ballots may be trending. And because it would be impossible for election officials to police what challengers may be texting or emailing from their electronic devices, the Secretary has instructed clerks that the proper method of enforcing this requirement is to prohibit these devices to ensure that no unlawful communications are made.

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With respect to in-person polling places, challengers may possess and use electronic devices so long as they do not use the devices to make visual or audio recordings. The purposes of this restriction are obvious—to protect the privacy of voters, to deter possible voter intimidation, and to deter or curb disruption at the polls. (Defs' Ex A, Brater Aff, ¶45-46.) The Michigan Constitution provides for the right to vote a "secret ballot." Const 1963, art 2, § 4(1)(a). See also art 2, § 4(2) ("the legislature shall enact laws . . . to preserve the secrecy of the ballot[.]") Activity that disrupts voting or that rises to voter intimidation is likewise prohibited. See MCL 750.170; MCL 168.932(1)(a). Further, the U.S. Supreme Court has observed that states have an obligation to safeguard their citizens' constitutional right to vote. *Cf. Burdick v Takushi*, 504 US 428, 433 (1992).

The Secretary's authority to issue these instructions for AVCBs and polling places is fully supported by the language in § 31(1)(a), (b), and (c), empowering her to issue instructions, advice and directives for the conduct of elections, including "procedures . . . for processing challenges." MCL 168.31(1)(a)-(c). Notably, the Secretary's prohibitions with respect to the use of cell phones by voters in the polls was previously challenged on First Amendment grounds by a voter who wished to use his cell phone to take a "ballot selfie" but was barred from doing so under the instructions in place at that time. See *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016). In staying the preliminary injunction issued in that case based on laches, the Sixth Circuit spoke favorably of the Secretary's instructions: "The State's policy advances several serious governmental interests: preserving the *privacy* of other voters, *avoiding delays and distractions at the polls*, preventing vote buying, and *preventing voter intimidation*." *Id.* at 400 (emphasis added). While the state later agreed to allow a limited opportunity to take a "ballot selfie," this

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case supports the Secretary's authority to issue instructions to protect privacy, and to forestall disturbances and delays at polling places relating to the use of electronic devices.

Further, the Secretary's instructions do not conflict with any existing election laws. Nothing in § 733 gives challengers the right to possess and use electronic devices in AVCBs or polling places. Section 733 provides that challengers may "observe" certain actions and "[k]eep records of votes cast and other election procedures as the challenger desires." MCL 168.733(1)(b), (h), (i). Challengers may "observe" actions by watching and they may "keep records" by taking handwritten notes, as paper, notebooks, pens, etc, are not prohibited within AVCBs or polling places. The phrase "as the challenger desires" in § 733(1)(h) does not mean that a challenger can use any method he or she sees fit to keep a record. It simply means that if a challenger wishes to make a record, he or she may do so.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the prohibitions regarding electronic devices are without merit and should be dismissed.

e. The recording of impermissible challenges

The DeVisser Plaintiffs complain that the instructions do not require election inspectors to make a record in the poll book of every single time an impermissible challenge – one without basis in law – is made by a challenger. These instructions were implemented due to an increase in the volume of indiscriminate or impermissible challenges. (Defs' Ex A, Brater Aff, ¶ 41.)

Notably, the instructions require permissible challenges (those with a basis in law) to be recorded even if the challenge is rejected. (*Id.*, ¶ 42.) The law only permits challenges of a voter's registration status in the precinct, that an election procedure is not being properly performed, or to a voter attempting to vote who previously applied for an absent voter ballot. MCL 168.733(1)(c)-(d), MCL 168.727(1). Section 727(2) only requires an election inspector to

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make a written report of a challenge to a voter's registration status. MCL 168.727(2)(a)-(c). The Election Law prohibits challengers from making a "challenge indiscriminately and without good cause," and from "interfere[ing] with and unduly" delaying the work of the election inspectors. MCL 168.727(3).

It is difficult to ascertain what harm Plaintiffs will suffer if they are not permitted to make an infinite number of unsupported challenges and require election inspectors to deviate from assisting voters and tabulating ballots to record impermissible challenges. Again, the Secretary is expressly mandated to "publish and furnish . . . a manual of instructions that includes specific instructions on . . . procedures . . . for processing challenges[.]" MCL 168.31(1)(c). The instructions are consistent with the challenger-related statutes and simply clarify that all challenges with a basis in law must be heard and recorded (whether the challenger is correct or incorrect that a voter is ineligible or that a procedure is not being followed), and that challenges without a basis in law or contrary to the law cannot be made and need not be recorded. (Defs' Ex A, Brater Aff, ¶¶ 40-42.) Nothing in the Challenger Guidance allows an election inspector to determine that a challenge with a basis in law is impermissible or need not be recorded.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the prohibitions regarding electronic devices are without merit and should be dismissed.

3. The remaining claims by the O'Halloran Plaintiffs need not be addressed at this time.

The O'Halloran Plaintiffs contest several other instructions that the DeVisser Plaintiffs do not and they filed a motion for emergency declaratory and injunctive relief.[10] But because the

[10] The O'Halloran Plaintiffs contest instructions relating to the ejection of challengers from polling places and AVCBs, the appeal of challenges resolved by an election inspector to the local

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O'Halloran complaint must be dismissed without prejudice as discussed in Argument I, it is unnecessary to address their additional claims or their motion for injunctive relief. Indeed, at this time it is unclear whether these Plaintiffs will properly refile their complaint, when they may do so, and whether they will modify any of the additional claims from that previously alleged. If they do refile, Defendants request the opportunity to submit supplemental briefing.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Secretary of State Benson and Director Brater respectfully request that this Honorable Court deny Plaintiffs' requested relief and grant Defendants' motion for summary disposition, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

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PROOF OF SERVICE

Heather S. Meingast certifies that on October 11, 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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clerk, and guidance related to factors election officials should take into consideration in establishing AVCBs.

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and **KENNETH CRIDER**,

Plaintiffs,

v.

Case No. 22-000162-MZ

JOCELYN BENSON,
in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**,
in his official capacity as the **DIRECTOR OF THE MICHIGAN BUREAU OF ELECTIONS**,

Hon. Brock A. Swartzle

Defendants.

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and **REPUBLICAN NATIONAL COMMITTEE**,

Plaintiffs,

v.

Case No. 22-000164-MZ

JOCELYN BENSON,
in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**,
in his official capacity as **DIRECTOR OF ELECTIONS**,

Hon. Brock A. Swartzle

Defendants.

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THE MICHIGAN DEMOCRATIC PARTY'S PROPOSED AMICUS CURIAE BRIEF

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THE MICHIGAN DEMOCRATIC PARTY'S PROPOSED AMICUS CURIAE BRIEF

DESCRIPTION OF AMICUS CURIAE AND STATEMENT OF INTEREST[1]

The Michigan Democratic Party ("MDP") is the Democratic Party's official state party committee for the State of Michigan. Affidavit of Erica Peresman ("Peresman Aff."), Ex. 1 at ¶ 1. The MDP aims to ensure that the constitutional rights of its members, voters, and candidates are not impeded. For decades, both the MDP and the Michigan Republican Party ("MRP"), as major political parties under Section 16 of the Michigan Election Law (MCL 168.1 *et seq.*), have overseen election challenger programs. *Id.* These programs require designating and issuing credentials to election challengers.

As a major political party and credentialing organization, the MDP has an interest in the proper and efficient administration of elections. Election challengers and poll watchers it appoints help facilitate this. They act as a check and balance on the process, and their presence in polling places and absentee counting rooms helps boost public confidence in the integrity of our elections. For the process to work as intended, the organizations that credential challengers have a responsibility to know the rights and duties as set forth in the Michigan Election Law, supplemented by guidance issued by the Michigan Secretary of State from time to time. The MDP takes very seriously its responsibility to educate its appointed and credentialed challengers about these matters.

The Secretary of State's guidance includes *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*, released in May 2022 (the "Manual"), at issue in this case.

[1] No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

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Michigan Election Law requires the Secretary of State to issue this manual. MCL 168.31(1)(c). The Manual applies to challengers credentialed by the MDP in the same way as those credentialed by the MRP. Accordingly, the MDP incorporated these instructions in its challenger and poll watcher training for the August 2022 Primary Election. Peresman Aff. at ¶ 5. It was not difficult. Nor did the Manual impair challengers' or poll watchers' discharge of their duties during the August 2022 Primary Election. In fact, the new Manual's guidance provided for a smoother administration of the election by clarifying how challengers should approach their tasks.

The MDP has already devoted substantial time and resources training hundreds of volunteer challengers based on the guidelines in the Manual. If either Plaintiffs' request is granted, the MDP would have to invest significant resources updating and retraining volunteers to comply under new guidelines. Peresman Aff. at ¶ 12. The MDP is also concerned that rescinding the current Manual would interfere with its challengers' and poll watchers' ability to help facilitate an efficient election in which the public can place its trust.

INTRODUCTION

In November 2020, the world witnessed what could go wrong when election challengers are improperly trained and when protocols for those challengers are ambiguous. The Senate Oversight Committee's Report on the November 2020 Election in Michigan ("Senate Oversight Committee Report"), signed onto by the three Republican members of the Committee, found that:

> The environment and those emotions were compounded by a lack of proper recruitment and/or training of election workers on the part of the clerk, as well as a failure of the Republican party to verify recruitment and training, supply an adequate number of election attorneys, and to properly train and counsel some of their volunteers and challengers. Republican officials, along with some ostensibly Independent challengers, furthered the crisis by putting out the call to other members and citizens to descend on the location to stop what was described and presented as a stealing of the election.

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Id. at 13. This was particularly apparent at then-TCF Center in Detroit, where disorder and disruption dominated the absent voter counting board. The proliferation of challenges by untrained challengers built on one another to create chaos that "increased the angst and fears of the untrained challengers and observers, as well as the many in the public who did not understand what was shown to them by the media." *Id.* This prompted a call to ensure that "the rights and duties of poll watchers and challengers be better understood and reinforced in their respective training and must be protected equally by election officials." *Id.* at 12.

Following these findings, the Secretary of State executed her authority to oversee the administration of elections in the State of Michigan by issuing the current Manual in May 2022. This authority is under express Legislative directive, which requires the Secretary of State to "issue instructions," including "a manual of instructions that includes specific instructions on … procedures and forms for processing challenges," among other things. MCL 168.31(1)(a) and (c). The Manual appropriately interprets and applies the Michigan Election Law—which the Secretary of State is empowered to do. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239, 501 NW2d 88 (1993) ("Agencies have the authority to interpret the statutes they are bound to administer and enforce."). So long as the Manual does not directly conflict with the Michigan Election Law or tread entirely new policy ground (it does not), the Michigan Election Law grants the Secretary of State full authority to publish the Manual. *See Michigan Trucking Ass'n v Michigan Pub Serv Comm'n*, 225 Mich App 424, 430 (1997).

Rather than recognize this clear Legislative direction, Plaintiffs ask this Court to simultaneously *eviscerate* the Secretary of State's authority under the Michigan Election Law and *exercise* the Secretary of State's authority by rewriting the Manual in an act of judicial overreach. Either would set us back to the dark days of November 2020. In that cycle, election challengers

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and poll watchers on behalf of the MDP observed numerous instances – well documented in the Senate Oversight Committee Report, the media, and various court cases alike – of individuals on behalf of the MRP and "ostensibly Independent challengers" (Senate Oversight Committee Report at 13) issuing indiscriminate challenges, without good cause grounded in the Michigan Election Law, and with the purpose of interfering with or unduly delaying the work of election inspectors. Affidavit of David Jaffe, Ex. 2 ("Jaffe Aff."), at ¶ 6. That conduct hindered the ability of election officials to perform their duties under the Michigan Election Law and caused untold damage to our democracy by sowing mistrust in the public in our electoral system.

The Manual's detailed procedures help fortify Michigan's election procedures against the types of disruption faced during the November 2020 election. The MDP has reviewed that Manual cover-to-cover. Peresman Aff. at ¶ 5. It is fully consistent with the Michigan Election Law. It is also materially consistent with prior practice in many ways, including guidance issued by the Secretary of State in 2020 (the "Prior Manual"). The differences relative to the Prior Manual are rooted in specific problems that arose in the November 2020 election and subsequently, but nonetheless stay within the bounds of the Michigan Election Law.

The MDP has already trained numerous election challengers and poll watchers, and will train others in the coming weeks, to serve their important roles in the election process by following the terms of the Manual in their entirety. *Id.* at ¶¶ 6, 10, 12. Retraining volunteers to comply with any new, judicially-mandated guidelines would require investing significant resources. *Id.* at ¶ 11. The Plaintiffs nonetheless want to turn back the clock to the chaotic days of the November 2020 election, with MRP specifically seeking to reinstate the Prior Manual.[2] This is somewhat ironic

[2] The O'Halloran Plaintiffs are represented by Ann Howard, who is the subject of a petition by the Attorney General to appoint a Special Prosecutor for review of a charging request relating to conspiracy to unlawfully obtain access to voting machines used in the 2020 election, among other

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when many of the complained-of elements of the Manual can also be found in the Prior Manual; the Manual simply enhances them to improve clarity and address specific issues. Contrary to the Plaintiffs' suggestions, the MDP – to which the Manual is equally applicable – is confident that election challengers and poll watchers can discharge all statutory rights and duties with alacrity without running afoul of the Michigan Election Law.

ARGUMENT

I. THE SECRETARY OF STATE APPROPRIATELY EXERCISED ITS AUTHORITY TO INTERPRET AND EXPLAIN EXISTING STATUTORY PROVISIONS TO A SPECIFIC CLASS OF ELECTION PARTICIPANTS.

The Michigan Election Law assigns to the Secretary of State ultimate responsibility for administering elections in the state. MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act."). This requires the Secretary of State to fulfill a wide array of duties. For example, the Secretary is entrusted to issue instructions for how elections and registrations will be conducted. MCL 168.31(1)(a) and (c). The Secretary executed that authority when issuing the Manual, offering the Secretary's view on the rights and duties of election challengers and poll watchers in Michigan.

Of course, the Secretary of State's powers are not boundless, and agency actions are subject to the Administrative Procedures Act. See MCL 24.203(2). Unless exercising its rule-making authority in accordance with the Administrative Procedures Act, it may not decide matters of

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things. In particular, Howard's alleged role under investigation is the "coordinat[ing of] printing of fake ballots to be run through the tabulators and recruitment of 'volunteers.'" Ex. 3 (Aug. 5, 2022 Petition for Appointment of Special Counsel, *available at* https://www.michigan.gov/-/media/Project/Websites/AG/releases/2022/August/SPA-Petition---Tabulators-Case.pdf).

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public policy, or dictate the actions of local election officers. This Court clarified the scope of these limitations in two recent decisions, *Davis v Benson* and *Genetski v Benson*.

In *Davis*, this Court took issue with the Secretary of State's directive prohibiting "the open carry of firearms on election day in polling places, clerk's office(s), and absent voter counting boards[,]" and within 100 feet of those locations. *Davis v Benson*, 2020 WL 7033534, at *1 (Mich Ct Cl Oct 27, 2020). The Court's primary concerns were that "[t]he directive itself covers a substantive policy area—where a resident can openly carry a firearm—and applies to every resident of this state," and that it placed additional general restrictions on where people not involved in the election process can openly carry a firearm beyond those contained in existing statutes. *Id.* at *3.

In *Genetski*, this Court was concerned with the Secretary of State establishing a presumption that signatures on absent voter ballot applications and return envelopes were valid. *Genetski v Benson*, 2021 WL 1624452 (Mich Ct Cl March 9, 2021). The Court held that there was no such presumption in the Michigan Election Law; the declaration had general application because it applied to any person exercising the right to vote through absent voter ballot applications and absent voter ballots; and the Secretary of State obligating local election officials to act in particular fashion resulted in its proclamation having the force of law. *Id.* at *4.

Outside of the election context, courts have taken issue with agency action that conflicted directly with statutory provisions. See, e.g., *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188 (1988) (where rule required hearings to take place in the county where the claimant resided, agency action permitting telephonic hearings would be deemed to take place where the referee was located and not in two places

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simultaneously, and thereby conflicted with the rule's requirements when the referee was located in a different county).

These cases, however, do not mean that the Secretary of State has *no* power to issue instructions relating to elections. To the contrary, ***the Secretary of State is specifically empowered by the Michigan Election Law to (1) issue instructions regarding the administration of elections, and (2) issue the Manual***. MCL 168.31(1)(a) and (c). Thus, so long as the Manual is consistent with the Michigan Election Law and does not tread new policy ground, the Secretary of State's issuance is a permissive exercise of statutory authority that is allowed under the Administrative Procedures Act. *See* MCL 24.207(j).

Michigan courts have consistently held that these powers rest with agencies, and their exercise does not violate the Administrative Procedures Act. See, e.g., *Twp of Hopkins v State Boundary Comm'n*, __ Mich App __, No. 355195 (Feb 24, 2022) (statute provided comprehensive scheme to resolve boundary disputes, and agency's guidelines do not add to or contradict the requirements already found in the statute, so the agency's guidelines were enforceable and its failure to issue rules did not breach a statutory requirement to make rules "necessary or desirable" because the determination of what was necessary was left to the reasonable discretion of the agency); *Michigan Trucking Ass'n v Michigan Pub Serv Comm'n*, 225 Mich App 424, 430 (1997) (broad statutory authorization to implement a motor carrier safety rating system by "rule or order" rendered agency implementation of a motor carrier rating system a proper permissive exercise of statutory authority under MCL 24.207(j)); *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19, 47 (2005) (" '[c]ertain portions of RAB 91-12 are clearly explanatory and interpretive, expressing Treasury's position on its standardization of invoices as to form and content [and those] portions of the document are within the § 7(h) exclusion from the APA' rule promulgation requirements").

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Despite Plaintiffs' hyperbole, the Manual here properly and legitimately provides helpful clarification to election challengers and poll watchers about how to comply with the Michigan Election Law. This is an essential function of an agency:

> Communication to the public does not convert an interpretive statement into an independently enforceable rule. Rather, informing the public is one of the purposes of interpretive "rules." Interpretive rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to *advise* the public of the agency's construction of the law it administers.

Clonlara, *supra* at 243-244 (cleaned up). The Manual's permissibility is further emphasized by its exception to the definition of "rule" under the Administrative Procedures Act. Not only is it excepted from the definition under MCL 24.207(j), but elements of it additionally fall under exceptions found in MCL 24.207(g) and (h). To hold otherwise would effectively eliminate all ability of the Secretary of State to interpret the statutes it is entrusted with administering. Not only would this needlessly impede the efficient and proper administration of elections, but it would create substantial legal uncertainty by contradicting clear precedent from this Court, the Michigan Court of Appeals, and the Michigan Supreme Court.

II. THE PRACTICAL IMPACT OF THE MANUAL, AND ITS CONSISTENCY WITH THE PRIOR MANUAL AND MICHIGAN ELECTION LAW, DEMONSTRATES THAT IT IS NOT A RULE.

Several MDP employees are registered to receive notifications from the Secretary of State relating to elections. Peresman Aff. at ¶ 4. These are available to the public and anyone who subscribes.[3] From this, the MDP received notification that the Manual had been issued on May 25, 2022. Peresman Aff. at ¶ 4 & ex. A thereto. The MDP promptly reviewed the Manual, cover-to-

[3] *See* https://service.govdelivery.com/accounts/MISOS/subscriber/new?topic_id=MISOS_48 (last visited on October 8, 2022). The MDP notes that while the Manual was first made available in May 2022 (and at a minimum the MRP admits to having received by the latest July 2022), the MRP waited until just five weeks before the General Election to file this suit.

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cover. *Id.* at ¶ 5. The MDP confirmed that its provisions are consistent with the Michigan Election Law. Afterward, the MDP made the minor updates necessary to its training protocols. *Id.* The MDP trained approximately 368 election challengers and poll watchers before the August 2022 primary. *Id.* at ¶ 6. It has trained 723 challengers and poll watchers for the November 2022 election to date, and expects to train hundreds more. *Id.* at ¶ 10. Each training session is approximately an hour and a half long, with additional time for the Detroit Absent Voter Counting Facility at Huntington Place. *Id.* at ¶ 7. The MDP fully expects that it and its trained election challengers and poll watchers will be able to discharge their duties, and find none of their rights impaired, while abiding by the entirety of the Manual. *Id.* at ¶ 12.

The Plaintiffs' argument seems to be that the Manual is improper because it includes language and terms not contained in the Michigan Election Law. Indeed, the argument endorsed by the O'Halloran Plaintiffs (and, to a lesser degree, the MRP) seems to be that the Secretary of State is only empowered to issue a manual that duplicates the statutory language contained in the Michigan Election Law. See O'Halloran Motion at 7-8 (arguing that "[i]t should be obvious that all statutory rights should be presented" in the Manual); see generally O'Halloran Motion at 5-7, and MRP Compl. at ¶ 30 (arguing that the Manual is improper because certain procedural elements are not contained word-for-word in the Michigan Election Law). That is not the standard. To hold that as the standard would read the phrase "issue instructions" out of MCL 168.31(1)(a) entirely, read language into MCL 168.31(1)(c) requiring the Secretary of State's "manual of instructions" to include all of the Michigan Election Law word-for-word, and read the words "procedures and forms for processing challenges" out. It also would render the exceptions to the definition of "rule" contained in MCL 24.207 a nullity. This would upend the established precedents of *Clonlara*, *Hinderer*, *Michigan Trucking*, and a host of other Michigan Supreme Court and Court of Appeals

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decisions—all for no purpose, because the Manual is not disruptive. The MDP had absolutely no difficulty training its challengers for the August 2022 primary using the Manual, and those challengers had no difficulty exercising their rights and performing their duties in the August 2022 primary. Peresman Aff. at ¶¶ 5, 6, 8. There is no reason to think November will be any different. Peresman Aff. at ¶ 12.

In accordance with this Court's October 3, 2022 Order, the remainder of this Brief will explain why each of the Plaintiffs' complaints about specific elements of the Manual are hollow, and how each provision is consistent with the Michigan Election Law. Each qualifies as a permissive exercise of statutory power to "issue instructions" and to "publish…a manual of instructions" pursuant to MCL 168.31(1)(a) and (c), in accordance with MCL 24.207(j). Other exceptions taking the Manual outside the definition of "rule" are noted where also applicable.

A. THE PROVISIONS OF THE MANUAL WITH WHICH THE MRP TAKES ISSUE ARE CONSISTENT WITH THE MICHIGAN ELECTION LAW AND DO NOT IMPEDE A CHALLENGER'S PROPER EXERCISE OF ITS STATUTORY RIGHTS AND DUTIES.

Preliminarily, it is important to note that the MRP's requested relief is to reissue the Prior Manual – from October 2020. This matters because almost all of the provisions of the Manual with which the MRP takes issue were also present in the Prior Manual.

1. The Manual and the Michigan Election Law are consistent with respect to the form of credential for election challengers (MRP Compl. at ¶ 30(a)).

The MRP seems to argue that because the Secretary of State has historically left credentialing organizations to generate their own challenger credential forms, the Secretary of State cannot now require the use of any specific form. To the contrary, the Secretary of State is empowered to "prescribe and require uniform forms … the secretary of state considers advisable for use in the conduct of elections and registrations." MCL 168.31(1)(e). Pursuant to this statutory authority, the Secretary of State considered it advisable to, and did, craft a form of challenger

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credential. See also *Michigan Trucking*, *supra*. The MRP has suggested no manner in which the Secretary of State's designated form of credential is inadequate under or inconsistent with the Michigan Election Law.

Moreover, this is a procedural matter, not a substantive right; and there is absolutely no burden in complying, as the Secretary of State has posted a link to the credential on its website and allows for the provision of digital credentials that arguably are more convenient for any credentialing organization for challengers outside of the AVCBs. Manual at 5. The MDP had no difficulty adopting the Secretary of State's designated form of credential for use by its election challengers in August 2022, and respectfully suggests that more than adequate time remains for the MRP to issue compliant credentials before the November 2022 election. In all candor, it hardly seems worth expending judicial resources on a matter so trivial that it imposes no hardship and can be resolved by simply using the new forms.

2. **The Manual and the Michigan Election Law are consistent with respect to the timing when an election challenger may be appointed, and merely suggest that credentialing organizations should train their challengers in advance (MRP Compl. at ¶ 30(b)).**

The Michigan Election Law details that challengers must be appointed and credentialed, but is silent about when that must occur. Under the Prior Manual – notably, ***not*** a rule – political parties could appoint challengers "through" the date of the election. Prior Manual at 4. The current Manual states that political parties may appoint challengers "until Election Day." Manual at 2. The MRP implicitly argues that the Prior Manual, although not promulgated as a rule, is somehow elevated to the status of a rule by virtue of prior practice; and therefore, the Prior Manual's language cannot be varied absent the rule-making process.

Initially, the MDP notes that the Manual and Prior Manual do not conflict. The current Manual uses "until," which includes the day-of deadline. This is consistent with practice, such that

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challengers have been appointed on Election Day. The Manual does not use the words "before" or "prior to," after all. Regardless, providing that challengers may be appointed "until" Election Day is a reasonable interpretation of the Michigan Election Law in response to the November 2020 election. Training challengers in their rights, duties, and limitations takes time. As recognized in the Senate Oversight Committee Report, the "failure of the Republican party to verify recruitment and training … and to properly train and counsel some of their volunteers and challengers" created considerable disorder and disruption. Senate Oversight Committee Report at 13. They recommended that "the rights and duties of poll watchers and challengers be better understood and reinforced in their respective training and must be protected equally by election officials." *Id.* at 12. Requiring advance credentialing will improve the opportunity to properly train challengers. It will also reduce the likelihood that a situation similar to that which arose in November 2020 will occur again, where "Republican officials, along with some ostensibly Independent challengers, furthered the crisis by putting out the call to other members and citizens to descend on the location to stop what was described and presented as a stealing of the election." Senate Oversight Committee Report at 13.

The MDP has already begun training its challengers and poll watchers based on the Manual. Peresman Aff. at ¶ 10. If the MRP is concerned about the Manual's use of the word "until," its solution is much simpler than running to court: simply train, appoint, and credential challengers in advance.

3. **The Michigan Election Law requires that election challengers be able to raise objections with "an" election inspector, not "any" election inspector (MRP Compl. at ¶ 30(c)).**

The Michigan Election Law requires that an election challenger be able to raise objections with "an" election inspector. *See* MCL 168.733(1)(e). Contrary to the MRP's suggestion, "an" is not the same word as "any." Courts must construe all words in a statute in accordance with their

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common usage. MCL 8.3a. Based on the common usage of "an," so long as an election challenger can raise objections with *at least one* identified election inspector, the Michigan Election Law is satisfied. Moreover, the Michigan Election Law vests the Secretary of State with the ability to oversee and administer elections (MCL 168.21), and to issue instructions concerning the procedures to process challenges (MCL 168.31(1)(a) and (c)). For Plaintiffs' argument to prevail would require this Court to re-write the statute or read language into it that simply is not there.

The Manual confirms that a "challenger liaison" is, in fact, "an election inspector." *See* Manual at 5. It also permits additional election inspectors to be designated as challenger liaisons or their designees, and creates a process to determine who the challenger liaison is if none is formally identified. *Id.* This complies with the Michigan Election Law as it ensures that there is always "an" election inspector to whom challenges may be presented. Because it is consistent with the Michigan Election Law, this element of the Manual is a permissive exercise of statutory power to "issue instructions," MCL 168.31(1)(a), and to "publish and furnish…a manual of instructions," MCL 168.31(1)(c), in accordance with MCL 24.207(j).

Notably, this is similar to the approach taken in the Prior Manual. The Prior Manual formally focused challenges with the precinct chairperson. Prior Manual at 8. If anything, the Manual improves a challenger's flexibility in bringing challenges by permitting additional challenger liaisons or designees.

By designating challenger liaisons and their designees, the Manual establishes a procedure (*not* a substantive right) that helps ensure both that experienced election inspectors are tasked with managing challenges, and that those challenges are handled consistently. This is important considering the activities observed during the November 2020 and subsequent elections, where election challengers did not appear to be familiar with the election process or aware of their rights

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and duties. Jaffe Aff. at ¶ 7. Indeed, election challengers were observed in some precincts to intentionally ask the same question multiple times of different election inspectors in the hopes of obtaining differing answers. Jaffe Aff. at ¶ 9(c). This highlights the need for consistency and uniformity.

Moreover, focusing challenges with challenger liaisons also minimizes disruption to the duties of other election inspectors, as was experienced in the November 2020 election. *See* Jaffe Aff. at ¶ 8. The other election inspectors present can focus on the task of administering the election without unnecessary distraction. This is consistent with the Michigan Election Law. *See* MCL 168.727(3).

4. **The Manual's restriction on access to certain electronic devices is consistent with the Michigan law regarding secret ballots (MRP Compl. at ¶ 30(d)).**

The MRP takes issue with the Manual's prohibition on the possession of certain electronic devices at the AVCB.[4] The Michigan Election Law requires that election challengers be permitted to "[k]eep records of votes cast and other election procedures as the challenger desires." MCL 168.733(1)(h). No statutory language specifies the manner in which election challengers are permitted to keep records. As this provision was enacted in 1955, the drafters certainly could not have intended it to apply to the use of cell phones, laptops, or tablets. To permit video or audio recordings runs a severe risk of violating various Michigan Election Law provisions designed to protect voters and election inspectors alike. It also poses a threat to the right to a secret ballot enshrined in the Michigan Constitution. Mich. Const. § 4(1)(a). Accordingly, this same prohibition was part of the Prior Manual, which the MRP advocates keeping. Prior Manual at 3.

[4] There is no restriction to possessing electronic devices at in person polling locations, although their use is restricted.

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The MRP further argues that a challenger's oath, sworn in accordance with MCL 168.765a(9), is sufficient protection. The Prior Manual, however, also barred challengers from "using phones, laptops, tablets or other electronic devices in an AVCB [absent voter counting board]." Prior Manual at 6. Unfortunately, in November 2020, an oath and prohibition on use proved insufficient. More than a few Republican challengers were caught filming, and at least one flagrant repeat offender was escorted from the TCF Center by Detroit Police. Jaffe Aff. at ¶ 8(b)(iii); see also MCL 168.727(3); 168.733(4).

Regardless, and significantly, the Manual's bar on the *possession* of the identified electronic devices does not impair a challenger's ability to exercise his or her rights in comparison with the bar on their *use* contained in the Prior Manual. The MDP's challengers had no difficulty relinquishing their electronic devices during the August 2022 primary. It is difficult to see how other challengers cannot also comply—unless their true intent, as in November 2020, is to skirt the ban on use of specified electronic devices and utilize them for improper purposes.

Other means exist for keeping records. The MDP's election challengers and poll watchers keep notes using pen and paper in absent voter ballot counting facilities, which the MDP collects afterward. Peresman Aff. at ¶ 9. This has proven more than adequate, election after election, for many years before (and after) cellular phones were available.

5. The Manual's approach to "impermissible challenges" is consistent with the Michigan Election Law (MRP Compl. at ¶ 30(e)).

The Michigan Election Law distinguishes between permissible and impermissible challenges by identifying specific permissible challenges: "the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book." MCL 168.737(1). To be qualified, an elector must be a citizen of the United States, not less than 18 years of age, a resident of the State of Michigan, and a resident of

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the township or city for at least 30 days. MCL 168.492; MCL 168.10. The Michigan Election Law allows recording "a challenge being made under subsection (1)" only. MCL 168.737(2). It does not permit challenges made on any other grounds, nor does it require recording challenges that are not contemplated by subsection (1).

The Manual identifies the four specific ways that a challenger may make a challenge that is permitted under the Michigan Election Law, specifically that the person is: (i) not registered to vote; (ii) underage; (iii) not a U.S. citizen; or (iv) not a 30-day resident where they are voting. Manual at 11-12. The Manual then identifies numerous specific impermissible challenges, none of which would constitute a challenge of a type permitted under the Michigan Election Law. Manual at 12-13. Because these impermissible challenges do not arise under MCL 168.737(1) and therefore are not required to be recorded under the Michigan Election Law, the Manual states that impermissible challenges need not be recorded. The two are perfectly consistent.

The MRP nonetheless argues that the Manual is improper because it uses different language from the Prior Manual when discussing challenges. Although the Prior Manual does not provide the convenient moniker of "permissible" and "impermissible" challenges, the Prior Manual is consistent with the current Manual in its treatment of challenges. Specifically, the Prior Manual identifies specific types of challenges that may be made, and directs that those specific types of challenges must be recorded in the pollbook. Prior Manual at 8-10.[5] Like the Michigan Election Law, the Prior Manual thereby indirectly states that challenges of other, unpermitted types need

[5] The Prior Manual also identifies additional "types of challenges" beyond the "unqualified voter[.]" Prior Manual at 8. These are contemplated by the Manual also, but are described more broadly as a challenger's rights. Manual at 19-20. This is another purely procedural point, updated in response to the confusion encountered in November 2020.

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not be recorded. The Prior Manual even identifies some of the types of challenges now labeled as "impermissible" as challenges that may not be asserted. Prior Manual at 8.

Unfortunately, the clarification in the Manual is also necessary. As learned the hard way in the 2020 election, challengers raised impermissible challenges. Even when asserted at AVCBs – i.e., away from voters, eliminating the possibility of direct voter intimidation – these challenges were used to intimidate election inspectors and disrupt the election process. Jaffe Aff. at ¶¶ 8(c), 9. These are the specific issues that the Manual is attempting to redress. Manual at 12.

B. THE PROVISIONS OF THE MANUAL WITH WHICH THE O'HALLORAN PLAINTIFFS TAKE ISSUE ARE CONSISTENT WITH THE MICHIGAN ELECTION LAW AND DO NOT IMPEDE A CHALLENGER'S PROPER EXERCISE OF ITS STATUTORY RIGHTS AND DUTIES.

Unlike the MRP, the O'Halloran Plaintiffs ask this Court to rescind the Manual on one hand, and on the other ask for the Court to rewrite specific provisions. Assuming that rescission would reinstitute the Prior Manual, the MDP directs this Court to the similarities between the manuals addressed above. Any Court-ordered line-by-line revision, however, represents judicial overreach and a significant violation of separation of powers principles that make such a request untenable. Nonetheless, the MDP will address each of the objections raised in the O'Halloran Plaintiffs' Motion.

1. **The Manual does not mandate ejecting election inspectors, and the Michigan Election Law does not restrict the grounds for ejection (O'Halloran Motion at ¶ 8(a)).**

Under the Michigan Election Law, "[a]ny evidence of drinking of alcoholic beverage or disorderly conduct is ***sufficient cause*** for the expulsion of a challenger from the polling place or the counting board." MCL 168.733(3) (emphasis added). No statutory provision *limits* the grounds for expulsion to these two categories of offenses. It is a reasonable interpretation of the Michigan Election Law that any challenger who repeatedly violates his or her duties to "not make a challenge indiscriminately and without good cause" or to "not interfere with or unduly delay the work of the

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election inspectors" may be removed. MCL 168.727(3). Indeed, this is consistent with existing practice under the Prior Manual; the only distinction is that an election inspector may eject challengers directly instead of only asking that they leave and relying on the precinct chairperson or law enforcement to remove them. *Cf.* Manual at 22 *with* Prior Manual at 5, 8. By permitting election inspectors to eject challengers when they violate the Michigan Election Law instead of turning solely to law enforcement, the Manual avoids an unnecessary strain on public resources and diversion from addressing other public safety concerns in the community.

Moreover, the Manual only states that "[a] challenger who ***repeatedly*** fails to follow any of the instructions or directions set out in this manual or issued by election inspectors ***may*** be ejected by an election inspector." Manual at 22 (emphasis added). This phrase vests authority and discretion in local election inspectors. But because it does not obligate local election officials to undertake any specific course of action, the Manual does not have the force of law. *Cf. Genetski*, *supra*. It therefore is an exception to the definition of "rule" under MCL 24.207(h).

This addition to the Manual is also important in light of activity observed at the November 2020 and subsequent elections. Specifically, numerous credentialed election challengers engaged in activity intended to, and which did, interfere with or unduly delay the work of election inspectors. Jaffe Aff. at ¶ 6. This is specifically barred by the Michigan Election Law. MCL 168.727(3). Advising election challengers that they may be ejected for violating the Michigan Election Law does not contradict the statute. It merely puts election challengers on notice that they may be held to account if they violate the law.

2. **The Michigan Election Law require that election challengers be able to raise objections with "an" election inspector, not "any" election inspector (O'Halloran Motion at ¶ 8(b)).**

This issue is duplicative of a concern raised by the MRP Plaintiffs, and the MDP respectfully refers to and incorporates Section III(A)(3) of this Brief.

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3. **The Manual and the Michigan Election Law are consistent with respect to the number of challengers each credentialing organization may have present in absent voter ballot processing facilities (O'Halloran Motion at ¶ 8(c)).**

The Manual sets forth factors that clerks should consider when determining the number of challengers each credentialing organization may field in an absent voter ballot processing facility. This is not a contraction relative to Rule 168.791, as the O'Halloran Plaintiffs suggest. Rather, it is a guard against improper contraction based on a misreading of the Michigan Election Law, arising out of an ambiguity in the Michigan Election Law. The Michigan Election law provides that each credentialing organization "may designate not more than 1 challenger to serve at each counting board." MCL 168.730(1). As the Manual explains, this is ambiguous because "counting board" is used in multiple different ways in the Michigan Election Law:

> The Michigan Election Law uses the term 'absent voter counting board' simultaneously to refer to a single absent voter counting board corresponding to an individual in-person precinct; a station within a facility processing absent voter ballots for multiple in-person precincts; the entire facility at which all absent voter ballots are processed for a jurisdiction; and an entire facility at which combined absent voter ballots are processed for multiple jurisdictions in a county. The Michigan Election Law does not expressly state how many challengers may be present at an absent voter counting board or combined absent voter counting board in each of these scenarios.

Manual at 7-8. In other words, the Manual is designed to prevent a misreading of the Michigan Election Law that could allow local election officials to deny challengers sufficient access by claiming only one challenger is permitted per facility (or "board") in a larger or combined precinct.

This intent is made clear by the Manual expressly providing that "clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility." Manual at 8. The Manual thereby expressly recognizes, and requires clerks to consider, a challenger's right to meaningfully observe the process. It does not bless a clerk's subversion of this critical task.

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4. **The Michigan Election Law does not require that election challengers have access to the same technologies as election inspectors (O'Halloran Motion at ¶ 8(d)).**

This element is duplicative of a concern raised by the MRP Plaintiffs, and the MDP respectfully refers to and incorporates Section III(A)(1) of this Brief.

The O'Halloran Plaintiffs further state that challengers should have the same access to electronic tools that are available to election inspectors, but nothing in the Michigan Election Law suggests that. Again, challengers can exercise their rights and fulfill their duties with pen and paper alone in absent voter ballot counting facilities, as has been the consistent practice for many decades. Peresman Aff. at ¶ 9.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed herein and the motion and brief filed by the Secretary of State, the Court should deny Plaintiffs' motion for declaratory judgment and injunctive relief and dismiss the complaint with prejudice pursuant to MCR 2.116(C)(8).

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: October 11, 2022

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EXHIBIT 1

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and **KENNETH CRIDER**,

Plaintiffs,

v.

Case No. 22-000162-MZ

JOCELYN BENSON,
in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**,
in his official capacity as the **DIRECTOR OF THE MICHIGAN BUREAU OF ELECTIONS**,

Hon. Brock A. Swartzle

Defendants.

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and **REPUBLICAN NATIONAL COMMITTEE**,

Plaintiffs,

v.

Case No. 22-000164-MZ

JOCELYN BENSON,
in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**,
in his official capacity as **DIRECTOR OF ELECTIONS**,

Hon. Brock A. Swartzle

Defendants.

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AFFIDAVIT OF ERICA PERESMAN

Erica Peresman, being duly sworn, deposes and states as follows:

1. I am an adult of sound mind, have personal knowledge of the matters stated in this affidavit, and if called as a witness, could testify competently to the truth of the matters herein.

2. I have been employed as the Voter Protection Director of the Michigan Democratic Party since March 2019, and I first volunteered as a challenger in 2000. I am a licensed attorney in good standing in the State of Michigan and have specialized in Michigan election law for the past several years.

3. The MDP is the Democratic Party's official state party committee for the State of Michigan. The MDP aims to ensure that the constitutional rights of its members, voters, and candidates are not impeded. For decades, the MDP has overseen election challenger programs. These programs include training and require designating and issuing credentials to election challengers.

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4. Several MDP employees are registered to receive notifications available from the Secretary of State relating to elections. On May 25, 2022, MDP employees received notice via email, attached as ex. A hereto, that the Secretary of State had published *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the "Manual").

5. After reviewing the Manual cover-to-cover, the MDP made the minor updates necessary to its training protocols, and began training election challengers and poll watchers for the August 2022 primary on June 13.

6. The MDP trained approximately 368 election challengers and poll watchers for the August 2022 primary based on the Manual, as well as applicable statutes and the Election Officials' Manual promulgated by the Michigan Bureau of Elections.

7. Generally, challenger training for the August 2022 primary consisted of one training session of 1-1.5 hours for all challengers, followed by a second 1-1.5 hour training session for challengers who would be serving at the Detroit Absent Voter Counting Facility at Huntington Place.

8. The MDP's challengers did not have any difficulty exercising any of their rights and duties while abiding by the Manual in its entirety during the August 2022 primary.

9. The MDP's election challengers and poll watchers in absent voter ballot counting facilities keep notes using pen and paper, which the MDP collects afterward. This has been the practice for many decades.

10. The MDP started training its election challengers and poll watchers for the November 2022 election on September 14, relying on the Manual. It has trained 723 challengers and poll watchers for the November 2022 election to date, and expects to train hundreds more.

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11. The MDP would have to invest significant resources updating and retraining volunteers to comply under any new guidelines. With the November election four weeks away, this poses an enormous and potentially insurmountable burden to ensure that all challengers will be prepared properly if there are changes. The MDP is also concerned that rescinding the current Manual would interfere with its challengers' and poll watchers' ability to help facilitate an efficient election in which the public can place its trust.

12. The MDP expects that its challengers and poll watchers will abide by the Manual in its entirety, and does not anticipate this impeding the discharge of challenger duties or impeding challenger rights.

FURTHER AFFIANT SAYETH NOT.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Executed this Oct. 11, 2022

Name: Erica Peresman

Subscribed and sworn to before me
this 11 day of October, 2022.

Notary Public,

My Commission Expires: Feb 16, 2029

CLINTON CUYLER JR
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF WAYNE
My Commission Expires February 16, 2029
Acting in the County of

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EXHIBIT A

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MI DEMS
MICHIGAN DEMOCRATIC PARTY

Olivia Luckett <oluckett@michigandems.com>

5/25/2022 News Update - Updated Challenger Document, Ballot Proof Approval, Election Geo and AV Impacts and more

1 message

Michigan Bureau of Elections <MISOS@public.govdelivery.com> Wed, May 25, 2022 at 9:03 AM
Reply-To: MISOS@public.govdelivery.com
To: oluckett@michigandems.com

Having trouble viewing this email? View it as a Web page.

Michigan Bureau of Elections
News Update
for Election Administrators

Regular Edition News Update #2022-18

May 25, 2022

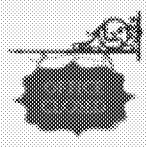
Updated Challenger Document

The Bureau of Elections' Appointment, Rights and Duties of Election Challengers and Poll Watchers document has been updated and is available on Michigan.gov/Elections. This document provides more detailed information for challengers, poll watchers, clerks, and election inspectors regarding the different types of challenges allowed and the steps to take when those challenges are made. It also provides guidance regarding challengers and poll watchers in Absent Voter Counting Boards. We will be printing the document in a booklet form for easier use in precincts. We will also add the booklets to the county order form in eLearning when they are available.

Additionally, we have provided a Michigan Challenger Credential Card on our website. Parties and credentialling organizations should ensure the credentials issued to their challengers substantially comply with this form.

In this issue:

- Updated Challenger Document
- BOE Closed on Monday
- Ballot Proof Approval for August 2, 2022 Primary Election
- QVF Software Updates
- Election Security
- Redistricting Status Update
- Election Geo and AV Impacts
- Polling Location Assignments
- Redistricting Module Retirement



BOE Closed on Monday

The Bureau of Elections will be closed on Monday, May 30 in observance of Memorial Day.

Ballot Proof Approval for

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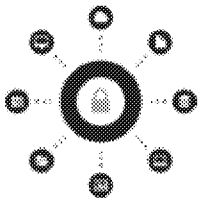
QVF Software Updates

- Mass AV now has an "Include: Perm Accessible" option to email the accessible app link to voters from QVF. Uncheck the voters for whom QVF does not have an email address on file before clicking "Send Accessible App"; an error message will show the voters who could not be emailed.
- Perm AV and Perm Accessible lists are now exclusive of one another. Uncheck one list to add a check to the other.
- AV Details & AV Scan now shows a secondary signature as well as the primary signature, when available.
- In AV Details, a ballot's sent or received date can be edited without having to the delete the ballot and re-enter with the corrected dates.
- In Voting History, changed the address to display "Legacy Address" for elections held prior to the launch of QVF Refresh



Election Security

Over the past few months many of our local clerks have received phishing emails from a malicious source. Fortunately, clerks have been diligent and able to identify these malicious emails, doing an excellent job of putting their election-security training to good use! It is critical to remain cyber-resilient. At the below link is a detailed infographic to assist with avoiding Phishing emails:

How to avoid Phishing Emails

August 2, 2022 Primary Election

If the Board of State Canvassers has certified the candidate list, the Bureau of Elections will accept ballots for conditional approval as to form for the August 2, 2022 election beginning on Tuesday, May 31, 2022. This is part of an effort to help counties, local jurisdictions and vendors have more lead time to have absent voter ballots available for voters starting 40 days before August 2. Ballot proofs should be submitted to Dave Tarrant at Tarrantd2@Michigan.gov. Please note that under the Michigan Constitution, the Michigan Legislature may add proposed constitutional amendments to the ballot as late as June 3. The BOE is not aware of any efforts to add constitutional amendments to the August ballot at this time but cannot guarantee that the Michigan Legislature will not do so. BOE approval of ballot format will therefore be conditional on no additional state-level measures being added to the ballot.

Once BOE approves the form of the ballot, it is imperative that county and local clerks employ a rigorous proofing process of the content of the ballot. That is especially important this year; while reprinting ballots because of errors is always problematic, it will likely be especially difficult and expensive this year because of shortages in paper supply. Important steps to take include:

- Counties and municipalities should establish points of contact and timelines for the review of ballots to ensure that every ballot style is reviewed by both the county and municipal clerk prior to printing.
- Counties should communicate with neighboring counties

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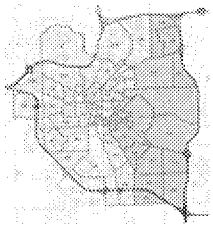

Redistricting Status Update

All districts subject to redistricting in 2021 have been updated in QVF. This does not necessarily mean that every jurisdiction's redistricting is 100% complete at this time. Please review your jurisdiction's Street Index Report and Permanent Geography module to identify areas of concern and email questions to ElectionData@Michigan.gov. Redistricting-related questions should not be submitted through the standard "Street Change Requests" tool. The "Street Change Requests" tool is for new street segments, expanded house number ranges or school district assignment corrections. The Bureau will do its best to address these requests expeditiously as redistricting winds down.

Polling Location Assignments

Polling locations for the August Primary have been published to MVIC. Clerks should review precinct assignments in **both** the Precincts & Polling Locations and the Election Geography modules for accuracy. Any edits to polling locations moving forward for August and November will need to be committed in both modules of QVF. MVIC displays the polling location that is assigned in the Election Geography module.

- Lookup > Precincts and Polling Locations
- Elections > Election Geography

about any school district language in school districts that cross county lines.

- Carefully review your split precincts and any district numbers that have changed. Ensure you have accounted for all your ballot splits.
- Ensure all "vote for" numbers are correct.
- Make sure all local office partial terms are included on the ballot.

Election Geo & AV Impacts

The Bureau of Elections continues to review US Congressional, State House, State Senate, County Commissioner districts and precinct assignments, making corrections where necessary. During this time, changes may occur that impact your jurisdiction's election geography. Counting Boards and Ballot Style Aliases may be reset while making district corrections, so please be aware of the potential for these changes while processing absent voter ballot applications.

Redistricting Module Retirement

Clerk access to the Redistricting module will be removed soon. New requests can no longer be submitted through the module; however, any requests and files already submitted will be retained and accessed by Bureau staff.

Helpful Links

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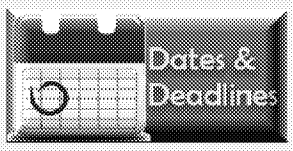
Obtained by Judicial Watch, Inc. v. Michigan FOIA



Questions? Please contact the Bureau of Elections at 1-800-292-5973 or elections@michigan.gov.

The Bureau of Elections News Upcate will always be sent to the Clerk and Deputy Clerk email accounts. If other election administrators would like to receive this newsletter as well use the Subscribe link below to have it sent directly to another email account.

It is recommended that you add mlaos@govsubscriptions.michigan.gov and MISOS@public.govdelivery.com to your safe senders list.

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EXHIBIT 2

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and **KENNETH CRIDER**,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**, in his official capacity as the **DIRECTOR OF THE MICHIGAN BUREAU OF ELECTIONS**,

Defendants.

Case No. 22-000162-MZ

Hon. Brock A. Swartzle

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and **REPUBLICAN NATIONAL COMMITTEE**,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as the duly elected **SECRETARY OF STATE**, and **JONATHAN BRATER**, in his official capacity as **DIRECTOR OF ELECTIONS**,

Defendants.

Case No. 22-000164-MZ

Hon. Brock A. Swartzle

ANN M. HOWARD, P.C.
Ann M. Howard (P49379)
26100 American Drive, #607

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General

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Scott R. Lesser (P72446)
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(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
Attorneys for Proposed Amicus Curiae The Michigan Democratic Party

---

AFFIDAVIT OF DAVID JAFFE

David Jaffe, being duly sworn, deposes and states as follows:

1. I am an adult of sound mind and have personal knowledge of the matters stated in this affidavit.

2. I am the volunteer team leader for the Democratic election challengers credentialed by the Michigan Democratic Party (the "MDP") at Huntington Place, known in August and November 2020 as TCF Center. I have been a volunteer team leader in three election cycles, and have served as an election challenger in at least six election cycles. I am also a licensed attorney in good standing in the State of Michigan.

3. I have been trained for my role as a volunteer team leader by the Michigan Democratic Party's Voter Protection Program.

4. In three election cycles, I have helped train election challengers before they were credentialed by the MDP, including by preparing and presenting training materials.

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5. In the performance of my duties as a volunteer team leader for the Democratic election challengers, I have access to and knowledge of MDP's records from the Huntington Place/TCF Center location, and knowledge of its practices as described in this Affidavit. The following statements are based on my own personal knowledge and a review of the business records maintained by the MDP. Based on my review of those records, if called as a witness, I could testify competently to the truth of the matters set forth in this Affidavit.

6. During the November 2020 election, many MDP challengers, and I personally, witnessed many instances of MRP challengers and ostensibly independent challengers credentialed by the Election Integrity Fund ("EIF") issuing indiscriminate challenges, without good cause, and with the clear purpose of interfering with or unduly delaying the work of election inspectors. Because MRP and EIF challengers coordinated their efforts, I will refer to them together as "Republican challengers."

7. Based on my observations and those of other MDP challengers, which were documented with contemporaneous notes, I believe that many Republican challengers were not trained or were inadequately trained in their rights, duties, and restrictions, while others were unfamiliar with the election process more broadly. Exceptionally routine election activities, which had been done for decades without incident, were "challenged"—not because they were improper, but because the challengers did not understand what was happening.

8. To name a few examples, I or other MDP challengers at TCF Center witnessed the following in the November 2020:

a. Republican challengers did not understand Michigan law and procedures for counting absentee ballots. They often claimed that election workers broke the

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law or cheated when in fact things were being done correctly. For example, but without limitation:

i. They believed that ballots that were returned without the secrecy sleeve were invalid. This is not Michigan law.

ii. They complained vociferously that voters' signatures were not being checked at TCF Center. But the law requires signatures to be checked at the Clerk's office before they are delivered to the AVCB.

iii. They were evidently not aware of what happens to a challenged ballot under the Michigan Election Law. Many Republican challengers mistakenly thought that a challenge meant that the ballot should be set aside and not counted. The law actually requires that the ballot number be noted, but that the ballot be counted. That way, if there is a court proceeding later, the judge can order that a challenged ballot be retrieved.

iv. They did not know that the election inspectors in the AVCB did not have access to Qualified Voter File. They did not know that the electronic list on the computer screens was an Electronic Poll Book.

v. They believed that there was a legal requirement that absentee ballots be recorded in the QVF by 9:00 pm on Election Day. There is no such rule.

b. Republican challengers and their leaders aggressively and systematically violated the laws and rules that govern challengers. For example:

i. Whenever an envelope contained a ballot that wasn't in a secrecy sleeve, a challenger "challenged" the ballot, and demanded that Election Inspectors stop and write down each challenge. But voters in Michigan are not required to use secrecy sleeves, and these ballots were perfectly legitimate. Election officials explained the law. Republican challengers continued these baseless challenges anyway.

ii. At one point a large group of Republican challengers huddled with some of their leaders. One of these leaders shouted, loud enough for several of our volunteers to hear, "You've got to be more aggressive." From that point onward, the shouting, the abuse and the disruption increased. Many Republican challengers began challenging every ballot and demanding that the election inspectors stop and write down the challenge. Our team never heard any challenger articulate a good reason to believe that the voter is not eligible to vote.

iii. Phones were allowed after the polls closed Tuesday evening, but filming and recording were not. The Republicans knew this rule and flouted it

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intentionally and repeatedly. More than a few Republican challengers were caught filming; most were given warnings. But at least one flagrant repeat offender was escorted from the room by the Detroit Police.

c. Republican challengers and their leaders aggressively harassed election workers and obstructed their work in an effort to disrupt and slow the count, and to make false claims of misconduct and fraud. For example, but without limitation:

i. A female election inspector had a challenger snarl at her, out of the blue, "I'll bet you aborted your babies!"

ii. Republican challengers repeatedly pressed in close to election workers and yelled accusations. Some came face to face with election inspectors and removed their masks to taunt the inspectors about COVID-19. I could see the fear on election workers' faces, and saw more than one reduced to tears.

iii. Republican challengers repeatedly tried to stop the work at Counting Boards to interrogate each inspector about his or her party affiliation, falsely claiming – often by yelling -- that there has to be a Republican inspector at each counting Board. Supervisors repeatedly had to intervene to stop these improper challenges and the hostile and aggressive conduct of Republican challengers.

iv. At one point, after I intervened when a Republican challenger was aggressively shouting at an election supervisor, the challenger told me that he knows who I am, and that "we will be coming after you."

v. One Republican challenger asked one of my colleagues, "do you want to get hurt?" It took the head of security and a Detroit Police captain to talk him down.

9. A limited number of Republican challengers appeared for the August 2021 primary (approximately eleven, credentialed by the Election Integrity Fund) and November 2021 general election (one Republican challenger, who arrived late and left early). The general approach of the approximately eleven Election Integrity Fund challengers was consistent with that during the November 2020 election, albeit at a smaller scale. For example, but sadly without limitation, I observed the following:

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a. Crowding of election inspectors, looking over their shoulders, and removing of masks, despite COVID-19 guidelines that applied to all. These are classic physical intimidation techniques; many election inspectors expressed objections and distress. Republican challengers claimed they had to stand close to see, and (often loudly) accused of election supervisors and security personnel of interfering with their rights when asked to step back or respect the physical space of election inspectors. Our challengers were able to see perfectly well from a distance.

b. Even though a large monitor is provided for challengers, most Republican challengers insisted on crowding in on the election inspector operating the computer and leaning over that person to see the small screen. Republican challengers also crowded in on other election inspectors in a manner that was clearly intimidating

c. Republican challengers intentionally asked the same question of many election inspectors across the counting room. They would gather in an aisle, often where other challengers were standing; a leader would assign a question or objection and instruct the challengers to ask it across the room. This was done quite openly, and our challengers were not eavesdropping; the instructions were loud enough for other people who were nearby to hear quite easily. On one of these occasions, the person giving instructions said words to the effect of "let's see if we can get them to give different answers."

d. Republican challengers repeatedly asked individual election inspectors to explain their process in detail. These questions were often couched with an explanation

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that the challenger was (purportedly) new and didn't understand. The many inspectors who tried to patiently explain what they were doing had to take time away from their work to do so. Once one explained, the Republican challengers repeated the requests and questions to different inspectors around the room.

e. Republican challengers repeatedly asked whether Republican election inspectors were present at various locations and asked for the names of Republican election inspectors.

f. One EIF challenger who was observing the adjudication stations pulled out her mobile phone at 1:50 pm and began texting. Security personnel told her that phone use was not permitted, and she claimed that she was a new challenger and did not know about the rule. The security personnel reminded her of the acknowledgement and oath she had signed when she entered, which expressly state that phones are not allowed.

g. The one MRP-credentialed challenger who came at the General Election left before the polls closed (not permitted under the Michigan Election Law and based on the oath signed by challengers). He took photographs of the counting room (through the glass door) immediately after leaving. Security personnel were alerted, and insisted that he delete the photographs.

10. In May 2022, the Secretary of State published *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the "Manual"). The MDP is registered to receive notifications available from the Secretary of State relating to elections, and received notice that the Manual had been issued on May 25, 2022.

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11. After reviewing the Manual, the MDP made the minor updates necessary to its training protocols, then began training election challengers and poll watchers in advance of the August 2022 primary.

12. The MDP trained approximately thirty election challengers and poll watchers to work at the Detroit Absent Voter Counting Facility at Huntington Place for the August 2022 primary. The training was based on the Manual, as well as applicable statutes and the Election Officials' Manual promulgated by the Michigan Bureau of Elections.

13. Generally, challenger training for the August 2022 primary consisted of one training session of 1-1.5 hours, followed by a second 1-1.5 hour training session for the Detroit Absent Voter Counting Facility at Huntington Place.

14. The MDP's challengers at the Detroit Absent Voter Counting Facility at Huntington Place did not have any difficulty exercising all of their rights while abiding by the Manual in its entirety during the August 2022 primary.

15. In my view, the Manual's protocols helped improve the administration of the August 2022 primary. I observed challengers credentialed by Michigan Citizens for Election Integrity (MCEI) make challenges and ask questions without interference. However, some of these challengers behaved aggressively and harassed election inspectors and violated other rules. When they did so, they were admonished by election officials. I did not observe any interference by election officials with proper challenger conduct.

FURTHER AFFIANT SAYETH NOT.

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I affirm, under the penalties for perjury, that the foregoing representations are true.

Executed this October 11, 2022

Name: David Jaffe

Subscribed and sworn to before me
this 11 day of October, 2022.

Notary Public,
My Commission Expires: 1-25-2025

MICHELLE TEMBY
NOTARY PUBLIC - MICHIGAN
MACOMB COUNTY
ACTING IN THE COUNTY OF Oakland
MY COMMISSION EXPIRES 01/25/2025

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EXHIBIT 3

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STATE OF MICHIGAN

OFFICE OF THE ATTORNEY GENERAL

IN THE MATTERS OF:
Matthew DePerno
Stefanie Lambert Juntilla
Daire Rendon
Ann Howard
Ben Cotton
Jeff Lenberg
Douglas Logan
James Penrose
Dar Leaf

_____/

PETITION FOR APPOINTMENT
OF SPECIAL PROSECUTOR

NOW COMES Dana Nessel, Attorney General for the State of Michigan, and petitions the Prosecuting Attorneys Coordinating Council (PACC) for the appointment of a Special Prosecuting Attorney for the following reasons:

1. The Michigan State Police and the Michigan Department of Attorney General (MDAG) are jointly investigating a conspiracy to unlawfully obtain access to voting machines used in the 2020 General Election.
2. The Michigan State Police and the special agents with the MDAG have completed a preliminary review and it is now time for a prosecutorial review for charges that include but are not limited to Conspiracy, MCL 750.157a; Using a Computer System to Commit a Crime, MCL 752.796; Willfully Damaging a Voting Machine, MCL 168.932(b); Malicious Destruction of Property, MCL 750.377a; Fraudulent Access to a Computer or Computer System, MCL 752.795a; and False Pretenses, MCL 750.218.

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3. On February 10, 2022, Michigan Secretary of State Jocelyn Benson requested the MDAG and MSP investigate third party access to vote tabulators, components and technology in Roscommon, Michigan. That investigation has now been presented to the Criminal Trials and Appeals Division seeking approval for criminal charges against the above listed individuals.
4. It is alleged that DePerno, Lambert Juntilla and Rendon orchestrated a coordinated plan to gain access to voting tabulators that had been used in Roscommon County and Richfield Township (Roscommon County), Irving Township (Barry County) and Lake City Township (Missaukee County). In Roscommon County the clerk stated she was told by Rep Rendon that the House of Representatives was conducting an investigation in election fraud.
5. All 5 tabulators were taken to hotels and/or AIRBNB's in Oakland County where Lenberg, Cotton, Penrose and Logan broke into the tabulators and performed "tests" on the equipment. It was determined during the investigation that DePerno was present at a hotel room during such "testing."
6. Howard coordinated printing of fake ballots to be run through the tabulators and recruitment of "volunteers."
7. Irving Township Clerk Sharon Olson indicated that she was asked by Barry County Sheriff Dar Leaf to cooperate with investigators regarding an election fraud investigation. Subsequent to this conversation, Olson turned over her tabulator to a third party.
8. When this investigation began there was not a conflict of interest. However, during the course of the investigation, facts were developed that DePerno was one of the prime instigators of the conspiracy.

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9. DePerno is now the presumptive Republican nominee for Attorney General.

10. A conflict arises when "the prosecuting attorney has a personal interest (financial or emotional) in the litigation." *People v Doyle*, 159 Mich App 632 (1987).

11. It is hereby understood and agreed that pursuant to the provisions of MCL 49.160, if any Special Prosecutor appointed pursuant to this petition shall handle any matter on behalf of the petitioner, all costs of prosecution, other than personnel costs, shall be borne by the Michigan Department of Attorney General, who has been determined disqualified or otherwise unable to serve.

WHEREFORE, your Petitioner prays:

A. That a Special Prosecuting Attorney be appointed in this matter to review the charging request and handle any prosecution that may result against DePerno, Lambert Juntilla, Rendon, Howard, Cotton, Lenberg, Logan, Penrose and Leaf.

B. For any additional relief that law and justice may require.

Dated: August 5, 2022

Danielle Hagaman-Clark (P63017)
Division Chief
Criminal Trials and Appeals Division
Michigan Department of Attorney General

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/5/2024 1:51:01 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: DRAFT Colorado amicus
Attachments: Colorado SCOTUS amicus 1.4.23 hsm 8.30 p.m..docx

Importance: High

Hi Jonathan,

See current version attached.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/5/2024 2:11:23 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: DRAFT Colorado amicus

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, January 4, 2024 9:09 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Colorado amicus

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Wk Prod MCL 15.243(1)(h)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 4, 2024 at 8:51 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: DRAFT Colorado amicus

Hi Jonathan,

See current version attached.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/5/2024 2:15:58 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: DRAFT Colorado amicus
Attachments: Colorado SCOTUS amicus 1.4.23 hsm 8.30 p.m..docx

Wk Prod MCL 15.243(1)(h)

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, January 4, 2024 9:09 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: DRAFT Colorado amicus

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Wk Prod MCL 15.243(1)(h)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 4, 2024 at 8:51 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: DRAFT Colorado amicus

Hi Jonathan,

See current version attached.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/5/2024 2:02:40 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: Colorado amicus
Attachments: Colorado SCOTUS amicus 1.5.24 hsm 12.30 a.m..docx

Importance: High

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Friday, January 5, 2024 12:48 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>
Subject: Colorado amicus
Importance: High

DPP MCL 15.243(1)(m)

Thanks,

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/20/2022 9:55:17 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Albro, Lisa (AG) [AlbroL@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: Challenger litigation

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 20, 2022 5:46 PM
To: Albro, Lisa (AG) <AlbroL@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: Challenger litigation

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Lisa,

DPP MCL 15.243(1)(m)

Best,

Jonathan

From: "Albro, Lisa (AG)" <AlbroL@michigan.gov>
Date: Thursday, October 20, 2022 at 3:50 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: Challenger litigation

Good afternoon. The Court of Claims entered the attached order this afternoon.

Thank you,
Lisa

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, October 18, 2022 12:57 PM
To: Albro, Lisa (AG) <AlbroL@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: Challenger litigation

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Thanks so much, Lisa!

From: "Albro, Lisa (AG)" <AlbroL@michigan.gov>
Date: Tuesday, October 18, 2022 at 12:52 PM
To: "Meingast, Heather (AG)" <MeingastH@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>, Christina Grossi <grossic@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: Challenger litigation

Email #2.

Attached are Defendants' most recent filings. Due to size, will send one more email containing Intervenor APRI's filings. Thank you.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Tuesday, October 18, 2022 12:26 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>; Albro, Lisa (AG) <AlbroL@michigan.gov>
Subject: RE: Challenger litigation

Hi Jonathan, right no way to get it online, I have added my assistant Lisa to the email, she will send around the recent filings.

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, October 18, 2022 12:11 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: Challenger litigation

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Hi Heather,

I hope you had a good weekend. I checked the docket in the challenger guidance litigation and see there's been a lot of action since the response to the order to show cause on 10/11. Would you or someone else be able to send us the filings so we can stay up to date? So far as we can tell, there's no way to access the state-court filings unless you're a party. Is that right?

Thank you,

Jonathan

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Date: Wednesday, October 12, 2022 at 12:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Christina Grossi <grossic@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: Challenger litigation

Hi Jonathan,

Attached are our filings and an amicus brief by the MDP.

Thanks,
Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 12, 2022 11:55 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grossi, Christina (AG) <GrossiC@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Challenger litigation

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Good morning, Heather and Christina. When you have a moment, would you mind sending us yesterday's filing in the challenger guidance litigation in the Court of Claims? Thanks so much.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/11/2024 4:55:34 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Trump amicus brief - DRAFT
Attachments: Colorado SCOTUS amicus Jan 11 REV eag2 HSM.docx; Colorado SCOTUS amicus 1.5.24 10.50 am FINAL.docx

Importance: High

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/11/2024 7:50:46 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: RE: Trump amicus brief - DRAFT

Thanks, will take a look shortly.

Heather S. Meingast, Division Chief
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Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, January 11, 2024 2:18 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Trump amicus brief - DRAFT

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 11, 2024 at 11:57 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Trump amicus brief - DRAFT

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/11/2024 9:37:14 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Draft Michigan amicus brief in Colorado case
Attachments: Colorado SCOTUS amicus Jan 11 FINAL DRAFT.docx

Here we go.

Heather S. Meingast, Division Chief
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Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/18/2024 3:32:05 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Meijer 14.3 amicus brief -- privileged

Thanks. Ours went to the printer timely this morning, should be filed this afternoon. I am out starting now, will be back in Monday.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, January 18, 2024 10:20 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Meijer 14.3 amicus brief -- privileged

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DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/27/2022 4:11:51 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: Karamo, et al. v Winfrey, et al., 22-012759-AW
Attachments: Complaint.pdf; Motion for expedited hearing on preliminary injunction.pdf; Motion to disqualify bench.pdf

Here we go.

From: Lynch, Richard <Richard.Lynch@3rdcc.org>
Sent: Wednesday, October 26, 2022 6:01 PM
To: 'msc_clerk@courts.mi.gov' <msc_clerk@courts.mi.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Karamo, et al. v Winfrey, et al., 22-012759-AW

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good afternoon,
This afternoon the above-captioned matter was filed in the Third Judicial Circuit Court. The Complaint requests declaratory relief, injunctive relief, and mandamus. Plaintiffs also filed motions for an expedited hearing on the motion for preliminary injunction and to disqualify the Third Circuit bench.

Do not hesitate to contact me with any questions regarding this matter.

Best regards,
Rich

Richard Lynch
(he/his/him)
General Counsel
Third Judicial Circuit of Michigan
Two Woodward Avenue
742 CAYMC
Detroit, MI 48226
(313) 224-8802

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

PHILIP O'HALLORAN, MD
Poll Challenger,

22-012759-PW

Case No: 22- -AW

BRADEN GIACOBAZZI
Poll Challenger,

Hon. Timothy M. Kenny

TIMOTHY MAHONEY,
Poll Watcher,

KRISTIE WALLS,
Detroit Election Worker,

PATRICIA FARMER,
Detroit Resident Taxpayer,

ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
Plaintiffs,

-vs-

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS,
In their official capacity,
Defendants.

Daniel J. Hartman (P52632)
Attorney for Plaintiffs
PO BOX 307
Petoskey, MI 49770
(231) 348-5100

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Alexandria Taylor (P75271)
Attorney for Plaintiffs
19 Clifford Street
Detroit, MI 48226
313-960-4339
ataylor@taylawfirm.com

There are no other pending civil litigation arising out of the transaction or occurrence alleged in this complaint.

COMPLAINT FOR MANDAMUS, PRELIMINARY INJUNCTION, DECLARATORY JUDGMENT AND OTHER RELIEF

This complaint concerns a matter of Michigan Election Law and is directed to Chief Judge Hon. Timothy M. Kenny

NOW COME, the Plaintiffs, by and through their attorneys and in support of their complaint states as follows:

PARTIES

1. Plaintiff Kristina Karamo is the Republican Candidate for Michigan Secretary of State and was an election poll challenger during the November 3, 2020, election.
2. Plaintiff Philip O'Halloran, MD is an election poll challenger who worked as an election poll challenger in the TCF Center during the November 3, 2020, General Election, and worked at the Huntington Center as an election poll challenger during the August 2, 2022, Primary Election, and is scheduled to work at the Huntington Center as an election poll challenger the November 8, 2022, General Election.
3. Plaintiff Kristie L. Warner-Walls is an election poll challenger who has worked as an election poll challenger in the TCF Center during the November 3, 2020, General Election, worked at the Huntington Center as an election poll challenger during the August 2, 2022,

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Primary Election, and is scheduled to work at the Huntington Center as an election poll challenger the November 8, 2022, General Election.

4. Plaintiff Timothy Mahoney is an election poll watcher. Timothy Mahoney attempted to observe the pre-processing of ballots on August 1, 2022 and was denied access.
5. Plaintiff Kristie Walls is an election poll worker stationed at the high-speed scanners on August 2, 2022, and is scheduled to work the November 8, 2022 election.
6. Plaintiff Patricia Farmer is a citizen taxpayer of the City of Detroit.
7. Plaintiff Election Integrity Fund and Force is a Michigan non-profit Michigan Corporation that has been registered as a non-partisan organization providing poll challengers and poll watchers to the Huntington Center
8. Defendant Janice Winfrey is the Clerk for the City of Detroit who has statutory duties under the Michigan Election Code, being MCL 168.1 et seq the Public Act 116 of 1954
9. Defendant City of Detroit Board of Election Inspectors has statutory duties under the Michigan Election Code, being MCL 168.1 et seq the Public Act 116 of 1954

JURISDICTION

10. Jurisdiction is proper pursuant to MCL 600.775.
11. Venue is proper pursuant to MCL 600.1615.

GENERAL ALLEGATIONS

12. In 2018, Michigan created a new system for the casting and counting of absentee ballots following the 2018 Initiated Act which allowed for absentee voter counting boards.
13. Many laws were altered after the Initiated Act to further this OPTIONAL process.
14. Michigan dramatically increased the use of absentee voting which had been restricted to widespread 'no excuse absentee voting.

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15. The new process permitted a jurisdiction, such as the City of Detroit, to form an optional process to collect absentee ballots and count the absentee ballots at an absentee voter counting board "AVCB". MCL 168.764D.
16. Detroit opted to have all city precincts gathered into a counting center located at the TCF center (now known as Huntington Center) with multiple AVCBs to count individual precincts.
17. The novel process of counting absentee ballots at the TCF Center in 2020 was plagued with many problems which have created controversy around the results of the 2020 election.
18. This experimental process was a failure.
19. Despite the concerns raised, on August 2, 2022, the primary for the City of Detroit precincts were counted in Absentee Counting Boards at the Huntington Center (formerly known as TCF center).
20. The process was once again plagued with illegal actions and the invention of processes not authorized by law.

REQUEST FOR AN ABSENTEE BALLOT BY APPLICATION

21. The absentee ballot is only to be provided to a registered voter upon completion of an application for an absentee ballot. MCL 168.761(1)
22. The registered voter can request inclusion in the permanent absentee voter program since 2018- but the request must be still documented.
23. The clerk is required to verify the identity of a person who requests an absentee ballot:
    a. If the person files the application which requests the absentee ballot *in person* at the clerk's office, then there is a process defined in MCL 168.761(6) that requires identification.

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i. Identification can be provided with an ID and the ballot is provided; or

ii. Identification can be made by an affidavit which includes the reason identification can not be provided but the ballot is received as a challenged ballot.

b. If the person requests the application which requests the absentee ballot *by mail or online* then there is a requirement that there be verification of identity in a process described in MCL 168.761(2) through signature comparison to the QVF. The QVF is the qualified voter file as defined by Michigan law.

MCL 168.761 (2) The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card.

24. The signature comparison process remains undefined. Specifically, the Secretary of State was informed by the Michigan Court of Claims in *Genetski & Michigan Republican Party v. Jocelyn Benson and Johnathan Brater* 20-000216-MM that the Michigan Secretary of State was required to use the Michigan Administrative Procedures Act to promulgate rules for signature comparison and that the SOS Guidance informing clerks that the signatures were presumed valid and that the "any redeeming characteristic standard" was unlawful.

25. No signature comparison process has been made into a rule.

26. The lack of a signature standard means that the process involving a mailed-in ballot application or online registration is unlawful; and as it is the only alternative that does not require an absentee voter to show identification at the precinct in order to obtain the ballot this entire scheme must be declared invalid.

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27. The Court should declare that only Absentee Ballots that have been requested in person can be validly voted in the election.

RETURN OF THE ABSENTEE BALLOT

28. The absentee ballots are received at the clerk's office, at drop boxes or through the mail.

29. Michigan law provides for absentee ballots to be placed in drop boxes.

30. MCL 168.761(4) states the law of possession of an absentee ballot and requires this notice to be placed on each absentee ballot.

PERSONS WHO CAN LEGALLY BE IN POSSESSION OF AN ABSENT VOTER BALLOT ISSUED TO AN ABSENT VOTER ARE LIMITED TO:

- **THE ABSENT VOTER;**
- **A PERSON WHO IS A MEMBER OF THE ABSENT VOTER'S IMMEDIATE FAMILY OR RESIDES IN THE ABSENT VOTER'S HOUSEHOLD AND WHO HAS BEEN ASKED BY THE ABSENT VOTER TO RETURN THE BALLOT;**
- **A PERSON WHOSE JOB IT IS TO HANDLE MAIL BEFORE, DURING, OR AFTER BEING TRANSPORTED BY A PUBLIC POSTAL SERVICE, EXPRESS MAIL SERVICE, PARCEL POST SERVICE, OR COMMON CARRIER, BUT ONLY DURING THE NORMAL COURSE OF HIS OR HER EMPLOYMENT;**
- **AND THE CLERK, ASSISTANTS OF THE CLERK, AND OTHER AUTHORIZED ELECTION OFFICIALS OF THE CITY OR TOWNSHIP.**

ANY OTHER PERSON IN POSSESSION OF AN ABSENT VOTER BALLOT IS GUILTY OF A FELONY.

31. Whenever a drop box or the post office is used to return a ballot there is no real opportunity to observe who returns a ballot.

32. US Mail collection boxes are not observed or recorded by a camera.

33. MCL 168.761D provides the regulation of absentee ballot drop boxes and provides in section (1) that all drop boxes ordered and installed prior to October 1, 2020, are exempt from the law but in section (2) that the law requires reasonable efforts if the drop box was

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ordered but not installed before October 1, 2020. There appears to be no requirement to secure the drop boxes installed in exemption of this law.

34. The ballot envelope and the law both require any person who handles the envelope fill out an attestation.

35. The law restricts who may possess and deliver a ballot to an immediate family member OR individual residing in the household of the voter.

168.764a Instructions for absent voters.

The following instructions for an absent voter must be included with each ballot or set of ballots furnished an absent voter:

Step 5. Deliver the return envelope by 1 of the following methods:

(a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.

(b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk, or to a secure drop box located in the city or township.

(c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or an individual residing in the voter's household may mail or deliver a ballot to the clerk for the voter.

(d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pick up the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. All individuals authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials.

WARNING All of the following actions are violations of the Michigan election law and are illegal in this state:

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(4) For an individual other than those listed in these instructions to return, offer to return, agree to return, or solicit to return an absent voter ballot to the clerk.

(5) For an individual other than the absent voter; an individual listed in these instructions; or an individual whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment to be in *possession of a voted or unvoted absent voter ballot.*

168.764b Delivery and acceptance of absent voter ballots; appointment, oath, credentials, and duties of assistants; collection of absent voter ballots; prohibition; noncompliance.

(1) *An absent voter ballot must be delivered to the clerk only as authorized in the instructions for an absent voter provided in section 764a.*

MCL 168.761D(4)(c) The city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box.

36. The requirement for video monitoring does not set forth standards beyond *effective monitoring*.

37. There is no explanation of what monitoring requires although it would be presumed that the monitoring would be to ensure that unauthorized persons do not drop ballots off at the drop box.

38. There is no provision for recording, storage, or streaming of the video.

39. There is no means by which the public may check the work of the officials monitoring the ballot drop boxes.

40. The documentary 2000 Mules demonstrated with video from Detroit combined with other released recordings of drop boxes in the City of Detroit that persons violated the law by dropping off multiple ballots in the 2020 election. This video is available.

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41. The 2000 Mules video and other videos show that felony delivery of ballots to the drop boxes was routinely captured but there have been no prosecutions reported for the persons in Detroit who brought multiple ballots to the drop box.
42. The use of the term "effective" means that the clerk is required to monitor the drop box and that the monitoring must be effective in preventing the violation of law or assist in the prosecution of those who do. This has not been done.
43. The Court should enter declaratory relief after reviewing the videos that the Detroit clerk has not been 'effective' in monitoring the drop boxes which is a duty assumed when Detroit chose to use drop boxes for ballot collection.

Verification of Identity for Absentee Ballot Mailed-in or Dropped Off

44. The only method for identification is the signature comparison. This critical piece is the only safeguard to prevent ballot box stuffing.
45. The Equal Protection clause of the US Constitution requires that the identification process protects against dilution of a vote by allowing unqualified voters to cast ballots.
46. MCL 168.765 requires that the Detroit City clerk:
    a. Shall not open the ballot return envelope BEFORE delivering to the board of election inspectors
    b. Shall safely keep the ballot return envelopes safely in her office until election day

MCL 168.765.

(1) Except as otherwise provided in subsection (6), a clerk who receives an absent voter ballot return envelope containing the marked ballots of an absent voter shall not open that envelope before delivering the envelope to the board of election inspectors as provided in this section. Except as otherwise provided in subsection (6), the city or township clerk shall safely keep in his or her office until election day any absent voter

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ballot return envelopes received by the clerk before election day containing the marked ballots of an absent voter.

47. MCL 168.766 requires that the *Board of Election Inspectors* (Not the clerk) verify the 'legality' of the ballot by doing the following checks:
    a. That the absent voter has not voted in person.
    b. That the absent voter is included in the QVF or Master registration record,
    c. Examine the statement of the absent voter to see that it is properly executed
    d. Determine if the absentee voter signature is genuine by comparing the ballot signature to the signature on file QVF

168.766 Marked ballot or absent voter ballot; verification.
(1) Upon receipt from the city or township clerk of any envelope containing the marked ballot or ballots of an absent voter, the board of inspectors of election shall verify the legality of the vote by doing both of the following:
(a) Examining the digitized signature for the absent voter included in the qualified voter file under section 509q or the registration record as provided in subsection (2) to see that the person has not voted in person, that he or she is a registered voter, and that the signature on the statement agrees with the signature on the registration record.
(b) Examining the statement of the voter to see that it is properly executed.
(2) *The qualified voter file must be used to determine the genuineness of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file.* If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on an envelope containing an absent voter ballot to the signature contained on the master card.

48. The board of election inspectors shall determine the legality of the ballot and mark any illegal ballot as 'reject as illegal' and return it to the clerk for preservation as required by law pursuant to MCL 168.767.

168.767 Absent voters' ballots; illegal vote; rejection of ballot; marking; preservation. Sec. 767.

If upon an examination of the envelope containing an absent voter's ballot or ballots, it is determined that the signature on the envelope does *not agree sufficiently with the signature* on the registration card or the digitized signature contained in the qualified voter file as provided under section 766 so as to identify the voter or if the board shall have knowledge that the person voting the ballot or ballots has died, or if it is determined by a majority of the board that such vote is illegal for any other reason, then such vote shall be rejected, and thereupon some member of the board shall, without opening the envelope, mark across the face of such envelope, "rejected as illegal", and the reason therefor. The statement shall be initialed by the chairman of the board of election inspectors. Said envelope and the ballot or ballots contained

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therein shall be returned to the city, township or village clerk and retained and preserved in the manner now provided by law for the retention and preservation of official ballots voted at such election.

49. The legislature's use of 'legality' in MCL 168.766 and 'rejected as illegal' in MCL 168.767 means that a ballot that fails to meet the verification is illegal.

50. One significant problem with the identification procedure of comparing the signature on the ballot envelope to the QVF is that there are *no signature standards* for comparison to determine if a signature 'agrees sufficiently'.

    a. In the case of *Robert Genetski and Mich Rep Party v Jocelyn Benson and Jonathan Brater* Case No 20-000216-MM, the Michigan Court of Claims rejected the Secretary of State guidance which was issued immediately before the 2020 election because it had not followed formal rulemaking procedures which included notice, public comment and the legislative review required by the Administrative Procedures Act.

    b. The Secretary of State has not provided a promulgated administrative rule for signature comparison thus, leaving the signature comparison to an arbitrary and capricious whim of an individual clerk.

    c. To this date no standard exists to replace the unlawful guidance.

    d. As the sole method for determining identity is signature comparison for an absentee vote which was obtained by mail or online request this security of our elections is woefully inadequate.

51. The City of Detroit used an unauthorized technology within the electronic voting system illegally during the August 2, 2022, Primary election for signature comparison:

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a. Chris Thomas, Senior Advisor to the Clerk of the City of Detroit, office has reported that the city used an artificial intelligence system called Relia-vote to make digital signature comparisons.

b. Subsequently, records were made public that showed that Detroit had received a $750,000 grant from The Center for Tech and Civil Living (CTCL) widely known as "Zuckerbucks" to purchase this system.

c. This system and its software were apparently interfaced with the QVF without the configuration being disclosed to the public, without any apparent oversight by the Board of State Canvassers.

d. The interface with Relia-vote has created new security risks that have not been publicly disclosed, do not comply with the requirements of MCL 168.37 that the voting system be uniform throughout the State.

e. The interface with Relia-Vote is illegal in that it fails to comply with the certification requirements of the federal Help America Vote Act of 2002 which requires that the voting system as configured be certified as meeting or exceeding the current Voluntary Voting System Standards (VVSG 2.0) for election security and transparency as established by the US Election Assistance Commission (EAC) and certified by an accredited Voting System Testing Laboratory (VSTL).

f. There is no authority in the law to have the Relia-vote system and its artificial intelligence replace the Detroit Board of Election Inspectors and to use a digital comparison of the signatures to augment the clerk.

g. The entire process used in Detroit is *ultra vires* and illegal.

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52. The Secretary of State has also informed the City of Detroit Clerk (and all election clerks in Michigan) that since the application for an absentee ballot is compared to the QVF that the signature on the ballot can be compared ONLY to the application. This is part of the election worker training from both 2020 and 2022.

53. This Secretary of State's process of comparing only to the signature on the application is a violation of MCL 168.766 and to the extent, this is followed in the actions of the City of Detroit it is also in violation of law.

Counting of Ballots by an AVCB

54. The counting of ballots at the Huntington Center (an absentee voter counting place is governed by the procedures in MCL 168.765a).

> **MCL 168.765a (4) In a city or township that uses absent voter counting boards under this section, absent voter ballots must be counted in the manner provided in this section and, except as otherwise provided in section 764d, absent voter ballots must not be delivered to the polling places.**
>
> **Subject to section 764d, the board of election commissioners shall provide a place for each absent voter counting board to count the absent voter ballots.**
>
> ***
>
> **The places must be designated as absent voter counting places.**
>
> **Except as otherwise provided in this section, laws relating to paper ballot precincts, including laws relating to the appointment of election inspectors, apply to absent voter counting places.**
>
> **The provisions of this section relating to placing of absent voter ballots on electronic voting systems apply.**
>
> **More than 1 absent voter counting board may be located in 1 building.**

55. MCL 168.765a(6) provides the following rules:

> [Note 764d does not apply to the City of Detroit AVCB as it is not combined with another jurisdiction]

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a. All ballots received by the clerk BEFORE election day MUST be delivered to the AVCB at the time the election inspectors report for duty on election day.
b. All ballots received by the clerk ON election day MUST be delivered to the AVCB.
c. All ballots must be delivered sealed in the ballot return envelope.
d. Written or stamped on each return envelope must be the date and time the envelope was received.
e. Written or stamped on each return envelope is a statement by the clerk that the signatures on the envelope have been checked AND found to 'agree' with the signatures contained in the QVF as provided in Section 766-the standard which remains unpromulgated.
f. The clerk shall mark a ballot 'rejected' and place their name and reason for rejection on the ballot.
    i. If determined after 8 pm on the day before the election that the signature does not agree when compared.
    ii. If it is determined after 8 pm on the day before election day that the absentee voter failed to sign the ballot.
    iii. If the statement of the voter is not properly executed.
g. A rejected ballot must be preserved at the clerk's office and NOT sent to the AVCB.
h. If the problems with the signature or statement is discovered BEFORE 8 pm on election day, then the clerk must notify the absentee voter as soon as 'practicable' of the rejection but either before 48 hours or before 8pm on election day (whichever is first.)

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i. Pursuant to Section 765(5) the clerk is required to post or make public BOTH the number of ballots sent out and the number of ballots that were received. This notification must be made before 8 am on election day.

j. Pursuant to Section 765(5) the clerk is required to post or make public the "Total" number of ballots received and made available to the board of election inspectors or absentee counting board under this act. The total number includes the ballots received before and on election day. This notification is to be made before 9 pm on election day.

k. Pursuant to Section 765 (5) the clerk is required to post or make public the total number of absentee ballots received at the precinct on election day along with the "Total" votes received by the clerk's office and previously made public at 9 pm. This must be done as soon as possible.

MCL 168.765a(6)

Subject to section 764d, absent voter ballots received by the clerk *before* election day *must* be delivered to the absent voter counting board by the clerk or the clerk's authorized assistant at the time the election inspectors of the absent voter counting boards report for duty, which time must be established by the board of election commissioners.

Except as otherwise provided in section 764d, absent voter ballots received by the clerk before the time set for the closing of the polls on election day *must* be delivered to the absent voter counting boards.

Except as otherwise provided in section 765(6), absent voter ballots *must* be delivered to the absent voter counting boards or combined absent voter counting boards in the sealed absent voter ballot return envelopes in which they were returned to the clerk.

Written or stamped on each of the return envelopes *must* be the time and the date that the envelope was received by the clerk and a statement by the clerk that the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the voters on the registration cards or the digitized signatures of voters contained in the qualified voter file as provided under section 766.

If it is determined after 8 p.m. on the day before election day that a signature on the registration card or a digitized signature contained in the qualified voter file and on the

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absent voter ballot return envelope does not agree as provided under section 766, if it is determined after 8 p.m. on the day before election day that the absent voter failed to sign the envelope, or if the statement of the absent voter is not properly executed, the clerk shall mark the envelope "rejected" and the reason for the rejection and shall place his or her name under the notation

An envelope marked "rejected" must not be delivered to the absent voter counting board or combined absent voter counting board but must be preserved by the clerk until other ballots are destroyed in the manner provided in this act.

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot return envelope because the signature on the absent voter ballot return envelope does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot return envelope, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail.

The clerk shall also comply with section 765(5).

MCL 168.765(5)

On or before 8 a.m. on election day, the clerk shall post in the clerk's office or otherwise make public the number of absent voter ballots the clerk distributed to absent voters and the number of absent voter ballot return envelopes containing the marked ballots of absent voters received by the clerk before election day and to be delivered to the board of election inspectors or the absent voter counting boards under this act.

On or before 9 p.m. on election day, the clerk shall post in the clerk's office or otherwise make public the number of absent voter ballot return envelopes containing the marked ballots of absent voters received by the clerk on election day and delivered to the board of election inspectors, under subsection (3), along with the total number of absent voter ballot return envelopes containing the marked ballots of absent voters received by the clerk both before and on election day and delivered to the board of election inspectors or the absent voter counting boards under this act.

As soon as possible after all precincts in the city or township are processed, the clerk shall post in the clerk's office or otherwise make public the number of absent voter ballot return envelopes containing the marked ballots of absent voters received by the election inspectors at the precincts on election day, along with the total number of absent voter ballot return envelopes containing the marked ballots of absent voters received in the city or township for that election.

This subsection applies only to elections in which a federal or state office appears on the ballot.

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Posting or Making public the numbers of Absentee Ballots Sent and Returned

56. The provisions of Section 765(5) would limit the claims that late night ballots were being injected into the election outcome as the total number of absentee ballots to be counted would be public by 9 pm.

57. The board of election inspectors and the signature comparison process was allegedly done at a location where ballots for the City of Detroit were preprocessed which raises several concerns:

    a. There is no access by poll challengers or watchers of this process of signature comparison which prevents the poll challengers from any ability to challenge the absentee voter having the qualifications to vote.

    b. The marked ballot envelopes that are rejected which deprives that voter from having their vote counted in this process is done without the poll challenger or poll watcher being able to observe or challenge the key process.

    c. Plaintiff Tim Mahoney attempted to observe the process on August 1, 2022 and was denied entry.

    d. The practice of the clerk of the City of Detroit is to have the clerk use one of two methods to verify the signature as described during the August 2, 2022 Primary.

        i. The clerk (not the board of election inspectors) makes the signature comparison and marks the ballot by hand with a date and time stamp and places their initials or signature on a section of the ballot that has an attestation that the signature comparison was made and approved.

        ii. The clerk (not the board of election inspectors) uses the Relia-vote system which makes a digital comparison by retrieving the signature from the QVF

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with an adjustable setting that allows the clerk to manually accept signatures that do not meet the pre-programmed standard. A digital stamp is then placed on the envelope with the date and time along with the name or initials of the clerk by the Relia-vote machine.

e. Either method is a process done by the clerk and NOT the board of election inspectors in violation of Section 766.

f. Other AVCBs in the state of Michigan provides for signature comparison at the AVCB and in the view of the election poll challengers.

THE PUBLIC OBSERVATION REQUIREMENT

58. MCL 168.798a provides that if a separate counting center such as Huntington Center is used that ALL proceedings:

a. SHALL be under the clerk or authorized assistants;

b. SHALL be conducted under the observation of the public

c. No person except those authorized shall touch a ballot or return is the only restriction on public observation of ALL proceedings.

168.798a Separate counting center; direction and conduct of proceedings; method.

If a separate counting center is used, all proceedings shall be under the direction of the clerk or authorized assistants.

The proceedings shall be conducted under observation by the public, but no persons except those authorized shall touch a ballot or return. Persons who engage in processing and counting of the ballots shall be deputized and take an oath that they will faithfully perform their assigned duties. . . .

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59. The Detroit Clerk has not provided access for the observation of the signature comparison process and instead without the purview of poll watchers and poll challengers the Detroit City Clerk has sorted out ballots and removed the ballots that are unsigned or do not meet the (undefined) process for signature comparison and are rejected.
60. There is concern that the process can be used to remove legitimate votes from areas or otherwise identified as ballots that would be cast in opposition to the political views of the clerk.
61. While it is understood that there has been a modification of law in that MCL 168.765 provides for pre-processing with the observation of poll challengers this process is limited to the separation of the ballot from the envelope and verifying the ballot is in a secrecy envelope-essentially what seat 1 and 2 were doing at the AVCB in 2020 and the primary on August 2, 2022.
62. The signature comparison is NOT governed by this provision and there is a strong probability this will occur again behind closed doors.

UNAUTHORIZED PROCESS FOR DUPLICATION OF BALLOTS

63. MCL 168.798b also provides for the duplication of ballots ONLY when the ballot is so damaged or defective that it cannot be properly counted by the electronic tabulating equipment, a true duplicate copy shall be made.

> **MCL 168.798b . . .If a ballot is <u>damaged or defective</u> so that it cannot properly be counted by the electronic tabulating equipment, a true duplicate copy shall be made and substituted for the damaged or defective ballot. Each duplicate ballot shall be clearly labeled "duplicate", and shall bear a serial number, which shall be recorded on the damaged or defective ballot.**

64. The City of Detroit AVCB illegally used the duplication process without legal authority for the improper purpose of copying some votes for contests on a ballot that was the

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improper form which had been sent to the absent voter. An example is when a ballot for the wrong precinct was sent, then the ballot for contests which were in common would be duplicated onto a ballot from the right precinct and then the ballot was 'fixed' by duplication.

65. The City of Detroit AVCB created a method of converting Absent Uniformed Voters or Overseas Voter's electronic ballots to a ballot for tabulating through a process called duplication.

66. This process is not authorized by law. MCL 168.759a does not provide for the duplication of the ballot by election inspectors for the purpose of tabulating.

The Use of High-Speed Scanners

67. MCL 168.765a(8) requires the AVCB to process the ballots and returns in as nearly the same manner as the ballots processed at the precincts.

> **MCL 168.765a(8) The absent voter counting boards and combined absent voter counting boards *shall process the ballots and returns in as nearly as possible the same manner as ballots are processed in paper ballot precincts.* The poll book may be combined with the absent voter list or record required by section 760, and the applications for absent voter ballots may be used as the poll list. The processing and tallying of absent voter ballots may commence at 7 a.m. on the day of the election.**

68. The City of Detroit uses high-speed scanners rather than tabulators.

69. MCL 168.795 requires that the tabulators be programmed to reject certain ballots that are marked contrary to the instructions.

70. The tabulation of the ballots would permit poll challengers to see the ballots that are rejected or reversed for non-compliance with instructions for marking a ballot. Scanning the ballots eliminates this process from the purview of the poll challenger.

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71. Instead of rejecting the ballots as required by law the City of Detroit provides for a process of 'adjudication' which is not authorized by law.
72. The high-speed scanners are a *configuration* of the electronic voting system that is not certified as required by the Help America Vote Act in 52 USC 20901 et seq OR by the board of state canvassers as required by MCL 168.795a.
73. On information and belief, the software that is used to convert a ballot image to the dominion software as of 2018 was created by either Konnech, Inc or Votem (who purchased certain assets from Konnech, Inc. This information is presented online and appears as though Detroit paid these vendors for work.
74. Konnech, Inc and its principal Eugene Yu are under criminal investigation related to election security breaches to the Chinese Community Party (CCP).
75. Further information has developed that this company Konnech has strong ties to the CCP and has been integrally part of the Detroit Absentee Counting Board.
76. There will need to be discovery and hearings on the extent of this national security breach that has occurred and the epicenter appears to be Detroit.

The Adjudication Process is Unauthorized by Law

77. The adjudication process is not provided for anywhere in statute.
78. The word adjudication does not appear anywhere in the election code; nor is there a description of the process used in Detroit.
79. In the General Election of 2020 and in the Primary Election of 2022, the AVCB Counting Center used the following process:
    a. When a ballot is marked improperly so as to be rejected the digital ballot image is sent to a bank of ten computers called adjudication.

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b. At each computer a screen displays the optical scanned image as a digital image that has software that identifies the portion of the ballot which needs to be adjudicated.

c. Two election inspectors (presumed to be one from each party) review the image and the contest that has been presented for adjudication and have the options of:

   i. Doing nothing and accepting the ballot as cast by selecting the option to ACCEPT.

   ii. Altering the image by darkening or marking the selection to carry out their perception of the voter's intent after selecting the option to OVERRIDE.

   iii. Altering the image by removing a mark to carry out their perception of the voter's intent after selecting the option to OVERRIDE.

   iv. Sending the ballot to election officials by selecting the option QUARANTINE.

   v. In the case of a write-in ballot by rejecting the write-in candidate or accepting if the candidate is listed as an official write-in and entering the vote into a separate write-in program.

d. The adjudication process which alters the ballot image is illegal.

e. The adjudication process, on information and belief, permits the acceptance of ballots that were 'adjudicated' but are required by law to not be counted pursuant to MCL 168.798(c)(3).

80. https://rumble.com/embed/v8upcz/ is a video in which Dominion CEO Eric Coomer explained adjudication features in 2017.

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a. The video begins with the statement that the voter did not fill out the ballot as instructed and has either not filled out the ovals completely or have circled their selections.

b. Dr. Eric Coomer states clearly, "We're not sure what the voter intent is but we are going to allow the adjudicators to make that call...and edit the ballot."

81. The law defines a mark and states that only a stray ballot mark may disregard but there is no legal process to alter or change a mark.

82. In fact, the system is designed to count portions of a ballot when the law requires the entire ballot be rejected.

MCL 168.795(2)
...Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location *must be programmed to reject a ballot* if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot, or if, in a primary election, votes are recorded for candidates of more than 1 political party.

83. An examination of the requirements of MCL 168.795(1) in subparts c and e has similar language which provides for the rejection of an in-person cast ballot by the tabulator equipment and the opportunity that the voter be provided a spoiled ballot and be able to self-correct their error. The provisions are highlighted above. A ballot marked improperly is rejected and the voter is given a chance to self-correct on the spot.

MCL 168.795(1) An electronic voting system acquired or used under sections 794 to 799a *must meet* all of the following requirements:

(c) Permit each elector to vote at an election for all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or

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a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question. Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and programmed to reject a ballot containing that type of an error. ***If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.***

(e) Permit an elector in a primary election to vote for the candidates in the party primary of the elector's choice. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject each ballot on which votes are cast for candidates of more than 1 political party. Electronic tabulating equipment that can detect that the elector has voted for candidates of more than 1 political party must be located at each polling place and programmed to reject a ballot containing that type of an error. ***If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.***

84. Contrast to section 2 of MCL 168.795 which requires the electronic voting system that count absentee ballots REJECT a ballot that is mismarked. There is no provision to correct provided to the absent voter but the ballot is rejected. There is no law or provision for adjudication or any other process to alter the ballot manually or digitally. The section applies to ballots counted at a central location.

85. In Detroit at the AVCB on August 2, 2022, many ballots which contained votes for candidates on two political parties were 'adjudicated'.

    a. This means that the scanning device created an optical image and election workers were able to digitally remove marks or digitally darken marks to decide what the voter's intent was when the ballot was mismarked.

    b. This process is a violation of law which required the ballot be rejected. This is part of the voting system as the software allows adjudication—a word that does not appear anywhere in law or administrative rule.

    c. The percentage of ballots that were adjudicated was staggering.

    d. The same illegal process was observed in 2020 during the general election.

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e. The same illegal process is slated to be used in the 2022 Mid Terms Michigan Election in Detroit.

86. *The Election Officials' Manual Chapter 8 Absentee Ballot Election Day Processing* is a 15-page guidance which does not provide for adjudication of ballots.

87. The entire process is created by the vendor Dominion and used illegally by the City of Detroit.

88. The legislature specified that the entire ballot is rejected and since the Absentee Voter is not present there is no option to spoil the ballot and cast another.

89. More than one half of the Detroit Ballots were adjudicated illegally in the 2020 election.

> **168.798c Casting absentee votes on paper ballots or ballot cards; count; recording; voting and processing absent voters' ballots; inspection of rejected ballot.**
> **(1) Absentee votes may be cast on paper ballots or ballot cards or both. Absent voter ballots may be counted in the various voting precincts or may be counted by absent voter counting boards. Absentee votes cast on paper ballots may be recorded by election inspectors on ballot cards for counting by tabulating equipment.**
> **(2) In an election held under this act, absent voters' ballots may be voted and processed in the manner provided by this chapter.**
> **(3) If electronic tabulating equipment rejects an absent voter ballot due to programming required under section 795, the rejected ballot shall be inspected to confirm the presence of the error before the ballot is processed. *A vote for each elective office or ballot question in which an error is confirmed shall not be counted.***

90. The definition of a valid mark which constitutes a vote is clearly defined in MCL 168.803.

> **168.803 Counting and recounting of votes; intent of voter; stray marks; instructions issued by secretary of state.**
> **(1) Except as otherwise provided in this act, the following rules govern the counting and recounting of votes:**
> **(a) If it is clearly evident from an examination of a ballot that the ballot has been mutilated for the purpose of distinguishing it or that there has been placed on the ballot some mark, printing, or writing for the purpose of distinguishing it, then that ballot is void and shall not be counted.**

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(b) A cross, the intersection of which is within or on the line of the proper circle or square, or a check mark, the angle of which is within a circle or square, is valid. Crosses or check marks otherwise located on the ballot are void.

(c) Marks other than crosses or check marks used to designate the intention of the voter shall not be counted.

(d) A cross is valid even though 1 or both lines of the cross are duplicated, if the lines intersect within or on the line of the square or circle.

(e) Two lines meeting within or on the line of the square or circle, although not crossing each other, are valid if it is apparent that the voter intended to make a cross.

(f) A failure to properly mark a ballot as to 1 or more candidates does not alone invalidate the entire ballot if the ballot has been properly marked as to other candidates, unless the improper marking is determined to be a distinguishing mark as described in this subsection.

(g) Erasures and corrections on a ballot made by the elector in a manner frequently used for this purpose shall not be considered distinguishing marks or mutilations.

(h) A ballot or part of a ballot from which it is impossible to determine the elector's choice of candidate is void as to the candidate or candidates affected by that determination.

(i) A vote cast for a deceased candidate is void and shall not be counted, except that a vote cast for a candidate for governor who has died, and for whom a replacement has not been made, shall be counted for the candidate for lieutenant governor of that party.

(j) A ballot cast that is not counted shall be marked by the inspector "not counted", kept separate from the others by being tied or held in 1 package, and placed in the ballot box with the counted ballots.

(k) A vote shall not be counted for a candidate unless a cross or a check mark has been placed by the voter in the square before the space in which the name of the candidate has been printed, written, or placed.

(2) If an electronic voting system requires that the elector place a mark in a predefined area on the ballot in order to cast a vote, the vote shall not be considered valid unless there is a mark within the predefined area. A stray mark made within a predefined area is not a valid vote. In determining whether a mark within a predefined area is a stray mark, the board of canvassers or election official shall compare the mark with other marks appearing on the ballot. The secretary of state shall issue instructions, subject to the approval of the board of state canvassers, relevant to stray marks to ensure the fairness and uniformity of determinations made under this subsection. A secretary of state's instruction relevant to stray marks shall not be applied to a ballot unless the secretary of state issued the instruction not less than 63 days before the date of the election.

91. There are clear instructions to the voter on how to mark the ballot.

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92. A voter which chooses to vote in person has the option of watching to ensure the ballot is accepted by the tabulator.

93. Voting by absentee does not provide the voter the opportunity to correct an improperly marked ballot.

94. There is no lawful means to alter the mark in adjudication to carry out the voter's intent and any effort to do so would be a violation of law.

95. Alteration of the image or even duplication to remove stray marks is not permitted. A hand count of the ballot with a stray mark is permitted by MCL 168.798c.

96. On information and belief, the software on the electronic voting system software allows the clerk to choose the standard for a "mark" by setting the pixel count range including a minimum number of pixels within the area to be marked during voting.

97. As the legislature has not set a uniform standard, this is an arbitrary and capricious process that violates equal protection.

98. The adjudication process used by the City of Detroit is unlawful.

The Mismatched Ballot Illegal process used by Detroit AVCB

99. MCL 168.765(4) provides that the rules for counting ballots at an AVCB precincts apply to absentee counting boards.

> **MCL 168.765(4) ...Except as otherwise provided in this section, laws relating to paper ballot precincts, including laws relating to the appointment of election inspectors, apply to absent voter counting places. . .**

100. MCL 168.797a(2) requires that an election inspector shall determine if the numbered absentee ballot that is returned in the sealed envelope matches the absentee ballot number that the clerks recorded as delivered to the voter and when it does not that the ballot is marked rejected.

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MCL 168.797a (2) If the electronic voting system provides for the use of a ballot that is processed through electronic tabulating equipment after the elector votes, the elector shall transport the ballot to the ballot box, or other approved ballot container, without exposing any votes.

An election inspector shall ascertain, by comparing the number appearing on the ballot stub with the number recorded on the poll list, that the ballot delivered by the voter is the same ballot that was issued to the elector.

If the numbers do not agree, the ballot shall be marked as "rejected", and the elector shall not be allowed to vote.

If the numbers agree, an election inspector shall remove and discard the stub. Except as otherwise provided in this subsection, the election inspector shall deposit the ballot in the ballot box or other approved ballot container. . .

101. Instead, Detroit AVCB has a process in which the ballot number is altered by tape and relabeled and then the ballot is noted in the pollbook but is then sent into the pile to be scanned.

102. This process as used by Detroit AVCB is in violation of law.

The Rights and Responsibilities of a Poll Challenger

103. MCL 168.733(2) provides certain rights and responsibilities:

1. Observe the manner in which the duties of election inspectors are being performed.
2. Challenge the voting rights of a person who has "good reason" not to believe is a registered elector.
3. Challenge an election procedure not being properly performed.
4. Examine each ballot AS it is being counted.
5. Observe the recording of Absentee ballots on vote machines.

168.733 Challengers; space in polling place; rights; space at counting board; expulsion for cause; protection; threat or intimidation.
(1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:

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(a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.

(b) Observe the manner in which the duties of the election inspectors are being performed.

(c) *Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.*

(d) Challenge an election procedure that is not being properly performed.

(e) Bring to an election inspector's attention any of the following:

(i) Improper handling of a ballot by an elector or election inspector.

(ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(iii) Campaigning being performed by an election inspector or other person in violation of section 744.

(iv) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines.

(2) The board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable.

(3) Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board. The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties.

(4) A person shall not threaten or intimidate a challenger while performing an activity allowed under subsection (1). A challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place.

104. The process used by the Detroit AVCB prevents any meaningful opportunity to challenge the rights of a person when there is a 'good faith' belief that that person is not entitled to vote.

105. The process used by the Detroit AVCB with the use of high-speed scanners instead of tabulators prevents the opportunity to examine the ballot as it is being counted and to observe the recording of the absent voter ballots on the voting machines.

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The Detroit AVCB infringed on the access rights of the Poll Challengers

106. The rules as stated in MCL 168.733 permit a poll challenger to observe the counting of the ballots.

107. These access rights would include the access to the platform in which there is management of the election software, adjudication of quarantined ballots and the control of the election software.

108. During the previous November 2020 General Election and the 2022 Primary Election, the Detroit AVCB has intimidated challengers who have asserted lawful authority to be present and observe the key processes.

109. Pursuant to MCL 168.974(d), "Counting center" means 1 or more locations selected by the board of election commissioners of the city, county, township, village, or school district at which ballots are counted by means of electronic tabulating equipment or *vote totals are electronically received from electronic tabulating equipment and electronically compiled.*

110. The counting center therefore includes the platform at the Huntington place, the city clerk's office where the election returns are gathered and reported to the state as well as the state area where all election returns are compiled.

111. Poll challengers were unlawfully denied access to these areas and prohibited from access, as their duties include observation and reporting of violations of law and procedure.

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POST ELECTION DUTIES AS TO QVF UPDATE

112. There are post-election duties described in MCL 168.813 including in subsection (5) which provides;

> **MCL 168.813 (5) Within 7 days after an election, the city or township clerk shall ensure that the qualified voter file is current and includes any individual who registered to vote under section 497(3) and (4)**

113. The QVF voting role from the 2020 election is still being altered through the state to add or change voting history. There is a failure to document in the publicly available QVF an accurate report of who actually voted in the City of Detroit.

COUNT ONE: DECLARATORY RELIEF

114. All previous averments are incorporated herein.

115. Any Michigan court of record with jurisdiction "[i]n a case of actual controversy within its jurisdiction," may entertain a declaratory judgment action in that case, "whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). Circuit, district, and probate courts have jurisdiction in any case in which they would have jurisdiction if other relief was sought. MCR 2.605(A)(2).

116. There must be an actual controversy that causes a party to seek a declaration of rights or legal relationships. MCR 2.605(A)(1); MCR 2.111(B)(2). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a Plaintiff's future conduct in order to preserve legal rights."

117. The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the

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sharpening of the issues raised. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (quotation marks and citations omitted).

118. The Plaintiffs seeks clarification on certain past practices of the Detroit City Clerk which are illegal, done improperly, or done without authority of law:

a. The Detroit City Clerk is not complying with *verification of identity* process of an applicant for an absentee ballot pursuant to MCL 168.761 in that there must either be a signature comparison (which is impossible without a standard) or in person identification presented.

b. The Detroit City Clerk is not enforcing the restriction of possession of AV ballots as required by MCL 168.761(4) in that the ballot boxes are essentially unmonitored and despite video evidence of ballot 'mules; there has been no alteration to secure the ballots from persons not authorized to transport ballots or alternatively just 'stuffing' ballots into the boxes.

c. There is no evidence of compliance with MCL 168.765 by the Detroit City Clerk in that ballot processing for signatures is both unobserved by poll challengers and the evidence on the ballot envelope indicates the signature verification is being delegated to a computer system called Relia-Vote that has unauthorized access to the state QVF, has not been approved as part of the lawful configuration of the electronic voting system, and/or uses standards that are arbitrary and capricious or worse; the failed standard of any "redeeming characteristic" standard proffered by the SOS but not passed through the Administrative Procedures Act.

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d. There is no evidence of compliance by the Detroit board of election inspectors to MCL 168.766 and their duties for signature comparison. Instead, there is a rogue process in violation of statute.

e. There was non-compliance in the past with the posting provisions of MCL 168.765(5) by the Detroit City Clerk.

f. There was a denial of access by the Detroit City Clerk of poll challengers to the pre-processing center (which should occur at the AVCB in the purview of challengers, to the raised platform or any place where vote totals were aggregated in violation of law on of which is MCL 168.733(2).

g. There is unlawful duplication of ballots by the Detroit City Clerk in excess of authority under MCL 168.798b for when the clerk sent the wrong ballot to a voter.

h. There is an unlawful adjudication process being done under the authority of the Detroit City Clerk in violation of the Help America Vote Act and Michigan law that defines a mark under MCL 168.803.

i. There is an unlawful process for high-speed scanning done under the authority of the Detroit City Clerk which is not part of the approved electronic voting system and is therefore illegal, and much worse, there is evidence that the software was written by a company with strong ties to foreign election interference criminal investigations are currently underway.

j. There was non-compliance with post-election responsibilities to update accurate vote history in violation of MCL 168.813 by the Detroit City Clerk.

119. "The court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar." MCR 2.605(D).

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120. Plaintiffs request an expediated hearing.

121. Once a declaratory judgment has determined the rights of the parties, additional "necessary or proper relief" may be granted, including monetary damages, following reasonable notice and hearing. MCR 2.605(F); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995).

WHEREFORE, the Plaintiffs request declaratory relief after an expedited hearing and all other necessary and proper relief including monetary damages, if deemed appropriate.

COUNT TWO: INJUNCTIVE RELIEF

122. All previous averments are incorporated herein.

123. The moving party has the burden of establishing that a preliminary injunction should issue. MCR 3.310(A)(4).

124. The court should consider four factors in determining whether to grant a preliminary injunction: (1) whether the injunction would harm the public interest; (2) whether the harm to the plaintiff in the absence of a stay would outweigh the harm to the defendant if the stay is granted; (3) whether the plaintiff is likely to succeed on the merits; and (4) whether the plaintiff will be irreparably harmed if a preliminary injunction is denied. *Michigan State Emp Ass'n v Dep't of Mental Health, 421 Mich 152, 157-158 (1984)*

125. The public interest is for there to be a fair, honest, secure and transparent election process that conforms to the law.

126. Numerous violations of statute indicate that this court should grant extraordinary relief in the form of some judicial oversight, injunctive relief, or other action.

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127. The harm to the Plaintiffs outweighs any harm to the Defendants. The Defendants as public employees have no individual harm in their official capacity. The Plaintiffs, from candidates, to poll challengers, to election workers, and election public interest organizations are united in their statement that the illegal and ultra vires actions of the Detroit Clerk and Board of Elections will result in an illegal election. The rule of law must be observed.

128. Plaintiff will prevail on the merits as the law is clear and the violations rampant.

129. The failure to address this pre-election will result in further confusion and problems post-election.

130. An injunction on the optional use of the absentee counting board forcing the ballots to be tabulated at the precincts on an approved system distributes the work and brings into compliance of the law. The precinct election workers can check signature verification at the precinct. The ballot sorting operation that Detroit uses allows them to easily produce the ballots by precinct.

131. The court should require all Detroit voters to vote in person or obtain their ballots in person at the clerk's office. This is the only valid process of identity in the statute because the MI SOS failed to promulgate a signature comparison rule.

132. The court should require all ballots be counted at the precinct. The system already sorts them and there is no problem with running them through the 'uniform system' at the tabulator as the high-speed scanner and adjudication process is both illegal and likely compromised due to the connection to Konnech.

133. This process is a fiscal nightmare. There is much expense created unnecessary to accumulate ballots into a counting board. Every precinct in Detroit is limited to less than

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2999 persons by law. Every precinct in the state is able to execute counting 2999 or less ballot timely and affordably. The use of a duplicate process for the AVCB is not saving money rather it creates a second redundant process.

WHEREFORE, the Plaintiffs request the Court order Detroit to (1) halt the use of absentee ballots that are obtained without identification, (3) halt the counting of ballots cast through drop boxes that are not effectively monitored; and (3) distribute the ballots to the precincts to use equipment and procedures that are as near as possible as the in-person process and in compliance of law. The AVCB has many problems that cannot be remedied. As it is an optional process it must be sent to the scrap heap of history as a failed experiment.

COUNT THREE: MANDAMUS RELIEF

134. All previous averments are incorporated herein.

135. A writ of mandamus directs a public official to perform his or her legal duty. *Jones v Dep't of Corrections*, 468 Mich 646, 658 (2003). A writ of mandamus cannot be sought to "control the exercise or direction of the discretion to be exercised," or "for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies." *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410 (1984).

136. The Court of Appeals or the Court of Claims has exclusive jurisdiction over an action for mandamus against a state officer. MCR 3.305(A)(1). "All other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court." MCR 3.305(A)(2).

137. The clerk of the City of Detroit is not a state officer and therefore the complaint is properly brought to the circuit court.

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138. The Plaintiffs have a clear legal right to have the clerk follow the law as written.

139. The Defendants have a clear legal obligation to follow the law as it is written and to refrain from creating new processes, new procedures, and using unapproved equipment that is not certified as required by law.

140. The acts governed by the mandamus action are acts of the clerk are ministerial and not discretionary. They are required by statute.

141. There is no other remedy that will correct the abuses and require the Defendants to comply with their legal obligations.

WHEREFORE, the Plaintiffs request mandamus relief and that the Defendants be required to fulfil their clear administrative duties as stated in the law related to the past practices of the Detroit City Clerk and Board of Election Inspectors as stated herein.

Dated: 10/26/2022

/s/ Daniel J. Hartman
Daniel J. Hartman (P52632)

/s/ Alexandria J. Taylor
Alexandria J. Taylor (P75271)

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STATE OF MICHIGAN
IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

PHILIP O'HALLORAN, MD
Poll Challenger,

CASE NO:22- -AW

BRADEN GIACOBAZZI
Poll Challenger,

HON.

TIMOTHY MAHONEY,
Poll Watcher,

KRISTY WALLS,
Detroit Election Worker,

PATRICIA FARMER,
Detroit Resident Taxpayer,

ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
Plaintiffs,

v.

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS,
In their official capacity,
Defendants.

Daniel J. Hartman (P52632)
Attorney for Plaintiffs
PO BOX 307
Petoskey, MI 49770
(231) 348-5100

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Alexandria Taylor (P75271)
Attorney for Plaintiffs
19 Clifford Street
Detroit, MI 48226
(313) 960-4339

MOTION FOR DISQUALIFICATION

OF THE 3rd JUDICIAL CIRCUIT BENCH

NOW COMES, the plaintiffs through their attorneys, and state in support of their motion:

1. Venue and jurisdiction are proper in the 3rd Circuit Court; however, the bench should not hear the matter and a visiting judge should be assigned.
2. The motion was timely made at the time of the filing of the complaint pursuant to MCR 2.003(D)(1a)..
3. Due process "requires an unbiased and impartial decisionmaker." *Cain v Dep't of Corrections, 451 Mich 470, 497 (1996).*
4. MCR 2.003(C)(1)(b) provides the recusal of a judge based upon objective and reasonable perceptions, has a serious risk of actual bias impacting due process rights of a party as enunciated in *Caperton v Massey, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).*
5. In the Roberts dissent of *Caperton, supra*, four justices stated that the majority had loosened the standard to a 'vague probability' and stated that there is not sufficient guidance to Judges when to recuse themselves.
6. The *Caperton* case cites *Tumey v Ohio 273 US 510 (1927)* which held a judge must recuse sua sponte if there is a direct, personal, substantial pecuniary interest in the outcome of a case, and that mere personal bias or prejudice is not enough to require recusal.

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7. In support of this motion is the affidavit of Daniel J. Hartman attached pursuant to MCR 2.003D(2).

WHEREFORE, the plaintiffs request the motion for recusal be granted and an assignment to a visiting Judge be made.

Dated: 10/26/2022

/s/ Daniel J. Hartman
Daniel J. Hartman (P52632)

Affidavit of Daniel J. Hartman pursuant to MCR 2.003(D)(2) in support of the motion for disqualification:

1. In good faith, the Plaintiffs request that the 3rd Circuit Court recuse the entire bench on the following grounds:
    a. The elections at issue for the entire bench are conducted by the Wayne County Clerk and the Board of Elections.
    b. The County clerk and the 3rd Circuit Bench work closely on every case and are nearly intertwined.
    c. While there is no personal bias there is more than an appearance of impropriety in this close relationship.
    d. An adverse determination by a Judge against the County Clerk has a strong probability that hard feelings would affect the working relationship between the clerk and the court.
    e. A judge would not hear the case of a staff member and the County Clerks are while not staff they have nearly as close of a working relationship as the judicial staff.

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f. Some of the judges are on the ballot for the midterm and clearly should not be assigned the case.

g. The Detroit City Clerk is separate from the Wayne County Clerk, but the 3rd Circuit is on the Detroit City ballots.

h. The relationship between the Wayne County clerk and the Detroit City clerk as to the conduct of elections especially as to election supervision responsibilities is significant.

i. It is unlikely that a 3rd Circuit Curt Judge would prefer to hear this political case, but while willing to do their duty to sit, however, the interests of justice would best be served by the recusal of the entire 3rd Circuit Bench and to have a visiting judge elected outside of Wayne County.

I submit this affidavit under the penalty of perjury based on the facts and law and argue that while this raises an issue of first impression and no case law was found on point, that the request is meritorious to the best of my knowledge and belief and based on the facts as stated herein.

DocuSigned by:

Daniel J. Hartman

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STATE OF MICHIGAN
IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

PHILIP O'HALLORAN, MD
Poll Challenger,

22-012759-AW

CASE NO: 22- -AW

BRADEN GIACOBAZZI
Poll Challenger,

HON.

TIMOTHY MAHONEY,
Poll Watcher,

KRISTY WALLS,
Detroit Election Worker,

PATRICIA FARMER,
Detroit Resident Taxpayer,

ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
Plaintiffs,

v.

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS,
In their official capacity,
Defendants.

Daniel J. Hartman (P52632)
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(231) 348-5100

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Alexandria Taylor (P75271)
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Detroit, MI 48226
(313) 960-4339

MOTION FOR EXPEDITED SCHEDULING AND AN EMERGENCY HEARING.

MOTION FOR PRELIMINARY INJUNCTION

NOW COMES the Plaintiffs, through their attorneys, and state in support of their motions:

1. The Defendant seeks injunctive relief pursuant to MCR 3.310 and requests that this Court order the Defendants to comply with the Michigan Election Law and specifically to address the election laws which have been broken in the August, 2022 Primary and without intervention will be violated again rending the election in the City of Detroit illegal.
2. The Plaintiffs seek orders to remedy the following violations:

   (i) That all ballots requested by mail or online require identification under the procedure of bringing the identification to the clerk's office as there is no standard rule promulgated for signature comparison and therefore no ability to fulfill the requirements for signature comparison pursuant to MCL 168.761 (2);

   (ii) That all ballots that are returned to the ballot drop boxes are not effectively monitored in violation of MCL 168.761D(4)(c). Reports are currently ongoing of the failure to provide cameras as required by law and more important to monitor the cameras to prevent persons not authorized to transport ballots from injecting them into the election in violation of MCL 168.764a and MCL 168.764b. Finally, there has been a denial of the requirement under MCL 168.798a which requires observation by the public, (the poll watchers and poll challengers included) of the signature comparison

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process. The newly enacted changes to MCL 168.765 that permit the clerk to separate the ballots in the secrecy envelope from the outer envelope require observation by the poll challengers and poll watchers but the practice of the Detroit Clerk is to do the signature comparison outside of the purview of the poll challenger and public.

(iii) That all ballots that are returned also have a signature comparison without a standard. If the SOS instruction is followed to compare the signature to the application rather than the QVF then this is a violation of law. Further that the use of the Veri-vote system for signature comparison on ballot envelopes is both a security risk and a non-conforming novel process not permitted or authorized by law; and finally the signature comparison has been, and will be done, without following the law in MCL 168.765 and MCL 168.766.

(iv) The Clerk is failing to reject ballots that are illegally pursuant to MCL 168.767.

(v) There was no evidence of compliance with the requirements to post the number of absentee ballots mailed and returned under MCL 168.765(5) at 8 am on election day and before 9 pm on election night.

(vi) The clerk has failed to follow the rules when a ballot number does not match and instead permits the ballot to be commingled and counted. This is a violation of MCL 168.765.

(vii) The clerk has provided for duplication of ballots in excess of authority granted by law which is limited only to a damaged ballot by MCL 168.798b. There is no process for duplicating portions of a 'wrong' ballot that was cast. The

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duplication process is also used for military and overseas voters that are emailed without authority.

(viii) The use of high-speed scanners instead of tabulators. The requirement is that the AVCB is to process ballots in nearly the same manner as in person pursuant to MCL 168.765(8). This configuration is not uniform in the software or hardware to the rest of the state or the uniform system. The scanners are also not certified for use by a VSTL as configured in violation of the standards of the Help America Vote Act section 301 and do not conform to the requirement of MCL 168.795a in that they are not authorized for use.

(ix) These scanners also create a ballot image that is altered by the adjudication process. The ballot images are then reportedly not saved after being converted into the cast vote record in the table violating MCL 168.795(K) and HAVA Section 301 which requires an audit trail.

(x) There is an adjudication process that is completely unauthorized by law and contrary to Michigan law which defines a mark in MCL 168.803. The determination of a voter's intent is a violation of equal protection. The removal of a stray mark is permitted by law but not the interpretation of an improper mark contrary to instructions.

(xi) The law requires rejection of a ballot, not adjudication. It does not allow for the counting of some of the contests on the ballot. The voting system is supposed to be programmed to reject the ballot when the ballot is marked in violation of the law. MCL 168.795(2)

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(xii) The clerk has restricted access of the poll challengers to the platform and the center at the clerk's office where votes from precincts accumulate. Access is guaranteed by MCL 168.974(d) where votes are received and accumulated by MCL 168.733.

3. The Plaintiffs are entitled to the relief by law. See the brief which is incorporated herein.
4. The election is scheduled for November 8, 2022 and is less than two full weeks away so an emergency hearing must be scheduled and heard before the election in order to prevent irreparable harm.
5. In the event, this Court declines to act before the election then there will be a question about the legitimacy of the outcome but the case will require resolution.
6. The lawsuit has been prepared expeditiously after the plaintiffs learned both that their challenges filed on August 2, 2022 (and others) were ignored and that the Detroit Clerk was training election workers to violate the law again. This discovery occurred very recently as in days before this filing.
7. It is inconceivable that the clerk would violate this many laws, fail to address challenges filed in August, and then plan to violate the same laws objected to previously.
8. *Ex parte* relief was not sought as the court has time to order the clerk to answer and conduct an emergency hearing.

WHEREFORE, the Plaintiffs ask for an expedited schedule, an emergency hearing and the entry of orders of injunctive relief as required by law.

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Respectfully Submitted,

/s/ Daniel J Hartman 10/26/2022

Daniel J. Hartman (P52632)

/s/ Alexandria J. Taylor 10/26/2022

Alexandria Taylor (P75271)

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STATE OF MICHIGAN
IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

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BRADEN GIACOBAZZI
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ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
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v.

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS,
In their official capacity,
Defendants.

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BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING

The Complaint asks for declaratory, injunctive, and mandamus relief from numerous violations of Michigan Election Law that have occurred in the General Election of 2020 and the August 2, 2022 Primary.

Injunctive relief is an extraordinary remedy that should only be granted when justice requires, when no adequate legal remedy exists, and when there is a real and imminent danger of irreparable injury. *Pontiac Fire Fighters Union Local 376 v Pontiac, 482 Mich 1, 8 (2008).*

In the present case the danger is **real.** The violation has occurred previously and so there is a reasonable expectation that the violations will occur again BUT for action. This is not speculative when the election laws have been violated twice. The danger is **imminent** in that the election is about to occur in several weeks. Without action by this court, there will be injury. The injuries will be addressed with each act that the Plaintiffs seek to be enjoined. The injury will also be irreparable as will be discussed below.

To address why this filing is so close to the election, the Plaintiffs have only recently realized that these issues were not going to be addressed. Challenges were filed at the August 2, 2022 primary which were ignored. Records of action on the challenges are absent and unattainable. Challengers who filed written challenges expected action on the challenges. The violations of law and procedure were reported.

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168.733 Challengers; space in polling place; rights; space at counting board; expulsion for cause; protection; threat or intimidation.

Sec. 733.

(1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:

(a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.

(b) Observe the manner in which the duties of the election inspectors are being performed.

(c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.

(d) Challenge an election procedure that is not being properly performed.

(e) Bring to an election inspector's attention any of the following:

(i) Improper handling of a ballot by an elector or election inspector.

(ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(iii) Campaigning being performed by an election inspector or other person in violation of section 744.

(iv) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

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(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines.

After 60 days had passed and no response despite the written challenges being filled out by the clerk's office, the Plaintiffs have rapidly assembled and brought this action which should be unnecessary BUT FOR blatant violations of election law. It only became apparent about one week ago when the Detroit clerk, during its training of election staff, indicated that the same violations of the law would be used in the 2022 General Midterm Election. While it is anticipated that the Defendants will claim the action was brought too close to this election, it is better that this be addressed before the election rather than after and once again calling into question the results of the election.

The court should consider four factors in determining whether to grant a preliminary injunction:

(1) whether the injunction would harm the public interest;

(2) whether the harm to the Plaintiff in the absence of a stay would outweigh the harm to the Defendant if the stay is granted;

(3) whether the Plaintiff is likely to succeed on the merits; and

(4) whether the Plaintiff will be irreparably harmed if a preliminary injunction is denied.

Michigan State Emp Ass'n v Dep't of Mental Health, 421 Mich 152, 157-158 (1984).

A party seeking a preliminary injunction "bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34 (2008).

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"In order to establish irreparable injury, the moving party must demonstrate a non-compensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical. Economic injuries are not irreparable because they can be remedied by damages at law." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998) (internal citations omitted).

(1) whether the injunction would harm the public interest;

The public interest is in following Michigan Election Law. There should be no deviations or novel processes created. If an action is not authorized by law or the law requires a disposition then the public interest is to follow the law. All of the acts sought to be enjoined are violations of Michigan Election Law or unauthorized acts that are unauthorized by law.

The Plaintiffs seek orders to remedy the following violations:

(i) That all ballots requested by mail or online require identification under the procedure of bringing the identification to the clerk's office as there is no standard rule promulgated for signature comparison and therefore no ability to fulfill the requirements for signature comparison pursuant to MCL 168.761 (2);

(ii) That all ballots that are returned to the ballot drop boxes are not effectively monitored in violation of MCL 168.761D(4)(c). Reports are currently ongoing of the failure to provide cameras as required by law and more important to monitor the cameras to prevent persons not authorized to transport ballots from injecting them into the election in violation of MCL 168.764a and MCL 168.764b. Finally, there has been a denial of the

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requirement under MCL 168.798a which requires observation by the public, (the poll watchers and poll challengers included) of the signature comparison process. The newly enacted changes to MCL 168.765 that permit the clerk to separate the ballots in the secrecy envelope from the outer envelope require observation by the poll challengers and poll watchers but the practice of the Detroit Clerk is to do the signature comparison outside of the purview of the poll challenger and public.

(iii) That all ballots that are returned also have a signature comparison without a standard. If the SOS instruction is followed to compare the signature to the application rather than the QVF then this is a violation of law. Further that the use of the Veri-vote system for signature comparison on ballot envelopes is both a security risk and a non-conforming novel process not permitted or authorized by law; and finally the signature comparison has been, and will be done, without following the law in MCL 168.765 and MCL 168.766.

(iv) The Clerk is failing to reject ballots that are illegally pursuant to MCL 168.767.

(v) There was no evidence of compliance with the requirements to post the number of absentee ballots mailed and returned under MCL 168.765(5) at 8 am on election day and before 9 pm on election night.

(vi) The clerk has failed to follow the rules when a ballot number does not match and instead permits the ballot to be commingled and counted. This is a violation of MCL 168.765.

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(vii) The clerk has provided for duplication of ballots in excess of authority granted by law which is limited only to a damaged ballot by MCL 168.798b. There is no process for duplicating portions of a 'wrong' ballot that was cast. The duplication process is also used for military and overseas voters that are emailed without authority.

(viii) The use of high-speed scanners instead of tabulators. The requirement is that the AVCB is to process ballots in nearly the same manner as in person pursuant to MCL 168.765(8). This configuration is not uniform in the software or hardware to the rest of the state or the uniform system. The scanners are also not certified for use by a VSTL as configured in violation of the standards of the Help America Vote Act section 301 and do not conform to the requirement of MCL 168.795a in that they are not authorized for use.

(ix) These scanners also create a ballot image that is altered by the adjudication process. The ballot images are then reportedly not saved after being converted into the cast vote record in the table violating MCL 168.795(K) and HAVA Section 301 which requires an audit trail.

(x) There is an adjudication process that is completely unauthorized by law and contrary to Michigan law which defines a mark in MCL 168.803. The determination of a voter's intent is a violation of equal protection. The removal of a stray mark is permitted by law but not the interpretation of an improper mark contrary to instructions.

(xi) The law requires rejection of a ballot, not adjudication. It does not allow for the counting of some of the contests on the ballot. The voting system is

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supposed to be programmed to reject the ballot when the ballot is marked in violation of the law. MCL 168.795(2)

(xii) The clerk has restricted access of the poll challengers to the platform and the center at the clerk's office where votes from precincts accumulate. Access is guaranteed by MCL 168.974(d) where votes are received and accumulated by MCL 168.733.

(2) whether the harm to the plaintiff in the absence of a stay would outweigh the harm to the defendant if the stay is granted;

The harm must be as stated above harm that is an irreparable injury. The loss of confidence in yet another election from violations of law will undermine the security of the entire election. The relief the Plaintiffs seek is to have the court enforce the laws that already exist. To determine the effects that each of these violations have on the outcome is nearly impossible but the effect is a loss of confidence in the integrity of the election. On balance there is NO harm to the defendants from following the law. There may be economic harm or inconvenience, but it will be far less than having to re-run the election or to spend years in litigation. The court should restrain illegal acts and require the clerk to follow the law as written. In the event the clerk claims they are in compliance then they will not suffer any harm by agreeing to follow the law.

(3) whether the plaintiff is likely to succeed on the merits; and

There is virtually no way that the plaintiffs do not succeed on the merits. The law is clear and the violations flagrant. There is likely going to be defenses asserted for latches and for lack of standing. Neither of these are defenses to the merits. On the merits, the Plaintiffs prevail. While it seems preposterous, the clerk may actually argue that she lacks time to conform to the law before the election is conducted—meaning that she intends to conduct an illegal election.

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(4) whether the plaintiff will be irreparably harmed if a preliminary injunction is denied.

If there is a denial, there will be irreparable harm. Damages can not replace the harm. Plaintiffs that are poll challengers will have been denied their legal rights, the taxpayers citizens will have to bear the expense, time and uncertainty of litigation and possibly re-running of the election as well as harm to the reputation of the community, the candidate bears the real risk of these illegal practices changing the outcome of the election, the non-profit which has been instructing its poll challengers and poll watchers will have conflict during the election as well as the very principles for which they stand a secure, honest open and transparent election will be again denied to them. There is no recovery for a violation of the constitutional rights of citizen voters. These ordinary people will lack standing and be effectively barred from seeking redress of these violations of law. In general, there is no way to repair the damage that can easily be avoided by following the law.

Therefore, the Plaintiffs respectfully requests that this Honorable Court enter orders for injunctive relief keeping this election in conformity to law.

Respectfully Submitted,

/s/ Daniel J Hartman

Daniel J. Hartman (P52632)

/s/ Alexandria J. Taylor

Alexandria Taylor (P75271)

October 26, 2022

DocuSign Envelope ID: 1AC5DC86-EBAA-4FB7-A769-D375111C7056

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STATE OF MICHIGAN
IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

PHILIP O'HALLORAN, MD
Poll Challenger,

22-012759-AW

CASE NO:22- -AW

BRADEN GIACOBAZZI
Poll Challenger,

HON.

TIMOTHY MAHONEY,
Poll Watcher,

KRISTY WALLS,
Detroit Election Worker,

PATRICIA FARMER,
Detroit Resident Taxpayer,

ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
Plaintiffs,

v.

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS,
In their official capacity,
Defendants.

Daniel J. Hartman (P52632)
Attorney for Plaintiffs
PO BOX 307
Petoskey, MI 49770
(231) 348-5100

DocuSign Envelope ID: 1AC5DC86-EBAA-4FB7-A769-D375111C7056

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Alexandria Taylor (P75271)
Attorney for Plaintiffs
19 Clifford Street
Detroit, MI 48226
(313) 960-4339

MOTION FOR DISQUALIFICATION

OF THE 3rd JUDICIAL CIRCUIT BENCH

NOW COMES, the plaintiffs through their attorneys, and state in support of their motion:

1. Venue and jurisdiction are proper in the 3rd Circuit Court; however, the bench should not hear the matter and a visiting judge should be assigned.
2. The motion was timely made at the time of the filing of the complaint pursuant to MCR 2.003(D)(1a)..
3. Due process "requires an unbiased and impartial decisionmaker." *Cain v Dep't of Corrections, 451 Mich 470, 497 (1996).*
4. MCR 2.003(C)(1)(b) provides the recusal of a judge based upon objective and reasonable perceptions, has a serious risk of actual bias impacting due process rights of a party as enunciated in *Caperton v Massey, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).*
5. In the Roberts dissent of *Caperton, supra*, four justices stated that the majority had loosened the standard to a 'vague probability' and stated that there is not sufficient guidance to Judges when to recuse themselves.
6. The *Caperton* case cites *Tumey v Ohio 273 US 510 (1927)* which held a judge must recuse sua sponte if there is a direct, personal, substantial pecuniary interest in the outcome of a case, and that mere personal bias or prejudice is not enough to require recusal.

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7. In support of this motion is the affidavit of Daniel J. Hartman attached pursuant to MCR 2.003D(2).

WHEREFORE, the plaintiffs request the motion for recusal be granted and an assignment to a visiting Judge be made.

Dated: 10/26/2022

/s/ Daniel J. Hartman
Daniel J. Hartman (P52632)

Affidavit of Daniel J. Hartman pursuant to MCR 2.003(D)(2) in support of the motion for disqualification:

1. In good faith, the Plaintiffs request that the 3rd Circuit Court recuse the entire bench on the following grounds:
    a. The elections at issue for the entire bench are conducted by the Wayne County Clerk and the Board of Elections.
    b. The County clerk and the 3rd Circuit Bench work closely on every case and are nearly intertwined.
    c. While there is no personal bias there is more than an appearance of impropriety in this close relationship.
    d. An adverse determination by a Judge against the County Clerk has a strong probability that hard feelings would affect the working relationship between the clerk and the court.
    e. A judge would not hear the case of a staff member and the County Clerks are while not staff they have nearly as close of a working relationship as the judicial staff.

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f. Some of the judges are on the ballot for the midterm and clearly should not be assigned the case.

g. The Detroit City Clerk is separate from the Wayne County Clerk, but the 3rd Circuit is on the Detroit City ballots.

h. The relationship between the Wayne County clerk and the Detroit City clerk as to the conduct of elections especially as to election supervision responsibilities is significant.

i. It is unlikely that a 3rd Circuit Curt Judge would prefer to hear this political case, but while willing to do their duty to sit, however, the interests of justice would best be served by the recusal of the entire 3rd Circuit Bench and to have a visiting judge elected outside of Wayne County.

I submit this affidavit under the penalty of perjury based on the facts and law and argue that while this raises an issue of first impression and no case law was found on point, that the request is meritorious to the best of my knowledge and belief and based on the facts as stated herein.

DocuSigned by:

Daniel J. Hartman

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/29/2024 5:37:20 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 litigation update

Thanks Jonathan.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, January 29, 2024 9:17 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 litigation update

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Hi Heather,

Here's our weekly update for last week coming a little late due to my schedule last week.

///

DPP MCL 15.243(1)(m)

45 amicus briefs were also filed through last Thursday: 31 in support of Trump and 14 in support of neither party. The briefs include 5 separate briefs from states or state officials. We've provided toplines from some notable briefs below.

As a reminder, Respondent briefs must be filed by next Wednesday, January 31 along with amicus briefs in support of Respondents. Reply briefs must be filed by February 5th. Oral Argument will be held February 8.

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Please let us know if you have any questions or if you'd like a copy of any of the briefs.

Amicus Briefs in Support of Trump

- **States of Indiana, West Virginia, and Twenty-Three other states, the Arizona Legislature, and the Legislature of North Carolina**
  - Section 3 cannot be used to disqualify a person from holding office unless Congress first acts
  - Without more direction from Congress, courts cannot say what constitutes "insurrection" under Section 3

- Chuck Gray, Secretary of State of Wyoming
  - The President is not an "Officer of the United States"
  - Former President Trump did not commit either act described in Section 3

- State of Kansas
  - Section 3 must be strictly construed because Section 3 is penal and to avoid interfering with Trump's First Amendment rights
  - Section 3 does not cover the President of the United States and Trump did not engage in an insurrection or rebellion

- **U.S. Senator Ted Cruz, Majority Leader Steve Scalise, and 177 Other Members of Congress**
  - The Colorado Supreme Court's decision encroaches on Congressional power
  - Section 3 does not apply to Trump
  - The Colorado Supreme Court's decision lacks neutral principles and will lead to widespread de-balloting of political opponents

- The Claremont Institute's Center for Constitutional Jurisprudence (John Yoo, counsel of record)
  - A former president is not within the jurisdictional scope of Section 3 of the Fourteenth Amendment
  - Section 3 of the Fourteenth Amendment is not judicially enforceable without implementing legislation
  - Section 3's Offense element requires congressional legislation

- **The Honorable Peter Meijer** (former Congressional Rep. R-MI)
  - The Colorado Supreme Court wrongfully decided a non-justiciable political question
  - The Colorado Supreme Court's Decision, if allowed to stand, will create political chaos
    - If the U.S. Supreme Court disqualifies Trump, it could open up other politicians to 14.3 arguments-Here, the brief cites specific examples of events that could be the basis of disqualification.

- Judicial Watch, Inc. and Allied Educational Foundation
  - Under *Mathews v. Eldridge* and its progeny, Colorado's civil proceeding was not an appropriate hearing given the demands of the Due Process Clause
  - If the decision of the Colorado Supreme Court is allowed to stand, federal presidential elections will routinely involve Section 3 challenges

- **Former U.S. Attorneys** (appointed by Pres. Trump and Pres. George W. Bush)
  - The Colorado Courts erred in applying Colorado Rule of Evidence 803(8) (the basis for allowing the January 6th Report into evidence).

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- Amici claim the January 6th Report does not bear the requisite indicia of trustworthiness and reliability to render it an admissible "public record" per Rule 803(8)

- **Former Attorneys General Edwin Meese III, Michael B. Mukasey and William P. Barr; Law Professors Steven Calabresi and Gary Lawson; Citizens United and Citizens United Foundation**
  - Section 3 does not disqualify presidential candidates from the ballot
  - Section 3 requires enabling legislation under Section 5

- **Eligible Voters of All 50 States and 1 Territory**
  - The Colorado Supreme Court improperly created rights not given to it in violation of the Ninth Amendment
  - Exclusion of Trump by the Co. Supreme Court violates the Tenth Amendment
  - The Colorado Supreme Court lacked subject matter jurisdiction over Trump because he did not "engage" in insurrection

Amicus Briefs in Support of Neither Party

- **Michigan Secretary of State Jocelyn Benson**
  - The Court's full and complete resolution of any question regarding the application of Section 3 of the Fourteenth Amendment is necessary to avoid confusion and uncertainty in the elections process.
  - A ruling pursuant to the Electors Clause or a ruling that applies to holding office not running for office will only delay final resolution of the issues.

- **The Secretaries of State of Missouri, Alabama, Arkansas, Idaho, Indiana, Kansas, Montana, Nebraska, Ohio, Tennessee, and West Virginia**
  - Section Three does not empower secretaries of state to disqualify candidates for federal office.
  - Even if the court holds that Section 3 is self-executing, it should nevertheless avoid any construction that empowers secretaries of state to exercise an inherent disqualification power because of the obvious practical problems that would flow from such a decision.

- **Brennan Center for Justice, Protect Democracy, Campaign Legal Center, and League of Women Voters**
  - *Moore v. Harper* is not an invitation to transform ordinary state court interpretation of state election law into a federal constitutional issue for this Court to police
  - The Colorado Supreme Court's interpretation of Colorado law was well within the ordinary bounds of judicial review

- **NAACP Legal Defense & Educational Fund**
  - The Reconstruction Amendments were born out of the Civil War and intended to ensure the worst abuses in our Nation's history are not repeated
  - Section 3 of the Fourteenth Amendment Is self-executing and does not present a nonjusticiable political question
  - This Court has a Constitutional responsibility to apply the Fourteenth Amendment and avoid repeating its gravest mistakes

- **Akhil Reed Amar and Vikram David Amar**
  - Describes history and significance of the first insurrection of the 1860s, an insurrection prior to and leading up to the Civil War, which the Amici analogize to the events of January 6

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- Provides short answers to a slew of questions raised by the case which Amici argue are easily disposed of, e.g.: "Of *course* the president is an 'officer' covered by Section Three. *Of course,* a detailed congressional statute is not necessary to implement Section Three." (6)

- **Edward B. Foley, Benjamin Ginsberg, and Richard Hansen**
  - States may resolve an office-seeker's eligibility under Section 3, and this Court may review such decisions on their merits
  - Failure to resolve the merits now would place the Nation in great peril

- **Professor Derek T. Muller**
  - States have the power to review the qualifications of presidential candidates.
  - States have no obligation to review the qualifications of presidential candidates
  - This Court should be aware that other election law doctrines constrain state power in this case, and a decision can have an effect on other presidential election issues

- **Professors and Legal Scholars**
  - The question whether Mr. Trump is eligible is a justiciable legal question
  - Congress does not have exclusive authority to decide presidential eligibility questions

- **Ryan Binkley, Binkley for President 2024, Wisconsin Voter Alliance, Pure Integrity Michigan Elections and Michigan Fair Elections**
  - Binkley is a Republican Presidential candidate and has been denied a place on the Minnesota primary ballot based on rules set by the Minnesota Republican Party
  - The Minnesota Supreme Court denied his petition challenging this decision on January 13, 2024. Binkley says he will file a petition for writ of certiorari "prior to the February 5, 2024 hearing in this case." (5)
  - Binkley argues that the disqualification is similar to Trump's disqualification in Colorado:
    - The actions of Colorado and Minnesota are preempted by the Electors Clause and D.C. Code § 16–3501 (re: writ of quo warranto)
    - Colorado and Minnesota have erred by prematurely disqualifying potential President Elects from their presidential elections
    - The Court should acknowledge that states can only disqualify presidential candidates who do not meet Constitutional requirements for president pursuant to Article II, Section 1, clause 5 of the U.S. Constitution (i.e., citizenship, residency, age requirements)

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 1/30/2024 2:36:21 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: New Kaardal ISL lawsuit--privileged

Interesting, thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, January 30, 2024 9:33 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: New Kaardal ISL lawsuit--privileged

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Hi Heather,

In case you don't have it, I've attached a complaint that Eric Kaardal filed last week in Pennsylvania. The case has similar standing issues as *Lindsey* and may be informative if a motion to dismiss is resolved before yours.

As in *Lindsey*, Kaardal represents a (very small) group of Pennsylvania legislators asserting claims under the Elections and Electors clauses. They allege that the federal government and Pennsylvania Governor Shapiro have usurped the plaintiffs' legislative authority related to voter registration practices: automatic voter registration instituted by Governor Shapiro and Biden's Executive Order 14019, which directs federal agencies to take action to facilitate voter registration. As in *Lindsey*, the legislator plaintiffs claim standing based on their status as legislators, taxpayers, and voters, so its resolution of standing issues will likely be informative if decided more promptly.

The lawsuit is in its very early stages. The plaintiffs haven't sought preliminary relief, nor does the complaint appear to have been served. We'll keep you updated on its progress.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/27/2022 4:35:18 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Karamo, et al. v Winfrey, et al., 22-012759-AW

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 27, 2022 12:20 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Karamo, et al. v Winfrey, et al., 22-012759-AW

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Thanks. **DPP MCL 15.243(1)(m)**

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, October 27, 2022 at 12:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: Karamo, et al. v Winfrey, et al., 22-012759-AW

Here we go.

From: Lynch, Richard <Richard.Lynch@3rdcc.org>
Sent: Wednesday, October 26, 2022 6:01 PM
To: 'msc_clerk@courts.mi.gov' <msc_clerk@courts.mi.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Karamo, et al. v Winfrey, et al., 22-012759-AW

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Good afternoon,
This afternoon the above-captioned matter was filed in the Third Judicial Circuit Court. The Complaint requests declaratory relief, injunctive relief, and mandamus. Plaintiffs also filed motions for an expedited hearing on the motion for preliminary injunction and to disqualify the Third Circuit bench.

Do not hesitate to contact me with any questions regarding this matter.

Best regards,
Rich

Richard Lynch
(he/his/him)
General Counsel

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Third Judicial Circuit of Michigan
Two Woodward Avenue
742 CAYMC
Detroit, MI 48226
(313) 224-8802

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Sent: 2/7/2024 7:52:06 PM
To: Osher, Daniel [OsherD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Change time of meeting tomorrow?

I texted Mike to check, have not heard back yet.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 2:50 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Change time of meeting tomorrow?

Yep works for me

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, February 7, 2024 2:43:13 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Subject: Re: Change time of meeting tomorrow?

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Could we do 930? I have a flight at noon.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, February 7, 2024 at 12:18 PM
To: Osher, Daniel <OsherD@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

That works for me.

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Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 11:57 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

No problem with rescheduling, but unfortunately I'm not available tomorrow afternoon. I'm available Friday morning before 11am in case there's a time in there that works?

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, February 7, 2024 11:49 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Osher, Daniel <OsherD@michigan.gov>
Subject: RE: Change time of meeting tomorrow?

DPP MCL 15.243(1)(m) so I agree with moving it. I'm pretty flexible, will wait to see what Dan says and can reach out to Mike when we have some thoughts on timing.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, February 7, 2024 11:30 AM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Change time of meeting tomorrow?

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DPP MCL 15.243(1)(m)

Wk Prod MCL 15.243(1)(h) Is there any possibility of moving our meeting to the afternoon tomorrow? If that would work for you, would you be able to check with Mike Brady about his availability?

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 2/8/2024 8:45:23 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]; Brady, Mike (MDOS) [BradyM@michigan.gov]
Subject: RE: Change time of meeting tomorrow?

I think so. I don't have anything.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, February 8, 2024 3:44 PM
To: Osher, Daniel <OsherD@michigan.gov>; Brady, Mike (MDOS) <BradyM@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Change time of meeting tomorrow?

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Should we just cancel this one?

Get Outlook for iOS

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 4:56:13 PM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

Got it—thanks for the heads up. Nothing on our end over here.

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Brady, Mike (MDOS) <BradyM@michigan.gov>
Sent: Wednesday, February 7, 2024 3:49 PM

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To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

A/C Priv MCL 15.243(1)(g)

Michael J. Brady (he/his), *Chief Legal Director*
Secretary of State Jocelyn Benson
Michigan Department of State
mobile: 517.599.7343

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 3:30 PM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

I'm available 9-10am Monday and 10a-12p Tuesday. We could also just pull this one down, unless anyone had something in particular they wanted to discuss.

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Brady, Mike (MDOS) <BradyM@michigan.gov>
Sent: Wednesday, February 7, 2024 3:28 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

DPP MCL 15.243(1)(m) From reading the email thread below, it wasn't entirely clear whether you all wanted tomorrow (Thurs, 2/8) or Friday (2/9) at 9:30 AM. Either way, that particular time slot doesn't work for me. I could do Thursday afternoon, though it sounds like that doesn't work for folks. Unfortunately, I'm tied up all day Friday. Early next week works for me too.

Michael J. Brady (he/his), *Chief Legal Director*
Secretary of State Jocelyn Benson
Michigan Department of State
mobile: 517.599.7343

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, February 7, 2024 3:21 PM

Obtained by Judicial Watch, Inc. v. Michigan FOIA

To: Osher, Daniel <OsherD@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>; Brady, Mike (MDOS) <BradyM@michigan.gov>
Subject: RE: Change time of meeting tomorrow?

+ Mike

To see if we can pin down 9:30 for tomorrow.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 2:50 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Change time of meeting tomorrow?

Yep works for me

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, February 7, 2024 2:43:13 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Subject: Re: Change time of meeting tomorrow?

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Could we do 930? I have a flight at noon.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, February 7, 2024 at 12:18 PM
To: Osher, Daniel <OsherD@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

Obtained by Judicial Watch, Inc. v. Michigan FOIA

That works for me.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Wednesday, February 7, 2024 11:57 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Change time of meeting tomorrow?

No problem with rescheduling, but unfortunately I'm not available tomorrow afternoon. I'm available Friday morning before 11am in case there's a time in there that works?

Daniel Osher
Deputy Legal Counsel
Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, February 7, 2024 11:49 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Osher, Daniel <OsherD@michigan.gov>
Subject: RE: Change time of meeting tomorrow?

DPP MCL 15.243(1)(m) so I agree with moving it. I'm pretty flexible, will wait to see what Dan says and can reach out to Mike when we have some thoughts on timing.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, February 7, 2024 11:30 AM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Change time of meeting tomorrow?

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DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m) Is there any possibility of moving our meeting to the afternoon tomorrow? If that would work for you, would you be able to check with Mike Brady about his availability?

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/31/2022 5:26:35 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Grossi, Christina (AG) [GrossiC@michigan.gov]
Subject: RE: New Flint lawsuit
Attachments: Summonses, Complaint, Motion, and Exs_ GOP v Flint Bd of Elect Commr's.pdf

Here you go.

H

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, October 31, 2022 1:23 PM
To: Grossi, Christina (AG) <GrossiC@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: New Flint lawsuit

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Christina and Heather,

I hope you both had a good weekend. We saw reporting on the new lawsuit in Flint alleging inadequate numbers of Republican election inspectors. I spoke briefly with Mike about the issue. Would you mind sharing a copy of the complaint? We're seeing similar complaints/lawsuits in other states (particularly Arizona) as part of an effort to claim bias in larger jurisdictions ahead of the election.

Thanks,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(850) 706-0940 | @statesunited
jonathan@statesuniteddemocracy.org

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Approved, SCAO | Original - Court, 1st copy - Defendant | 2nd copy - Plaintiff, 3rd copy - Return

STATE OF MICHIGAN 7th JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS	CASE NO. 22- 118123 -AW

Court address: 900 S. Saginaw Street, Flint, MI 48502

JOSEPH J. FARAH P-30439

Court telephone no.: (810) 424-4355

Plaintiff's name(s), address(es), and telephone no(s).	v	Defendant's name(s), address(es), and telephone no(s).
MICHIGAN REPUBLICAL PARTY and REPUBLICAN NATIONAL COMMITTEE		DAVINA DONAHUE City of Flint Board of Election Commissioners 1101 S. Saginaw Street 2nd Floor, City Hall 201-C Flint, MI 48502
Plaintiff's attorney, bar no., address, and telephone no. Charles R. Spies (P83260) Thomas F. Christian III (P83146) Robert L. Avers (P75396), Dickinson Wright PLLC 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 623-1670		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- ☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- ☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
- ☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- ☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
- ☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- ☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
10/28/2022	1/27/2023	Kristany Wilmoth

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

MC 01 (9/19) **SUMMONS** MCR 1.109(D), MCR 2.102(B), MCR 2.103, MCR 2.104, MCR 2.105

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Approved, SCAO | Original - Court, 1st copy - Defendant | 2nd copy - Plaintiff, 3rd copy - Return

STATE OF MICHIGAN 7th JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS JOSEPH J. FARAH P-30439	CASE NO. 22-118123 -AW

Court address: 900 S. Saginaw Street, Flint, MI 48502 | Court telephone no.: (810) 424-4355

Plaintiff's name(s), address(es), and telephone no(s).		Defendant's name(s), address(es), and telephone no(s).
MICHIGAN REPUBLICAL PARTY and REPUBLICAN NATIONAL COMMITTEE	v	WILLIAM KIM City of Flint Board of Election Commissioners 1101 S. Saginaw Street 3rd Floor, City Hall Flint, MI 48502
Plaintiff's attorney, bar no., address, and telephone no. Charles R. Spies (P83260) Thomas F. Christian III (P83146) Robert L. Avers (P75396), Dickinson Wright PLLC 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 623-1670		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
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3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
10/28/2022	11/27/2023	Kristany Wilmoth

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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Approved, SCAO | Original - Court, 1st copy - Defendant | 2nd copy - Plaintiff, 3rd copy - Return

STATE OF MICHIGAN 7th JUDICIAL DISTRICT / JUDICIAL CIRCUIT / COUNTY PROBATE	SUMMONS JOSEPH J. FARAH P-30439	CASE NO. 22- 118123 -AW

Court address: 900 S. Saginaw Street, Flint, MI 48502

Court telephone no.: (810) 424-4355

Plaintiff's name(s), address(es), and telephone no(s).	v	Defendant's name(s), address(es), and telephone no(s).
MICHIGAN REPUBLICAL PARTY and REPUBLICAN NATIONAL COMMITTEE		STACEY KAAKE City of Flint Board of Election Commissioners 1101 S. Saginaw Street #201A Flint, MI 48502
Plaintiff's attorney, bar no., address, and telephone no. Charles R. Spies (P83260) Thomas F. Christian III (P83146) Robert L. Avers (P75396), Dickinson Wright PLLC 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 623-1670		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

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☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

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3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
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Issue date	Expiration date*	Court clerk
10/28/2022	1/27/2023	Kristany Wilmoth

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT FOR THE COUNTY OF GENESEE

MICHIGAN REPUBLICAN PARTY and
REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

v.

DAVINA DONAHUE, Interim City Clerk,
in her official capacity as a member of City of Flint Board of Election Commissioners,
WILLIAM KIM, City Attorney,
in his official capacity as a member of City of Flint Board of Election Commissioners, and
STACEY KAAKE, City Assessor,
in her official capacity as a member of City of Flint Board of Election Commissioners.

Defendants.

A TRUE COPY
GENESEE COUNTY CLERK

Case No. 22-118123AW
Hon.

IMMEDIATE AND EXPEDITED RELIEF REQUESTED, INCLUDING ORDER TO SHOW CAUSE

JOSEPH FARAH P-30439

Charles R. Spies (P83260)
Robert L. Avers (P75396)
Max A. Aidenbaum (P78793)
Thomas F. Christian III (P83146)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
maidenbaum@dickinson-wright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs

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There is no pending or resolved civil action arising out of the same transaction or occurrence as alleged in this Complaint.

VERIFIED COMPLAINT FOR WRIT OF MANDAMUS AND MOTION TO SHOW CAUSE AND TO EXPEDITE UNDER MCR 3.305(C)

NOW COMES Plaintiffs Michigan Republican Party and Republican National Committee (collectively, "Plaintiffs"), who state the following as their Complaint against the Defendants, Davina Donahue, Interim City Clerk, in her official capacity as a member of City of Flint Board of Election Commissioners, William Kim, City Attorney, in his official capacity as a member of City of Flint Board of Election Commissioners, and Stacey Kaake, City Assessor, in her official capacity as a member of City of Flint Board of Election Commissioners:

INTRODUCTION

1. Plaintiffs seek an expedited hearing on this matter under MCR 2.605(D), which authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance [this case] on the calendar." Expedited consideration is warranted and necessary here. Absent declaratory relief, Plaintiffs' statutory right under Michigan law to have an "equal number, as nearly as possible," of Republican-affiliated election inspectors as Democrat-affiliated election inspectors at the upcoming general election in the City of Flint will continue to be violated and jeopardized by Defendants' acts.

2. Plaintiffs respectfully seek an ex parte order to show cause and to expedite consideration of these proceedings under MCR 3.305(C), which provides that in actions for mandamus, "[o]n ex parte motion and a showing of the necessity for immediate action, the court may issue an order to show cause. The motion may be made in the complaint. The court shall indicate in the order when the defendant must answer the order."

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3. Immediate action is necessary under MCR 3.305(C). Under the default timeline in MCR 2.108(A)(1), the Defendants would have 21 days to file an answer, which would be Friday, November 18, 2022 – 10 days after the general election on Tuesday, November 8, 2022. Moreover, any oral argument would require additional time, which would leave no time to compel Defendants' to comply with their clear legal duties under Michigan law. The default timeline for responsive pleadings under the Michigan rules would therefore directly injure Plaintiffs and prevent relief. To compel Defendants to act before November 8, 2022, Plaintiffs ask the Court to direct the Defendants to file their answer to a show cause order by 12:00 p.m. on Tuesday, November 1, 2022. Additionally, Plaintiffs respectfully request that the Court issue a decision on this request for relief by Wednesday, November 2, 2022. A proposed order granting the motion to show cause is attached hereto as **Exhibit E**.

4. Plaintiffs will make best efforts to effectuate formal service of process immediately upon the filing of this Verified Complaint and receipt of summonses from this Court, and will contact Defendant Kim, the City's attorney, to ensure that he is aware of this filing and of Plaintiffs' requests.

5. There remains time for this Court to issue the relief sought herein, and for Defendants to comply with a Court order compelling the satisfaction of their duties under the law. Indeed, Defendants have represented that they intend to continue holding election inspector training into November, which of course is consistent with the ongoing legal duties as set forth further below.

PARTIES, JURISDICTION, AND VENUE

6. Plaintiff the Michigan Republican Party ("MRP") is a "major political party" as that term is defined by the Michigan Election Law. See MCL 168.16. Formed for the general

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purposes of, among other things, ensuring that elections are conducted in an open, fair, and orderly manner, and that its rights and privileges and those of its members in connection with elections are exercised and are otherwise not violated or infringed upon. MRP maintains headquarters at 520 Seymour Street, Lansing, Michigan 48912.

7. Plaintiff the Republican National Committee (the "RNC") is a national political party with its principal place of business at 310 First Street, S.E., Washington D.C., 20003. In addition to managing the Republican Party's business affairs at the national level, the RNC supports state Republican parties (including MRP) by, among other actions, coordinating election strategy—including by supporting MRP's efforts to appoint and support election inspectors to ensure that elections are conducted in an open, fair, and orderly manner.

8. Defendant Davina Donahue, Interim City Clerk, is a member of City of Flint Board of Election Commissioners. The City of Flint Board of Election Commissioners is responsible for overseeing the conduct of elections within the City of Flint. She is being sued in her official capacity as a city election official. Her official business address is 1101 S. Saginaw St., 2nd Floor City Hall, 201-C Flint, MI 48502.

9. Defendant William Kim, City Attorney, is a member of City of Flint Board of Election Commissioners. The City of Flint Board of Election Commissioners is responsible for overseeing the conduct of elections within the City of Flint. He is being sued in his official capacity as a city election official. His official business address is 1101 S. Saginaw St., 3rd Floor of Flint City Hall, Flint, MI 48502.

10. Defendant Stacey Kaake, City Assessor, is a member of City of Flint Board of Election Commissioners. The City of Flint Board of Election Commissioners is responsible for overseeing the conduct of elections within the City of Flint. She is being sued in her official

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capacity as a city election official. Her official business address is 1101 S. Saginaw St, #201A Flint, MI 48502.

11. The 7th Judicial Circuit Court has jurisdiction over this Complaint, and venue in this Court is proper, because the Defendants are all residents, or maintain their principal places of business, in Genesee County, Michigan, and because all or part of the claim for relief at issue in this litigation arose in Genesee County, Michigan.

12. Plaintiffs are "litigant[s] [who have] a special injury or right, [and] substantial interest, that will be detrimentally affected in a manner different from the citizenry at large" and have standing to bring the claims asserted in this Complaint. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW 2d 686 (2010).

13. Plaintiffs have been diligent in their efforts to vindicate their legal rights and secure Defendants' compliance with the legal duties under Michigan law. Plaintiffs have not been dilatory nor otherwise prejudiced Defendants with any undue delay attendant to the filing of this action.

COUNT I: WRIT OF MANDAMUS RE: DEFENDANTS' DUTIES UNDER MCL 168.674(2) FOR EACH ELECTION PRECINCT.

14. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

15. Michigan law expressly requires that the City of Flint Board of Election Commissioners (the "Board") "shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2). The Board's legal duty to appoint an equal number of election inspectors from each major political party to each election precinct runs through Election Day. [1] See MCL 168.674(5).

[1] While Michigan law permits the county chair of a major political party to challenge the appointment of *individual* election inspectors based on those individuals' partisan bona fides,

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16. Election inspectors play an important role in instilling confidence in our electoral process. While there may have been a shortage of Republican election inspectors in Flint during previous election cycles, this year Plaintiffs made a concerted effort to work with the City of Flint to assist in recruiting inspectors and to collaboratively assist the City in fulfilling its obligations under MCL 168.674.

17. On May 12, 2022, Plaintiffs provided former-Clerk Brown with applications for 122 Republicans interested in serving as election inspectors in the City of Flint for the August 2, 2022 primary election.

18. Despite Plaintiffs' efforts to assist the Defendants with satisfying Defendants' duties to appoint an equal number of election inspectors from each major political party, on July 16, 2022, the City of Flint provided the Genesee County Republican Party with a list indicating that the City had hired only 27 Republican election inspectors. The City had, however, hired 442 Democrat election inspectors for the same election. A 27:442 ratio does not satisfy the "equal as possible" requirement set forth under Michigan law. Therefore, the Board has failed to satisfy its clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and each absent voter counting board ("AVCB") under MCL 168.674(2).

19. Because of the discrepancy between the quantity of Democrat and Republican election inspectors, the Plaintiffs contacted former-Clerk Brown on July 26, 2022—one week prior to the primary election—to address the City's unequal appointment of partisan election inspectors.

among other qualifications, see MCL 168.674(3), the Board's clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and AVCB is enforceable through, among other actions, a writ of mandamus commenced by an aggrieved major political party such as Plaintiffs.

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20. Former-Clerk Brown assured Plaintiffs that the City would contact the individual Republicans provided by Plaintiffs back in May 2022.

21. Soon after the primary election, Plaintiffs contacted the 122 Republicans on the list that Plaintiffs had provided former-Clerk Brown and learned that the City had hired only an additional 22 applicants.

22. The ratio of Democratic election inspectors to Republican election inspectors employed by the City of Flint for the August 2022 primary election was approximately 15:1. Again, this demonstrates that the Board has failed to satisfy its clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and each absent voter counting board ("AVCB") under MCL 168.674(2).

23. Plaintiffs issued a letter to former-Clerk Brown on September 9, 2022, which enclosed a list of 61 Republicans that had confirmed their interest and availability to work as election inspectors during the November 2022 general election in the City of Flint. That letter also requested, as a show of good faith, written assurance that the clerk would commit to contacting and scheduling election inspector training for each person on that list. Plaintiffs, however, never received such written assurance.

24. Neither the 15:1 ratio for the August primary election nor the Board's subsequent effort to appoint an equal number as possible of Democrat and Republican election inspectors satisfied the Board's clear legal duties under Michigan law.

25. On October 15, 2022, Plaintiffs received the list of election inspectors issued by the Board to the Chair of the Genesee County Republican Party for the upcoming November 2022 general election. A copy of that correspondence and list are attached hereto as **Exhibit 1**.

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26. Of the approximately 562 election inspectors included in the list, only 57—or approximately 10%—are Republicans. This disparity shows that the Board has failed to comply with its clear legal duty under MCL 168.674(2).

27. Since the August primary, additional Republicans have contacted the City Clerk's office to inquire about working as election inspectors. Yet, despite the disparity of Democratic election inspectors to Republican election inspectors appointed by the City, those Republican individuals were rejected by staff in the clerk's office.

28. In one instance, Ms. Gloria Boone, the City of Flint's Election Supervisor, informed a prospective Republican election inspector that the clerk's office had received "a lot" of calls from Republicans asking about serving as election inspectors. Ms. Boone expressly dismissed the notion that the City "needs more Republicans" as election inspectors because Flint "is a predominately Democratic area." Ms. Boone also indicated that a prospective election inspector's partisan affiliation is irrelevant to their serving as election inspectors. This, despite the Board's clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and each AVCB.

29. In a good-faith attempt to resolve this matter without litigation, Plaintiffs (through counsel) sent to Defendants a letter dated October 21, 2022, requesting that the Board comply with its clear legal duties under MCL 168.674(2). (See **Exhibit 2**, October 21, 2022 Letter.) Defendant Kim responded to Plaintiffs' letter and acknowledged that Michigan law requires that the Board "shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2). (See **Exhibit 3**, October 25, 2022 Response Letter.)

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30. Defendant Kim's response letter detailed the Board's purported efforts to appoint Republican-affiliated election inspectors, and represented that (a) recent appointments of City election inspectors have brought the total number of Republican-affiliated election inspectors to over 120, with "almost 50 of the persons listed" in Plaintiffs' October 21, 2022 letter having been appointed as election inspectors and (b) the City Clerk's office intended to contact persons identified on the list provided by Plaintiffs and inquire as to whether such persons remain interested in submitting the required application, attending the necessary training, and working the November 8 general election. (See **Exhibit 3**, October 25, 2022 Response Letter.)

31. Plaintiffs' unaddressed demands relating to the Board's violation of MCL 168.674(2) include, among other requests:

a. Assist each prospective Republican election inspector that contacts the City to inquire about serving in that role in a manner consistent with this Board's ongoing duty under MCL 168.674(5), rather than turning those individuals away;

b. Take affirmative actions to recruit additional Republican election inspectors, including but not limited to educating City staff about the requirement to recruit and appoint Republican election inspectors, and publicly posting a call for Republicans to volunteer to serve as election inspectors; and

c. Assist each prospective Republican election inspector that contacts the City to inquire about serving in that role in a manner consistent with this Board's ongoing duty under MCL 168.674(5), rather than turning those individuals away.

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32. Defendants' half-hearted steps do not satisfy their duties under MCL 168.674(2) or MCL 168.674(5).

33. Even if Plaintiffs take Defendant Kim's numbers to be true and adjust up accordingly from the numbers Plaintiffs had previously ascertained: now, of the approximately 682 election inspectors the city has, only 120—or approximately 17.6%—are Republicans. Defendants have not satisfied their ongoing duties under MCL 168.674(2) and (5) because, despite the numbers of partisan inspectors not yet being equal, and with the election still more than a week away, Defendants have refused to take the additional steps necessary to satisfy their clear legal duties through Election Day.

34. Defendant Kim accommodated this request on October 27, 2022. While the Board's hiring of additional Republican-affiliated election inspectors is a step in the right direction, it nevertheless falls woefully short of the Board's continuing duties under Michigan law.

35. Plaintiffs are entitled to a writ of mandamus: (a) Plaintiffs, as a major political party, have a clear legal right to the performance of the Board's duty to legal duty to appoint an equal number of election inspectors from each major political party under MCL 168.674(2) and (5); (b) the Defendants have a clear legal duty to perform those acts under MCL 168.674(2) and (5); (c) those acts of appointing election inspections are, by their very nature, ministerial; and (d) no other adequate legal or equitable remedy exists to achieve the relief sought. Indeed, while MCL 168.674 sets forth a separate, administrative process through which county chairs of political parties may challenge the partisan bona fides and qualifications of individual inspectors, that process does not provide a means for challenging the Board's failure to appoint as equal a number of partisan inspectors as possibly, and therefore that process does not provide Plaintiffs with a remedy here.

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36. Without immediate action by this Court compelling Defendants to hire Republican-affiliated election inspectors, Plaintiffs' right to have "an equal number, as nearly as possible, of [Republican-affiliated] election inspectors in each election precinct" will forever be lost. MCL 168.674(2), (5).

COUNT II: WRIT OF MANDAMUS RE: DEFENDANTS' DUTIES UNDER MCL 168.674(2), (5), AND MCL 168.765a(2) REGARDING FLINT'S AVCB(S).

37. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

38. The Board's legal duty to appoint an equal number of election inspectors from each major political party also applies with equal force to Flint's AVCBs. See MCL 168.765a(2) (providing that the requirements for the appointment of equal numbers of election inspectors from each major political party, among other requirements under section 674, "apply to the appointment of election inspectors to [AVCBs.]").

39. The Board's legal duty to appoint an equal number of election inspectors from each major political party to each AVCB runs through Election Day. MCL 168.674(5).

40. As of October 21, 2022, Plaintiffs understood that the City of Flint had hired only four Republican election inspectors to work at its AVCBs, compared to the 56 Democrats hired by the City for the same role.

41. On October 26, 2022, Plaintiffs, through counsel, requested a telephone conference with Defendant Kim to discuss the City's non-compliance with the equal number requirement for AVCBs. Specific discussion points were to include:

a. Requested reallocation of no fewer than 20 Republican election inspectors from precinct polling places to the City's AVCBs; and

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b. Appointment of no fewer than 25 Republican election inspectors as chairpersons.

42. Defendant Kim responded via email to Plaintiffs' counsel and declined to meet and confer regarding Plaintiff's requests, stating: "we find no clear legal duty to act as requested and would not want to create the appearance of showing undue favoritism to any political party."

43. Defendant Kim provided Plaintiffs' counsel a list of Republican-affiliated election inspectors, which list was purported to be current as of approximately 4:30 PM ET on October 27, 2022. The figures shown on that list, even assuming their veracity, continue to show that the Board has failed to satisfy its clear legal duties under MCL 168.674(2), (5), and MCL 168.765a(2).

44. These figures indicate that the total number of Republican-affiliated election inspectors is 130, with only six of these Republican-affiliated election inspectors having been assigned to Flint's AVCB. (See **Exhibit 4**.)

45. Therefore, the ratio of Republican election inspectors to Democrat election inspectors appointed to Flint's AVCBs is still far from equal, given that, to the best of Plaintiffs' knowledge, Flint has appointed only six Republicans to serve as election inspectors in its ACVBs in comparison to appointing 56 Democrats for that same role. That approximate 1:9 ratio is far from what is required of the Board by their ongoing duties under MCL 168.674(2), (5), and MCL 168.765a(2).

46. Defendant Kim's indication that the Board will not appoint additional Republican inspectors demonstrates that Defendants have no intention of satisfying their legal duties as to AVCBs under MCL 168.674(2) and (5).

47. Plaintiffs are entitled to a writ of mandamus: (a) Plaintiffs, as a major political party, have a clear legal right to the performance of the Board's duty to legal duty to appoint an

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equal number of election inspectors from each major political party to each AVCB under MCL 168.674(2) and (5); (b) the Defendants have a clear legal duty to perform those acts under MCL 168.674(2) and (5); (c) those acts of appointing election inspections are, by their very nature, ministerial; and (d) no other adequate legal or equitable remedy exists to achieve the relief sought. Indeed, while MCL 168.674 sets forth a separate, administrative process through which county chairs of political parties may challenge the partisan bona fides and qualifications of individual inspectors, that process does not provide a means for challenging the Board's failure to appoint as equal a number of partisan inspectors as possibly, and therefore that process does not provide Plaintiffs with a remedy here.

48. Without immediate action by this Court compelling Defendants to reallocate Republican-affiliated election inspectors to AVCBs, Plaintiffs' right to have "an equal number, as nearly as possible, of [Republican-affiliated] election inspectors in each election precinct" will forever be lost. MCL 168.674(2), (5), MCL 168.765a(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that this Honorable Court enter the proposed Order to Show Cause attached hereto as **Exhibit E**, and that it enter a judgment as follows:

a. A declaratory judgment that Defendants are violating their clear legal duties under MCL 168.674(2), MCL 168.674(5), and MCL 168.765a(2);

b. A writ of mandamus compelling Defendants to satisfy their clear legal duties by:

   i. Appointing as election inspectors for the upcoming November 2022 general election the individuals set forth in the list attached hereto as **Exhibit 5**;

   ii. Reallocating no fewer than 20 Republican election inspectors from precinct polling places to the City's AVCBs;

   iii. Reallocating no fewer than 25 Republican election inspectors as chairpersons;

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iv. Taking affirmative actions to recruit additional Republican election inspectors, including but not limited to educating City staff about the requirement to recruit and appoint Republican election inspectors, and publicly posting a call for Republicans to volunteer to serve as election inspectors; and

v. Assisting each prospective Republican election inspector that contacts the City to inquire about serving in that role in a manner consistent with this Board's ongoing duty under MCL 168.674(5), rather than turning those individuals away.

c. Any other relief this Court deems just and equitable.

Dated: October 28, 2022

Respectfully submitted,

Charles R. Spies with consent Thomas Christian P83146

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Robert L. Avers (P75396)
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Attorneys for Plaintiffs

4882-3798-1756 v3 [99168-2]

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VERIFICATION

I, Paul J. Cordes, a representative of the Michigan Republican Party ("MRP"), being duly sworn, and being authorized to give this Verification on behalf of MRP in support of the allegations contained in the foregoing Verified Complaint, do hereby declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Michigan Republican Party

By: Paul J. Cordes
Its: Chief of Staff

Subscribed and sworn to before me this 28th day of October, 2022.

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

, Notary Public
Kent County, State of Michigan
My commission expires: 2-2-2027

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VERIFICATION

I, Robert Yosaitis, a representative of the Republican National Committee (the "RNC"), being duly sworn, and being authorized to give this Verification on behalf of the RNC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Republican National Committee

By: Robert Yosaitis
Its: Michigan State Director

Subscribed and sworn to before me this 28th day of October, 2022.

Shaylynn Gruenberg, Notary Public
Ingham County, State of Michigan
My commission expires: 1/21/29

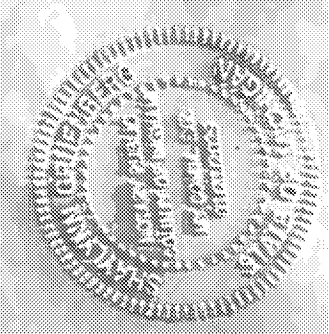

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EXHIBIT 1

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OFFICE OF THE CITY CLERK

October 15, 2022

Genesee County Republican Party
Matthew Smith, Chairperson

RE: November 8, 2022
Primary Election

VIA: Email

Dear Mr. Matthew Smith:

In accordance with State Law, you will find enclosed a listing of Election Inspectors and Absentee Counting board workers recently appointed by Flint's Election Commission to staff City of Flint precincts for the upcoming November 8, 2022, General Election.

If you need additional information, please contact our office at (810) 766-7414.

Sincerely,

Davina Donahue
Interim, City Clerk

Attachment(s)

MUNICIPAL CENTER
* 1101 S. SAGINAW STREET Room 201C FLINT, MICHIGAN 48502 (810) 766-7414 FAX (810) 766-7404 TDD 766-7120 *

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Election Workers

Election Date: 11/8/2022

Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	ADAMS	REGINA	1058 RIVERFOREST DR.	48532	63	☐	8740176	234891	
Inspector	DEM	AIKINS	ANITA	311 ROBBIE LANE	48505	8	☐	7874041	036927	
County Counting Cb	DEM	ALEXANDER	ANTWAIN	2202 SANTA BARBARA DR	48504	64	☐	766-7414		
Chairperson	DEM	ALEXANDER	LINDA	8425 N DORT HWY.	48458	20	☐	869-4255		
New Inspector	REP	ALHASSOON	TERESA	1901 MONTEITH ST	48506	66	☐	285-6831		
Chairperson	DEM	ALKIEK	SARAH	3244 BENDING BROOK DR	48433	45	☐	248-7607		
Chairperson	DEM	ANDERSON	JACQUELINE	3017 LAWNDALE AVE.	48504	13	☐	730-6114		
New Inspector	DEM	ANDERSON	MICHAEL	6517 GLOUCESTER ST	48503	66	☐	965-9037		
Inspector	DEM	ANDERSON	MYCHELLE	625 RIDGEWAY AVE	48505	51	☐	336-1317		
New Inspector	DEM	ANDERSON	ROSIA T	G3100 MILLER RD APT#29B	48505	53	☐	347-6972		
Chairperson	IND	ANDERSON	SHERI	1124 EDITH AVE	48507	61	☐	239-4954	037054	
Inspector	DEM	ANTHONY JR	WILLIE B	G-3100 MILLER RD. #17C	48507	66	☐	730-3715	037581	
Inspector	DEM	ATKINS	MARY	1902 GREENBRIAR LANE	48507	66	☐	937-7383	037288	
Inspector	REP	AVERSA	MICHAEL	402 RIVERWOODSD DR	48433	66	☐	919-2357		
New Inspector	REP	AVERSA	NADINA	402 RIVER WOODS DR	48433	13	☐	919-2356		
Inspector	REP	BA	PAMELA	5611 MAPLE PARK DR	48507	66	☐	744-4042		
Chairperson	DEM	BACH	MATTHEW	3211 HAWTHORNE DR	48503	48	☐	874-1073		
Inspector	DEM	BANKS	ANTQUAIN	6104 DETROIT ST	48458	56	☐	5295551		
Inspector	DEM	BANKS	SANDRA A	6104 DETROIT ST	48458	3	☐	742-9091		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	BANKS	SHAROD	6102 BOULDER DR	48529	59	☑	742-9091		
Inspector	DEM	BARBEE	SHACONNA	2637 BROWNELL BLVD	48504	36	☐	6600174	036281	
Inspector	DEM	BARFIELD	JACKELYN	5721 SUBURBAN CT	48505	4	☐	908-3368		
Inspector	DEM	BELAL	REEM FARAUK	2004 FOX HILL DR APT #5	48439	47	☐	863-8995		
Inspector	DEM	BELL	BREAWNA	3011 BARTH ST.	48504	19	☐	5532944	036762	
Chairperson	DEM	BELL	CLYDE	2617 PINETREE DR	48507	66	☐	513-7337		
New Inspector	DEM	BERRY	ALBERT	1199 PEACHTREE DR	48458	66	☐	610-4891		
Inspector	DEM	BICK	EDNA	620 APPLEGATE LANE	48439	4	☐	914-4755		
Chairperson	DEM	BILLINGS	CARMON R	3411 FOREST HILL AVE	48504	1	☐	4236293	036523	
Chairperson	DEM	BILLINGS	FAYE	3411 FOREST HILL AVE	48504	1	☐	6107330	036628	
Inspector	DEM	BINGHAM	LORETTA B	4235 KELLAR AVE #12	48504	11	☐	785-0090	034629	
Inspector	DEM	BIVINS	ARTHUR	PO BOX 5023	48503	37	☐	789-7173	037209	
Inspector	REP	BLACK	WILLIE M	3283 W RIDGEWAY AVE	48504	66	☐	2410334	035985	
Chairperson	DEM	BLACK-NAU	AMANDA	128 W OAKLEY ST	48503	60	☐	5532183	036399	
ACB	DEM	BLAKE	MATTIE	3604 SUFFOLK CT	48433	63	☐	2936716		
New Inspector	REP	BODUCH	JEFFREY	13368 N FENTON RD	48430	66	☐	240-2843		
Inspector	DEM	BOGGS	TRACEY	5117 MILL WHEEL DR	48439	6	☐	252-9967		
Chairperson	DEM	BOHANNON	DOROTHY	5154 MAPLEBROOK LANE	48507	66	☐	285-9602	037284	
Supervisor	DEM	BOND	BRYAN	6211 DELAND RD	48433	65	☐	7667340	028943	
Inspector	DEM	BOOTH	LINDA	1214 ELDORADO DR	48504	40	☐	235-8632	036529	
Inspector	DEM	BOSEMAN	SANDRA K.	1363 FOREST HILL AVE	48504	8	☐	237-7273		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	BOYCE	INEATHER	505 E STEWART AVE	48505	37	☐	785-6056	000047	
Inspector	DEM	BRADLEY	ROSALIND	901 E PHILADELPHIA	48505	37	☐	285-6528		
New Inspector	DEM	BRANCH	SHARROD	2030 CROCKER AVE	48503	5	☐	766-7414		
Inspector	DEM	BRANDON	CLAUDETTE	3814 BROWNELL BLVD	48504	48	☐	785-0463	037192	
Inspector	DEM	BRENT	CHARLOTTE	3276 FRIEND DR	48507	26	☐	767-4864		
Inspector	DEM	BREWER	XAVIER	1017 BEARD ST	48503	1	☐	610-2688	037583	
Inspector	DEM	BRITTON	DERRICK	1705 WILBERFORCE DR	48503	10	☐	766-7414		
Inspector	DEM	BROCKER	JOEL	2430 KENTUCKY AVE	48506	19	☐	309-7525	037090	
Chairperson	DEM	BROOKS	SHAKETTA M	421 W WATER ST #105	48503	66	☐	336-9529		
New Inspector	DEM	BROUGHTON	MYRA	16104 BLACKBERRY CREEK	48519	66	☐	210-8268		
Inspector	DEM	BROUGHTON	MYRA JANE	16104 BLACKBERRY CREEK	48519	20	☐	210-8268	200	
New Inspector	DEM	BROWN	ANITA L	6605 CRANWOOD DR	48505	6	☐	308-1825		
County Counting Ct	DEM	BROWN	BREAUNTE JESSE	6401 VALORIE LN	48504	64	☐	789-8105		
Inspector	DEM	BROWN	COLETTE	621 E SPENCER ST.	48505	3	☐	624-4707	037601	
Inspector	DEM	BROWN	EDEN	1517 RANDY CT	48505	61	☐	789-5490		
Chairperson	DEM	BROWN	GINA R	1708 BRISTOL COURT DR	48458	21	☐	7304670	000835	
Inspector	DEM	BROWN	MYRTEL	3331 MAYWOOD DR	48504	66	☐	789-7033	037488	
Inspector	DEM	BROWN	SAMUEL	1182 ROCKRIDGE TRAIL	48532	10	☐	240-8360		
Inspector	DEM	BROWN	SANDRA	1517 RANDY CT	48505	40	☐	7895490	037602	
New Inspector	DEM	BROWNE	EN-DIA	4436 SAINT JAMES CT	48532	66	☐	309-7334		
New Inspector	DEM	BRYANT	JOSHUA	722 W HAMILTON AVE	48504	66	☐	232-3325		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	DEM	BURTON	CANDACE	1817 ROCKCREEK LANE	48507	66	☐	610-9868		
Inspector	DEM	BYRD	ADRION	702 FATHER DUKETTE BLVD #913	48503	23	☐	293-5156		
ACB	DEM	CALDWELL	DENNIE	1128 BURNT LEAF DR	48439	66	☐	695-3083		
Inspector	DEM	CALDWELL	PAULETTE	2702 LANDON	48504	8	☐	2856374	000271	
Chairperson	DEM	CALHOUN	BRENDA D	1901 CASTLE LN	48504	45	☐	785-4338	036177	
Inspector	DEM	CAMEZ	CLARISS	1107 MASON ST	48503	66	☐	288-4661		
Chairperson	DEM	CAMPBELL	SUZAN	2016 S DEXTER ST	48503	24	☐	313-3780		
ACB	DEM	CAMPBELL	YOLUNDA	6330 DETROIT ST	48458	63	☐	447-4876		
Chairperson	DEM	CARRADINE	ABBEY	1807 BAYBERRY LANE	48507	57	☐	391-1665		
Inspector	DEM	CARTER	LOLA	6417 KAREN DR	48504	1	☐			
Inspector	DEM	CARTER	SHARON	1902 MARLOWE DR	48504	66	☐	907-9533	037298	
Inspector	DEM	CATRON	VERSHAUNDA	1913 LAUREL OAK DR	48507	52	☐	288-3933	037490	
New Inspector	REP	CHAMBLESS	KIMBERLY	12119 HOGAN RD	48436	66	☐	691-6534		
Inspector	DEM	CLARK	ROGER	1218 VINCENT CT #4	48503	40	☐	819-4227		
ACB	DEM	CLARKE	TRYPHENA	6333 ELMS RD	48433	63	☐	293-7752		
Chairperson	DEM	CLEMONS	DAYNA	1193 RIVER VALLEY DR #11	48532	4	☐	4440238	035940	
Inspector	DEM	COBB III	WILLIAM	3423 BRIMFIELD DR.	48503	55	☐	908-7575	037491	
N. B. Worker	DEM	COHOON	BRIANA	3208 LEWIS ST	48506	67	☐	863-3035		
Inspector	DEM	COLEMAN	DEBORAH K	1302 W MOORE ST.	48504	52	☐	597-7306		
Inspector	DEM	COLEMAN	FRANCIS	1121 ROSEDALE AVE.	48505	52	☐	265-2710		
Inspector	DEM	COLEMAN	MARILYN	6233 EAGLE RIDGE LANE #102	48505	60	☐	308-8270		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	COLEMAN	MICHAEL	G-4606 BEECHER RD	48532	44	☐	336-6911		
Inspector	DEM	COLEMAN	SHERRY	2422 ELMWOOD DR	48504	66	☐	336-3280	037585	
ACB	DEM	COLEN	GLORIA	1206 BLACKBERRY CREEK	4850	63	☐	407-8733		
Inspector	IND	COLLINS	JALEESA	1413 MILBOURNE AVE	48504	28	☐	259-1277	037337	
Inspector	DEM	COLLINS	LILLIAN	3485 SOUTHGATE DR	48507	40	☐	232-3485	036988	
New Inspector	REP	CONLEY	OLIVER	9322 WOODSIDE TRAIL	48473	66	☐	208-6618		
Inspector	DEM	CONNOR	ELAINE	2954 HELBER ST	48504	51	☐	239-7151		
New Inspector	DEM	COOKS	STEVE	1430 BARRWOOD LN	48507	66	☐	845-6171		
ACB	DEM	COPEDGE	BRIGITT A	1519 LAPEER RD	48503	63	☐	2523976	036949	
County Counting Cb	DEM	COWPER	SUE ELLEN	834 LINCOLN AVE.	48507	65	☐	259-1747	city	
New Inspector	REP	CRAMER	DENNIS	5299 WORCHESTER DR	48473	66	☐	282-5206		
ACB	DEM	CROOM	CLAUDIA	6401 FLEMING RD	48504	63	☐	789-4407		
New Inspector	REP	CROSS	LEONARD G.	4429 PENGELLY RD	48507	10	☐	810-8747		
Inspector	DEM	CUMMINGS	DEBRA R	501 LYON ST #16	48503	66	☐	336-0123	037580	
Inspector	DEM	CURRY	TERENCE	5817 BALDWIN BLVD	48505	19	☐	588-1656	037265	
New Inspector	REP	CURTIS	MICHAEL	5348 W FARRAND RD	48420	66	☐	308-0233		
Chairperson	DEM	DABBS	SONJA	5719 LESLIE DR	48504	41	☐	8203085	035583	
Chairperson	DEM	DANTZLER	FLORA	4495 CALKINS RD APT 231	48532	4	☐	9622018	036188	
Inspector	IND	DARROUGH	LENA	3115 BEGOLE ST	48504	42	☐	814-3323	037104	
New Inspector	DEM	DAVIDSON	ROBERT	13510 S HORRELL RD	48430	66	☐	629-7955		
Inspector	DEM	DAVIS	ANITA	3124 VINEYARD LN	48433	29	☐	720-0446		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	DAVIS	BEVERLY D	3309 BUICK ST. #25	48505	16	☐	399-3464		
Inspector	DEM	DAVIS	CARRIE ANN	3630 CACO	48504	57	☐	280-3994		
New Inspector	DEM	DAVIS	KIRK	2737 NORBERT ST	48504	66	☐	589-4815		
New Inspector	DEM	DAVIS	MARJORIE	1706 WALNUT CREEK DR	48507	66	☐	210-4998		
Chairperson	DEM	DAVIS	STEPHANIE M	740 WILBERFORCE DR	48503	22	☐	235-9264	035915	
Inspector	DEM	DAY	BRENDA	208 E STEWART AVE	48505	16	☐	308-5009		
Inspector	REP	DAY	DANTE	139 EDWIN AVE	48505	13	☐	728-9804		
New Inspector	REP	DEAN	ELIZABETH	2566 NOLEN DR	48504	10	☐	265-9738		
Inspector	DEM	DELMORONE	CHRIS	722 DICKINSON ST	48504	66	☐	767-2733		
New Inspector	DEM	DENT	NICKOLA	347 VICTORY LN		27	☐	877-6708		
ACB	DEM	DICKERSON	LILLIAN	7101 LINDALE DR	48458	63	☐	631-6370	036302	
Chairperson	DEM	DOCKERY	JOANN	831 W ALMA	48505	3	☐	877-6720	037492	
New Inspector	DEM	DOMANSKI	PAMELA	544 BOUTELL DR	48439	66	☐	240-2333		
Supervisor	DEM	DONAHUE	DAVINA	5148 PASADENA AVE	48433	65	☐	4932256	033975	
Chairperson	DEM	DONALD	HATTIE	1905 WINDSOR LANE	48532	57	☐	233-3471	037180	
Inspector	DEM	DOTSON	JERON LEE	5125 SPINNING WHEEL DR	48439	55	☐	882-9009		
New Inspector	DEM	DOUGLAS	CRYSTAL	1642 WAGONWHEEL LN	48439	66	☐	624-2630		
ACB	DEM	DOUMBIA	MELANIE R	437 E DARTMOUTH ST.	48505	63	☐	819-4586		
Inspector	DEM	DOZIER	DIANA J	120 W RANKIN ST	48505	14	☐		001298	
ACB	DEM	DRISKELL	LOYCE	1916 OWEN ST	48503	66	☐	410-8186		
ACB	DEM	EATON	KAREN	2112 SHERFF PL	48503	63	☐	288-9036		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	ECHOLS	RENELL	2414 WINONA AVE	48503	39	☐	210-5333		
Inspector	DEM	ECHOLS	WILLIAM	3621 PENBROOK LANE #15	48507	38	☐	221-3222		
New Inspector	REP	EDELEN	AVION	6635 MAPLEBROOK LN	48507	19	☐	766-7414		
Inspector	DEM	EDWARDS	ANNIE	5806 GLENN AVE	48505	17	☐	285-2562	036982	
Inspector	DEM	EDWARDS	EMILY	1726 WALNUT CREEK	48507	55	☐	610-8199		
New Inspector	DEM	EDWARDS	JIMMIE	3301 HELBER ST	48504	66	☐	620-9669		
Chairperson	DEM	EDWARDS	LEONARD ROY	3337 JENNINGS RD	48504	26	☐	5532164	036987	
Inspector	DEM	EDWARDS	TONYA L	1710 LAUREL OAK DR	48507	55	☐	313-4330		
New Inspector	DEM	ELLIOTT	VETINA	217 JAMIESON ST	48504	66	☐	682-3471		
Chairperson	DEM	ELLISON	STEVEN	3901 BURGESS ST	48504	3	☐	8588047	037318	
Inspector	DEM	ELRIDGE	VELMA	8107 RIVERVIEW DR	48532	14	☐	293-9040		
Inspector	DEM	EMERY	SANDRA	1045 TAHOE TRAIL	48532	8	☐	7329084	037195	
Chairperson	DEM	ENGLISH	LINDA L	4117 BROWNELL BLVD	48504	6	☐	787-2689	036089	
Inspector	DEM	ERNST	JERRY	712 NAFUS ST	48867	66	☐	725-9307		
Chairperson	DEM	ETHERLY	JOHNNIE MAE	1101 WELCH BLVD	48504	41	☐	4583777	036609	
Inspector	DEM	ETHERLY	TAMMY	1850 TEBO ST	48503	50	☐	3471080	034561	
New Inspector	DEM	EUDY	DAVID	10699 INNBROOK DR #506	48168	66	☐	506-4865		
County Counting Ct	DEM	EVANS	ASHLEY	3341 SPARROW	48519	64	☐	766-7414		
Inspector	DEM	EVANS	BRENDA	4602 GREENLAWN DR	48504	45	☐	610-0535	037057	
Chairperson	DEM	EVANS	DAPHNE	6234 CYPRESS DR	48458	11	☐	3080305	036714	
ACB	DEM	EVANS	DERRYL	1009 MAXINE ST	48503	63	☐	348-1122	037212	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	EVANS	SHEILA	3808 PARKWAY CT	48503	49		7432496		
Inspector	DEM	FARRIS	ROBIN R	2110 NEWBERRY	48532	66		4935875	036056	
Inspector	DEM	FEASTER	EDITH E	4517 TRUMBULL DR	48504	12		8208125	000850	
Inspector	DEM	FELLERS	EDWARD	1060 LINCOLN DR	48507	30		6185789	036271	
ACB	DEM	FELTON	JANET	7002 CRANWOOD	48505	63		789-0601	034956	
Chairperson		FELTON	SHERRY	PO BOX 321222	48532	59		7854462	001132	
Chairperson	DEM	FELTON	STEFAN	321 W BALTIMORE BLVD	48505	59		336-6772	038968	
Inspector	DEM	FERGUSON	GERLINE	2913 MALLERY ST	48504	14		766-7414		
New Inspector	DEM	FERGUSON	JOYCE	330 W MARENGO AVE	48505	66		265-3816		
Inspector	DEM	FIRMINGHAM	NORMAN	1928 WEAVER ST.	48506	6		728-5958		
Inspector	DEM	FLEMING	LULA M	518 E MARENGO	48505	5		787-0919	038430	
N. B. Worker	IND	FOSTER	PAUL	1711 SUNCREST DR	48504	67		7421634	034840	
Inspector	DEM	FRANKLIN	DENISE	3900 HAMMERBERG RD APT #338	48507	58		210-5860	037300	
Inspector	DEM	FRANKLIN	JUSTIN	5092 ROCKWOOD DR	48439	20		869-9984		
Inspector	DEM	FRANKLIN	LETICIA	814 KEARSLEY ST APT 406	48503	24		875-0708	037609	
Inspector	DEM	FREDELL	ARTRICE	1932 N VERNON AVE	48506	21		308-2681		
Inspector	DEM	FREEMAN	JOELENA	1817 BAYBERRY LANE	48507	58		259-1561		
New Inspector	DEM	FULLER	SARAH	13101 BLACKBERRY CRK	48519	66		742-9091		
Inspector	DEM	FUNCHES	DEBORAH	3119 BLUE GRASS LANE	48473	51		6352226	037266	
Chairperson	DEM	GADDY	DENISHA	1526 GARLAND ST	48503	16		3716424	037023	
Chairperson	DEM	GADDY	MELODY	1526 GARLAND ST	48503	16		8933316	035169	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	GAINES	JOSEPH R	1801 W GENESEE ST	48504	8	☐	624-1994		
Inspector	DEM	GALE	CALLIE	3201 MILBOURNE DR	48504	11	☐	391-9740		
Inspector	DEM	GARCIA	ARMINDA	1604 E COURT ST		46	☐	513-8463		
Inspector	DEM	GARCIA	PABLO	1807 BAGLEY ST	48504	42	☐	422-3270		
New Inspector	FD	GARCIA	PABLO	1807 BAGLEY ST	48504	66	☐	422-3270		
Inspector	DEM	GARCIA	RAUL	1604 E COURT ST	4850	46	☐	513-8463		
Inspector	DEM	GARCIA	VITA	1807 BAGLEY ST	48504	24	☐	874-3343		
Inspector	DEM	GAYLES	VIVIAN	700 E COURT ST #207	48503	46	☐		027361	
Inspector	DEM	GILBER	CARLOS	1225 BLUEBERRY LN	48507	14	☐	493-2205		
County Counting Ctr	DEM	GILBERT	AUTUMN	G3176 COURT ST.	48532	64	☐	766-7414		
Inspector	DEM	GIST	JANICE	4314 CRISSMAN	48505	29	☐	234-1924	037022	
Inspector	DEM	GOODSON	BIRDIE	3071 COURTZ ISLE APT#4	48532	4	☐	238-7628	036753	
New Inspector	DEM	GORDON	TALIA	627 E SECOND ST UNIT #3	48503	46	☐	313-6184		
Inspector	DEM	GRAY	DELL	418 MARENGO AVE	48505	5	☐	787-3107	036977	
Inspector	DEM	GREEN	JASMINE	2017 AITKEN AVE	48503	66	☐	235-7913		
Chairperson	DEM	GREEN	RACHELLE	6380 S GARDEN DR	48458	50	☐	836-4414		
Inspector	DEM	GREEN	WANDA	222 W PULASKI AVE	48505	11	☐	8626606	037493	
Inspector	DEM	GREEN-CANNADAY	ALENE	2259 HUNTER LANE	48529	66	☐	691-1651		
New Inspector	DEM	GRIGLAK	LAURA	510 DELL AVE	48507	66	☐	340-9521		
New Inspector	REP	GUALDONI	FRANCISCO	3535 LIPPINCOTT RD	48446	66	☐	348-7894		
ACB	DEM	HAIRSTON	DORA	4310 PARK FOREST DR	48507	63	☐	2326038	000906	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	HALL	JASMINE	1346 WINDING RIDGE DR APT #28	48439	57	☐	908-0650		
Chairperson	DEM	HAMPTON	CAROLYN	5919 MARJA ST	48505	66	☐	938-2938	036864	
N. B. Worker	DEM	HAMPTON	KENNETH	5919 MARJA ST	48505	67	☐	232-0877	036264	
Chairperson	IND	HANDA	SHERRY	4497 HOWE RD	48439	66	☐	849-0459	037494	
New Inspector	REP	HARDING	LYNNEA	8305 MABLEY HILL RD	48430	6	☐	862-7766		
Chairperson	DEM	HARDY	ANTIONETTE E	3721 MASON ST	48505	66	☐	789-4124	035592	
Chairperson	DEM	HARDY	JOHN E	3721 MASON ST	48505	66	☐	789-4124	036610	
Inspector	DEM	HARE	IRIS J	4316 WARRINGTON DR	48504	8	☐	785-6715	035596	
Inspector	DEM	HARE	TURANDA	402 RIVERBANK DR.	48503	66	☐	2825589	037267	
Chairperson	DEM	HARPER	WILLIAM PAXTON	1909 BASIL LN	48504	23	☐	3945595	035033	
New Inspector	DEM	HARRIS	CAROL	555 MARY ST	48503	66	☐	262-1013		
Inspector	DEM	HARRIS	SARAH	3743 GLOUCESTER ST.	48506	41	☐	743-5633	035645	
ACB	DEM	HART	MARGARET B.	915 E COURT ST #302	48503	63	☐	563-9463		
Inspector	DEM	HENDRICKS	DEDRIC L.	4102 CEDAR BEND DR	48439	61	☐	766-7411		
ACB	DEM	HENDRICKS	SUSAN	10359 HALSEY RD	48439	63	☐	397-8827		
New Inspector	REP	HENRICKSON	SANDRA	6057 E MAPLE AVE	48439	66	☐	407-3797		
Chairperson	DEM	HERRING	PAUL JR	405 UNIVERSITY AVE.	48503	54	☐	423-8960	036500	
County Counting Cb	DEM	HERRING	PAUL SR	405 UNIVERSITY AVE	48503	64	☐	766-7414		
Inspector	DEM	HICKS	FRED	3610 SUFFOLK CT	48433	14	☐	293-1217		
New Inspector	DEM	HIGH	RENEE	5062 E COOK RD	48439	66	☐	471-1886		
Inspector	DEM	HILL	CHIMENE	2117 STANFORD AVE	48504	29	☐	836-3966	CITY	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	HILL	PATRICIA	323 ALLENDALE PL	48503	1	☐	342-8467		
New Inspector	DEM	HILL	TERRY	2117 DUPONT ST	48504	5	☐	308-6431		
Inspector	DEM	HILL	TERRY	2117 DUPONT ST	48504	66	☐	308-6431		
New Inspector	REP	HILLER	MICHELLE	4440 TILLIE DR	48504	66	☐	391-3819		
ACB	DEM	HOBSON	HELEN	936 BELMONT AVE	48503	63	☐	239-7545	036803	
ACB	DEM	HOCKENHULL	MARIAN	1130 BURLINGTON DR	48503	64	☐	7422462		
ACB	DEM	HOLBROOK	OZIE	306 W PIERSON RD	48505	63	☐	249-0781	001020	
Chairperson	DEM	HOLLAND-AUGUST	SANDRA	3322 WOLCOTT ST	48504	44	☐	9552046	037201	
ACB	DEM	HOLLIMAN	ROSE	1176 DALEVIEW DR.	48532	63	☐	423-7223		
Chairperson	DEM	HOLLOWAY	DEWINTER	1818 W HOBSON AVE	48504	44	☐	787-3708	024413	
Chairperson	DEM	HOLMES	ALFREDIA	3131 PROSPECT ST	48504	49	☐	6245828	034522	
Chairperson	DEM	HOLMES	RAHLENA	6936 YORKSHIRE	48505	37	☐	835-6933	036816	
Chairperson	DEM	HOLT	GLORIA	2209 SWAYZE ST	48503	66	☐	234-7251	001021	
Inspector	DEM	HOWARD	DALE	501 S MEADE ST #3	48503	30	☐	5690125		
Inspector	DEM	HOWARD	ROBERT	7435 TIMBERLEA CT	48532	35	☐	964-1107		
New Inspector	DEM	HOWARD	WANDA	4202 TRUMBULL AVE	48504	66	☐	513-2475		
Inspector	DEM	HOWELL	JAMIKA	627 E REID RD.	48439	66	☐	308-8178	034577	
Inspector	DEM	HOWELL	JERIKA	11963 JUNIPER WAY APT #1236	48439	66	☐	447-5602	036979	
Inspector	DEM	HUDSON	RONALD	1046 E PRINCETON AVE	48505	66	☐	294-2199		
New Inspector	DEM	HUGHES	TIFFANY	1618 PINGREE AVE	48503	62	☐	394-3490		
Inspector	DEM	HUMPHREY	BARBETTE	3718 GLOUCESTER ST	48503	51	☑	394-2730		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	HUNTLEY	CATRINA	2250 S STATE	48817	66			036750	
Chairperson	DEM	HUSSEY	BRENDA E	4021 STERLING ST	48504	4		789-4430	000203	$402.00
New Inspector	66	HUSTON	LAURA L.	12366 ORCHARD WOOD DR	48430	66		614-1425		
Inspector	IND	IRVIN	JABREEA	2152 PARKTON	48458	19		3606431	037496	
ACB	REP	IRWIN	KATHRYN A	4318 PENGELLY RD	48507	63		444-5580		
Chairperson	DEM	JACKSON	JANAZE B	858 SCHAEFER ST	48503	37		2213331		
Inspector	DEM	JACKSON	JOANN	5314 BALDWIN BLVD	48505	13		7896874	036534	
Chairperson	DEM	JACKSON	MILDRED	5120 JUDITH ANN DR	48504	14		789-4983	036404	
Chairperson	DEM	JACKSON	RACINE L	726 E SIXTH ST	48503	66		238-8842	037202	
Inspector	DEM	JACKSON	ROBERT SR	1318 BANBURY PL	48505	3		240-2522	036954	
Inspector	DEM	JACKSON JR.	LEO M	5393 OLD FRANKLIN RD	48439	66		694-0163	036298	
Chairperson	DEM	JEFFERSON	ALFREDA	1526 W HOME AVE	48505	4			036566	
Inspector	IND	JENKINS	CARVETTA	1320 AVON PARK DR 7	48503	13		309-7328	037597	
Inspector	DEM	JENKINS	FRANCES	2318 BARTH ST	48504	33		234-6067	037204	
Chairperson	DEM	JENKINS	NINA	4013 FORESTHILL AVE	48504	39		2656098	036649	
Inspector	DEM	JOHNSON	ANNETTE	2718 TERRACE DR	48507	61		3085383	035148	
Inspector	DEM	JOHNSON	BRENDA	4906 WALNUT SQUARE BLVD	48532	5		7332187		
Inspector	DEM	JOHNSON	FAITH	5484 WESTCHESTER DRIVE	48532	66		814-6145	037289	
Chairperson	DEM	JOHNSON	FREDRICK L	6135 PENWOOD RD	48458	24		785-5502	036132	
Inspector	DEM	JOHNSON	JACQUELINE L	846 LINCOLN AVE	48507	55		8827375	036186	
Inspector	DEM	JOHNSON	JNAI	1017 BLOOR AVE.	48507	59		333-1036		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	JOHNSON	MABLE	5050 JUDITH ANN DR	48504	20	☐	610-6858		
Chairperson	DEM	JOHNSON	MARVA	3211 BEECHER RD	48503	24	☐	8746490	037181	
Inspector	DEM	JOHNSON	SHARAYAL	4158 OAK ST.	48439	3	☐	606-0497	037603	
New Inspector	DEM	JOHNSON	SHONELL	717 PINGREE AVE	48503	66	☐	989-7711		
Inspector	DEM	JOHNSON SR.	JOSEPH	3102 CONCORD ST	48504	22	☐	423-3559	036865	
County Counting Ca	REP	JOHNSON-DEPALMA	ROXANA	3205 CHEYENNE AVE	48507	66	☐	391-6772		
Chairperson	DEM	JONES	ANITA L	3918 PARK FOREST DR	48507	60	☐	7019505	036930	
Inspector	DEM	JONES	CAROLYN	G-4176 BEECHER RD	48532	66	☐	964-8304		
Chairperson	DEM	JONES	CHARLES	812 RUTH ST.	48503	33	☐	9647785		
Inspector	DEM	JONES	COLLEAN	702 FATHER DUKETTE #216E	48503	66	☐	4474632	036768	
County Counting Ca	DEM	JONES	DERRICK	860 SCHAFER ST		64	☐	919-8994		
Inspector	DEM	JONES	DONNA	3913 NORTH ST	48505	13	☐	2066034	000223	
Inspector	DEM	JONES	KENYETTA	3160 CORALENE	48505	15	☐	293-2720	037329	
ACB	DEM	JONES	LAVONZELLA	1802 PARKFRONT DR	48504	63	☐	210-3588	037206	
Inspector	DEM	JONES	MARGIE	5909 GLENN AVE	48505	2	☐	244-9375		
Inspector	DEM	JONES	RAY	822 E STEWART AVE.	48505	29	☐	335-4237		
Inspector	DEM	JONES	SANDRA Y	6101 SALLY CT	48505	13	☐	308-5279	037573	
Inspector	DEM	JONES	TAMMY	4306 INDUSTRIAL AVE	48505	66	☐	874-5621		
ACB	DEM	JONES	VICTOR	1802 PARKFRONT DR	48504	63	☐	875-7848	037604	
Inspector	DEM	JONES-FLEMING	CHERYL	226 W PULASKI ST	48505	26	☐	265-5774	+	
New Inspector	DEM	JORDAN	JACQUELINE	324 W 1ST AVE	48503	66	☐	814-1681		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	JORDAN	JOANN	6301 FLEMING RD	48504	1		789-3177	034580	
New Inspector	REP	JORDAN	JOHN	2548 W SHIAWASSEE RD	48430	66		620-6001		
Chairperson	DEM	KAMBUI	RACHEL LYNN	2522 ORCHARD LANE	48504	12		5693578	036974	
Inspector	DEM	KEAST	ANDREW	723 OAK ST #3	48503	34		766-7414		
Chairperson	DEM	KEITH	LASHEENA	6824 TOURAINE DR	48505	33		814-3719	037323	
New Inspector	REP	KELLER	KATHERINE	4342 HARRIER LANE	48519	66		701-3316		
Chairperson	REP	KENDALL	ANTONIA	1210 N CHEVROLET AVE	48504	55		525-3400		
Chairperson	DEM	KENDALL	KYLE	3749 EVERGREEN PKWY	48503	25		348-2448	035277	
Chairperson	DEM	KENEBREW	SONYA D	3121 BRIARWOOD DR.	48507	42		2935149	034316	
New Inspector	DEM	KINCAID	PEARLIE	3375 N LINDEN RD #322	48532	66		336-7215		
ACB	DEM	KING	BEVERLY	5501 PEAR TREE DR	48519	63		768-3782	036946	
Inspector	DEM	KING	EESHYIA	634 PROSPECT ST	48503	12		929-3839		
Inspector	DEM	KING	TERAE	2714 CLEMENT ST	48504	66		308-9739		
New Inspector	REP	KINGEN	DUSTIN J.	840 ENNEST BLVD	48386	8		982-8917		
Inspector	DEM	KIRKLAND	TERRI	3202 COMANCHE AVE	48507	58		2521250	036726	
Chairperson	DEM	KLAMER	STEPHEN	3112 FLEMING RD	48504	48		732-6742	001351	
New Inspector	REP	KOERBER	THERESA	9136 VASSAR RD	48439	66		265-0250		
New Inspector	REP	KOZLOWSKI	MARY E	13350 HAWK WOODS TRAIL	48430	6		766-7414		
New Inspector	REP	KRUEGER	KELLY	871 BOUTELL DR	48439	66		414-1963		
New Inspector	REP	KRUGER	CLAY	871 BOUTELL DR	48439	4		807-8686		
ACB	DEM	KRYZA	NORA	12008 JEFFERS LANE	48430	63		750-2126		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	LANSDOWN	MARY	638 W MARENGO AVE	48505	63		937-7368		
ACB	DEM	LANSDOWN	PATRICIA	638 W MARENGO AVE.	48505	63		308-2065		
ACB	DEM	LAWLER	ALMA	1045 RIVER VALLEY DR	48532	63		5777796	022818	
Supervisor	DEM	LECLAIR	TIM	3709 COMANCHE AVE	48507	66			031795	
Inspector	DEM	LEE	ERNESTINE	2810 E PIERSON RD	48506	66		342-8379		
New Inspector	DEM	LENOX	ANDREW	205 ROCKWELL ST	48430	66		875-7864		
Chairperson	DEM	LEVERETTE	KATHLEEN	2721 CONCORD ST	48504	51		265-1211	037498	
Chairperson	DEM	LIGGINS	LESLEY	1810 GREENBROOK LN	48507	49		874-7109	036779	
New Inspector	DEM	LINDSAY	WARD	13510 S HORRELL CT	48430	66		629-7955		
Inspector	DEM	LINDSEY	LOUVENIA	2030 N AVERILL AVE #5C	48503	49		6601945	037207	
Inspector	DEM	LIVERMON	DEBORAH	2709 THOMAS ST	48504	66		7870561	034319	
Inspector	REP	LONG	DARLINE	3622 WINONA ST	48504	66		4443778	036919	
Chairperson	DEM	LOVE	DEBORAH ANN	5610 JUNIPER LANE	48505	53		2105402	036285	
Inspector	DEM	LOVE	JAMARCO	3800 MASON ST	48505	66		3361280	037499	
Inspector	DEM	LOVE	PATRICIA	2101 STEDRON ST #115	48504	4		308-4645	037500	
Inspector	DEM	LOVING	ANITA	152 MYRTLE AVE	48505	37		787-9828	037064	
Inspector	DEM	LUCAS-LARRISON	GENEVA	1516 WOODSLEA DR	48507	30		234-5013	036711	
Inspector	DEM	LUSTER	GINA	4414 LINDEN CT #8	48532	29		720-0940	037286	
Inspector	DEM	MABRY	ROBERT	6309 KAREN DR	48504	1		787-5829	036736	
New Inspector	REP	MALCOMNSON	ROBERT	2267 N HENDERSON RD	48423	66		247-1897		
N. B. Worker	DEM	MANNINGHAM	JULIONA	5373 WOODLAWN DR	48506	65		8539429	CITY	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	DEM	MANUEL	JEANETTE	1501 COLUMBIA DR	48504	66	☐	814-0690		
New Inspector	REP	MARDEN	LEONARD	4320 N OAK RD	48423	66	☐	964-3025		
N. B. Worker	DEM	MARTIN	CARL	6281 LAKE DR	48840	67	☐	517-4021	CITY	
New Inspector	DEM	MARTIN	CHERYL A.	126 E FLINT PARK BLVD	48505	8	☐	810-5135		
Chairperson	DEM	MARTIN	JAN Y	721 E 12TH ST	48503	40	☐	2825639	031993	
Inspector	DEM	MASON	SONYA	121 W BISHOP AVE	48505	12	☐	766-7414		
New Inspector	REP	MAST	TRUMAN	519 WHEELING RD	48444	66	☐	614-4845		
Inspector	DEM	MATTHEWS	TRACY F	1905 MCPHAIL ST	48503	50	☐	9081660	035691	
Charperson	DEM	MAYO	CAROLYN	1309 HIBISCUS ST.	48458	8	☐	8749832	037213	
Inspector	DEM	MAZUREK	CAITLIN	6038 MAPLE TRL	48439	45	☐	514-9804		
ACB	DEM	MCCHRISTIAN	ANGIE	1518 WISCONSIN AVE	48506	63	☐	275-0366	037662	
New Inspector	REP	MCCLINTCK	JEFFREY	6070 N SEYMOUR RD	48433	66	☐	501-0789		
New Inspector	DEM	MCCLINTOCK	STEPHANIE	6070 N SEYMOUR AVE	48433	66	☐	723-6329		
New Inspector	DEM	MCCLINTON	CLAIRE	129 W JAMIESON ST	48505	66	☐	813-1852		
Inspector	DEM	MCGOWAN	DOLORES	3045 FALCON DR	48519	80	☐	7424961	034778	
N. B. Worker	DEM	MCINTYRE	BENJAMIN	3730 LAPEER RD. LOT 129	48060	67	☐	9666213	036905	
N. B. Worker	DEM	MCINTYRE	KAILEY	3730 LAPEER RD LOT 129	48060	67	☐	2478005	037164	
N. B. Worker	DEM	MCINTYRE	NEHEMIAH	2486 E MT. MORRIS RD	48458	67	☐	348-6618	037231	
N. B. Worker	IND	MCKEEVER	CYNTHIA	1075 TERRY AVE	48458	67	☐	458-3946	034760	
New Inspector	DEM	MCKENZE	GEORGE	3910 WINONA ST	48504	2	☐	525-5003		
Chairperson	DEM	MCKENZE	VICTORIA	3910 WINONA AVE	48504	2	☐	525-5003		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	REP	MCLAUGHLIN	BRENDA	5305 GREENLEAF DR	48473	66		287-7791		
Inspector	DEM	MCLAURIN-BEY	BARBARA	2324 LAPEER RD. #307	48503	50		333-7888	037214	
Inspector	DEM	MCQUEEN	ANDRE	1050 E GENESEE ST.	48505	13		529-6680		
Inspector	DEM	MCQUILLER	BRIDGET	1235 W DOWNEY AVE	48505	16		333-1080		
Inspector	REP	MCQUILLER	JAMIAH ANGEL	1235 W DOWNEY AVE	48505	66		333-1080		
Inspector	DEM	MICKENS	BRIAN	3201 PENCOMBE PL	48503	54		422-9120		
Inspector	DEM	MILLER	CAROLINE	3810 TWILIGHT DR.	48506	66		280-0932	037327	
Chairperson	DEM	MILOW JR.	FRED	1002 E AUSTIN AVE.	48505	6		787-2197	036268	
Inspector	DEM	MITCHELL	WILLIE DORIS	5020 N JENNINGS RD	48504	5		789-4832	036229	
New Inspector	DEM	MITCHNER	LISA	2014 BURR BLVD	48503	66		394-1907		
Inspector	DEM	MOHAMED	RASHA	1177 HEATHERWOODE CT	48532	47		230-1127		
Inspector	DEM	MOORE	EARNESTINE	700 E COURT ST #122	48503			2657804	036621	
Chairperson	DEM	MOORE	ELEXIS	PO BOX 5073	48503	46			036624	
Inspector	DEM	MOORE	KATHY	5908 LESLIE DR	48504	8		875-9212	037183	
Chairperson		MOORE	MICHEL	2438 MISSOURI AVE	48506	23		2394642	036564	
Chairperson	DEM	MOORE	NATHANIEL	1104 CARPENTER RD	48505	4		620-5780		
Inspector	DEM	MOORE	TOWANNA	2001 N CENTER RD #212	48506	66		2071647	036910	
New Inspector	RD	MORAN	CARILEE	10325 DENTON CREEK DR	48430	66		730-4744		
New Inspector	DEM	MORAN	CARILEE	10325 DENTON CREEK DR	48430	66		734-7304		
New Inspector	DEM	MORELAND	TINA	737 E ALMA AVE	48503	66		908-3591		
Chairperson	DEM	MORGAN	KYRIE	722 MORGAN DR	48473	19		9902437	035473	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	L	MORSE	KEVIN	5360 KELLY RD	48458	66	☐	444-2211		
Inspector	DEM	MORSI	ABRAR	4473 BRENDENSHIRE CT	48532	24	☐	394-7469		
Inspector	DEM	MOSLEY	BERNETTA	1309 LILLIAN DR	48505	66	☐	936-9372	036963	
ACB	DEM	MUNROE-YOUNIS	MONA	2721 INDIAN BOW TRAIL	48507	63	☐	845-4633	CITY	
Inspector	DEM	MURCHISON	MALCOLM	8216 BURKESHIRE CIRCLE #107	48473	23	☐	908-3563		
New Inspector	REP	NANCE	CAROLYN	1347 LAKE VALLEY DR	48430	66	☐	965-3482		
New Inspector	REP	NANCE	CAROLYN	1347 LAKE VALLEY DR	48430	1	☐	965-3482		
Inspector	DEM	NAPPIER	IDA M	1921 CHERRYLAWN DR	48504	11	☐	7858029	035944	
Inspector	DEM	NASH	LYNETTE	1020 PRINCETON AVE	48505	27	☐	5223776		
Inspector	DEM	NASH	VITA	5281 BERMUDA LANE	48505	15	☐	3081738	037290	
County Counting Ct	DEM	NELSON	MARGARET	2025 MCAVOY ST	48503	64	☐	787-7224	034782	
Supervisor	REP	NEUMANN	KATHRYN	4369 MT. VERNON PASS	48473	66	☐	845-7569	CITY	
Inspector	DEM	NICHOLSON	ALMEDA KAY	5817 BALDWIN BLVD	48505	23	☐	8827096	000320	
Inspector	DEM	ODUM	ARNENIA	1196 CREEK VIEW CT	48509	20	☐	9197191	036769	
New Inspector	DEM	OLLIE	QUANDREL	3832 PARK FOREST DR	48507	66	☐	610-4745		
New Inspector	DEM	OLLIE	SHANISE	3832 PARKFOREST DR	48507	66	☐	763-4397		
Inspector	DEM	ONEAL	KARLOUS	1117 BURNT LEAF LN	48439	29	☐	694-4798	037356	
New Inspector	REP	ONFRY	DAVID	11415 BRECKENRIDGE DR	48423	66	☐	274-3961		
New Inspector	DEM	OPER	ANNE	544 BURROUGHS AVE		66	☐	814-8468		
County Counting Ct	REP	OTLOSKI	JENNIFER	2529 N CHEVROLET AVE	48504	64	☐		COF	
New Inspector	REP	OWEN	KRISTEN	3001 WESTWOOD PKWY	48503	66	☐	735-0111		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	OWENS	TAMMARA	1701 CARMANBROOK PKWY	48507	56	☐	766-7414		
Inspector	DEM	PALMER	HAROLD	2923 MCCLURE AVE #2	48506	22	☐	240-0009		
New Inspector	REP	PALMGREN	RONALD	4449 SUNSET BLVD	48439	15	☐	245-2869		
New Inspector	REP	PANIGI	ROBIN	2381 MEADOWCROFT DR	48519	15	☐	938-0016		
New Inspector	REP	PARILLO	TAMMERA	3010 HAWTHORNE DR	48503	19	☐	964-9239		
Inspector	REP	PARKER	MICAH L	6076 PALMETTO DR	48458	66	☐	259-0892		
New Inspector	DEM	PARKS	REGINALD	315 W MCCLELLAN ST	48505	66	☐	447-3777		
Inspector	DEM	PARSON	NORMA	1146 HEATHERWOODE RD	48532	53	☐	767-5762	037185	
Inspector	DEM	PASCAL	SHARON	1505 COLUMBIA DR	48503	30	☐	5770036	036518	
New Inspector	DEM	PATRICK	VIVIAN	925 MILLBROOK DR APT D	48503	66	☐	407-2476		
Inspector	DEM	PATRICK-KEYES	CHARLOTTE	4224 COMSTOCK AVE		42	☐	336-8577	037241	
New Inspector	DEM	PAYNE	EDWARD	5532 OLD FRANKLIN RD	4843	66	☐	429-0840		
ACB	DEM	PERRY	CHELSEA	3814 KENT ST	48503	63	☐	744-9431		
ACB	DEM	PERRY	COREEY	3814 KENT	48503	63	☐	7449431	035292	
Inspector	DEM	PERRY	SHAWLENE	910 BROOKHOLLOW CT 1-A	48503	40	☐	232-6098	035595	
Chairperson	DEM	PERRY-JOHNSON	ANNA	1184 RIVER VALLEY DR #6	48532	66	☐	2496964	034502	
Inspector	DEM	PERTEET	ANNIE	1807 WOODLIN DR	48504	12	☐	875-2894		
New Inspector	DEM	PETER	ELLEN	320 WINDY BLUFF	48433	66	☐	487-0254		
Inspector	DEM	PETERS	DIANE MARIE	5310 CEDAR SHORES BLVD APT #101	48504	61	☐	9641948	000344	
Chairperson	DEM	PETERSON	GERALDINE	1206 WHITFIELD DR	48439	60	☐	695-5020	037027	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	PETERSON	KIM	701 COLUMBIA DR	48503	35	☐	422-9944		
Chairperson	DEM	PHILPOT	SANDRA	2835 MALLERY ST	48504	33	☐	235-6575	037234	
Chairperson	DEM	PICKETT	CYNTHIA	951 E ATHERTON RD	48507	50	☐	5132619	000607	
Vice-Training	DEM	POLLARD	PHYLLIS	G-4493 FENTON RD LOT 43	48529	58	☐	309-7006	037227	
Chairperson	DEM	POLLARD	RITRESHIA	G4493 FENTON RD LOT #43	48529	38	☐	3083169		
ACB	DEM	POPLAR	JACQUELINE	3921 WINONA ST.	48504	63	☐	785-2014		
New Inspector	DEM	POSEY	TINA	1918 WOODSLEA DR #7	48507	66	☐	938-9935		
Chairperson	DEM	POUNCIL	FLOYD	3109 MALLERY ST	48504	66	☐	9565529	034784	
New Inspector	REP	PRAY	PATRICK	1060 DOROTHY ST	48458	66	☐	618-7691		
Chairperson	IND	PREVO	JANA	2836 BEGOLE ST	48504	66	☐	2382919	037100	
Inspector	DEM	PREVO	NAKIA JAVAN	2836 BEGOLE ST	48504	66	☐	2382919	036860	
ACB	DEM	RANDALL	LORENE	2118 DWIGHT AVE	48503	63	☐	767-7154	037502	
Inspector	DEM	RAWLS	ALICE LEE	3136 WAGON TRL	48507	44	☐	9640164	035925	
Chairperson	DEM	RAY	LISA	2275 BATES RD	48458	8	☐	4477088	035598	
Chairperson	DEM	REDMOND	GERALDINE	3800 RICHFIELD RD #408	48506	26	☐	4495842	035152	
Chairperson	IND	REED	MONICA	PO BOX 320383	48532	46	☐	516-0197	037305	
Inspector	DEM	REED	TYNISHA	4321 MARTIN LUTHER KING DR.	48505	59	☐	787-1614		
Inspector	DEM	REEVES	IMANI	3722 GREENBROOK LN	48507	66	☐	449-1924		
Inspector	DEM	RHYMES	LESSIE	3409 LAS PALMAS CT	48504	40	☐	7333404	036110	
Inspector	DEM	RICHARD	DAMITA	755 E GRAND BLANC RD BLD-10 APT 4	48439	33	☐	701-9726		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	RICHARDSON	DEBORAH	816 E WELLINGTON AVE	48503	45		210-8919	037503	
ACB	DEM	RICHARDSON	JAMES	915 COURT ST #403	48503	66		348-5331		
ACB	DEM	RICHARDSON	MARY JANE	915 E COURT ST. #402	48502	63		348-5332		
New Inspector	REP	RICHARDSON	SUSAN	508 W PARK VW	48420	16		410-6186		
New Inspector	DEM	RIGGIO	SARA	11163 W PIERSON RD	48433	66		620-5716		
Chairperson	DEM	ROBERTS	DEBORAH	5179 WOODHAVEN DR.	48504	31		820-4831		
Inspector	DEM	ROBERTSON	AREANNA	1904 W DARTMOUTH ST	48504	31		239-6255		
Inspector	DEM	ROBERTSON	SHARON R	3722 GREENBROOK LANE	48507	12		624-7857		
Inspector	DEM	ROLAND	ROBIN	802 E ATHERTON RD.	48507	66		259-6706	037607	
County Counting Ck	DEM	ROSS	BELINDA GAIL	2106 STONEYBROOK CT	48507	65		250-1318		
Inspector	DEM	ROSS	JETHENE	606 LELAND ST	48433	52		8674547	037215	
ACB	DEM	RUSHING	ANNA	9156 SUNCREST DR.	48504	63		444-4336		
New Inspector	REP	SALACUSE	CYNTHIA	601 FRANK ST	48504	66		810-7306		
New Inspector	DEM	SAMUELS-LARRY	SUNNI T	5185 NORTHRUP RD	48439	66		423-4229		
Inspector	DEM	SASSER	BRENDA	702 FATHER DUKETTE BLVD #913	48503	12		917-8883		
Inspector	DEM	SAUCEDA	AURORA	3609 DALE AVE	48506	33		744-4716		
Chairperson	DEM	SAUNDERS	GILBERT	3909 CLAIRMONT ST.	48532	15	✔	3080651	036660	
Inspector	DEM	SCALES-SMITH	EASTER	401 W ELDRIDGE	48505	19		6180174	037028	
New Inspector	DEM	SCHEITLER	SARAH	510 CRAPO ST	48503	66		210-4988		
N. B. Worker	REP	SCHILLER	ADELAIDE	2462 BLARNEY DR	48423	64		965-1801	CITY	
Inspector	DEM	SCHULER	SHIRLEY ANN	3228 PROSPECT ST	48504	66		232-8861	037333	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	SCHWARTZ	ANGELA	2810 NORBERT ST	48504	19	☐	313-3008		
Chairperson	DEM	SCOTT	JENNIFER D	PO BOX	48437	13	☐	3993171	001318	
New Inspector	DEM	SCRUGGS	CLIFFORD III	3922 W COURT ST.	48532	28	☐	766-7414		
Inspector	DEM	SETTLE	MARLIS	19201 BLACKBERRY CREEK	48519	35	☐	836-4189		
ACB	REP	SEVIGNY	JENNIFER	2255 BALD EAGLE LAKE RD	48462	63	☐			
Inspector	DEM	SHELL	PATRICIA	3124 MALLERY ST	48504	6	☐	908-8036	037334	
Inspector	DEM	SHELTON	GERRY D	1109 BURLINGTON DR	48503	49	☐	7436791	034925	
Inspector	DEM	SHELTON	MARY	1109 BURLINGTON	48503	49	☐	7337674	036728	
Inspector	DEM	SHINN	THEODORE	3412 HAWTHORNE DR	48503	12	☐	712-6051		
Inspector	DEM	SHULTERS	CHRISTA	2029 GERARD ST	48507	15	☐	471-8635		
Chairperson	DEM	SHUMPERT	DANETTE	3095 LINDEN RD #517	48507	21	☐	2406862	036991	
Inspector	DEM	SIMMONS	DANA	2402 CLEMENT ST	48504	27	☐	423-1934		
ACB	DEM	SIMPKINS	ESTELLA	3716 PROVIDENCE ST.	48503	63	☐	620-9460	037217	
Inspector	DEM	SIMS	VALDENE	402 E GENESEE ST	48505	14	☐	239-7436	036766	
Inspector	DEM	SKINNER	WYVONNE MARIE	333 E MARENGO AVE	48505	66	☐	787-1328	036958	
Inspector	DEM	SMART	SHIRLEY	3206 KINGS LANE	48529	66	☐	9190849	035810	
New Inspector	DEM	SMITH	DANA	2402 CLEMENT ST	48504	4	☐	423-1934		
Inspector	DEM	SMITH	DIAMOND	2705 MALLERY ST	48504	32	☐	336-7518		
Inspector	DEM	SMITH	IMARI	2016 S DEXTER ST	48503	37	☐	313-3480		
Inspector	DEM	SMITH	KATHY L	3220 BARTH ST	48503	61	☐	820-7005		
New Inspector	DEM	SMITH	STEFFON C	1314 LILLAN DR	48505	66	☐	882-7954		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	SOBRINO	ELENA	501 AVON ST.	48503	46	☐	813-3035		
New Inspector	REP	SORENSEN	LAT	250 STAWBERRY RDG	48458	3	☐	908-8381		
Inspector	DEM	SPEARMAN-NORRIS	CRYSTAL	6178 EAST KNOLL DR.	48439	66	☐	3914537	037587	
Inspector	DEM	SPEARS-MARVE	BERNICE	6111 HARWOOD DR	48458	66	☐	787-7356	036810	
Chairperson	DEM	SPERLA	ETHAN	609 E MAIN ST	48433	61	☐	247-9166		
Inspector	DEM	SPICER-JOHNSON	SHANTARA	729 WESTCOMBE	48503	66	☐	766-7414		
Inspector	DEM	SPRATT	FLORENCE	830 E GILLESPIE AVE	48505	15	☐	3081748	036179	
Inspector	DEM	STAMPS	ANGELA	2713 E PIERSON RD	48506	66	☐		037099	
New Inspector	REP	STEMPER	SUSAN	11199 FRANCES RD	48433	66	☐	241-1123		
Inspector	DEM	STEPHENS	SHIRLEY D	925 COTTAGE GROVE AVE	48504	59	☐	3082971	035458	
Chairperson	DEM	STITT	SHIRLEY L	506 E DEWEY ST	48505	66	☐	2657727	035765	
Chairperson	DEM	STOCKMAN-HOPKINS	TWYLA	326 E MARENGO AVE	48505	5	☐	4236198	036533	
Inspector	DEM	STRONG-MITCHELL	RUTHIE	1635 SEYMOUR AVE	48503	57	☐	234-0084		
New Inspector	DEM	STROZIER	TIHNA	1807 BAYBERRY LN	48507	58	☐	962-7177		
Inspector	DEM	SURLES	STEPHANIE	2648 PINETREE DR	48507	10	☐	715-1050		
New Inspector	DEM	SWANIGAN	SYLVIA	PO BOX 311164	48531	66	☐	347-2359		
Chairperson	DEM	SWILLEY-GREEN	CLARISSA	617 W FOSS AVE	48505	66	☐	938-9414	037593	
New Inspector	REP	SYLVESTER	VALERIE	16159 RIVER RIDGE TRL	48451	66	☐	516-4279		
Inspector	DEM	SYMONS	JEFFREY	9348 HILLSIDE CT	48423	41	☐	813-2857	035942	
Inspector	DEM	TABBAH	MARIAM	673 BENDING BRK	48433	45	☐	962-4554		
Inspector	DEM	TAYLOR	DAWANA	1308 MCINTOSH DR	48503	31	☐	336-7786		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	TAYLOR	MICHAEL	3402 KINGS LANE	48529	47	☐	4936557	037066	
New Inspector	REP	TAYLOR	SCOTT	2419 ILLINOIS AVE	48507	66	☐	249-1674		
Chairperson	DEM	TAYLOR	SHELLIE	517 STOCKDALE ST	48503	28	☐	7307577	036182	
Inspector	DEM	TERRY	LEONARD	420 PINGREE	48503	66	☐	3479131	037010	
Chairperson	DEM	TERRY	LEWENNA	124 E MARENGO AVE.	48505	43	☐	874-0880	036072	
Inspector	DEM	THOMAS	BARBARA	3235 PROSPECT	48504	53	☐	691-7734	037218	
Inspector	DEM	THOMAS	DELORES	1526 GARLAND ST	48503	16	☐	8757136	037032	
Inspector	DEM	THOMAS	SHIRLEY A	1712 W MCCLEELLAN ST	48504	66	☐	787-8799		
Chairperson	DEM	THOMAS	TAMMY J.	4418 BILLINGS ST	48505	15	☐	785-0160	037187	
New Inspector	DEM	THOMPSON	JAWANA	2002 ECKLEY AVE	48503	66	☐	248-8028		
Inspector	U	THOMPSON	MARTITA	1429 LYON ST	48503	66	☐	479-7115		
Inspector	DEM	THOMPSON	NANCY J.	2201 KANSAS ST.	48506	19	☐	235-1543		
Chairperson	DEM	THOMPSON	SHELLEY	8145 BRISTOL RD	48473	27	☐	618-3172		
Chairperson	DEM	THRELKELD	ROCHELLE E	214 E PULASKI AVE	48505	66	☐	789-2686	035051	
Inspector	DEM	THRELKELD	TONEDIA A	4020 WINONA ST	48504	66	☐	789-5660	000930	
County Counting Ct	DEM	THROWER	CARLA	501 E YORK AVE	48505	64	☐	5254130	000432	
Inspector	DEM	THROWER	CHANTA	2637 BROWNELL BLVD	48504	66	☐	309-7078	036280	
Chairperson	DEM	TIBBITTS	LAREE	1301 MCINTOSH	48503	66	☐	820-1563	037229	
Inspector	DEM	TOLBERT	DOROTHY	1413 MILBOURNE AVE	48504	66	☐	259-1277		
Inspector	DEM	TOLES	VALERIE	1214 CRIIMSON ROSE DR	48458	13	☐	293-5350		
Inspector	DEM	TOMLIN	JENNA N	618 MCKEIGHAN AVE	48507	66	☐	429-9415		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	TOOMBS	TOREA	3011 BARTH ST.	48504	19	☐	3367392	036722	
ACB	DEM	TOWNSEND	JONNIE FAYE	3022 BARTH ST	48504	63	☐	936-9836	036975	
Inspector	DEM	TOWNSEND	ROBERT	PO BOX 3220	48503	57	☐	347-4172		
Inspector	DEM	TRANNON	BEVERLY ANN	601 W DARTMOUTH ST.	48504	26	☐	234-7018		
Inspector	DEM	TRENT	CARRIE	119 E GENESEE ST.	48505	26	☐	964-4481		
Inspector	DEM	TRUSS	MATTIE	PO BOX 1393	48501	66	☐	3365936	036284	
Inspector	DEM	TUGGLE	MARGRET	4002 W KEARSLEY ST.	48532	39	☐	820-4220		
Inspector	DEM	TURNER	KIMBERLY	5106 WOODHAVEN DR	48504	44	☐	820-0178		
Inspector	DEM	TURNER	LINDA	3710 FOXCROFT CIRCLE	48503	52	☐	743-0425	036723	
Inspector	DEM	TURNER	SHEENA	6217 EAGLE RIDGE LANE #201	48505	42	☐	333-3129	037071	
Inspector	DEM	TURNER	VIVIAN E	523 W GRACELAWN AVE	48505	28	☐	238-6020	000441	
ACB	DEM	ULLRICH	DONNA	905 E COURT ST. #403	48503	63	☐	730-1590		
Chairperson	DEM	UMPHRYES	TERRIE	1127 W KURTZ AVE	48505	43	☐	210-8499	037219	
Chairperson	DEM	VANDERSON	WYVETTE	630 E BAKER AVE	48505	48	☐	233-3362	037575	
New Inspector	DEM	VANKUREN	MISTY	5046 KENDALL DR	48509	66	☐	553-2405		
New Inspector	DEM	VOSS	AIDEN	727 WASHINGTON ST	49686	66	☐	620-3317		
ACB	DEM	WADE	DARICE L	PO BOX 5415	48505	63	☐	2591635	034604	
Inspector	DEM	WAHLFIELD	MARK	749 MARLENE ST	49321	51	☐	801-5082		
Chairperson	DEM	WALKER	DON E	2101 STEDRON #353	48504	60	☐		037336	
Inspector	DEM	WALKER	ESTELLA	1814 E COURT ST	48503	61	☐		037505	
Inspector	DEM	WALKER	FATIMA	2920 CONCORD ST	48504	65	☐	610-5066		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	WALKER	KAREN	1373 BRIARROSE DR	48458		☐	969-1066		
Inspector	DEM	WALKER	SONIETTA	1846 BARKS	48503	66	☐		037307	
Chairperson	DEM	WALLING	CARRIE	806 KENSINGTON AVE	48503	56	☐	247-3408		
Chairperson	DEM	WASHINGTON	CAROLYN	7208 CEDAR BEND DR	48439	11	☐	308-8587		
Inspector	REP	WASKOVIAK	ROBERT JR	456 COMMON WEALTH AVE	48503	66	☐	908-3459		
Chairperson	DEM	WATCHORN	ANDREW	918 E KEARSLEY ST	48503	48	☐	804-6833		
ACB	DEM	WATCHORN	KATHLEEN	915 E COURT ST. #206	48503	63	☐	313-3195		
Inspector	DEM	WATSON	DELORIS	2818 CHEROKEE AVE	48507	45	☐	936-1734	037105	
Inspector	DEM	WATSON	JUANITA	2250 TOBY BETH DR	48505	13	☐	333-3952	037576	
New Inspector	DEM	WATSON	RAMONA	2205 CEDAR BEND DR	48439	66	☐	875-6419		
New Inspector	DEM	WEATHERLY-YOUNG	MINNIE	621 W PASADENA AVE	48505	27	☐	789-6265		
Supervisor	DEM	WEILER	KATHY	1297 HEATHERWOOD DR #3B	48439	65	☐	766-7255	CITY	
Inspector	DEM	WELCH	CONSTANCE	2135 PARKTON RD	48458	66	☐	787-0715		
Inspector	DEM	WELLS	KENYATTA	418 W MCCLELLAN	48505	66	☐	309-4872	037310	
New Inspector	REP	WERTH	JANETTE	6231 EAST HILL RD	48439	66	☐	804-1489		
Inspector	DEM	WESLEY	BARBARA	1717 WOODSLEA DR	48507	66	☐	275-5840		
Inspector	DEM	WESLEY	ROBERT	1655 NEOME DR.	48503	66	☐	938-9994		
Inspector	DEM	WESTON	TYAIJIA	855 GREEN RD #307	48198	1	☐	964-2366		
ACB	DEM	WHALEY	MARY	475 REMINGTON CT	48430	63	☐	813-8366		
Chairperson	DEM	WHEELER	ALISHA	5511 GRANVILLE AVE	48505	5	☐		036928	
Inspector	DEM	WHEELER	MAY F	313 W COURT ST A132	48502	44	☐	4232498	037343	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	WHITE	AYSIAH	3410 LAS PALMAS CT	48504	59	☐	625-5814		
Inspector	DEM	WHITE-BECOATS	SANDRA A	1861 SPRINGFIELD ST	48503	30	☐	7437242	035689	
New Inspector	REP	WHITTAKER	WESLEY	607 FENTON COMMONS LN	48430	66	☐	397-7466		
Inspector	DEM	WILLIAMS	ALAN	410 LIPPINCOTT BVLD C31	48503	52	☐	7018525	036920	
New Inspector	DEM	WILLIAMS	TRACY	4730 CANTERBURY LN	48504	66	☐	766-7414		
New Inspector	DEM	WILLIAMS	YVONNE	3821 WHITTIER AVE	48506	66	☐	296-3833		
Inspector	DEM	WILLIAMSON	EDDIE	2016 CRESTBROOK LANE	48507	55	☐	610-9891		
Inspector	DEM	WILSON	JOYCE	5006 LAURENE ST	48505	6	☐	458-3970		
Chairperson	DEM	WINGATE	TONYA E	3131 PROSPECT ST	48504	66	☐	406-7790	037034	
New Inspector	DEM	WOODRUFF	KAYLA	2007 HILLS ST	48503	66	☐	247-9513		
Inspector	DEM	WOODS	BEVERLY	4116 COMSTOCK AVE	48504	6	☐			
Inspector	DEM	WOODS	BRANDON	4116 COMSTOCK AVE	48504	6	☐	986-4158	037221	
New Inspector	DEM	WRIGHT	BARBARA	2021 CHELAN ST	48503	55	☐	820-8463		
Inspector	DEM	WRIGHT	ILEAN	2844 BERKLEY	48504	54	☐	447-4923	037359	
Chairperson	DEM	WRIGHT	KINEA	2528 ALTOONA ST.	48504	35	☐	919-0472		
New Inspector	DEM	WRIGHT	WILLIE	4110 DONNELLY ST	48504	66	☐	919-0472		
ACB	DEM	YOUNG	CATHY	14046 NEFF RD	48420	63	☐			
Inspector	DEM	YOUNG	DONDRE	1226 GILBERT ST	48532	66	☐	875-3523		
Inspector	DEM	YOUNG	ROSE	6801 DANA LN	48504	3	☐	262-1729		
Inspector	DEM	YOUNGER	MAGNOLIA	6932 YORKSHIRE BLVD	48505	28	☐	308-2745	001325	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount

Total Election Workers: 562 **Total Amount:** $402.00

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EXHIBIT 2

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DICKINSON WRIGHT PLLC

1825 Eye St, N.W., Suite 900
Washington, DC 20006
Telephone: (202) 457-0160
Facsimile: (844) 670-6009
http://www.dickinsonwright.com

Charles R. Spies
CSpies@dickinsonwright.com
(202) 466-5964

350 S. Main Street, Suite 300
Ann Arbor, MI 48104-2131
Telephone: (734) 623-7075
Facsimile: (844) 670-6009
http://www.dickinsonwright.com

Robert L. Avers
RAvers@dickinsonwright.com
(734) 623-1672

October 21, 2022

VIA EMAIL:

Davina Donahue, *in capacity as member of Flint Board of Election Commissioners*
Interim City Clerk
1101 S. Saginaw St.
2nd Floor City Hall, 201-C
Flint, MI 48502
ddonahue@cityofflint.com

William "Bill" Kim, *in capacity as member of Flint Board of Election Commissioners*
City Attorney
1101 S. Saginaw St.
3rd Floor of Flint City Hall
Flint, MI 48502
wkim@cityofflint.com

Stacey Kaake, *in capacity as member of Flint Board of Election Commissioners*
City Assessor
1101 S. Saginaw St, #201A
Flint, MI 48502
skaake@cityofflint.com

Dear Commissioners,

We are counsel for the Michigan Republican Party and the Republican National Committee (collectively, the "GOP"). We write to you in your capacity as members of the Flint Board of Election Commissioners (the "Board"), and specifically regarding the insufficient number of Republican-affiliated election inspectors that have been appointed by the Board to serve as inspectors in the quickly-approaching general election.

In light of the departure of former-Clerk Inez Brown, with whom we and our clients communicated about this matter on countless occasions, we've provided here a brief summary and background of this matter.

As you are no doubt aware, Michigan law expressly requires that this Board "**shall** appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2) (emphasis added). Likewise, the Board's legal duty to appoint an equal number of election inspectors from each major political party also applies with equal force to Flint's Absent Voter Counting Boards ("AVCBs"). *See* MCL 168.765a(2) (providing that the requirements for the

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appointment of equal numbers of election inspectors from each major political party, among other requirements under section 674, "apply to the appointment of election inspectors to [AVCBs.]").

Importantly, the Board's legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and to each AVCB runs through Election Day. MCL 168.674(5).

Election inspectors play an important role in instilling confidence in our electoral process. While there may have been a shortage of Republican election inspectors in previous election cycles, this year the GOP has made a concerted effort to work with the City of Flint to assist in recruiting inspectors and collaboratively assist the City in fulfilling its obligations under MCL 168.674. For example, on May 12, 2022, the GOP provided former-Clerk Brown with applications for 122 Republicans interested in serving as election inspectors in the City of Flint for the August 2, 2022 primary election. Despite the GOP's efforts, on July 16, 2022, the City of Flint provided the Genesee County Republican Party with a list indicating that the City had hired only 27 Republican election inspectors. The City had, however, hired 442 Democrat election inspectors for the same election. It goes without saying that a 27:442 ratio is a far cry from the "equal as possible" requirement set forth under Michigan law. Making matters worse, the City of Flint hired only 4 Republican election inspectors to work at its AVCBs, compared to the 56 Democrats hired by the City for the same role.

In light of the discrepancy between the quantity of Democrat and Republican election inspectors, the GOP contacted former-Clerk Brown on July 26, 2022—one week prior to the primary election—to address the City's unequal appointment of partisan election inspectors. Former-Clerk Brown assured the GOP that the City would contact the Republicans provided by the GOP back in May 2022. But even then, the GOP contacted those Republicans after the primary election, and learned that the City had hired only an additional 22 applicants. In sum, the ratio of Democratic election inspectors to Republican election inspectors employed by the City of Flint for the August 2022 primary election was approximately 15:1. Neither that ratio nor the Board's effort to appoint an equal number as possible of Democrat and Republican election inspectors satisfied Michigan law.

Nonetheless, for the sake of assisting the Board in complying with its duty under Michigan law to appoint an equal number of election inspectors from each major political party to each election precinct and each AVCB, the GOP issued a letter to former-Clerk Brown on September 9, 2022, which enclosed a list of 61 Republicans that had confirmed their interest and availability to work as election inspectors during the November 2022 general election in the City of Flint. That letter also requested, as a show of good faith, written assurance that the clerk would commit to contacting and scheduling election inspector training for each person on that list. The GOP, however, never received such written assurance.

It was against that backdrop that the GOP received the list of election inspectors issued by the Board to the Chair of the Genesee County Republican Party for the upcoming November 2022 general election. A copy of that correspondence and list are attached hereto as **Exhibit A**.

Simply put, the Board's list of election inspectors does not comply with Michigan law. Of the approximately 562 election inspectors included in the list, only 57—or approximately 10%—are

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Republicans. This disparity does not comply with MCL 168.674(2). Likewise, the Board has appointed 45 Democrat election inspectors to serve at the AVCBs, compared with merely 2 Republicans for the same role. This disparity is also not compliant with MCL 168.674(2). As a further example of these unacceptable disparities, the Board has appointed 98 Democrats to serve as chairpersons, but only 2 Republicans to the same role.

Making matters worse, the GOP has learned that additional Republicans recently contacted the clerk's office to inquire about working as election inspectors. Yet, despite the disparities outlined above, those individuals were rejected by staff in the clerk's office.

In one instance, Ms. Gloria Boone, the City of Flint's Election Supervisor, informed a prospective Republican election inspector that the clerk's office had received "a lot" of calls from Republicans asking about serving as election inspectors, but Ms. Boone questioned the rumors that the City "needs more Republicans" as election inspectors because Flint "is a predominately Democratic area" and indicated that she does not need to know their partisan affiliation. That individual was directed by clerk staff to fill out and submit an application, but was left with the impression that the clerk's office did not need any more Republican election inspectors.

In light of the demonstrated numerical disparities between Republican and Democrat election inspectors identified by the Board, and the Board's clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and to each AVCB—a duty that runs through Election Day under Michigan law, *see* MCL 168.674(5)—the intention of this letter is to assist the Board in good faith with bringing its appointment of election inspectors into compliance with Michigan law.

While our Firm has been authorized to take all appropriate actions under law and equity to ensure that the clear legal duties of the Board are fulfilled as they relate to the appointment election inspectors under MCL 168.674, 168 765a, etc.,[1] we appreciate that the confluence of the departure of former-Clerk Brown and the Board's understanding of its duties under Michigan law may lead to an amicable resolution of this matter. With that in mind, the GOP respectfully requests that the Board take the following actions by 4:30pm on Tuesday, October 25, 2022:

- Appoint as election inspectors for the upcoming November 2022 general election the individuals set forth in the appended list, attached hereto as **Exhibit B**;

- Reallocate no less than twenty (20) Republican election inspectors from precinct polling places to the City's AVCBs;

[1] While Michigan law permits the county chair of a major political party to challenge the appointment of individual election inspectors based on those individuals' partisan bona fides, among other qualifications, *see* MCL 168.674(3), the Board's clear legal duty to appoint an equal number of election inspectors from each major political party to each election precinct and AVCB would be enforceable through, among other actions, a writ of mandamus commenced by an aggrieved major political party.

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- Appoint no less than twenty-five (25) Republican election inspectors as chairpersons;

- Take affirmative actions to recruit additional Republican election inspectors, including but not limited to educating City staff about the requirement to recruit and appoint Republican election inspectors, and publicly posting a call for Republicans to volunteer to serve as election inspectors;

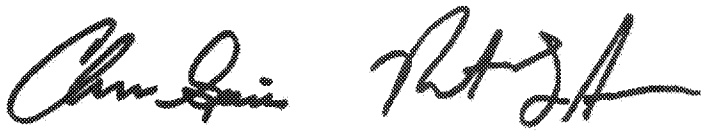
- Assist each prospective Republican election inspector that contacts the City to inquire about serving in that role in a manner consistent with this Board's ongoing duty under MCL 168.674(5), rather than turning those individuals away; and

- Cease accepting prospective Democrat election inspectors in order to permit the above-referenced actions an opportunity to work toward a more equal balance of Republican and Democrat election inspectors as required under Michigan law.

We appreciate your taking the time to consider these requests, which are firmly rooted in Michigan law, and we likewise trust that the Board shares our desire to promptly resolve this matter in a collaborative manner rather than proceeding with expedited litigation.

With that in mind, please do respond to us at cspies@dickinsonwright.com and ravers@dickinsonwright.com by 4:30PM EDT on Tuesday, October 25, 2022, to confirm the Board's compliance with these requests. Separate from that timeline, we welcome the opportunity to discuss this matter with your counsel in advance of that deadline if the Board believes such discussions would be fruitful in reaching an acceptable solution prior to 4:30 PM EDT on October 25, 2022.

Cordially,



Charles R. Spies
Robert Avers
Counsel to GOP

Enclosures

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Exhibit A

Obtained by Judicial Watch, Inc. v. Michigan FOIA

OFFICE OF THE CITY CLERK

October 15, 2022

Genesee County Republican Party
Matthew Smith, Chairperson

RE: November 8, 2022
Primary Election

VIA: Email

Dear Mr. Matthew Smith:

In accordance with State Law, you will find enclosed a listing of Election Inspectors and Absentee Counting board workers recently appointed by Flint's Election Commission to staff City of Flint precincts for the upcoming November 8, 2022, General Election.

If you need additional information, please contact our office at (810) 766-7414.

Sincerely,

Davina Donahue
Interim, City Clerk

Attachment(s)

MUNICIPAL CENTER
1101 S. SAGINAW STREET Room 201C FLINT, MICHIGAN 48502 (810) 766-7414 FAX (810) 766-7404 TDD 766-7120

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Election Workers

Election Date: 11/8/2022

Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	ADAMS	REGINA	1058 RIVERFOREST DR.	48532	83	☐	8740176	234891	
Inspector	DEM	AIKINS	ANITA	311 ROBBIE LANE	48505	8	☐	7874041	036927	
County Counting Ck	DEM	ALEXANDER	ANTWAIN	2202 SANTA BARBARA DR	48504	64	☐	766-7414		
Chairperson	DEM	ALEXANDER	LINDA	8425 N DORT HWY.	48458	20	☐	869-4255		
New Inspector	REP	ALHASSOON	TERESA	1901 MONTEITH ST	48506	66	☐	285-6831		
Chairperson	DEM	ALKIEK	SARAH	3244 BENDING BROOK DR	48433	45	☐	248-7607		
Chairperson	DEM	ANDERSON	JACQUELINE	3017 LAWNDALE AVE.	48504	13	☐	730-6114		
New Inspector	DEM	ANDERSON	MICHAEL	6517 GLOUCESTER ST	48503	66	☐	955-9037		
Inspector	DEM	ANDERSON	MYCHELLE	625 RIDGEWAY AVE	48505	51	☐	336-1317		
New Inspector	DEM	ANDERSON	ROSIA T	G3100 MILLER RD APT#29B	48505	53	☐	347-8972		
Chairperson	IND	ANDERSON	SHERI	1124 EDITH AVE	48507	61	☐	239-4954	037054	
Inspector	DEM	ANTHONY JR	WILLIE B	G-3100 MILLER RD. #17C	48507	66	☐	730-3715	037581	
Inspector	DEM	ATKINS	MARY	1902 GREENBRIAR LANE	48507	66	☐	937-7383	037288	
Inspector	REP	AVERSA	MICHAEL	402 RIVERWOODSD DR	48433	66	☐	919-2357		
New Inspector	REP	AVERSA	NADINA	402 RIVER WOODS DR	48433	13	☐	919-2356		
Inspector	REP	BA	PAMELA	5611 MAPLE PARK DR	48507	66	☐	744-4042		
Chairperson	DEM	BACH	MATTHEW	3211 HAWTHORNE DR	48503	48	☐	874-1073		
Inspector	DEM	BANKS	ANTQUAIN	6104 DETROIT ST	48458	56	☐	5295551		
Inspector	DEM	BANKS	SANDRA A	6104 DETROIT ST	48458	3	☐	742-9091		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	BANKS	SHAROD	6102 BOULDER DR	48529	59	☑	742-9091		
Inspector	DEM	BARBEE	SHACONNA	2637 BROWNELL BLVD	48504	36	☐	6600174	036281	
Inspector	DEM	BARFIELD	JACKELYN	5721 SUBURBAN CT	48505	4	☐	908-3368		
Inspector	DEM	BELAL	REEM FARAUK	2004 FOX HILL DR APT #5	48439	47	☐	863-8995		
Inspector	DEM	BELL	BREAWNA	3011 BARTH ST.	48504	19	☐	5532944	036762	
Chairperson	DEM	BELL	CLYDE	2617 PINETREE DR	48507	66	☐	513-7337		
New Inspector	DEM	BERRY	ALBERT	1199 PEACHTREE DR	48458	66	☐	610-4891		
Inspector	DEM	BICK	EDNA	620 APPLEGATE LANE	48439	4	☐	914-4755		
Chairperson	DEM	BILLINGS	CARMON R	3411 FOREST HILL AVE	48504	1	☐	4236293	036523	
Chairperson	DEM	BILLINGS	FAYE	3411 FOREST HILL AVE	48504	1	☐	6107330	036628	
Inspector	DEM	BINGHAM	LORETTA B	4235 KELLAR AVE #12	48504	11	☐	785-0090	034829	
Inspector	DEM	BIVINS	ARTHUR	PO BOX 5023	48503	37	☐	789-7173	037209	
Inspector	REP	BLACK	WILLIE M	3283 W RIDGEWAY AVE	48504	66	☐	2410334	035985	
Chairperson	DEM	BLACK-NAU	AMANDA	128 W OAKLEY ST	48503	60	☐	5532183	036399	
ACB	DEM	BLAKE	MATTIE	3604 SUFFOLK CT	48433	63	☐	2936716		
New Inspector	REP	BODUCH	JEFFREY	13368 N FENTON RD	48430	66	☐	240-2843		
Inspector	DEM	BOGGS	TRACEY	5117 MILL WHEEL DR	48439	6	☐	252-9967		
Chairperson	DEM	BOHANNON	DOROTHY	5154 MAPLEBROOK LANE	48507	66	☐	285-9602	037284	
Supervisor	DEM	BOND	BRYAN	6211 DELAND RD	48433	65	☐	7667340	028943	
Inspector	DEM	BOOTH	LINDA	1214 ELDORADO DR	48504	40	☐	235-8632	036529	
Inspector	DEM	BOSEMAN	SANDRA K.	1363 FOREST HILL AVE	48504	8	☐	237-7273		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	BOYCE	INEATHER	505 E STEWART AVE	48505	37	☐	785-6056	000047	
Inspector	DEM	BRADLEY	ROSALIND	901 E PHILADELPHIA	48505	37	☐	285-6528		
New Inspector	DEM	BRANCH	SHARROD	2030 CROCKER AVE	48503	5	☐	766-7414		
Inspector	DEM	BRANDON	CLAUDETTE	3814 BROWNELL BLVD	48504	48	☐	785-0463	037192	
Inspector	DEM	BRENT	CHARLOTTE	3276 FRIEND DR	48507	26	☐	767-4864		
Inspector	DEM	BREWER	XAVIER	1017 BEARD ST	48503	1	☐	610-2888	037583	
Inspector	DEM	BRITTON	DERRICK	1705 WILBERFORCE DR	48503	10	☐	766-7414		
Inspector	DEM	BROCKER	JOEL	2430 KENTUCKY AVE	48506	19	☐	309-7525	037090	
Chairperson	DEM	BROOKS	SHAKETTA M	421 W WATER ST #105	48503	66	☐	336-9529		
New Inspector	DEM	BROUGHTON	MYRA	16104 BLACKBERRY CREEK	48519	66	☐	210-8268		
Inspector	DEM	BROUGHTON	MYRA JANE	16104 BLACKBERRY CREEK	48519	20	☐	210-8268	200	
New Inspector	DEM	BROWN	ANITA L	6605 CRANWOOD DR	48505	6	☐	308-1825		
County Counting Ck	DEM	BROWN	BREAUNTE JESSE	6401 VALORIE LN	48504	64	☐	789-8105		
Inspector	DEM	BROWN	COLETTE	621 E SPENCER ST.	48505	3	☐	624-4707	037601	
Inspector	DEM	BROWN	EDEN	1517 RANDY CT	48505	61	☐	789-5490		
Chairperson	DEM	BROWN	GINA R	1708 BRISTOL COURT DR	48458	21	☐	7304670	000835	
Inspector	DEM	BROWN	MYRTEL	3331 MAYWOOD DR	48504	66	☐	789-7033	037488	
Inspector	DEM	BROWN	SAMUEL	1182 ROCKRIDGE TRAIL	48532	10	☐	240-8360		
Inspector	DEM	BROWN	SANDRA	1517 RANDY CT	48505	40	☐	7895490	037602	
New Inspector	DEM	BROWNE	EN-DIA	4436 SAINT JAMES CT	48532	66	☐	309-7334		
New Inspector	DEM	BRYANT	JOSHUA	722 W HAMILTON AVE	48504	66	☐	232-3325		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	DEM	BURTON	CANDACE	1817 ROCKCREEK LANE	48507	66		610-9968		
Inspector	DEM	BYRD	ADRION	702 FATHER DUKETTE BLVD #913	48503	23		293-5158		
ACB	DEM	CALDWELL	DENNIE	1128 BURNT LEAF DR	48439	66		695-3083		
Inspector	DEM	CALDWELL	PAULETTE	2702 LANDON	48504	8		2656374	000271	
Chairperson	DEM	CALHOUN	BRENDA D	1901 CASTLE LN	48504	45		785-4338	036177	
Inspector	DEM	CAMEZ	CLARISS	1107 MASON ST	48503	66		288-4661		
Chairperson	DEM	CAMPBELL	SUZAN	2016 S DEXTER ST	48503	24		313-3780		
ACB	DEM	CAMPBELL	YOLUNDA	6330 DETROIT ST	48458	63		447-4876		
Chairperson	DEM	CARRADINE	ABBEY	1807 BAYBERRY LANE	48507	57		391-1665		
Inspector	DEM	CARTER	LOLA	6417 KAREN DR	48504	1				
Inspector	DEM	CARTER	SHARON	1902 MARLOWE DR	48504	66		907-9533	037298	
Inspector	DEM	CATRON	VERSHAUNDA	1913 LAUREL OAK DR	48507	52		288-3933	037490	
New Inspector	REP	CHAMBLESS	KIMBERLY	12119 HOGAN RD	48436	66		691-6534		
Inspector	DEM	CLARK	ROGER	1218 VINCENT CT #4	48503	40		819-4227		
ACB	DEM	CLARKE	TRYPHENA	6333 ELMS RD	48433	63		293-7752		
Chairperson	DEM	CLEMONS	DAYNA	1193 RIVER VALLEY DR #11	48532	4		4440238	035940	
Inspector	DEM	COBB III	WILLIAM	3423 BRIMFIELD DR.	48503	55		908-7575	037491	
N. B. Worker	DEM	COHOON	BRIANA	3208 LEWIS ST	48506	67		863-3035		
Inspector	DEM	COLEMAN	DEBORAH K	1302 W MOORE ST	48504	52		597-7306		
Inspector	DEM	COLEMAN	FRANCIS	1121 ROSEDALE AVE.	48505	52		265-2710		
Inspector	DEM	COLEMAN	MARILYN	6233 EAGLE RIDGE LANE #102	48505	60		308-8270		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	COLEMAN	MICHAEL	G-4606 BEECHER RD	48532	44	☐	336-6911		
Inspector	DEM	COLEMAN	SHERRY	2422 ELMWOOD DR	48504	66	☐	336-3280	037585	
ACB	DEM	COLEN	GLORIA	1206 BLACKBERRY CREEK	4850	63	☐	407-8733		
Inspector	IND	COLLINS	JALEESA	1413 MILBOURNE AVE	48504	28	☐	259-1277	037337	
Inspector	DEM	COLLINS	LILLIAN	3485 SOUTHGATE DR	48507	40	☐	232-3485	036988	
New Inspector	REP	CONLEY	OLIVER	9322 WOODSIDE TRAIL	48473	66	☐	208-6618		
Inspector	DEM	CONNOR	ELAINE	2954 HELBER ST	48504	51	☐	239-7151		
New Inspector	DEM	COOKS	STEVE	1430 BARRWOOD LN	48507	66	☐	845-6171		
ACB	DEM	COPEDGE	BRIGITT A	1519 LAPEER RD	48503	63	☐	2523976	036949	
County Counting Cls	DEM	COWPER	SUE ELLEN	834 LINCOLN AVE.	48507	65	☐	259-1747	city	
New Inspector	REP	CRAMER	DENNIS	5299 WORCHESTER DR	48473	66	☐	282-5206		
ACB	DEM	CROOM	CLAUDIA	6401 FLEMING RD	48504	63	☐	789-4407		
New Inspector	REP	CROSS	LEONARD G.	4429 PENGELLY RD	48507	10	☐	810-8747		
Inspector	DEM	CUMMINGS	DEBRA R	501 LYON ST #16	48503	66	☐	336-0123	037580	
Inspector	DEM	CURRY	TERENCE	5817 BALDWIN BLVD	48505	19	☐	588-1656	037265	
New Inspector	REP	CURTIS	MICHAEL	5346 W FARRAND RD	48420	66	☐	308-0233		
Chairperson	DEM	DABBS	SONJA	5719 LESLIE DR	48504	41	☐	8203085	035583	
Chairperson	DEM	DANTZLER	FLORA	4495 CALKINS RD APT 231	48532	4	☐	9622018	038188	
Inspector	IND	DARROUGH	LENA	3115 BEGOLE ST	48504	42	☐	814-3323	037104	
New Inspector	DEM	DAVIDSON	ROBERT	13510 S HORRELL RD	48430	66	☐	629-7955		
Inspector	DEM	DAVIS	ANITA	3124 VINEYARD LN	48433	29	☐	720-0446		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	DAVIS	BEVERLY D	3309 BUICK ST. #25	48505	16	☐	399-3464		
Inspector	DEM	DAVIS	CARRIE ANN	3630 CACO	48504	57	☐	280-3994		
New Inspector	DEM	DAVIS	KIRK	2737 NORBERT ST	48504	66	☐	569-4815		
New Inspector	DEM	DAVIS	MARJORIE	1706 WALNUT CREEK DR	48507	66	☐	210-4998		
Chairperson	DEM	DAVIS	STEPHANIE M	740 WILBERFORCE DR	48503	22	☐	235-9264	035915	
Inspector	DEM	DAY	BRENDA	208 E STEWART AVE	48505	16	☐	308-5009		
Inspector	REP	DAY	DANTE	139 EDWIN AVE	48505	13	☐	728-9804		
New Inspector	REP	DEAN	ELIZABETH	2566 NOLEN DR	48504	10	☐	265-9738		
Inspector	DEM	DELMORONE	CHRIS	722 DICKINSON ST	48504	66	☐	767-2733		
New Inspector	DEM	DENT	NICKOLA	347 VICTORY LN		27	☐	877-6708		
ACB	DEM	DICKERSON	LILLIAN	7101 LINDALE DR	48458	63	☐	631-6370	036302	
Chairperson	DEM	DOCKERY	JOANN	831 W ALMA	48505	3	☐	877-6720	037492	
New Inspector	DEM	DOMANSKI	PAMELA	544 BOUTELL DR	48439	66	☐	240-2333		
Supervisor	DEM	DONAHUE	DAVINA	5148 PASADENA AVE	48433	65	☐	4932256	033975	
Chairperson	DEM	DONALD	HATTIE	1905 WINDSOR LANE	48532	57	☐	233-3471	037180	
Inspector	DEM	DOTSON	JERON LEE	5125 SPINNING WHEEL DR	48439	55	☐	882-9009		
New Inspector	DEM	DOUGLAS	CRYSTAL	1642 WAGONWHEEL LN	48439	66	☐	624-2630		
ACB	DEM	DOUMBIA	MELANIE R	437 E DARTMOUTH ST.	48505	63	☐	819-4586		
Inspector	DEM	DOZIER	DIANA J	120 W RANKIN ST	48505	14	☐		001296	
ACB	DEM	DRISKELL	LOYCE	1916 OWEN ST	48503	66	☐	410-8186		
ACB	DEM	EATON	KAREN	2112 SHERFF PL	48503	63	☐	288-9036		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	ECHOLS	RENELL	2414 WINONA AVE	48503	39	☐	210-5333		
Inspector	DEM	ECHOLS	WILLIAM	3621 PENBROOK LANE #15	48507	38	☐	221-3222		
New Inspector	REP	EDELEN	AVION	6635 MAPLEBROOK LN	48507	19	☐	766-7414		
Inspector	DEM	EDWARDS	ANNIE	5806 GLENN AVE	48505	17	☐	265-2562	036982	
Inspector	DEM	EDWARDS	EMILY	1726 WALNUT CREEK	48507	55	☐	610-8199		
New Inspector	DEM	EDWARDS	JIMMIE	3301 HELBER ST	48504	66	☐	620-9669		
Chairperson	DEM	EDWARDS	LEONARD ROY	3337 JENNINGS RD	48504	26	☐	5532164	036987	
Inspector	DEM	EDWARDS	TONYA L	1710 LAUREL OAK DR	48507	55	☐	313-4330		
New Inspector	DEM	ELLIOTT	VETINA	217 JAMIESON ST	48504	66	☐	682-3471		
Chairperson	DEM	ELLISON	STEVEN	3901 BURGESS ST	48504	3	☐	8588047	037318	
Inspector	DEM	ELRIDGE	VELMA	8107 RIVERVIEW DR	48532	14	☐	293-9040		
Inspector	DEM	EMERY	SANDRA	1045 TAHOE TRAIL	48532	8	☐	7329084	037195	
Chairperson	DEM	ENGLISH	LINDA L	4117 BROWNELL BLVD	48504	6	☐	787-2689	036089	
Inspector	DEM	ERNST	JERRY	712 NAFUS ST	48867	68	☐	725-9307		
Chairperson	DEM	ETHERLY	JOHNNIE MAE	1101 WELCH BLVD	48504	41	☐	4583777	036609	
Inspector	DEM	ETHERLY	TAMMY	1850 TEBO ST	48503	50	☐	3471080	034561	
New Inspector	DEM	EUDY	DAVID	10699 INNBROOK DR #506	48168	66	☐	506-4865		
County Counting Cb	DEM	EVANS	ASHLEY	3341 SPARROW	48519	64	☐	766-7414		
Inspector	DEM	EVANS	BRENDA	4602 GREENLAWN DR	48504	45	☐	610-0535	037057	
Chairperson	DEM	EVANS	DAPHNE	6234 CYPRESS DR	48458	11	☐	3080305	036714	
ACB	DEM	EVANS	DERRYL	1009 MAXINE ST	48503	63	☐	348-1122	037212	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	EVANS	SHEILA	3808 PARKWAY CT	48503	49	☐	7432496		
Inspector	DEM	FARRIS	ROBIN R	2110 NEWBERRY	48532	66	☐	4935875	036056	
Inspector	DEM	FEASTER	EDITH E	4517 TRUMBULL DR	48504	12	☐	8208125	000850	
Inspector	DEM	FELLERS	EDWARD	1060 LINCOLN DR	48507	30	☐	6185789	036271	
ACB	DEM	FELTON	JANET	7002 CRANWOOD	48505	63	☐	789-0601	034956	
Chairperson		FELTON	SHERRY	PO BOX 321222	48532	59	☐	7854462	001132	
Chairperson	DEM	FELTON	STEFAN	321 W BALTIMORE BLVD	48505	59	☐	336-6772	036968	
Inspector	DEM	FERGUSON	GERLINE	2913 MALLERY ST	48504	14	☐	766-7414		
New Inspector	DEM	FERGUSON	JOYCE	330 W MARENGO AVE	48505	66	☐	265-3616		
Inspector	DEM	FIRMINGHAM	NORMAN	1928 WEAVER ST.	48506	6	☐	728-5958		
Inspector	DEM	FLEMING	LULA M	518 E MARENGO	48505	5	☐	787-0919	036430	
N. B. Worker	IND	FOSTER	PAUL	1711 SUNCREST DR	48504	67	☐	7421634	034840	
Inspector	DEM	FRANKLIN	DENISE	3900 HAMMERBERG RD APT #338	48507	58	☐	210-5860	037300	
Inspector	DEM	FRANKLIN	JUSTIN	5092 ROCKWOOD DR	48439	20	☐	869-9984		
Inspector	DEM	FRANKLIN	LETICIA	814 KEARSLEY ST APT 406	48503	24	☐	875-0708	037609	
Inspector	DEM	FREDELL	ARTRICE	1932 N VERNON AVE	48506	21	☐	308-2681		
Inspector	DEM	FREEMAN	JOELENA	1817 BAYBERRY LANE	48507	58	☐	259-1561		
New Inspector	DEM	FULLER	SARAH	13101 BLACKBERRY CRK	48519	66	☐	742-9091		
Inspector	DEM	FUNCHES	DEBORAH	3119 BLUE GRASS LANE	48473	51	☐	6352226	037266	
Chairperson	DEM	GADDY	DENISHA	1526 GARLAND ST	48503	16	☐	3716424	037023	
Chairperson	DEM	GADDY	MELODY	1526 GARLAND ST	48503	16	☐	8933316	035169	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	GAINES	JOSEPH R	1801 W GENESEE ST	48504	8	☐	624-1994		
Inspector	DEM	GALE	CALLIE	3201 MILBOURNE DR	48504	11	☐	391-9740		
Inspector	DEM	GARCIA	ARMINDA	1604 E COURT ST		46	☐	513-8463		
Inspector	DEM	GARCIA	PABLO	1807 BAGLEY ST	48504	42	☐	422-3270		
New Inspector	FD	GARCIA	PABLO	1807 BAGLEY ST	48504	66	☐	422-3270		
Inspector	DEM	GARCIA	RAUL	1604 E COURT ST	4850	46	☐	513-8463		
Inspector	DEM	GARCIA	VITA	1807 BAGLEY ST	48504	24	☐	874-3343		
Inspector	DEM	GAYLES	VIVIAN	700 E COURT ST #207	48503	46	☐		027361	
Inspector	DEM	GILBER	CARLOS	1225 BLUEBERRY LN	48507	14	☐	493-2205		
County Counting Cl	DEM	GILBERT	AUTUMN	G3176 COURT ST.	48532	64	☐	766-7414		
Inspector	DEM	GIST	JANICE	4314 CRISSMAN	48505	29	☐	234-1924	037022	
Inspector	DEM	GOODSON	BIRDIE	3071 COURTZ ISLE APT#4	48532	4	☐	238-7628	036753	
New Inspector	DEM	GORDON	TALIA	627 E SECOND ST UNIT #3	48503	46	☐	313-6184		
Inspector	DEM	GRAY	DELL	418 MARENGO AVE	48505	5	☐	787-3107	036977	
Inspector	DEM	GREEN	JASMINE	2017 AITKEN AVE	48503	66	☐	235-7913		
Chairperson	DEM	GREEN	RACHELLE	6380 S GARDEN DR	48458	50	☐	836-4414		
Inspector	DEM	GREEN	WANDA	222 W PULASKI AVE	48505	11	☐	6626606	037493	
Inspector	DEM	GREEN-CANNADAY	ALENE	2259 HUNTER LANE	48529	66	☐	691-1651		
New Inspector	DEM	GRIGLAK	LAURA	510 DELL AVE	48507	66	☐	340-9521		
New Inspector	REP	GUALDONI	FRANCISCO	3535 LIPPINCOTT RD	48446	66	☐	348-7894		
ACB	DEM	HAIRSTON	DORA	4310 PARK FOREST DR	48507	63	☐	2326038	000906	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	HALL	JASMINE	1348 WINDING RIDGE DR APT #28	48439	57	☐	908-0650		
Chairperson	DEM	HAMPTON	CAROLYN	5919 MARJA ST	48505	66	☐	938-2938	036864	
N. B. Worker	DEM	HAMPTON	KENNETH	5919 MARJA ST	48505	67	☐	232-0877	036264	
Chairperson	IND	HANDA	SHERRY	4497 HOWE RD	48439	66	☐	849-0459	037494	
New Inspector	REP	HARDING	LYNNEA	8305 MABLEY HILL RD	48430	6	☐	862-7766		
Chairperson	DEM	HARDY	ANTIONETTE E	3721 MASON ST	48505	66	☐	789-4124	035592	
Chairperson	DEM	HARDY	JOHN E	3721 MASON ST	48505	66	☐	789-4124	036610	
Inspector	DEM	HARE	IRIS J	4316 WARRINGTON DR	48504	8	☐	785-6715	035596	
Inspector	DEM	HARE	TURANDA	402 RIVERBANK DR.	48503	66	☐	2825589	037267	
Chairperson	DEM	HARPER	WILLIAM PAXTON	1909 BASIL LN	48504	23	☐	3945595	035033	
New Inspector	DEM	HARRIS	CAROL	555 MARY ST	48503	66	☐	262-1013		
Inspector	DEM	HARRIS	SARAH	3743 GLOUCESTER ST.	48506	41	☐	743-5633	035645	
ACB	DEM	HART	MARGARET B.	915 E COURT ST #302	48503	63	☐	563-9463		
Inspector	DEM	HENDRICKS	DEDRIC L.	4102 CEDAR BEND DR	48439	61	☐	766-7411		
ACB	DEM	HENDRICKS	SUSAN	10359 HALSEY RD	48439	63	☐	397-8827		
New Inspector	REP	HENRICKSON	SANDRA	6057 E MAPLE AVE	48439	66	☐	407-3797		
Chairperson	DEM	HERRING	PAUL JR	405 UNIVERSITY AVE.	48503	54	☐	423-8960	036500	
County Counting Ctr	DEM	HERRING	PAUL SR	405 UNIVERSITY AVE	48503	64	☐	766-7414		
Inspector	DEM	HICKS	FRED	3610 SUFFOLK CT	48433	14	☐	293-1217		
New Inspector	DEM	HIGH	RENEE	5062 E COOK RD	48439	66	☐	471-1886		
Inspector	DEM	HILL	CHIMENE	2117 STANFORD AVE	48504	29	☐	836-3986	CITY	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	HILL	PATRICIA	323 ALLENDALE PL	48503	1	☐	342-6467		
New Inspector	DEM	HILL	TERRY	2117 DUPONT ST	48504	5	☐	308-6431		
Inspector	DEM	HILL	TERRY	2117 DUPONT ST	48504	66	☐	308-6431		
New Inspector	REP	HILLER	MICHELLE	4440 TILLIE DR	48504	66	☐	391-3819		
ACB	DEM	HOBSON	HELEN	936 BELMONT AVE	48503	63	☐	239-7545	036803	
ACB	DEM	HOCKENHULL	MARIAN	1130 BURLINGTON DR	48503	64	☐	7422462		
ACB	DEM	HOLBROOK	OZIE	306 W PIERSON RD	48505	63	☐	249-0781	001020	
Chairperson	DEM	HOLLAND-AUGUST	SANDRA	3322 WOLCOTT ST	48504	44	☐	9552046	037201	
ACB	DEM	HOLLIMAN	ROSE	1176 DALEVIEW DR.	48532	63	☐	423-7223		
Chairperson	DEM	HOLLOWAY	DEWINTER	1818 W HOBSON AVE	48504	44	☐	787-3708	024413	
Chairperson	DEM	HOLMES	ALFREDIA	3131 PROSPECT ST	48504	49	☐	6245828	034522	
Chairperson	DEM	HOLMES	RAHLENA	6936 YORKSHIRE	48505	37	☐	835-6933	036816	
Chairperson	DEM	HOLT	GLORIA	2209 SWAYZE ST	48503	66	☐	234-7251	001021	
Inspector	DEM	HOWARD	DALE	501 S MEADE ST #3	48503	30	☐	5690125		
Inspector	DEM	HOWARD	ROBERT	7435 TIMBERLEA CT	48532	35	☐	964-1107		
New Inspector	DEM	HOWARD	WANDA	4202 TRUMBULL AVE	48504	66	☐	513-2475		
Inspector	DEM	HOWELL	JAMIKA	627 E REID RD.	48439	66	☐	308-8178	034577	
Inspector	DEM	HOWELL	JERIKA	11963 JUNIPER WAY APT #1236	48439	66	☐	447-5602	036979	
Inspector	DEM	HUDSON	RONALD	1046 E PRINCETON AVE	48505	66	☐	294-2199		
New Inspector	DEM	HUGHES	TIFFANY	1618 PINGREE AVE	48503	62	☐	394-3490		
Inspector	DEM	HUMPHREY	BARBETTE	3718 GLOUCESTER ST	48503	51	☑	394-2730		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	HUNTLEY	CATRINA	2250 S STATE	48817	66	☐		036750	
Chairperson	DEM	HUSSEY	BRENDA E	4021 STERLING ST	48504	4	☐	789-4430	000203	$402.00
New Inspector	66	HUSTON	LAURA L.	12366 ORCHARD WOOD DR	48430	66	☐	614-1425		
Inspector	IND	IRVIN	JABREEA	2152 PARKTON	48458	19	☐	3606431	037496	
ACB	REP	IRWIN	KATHRYN A	4318 PENGELLY RD	48507	63	☐	444-5580		
Chairperson	DEM	JACKSON	JANAZE B	858 SCHAEFER ST	48503	37	☐	2213331		
Inspector	DEM	JACKSON	JOANN	5314 BALDWIN BLVD	48505	13	☐	7896874	036534	
Chairperson	DEM	JACKSON	MILDRED	5120 JUDITH ANN DR	48504	14	☐	789-4983	036404	
Chairperson	DEM	JACKSON	RACINE L	726 E SIXTH ST	48503	66	☐	238-8842	037202	
Inspector	DEM	JACKSON	ROBERT SR	1318 BANBURY PL	48505	3	☐	240-2522	036954	
Inspector	DEM	JACKSON JR.	LEO M	5393 OLD FRANKLIN RD	48439	66	☐	694-0163	036298	
Chairperson	DEM	JEFFERSON	ALFREDA	1526 W HOME AVE	48505	4	☐		036566	
Inspector	IND	JENKINS	CARVETTA	1320 AVON PARK DR 7	48503	13	☐	309-7328	037597	
Inspector	DEM	JENKINS	FRANCES	2318 BARTH ST	48504	33	☐	234-6067	037204	
Chairperson	DEM	JENKINS	NINA	4013 FORESTHILL AVE	48504	39	☐	2656098	036649	
Inspector	DEM	JOHNSON	ANNETTE	2718 TERRACE DR	48507	61	☐	3085383	035148	
Inspector	DEM	JOHNSON	BRENDA	4906 WALNUT SQUARE BLVD	48532	5	☐	7332187		
Inspector	DEM	JOHNSON	FAITH	5484 WESTCHESTER DRIVE	48532	66	☐	814-6145	037289	
Chairperson	DEM	JOHNSON	FREDRICK L	6135 PENWOOD RD	48458	24	☐	785-5502	036132	
Inspector	DEM	JOHNSON	JACQUELINE L	846 LINCOLN AVE	48507	55	☐	8827375	036186	
Inspector	DEM	JOHNSON	JNAI	1017 BLOOR AVE.	48507	59	☐	333-1036		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	JOHNSON	MABLE	5050 JUDITH ANN DR	48504	20	☐	610-6858		
Chairperson	DEM	JOHNSON	MARVA	3211 BEECHER RD	48503	24	☐	8746490	037181	
Inspector	DEM	JOHNSON	SHARAYAL	4158 OAK ST.	48439	3	☐	606-0497	037603	
New Inspector	DEM	JOHNSON	SHONELL	717 PINGREE AVE	48503	66	☐	989-7711		
Inspector	DEM	JOHNSON SR.	JOSEPH	3102 CONCORD ST	48504	22	☐	423-3559	036865	
County Counting Cb	REP	JOHNSON-DEPALMA	ROXANA	3205 CHEYENNE AVE	48507	66	☐	391-6772		
Chairperson	DEM	JONES	ANITA L	3918 PARK FOREST DR	48507	60	☐	7019505	036930	
Inspector	DEM	JONES	CAROLYN	G-4176 BEECHER RD	48532	66	☐	964-8304		
Chairperson	DEM	JONES	CHARLES	812 RUTH ST.	48503	33	☐	9647785		
Inspector	DEM	JONES	COLLEAN	702 FATHER DUKETTE #216E	48503	66	☐	4474632	036768	
County Counting Cb	DEM	JONES	DERRICK	660 SCHAFER ST		64	☐	919-8994		
Inspector	DEM	JONES	DONNA	3913 NORTH ST	48505	13	☐	2066034	000223	
Inspector	DEM	JONES	KENYETTA	3160 CORALENE	48505	15	☐	293-2720	037329	
ACB	DEM	JONES	LAVONZELLA	1802 PARKFRONT DR	48504	63	☐	210-3588	037206	
Inspector	DEM	JONES	MARGIE	5909 GLENN AVE	48505	2	☐	244-9375		
Inspector	DEM	JONES	RAY	822 E STEWART AVE.	48505	29	☐	335-4237		
Inspector	DEM	JONES	SANDRA Y	6101 SALLY CT	48505	13	☐	308-5279	037573	
Inspector	DEM	JONES	TAMMY	4306 INDUSTRIAL AVE	48505	66	☐	874-5621		
ACB	DEM	JONES	VICTOR	1802 PARKFRONT DR	48504	63	☐	875-7848	037604	
Inspector	DEM	JONES-FLEMING	CHERYL	226 W PULASKI ST	48505	26	☐	265-5774	+	
New Inspector	DEM	JORDAN	JACQUELINE	324 W 1ST AVE	48503	66	☐	814-1681		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	JORDAN	JOANN	6301 FLEMING RD	48504	1		789-3177	034580	
New Inspector	REP	JORDAN	JOHN	2548 W SHIAWASSEE RD	48430	66		620-6001		
Chairperson	DEM	KAMBUI	RACHEL LYNN	2522 ORCHARD LANE	48504	12		5693578	036974	
Inspector	DEM	KEAST	ANDREW	723 OAK ST #3	48503	34		766-7414		
Chairperson	DEM	KEITH	LASHEENA	6824 TOURAINE DR	48505	33		814-3719	037323	
New Inspector	REP	KELLER	KATHERINE	4342 HARRIER LANE	48519	66		701-3316		
Chairperson	REP	KENDALL	ANTONIA	1210 N CHEVROLET AVE	48504	55		525-3400		
Chairperson	DEM	KENDALL	KYLE	3749 EVERGREEN PKWY	48503	25		348-2448	035277	
Chairperson	DEM	KENEBREW	SONYA D	3121 BRIARWOOD DR.	48507	42		2935149	034316	
New Inspector	DEM	KINCAID	PEARLIE	3375 N LINDEN RD #322	48532	66		336-7215		
ACB	DEM	KING	BEVERLY	5501 PEAR TREE DR	48519	63		768-3762	036946	
Inspector	DEM	KING	EESHYIA	634 PROSPECT ST	48503	12		929-3839		
Inspector	DEM	KING	TERAE	2714 CLEMENT ST	48504	66		308-9739		
New Inspector	REP	KINGEN	DUSTIN J.	840 ENNEST BLVD	48386	8		982-8917		
Inspector	DEM	KIRKLAND	TERRI	3202 COMANCHE AVE	48507	58		2521250	036726	
Chairperson	DEM	KLAMER	STEPHEN	3112 FLEMING RD	48504	48		732-6742	001351	
New Inspector	REP	KOERBER	THERESA	9136 VASSAR RD	48439	66		265-0250		
New Inspector	REP	KOZLOWSKI	MARY E	13350 HAWK WOODS TRAIL	48430	6		766-7414		
New Inspector	REP	KRUEGER	KELLY	871 BOUTELL DR	48439	66		414-1963		
New Inspector	REP	KRUGER	CLAY	871 BOUTELL DR	48439	4		807-8686		
ACB	DEM	KRYZA	NORA	12008 JEFFERS LANE	48430	63		750-2126		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
ACB	DEM	LANSDOWN	MARY	638 W MARENGO AVE	48505	63	☐	937-7368		
ACB	DEM	LANSDOWN	PATRICIA	638 W MARENGO AVE.	48505	63	☐	308-2065		
ACB	DEM	LAWLER	ALMA	1045 RIVER VALLEY DR	48532	63	☐	5777796	022818	
Supervisor	DEM	LECLAIR	TIM	3709 COMANCHE AVE	48507	66	☐		031795	
Inspector	DEM	LEE	ERNESTINE	2810 E PIERSON RD	48506	66	☐	342-8379		
New Inspector	DEM	LENOX	ANDREW	205 ROCKWELL ST	48430	66	☐	875-7864		
Chairperson	DEM	LEVERETTE	KATHLEEN	2721 CONCORD ST	48504	51	☐	265-1211	037498	
Chairperson	DEM	LIGGINS	LESLEY	1810 GREENBROOK LN	48507	49	☐	874-7109	036779	
New Inspector	DEM	LINDSAY	WARD	13510 S HORRELL CT	48430	66	☐	629-7955		
Inspector	DEM	LINDSEY	LOUVENIA	2030 N AVERILL AVE #5C	48503	49	☐	6601945	037207	
Inspector	DEM	LIVERMON	DEBORAH	2709 THOMAS ST	48504	66	☐	7870561	034319	
Inspector	REP	LONG	DARLINE	3622 WINONA ST	48504	66	☐	4443778	036919	
Chairperson	DEM	LOVE	DEBORAH ANN	5610 JUNIPER LANE	48505	53	☐	2105402	036285	
Inspector	DEM	LOVE	JAMARCO	3800 MASON ST	48505	66	☐	3361280	037499	
Inspector	DEM	LOVE	PATRICIA	2101 STEDRON ST #115	48504	4	☐	308-4645	037500	
Inspector	DEM	LOVING	ANITA	152 MYRTLE AVE	48505	37	☐	787-9828	037064	
Inspector	DEM	LUCAS-LARRISON	GENEVA	1516 WOODSLEA DR	48507	30	☐	234-5013	036711	
Inspector	DEM	LUSTER	GINA	4414 LINDEN CT #8	48532	29	☐	720-0940	037286	
Inspector	DEM	MABRY	ROBERT	6309 KAREN DR	48504	1	☐	787-5829	036736	
New Inspector	REP	MALCOMNSON	ROBERT	2267 N HENDERSON RD	48423	66	☐	247-1897		
N. B. Worker	DEM	MANNINGHAM	JULIONA	5373 WOODLAWN DR	48506	65	☐	8539429	CITY	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	DEM	MANUEL	JEANETTE	1501 COLUMBIA DR	48504	66	☐	814-0690		
New Inspector	REP	MARDEN	LEONARD	4320 N OAK RD	48423	66	☐	964-3025		
N. B. Worker	DEM	MARTIN	CARL	6281 LAKE DR	48840	67	☐	517-4021	CITY	
New Inspector	DEM	MARTIN	CHERYL A.	126 E FLINT PARK BLVD	48505	8	☐	810-5135		
Chairperson	DEM	MARTIN	JAN Y	721 E 12TH ST	48503	40	☐	2825639	031993	
Inspector	DEM	MASON	SONYA	121 W BISHOP AVE	48505	12	☐	766-7414		
New Inspector	REP	MAST	TRUMAN	519 WHEELING RD	48444	66	☐	614-4845		
Inspector	DEM	MATTHEWS	TRACY F	1905 MCPHAIL ST	48503	50	☐	9081660	035691	
Chairperson	DEM	MAYO	CAROLYN	1309 HIBISCUS ST.	48458	8	☐	8749832	037213	
Inspector	DEM	MAZUREK	CAITLIN	6038 MAPLE TRL	48439	45	☐	514-9804		
ACB	DEM	MCCHRISTIAN	ANGIE	1518 WISCONSIN AVE	48506	63	☐	275-0366	037662	
New Inspector	REP	MCCLINTCK	JEFFREY	6070 N SEYMOUR RD	48433	66	☐	501-0789		
New Inspector	DEM	MCCLINTOCK	STEPHANIE	6070 N SEYMOUR AVE	48433	66	☐	723-6329		
New Inspector	DEM	MCCLINTON	CLAIRE	129 W JAMIESON ST	48505	66	☐	813-1852		
Inspector	DEM	MCGOWAN	DOLORES	3045 FALCON DR	48519	80	☐	7424961	034778	
N. B. Worker	DEM	MCINTYRE	BENJAMIN	3730 LAPEER RD. LOT 129	48060	67	☐	9666213	036905	
N. B. Worker	DEM	MCINTYRE	KAILEY	3730 LAPEER RD LOT 129	48060	67	☐	2478005	037164	
N. B. Worker	DEM	MCINTYRE	NEHEMIAH	2486 E MT. MORRIS RD	48458	67	☐	346-6618	037231	
N. B. Worker	IND	MCKEEVER	CYNTHIA	1075 TERRY AVE	48458	67	☐	458-3946	034760	
New Inspector	DEM	MCKENZE	GEORGE	3910 WINONA ST	48504	2	☐	525-5003		
Chairperson	DEM	MCKENZE	VICTORIA	3910 WINONA AVE	48504	2	☐	525-5003		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
New Inspector	REP	MCLAUGHLIN	BRENDA	5305 GREENLEAF DR	48473	66	☐	287-7791		
Inspector	DEM	MCLAURIN-BEY	BARBARA	2324 LAPEER RD. #307	48503	50	☐	333-7888	037214	
Inspector	DEM	MCQUEEN	ANDRE	1050 E GENESEE ST.	48505	13	☐	529-6880		
Inspector	DEM	MCQUILLER	BRIDGET	1235 W DOWNEY AVE	48505	16	☐	333-1080		
Inspector	REP	MCQUILLER	JAMIAH ANGEL	1235 W DOWNEY AVE	48505	66	☐	333-1080		
Inspector	DEM	MICKENS	BRIAN	3201 PENCOMBE PL	48503	54	☐	422-9120		
Inspector	DEM	MILLER	CAROLINE	3810 TWILIGHT DR.	48506	66	☐	280-0932	037327	
Chairperson	DEM	MILOW JR.	FRED	1002 E AUSTIN AVE.	48505	6	☐	787-2197	036268	
Inspector	DEM	MITCHELL	WILLIE DORIS	5020 N JENNINGS RD	48504	5	☐	789-4632	036229	
New Inspector	DEM	MITCHNER	LISA	2014 BURR BLVD	48503	66	☐	394-1907		
Inspector	DEM	MOHAMED	RASHA	1177 HEATHERWOODE CT	48532	47	☐	230-1127		
Inspector	DEM	MOORE	EARNESTINE	700 E COURT ST #122	48503		☐	2657804	036621	
Chairperson	DEM	MOORE	ELEXIS	PO BOX 5073	48503	46	☐		036624	
Inspector	DEM	MOORE	KATHY	5908 LESLIE DR	48504	8	☐	875-9212	037183	
Chairperson		MOORE	MICHEL	2438 MISSOURI AVE	48506	23	☐	2394642	036564	
Chairperson	DEM	MOORE	NATHANIEL	1104 CARPENTER RD	48505	4	☐	620-5780		
Inspector	DEM	MOORE	TOWANNA	2001 N CENTER RD #212	48506	66	☐	2071647	036910	
New Inspector	RD	MORAN	CARILEE	10325 DENTON CREEK DR	48430	66	☐	730-4744		
New Inspector	DEM	MORAN	CARILEE	10325 DENTON CREEK DR	48430	66	☐	734-7304		
New Inspector	DEM	MORELAND	TINA	737 E ALMA AVE	48503	66	☐	908-3591		
Chairperson	DEM	MORGAN	KYRIE	722 MORGAN DR	48473	19	☐	9902437	035473	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	L	MORSE	KEVIN	5350 KELLY RD	48458	66	☐	444-2211		
Inspector	DEM	MORSI	ABRAR	4473 BRENDENSHIRE CT	48532	24	☐	394-7469		
Inspector	DEM	MOSLEY	BERNETTA	1309 LILLIAN DR	48505	66	☐	936-9372	036963	
ACB	DEM	MUNROE-YOUNIS	MONA	2721 INDIAN BOW TRAIL	48507	63	☐	845-4633	CITY	
Inspector	DEM	MURCHISON	MALCOLM	8216 BURKESHIRE CIRCLE #107	48473	23	☐	908-3583		
New Inspector	REP	NANCE	CAROLYN	1347 LAKE VALLEY DR	48430	66	☐	965-3482		
New Inspector	REP	NANCE	CAROLYN	1347 LAKE VALLEY DR	48430	1	☐	965-3482		
Inspector	DEM	NAPPIER	IDA M	1921 CHERRYLAWN DR	48504	11	☐	7858029	035944	
Inspector	DEM	NASH	LYNETTE	1020 PRINCETON AVE	48505	27	☐	5223776		
Inspector	DEM	NASH	VITA	5281 BERMUDA LANE	48505	15	☐	3081738	037290	
County Counting Cb	DEM	NELSON	MARGARET	2025 MCAVOY ST	48503	64	☐	787-7224	034782	
Supervisor	REP	NEUMANN	KATHRYN	4369 MT. VERNON PASS	48473	66	☐	845-7569	CITY	
Inspector	DEM	NICHOLSON	ALMEDA KAY	5817 BALDWIN BLVD	48505	23	☐	8827098	000320	
Inspector	DEM	ODUM	ARNENIA	1196 CREEK VIEW CT	48509	20	☐	9197191	036769	
New Inspector	DEM	OLLIE	QUANDREL	3832 PARK FOREST DR	48507	66	☐	610-4745		
New Inspector	DEM	OLLIE	SHANISE	3832 PARKFOREST DR	48507	66	☐	763-4397		
Inspector	DEM	ONEAL	KARLOUS	1117 BURNT LEAF LN	48439	29	☐	694-4798	037356	
New Inspector	REP	ONFRY	DAVID	11415 BRECKENRIDGE DR	48423	66	☐	274-3961		
New Inspector	DEM	OPER	ANNE	544 BURROUGHS AVE		66	☐	814-8468		
County Counting Cb	REP	OTLOSKI	JENNIFER	2529 N CHEVROLET AVE	48504	64	☐		COF	
New Inspector	REP	OWEN	KRISTEN	3001 WESTWOOD PKWY	48503	66	☐	735-0111		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	OWENS	TAMMARA	1701 CARMANBROOK PKWY	48507	56	☐	766-7414		
Inspector	DEM	PALMER	HAROLD	2923 MCCLURE AVE #2	48506	22	☐	240-0009		
New Inspector	REP	PALMGREN	RONALD	4449 SUNSET BLVD	48439	15	☐	245-2869		
New Inspector	REP	PANIGI	ROBIN	2381 MEADOWCROFT DR	48519	15	☐	938-0016		
New Inspector	REP	PARILLO	TAMMERA	3010 HAWTHORNE DR	48503	19	☐	964-9239		
Inspector	REP	PARKER	MICAH L	6076 PALMETTO DR	48458	66	☐	259-0892		
New Inspector	DEM	PARKS	REGINALD	315 W MCCLELLAN ST	48505	66	☐	447-3777		
Inspector	DEM	PARSON	NORMA	1146 HEATHERWOODE RD	48532	53	☐	767-5762	037185	
Inspector	DEM	PASCAL	SHARON	1505 COLUMBIA DR	48503	30	☐	5770036	036518	
New Inspector	DEM	PATRICK	VIVIAN	925 MILLBROOK DR APT D	48503	66	☐	407-2476		
Inspector	DEM	PATRICK-KEYES	CHARLOTTE	4224 COMSTOCK AVE		42	☐	336-8577	037241	
New Inspector	DEM	PAYNE	EDWARD	5532 OLD FRANKLIN RD	4843	66	☐	429-0840		
ACB	DEM	PERRY	CHELSEA	3814 KENT ST	48503	63	☐	744-9431		
ACB	DEM	PERRY	COREEY	3814 KENT	48503	63	☐	7449431	035292	
Inspector	DEM	PERRY	SHAWLENE	910 BROOKHOLLOW CT 1-A	48503	40	☐	232-6098	035595	
Chairperson	DEM	PERRY-JOHNSON	ANNA	1184 RIVER VALLEY DR #6	48532	66	☐	2496964	034502	
Inspector	DEM	PERTEET	ANNIE	1807 WOODLIN DR	48504	12	☐	875-2894		
New Inspector	DEM	PETER	ELLEN	320 WINDY BLUFF	48433	66	☐	487-0254		
Inspector	DEM	PETERS	DIANE MARIE	5310 CEDAR SHORES BLVD APT #101	48504	61	☐	9641948	000344	
Chairperson	DEM	PETERSON	GERALDINE	1206 WHITFIELD DR	48439	60	☐	695-5020	037027	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	PETERSON	KIM	701 COLUMBIA DR	48503	35	☐	422-9944		
Chairperson	DEM	PHILPOT	SANDRA	2835 MALLERY ST	48504	33	☐	235-6575	037234	
Chairperson	DEM	PICKETT	CYNTHIA	951 E ATHERTON RD	48507	50	☐	5132619	000607	
Vice-Training	DEM	POLLARD	PHYLLIS	G-4493 FENTON RD LOT 43	48529	58	☐	309-7006	037227	
Chairperson	DEM	POLLARD	RITRESHIA	G4493 FENTON RD LOT #43	48529	38	☐	3083169		
ACB	DEM	POPLAR	JACQUELINE	3921 WINONA ST.	48504	63	☐	785-2014		
New Inspector	DEM	POSEY	TINA	1918 WOODSLEA DR #7	48507	66	☐	938-9935		
Chairperson	DEM	POUNCIL	FLOYD	3109 MALLERY ST	48504	66	☐	9665529	034784	
New Inspector	REP	PRAY	PATRICK	1060 DOROTHY ST	48458	66	☐	618-7891		
Chairperson	IND	PREVO	JANA	2836 BEGOLE ST	48504	66	☐	2382919	037100	
Inspector	DEM	PREVO	NAKIA JAVAN	2836 BEGOLE ST	48504	66	☐	2382919	036860	
ACB	DEM	RANDALL	LORENE	2118 DWIGHT AVE	48503	83	☐	767-7154	037502	
Inspector	DEM	RAWLS	ALICE LEE	3136 WAGON TRL	48507	44	☐	9640164	035925	
Chairperson	DEM	RAY	LISA	2275 BATES RD	48458	8	☐	4477088	035598	
Chairperson	DEM	REDMOND	GERALDINE	3800 RICHFIELD RD #408	48506	26	☐	4495842	035152	
Chairperson	IND	REED	MONICA	PO BOX 320383	48532	46	☐	516-0197	037305	
Inspector	DEM	REED	TYNISHA	4321 MARTIN LUTHER KING DR.	48505	59	☐	787-1614		
Inspector	DEM	REEVES	IMANI	3722 GREENBROOK LN	48507	66	☐	449-1924		
Inspector	DEM	RHYMES	LESSIE	3409 LAS PALMAS CT	48504	40	☐	7333404	036110	
Inspector	DEM	RICHARD	DAMITA	755 E GRAND BLANC RD BLD-10 APT 4	48439	33	☐	701-9726		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	RICHARDSON	DEBORAH	816 E WELLINGTON AVE	48503	45	☐	210-8919	037503	
ACB	DEM	RICHARDSON	JAMES	915 COURT ST #403	48503	66	☐	348-5331		
ACB	DEM	RICHARDSON	MARY JANE	915 E COURT ST. #402	48502	63	☐	348-5332		
New Inspector	REP	RICHARDSON	SUSAN	508 W PARK VW	48420	16	☐	410-6166		
New Inspector	DEM	RIGGIO	SARA	11163 W PIERSON RD	48433	66	☐	620-5716		
Chairperson	DEM	ROBERTS	DEBORAH	5179 WOODHAVEN DR.	48504	31	☐	820-4831		
Inspector	DEM	ROBERTSON	AREANNA	1904 W DARTMOUTH ST	48504	31	☐	239-6255		
Inspector	DEM	ROBERTSON	SHARON R	3722 GREENBROOK LANE	48507	12	☐	624-7857		
Inspector	DEM	ROLAND	ROBIN	802 E ATHERTON RD.	48507	66	☐	259-6706	037607	
County Counting Ct	DEM	ROSS	BELINDA GAIL	2106 STONEYBROOK CT	48507	65	☐	250-1318		
Inspector	DEM	ROSS	JETHENE	606 LELAND ST	48433	52	☐	8674547	037215	
ACB	DEM	RUSHING	ANNA	9156 SUNCREST DR.	48504	63	☐	444-4336		
New Inspector	REP	SALACUSE	CYNTHIA	601 FRANK ST	48504	66	☐	810-7306		
New Inspector	DEM	SAMUELS-LARRY	SUNNI T	5185 NORTHRUP RD	48439	66	☐	423-4229		
Inspector	DEM	SASSER	BRENDA	702 FATHER DUKETTE BLVD #913	48503	12	☐	917-8883		
Inspector	DEM	SAUCEDA	AURORA	3609 DALE AVE	48506	33	☐	744-4716		
Chairperson	DEM	SAUNDERS	GILBERT	3909 CLAIRMONT ST.	48532	15	☑	3080651	036660	
Inspector	DEM	SCALES-SMITH	EASTER	401 W ELDRIDGE	48505	19	☐	6180174	037028	
New Inspector	DEM	SCHEITLER	SARAH	510 CRAPO ST	48503	66	☐	210-4988		
N. B. Worker	REP	SCHILLER	ADELAIDE	2462 BLARNEY DR	48423	64	☐	965-1801	CITY	
Inspector	DEM	SCHULER	SHIRLEY ANN	3228 PROSPECT ST	48504	66	☐	232-8861	037333	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	SCHWARTZ	ANGELA	2810 NORBERT ST	48504	19	☐	313-3008		
Chairperson	DEM	SCOTT	JENNIFER D	PO BOX	48437	13	☐	3993171	001318	
New Inspector	DEM	SCRUGGS	CLIFFORD III	3922 W COURT ST.	48532	28	☐	766-7414		
Inspector	DEM	SETTLE	MARLIS	19201 BLACKBERRY CREEK	48519	35	☐	836-4189		
ACB	REP	SEVIGNY	JENNIFER	2255 BALD EAGLE LAKE RD	48462	63	☐			
Inspector	DEM	SHELL	PATRICIA	3124 MALLERY ST	48504	6	☐	908-8036	037334	
Inspector	DEM	SHELTON	GERRY D	1109 BURLINGTON DR	48503	49	☐	7436791	034925	
Inspector	DEM	SHELTON	MARY	1109 BURLINGTON	48503	49	☐	7337674	036728	
Inspector	DEM	SHINN	THEODORE	3412 HAWTHORNE DR	48503	12	☐	712-6051		
Inspector	DEM	SHULTERS	CHRISTA	2029 GERARD ST	48507	15	☐	471-8635		
Chairperson	DEM	SHUMPERT	DANETTE	3095 LINDEN RD #517	48507	21	☐	2406862	036991	
Inspector	DEM	SIMMONS	DANA	2402 CLEMENT ST	48504	27	☐	423-1934		
ACB	DEM	SIMPKINS	ESTELLA	3716 PROVIDENCE ST.	48503	63	☐	620-9460	037217	
Inspector	DEM	SIMS	VALDENE	402 E GENESEE ST	48505	14	☐	239-7436	036766	
Inspector	DEM	SKINNER	WYVONNE MARIE	333 E MARENGO AVE	48505	66	☐	787-1328	036958	
Inspector	DEM	SMART	SHIRLEY	3206 KINGS LANE	48529	66	☐	9190849	035810	
New Inspector	DEM	SMITH	DANA	2402 CLEMENT ST	48504	4	☐	423-1934		
Inspector	DEM	SMITH	DIAMOND	2705 MALLERY ST	48504	32	☐	336-7518		
Inspector	DEM	SMITH	IMARI	2016 S DEXTER ST	48503	37	☐	313-3480		
Inspector	DEM	SMITH	KATHY L	3220 BARTH ST	48503	61	☐	820-7005		
New Inspector	DEM	SMITH	STEFFON C	1314 LILLAN DR	48505	66	☐	882-7954		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	SOBRINO	ELENA	501 AVON ST.	48503	46	☐	813-3035		
New Inspector	REP	SORENSEN	LAT	250 STAWBERRY RDG	48458	3	☐	908-8381		
Inspector	DEM	SPEARMAN-NORRIS	CRYSTAL	6178 EAST KNOLL DR.	48439	66	☐	3914537	037587	
Inspector	DEM	SPEARS-MARVE	BERNICE	6111 HARWOOD DR	48458	66	☐	787-7356	036810	
Chairperson	DEM	SPERLA	ETHAN	609 E MAIN ST	48433	61	☐	247-9166		
Inspector	DEM	SPICER-JOHNSON	SHANTARA	729 WESTCOMBE	48503	66	☐	766-7414		
Inspector	DEM	SPRATT	FLORENCE	830 E GILLESPIE AVE	48505	15	☐	3081748	036179	
Inspector	DEM	STAMPS	ANGELA	2713 E PIERSON RD	48506	66	☐		037099	
New Inspector	REP	STEMPER	SUSAN	11199 FRANCES RD	48433	66	☐	241-1123		
Inspector	DEM	STEPHENS	SHIRLEY D	925 COTTAGE GROVE AVE	48504	59	☐	3082971	035458	
Chairperson	DEM	STITT	SHIRLEY L	506 E DEWEY ST	48505	66	☐	2657727	035765	
Chairperson	DEM	STOCKMAN-HOPKINS	TWYLA	326 E MARENGO AVE	48505	5	☐	4236198	036533	
Inspector	DEM	STRONG-MITCHELL	RUTHIE	1835 SEYMOUR AVE	48503	57	☐	234-0084		
New Inspector	DEM	STROZIER	TIHNA	1807 BAYBERRY LN	48507	58	☐	962-7177		
Inspector	DEM	SURLES	STEPHANIE	2648 PINETREE DR	48507	10	☐	715-1050		
New Inspector	DEM	SWANIGAN	SYLVIA	PO BOX 311164	48531	66	☐	347-2359		
Chairperson	DEM	SWILLEY-GREEN	CLARISSA	617 W FOSS AVE	48505	66	☐	938-9414	037593	
New Inspector	REP	SYLVESTER	VALERIE	16159 RIVER RIDGE TRL	48451	66	☐	516-4279		
Inspector	DEM	SYMONS	JEFFREY	9348 HILLSIDE CT	48423	41	☐	813-2857	035942	
Inspector	DEM	TABBAH	MARIAM	673 BENDING BRK	48433	45	☐	962-4554		
Inspector	DEM	TAYLOR	DAWANA	1308 MCINTOSH DR	48503	31	☐	336-7786		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	TAYLOR	MICHAEL	3402 KINGS LANE	48529	47	☐	4936557	037066	
New Inspector	REP	TAYLOR	SCOTT	2419 ILLINOIS AVE	48507	66	☐	249-1674		
Chairperson	DEM	TAYLOR	SHELLIE	517 STOCKDALE ST	48503	28	☐	7307577	036182	
Inspector	DEM	TERRY	LEONARD	420 PINGREE	48503	66	☐	3479131	037010	
Chairperson	DEM	TERRY	LEWENNA	124 E MARENGO AVE.	48505	43	☐	874-0880	036072	
Inspector	DEM	THOMAS	BARBARA	3235 PROSPECT	48504	53	☐	691-7734	037218	
Inspector	DEM	THOMAS	DELORES	1528 GARLAND ST	48503	16	☐	8757136	037032	
Inspector	DEM	THOMAS	SHIRLEY A	1712 W MCCLEELLAN ST	48504	66	☐	767-8799		
Chairperson	DEM	THOMAS	TAMMY J.	4418 BILLINGS ST	48505	15	☐	785-0160	037187	
New Inspector	DEM	THOMPSON	JAWANA	2002 ECKLEY AVE	48503	66	☐	248-8028		
Inspector	U	THOMPSON	MARTITA	1429 LYON ST	48503	66	☐	479-7115		
Inspector	DEM	THOMPSON	NANCY J.	2201 KANSAS ST.	48506	19	☐	235-1543		
Chairperson	DEM	THOMPSON	SHELLEY	8145 BRISTOL RD	48473	27	☐	618-3172		
Chairperson	DEM	THRELKELD	ROCHELLE E	214 E PULASKI AVE	48505	66	☐	789-2686	035051	
Inspector	DEM	THRELKELD	TONEDIA A	4020 WINONA ST	48504	66	☐	789-5660	000930	
County Counting Cb	DEM	THROWER	CARLA	501 E YORK AVE	48505	64	☐	5254130	000432	
Inspector	DEM	THROWER	CHANTA	2637 BROWNELL BLVD	48504	66	☐	309-7078	036280	
Chairperson	DEM	TIBBITTS	LAREE	1301 MCINTOSH	48503	66	☐	820-1563	037229	
Inspector	DEM	TOLBERT	DOROTHY	1413 MILBOURNE AVE	48504	66	☐	259-1277		
Inspector	DEM	TOLES	VALERIE	1214 CRIIMSON ROSE DR	48458	13	☐	293-5350		
Inspector	DEM	TOMLIN	JENNA N	618 MCKEIGHAN AVE	48507	66	☐	429-9415		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Chairperson	DEM	TOOMBS	TOREA	3011 BARTH ST.	48504	19	☐	3367392	036722	
ACB	DEM	TOWNSEND	JONNIE FAYE	3022 BARTH ST	48504	63	☐	936-9836	036975	
Inspector	DEM	TOWNSEND	ROBERT	PO BOX 3220	48503	57	☐	347-4172		
Inspector	DEM	TRANNON	BEVERLY ANN	801 W DARTMOUTH ST.	48504	26	☐	234-7018		
Inspector	DEM	TRENT	CARRIE	119 E GENESEE ST.	48505	26	☐	964-4481		
Inspector	DEM	TRUSS	MATTIE	PO BOX 1393	48501	66	☐	3365936	036284	
Inspector	DEM	TUGGLE	MARGRET	4002 W KEARSLEY ST.	48532	39	☐	820-4220		
Inspector	DEM	TURNER	KIMBERLY	5106 WOODHAVEN DR	48504	44	☐	820-0178		
Inspector	DEM	TURNER	LINDA	3710 FOXCROFT CIRCLE	48503	52	☐	743-0425	036723	
Inspector	DEM	TURNER	SHEENA	6217 EAGLE RIDGE LANE #201	48505	42	☐	333-3129	037071	
Inspector	DEM	TURNER	VIVIAN E	523 W GRACELAWN AVE	48505	28	☐	238-6020	000441	
ACB	DEM	ULLRICH	DONNA	905 E COURT ST. #403	48503	63	☐	730-1590		
Chairperson	DEM	UMPHRYES	TERRIE	1127 W KURTZ AVE	48505	43	☐	210-8499	037219	
Chairperson	DEM	VANDERSON	WYVETTE	630 E BAKER AVE	48505	48	☐	233-3362	037575	
New Inspector	DEM	VANKUREN	MISTY	5046 KENDALL DR	48509	66	☐	553-2405		
New Inspector	DEM	VOSS	AIDEN	727 WASHINGTON ST	49686	66	☐	620-3317		
ACB	DEM	WADE	DARICE L	PO BOX 5415	48505	63	☐	2591635	034604	
Inspector	DEM	WAHLFIELD	MARK	749 MARLENE ST	49321	51	☐	801-5082		
Chairperson	DEM	WALKER	DON E	2101 STEDRON #353	48504	60	☐		037336	
Inspector	DEM	WALKER	ESTELLA	1814 E COURT ST	48503	61	☐		037505	
Inspector	DEM	WALKER	FATIMA	2920 CONCORD ST	48504	65	☐	610-5066		

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	WALKER	KAREN	1373 BRIARROSE DR	48458		☐	969-1066		
Inspector	DEM	WALKER	SONIETTA	1846 BARKS	48503	66	☐		037397	
Chairperson	DEM	WALLING	CARRIE	806 KENSINGTON AVE	48503	56	☐	247-3408		
Chairperson	DEM	WASHINGTON	CAROLYN	7208 CEDAR BEND DR	48439	11	☐	308-8587		
Inspector	REP	WASKOVIAK	ROBERT JR	456 COMMON WEALTH AVE	48503	66	☐	908-3459		
Chairperson	DEM	WATCHORN	ANDREW	918 E KEARSLEY ST	48503	48	☐	804-6833		
ACB	DEM	WATCHORN	KATHLEEN	915 E COURT ST. #206	48503	63	☐	313-3195		
Inspector	DEM	WATSON	DELORIS	2818 CHEROKEE AVE	48507	45	☐	936-1734	037105	
Inspector	DEM	WATSON	JUANITA	2250 TOBY BETH DR	48505	13	☐	333-3952	037576	
New Inspector	DEM	WATSON	RAMONA	2205 CEDAR BEND DR	48439	66	☐	875-6419		
New Inspector	DEM	WEATHERLY-YOUNG	MINNIE	621 W PASADENA AVE	48505	27	☐	789-6265		
Supervisor	DEM	WEILER	KATHY	1297 HEATHERWOOD DR #3B	48439	65	☐	766-7255	CITY	
Inspector	DEM	WELCH	CONSTANCE	2135 PARKTON RD	48458	66	☐	787-0715		
Inspector	DEM	WELLS	KENYATTA	418 W MCCLELLAN	48505	66	☐	309-4872	037310	
New Inspector	REP	WERTH	JANETTE	6231 EAST HILL RD	48439	66	☐	804-1489		
Inspector	DEM	WESLEY	BARBARA	1717 WOODSLEA DR	48507	66	☐	275-5840		
Inspector	DEM	WESLEY	ROBERT	1655 NEOME DR.	48503	66	☐	938-9994		
Inspector	DEM	WESTON	TYAIJIA	855 GREEN RD #307	48198	1	☐	964-2366		
ACB	DEM	WHALEY	MARY	475 REMINGTON CT	48430	63	☐	813-8366		
Chairperson	DEM	WHEELER	ALISHA	5511 GRANVILLE AVE	48505	5	☐		036928	
Inspector	DEM	WHEELER	MAY F	313 W COURT ST A132	48502	44	☐	4232498	037343	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount
Inspector	DEM	WHITE	AYSIAH	3410 LAS PALMAS CT	48504	59	☐	625-5814		
Inspector	DEM	WHITE-BECOATS	SANDRA A	1861 SPRINGFIELD ST	48503	30	☐	7437242	035689	
New Inspector	REP	WHITTAKER	WESLEY	607 FENTON COMMONS LN	48430	66	☐	397-7466		
Inspector	DEM	WILLIAMS	ALAN	410 LIPPINCOTT BVLD C31	48503	52	☐	7018525	036920	
New Inspector	DEM	WILLIAMS	TRACY	4730 CANTERBURY LN	48504	66	☐	766-7414		
New Inspector	DEM	WILLIAMS	YVONNE	3821 WHITTIER AVE	48506	66	☐	296-3833		
Inspector	DEM	WILLIAMSON	EDDIE	2016 CRESTBROOK LANE	48507	55	☐	610-9891		
Inspector	DEM	WILSON	JOYCE	5006 LAURENE ST	48505	6	☐	458-3970		
Chairperson	DEM	WINGATE	TONYA E	3131 PROSPECT ST	48504	66	☐	406-7790	037034	
New Inspector	DEM	WOODRUFF	KAYLA	2007 HILLS ST	48503	66	☐	247-9513		
Inspector	DEM	WOODS	BEVERLY	4116 COMSTOCK AVE	48504	6	☐			
Inspector	DEM	WOODS	BRANDON	4116 COMSTOCK AVE	48504	6	☐	986-4158	037221	
New Inspector	DEM	WRIGHT	BARBARA	2021 CHELAN ST	48503	55	☐	820-8463		
Inspector	DEM	WRIGHT	ILEAN	2844 BERKLEY	48504	54	☐	447-4923	037359	
Chairperson	DEM	WRIGHT	KINEA	2528 ALTOONA ST.	48504	35	☐	919-0472		
New Inspector	DEM	WRIGHT	WILLIE	4110 DONNELLY ST	48504	66	☐	919-0472		
ACB	DEM	YOUNG	CATHY	14046 NEFF RD	48420	63	☐			
Inspector	DEM	YOUNG	DONDRE	1226 GILBERT ST	48532	66	☐	875-3523		
Inspector	DEM	YOUNG	ROSE	6801 DANA LN	48504	3	☐	262-1729		
Inspector	DEM	YOUNGER	MAGNOLIA	6932 YORKSHIRE BLVD	48505	28	☐	308-2745	001325	

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Job Type	Party	Last Name	First Name	Worker Address	Zip Code	PCT	Meeting	Phone	Emp Code	Amount

Total Election Workers: 562 **Total Amount:** $402.00

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Exhibit B

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First Name	Last Name	Full Name	Phone	Email
Donald	Potter	Donald Potter	8105696624	00awfulkinawful@gmail.com
Alan	Pierce	Alan Pierce	(260)-740-2926	2021awp@gmail.com
Annie	Visner	Annie Visner	2482858164	amarobichaud@gmail.com
Angela	Green-Izzo	Angela Green-Izzo	7274525300	angelagreenizzo@gmail.com
Ann	Spreeman	Ann Spreeman	8106242147	arrn49@aol.com
Brian	Mcelhone	Brian Mcelhone	2487614888	bmcelhone@outlook.com
Rebecca	LaVell	Rebecca LaVell	8106568272	booboolrb@aol.com
Brent	Leavitt	Brent Leavitt	2488285671	brentleavitt64@gmail.com
Herb	Schollenberger	Herb Schollenberger	8108355680	Bud711@live.com
Debra	Scheeler	Debra Scheeler	8102800477	debrajean9650@yahoo.com
Desiree	Londrigan	Desiree Londrigan	8106250860	Deslondrigan@yahoo.com
Doris	Skinner	Doris Skinner	8109228408	dorieskinner@gmail.com
Leo	Skinner	Leo Skinner	8103470985	dorieskinner@gmail.com
Amanda	Reddy	Amanda Reddy	8102236565	dreamernowdoer@gmail.com
Deborah	Selves	Deborah Selves	8105164056	dselves123@gmail.com
Darrell	Schultz	Darrell Schultz	5863370702	emscowboy1@hotmail.com
Brittany	Carsten	Brittany Carsten	8108693973	freedomfighter9110@protonmail.com
Michele	Sheeran	Michele Sheeran	2482319051	gotellumberto@gmail.com
Grace	Martin	Grace Martin	8106911719	grannyfullofgrace@yahoo.com
Julie	Bade	Julie Bade	8105169331	jbade32@gmail.com
John	Berzsenyi	John Berzsenyi	2484679476	jdberzsenyi@yahoo.com
Jeananne	Fox	Jeananne Fox	8109643380	jjhhbk@aol.com
John	Carr	John Carr	2488945233	johncarrquick@gmail.com
Judith	Neblock	Judith Neblock	9898231264	judyneblock@reagon.com
Julie	Radford	Julie Radford	8104479483	juliemathnerd@gmail.com
Julie	Lynch	Julie Lynch	8102877108	julierlynch3@gmail.com
Lat	Sorensen	Lat Sorensen	8109088381	latmankl@live.com
Anna	Pierce	Anna Pierce		libertyjanegirl@ymail.com
Lilah	Butler	Lilah Butler	8103447437	lilah322@gmail.com
Deborah	Johnson	Deborah Johnson	8102401959	llj466@comcast.net
Jennifer	Malone	Jennifer Malone	8109863700	malonejennifer96@gmail.com
Margie	Schaar	Margie Schaar	7347714423	margieschaar@gmail.com
Melissa	Birmingham	Melissa Birmingham	8103478067	mbirmi2007@gmail.com
Dennis	Morton	Dennis Morton	8108347000	mortondennis114@gmail.com
Myles	Waybrant	Myles Waybrant	2482499956	mwaybrant@xtrmauto.com
Nancy	Barlage	Nancy Barlage	9897211944	nbarlage@live.com
Robert	Hunter	Robert Hunter	8102802576	pappagrumpy1@aol.com
Prudence	Adam	Prudence Adam	8106293982	prudyadam@gmail.com
Robin	Finnie	Robin Finnie	3046157456	rbnsons313@yahoo.com
Robert	Waskoviak	Robert Waskoviak	8109083459	robwaskoviak@gmail.com
Renee	Lafata-Williams	Renee Lafata-Williams	8138923816	rslafata64@gmail.com
Karen	Wakeman-Sleva	Karen Wakeman-Sleva	8103447127	slevakl1@gmail.com
Steven	Dodge	Steven Dodge	8108458839	stevendodge@msn.com
Thomas	Root	Thomas Root	8106594213	tdakmc@sbcglobal.net
Tracy	Kedovary	Tracy Kedovary	8109315612	tlkedovary@mail.com
Trisha	Nappi	Trisha Nappi	8105775430	tnappi01@yahoo.com
Thomas	VanWormer	Thomas VanWormer	2316688230	tvanwormer@charter.net
Wladimir	Foo	Wladimir Foo	8104108477	wjcfoo@gmail.com
Julie	Bade	Julie Bade	8105169331	jbade32@gmail.com
Anna	Glasstetter	Anna Glasstetter	(810)-336-5610	annadutcher@gmail.com

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Mary	Cunningham	Mary Cunningham	(810)-577-9604	JustCallMaryC@gmail.com
Laura	Brown	Laura Brown	(248)-379-2780	lsbrown09@gmail.com
Marilyn	Alvey	Marilyn Alvey	(810)-542-0386	maralvey@yahoo.com
Tracy	Holcomb	Tracy Holcomb	(810)-252-7735	tlholcomb1@gmail.com
Angela	Rowe	Angela Rowe	2483424784	angelahelenr@gmail.com
Marilyn	Alvey	Marilyn Alvey	8105420386	maralvey@yahoo.com
Steven	Loftin	Steven Loftin	8108143543	sp_prod@yahoo.com
Laura	Brown	Laura Brown	(248)-379-2780	lsbrown09@gmail.com
Steven	Liftin	Steven Liftin	8108143543	sp_prod@yahoo.com
Elizabeth	Rilett	Elizabeth Rilett	8102754999	lizrilett@aol.com
Denise	Jobson	Denise Jobson	8102521354	dljobson@comcast.net
Ginny	Schuelke	Ginny Schuelke	9898597869	ginnyschuelke@gmail.com
Larry	Schuelke	Larry Schuelke	9896311667	larry.schuelke@gmail.com
Tom	Robinson	Tom Robinson	9893154430	
Shannon	Robinson	Shannon Robinson	9892742508	
Truman	Most	Truman Most	8106144845	
Belinda	Turner	Belinda Turner	8103589758	
Francisco	Gualdoni	Francisco Gualdoni	8103487894	
Linda	Gualdoni	Linda Gualdoni	8105168204	
Scott	Freeburn	Scott Freeburn	(810)-513-0860	1scottfreeburn@gmail.com
Aaron	MASON	Aaron MASON	8109087950	aemason3354@gmail.com
Anita	Moliterno	Anita Moliterno	(810)-278-5664	amolit02@hotmail.com
Ang	Richardson	Ang Richardson	8107201081	angmrich68@protonmail.com
Annie	Visner	Annie Visner	2482858164	annievisner@gmail.com
ARTHUR	WIARD	ARTHUR WIARD	(1248)-444-0561	awiard11@gmail.com
John	Baxter	John Baxter	(810)-962-7437	baxterjohn6591@gmail.com
Jane	Slone	Jane Slone	6158929261	bethslone615@gmail.com
Brenda	Tersigni	Brenda Tersigni	8108451836	BLTersigni@gmail.com
Jeffrey	Burgard	Jeffrey Burgard	(630)-215-0764	burgard372@gmail.com
Cynthia	Stewart	Cynthia Stewart	8107018062	busybunchof5@yahoo.com
Traci	Wall	Traci Wall	9062355297	c.td.tdwall@gmail.com
Heannetta	Carter	Heannetta Carter	2487665177	chdcarter@outlook.com
Connie	Keianth	Connie Keianth	(989)-284-5853	conniescherf@gmail.com
Jeremy	Dahlquist	Jeremy Dahlquist	2025498942	dahlquistpalau@gmail.com
David	Hoagland	David Hoagland	8589997740	david.hoagland@coppercat.com
Debra	Wagner	Debra Wagner	2488211660	debbiewagner54@hotmail.com
Debbie	Glasgow	Debbie Glasgow	(989)-631-5002	dekglas@gmail.com
Denise	Jacob	Denise Jacob	(810)-577-6469	Denisej722@hotmail.com
Dennis	Weber	Dennis Weber	989-233-4457	denweb@toast.net
Diego	Barrios	Diego Barrios	7722673551	diebarr@gmail.com
Lawrence	Malan	Lawrence Malan	12483762002	doitall62@outlook.com
Gregory	Shannon	Gregory Shannon	5172309502	drgshannon@yahoo.com
Denise	Rittenbury	Denise Rittenbury	8109869751	drittenbury41@gmail.com
Frank	Kozlowski	Frank Kozlowski	(248)-292-1435	frankandmary@fmkozlow.com
Grace	Martin	Grace Martin	8106911719	grannyfullofgrace@gmail.com
Shirley	Schaefer	Shirley Schaefer	(989)-225-3049	inthespiritofgod@gmail.com
Jamie	Barmes	Jamie Barmes	6624037904	jamieb0505@icloud.com
Judith	Brecht	Judith Brecht	8108131300	jkbrecht@gmail.com
Julie	Rose	Julie Rose	8105160929	julierosertc@gmail.com
Kathy	Davis	Kathy Davis	8102231148	kad46@charter.net
Karen	Jernigan	Karen Jernigan	8104445609	karenjernigan1@gmail.com

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Katherine	Maguire	Katherine Maguire	2482318158	katecmaguire@gmail.com
Judith	Ketchum	Judith Ketchum	8103940802	Ketchu1j@yahoo.com
Alyss	Kovach	Alyss Kovach	2486726424	kovalikat@sbcglobal.net
Lori	Bowie	Lori Bowie	2482450535	ladbowie@yahoo.com
Laurie	Spencer	Laurie Spencer	2484645900	laurie@coppercat.com
Mary	Moylan	Mary Moylan	9892450196	marymoylan@mac.com
Carrie	McEnrue	Carrie McEnrue	8103946432	mcenruecian@hotmail.com
Monica	Marshall	Monica Marshall	8109551806	mihailukyl@gmail.com
Paul	Kirk	Paul Kirk	2484082726	paul.pk.kirk@icloud.com
Renita	Bonadies	Renita Bonadies	(810)-845-7721	renitabon@gmail.com
Susan	Chandler	Susan Chandler	9897218772	robertchandler12@yahoo.com
Robert	Chandler	Robert Chandler	9897218911	robertchandler12@yahoo.com
Rusty	Edwards	Rusty Edwards	(810)-447-7309	rustyedwards37@gmail.com
Scott	Bradfield	Scott Bradfield	(423)-404-0622	scotzhotz@gmail.com
Sherry	Marden	Sherry Marden	8109643774	smarden747@gmail.com
Susan	McPherson	Susan. (Sue) McPherson	8107300418	sueskeeter@aol.com
Shelly	Urban	Shelly Urban	(810)-210-6659	taylorj24@msn.com
Kimberly	McCarthy	Kimberly McCarthy	2487637887	ted-kim1@msn.com
Theodore	Seeger	Theodore Seeger	(989)-928-6023	tseeger6@gmail.com
William	Stewart	William Stewart	8106252014	twobits13@gmail.com
Tyler	Elie	Tyler Elie	8103477143	ty.elie420@gmail.com
Jim	Valykeo	Jim Valykeo	6168890928	valakoraceheads@aol.com
Valentin	Dumitrescu	Valentin Dumitrescu	(313)-737-8639	valentin.dumitrescu@stellantis.com
Gladyes	Williamson	Gladyes Williamson	810429S434	williamsongladyes@gmail.com
Lisa	Bradshaw	Lisa Bradshaw	8103483725	xtraawnry@gmail.com
Laura	Brown	Laura Brown	2483792780	
Lisa	Basinski	Lisa Basinski	8104230359	

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EXHIBIT 3

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CITY OF FLINT
Department of Law

Sheldon A. Neeley
Mayor

October 25, 2022

Charles R. Spies
Robert L. Avers
Dickinson Wright PLLC.
cspies@dickinsonwright.com
ravers@dickinsonwright.com

Dear Mr. Spies and Mr. Avers,

The City of Flint Law Department is in receipt of your October 21, 2022 letter. Thank you for communicating your concerns to us regarding the appointment of election inspectors at the City of Flint.

As you quoted, MCL 168.674(2) conditions the appointment of equal election inspectors from each political party with the clause, "as nearly as possible." The list of election inspectors circulated on October 15, 2022, included all Republican-affiliated election inspectors who (a) submitted the necessary application,[1] (b) agreed to attend the necessary training,[2] and (c) were available to work the November 8, 2022 general election. This necessarily limited the number of Republican-affiliated election inspectors who could be appointed because it would violate the law to appoint election inspectors who do not satisfy the statutory requirements.

Furthermore, the Chair of the election commission, interim City Clerk Donahue, has the authority to fill vacancies in the offices of election inspector.[3] I am informed that, pursuant to that authority, subsequent appointments of election inspectors have brought the total number of Republican-affiliated election inspectors to over 120. Indeed, almost 50 of the persons listed in your October 21 letter have been appointed as election inspectors.

In that vein, we would like to thank you for the additional names that you have provided in your October 21 letter. For the persons you listed that the City Clerk's Office has not already been in contact with, that office intends to contact them and inquire as to whether they remain interested in submitting the required application, attending the necessary training, and working the November 8 general election. However, we would also note that in addition to names which have already

[1] *See, e.g.*, MCL §168.674(1); MCL §168.677
[2] *See* MCL §168.683.
[3] *See* MCL §168.674(5).

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been appointed as election inspectors, your list also includes duplicative names, names of persons who – when contacted by the City Clerk's office – informed us that they were already working as election inspectors in other jurisdictions, and the name of at least one person who yelled profanity at the staff who contacted him and instructed our staff to not call them in the future.

Thank you for your interest in safeguarding the democratic process, and we hope that your client will continue to be interested in ensuring that every voter in Flint can fully participate in the November 8, 2022 general election.

Sincerely,

William Kim
City Attorney

cc:
Davina Donahue, interim City Clerk
Stacey Kaake, City Assessor

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EXHIBIT 4

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Last Name	First Name	Pct
Alhassoon	Teresa	60
Aversa	Nadina	22
Aversa	Michael	22
Ba	Pamela	2
Berry	Albert	10
Boduch	Jeffrey	54
Broughton	Myra	20
Bryant	Joshua	26
Bueton	Candace	58
Camez	Clarissa	31
Cannaday	Aignier	11
Cannaday	Alene	11
Chambless	Kimberly	43
Conley Jr.	Oliver	48
Cooks Jr.	Steve	13
Cramer	Denis	38
Cross	Leonard	39
Curtis	Michael	22
Davidson	Robert	15
Davis	Kirk	16
Davis	Marjorie	55
Day	Dante	13
Dean	Elizabeth	10
Domansi	Pamela	15
Douglas	Crystal	19
Eaton-Woodruff	Kayla	30
Edelen	Avion	19
Edwards	Jimmie	16
Eudy	David	25
Fuller	Srah	26
Garcia	Paul	33
Grigfak	laura	24
Gualboni	Francisco	51
Harding	Lynnea	44
Harding	John	44
Harris	Carol	31
Henrikson	Sandra	23
High	Renae	22
Hiller	Michelle	33
Houck	Rebecca	TBD
Huston	Laura	33
Irwin	Kathryn A	AVB
Johnson-DePalma	Roxana	TBD
Jones	Tammy	15
Jordan	Brian	29
Jordan	Jacqueline	30

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Last Name	First Name	Pct
Jordan	John	51
Keller	Katherine	52
Keller	Katherine	TBD
Kendall	Antonia	55
Kimbrell-Sadler	Julie	AVB
Kincaid	Pearlie	40
Kingen	Dustin J.	8
Koerber	Theresa	41
Kozlowski	Mary	6
Kozlowski	Frank	6
Krueger	Clay	4
Krueger	Dustin	45
Krueger	Kelly	59
Lenox	Andrew	42
Lindsay	Ward	15
Lindsay	Weigi	42
Long	Darline	TBD
Malan	Lawrence	27
Malcomnson	Robert	46
Marden	Leonard	30
Martin	Grace	46
Mast	Truman	10
McClintock	Jeffrey	44
McClintock	Stephnie	52
McClinton	Claire	21
McLaughlin	Brenda	46
McQuiller	Jamiah Angel	TBD
Mitchner	Lisa	58
Moran	Carilee	38
Moran	Carilee	48
Moreland	Tina	48
Morse	Kevin	60
Nachtigal	Ronald	27
Nance	Carolyn	38
Neumann	Kathryn	TBD
Ollie	Shanise	49
Ollie	Qyardeel	49
Onufey	David	22
Oper	Anne	50
Otloski	Jennifer	Clerk Ofc
Otloski	Elizabeth	Clerk Ofc
Otloski	Alica	Clerk Ofc
Owen	Kristen	57
Palmgren	Ronald	15
Panigi	Robin	19
Parillo	Tammera	61

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Last Name	First Name	Pct
Parker	Micah L.	TBD
Parks	Riginald	55
Pasbjerg	Lisa	41
Patrick	Vivian	29
Payne	Edward	50
Posey	Tina	54
Pray	Patrick	60
Richardson	Susan	16
Riggio	Sara	56
Rillet	Elizabeth	45
Salacuse	Cynthia	TBD
Samuels-Larry	Sunni	58
Schiller	Adelaide	Clerk Ofc
Schritter	Sarah	59
Schuelke	Lawrence M.	5
Schuelke	Virginia	5
Sevigny	Jenifer	AVB
Sevigny	Jennifer	AVB
Shareef	Julia	55
Sidibe	Siriman	TBD
Snyder	April	33
Sorenson	Lat	TBD
Stemper	Susan	55
Sylvester	Valerie	25
Taylor	Scott	56
Thomas	Shirley	29
Thompson	Martita	42
Tueeaud	Vicky	31
Voss	Aiden	49
Wahfield	Mark	53
Waskoviak	Robert	54
Watson	Ramona	56
Werth	Janette	61
Wesley	Robert	55
Whittaker	Wesley	38
Womack	Osei	30
Zitterkopf	Lisa	AVB
Zitterkopf	Michael	AVB

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EXHIBIT 5

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Donald	Potter	Donald Potter	810S696624	00awfulkinawful@gmail.com
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Annie	Visner	Annie Visner	2482858164	amarobichaud@gmail.com
Angela	Green-Izzo	Angela Green-Izzo	7274525300	angelagreenizzo@gmail.com
Ann	Spreeman	Ann Spreeman	8106242147	arrn49@aol.com
Brian	Mcelhone	Brian Mcelhone	2487614888	bmcelhone@outlook.com
Rebecca	LaVell	Rebecca LaVell	8106568272	booboolrb@aol.com
Brent	Leavitt	Brent Leavitt	2488285671	brentleavitt64@gmail.com
Herb	Schollenberger	Herb Schollenberger	8108355680	Bud711@live.com
Debra	Scheeler	Debra Scheeler	8102800477	debrajean9650@yahoo.com
Desiree	Londrigan	Desiree Londrigan	8106250860	Deslondrigan@yahoo.com
Doris	Skinner	Doris Skinner	8109228408	dorieskinner@gmail.com
Leo	Skinner	Leo Skinner	8103470985	dorieskinner@gmail.com
Amanda	Reddy	Amanda Reddy	8102236565	dreamernowdoer@gmail.com
Deborah	Selves	Deborah Selves	8105164056	dselves123@gmail.com
Darrell	Schultz	Darrell Schultz	5863370702	emscowboy1@hotmail.com
Brittany	Carsten	Brittany Carsten	8108693973	freedomfighter9110@protonmail.com
Michele	Sheeran	Michele Sheeran	2482319051	gotellumberto@gmail.com
Grace	Martin	Grace Martin	8106911719	grannyfullofgrace@yahoo.com
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Mary	Cunningham	Mary Cunningham	(810)-577-9604	JustCallMaryC@gmail.com
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Shannon	Robinson	Shannon Robinson	9892742508	
Truman	Most	Truman Most	8106144845	
Belinda	Turner	Belinda Turner	8103589758	
Francisco	Gualdoni	Francisco Gualdoni	8103487894	
Linda	Gualdoni	Linda Gualdoni	8105168204	
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Debra	Wagner	Debra Wagner	2488211660	debbiewagner54@hotmail.com
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Denise	Jacob	Denise Jacob	(810)-577-6469	Denisej722@hotmail.com
Dennis	Weber	Dennis Weber	989-233-4457	denweb@toast.net
Diego	Barrios	Diego Barrios	7722673551	diebarr@gmail.com
Lawrence	Malan	Lawrence Malan	12483762002	doitall62@outlook.com
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Judith	Brecht	Judith Brecht	8108131300	jkbrecht@gmail.com
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Karen	Jernigan	Karen Jernigan	8104445609	karenjernigan1@gmail.com

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Monica	Marshall	Monica Marshall	8109551806	mihailukyl@gmail.com
Paul	Kirk	Paul Kirk	2484082726	paul.pk.kirk@icloud.com
Renita	Bonadies	Renita Bonadies	(810) 845-7721	renitabon@gmail.com
Susan	Chandler	Susan Chandler	9897218772	robertchandler12@yahoo.com
Robert	Chandler	Robert Chandler	9897218911	robertchandler12@yahoo.com
Rusty	Edwards	Rusty Edwards	(810)-447-7309	rustyedwards37@gmail.com
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Susan	McPherson	Susan. (Sue) McPherson	8107300418	sueskeeter@aol.com
Shelly	Urban	Shelly Urban	(810)-210-6659	taylorj24@msn.com
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Theodore	Seeger	Theodore Seeger	(989)-928-6023	tseeger6@gmail.com
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Jim	Valykeo	Jim Valykeo	6168890928	valakoraceheads@aol.com
Valentin	Dumitrescu	Valentin Dumitrescu	(313)-737-8639	valentin.dumitrescu@stellantis.com
Gladyes	Williamson	Gladyes Williamson	8104295434	williamsongladyes@gmail.com
Lisa	Bradshaw	Lisa Bradshaw	8103483725	xtraawnry@gmail.com
Laura	Brown	Laura Brown	2483792780	
Lisa	Basinski	Lisa Basinski	8104230359	

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EXHIBIT 6

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STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT FOR THE COUNTY OF GENESEE

MICHIGAN REPUBLICAN PARTY and
REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

v

Case No.
Hon.

DAVINA DONAHUE, Interim City Clerk,
in her official capacity as a member of City of Flint
Board of Election Commissioners,
WILLIAM KIM, City Attorney,
in his official capacity as a member of City of Flint
Board of Election Commissioners, and
STACEY KAAKE, City Assessor,
in her official capacity as a member of City of Flint
Board of Election Commissioners,

Defendants.

ORDER TO SHOW CAUSE

This matter having come before the Court upon the ex parte motion to show cause contained in Plaintiffs' Verified Complaint pursuant to MCR 3.305(C), the Court having considered such motion and found that Plaintiffs make the requisite showing of the necessity for immediate action, and the Court otherwise being fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' ex parte motion to show cause is GRANTED;

2. Plaintiffs shall serve on Defendants copies of (i) Plaintiffs' Verified Complaint and (ii) this Order to Show Cause by no later than 12:00 PM Eastern Time on Monday, October 31, 2022;

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3. Defendants shall file and serve on Plaintiffs an answer to this Order to Show Cause by no later than 12:00 PM Eastern Time on Tuesday, November 1, 2022;

4. In their answer, Defendants must show cause why the Court should not award the relief requested in the Prayer for Relief contained in Plaintiffs' Verified Complaint, including the requested writ of mandamus.

IT IS SO ORDERED.

_____

CIRCUIT COURT JUDGE

Dated: _____

4876-5996-0636 v1 [99168-2]

Obtained from GENESEE COUNTY, Michigan CLERK

LEGAL DIVISION
900 SOUTH SAGINAW
FLINT, MI 48502
810-257-3220

RECEIPT 512089
DATE 10/28/22
PAGE 1

COURT CASE NO. 22-118123-AW-A MICHIGAN REPUBLICA VS DONAHUE,DAVINA,

RECEIVED OF DICKINSON WRIGHT
FOR THE ITEMS INDICATED BELOW: CHECK 48850

ACCOUNT NO.	DESCRIPTION	PAYMENT
101.1-021-652.43-35-03	CIVIL FILING FEE	31.00
701.1-000-001.60-90-02	CIVIL FILING FEE	119.00
701.0-000-016.15-90-00	ELECTRONIC FILING FEE	25.00
KW	TOTAL	$175.00

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/4/2024 1:58:40 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Re: Trump v. Anderson

Thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Sunday, March 3, 2024 4:07 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Trump v. Anderson

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

As you may have seen, the Supreme Court today announced that it will issue one or more opinions tomorrow morning at 10 a.m. ET. We anticipate that the decision in *Trump v. Anderson*, Donald Trump's appeal of the Colorado Supreme Court's decision excluding him from the primary ballot, will issue then. We plan to monitor the Court's website and, assuming the opinion issues, have guidance shortly thereafter.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/18/2024 4:48:59 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: RE: New RNC lawsuit

ok

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 12:47 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Re: New RNC lawsuit

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Will call you at 2.

Can also discuss the attached.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, March 18, 2024 at 12:38 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: RE: New RNC lawsuit

Sure, anytime works.

H

Heather S. Meingast, Division Chief
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meingasth@michigan.gov
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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 12:29 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: New RNC lawsuit

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Hi Heather,

Is there a good time to check in about this briefly this afternoon, ideally between 2 and 4 pm?

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
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jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/4/2024 7:35:35 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Trump v. Anderson analysis

Thanks Jonathan.

Heather S. Meingast, Division Chief
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Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 4, 2024 2:14 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Trump v. Anderson analysis

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Privileged and Confidential

Hi Heather,

As you have surely seen, in *Trump v. Anderson*, the Supreme Court this morning issued an unsigned per curiam decision reversing the Colorado Supreme Court and holding that former President Donald Trump cannot be excluded from the Republican primary ballot in Colorado under Section 3 of the Fourteenth Amendment.

According to the Court, "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States." (Slip op. at 12). This means not only that States cannot enforce Section 3 against federal candidates and officeholders but also that no part of the federal government may enforce Section 3 absent specific legislation from Congress providing for enforcement of the disqualification.

DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/4/2024 4:01:26 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 call at 11 a.m.

Is this really the link?

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(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 4, 2024 10:32 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 call at 11 a.m.

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Security MCL 15.243(1)(u)

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jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/11/2024 6:56:47 PM
To: Zack Goldberg [zack@statesuniteddemocracy.org]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: RE: United Sovereign Americans - New MD Case

Oops, spelled your name wrong Zack, many apologies.

Heather

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meingastH@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Monday, March 11, 2024 2:56 PM
To: Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: United Sovereign Americans - New MD Case

Thanks Zach, will take a look. **DPP MCL 15.243(1)(m)**

Heather

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meingastH@michigan.gov
(517) 335-7659 (office)

From: Zack Goldberg <zack@statesuniteddemocracy.org>
Sent: Monday, March 11, 2024 2:34 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: United Sovereign Americans - New MD Case

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Hi Heather,

DPP MCL 15.243(1)(m)

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A Missouri-based nonprofit called "United Sovereign Americans" sued the Maryland State Board of Elections seeking to enjoin the Board from certifying future elections until the Board, among other things, updates its voter rolls, decertifies its voting systems, and follows the guidance of a court-appointed Special Master to implement suggested programs to improve monitoring and transparency in the voting systems. The lawsuit alleges: (1) the state's voter registration database contains nearly 80K registration violations in violation of the NVRA; (2) the number of voting systems errors exceeds HAVA's maximum allowable error rate; (3) the state failed to properly certify its voting systems; (4) the state's voting systems improperly use modems to transmit results; (5) the state failed to appropriately respond to public information requests; and (6) the state's voting systems fail to give voters the ability to correct certain undervotes in violation of HAVA. The complaint claims that the Board is violating HAVA and the NVRA, as well as state election law. The full complaint is attached.

DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Best,
Zack

Zack Goldberg (he/him) | Counsel
States United Democracy Center
917.656.6234 | @statesunited
zack@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/19/2024 12:36:32 AM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Re: Nevada lawsuit

Got it, thanks.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 5:51 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Nevada lawsuit

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Nevada was sued by the RNC, as well.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/20/2024 5:27:15 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]
CC: Gillian Feiner [Gillian@statesuniteddemocracy.org]; Beth Stevens [beth@statesuniteddemocracy.org]
Subject: RE: Dar Leaf tweets/document

Thanks, I appreciate the team's work on this.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, March 20, 2024 12:57 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Cc: Gillian Feiner <Gillian@statesuniteddemocracy.org>; Beth Stevens <beth@statesuniteddemocracy.org>
Subject: Dar Leaf tweets/document

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Dan and Heather,

DPP MCL 15.243(1)(m)

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/18/2024 8:14:48 PM
To: Teegardin, Rachel [TeegardinR1@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Thursday Democracy Check-in

I am open on Friday.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Teegardin, Rachel <TeegardinR1@michigan.gov>
Sent: Monday, March 18, 2024 3:47 PM
To: Osher, Daniel <OsherD@michigan.gov>; Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Thursday Democracy Check-in

On Friday- CG can do anything between 12:00-1:30 or 2:0p.

Best, Rachel

Rachel Teegardin
Executive Assistant to
Christina Grossi, Chief Legal Counsel
Executive Office of Governor- Gretchen Whitmer
517-285-9138
TeegardinR1@michigan.gov

STATE OF MICHIGAN
OFFICE of the GOVERNOR

From: Osher, Daniel <OsherD@michigan.gov>
Sent: Monday, March 18, 2024 3:45 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Teegardin, Rachel <TeegardinR1@michigan.gov>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Thursday Democracy Check-in

I'm available anytime Friday except 11:30-12. @Teegardin, Rachel, does CG have availability Friday?

Daniel Osher
Deputy Legal Counsel

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Office of the Governor, State of Michigan
osherd@michigan.gov
(517) 242-0089

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 3:34 PM
To: Osher, Daniel <OsherD@michigan.gov>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Thursday Democracy Check-in

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Dan,

I have a conflict with our usual time on Thursday. Are you (and Christina) available Friday at all? Heather says she's pretty flexible.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/26/2024 6:11:29 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: Keefer v. Biden -- Privileged

Thanks Jonathan, we will take look.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, March 26, 2024 1:55 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Keefer v. Biden -- Privileged

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DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/23/2024 5:32:12 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Curling litigation guidance

Thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, March 22, 2024 4:32 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Curling litigation guidance

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Heather,

Here's the memo on the Curling v. Raffensperger litigation that I mentioned earlier today. Have a great weekend.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/19/2024 12:51:26 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 14.3 update

Thanks.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 9:01 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 update

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Heather,

DPP MCL 15.243(1)(m)

Please let us know if you have any questions or would like to discuss.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/29/2024 3:51:15 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Review of RNC list maintenance allegations

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, March 29, 2024 11:11 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Review of RNC list maintenance allegations

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, March 29, 2024 at 8:50 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Michael Pomante <michael@statesuniteddemocracy.org>
Subject: RE: Review of RNC list maintenance allegations

Excellent, thank you. Erik and I will take a look and let you if a conversation will be helpful.

Also we were sued again yesterday by RNC, see attached.

Happy Friday,

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, March 29, 2024 8:00 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Michael Pomante <michael@statesuniteddemocracy.org>
Subject: Review of RNC list maintenance allegations

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Hi Heather,

At my request, a member of our research team, Michael Pomante, went through the RNC's letter and complaint and annotated it with some thoughts about the data, including articles that either debunk or contextualize the allegations where appropriate. One thing that leapt out is how common registration rates over 100% of CVAP are. Full citation info is available in the separate Word document.

If you'd like to discuss any of this with us, let us know.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/2/2024 6:15:02 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: RNC MTD response in NV--privileged

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, May 2, 2024 1:42 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RNC MTD response in NV--privileged

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Hi Heather,

I've attached the RNC's April 29 response to the motion to dismiss in its Nevada NVRA list maintenance case, in case it's helpful to you to get a head start. The reply is due on May 20.

DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/13/2024 7:53:33 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

DPP MCL 15.243(1)(m)

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, May 13, 2024 1:00 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, May 10, 2024 at 3:33 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 10, 2024 3:28 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, May 3, 2024 at 4:51 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

Yep. Also, notice of appeal filed in Lindsey.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 3, 2024 4:45 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, May 3, 2024 at 4:41 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

DPP MCL 15.243(1)(m)

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Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 3, 2024 4:38 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, May 3, 2024 at 2:17 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 3, 2024 2:01 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: FW: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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DPP MCL 15.243(1)(m)

From: ca06-ecf-noticedesk@ca6.uscourts.gov <ca06-ecf-noticedesk@ca6.uscourts.gov>
Date: Friday, May 3, 2024 at 1:55 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: 21-1786 Timothy King, et al v. Gretchen Whitmer, et al "motion recall mandate"

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United States Court of Appeals for the Sixth Circuit

Notice of Docket Activity

The following transaction was filed on 05/03/2024

Case Name:	Timothy King, et al v. Gretchen Whitmer, et al
Case Number:	21-1786
Document(s):	Document(s)

Docket Text:
MOTION filed by Mr. Lawrence John Joseph for Scott Hagerstrom, Julia Haller, Brandon Johnson, Howard Kleinhendler, Sidney Powell and Gregory J Rohl to recall mandate. Certificate of Service: 05/03/2024. [21-1786] (LJJ)

Notice will be electronically mailed to:

Ms. Heather S. Meingast, Assistant Attorney General: meingasth@michigan.gov, albrol@michigan.gov, richardsm1@michigan.gov
Mr. Paul Joseph Orfanedes: porfanedes@judicialwatch.org, orfanedes@yahoo.com, jwlegal@judicialwatch.org
Mr. Lawrence John Joseph: ljoseph@larryjoseph.com
Mr. David H. Fink: dfink@finkbressack.com, ggayer@finkbressack.com, khunt@finkbressack.com
Mr. Erik A. Grill: grille@michigan.gov, albrol@michigan.gov, richardsm1@michigan.gov
Mr. Nathan Joshua Fink: nfink@finkbressack.com, ggayer@finkbressack.com, khunt@finkbressack.com
Mr. Howard Kleinhendler: howard@kleinhendler.com
Ms. Sidney Powell: sidney@federalappeals.com, mbkateri@protonmail.com
Mr. T. Russell Nobile: rnobile@judicialwatch.org, trnobile@yahoo.com

Notice will be stored in the notice cart for:

Ms. Beverly L. Harris, Case Manager
Mr. Charles Anthony Milton, Case Manager

The following document(s) are associated with this transaction:
Document Description: motion
Original Filename: DTR Recall Mandate.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1105031299 [Date=05/03/2024] [FileNumber=7162323-0] [7d67abf5426fdb1c385e080572bc059149c7483e8feecb986b2bb0aa38e35b02c63a6f566afb74dad7b4e458532c48dbce322f2fd7b93e2d2cdbbd0440e0dc1e]]

Document Description: Addendum
Original Filename: DTR Recall Mandate Add.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1105031299 [Date=05/03/2024] [FileNumber=7162323-1] [10c325dec387f9a4f8caf4ea320529e840410297c8b497df5066777aac77218837691b6de38c2def2bc7f352a787052514cdbe92d8ed7b7d8f50eacbea37b07a]]

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From: Meingast, Heather (AG) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c266d4268285494d9331bb0303fc8111-Meingast Heather]
Sent: 2/13/2023 1:29:41 PM
To: Janae Steggall [janae@statesuniteddemocracy.org]

Subject: Accepted: MI AG Brief
Location: https://us02web.zoom.us/j/84948560410

Start: 2/13/2023 9:00:00 PM
End: 2/13/2023 9:30:00 PM
Show Time As: Busy

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/1/2022 8:36:56 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: Recount petitions
Attachments: Prop 2 Recount Request.pdf; Prop 3 Recount Request.pdf

Here you go.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, December 1, 2022 2:57 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Recount petitions

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

Mike mentioned to me yesterday that there are recount requests for Proposals 2 and 3 and suggested you could help me get copies of those requests. Would you be able to send them to us? Thanks so much. If there's any assistance we can provide, please let us know.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(850) 706-0940 | @statesunited
jonathan@statesuniteddemocracy.org

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RECEIVED/FILED
2022 NOV 30 AM 11:38

BOARD OF STATE CANVASSERS
FOR THE STATE OF MICHIGAN

IN THE MATTER OF THE RECOUNT OF 2022 MICHIGAN PROPOSAL #2 of 2022.

NOW COMES JEROME JAY ALLEN, the undersigned, an elector in this state of Michigan identified with their full name and jurisdiction of registration below their signature and pursuant to MCL 168.880 hereby presents and files with the secretary of state this sworn, printed petition that the undersigned electors believe that there has been fraud or error committed (1) by the inspectors of election in the return made; and (2) by the county canvassing board in the canvass of votes cast upon the questions of the proposed amendment to the constitution known as proposal 2 of 2022.

FURTHER that pursuant to MCL 168.865 this sworn petition sets forth the nature of the mistakes or frauds complained and identifies the city, ward, township, and precinct in which they are alleged to have occurred so that there may be a correction of the mistakes.

FURTHER that pursuant to MCL 168.881(1) this petition shall be filed with the state bureau of elections.

FURTHER that pursuant to MCL 168.881(6) the sum of $5,875 representing $125 per precinct for 47 precincts as the votes separating the questions were reported as greater than 0.5%. The precincts affected are listed in the attachment which identifies the county, the jurisdiction (City/Ward or Township), and the precinct (or in the case of the City of Detroit the AVCB and precinct.

The following mistakes or frauds complained of have resulted in a belief by the undersigned electors that there is fraud or error which requires a recount by hand that will result in a correction of the statement of votes cast:

FRAUD OR MISTAKE NUMBER 1: Configuration of voting systems is not certified to meet or exceed VVSG 2.0 by an accredited VVSG

The Votes were counted by use of a 'voting system' that was not certified (or recertified), *as configured,* to the VVSG 2.0 by an accredited laboratory as required by HAVA.

HAVA The Help America Vote Act of 2002

In person + AV Boards counters for all attached precincts. (SL)

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1) The Help America Vote Act of 2002 (HAVA) in Section 301(a)(6) sets forth the requirements that required each state to set forth non-discriminatory standards for what constitutes a vote for each voting system that is used in the state.
2) The definition of a voting system per HAVA Section 301(b)(2)(e) includes the instructions given to a voter on how to mark the ballot.
3) HAVA created the US Election Assistance Commission with the authority to provide a regulatory process ro accredit Voting System Test Laboratories (VSTL)
4) These VSTLs are authorized to certify each voting system *as configured* for use as meeting or exceeding standards called the Voluntary Voting System Guidelines (VVSG)
5) The VVSG has been in effect since 2021.
6) Michigan passed legislation that mandates the implementation of a statewide, uniform voting system and requires it to meet the requirements of HAVA (PA 91 of 2002).
7) HAVA in Section 253 Condition for receipt of Funds specifies the certification of compliance that was required by each state which included a plan for performance goals and measures and included requirements that the state would maintain the standards. The conditions were lengthy but mandatory upon receipt of funds.
8) The Federal Register with all the other states and territories published the original Michigan plan on March 24, 2004, but then Secretary of State Terri Land submitted an amended state plan dated September 27, 2005, which was published on November 9, 2005. There is no evidence that this plan has been updated subsequently on the internet or readily accessible records of the MI SOS or US EAC.

   On page 31 of the State Plan, the document reads:

   > IV. Voting System Guidelines and Processes How the State will adopt voting system guidelines and processes, which are consistent with the requirements of section 301. -- HAVA §254(a)(4)
   >
   > *Michigan has adopted legislation that mandates the implementation of a statewide, uniform voting system (PA 91 of 2002). The voting system selected will meet the requirements of Section 301 of the Help America Vote Act, including all accessibility requirements.*

THERE IS NO EVIDENCE OF COMPLIANCE IN STATE OR FEDERAL RECORDS that any Michigan voting system has been certified (or recertified) by a VSTL as meeting or exceeding the requirements of VVSG 2.0 , *as configured.*

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THEREFORE, there is a belief that the voting system, *as configured*, is not qualified by law to accurately count the ballots and that a hand recount will result in a different vote total.

FRAUD OR MISTAKE NUMBER 2: Digital Adjudication Software

Furthermore, certain AVCBs have used digital adjudication software as an optional application offered by the vendors. This specific software digital adjudication application violates both HAVA Section 301(a) (6) and Michigan Election Law (MCL 168.803) as it allows for the 'manipulation, alteration or transformation of the ballot image" to alter the voter's mark to what the adjudicator decides was the voter's intent.

The AVCBs identified by Chris Thomas and poll challengers include as the boards for the (1) County of Wayne in the Cities of Livonia and Detroit; (2) County of Oakland in the Cities of Farmington Hills, Rochester Hills, and Troy (3) County of Washtenaw, City of Ann Arbor (4) County of Muskegon, City of Muskegon (5) County of Ingham, City of Lansing and (6) County of Kent City of Grand Rapids are collectively referred to AVCBs with Adjudication Software.

THERE IS A BELIEF THAT THIS SOFTWARE HAS RESULTED IN VOTES BEING COUNTED FROM BALLOTS THAT HAVE BEEN ALTERED BY THE ADJUDICATORS

FRAUD OR MISTAKE NUMBER 3: Violation of MCL 168.795(2)

A ballot that is voted in person improperly is to be rejected by the tabulator under Federal and Michigan Law to permit the voter an opportunity to self-correct the ballot or have it spoiled. An absentee ballot that is rejected by the tabulator is to be rejected. To reduce the risk, federal law sets forth the process to educate and instruct the elector to limit the occurrences of a ballot being filled out improperly. HAVA Section 301(a)(1).

There is no process in Michigan to save part of a ballot when the ballot is rejected.

> MCL 168.795(2)
> Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location ***must be programmed to reject a ballot*** if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot,

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or if, in a primary election, votes are recorded for candidates of more than 1 political party.

Instead, as observed and reported on November 3, 2022, by Chris Thomas (formerly the Director of the Michigan Bureau of Elections for various Secretaries of State from 1980 to 2017 then a consultant for the City of Detroit for November 2020-2022) who during a hearing in the 3rd Circuit Court for the County of Wayne in *Karamo, et all v City of Detroit Clerk*, Case No. 22-012-759AW, that the rest of an overvoted ballot was counted without the race which was overvoted at the Detroit AVCB using the ImageCast Central™ Software from Dominion Voting Systems, Inc. with the adjudication application.

THEREFORE, there is a good faith belief that ballots that are to be rejected by law have been counted improperly at the AVCBs using adjudication software and high-speed scanning devices.

FRAUD OR MISTAKE NUMBER 4: Use of Voting system in violation of MCL 168.795a

HAVA Section 304 makes it very clear that the federal minimum requirements for voting systems are a *minimum*. States are free to have more restrictive laws on the books.

MCLA 168.795a states an express prohibition on the use of an electronic voting system unless it meets three separate requirements. The third of these requirements has not been met. There is no standards or independent testing authority recognized by the national association of state election inspectors. This was confirmed in the hearing on November 3, 2022 referenced above in the testimony of Chris Thomas who opined that this law was outdated.

MCL 168.795a (1) **An electronic voting system shall not be used in an** election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and **unless it meets 1 of the following conditions:**

(a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.

(b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

There is no legal means to disregard this law by the executive branch. The law must be enforced until repealed or held to be unconstitutional by a

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judicial branch official. The rule of law does not allow the executive branch to select which laws it will follow.

However, the Secretary of State has required all election clerks to use a voting system in violation of MCL 168.795a.

THEREFORE, there is a belief that the voting system is not qualified by law to accurately count the ballots and that a hand recount will result in a different vote total.

MISTAKE OR FRAUD NUMBER 5: TABULATORS CONNECTED TO THE INTERNET

Michigan required all manufacturers of tabulators during procurement to assure that the tabulators would not be connected to the internet and that data would be transferred by removable storage drive to the Election Management System. This was to prevent a foreign or domestic criminal from accessing the tabulator while it is processing ballots. In reliance upon these representations, the systems lack individual cybersecurity protections as the tabulators were reported offline and without the capacity to go online. However, recent information has developed where certain systems have cellular modems in them. Further, Security logs from tabulators have shown that the tabulators are in fact both capable of transmitting online and are configured to transmit online and have transmitted online during the August 2, 2022, primary election. The tabulators have not changed their capabilities since August. Tabulators in the AVCB using central election software are both wired together and online. It is believed that this creates both an illegal configuration and that this creates a vulnerability to 'hack' the election results. Recent reports of machines reporting inaccurate results in Cherokee Kansas, DeKalb County Georgia, and Williamson County Tennessee have only been discovered by hand counting ballots. The mechanism of the errors which changed the outcome of three elections after the hand recount is unknown. There is still questions concerning how Antrim County reported in 2020 General election more votes in three precincts and misreported both the presidential election and at least one down-ballot issue.

The connectivity, whether the secretary of state believes it or not, creates the opportunity that the machine can be accessed by hackers, foreign or domestic, and has created a belief that requires hand-count to correct the error in the tally.

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MISTAKE OR FRAUD NUMBER 6. E-poll books connected to the internet

Michigan has required the use of e poll books and has required the e poll books to be air-gapped (not connected to the internet) during the tabulation of votes. During the August 2, 2022 primary an e-poll book reportedly crashed in St. Clair County and per the affidavit when the Secretary of State was contacted they said the problem was on their end and re-set the e-poll book remotely. During the November 8, 2022 General Election, it has been reported by Kate Riley from the Wayne County Board of Canvasser that many, many precincts in Detroit experienced simultaneous failure of the e-poll book which resulted in a conversation with the Secretary of State Bureau of Elections Director Brater who reported the error had been addressed by the State, that Detroit was not at fault, and that the election was secure. This is strong evidence again of connectivity. The e-poll book connectivity is a significant issue of the integrity of the elections especially when the tabulator count is required to be matched against the number in the e-poll book.

Based on the connectivity of the e-poll book, there is a good faith belief that a recount will permit the board of examiners to determine how this connectivity affected the canvass.

MISTAKE OR FRAUD NUMBER 6: Examination of the return shows that there is a significant deviation from the top of the tickets and the bottom of the ticket in many, many precincts which is contrary to the manner in which people vote.

There is up to a 20-point difference in some precincts between the top three races and the local races. This voting has to be interpreted that the Republican voters who cast votes for local Republican candidates rejected the candidates for Governor, Attorney General, and Secretary of State or contrary that the Democratic Voters who cast votes in support of the top three races then rejected the Democratic Candidates down the ballot. This spread creates a belief that there have been votes that have been recorded improperly as this does not reflect normal voting behavior-especially considering the candidates and the polarizing of the two parties in this election. The canvass on the proposals is similar to the top of the ticket. As such there is a belief that the results are not genuine.

This phenomenon is also reported in Arizona which is hotly contested.

There is a belief that the recount will show that a hand count of the ballots will correct the mistake of fraud in the canvass.

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CONCLUSION

A recount of the November 2022 election will allow each county that is challenged to examine the paper record and hand count to comply with a lawful count of the paper ballots. While this will not address the widespread concerns about ballots being injected into the election for voters that are not real or eligible to vote, the examination of the paper record will remedy the objection raised related to the voting system being used in violation of MCL 168.795a and when the system is not certified, *as configured,* be an accredited VSTL. Further, the concerns related to the voting system and the e-poll book being connected to the internet contrary to representations creating a significant risk of foreign or domestic hacking will be addressed. Finally, the board of canvassers has the ability to hand count the ballots and apply the law related to MCL 168.798(2) to save votes on a ballot that is required to be rejected by law and eliminate the digital adjudication of ballots to count only properly marked ballots.

Being under oath, the following undersigned elector declare that he believes that there is fraud or mistake in the canvass of the precincts listed in Attachment A and hereby deposit the sum of money requesting a recount of the precincts listed for the correction of error.

I declare under penalty of perjury that the above statements are true to the best of my knowledge, information, and belief.

Signed:

JEROME JAY ALLEN 11/29/22
Precinct 6, Bloomfield Township
Oakland County
Michigan Notary Acknowledgement
The State of Michigan
County of Oakland
Acknowledged before me in Oakland County, Michigan on 11/29/22 (the date by Jerome Jay Allen (name of signatory).

Notary Public Signature
Print MATTHEW LAHR
Title BRANCH MANAGER
My commission expires: 3-1-2023
Acting in Oakland County

MATTHEW LAHR
Notary Public, State of Michigan
County of Macomb
My Commission Expires Mar. 01, 2023
Acting in the County of OAKLAND

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ATTACHMENT A

#	COUNTY	JURISDICTION	PRECINCT #
1	KALAMAZOO	KALAMAZOO TOWNSHIP	3
2	KALAMAZOO	OSHTEMO TOWNSHIP	2
3	KALAMAZOO	PORTAGE CITY	8
4	KALAMAZOO	RICHLAND TOWNSHIP	3
5	KALAMAZOO	TEXAS TOWNSHIP	4
6	KALAMAZOO	TEXAS TOWNSHIP	5
7	MACOMB	CHESTERFIELD TOWNSHIP	4
8	MACOMB	CHESTERFIELD TOWNSHIP	7
9	MACOMB	CHESTERFIELD TOWNSHIP	9
10	MACOMB	CLINTON TOWNSHIP	1
11	MACOMB	CLINTON TOWNSHIP	15
12	MACOMB	CLINTON TOWNSHIP	38
13	MACOMB	HARRISON TOWNSHIP	7
14	MACOMB	MACOMB TOWNSHIP	1
15	MACOMB	MACOMB TOWNSHIP	7
16	MACOMB	MACOMB TOWNSHIP	8
17	MACOMB	SHELBY TOWNSHIP	5
18	MACOMB	SHELBY TOWNSHIP	18
19	MACOMB	SHELBY TOWNSHIP	26
20	MACOMB	SHELBY TOWNSHIP	27
21	MUSKEGON	MUSKEGON CITY	2007
22	MUSKEGON	MUSKEGON CITY	4011
23	MUSKEGON	MUSKEGON CITY	4012
24	MUSKEGON	MUSKEGON CITY	4013
25	MUSKEGON	MUSKEGON CITY	4014
26	OAKLAND	TROY CITY	2
27	OAKLAND	TROY CITY	3
28	OAKLAND	TROY CITY	4
29	OAKLAND	TROY CITY	5
30	OAKLAND	TROY CITY	7
31	OAKLAND	TROY CITY	8
32	OAKLAND	TROY CITY	9
33	OAKLAND	TROY CITY	10
34	OAKLAND	TROY CITY	11
35	OAKLAND	TROY CITY	12
36	OAKLAND	TROY CITY	14
37	OAKLAND	TROY CITY	15

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38	OAKLAND	TROY CITY	16
39	OAKLAND	TROY CITY	17
40	OAKLAND	TROY CITY	18
41	OAKLAND	TROY CITY	19
42	OAKLAND	TROY CITY	20
43	OAKLAND	TROY CITY	22
44	OAKLAND	TROY CITY	23
45	OAKLAND	TROY CITY	26
46	OAKLAND	TROY CITY	29
47	OAKLAND	TROY CITY	37

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ADDENDUM:
Referenced Laws

168.880 Recount of votes; petition by elector on constitutional amendment or question, deadline, contents.

Any elector in this state who believes that there has been fraud or error committed by the inspectors of election in the return made by said inspectors or of any county canvassing board in the canvass of votes cast upon the question of a proposed amendment to the constitution or any other question or proposition, the votes for which are canvassed by the board of state canvassers, may, not later than 2 days after final certification and determination by the board of state canvassers of the canvass of votes cast at an election, present to and file with the secretary of state a written or printed petition which shall be sworn to by the elector presenting the same and which shall set forth as nearly as may be the nature and character of the fraud or error of which the complaint is made and the counties, cities or townships or the precincts thereof in which it is believed that the fraud or error occurred, and such petition shall contain a prayer that a correction thereof be made by a recount of the votes cast therein.

168.881 Recount petition; filing; deposit; refund; disposition of sum deposited.

(1) A person filing a recount petition under section 879 or 880 shall file the petition with the state bureau of elections. Except as otherwise provided in this section, at the time of filing the petition, the petitioner shall deposit the sum of $25.00 for each precinct in which a recount of the votes is demanded in cash or by check or other negotiable instrument made payable to the state of Michigan.

***

(6) If the vote is on a proposal and the official canvass of votes shows that the number of votes separating the "yes" votes and the "no" votes is more than 50 votes or 0.5% of the total number of votes cast on the proposal, whichever is greater, the petitioner shall deposit with the state bureau of elections the sum of $125.00 for each precinct referred to in his or her petition.

168.865 Recount petition; contents.

Such petition shall be sworn to and shall set forth as near as may be the nature of the mistakes or frauds complained of and the city, ward, township, village and precinct in which they are alleged to have occurred, and shall ask for a correction thereof.

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HAVA Section 301(a) REQUIREMENTS.—Each voting system used in an election for Federal office shall meet the following requirements:

(1) IN GENERAL.—

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office— (I) notify the voter that the voter has selected more than one candidate for a single office on the ballot; (II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and (III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (**including mail-in absentee ballots and mail-in ballots**), may meet the requirements of subparagraph (A)(iii) by— H. R. 3295—40

(i) establishing a **voter education program** specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

(ii) providing the **voter with instructions** on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the p

HAVA Section 301 (a) (6) UNIFORM DEFINITION OF WHAT CONSTITUTES A VOTE.— Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

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HAVA Section 301 (b) VOTING SYSTEM DEFINED.—In this section, the term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

HAVA Section 304. MINIMUM REQUIREMENTS. The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906.

168.803 Counting and recounting of votes; intent of voter; stray marks; instructions issued by secretary of state.

Sec. 803.

(1) Except as otherwise provided in this act, the following rules govern the counting and recounting of votes:

(a) If it is clearly evident from an examination of a ballot that the ballot has been mutilated for the purpose of distinguishing it or that there has been

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placed on the ballot some mark, printing, or writing for the purpose of distinguishing it, then that ballot is void and shall not be counted.

(b) A cross, the intersection of which is within or on the line of the proper circle or square, or a check mark, the angle of which is within a circle or square, is valid. Crosses or check marks otherwise located on the ballot are void.

(c) Marks other than crosses or check marks used to designate the intention of the voter shall not be counted.

(d) A cross is valid even though 1 or both lines of the cross are duplicated, if the lines intersect within or on the line of the square or circle.

(e) Two lines meeting within or on the line of the square or circle, although not crossing each other, are valid if it is apparent that the voter intended to make a cross.

(f) A failure to properly mark a ballot as to 1 or more candidates does not alone invalidate the entire ballot if the ballot has been properly marked as to other candidates, unless the improper marking is determined to be a distinguishing mark as described in this subsection.

(g) Erasures and corrections on a ballot made by the elector in a manner frequently used for this purpose shall not be considered distinguishing marks or mutilations.

(h) A ballot or part of a ballot from which it is impossible to determine the elector's choice of candidate is void as to the candidate or candidates affected by that determination.

(i) A vote cast for a deceased candidate is void and shall not be counted, except that a vote cast for a candidate for governor who has died, and for whom a replacement has not been made, shall be counted for the candidate for lieutenant governor of that party.

(j) A ballot cast that is not counted shall be marked by the inspector "not counted", kept separate from the others by being tied or held in 1 package, and placed in the ballot box with the counted ballots.

(k) A vote shall not be counted for a candidate unless a cross or a check mark has been placed by the voter in the square before the space in which the name of the candidate has been printed, written, or placed.

(2) If an electronic voting system requires that the elector place a mark in a predefined area on the ballot in order to cast a vote, the vote shall not be considered valid unless there is a mark within the predefined area. A stray mark made within a predefined area is not a valid vote. In determining whether a mark within a predefined area is a stray mark, the board of canvassers or election official shall compare the mark with other marks appearing on the ballot. The secretary of state shall issue instructions, subject to the approval of the board of state canvassers, relevant to stray marks to ensure the fairness and uniformity of determinations made under this subsection. A secretary of state's instruction relevant to stray marks

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shall not be applied to a ballot unless the secretary of state issued the instruction not less than 63 days before the date of the election.

168.795 Electronic voting system; requirements; method for rendering electronic tabulating equipment inoperable; equipping each polling place with accessible voting device.

Sec. 795.

(1) An electronic voting system acquired or used under sections 794 to 799a must meet all of the following requirements:

(a) Provide for voting in secrecy, except in the case of voters who receive assistance as provided by this act.

(b) Utilize a paper ballot for tabulating purposes.

(c) Permit each elector to vote at an election all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question. Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

(d) Permit an elector, at a presidential election, by a single selection to vote for the candidates of a party for president, vice-president, and presidential electors.

(e) Permit an elector in a primary election to vote for the candidates in the party primary of the elector's choice. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject each ballot on which votes are cast for candidates of more than 1 political party. Electronic tabulating equipment that can detect that the elector has voted for candidates of more than 1 political party must be located at each polling place and programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

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(f) Prevent an elector from voting for the same person more than once for the same office.

(g) Reject a ballot on which no valid vote is cast. Electronic tabulating equipment must be programmed to reject a ballot on which no valid vote is cast.

(h) Be suitably designed for the purpose used; be durably constructed; and be designed to provide for safety, accuracy, and efficiency.

(i) Be designed to accommodate the needs of an elderly voter or a person with 1 or more disabilities.

(j) Record correctly and count accurately each vote properly cast.

(k) Provide an audit trail.

(l) Provide an acceptable method for an elector to vote for a person whose name does not appear on the ballot.

(m) Allow for accumulation of vote totals from the precincts in the jurisdiction. The accumulation software must meet specifications prescribed by the secretary of state and must be certified by the secretary of state as meeting these specifications.

(n) Be compatible with or include at least 1 voting device that is accessible for an individual with disabilities to vote in a manner that provides the same opportunity for access and participation, including secrecy and independence, as provided for other voters. The voting device must include nonvisual accessibility for the blind and visually impaired.

(2) Electronic tabulating equipment that counts votes at the precinct before the close of the polls must provide a method for rendering the equipment inoperable if vote totals are revealed before the close of the polls. **Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location must be programmed to reject a ballot if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot, or if, in a primary election, votes are recorded for candidates of more than 1 political party.**

(3) Each jurisdiction in this state conducting an election shall equip each polling place with at least 1 accessible voting device as required under subsection (1)(n).

168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.

Sec. 795a.

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(1) An electronic voting system shall not be used in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and unless it meets 1 of the following conditions:

(a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.

(b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

(2) The vendor or representative seeking approval of an electronic voting system shall do all of the following:

(a) Deposit with the secretary of state a nonrefundable application fee of $1,500.00 for a new voting system and a fee of $500.00 for an upgrade to any existing system.

(b) File with the secretary of state a list of all states in which the voting system has been approved for use. This list shall state how long the system has been used in the state and shall disclose any reports compiled by any state or local government concerning the performance of the system. The vendor shall remain responsible for filing this information on an ongoing basis.

(c) File with the secretary of state copies of all standard contracts and maintenance agreements used in connection with the sale of the voting system. All changes to standard contracts and maintenance agreements shall be filed with the secretary of state.

(d) Pay the cost for any field test required by the board of state canvassers.

(e) State the number of voters each component of the voting system can process per hour under each of the following circumstances:

(i) An election in which there are 10 or fewer items to be voted on the ballot by each voter.

(ii) An election in which the ballot consists of the number of items typically voted on at a presidential general election in this state.

(3) The board of state canvassers shall conduct a field test of all new voting systems as part of the certification process. The field test shall involve Michigan electors and election officials in simulated election day conditions. The test shall be designed to gauge voter reaction to the system, problems that voters have with the system, and the number of voting stations required for the efficient operation of an election based upon the vendor's statement provided under subsection (2)(e).

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(4) The board of state canvassers shall approve an electronic voting system for use in this state only if it meets the conditions of subsection (1) except that in an emergency situation that threatens the ability of a county, city, or township to conduct a scheduled election, the board of state canvassers may approve a correction of software or firmware after testing the software or firmware performance.

(5) If an electronic voting system is approved for use before January 1, 1997 by the board of state canvassers, it may be used in an election. However, if the electronic voting system has its software or firmware improved or changed, the system shall comply with the requirements of subsection (1).

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

(7) A county, city, township, village, or school district shall file "an intent to purchase statement" with the secretary of state 30 days before any purchase agreement is made to purchase a new voting system. The secretary of state shall provide all information concerning the operation of the voting system in Michigan or any other state to the local unit of government within 25 days after receiving the "intent to purchase statement".

(8) The secretary of state shall instruct local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a and the rules promulgated pursuant to sections 794 to 799a.

(9) If the board of state canvassers determines that an electronic voting system that was approved under subsection (1) no longer meets the requirements described in that subsection, the board of state canvassers may disapprove that voting system. An electronic voting system that has been disapproved by the board of state canvassers under this subsection shall not be used in an election, unless it is reapproved by the board of state canvassers under subsection (1).

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BOARD OF STATE CANVASSERS
FOR THE STATE OF MICHIGAN

IN THE MATTER OF THE RECOUNT OF 2022 MICHIGAN PROPOSAL #3 of 2022.

NOW COMES JEROME JAY ALLEN, the undersigned an elector in this State of Michigan identified with my full name and jurisdiction of registration below their signature and pursuant to MCL 168.880 hereby presents and files with the secretary of state this sworn, printed petition that the undersigned electors believe that there has been fraud or error committed (1) by the inspectors of election in the return made; and (2) by the county canvassing board in the canvass of votes cast upon the questions of the proposed amendment to the constitution known as proposal 3 of 2022.

FURTHER that pursuant to MCL 168.865 this sworn petition sets forth the nature of the mistakes or frauds complained and identifies the city, ward, township, and precinct in which they are alleged to have occurred so that there may be a correction of the mistakes.

FURTHER that pursuant to MCL 168.881(1) this petition shall be filed with the state bureau of elections.

FURTHER that pursuant to MCL 168.881(6) the sum of $70,000 representing $125 per precinct for 560 precincts as the votes separating the questions were reported as greater than 0.5%. The precincts affected are listed in the attachment which identifies the county, the jurisdiction (City/Ward or Township), and the precinct (or in the case of the City of Detroit the AVCB and precinct.

The following mistakes or frauds complained of have resulted in a belief by the undersigned electors that there is fraud or error which requires a recount by hand that will result in a correction of the statement of votes cast:

FRAUD OR MISTAKE NUMBER 1: Configuration of voting systems is not certified to meet or exceed VVSG 2.0 by an accredited VVSG

The Votes were counted by use of a 'voting system' that was not certified (or recertified), *as configured,* to the VVSG 2.0 by an accredited laboratory as required by HAVA.

HAVA The Help America Vote Act of 2002

In person + AV counting Board Requested for all attached precincts. (SL)

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1) The Help America Vote Act of 2002 (HAVA) in Section 301(a)(6) sets forth the requirements that required each state to set forth non-discriminatory standards for what constitutes a vote for each voting system that is used in the state.
2) The definition of a voting system per HAVA Section 301(b)(2)(e) includes the instructions given to a voter on how to mark the ballot.
3) HAVA created the US Election Assistance Commission with the authority to provide a regulatory process ro accredit Voting System Test Laboratories (VSTL)
4) These VSTLs are authorized to certify each voting system *as configured* for use as meeting or exceeding standards called the Voluntary Voting System Guidelines (VVSG)
5) The VVSG has been in effect since 2021.
6) Michigan passed legislation that mandates the implementation of a statewide, uniform voting system and requires it to meet the requirements of HAVA (PA 91 of 2002).
7) HAVA in Section 253 Condition for receipt of Funds specifies the certification of compliance that was required by each state which included a plan for performance goals and measures and included requirements that the state would maintain the standards. The conditions were lengthy but mandatory upon receipt of funds.
8) The Federal Register with all the other states and territories published the original Michigan plan on March 24, 2004, but then Secretary of State Terri Land submitted an amended state plan dated September 27, 2005, which was published on November 9, 2005. There is no evidence that this plan has been updated subsequently on the internet or readily accessible records of the MI SOS or US EAC.

On page 31 of the State Plan, the document reads:

> IV. Voting System Guidelines and Processes How the State will adopt voting system guidelines and processes, which are consistent with the requirements of section 301. -- HAVA §254(a)(4)
>
> *Michigan has adopted legislation that mandates the implementation of a statewide, uniform voting system (PA 91 of 2002). The voting system selected will meet the requirements of Section 301 of the Help America Vote Act, including all accessibility requirements.*

THERE IS NO EVIDENCE OF COMPLIANCE IN STATE OR FEDERAL RECORDS that any Michigan voting system has been certified (or recertified) by a VSTL as meeting or exceeding the requirements of VVSG 2.0 , *as configured.*

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THEREFORE, there is a belief that the voting system, *as configured*, is not qualified by law to accurately count the ballots and that a hand recount will result in a different vote total.

FRAUD OR MISTAKE NUMBER 2: Digital Adjudication Software

Furthermore, certain AVCBs have used digital adjudication software as an optional application offered by the vendors. This specific software digital adjudication application violates both HAVA Section 301(a) (6) and Michigan Election Law (MCL 168.803) as it allows for the 'manipulation, alteration or transformation of the ballot image" to alter the voter's mark to what the adjudicator decides was the voter's intent.

The AVCBs identified by Chris Thomas and poll challengers include as the boards for the (1) County of Wayne in the Cities of Livonia and Detroit; (2) County of Oakland in the Cities of Farmington Hills, Rochester Hills, and Troy (3) County of Washtenaw, City of Ann Arbor (4) County of Muskegon, City of Muskegon (5) County of Ingham, City of Lansing and (6) County of Kent City of Grand Rapids are collectively referred to AVCBs with Adjudication Software.

THERE IS A BELIEF THAT THIS SOFTWARE HAS RESULTED IN VOTES BEING COUNTED FROM BALLOTS THAT HAVE BEEN ALTERED BY THE ADJUDICATORS

FRAUD OR MISTAKE NUMBER 3: Violation of MCL 168.795(2)

A ballot that is voted in person improperly is to be rejected by the tabulator under Federal and Michigan Law to permit the voter an opportunity to self-correct the ballot or have it spoiled. An absentee ballot that is rejected by the tabulator is to be rejected. To reduce the risk, federal law sets forth the process to educate and instruct the elector to limit the occurrences of a ballot being filled out improperly. HAVA Section 301(a)(1).

There is no process in Michigan to save part of a ballot when the ballot is rejected.

> MCL 168.795(2)
> Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location ***must be programmed to reject a ballot*** if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot,

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or if, in a primary election, votes are recorded for candidates of more than 1 political party.

Instead, as observed and reported on November 3, 2022, by Chris Thomas (formerly the Director of the Michigan Bureau of Elections for various Secretaries of State from 1980 to 2017 then a consultant for the City of Detroit for November 2020-2022) who during a hearing in the 3rd Circuit Court for the County of Wayne in *Karamo, et all v City of Detroit Clerk*, Case No. 22-012-759AW, that the rest of an overvoted ballot was counted without the race which was overvoted at the Detroit AVCB using the ImageCast Central™ Software from Dominion Voting Systems, Inc. with the adjudication application.

THEREFORE, there is a good faith belief that ballots that are to be rejected by law have been counted improperly at the AVCBs using adjudication software and high-speed scanning devices.

FRAUD OR MISTAKE NUMBER 4: Use of Voting system in violation of MCL 168.795a

HAVA Section 304 makes it very clear that the federal minimum requirements for voting systems are a *minimum*. States are free to have more restrictive laws on the books.

MCLA 168.795a states an express prohibition on the use of an electronic voting system unless it meets three separate requirements. The third of these requirements has not been met. There is no standards or independent testing authority recognized by the national association of state election inspectors. This was confirmed in the hearing on November 3, 2022 referenced above in the testimony of Chris Thomas who opined that this law was outdated.

MCL 168.795a (1) **An electronic voting system shall not be used in an** election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and **unless it meets 1 of the following conditions:**

(a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.

(b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

There is no legal means to disregard this law by the executive branch. The law must be enforced until repealed or held to be unconstitutional by a

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judicial branch official. The rule of law does not allow the executive branch to select which laws it will follow.

However, the Secretary of State has required all election clerks to use a voting system in violation of MCL 168.795a.

THEREFORE, there is a belief that the voting system is not qualified by law to accurately count the ballots and that a hand recount will result in a different vote total.

MISTAKE OR FRAUD NUMBER 5: TABULATORS CONNECTED TO THE INTERNET

Michigan required all manufacturers of tabulators during procurement to assure that the tabulators would not be connected to the internet and that data would be transferred by removable storage drive to the Election Management System. This was to prevent a foreign or domestic criminal from accessing the tabulator while it is processing ballots. In reliance upon these representations, the systems lack individual cybersecurity protections as the tabulators were reported offline and without the capacity to go online. However, recent information has developed where certain systems have cellular modems in them. Further, Security logs from tabulators have shown that the tabulators are in fact both capable of transmitting online and are configured to transmit online and have transmitted online during the August 2, 2022, primary election. The tabulators have not changed their capabilities since August. Tabulators in the AVCB using central election software are both wired together and online. It is believed that this creates both an illegal configuration and that this creates a vulnerability to 'hack' the election results. Recent reports of machines reporting inaccurate results in Cherokee Kansas, DeKalb County Georgia, and Williamson County Tennessee have only been discovered by hand counting ballots. The mechanism of the errors which changed the outcome of three elections after the hand recount is unknown. There is still questions concerning how Antrim County reported in 2020 General election more votes in three precincts and misreported both the presidential election and at least one down-ballot issue.

The connectivity, whether the secretary of state believes it or not, creates the opportunity that the machine can be accessed by hackers, foreign or domestic, and has created a belief that requires hand-count to correct the error in the tally.

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MISTAKE OR FRAUD NUMBER 6. E-poll books connected to the internet

Michigan has required the use of e poll books and has required the e poll books to be air-gapped (not connected to the internet) during the tabulation of votes. During the August 2, 2022 primary an e-poll book reportedly crashed in St. Clair County and per the affidavit when the Secretary of State was contacted they said the problem was on their end and re-set the e-poll book remotely. During the November 8, 2022 General Election, it has been reported by Kate Riley from the Wayne County Board of Canvasser that many, many precincts in Detroit experienced simultaneous failure of the e-poll book which resulted in a conversation with the Secretary of State Bureau of Elections Director Brater who reported the error had been addressed by the State, that Detroit was not at fault, and that the election was secure. This is strong evidence again of connectivity. The e-poll book connectivity is a significant issue of the integrity of the elections especially when the tabulator count is required to be matched against the number in the e-poll book.

Based on the connectivity of the e-poll book, there is a good faith belief that a recount will permit the board of examiners to determine how this connectivity affected the canvass.

MISTAKE OR FRAUD NUMBER 6: Examination of the return shows that there is a significant deviation from the top of the tickets and the bottom of the ticket in many, many precincts which is contrary to the manner in which people vote.

There is up to a 20-point difference in some precincts between the top three races and the local races. This voting has to be interpreted that the Republican voters who cast votes for local Republican candidates rejected the candidates for Governor, Attorney General, and Secretary of State or contrary that the Democratic Voters who cast votes in support of the top three races then rejected the Democratic Candidates down the ballot. This spread creates a belief that there have been votes that have been recorded improperly as this does not reflect normal voting behavior-especially considering the candidates and the polarizing of the two parties in this election. The canvass on the proposals is similar to the top of the ticket. As such there is a belief that the results are not genuine.

This phenomenon is also reported in Arizona which is hotly contested.

There is a belief that the recount will show that a hand count of the ballots will correct the mistake of fraud in the canvass.

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CONCLUSION

A recount of the November 2022 election will allow each county that is challenged to examine the paper record and hand count to comply with a lawful count of the paper ballots. While this will not address the widespread concerns about ballots being injected into the election for voters that are not real or eligible to vote, the examination of the paper record will remedy the objection raised related to the voting system being used in violation of MCL 168.795a and when the system is not certified, *as configured,* be an accredited VSTL. Further, the concerns related to the voting system and the e-poll book being connected to the internet contrary to representations creating a significant risk of foreign or domestic hacking will be addressed. Finally, the board of canvassers has the ability to hand count the ballots and apply the law related to MCL 168.798(2) to save votes on a ballot that is required to be rejected by law and eliminate the digital adjudication of ballots to count only properly marked ballots.

Being under oath, the following undersigned electors declare that they believe that there is fraud or mistake in the canvass of the precincts listed in Attachment A and hereby deposit the sum of money requesting a recount of the precincts listed for the correction of error.

I declare under penalty of perjury that the above statements are true to best of my knowledge, information, and belief.

Signed: _____

JEROME JAY ALLEN 11/29/22
Precinct 6, Bloomfield Township
Oakland County

Michigan Notary Acknowledgement
The State of Michigan
County of Oakland
Acknowledged before me in Oakland County, Michigan on 11/29/22 (the date by JEROME JAY ALLEN (name of signatory).

_____
Notary Public Signature

Print MATTHEW LAHR

Title BRANCH MANAGER

My commission expires: 3-1-2023

Acting in Oakland County

MATTHEW LAHR
Notary Public, State of Michigan
County of Macomb
My Commission Expires Mar. 01, 2023
Acting in the County of OAKLAND

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ATTACHMENT A

#	COUNTY	JURISDICTION	PRECINCT #
1	ALLEGAN	GANGES TOWNSHIP	1
2	ALLEGAN	GUNPLAIN TOWNSHIP	1
3	ALLEGAN	HEATH TOWNSHIP	1
4	ALLEGAN	SAUGATUCK TOWNSHIP	1
5	ANTRIM	ELK RAPIDS TOWNSHIP	1
6	ANTRIM	FOREST HOME TOWNSHIP	1
7	ANTRIM	MILTON TOWNSHIP	1
8	BARRY	BARRY TOWNSHIP	1
9	BARRY	IRVING TOWNSHIP	1
10	BARRY	RUTLAND TOWNSHIP	2
11	BAY	FRANKENLUST TOWNSHIP	1
12	BENZIE	ALMIRA TOWNSHIP	1
13	BENZIE	BENZONIA TOWNSHIP	1
14	BERRIEN	BRIDGMAN CITY	1
15	BERRIEN	CHIKAMING TOWNSHIP	1
16	BERRIEN	ROYALTON TOWNSHIP	2
17	BERRIEN	ST. JOSEPH CHARTER TWP	3
18	CALHOUN	BATTLE CREEK CITY	3
19	CALHOUN	BATTLE CREEK CITY	6
20	CALHOUN	MARSHALL CITY	1
21	CALHOUN	MARSHALL CITY	2
22	CALHOUN	MARSHALL TOWNSHIP	1
23	CHARLEVOIX	CHARLEVOIX CITY	2
24	CHARLEVOIX	CHARLEVOIX TOWNSHIP	4
25	CHARLEVOIX	HAYES TOWNSHIP	7
26	CHARLEVOIX	MARION TOWNSHIP	9
27	CHEBOYGAN	BENTON TOWNSHIP	1
28	CHEBOYGAN	CHEBOYGAN CITY	2
29	CHEBOYGAN	TUSCARORA TOWNSHIP	1
30	CHIPPEWA	SAULT STE MARIE CITY	1
31	CHIPPEWA	SAULT STE MARIE CITY	2
32	CHIPPEWA	SAULT STE MARIE CITY	3
33	CLARE	HAYES TOWNSHIP	2
34	CLINTON	BATH TOWNSHIP	2
35	CLINTON	BATH TOWNSHIP	4

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36	CLINTON	DE WITT TOWNSHIP	1
37	CLINTON	DE WITT TOWNSHIP	2
38	CLINTON	DE WITT TOWNSHIP	3
39	CLINTON	DE WITT TOWNSHIP	5
40	CLINTON	VICTOR TOWNSHIP	1
41	DICKINSON	KINGSFORD CITY	1
42	DICKINSON	KINGSFORD CITY	2
43	DICKINSON	NORWAY CITY	1
44	EATON	EATON TOWNSHIP	2
45	EATON	GRAND LEDGE CITY	1
46	EATON	GRAND LEDGE CITY	2
47	EMMET	BEAR CREEK TOWNSHIP	1
48	EMMET	LITTLE TRAVERSE TWP	1
49	EMMET	PETOSKEY CITY	1
50	EMMET	WEST TRAVERSE TWP	1
51	GD TRAVERSE	ACME TOWNSHIP	1
52	GD TRAVERSE	EAST BAY TOWNSHIP	1
53	GD TRAVERSE	EAST BAY TOWNSHIP	4
54	GD TRAVERSE	GARFIELD TOWNSHIP	3
55	GD TRAVERSE	GARFIELD TOWNSHIP	5
56	GD TRAVERSE	LONG LAKE TOWNSHIP	1
57	GD TRAVERSE	PENINSULA TOWNSHIP	2
58	GD TRAVERSE	TRAVERSE CITY	3
59	GD TRAVERSE	TRAVERSE CITY	9
60	GENESEE	FENTON CITY	2
61	GENESEE	FENTON TOWNSHIP	2
62	GENESEE	FENTON TOWNSHIP	6
63	GENESEE	FLINT CITY	1
64	GENESEE	FLINT CITY	14
65	GENESEE	FLINT CITY	40
66	GENESEE	FLINT CITY	56
67	GENESEE	FLINT CITY	57
68	GENESEE	FLINT CITY	58
69	GENESEE	GRAND BLANC TWP	8
70	HOUGHTON	HOUGHTON CITY	2
71	INGHAM	LANSING CITY	1001
72	INGHAM	LANSING CITY	1002
73	INGHAM	LANSING CITY	1003
74	INGHAM	LANSING CITY	1004

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75	INGHAM	LANSING CITY	1005
76	INGHAM	LANSING CITY	1006
77	INGHAM	LANSING CITY	1007
78	INGHAM	LANSING CITY	1008
79	INGHAM	LANSING CITY	1009
80	INGHAM	LANSING CITY	1010
81	INGHAM	LANSING CITY	2011
82	INGHAM	LANSING CITY	2012
83	INGHAM	LANSING CITY	2013
84	INGHAM	LANSING CITY	2014
85	INGHAM	LANSING CITY	2015
86	INGHAM	LANSING CITY	2016
87	INGHAM	LANSING CITY	2017
88	INGHAM	LANSING CITY	2018
89	INGHAM	LANSING CITY	2019
90	INGHAM	LANSING CITY	2020
91	INGHAM	LANSING CITY	3023
92	INGHAM	LANSING CITY	3024
93	INGHAM	LANSING CITY	3025
94	INGHAM	LANSING CITY	3026
95	INGHAM	LANSING CITY	3027
96	INGHAM	LANSING CITY	3028
97	INGHAM	LANSING CITY	3029
98	INGHAM	LANSING CITY	3030
99	INGHAM	LANSING CITY	4031
100	INGHAM	LANSING CITY	4032
101	INGHAM	LANSING CITY	4033
102	INGHAM	LANSING CITY	4034
103	INGHAM	LANSING CITY	4035
104	INGHAM	LANSING CITY	4036
105	INGHAM	LANSING CITY	4037
106	INGHAM	LANSING CITY	4038
107	INGHAM	LANSING CITY	4039
108	INGHAM	LANSING CITY	4040
109	IONIA	PORTLAND CITY	1
110	IOSCO	EAST TAWAS CITY	1
111	ISABELLA	MOUNT PLEASANT CITY	4
112	ISABELLA	MOUNT PLEASANT CITY	5
113	ISABELLA	UNION TOWNSHIP	3
114	JACKSON	BLACKMAN TOWNSHIP	2
115	JACKSON	BLACKMAN TOWNSHIP	3
116	JACKSON	HENRIETTA TOWNSHIP	1
117	KALAMAZOO	COMSTOCK TOWNSHIP	5
118	KALAMAZOO	KALAMAZOO CITY	21
119	KALAMAZOO	KALAMAZOO CITY	6

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120	KALAMAZOO	KALAMAZOO TOWNSHIP	3
121	KALAMAZOO	OSHTEMO TOWNSHIP	2
122	KALAMAZOO	PORTAGE CITY	11
123	KALAMAZOO	PORTAGE CITY	12
124	KALAMAZOO	PORTAGE CITY	14
125	KALAMAZOO	PORTAGE CITY	15
126	KALAMAZOO	PORTAGE CITY	16
127	KALAMAZOO	PORTAGE CITY	5
128	KALAMAZOO	PORTAGE CITY	6
129	KALAMAZOO	PORTAGE CITY	8
130	KALAMAZOO	RICHLAND TOWNSHIP	3
131	KALAMAZOO	ROSS TOWNSHIP	2
132	KALAMAZOO	TEXAS TOWNSHIP	4
133	KALAMAZOO	TEXAS TOWNSHIP	5
134	KALKASKA	CLEARWATER TOWNSHIP	1
135	KALKASKA	EXCELSIOR TOWNSHIP	1
136	KALKASKA	KALKASKA TOWNSHIP	1
137	KALKASKA	ORANGE TOWNSHIP	1
138	KENT	GRAND RAPIDS CITY	1001
139	KENT	GRAND RAPIDS CITY	1002
140	KENT	GRAND RAPIDS CITY	1003
141	KENT	GRAND RAPIDS CITY	1004
142	KENT	GRAND RAPIDS CITY	1005
143	KENT	GRAND RAPIDS CITY	1006
144	KENT	GRAND RAPIDS CITY	1007
145	KENT	GRAND RAPIDS CITY	1008
146	KENT	GRAND RAPIDS CITY	1009
147	KENT	GRAND RAPIDS CITY	1010
148	KENT	GRAND RAPIDS CITY	1011
149	KENT	GRAND RAPIDS CITY	1012
150	KENT	GRAND RAPIDS CITY	1013
151	KENT	GRAND RAPIDS CITY	1014
152	KENT	GRAND RAPIDS CITY	1015
153	KENT	GRAND RAPIDS CITY	1016
154	KENT	GRAND RAPIDS CITY	1018
155	KENT	GRAND RAPIDS CITY	1019
156	KENT	GRAND RAPIDS CITY	1020
157	KENT	GRAND RAPIDS CITY	1022
158	KENT	GRAND RAPIDS CITY	2024
159	KENT	GRAND RAPIDS CITY	2025
160	KENT	GRAND RAPIDS CITY	2026
161	KENT	GRAND RAPIDS CITY	2027
162	KENT	GRAND RAPIDS CITY	2028
163	KENT	GRAND RAPIDS CITY	2029
164	KENT	GRAND RAPIDS CITY	2030

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165	KENT	GRAND RAPIDS CITY	2031
166	KENT	GRAND RAPIDS CITY	2032
167	KENT	GRAND RAPIDS CITY	2033
168	KENT	GRAND RAPIDS CITY	2034
169	KENT	GRAND RAPIDS CITY	2035
170	KENT	GRAND RAPIDS CITY	2036
171	KENT	GRAND RAPIDS CITY	2037
172	KENT	GRAND RAPIDS CITY	2038
173	KENT	GRAND RAPIDS CITY	2039
174	KENT	GRAND RAPIDS CITY	2040
175	KENT	GRAND RAPIDS CITY	2041
176	KENT	GRAND RAPIDS CITY	2042
177	KENT	GRAND RAPIDS CITY	2043
178	KENT	GRAND RAPIDS CITY	2044
179	KENT	GRAND RAPIDS CITY	2045
180	KENT	GRAND RAPIDS CITY	2046
181	KENT	GRAND RAPIDS CITY	2047
182	KENT	GRAND RAPIDS CITY	2048
183	KENT	GRAND RAPIDS CITY	3049
184	KENT	GRAND RAPIDS CITY	3051
185	KENT	GRAND RAPIDS CITY	3052
186	KENT	GRAND RAPIDS CITY	3053
187	KENT	GRAND RAPIDS CITY	3054
188	KENT	GRAND RAPIDS CITY	3055
189	KENT	GRAND RAPIDS CITY	3056
190	KENT	GRAND RAPIDS CITY	3057
191	KENT	GRAND RAPIDS CITY	3058
192	KENT	GRAND RAPIDS CITY	3059
193	KENT	GRAND RAPIDS CITY	3060
194	KENT	GRAND RAPIDS CITY	3061
195	KENT	GRAND RAPIDS CITY	3062
196	KENT	GRAND RAPIDS CITY	3063
197	KENT	GRAND RAPIDS CITY	3064
198	KENT	GRAND RAPIDS CITY	3065
199	KENT	GRAND RAPIDS CITY	3066
200	KENT	GRAND RAPIDS CITY	3067
201	KENT	GRAND RAPIDS CITY	3068
202	KENT	GRAND RAPIDS CITY	3069
203	KENT	GRAND RAPIDS CITY	3070
204	KENT	GRAND RAPIDS CITY	3071
205	KENT	GRAND RAPIDS CITY	3072
206	KENT	GRAND RAPIDS CITY	3073
207	KENT	GRAND RAPIDS CITY	3074
208	KENT	KENTWOOD CITY	#1-2
209	KENT	KENTWOOD CITY	#1-8

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210	KENT	KENTWOOD CITY	#2-11
211	KENT	KENTWOOD CITY	#2-15
212	KENT	KENTWOOD CITY	#2-16
213	LAPEER	IMLAY CITY	2
214	LEELANAU	ELMWOOD TOWNSHIP	1
215	LEELANAU	ELMWOOD TOWNSHIP	2
216	LEELANAU	LEELANAU TOWNSHIP	1
217	LEELANAU	SUTTONS BAY TOWNSHIP	1
218	LENAWEE	ADRIAN CITY	4
219	LENAWEE	CLINTON TOWNSHIP	2
220	LENAWEE	TECUMSEH TOWNSHIP	1
221	LIVINGSTON	GENOA TOWNSHIP	3
222	LIVINGSTON	GENOA TOWNSHIP	4
223	LIVINGSTON	GREEN OAK TOWNSHIP	1
224	LIVINGSTON	GREEN OAK TOWNSHIP	3
225	LIVINGSTON	GREEN OAK TOWNSHIP	5
226	LIVINGSTON	GREEN OAK TOWNSHIP	6
227	LIVINGSTON	HAMBURG TOWNSHIP	6
228	LIVINGSTON	HOWELL CITY	2
229	LIVINGSTON	OCEOLA TOWNSHIP	2
230	LIVINGSTON	PUTNAM TOWNSHIP	1
231	LIVINGSTON	PUTNAM TOWNSHIP	3
232	LIVINGSTON	TYRONE TOWNSHIP	1
233	MACOMB	CHESTERFIELD TOWNSHIP	4
234	MACOMB	CHESTERFIELD TOWNSHIP	7
235	MACOMB	CHESTERFIELD TOWNSHIP	9
236	MACOMB	CLINTON TOWNSHIP	1
237	MACOMB	CLINTON TOWNSHIP	15
238	MACOMB	CLINTON TOWNSHIP	26
239	MACOMB	CLINTON TOWNSHIP	38
240	MACOMB	HARRISON TOWNSHIP	7
241	MACOMB	MACOMB TOWNSHIP	1
242	MACOMB	MACOMB TOWNSHIP	7
243	MACOMB	MACOMB TOWNSHIP	8
244	MACOMB	SHELBY TOWNSHIP	5
245	MACOMB	SHELBY TOWNSHIP	18
246	MACOMB	SHELBY TOWNSHIP	26
247	MACOMB	SHELBY TOWNSHIP	27
248	MARQUETTE	CHOCOLAY TOWNSHIP	1
249	MARQUETTE	MARQUETTE CITY	2
250	MARQUETTE	MARQUETTE CITY	5
251	MARQUETTE	MARQUETTE CITY	7

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252	MIDLAND	JEROME TOWNSHIP	1
253	MIDLAND	LARKIN TOWNSHIP	1
254	MIDLAND	LARKIN TOWNSHIP	2
255	MONTCALM	GREENVILLE CITY	3
256	MUSKEGON	FRUITLAND TOWNSHIP	1
257	MUSKEGON	FRUITPORT TOWNSHIP	4
258	MUSKEGON	MUSKEGON CITY	1001
259	MUSKEGON	MUSKEGON CITY	1002
260	MUSKEGON	MUSKEGON CITY	1003
261	MUSKEGON	MUSKEGON CITY	1004
262	MUSKEGON	MUSKEGON CITY	2005
263	MUSKEGON	MUSKEGON CITY	2006
264	MUSKEGON	MUSKEGON CITY	2007
265	MUSKEGON	MUSKEGON CITY	3009
266	MUSKEGON	MUSKEGON CITY	3010
267	MUSKEGON	MUSKEGON CITY	4011
268	MUSKEGON	MUSKEGON CITY	4012
269	MUSKEGON	MUSKEGON CITY	4013
270	MUSKEGON	MUSKEGON CITY	4014
271	MUSKEGON	NORTH MUSKEGON CITY	1
272	MUSKEGON	NORTH MUSKEGON CITY	2
273	OAKLAND	FARMINGTON HILLS CITY	1
274	OAKLAND	FARMINGTON HILLS CITY	10
275	OAKLAND	FARMINGTON HILLS CITY	11
276	OAKLAND	FARMINGTON HILLS CITY	12
277	OAKLAND	FARMINGTON HILLS CITY	13
278	OAKLAND	FARMINGTON HILLS CITY	14
279	OAKLAND	FARMINGTON HILLS CITY	15
280	OAKLAND	FARMINGTON HILLS CITY	16
281	OAKLAND	FARMINGTON HILLS CITY	17
282	OAKLAND	FARMINGTON HILLS CITY	18
283	OAKLAND	FARMINGTON HILLS CITY	19
284	OAKLAND	FARMINGTON HILLS CITY	2
285	OAKLAND	FARMINGTON HILLS CITY	20
286	OAKLAND	FARMINGTON HILLS CITY	21
287	OAKLAND	FARMINGTON HILLS CITY	22
288	OAKLAND	FARMINGTON HILLS CITY	23
289	OAKLAND	FARMINGTON HILLS CITY	24
290	OAKLAND	FARMINGTON HILLS CITY	25
291	OAKLAND	FARMINGTON HILLS CITY	26
292	OAKLAND	FARMINGTON HILLS CITY	27
293	OAKLAND	FARMINGTON HILLS CITY	3
294	OAKLAND	FARMINGTON HILLS CITY	4
295	OAKLAND	FARMINGTON HILLS CITY	5
296	OAKLAND	FARMINGTON HILLS CITY	6

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297	OAKLAND	FARMINGTON HILLS CITY	7
298	OAKLAND	FARMINGTON HILLS CITY	8
299	OAKLAND	FARMINGTON HILLS CITY	9
300	OAKLAND	PONTIAC CITY	1
301	OAKLAND	PONTIAC CITY	3
302	OAKLAND	ROCHESTER HILLS CITY	1
303	OAKLAND	ROCHESTER HILLS CITY	10
304	OAKLAND	ROCHESTER HILLS CITY	11
305	OAKLAND	ROCHESTER HILLS CITY	12
306	OAKLAND	ROCHESTER HILLS CITY	13
307	OAKLAND	ROCHESTER HILLS CITY	14
308	OAKLAND	ROCHESTER HILLS CITY	15
309	OAKLAND	ROCHESTER HILLS CITY	16
310	OAKLAND	ROCHESTER HILLS CITY	17
311	OAKLAND	ROCHESTER HILLS CITY	18
312	OAKLAND	ROCHESTER HILLS CITY	19
313	OAKLAND	ROCHESTER HILLS CITY	2
314	OAKLAND	ROCHESTER HILLS CITY	20
315	OAKLAND	ROCHESTER HILLS CITY	21
316	OAKLAND	ROCHESTER HILLS CITY	22
317	OAKLAND	ROCHESTER HILLS CITY	23
318	OAKLAND	ROCHESTER HILLS CITY	24
319	OAKLAND	ROCHESTER HILLS CITY	25
320	OAKLAND	ROCHESTER HILLS CITY	27
321	OAKLAND	ROCHESTER HILLS CITY	28
322	OAKLAND	ROCHESTER HILLS CITY	29
323	OAKLAND	ROCHESTER HILLS CITY	3
324	OAKLAND	ROCHESTER HILLS CITY	30
325	OAKLAND	ROCHESTER HILLS CITY	31
326	OAKLAND	ROCHESTER HILLS CITY	32
327	OAKLAND	ROCHESTER HILLS CITY	4
328	OAKLAND	ROCHESTER HILLS CITY	5
329	OAKLAND	ROCHESTER HILLS CITY	6
330	OAKLAND	ROCHESTER HILLS CITY	7
331	OAKLAND	ROCHESTER HILLS CITY	8
332	OAKLAND	ROCHESTER HILLS CITY	9
333	OAKLAND	TROY CITY	1
334	OAKLAND	TROY CITY	10
335	OAKLAND	TROY CITY	11
336	OAKLAND	TROY CITY	12
337	OAKLAND	TROY CITY	13
338	OAKLAND	TROY CITY	14
339	OAKLAND	TROY CITY	15
340	OAKLAND	TROY CITY	16
341	OAKLAND	TROY CITY	17

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342	OAKLAND	TROY CITY	18
343	OAKLAND	TROY CITY	19
344	OAKLAND	TROY CITY	2
345	OAKLAND	TROY CITY	20
346	OAKLAND	TROY CITY	21
347	OAKLAND	TROY CITY	22
348	OAKLAND	TROY CITY	23
349	OAKLAND	TROY CITY	24
350	OAKLAND	TROY CITY	25
351	OAKLAND	TROY CITY	26
352	OAKLAND	TROY CITY	27
353	OAKLAND	TROY CITY	28
354	OAKLAND	TROY CITY	29
355	OAKLAND	TROY CITY	3
356	OAKLAND	TROY CITY	31
357	OAKLAND	TROY CITY	32
358	OAKLAND	TROY CITY	33
359	OAKLAND	TROY CITY	34
360	OAKLAND	TROY CITY	35
361	OAKLAND	TROY CITY	37
362	OAKLAND	TROY CITY	4
363	OAKLAND	TROY CITY	5
364	OAKLAND	TROY CITY	7
365	OAKLAND	TROY CITY	8
366	OAKLAND	TROY CITY	9
367	OTSEGO	BAGLEY TOWNSHIP	1
368	OTSEGO	OTSEGO LAKE TOWNSHIP	1
369	OTTAWA	FERRYSBURG CITY	1
370	OTTAWA	HOLLAND TOWNSHIP	4
371	SHIAWASSEE	WOODHULL TOWNSHIP	1
372	VAN BUREN	ALMENA TOWNSHIP	2
373	VAN BUREN	ANTWERP TOWNSHIP	2
374	VAN BUREN	SOUTH HAVEN TOWNSHIP	1
375	WASHTENAW	ANN ARBOR CITY	1002
376	WASHTENAW	ANN ARBOR CITY	1005
377	WASHTENAW	ANN ARBOR CITY	1006
378	WASHTENAW	ANN ARBOR CITY	1008
379	WASHTENAW	ANN ARBOR CITY	1009
380	WASHTENAW	ANN ARBOR CITY	1010
381	WASHTENAW	ANN ARBOR CITY	1011
382	WASHTENAW	ANN ARBOR CITY	2015
383	WASHTENAW	ANN ARBOR CITY	2016
384	WASHTENAW	ANN ARBOR CITY	2017

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385	WASHTENAW	ANN ARBOR CITY	2018
386	WASHTENAW	ANN ARBOR CITY	2019
387	WASHTENAW	ANN ARBOR CITY	2020
388	WASHTENAW	ANN ARBOR CITY	2021
389	WASHTENAW	ANN ARBOR CITY	3022
390	WASHTENAW	ANN ARBOR CITY	3023
391	WASHTENAW	ANN ARBOR CITY	3024
392	WASHTENAW	ANN ARBOR CITY	3025
393	WASHTENAW	ANN ARBOR CITY	3026
394	WASHTENAW	ANN ARBOR CITY	3027
395	WASHTENAW	ANN ARBOR CITY	3028
396	WASHTENAW	ANN ARBOR CITY	3029
397	WASHTENAW	ANN ARBOR CITY	3030
398	WASHTENAW	ANN ARBOR CITY	4032
399	WASHTENAW	ANN ARBOR CITY	4033
400	WASHTENAW	ANN ARBOR CITY	4034
401	WASHTENAW	ANN ARBOR CITY	4035
402	WASHTENAW	ANN ARBOR CITY	4036
403	WASHTENAW	ANN ARBOR CITY	4037
404	WASHTENAW	ANN ARBOR CITY	4038
405	WASHTENAW	ANN ARBOR CITY	4039
406	WASHTENAW	ANN ARBOR CITY	4040
407	WASHTENAW	ANN ARBOR CITY	5042
408	WASHTENAW	ANN ARBOR CITY	5043
409	WASHTENAW	ANN ARBOR CITY	5044
410	WASHTENAW	ANN ARBOR CITY	5045
411	WASHTENAW	ANN ARBOR CITY	5046
412	WASHTENAW	ANN ARBOR CITY	5047
413	WASHTENAW	ANN ARBOR CITY	5048
414	WASHTENAW	ANN ARBOR CITY	5049
415	WASHTENAW	ANN ARBOR CITY	5050
416	WASHTENAW	ANN ARBOR CITY	5051
417	WASHTENAW	ANN ARBOR CITY	5052
418	WASHTENAW	ANN ARBOR CITY	5053
419	WAYNE	DETROIT CITY	AVCB1
420	WAYNE	DETROIT CITY	AVCB10
421	WAYNE	DETROIT CITY	AVCB100
422	WAYNE	DETROIT CITY	AVCB101
423	WAYNE	DETROIT CITY	AVCB102
424	WAYNE	DETROIT CITY	AVCB103
425	WAYNE	DETROIT CITY	AVCB105
426	WAYNE	DETROIT CITY	AVCB11
427	WAYNE	DETROIT CITY	AVCB110
428	WAYNE	DETROIT CITY	AVCB12
429	WAYNE	DETROIT CITY	AVCB13

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430	WAYNE	DETROIT CITY	AVCB14
431	WAYNE	DETROIT CITY	AVCB15
432	WAYNE	DETROIT CITY	AVCB16
433	WAYNE	DETROIT CITY	AVCB17
434	WAYNE	DETROIT CITY	AVCB18
435	WAYNE	DETROIT CITY	AVCB19
436	WAYNE	DETROIT CITY	AVCB2
437	WAYNE	DETROIT CITY	AVCB20
438	WAYNE	DETROIT CITY	AVCB21
439	WAYNE	DETROIT CITY	AVCB22
440	WAYNE	DETROIT CITY	AVCB23
441	WAYNE	DETROIT CITY	AVCB24
442	WAYNE	DETROIT CITY	AVCB25
443	WAYNE	DETROIT CITY	AVCB26
444	WAYNE	DETROIT CITY	AVCB27
445	WAYNE	DETROIT CITY	AVCB28
446	WAYNE	DETROIT CITY	AVCB29
447	WAYNE	DETROIT CITY	AVCB3
448	WAYNE	DETROIT CITY	AVCB30
449	WAYNE	DETROIT CITY	AVCB31
450	WAYNE	DETROIT CITY	AVCB32
451	WAYNE	DETROIT CITY	AVCB33
452	WAYNE	DETROIT CITY	AVCB34
453	WAYNE	DETROIT CITY	AVCB35
454	WAYNE	DETROIT CITY	AVCB36
455	WAYNE	DETROIT CITY	AVCB37
456	WAYNE	DETROIT CITY	AVCB38
457	WAYNE	DETROIT CITY	AVCB39
458	WAYNE	DETROIT CITY	AVCB4
459	WAYNE	DETROIT CITY	AVCB40
460	WAYNE	DETROIT CITY	AVCB41
461	WAYNE	DETROIT CITY	AVCB42
462	WAYNE	DETROIT CITY	AVCB43
463	WAYNE	DETROIT CITY	AVCB44
464	WAYNE	DETROIT CITY	AVCB45
465	WAYNE	DETROIT CITY	AVCB46
466	WAYNE	DETROIT CITY	AVCB47
467	WAYNE	DETROIT CITY	AVCB48
468	WAYNE	DETROIT CITY	AVCB49
469	WAYNE	DETROIT CITY	AVCB5
470	WAYNE	DETROIT CITY	AVCB50
471	WAYNE	DETROIT CITY	AVCB51
472	WAYNE	DETROIT CITY	AVCB52
473	WAYNE	DETROIT CITY	AVCB53
474	WAYNE	DETROIT CITY	AVCB54

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475	WAYNE	DETROIT CITY	AVCB55
476	WAYNE	DETROIT CITY	AVCB56
477	WAYNE	DETROIT CITY	AVCB57
478	WAYNE	DETROIT CITY	AVCB58
479	WAYNE	DETROIT CITY	AVCB59
480	WAYNE	DETROIT CITY	AVCB6
481	WAYNE	DETROIT CITY	AVCB60
482	WAYNE	DETROIT CITY	AVCB61
483	WAYNE	DETROIT CITY	AVCB62
484	WAYNE	DETROIT CITY	AVCB63
485	WAYNE	DETROIT CITY	AVCB64
486	WAYNE	DETROIT CITY	AVCB65
487	WAYNE	DETROIT CITY	AVCB66
488	WAYNE	DETROIT CITY	AVCB67
489	WAYNE	DETROIT CITY	AVCB68
490	WAYNE	DETROIT CITY	AVCB69
491	WAYNE	DETROIT CITY	AVCB7
492	WAYNE	DETROIT CITY	AVCB70
493	WAYNE	DETROIT CITY	AVCB71
494	WAYNE	DETROIT CITY	AVCB72
495	WAYNE	DETROIT CITY	AVCB73
496	WAYNE	DETROIT CITY	AVCB74
497	WAYNE	DETROIT CITY	AVCB75
498	WAYNE	DETROIT CITY	AVCB76
499	WAYNE	DETROIT CITY	AVCB77
500	WAYNE	DETROIT CITY	AVCB78
501	WAYNE	DETROIT CITY	AVCB79
502	WAYNE	DETROIT CITY	AVCB8
503	WAYNE	DETROIT CITY	AVCB81
504	WAYNE	DETROIT CITY	AVCB82
505	WAYNE	DETROIT CITY	AVCB83
506	WAYNE	DETROIT CITY	AVCB84
507	WAYNE	DETROIT CITY	AVCB85
508	WAYNE	DETROIT CITY	AVCB86
509	WAYNE	DETROIT CITY	AVCB87
510	WAYNE	DETROIT CITY	AVCB89
511	WAYNE	DETROIT CITY	AVCB9
512	WAYNE	DETROIT CITY	AVCB94
513	WAYNE	DETROIT CITY	AVCB95
514	WAYNE	DETROIT CITY	AVCB97
515	WAYNE	DETROIT CITY	AVCB99
516	WAYNE	LIVONIA CITY	00001A
517	WAYNE	LIVONIA CITY	00001B
518	WAYNE	LIVONIA CITY	00002A
519	WAYNE	LIVONIA CITY	00003A

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520	WAYNE	LIVONIA CITY	00003B
521	WAYNE	LIVONIA CITY	00004A
522	WAYNE	LIVONIA CITY	00007A
523	WAYNE	LIVONIA CITY	00008A
524	WAYNE	LIVONIA CITY	00008B
525	WAYNE	LIVONIA CITY	00009A
526	WAYNE	LIVONIA CITY	00010A
527	WAYNE	LIVONIA CITY	00011A
528	WAYNE	LIVONIA CITY	00012A
529	WAYNE	LIVONIA CITY	00013A
530	WAYNE	LIVONIA CITY	00014A
531	WAYNE	LIVONIA CITY	00015A
532	WAYNE	LIVONIA CITY	00016A
533	WAYNE	LIVONIA CITY	00016B
534	WAYNE	LIVONIA CITY	00017A
535	WAYNE	LIVONIA CITY	00017B
536	WAYNE	LIVONIA CITY	00018A
537	WAYNE	LIVONIA CITY	00019A
538	WAYNE	LIVONIA CITY	00019B
539	WAYNE	LIVONIA CITY	00020A
540	WAYNE	LIVONIA CITY	00021A
541	WAYNE	LIVONIA CITY	00022A
542	WAYNE	LIVONIA CITY	00022B
543	WAYNE	LIVONIA CITY	00023A
544	WAYNE	LIVONIA CITY	00023B
545	WAYNE	LIVONIA CITY	00024A
546	WAYNE	LIVONIA CITY	00024B
547	WAYNE	LIVONIA CITY	00025A
548	WAYNE	LIVONIA CITY	00031A
549	WAYNE	LIVONIA CITY	00031B
550	WAYNE	LIVONIA CITY	00032A
551	WAYNE	LIVONIA CITY	00033A
552	WAYNE	LIVONIA CITY	00034A
553	WAYNE	LIVONIA CITY	00034B
554	WAYNE	LIVONIA CITY	00034C
555	WAYNE	LIVONIA CITY	00035A
556	WAYNE	LIVONIA CITY	00035B
557	WAYNE	LIVONIA CITY	00035C
558	WAYNE	LIVONIA CITY	00036A
559	WAYNE	LIVONIA CITY	00036B
560	WEXFORD	CADILLAC CITY	3

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ADDENDUM:
Referenced Laws

168.880 Recount of votes; petition by elector on constitutional amendment or question, deadline, contents.

Any elector in this state who believes that there has been fraud or error committed by the inspectors of election in the return made by said inspectors or of any county canvassing board in the canvass of votes cast upon the question of a proposed amendment to the constitution or any other question or proposition, the votes for which are canvassed by the board of state canvassers, may, not later than 2 days after final certification and determination by the board of state canvassers of the canvass of votes cast at an election, present to and file with the secretary of state a written or printed petition which shall be sworn to by the elector presenting the same and which shall set forth as nearly as may be the nature and character of the fraud or error of which the complaint is made and the counties, cities or townships or the precincts thereof in which it is believed that the fraud or error occurred, and such petition shall contain a prayer that a correction thereof be made by a recount of the votes cast therein.

168.881 Recount petition; filing; deposit; refund; disposition of sum deposited.

(1) A person filing a recount petition under section 879 or 880 shall file the petition with the state bureau of elections. Except as otherwise provided in this section, at the time of filing the petition, the petitioner shall deposit the sum of $25.00 for each precinct in which a recount of the votes is demanded in cash or by check or other negotiable instrument made payable to the state of Michigan.

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(6) If the vote is on a proposal and the official canvass of votes shows that the number of votes separating the "yes" votes and the "no" votes is more than 50 votes or 0.5% of the total number of votes cast on the proposal, whichever is greater, the petitioner shall deposit with the state bureau of elections the sum of $125.00 for each precinct referred to in his or her petition.

168.865 Recount petition; contents.

Such petition shall be sworn to and shall set forth as near as may be the nature of the mistakes or frauds complained of and the city, ward, township, village and precinct in which they are alleged to have occurred, and shall ask for a correction thereof.

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HAVA Section 301(a) REQUIREMENTS.—Each voting system used in an election for Federal office shall meet the following requirements:
(1) IN GENERAL.—

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office— (I) notify the voter that the voter has selected more than one candidate for a single office on the ballot; (II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and (III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (**including mail-in absentee ballots and mail-in ballots**), may meet the requirements of subparagraph (A)(iii) by— H. R. 3295—40

(i) establishing a **voter education program** specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

(ii) providing the **voter with instructions** on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the p

HAVA Section 301 (a) (6) UNIFORM DEFINITION OF WHAT CONSTITUTES A VOTE.— Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

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HAVA Section 301 (b) VOTING SYSTEM DEFINED.—In this section, the term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

HAVA Section 304. MINIMUM REQUIREMENTS. The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906.

168.803 Counting and recounting of votes; intent of voter; stray marks; instructions issued by secretary of state.

Sec. 803.

(1) Except as otherwise provided in this act, the following rules govern the counting and recounting of votes:

(a) If it is clearly evident from an examination of a ballot that the ballot has been mutilated for the purpose of distinguishing it or that there has been

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placed on the ballot some mark, printing, or writing for the purpose of distinguishing it, then that ballot is void and shall not be counted.

(b) A cross, the intersection of which is within or on the line of the proper circle or square, or a check mark, the angle of which is within a circle or square, is valid. Crosses or check marks otherwise located on the ballot are void.

(c) Marks other than crosses or check marks used to designate the intention of the voter shall not be counted.

(d) A cross is valid even though 1 or both lines of the cross are duplicated, if the lines intersect within or on the line of the square or circle.

(e) Two lines meeting within or on the line of the square or circle, although not crossing each other, are valid if it is apparent that the voter intended to make a cross.

(f) A failure to properly mark a ballot as to 1 or more candidates does not alone invalidate the entire ballot if the ballot has been properly marked as to other candidates, unless the improper marking is determined to be a distinguishing mark as described in this subsection.

(g) Erasures and corrections on a ballot made by the elector in a manner frequently used for this purpose shall not be considered distinguishing marks or mutilations.

(h) A ballot or part of a ballot from which it is impossible to determine the elector's choice of candidate is void as to the candidate or candidates affected by that determination.

(i) A vote cast for a deceased candidate is void and shall not be counted, except that a vote cast for a candidate for governor who has died, and for whom a replacement has not been made, shall be counted for the candidate for lieutenant governor of that party.

(j) A ballot cast that is not counted shall be marked by the inspector "not counted", kept separate from the others by being tied or held in 1 package, and placed in the ballot box with the counted ballots.

(k) A vote shall not be counted for a candidate unless a cross or a check mark has been placed by the voter in the square before the space in which the name of the candidate has been printed, written, or placed.

(2) If an electronic voting system requires that the elector place a mark in a predefined area on the ballot in order to cast a vote, the vote shall not be considered valid unless there is a mark within the predefined area. A stray mark made within a predefined area is not a valid vote. In determining whether a mark within a predefined area is a stray mark, the board of canvassers or election official shall compare the mark with other marks appearing on the ballot. The secretary of state shall issue instructions, subject to the approval of the board of state canvassers, relevant to stray marks to ensure the fairness and uniformity of determinations made under this subsection. A secretary of state's instruction relevant to stray marks

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shall not be applied to a ballot unless the secretary of state issued the instruction not less than 63 days before the date of the election.

168.795 Electronic voting system; requirements; method for rendering electronic tabulating equipment inoperable; equipping each polling place with accessible voting device.

Sec. 795.

(1) An electronic voting system acquired or used under sections 794 to 799a must meet all of the following requirements:

(a) Provide for voting in secrecy, except in the case of voters who receive assistance as provided by this act.

(b) Utilize a paper ballot for tabulating purposes.

(c) Permit each elector to vote at an election all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question. Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

(d) Permit an elector, at a presidential election, by a single selection to vote for the candidates of a party for president, vice-president, and presidential electors.

(e) Permit an elector in a primary election to vote for the candidates in the party primary of the elector's choice. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject each ballot on which votes are cast for candidates of more than 1 political party. Electronic tabulating equipment that can detect that the elector has voted for candidates of more than 1 political party must be located at each polling place and programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

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(f) Prevent an elector from voting for the same person more than once for the same office.

(g) Reject a ballot on which no valid vote is cast. Electronic tabulating equipment must be programmed to reject a ballot on which no valid vote is cast.

(h) Be suitably designed for the purpose used; be durably constructed; and be designed to provide for safety, accuracy, and efficiency.

(i) Be designed to accommodate the needs of an elderly voter or a person with 1 or more disabilities.

(j) Record correctly and count accurately each vote properly cast.

(k) Provide an audit trail.

(l) Provide an acceptable method for an elector to vote for a person whose name does not appear on the ballot.

(m) Allow for accumulation of vote totals from the precincts in the jurisdiction. The accumulation software must meet specifications prescribed by the secretary of state and must be certified by the secretary of state as meeting these specifications.

(n) Be compatible with or include at least 1 voting device that is accessible for an individual with disabilities to vote in a manner that provides the same opportunity for access and participation, including secrecy and independence, as provided for other voters. The voting device must include nonvisual accessibility for the blind and visually impaired.

(2) Electronic tabulating equipment that counts votes at the precinct before the close of the polls must provide a method for rendering the equipment inoperable if vote totals are revealed before the close of the polls. **Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location must be programmed to reject a ballot if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot, or if, in a primary election, votes are recorded for candidates of more than 1 political party.**

(3) Each jurisdiction in this state conducting an election shall equip each polling place with at least 1 accessible voting device as required under subsection (1)(n).

168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.

Sec. 795a.

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(1) An electronic voting system shall not be used in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and unless it meets 1 of the following conditions:

(a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.

(b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

(2) The vendor or representative seeking approval of an electronic voting system shall do all of the following:

(a) Deposit with the secretary of state a nonrefundable application fee of $1,500.00 for a new voting system and a fee of $500.00 for an upgrade to any existing system.

(b) File with the secretary of state a list of all states in which the voting system has been approved for use. This list shall state how long the system has been used in the state and shall disclose any reports compiled by any state or local government concerning the performance of the system. The vendor shall remain responsible for filing this information on an ongoing basis.

(c) File with the secretary of state copies of all standard contracts and maintenance agreements used in connection with the sale of the voting system. All changes to standard contracts and maintenance agreements shall be filed with the secretary of state.

(d) Pay the cost for any field test required by the board of state canvassers.

(e) State the number of voters each component of the voting system can process per hour under each of the following circumstances:

(i) An election in which there are 10 or fewer items to be voted on the ballot by each voter.

(ii) An election in which the ballot consists of the number of items typically voted on at a presidential general election in this state.

(3) The board of state canvassers shall conduct a field test of all new voting systems as part of the certification process. The field test shall involve Michigan electors and election officials in simulated election day conditions. The test shall be designed to gauge voter reaction to the system, problems that voters have with the system, and the number of voting stations required for the efficient operation of an election based upon the vendor's statement provided under subsection (2)(e).

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(4) The board of state canvassers shall approve an electronic voting system for use in this state only if it meets the conditions of subsection (1) except that in an emergency situation that threatens the ability of a county, city, or township to conduct a scheduled election, the board of state canvassers may approve a correction of software or firmware after testing the software or firmware performance.

(5) If an electronic voting system is approved for use before January 1, 1997 by the board of state canvassers, it may be used in an election. However, if the electronic voting system has its software or firmware improved or changed, the system shall comply with the requirements of subsection (1).

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

(7) A county, city, township, village, or school district shall file "an intent to purchase statement" with the secretary of state 30 days before any purchase agreement is made to purchase a new voting system. The secretary of state shall provide all information concerning the operation of the voting system in Michigan or any other state to the local unit of government within 25 days after receiving the "intent to purchase statement".

(8) The secretary of state shall instruct local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a and the rules promulgated pursuant to sections 794 to 799a.

(9) If the board of state canvassers determines that an electronic voting system that was approved under subsection (1) no longer meets the requirements described in that subsection, the board of state canvassers may disapprove that voting system. An electronic voting system that has been disapproved by the board of state canvassers under this subsection shall not be used in an election, unless it is reapproved by the board of state canvassers under subsection (1).

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/17/2024 8:32:45 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]
Subject: RE: Keefer appeal update--privileged

Thanks Jonathan. Still waiting for our briefing letter in Lindsey.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 17, 2024 3:56 PM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Keefer appeal update--privileged

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No news from SCOTUS, but the Third Circuit recently issued the briefing schedule. Keefer's brief is due on **June 26**. As we discussed, I'll be sure to forward it to you after it's filed. Assuming no extensions, the defendants' brief will be due on **July 26**.

Any responses to Kaardal's cert. petition are due **May 28**. (I'd expect the respondents to waive.)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 6/13/2024 12:20:55 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Congrats on signature match!

Thanks, we are relieved. No appeal from us.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, June 13, 2024 7:00 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Congrats on signature match!

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Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Sent: 6/13/2024 3:23:13 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Useful quick take on election standing implications

Lol, thanks.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, June 13, 2024 11:19 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Useful quick take on election standing implications

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I guess the kids call this a "hot take."

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Thursday, June 13, 2024 at 11:18 AM
To: Heather Meingast <meingasth@michigan.gov>
Subject: Useful quick take on election standing implications

From Derek Muller at Notre Dame: https://electionlawblog.org/?p=143653

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Sent: 6/24/2024 8:03:27 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: NV NVRA ruling

Thanks, just sent it around to folks.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, June 24, 2024 3:46 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: NV NVRA ruling

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The judge handling the RNC's NV NVRA lawsuit apparently orally ruled last week that the plaintiffs lack standing. DPP MCL 15.243(1)(m) There's no order out yet. When there is, we'll let you know. Here's an article on the ruling (whose accuracy I can't vouch for, unfortunately).

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/30/2024 2:49:59 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: MSC 166424-5, O'Halloran v Secr of State, Devisser v Secr of State
Attachments: 166424 2024-05-29 or.pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Larry Royster <RoysterL@courts.mi.gov>
Sent: Wednesday, May 29, 2024 2:44 PM
To: ahoward@annhowardlaw.com; Grill, Erik (AG) <GrillE@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Prescott@sppplaw.com; dfink@finkbressack.com; btoskey@cstmlaw.com; giroux@millercanfield.com; richards@millercanfield.com; eldridge@millercanfield.com; mbrewer@goodmanacker.com; charlesspies@gmail.com; tchristian@dickinsonwright.com; ravers@dickinsonwright.com; Prescott@sppplaw.com; rowanconybeare@gmail.com; pmayor@aclumich.org; dkorobkin@aclumich.org; mbrewer@goodmanacker.com
Cc: cspies@dickinsonwright.com
Subject: MSC 166424-5, O'Halloran v Secr of State, Devisser v Secr of State

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Dear Counselors,
Attached is an order of the Michigan Supreme Court in Nos. 166424-5, *O'Halloran, MD v Secretary of State, Devisser v Secretary of State*, that schedules oral arguments on Tuesday, June 18 at 9:00 AM and allows for supplement briefing by June 10 at 5:00 PM. Although not specifically stated in the order, the arguments will be held via Zoom. The Zoom connection information will be sent to the attorneys arguing the case at a later date. I believe those attorneys are assistant attorney general Heather Meingast for the defendants-appellants, and attorneys Ann Howard and Robert Avers for the plaintiffs-appellees. If I have that wrong, please let me know right away.
If you have any questions or concerns with the order, feel free to contact me directly.

Larry Royster
Clerk, Michigan Supreme Court
Hall of Justice
925 W. Ottawa St.
P.O. Box 30052
Lansing, MI 48909
Ph: (517) 373-2553

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Order

Michigan Supreme Court
Lansing, Michigan

May 29, 2024

166424-5

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,
Plaintiffs-Appellees,

v

SC: 166424
COA: 363503
Ct of Claims: 22-000162-MZ

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,
Defendants-Appellants.

_____/

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellees,

v

SC: 166425
COA: 363505
Ct of Claims: 22-000164-MZ

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,
Defendants-Appellants.

_____/

On order of the Court, the application for leave to appeal the October 19, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application for June 18, 2024 at 9:00 a.m. MCR 7.305(H)(1). The parties may file supplemental briefs by 5:00 p.m. on June 10, 2024, addressing whether: (1) the challenged provisions of the election procedure manual issued by the Secretary of State are consistent with Michigan Election Law, MCL 168.1 *et seq.*; and (2) even if authorized by statute, the Secretary of State was required to promulgate the challenged provisions as formal rules under the Administrative Procedures Act, MCL 24.201 *et seq.*

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The total time allowed for oral argument shall be 30 minutes: 15 minutes for the plaintiffs, and 15 minutes for the defendants, to be divided at their discretion. MCR 7.314(B)(2).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on June 10, 2024.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2024

Clerk

s0529

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/3/2024 2:31:56 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Privileged - EPGA
Attachments: Defendant's Brief.B.Eric Restuccia.pdf; 2020.9.23 - Supplemental Authority - MSC.pdf; In re Certified -- Governor's Supplement.pdf

Hi Jonathan,

Maybe these briefs will help?

Heather

Heather S. Meingast, Division Chief
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meingasth@michigan.gov
(517) 335-7659 (office)

From: Allen, Christopher (AG) <AllenC28@michigan.gov>
Sent: Friday, May 3, 2024 9:44 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Sherman, Ann (AG) <ShermanA@michigan.gov>; Restuccia, Eric (AG) <RestucciaE@michigan.gov>
Cc: Gustafson, Holly (AG) <GustafsonH@michigan.gov>
Subject: RE: Inquiry from States United SAAG

Heather,

See attached the merits briefing on behalf of the Governor in the MSC. The supplemental brief ordered by the Court has some history of the emergency powers laws and other public health related laws, and the supplemental authority was filed after that with some additional points. Let me know if you need anything else!

Chris

Christopher M. Allen
Assistant Solicitor General
Michigan Department of Attorney General
517.582.5546 (work cell)
517.335.7628 (SG main line)
Teams call

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Thursday, May 2, 2024 4:37 PM
To: Sherman, Ann (AG) <ShermanA@michigan.gov>; Restuccia, Eric (AG) <RestucciaE@michigan.gov>; Allen, Christopher (AG) <AllenC28@michigan.gov>

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Cc: Gustafson, Holly (AG) <GustafsonH@michigan.gov>
Subject: Inquiry from States United SAAG

Hi Team,

I have a request for a brief(s) from the EPGA case, MSC No. 161492, that would have a nice history of the laws. Do you recall which brief had a nice outline, and if so can I get a copy? Not super urgent.

Thanks,
Heather

Heather S. Meingast, Division Chief
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STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,

Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.
_____/

The appeal involves a question that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORAL ARGUMENT REQUESTED

B. Eric Restuccia
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

Joseph T. Froehlich (P71887)
Joshua Booth (P53847)
John Fedynsky (P65232)
Kyla Barranco (P81082)
Assistant Attorneys General
Department of Attorney General
Attorney for the Governor and Director
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7656

Dated: August 6, 2020

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Because the COVID-19 crisis persisted, the EMA requires the Governor to declare a state of disaster and emergency, which she promptly does. 8

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Constitutional Provisions

Const 1963, art 3, § 1 38

Const 1963, art 3, § 2 xiii

Const 1963, art 4, § 26 xiii

Const 1963, art 4, § 3 xiii

Const 1963, art 4, § 33 30

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STATEMENT OF JURISDICTION

The federal district court for the Western District of Michigan certified two questions to this Court on June 16, 2020. This Court has jurisdiction over this case under MCR 7.308(A)(2).

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STATEMENT OF QUESTIONS PRESENTED

The federal district court certified two questions to this Court: (1) whether, under the Emergency Powers of the Governor Act, MCL § 10.31, et seq., or the Emergency Management Act, MCL § 30.401, *et seq.*, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and (2) whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

The Plaintiffs separated the matter into four headings, and this brief shall do the same, except it shall first address the issue whether this Court should answer the certified question as an initial matter. The questions presented therefore are as follows:

I. By court rule, this Court has discretion on whether to answer a question that has been certified by a federal court. The executive orders at issue here – governing non-essential medical procedures – were rescinded more than 60 days ago. In light of the serious questions of mootness and sovereign immunity in the underlying case, should this Court resolve these state law claims as a certified question in these circumstances?

The Governor and Director answer: No.

Plaintiffs answer: Yes.

II. Under the Emergency Management Act, the Governor is duty-bound to declare a state of disaster or emergency where the circumstances, such as here, warrant it. By law, that declaration terminates after 28 days unless extended by "resolution of both houses of the legislature" but does not prohibit the Governor from issuing a new declaration. Where emergency and disaster conditions remained, did the Governor have the authority to issue a new declaration under the EMA?

The Governor and Director answer: Yes.

Plaintiffs answer: No.

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III. Under the Emergency Powers of the Governor Act, the Governor may declare an emergency where, as here, the circumstances warrant it. The Plaintiffs assert that that the Governor can only exercise the authority under the EPGA for "time limited" emergencies. Where the EPGA provides for no such predetermined time limitations on the duration of the emergency, did the Governor have the authority to issue a declaration under the EPGA during this ongoing emergency?

The Governor and Director answer: Yes.

Plaintiffs answer: No.

IV. The EPGA authorizes the Governor, in times of emergency, to promulgate "reasonable" orders that are "necessary" to protect life and property or to bring the emergency under control. Any legislative enactment must respect the Separation of Powers and corresponding constitutional principles of non-delegation. Where such standards provide guidance appropriate to the context of emergency response and are ubiquitous in the law, does Michigan law violate these constitutional principles?

The Governor and Director answer: No.

Plaintiffs answer: Yes.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Const 1963, art 3, § 2 provides, in pertinent part:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 4, § 1 provides, in pertinent part:

> Except to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives.

Const 1963, art 4, § 26 provides, in pertinent part:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Const 1963, art 4, § 33 provides, in pertinent part:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law. If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house.

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Constitutional Provisions

Const 1963, art 5, § 1:

> Except to the extent limited or abrogated by article V, section 2, or article IV, section 6, the executive power is vested in the governor.

Pertinent Provisions of the Emergency Powers of the Governor Act

MCL 10.31:

> (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.
>
> (2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

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MCL 10.32:

It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.

MCL 10.33

The violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor.

Pertinent Provisions of the Emergency Management Act

MCL 30.402(e):

"Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.

MCL 30.402(h):

(h) "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

MCL 30.402(p):

(p) "State of disaster" means an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

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MCL 30.402(q):

(q) "State of emergency" means an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected.

MCL 30.403:

(1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an

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executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing.

MCL 30.404:

(1) An executive order or proclamation of a state of disaster or a state of emergency shall serve to authorize the deployment and use of any forces to which the plan or plans apply and the use or distribution of supplies, equipment, materials, or facilities assembled or stockpiled pursuant to this act.

(2) Upon declaring a state of disaster or a state of emergency, the governor may seek and accept assistance, either financial or otherwise, from the federal government, pursuant to federal law or regulation.

(3) The governor may, with the approval of the state administrative board, enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign country. A reciprocal aid agreement shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; the services of the national guard when not mobilized for federal service or state defense force as authorized by the Michigan military act, Act No. 150 of the Public Acts of 1967, as amended, being sections 32.501 to 32.851 of the Michigan Compiled Laws, and subject to federal limitations on the crossing of national boundaries by organized military forces; health, medical, and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; and other necessary equipment, facilities, and services. A reciprocal aid agreement shall specify terms for the reimbursement of costs and expenses and conditions necessary for activating the agreement. The legislature shall appropriate funds to implement a reciprocal aid agreement.

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MCL 30.405:

(1) In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following:

(a) Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency. This power does not extend to the suspension of criminal process and procedures.

(b) Utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency.

(c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.

(d) Subject to appropriate compensation, as authorized by the legislature, commandeer or utilize private property necessary to cope with the disaster or emergency.

(e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area within the state if necessary for the preservation of life or other mitigation, response, or recovery activities.

(f) Prescribe routes, modes, and destination of transportation in connection with an evacuation.

(g) Control ingress and egress to and from a stricken or threatened area, removal of persons within the area, and the occupancy of premises within the area.

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.

(i) Provide for the availability and use of temporary emergency housing.

(j) Direct all other actions which are necessary and appropriate under the circumstances.

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(2) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms or ammunition.

(3) A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor.

MCL 30.417 provides, in pertinent part:

This act shall not be construed to do any of the following:

(a) Interfere with the course or conduct of a labor dispute. However, actions otherwise authorized by this act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety.

(b) Interfere with the dissemination of news or comment on public affairs. However, any communications facility or organization, including radio and television stations, wire services, and newspapers, may be requested to transmit or print public service messages furnishing information or instructions in connection with a disaster or emergency.

(c) Affect the jurisdiction or responsibilities of law enforcement agencies, fire fighting forces, and units or personnel of the armed forces of the United States when on active duty. However, state, local, and interjurisdictional emergency operations plans shall place reliance upon the forces available for performance of functions related to disasters or emergencies.

(d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

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INTRODUCTION

The novel coronavirus menacing this State and country is a public health emergency. It has infected millions, killed hundreds of thousands, and continues to spread in our communities and across state lines. It is the gravest health crisis this country has faced in more than a century. In response, every Governor in the country declared a state of emergency. As of July 30, every state still had one.

The questions presented here ask whether Michigan's Governor had the authority to declare and reissue the states of emergency. They are basic ones, important to the principles of democracy, and the answers are critical to the protection of Michigan's residents as they face the most dangerous threat to their health in generations. Michigan has more than 60,000 cases of this disease, and more than 6,000 have died. Many more would have died had not the Governor taken immediate and effective action. The evidence is unmistakable that the threat remains imminent, as the country has seen on average more than 50,000 new cases and more than 1,000 deaths a day recently for the first time since early June.

But as this Court knows well, that a question may be important does not mean that it is well presented. The Plaintiffs as health providers filed a complaint in federal district court challenging temporary limitations on non-essential medical procedures, limitations that were lifted two months ago. The Plaintiffs' claims are thus moot. Furthermore, the state-law questions they present are barred from consideration in federal court by the Eleventh Amendment. The federal district court found sovereign immunity waived and mootness not an issue, but settled law indicates otherwise, and the immunity ruling is now pending on appeal.

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The certification process is a good one, and the Governor and Director value it. But not in this case. Not with claims that should have been dismissed on two separate justiciability grounds. With serious issues of mootness and immunity pervading the case, this Court should refrain from taking up significant legal questions in what could be little more than an advisory opinion, and when other pending cases already raise these issues. The questions are too important to be answered in this setting.

If this Court disagrees, then the Governor and Director ask this Court to reject the statutory and constitutional challenges the Plaintiffs have raised and confirm the validity of the Governor's declarations of disaster and emergency under the Emergency Powers of the Governor Act (EPGA) and the Emergency Management Act (EMA).

First, under the EMA, the Governor has the authority, in fact the duty, to declare a state of disaster and a state of emergency because that is exactly what Michigan is facing. The EMA's language, and the experience of the entire country, support the declaration. Yet, the legal issue is a narrow one: did the Governor properly issue a new declaration under the EMA after the Legislature refused to extend the original one? The answer is yes. The statutory text and common-sense lead to this conclusion. A plain reading of the EMA shows that it does not bar a new declaration, but instead compels one whenever the conditions on the ground warrant it, as one would expect from a grant of emergency powers designed to protect and assist the people of this State in times of crisis.

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Second, the Governor has properly exercised her authority under the EPGA. The statutory language is clear. The pandemic presents an "emergency," one that is an immediate threat to the public. The EPGA is not, as the Plaintiffs contend, "time limited." And wisely so. The reality – as confirmed by the universal efforts to respond to this public health threat – is that an emergency can be ongoing. The EPGA duly reflects this and equips the Governor to respond accordingly. And the Plaintiffs' effort to read into the EPGA the 28-day limit from the EMA contradicts both the EPGA's and EMA's text in multiple respects, as confirmed most plainly in the EMA's express statement of scope in § 17 that it does not "[l]imit, modify, or abridge" the EPGA or any other statutory power conferred on the Governor.

Third, the EPGA does not violate the doctrines of Separation of Powers or of non-delegation. Many states have emergency statutes granting their governors authority to take the kind of actions that the Governor has taken here. Under the EPGA, those actions must be "reasonable" and "necessary," they must be directed at "protect[ing] life and property" or "bring[ing] the emergency situation . . . under control," and they may only be taken during a time of "public emergency" or "reasonable apprehension of immediate danger." These are real limitations. This is not a grant of unlimited executive power, as there is much that the Governor cannot do. The EPGA standards are not meaningless, just as the concepts of Equal Protection or Due Process are not meaningless. This Court has upheld similar frameworks, like "good cause" as a standard. The Legislature created reasonably precise standards for the Governor given the nature of the laws at issue here.

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And the Governor is not acting under an improper delegation of legislative authority. She is executing emergency response, as authorized, constrained, and guided by law. The nature of governance, and of emergencies, requires it.

Throughout, democracy remains secure. The Legislature may override the Governor. Her decisions are subject to judicial review. And she must stand for reelection. That is how our democracy works. Legitimate governmental power is derived from the consent of the governed, which is a bedrock principle animating both our founding and the present day. In a representative democracy, it is expressed through executive action taken under valid, duly enacted statutes. Under both the EMA and EPGA, the Governor has done just that.

STATEMENT OF FACTS AND PROCEEDINGS

The coronavirus spreads easily and can cause extended hospitalization.

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a large family of viruses that cause respiratory illnesses), but the strain is novel. There is no general or natural immunity built up in the population (meaning everyone is susceptible), no vaccine, and no known treatment to combat the virus itself (as opposed to treatment to mitigate its symptoms).

It is widely known and accepted that COVID-19, the disease that results from the virus, is highly contagious, spreading easily from person to person via

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"respiratory droplets."[1] Experts agree that being anywhere within six feet of an infected person puts you at a high risk of contracting the disease.[2] But even following that advice is not a sure-fire way to prevent infection. The respiratory droplets from an infected person can land on surfaces and be transferred many hours later to the eyes, mouth, or nose of others who touch the surface. Moreover, since many of those infected experience only mild symptoms, a person could spread the disease before he even realizes he is sick.[3] Most alarmingly, a person with COVID-19 could display no symptoms, but still spread the disease.[4]

The severity of the disease varies from person to person. While some exhibit only mild or no symptoms, nearly 19% of those infected—particularly those with other underlying medical conditions or advanced age—may require extended hospitalization or intensive care.[5]

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[1] World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions .

[2] Centers for Disease Control and Prevention, *Social Distancing, Quarantine, and Isolation*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html .

[3] Centers for Disease Control and Prevention, *Evidence Supporting Transmission of Severe acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (explaining that "[o]ne report suggested that up to 13% of infections may be transmitted during the presymptomatic period of illness").

[4] *Id.*

[5] Centers for Disease Control and Prevention, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html

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The Governor declares states of emergency and disaster.

On March 10, 2020, in response to the growing pandemic in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to the Governor under Michigan law—pursuant to her authority under the Emergency Powers of the Governor Act (EPGA), the Emergency Management Act (EMA), and Article 5, § 1. (Executive Order 2020-4, Pls' App'x 83a.) Governor Whitmer was not alone. Every state in the country declared a similar state of emergency or disaster under their state laws during the month of March.[6]

With this authority invoked, the Governor began to issue substantive executive orders to stem the tide of COVID-19 infections. These included caps on large assemblages of people,[7] closures of premises of certain places of public accommodation,[8] and various iterations of the now-rescinded Stay Home, Stay Safe Order, which was frequently adjusted in light of the ever-changing challenges presented by this pandemic.[9]

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[6] National Governors Association, *Status of State COVID-19 executive orders*, https://www.nga.org/state-covid-19-emergency-orders/

[7] See, e.g., Executive Order 2020-5, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[8] See, e.g., Executive Order 2020-9, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[9] See generally Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

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In response to impending healthcare shortages, the Governor orders certain medical care facilities to implement plans postponing non-essential medical procedures.

Relevant here, on March 20, 2020, the Governor issued Executive Order 2020-17, entitled "Temporary restrictions on non-essential medical and dental procedures." (Pls' App'x 85a.) It required "all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities . . . must implement a plan to temporarily postpone . . . all non-essential procedures." (Pls' App'x 86a, ¶ 1.) As the order signaled in its preamble, this postponement-plan requirement was imposed "[t]o mitigate the spread of COVID-19, protect the public health, provide essential protections to Michiganders, and ensure the availability of health care resources," such as personal protective equipment, hospital beds, and other resources – which were in high and immediate demand as a result of this aggressively spreading pandemic, but in troublingly short supply. (Pls' App'x 85a.) The Governor's Stay Home orders correspondingly incorporated these postponement requirements into their provisions regarding authorized travel. See, e.g., EO 2020-77(7)(a)(6) (permitting individuals to travel for necessary medical care, including medical procedures that had not been postponed pursuant to EO 2020-17).

The Governor terminates the states of emergency and disaster under the EMA after the Legislature refuses to extend them.

On April 1, the Governor issued Executive Order 2020-33, which expanded upon the prior declaration of a state of emergency and, consistent with the virus's aggressive and destructive spread, declared states of emergency and disaster across

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the State of Michigan. (Pls' App'x 88a.) Under the EMA (though not the EPGA), the declarations must be terminated after 28 days absent resolution by both houses of the Legislature. MCL 30.403(3), (4). On April 7, the Michigan House and Senate approved an extension of the declaration until April 30, 2020.

Prior to April 30, the Governor again asked the Legislature to extend the states of disaster and emergency under the EMA pursuant to MCL 30.403(3) and (4), but the Legislature did not do so.

On April 30, 2020, then, the Governor issued a series of three executive orders. First, Executive Order 2020-66 (Pls' App'x 101a) declared the previously issued states of emergency and disaster under the EMA terminated as required by MCL 30.403(3) and (4) because the Legislature refused to extend them. Although noting that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created very much exist," the Governor recognized that the Legislature – "despite the clear and ongoing emergency and disaster conditions afflicting our state – has refused to extend [the states of emergency and disaster] beyond today." (Pls' App'x 104a.) Accordingly, she was required by the EMA's plain language to issue an order "terminat[ing]" the states of emergency and disaster. (*Id.*)

Because the COVID-19 crisis persisted, the EMA requires the Governor to declare a state of disaster and emergency, which she promptly does.

After terminating the prior declarations, the Governor again declared a state of emergency and a state of disaster under the EMA. (Executive Order 2020-68, Pls'

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App'x 109a.) Although the measures issued pursuant to her emergency authority had been working, "the need for them—like the unprecedented crisis posed by this global pandemic—is far from over." (Pls' App'x 110a.) COVID-19, she said,

> remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. [*Id.*]

The Governor also found, "[t]he health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster." (Pls' App'x 111a.) Thus, she stated: "I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency Management Act." (Pls' App'x 112a.) And she ordered "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." (*Id.*)

The Governor reaffirms her declaration of the state of emergency under the EPGA.

In the third Executive Order of the series, the Governor reaffirmed the state of emergency under the EPGA, ordering that "[a] state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945." (Pls' App'x 105a, Executive Order 2020-67.) And like in Executive Order 2020-68, she ordered, "Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order." (Pls' App'x 107a–108a.)

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The Governor rescinds the executive orders affecting the Plaintiffs, yet the Plaintiffs maintain suit in federal court.

On May 12, 2020, Plaintiffs filed suit in the District Court for the Western District of Michigan, raising challenges both to the Governor's authority to issue Executive Orders 2020-17 and 2020-77, and the propriety of those orders under the state and federal constitutions. Pertinent here, the Plaintiffs alleged that the Governor's emergency authority under both the EMA and the EPGA terminated on April 30 (Pls' App'x 23a,¶ 92), and also claimed that the EPGA and the EMA violate the Separation of Powers of the Michigan Constitution. (Pls' App'x 25a, ¶ 100–111.)

Nine days after the Plaintiffs filed their complaint, on May 21, 2020, the Governor issued Executive Order 2020-96, which rescinded Executive Order 2020-17 effective May 28, 2020 at 11:59 p.m, and also lifted its corresponding travel limitation. (Pls' App'x 125a.) As that order's preamble explained, the urgent concerns that had required the imposition of those requirements had shown sufficiently reliable signs of abatement: "our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies." (Pls' App'x 114a.)

The federal district court certifies questions to this Court.

The district court sua sponte ordered briefing on whether the Court should certify the Plaintiffs' state law claims and held a hearing to consider the question. After the hearing, the State Defendants filed a joint motion for reconsideration raising the Eleventh Amendment as a bar to the district court's exercise of any jurisdiction over the state law claims, adding it to the other jurisdictional

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challenges to the court's consideration of these claims (such as mootness, qualified immunity, and abstention) that they had raised in prior filings and that were then also pending before the court.

Despite the rescission of the challenged restrictions, on June 16, 2020, the court determined the case was not moot (Pls' App'x 65a), and certified two questions to this Court:

> (1) Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq.*, or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and
>
> (2) Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution. [Pls' App'x 60a.]

In a separate ruling issued that same day, the court also refused to dismiss the state law claims on the basis of sovereign immunity. As the court recognized, "[S]tate officials enjoy Eleventh Amendment immunity for all lawsuits that bring state-law claims against state officials in federal court, whether the claims are monetary or injunctive in nature." (Pls' App'x 54a.) Yet, the court found that the State Defendants waived their Eleventh Amendment immunity by not raising it in the principal briefs of their motions to dismiss or in initial response to the court's invitation to brief the propriety of certification to this Court. (Pls' App'x 58a.) The State Defendants have appealed that ruling; the case remains pending in the Sixth Circuit. (CA 6, Docket No. 20-1611.)

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The virus rages on.

In recent months, as Michigan began to flatten the curve of the virus's spread, other States began voluntarily reopening. Several of those states have seen dramatic increases in cases over the past several weeks, stressing hospital capacity.[10] Texas, for example, saw its hospital bed usage explode in July, more than quintupling the number of COVID-19 patients requiring hospitalization since April and May.[11] Nearly every day of July, Florida saw over 9,000 confirmed infections and several days with over 100 deaths.[12] On the whole, the United States' daily case count registered new records throughout July, and the death toll to surpassed 150,000.[13]

Given the ongoing threat in Michigan throughout this spring and summer, the Governor has extended the states of emergency and disaster under the EPGA and EMA, which remain in place today.[14] And like all 50 States, the District of

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[10] The Texas Tribune, *Texas hospitals are running out of drugs, beds, ventilators and even staff*, https://www.texastribune.org/2020/07/14/texas-hospitals-coronavirus/

[11] Texas Department of State Health Services Dashboard, available at https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

[12] Florida Department of Health, Florida's COVID-19 Data and Surveillance Dashboard, https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

[13] Centers for Disease Control, *United States COVID-19 Cases and Deaths by State*, https://www.cdc.gov/covid-data-tracker/#cases

[14] See Executive Order 2020-99 (extending through June 19, 2020) (Pls' App'x 142a); Executive Order 2020-127 (extending through July 16, 2020) (Pls' App'x 146a); Executive Order 2020-151 (extending through August 11, 2020) (Pls' App'x 150a).

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Columbia, and four territories, Michigan remains subject to major disaster declarations under federal law making federal funding available to combat the disease.[15] The Governor's actions under state law are also consistent with the nation as a whole – as of this filing, all 50 states (and several territories and the District of Columbia) have in place declared emergencies.[16]

STANDARD OF REVIEW

This Court's review of certified questions is discretionary. See MCR 7.303(B)(4).

In each of these executive orders, the Governor noted that Executive Orders 2020-67 and 2020-68 were subject to challenge in *Michigan House of Representatives and Michigan Senate v Whitmer* (see, e.g., Pls' App'x 140a), and that

> This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act." [See, e.g., Pls' App'x 140a, 142a.]

[15] FEMA, *COVID-19 Disaster Declarations*, https://www.fema.gov/disasters/coronavirus/disaster-declarations

[16] National Governors Association, *Status of State COVID-19 executive orders*, https://www.nga.org/state-covid-19-emergency-orders/ (noting that as of July 30, 2020 that all 50 states were under an "active" state of "emergency," "disaster," or "public health emergency") (last accessed on August 6, 2020).

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ARGUMENT

I. This Court should decline to review the merits of the questions.

It is a basic point that the Michigan courts are the masters of Michigan law, and that this Court is the final authority in interpreting it. That is the reason that the certified-question process, see MCR 7.308(A), is a good one. But the process is also a discretionary one, and there are occasions in which this Court should refrain from answering questions certified to it. This is such an occasion.

The State Defendants opposed the federal district court's decision to certify these questions, noting that the executive orders challenged in the complaint were rescinded in May and that other cases are pending in Michigan courts raising the same questions, including the legislative suit challenging the Governor's authority, *House & Senate v Governor,* No. 353655. Moreover, the State Defendants invoked their immunity under the Eleventh Amendment. The federal district court rejected these arguments and pushed forward with its sua sponte certification request.

While mootness and Eleventh Amendment immunity are issues that will be ultimately be resolved by the federal courts, this Court should bear them in mind when deciding whether to exercise its discretion to use this request as the chosen vehicle to resolve core and fundamental questions of Michigan law. These questions are by no means unique to this case and settled law casts serious doubt over the federal district court's jurisdiction to consider the claims that present them. Indeed, one potentially dispositive challenge to that jurisdiction is presently pending before the Sixth Circuit. These are not the circumstances under which this Court's certification authority is well exercised.

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A. The decision whether to answer certified questions is a matter of this Court's discretion.

This Court has authority to entertain certified questions from the federal courts. See MCR 7.308(A)(2). The rules governing certification confer "discretion" on this Court as to whether it should grant review on certified questions. See MCR 7.303(B) (identifying as "discretionary review" the circumstance in which the Court may "(4) respond to a certified question (see MCR 7.308(A)").

But the rules do not require the Court to exercise this discretion to provide an answer even though it entertains briefing on the merits of the questions. This Court has declined to answer certified questions in the past from the federal courts. See, e.g., *In re Certified Question from U.S. Dist. Court for E Dist of Michigan*, 490 Mich 922 (2011); *In re Certified Question from United States Court of Appeals for Ninth Circuit*, 474 Mich 1228 (2006). It should do the same here.

B. The claims from the Plaintiffs' complaint are moot.

The Plaintiffs' complaint in federal court is predicated on two executive orders, EOs 2020-17 and 2020-77, which required certain medical facilities to adopt temporary postponement plans for non-essential medical procedures and imposed corresponding limitations on travel. The Plaintiffs have alleged they "are suffering immeasurable and irreparable harm from" the presence of these restrictions, and they seek relief from them. (Pls' App'x 5a, Complaint, ¶18.) But these executive orders, including the challenged restrictions, have been rescinded for over two months now, and the Plaintiffs, like all other medical providers and patients, may perform and undergo all manner of medical procedures in the proper conditions.

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Under U.S. Supreme Court case law, a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v Chafin*, 568 US 165, 172 (2013). An "advisory opinion[] on abstract propositions of law" must be avoided. *Hall v Beals*, 396 US 45, 48 (1969) (per curiam). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp v Cuno*, 547 US 332, 341 (2006).

As here, where an executive order places only "temporary restrictions" that "expire[ ] before . . . [a] [c]ourt [takes] any action," the action is rendered moot. See *Trump v Hawaii*, 138 S Ct 2392, 2404 (2018), citing *Trump v IRAP*, 138 S Ct 353 (2017), and *Trump v Hawaii*, 138 S Ct 377 (2017).

Months ago, the Governor rescinded EO 2020-17 and its accompanying travel limitation, the focus of the Plaintiffs' complaint. In response to this change in circumstances, the Plaintiffs – echoing the federal district court's rationale – now contend that they "are still subject to various restrictions on their provision of medical services under EO 2020-145." (Pls' Brief, p 45.) But this has all the earmarks of an amended complaint, raising new allegations wholly absent from their operative complaint.

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Indeed, their new contentions are inconsistent with that complaint, which expressly alleges that the Plaintiffs seek only the opportunity to reopen with precautionary safeguards in place. (Pls' App'x 5a, Complaint, ¶32, 36.)[17]

While the Plaintiffs' point is well taken that mootness is a question for the federal court, *id.* at 46,[18] that argument misses the point. This Court is the gatekeeper about when it shall answer certified questions, and it should consider whether it wishes to exercise this authority to answer questions raised from a complaint that challenges restrictions that had been lifted even before the certification request was made. Stated differently, should this Court answer a certified question that should be, and may very well ultimately be, deemed moot? The Governor and Director suggest that it should not.

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[17] Similarly, the federal district court noted that, while the prior travel restriction for postponed procedures had been rescinded, other aspects of the Stay Home order still generally remained in place. But again, the Plaintiffs have not sought relief from any other such restrictions, and regardless, they too have been lifted for over two months now. See EO 2020-110 (lifting the prior "stay home" requirement).

[18] It *is* a matter for the federal court, and one that a Michigan federal court has already found to be meritorious. See *Martinko v Whitmer*, Case No. 20-cv-10931, Opinion and Order granting Defendant's motion to dismiss (ED Mich June 5, 2020) (dismissing challenges to rescinded executive orders as moot and barred by the Eleventh Amendment).

Other federal courts have likewise routinely deemed moot challenges to rescinded or expired COVID-19 emergency response measures. See, e.g., *Cameron v. Beshear*, No. 3:20-CV-00023-GFVT, 2020 WL 2573463, at *2 (E.D. Ky. May 21, 2020); *Krach v. Holcomb*, No. 1:20-CV-184-HAB, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020); *Spell v. Edwards*, 962 F.3d 175 (June 18, 2020) (preliminary-injunction context); *Ministries v. Newsom*, No. 20-CV-683-BAS-AHG, 2020 WL 2991467, at *3 (S.D. Cal. June 4, 2020) (same); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *4 (N.D. Ill. May 3, 2020) (same).

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C. This point applies with equal force regarding the Eleventh Amendment immunity defense.

The State Defendants also argued that the federal court should have dismissed the state law claims there because they were barred from consideration in that forum by the Eleventh Amendment. As the U.S. Supreme Court has explained, "[t]he ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court." *Bd of Trustees of the Univ of Alabama v Garrett*, 531 US 356, 363 (2001). That applies here where the Plaintiffs to seek to enjoin state officials on the basis of state law. See *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 121 (1984). The federal district court did not determine that Eleventh Amendment immunity was inapplicable, but instead held that the State Defendants waived the argument and had acceded to federal jurisdiction.

This ruling is erroneous. Waiver requires a clear intent; litigation conduct does not betray that intent unless it reflects an inconsistent and unfair invocation of immunity "to achieve litigation advantages," such as by acting to remove a case to federal court, and then later seeking dismissal from that court under the Eleventh Amendment. *Lapides v Bd of Regents of Univ Sys of Georgia*, 535 US 613, 620 (2002). Correspondingly, the Sixth Circuit has only found such a waiver where the State waited *until after a final adverse judgment* to raise it. *Ku v State of Tennessee*, 322 F3d 431, 435 (CA 6, 2003); see also *Barachkov v Davis*, 580 F Appx 288, 300 (CA 6, 2014) (rejecting the notion that immunity had been waived because it had not been raised in an opening summary judgment brief).

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The State Defendants' conduct reflected no such intent or gamesmanship. This case is still young; at the time of the certification request, the parties had filed briefs regarding the Plaintiffs' motion for a preliminary injunction that was withdrawn before decision, and the State Defendants had filed opening briefs on their motions to dismiss. Throughout these preliminary filings, the State Defendants had urged the federal district court not to exercise jurisdiction over the Plaintiffs' state law claims, and the Defendants added their claim under the Eleventh Amendment to this mix as soon as they realized it was missing. These are not the circumstances by which a State affirmatively waives its right to sovereign immunity under the Eleventh Amendment, and the State Defendants have taken an appeal to correct this threshold error of law.[19] If the State Defendants prevail on appeal, the district court's act of certifying the questions was outside of its jurisdiction, as the State Defendants were not properly before it.

The questions at issue are legitimate ones in the abstract, and important to all of Michigan's residents. But that does not make them well presented here. The Plaintiffs lack live claims, and the federal district court lacks jurisdiction. These are no small things; they are significant jurisdictional concerns, and they counsel against this Court granting the instant certification request and providing guidance not ultimately needed for the disposition of this case.

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[19] Contrary to the Plaintiffs' argument (see p 46), this appeal is not challenging the certification decision, but rather the refusal to dismiss the state law claims based on sovereign immunity. See Sixth Circuit Case No. 20-1581.

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II. The Governor has properly exercised her authority under the Emergency Management Act.

The EMA requires the Governor to issue a declaration of disaster and one of emergency where the circumstances warrant it. On April 30, 2020, Michigan was facing a disaster and an emergency. Indeed, it still is. Nonetheless, despite the ongoing emergency and disaster, the Plaintiffs claim that, as of April 30, the Governor cannot issue a new declaration under the EMA because the Legislature refused to extend her prior declaration. But the EMA does not say that. It does not create that limit. To the contrary, it mandates the opposite: if emergency or disaster conditions exist, the Governor is duty-bound by the EMA to issue a declaration and activate that statute's emergency-response powers and resources to protect this State and its residents. That corresponds with the plain text of the EMA, and it makes eminent practical sense.

A. The Governor properly declared a disaster and an emergency under the EMA.

First enacted in 1976, the EMA sets forth several independent, related obligations regarding state and local responses to emergencies and disasters in the State. For the Governor, the EMA grants her the important responsibility to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). This broad charge places the Governor at the forefront of emergency and disaster responsiveness and serves as a baseline for the latitude given to her by the Legislature in times of crisis. To that end, she possesses the authority to "issue executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(2).

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This broad statement of authority is confirmed throughout the EMA. For example, MCL 30.414(3) makes clear that the EMA "shall not be construed to restrain the governor from exercising on his own initiative any of the powers set forth in this act." The Act also emphasizes it is intended to supplement the Governor's preexisting emergency response authority, stating that it does not "[l]imit, modify, or abridge" the authority of the Governor to proclaim a state of emergency under the EPGA "or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of the state independent of, or in conjunction with, this act." MCL 30.417(d).[20]

Consistent with the EMA's broad authority, the Governor has the obligation to declare states of disaster and emergency if the pertinent conditions exist. She "*shall*, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists." MCL 30.403(3) (emphasis added). Similarly, she "*shall*, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists." MCL 30.403(4) (emphasis added). These provisions mirror one another.

Upon that order or proclamation, the law grants the Governor authority to marshal both state and federal resources to adequately deal with the danger facing

[20] The EPGA confers emergency response authority on the Governor without mention of legislative involvement, a characteristic the EMA protects in § 17(d) by expressly disclaiming that it creates any limitations on other laws.

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the State.[21] The executive order or proclamation also authorizes the Governor to exercise additional broad powers, including "[s]uspending a regulatory statute, order, or rule prescribing the procedures for conduct of state business" in certain circumstances, "[c]ontrol[ling] ingress and egress to and from a stricken or threatened area," and "[d]irect[ing] all other actions which are necessary and appropriate under the circumstances." MCL 30.405(1)(a), (g), (j). And the EMA expressly defines "state of disaster" and "state of emergency" independently from "disaster" and "emergency." "[D]isaster" and "emergency" refer to conditions that the Governor may find to exist in the State.[22]

Distinctly, "state of emergency" and "state of disaster" – both of which were declared in Executive Order 2020-68 – are defined as types of executive orders or proclamations that the Governor must issue upon finding certain conditions exist. " '[S]tate of disaster [or emergency]' means *an executive order or proclamation* that activates the disaster [or emergency] response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p), (q) (emphasis added.)

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[21] See, e.g., MCL 30.404(1) (deployment of forces and distribution of supplies); MCL 30.404(2) (federal assistance); MCL 30.408(1) (cooperation among state agencies).

[22] The EMA defines both "disaster" and "emergency."

Under MCL 30.402(e), " '[d]isaster' means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, . . . epidemic . . . "

"Emergency" is defined as "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h).

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In short, "state of emergency" and "state of disaster" are *species of executive orders* that activate certain response efforts and resource and may – indeed, must – be issued when "emergency" or "disaster" conditions are found to exist. This plainly stated distinction is important to properly understanding the interplay between the Governor's termination of her prior declarations and her issuance of a new declaration.

As the EMA makes clear, "if [the Governor] finds that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," the Governor "*shall*" declare so. MCL 30.403(3), (4). Under longstanding Michigan precedent, "the word 'shall' is ordinarily construed in its imperative sense, excluding the idea of discretion." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 670 (1988); see also *Sauder v Dist Bd of Sch Dist No 10*, 271 Mich 413, 418 (1935) (a statute that uses "shall" "is imperative" when "the public are interested"). The Governor thus has a *duty* to declare a state of emergency or disaster if one is occurring.

And just as the Governor is required to *declare* a state of disaster or emergency, i.e., issue such an executive order, if the conditions merit it, she also has the duty to "terminate" that order if the conditions cease or the Legislature refuses to extend it by resolution. MCL 30.403(3), (4). That termination, however, expressly extends only to the order itself. What does not terminate under the EMA is the Governor's duty to issue declarations, and activate the statute's emergency response mechanism, whenever the conditions on the ground warrant it.

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B. Under the EMA's mandates, the Governor terminated her earlier declarations and issued new ones because there was a "disaster" and "emergency" in Michigan.

On April 30, 2020, the Legislature declined to extend the Governor's executive orders declaring states of emergency and disaster under the EMA, despite the fact that the State continued to face emergency and disaster conditions as a result of the pandemic. On April 30, then, in accordance with the mandate that the Governor "terminate" the state of emergency and disaster declarations under the EMA absent legislative extension, MCL 30.403(3), (4), the Governor so terminated. (Pls' App'x 101a, EO 2020-66.)

But the conditions on the ground remained dire. On that day alone, more than 100 Michigan residents died from the virus and over 1,100 were confirmed infected.[23] Thus, the Governor rightly found "that an emergency [or disaster] has occurred or that the threat of an emergency [or disaster] exists," triggering her duty under the EMA to declare as such. MCL 30.403(3), (4); (Pls' App'x 109a, EO 2020-68.) In carrying out her statutory duty, the Governor acknowledged that the measures implemented based on her authority under the EMA and the EPGA "have been effective, but the need for them – like the unprecedented crisis posed by this global pandemic – is far from over." (*Id.* at 110a.) She emphasized the continued lack of treatment for the virus, the ease of transmission, and the "lack [of] adequate means to fully test for it and trace its spread." (*Id.*)

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[23] MLive, *Thursday, April 30: Latest developments on coronavirus in Michigan*, available at https://www.mlive.com/public-interest/2020/04/thursday-april-30-latest-developments-on-coronavirus-in-michigan.html

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Ultimately, the Governor found that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist." (*Id.*) Given her findings and the immediate danger that this pandemic continued to present to Michigan residents, the Governor was obligated to issue the declaration.

C. The Plaintiffs' construction of the EMA conflicts with the plain text of the EMA and is unworkable.

The text of the EMA is unambiguous. It requires the Governor to terminate the order declaring a disaster or emergency declaration after 28 days if the Legislature does not extend the order's duration. See MCL 30.403(3), (4) ("After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster [emergency] terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature."). But the EMA is silent about the termination of one order foreclosing the issuance of a subsequent one. Nothing in the EMA bars that action.

This silence, coupled with the EMA's ongoing emergency-response mandate to the Governor, compels only one result. The EMA does not impose a limit on the Governor to declare a disaster or emergency anew if the circumstances warrant it. This Court does not have the authority to engraft limitations where the Legislature has not created them.

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Rather, the Court applies the statute as written where the statutory language is clear. *Hamed v Wayne Co,* 490 Mich 1, 8 (2011). No construction is permitted. *Id.*[24] This is a principle with a long history. See, e.g., *Voorhies v Judge of Recorder's Court*, 220 Mich 155, 157–158 (1922) (the judiciary does not have the authority "to add a condition or restriction thereto found in the earlier statute and left out of the later one . . . . [t]he contention made, if allowed, would go beyond the construction of the statute, and ingraft upon its provisions a restriction which the Legislature might have added but left out.").

The Plaintiffs' construction of the EMA as barring a "new" declaration only creates questions that are unanswered in the statute:

- Does an intensification of the original threat constitute grounds for a new declaration?
- What part of the danger has to arise from the original threat and how much has to arise from the changed conditions?
- How much time has to pass before it becomes a "new" emergency, and would it bind a subsequent Governor?

The EMA provides no answer, and no guidance to a court as to how it might derive one. And unsurprisingly so. These are questions the EMA never intended to be asked, let alone to control whether the Governor can discharge her duty.

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[24] For that reason, any reliance on legislative analyses is unwarranted, see Pls' Brief, p 12 (citing House Fiscal Agency Bill Analysis, H.B. 5496, Pls' App'x 48a–49a) where the statute's language is unambiguous. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 355 n 50 (2015) ("[T]he language of the [statute] is unambiguous and, as a result, the examination of legislative history 'of any form' is not proper . . . ."). Even if the statute were ambiguous, this Court has questioned the interpretive value of this kind of legislative history, indicating that it is entitled to "little judicial consideration." *Id.* And the Fiscal Analysis offered by the Plaintiffs here does not address the question of what, if any, limitation the EMA imposes on issuing a new declaration.

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These are not just academic questions. The pandemic at issue here illustrates the point. The end of July has seen a substantial increase in cases in Michigan, with more new cases here than the state has encountered since the early weeks of the pandemic. And other parts of the country, notably in the south and west, have seen a greater number of new cases and deaths than at any previous time of this crisis.

According to the Plaintiffs' construction, even if the Legislature now wished for the Governor to issue a new declaration after an initial refusal to extend the duration, that action would be barred because the EMA does not state that the Governor may issue a new declaration. That is unworkable. It turns the authorization upside down. The Governor is not directed to issue a declaration only when she has not previously done so, but is obliged when the circumstances warrant it. The universal experience of this country demonstrates that this coronavirus presents an immediate threat to our residents. The Michigan Governor stands with virtually every other executive official in this country.

If, in enacting the EMA, the Legislature had intended to try to retain ultimate control over the Governor's issuance of declarations, it could have written the statute accordingly. The Plaintiffs' list of other state laws investing their executives with emergency powers, (see Pls' Br, pp 40–41, n 10), is filled with statutes that purport to do this. (See *id.*, listing 16 state statutes that enable the Legislature to terminate an emergency, such as Ark. Code Ann. § 12-75-107(c)(1) ("The General Assembly by concurrent resolution may terminate a state of disaster

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emergency at any time.").) But the Legislature here did not attempt to reserve this authority. Instead, it gave the Governor an ongoing duty to declare a state of emergency or disaster whenever one exists, with a periodic obligation to terminate, re-evaluate, and re-declare if warranted. And so the Governor has done.

This understanding is consistent with the principles of proper delegation. The Legislature may delegate authority to the Governor provided it prescribes standards for guidance that are reasonably precise in light of the subject matter of the delegation. But once the Legislature does so, it may not retain what amounts to a legislative veto. See *Blank v Dep't of Corrections*, 462 Mich 103, 113 (2000) (Kelly, J., lead opinion). The suggestion here is that the Legislature may delegate certain actions, but then effectively retain the "right to approve or disapprove" the Governor's later exercise of that authority.

The concept of an improper legislative veto was outlined by the U.S. Supreme Court in *INS v Chadha*, 462 US 919, 959 (1983). In *Blank*, this Court applied *Chadha* in considering the constitutionality of a 1977 amendment to the Administrative Procedures Act, which required an administrative agency to "obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules." 462 Mich at 108 (Kelly, J.). The lead opinion framed the issue as "whether the Legislature, upon delegating [rulemaking authority to an executive-branch agency], may retain the right to approve or disapprove rules proposed by [the agency]." *Id.* at 113. It reasoned that the Legislature's approval or disapproval of an executive-agency rule is "inherently

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legislative" and "subject to the enactment and presentment requirements." *Id.* at 115–116. See also *Wolf v Scarnati,* ___ Pa ___ 2020 WL 3567269, *19 (July 1, 2020) ("[B]ecause the General Assembly intended that H.R. 836 terminate the Governor's declaration of disaster emergency without the necessity of presenting that resolution to the Governor for his approval or veto, we hold, pursuant to our power . . . that H.R. 836 is a legal nullity . . . .").

So too here. On April 30, the Governor had the power and duty to terminate her declared states of emergency and disaster under the EMA, and to declare new ones if emergency or disaster conditions existed. They existed, so she declared. The Legislature could bar her from doing this, but only through legislative enactment. See *Blank*, 462 Mich at 119 ("When the Legislature engages in 'legislative action' it must do so by enacting legislation," and "the Legislature cannot circumvent the enactment and presentment requirements."). There was no such enactment, and no bar to the Governor re-declaring as authorized and required under the EMA.

D. The requirement that the Governor issue a new declaration is a true limitation on her authority and does not create a circumvention of the Legislature's role in the EMA.

The Plaintiffs contend that this plain reading renders the Legislature's authority to extend the duration of the disaster or emergency "meaningless," as it constitutes a "end run" around the Legislature's role in helping the State address a disaster or an emergency. (Pls' Br, pp 13, 14). The Governor and Director disagree.

The requirement that the Governor must issue a new declaration under the EMA, rather than extend the duration of a prior one, gives rise to three distinct limitations on her authority.

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First, while a Governor's factual finding of an emergency is entitled to great deference, it is not beyond judicial review. *Straus v Governor*, 459 Mich 526, 533 (1999), quoting *People ex rel Johnson v Coffey*, 237 Mich 591, 602 (1927) ("The Governor holds an exalted office. To him, and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed question of fact is final. His finding of fact, *if it has evidence to support it*, is conclusive on this court.") (emphasis added). Accordingly, any declaration under the EMA is subject to judicial review on the question whether the definition of "disaster" or "emergency," MCL 30.402(e), (h), was satisfied. The fact that the Governor is forced to issue a new declaration has a direct effect on when any review would occur. Namely, it would ensure that the review is of the emergency not when declared on Day 1, but as it is on the day of the re-declaration which would occur at least 28 days later. While the threat here has not dissipated, in most circumstances, the threat will become less immediate as time passes, making it more difficult to support the finding of an emergency if challenged.

Second, any declaration under the EMA may be subject to a legislative override, Const 1963, art 4, § 33 (two-thirds vote), by repeal or amending of the EMA to bar the Governor from issuing a new declaration. Cf. *Dodak v State Admin Bd*, 441 Mich 547, 558 (1993) ("If the Legislature disagrees with [the executive's view of the law], it can work a political resolution of the disagreement by expressly repealing [it]"). This is the way the legislative process works.

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Third, the Governor is accountable not only to the co-equal branches of government, but also directly to the People, before whom she must stand for reelection. With a re-declaration comes renewed public scrutiny of the Governor's actions. This crisis well illustrates the point. It has been, among other things, one of the most significant political events in generations in Michigan, placing the Governor's executive actions front and center. The fact that the Legislature has chosen not to extend her original declaration beyond 28 days under the EMA has real consequences to the political process.

Finally, the Plaintiffs raise the specter of an "indefinite" emergency by the series of re-declarations by the Governor of the same emergency after the 28 days have transpired. (Pls' Br, p 12.). But that overlooks the plain language of the EMA, which expressly defines what "emergency" or "disaster" conditions must exist for the Governor to issue a declaration, and the fact that any such declaration may be subject to judicial challenge or legislative override at any time. She is not above the law, nothing that has occurred in the course of this pandemic suggests otherwise. Indeed, it is no coincidence that Michigan is one of apparently 50 states in which there is still currently a declared emergency. See n 16 above. Michigan is not an outlier. The Governor has not acted unreasonably in redeclaring a disaster and an emergency under the EMA on April 30, 2020 in response to the coronavirus. It continues to present a threat of widespread loss of life and it is essential that the Governor take action to save lives and protect the public health of Michigan's residents – just as the EMA charges her to do. MCL 30.402(e) & (h), MCL 30.403.

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III. The Governor has properly exercised her authority under the Emergency Powers of the Governor Act.

The EPGA invests the Governor with extraordinary – but not unlimited – power to respond to emergencies. The states have conferred emergency powers on their Governors. This is an essential aspect of good governance. On the basis of her emergency powers, the Michigan Governor – like Governors elsewhere – declared an emergency. And like every other state, Michigan continues to face an emergency.

The arguments of the plaintiffs otherwise are unavailing. Nothing in the EPGA creates a time limitation. Contrary to Plaintiffs' assertion, there can be an ongoing emergency, as confirmed by this very pandemic, which in some parts of the country has only now become its most dangerous. The Plaintiffs' effort to incorporate the 28-day durational limit from the EMA finds no support in the EPGA and is expressly forbidden by the EMA. And while the Legislature has created two sources of emergency power, this does not make the EMA mere surplusage. The EMA provides for additional structure for emergency responses, but has its own restrictions, while the EPGA may be narrower in other respects. Finally, the Governor has not conceded that the emergency is over.

A. The EPGA's broad, but not unlimited, grant of authority supports the Governor's declared state of emergency.

The EPGA, enacted in 1945, provides the Governor with broad powers "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state." MCL 10.31(1). This Court has termed this grant of power to be "extraordinary." *Walsh v City of River Rouge,* 385 Mich 623, 640 (1971).

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The Governor "may proclaim a state of emergency" during these times, or upon "reasonable apprehension of immediate danger" of such an emergency, "when public safety is imperiled." *Id.* Upon the proclamation of a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.* Any "orders, rules, and regulations promulgated . . . are effective from the date and in the manner prescribed in the orders, rules, and regulations." MCL 10.31(2). And they "may be amended, modified, or rescinded . . . by the governor" and "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." *Id.* As a whole, the EPGA must "be broadly construed to effectuate [its] purpose," which is to "invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32.

As of April 30, the State faced such a "time[ ] of great public crisis," "disaster," or "similar public emergency." MCL 10.31(1). Indeed, in April, the virus killed more Michigan residents than heart disease and cancer combined.[25] As of this filing, over 6,000 have died here, and over 150,000 have died in the United States.[26] And, as Michigan and other states have seen, this threat remains real.

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[25] Michigan Department of Community Health, Number of Deaths by Select Causes of Death by Month, available at https://www.mdch.state.mi.us/osr/Provisional/MontlyDxCounts.asp

[26] See n 13.

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These facts form the basis of the Governor's finding of a state of emergency under the EPGA, and well justify the "reasonable" and "necessary" measures she has taken "to protect life" throughout the State or bring this pandemic "under control." MCL 10.31(1). The fact that the State of Michigan remains in a state of emergency is because the State and its residents still face an emergency.

B. The Plaintiffs' argument that the EPGA is "time-limited" is contradicted by the EPGA's plain language, and their effort to insert the EMA's 28-day limit conflicts with the EPGA's text.

The Plaintiffs' overarching error is their misunderstanding of the meaning and nature of an emergency. Nothing in the EPGA – or in the reality of an emergency – provides that an emergency can only last a certain amount of time. Thus, they misread the EPGA itself when they say that emergency is "time limited," when they argue that emergency refers to a "limited period of time," and when they seek to limit the EPGA with the EMA's 28-day limit. (Pls' Br, pp 17, 19–22, 26.)

The EPGA explains that the Governor may proclaim a state of emergency "[d]uring times of great public crisis, disaster, rioting, catastrophe," or "reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled." MCL 10.31(1). Nothing in these terms suggest that an "immediate danger" will only be short-lived. Indeed, it is a matter of common sense that a threat does not automatically become less "immediate" and "dangerous" simply because some predetermined amount of time has elapsed. This pandemic bears out that proposition because it continues to present that very kind of threat. The experience of other states confirms this, and it explains why – as of July 30, 2020 – every state apparently is in a state of emergency. See n 16 above.

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The ordinary dictionary-definitions of "emergency" make the same point. Take the Plaintiffs' definition from the 1942 (2d ed.) *Webster's New International* dictionary: "[a]n unforeseen combination of circumstances which calls for immediate action; also, less properly, exigency." (Pls' Brief, pp 18, 20). This is a good definition. The pandemic was unforeseen. The point, however, is that it remains an emergency in that the danger it presents is ongoing, and thus it remains an "immediate" threat. The Plaintiffs' error is their focus on the timing of whether the pandemic is still "unforeseen." (*Id.* at 20). But the immediacy of the danger is the key. Five minutes after a fire engulfs a city, it is no longer "unforeseen," but the idea that the dangers it presents have passed misunderstands the meaning of emergency, and likewise the meaning of the EPGA. The language from § 2, MCL 10.32 ("broadly construed" and "legislative intent to invest the governor with sufficiently broad power of action"), provides further support, but frankly the Court need not even consider it because the EPGA's text is clear.

Sensing perhaps that this may not be dispositive, the Plaintiffs further assert that the EMA's 28-day limit may be imported into the EPGA. (Pls' Brief, pp 26–29). But again, the plain text of the EMA forecloses this argument.

In the section of the EMA governing the construction of the Act, the EMA expressly states that its terms do not "[l]imit, modify, or abridge the authority of the governor to proclaim a state of emergency" under the EPGA. MCL 30.417(d). In response, the Plaintiffs emphasize that the EMA's time limits may be imported without limiting the Governor's power of proclaiming an emergency. (Pls' Br, p 28).

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While that argument is strained, this Court need not even examine the point because the rest of § 17(d) answers the question clearly when it further states that it does not limit, modify, or abridge the "*exercise any other powers vested in him or her* under the state constitution of 1963, *statutes*, or common law of this state independent of, or in conjunction with, this act." MCL 30.417(d). The EPGA is a statute. Thus, the Plaintiffs' effort to constrain the powers of the Governor under the EPGA by its reading of the EMA is expressly rejected.

C. The Plaintiffs' other arguments are also unavailing.

The Plaintiffs' other arguments fare no better. Reading the EMA according to its plain text does not render it mere surplusage, and the Governor has not concluded that the emergency has resolved. Her declarations remain in place.

As an initial matter, the Legislature clearly intended the grant of authority to the Governor under the EMA be in addition to, and separate from, the authority it conferred under the EPGA. Section 17(d)'s text is clear on that point.

That does not mean that the scope of each ends up being the same in all instances, or that one Act is subsumed by the other. The Acts are distinct, with each providing their own terms and processes for invoking and exercising their respective grants of authority.[27]

[27] For instance, the EMA contains express limitations (see, e.g., MCL 30.417(a)-(c), regarding interference with labor disputes, news media, and jurisdiction of law enforcement agencies) and authorizations (see, e.g., MCL 30.411, regarding the provision of civil immunity), while the EPGA does not include these express limitations and authorizations.

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And the Plaintiffs overlook the comprehensive infrastructure of actors and resources that is provided by the EMA, which includes coordination with the federal government and other states, MCL 30.404, a state emergency management apparatus, MCL 30.407, 407a, 408, the coordination with local authorities, MCL 30.409, 410, 411, 413, and contingency funds, MCL 30. 418, 419. But ultimately, Section 17(d) of the EMA makes clear that the EPGA operates separately and is not limited by the EMA.

Moreover, the Plaintiffs argue the Governor terminated this emergency on April 30, 2020 in EO 2020-66. (Pls' Brief, pp 24–28). But the Governor did not terminate the emergency – she terminated the emergency declaration. As explained above, there is no question that the facts supporting the emergency endured. Also, this elides the point that she declared an emergency under the EPGA. The real issue is whether there was and is an emergency – yes, there was and is.

IV. The Emergency Powers of the Governor Act is constitutional and does not reflect an improper delegation by the Legislature and does not violate the Michigan Constitution's Separation of Powers.

Just as in the vast majority of states, the Legislature here has properly delegated emergency response authority to the Governor to take reasonable and necessary action to protect Michigan residents in times of crisis. The Plaintiffs argue that the EPGA is an improper delegation and violates the separation of powers because it lacks sufficient standards to guide the Governor. Not so.

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A. The branches of government are not barred from working together, and sharing their authority is permitted so long as adequate guidance is given.

The Michigan Constitution provides for the separation of powers among the three branches of state government. In particular, the Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch. [Const 1963, art 3, § 1.]

But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982) ("while art. 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate."), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation of powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power – the power "to make, alter, and amend laws" – sits with the Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and this Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Taylor*, 468 Mich at 8 (internal quotes omitted).

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The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978). Under this test, "legislation which contains a delegation of power to . . . [another branch] must contain either explicitly or by reference . . . standards prescribed for guidance." *Id.* at 437–438. While it is clear that "a legislative body may not delegate to another its lawmaking powers," that does not prevent an official from being "clothed with the authority to say when the law shall operate . . . provided, however, that the standards prescribed for guidance are as reasonably precise as the subject-matter requires or permits." *Osius v City of St Clair Shores*, 344 Mich 693, 698 (1956). And the statute carries a presumption of constitutionality; it "must be construed in such a way as to render it valid." *Westervelt,* 402 Mich at 438.

In Michigan, like the federal system, successful nondelegation claims are exceedingly rare. See *Taylor*, 468 Mich at 9 ("In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful.")

While the doctrinal language in the state and federal systems are nominally different, this Court has treated them as twins. See *Taylor*, 468 Mich at 7–9, 10 ("[W]e have rejected [nondelegation] claims on a basis similar to the federally developed rationale."). The first and last year that the U.S. Supreme Court struck down one statute on that ground was 1935, in two cases. See *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935). None has been successful since.

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In *Panama Refining*, there was simply no purported guidance whatsoever to guide the President's discretion. 293 US at 430 ("[T]he Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."); see also *Mistretta v United States*, 488 US 361, 373 n 7 (1989) (describing its conclusions in *Panama Refining* and *ALA Schecter* "that Congress had failed to articulate *any* policy or standard") (emphasis added). Such is not the case here.

B. The Legislature's delegation of emergency powers, requiring "reasonable" action "necessary to protect life and property or to bring the emergency situation . . . under control," is constitutional.

As noted, this case presents no exception to the general rule. The standards set forth in the EPGA are as reasonably precise as the subject matter requires or permits. See *Westervelt*, 402 Mich at 439. The Legislature did not grant the Governor a blank check. The EPGA provides the Governor the authority, after declaring a state of emergency, to "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1) (emphasis added). Thus, there are several limits on the Governor's authority. Her orders may come only upon a "public emergency" and the orders must not only be reasonable *and* necessary, they must be directed at protection of "life and property" or "bring[ing] the emergency situation . . . under control" in the "affected area." *Id.*

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Michigan courts have consistently upheld similar language as sufficiently precise to avoid any nondelegation problem. In *Klammer v Department of Transportation*, 141 Mich App 253, 262 (1985), the Court of Appeals considered that the word "necessary" was a sufficiently precise standard for the retirement board in considering the length of time a certain state worker could continue after reaching the mandatory retirement age. See also *GF Redmond & Co v Michigan Sec Comm'n*, 222 Mich 1, 7 (1923) ("[T]he term 'good cause' for revocation of the license, relating, as it does, to the conduct of the business regulated by the policy declared in the statute, is sufficiently definite."); *Smith v Behrendt*, 278 Mich 91, 97–98 (1936) (holding that allowing the executive to grant oversize loads for freeway travel in "special cases" was a proper delegation of legislative authority).

These examples suffice to reveal that the courts are hesitant to invalidate laws on the basis of an allegedly improper delegation where the Legislature provides even general direction to the executive branch.

The Plaintiffs rely on two Michigan cases to support their claim, see Pls' Brief, pp 31–32, both of which are distinguishable. In *Blue Cross & Blue Shield of Michigan v Milliken*, this Court determined that "the power delegated to the Insurance Commissioner" regarding approval of actuarial risk factors "is completely open ended." 422 Mich 1, 53 (1985). And for good reason. The commissioner's authority was not guided at all. Instead, the commissioner was granted complete authority to " 'approve' or 'disapprove' the proposed risk factors; the basis of the evaluation is not addressed." *Id.* *Blue Cross* is a poor comparison.

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The second is *Oshtemo Charter Twp v Kalamazoo Cty Rd Comm'n*, 302 Mich App 574 (2013). The case likewise provides no help to the Plaintiffs, and if anything, supports the constitutionality of the EPGA. As the *Oshtemo* court explained, "[t]his case is extremely similar to *Blue Cross & Blue Shield*" in that the statute at issue provided for a "complete lack of standards," not even "in the form of a generalized statement of public policy." *Id.* at 591, 592. The Court of Appeals did not ultimately reach the merits of the improper delegation claim, but noted that if the "road commission's decision to 'approve or void' an ordinance *were not limited to voiding those ordinances that are* ***unreasonable***, *the complete lack of standards contained in* the statute would very likely render it a constitutionally deficient delegation of authority." *Id.* at 591 (emphasis added). That is, a reasonableness standard would cure any constitutional concern. This analysis supports the EPGA's constitutionality.

And of course, the standards imposed on the Governor's authority under the EPGA are not read in a vacuum, the "subject matter" of the delegation guides how strictly or narrowly drawn the standards must be. *Westervelt*, 402 Mich at 439. The context of a developing "crisis, disaster, rioting, catastrophe, or similar public emergency," MCL 10.31(1), counsels granting substantial leeway to the decisionmaker. Public emergencies are not static events, nor do they unfold predictably. Response to such crises warrant – indeed require – nimbleness coupled with judgment to meet the needs of the moment. There is no specific one-size-fits-all response to a complex and ongoing emergency.

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The subject matter here requires the broadest level of leeway permissible under the nondelegation doctrine. If "the management of natural resources is a difficult and complex task," *DNR v Seaman*, 396 Mich 299, 311 (1976), the response to a rapidly developing and ever-changing public health crisis is even more so.

Likewise, under a substantially similar standard, the U.S. Supreme Court has "over and over upheld even very broad delegations." *Gundy v United States*, 139 S Ct 2116, 2129 (2019). *Gundy* highlighted the consistency with which the Court had granted deference to Congress, mentioning cases upholding Congressional delegations to regulate in the "public interest," or for agencies to "set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* at 2129. Recently, the Court turned away a delegation challenge to an agency's charge to promulgate air quality standards that are "*requisite* to protect the public health." *Id.*, citing *Whitman v Am Trucking Associations*, 531 US 457, 473 (2001). Thus, the "practical understanding" that we live in an "increasingly complex society, replete with ever changing and more technical problems," drives the hesitance to upend laws that "delegate power under broad general directives." *Mistretta v United States*, 488 US 361, 372 (1989). That principle holds here, and with even greater force.

The EPGA provides the Governor substantial discretion, but limits her ability to act upon a finding of an emergency, and even then the Governor may only exercise her discretion to issue "reasonable" orders "necessary" to protect "life and property" or to bring the emergency "under control." MCL 10.31(1). These guideposts are more than sufficient to pass constitutional muster.

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C. The claims of the Plaintiffs that the Governor's authority is without limits under the EPGA, that she is exercising legislative authority, and that the structure of government has been compromised are mistaken.

Perhaps the most critical flaw in the Plaintiffs' position is their failure to recognize that the limits of "reasonable" and "necessary" are not just sufficient constitutionally, but they constitute true limits. The Governor has not become a law unto herself, nor has the Legislature abdicated its "core function to the executive branch" (Pls' Br p 30) by providing the Governor with a set of tools commensurate to the task of emergency response.

As noted, any declaration of an "emergency" in the first instance, or the failure to rescind that emergency because the conditions have subsided, are subject to judicial review. The claim that "they are no limit at all" (p 37) is not well taken.

Michigan jurisprudence is filled with general standards that have real meaning, that control and limit the actions of government, and ensure the liberty of all Americans. Such general principles as Equal Protection and Due Process are the bedrock of liberty in the U.S. Constitution, to say nothing of the Necessary and Proper Clause. Standards like reasonableness and necessity are not meaningless phrases, or just eloquent statements that have no jurisprudential significance. They are true standards of law that guide and restrain conduct and that enable meaningful challenge and review of that conduct. And they are the standards that the Michigan Governor has taken care to follow in responding to this emergency under the EPGA.

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Plaintiffs warn of unending "unilateral rule" by the executive (Pls' Brief, p 36), but of course nothing in the EPGA's delegation of authority purports to provide for that. The EPGA requires at all times the presence of a public emergency or reasonable apprehension of immediate danger, which is subject to judicial review. Plaintiffs fail to explain where the Constitution demands the Legislature impose some predetermined, categorical time limit on the duration of emergencies.

Nor do the Plaintiffs explain how the presence of any such time limit might bear on whether the Governor is exercising legislative authority. Indeed, while Plaintiffs stress that "[t]he Michigan Constitution cannot simply be put on the shelf for several years" (Pls' Brief, p 36), how would the Constitution no longer be offended if only placed on the shelf for 28 days? In short, the Plaintiffs' argument proves too much.[28] The Legislature has not shelved the Constitution or forfeited its institutional role by enabling executive response to emergencies through the EPGA. The states have generally conferred such emergency powers on their executive, and Michigan stands among them.

In a similar vein, even though included in the certified questions, it is telling that the Plaintiffs do not challenge the constitutionality of the EMA on this ground, see Pls' Brief, pp 29–44, where the standards under which the Governor may act ultimately rest on same general principles that guide the EPGA.

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[28] As a result, the Plaintiffs' citation of more than 30 states with clauses that enable state legislatures to terminate their emergencies, see Pls' Br, pp 40–41, n 10, really only confirms that the Governor is exercising executive authority. The Legislature cannot alienate its legislative authority for even a single day.

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Indeed, under § 3 of the EMA, the Governor may "issue executive orders, proclamations, and directives having the force and effect of law to implement this act." MCL 30.403(2). This general statement is given form in § 5, that provide for suspension of regulatory statutes where "necessary" to cope with the disaster or emergency, MCL 30.405(1)(a), and for the provision of state resources where "reasonably necessary" to cope with the disaster or emergency, MCL 30.405(1)(b). Yes, the same language, or the same kinds of standards, as the EPGA.

On this point, the essential fact is that the executive authority the Governor is wielding is just that, executive authority. She is not enacting laws. None of the Governors are. She is using the tools the Legislature gave her to carry out the task it entrusted to her.

It is a little like the Michigan statute that enables police officers to issue lawful orders in traffic, which if violated, are misdemeanors. See MCL 257.602.[29] In that setting, it is necessary for the police to exercise executive authority. They are not acting like a legislature, and they are not creating laws. But the police officer's orders have the force and effect of law. The same is true here, but on a broader scale.

And, as noted, many states have granted their governors similarly broad authority to meet the moment of an emergency circumstance. See the following examples from a range of states:

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[29] MCL 257.602 provides: "A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state."

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- Ariz Rev Stat § 26-303(E)(1) (during a state of emergency . . . [t]he governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter.");

- Ky Rev Stat Ann § 39A.100(1)(j) (granting governor broad powers "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the [state]");

- Miss Code Ann § 33-15-11(c)(4) (the governor may "perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency");

- Haw Rev Stat § 127A-13(3); 14(c) (granting the governor – who "shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency" – the power to suspend laws that "impede[] or tend[] to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions");

- 20 Ill Comp Stat 3305/7 (giving the Illinois Governor the power to "utilize all available resources of the State government as reasonably necessary to cope with the disaster").[30]

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[30] According to *Health Security,* Vol 17, No. 2, 2019, "An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response," p 3, Michigan's emergency powers laws are like to the majority of states:

> A majority of states have broad statutes enabling the governor to temporarily change statutes or regulations during a declared emergency. In total, 42 states explicitly permit the governor to change statutes or regulations during an emergency. In 35 states, governors are explicitly permitted to suspend or amend both statutes and regulations that interfere with an efficient, effective response to an emergency to an emergency. In 7 states (listed) governors are permitted to amend regulations during a declared emergency but are not explicitly authorized to modify or remove statutory requirements. [Figures and footnotes omitted.]

https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf

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Yet the Plaintiffs have cited no cases in which a court has apparently stepped in to nullify these grants.[31]

It is easy to understand why this is so. The Governor is best equipped to address the exigencies of an emergency, not the Legislature. While legislative deliberation ordinarily is valuable, a fast-moving, contagious disease requires an agile and flexible response, not Robert's Rules of Order.

The Legislature knows that to meet the moment, proper delegation to the executive is the wisest course, which is why it granted the authorities it did to the Governor. This pandemic has only confirmed the prescience of that judgment.

And throughout, Michigan's democracy has remained fully intact and vibrant. Of course, some officials and residents have disagreed with some actions of the Governor. That is what happens in a democracy. And the avenues that democracy duly provides to voice and act upon such disagreement have been, and continue to be, open. The Legislature has at all times remained free and empowered to take action as to this pandemic through lawmaking, including through the override of the Governor as that body may see fit. The Governor's actions are likewise subject to challenge by private parties and to review by the courts, and she will, in the end, have to stand for reelection.

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[31] Insofar as the Plaintiffs rely on the decision in Wisconsin, *Wisconsin Legislature v Palm*, 942 NW2d 900 (WI 2020), that case is distinguishable. See *id.* at 914 ("[T]he Governor's emergency powers are not challenged by the Legislature, and [the agency official] does not rely on the Governor's emergency powers. Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval.").

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While many things about this pandemic have been "sobering" (Pls' Brief, p 39), the proper operation of these democratic processes is not among them. Through the EPGA and the EMA, the Legislature duly delegated to the Governor the critical task and necessary tools of emergency response. This was a constitutional choice, and as the past few months have vividly illustrated, a wise and necessary one. There is no basis for this Court to disrupt it here.

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CONCLUSION AND RELIEF REQUESTED

This Court should decline to review these questions, but if it does, this Court should affirm the Governor's exercise of her authority under both the Emergency Powers of the Governor Act and the Emergency Management Act.

Respectfully submitted,

s/ B. Eric Restuccia

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Dated: August 6, 2020

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STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,
Plaintiffs,
v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendants.
/

The appeal involves a question that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

SUPPLEMENTAL AUTHORITY OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES

Consistent with MCR 7.312(I), Governor Gretchen Whitmer and Director of Department of Health and Human Services Robert Gordon provide supplemental authority and state the following:

1. After oral argument, the Court ordered supplemental briefing on two questions. The parties filed supplemental briefing on September 16, 2020.

2. In preparing supplemental briefing, counsel for the Governor and Director worked with the State Archives to locate executive orders or proclamations declaring a state of emergency under the Emergency Powers of the Governor Act.

3. After the Archives' staff concluded their time intensive search, counsel have identified three more that were not available before September 16, 2020:

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June 9, 1953 (tornado) (App'x A); August 30, 1954 (Labor Day weekend traffic) (App'x B); May 24, 1955 (Memorial Day weekend traffic) (App'x C).

4. Although it may not be exhaustive, the following list then includes all the executive orders or proclamations found by counsel invoking the EPGA:

a. Gov. Kelly – December 6, 1946 (statewide coal shortage)
b. Gov. Williams – February 27, 1950 (statewide coal shortage)
c. Gov. Williams – June 9, 1953 (tornado) (App'x A)
d. Gov. Williams – August 30, 1954 (Labor Day weekend traffic) (App'x B)
e. Gov. Williams – May 24, 1955 (Memorial Day weekend traffic) (App'x C)
f. Gov. Romney – May 28, 1964 (civil unrest – Hillsdale) (1964-2)[1]
g. Gov. Romney – June 2, 1964 (civil unrest – Hillsdale) (1964-3)
h. Gov. Romney – July 23, 1967 (civil unrest – Detroit area) (1967-3)[2]
i. Gov. Romney – July 24, 1967 (civil unrest – Flint) (1967-4)
j. Gov. Romney – July 24, 1967 (civil unrest – Grand Rapids area) (1967-5)[3]
k. Gov. Romney – April 5, 1968 (civil unrest – Wayne County) (1968-1)[4]
l. Gov. Romney – April 5, 1968 (civil unrest – Macomb County) (1968-2)[5]
m. Gov. Romney – April 5, 1968 (civil unrest – Oakland County) (1968-3)[6]
n. Gov. Romney – July 27, 1968 (civil unrest – Grand Rapids area) (1968-8)
o. Gov. Milliken – April 14, 1970 (Ban on fishing) (1970-6)[7]
p. Gov. Milliken – May 15, 1970 (civil unrest – Ypsilanti) (1970-9)

---

[1] Executive orders cited in this Supplemental Authority from this date on were accessed at the Library of Michigan's website. See https://bit.ly/3hnn7jV.

[2] E.O. 1967-3 was amended several times. See https://lmdigital.libraryofmichigan.org/collections/p16110coll2/items/104796

[3] E.O. 1967-5 was amended several times. See https://lmdigital.libraryofmichigan.org/collections/p16110coll2/items/104806

[4] E.O. 1968-1 was amended twice. See https://lmdigital.libraryofmichigan.org/collections/p16110coll2/items/104814

[5] E.O. 1968-2 was amended once. See https://lmdigital.libraryofmichigan.org/collections/p16110coll2/items/104817

[6] E.O. 1968-3 was amended once. See https://lmdigital.libraryofmichigan.org/collections/p16110coll2/items/104819

[7] As attached to the Governor and Director's Supplemental Brief, the following were also issued: 1970-7 (issued April 29, 1970 (Ban on Commercial Walleye Fishing in Lake Erie)); 1970-11 (issued May 20, 1970 (Fish Hazard)). Executive Order 1971-10, issued December 20, 1971, rescinded Executive Orders 1970-6 and 1970-11.

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5. According to the Archives, executive orders and proclamations for certain eras of Michigan are not organized or held in a readily accessible location, and many are not indexed, so the counsel for the Governor and Director wished to provide as accurate a list as they could in one place for the convenience of the Court.[8]

Respectfully submitted,

s/ B. Eric Restuccia

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Dated: September 23, 2020

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[8] Consistent with providing this Court the most accurate information, the signing counsel identified two matters needing correction/clarification from the supplemental filing for the Governor and Director from September 16, 2020.

First, the citation to "MCL 333.5501" in note 7, page 14, should be MCL 333.5101, and the references on page 16 to "MCL 30.303, and MCL 30.305," should be to MCL 30.403 and MCL 30.405.

Second, the subject of the first two sentences on page 14 is the emergency laws MCL 333.2251 and 333.2253, and should include the following additions in **bold** to make that clear: "Nothing in these provisions **(MCL 333.2251 and .2253)**, or elsewhere in the Public Health Code, purports to limit the Governor's authority under the EPGA, or deprive the Governor of the ability to act in response to epidemics that imperil the public safety. The Governor is not identified, and **these emergency** laws make no reference to the EPGA (or the EMA), let alone claim to displace or otherwise limit the Governor's authority under either of those statutes." The signing counsel regrets the need for these corrections/clarifications. See attached corrected pages 14 and 16.

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STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, D/B/A GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFREY GULICK,

Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.
_____/

The appeal involves a question that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

SUPPLEMENTAL BRIEF OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES

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STATEMENT OF QUESTIONS PRESENTED

On September 9, 2020, this Court requested additional briefing on two questions:

I. Whether the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq.*, applies in the context of public health generally or to an epidemic such as COVID-19 in particular.

The Governor and Director answer: Yes, and yes.

Plaintiffs answer: No, and no.

II. Whether "public safety," as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether "public safety" encompasses "public health" events such as epidemics.

The Governor and Director answer: Ordinary meaning, and yes.

Plaintiffs answer: Term of art, and no.

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INTRODUCTION

The language of the Emergency Powers of the Governor Act (EPGA) is unambiguous. It empowers the Governor to protect life and property when the public safety is imperiled by a "great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind." MCL 10.31(1). This pandemic presents such an emergency, by imperiling the safety of Michigan's residents. In their briefing, the Plaintiffs here have conceded as much. There are two points here in response to this Court's questions.

First, the EPGA encompasses public health crises generally when they jeopardize public safety, and the COVID-19 pandemic presents exactly this sort of crisis. The public's safety is threatened by a widespread, highly contagious, as-yet untreatable virus that has killed thousands. That is why every state, like Michigan, faces a state of emergency.[1] And it is why the Plaintiffs in this case, like the plaintiffs in many other cases, have never questioned that this pandemic can create, and has created, the emergency circumstances contemplated under the EPGA. Nothing in the EMA or in the public health laws of 1945 or today undermines this conclusion, or purports to preclude the Governor from responding to public health crises that imperil public safety, such as COVID-19.

---

[1] See https://www.nga.org/state-covid-19-emergency-orders/ (last accessed September 15, 2020) (designated as a state of "emergency," state of "public health emergency," or state of "disaster").

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Second, the term "public safety" was not used as a term of art in the EPGA, and it should be given its ordinary meaning and application. And as the Plaintiffs have conceded, the "public safety" is imperiled by the widespread risk of death and significant harm posed by a pandemic such as COVID-19. Michigan courts, the U.S. Supreme Court, and contemporary ordinary usage all recognize that the dangers of epidemics can, and do, affect "public safety," and the use of the EPGA by Governors in the past comports with this understanding of the statute's scope by applying to circumstances beyond quelling a riot. The deadly epidemic of COVID-19 imperils public safety, and the Governor has properly invoked the EPGA to protect the people of this State from it.

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ARGUMENT

I. The Emergency Powers of the Governor Act applies in the context of public health generally and to an epidemic such as COVID-19 when it imperils the safety of Michigan's residents.

The text of the EPGA is unambiguous and requires no further construction. It empowers the Governor – during an emergency – to take action to protect the public in Michigan when their safety is imperiled. The COVID-19 pandemic presents such an emergency. The Plaintiffs have expressly recognized as much in their briefing. Moreover, the fact that the Emergency Management Act expressly references an "epidemic" does not foreclose the EPGA from addressing it as well. As the EMA made clear, the Legislature intended the two emergency acts would act side-by-side, and the EMA would not work to limit the EPGA. And the fact that the public health laws, both in 1945 and now, conferred authority on other executive agencies to respond to communicable diseases or epidemics does not limit the Governor's authority under the EPGA.

A. The COVID-19 pandemic is a public emergency under the EPGA that imperils the safety of Michigan's residents by threatening their lives.

This Court's canons of constructions place the statutory text – and its plain meaning – at the center of understanding the intent of the Legislature in enacting a law. Legion are the cases that provide that a statute must be applied as written when unambiguous and that no construction is permitted. See, e.g., *McQueer v Perfect Fence Co*, 502 Mich 276, 286 (2018) ("The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written"). Such is the case here.

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As this brief more fully presents below, the phrase "when public safety is imperiled" (MCL 10.31(1)) includes the circumstance in which a pandemic jeopardizes the lives of Michigan residents, as reflected in both Michigan law and federal law. See *In People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 393 (1923) ("of paramount necessity, a community has the right to protect itself against an epidemic of disease which *threatens the* ***safety*** of its members.") (emphasis added); *Jacobson v Commonwealth of Massachusetts*, 197 US 11, 37 (1905) ("It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care *for the public health* ***and the public safety*** *when endangered by epidemics of disease.*") (emphasis added). See Issue II, below.

The Plaintiffs have expressly agreed on this point that the Governor acted appropriately in addressing the COVID-19 pandemic under the EPGA. In fact, the Plaintiffs stated this point twice. Initially, the concession appeared in the introduction. See Plaintiffs' Reply, p 1 ("Plaintiffs acknowledge that for 51 days following the Governor's first declaration of a state of emergency based on COVID-19, *the Governor acted within the bounds of the enabling* ***statutes*** and the Michigan Constitution. *This is no small concession.*") (emphasis added). And then the Plaintiffs reiterated the point in the body of the reply brief in addressing the authority of the Governor under the EPGA. See *id.* at 3 ("The Governor acted within the limits of her authority for 51 days.").

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In the usual case, this agreement would operate as a waiver and would foreclose the ability of the Plaintiffs to argue otherwise. See, e.g., *People v Carter,* 462 Mich 206, 215 (2000). And indeed, that conclusion would seem to hold even more strongly in this certified-question context, where this Court is acting in a very specific capacity, i.e., to guide a federal court's adjudication of the particular questions of state law that have been put before this Court.[2] Regardless, it is telling that the Plaintiffs have understood the EPGA to cover epidemics such as COVID-19.

---

[2] As noted in earlier briefing, this Court should decline to answer these questions, given the significant immunity and justiciability issues. And, on this point, at argument the undersigned counsel was asked whether this Court's answers to certified questions created binding precedent in the state courts, see MCR 7.308(A)(2), and he responded yes, but that he had not examined the issue. After further research, the answer to that question is more nuanced. Strictly speaking, the answer to the question does not appear to bind the requesting court. See, e.g., *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 472 Mich 1225, 1229 (2005) (Young, J., concurring) ("We have absolutely no authority to force a federal court, sister state court, or tribal court to adopt our answer to a certified question.") But the federal courts are bound to the construction of state law set by that state's highest court. *Montana v Wyoming*, 563 US 368, 377 n 5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law.' "), quoting *West v American Telephone & Telegraph Co*, 311 US 223, 236 (1940). See also *Grover by Grover v Eli Lilly and Co*, 33 F3d 716, 719 (CA 6, 1994) ("When a state supreme court accepts a certified question, it voluntarily undertakes a substantial burden and its resolution of the issue must not be disregarded."). And Michigan's appellate courts have apparently treated this Court's decisions in certified questions as binding, as exampled by a case in which that court did not follow it as precedent because the specific proposition was not essential to the resolution of the issue. See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 270 (2003) ("In addition, the Supreme Court stated that mutual insurance company policyholders 'would be in a better position to assert a property interest in the surplus....' *In re Certified Question (Fun 'N Sun RV, Inc. v Michigan)*, 447 Mich 765, 791 n 34 (1994), after remand 223 Mich App 542 (1997). *However, this statement was not essential to the determination of that case and, thus, is not binding precedent.*") (emphasis added).

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The same basic point is true of the Legislature in their amicus brief, see p 22, which argues the same in substance as their brief in the Court of Appeals in their own case, because they do not contest that the EPGA could cover local public health emergencies. See *House of Rep v Governor*, ___ Mich App ___ (2020), slip op, p 15 ("Although it is the Legislature's position that the EPGA does not encompass statewide epidemics, it did not contend in its brief on appeal that the EPGA did not cover localized or regional epidemics or epidemics in general. Indeed, as noted earlier, the Legislature conceded that the parties agreed that *the two acts 'cover the same subject matter.'* This is akin to a waiver of the issue.") (emphasis added). The fact that the two key parties who have been litigating the breadth of the EPGA have in substance agreed that the EPGA governs this pandemic as a public health emergency strongly supports the natural, plain reading of this statute.

B. The fact that the EPGA does not list "epidemic" – in contrast to the Emergency Management Act – does not limit the general terms or the authority of the Governor under the EPGA.

Unlike the EPGA that uses general terms to encompass its breadth, the EMA provides a specific definition of "disaster" that expressly includes an "epidemic":

> (e) "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, *epidemic*, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders. [MCL 30.402(e) (emphasis added).]

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At oral argument, there was a suggestion that the inclusion of the term "epidemic" here meant that the EPGA did not also encompass a public crisis that resulted from an epidemic. Judge Tukel had reached that conclusion in his dissent in the Legislature's suit. See *House of Rep,* ___ Mich App ___, slip op p 9 (dissenting).[3]

This argument suffers from at least two fatal flaws.

First, the EMA makes clear that it does not "limit, abridge, or modify" the EPGA. MCL 30.417(d). As noted above, the ordinary understanding of a "public emergency" that imperils the safety of the public by threatening their lives would include an "epidemic of disease" such as COVID-19. See *Hill,* 224 Mich at 393. As previously briefed by the Governor and the Director of the Department of Health and Human Services in their principal filing here, § 17(d) ensures that the EMA does not limit the Governor's ability to proclaim an emergency under the EPGA:

> [This act shall not be construed to do any of the following:]
>
> Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of the Michigan Compiled Laws, or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act.

---

[3] Judge Tukel's dissent reasoned as follows:

> Thus, applying the rules of construction in a straightforward manner, it is readily apparent that the inclusion of the word "epidemic" in the definition of disaster under the EMA means that the Legislature did not understand any of the EPGA's triggering events to include an epidemic; if the EPGA applied to an epidemic, there would have been no reason to include it in the EMA definition, as it would be a redundancy, contrary to how we construe statutes, because the governor can impose all of the same relief under the EPGA as may be imposed under the EMA. [Slip op, p 9.]

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Thus, any effort to narrow the construction of the EPGA by the EMA is expressly foreclosed by the plain terms of § 17(d), whether examining the Governor's power to proclaim a state of emergency or the Governor's powers more generally. In short, nothing in the EMA constrains the Governor's powers, including under the EPGA.

Second, insofar as this argument is advanced as one of mere statutory construction, such a claim is unavailing. Both the EMA and the EPGA cover "disaster[s]," with the EMA expressly defining the term but the EPGA not. If the EMA's definition is treated as some sort of limitation on the EPGA, such that whatever is included in the former must be excluded from the latter, there would be nothing left to the EPGA. The definition of "disaster" in the EMA encompasses "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause." MCL 30.402(e). If all such circumstances were excised from the scope of the EPGA, what threats to public safety would be left? Indeed, even the one kind of event that appears to be indisputably within the EPGA's scope – rioting – is expressly included in the EMA:

> (e) "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to . . . hostile military action or paramilitary action, *or similar occurrences resulting from terrorist activities, **riots**, or civil disorders*. [MCL 30.402(e) (emphasis added).][4]

Under this view, even the "riot statute" does not address riots – only the EMA does.

[4] As noted at oral argument, the EMA was passed in 1976 with an express exclusion of riots: "Riots and other civil disorders are not within the meaning of this term unless they directly result from and are aggravating element of the disaster." See Public Act 390 of 1976. The current language was passed in 1990. See PA 50 of 1990.

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There is no sound reason to construe the EMA and the EPGA in this fashion. Rather, this Court should give the Legislature's words their plain meaning. The Legislature made clear that the EMA was designed to be, among other things, an additional power, not one that displaced or cabined the Governor's other powers.

Canons of statutory construction are tools to divine legislative meaning, not obscure it. Here, the Legislature, in enacting the EMA, made certain that the reader would not be left to guess at its intentions, and it included § 17(d) to ensure that a reviewing court would not attempt the very thing attempted here – to use the EMA to limit the Governor's other authorities, including under the EPGA. It is no wonder that the Plaintiffs and the Legislative plaintiffs in *House of Representatives* did not advance this argument previously.

C. Nothing in the public health laws of 1945 or the laws present today impinges on the Legislature's broad grant of authority to the Governor to combat emergencies under the EPGA.

The laws governing public health in Michigan, in 1945 or today, do nothing to limit the Governor's authority under the EPGA. The power of the executive branch of government is vested in the Governor. Mich Const, art 5, § 1. And, unless otherwise provided by the state constitution, the Governor supervises each principal department to ensure that "the laws be faithfully executed." Art 5, § 7. In some circumstances, the state constitution further provides the Governor with "concurrent legislative authority" over the executive branch. See *House Speaker v Governor,* 443 Mich 560, 579 (1993) (evaluating the Governor's power "to reorganize the executive branch" under art 5, § 2).

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In enacting laws pertaining to the public health, the Legislature has, at times, conferred authority on various executive departments and agencies to respond to communicable diseases or epidemics, including in emergency circumstances. But none of these grants of authority has purported to limit the substantial authority that the Governor has over the executive branch in general, or the specific authority that the Governor has under the EPGA to respond to emergencies "when the public safety is imperiled." MCL 10.31(1). For the authority conferred by the Legislature on public health authorities, these laws did not purport to be exclusive of any powers conferred by law on the Governor. This is true of the laws from both 1945 and now.

For the public health laws that were in place when the EPGA was passed, those laws – much as the current ones – provided authority to the state board of health (later replaced by the state health commissioner) to respond to communicable diseases:

> Whenever it shall be shown to the satisfaction of the state board of health, that cholera, diphtheria, or other dangerous communicable disease exists in any foreign country, neighboring state, or locality within this state whereby the public health is imperiled, and it shall be further shown that immigrants, passengers or other persons seeking to enter this state, or to travel from place to place within this state, are coming from any locality where such dangerous communicable disease exists, the state board of health shall be authorized to establish a system of quarantine for the state of Michigan *and the governor shall have authority to order the state militia to any section of the state on request of the state board of health to enforce such quarantine.*
>
> [Public Act 230 of 1885; CL 1948, 329.1 (emphasis added).][5]

[5] In Public Act 146 of 1919, the powers and duties to the state public health board were transferred to the state health commissioner. See CL 1948, 325.4.

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In the same vein, the Legislature provided to the state health commissioner the ability to bar public meetings to prevent the spread of epidemics, extending to the entire state if "countersigned" by the Governor:

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, forbid the holding of public meetings of any nature whatsoever except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. Such action shall not be taken, however, without the consent and approval of the advisory council of health. Any order made pursuant to this section shall be published in such manner as the advisory council of health may direct and shall become effective at a date specified in said order. *Such order shall be signed by the health commissioner and if applicable to the entire state be countersigned by the governor.*
>
> [Public Act 146 of 1919; CL 1948, 325.9 (emphasis added).]

These provisions enabled the state board of health (commissioner) to respond to "dangerous communicable disease[s]" by "establish[ing] a system of quarantine," or by "forbid[ding] the holding of public meetings." CL 1948, 329.1, 325.9. See also *Rock v Carney*, 216 Mich 280, 295 (1921) ("There is power to protect the public health; it is vested by law in public health boards to be exercised through reasonable rules and regulations duly promulgated").[6]

Also, the same substantive provision regarding communicable diseases appears in the 1929 compiled laws. See CL 1929, Ch 114, 6600, sec. 1. It is worth noting in passing that this Court rejected an improper delegation challenge to this law. See *Hurst v Warner*, 102 Mich 238, 246 (1894) ("the statute is constitutional"). The health code in CL 1948 was outlined by Department in Chapter 325, 325.1 to 325.307, and by communicable disease in Chapter 329, 329.1 to 329.405.

[6] The public health laws also invested the local public health officials a role in addressing communicable diseases. See CL 1948, 327.1 *et seq.* See also *Keho v Bd of Auditors of Bay Cty*, 235 Mich 163, 166 (1926).

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These statutory provisions extant in 1945 did not, however, bar the Governor from taking action in response to such diseases. To the contrary, the decision making regarding its enforcement under these provisions was expressly reserved to the Governor. And there is nothing to suggest that, by expressly reserving a role for the Governor in the state board's (commissioner's) exercise of these laws, the Legislature intended that to be the *only* role the Governor could or would play in protecting the public from dangerous communicable diseases.

Indeed, the authority conferred on the Governor by the EPGA enabled the Governor to provide such protections in a broader and more flexible manner. These old public health laws did not enable the response action to be tailored in form and type to what is "reasonable" and "necessary" under the particular circumstances presented by the dangerous communicable disease. MCL 10.31(1). Simply put, there is no reason to conclude that the Legislature intended to deprive the Governor of the ability to act under the EPGA in response to diseases, merely because it vested the state board of health (commissioner) with authority as well.

The same point applies to the current laws governing emergencies and public health. For emergencies that require the protection of "public health, safety, or welfare," the Administrative Procedures Act provides agencies with the authority to promulgate "an emergency rule without following the notice and participation procedures" normally required by the APA, so long as the Governor "concurs in the finding of emergency." MCL 24.248(1). The rule can last up to six months, with the Governor authorized to extend its duration by another six months upon filing a

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"certificate of the need for the extension." *Id.* As with the laws discussed above, there is nothing to suggest that, by creating this tool of emergency response – in which executive agencies are authorized to act, but only upon the Governor's approval – the Legislature intended to supplant, repeal, or limit any authority otherwise vested in the Governor, including under the EPGA.

So too under the Public Health Code. The key provision to address epidemics and the emergency powers of the Director of DHHS states:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. [MCL 333.2253(1).][7]

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[7] See also MCL 333.2251:

> (1) Upon a determination that an imminent danger to the health or lives of individuals exists in this state, the director immediately shall inform the individuals affected by the imminent danger and issue an order that shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the director's findings and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.
>
> (2) Upon failure of a person to comply promptly with a department order issued under this section, the department may petition the circuit court having jurisdiction to restrain a condition or practice which the director determines causes the imminent danger or to require action to avoid, correct, or remove the imminent danger.
>
> (3) If the director determines that conditions anywhere in this state constitute a menace to the public health, the director may take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.

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Nothing in these provisions, or elsewhere in the Public Health Code, purports to limit the Governor's authority under the EPGA, or deprive the Governor of the ability to act in response to epidemics that imperil the public safety. The Governor is not identified, and the laws make no reference to the EPGA (or the EMA), let alone claim to displace or otherwise limit the Governor's authority under either of those statutes. Rather, the Public Health Code expressly states that it is "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1).

> (4) If the director determines that an imminent danger to the health or lives of individuals in this state can be prevented or controlled by the promulgation of an emergency rule under section 48(2) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248, to schedule or reschedule a substance as a controlled substance as provided in part 72,1 the director shall notify the director of the department of licensing and regulatory affairs and the administrator of his or her determination in writing. The notification shall include a description of the substance to be scheduled or rescheduled and the grounds for his or her determination. The director may provide copies of police, hospital, and laboratory reports and other information to the director of the department of licensing and regulatory affairs and the administrator as considered appropriate by the director.
>
> (5) As used in this section:
>
> > (a) "Administrator" means that term as defined in section 7103.2
> >
> > (b) "Imminent danger" means a condition or practice exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.
> >
> > (c) "Person" means a person as defined in section 11063 or a governmental entity.

See also MCL 333.5501 *et seq.* (governing prevention and control of diseases).

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Indeed, when the Legislature enacted the Public Health Code, it made the effect of that enactment on existing law clear, repealing many laws the Code was intended to supplant. See Strichartz, *Michigan Public Health Code,* (ICLE, 1982), p 896. It left the EPGA, however, fully intact. There is no basis, express or implied, to read the Public Health Code to limit the scope of the EPGA. Cf *Staiger v Madill*, 328 Mich 99, 112 (1950) (the principle that repeal by implication is disfavored "is of especial application in the case of an important public statute of long standing which should be shown to be repealed either expressly, or by a strong and necessary implication").

Correspondingly, consistent with this grant of authority under the Public Health Code, the Director of the Department has issued sixteen orders in response to the COVID-19 pandemic, twelve of which remain in place, and some of which govern similar subjects as the Governor's orders.[8] And the Governor has exercised authority under both the EPGA and the EMA that goes beyond the emergency powers contemplated under the Public Health Code, issuing orders that fall outside of the powers of the Director along with orders that overlap with those powers. (See list of Governor's executive orders.)[9]

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[8] See https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html (last accessed September 14, 2020). The four rescinded orders were dated April 2, 2020 (the order at issue in this case) as well as May 18, 2020, May 27, 2020, and June 10, 2020.

[9] See https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html (last accessed September 14, 2020).

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As with the statutory provisions discussed above, this overlap in authority does not demand a strained reading of the EPGA. As noted already, the Governor is the chief executive and is granted authority constitutionally over the principal departments. See art 5, § 7. She stands at the top of the pyramid of authority in the executive branch and is the official of that branch most politically accountable to the people. The idea that statutory grant of authority to a department or agency, simply by virtue of its existence, limits or displaces a statutory grant of authority to the Governor would turn this pyramid upside down.

Meanwhile, it makes eminent sense that, even when executive departments and agencies are authorized to act in certain areas and ways, the Governor would retain broad authority to make decisions and act as well, particularly as to crises that threaten the safety of the public whose State she has been elected to govern. Accordingly, some of the responsibilities in responding to a public health emergency overlap between the Governor and the Director, but the Governor has additional powers in both the EPGA and the EMA, which are not contemplated by the public health emergency laws. Compare, e.g., MCL 333.2251 and .2253 with MCL 10.31(1), MCL 30.303, and MCL 30.305. As a matter of both interpretation and governance, this overlap is unexceptional and perfectly sound.

In the end, the plain language of the EPGA is clear and requires no further construction. The Governor has properly acted to protect Michigan's residents from this pandemic, which presents an ongoing threat to their safety.

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II. An epidemic in general, and COVID-19 in particular, implicates public safety as that term is used and understood in the EPGA.

For the second question, this Court asked "whether 'public safety,' as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether 'public safety' encompasses 'public health' events such as epidemics."

"Public safety" as a concept embedded in the police power does not have a settled, defined meaning. But whether or not "public safety" is a term of art, it encompasses public health events like epidemics. In early 20th century cases discussing the breadth of the State's police power in combating outbreaks of disease, both this Court and the U.S. Supreme Court understood that epidemics implicate "public safety." Contemporary lay understanding is in concert as confirmed by dictionary definitions. And the prior invocations of the EPGA by Michigan Governors further reinforce the breadth of scope that the statute's plain language reflects. Accordingly, an epidemic such as COVID-19 falls within the scope of the EPGA.

A. A legal term of art is one that has a settled, definite, and well-known meaning at common law.

This Court is tasked with determining the Legislature's intent, with the presumption "that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted and the statute must be enforced as written." *People v March*, 499 Mich 389, 398 (2016) (citation and internal quote omitted).

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Thus, when, as here, a statute fails to define a term, "we presume that the Legislature intended for the words to have their ordinary meaning." *March,* 499 Mich at 398; MCL 8.3a. Only when an undefined term "has 'a settled, definite, and well known meaning at common law,'" will the Court adopt that meaning over the plain and ordinary understanding. *March*, 499 Mich at 398, quoting *People v Covelesky,* 217 Mich 90, 100 (1921) (subsequent history omitted). Such "technical words and phrases . . . shall be construed and understood according to [their] peculiar and appropriate meaning. MCL 8.3a; see also *March*, 499 Mich at 398.

B. "Public safety" has no discrete, settled legal meaning in the context of the police power, which does not demarcate a line between "public safety" and "public health."

The four corners of the police power are not clearly defined. As the U.S. Supreme Court long ago described it, the police power, "whether called 'police,' 'governmental,' or 'legislative,' exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore & M S R Co v State of Ohio*, 173 US 285, 297 (1899).

Although its breadth is unquestionable, the State's police power has been described in myriad ways and "is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest." *Jaarda v Van Ommen*, 265 Mich 673, 684 (1934).

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In fact, this Court has described the police power as "somewhat vaguely termed" and noted that "the exact description and limitation of which have not been attempted by the courts." *Withey v Bloem*, 163 Mich 419, 423 (1910). See also *Hamilton v Vaughan*, 212 Mich 31, 43 (1920) (Fellows, J., dissenting) ("[A] hard and fast definition of the police power, inclusive and exclusive, has not been generally attempted by the courts . . . ."). The police power constitutes a package of authority that has no concrete formulation. Reviewing the multiplicity of definitions confirms this, and only highlights that "public safety," a constituent part of the "vaguely termed" police power, *Withey v Bloem*, 163 Mich at 423, has no "settled, definite, and well known meaning at common law," *March*, 499 Mich at 398.[10]

But it is not as if the police power ebbs and flows with each case. It remains the same, though the words used to describe it may vary. As such, one cannot reasonably interpret that litany of objects as having no overlap. In some formulations, for example, "public health" is listed side-by-side with "public safety," see n 10, and in others, it is defined as a part of "public safety." In *Clements v McCabe*, 210 Mich 207, 215 (1920), this Court stated that the police power "operates

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[10] See, e.g., *Mooney v Vill of Orchard Lake*, 333 Mich 389, 392 (1952) ("The test of legitimacy [of the exercise of police power] is the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and *public health, safety, morals or the general welfare.*"); *Cady v City of Detroit*, 289 Mich 499, 504–505 (1939) ("The sovereign power of the state includes *protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public,* or any substantial part of the public."); *People v Brazee*, 183 Mich 259, 264 (1914) ("It is an attribute of sovereign power to enact laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the *health, safety, and welfare of society*. This power is known as the police power.").

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in a conceded sphere relating to public safety, order, and morals *for the protection of* health, person, and property, which is never questioned." *Id.* (emphasis added).

The takeaway from these various recitations of the police power is that the constituent phrases necessarily overlap. For example, the public "welfare" can no doubt be impacted by concerns of public safety. So too can the public "safety" be affected by epidemics that threaten the public health. Given the varied and inconsistent formulations, it is difficult to see how these intertwining and overlapping phrases – and "public safety" in particular – have "a settled, definite, and well known meaning at common law," let alone a meaning that permits no overlap between them. *March*, 499 Mich at 398.

One thing is clear, though. The concept of "public safety" has long been understood to encompass epidemics.

C. At the time of the EPGA's enactment, it was well understood that epidemics endanger public safety as well as public health.

At the time of the EPGA's enactment, the phrase "public safety" included dangers stemming from epidemics. In the early twentieth century, the U.S. Supreme Court and this Court both understood that epidemics in particular threaten "public safety." And during that era, the Legislature granted authority to certain cities to combat contagious diseases "when the public safety may so require."

Jacobson v Commonwealth of Massachusetts, is the lodestar case regarding the permissible scope of a State's emergency response to an epidemic. 197 US 11 (1905). *Jacobson* is the genesis of the broad latitude afforded the State in

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responding to public health emergencies, and that case has played a critical role in guiding courts across the country in their consideration of challenges to the States' responses to COVID-19. See, e.g., *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, 509 U.S. ___ (2020) slip op., p. 2 (summary order issued May 29, 2020) (Roberts, C.J., concurring); *League of Independent Fitness Facilities and Trainers, Inc v Governor Gretchen Whitmer*, 814 Fed Appx 125, 127 (2020) ("All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. [citing *Jacobson*.] This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own.")

Jacobson concerned Massachusetts' delegation of authority to localities to permit mandatory vaccinations during a public health crisis. *Id.* The state law at issue specifically granted the authority to localities to impose mandatory vaccinations, and Cambridge exercised it during a smallpox outbreak. *Id.* at 12–13. A resident refused, was charged, and pled that the U.S. Constitution protected him against mandatory vaccination. *Id.* at 13. In rejecting his theory, the U.S. Supreme Court made clear that an epidemic endangers "public safety":

> It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care *for the public health* ***and the public safety*** *when endangered by epidemics of disease.* Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was *vital to the safety of all.* [*Jacobson*, 197 US at 37 (emphasis added).]

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In *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388 (1923), this Court followed the same path, quoting *Jacobson* at length and defending the right of the State to guard against pandemics: "of paramount necessity, a community has the right to protect itself against an epidemic of disease which *threatens the safety* of its members." *Id.* at 391 (emphasis added). Moreover, this Court in *Hill* cited *Jacobson* for the proposition that "it cannot be adjudged that the present regulation of the board of health was not necessary *in order to protect the public health* ***and*** *secure the public safety*." 224 Mich at 391 (emphasis added). See also *In re Jeffries Homes Housing Project*, 306 Mich 638, 646 (1943) (characterizing as matters of "public safety" actions "diminish[ing] the potentialities of epidemics" and "prevent[ing] the spread of . . . disease"). In a similar vein, this Court has recognized that communicable diseases are "dangerous" and present a "danger." *Hill*, 224 Mich at 392–393 ("[a] child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both *dangerous* and contagious"), *id.* at 393 ("So a child recently exposed to such a disease may be denied the privilege of our schools until all *danger* shall have passed") (emphases added), quoting *In the Matter of Viemeister*, 179 NY 235 (1904).

This Court has thus treated public health and public safety not as separate silos of concern. Rather, it has recognized that both are implicated by epidemics. To sever these symbiotic concepts would tear at the fabric of long-held understanding and tradition about police power to protect the public in a crisis.

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Common understanding by reference to a contemporary dictionary definition confirms this. "Safety" contemplates the keeping of others free from danger, hazard, and disease. Webster's New Collegiate Dictionary (1949) defines "safety" to mean "1. Condition of being safe; freedom from danger or hazard," or alternatively, "4. A keeping of oneself or others safe, esp. from danger of accident *or disease*." (Emphasis added.)[11] While this definition does not contemplate every malady or health issue one might experience, no matter how small, it plainly encompasses disease (and, therefore, epidemics).

This definition also makes sense in the context of the statute. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 59 (2014) ("Individual words and phrases are not read in a vacuum . . . ."). The Governor's authority actuates only when "public safety is *imperiled*." MCL 10.31(1). As a result, it is not so broad as to grant the Governor authority to combat, for example, a widespread contraction of the common cold. While that would surely be a "public health" concern, it would not be one of "public safety," because the public would not be in need of protection from a widespread risk of significant harm or death.

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11 **safe'ty** (sāf'tĭ), *n.* **1.** Condition of being safe; freedom from danger or hazard. **2.** Quality of being devoid of whatever exposes one to danger or harm; safeness. **3.** *Rare.* Close custody. **4.** A keeping of oneself or others safe, esp. from danger of accident or disease. **5.** A protective device, as on a firearm, to prevent accidental discharge. **6.** *Amer. Football.* Any act resulting in the ball's being declared dead on, above, or behind the goal line, in the possession of a player guarding his own goal, provided the impetus which sent the ball to or across the line was given by the side defending the goal; also, a score (2 points) so made. **7.** *Baseball.* A safe hit. —*adj.* **1.** Made or planned so as to ensure the safety of the user, operator, etc., as in **safety glass.** **2.** Of or pertaining to the safeguarding of the public, or of a group of employees, or the like, from accident; as, *safety* measures, rules; *safety* engineers.

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Trying to read "public safety" narrowly to exclude all matters of public health – for instance, as comprising only matters requiring law-enforcement actions – would not only contravene the phrase's plain meaning, but would also conflict with the types of "public emergenc[ies]" detailed in the EPGA.

Along with other limitations, the Governor may only proclaim a state of emergency under the EPGA "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency," or during "reasonable apprehension of immediate danger of" such an emergency. MCL 10.31(1). This list certainly includes events that may require law-enforcement actions to protect the public safety, such as riots. But it also includes events whose threats to public safety predominantly, if not entirely, call for other forms of police-power intervention, such as "disaster[s]" and "catastrophe[s]." Both the "broad power of action" explained in MCL 10.32 and the types of "public emergencies" in MCL 10.31(1) signal that a law-enforcement limitation should not be read into "public safety." Instead, the phrase should be read with the breadth its plain meaning requires. And when so read, it is clear that epidemics such as COVID-19 can, and do, imperil public safety.

D. Prior invocations of the EPGA confirms that it covers more than simply law enforcement response to civil unrest.

While the applicability of EPGA to this epidemic is settled by the plain language of the statute, it bears mention that this conclusion comports with how prior Governors have read and used the statute.

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In questioning whether the EPGA can be used in response to an epidemic, the Legislature asserts that the EPGA has only ever been invoked twice, once for a riot and another occasion for an ice storm in 1985. (Amicus Br, p 28.) This claim is mistaken. In fact, the EPGA has been invoked multiple times since its enactment, at least three of which involved emergencies well beyond what a law-enforcement-limited reading of "public safety" would countenance.

In 1946, Governor Harry Kelly, the year after he signed into law the EPGA, he invoked it to declare a state of emergency "throughout the entire state" based on a critical coal shortage caused by a strike:

> WHEREAS, it has been represented to me by the Federal Solid Fuels Administration and Captain Donald S. Leonard, State Fuel Administrator, that the strike in the bituminous coal mines of the nation and the drastic curtailment of fuel supplies coming into the state, caused by the subsequent embargo on railroad transportation, have created *a public crisis within the State of Michigan endangering the health, safety, property and general welfare of the people of the State.* [Appendix A (emphasis added).]

With the recently enacted EPGA, Governor Kelly imposed restrictions to conserve coal and transfer it from some communities to others "in dire need."[12]

In 1950, Governor G. Mennen Williams encountered the same kind of crisis, and issued the same basic proclamation under the EPGA: "the shortage of coal has created a public crisis with the State of Michigan endangering the health, safety, property and general welfare of the people of the State." (Appendix B, p 3.)

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[12] *Michigan Declares Emergency Exists*, New York Times, December 7, 1946, available at https://timesmachine.nytimes.com/timesmachine/1946/12/07/98603154.html?pageNumber=2

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For this declaration, Governor Williams also issued regulations regarding the delivery of coal and the establishment of "certificates of necessity" for the use of coal that would become effective once the local chief executive certified the existence of "emergency conditions":

> 1. The coal stocks in wholesale and retail yards be frozen and no deliveries be made therefrom except as authorized through certificates of necessity . . .
> 2. That certificates of necessity shall be issued by the local fuel administrator only to persons, agencies, institutions and utilities upon the basis of need and essential use in the following classifications . . . [Appendix B, p 1.]

On a third occasion, in 1970, Governor William Milliken invoked the EPGA as a tool for "proper safeguarding of the public health, safety, and welfare" by prohibiting certain fishing in Lake St. Clair and the St. Clair River for a duration of over 20 months.[13] Governor Milliken issued Executive Order 1970-6, which found "a state of reasonable apprehension of immediate danger to the public health, safety and welfare" and barred fishing, on threat of a misdemeanor, in Lake St. Clair and the St. Clair River. (E.O. 1970-6, Appendix C.) Apparently, there was a

[13] In addition to the executive orders discussed here, several others appear to have been issued pursuant to the EPGA apparently addressing civil unrest. See, e.g., Executive Orders 1964-02 (state of emergency in Hillsdale); 1967-3 (Flint); 1967-4 (Detroit), 1967-5 (Grand Rapids); 1968-1 (Wayne County); 1968-2 (Mt. Clemens); 1970-9 (Ypsilanti). Executive orders from 1955 to present are available at the Library of Michigan online. https://bit.ly/3hnn7jV. Executive orders and proclamations prior to that time are housed at the Archives of Michigan but are not organized or held in a single, accessible location, and many are not indexed.

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contamination of fish in those bodies of water, and Canada had ordered a similar measure the week prior.[14]

On April 29, 1970, Governor Milliken also proclaimed, "a state of reasonable apprehension of immediate danger to the public health, safety, and welfare from the species, Walleye," in Lake Erie. (E.O. 1970-7, Appendix D). On May 20, 1970, the Governor reiterated the "reasonable apprehension of immediate danger to the public health" by certain species of fish, and continued the prohibition on commercial fishing in Lake Erie, but dialed back the full ban on fishing in the St. Clair River and Lake St. Clair, amending E.O. 1970-6 to permit only catch-and-release recreational fishing in those bodies of water. (E.O. 1970-11, Appendix E.)[15] Again, violations of the order constituted misdemeanors. (*Id.*)[16]

---

[14] *St. Clair Fishing Banned By Michigan's Governor*, New York Times, April 11, 1970, available at https://www.nytimes.com/1970/04/11/archives/st-clair-fishing-banned-by-michigans-governor.html

[15] The order also expanded the catch-and-release requirement to the Detroit River, and Lake Erie, for certain species of fish. (E.O. 1970-11, ¶¶ 2–3.) The expansion of the area covered by the executive order was linked to the discovery that contaminated fish may have migrated from Lake Erie. *Sports Fishing Ban at Michigan Lake Ends After 5 Weeks*, New York Times, May 24, 1970, available at https://www.nytimes.com/1970/05/24/archives/sports-fishing-ban-at-michigan-lake-ends-after-5-weeks.html

[16] Of note, a legal challenge was mounted against the ban that reached this Court. But it was promptly turned away. On August 12, 1970, the Court disposed of the "complaint of plaintiff for superintending control . . . for the reasons that said complaint is without merit." See *Lake St. Clair Advisory Comm v Milliken*, Order issued Aug 12, 1970 (Docket No 52968). According to press reports, there were successful challenges to the validity of these executive orders, or pieces thereof, in trial courts. See *Gov. Milliken Bans Fishing*, Mackinac Center for Public Policy, Aug 31, 2020, available at https://www.mackinac.org/27988. The attorneys for the State Defendants have not been able to identify the nature of these challenges or located any additional appellate authority pertaining to these executive orders.

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These restrictions on fishing continued under the Governor's EPGA authority for over 20 months. On December 20, 1971, the Governor found the condition supporting the emergency declaration "no longer exists" and rescinded 1970-6 and 1970-11 "pursuant to . . . the provision of Act 302 of the Public Act of 1945," which is the EPGA. (E.O. 1971-10, Appendix F.)

These prior invocations of the EPGA only confirm what the statute's plain text makes clear: "public safety" in MCL 10.31(1) contemplates matters well beyond civil unrest, and it overlaps with public health. The statute requires this reading of "public safety." Where an immediate danger to public safety exists – whether in the streets through lawlessness, in our water through contaminated fish, or in the air as COVID-19 spreads aggressively throughout the state – the EPGA offers the Governor emergency authority. Contortions of canons of construction should not stand in the way of such sound, sensible, and settled executive authority. The canons exist so that the law can be used to good effect in the real world. The EPGA has been put to such use for 75 years, and the Governor here has put it to such use in response to this pandemic – just as the statute contemplates, and just as the public safety has required.

* * *

Not all public health issues are public safety issues, and not all public safety issues are public health issues. But one thing is for certain: an epidemic such as COVID-19 is both.

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A virus that is novel, airborne, highly contagious, potentially fatal, and as-yet untreatable has been menacing our State. The thousands of lives it has taken, and the countless more it has harmed, leave no doubt that it has imperiled the safety of the public. The Governor is taking the immediate action necessary to combat the virus's rampant spread and protect life. This is the greatest public health crisis of our age. And it is an emergency under the EPGA.

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CONCLUSION AND RELIEF REQUESTED

This Court should conclude that the Emergency Powers of the Governor Act empowers the Governor to address public health emergencies that imperil the public safety, including the COVID-19 pandemic.

Respectfully submitted,

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75329)
Assistant Solicitor General

Joshua Booth (P53847)
Kyla Barranco (P81082)
John Fedynsky (P65232)
Joseph T. Froehlich (P71887)
Assistant Attorneys General
Department of Attorney General
Attorney for the Governor and Director
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

Dated: September 16, 2020

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 7/31/2024 5:29:51 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]
Subject: RE: Keefer brief

Thanks!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, July 31, 2024 10:18 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Subject: Keefer brief

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good morning. Democracy Docket has the Pennsylvania defendants' response brief in *Keefer* here. I've not had a chance to review.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 3/29/2024 12:50:04 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Michael Pomante [michael@statesuniteddemocracy.org]
Subject: RE: Review of RNC list maintenance allegations
Attachments: 20240328 Sums Cmplt.pdf

Excellent, thank you. Erik and I will take a look and let you if a conversation will be helpful.

Also we were sued again yesterday by RNC, see attached.

Happy Friday,

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, March 29, 2024 8:00 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Michael Pomante <michael@statesuniteddemocracy.org>
Subject: Review of RNC list maintenance allegations

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

If you'd like to discuss any of this with us, let us know.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24-000041-MZ

Court address: Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.: 517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
Republican National Committee, Michigan Republican Party, National Republican Congressional Committee, Dennis Grosse, Blake Edmonds, and Cindy Berry	v	Jocelyn Benson, in her official capacity as Michigan Secretary of State
Plaintiff's attorney, bar no., address, and telephone no. Charles R. Spies (P83260), Robert L. Avers (P75396) and Joseph A. Vacante (P87036), Dickinson Wright PLLC, 350 S Main, Ste 300, Ann Arbor, MI 48104 (734)623-1672 cspies@dickinsonwright.com, ravers@dickinsonwright.com, jvacante@dickinsonwright.com		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- ☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- ☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.
- ☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- ☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
- ☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- ☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
March 28, 2024	June 27, 2024	Jerome W. Zimmer Jr.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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Summons (3/23)

Case No. 24-000041-MZ

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the summons and complaint and file proof of service with the court clerk before the expiration date on the summons. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

_____ on _____.
Attachments (if any) Date and time

_____ on behalf of _____
Signature

_____
Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24-000041-MZ

Court address: Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.: 517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
Republican National Committee, Michigan Republican Party, National Republican Congressional Committee, Dennis Grosse, Blake Edmonds, and Cindy Berry	v	Jonathan Brater, in his official capacity as Director of Elections
Plaintiff's attorney, bar no., address, and telephone no. Charles R. Spies (P83260), Robert L. Avers (P75396) and Joseph A. Vacante (P87036), Dickinson Wright PLLC, 350 S Main, Ste 300, Ann Arbor, MI 48104 (734)623-1672 cspies@dickinsonwright.com, ravers@dickinsonwright.com, jvacante@dickinsonwright.com		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- ☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- ☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.
- ☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- ☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
- ☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- ☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
March 28, 2024	June 27, 2024	Jerome W. Zimmer Jr.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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Summons (3/23)

Case No. 24-000041-MZ

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the summons and complaint and file proof of service with the court clerk before the expiration date on the summons. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

_____ on _____.
Attachments (if any) Date and time

_____ on behalf of _____
Signature

_____
Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DENNIS GROSSE, BLAKE EDMONDS, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24- 000041 -MZ

Hon. Christopher P. Yates

EXPEDITED RELIEF REQUESTED

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
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350 S. Main Street, Ste 300
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(734) 623-1672
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Charles R. Spies (P83260)
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Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

/

VERIFIED COMPLAINT FOR EXPEDITED DECLARATORY AND INJUNCTIVE RELIEF

Although there is no other pending or resolved civil action arising out of the specific transaction or occurrence alleged in this Verified Complaint, one policy of the Secretary of State that is challenged

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here is substantively the same as one of the Secretary's policies that was struck down by this Court in Genetski v Benson, No. 20-000216-MM, 2021 WL 1624452 (Mich Ct Cl, 2021).

NOW COME Plaintiffs Cindy Berry, Dennis Grosse, Blake Edmonds, the Michigan Republican Party, the National Republican Congressional Committee, and the Republican National Committee (collectively, "Plaintiffs"), by and through their attorneys, Dickinson Wright PLLC, and state as follows in support of their Verified Complaint against Michigan Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (collectively, the "Secretary"):

INTRODUCTION

1. Under the Michigan Constitution, each "citizen of the United States who is an elector qualified to vote in Michigan" has the "right, once registered, to vote an absent voter ballot without giving a reason." Const 1963, art 2, § 4(1)(h). This action seeks to enforce those provisions under the Michigan Constitution and the Michigan Election Law requiring that "election officials shall: (1) verify the identity of a voter who applies for an absent voter ballot other than in person by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record; and (2) verify the identity of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record." *Id.*

2. The Michigan Election Law requires voters to sign applications for absent voter ballots in order to receive a ballot. See MCL 168.759 and MCL 168.761. Likewise, any voter that chooses to vote by absent voter ballot is required by law to sign their absent voter ballot return envelope in order for their ballot to count. MCL 168.764a. Local election officials are then required to verify the respective signatures on the absent voter ballot applications and the absent voter ballot return envelopes by comparing those signatures against the voter's "signature on file," which, depending on the circumstances, can mean the signature of the voter contained in the qualified

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voter file, the signature of the voter contained on the master card, or, in some instances regarding absent voter ballot return envelopes, the signature on the voter's absent voter ballot application. MCL 168.761. See also MCL 168.766a(7).

3. If, when "verify[ing] the identity" of an absent voter as required under the Michigan Constitution, the local election official determines that the signature on a voter's absent voter ballot application or absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, then that application or ballot must be rejected. See MCL 168.761(2) (regarding applications); MCL 168.765(2) (regarding ballots).

4. In the event an election official rejects an application or absent voter ballot due to a missing or mismatched signature, then that voter has the right to be promptly notified and afforded "an equitable opportunity to correct the issue with the signature." Const 1963, art 2, § 4(1)(h). To that end, the Michigan Election Law requires the Secretary to maintain an electronic system for tracking absent voter applications and ballots to ensure that voters are aware of the status of their application and ballot, MCL 168.764c, and, separately, also requires local election officials to notify voters when their application or ballot has been rejected due to a missing or mismatched signature so that the voter may cure their deficient signature. MCL 168.761; MCL 168.765; MCL 168.766; MCL 168.766a.

5. Together, the above-referenced provisions create a framework that (a) preserves the purity of elections and guards against abuses of the elective franchise by ensuring that each absent voter application and absent voter ballot originated from, and was completed by, the intended voter, while also (b) ensuring that those absentee voters whose identities could not be verified as a result of missing or mismatched signatures have an opportunity to cure their deficient application

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or ballot such that the signature verification process does not prevent any qualified elector from voting.

6. Plaintiffs, however, recently learned that Defendants Secretary Benson and Director Brater covertly issued a publication entitled "Signature Verification, Voter Notification, and Signature Cure" that directs local election officials to apply a standard to the signature verification process that is inconsistent with this balanced constitutional and statutory framework.

7. The Secretary's publication, referenced herein as the "Signature Verification Instructions," is attached hereto as **Exhibit A**. While the Michigan Constitution expressly mandates that election officials "verify the identity" of any voter who applies for an absent voter ballot or who votes an absent voter ballot other than in person by completing the signature comparison scheme outlined above, see Const 1963, art 2, § 4(1)(h), the Secretary has instructed local election officials to apply a "presumption of validity" to those signatures. Ex. A, at 3.

8. This new rule, however, is directly inconsistent with the plain language of the Michigan Constitution and the Michigan Election Law. And despite the fact that this Court has held on at least three recent occasions that the Secretary issued rules in violation of Michigan's Administrative Procedures Act ("APA"), see *Davis v Benson*, No. 20-000207-MZ, 2020 WL 7033534 (Mich Ct Cl, 2020); *Genetski v Benson*, No. 20-000216-MM, 2021 WL 1624452 (Mich Ct Cl, 2021), and *DeVisser v Benson*, No. 22-000164-MM, *aff'd O'Halloran v Secretary of State*, Nos. 363503, 363505, --- Mich App ---, 2023 WL 6931928 (Mich Ct App, 2023), *app'n for leave to appeal docketed*, Nos. 166424-25 (Mich, 2023), the Secretary's "presumption of validity" rule was not promulgated in accordance with the APA.

9. The Secretary's presumption of validity is not the only unlawful policy that was applied to absent voter applications and ballot return envelopes during the February 2024

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presidential primary election. Similar to the Secretary's presumption of validity, Rule 168.24 of the Michigan Administrative Code—recently promulgated by the Secretary—is also inconsistent with the Michigan Constitution and the Michigan Election Law.

10. Indeed, while the Michigan Election Law clearly requires election officials to "verify" the signatures on both absent voter ballot applications and absent voter ballot return envelopes (see e.g., MCL 168.765(2); MCL 168.766(1)), and while the Michigan Constitution likewise requires election officials to "verify the identity" of the absent voter by comparing the voter's signatures on absent voter ballot applications and ballot return envelopes to the corresponding voter's signature in their registration file, Rule 168.24 purports to allow election officials to approve an absent voter's signature based on mere speculation. See Mich Admin Code R 168.24(1) (permitting election officials to consider a litany of "possible explanations" for "discrepancies in signatures" such as the possibility that a "voter's signature may have changed slightly over time," that a signature was "written in haste," or that the signature may have been made on a "rough, soft, uneven, or unstable [surface].").

11. Speculation, however, is incompatible with verification. Requiring election officials to approve signatures with discrepancies based on mere speculation is completely inconsistent with the Michigan Constitution and the Michigan Election Law, both of which mandate that election officials *verify* the identity of absent voters through the above-described signature verification process.

12. Nevertheless, the Secretary's presumption of validity as well as Rule 168.24 were recently applied during the February 27, 2024 presidential primary election for which more than 1.26 million absent voter ballots were distributed to applicants across Michigan, and at least 934,000 absent voter ballots were submitted by Michigan voters.

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13. By all accounts, neither the application of the presumption of validity set forth in the Secretary's Signature Verification Instructions, nor the application of Rule 168.24, was limited to the February 2024 presidential primary and, absent relief, both will apparently remain in effect with respect to upcoming elections.

14. As a result, and in light of the impending primary election on August 6, 2024, and the general election on November 5, 2024, Plaintiffs respectfully ask this Court to: **(a)** declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is inconsistent with the Michigan Constitution and the Michigan Election Law and is therefore unenforceable; **(b)** declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is a "rule" as that term is defined under the APA, that the Secretary failed to follow the applicable requirements under the APA when she promulgated that rule, and that the rule is therefore invalid; **(c)** declare that Rule 168.24 of the Michigan Administrative Code is inconsistent with both the Michigan Constitution and the Michigan Election Law and is therefore unenforceable; **(d)** order the Secretary to rescind her Signature Verification Instructions, strike the language instructing local election officials that signatures on absent voter ballot applications and absent voter ballot return envelopes are entitled to a presumption of validity, strike the language requiring election officials to speculate as to "possible reasons for discrepancies in signatures" under Rule 168.24, and issue new Signature Verification Instructions directing local election officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Constitution and the Michigan Election Law; and **(e)** enjoin the Secretary from implementing her presumption of validity and Rule 168.24 as to signatures on absent voter

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ballot applications and absent voter ballot return envelopes in advance of the August 6, 2024 primary election and the November 5, 2024 general election.

15. Plaintiffs seek an expedited hearing on this matter under MCR 2.605(D), which expressly authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance [this case] on the calendar." Expedited consideration is warranted and necessary here. There can be no dispute that the voter signature and identification verification requirements under the Michigan Constitution and the Michigan Election Law are imperative to ensuring the integrity and accuracy of Michigan's elections. To be clear, the relief sought here is prospective in nature: Plaintiffs seek the above-described relief—including a declaration as to their legal rights with respect to the validity of a currently existing directive issued by the Secretary, as well as a provision of the Michigan Administrative Code (i.e., Rule 168.24)—in advance of the next election to ensure that local election officials are instructed to follow the law in future elections. Absent declaratory and injunctive relief, the rights of Plaintiffs will continue to be violated and jeopardized by the Secretary's acts—including those acts relative to the Secretary's guidance directing the application of an unlawful presumption of validity as to absent voter signatures and the unlawful speculation as to "possible explanations" for "discrepancies in signatures" under Rule 168.24, both of which are contrary to Michigan law—in the forthcoming election.

16. Time remains to adjudicate this case and controversy on the merits in an expedited fashion prior to the August 6, 2024 primary election and the November 5, 2024 general election, and without the need for temporary or preliminary injunctive relief.[1] Specifically, some jurisdictions will begin verifying absent voter ballot signatures for the August primary election on June 27, 2024, and will likewise begin verifying absent voter ballot signatures for the general

[1] Plaintiffs reserve the right to seek preliminary injunctive relief should the need arise.

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election on September 26, 2024. By seeking prospective relief several months in advance of these elections, there remains ample time for an expedited merits proceeding before this Court; for expedited appellate review (if necessary); for the Secretary to issue signature verification instructions that comply with the Michigan Constitution and the Michigan Election Law; and for local election officials to implement those instructions.

17. To that end, Plaintiffs will make best efforts to effectuate formal service of process as soon as possible upon the filing this Verified Complaint and receipt of corresponding summonses from this Court, and will contact the Assistant Attorneys General that typically serve as elections counsel for the Secretary to discuss a briefing schedule regarding the motion practice necessary to promptly decide the questions of law presented in this case.

PARTIES, JURISDICTION, AND VENUE

18. Plaintiff Dennis Grosse is a Michigan citizen and a registered and eligible voter residing in Berrien County, Michigan. As a registered voter that cast an absentee ballot in the February 2024 presidential primary election who also intends to vote by absentee ballot in future elections, Plaintiff Grosse has a direct, personal, and substantial interest in ensuring that his vote counts and is not diluted, and that his opportunity to vote in future elections is equal to the opportunity provided to other eligible Michigan voters that cast an absentee ballot as well as those Michigan voters that cast a ballot in a polling place.

19. Plaintiff Blake Edmonds is a Michigan citizen and a registered and eligible voter residing in Kent County, Michigan. As a registered voter that cast a ballot in a polling place for the February 2024 presidential primary election who also intends to vote in-person at polling places in future elections, Plaintiff Edmonds has a direct, personal, and substantial interest in ensuring that his vote counts and is not diluted, and that his opportunity to vote in future elections

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is equal to the opportunity provided eligible Michigan voters that cast an absentee ballot as well as those Michigan voters that cast a ballot in a polling place.

20. Plaintiff Cindy Berry serves as the Clerk for the Township of Chesterfield and resides in Macomb County. Plaintiff Berry has attempted to reconcile the Secretary's Signature Verification Instructions—and especially the Secretary's presumption of validity as to absent voter signatures, and the language from Rule 168.24 permitting election officials to speculate as to "possible reasons for discrepancies in signatures"—against the text of the Michigan Constitution and the Michigan Election Law. As a local clerk, Plaintiff Berry is subject to the instructions and the Rules at issue here, and seeks a declaration regarding whether clerks are, and will continue to be, subject to Rule 168.24 and the Secretary's presumption of validity as to absent voter signatures that by all accounts appear to remain in effect at this time. Plaintiff Berry is also a registered voter that cast a ballot for the February 2024 presidential primary election through Michigan's early voting process, who also intends to vote by absentee ballot in future elections, and who has a direct, personal, and substantial interest in ensuring that her vote counts and is not diluted.

21. Plaintiff the Michigan Republican Party ("MRP") is a "major political party" as that term is defined by the Michigan Election Law. See MCL 168.16. Formed for the general purposes of, among other things, promoting Republican values and assisting candidates who share those values with election or appointment to partisan federal, state, and local office, MRP maintains headquarters at 520 Seymour Street, Lansing, Michigan 48912. Further, MRP works to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and works to protect the fundamental constitutional right to vote of its members and all Americans, and to promote their participation in the political process. MRP brings this action on behalf of itself and

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its members. As a result, Plaintiff MRP has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and members.

22. Plaintiff the National Republican Congressional Committee (the "NRCC") is a national committee, as defined by 52 U.S.C. § 30101(14), and the Republican Party's congressional campaign committee with its principal place of business at 320 First Street S.E., Washington, D.C. 20003. The NRCC is the only national political party committee exclusively devoted to electing Republican candidates to the U.S. House of Representatives from across the United States, including from Michigan's 13 congressional districts. Each election cycle, including in 2024, the NRCC supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, voter registration, and voter turnout programs, as well as other party-building activities. The NRCC brings this action on behalf of itself and its members—six of whom currently serve as congressional representatives for districts in Michigan. As a result, Plaintiff NRCC has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its members as well its candidates in the 2024 Michigan elections.

23. Plaintiff the Republican National Committee (the "RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14), with its principal place of business at 310 First Street, S.E., Washington D.C., 20003. In addition to managing the Republican Party's business affairs at the national level, the RNC supports state Republican parties (including MRP) by, among other actions, supporting MRP's efforts to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and to protect the fundamental constitutional right to vote of its members and of all Americans and to promote their participation in the political

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process. The RNC made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Michigan in past election cycles, and is doing so again in 2024. The RNC has clear and obvious interests in the rules under which it, and those it represents and supports, exercise their constitutional rights to vote and to participate in elections. RNC brings this action on behalf of itself and its members. As a result, Plaintiff RNC has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and members.

24. Defendant Jocelyn Benson is Michigan's Secretary of State and is being sued in her official capacity. Secretary Benson is the "chief elections officer of the state" responsible for overseeing the conduct of Michigan elections, and has "supervisory control over local election officials in the performance of their duties under the [Michigan Election Law]." MCL 168.21.

25. Defendant Jonathan Brater is Michigan's Director of Elections and is being sued in his official capacity.

26. This Court has exclusive jurisdiction to "hear and determine any claim or demand, statutory or constitutional . . . or any demand for . . . equitable[ ] or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Additionally, this Court has authority to grant injunctive relief under MCR 3.310.

27. Because Plaintiffs raise statutory and constitutional claims and ask this Court to order equitable and declaratory relief against Defendants Secretary Benson and Director Brater, this Court has exclusive jurisdiction to hear these claims. For the same reason, venue is appropriate in this Court.

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28. An actual controversy exists here between Plaintiffs and the Secretary. For the reasons explained in this Verified Complaint, Plaintiffs' respective rights—ranging from the rights of voters casting ballots in person at polling places or by mail, to clerks that are subject to the unlawful guidance and policies at issue here, and to political parties and committees (and their members) supporting candidates up and down the ballot and mobilizing and educating voters in Michigan—have been violated and jeopardized by the Secretary's acts, including but not limited to the issuance of the Signature Verification Instructions and the Secretary's unlawful directives that local election officials apply a presumption of validity as to absent voter signatures and that those same officials must speculate as to "possible reasons for discrepancies in signatures" rather than verifying those signatures a required by Michigan law.

29. The injury to Plaintiffs is at once completed and ongoing. Absent relief from this Court, these injuries will recur indefinitely because the Secretary, local election officials, and private citizens alike will consider the Signature Verification Instructions and Rule 168.24 binding legal authority and will continue applying the unlawful presumption of validity and speculating as to possible reasons for discrepancies in absent voter signatures. Therefore, a decision from this Court will redress the violation of Plaintiffs' rights under the Michigan Constitution and Michigan Election Law for the August 2024 primary election, the November 2024 general election, and beyond.

LEGAL AND FACTUAL BACKGROUND

The Constitution and the Michigan Election Law Expressly Provide a Framework for Ensuring the Accuracy and Integrity of Elections

30. Under the Michigan Constitution, "[e]very citizen of the United States who is an elector qualified to vote in Michigan" has "[t]he fundamental right to vote, including but not

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limited to the right, once registered, to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a).

31. Balanced against that right, of course, "are the constitutional commands given by the people of Michigan to the Legislature in Const 1963, art 2, § 4" to regulate elections. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007). There, the Michigan Constitution commands that "the legislature shall," in addition to regulating the "time, place and manner" of elections, enact laws "to preserve the purity of elections . . . to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4(2).

32. As the Michigan Supreme Court acknowledged, "[t]hese provisions have been a part of our constitution for almost as long as Michigan has been a state. As [the Michigan Supreme Court] noted in the nineteenth century, the purpose of a law enacted pursuant to these constitutional directives 'is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting.*' " *In re Request for Advisory Opinion*, 479 Mich at 17. (Emphasis in original and internal citation omitted).

33. This balance is paramount to the electoral process. "In sum, while a citizen's right to vote is fundamental, this right is not unfettered. It competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, including ensuring that lawful voters not have their votes diluted." *Id.* at 20.

34. For example, any registered elector that votes in-person is required to prove their identity *before* an election official gives that elector a ballot. This mandate that an elector "prove their identity" is expressly provided in both the Michigan Constitution and the Michigan Election

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Law. See MCL 168.523(1) (requiring "at each election, before being given a ballot, [that] **each registered elector offering to vote must identify himself or herself by presenting identification for election purposes**"); MCL 168.523(2) (providing electors without photo identification the opportunity to verify their identity by signing an affidavit in the presence of an election inspector, with the caveat that "an elector being allowed to vote without identification for election purposes as required under this section is subject to challenge as provided in [MCL 168.727]"); Const 1963, art 2, § 4(1)(g) (granting registered electors qualified to vote in Michigan the right "**to prove their identity** when voting in person or applying for an absent voter ballot in person by (1) presenting their photo identification, including photo identification issued by a federal, state, local, or tribal government or an educational institution, or (2) if they do not have photo identification [then by] executing an affidavit verifying their identity.").

35. The mandate that an elector must "prove their identity" before receiving a ballot in a polling place either by presenting photographic ID or by executing an affidavit in the presence of an election official is, indeed, constitutional. See *In re Request for Advisory Opinion,* 479 Mich at 22–28 (holding that the requirements in MCL 168.523, i.e., that an in-person voter prove their identity by either presenting photographic identification or by signing an affidavit affirming that the voter lacks photographic identification, provide a reasonable, nondiscriminatory restriction on the state and federal constitutional right to vote that is warranted by the state's compelling regulatory interest to preserve the purity of elections and guard against abuses of the elective franchise).

36. That mandate is also overwhelmingly supported by public opinion. See Detroit Regional Chamber, *Statewide Poll Reveals Opinions on Political Landscape* (June 7, 2021) https://www.detroitchamber.com/statewide-poll-reveals-opinions-on-political-landscape-covid-

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19-and-vaccination-perceptions-ongoing-labor-shortage-and-voting-rights/ (last visited March 25, 2024) (finding that 79.7% of respondents in statewide poll support requiring "every voter coming to the polls present a government-issued identification to cast their ballot").

37. While the process is somewhat different for those voting by absent voter ballot, the Constitution nonetheless requires voters "to **prove their identity** when applying for or voting an absent voter ballot other than in person by providing their signature to the election official authorized to issue absent voter ballots." Const 1963, art 2, § 4(1)(h) (emphasis added); see also MCL 168.759(3) ("An elector must sign the absent voter ballot application."); MCL 168.764a (requiring electors to sign and date their absent voter ballot return envelope).

38. To that end, when an election official is provided a voter's signature for the purpose of proving that voter's identity as a precondition to that voter applying for an absent voter ballot other than in person, the Michigan Constitution mandates that the election official shall "**verify the identity** of a voter who applies for an absent voter ballot other than in person by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record." Const 1963, art 2, § 4(1)(h) (emphasis added); see also MCL 168.761(1) ("If the clerk of a city or township receives an application for an absent voter ballot, the clerk must immediately determine if the applicant is registered to vote in that city or township and if the signature on the application agrees sufficiently with the signature on file for the individual as required in subsection (2)."); MCL 168.761(2) ("The signature on file must be used to determine the genuineness of a signature on an application for an absent voter ballot. Signature comparisons must be made using the procedures required under [MCL 168.766a].").

39. Likewise, when an election official is provided a voter's signature for the purpose of proving that voter's identity as a precondition to that elector voting an absent voter ballot other

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than in person, the Michigan Constitution mandates that the election official shall: "**verify the identity** of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record." Const 1963, art 2, § 4(1)(h) (emphasis added). See also MCL 168.765(2) ("The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with [MCL 168.766]. The review under this subsection includes **verifying** the signature on each absent voter ballot return envelope in accordance with [MCL 168.766a].") (emphasis added); MCL 168.766(1) (mandating that city or township clerks "shall determine" whether an absent voter ballot is approved for tabulation "by **verifying** both of the following: (a) [t]he elector is a registered elector and has not voted in person in that election [and] (b) [u]sing the procedures required under [MCL 168.766a], the signature on the absent voter ballot return envelope agrees sufficiently with the elector's signature on file.") (emphasis added).

40. As for verifying the signature on an elector's absent voter ballot application or absent voter ballot envelope, MCL 168.766a sets forth the standard by which local clerks must determine whether the signature is valid. Specifically, section 766a provides that "[a]n elector's signature is invalid only if it differs in significant and obvious respects from the elector's signature on file. Slight dissimilarities must be resolved in favor of the elector. Exact signature matches are not required to determine that a signature agrees sufficiently with the signature on file." MCL 168.766a(2).

41. For the purposes of verifying the signature on an elector's absent voter ballot application or absent voter ballot envelope, a voter's "signature on file" means "any signature of an elector contained in the qualified voter file[,]" or, "[i]f the qualified voter file does not contain

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a copy of an elector's digitized signature, or is not accessible, [then] the signature of the elector contained on the master card." MCL 168.766a(7)(a)-(b). Further, and "[o]nly for purposes of the signature comparison conducted under [MCL 168.766] for an elector's absent voter ballot envelope," the term "signature on file" may also mean "the signature on the elector's absent voter ballot application." MCL 168.766a(7)(c).

42. If a clerk determines that the signature on an elector's absent voter ballot application or absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, then that application or ballot must be rejected. MCL 168.766a(3); see also MCL 168.761(2) (regarding applications); MCL 168.765(2) (regarding ballots); MCL 168.766(2) (regarding ballots).

43. When a clerk rejects an absent voter ballot application or absent voter ballot due to a missing or mismatched signature—and to ensure that the election integrity measures outlined herein do not prevent any qualified elector from voting—then that voter has the right to be promptly notified and afforded "an equitable opportunity to correct the issue with the signature." Const 1963, art 2, § 4(1)(h).

44. In that vein, Michigan law requires the Secretary to maintain an electronic system for tracking absent voter applications and ballots to ensure that voters are aware of the status of their application and ballot. See MCL 168.764c; see also Const 1963, art 2, § 4(1)(i).

45. Separately, the Michigan Election Law also requires local election officials to notify voters when their application or ballot has been rejected due to a missing or mismatched signature so that the voter may cure their deficient signature. MCL 168.761; MCL 168.765; MCL 168.766(3)-(6); MCL 168.766a(3)-(6).

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46. Importantly, while the Michigan Constitution and the Michigan Election Law set forth a detailed framework for verifying the identity of absent voters through signature verification, neither the Michigan Constitution nor the Michigan Election Law provides that those signatures should be presumed valid as instructed by the Secretary in her Signature Verification Instructions. Nor does the Michigan Constitution or the Michigan Election Law provide that election officials may speculate as to possible reasons for discrepancies in signatures, despite contrary provisions under Rule 168.24 and the Secretary's Signature Verification Instructions.

Genetski v Benson: ***This Court finds that the Secretary's guidance regarding signature verification as to AV ballot applications and AV ballot return envelopes—which mandated a presumption of validity as to those signatures—violated the Administrative Procedure Act.***

47. This is not the first time that the Secretary has improperly attempted to direct local election officials to apply a presumption of validity as to absent voter signatures. On October 6, 2020, the Secretary issued guidance to local clerks and election officials instructing them to, among other things, apply a presumption of validity when verifying signatures on absent voter applications and ballots.

48. The MRP and Allegan County Clerk Robert Genetski sued the Secretary, alleging, *inter alia*, that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes conflicted with the Michigan Election Law and, separately, that the Secretary's presumption of validity constituted a "rule" that failed to comport with APA rule-issuance procedures. That case was captioned as *Genetski v Benson*, No. 20-000216-MM (Mich Ct Cl, 2021).

49. In a written Opinion and Order dated March 9, 2021, this Court granted summary disposition in favor of the *Genetski* plaintiffs because the challenged signature verification guidance—including the Secretary's instruction that signatures on absent voter applications and

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absent voter ballot return envelopes be presumed valid—were issued in violation of the APA. See *Genetski v Benson*, No. 20-000216-MM (Mich Ct Cl, 2021), Opinion and Order Granting Summary Disposition, at 14, attached hereto as **Exhibit B** (concluding that the Secretary's signature verification standards "amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with the APA, the 'rule' is invalid."); see also *id.* at 10 ("Policy determinations like the one at issue—which places a thumb on the scale in favor of a signature's validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature.").

50. Because the Court concluded that the Secretary's signature verification guidance was invalid for failing to comply with the APA, it did not address the *Genetski* plaintiffs' claim that the Secretary's presumption of validity as to absent voter signatures conflicted with the Michigan Election Law. *Id.* at 10 n 5 ("Given that the standards are invalid for being enacted without compliance with the APA, the Court declines, for now, to determine whether the mandatory presumption [of validity] imposed is contrary to the law, as plaintiffs have alleged in Count I."). As a result, the *Genetski* plaintiffs' claim that the Secretary's presumption of validity as to absent voter signatures conflicted with the Michigan Election Law was dismissed without prejudice. *Id.* at 1, 14–16.

The Secretary promulgates rules regarding signature verification as to AV ballot applications and AV ballot return envelopes, but abandons the "presumption of validity" mid-rulemaking due to an onslaught of opposition during the public hearing and comment period.

51. Several months after the *Genetski* court concluded that the Secretary's signature verification instructions violated the APA, the Secretary commenced the rulemaking process under the APA by proposing rule set number 2021-61 ST, entitled "Signature Matching for Absent Voter Ballot Applications and Absent Voter Ballot Envelopes." See generally Michigan Legislative

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Council, Joint Committee on Administrative Rules Documents for 2021-061 ST (available at https://council.legislature.mi.gov/JCAR/Documents?path=/JCARFiles/Rule%20Documents%20by%20Department%20and%20Rule%20Number/Department%20of%20State/2021-061%20ST) (last visited March 25, 2024) (public rulemaking record for 2021-061 ST).

52. An early draft of the ruleset proposed by the Secretary, dated August 5, 2021, is attached hereto as **Exhibit C**. Among those proposed rules, the Secretary included language that would require local election officials to presume the validity of signatures on absent voter ballot applications and absent voter ballot return envelopes during the verification process. Specifically, draft R 168.22(2) / Rule 2(1) stated as follows at that time:

> (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, **signatures must be reviewed beginning with the presumption that the voter's signature is his or her genuine, valid signature.**

Ex. C, at 1 (emphasis added).

53. That presumption of validity, however, was met with an onslaught of public opposition during the public hearing and comment period.

54. For example, State Senator Ruth Johnson—former Oakland County Clerk, Michigan Secretary of State from 2011-2019, and then-Chair of the Senate Elections Committee—submitted a written comment stating that she "strongly oppose[s] these rules as written and find[s] them to be in direct contradiction to existing Michigan election law." Senator Johnson's Public Comment on Proposed Ruleset 2021-61 ST is attached hereto as **Exhibit D**.

55. As for the Secretary's proposed presumption of validity regarding absent voter signatures, Senator Johnson wrote that the presumption "is in direct conflict with the statutory language which instructs clerks to 'determine' the genuineness of signatures." Ex. D, at 1. See also

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id., at 2 ("I feel strongly that the presumption of genuineness contained in these proposed administrative rules is inappropriate and not in conformance with existing Michigan election law."). From Senator Johnson's perspective as a former county clerk and former Secretary of State, the proposed rules would "abrogate clerks' statutory role by presuming signatures to be valid upon receipt...." *Id.*

56. Similarly, State Representative Ann Bollin—former Brighton Township clerk from 2003-2018, and then-Chair of the House Elections and Ethics Committee—also submitted a written comment in opposition to the proposed rules. Representative Bollin's Public Comment on Proposed Ruleset 2021-61 ST is attached hereto as **Exhibit E**.

57. As explained by Representative Bollin, "[s]ignature verification is a hallmark standard that protects the voter." Ex. E, at 2. Representative Bollin, who, again, served as a local clerk for sixteen years, commented that "[t]he makers of these proposed rules would have us believe that this standard of 'initial presumption of validity' is common practice. This is false." *Id.* at 3. Rather, "[t]his alleged standard was a directive put forth by the [Secretary] last year that resulted in a lot of confusion and potential fraud," and, as acknowledge by Representative Bollin, the standard was then struck down by the Court of Claims in *Genetski*. *Id.* Thus, while Representative Bollin detailed her "serious concerns about the changes the Department of State is proposing," she believed "we can work together with our local clerks to improve upon these proposed rules and create a better product that both advances democracy AND protects the vote and ensures our elections are secure." *Id.* at 4 (emphasis in original).

58. Following the public hearing and comment period, Secretary Benson abandoned the presumption of validity in the proposed ruleset. To that end, and in response to ruleset changes proposed by the Legislature's Joint Committee on Administrative Rules ("JCAR"), the Secretary

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formally notified JCAR that she "accepts JCAR's proposal to strike the instruction in R 168.22(1) that local election officials must begin review of a voter's signature on an absent voter ballot application or an absent voter ballot envelope with a 'presumption' that the signature is valid." A copy of the Secretary's March 4, 2022 Response to JCAR's Proposed Changes to JCAR No. 21-73, MOAHR No. 2021-61ST, is attached hereto as **Exhibit F**. Thus, the Secretary represented that she would "remove the term presumption from R 168.22(1) without otherwise substantially changing the text of the Ruleset already reviewed by JCAR." *Id.* at 1.

59. Shortly thereafter, the Secretary issued an updated version of the draft ruleset that excluded the prior language that would have required local election officials to presume the validity of signatures on absent voter ballot applications and absent voter ballot return envelopes. One such version of the updated draft ruleset that was generated in redline form indicated the above-referenced change to draft R 168.22(2) / Rule 2(1) as follows:

> (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, or for the purposes of 766(2), 1954 PA 116, MCL 168.766, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, ~~signatures must be reviewed beginning with the presumption that the voter's signature is his or her genuine, valid signature. A~~**a**n election official may **determine that**~~decline to accept~~ a signature **does not agree sufficiently with the signature on file** only ~~if,~~ after reviewing **the** ~~an~~ absent voter ballot application signature or absent voter ballot envelope signature using the process set forth in these rules~~, the election official determines that the signature does not agree sufficiently with the signature on file~~.

A redlined copy of the amended ruleset proposed by the Secretary, dated March 7, 2022, is attached hereto as **Exhibit G**.

60. The amended ruleset, which *excluded* the Secretary's previous proposed instruction requiring local election officials to presume the validity of signatures on absent voter ballot

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applications and absent voter ballot return envelopes during the verification process, was added to the Michigan Administrative Code, effective December 19, 2022. See Mich Admin Code R 168.22.

61. Aside from the rulemaking record, the Secretary's abandonment of the presumption of validity was highly publicized. See, e.g., David Eggert, *Benson rejects GOP changes to signature-verification rules*, Associated Press (Mar. 4, 2022) https://apnews.com/article/elections-michigan-jocelyn-benson-f0bd1e768957e1b60aaf16f5f504b69c (last accessed March 25, 2024) (reporting that while the Secretary rejected most of JCAR's proposed revisions to the ruleset, the Secretary "said she will remove language instructing election officials to presume that a signature is genuine and valid[,]" and "Rep. Luke Meerman, a Republican member of [JCAR] from Coopersville, welcomed Benson's decision to strike the presumption that signatures are valid, saying 'we are making it so people can have faith in Michigan's election process.'").

62. Indeed, State Representative Luke Meerman—the alternate chair of JCAR—announced in a press release that JCAR had "succeeded in its push for greater security measures in Secretary of State Jocelyn Benson's proposed election rules." Mich. House Republicans, *Benson withdraws attempt to water down signature verification standards after legislative push back* (Mar. 4, 2022) https://gophouse.org/posts/benson-withdraws-attempt-to-water-down-signature-verification-standards-after-legislative-push-back (last accessed Mar. 25, 2024). While the Secretary had "proposed administrative rules to require local election officials to review signatures on absentee applications and ballots starting with a presumption that the signature is valid," Rep. Meerman stated he was "pleased" that the Secretary had withdrawn that aspect of the proposed ruleset and "that Secretary Benson has acknowledged that state law does not give her the power to water down signature requirement standards." *Id.*

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63. Thus, there can be no question that the presumption of validity was removed from proposed ruleset number 2021-61 ST before those rules were added to the Michigan Administrative Code.

Despite abandoning the "presumption of validity" during the rulemaking process, the Secretary nonetheless continues to direct local election officials to apply a presumption of validity when verifying signatures on AV ballot applications and AV ballot return envelopes.

64. Meanwhile—and *despite* the express mandates under the Michigan Constitution that voters must "prove their identity when applying for or voting an absent voter ballot" and that election officials shall "verify the identity" of those voters by comparing the aforementioned voters' signatures to the corresponding signature in each voter's registration record, *despite* the holding in *Genetski* that the Secretary's previous signature verification instructions (which directed local election officials to presume that absent voters' signatures are valid) were issued in violation of the APA, and *despite* the fact that the Secretary abandoned the presumption of validity when she finally promulgated signature verification rules under the APA—the Secretary is *still* instructing local election officials to apply a "presumption of validity" to absent voter signatures.

65. On the Department of State's public website, the Secretary maintains a guidance document entitled, "Election Officials' Manual, Chapter 6: Michigan's Absent Voter Process." A copy of the February 2024 version of the "Election Officials' Manual, Chapter 6: Michigan's Absent Voter Process" (hereinafter, the "Absent Voter Process Manual") is attached hereto as **Exhibit H**.

66. Section VIII of the Absent Voter Process Manual provides instructions regarding the process for verifying signatures on absent voter ballot applications. See Ex. H at 12 ("VIII. Absent voter ballot application signature verification requirement"). Likewise, section XVI of the

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Absent Voter Process Manual provides instructions regarding the process for verifying signatures on absent voter ballot return envelopes. See *id.* at 18-19 ("XVI Ballot verification requirement").

67. While the Secretary's presumption of validity is not included in the Absent Voter Process Manual, that publicly-available manual is not the only set of instructions that the Secretary has issued regarding the verification of absent voter signatures.

68. Indeed, both of the above-referenced sections of the Absent Voter Process Manual—Section VIII regarding the verification of signatures on absent voter ballot applications, and Section XVI regarding the verification of signatures on absent voter ballot return envelopes—incorporate by reference an entirely separate set of instructions issued by the Secretary regarding the verification of absent voter signatures. See Ex. H at 12 ("For further guidance on reviewing signatures, contacting voters, and curing missing or mismatched signatures, refer to Signature and Cure Guidance in the eLearning Center.") *Id.* at 19 ("For further guidance on reviewing signatures, contacting voters, and curing missing or mismatched signatures, refer to Signature and Cure Guidance in the eLearning Center.")

69. According to the Absent Voter Process Manual, this separate set of signature verification instructions is "[a]vailable in the eLearning Center at https://mielections.csod.com/ui/lms-learning-details/app/material/ae9edc3b-8bfd-4494-a5c1-eb7022679d7a." *Id.* at 12, n 4; *id.* at 19, n 5.

70. That document, however, is protected from public scrutiny and is not publicly available, as the corresponding hyperlink launches the Secretary's "Michigan Elections eLearning Center," access for which is restricted to local election officials (i.e., clerks, deputy clerks, etc.). As demonstrated in the screenshot below, individualized credentials issued by the Secretary are required to access documents housed in the Secretary's Michigan Elections eLearning Center:

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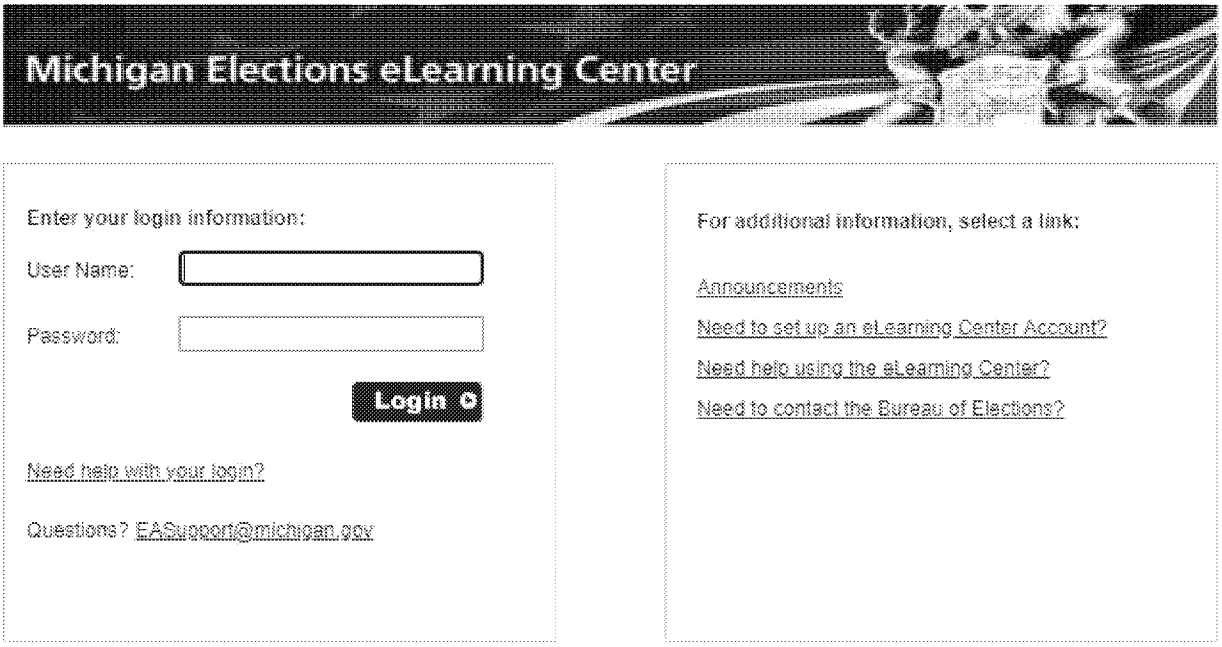

71. Upon information and belief, the document attached hereto as **Exhibit A** (and referenced throughout as the Secretary's "Signature Verification Instructions") is the "Signature and Cure Guidance in the eLearning Center" incorporated by reference in—and available at the hyperlinks in footnotes 4 & 5 of—the Absent Voter Process Manual.

72. The Secretary's Signature Verification Instructions clearly instruct local election officials to apply a presumption of validity to absent voter signatures:

> Clerks must determine whether the signature being validated agrees sufficiently with the signature on file. **Voter signatures are entitled to an *initial* presumption of validity.** An initial presumption of validity does not mean that all signatures are "presumed valid" without further review. Instead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law, MCL 168.766a, et seq.; and R 168.21, et seq.

Ex. A, at 3 (bold and underlined emphasis added).

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The Secretary's presumption of validity violates the Administrative Procedures Act and is otherwise inconsistent with the Michigan Constitution and the Michigan Election Law.

73. The Secretary's presumption of validity as to absent voter signatures violates the APA, the Michigan Constitution, and the Michigan Election Law.

74. Regarding the APA, the Secretary's presumption of validity was not among ruleset No. 2021-61ST recently promulgated by the Secretary.

75. In fact, while the Secretary included the presumption of validity in the initial proposed ruleset, the Secretary's then-proposed presumption of validity was met with an onslaught of public opposition during the rulemaking process such that the Secretary expressly abandoned the presumption during the rulemaking process.

76. The Secretary's Signature Verification Instructions—which expressly include the presumption of validity as to absent voter signatures—are clearly intended to be binding on local election officials.

77. The cover of both the Absent Voter Process Manual and the Signature Verification Instructions expressly indicates that the respective documents are "INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS." Ex. A, at cover (emphasis in original); Ex. H, at cover (emphasis in original).

78. Moreover, the Signature Verification Instructions contain express self-descriptors that are typically associated with documents meant to have the effect of a rule or law. For example, the Signature Verification Instructions expressly provide that:

> **This document provides <u>instructions</u> for**:
>
> 1. Reviewing signatures immediately upon receipt and providing voter notification for a mismatched signature.
>
> 2. **Verifying the voter's signature against the QVF**.

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3. Curing missing or mismatched signatures.

Ex. A, at 1 (emphasis added).

79. Instructions issued by the Secretary of State are binding on local election officials conducting elections. See *Davis v Secretary of State*, 333 Mich App 588, 598; 963 NW2d 653 *appeal denied*, 506 Mich 1040; 951 NW2d 911 (2020) (citing *Secretary of State v Berrien Co Bd of Election Comm'rs*, 373 Mich 526, 530-531; 129 NW2d 864 (1964)).

80. Certainly, the Michigan Election Law requires the Secretary of State to "issue instructions and promulgate rules pursuant to the administrative procedures act [MCL 24.201 *et seq.*] for the conduct of elections and registrations in accordance with the laws of this state," MCL 168.31(1)(a).

81. It is undisputed, however, that Secretary Benson must comply with the APA when making a "rule"—a term that the Michigan APA expressly defines as "an agency regulation, statement, standard, policy, ruling, or ***instruction*** of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207 (emphasis added).

82. The Secretary's presumption of validity as to absent voter signatures therefore constitutes a rule as defined under the APA.

83. Contrary to the Secretary's instruction to apply a presumption of validity to absent voter signatures, neither the Michigan Constitution nor the Michigan Election Law indicate that absent voter signatures should be presumed valid.

84. Rather, the Michigan Election Law clearly requires election officials to "verify" the signatures on both absent voter ballot applications and absent voter return envelopes. See MCL

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168.765(2) ("The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with [MCL 168.766]. The review under this subsection includes **verifying** the signature on each absent voter ballot return envelope in accordance with [MCL 168.766a].") (emphasis added); MCL 168.766(1) (mandating that city or township clerks "shall determine" whether an absent voter ballot is approved for tabulation "by **verifying** both of the following: (a) [t]he elector is a registered elector and has not voted in person in that election [and] (b) [u]sing the procedures required under [MCL 168.766a], the signature on the absent voter ballot return envelope agrees sufficiently with the elector's signature on file.") (emphasis added).

85. More importantly, the Michigan Constitution expressly requires that election officials shall "**verify the identity**" of voters who apply for an absent voter ballot and of those who vote an absent voter ballot by comparing each voter's signature on the absent voter ballot application or the absent voter ballot return envelope to the voter's signature in their registration record. Const 1963, art 2, § 4(1)(h) (emphasis added).

86. The term "verify" as used in both the Michigan Constitution and the Michigan Election Law is incompatible with the term "presumption" as used in the Secretary's Signature Verification Instructions. Compare "Verify." Merriam-Webster.com Dictionary, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/verify (last visited March 25, 2024) (defining "**verify**" as "**to establish the truth, accuracy, or reality of**") and "Establish." Merriam-Webster.com Dictionary, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/establish (last visited March 25, 2024) (defining "**establish**" as "**to put beyond doubt**"), with "Presume." Merriam-Webster.com Dictionary, Merriam-Webster,

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available at https://www.merriam-webster.com/dictionary/presume (last visited March 25, 2024) (defining "**presume**" as "**to suppose to be true without proof.**")

87. As outlined above, the Secretary's presumption of validity as to absent voter signatures is directly inconsistent with both the Michigan Constitution and the Michigan Election Law. When the Michigan Constitution and Michigan Election Law expressly mandate that election officials verify the identity of absent voters through a signature comparison process, the Secretary is not authorized to change that standard to something less than verification, be it through a presumption of validity or otherwise.

88. Likewise, and despite the fact that Defendants are subject to the APA, see MCL 24.203(2) (defining "agency" in a way that includes the Secretary of State), the above-referenced rule change was *not* promulgated in accordance with the APA. See also *Genetski v Benson*, No. 20-000216-MM, 2021 WL 1624452, at *4 (Mich Ct Cl, 2021) (Ex. B at 7) ("A 'rule' not promulgated in accordance with the APA's procedures is invalid.") (citations omitted).

89. Instead, it appears that the Signature Verification Instructions and the Secretary's underlying presumption of validity as to absent voter signatures were promulgated without any formal rulemaking or process. Indeed, the Signature Verification Instructions are not even available to the public, and are instead maintained by the Secretary on her Michigan Elections eLearning Center, access to which is restricted to local election officials.

The Secretary's Rule 168.24, which directs election officials to speculate regarding "possible explanations for discrepancies in signatures," is inconsistent with the Michigan Constitution and the Michigan Election Law.

90. The Secretary's policy requiring election officials to consider "possible explanations for discrepancies in signatures" as embodied by Rule 168.24 of the Michigan Administrative Code violates the Michigan Constitution and the Michigan Election Law.

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91. Under Rule 168.24, election officials are required to consider as "possible explanations" for "discrepancies in signatures" the notions that, *inter alia*, a "voter's signature style may have changed slightly over time," the voter's "signature may have been written in haste," or the voter may have signed their absent voter application or ballot return envelope on a surface that was "rough, soft, uneven, or unstable." See Mich Admin Code R 168.24(1).

92. Contrary, however, to the Secretary's mandate under Rule 168.24, neither the Michigan Constitution nor the Michigan Election Law permit election officials to speculate as to possible explanations for discrepancies in signatures.

93. Rather, the Michigan Election Law clearly requires election officials to "verify" the signatures on both absent voter ballot applications and absent voter return envelopes. See MCL 168.765(2) ("The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with [MCL 168.766]. The review under this subsection includes **verifying** the signature on each absent voter ballot return envelope in accordance with [MCL 168.766a].") (emphasis added); MCL 168.766(1) (mandating that city or township clerks "shall determine" whether an absent voter ballot is approved for tabulation "by **verifying** both of the following: (a) [t]he elector is a registered elector and has not voted in person in that election [and] (b) [u]sing the procedures required under [MCL 168.766a], the signature on the absent voter ballot return envelope agrees sufficiently with the elector's signature on file.") (emphasis added).

94. More importantly, the Michigan Constitution expressly requires that election officials shall "**verify the identity**" of voters who apply for an absent voter ballot and of those who vote an absent voter ballot by comparing the voter's signature on the absent voter ballot

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application or the absent voter ballot return envelope to the voter's signature in their registration record. Const 1963, art 2, § 4(1)(h) (emphasis added).

95. If a clerk determines that the signature on an elector's absent voter ballot application or absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, then that application or ballot must be rejected, see MCL 168.766a(3); MCL 168.761(2) (regarding applications); MCL 168.765(2) (regarding ballots); and MCL 168.766(2) (regarding ballots), which in turn initiates the local election official's duty to notify that voter that their application or ballot has been rejected due to a missing or mismatched signature so that the voter may cure their deficient signature. See MCL 168.761; MCL 168.765; MCL 168.766(3)-(6); MCL 168.766a(3)-(6).

96. As outlined above, the Secretary's Policy mandating that election officials speculate as to "possible explanations for discrepancies in signatures" under Rule 168.24 is directly inconsistent with both the Michigan Constitution and the Michigan Election Law. When the Michigan Constitution and Michigan Election Law mandate that election officials verify the identity of absent voters through a signature comparison process, the Secretary is not authorized to change that standard to something less than verification, whether through a promulgated rule or otherwise.

97. An administrative rule simply cannot conflict with a statute. *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 161; 975 NW2d 52 (2021) ("[A]n [administrative] agency is not empowered to change law enacted by the Legislature. . . .When an administrative rule conflicts with a statute, the statute controls"). When, as here, "a statute and an administrative rule conflict, the statute necessarily controls." *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 366; 891 NW2d 884 (2016).

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Judicial intervention is necessary to ensure that the Michigan Constitution and the Michigan Election Law are enforced during the August 2024 primary election and the November 2024 general election.

98. As recognized in the Carter-Baker Commission Report, absentee voting "has been one of the major sources of fraud." See, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform (*i.e.*, the "Carter-Baker Commission Report"), at 35, September 2005, available at https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF (last visited March 25, 2024).

99. For that reason, the Carter-Baker Commission recommended that "[t]o *verify the identity* of voters who cast absentee ballots, the voter's signature on the absentee ballot can be matched with a digitized version of the signature that the election administrator maintains," and that this signature matching "should be done *consistently* in all cases, so that election officials can *verify the identity* of every new registrant who casts an absentee ballot." *Id.* at 20 (emphasis added)

100. To that end, the Michigan Constitution and the Michigan Election Law expressly provide the above-described signature verification framework that (a) preserves the purity of elections and guards against abuses of the elective franchise by ensuring that each absent voter application and absent voter ballot originated from, and was completed by, the intended voter, while also (b) ensuring that those absentee voters whose identities could not be verified as a result of missing or mismatched signatures have an opportunity to cure their deficient application or ballot such that the signature verification process does not prevent any qualified elector from voting.

101. Akin to verifying a voter's identity at a polling place through either the showing of an approved form of identification or completing an affidavit in the presence of an election

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inspector under Michigan law, this signature verification process is pivotal to protecting the integrity of Michigan elections.

102. Unlike the verification of identity at polling places, however, the signature verification process is completed by local clerks *outside* the presence of election inspectors, election challengers, and poll watchers. See, e.g., MCL 168.765(2) (providing that signature verification must be completed by the "city or township clerk," and further providing that ". . . a precinct board of election inspectors or an absent voter counting board must *not* make any further signature verification for an absent voter ballot return envelope.") (emphasis added); MCL 168.768 ("If the elector's signature is missing or the statement that the absent voter ballot is approved for tabulation is incomplete, the board of election inspectors must immediately contact the city or township clerk.").

103. In other words, unlike the verification of the identity of those voters who vote in-person, which occurs in the presence of election inspectors, election challengers, and poll watchers, the verification of the identity of an absent voter through the signature verification process occurs behind closed doors and only in the presence of clerks and their subordinates.

104. The Secretary's Signature Verification Instructions—including the presumption of validity as to absent voter signatures and Rule 168.24—were applied during the February 27, 2024 presidential primary election. In other words, the Secretary's unlawful presumption of validity and Rule 168.24 were applied to signatures on more than one million absent voter applications leading up to the February 27, 2024 presidential primary election, and were then applied to more than 934,000 absent voter ballot return envelopes during the election itself.

105. This, despite the fact that the Secretary's presumption of validity as to absent voter signatures was not promulgated in accordance with the APA, and despite the fact that both the

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presumption of validity and Rule 168.24 are directly inconsistent with both the Michigan Constitution and the Michigan Election Law.

106. As a result, Plaintiffs have no other adequate remedy than to bring this suit to ensure that Michigan's Constitution and Election Law—rather than the Secretary's unlawful presumption of validity and Rule 168.24—are enforced during the August 2024 primary election, the November 2024 general election, and beyond.

COUNT I – VIOLATIONS OF THE MICHIGAN CONSTITUTION (PRESUMPTION OF VALIDITY)

107. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

108. As set forth in paragraphs 1-7, 37-39, 46, 64, 83, and 85-87 (among others) of this Verified Complaint, the Secretary's presumption of validity as to absent voter signatures is directly inconsistent with the Michigan Constitution.

109. Injunctive and declaratory relief are therefore necessary to remedy the Secretary's unlawful presumption of validity as to absent voter signatures. Plaintiffs are unable to reconcile the mandate set forth in the Secretary's Signature Verification Instructions requiring that absent voter signatures are entitled to a presumption of validity with those provided under the Michigan Constitution.

110. There is a current ripe case or controversy between the parties concerning the legality of the Secretary's Signature Verification Instructions. Local clerks have already reviewed absent voter ballot applications and absent voter ballot return envelopes pursuant to the Secretary's unlawful presumption of validity. This undoubtedly has and will continue to result in invalid ballots being counted despite missing or mismatched absent voter signatures. Absent declaratory or injunctive relief from this Court, that presumption will continue to be applied in future elections,

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in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized by the Secretary's acts, including the issuance of the Secretary's Signature Verification Instructions and corresponding continued implementation of the Secretary's mandate that absent voter signatures be entitled to a presumption of validity.

111. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's Signature Verification Instructions and corresponding presumption of validity as to absent voter signatures remain in place, and justice requires the issuance of injunctive relief.

112. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Constitution, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters as required under the Michigan Constitution. Aside from being mandated by the Michigan Constitution, this signature verification process is critical to election security and designed to ensure that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter.

113. Plaintiffs lack an adequate remedy at law to prevent the enforcement of the Secretary's unlawful Signature Verification Instructions and corresponding presumption of validity as to absent voter signatures.

114. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's presumption of validity as to absent voter signatures set forth in the Secretary's Signature Verification Instructions would allow a single state officer to circumvent (and essentially amend) valid and enforceable constitutional mandates on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring

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the integrity and accuracy of Michigan's elections and that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter as required under the Michigan Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is inconsistent with the Michigan Constitution and is therefore unenforceable; that this Court enjoin the Secretary from implementing her presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes in advance of the August 6, 2024 primary election and the November 5, 2024 general election; that this Court order the Secretary to rescind her Signature Verification Instructions, strike the language in that document instructing local election officials that signatures on absent voter ballot applications and absent voter ballot return envelopes are entitled to a presumption of validity, and issue new Signature Verification Instructions directing local election officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Constitution; and that this Court award any other relief that it deems just and equitable.

COUNT II – VIOLATIONS OF THE MICHIGAN ELECTION LAW (PRESUMPTION OF VALIDITY)

115. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

116. As set forth in paragraphs 1-6, 37-42, 46, 64, 83-84, and 86-87 (among others) of this Verified Complaint, the Secretary's presumption of validity as to absent voter signatures is directly inconsistent with the Michigan Election Law.

117. Injunctive and declaratory relief are therefore necessary to remedy the Secretary's unlawful presumption of validity as to absent voter signatures. Plaintiffs are unable to reconcile

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the mandate set forth in the Secretary's Signature Verification Instructions requiring that absent voter signatures are entitled to a presumption of validity with those provided under the Michigan Election Law.

118. There is a current ripe case or controversy between the parties concerning the legality of the Secretary's Signature Verification Instructions. Local clerks have already reviewed absent voter ballot applications and absent voter ballot return envelopes pursuant to the Secretary's unlawful presumption of validity. This undoubtedly has and will continue to result in invalid ballots being counted despite missing or mismatched absent voter signatures. Absent declaratory or injunctive relief from this Court, that presumption will continue to be applied in future elections, in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized by the Secretary's acts, including the issuance of the Secretary's Signature Verification Instructions and corresponding continued implementation of the Secretary's mandate that absent voter signatures be entitled to a presumption of validity.

119. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's Signature Verification Instructions and corresponding presumption of validity as to absent voter signatures remain in place, and justice requires the issuance of injunctive relief.

120. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Election Law, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters as required under the Michigan Election Law. Aside from being mandated by the Michigan Election Law, this signature verification process is critical to election security and designed to ensure that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter.

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121. Plaintiffs lack an adequate remedy at law to prevent the enforcement of the Secretary's unlawful Signature Verification Instructions and corresponding presumption of validity as to absent voter signatures.

122. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's presumption of validity as to absent voter signatures set forth in the Secretary's Signature Verification Instructions would allow a single state officer to circumvent (and essentially amend) valid and enforceable state laws on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring the integrity and accuracy of Michigan's elections and that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter as required under Michigan law.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is inconsistent with the Michigan Election Law and is therefore unenforceable; that this Court enjoin the Secretary from implementing her presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes in advance of the August 6, 2024 primary election and the November 5, 2024 general election; that this Court order the Secretary to rescind her Signature Verification Instructions, strike the language in that document instructing local election officials that signatures on absent voter ballot applications and absent voter ballot return envelopes are entitled to a presumption of validity, and issue new Signature Verification Instructions directing local election officials to verify the identity of any

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voter who applies for or who votes an absent voter ballot as required by the Michigan Election Law; and that this Court award any other relief that it deems just and equitable.

COUNT III – VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

123. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

124. Under MCL 168.31, the Secretary is required to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state."

125. As set forth in paragraphs 6-8, 47-50, 64-72, 74-82, and 88-89 (among others) of this Verified Complaint, the Secretary issued a rule by including in her Signature Verification Instructions the mandate that local election officials apply a presumption of validity as to all absent voter signatures.

126. The Secretary's presumption of validity as to absent voter signatures constitutes a "rule" under the APA. The Secretary's presumption of validity is an instruction, standard, and/or procedure generally applicable to all absent voter ballot applications and absent voter ballots, and contains a mandatory statement from this state's chief elections office declaring that clerks must presume that signatures are valid. See MCL 24.207; see also Ex. A, at 3 ("Voter signatures are entitled to an initial presumption of validity.").

127. The Secretary issued this rule without following the procedures required under the APA.

128. Because the Secretary failed to comply with the APA when she included in her Signature Verification Instructions the mandate that local election officials apply a presumption of validity as to all absent voter signatures, this Court should find that the Secretary's presumption

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of validity rule is invalid, and should require that the corresponding text of the Michigan Constitution and Michigan Election Law be enforced.

129. The Secretary's actions here are also subject to collateral estoppel.

130. The elements of collateral estoppel are: (1) a question of fact or law essential to the judgment that was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue; and (3) mutuality of estoppel.

131. The legal question addressed in *Genetski* was whether the Secretary's signature verification guidance, which included the Secretary's instruction that signatures on absent voter applications and absent voter ballot return envelopes be presumed valid, was issued in violation of the APA. See Ex B (concluding that the Secretary's signature verification standards "amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with the APA, the 'rule' is invalid."); see also *id.* at 10 ("Policy determinations like the one at issue—which places a thumb on the scale in favor of a signature's validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature."). Therefore, the first element of collateral estoppel is satisfied here.

132. The Michigan Republican Party, which was a plaintiff in *Genetski*, is a plaintiff here, too. Likewise, Secretary Benson and Director Brater were both defendants in *Genetski* just as they are here, too. Therefore, the second and third elements of collateral estoppel are satisfied here.

133. The burden of persuasion in *Genetski* was the same as in the present matter.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is a "rule" as that term is defined under the APA, that the Secretary failed to

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follow the applicable requirements under the APA when she promulgated that rule, and that the rule is therefore invalid; that this Court find that the doctrine of offensive collateral estoppel applies here by virtue of this Court's decision in *Genetski*; that this Court enjoin the Secretary from implementing her presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes in advance of the August 6, 2024 primary election and the November 5, 2024 general election; that this Court order the Secretary to rescind their Signature Verification Instructions, strike the language in that document instructing local election officials that signatures on absent voter ballot applications and absent voter ballot return envelopes are entitled to a presumption of validity, and issue new Signature Verification Instructions directing local election officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Constitution and the Michigan Election Law; and that this Court award any other relief that it deems just and equitable.

COUNT IV – VIOLATIONS OF THE MICHIGAN CONSTITUTION (RULE 168.24)

134. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

135. As set forth in paragraphs 1-5, 9-11, 37-39, 46, 90-92, 94, and 96-97 (among others) of this Verified Complaint, the Secretary's Rule 168.24 of the Michigan Administrative Code is directly inconsistent with the Michigan Constitution.

136. Injunctive and declaratory relief are therefore necessary to remedy the Secretary's unlawful mandate under Rule 168.24 requiring election officials to approve signatures with discrepancies based on mere speculation. Plaintiffs are unable to reconcile that mandate with those provided under the Michigan Constitution.

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137. There is a current ripe case or controversy between the parties concerning the legality of Rule 168.24. Local clerks have already reviewed absent voter ballot applications and absent voter ballot return envelopes pursuant to Rule 168.24. This undoubtedly has and will continue to result in invalid ballots being counted despite missing or mismatched absent voter signatures. Absent declaratory or injunctive relief from this Court, this unlawful acceptance of absent voter signatures based on mere speculation will continue in future election, in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized by the Secretary's acts, including the promulgation of Rule 168.24, the issuance of the Secretary's Signature Verification Instructions, and the corresponding continued implementation of the Secretary's mandate that election officials accept signatures with discrepancies based on mere speculation.

138. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's Rule 168.24 remains in place, and justice requires the issuance of injunctive relief.

139. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Constitution, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters as required under the Michigan Constitution. Aside from being mandated by the Michigan Constitution, this signature verification process is critical to election security and designed to ensure that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter.

140. Plaintiffs lack an adequate remedy at law to prevent the enforcement of the Secretary's unlawful mandate under Rule 168.24 requiring election officials to accept signatures with discrepancies based on mere speculation.

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141. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's Rule 168.24 mandate would allow a single state officer to circumvent (and essentially amend) valid and enforceable constitutional mandates on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring the integrity and accuracy of Michigan's elections and that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter as required under the Michigan Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the Secretary's mandate under Rule 168.24 requiring election officials to accept signatures with discrepancies based on mere speculation is inconsistent with the Michigan Constitution and is therefore unenforceable; that this Court enjoin the Secretary from implementing Rule 168.24 in advance of the August 6, 2024 primary election and the November 5, 2024 general election; that this Court order the Secretary to rescind her Signature Verification Instructions, strike the language in that document instructing local election officials to accept signatures with discrepancies based on mere speculation, and issue new Signature Verification Instructions directing local election officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Constitution; and that this Court award any other relief that it deems just and equitable.

COUNT V – VIOLATIONS OF THE MICHIGAN ELECTION LAW (RULE 168.24)

142. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

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143. As set forth in paragraphs 1-5, 9-11, 37-42, 46, 90-93, and 95-97 (among others) of this Verified Complaint, the Secretary's Rule 168.24 of the Michigan Administrative Code is directly inconsistent with the Michigan Election Law.

144. Injunctive and declaratory relief are therefore necessary to remedy the Secretary's unlawful mandate under Rule 168.24 requiring election officials to accept signatures with discrepancies based on mere speculation. Plaintiffs are unable to reconcile that mandate with those provided under the Michigan Election Law.

145. There is a current ripe case or controversy between the parties concerning the legality of Rule 168.24. Local clerks have already reviewed absent voter ballot applications and absent voter ballot return envelopes pursuant to Rule 168.24. This undoubtedly has and will continue to result in invalid ballots being counted despite missing or mismatched absent voter signatures. Absent declaratory or injunctive relief from this Court, this unlawful acceptance of absent voter signatures based on mere speculation will continue in future elections, in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized by the Secretary's acts, including the promulgation of Rule 168.24, the issuance of the Secretary's Signature Verification Instructions, and the corresponding continued implementation of the Secretary's mandate that election officials approve signatures with discrepancies based on mere speculation.

146. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's Rule 168.24 remains in place, and justice requires the issuance of injunctive relief.

147. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Election Law, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters as required under the

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Michigan Election Law. Aside from being mandated by the Michigan Election Law, this signature verification process is critical to election security and designed to ensure that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter.

148. Plaintiffs lack an adequate remedy at law to prevent the enforcement of the Secretary's unlawful mandate under Rule 168.24 requiring election officials to approve signatures with discrepancies based on mere speculation.

149. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's Rule 168.24 mandate would allow a single state officer to circumvent (and essentially amend) valid and enforceable state laws on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring the integrity and accuracy of Michigan's elections and that each application for an absent voter ballot and each corresponding absent voter ballot originated from and was completed by the intended voter as required under the Michigan Election Law.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the Secretary's mandate under Rule 168.24 requiring election officials to approve signatures with discrepancies based on mere speculation is inconsistent with the Michigan Election Law and is therefore unenforceable; that this Court enjoin the Secretary from implementing Rule 168.24 in advance of the August 6, 2024 primary election and the November 5, 2024 general election; that this Court order the Secretary to rescind her Signature Verification Instructions, strike the language in that document instructing local election officials to approve signatures with discrepancies based on mere speculation, and issue new Signature Verification Instructions directing local election

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officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Election Law; and that this Court award any other relief that it deems just and equitable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court order "a speedy hearing" of this action and "advance it on the calendar" as provided under MCR 2.605(D), and that it issue the following relief:

A. Declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is inconsistent with the Michigan Constitution and the Michigan Election Law and is therefore unenforceable;

B. Declare that the Secretary's presumption of validity as to signatures on absent voter ballot applications and absent voter ballot return envelopes is a "rule" as that term is defined under the APA, that the Secretary failed to follow the applicable requirements under the APA when she promulgated that rule, and that the rule is therefore invalid;

C. Declare that Rule 168.24 of the Michigan Administrative Code is inconsistent with both the Michigan Constitution and the Michigan Election Law and is therefore unenforceable;

D. Enjoin the Secretary from implementing her presumption of validity and Rule 168.24 as to signatures on absent voter ballot applications and absent voter ballot return envelopes in advance of the August 6, 2024 primary election and the November 5, 2024 general election;

E. Order the Secretary to rescind their Signature Verification Instructions, strike the language in that document instructing local election officials that signatures on absent voter ballot applications and absent voter ballot return envelopes are entitled to a presumption of validity,

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strike the language in that document requiring election officials to speculate as to "possible reasons for discrepancies in signatures" under Rule 168.24, and issue new Signature Verification Instructions directing local election officials to verify the identity of any voter who applies for or who votes an absent voter ballot as required by the Michigan Constitution and the Michigan Election Law;

F. Award Plaintiffs their costs, expenses, and attorney fees incurred in this action; and

G. Award any other relief this Honorable Court deems just and equitable.

Dated: March 28, 2024

Respectfully submitted,

/s/ Charles R. Spies

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Attorneys for Plaintiffs

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VERIFICATION

I, Dennis Grosse, being first duly sworn, depose and say that I am a resident of the state of Michigan and duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Verified Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Dennis Grosse

Subscribed and sworn to before me this 27th day of March, 2024.

Jodie A Haugher, Notary Public
Berrien County, State of Michigan
My commission expires: 9/8/2025

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VERIFICATION

I, Blake Edmonds, being first duly sworn, depose and say that I am a resident of the state of Michigan and duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Verified Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Blake Edmonds

Subscribed and sworn to before me this 27th day of March, 2024.

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

, Notary Public
Kent County, State of Michigan
My commission expires: 2-2-2027

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VERIFICATION

I, Tyson Shepard, a representative of the Michigan Republican Party ("MRP"), being duly sworn, and being authorized to give this Verification on behalf of MRP in support of the allegations contained in the foregoing Verified Complaint, do hereby declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Michigan Republican Party

By: Tyson Shepard
Its: Executive Director

Subscribed and sworn to before me this 27th day of March, 2024.

Kyle Robert Hogendyk, Notary Public
Kent County, State of Michigan
My commission expires: 2-2-2027

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

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VERIFICATION

I, Ashley Walukevich, a representative of the Republican National Committee (the "RNC"), being duly sworn, and being authorized to give this Verification on behalf of the RNC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Republican National Committee

By: Ashley Walukevich
Its: Deputy Political Director

Subscribed and sworn to before me this 27 day of March, 2024.

Donna Rossetti, Notary Public
Essex County, State of Massachusetts
My commission expires: 2/23/2029

Donna M Rossetti
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
2/23/2029

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VERIFICATION

I, James Zenn, a representative of the National Republican Congressional Committee (the "NRCC"), being duly sworn, and being authorized to give this Verification on behalf of the NRCC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

National Republican Congressional Committee

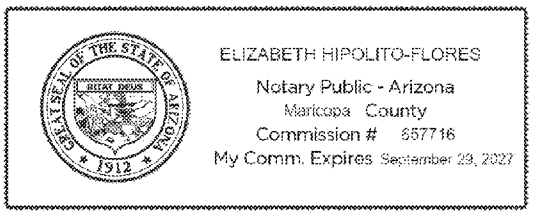
James Zenn

By: James Zenn
Its: Regional Political Director

Subscribed and sworn to before me this 27th day of March, 2024.

E. Hipolito-Flores

Elizabeth Hipolito-Flores, Notary Public
Maricopa County, State of Arizona
My commission expires: 09/29/2027



Notarized remotely online using communication technology via Proof.

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VERIFICATION

I, Cindy Berry, being first duly sworn, depose and say that I am a resident of the state of Michigan and duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Verified Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Cindy Berry

Subscribed and sworn to before me this 27th day of March, 2024.

Michelle C. Nizza, Notary Public
Sanilac County, State of Michigan
My commission expires: 12/16/2029

MICHELLE C. NIZZA
Notary Public, State of Michigan
County of Sanilac
My Commission Expires 12-16-2029
Acting in the County of Macomb

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DENNIS GROSSE, BLAKE EDMONDS, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

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202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

/

EXHIBIT LIST TO VERIFIED COMPLAINT

Exhibit A	Signature Verification Instructions
Exhibit B	Opinion and Order Granting Summary Disposition in *Genetski v Benson*, No. 20-000216-MM (Mich Ct Cl, 2021)

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Exhibit C	Draft Ruleset 2021-061 ST dated August 5, 2021
Exhibit D	Senator Ruth Johnson's Public Comment on Proposed Ruleset 2021-61 ST
Exhibit E	Representative Ann Bollin's Public Comment on Proposed Ruleset 2021-61 ST
Exhibit F	Secretary Benson's March 4, 2022 Response to JCAR's Proposed Changes to JCAR No. 21-73, MOAHR No. 2021-61ST
Exhibit G	Redlined copy of Amended Ruleset 2021-61 ST Proposed by Secretary Benson, dated March 7, 2022
Exhibit H	Absent Voter Process Manual

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Exhibit A

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Signature Verification, Voter Notification, and Signature Cure

December 2023

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
(517) 335-3234

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Introduction

Michigan election law requires absent voter (AV) ballot applications to be signed for an AV ballot to be issued. It also requires election officials to verify that the signature on an AV ballot envelope agrees sufficiently with the voter's signature in the Qualified Voter File (QVF) or the voter's signature on the AV ballot application for the ballot to be tabulated. Michigan election law and the department's administrative rules require AV applications and ballots to be accepted unless the signature does **not** agree sufficiently with the voter's signature on file. MCL 168.761, 765a, 766, 766a, 766b, R 168.21, et seq.

This document provides instructions for:

1. Reviewing signatures immediately upon receipt and providing voter notification for a mismatched signature.
2. Verifying the voter's signature against the QVF.
3. Curing missing or mismatched signatures.

Reviewing signatures immediately upon receipt and providing voter notification for a mismatched signature

Upon receipt, clerks must review absent voter ballot applications and absent voter ballot envelopes (AV application or ballot envelope) as soon as possible to determine whether a signature has been provided and whether the signature agrees sufficiently with the signature on file. If a clerk determines that the voter's signature on the AV ballot application or AV ballot return envelope is missing or does not agree sufficiently with the signature on file, the clerk must reject that application or return envelope and provide the voter with notice and the opportunity to cure the deficiency. Under the Michigan Constitution, the voter "has a right to be notified immediately and afforded due process, including an equitable opportunity to correct the issue with the signature." Mich. Const. Art II, Sec 4(1)(h).

Beginning 45 days before an election, Michigan election law requires clerks to notify a voter of a missing or mismatched signature on the voter's AV ballot or AV return envelope.

Between 45 and six calendar days before an election, the clerk must make a reasonable effort to verify or reject the AV ballot application or AV return

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envelope and to notify the voter of a signature deficiency no later than the end of the next business day following receipt.

Beginning five calendar days before the election and on Election Day, the clerk must verify or reject the AV ballot application or AV return envelope by the end of the calendar day of receipt.

The clerk must notify the voter of the signature deficiency by telephone, email, or text message, if available, or by U.S. mail if the other options are not available. The notice must indicate all of the following:

- The nature of the deficiency and that the deficiency has resulted in the rejection of the voter's AV ballot application or AV ballot return envelope
- The need to cure the deficiency in order for the AV ballot application to be accepted or for the AV ballot to be tabulated
- How to cure the deficiency
- The deadline for curing the deficiency
- The alternative methods of voting if the deficiency is not cured

A voter may cure a deficiency by completing and submitting a cure form. Michigan election law requires voters be permitted to receive and return a cure form electronically, in person, or by mail with postage prepaid. A voter must be permitted to submit an electronic image of the voter's physical signature for a cure form returned electronically. A cure form must be accepted if the signature on the cure form agrees sufficiently with the signature on file. If the clerk determines that the signature on the cure form does not agree sufficiently with the signature on file, the clerk must reject the cure form and contact the voter to provide information on other options to cure the deficiency and to provide the alternative methods of voting available for that election. If an AV application or AV ballot is rejected because the signature is missing or does not sufficiently agree with the signature on file, the cure form will be available to print from QVF for that voter.

For **AV applications**, the clerk must inform the voter of the need to cure the signature deficiency and the voter's options for doing so:

- **Before 4 p.m. on the Friday before Election Day**, by returning a cure form electronically, in person, or by mail. (Clerks must **not** send an AV ballot to an applicant by first-class mail after 5 p.m. on the fourth day before Election Day.)

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- **Between 4 p.m. on the Friday and 4 p.m. on the Monday before Election Day**, in person at the clerk's office.
- **After 4 p.m. on the Monday before Election Day,** (if available for that election) or at the precinct on Election Day (it is too late to cure the application for an AV ballot).

For **AV ballot return envelopes,** the clerk should inform the voter of the need to cure the signature deficiency and the voter's options for confirming that the voter signed the ballot or for providing a signature:

- **By 5 p.m. on the third day after Election Day,** the voter must confirm that the voter signed the ballot return envelope or provide a signature, either in person or by submitting an electronic image of the physical signature. An AV ballot return envelope that has not been cured by 8 p.m. on Election Day must be retained at the clerk's office.

An AV ballot return envelope that is cured after the close of polls on Election Day but before 5 p.m. on the third day after the election must be tabulated if the voter did not vote in person. If a cure form which resolves the signature deficiency on a voter's AV ballot return envelope is received by the clerk by 5 p.m. on the third day following the election, the clerk must approve the AV ballot for tabulation. Any AV ballot return envelopes that have not be cured by the deadline remain rejected.

Verifying the voter's signature against the QVF

Clerks must determine whether the signature being validated agrees sufficiently with the signature on file. Voter signatures are entitled to an *initial* presumption of validity. An initial presumption of validity does *not* mean that all signatures are "presumed valid" without further review. Instead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law, MCL 168.766a, et seq.; and R 168.21, et seq.

Clerks should consider a voter's signature questionable only if it differs in significant and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter. Exact matches are not required.

Redeeming qualities

When reviewing petition signatures that are not a perfect match with the signature on file, clerks must consider whether there are redeeming qualities

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in the signature as compared to the signature on file. The following list includes some possible explanations for signatures that do not match exactly, but keep in mind that other legitimate reasons may exist. Redeeming qualities include but are not limited to the following:

- Similar distinctive flourishes between the application or envelope and the QVF
- More matching features than nonmatching features
- Signature features do not match because it appears as if the voter's hand is trembling or shaking
- Only part of the signature matches the signature on file, for example, if only the first letters of the first and last name match
- Signature is partially printed but partially matches the signature on file
- Signature is a recognized diminutive of the voter's full legal name
- Signature omits a middle name, replaces a middle name with an initial, or replaces a middle initial with a name
- Signature style has changed slightly from signature on file

Explanations for differences in signatures

Clerks must also consider the following as possible reasons for discrepancies in signatures:

- Evidence of trembling or shaking in a signature could be health-related or the result of aging
- The voter may have used a diminutive of their full legal name, including, but not limited to, the use of initials, or the rearrangement of components of their full legal name, or omitting a second last name
- The voter's signature style may have changed slightly over time
- The signature may have been written in haste
- The surface of the location where the signature was made may have been rough, soft, uneven, or unstable

Clerks may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained

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in the voter's record, and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.

Voter communication

If clerks have genuine concerns about a signature's validity, they have the option of contacting the voter during the review process and obtaining an explanation from a voter (for example, the voter injured their hand), that satisfies the clerk that the signature is valid. This communication does *not* satisfy the separate requirement to notify voters who are found to have a missing or mismatched signature, which must be provided when required as discussed in the next section.

Voters should be encouraged to sign AV ballot applications and AV ballot return envelopes in a way that reasonably resembles the signature given for driver's license/state ID or voter registration purposes, so that the signature agrees sufficiently with the signature on file.

Curing a missing or mismatched signature

Clerks should review for missing or questionable signatures, and notify voters of these issues, using the timeline and procedures specified in the section of this document regarding "Reviewing signatures immediately upon receipt and providing voter notification for a mismatched signature." As noted, clerks should use any and all means available to contact voters, including phone, email, and mail. Written notice must always be issued. Two sample written notices are included at the end of this document; one asks the voter to provide a signature to compare against the ballot application signature and the other to provide a signature to compare against the ballot signature. Clerks do not need to use these exact notices.

The clerk must retain proof of having provided written notice to the voter and any signed forms returned to the clerk for 22 months following the final certification of the election.

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Sample notice to voter who must provide application signature

Dear Voter,

Your **absent voter ballot application** will be REJECTED because of a missing signature or because of your signature did not match the signature on file. You WILL NOT BE ISSUED an absentee ballot because of the signature discrepancy, unless you TAKE ONE OF THE FOLLOWING ACTIONS:

- Sign this signature cure form and mail it back to the clerk's office at [address], fax it to [number], or scan/photograph and email this signed form to [email]. The form must be received by 4 p.m. on the Friday before Election Day to allow time for the mailing of your absentee ballot. Please come to your local clerk's office in person if there are seven or fewer days to Election Day.

- You may visit the clerk's office at [address] and re-sign the application until 4 p.m. on the Monday before Election Day.

- If you do not cure the absent voter ballot application by 4 p.m. the Monday before Election Day, you may still vote at your early voting site (if available for the election) or at your precinct on Election Day.

VOTER CERTIFICATE FOR PROVIDING ABSENT VOTER BALLOT APPLICATION SIGNATURE

- I returned my absent voter ballot application to my clerk, and I have been notified that my signature on the application was either missing or did not seem to match my signature on file.

- I requested an absent voter ballot for the election. I am the individual whose name appears on the absent voter ballot application. I am signing this signature cure form instead of submitting a new application.

- I am a United States citizen.

- I am qualified and registered to vote in the city or township to which I returned my absent voter ballot.

If you are unable to provide a signature that is similar to the signature on file, please check the box below.

[ ] My signature differs from the signature on file due to a medical condition, advancing age, or the number of years that have elapsed since I last provided a signature for driver's license/state ID or voter registration purposes.

SIGN HERE IN INK *(Power of attorney is not acceptable).*

Signature

Printed name

Date: / / Address:
(number and street) (city or township) (ZIP code)

Date of birth:_____(00/00/0000)

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Sample notice to voter who must provide ballot signature

Dear Voter,

Your **absent voter ballot** will be REJECTED because of a missing signature or because your signature did not match the signature on file. Your absent voter ballot WILL NOT BE COUNTED UNLESS YOU TAKE ONE OF THE FOLLOWING ACTIONS:

- Until 5 p.m. on the second Friday before Election Day, you may make a written request that your absent voter ballot be "spoiled" and have a new ballot issued immediately.
- You may sign this signature cure form and mail it back to the clerk's office at [address], fax it to [number], or scan/photograph and email it to [email], or deliver it to the clerk's office at [address]. The form must be received by 5 p.m. on the Friday after Election Day.
- You may visit the clerk's office and re-sign the absent voter ballot return envelope or provide a signature. You must re-sign by 5 p.m. on the Friday after Election Day in order to have your ballot counted for this election.
- Alternatively, you may vote at an early voting site (if available for the election) or at the precinct on Election Day instead of voting an absent voter ballot.

VOTER CERTIFICATE FOR PROVIDING ABSENT VOTER BALLOT SIGNATURE

I returned my absent voter ballot to my clerk, and I have been notified that my signature on the absent voter ballot return envelope was either missing or did not seem to match my signature on file. I hereby affirm, under penalty of perjury, that:

- I requested and returned an absent voter ballot for the general election. I am the individual whose name appears on the absent voter ballot return envelope that I returned to my city or township clerk's office. I am signing this signature cure form instead of submitting a new absent voter ballot return envelope.
- I am a United States citizen.
- I am qualified and registered to vote in the city or township to which I returned my absent voter ballot.
- I or another authorized individual delivered my absent voter ballot to the clerk's office.

If you are unable to provide a signature that is similar to the signature on file, please check the box below.

[ ] My signature differs from the signature on file due to a medical condition, advancing age, or the number of years that have elapsed since I last provided a signature for driver's license/state ID or voter registration purposes.

Signature

Printed name

Date: ____ /____ /____ Address:_____
(number and street) (city or township) (ZIP code)

Date of birth:_____(00/00/0000)

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Exhibit B

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT GENETSKI, County of Allegan Clerk, individually and in his official capacity, and MICHIGAN REPUBLICAN PARTY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity, and JONATHAN BRATER, Director of Elections, in his official capacity,

Defendants.
_____/

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN PART TO PLAINTIFFS AND GRANTING SUMMARY DISPOSITION IN PART TO DEFENDANTS

Case No. 20-000216-MM

Hon. Christopher M. Murray

Before the Court is defendants' January 20, 2021 motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8), as well as plaintiffs' February 3, 2021 cross-motion for summary disposition filed pursuant to MCR 2.116(C)(8). Plaintiffs' cross-motion will be GRANTED in part with respect to Count II of the amended complaint because the challenged signature-matching standards were issued in violation of the Administrative Procedures Act. As a result of the grant of summary disposition in plaintiffs' favor on Count II, Count I of the amended complaint will be dismissed without prejudice. In addition, defendants' motion for summary disposition will be GRANTED in part with respect to Counts III and IV of the amended complaint.

I. BACKGROUND

The issues raised implicate signature-matching requirements for absent voter ballot applications and absent voter ballot return envelopes contained in this state's election law. MCL

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168.759 and MCL 168.761 require voters to sign applications for absent voter ballots in order to receive a ballot. In addition, this state's election laws require voters who choose to vote by absent voter ballot to sign their absent voter ballot return envelopes in order to have their ballots counted. MCL 168.764a. The signatures on the applications and the return envelopes are compared against signatures in the qualified voter file or those that appear on the "master registration card" in order to determine whether the signatures match. Signatures on applications or return envelopes that do not "agree sufficiently" with those on file are to be rejected. MCL 168.761(2). As of October 6, 2020, MCL 168.761(2)[1] was amended by 2020 PA 177 to give notice to voters' whose signatures do not "agree sufficiently" with those on file that their absent voter ballot application has been rejected. The purpose of the notice is to give voters the opportunity to correct inaccuracies with absent voter ballot signatures. The same notice requirements also apply to rejected signatures for absent voter ballots. MCL 168.765a(6). There is no dispute that this state's election law does not define what it means for signatures to "agree" or to "agree sufficiently" for purposes of comparing the signature on file with the signature on a received absent voter ballot application or absent voter ballot.

On the day PA 177 became effective, defendant Jocelyn Benson issued what defendants refer to as "guidance" for local clerks who are charged with inspecting signatures on absent voter ballot applications and ballots. The document, which was entitled "Absent Voter Ballot Processing: Signature Verification and Voter Notification Standards" largely mirrored guidance

[1] 2020 PA 302 further amended MCL 168.761 and other provisions of this state's election law. Those amendments do not become effective until June 27, 2021. This opinion and order only examines those provisions of the statute that are currently in effect at this time. And no issues have been raised with respect to the yet-to-be-effective statutory requirements.

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defendant Benson had previously issued. This guidance regarding signature verification forms the heart of the issues in the present case and it requires additional examination.

The stated purpose of the at-issue document was to "provide[ ] standards" for reviewing signatures, verifying signatures, and curing missing or mismatched signatures. Under a heading entitled "Procedures for Signature Verification," the document stated that signature review "begins with the presumption that" the signature on an absent voter ballot application or envelope is valid. Further, the form instructs clerks to, if there are "any redeeming qualities in the [absent voter] application or return envelope signature as compared to the signature on file, treat the signature as valid." (Emphasis in original). "Redeeming qualities" are described as including, but not being limited to, "similar distinctive flourishes," and "more matching features than nonmatching features." Signatures "should be considered questionable" the guidance explained, only if they differ "in multiple, significant and obvious respects from the signature on file." (Emphasis in original). "[W]henever possible," election officials were to resolve "[s]light dissimilarities" in favor of finding that the voter's signature was valid.[2]

The section on signature-verification procedures goes on to repeat the notion that "clerks should presume that a voter's [absent voter] application or envelope signature is his or her genuine signature, as there are several acceptable reasons that may cause an apparent mismatch." (Emphasis omitted). Next, the guidance gave excuses or hypothetical explanations for why signatures on absent voter ballot applications and absent voter ballots might not be an exact match to those that are on file. Finally, the document again mentioned the presumption when, in

[2] The guidance included a chart with what were deemed to be acceptable and unacceptable "defects" in signatures.

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conclusion, it stated that clerks "*must perform* their signature verification duties with the presumption that the voter's [absent voter] application or envelope signature is his or her genuine signature." (Emphasis added). By all accounts, the guidance set forth in that document was not limited to the then-upcoming November 2020 general election, nor has it been rescinded. Rather, it appears that the guidance remains in effect for local clerks with respect to upcoming elections.

II. PLAINTIFFS' COMPLAINT

Plaintiff Robert Genetski is the Allegan County Clerk. He, along with plaintiff Michigan Republican Party, filed a complaint alleging that defendant Benson's October 6, 2020 guidance is unlawful. The December 30, 2020 amended complaint alleges that the presumption in favor of finding valid signatures is unlawful, as is the directive to find "any redeeming qualities" for signatures. They contend that the presumption contained in the guidance issued by defendant Benson will allow invalid votes to be counted. Plaintiff Genetski has not, however, alleged that this guidance caused him to accept a signature that he believed was invalid.

The four-count amended complaint asks the Court to issue declaratory and injunctive relief with respect to future elections. Count I alleges that defendant Benson violated various provisions of this state's election law by issuing the challenged guidance regarding signature-matching requirements which allegedly conflicts with this state's election law. They ask the Court to issue injunctive relief to remedy the allegedly unlawful guidance. Additionally, they seek a declaratory ruling regarding the validity of defendant Benson's guidance.

Count II of the amended complaint alleges that defendant Benson's guidance was a "rule" as defined by the Administrative Procedures Act (APA) that was issued without compliance with the APA. Plaintiffs allege that the guidance is in fact a rule because it is generally applicable and

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requires local election officials to apply a mandatory presumption of validity to signatures. Plaintiffs ask the Court to declare that the "rule" is invalid.

Count III alleges a violation of Const 1963, art 1, §§ 2 and 5, as defendant Benson's guidance will result in the counting of invalid absent voter ballots which will ultimately result in the dilution of valid votes cast by this state's electorate. They argue that defendant Benson's guidance is so vague and imprecise that it cannot be applied uniformly throughout the state.[3]

Count IV alleges that plaintiff Genetski had a right to request an audit of his choosing under Const 1963, art 2, § 4(1)(h) as it relates to absent voter ballots. Plaintiffs acknowledge that defendants have announced and/or completed a state-wide audit of the November 2020 general election; however, according to plaintiffs, the audit does not address plaintiffs' concerns because it did not review whether signatures on absent voter ballots were properly evaluated. Plaintiffs ask the Court to declare that the right to request an audit under art 2, § 4(1)(h) encompasses the type of absent-voter-ballot review requested in the amended complaint. Plaintiff also suggests the manner in which such an audit should be conducted.

III. ANALYSIS

A. MOOTNESS AND RIPENESS

Defendants argue that this Court should refrain from evaluating the merits of plaintiffs' complaint because the issues are either moot or not ripe. With respect to mootness, there is no dispute that Count III, which raises an equal protection claim arising out of the November 2020

[3] Plaintiffs' briefing has conceded that this claim is now moot, with the November 2020 election having already come and gone. As a result, the Court will not address this claim in any additional detail.

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general election, is moot and must be dismissed. However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).

The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). Here, plaintiffs—particularly plaintiff Genetski, who is a local clerk subject to the guidance at issue—sought a declaration regarding whether he is and will continue to be subject to guidance that by all accounts remains in effect at this time. This clearly presents an actual controversy that is appropriate for declaratory relief. See *id.*

Defendants argue that no actual controversy exists because the Legislature could change the applicable law, or because defendant Benson could decide to revoke the guidance. That argument would seek to turn the requirements of declaratory relief on their head and would eviscerate the purpose of declaratory relief. If the Court were to adopt the view that no actual controversy exists because the law could change, there could be no limit to the number of cases

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that could be dismissed as moot. Here, plaintiffs have sought a declaration as to their legal rights with respect to the validity of a currently existing directive issued by defendant Benson in advance of the next election. That the law could hypothetically change in the future is not a reason to avoid issuing a declaration of the parties' currently existing legal rights, as plaintiffs have sought here. Indeed, the ability to seek an advance declaration of legal rights on an existing policy is one of the very reasons why the declaratory judgment rule was adopted in the first instance. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (discussing the purposes of the declaratory judgment rule).

B. WHETHER DEFENDANT'S ACTIONS VIOLATED THE APA

The dispositive issue, as the Court see it, concerns the APA and whether defendant Benson was required to comply with the APA when she issued the "Signature Verification and Voter Notification Standards." The Secretary of State has authority, under MCL 168.31(1)(a), to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[4] MCL 24.207. A "rule" not promulgated in accordance with the

[4] There is no dispute that defendant Benson is subject to the APA, generally. See MCL 24.203(2) (defining "agency" in a way that includes the Secretary of State). The only dispute is whether this particular action is subject to the APA.

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APA's procedures is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982).

An agency must utilize formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

As for whether the guidance or directive at issue is a "rule" subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9. In other words, the Court "must review the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.* (citation and quotation marks omitted).

Examining the "Signature Verification and Voter Notification Standards" through that lens, the Court agrees with plaintiffs that the same constitutes a "rule" that should have been promulgated pursuant to the APA's procedures. The standards are generally applicable to all absent voter ballot applications and absent voter ballots, and it contains a mandatory statement from defendant, this state's chief election officer, see MCL 168.21, declaring that all local clerks

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"*must perform* their signature verification duties" in accordance with the instructions. (Emphasis added). In addition, clerks must presume that signatures are valid. That this presumption is mandatory convinces the Court that it is not merely guidance, but instead is a generally applied standard that implements this state's signature-matching laws. See MCL 24.207 (defining "rule"); *AFSCME*, 451 Mich at 8 (describing what constitutes a "rule" under the APA); *Spear v Mich Rehab Servs*, 202 Mich App 1, 5; 507 NW2d 761 (1993) (focusing on the mandatory nature of policies in support of the conclusion that the same constituted a "rule" under the APA).

Defendants cite three statutory exceptions to rulemaking—MCL 24.207(g), (h), and (j)—but the Court is not persuaded that the standards are saved by any of these exceptions. The first argument is that MCL 24.207(j), which is sometimes referred to as the "permissive power exception," applies and exempts the standards from the APA's rulemaking requirements. MCL 24.207(j) exempts from the APA's definition of "rule," a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." Here, defendant Benson points to MCL 168.31(1)(a) as the source of her "permissive statutory power." That statute provides that the Secretary of State "shall" "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a). According to defendant Benson, MCL 168.31(1)(a) allows her to eschew the rule-making process in order to issue "instructions" like the standards at issue.

The Court disagrees. First, the Court disagrees with defendants' characterization of the standards at issue, for the reasons stated above. Second, the cited statutory authority requires defendant Benson to issue instructions that are "in accordance with the laws of this state." MCL 168.31(1)(a). Here, it is not apparent that the mandatory presumption of signature validity is "in

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accordance with the laws of this state."[5] To that end, nowhere in this state's election law has the Legislature indicated that signatures are to be presumed valid, nor did the Legislature require that signatures are to be accepted so long as there are any redeeming qualities in the application or return envelope signature as compared with the signature on file. Policy determinations like the one at issue—which places a thumb on the scale in favor of a signature's validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature. See *AFSCME*, 452 Mich at 10.

Third, a review of the plain language of MCL 168.31(1) and of caselaw discussing the permissive-power exemption does not support defendants' argument.[6] The primary problem with defendant Benson's argument is that the language in MCL 168.31(1) is too generic to support her positions. MCL 168.31(1)(a) simply states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections." If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the APA rule-making process, then defendants would never have to issue APA-promulgated rules for any election-related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—

[5] Given that the standards are invalid for being enacted without compliance with the APA, the Court declines, for now, to determine whether the mandatory presumption imposed is contrary to the law, as plaintiffs have alleged in Count I. Resolution of that issue becomes unnecessary in light of the decision to grant relief to plaintiffs on Count II of the complaint.

[6] The Court incorporates and restates its reasoning and discussion of a similar issue from *Davis v Benson*, (Docket Nos. 20-000207-MZ & 20-000208-MM).

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must still adhere to the APA if that implementation takes the form of a rule. See *id.* (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule."); *Spear*, 202 Mich App at 5 (holding that while the agency's "decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act."). Thus, while defendant Benson undoubtedly has discretion under MCL 168.31 to issue guidance or to instruct local clerks regarding signature validity requirements, the implementation of her discretionary decision can still be subject to the APA's requirements.

Furthermore, the caselaw relied on by defendants in arguing for a different conclusion is easily distinguishable, and, in some cases, even lends support for the Court's conclusion. See e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass'n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In the cases cited above, the pertinent agency's enabling statute expressly or impliedly authorized the specific action later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking *or* other means. See *Detroit Base Coalition*, 428 Mich at 187-188 ("The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found."). Here, MCL 168.31(1) provides generalized authority to defendant, and it lacks

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specificity with respect to the action taken (implementation of a mandatory presumption of signature validity), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition, Mich Trucking Ass'n*, and *By Lo Oil Co.*[7]

Defendants raise concerns that this Court's interpretation of MCL 168.31(1)(a) would leave the term "instructions" without any practical effect. According to defendants, this Court's view would raise questions regarding whether defendant Benson could do anything when advising and directing local election officials as to the proper methods of conducting elections. The Court disagrees with the premise of defendants' position because, regardless of what is permissible under MCL 168.31, it is apparent that that which occurred here is not permissible, absent compliance with the APA. Here, defendant issued a mandatory directive and required local election officials to apply a presumption of validity to all signatures on absent voter ballot applications and on absent voter ballots. The presumption is found nowhere in statute. The mandatory presumption goes beyond the realm of mere advice and direction, and instead is a substantive directive that adds to the pertinent signature-matching statutes. And for similar reasons, defendants' arguments about efficiency and the need for quick action do not change the Court's decision. That is, nothing about the Court's opinion should be read as limiting the Secretary of State's ability to take quick action when she so desires. However, when that action takes the form of a rule, then the APA and MCL 168.31 require that the APA be invoked. In other words, the statute gives the Secretary of State

[7] Remarkably, defendants continue to place reliance on the conclusions of the majority in *Pyke v Dep't of Social Servs*, 182 Mich App 619; 453 NW2d 274 (1990). But as noted in prior opinions, Judge Shepard's dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 533-534 & n 1; 473 NW2d 765 (1991). The *Pyke* Court's view on MCL 24.207(j) is irrelevant.

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the authority and the ability to meet the needs of a situation. But when the action taken constitutes a "rule" under MCL 24.207, the appropriate procedures must be followed.

Defendants' citation to the rule-making exceptions contained in MCL 24.207(g) and (h)—which are the primary exemptions cited in their reply briefing—are no more convincing. Turning first to MCL 24.207(g), this subsection is an exception to the APA's rule-making requirements for an "intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." This exception is inapplicable, however, because the at-issue standard involves a mandatory presumption that directly affects local election officials' duties with respect to the determination of whether a voter's signature on either an absent voter ballot or a returned ballot will be deemed to be valid. Cf. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563; 609 NW2d 593 (2000) (finding that a directive fit within the exception where it did not create any obligations or require compliance).

Nor is defendants' citation to the exception contained in MCL 24.207(h) convincing. That exception applies to a "form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). This exception "must be narrowly construed and requires that the interpretive statement at issue be merely explanatory." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 248; 501 NW2d 88 (1993) (citation and quotation marks omitted). If the purported "interpretive" statement changes the requirements of the law it is alleged to have interpreted, the exception does not apply. *Id.* See also *Schinzel v Dep't of Corrections*, 124 Mich App 217, 221; 333 NW2d 519 (1983). Here, because nothing in this state's election law refers to a presumption of validity, let alone a mandatory presumption, the standards at issue cannot be

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deemed to be merely explanatory. See *Clonlara*, 442 Mich at 248, 251. That is, rather than merely explaining existing obligations under the law, the standards have imposed new obligations that do not appear within the plain language of this state's signature-matching statutes.

In sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a "rule" that should have been promulgated in accordance with the APA. And absent compliance with the APA, the "rule" is invalid. Whether defendant Benson had authority to implement that which she did not need not be decided at this time because it is apparent the APA applied to the type of action taken in this case. Accordingly, plaintiffs are entitled to summary disposition on Count II of the complaint, and the Court will dismiss Count I without prejudice as a result.

C. PLAINTIFFS' AUDIT CLAIMS ARE WITHOUT MERIT

Finally, the Court examines Count IV of the complaint, which concerns plaintiffs' request for an audit. Const 1963, art 2, § 4(1)(h), provides that a qualified Michigan voter has the right to have "*the results* of statewide elections audited" in a manner prescribed by law. (Emphasis added). MCL 168.31a, amended after adoption of the aforementioned audit language, provides as follows:

> (1) In order to ensure compliance with the provisions of this act, after each election the secretary of state may audit election precincts.
>
> (2) *The secretary of state shall prescribe the procedures for election audits* that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. *The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures*. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. *An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results*

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> *of at least 1 statewide race or statewide ballot question in a precinct selected for an audit.* An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.
>
> (3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit. [Emphasis added.]

Plaintiffs acknowledge that an audit of the November 2020 general election results was conducted. They argue that they have the right to request an audit with respect to the subject of their choosing—signatures on absent voter ballot applications and on absent voter ballots—and in the manner of their choosing. For at least two reasons this claim is not supported by art 2, § 4 or the implementing statute, MCL 168.31a. First, the constitution speaks of an audit of election *results*, not signature-matching procedures. Second, while the statute allows for an audit that includes "reviewing the documents, ballots, and procedures" used in the election, the statute plainly leaves it to the Secretary of State to "prescribe the procedures for election audits" and mandates that the Secretary of State shall conduct audits "as set forth in the prescribed procedures." In other words, there is no support in the statute for plaintiffs to demand that an audit cover the subject of their choosing or to dictate the manner in which an audit is conducted. MCL 168.31a(2) leaves that to the Secretary of State. As a result, plaintiffs have failed to state a claim on which relief can be granted as it concerns Count IV, and this count will be dismissed with prejudice pursuant to MCR 2.116(C)(8).

IV. CONCLUSION

IT IS HEREBY ORDERED that pursuant to MCR 2.116(C)(10), plaintiffs' cross-motion for summary disposition is GRANTED in part with respect to Count II of the amended complaint because the guidance issued by the Secretary of State on October 6, 2020, with respect to signature-matching standards was issued in violation of the Administrative Procedures Act.

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IT IS FURTHER ORDERED that pursuant to MCR 2.116(C)(8) defendants' motion for summary disposition is GRANTED in part on Counts III and IV of the amended complaint.

IT IS FURTHER ORDERED that Count I of the amended complaint is dismissed without prejudice, for the reason that the at-issue standards are invalid under the Administrative Procedures Act.

This is a final order that resolves the last pending claim and closes the case.

Date: March 9, 2021

Christopher M. Murray
Judge, Court of Claims

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Exhibit C

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DEPARTMENT OF STATE

BUREAU OF ELECTIONS

SIGNATURE MATCHING FOR ABSENT VOTER BALLOT APPLICATIONS AND ABSENT VOTER BALLOT ENVELOPES

Filed with the secretary of state on

These rules take effect immediately upon filing with the secretary of state unless adopted under section 33, 44, or 45a(9) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, 24.244, or 24.245a. Rules adopted under these sections become effective 7 days after filing with the secretary of state.

(By authority conferred on the secretary of state by sections 31, 759, 761, 765, and 765a of the Michigan election law, 1954 PA 116, MCL 168.31, 168.759, 168.761, 168.765, and 168.765a)

R 168.21, R 168.22, R 168.23, R 168.24, R 168.25, and R 168.26 are added to the Michigan Administrative Code, as follows:

R 168.21 Definitions.

Rule 1. As used in these rules:

(a) "Election official" means the township, city, or county clerk or their staff responsible for verifying signatures.

(b) "Qualified voter file" means the voter registration database maintained by the Secretary of State.

(c) "Signature on file" means the signature of the voter contained in the qualified voter file or on the absent voter ballot application.

R 168.22 Sufficient agreement of voter signature; initial presumption of validity.

Rule 2. (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, signatures must be reviewed beginning with the presumption that the voter's signature is his or her genuine, valid signature.

(2) A voter's signature should be considered invalid only if it differs in multiple, significant, and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter. Exact matches are not required to determine that a signature agrees sufficiently with the signature on file.

R 168.23 Redeeming qualities.

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Rule 3. (1) If there are any redeeming qualities in the absent voter ballot application signature or absent voter ballot envelope signature as compared to the signature on file, the signature must be treated as valid. The bureau of elections shall provide examples of signatures with redeeming qualities and questionable signatures.

(2) Redeeming qualities include, but are not limited to, the following:

(a) Similar distinctive flourishes.

(b) More matching features than nonmatching features.

(c) Signature features do not match because it appears as if the voter's hand is trembling or shaking.

(d) Only part of the signature matches the signature on file, for example, if only the first letters of the first and last name match.

(e) Signature is partially printed but partially matches the signature on file.

(f) Signature is a recognized diminutive of the voter's full legal name.

(g) Signature omits a middle name, replaces a middle name with an initial, or replaces a middle initial with a name.

(h) Signature style has changed slightly from signature on file.

R 168.24 Explanations for differences in signatures.

Rule 4. (1) Elections officials shall consider the following as possible explanations for the discrepancies in signatures:

(a) Evidence of trembling or shaking in a signature could be health-related or the result of aging.

(b) The voter may have used a diminutive of their full legal name, including, but not limited to, the use of initials, or the rearrangement of components of their full legal name, such as a reversal of first and last names, use of a middle name in place of a first name, or omitting a second last name.

(c) The voter's signature style may have changed slightly over time.

(d) The signature on the absent voter ballot envelope or provisional ballot envelope may have been written in haste.

(e) The surface of the location where the signature was made may have been rough, soft, uneven, or unstable.

(2) In addition to the characteristics listed in R 168.23(2)(f) and (g), the elections official may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained in the voter's record, and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.

R 168.25 Timing of signature review and notification.

Rule 5. (1) If the absent voter ballot application or the absent voter ballot envelope is received at least 6 calendar days prior to the election, the clerk must notify the voter of issues with the voter's signature by the end of the next business day following receipt of the application or ballot envelope.

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(2) If the absent voter ballot application or the absent voter ballot envelope is received less than 5 calendar days prior to the election, the clerk must review applications and envelopes immediately upon receipt and immediately contact a voter upon determination that the voter's signature on the application or the envelope is missing or does not match the signature on file.

(3) If the absent voter ballot application or the absent voter ballot envelope is missing the voter's signature, or if the clerk determines that the voter's signature on the absent voter ballot application or on the absent voter ballot envelope does not agree sufficiently with the voter's signature on file, the clerk shall inform the voter using any and all contact information available that their absent voter ballot application or their absent voter ballot envelope is missing a signature or has a non-matching signature, and the need to cure the signature deficiency. The clerk must notify the voter by phone and email, and, in the absence of the voter's email address, by United States mail.

R 168.26 Curing signature deficiencies.

Rule 6. A voter may cure a missing or mismatched signature by providing a signature on the absent voter ballot application or ballot envelope with the missing or mismatched signature or by providing a signature on another form or method as specified by the election official on their website or in the election official's office. A voter may cure a missing or mismatched signature up until the close of polls on Election Day.

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Exhibit D

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RUTH A. JOHNSON
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senjohnson@senate.michigan.gov

THE SENATE
STATE OF MICHIGAN

October 1, 2021

Via Electronic Mail to: Elections@Michigan.gov

Michigan Bureau of Elections
PO Box 20126
Lansing, MI 48901

Re: Public Comment on Proposed Ruleset 2021-61 ST

I write to provide comment on the Department of State, Elections & Campaign Finance proposed Administrative Rules for Signature Matching Standards for Absent Voter Ballot Applications and Absent Voter Ballot Envelopes (Rule Set 2021-61 ST). I strongly oppose these rules as written and find them to be in direct contradiction to existing Michigan election law.

MCL 168.761 states in part that:

> *(2) The qualified voter file must be used to **determine the genuineness** of a signature on an application for an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card. [emphasis added]*

While MCL 168.766 states in part that:

> *(2) The qualified voter file must be used to **determine the genuineness** of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on an envelope containing an absent voter ballot to the signature contained on the master card. [emphasis added]*

However, the proposed administrative rules state in part that "signatures must be reviewed **beginning with the presumption that the voter's signature is his or her genuine**, valid signature." *[emphasis added]* This is in direct conflict with the statutory language which instructs clerks to "**determine**" the genuineness of signatures.

Furthermore, the proposed administrative rules go on to say that "if there are **any** redeeming qualities…the signature **must** be treated as valid." *[emphasis added]* This is a vague and biased standard that would serve to always err on the side of declaring a signature to be genuine and valid and which again does not conform to the statutory language which states that a clerk's determination should be based on whether "the signature on the absent voter ballot application does not **agree sufficiently** with the signature on the master card or the digitized signature contained in the qualified voter file". *[MCL 168.761, emphasis added]*

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Finally, the proposed rules also provide for a clerk to utilize hypothetical factors such as "the possibility that the voter is disabled" without any due diligence or contact with the voter to make such a determination. This goes beyond the authority of the administrative rulemaking process and seeks to instead make changes to election law that would be properly considered by the legislature.

I would further comment, that current law provides for a cure process to be used by clerks when there is a doubt as to the genuineness of a signature submitted on an absentee ballot application or absentee ballot envelope. And in fact, the legislature strengthened and added new protections for voters in this regard in my sponsored Senate Bill 757 of 2020 which was passed by the legislature and signed into law by the governor on October 7, 2020. This legislation made statutory changes which require clerks to notify a voter so that they have an opportunity to rectify cases in which the signature submitted does not agree sufficiently with the signature on file "as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing."

I feel strongly that the presumption of genuineness contained in these proposed administrative rules is inappropriate and not in conformance with existing Michigan election law. Nor is the provision to mandate the acceptance of a signature as genuine if it has "any" redeeming quality whatsoever. The "determination" of genuineness as provided in law should be a wholistic one to ensure that the signature - as stated in statute - "agrees sufficiently" with the signature on file. Finally, guidance to clerks that they may consider hypothetical factors such as the "possibility that the voter is disabled" without contacting the voter or having other factual grounds to make such a determination is also not consistent with existing law and constitutes an overreach in the rulemaking process which spills into the sole domain of the legislature.

Administrative rules for signature matching should pertain to signature matching (i.e. guidance to clerks with the input of handwriting experts which assists clerks in making a determination as to the genuineness of a signature). These proposed rules as written would instead serve to abrogate clerks' statutory role by presuming signatures to be valid upon receipt, accepting signatures regardless of whether they "agree sufficiently" if they have "any" redeeming quality, and by allowing clerks to guess reasons as to why a signature may not match with no further verification or grounds for that determination.

Sincerely,

Ruth A. Johnson
State Senator, 14th District
Chair, Senate Elections Committee

Cc: Representative Luke Meerman, Chairperson
Senator Jon Bumstead, Alternate Chairperson
Joint Committee on Administrative Rules

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Exhibit E

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42ND DISTRICT
STATE CAPITOL
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LANSING, MI 48909-7514

MICHIGAN HOUSE OF REPRESENTATIVES
ANN M. BOLLIN
STATE REPRESENTATIVE

PHONE: (517) 373-1784
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AnnBollin@house.mi.gov
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Oct. 1, 2021

Secretary of State Jocelyn Benson
Richard H. Austin Building
P.O. Box 30204
430 W. Allegan St.
Lansing, MI 48909

Secretary Benson:

The Department of State has proposed rules that will compromise the integrity of Michigan elections. As a former clerk for over 16 years and now serving as a legislator and Chair of the House Elections and Ethics Committee, I find it imperative that these rules not advance until we can ensure that the rules will protect the vote and the voter.

Presidential elections are always anomalies and 2020 was no different. It was an unprecedented election cycle. This was Michigan's first general election since the passage of Proposal 3 with no reason AV's and same day registration, a contentious presidential election cycle, and one that saw a record influx of outside money directly interfering with our elections. These factors, coupled with a pandemic and changes made to our election laws through executive orders or by the bench, eroded public trust and voter confidence. Politics have taken precedence over principles. Personal agendas over good governance and policy.

While Michigan's election is behind us, we need to learn from it. It is clear there are opportunities to improve our elections to help restore voter and candidate confidence.

Creating a pathway to make it easier to cheat or harder to vote should not be our goal. It should be easy to vote and hard to cheat. It is that simple. Our common goal – no matter where you stand politically – should be that every eligible voter can vote freely, secretly, independently, and securely and with confidence that their vote counted.

These proposed rules will erode the public's trust and allow political agendas to take precedence over sound public policy. We simply cannot adopt these rules in current form for the following reasons:

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MOAHR 2021-60 – Disqualification from Ballot Based Upon Contents of Affidavit of Identity

The Department of State will be doing a disservice to the people of Michigan if you enact a rule that disqualifies candidates simply because they forget to disclose every single jurisdiction in which they previously sought nomination or election – and without giving them a chance to correct mistakes caught before the filing deadline. It's overly harsh and goes against the goal of encouraging voter participation and expanding competition in races.

This same rule would put cumbersome new requirements on city and township election officials who are not responsible for campaign finance records. Campaign finance reports are filed with the Secretary of State's office or a county clerk's office.

Many campaign finance reports are not available online. This means county, township, and city staff would have to spend time and manpower to manually search records across the state on a quest to try and determine whether a candidate should be disqualified. Having to review potentially thousands of campaign finance records will be a major undertaking that will increase costs and cause delays for clerks' offices that are already understaffed.

MOAHR 2021-61 –Signature Matching for Absent Voter Ballot Applications and Absent Voter Ballot Envelopes

This rule would weaken the signature matching standards that are currently in place for absent voter applications and absent voter ballot envelopes. Signature verification is a hallmark standard that protects the voter. With the elimination of the requirement that a first-time voter must appear in person before an authorized election official since Proposal 3 to validate their identity, it is even more important that we tighten the signature rules, not loosen them.

The proposed rule definition of "signature on file" is not in accordance with state law. MCL 168. 761 (2) and MCL 168.766 (2) clearly state that signatures must be compared to the QVF or the mastercard file. It should not include the signature on the absent voter ballot application as a point of reference because that assumes that signature is valid without proper verification techniques being applied. The definition should only include those signatures that are "actually" on file either in the QVF, or the mastercard file.

This proposed rule would also create an automatic presumption that any signature on an absentee voter ballot application and absentee voter ballot envelope is valid. This rule includes overly broad "redeeming qualities" that would allow mismatched signatures to be accepted. It also includes vague "explanations for differences" that would be subject to vastly different interpretations from election officials in communities across our state.

Common sense dictates that the standard that should be followed for signature verification is that the signature should bear a "significant resemblance" to the signature on file. The rule components dealing with redeeming qualities and explanations for differences should default to a "significant resemblance" standard.

Accepting signatures where only part of the signature, a partially printed signature or a person who has changed their signature to only use initials instead of what is on file is not appropriate.

As a former clerk who verified signatures for thousands of voters, it easy to determine that a voter has signed on a rough surface but it is utterly ridiculous to think this standard should carry the same weight in

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verifying a voter's signature as signature characteristics that can readily validate a voter's signature. For example, how the I's are dotted, the capital letters are made, the spacing, etc.

We must rely on a "significant resemblance" standard. Signatures must have certain consistent markers. Again, this includes the way capital letters are written, and the way in which the letters "i" and "t" are dotted and crossed.

The makers of these proposed rules would have us believe that this standard of "initial presumption of validity" is common practice. This is false.

This alleged standard was a directive put forth by the SOS last year that resulted in a lot of confusion and potential fraud. This was challenged in Robert Genetski and Michigan Republican Party v. Jocelyn Benson and Jonathon Brater in the Court of Claims. On March 9, 2021 Judge Christopher Murray ruled that the SOS had no authority to provide this directive "because the challenged signature-matching standards were issue in violation of the Administrative Procedure Act."

As for the rules on timing of signature review and notification Rule 168.25, those provisions are set out in statute under MCL 168.761 (2) and MCL 168.765a (6) which were just signed into law last year. It should also be noted that the statute does not require the clerk to notify the voter by phone and email. It states by mail, phone, or email. This was also passed just last year and should remain as an option. Clerks have many responsibilities leading up to the election and with unreliable internet in many parts of state, we need to provide reasonable accommodations for our 1,500-plus clerks.

Rule 168.26 on curing signatures is overly simplistic. It essentially states that if the clerk thinks the signature is mismatched, they contact the voter and request they provide another signature which may also not match the signature on file. More diligence is necessary to cure mismatched signatures. It may even be on a separate piece of paper as written in the proposed rule.

Additionally, these rules should require regular updates of signatures and uniform signature verification training for election officials.

MOAHR 2021-62 Online Absent Voter Ballot Applications

The rules pertaining to online voter ballot applications are also insufficient. Local clerks currently rely upon physical signatures on absent voter applications and ballots to verify that an absentee ballot is being mailed to and voted by the person eligible to receive that ballot. These signatures are compared to the QVF and the master card if necessary. This has been a long-standing practice.

Confirmation that the signature has been checked is required to be noted on the AV application and the ballot before it is forwarded for processing should be incorporated into statute or the rule.

In 2020, the SOS directed voters to simply take a picture of their signature and submit it electronically to the local clerk. These images were often distorted, unreadable and resulted in delays in providing voters with their ballots until the signatures could be cured.

Local clerks were often not equipped with quality printers and supplies to print these "pictures." Signature curing took longer than necessary and resulted in voter confusion, duplicate applications, and disenfranchisement. The SOS's public service announcements were often confusing and misleading.

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Electronic uploads via unsecured email portals can lead to voter fraud and serve as a potential identity theft threat. It's just not that hard to find access to another person's name, address, birthday, and driver's license number. Slapping the digital signature of a voter that's already on file with the Secretary of State onto an online absentee ballot application – as Rule 168.33 proposes – strips away this important safeguard. Of course, the two signatures are going to match – they're the same exact file. There should be a two-factor authentication to prevent fraud and ensure absentee voting is a system the public can trust.

There are several other factors that make this practice difficult for clerks. Not all clerks have the same technological capabilities to move away from paper forms and applications. Rule 3 (4) which would allow voters to upload a copy of their physical signature ignores these potential technical limitations. Only a limited number of states have implemented this, and the security risks may not be fully known.

There are multiple ways for individuals to apply for an absentee ballot and with permanent AV application lists, we should not compromise perceived convenience for security.

The impact statement implies that these proposed rules are common practices in the SOS office. However, the idea of an online voter ballot application was only created last year because of a public health pandemic with no input from anyone. Something that has been used only once is not a common practice.

As I have detailed, I have serious concerns about the changes the Department of State is proposing – and so do hundreds of other residents and election officials. I believe we can work together with our local clerks to improve upon theses proposed rules and create a better product that both advances democracy AND protects the vote and ensures our elections are secure.

Sincerely,

Ann Bollin
State Representative
42nd House District

CC: Jonathan Brater

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Exhibit F

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

March 4, 2022

Senator Jon Bumstead, Chair
Representative Luke Meerman, Alternate Chair
Joint Committee on Administrative Rules
124 W. Allegan, Lansing, MI 48909

RE: Proposed Changes to JCAR No. 21-73, MOAHR No. 2021-61ST

Dear Senator Bumstead and Representative Meerman,

The Secretary of State acknowledges receipt of the changes proposed by the Joint Committee on Administrative Rules (JCAR) on February 23, 2022 to ruleset JCAR No. 21-73, MOAHR No. 2021-61ST (Ruleset). The Department appreciates JCAR's engagement with the Ruleset. For the following reasons the Secretary declines eight of JCAR's nine proposed changes, but accepts one of the proposed changes:

1. The Secretary rejects the suggestion that definition of "signature on file" in R 168.21(1)(d) be changed. JCAR's suggestion – that "[t]he e Secretary should change this definition to say that a signature on file is limited to the QVF digital signature and that a master[]card signature be considered a signature on file only when a QVF digital signature is missing" – is indistinguishable from the definition of "signature on file" in R 168.21(1)(d) as originally submitted to JCAR ("'Signature on file' means the signature of the voter contained in the qualified voter file. If the qualified voter file does not contain the voter's digitized signature, the signature of the voter contained on the master card is the signature on file."). Because the proposed change is no different than the language in the proposed rule, the Secretary rejects the change.
2. The Secretary accepts JCAR's proposal to strike the instruction in R 168.22(1) that local election officials must begin review of a voter's signature on an absent voter ballot application or an absent voter ballot envelope with a "presumption" that the signature is valid. While the language reflects current practice, and while the Secretary does not read the presumption language in the same manner the language was read by JCAR, the confusion created by the term justifies its removal from the rule. The Secretary will remove term presumption from R 168.22(1) without otherwise substantially changing the text of the Ruleset already reviewed by JCAR.
3. The Secretary rejects the suggestion that the voter contact process laid out in R 168.22(3) be made mandatory, or that the term "genuine concerns" is insufficiently clear. A clerk has a genuine concern about a voter's signature when the clerk cannot determine whether

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the signature on an absent voter ballot application or an absent voter ballot envelope does or does not match the signature on file, but still believes the voter may have signed the absent voter ballot application or the absent voter ballot envelope in question. For example, a clerk in a small jurisdiction may personally know the voter whose signature is in question, or know of a reason that the voter's signature may not match the signature on file. R 168.22(3) allows clerks in this position the option to contact the voter directly and inquire as to the origin of the signature before determining the signature's validity. In other words, the clerk may contact the voter to ask if the voter did, in fact, sign the absent voter ballot application or absent voter envelope in question, rather than requiring that the clerk reject the absent voter ballot application or absent voter envelope and requiring that the voter complete a more onerous cure process. The pre-determination contact process is made optional because it may not be practical to implement in every jurisdiction across Michigan, but it is provided as an option to avoid the burdens of unnecessary signature curing for clerks and voters alike.

4. The Secretary rejects the suggestion that the list of redeeming qualities in Rule 168.23(2) should be changed. In the Secretary's judgement, the list of redeeming qualities included in the Ruleset submitted to JCAR properly addresses the many ways in which a voter's signature may permissibly vary from the signature on file, while creating clear criteria for finding that a signature provided on an absent voter ballot application or an absent voter ballot envelope does not adequately match the signature on file. Additionally, the list of redeeming qualities correctly balances the need for a uniform floor on signature match processes across the state while allowing clerks flexibility to tailor the process to the needs of their jurisdiction. Finally, the Secretary does not find the list of redeeming qualities included in the ruleset to be confusing, nor does JCAR provide any evidence that JCAR's suggested language would add any clarity beyond the criteria included in the Ruleset.
5. The Secretary rejects the suggestion that R 168.24(1) be amended. The five factors in R 168.24(1) are similar to factors included in signature matching guidance in other states and election jurisdictions. In the Secretary's judgment, the factors provided in the rule are neither vague nor ambiguous, and JCAR provides no evidence to the contrary. Likewise, JCAR declares, with no evidence, that some of the five factors "seem unlikely" to occur. JCAR's opinion is not born out in the real world - all five factors are drawn from real-world situations that filing officials observe election after election. The Secretary also finds JCAR's suggestion that the rule should be changed because the rule envisions such common situations as a signature being made in haste, or a voter's signature changing as the voter ages, unconvincing. Finally, the Secretary disagrees with JCAR's assertion that the rule creates undue flexibility in the signature-matching process. As with R 168.23(2), the Secretary believes that R 168.24(1) strikes the correct balance between creating a uniform, statewide floor on the signature matching process while allowing local election officials to tailor the process to the needs of their communities.
6. The Secretary rejects the suggestion that the timing of the notification required in R 168.25(1) be modified. First, the statute cited by JCAR deals only with notification of an invalid signature; it is silent on the timing of the notification of the process by which a

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voter may cure an invalid signature. As a practical matter, informing voters of the cure procedure in a timely fashion makes the cure process available to more voters. Second, in the Secretary's view the statutory deadlines for informing voters of issues with their signatures creates a floor, but not a ceiling, on notification timing, and the Secretary retains the power to require a compressed, and thus a more voter friendly, notification timeline.

7. The Secretary rejects the suggestion that R 168.25(8) be changed to reduce the ways in which a voter may be informed of an issue with their signature. As explained above regarding the timing of such a notification, in the Secretary's view the statutory requirements surrounding the method of notification establish a floor, but not a ceiling, on the methods that clerks may be required to employ. The Secretary, in the role of chief election official, retains the power to require clerks take actions above the statutory floor. Additionally, the ability of the voter to take advantage of the cure process laid out in this ruleset is contingent upon quick and effective notification of an issue with the voter's ballot.
8. The Secretary rejects the suggestion that R 168.26(1)(b) provides insufficient detail about the appearance or structure of a cure form for signature match issues. Under MCL 168.31(1)(e), the Secretary has the power to "[p]rescribe and require uniform forms . . . the [S]ecretary considers advisable for use in the conduct of elections and registrations." The Secretary will use that power to create and distribute the cure form envisioned by this rule and need not include any additional detail about that form in this Ruleset.
9. The Secretary rejects the suggestion that R 168.26(3) be clarified to forbid clerks from using the mail system to cure a received absent voter ballot envelope that contains a non-matching signature or that does not bear a signature. There are no reports of this process ever being employed in Michigan, and the Secretary has no reason to believe such a process would be employed under the Ruleset. Such a process would be ineffective and result in delays that may prevent curing prior to 8 p.m. on Election Day. Moreover, such a process would be cumbersome – the clerk would need to package the absent voter ballot envelope to allow a new mailing, print the appropriate labels, and either include a second package for the voter to use to return the absent voter ballot envelope or rely on the voter to find a package to use for to return the newly-cured absent voter ballot envelope. These burdens and the accompanying complexity, combined with the lack of discernable advantage over the other methods of signature curing provided in the Ruleset, make it unlikely that a clerk would engage in multiple-mailing process with which JCAR is concerned.

This letter serves to notify JCAR that the Secretary is withdrawing this Ruleset under MCL 24.245a(10)(a) as permitted by MCL 24.245c(2), effective immediately. The Secretary will submit notice of the change to R 168.22(1) explained above to the Michigan Office of Administrative Hearings and Rules (MOAHR) for review, as required under MCL 24.245c(2). Upon receiving approval from MOAHR as to the form of the changes and a decision from MOAHR as to any burden created by the changes, the Secretary will take the appropriate action under MCL 24.245c(3) or MCL 24.245c(4).

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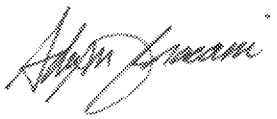
Sincerely,



Adam Fracassi
Regulatory Manager
Michigan Bureau of Elections

cc:
Katherine Wienczewski, Administrative Rules Division Director, Michigan Office of Administrative Hearings and Rules;
Deidre O'Berry, Michigan Office of Administrative Hearings and Rules;
Tim Reeves, Legal Counsel, Michigan Joint Committee on Administrative Rules;
Rachel Hughart, Legal Counsel, Michigan Joint Committee on Administrative Rules;
Members of the Joint Committee on Administrative Rules

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Exhibit G

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DEPARTMENT OF STATE

BUREAU OF ELECTIONS

SIGNATURE MATCHING FOR ABSENT VOTER BALLOT APPLICATIONS AND ABSENT VOTER BALLOT ENVELOPES

Filed with the secretary of state on

These rules take effect immediately upon filing with the secretary of state unless adopted under section 33, 44, or 45a(9) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, 24.244, or 24.245a. Rules adopted under these sections become effective 7 days after filing with the secretary of state.

(By authority conferred on the secretary of state by sections 31, 759, 761, 765, and 765a of the Michigan election law, 1954 PA 116, MCL 168.31, 168.759, 168.761, 168.765, and 168.765a)

R 168.21, R 168.22, R 168.23, R 168.24, R 168.25, and R 168.26 are added to the Michigan Administrative Code, as follows:

R 168.21 Definitions.

Rule 1. As used in these rules:

(a) "Election official" means the township, city, or county clerk or their staff responsible for verifying signatures.

(b) "Master card" means the master card document referenced in 761(2), 1954 PA 116, MCL 168.761, and 766(2), 1954 PA 116, MCL 168.766.

(c) "Qualified voter file" means the voter registration database maintained by the Secretary of State.

(d) "Signature on file" means the signature of the voter contained in the qualified voter file. If the qualified voter file does not contain the voter's digitized signature, the signature of the voter contained on the master card is the signature on file. If an absent voter ballot application signature has been compared against the signature of the voter contained in the qualified voter file or on the master card and the absent voter ballot application signature has been determined to agree sufficiently with the signature of the voter contained in the qualified voter file or on the master card, the absent voter ballot application signature is also a "signature on file" for the purpose of this ruleset. Nothing in this ruleset shall be construed to allow an absent voter ballot application signature to be used to validate an absent voter ballot envelope signature unless the absent voter ballot application signature has been found to agree sufficiently with the signature of the voter contained in the qualified voter file or on the master card.

R 168.22 Sufficient agreement of voter signature; initial presumption of validity; voter contact by clerk.

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Rule 2. (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, or for the purposes of 766(2), 1954 PA 116, MCL 168.766, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, ~~signatures must be reviewed beginning with the presumption that the voter's signature is his or her genuine, valid signature. A~~**a**n election official may **determine that**~~decline to accept~~ a signature **does not agree sufficiently with the signature on file** only ~~if,~~ after reviewing **the** ~~an~~ absent voter ballot application signature or absent voter ballot envelope signature using the process set forth in these rules~~, the election official determines that the signature does not agree sufficiently with the signature on file~~.

(2) A voter's signature should be considered invalid only if it differs in significant and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter. Exact matches are not required to determine that a signature agrees sufficiently with the signature on file.

(3) If, after examining a voter's absent voter ballot application signature or absent voter ballot envelope signature using the process set forth in these rules, an election official has genuine concerns about the signature's validity, the election official may contact the voter to address those concerns prior to determining that a signature is not valid. Any efforts by the election official to contact a voter under this subsection is not notification for the purposes of R 168.25 that the absent voter ballot application signature or absent voter ballot envelope signature has been found not to agree sufficiently with the signature on file. An election official who is unable to determine that the absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the signature on file after contacting or attempting to contact the voter for clarification under this subsection is still bound by the notification timelines set forth in R 168.25.

R 168.23 Redeeming qualities.

Rule 3. (1) In determining whether an absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with a signature on file, election officials shall consider whether any redeeming qualities are present. The bureau of elections shall provide examples of signatures with redeeming qualities and questionable signatures.

(2) Redeeming qualities include, but are not limited to, the following:

(a) Similar distinctive flourishes.

(b) More matching features than nonmatching features.

(c) Signature features do not match because it appears as if the voter's hand is trembling or shaking.

(d) Only part of the signature matches the signature on file, for example, if only the first letters of the first and last name match.

(e) Signature is partially printed but partially matches the signature on file.

(f) Signature is a recognized diminutive of the voter's full legal name.

(g) Signature omits a middle name, replaces a middle name with an initial, or replaces a middle initial with a name.

(h) Signature style has changed slightly from signature on file.

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R 168.24 Explanations for differences in signatures.

Rule 4. (1) Elections officials shall consider the following as possible explanations for the discrepancies in signatures:

(a) Evidence of trembling or shaking in a signature could be health-related or the result of aging.

(b) The voter may have used a diminutive of their full legal name, including, but not limited to, the use of initials, or the rearrangement of components of their full legal name, such as a reversal of first and last names, use of a middle name in place of a first name, or omitting a second last name.

(c) The voter's signature style may have changed slightly over time.

(d) The signature may have been written in haste.

(e) The surface of the location where the signature was made may have been rough, soft, uneven, or unstable.

(2) In addition to the characteristics listed in R 168.23(2)(f) and (g), the elections official may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained in the voter's record, and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.

R 168.25 Timing of signature review and notification.

Rule 5. (1) If the absent voter ballot application or the absent voter ballot envelope is received at least 6 calendar days prior to the election, the clerk must notify the voter of issues with the voter's signature by the end of the next business day following receipt of the application or ballot envelope.

(2) If the absent voter ballot application or the absent voter ballot envelope is received less than 5 calendar days prior to the election, an election official must review that absent voter ballot application or absent voter ballot envelope by the end of the calendar day on which the absent voter ballot application or absent voter ballot envelope was received by the clerk. If the election official determines that the voter's signature on the absent voter ballot application or absent voter ballot envelope does not agree sufficiently with the signature on file, the election official must contact the voter by the end of the calendar day on which the absent voter ballot application or absent voter ballot envelope was received by the clerk.

(3) If the absent voter ballot application or the absent voter ballot envelope is received by the clerk by 8 p.m. on the calendar day prior to an election, an election official must review the absent voter ballot application or absent voter ballot envelope before the end of the calendar day prior to the election. If the election official determines that the voter's signature on the absent voter ballot application or absent voter ballot envelope does not agree sufficiently with the signature on file, the election official must contact the voter by the end of the calendar day prior to the election.

(4) For the purposes of this rule, if the absent voter ballot application or absent voter ballot envelope comes into the physical control of the clerk's office before or during the clerk's scheduled business hours, that absent voter ballot application or absent voter

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ballot envelope is considered to have been received by the clerk on the day of submission. If an absent voter ballot application or absent voter ballot envelope comes into the physical control of the clerk's office after the end of the clerk's scheduled business hours, or if the absent voter ballot application or absent voter ballot envelope comes into the physical control of the clerk's office on a day on which the clerk does not have scheduled business hours, that absent voter ballot application or absent voter ballot envelope is considered to have been received on the first subsequent day during which the clerk has scheduled business hours.

(5) If a clerk's jurisdiction maintains one or more absent voter ballot application or absent voter ballot envelope drop boxes, each drop box must be checked by an election official for any absent voter ballot applications or absent voter ballot envelopes that have been deposited prior to the end of the clerk's scheduled business hours on every day during which the clerk has scheduled business hours. The election official checking the drop box must retrieve each absent voter ballot application or absent voter ballot envelope contained in the drop box at that time. Each absent voter ballot application or absent voter ballot envelope retrieved at that time is considered to have been received by the clerk on that day. An absent voter ballot application or absent voter ballot envelope deposited in those drop boxes on a day during which the clerk does not have scheduled business hours will not be considered to have been received by the clerk until the next day on which the clerk has scheduled business hours.

(6) An absent voter ballot envelope that is collected by an election official through the procedure laid out in 764b(4) or (5), 1954 PA 116, MCL 168.764b, shall be considered received when the election official comes into physical possession of the ballot envelope.

(7) Nothing in this rule shall prevent an election official from providing notification more quickly than mandated by this rule to a voter that the voter's absent voter ballot application signature or absent voter ballot envelope signature has been determined not to agree sufficiently with the signature on file.

(8) If the absent voter ballot application or the absent voter ballot envelope is missing the voter's signature, or if the clerk determines that the voter's signature on the absent voter ballot application or on the absent voter ballot envelope does not agree sufficiently with the voter's signature on file, the clerk shall inform the voter using any and all contact information available that their absent voter ballot application or their absent voter ballot envelope is missing a signature or has a non-matching signature, and the need to cure the signature deficiency. The clerk must notify the voter by phone and email, and, in the absence of the voter's email address, by United States mail.

R 168.26 Curing signature deficiencies.

Rule 6. (1) Any of the following methods may be used to cure a missing or mismatched signature:

(a) A voter may provide a signature on the absent voter ballot application or ballot envelope with the missing or mismatched signature;

(b) A voter may complete and submit a signature cure form prescribed by the Secretary of State; or

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(c) A voter may follow another form or method of curing a missing or mismatched signature as specified by the election official on their website or in the election official's office.

(2) A voter may cure a missing or mismatched signature up until the close of polls on Election Day.

(3) If a request if made by a voter, an election official may facilitate the cure of a missing or mismatched signature by making arrangements to

(a) collect a cure form; or

(b) provide the absent voter ballot application or absent voter ballot envelope missing a signature to the voter so that the voter might sign the absent voter ballot application or absent voter ballot envelope.

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Exhibit H

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Election Officials' Manual, Chapter 6: Michigan's Absent Voter Process

February 2024

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
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I. Introduction

Michigan's state constitution and the Michigan Election Law allow any voter to request and vote an absent voter ballot. This chapter covers the absent voter (AV) ballot process, including applications, deadlines, procedures for issuing absent voter ballots, emergency absent voter ballots, and receipt of absent voter ballots. Questions about the content of this chapter should be directed to Elections@Michigan.gov.

II. Eligibility

Every person registered to vote in Michigan is entitled to request, receive, and vote an absent voter ballot for an upcoming election. A request from a voter is not required for the Secretary of State or any county or municipal clerks to provide an absent voter application to a voter in person, electronically, or by mail with prepaid return postage.

III. Absent voter ballot application process

A voter must request their absent voter ballot in writing from their city or township clerk. An emailed request for an absent voter ballot is considered to be a written request, so long as the mandatory elements explained below are present. A clerk cannot issue an absent voter ballot in response to an oral request made over the phone or in person. However, upon receiving an oral request, a clerk may issue the voter making that request an absent voter ballot application.

A written request for an absent voter ballot is sufficient and must be honored by the clerk so long as the request includes the voter's name and a visible signature. This application may be submitted in-person or via mail, fax, email, or online at Michigan.gov/Vote. A physical written application may be scanned or otherwise digitized and emailed to the voter's local clerk, so long as the voter's signature is visible. The city or township clerk is required to issue an absent voter ballot application to any registered voter who requests one at any time during which an absent voter ballot application may be accepted.

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To ease the absent voter ballot application process for voters and clerks wishing to use a paper application, the Bureau of Elections provides a fillable absent voter ballot application form, available online.[1] Local clerks are also permitted to design their own absent voter ballot application form, so long as the form requests the voter's name and signature and follows all other requirements laid out in this chapter.

Absent voter ballot must be sent immediately

City and township clerks must immediately process absent voter applications. As noted below, to facilitate immediate delivery the clerk should send the ballot immediately after reviewing the AV ballot application, which must be done by the end of the next business day following receipt of the application in most cases. If the signature on the application agrees sufficiently with the signature on file, and it is within the 40-day period before the election listed in the application, the clerk must immediately send or deliver the ballot to the applicant. If it is sent by mail, the ballot must be sent with a postage prepaid absent voter ballot return envelope. For information on using the state-funded prepaid postage permit, see the Prepaid Postage Guide and FAQ.[2]

Voters may submit an absent voter ballot application prior to the time at which absent voter ballots are delivered to the clerk. If a voter has submitted an absent voter ballot application to the clerk and the clerk has verified the signature on that absent voter application the clerk must send the voter an absent voter ballot immediately upon delivery of absent voter ballots to the clerk.

Opportunity to cure a deficiency and notice

If the application is found to be deficient, the voter must be notified of the insufficiency and the voter's options to cure that deficiency.

Between 45 and 6 days before an election, the clerk must make a reasonable effort to verify or reject the AV ballot application received during this time by the end of the **next business day** following receipt. If the clerk determines that the voter's signature on the application is deficient, the clerk

[1] Available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/Election-Forms/Absent-Voter-Ballot-Application-Fillable.pdf?rev=c35e859a2abe40dfbca3c95027c8072a&hash=4430F4C6B6C603D59A7E196EB7E5B05A.

[2] Available on eLearning at https://mielections.csod.com/ui/lms-learning-details/app/material/f48cc379-22c8-44d1-b6b6-c169aaf51f00.

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must notify the voter by telephone, email, or text message, if available, or by U.S. mail if the other methods are unavailable.

Beginning five days before an election and on Election Day, the clerk must verify or reject the AV ballot application received during this time by the end of the **calendar day** of receipt. If the clerk determines that the elector's signature on the application is missing or does not agree sufficiently with the signature on file, the clerk must notify the elector by phone, email, or text message, if available, or by U.S. mail if the other methods are unavailable.

After 4 p.m. on the Friday before the election, if the clerk determines that the voter's signature on an AV ballot application is missing or does not agree sufficiently with the signature on file after this time, the clerk must **immediately** notify that voter of the rejection of their application.

Online absent voter ballot application

Voters who have a Michigan state driver's license or state ID can also request an absent voter ballot online at Michigan.gov/Vote. Applications submitted through Michigan.gov/Vote are signed using the signature that the voter submitted when applying for their driver's license or state identification card.[3] A digital signature is an acceptable signature for the absent voter ballot application.

Requirements for in-person absent voter ballot applications

If a voter applies to receive an absent voter ballot in person at their city or township clerk's office, the voter is required to present a picture ID or sign the *Affidavit of Voter not in Possession of Picture Identification* form. Both the acceptable picture IDs and the *Affidavit* are the same as those required for in-person voter registration and in-person voting on election day. For more information, see *Chapter 2: Voter Registration in Michigan*. A copy of the *Affidavit of Voter not in Possession of Picture Identification* is also included in Appendix I.

A voter who does not have an acceptable picture ID and who signs the *Affidavit of Voter not in Possession of Picture Identification* **must** be issued a ballot.

[3] Later in 2024, registered voters without a Michigan Driver's License or state ID will be able to apply for an AV ballot online by taking a picture of their signature and uploading it with their online application.

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A voter who applies for an absent voter ballot in person at their local clerk's office before 5 p.m. on the Friday prior to the election may choose to either receive the absent ballot at the clerk's office at the time the application is submitted or to have the clerk mail the absent voter ballot to the voter's address. A voter who applies for an absent voter ballot in person at their local clerk's office after 5 p.m. on the Friday prior to the election must receive the ballot at the clerk's office after submitting the application; the voter cannot opt for the ballot to be mailed to the voter's address. If a voter applying for an absent voter ballot does not have a valid picture ID and signs the *Affidavit of Voter not in Possession of Picture Identification*, and if the voter receives their absent voter ballot at the clerk's office, the voter's absent voter ballot must be processed as a challenged ballot. For more information on how to process a challenged ballot, see the section *Preparing a Challenged Absent Voter Ballot* below.

Voters who submit an absent voter ballot application through the mail, fax, or email, who submit the application through a municipal drop box, or who submit their application using any method that does not include an in-person interaction with their local clerk or the clerk's staff, are not required to show a picture ID to be issued their absent voter ballot.

Multiple-Election (or "Dual") absent voter ballot applications

Voters submitting an absent voter ballot application to receive an absent voter ballot for a primary election or presidential primary may opt for that application to also serve as the voter's application to receive an absent voter ballot for multiple elections – specifically, all elections following that primary or presidential primary in the calendar year. While the application has been referred to as a "dual" application in the past, when it typically applied to a primary and its corresponding general election, the application now functions as a multiple-election application. For example, a voter can submit a single absent voter ballot application for both the August primary election and the November general election. A voter could also submit a single absent voter ballot application for a presidential primary election and every election that follows it, which may include a May regular election, August primary election, and November general election. The multiple-election or "dual" application could also include any special elections that follow the primary or presidential primary.

A voter may also choose to submit their absent voter ballot application for only the primary election. A voter may request their absent voter ballot

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application not be treated as a multiple-election or dual application for any reason, including because the voter wishes to vote in person in certain elections. The number of voters who submit these types of applications will likely decline in future years as more voters join the permanent ballot list, described further below.

Any absent voter ballot application form developed by a local clerk must allow voters to select from the options described.

Accessible absent voter ballot applications

Voters with print disabilities can apply for an accessible electronic absent voter ballot through the Democracy Live OmniBallot program, which is available at Michigan.Gov/Vote.

Print disabilities are disabilities that interfere with the effective reading, writing, or use of printed material. This definition includes persons who are blind or visually impaired, those with learning disabilities, as well as those with a physical disability that interferes with holding or manipulating paper or a pen and pencil.

Accessible applications must include the voter's Michigan driver's license number, state ID number, or the last four digits of the voter's Social Security Number along with other voter registration information. Accessible applications do not need to be signed. When voters complete the application for an accessible ballot, the Bureau of Elections verifies the information provided matches the voter's QVF information and the application is added to the voter's QVF record. The Bureau of Elections then generates the voter's ballot in the OmniBallot platform. Finally, the Bureau emails the clerk two links: one for the clerk to verify the OmniBallot ballot is accurate, and one for the voter to access the ballot. The Bureau also provides includes instructions on how to use the OmniBallot system in this email.

When a clerk receives the email, the clerk should first open the designated clerk link and verify that the ballot is accurate. Next, the clerk should email the designated voter link and instructions on how to use the OmniBallot system to the voter. The instructions supplied in the email from the Bureau to the clerk should appear in the body of the email sent to the voter. Finally, the clerk marks in QVF that the voter has been sent an accessible ballot and records the letter "A" followed by the ballot number (for example A0001). The voter completes the ballot on the OmniBallot platform, prints it, and returns the completed ballot to the clerk in a signed envelope.

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Absent ballot applications received from military and overseas voters

If a voter applies for an absent voter ballot using a Federal Postcard Application (FPCA) or submits a Federal Write-in Absentee Ballot (FWAB), the voter should be processed as a MOVE voter. If a voter applies for an absent voter ballot using a regular application and lists a foreign address as the mailing address or temporary address, the voter should also be processed as a MOVE voter. If the voter provides an address in the United States that appears to be a military address, the clerk should contact the voter to determine if the voter is a MOVE voter. For instructions on receiving absent voter ballot applications and issuing absent voter ballots to military and overseas voters, see *Chapter 7: Federal Registration and Absent Voter Programs*.

IV. Maintaining a permanent ballot list

When applying for an absent voter ballot, a voter may also request to receive an absent voter ballot by mail for all future elections. Once this application is verified, the voter becomes a permanent mail ballot voter and must be sent an absent voter ballot for every election. The local clerk must retain these applications. In the future, these applications or a report verifying that a voter on the permanent ballot list has moved will be able to be added to the voter's record in QVF to more easily document a voter's move to different jurisdictions.

The Secretary of State or appropriate clerk can remove a voter from the permanent ballot list only in the following circumstances:

- The voter submits a signed request to remove their name from the permanent ballot list.
- The voter is no longer qualified to vote in Michigan.
- The Secretary of State or appropriate clerk receives reliable information that the voter has moved residences to another state, or has moved to another residence within the state without updating the voter's registration address.
- The voter does not vote for 6 consecutive years. If an application is rescinded for this reason, the clerk must send a notice to the voter that the application has been rescinded.

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Presidential primary ballot selection form

For presidential primary elections, the two major political parties have separate ballots with their party's prospective candidates, and each voter may select only one party's ballot to vote. To indicate which partisan primary they intend to vote in, a permanent mail ballot voter must submit a presidential primary ballot selection form to their clerk online, by mail, or in person.

Clerks will send presidential primary ballot selection forms with prepaid return postage to all permanent mail ballot voters who have not made a ballot selection no later than 60 days before the presidential primary. If a voter becomes a permanent mail ballot voter after this deadline, the clerk must immediately send a ballot selection form with prepaid return postage.

Clerks must send ballot selection forms to the same addresses that voters requested for mailing absent voter ballots.

Clerks must notify permanent mail ballot voters who have not made of ballot selection by the 40th day before the presidential primary of the requirement to make a selection in order to receive a presidential primary ballot. The notification must be by phone, email, and text message if available. If the voter's phone number and email address are unavailable, clerks must send notice by mail, and may additionally notify the voter by other available methods.

If the presidential primary has offices or proposals on the ballot other than President of the United States, a separate ballot with only those other offices or proposals will be mailed to the voter, along with a notice indicating that the voter did not make a presidential primary ballot selection and the process by which the voter can still participate in the presidential primary election, including early voting or voting in-person on Election Day.

The Bureau of Elections will provide future instructions regarding the discontinuation of the permanent absent voter ballot *application* list; until that time, clerks should continue to issue absent voter ballot applications for all elections to those on the list.

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V. Deadlines for requesting an absent voter ballot

There are several deadlines affecting the submission of absent voter ballot applications. The municipal clerk, or authorized personnel appointed by the clerk, must be available in the election official's office or at another publicly published or posted location to accept and process absent voter ballot applications at the deadlines laid out in this section.

Deadline to request an absent voter ballot be mailed to a voter

If a voter wishes to have their absent voter ballot mailed to their address, the absent voter ballot application must be received by the clerk no later than 5 p.m. on the Friday prior to the election.

While a voter has the legal right to request that their absent voter ballot be mailed to their address so long as the clerk receives the voter's absent voter ballot application by 5 p.m. on the Friday prior to the election, the Bureau recommends that clerks encourage voters submitting near the deadline to request their absent voter ballot be issued in person at the clerk's office to avoid mail delays or other issues.

If a voter's absent voter ballot application is received by the clerk after 5 p.m. on the Friday prior to the election and indicates that the voter wishes the absent voter ballot to be mailed to the voter's address, the clerk should alert the voter that their absent ballot request cannot be fulfilled. The clerk should inform the voter that the voter may appear in person at the clerk's office to request their absent voter ballot or may vote in person at their early voting site, if early voting is available for that election or at their polling place on Election Day. An absent voter ballot application rejected as untimely for one election must still be processed for any future elections listed on the application.

Deadline to request an absent voter ballot be issued to the voter at the clerk's office

Absent voter ballots can be issued to a registered voter at the clerk's office at any time until 4 p.m. on the day prior to the election. A voter may then complete and submit the absent voter ballot at the clerk's office, return the absent voter ballot to the clerk or an absent voter ballot dropbox until 8

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p.m. on Election Day, or tabulate the absent voter ballot at the voter's polling place on Election Day.

Every voter waiting in line at their clerk's office to request an absent voter ballot at 4 p.m. on the day prior to the election must be issued an absent voter ballot and allowed to complete the ballot in the clerk's office.

Same day voter registration

A voter who registers to vote or who updates their registration on Election Day by appearing in person at their clerk's office is also eligible to request and receive an absent voter ballot until 8 p.m. on Election Day. If the voter requests an absent voter ballot in person at the clerk's office on Election Day after registering to vote or updating their voter registration, the voter must complete the absent voter ballot in the clerk's office and must return the completed ballot to the clerk prior to leaving the clerk's office.

Every person waiting in line to register to vote or to update their voter registration at 8 p.m. on Election Day, and who is able to meet the requirements to register to vote, must be given the opportunity to request an absent voter ballot and allowed to complete the ballot in the clerk's office, including after 11:59 p.m. on Election Day if necessary.

Election Day vote centers

Cities or townships that processed at least 500 Election Day voter registrations in either or both of the previous two November general elections are also able to establish an Election Day vote center to tabulate ballots for voters who register or update their registration on Election Day.

Election Day vote centers function as polling places and must be located in the same building where the city or township clerk provides Election Day registration, which may include the clerk's satellite office.

For municipalities with an Election Day vote center, every person waiting in line to register or update voter registration at 8 p.m. on Election Day, and who is able to meet the requirements to register to vote, must be allowed to complete that transaction and to cast a ballot at the Election Day vote center, including after 11:59 p.m. on Election Day if necessary.

Deadline to submit an emergency ballot request

A voter may make an emergency request for an absent voter ballot if the voter cannot vote in person on Election Day because the person has become

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physically disabled or because of a family death or illness, the timing of which made it impossible for the voter to apply for an absent voter ballot by the statutory deadline.

A voter facing an emergency prior to 5 p.m. on the Friday before Election Day may submit a normal absent voter ballot application. An emergency absent voter ballot request must be made after 5 p.m. on the Friday before the election and before 4 p.m. on Election Day.

To submit an emergency absent voter ballot, the voter must complete a written request that includes the following elements:

- The voter's name and address.
- A statement that the voter is qualified to vote in the election.
- A statement indicating whether the emergency is caused by a physical disability or by a family death or illness requiring the voter to be absent from the jurisdiction on Election Day.
- A statement that the emergency occurred at a time that made it impossible for the voter to submit an absent voter ballot application by the statutory deadline.

Clerks may, but are not required to, provide an Emergency Absent Voter Application form that a voter may use in lieu of creating the written statement described above.

The voter requesting the emergency absent voter ballot may authorize another person to receive the voter's absent voter ballot, and to deliver that absent voter ballot to the voter. The authorization to receive an emergency absent voter's ballot and to deliver that ballot to the voter must be in writing and must be signed by the applicant. An emergency absent voter ballot may also be delivered by hand to the applicant by a person authorized by the clerk to handle this task.

VI. Required office hours on the weekend before the election

The clerk or a deputy clerk of each city or township must be available at the clerk's office to issue and receive absent voter ballots applications and absent voter ballots for any combination of at least 8 hours on the Saturday or Sunday immediately before Election Day. The clerk is required to publicly

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post the hours at which the clerk will be available to issue and receive absent voter ballots applications and absent voter ballots. The clerk must also enter these hours into *QVF Clerk Contacts* at least 30 days prior to Election Day.

VII. Restrictions on possession of signed absent voter ballot applications

Only the following persons may lawfully possess a signed absent voter ballot applications:

- The voter requesting an absent voter ballot.
- A member of the applicant's immediate family.
- A person residing in the applicant's household.
- A person handling of mail during the course of their employment.
- A person registered to vote in Michigan who was asked to submit the absent voter ballot application by the applicant.
- An authorized election official.

A person registered to vote in Michigan who returns an absent voter ballot application at the request of the applicant must sign the *Certificate of Authorized Registered Elector Returning Absent Voter Ballot Application*. If the application the person is returning is made on the absent voter ballot application form provided by the Bureau of Elections, the Certificate appears on the back of that form. Otherwise, the person should submit a completed, signed, and dated version of the following text:

> *I certify that my name is ..... , and my address is .....; that I am delivering the absent voter ballot application of ..... at the applicant's request; that I did not solicit or request to return the application; that I have not made any markings on the application; that I have not altered the application in any way; that I have not influenced the applicant; and that I am aware that a false statement in this certificate is a violation of Michigan election law.*

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VIII. Absent voter ballot application signature verification requirement

When a clerk receives a completed absent voter ballot application, the clerk must check that the signature appearing on the application matches the signature on the applicant's voter registration record to verify the applicant's identity. If the application contains a digital image of the voter's signature, which may occur because the voter has faxed or scanned and emailed an application or because the voter has applied online using the voter's driver's license signature, the clerk should compare the digital signature image to the voter's signature on file. A signature is invalid only if it differs in significant and obvious respects from the voter's signature on file. Slight dissimilarities must be resolved in favor of the voter, and an exact signature match is not necessary to determine that a signature agrees sufficiently with the signature on file.

If the clerk determines that a signature on an application does not match the individual's voter registration record, or if the application is not signed, the clerk should notify the voter of the issue and of the voter's options to cure the issue as described in the "Opportunity to cure a deficiency and notice" section of this chapter. For further guidance on reviewing signatures, contacting voters, and curing missing or mismatched signatures, refer to Signature and Cure Guidance[4] in the eLearning Center.

An absent voter application with Power of Attorney (POA) signature in lieu of the voter's signature cannot be accepted. Michigan election law allows a voter unable to sign due to physical disability to make a "mark" or to use a signature stamp.

IX. Issuance of absent voter ballots

An absent voter ballot application must be processed immediately upon receipt of the application by the clerk. Absent voter ballot applications that were not submitted in person at the clerk's office should be processed in the order they are received. An absent voter ballot should be immediately issued to a voter who submits their absent voter ballot application in person at the clerk's office.

[4] Available in the eLearning Center at at https://mielections.csod.com/ui/lms-learning-details/app/material/ae9edc3b-8bfd-4494-a5c1-eb7022679d7a.

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A voter can request that an absent voter ballot be mailed to the voter's registration address or to a different address as provided on the absent voter ballot application. Additionally, an absent voter ballot may be mailed or delivered to a post office box if the post office box is where the voter normally receives mail and the voter does not receive mail at their registration address.

Absent voter ballots cannot be sent by forwardable mail. Absent voter ballot envelopes should be printed with the postal instruction "Return Service Requested."

Campaign brochures or any material other than the absent voter ballot and instructions explaining how to complete and return the absent voter ballot may not be mailed with absent voter ballots. Additionally, the name of an elected or appointed official cannot appear on any ballot-related materials. Ballot-related material is defined as anything distributed with an absent voter ballot, including the instructions, the secrecy sleeve, the envelope in which the absent voter ballot is mailed, and the absent voter ballot return envelope.

An absent voter ballot must be mailed to the voter if there is an adequate amount of time for the voter to receive the ballot by mail, vote the ballot, and return the ballot to the clerk prior to 8 p.m. on Election Day. To avoid any appearance of impropriety, absent voter ballots should not be delivered by hand when the voter has requested the ballot be mailed unless the hand delivery of the ballot is necessary to ensure the timely return of the ballot.

X. Anatomy of an absent voter ballot

Each absent voter ballot mailing includes the following elements placed inside the outer mailing envelope. The clerk should check that each of the elements is present in every envelope before the envelope is mailed to the voter. Examples of each element may be found in *Appendix I*:

- Ballot instructions appropriate for election being held.
- Instructions for Absent Voters (usually printed on the secrecy sleeve).
- Secrecy Sleeve (if required to cover ballot markings).
- Correct Ballot (be mindful of ballot splits within a precinct caused by different geography such as school districts, villages, county commission districts, etc.).

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- Ballot Return Envelope addressed to the local clerk's office, including the voter signature certification.

XI. Absent voters who receive assistance

If an absent voter receives assistance from another person when marking their absent voter ballot, the individual who provided assistance must sign the certificate printed on the outside of the ballot return envelope. The certificate must be signed by any person who assists an absent voter in marking their ballot, including the voter's spouse, a member of the voter's household, an election official, or an individual employed as an election assistant.

XII. Return of absent voter ballots

Absent voter ballots must be returned to the clerk by 8 p.m. on Election Day. The clerk must make arrangements with the post office to pick up any absent voter ballots which are received by the post office after the post office on Election Day has made its final mail delivery of the day to the clerk's office. The clerk and the post office should also coordinate to ensure that the post office conducts a final check of its premises for any absent ballots delivered to the post office prior to 8 p.m., to ensure those ballots are delivered to the clerk by the deadline.

The 8 p.m. deadline applies to absent voter ballots returned to a clerk's office, a satellite clerk's office, or a ballot drop box. Voters in line to register to vote at 8 p.m. on Election Day must be allowed receive, complete, and return an absent voter ballot after registering to vote, including after 11:59pm if necessary.

Individuals allowed to return an absent voter ballot

Only certain persons are legally allowed to return a completed absent voter ballot. Persons are who may return a completed absent voter ballot are limited to:

- The voter.
- A member of the voter's immediate family.

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- A person residing in the voter's household who the voter has been asked to return the voter's completed absent voter ballot.
- A person handling of mail during the course of their employment.
- An authorized election official.

Tabulation of an absent voter ballot at an early voting site or Election Day polling place

A voter may also bring their own completed absent voter ballot to their early voting site or Election Day polling place to place into a tabulator to be counted. The absent voter ballot should be concealed inside its secrecy sleeve and the voter should indicate to the election inspectors that they would like to tabulate their ballot. For more information about processing these voters, refer to *Chapter 11: Election Day* and a forthcoming chapter on early voting.

XIII. Retrieval of absent voter ballot by election official

A clerk is required to retrieve a voter's completed absent voter ballot from the voter if all of the following conditions are satisfied:

- The clerk issued the absent voter ballot to the voter.
- The voter is unable to return the ballot using any permitted return options.
- The voter contacts the clerk to request retrieval of the voter's completed absent voter ballot before 5 p.m. on the Friday immediately prior to Election Day.
- The clerk does not need to travel outside of their jurisdiction to retrieve the ballot.

A clerk is permitted, but not required, to retrieve a completed absent voter ballot from a voter if the voter contacts the clerk to request retrieval after 5 p.m. on the Friday prior to Election Day or if the absent voter ballot is located outside of the clerk's jurisdiction.

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Clerks or election assistants authorized to pick up absent voter ballots must carry appropriate credentials and show those credentials to the voter at the voter's request. An election official should not retrieve voter's completed absent voter ballot without a request for retrieval from the voter.

XIV. Ballot drop boxes

Absent voter ballot drop boxes allow voters, or anyone authorized to be in possession of a voter's completed absent voter ballot or absent voter ballot application, to quickly and easily deliver completed absent voter ballots to the clerk. Proposal 2022-2 guarantees the right of all voters to a state-funded absent voter drop box. Each municipality must have at least one absent voter drop box, and for municipalities with more than 15,000 voters, one absent voter drop box for each 15,000 registered voters. Voters may use drop boxes to return absent voter ballot applications and marked absent voter ballots. For Bureau of Election guidance on locations, security, staffing and ballot retrieval, signage, and other considerations, see Ballot Drop Box Guidance in the eLearning Center. Absent voter ballot drop boxes must be distributed equitably throughout the municipality. In determining AV drop box locations, municipal clerks must, at minimum consider all of the following:

- Population density and distribution.
- Proximity to public transportation and parking.
- Accessibility, including for electors with disabilities.
- Any other factors the clerk considers relevant.

The Michigan Election Law requires that absent voter ballot drop boxes conform to the following requirements:

All AV drop boxes must be:

- Clearly labeled as an Absent Voter Ballot Drop Box that can be used to return completed absent voter applications and voted absent voter ballots.
- Securely locked, affixed to the ground or another stationary object and designed to prevent removal of applications and ballots when locked.
- Secured to prevent the AV drop box from being removed from its location.

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- Accessible 24 hours each day during the 40 days before Election Day, and be accessible until 8 pm on election day.
- Equipped with a single slot or mailbox-style lever to allow absent voter ballot applications and absent voter ballot return envelopes to be placed in the AV drop box, and all other openings on the AV drop box must be securely locked.
- Regularly inspected to confirm that the AV drop box complies with all requirements, beginning 75 days before each election and until election day.
- Located in a publicly accessible, well-lit area with good visibility.
- Video monitored by the municipal clerk to ensure effective monitoring of that AV drop box, beginning 75 days before each election and until Election Day.
    - Only for AV drop boxes that were not ordered or installed before October 1, 2020.
    - Beginning January 1, 2026, all AV drop boxes must be video monitored, regardless of when it was ordered or installed.
- Subject to immediate reporting to local law enforcement if vandalism or suspicious activity occurs in the immediate vicinity of the AV drop box.

Only a clerk, deputy clerk, or sworn member of the clerk's staff can collect absent ballots from the drop box. Ballots that have been deposited into ballot drop boxes by 8 p.m. on Election Day must be collected and counted.

75 days before each election and until election day, an authorized individual must regularly inspect each absent voter ballot drop box used in that city or township to confirm that the absent voter ballot drop box complies with all above requirements.

Beginning 35 days before each election and until election day, an authorized individual must collect, on any day in which the city or township clerk's office is open for business, the election materials deposited in an absent voter ballot drop box located in the city or township. Those materials must be immediately returned to the city or township clerk's office.

All absent voter ballot return envelopes collected from an absent voter ballot drop box must be transported in an approved ballot container.

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Collection from any drop box located off grounds of the city or township clerk's office or satellite office must be documented utilizing the collection form available in the eLearning Center.

XV. Military and Overseas Voters and accessible absent voter ballot envelopes

The completed ballots of military and overseas voters, as well as the completed ballots of voters using accessible ballots, will not arrive in a standard ballot return envelope. These voters receive their ballots electronically and do not receive an absent voter ballot return envelope, so they cannot return their ballot in such an envelope. Federal Write-In Absentee Ballots (FWAB), MOVE ballots that have been printed and returned, and accessible ballots that have been printed and returned will likely arrive in plain envelopes. Clerks should check their incoming mail for plain envelopes that look like they may contain the completed ballots of military and overseas voters, as well as the completed ballots of voters using accessible ballots. Some indicators that a plain envelope may contain such a ballot include envelopes that have "Official Ballot Material" written on them and envelopes with a signature on the back of the envelope.

If an envelope containing the completed ballots of a military and overseas voter, or the completed ballot of a voter who used an accessible ballot, is accidentally opened before Election Day, the envelope should be immediately resealed and placed with other returned absent voter ballots for processing on Election Day.

XVI. Ballot verification requirement

A voter must sign the certificate on the absent voter ballot envelope prior to returning the envelope containing the ballot to the clerk. By signing the certificate, the voter verifies the voter's eligibility to vote, the secrecy of the voter's ballot, and the lawful return of the voter's ballot.

An absent voter application with Power of Attorney (POA) signature in lieu of the voter's signature cannot be accepted. The Michigan Election Law allows a voter unable to sign due to physical impairment to make a "mark" or to use a signature stamp.

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Upon receiving a returned absent voter ballot envelope, the clerk must verify the voter's identity by checking that the voter's signature on the certificate matches the voter's signature saved in the QVF. Just as with absent voter ballot applications, a signature is invalid only if it differs in significant and obvious respects from the voter's signature on file. Slight dissimilarities must be resolved in favor of the voter, and an exact signature match is not necessary to determine that a signature agrees sufficiently with the signature on file. Because signatures on absent voter ballot applications have already been checked against the QVF and found to match prior to the absent voter ballot being issued, a clerk may check the signature on the absent voter ballot envelope against the voter's signature on their absent voter ballot application in lieu of checking the signature against the voter's signature stored in the QVF.

If the voter fails to sign the certificate or if the signature on the certificate does not match the signature on the voter's registration record, the ballot cannot be removed from the envelope, transported to an absent voter counting board, or counted unless the signature mismatch is cured. The ballot should be marked rejected in the QVF. **The clerk should immediately contact the voter and instruct the voter to visit the clerk's office to sign their absent voter ballot envelope or cure the mismatched signature on the absent voter ballot envelope.** If the voter is unable to sign their absent voter ballot envelope or otherwise cure their signature, the original ballot may be spoiled and the voter may be reissued a replacement ballot. The voter must make a request for a new ballot in writing.

For further guidance on reviewing signatures, contacting voters, and curing missing or mismatched signatures, refer to Signature and Cure Guidance[5] in the eLearning Center.

XVII. Spoiling an absent voter ballot

Voters have a right to spoil an absent voter ballot that has been received but not tabulated by the clerk for any reason. After the ballot has been spoiled, the voter must be issued a new absent voter ballot. The voter's request to spoil their ballot must be made in writing and must be signed by the voter.

[5] Available in the eLearning Center at https://mielections.csod.com/ui/ims-learning-details/app/material/ae9edc3b-8bfd-4494-a5c1-eb7022679d7a.

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There are three ballot-spoiling scenarios, and each has different timing requirements. Those scenarios are explained below:

Voter did not receive their absent voter ballot

A voter who requested but never received their absent voter ballot may request that the ballot sent to them by the clerk be spoiled and a new ballot be issued. If the request is made before 5 p.m. on the second Friday prior to the election, the voter may request the clerk mail the newly issued absent voter ballot to the voter, or the voter may opt to complete the ballot in person at the clerk's office. If the request is made after 5 p.m. on the Friday before the election, but before 4 p.m. on the day before the election, the voter may only be issued a new ballot by appearing in person at the clerk's office. It the request is made on or before the Sunday prior to the election, the voter may leave the clerk's office with their newly issued absent voter ballot. If the request is made on the day prior to the election, the voter must complete and return the newly issued absent voter ballot in the clerk's office; the voter cannot leave the office with the ballot.

A voter who requested but not receive their absent voter ballot may opt to vote in person at their polling place on Election Day instead of requesting a new absent voter ballot. The voter will be asked to complete an *Affidavit of Lost or Destroyed Absent Voter Ballot* at their precinct when they appear to vote, and then will be permitted to cast a normal ballot. A voter who signs the *Affidavit of Lost or Destroyed Absent Voter Ballot* may be subject to challenge by a properly credentialed election challenger as an absent voter in the polls.

Voter received but did not return their absent voter ballot

A voter who requested and received, but did not return, their absent voter ballot may request that the ballot sent to them by the clerk be spoiled and a new ballot be issued. If the request is made before 5 p.m. on the Friday prior to the election, the voter may request the clerk mail the newly issued absent voter ballot to the voter, or the voter may opt to complete the ballot in person at the clerk's office. If the request is made after 5 p.m. on the Friday before the election, but before 4 p.m. on the day before the election, the voter may only be issued a new ballot by appearing in person at the clerk's office. It the request is made on or before the Sunday prior to the election, the voter may leave the clerk's office with their newly issued absent voter ballot. If the request is made on the day prior to the election, the voter

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must complete and return the newly issued absent voter ballot in the clerk's office; the voter cannot leave the office with the ballot.

A voter who requested and received, but did not return, their absent voter ballot may opt to vote in person at their polling place on Election Day instead of requesting a new absent voter ballot. The voter will be asked to complete an *Affidavit of Lost or Destroyed Absent Voter Ballot* at their precinct when they appear to vote, and then will be permitted to cast a normal ballot. Alternatively, the voter may surrender their absent voter ballot to the election inspectors at the precinct, and then will be permitted to cast a normal ballot.

A voter who surrenders their absent voter ballot to election inspectors in the polling place is not subject to a challenge as an absent voter in the polls. A voter who signs the *Affidavit of Lost or Destroyed Absent Voter Ballot* may be subject to challenge by a properly credentialed election challenger as an absent voter in the polls.

Voter received and returned their absent voter ballot

Voter's signature verified by clerk

A voter who requested, received, and returned their absent voter ballot, and whose ballot was accepted by the clerk after the voter's signature was found to match the signature on file with the clerk, may request that their returned absent voter ballot be spoiled by the clerk and that the clerk issue them a new absent voter ballot. If the request is made before 5 p.m. on the second Friday prior to the election, the voter may request the clerk mail the newly issued absent voter ballot to the voter, or the voter may opt to complete the ballot in person at the clerk's office. A voter cannot request that a returned and accepted absent voter ballot be spoiled after 5 p.m. on the second Friday prior to Election Day. Additionally, once tabulated, verified ballots cannot be spoiled for any reason.

A voter who requested, received, and returned their absent voter ballot, and whose ballot was accepted by the clerk after the voter's signature was found to match the signature on file with the clerk, cannot request that their ballot be spoiled on Election Day. Such a voter is not eligible to cast a ballot at their precinct on Election Day.

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Voter's signature not verified by clerk

A voter who requested, received, and returned their absent voter ballot, but whose ballot was not accepted by the clerk after the voter's signature was found not to match the signature on file with the clerk, is treated in the same manner as a voter who requested but never received their absent voter ballot for the purposes of ballot spoilation. Such a voter may request that their ballot be spoiled. If the request is made before 5 p.m. on the Friday prior to the election, the voter may request the clerk mail the newly issued absent voter ballot to the voter, or the voter may opt to complete the ballot in person at the clerk's office. If the request is made after 5 p.m. on the Friday before the election, but before 4 p.m. on the day before the election, the voter may only be issued a new ballot by appearing in person at the clerk's office. It the request is made on or before the Sunday prior to the election, the voter may leave the clerk's office with their newly issued absent voter ballot. If the request is made on the day prior to the election, the voter must complete and return the newly issued absent voter ballot in the clerk's office; the voter cannot leave the office with the ballot.

A voter whose returned ballot was not accepted by the clerk after the voter's signature was found not to match the signature on file with the clerk may opt to vote in person at their polling place on Election Day instead of requesting a new absent voter ballot. The voter will be asked to complete an *Affidavit of Lost or Destroyed Absent Voter Ballot* at their precinct when they appear to vote, and then will be permitted to cast a normal ballot.

In addition to spoilation, a voter whose returned ballot was not accepted by the clerk after the voter's signature was found not to match the signature on file with the clerk may appear in person at the clerk's office to cure the signature issue by verifying that the signature on the absent voter ballot envelope is the voter's signature. Voters may cure a missing or mismatched signature on a returned ballot envelope until 5 pm on Friday after Election Day. The voter should contact their clerk for more information about the signature cure process.

Surrendered ballots

A voter who has received an absent voter ballot but who wishes to vote a new ballot in person at their polling place on Election Day may surrender their absent voter ballot to their clerk prior to Election Day or may surrender their absent voter ballot to election inspectors at their polling place on Election Day. To surrender an absent voter ballot, the voter should write "I am surrendering my ballot" on the absent voter ballot envelope and sign the

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envelope. A clerk receiving a surrendered ballot prior to Election Day should mark the ballot as surrendered in the QVF. A voter who has surrendered their absent voter ballot cannot be issued a new absent voter ballot; the voter's only opportunity to vote after surrendering their absent voter ballot is to appear at their polling place on Election Day.

XVIII. Deceased or incarcerated absent voters

If a clerk receives notice that a voter has died within the 40 days before an election, they must check whether that voter was issued an absent voter ballot. If the deceased notice comes after the voter has completed and returned their absent voter ballot, but prior to that ballot's tabulation, the local clerk should reject and should not tabulate the absent voter ballot.

Additionally, if a clerk is certain that a voter is currently serving a sentence in jail or prison, and is thus ineligible to vote, the voter's ballot should be rejected. In either case, the clerk should write "rejected as illegal" on the absent voter ballot return envelope and record the rejection and the reason for the rejection in the QVF.

A person who is incarcerated in a jail awaiting trial or sentencing is permitted to vote in Michigan. A clerk should not reject a person's ballot solely because the person is currently incarcerated. Instead, the clerk must verify that the person has been found guilty and has been sentenced to a term of incarceration before the clerk rejects the person's ballot.

XIX. Posting absent voter information

For any election involving a state or federal office, clerks are required to make the following public postings:

- Before 8:00 a.m. on Election Day, the clerk must publicly post the number of absent voter ballots distributed to absent voters, the number of absent voter ballots returned prior to Election Day, and the number of absent voters delivered to absent voter counting boards for tabulation on Election Day.
- Immediately upon completion of all precinct returns, the clerk must publicly post the total number of absent voter ballots tabulated for the election.

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The Bureau has developed a form that clerks may use to report this information; that form is included in *Appendix I*.

XX. Required recording of AV Ballot information in the QVF

Clerks are required to immediately record the sending and receipt of absent voter ballots in the Absent Voter module of the Qualified Voter File. This module provides an easy and efficient way for election officials to print absent voter ballot applications and ballot labels and to manage the list of voters sent ballots as required by law. Immediate recording of sent and received absent voter ballots also allows voters to track the status of their absent voter ballot via Michigan.Gov/Vote. Information regarding which absent ballots have been sent and received is also included in the ePollbook download of voter information in the Electronic Poll Book on Election Day. This information must be kept current to ensure that election inspectors do not issue an in-person ballot to any voter whose absent voter ballot has already been returned to and accepted by the clerk.

XXI. Voting after registering to vote or updating voter registrations on Election Day

In Michigan, voters may register to vote and obtain an absent voter ballot in the same transaction. The period where a voter may register and obtain an absent voter ballot starts 40 days prior to the election and runs until 8 p.m. on Election Day. While the deadline for persons who are registered to vote at their current address to request an absent voter ballot is 4 p.m. on Election Day, eligible persons may register to vote or update their registration to reflect their current address and receive an absent voter ballot until 8 p.m. on Election Day. A person registering to vote or updating their address on Election Day also has the option of bringing the QVF receipt printed after their successful registration to their precinct and casting a ballot in person at that precinct on Election Day.

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The availability of absent voter ballots in Michigan tightens the timelines for clerks to prepare electronic poll books containing all relevant absent voter ballot information for Election Day. Clerks in jurisdictions with 50 or fewer precincts are now required to export electronic pollbook lists from the QVF after 4:00 p.m. on the day before the election to ensure that the electronic poll book has the current information for all voter who requested absent voter ballots or who registered to vote and cast an absent voter ballot on the Monday prior to election.

XXII. Issuing AV Ballots to election-eligible voters who have moved

Voters frequently move during the 40-day absent voting period that precedes every election. Consult the following graphic to determine where such voters are eligible to vote and how the clerk of each jurisdiction should process those voters.

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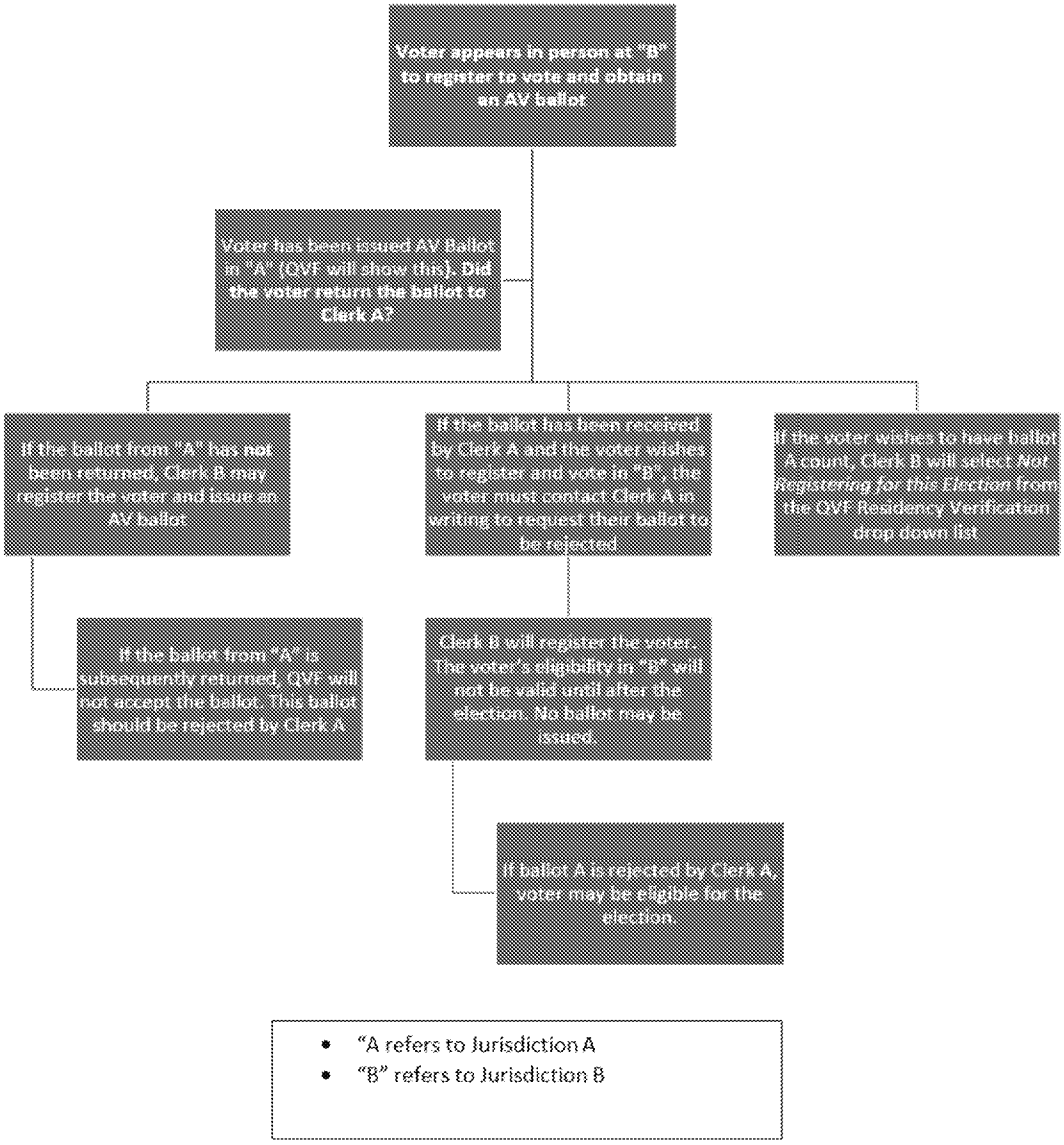

XXIII. Reporting postal service issues

Any clerk experiencing recurring issues with mail delivery may report those issues to electionmail.org. This website aggregates and tracks postal issues and the U.S. Postal Service's response. Reports made to electionmail.org by election officials in Michigan are forwarded to the Bureau of Elections. Issues that may be reported at electionmail.org include:

- Delivery delays;
- Damaged mail;

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- Lost mail;
- Undeliverable or returned mail; and
- Misdirected mail.

Please be as detailed as possible when reporting issues to electionmail.org. If possible, include specific addresses and mailing dates to assist USPS in identifying which postal facilities may be involved.

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STATE OF MICHIGAN
COURT OF CLAIMS

Bundle Cover Sheet

Lower Court:	L Ct No.:	COC No.:
		TEMP-7VMLGQ9O

Case Title:
REPUBLICAN NATIONAL COMMITTEE v. JOCELYN BENSON

Priority:	Filing Option:
NONE	File Only

Filer Information

Filer
Robert Avers
350 S. Main Street, Ste. 300
Ann Arbor, MI 48104

ravers@dickinsonwright.com

Attorney
Robert Avers, P75396(MI)
350 S. Main Street, Ste. 300
Ann Arbor, MI 48104

ravers@dickinsonwright.com

Filing Summary

Filing Type	Filing Name	Fee
Summons and Complaint	4875-2089-0290 v1 Summonses, Verified Complaint, and Exhibits	$150.00
	eFiling System Fee:	$25.00
	NON-REFUNDABLE Automated Payment Service Fee:	$5.25
	Total:	**$180.25**

Alternate Payment Reason: None

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The document(s) listed above were electronically filed with the Michigan Court of Claims.

TEMP-7VMLGQ9O-41350767

Obtained by Judicial Watch, Inc. v. Michigan FOIA

TrueFiling Case Initiation - Summons and Complaint

Case Title: REPUBLICAN NATIONAL COMMITTEE V. J(

Case Type: MZ

Case Description: Other Damage Suits: All other claims not otherwise coded

Party 1 (Plaintiff)

Business: Republican National Committee **Phone:**

Address: 320 First Street S.E.

City: Washington **State:** District of Columbia **Zip:** 20003

Attorney(s) for Party 1

Name: Robert L Avers **Bar Number:** 75396 **(Lead Counsel)**

Name: Joseph A. Vacante **Bar Number:** 87036 **(Lead Counsel)**

Name: Charles R Spies **Bar Number:** 83260 **(Lead Counsel)**

Party 2 (Defendant)

Name: Jocelyn Benson **Phone:**

Address: 430 W. Allegan

City: Lansing **State:** Michigan **Zip:** 48918

Party is Pro Se

Party 3 (Plaintiff)

Business: Michigan Republican Party **Phone:**

Address: 520 Seymour Street

City: Lansing **State:** Michigan **Zip:** 48912

Party is Pro Se

Party 4 (Plaintiff)

Name: Cindy Berry **Phone:**

Address: 47275 Sugarbush Road

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City: New Baltimore **State:** Michigan **Zip:** 48047

Party is Pro Se

Party 5 (Plaintiff)

Name: Blake Edmonds **Phone:**

Address: Kent County

City: Kent County **State:** Michigan **Zip:** 49150

Party is Pro Se

Party 6 (Plaintiff)

Name: Dennis Grosse **Phone:**

Address: Berrien County

City: Berrien County **State:** Michigan **Zip:** 49102

Party is Pro Se

Party 7 (Defendant)

Name: Jonathan Brater **Phone:**

Address: 430 W. Allegan

City: Lansing **State:** Michigan **Zip:** 48918

Party is Pro Se

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 8/2/2024 6:30:28 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Elon Musk created super PAC deceiving voters

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Friday, August 2, 2024 1:32 PM
To: Sargent, Aubrey (AG) <SargentA1@michigan.gov>; Liddell, Robyn (AG) <LiddellR@michigan.gov>; Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Potchen, Joseph (AG) <PotchenJ@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; AGPress <AGPress@michigan.gov>; Wimmer, Daniel (AG) <WimmerD2@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: Important - Elon Musk created super PAC deceiving voters

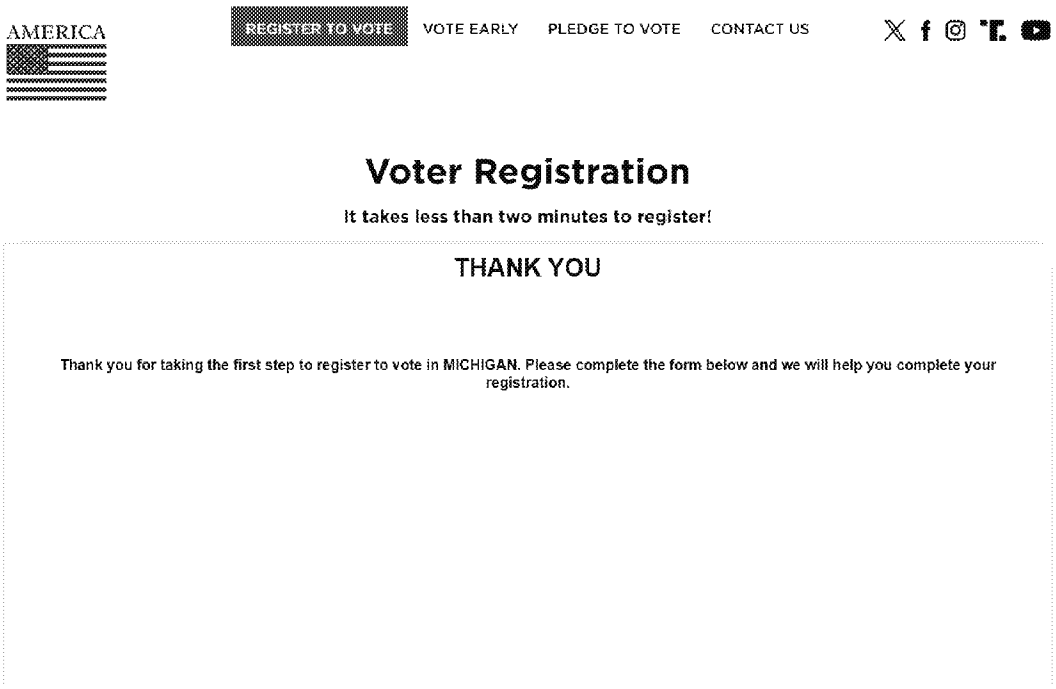
And Linus indicated there was no form below the image.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Friday, August 2, 2024 1:30 PM
To: Sargent, Aubrey (AG) <SargentA1@michigan.gov>; Liddell, Robyn (AG) <LiddellR@michigan.gov>; Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Potchen, Joseph (AG) <PotchenJ@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; AGPress <AGPress@michigan.gov>; Wimmer, Daniel (AG) <WimmerD2@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: Important - Elon Musk created super PAC deceiving voters

Linus was brave an put his information in, this is the image you get upon completion:

Obtained by Judicial Watch, Inc. v. Michigan FOIA



Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Sargent, Aubrey (AG) <SargentA1@michigan.gov>
Sent: Friday, August 2, 2024 1:25 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Liddell, Robyn (AG) <LiddellR@michigan.gov>; Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Potchen, Joseph (AG) <PotchenJ@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; AGPress <AGPress@michigan.gov>; Wimmer, Daniel (AG) <WimmerD2@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: Important - Elon Musk created super PAC deceiving voters

I will reach out to Darryl Hill

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Friday, August 2, 2024 1:23 PM
To: Sargent, Aubrey (AG) <SargentA1@michigan.gov>; Liddell, Robyn (AG) <LiddellR@michigan.gov>; Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Potchen, Joseph (AG) <PotchenJ@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; AGPress <AGPress@michigan.gov>; Wimmer, Daniel (AG) <WimmerD2@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: Important - Elon Musk created super PAC deceiving voters
Importance: High

Hi Danielle, Robyn and Aubrey,

Obtained by Judicial Watch, Inc. v. Michigan FOIA

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 5/19/2023 2:00:19 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Documents-privileged
Attachments: LAPEER TWP FOIA FROM A PIERCE.pdf; METAMORA TWP FOIA FROM A PIERCE.pdf

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 19, 2023 9:57 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Documents-privileged

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

Thanks very much.

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Lapeer Twp

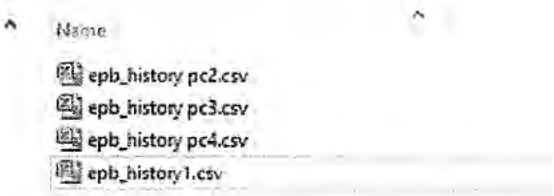
3 May 2023

Lapeer Township, Lapeer County, MI
Attn: FOIA Coordinator/Samantha Kesler Clerk

Re: Freedom of Information Act ("FOIA") Request

Dear FOIA Coordinator:

Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books for all registrants at all voting precincts in the jurisdiction for the election concluding November 8, 2022. These files should be in .CSV or .XLS format and is typically named EPB_History.CSV.



These files may contain the full birthdate and driver's license number of the registrants in your jurisdiction, which is exempt from FOIA release (MCL 168.509gg). Please open the copy of the digital file and erase the birth month, birth day and drivers license number information and save before providing. If you are able to retain the year of birth for the registrants (which is permissible), it would be appreciated.

Instructions on how to locate the requested information is available on pages 40-41 of the Electronic Poll Book Refresh Manual. These pages are included in Exhibit 1 below for your convenience.

Once the outlined redactions have been made there is no other exempt information in this document.
I have not requested any software or information which would somehow be deemed proprietary.

Please note that the electronic pollbooks are an original record and a component of the electronic voting system audit trail and should be retained for a federal minimum of 22 months (52 USC 207) and a state minimum of 24 months (MCL 168.811).

I would prefer to receive information via email. If email is unavailable, please contact me to coordinate an alternative.

Should you have any questions, please let me know.

Thank you.

Sincerely,

PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a) MI PII MCL 15.243(
(419-263 PII MCL 15.243(
Email: PII MCL 15.243(1)(a) @ymail.com

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Exhibit 1:

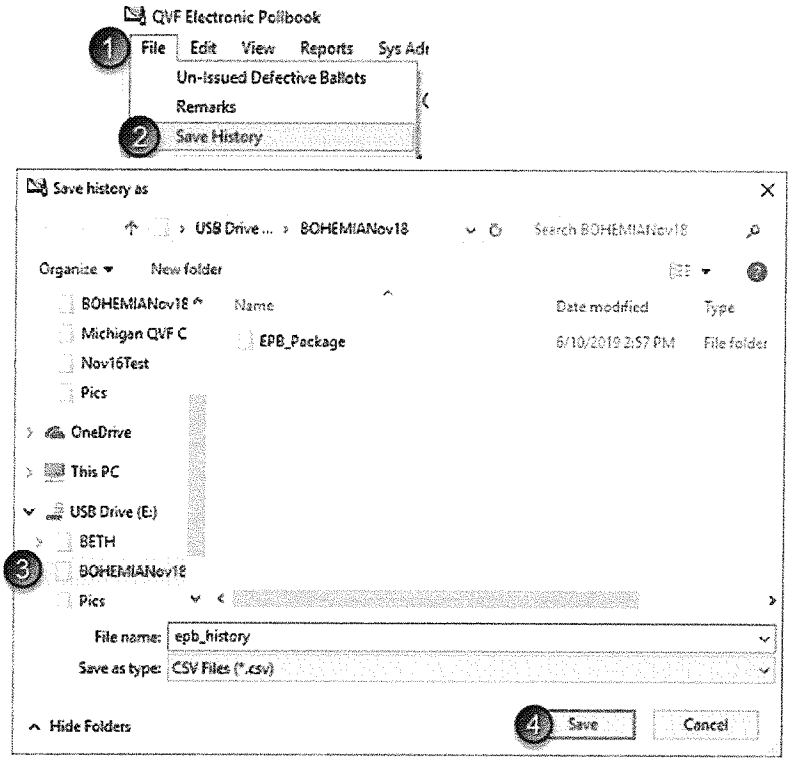
Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

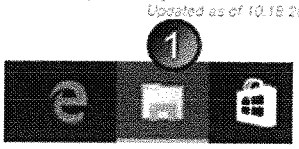
1. Click File
2. Click Save History
3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\
4. Click Save



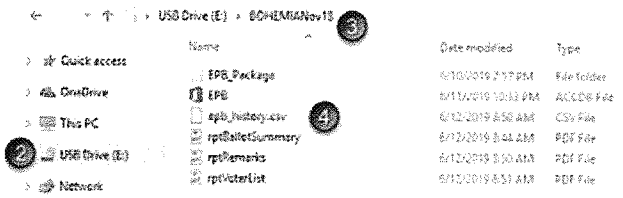
Obtained by Judicial Watch, Inc. v. Michigan FOIA

Ensure Files are on Flash Drive



To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB Back Up	ACCDB file
EPB_History	CSV file
rptBallot Summary	PDF file
rptRemarks	PDF file
rptVoter List	PDF file

The EPB_History.CSV file is what is being requested

You may also see the following files in your folder:

File Name	File Type
EPB_Package	File Folder
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Metamora Twp

Township: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

Metamora Township, Lapeer County
730 W Dryden Rd
Metamora, Michigan 48455
Phone: (810) 678-3645

Request Form
Note: Requestors are not required to use this form. The township may complete one for recordkeeping if not used.

FOIA Request for Public Records

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.*

Request No.: _____ **Date Received:** 4/25/23 in person

Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method
Date delivered to junk/spam folder: _____
Date discovered in junk/spam folder: _____

(Please Print or Type)

Name PII MCL 15.243(1)(a)	Phone 419263 PII MCL 15.243(1)(a)
Firm/Organization	Fax
Street PII MCL 15.243(1)(a)	Email PII MCL 15.243(1)(a) @gmail.com
City PII MCL 15.243(1)(a)	State MI Zip PII MCL 15.243(1)(a)

Request for: ☒ Copy (electronic) ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☒ Email to address above
☐ Deliver on digital media provided by the township: _____

***Note:** The township is not required to provide records in a digital format or on digital media if the township does not already have the technological capability to do so.*

Describe the public record(s) as specifically as possible. You may use this form or attach additional sheets:

Request EPB history from Nov 8 2022 election (csv. format) redacted as necessary

Consent to Non-Statutory Extension of Township's Response Time

I have requested a copy of records or a subscription to records or the opportunity to inspect records, pursuant to the Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq.* I understand that the township must respond to this request within five (5) business days after receiving it, and that response may include taking a 10-business day extension. However, I hereby agree and stipulate to extend the township's response time for this request until: _____ *(month, day, year)*.

Requestor's Signature PII MCL 15.243(1)(a) **Date** 4-25-23

(Complete both sides)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 7/5/2024 7:18:59 PM
To: Robert Cotter [Robert@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: RE: Trump v. US Summary - PRIVLEGED

Thanks Robert. **DPP MCL 15.243(1)(m)**

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Robert Cotter <Robert@statesuniteddemocracy.org>
Sent: Tuesday, July 2, 2024 5:35 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Trump v. US Summary - PRIVLEGED

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Privileged and Confidential
Attorney Work Product

Hi all,

We wanted to update you on yesterday's U.S. Supreme Court decision about presidential immunity from criminal prosecution in Trump v. US. A complete summary is attached along with the opinion, but big picture, the Court held that a President has (1) absolute immunity for core constitutional powers, (2) "at least" presumptive immunity for all other official acts, and (3) no immunity for unofficial acts. It further held that not only does immunity protect from prosecution, but any immune conduct cannot be used as evidence in a criminal prosecution against the President. Finally, it provided some guidance on the official/unofficial character of the allegations in the case. The decision marks a significant expansion in executive power. In her dissent, Justice Sotomayor said the Majority had endorsed "an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now."

In addition to summarizing the key points of the decision, the attached document also describes the potential impact on the D.C. and Georgia election interference prosecutions and offers some communications considerations, which we hope you find useful. Please don't hesitate to reach out if you have any questions.

Best,
Robert

--

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Robert Cotter (he/him) | Counsel
States United Democracy Center
224-235-2606 | @statesunited
robert@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/3/2024 9:34:45 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: RE: United Sovereign Americans NVRA lawsuits

Great, thank you.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, September 3, 2024 2:10 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: United Sovereign Americans NVRA lawsuits

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather: So you have them, Robert put together a list of all the United Sovereign Americans lawsuits, with links to the complaints. Maryland is the only decided case.

From: Robert Cotter <Robert@statesuniteddemocracy.org>
Date: Tuesday, September 3, 2024 at 12:40 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: United Sovereign Americans NVRA lawsuits

United Sovereign Americans, Inc. v. North Carolina State Board of Elections, No. 4:24-cv-00128-M (E.D.N.C. filed Aug. 28, 2024).

United Sovereign Americans, Inc. v. Nelson, No. 2:24-cv-00184-Z (N.D. Tex. filed Aug. 27, 2024).

United Sovereign Americans, Inc. v. Byrd, No. 4:24-cv-00327-MW-MAF (N.D. Fla. filed Aug. 19, 2024).

United Sovereign Americans, Inc. v. Ohio, No. 5:24-cv-01359-JRA (N.D. Ohio filed Aug. 8, 2024).

United Sovereign Americans, Inc. v. Pennsylvania, No. 1:24-cv-01003-DFB (M.D. Pa. filed June 18, 2024).

United Sovereign Americans, Inc. v. Maryland State Board of Elections, No. 1:24-cv-00672-SAG (D. Md. dismissed May 8, 2024), *appellant's brief filed*, No. 24-1449 (4th Cir. July 9, 2024).

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/9/2024 8:31:50 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Michael Pomante [michael@statesuniteddemocracy.org]
Subject: RE: Trump and Harris electors
Attachments: Democratic Presidential Electors.pdf; Republican Presidential Electors.pdf

Here we go.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 9, 2024 4:25 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Michael Pomante <michael@statesuniteddemocracy.org>
Subject: Re: Trump and Harris electors

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

Just wanted to follow up about the list of electors for Trump and Harris. Thanks!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, August 29, 2024 at 12:48 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Trump and Harris electors

Checking.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, August 26, 2024 11:31 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Trump and Harris electors

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Hi Heather,

When you have a chance, could you send me a list of the Harris and Trump electors?

Thanks,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

MI DEMS
MICHIGAN DEMOCRATIC PARTY

Certification of Democratic Presidential Electors

Pursuant to Michigan Election Law, as amended, a meeting of the Michigan Democratic State Central Committee, at which a quorum was present, was held on Saturday, August 24, 2024 following the Fall State Nominating Convention. The State Central Committee, having canvassed the proceedings of the Convention, determined the following to be Electors of President and Vice President of the United States for the Democratic Party.

Name	CD	Phone Number	Street Address	City	Zip
Dana LaLonde	1	PII MCL 15.243(1)(a)	PII MCL 15.243(1)(a)	PII MCL 15.243(1)(a)	PII MCL 15.243(1)(a)
Mary Minnick	2				
Patsy Petty	3				
Chokwe Pitchford	4				
James R. Pedersen	5				
Charles R. Browning	6				
Kathleen Carney	7				
Steve Dawes	8				
Jason Beardsley	9				
Alysa M. Diebolt	10				
Jessica Lumbreras	11				
Terrence Martin	12				
Jacalyn Kalogerakos	13				
Laura Dickerson	AL				
Brenda Lawrence	AL				

Signed

August 24, 2024

Chair, Michigan Democratic State Central Committee

Secretary, Michigan Democratic State Central Committee

Paid for by the Michigan Democratic State Central Committee. www.michigandems.com
Not authorized by any candidate or candidate's committee.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

CERTIFICATE OF THE REPUBLICAN PRESIDENTIAL ELECTORS ELECTED AT THE MICHIGAN REPUBLICAN FALL STATE CONVENTION, AUGUST 24, 2024

At Large
Peter Hoekstra
PII MCL 15.243(1)(a)

At Large
Jason Michael Woolford
PII MCL 15.243(1)(a)

District 1
John Haggard
PII MCL 15.243(1)(a)

District 2
Andrew Sebolt
PII MCL 15.243(1)(a)

District 3
Lance Elliott Griffin
PII MCL 15.243(1)(a)

District 4
David Yardley
PII MCL 15.243(1)(a)

District 5
Hank Choate
PII MCL 15.243(1)(a)

District 6
Timothy King
PII MCL 15.243(1)(a)

District 7
Meshawn Maddock
PII MCL 15.243(1)(a)

District 8
Amy Facchinello
PII MCL 15.243(1)(a)

District 9
Linda Glisman
PII MCL 15.243(1)(a)

District 10
Jim Tokarski
PII MCL 15.243(1)(a)

District 11
Marian Sheridan
PII MCL 15.243(1)(a)

District 12
Darlene Hennessy
PII MCL 15.243(1)(a)

District 13
Phillip A. Wagner
PII MCL 15.243(1)(a)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/10/2024 12:43:52 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: USPS draft common-interest agreement
Attachments: 08 06 24 DRAFT CIA for USPS8 HSM.pdf

Here we go. She PDF's the whole agreement, but presumably you can separate out my page.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 9, 2024 7:22 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Re: USPS draft common-interest agreement

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

That would be perfect. Thank you.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Monday, September 9, 2024 5:32:19 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: USPS draft common-interest agreement

I will be signing it. Should I have my secretary just make a separate page for MI and we can send it to you as a PDF?

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, August 29, 2024 12:35 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Re: USPS draft common-interest agreement

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

I'm checking in about getting a signature on the common interest agreement. Once we receive a signed copy, we can set up a call with the other states.

Thanks,

Jonathan

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Thursday, August 8, 2024 at 1:42 PM
To: Heather Meingast <meingasth@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: USPS draft common-interest agreement

Hi Heather,

Following up on our earlier conversations regarding the USPS, in collaboration with our clients in Nevada, we've put together a draft Common Interest Agreement for your consideration. Once we've got everyone on board, we can schedule a multi-state call to discuss further. Please let us know if you have any questions or concerns.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PRIVILEGED & CONFIDENTIAL

COMMON INTEREST AGREEMENT

The parties to this common interest agreement (the "Agreement"), specifically the States of Michigan, Nevada, New York, Oregon, and Pennsylvania (hereinafter the "Parties"), are evaluating legal issues related to the United States Postal Service (the "Postal Service"), including but not limited to issues arising from existing and future litigations challenging statutes, regulations, or other actions regarding the Postal Service's transformation of its processing and delivery network ("network change"), including the Postal Service's failure to seek an advisory opinion from the Postal Regulatory Commission ("PRC").

The Parties to this Agreement have a common interest in network change issues and litigations addressing such issues. The Parties wish to pursue their common interest concerning network change issues and litigations addressing such issues, while avoiding any waiver of the confidentiality of those privileged materials. The Parties agree to share information for the purpose of advancing their common interest in network change issues and litigations addressing such issues, including but not limited to potentially filing amicus briefs, to keep such information and materials confidential, and to protect any privileges attaching to such information and materials to the extent authorized by law. The Parties also agree that the sharing of information, both written and oral, among their staff, management, consultants, experts, and counsel will further their common objectives.

Both federal and state law provide for the sharing of confidential and/or privileged information[1] among those with common interests during the course of and in anticipation of litigation, without a waiver of any otherwise applicable privileges, protections, immunities, and exemptions from disclosure, so that the claims and defenses of the parties may be thoroughly investigated and prepared without giving undue advantage to the opposing side. Maintaining such confidentiality is necessary for the accomplishment of the Parties' objectives with respect to network change issues and litigations addressing such issues. This document sets forth the agreement under which the Parties and their respective staff, management, consultants, experts, and counsel will manage and protect confidential and/or privileged information shared and exchanged in the preparation of amicus briefs or other documents regarding network change issues and litigations addressing such issues.

Therefore, the Parties agree as follows:

1. Parties. The Parties to this Agreement are set forth above. Pursuant to Paragraph 10 below, additional Parties, through their counsel, may join this agreement and become Parties by executing the appropriate version of the attached Addendum, circulating a copy to all Parties and

[1] "Information," as used in this Agreement, is defined below.

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after receiving the approval of the existing Parties in writing or by email within five (5) days of receipt.

2. Purpose. The Parties share common interests and goals with respect to legal issues related to the Postal Service's network change and potential future litigations involving legal issues related to the same. The Parties recognize that the sharing and disclosure of privileged and confidential information among them is necessary. The purpose of this common interest agreement is to ensure that the privileged and/or confidential information shared will be used in preparing amicus briefs or other documents regarding network change issues and litigations addressing such issues, and the development of a potential future litigation strategy, and that this privileged and/or confidential information will not be disclosed to third parties or otherwise disclosed such that any privileges or other basis for confidentiality attached to these communications and documents shall be preserved and not waived.

3. "**Confidential and/or privileged information**" is information provided by or exchanged between the Parties, including, but not limited to, documents, materials, information, and communications exchanged among the Parties' staff, management, consultants, experts, and/or counsel, with the expectation of confidentiality and which is subject to one or more applicable privileges, protections, immunities, or exemptions from disclosure, including but not limited to, the attorney-client, attorney work product, deliberative process, and protections. "Confidential and/or privileged information" shall include information provided by or exchanged between the Parties prior to the execution of this agreement pursuant to the Common Interest Doctrine.

4. To avoid misunderstandings or inadvertent disclosure, all documents exchanged pursuant to this agreement should bear the legend "**Confidential – Protected by Common Interest Privilege**" or words to that effect. However, the inadvertent failure to include such a legend shall not waive any privilege or protection available under this agreement or otherwise. In addition, any Party may, where appropriate, also label documents exchanged pursuant to this agreement with other appropriate legends, such as, for example, "Attorney-Client Privileged" or "Attorney Work Product." Oral communications among the Parties shall be deemed confidential and protected under this agreement when discussing matters related to network change issues and litigations addressing such issues.

5. Non-Disclosure. The Parties agree to protect all communications and documents exchanged among them related to network change issues and litigations addressing such issues, regardless of whether such communications or document exchanges occurred before or after the effective date of this Agreement, as confidential and privileged to the extent allowable under applicable law, based upon all applicable privileges including, but not limited to, the attorney-client privilege, attorney work-product protections, common interest privilege, joint defense privilege, and governmental privileges including, but not limited to, the deliberative process privilege where applicable (hereinafter "**Protected Information**"). Protected Information

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(1) shall not be released, disclosed, discussed or made available to or with any persons or entities who are not Parties to this Agreement, and (2) shall not be used for any purpose other than to further the Parties' common interests described herein, except as provided in paragraphs 6 and 7 *infra*.

6. Use of Protected Information. Protected Information is to be used by the recipient of the information solely in connection with preparing and presenting the Parties' positions regarding network change issues and litigations addressing such issues. Protected Information may not be shared by a recipient with any non-party to this Agreement without prior written waiver by all Parties to this Agreement, unless the relevant Party determines that disclosure is (i) required by applicable law, and (ii) not otherwise covered by paragraph 7, *infra*, concerning Requests for Release and/or Disclosure. If the relevant Party determines that disclosure is required by applicable law and not otherwise covered by paragraph 7, *infra*, then it agrees to use its best efforts, as permitted by applicable law, to provide notice at least five (5) calendar days in advance, to all Parties to this Agreement prior to disclosure.

7. Requests for Release and/or Disclosure. The Parties agree and acknowledge that each Party may be subject to freedom of information or public records laws, and that nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. A Party who receives a request from a non-party to release, disclose, discuss, or obtain access to any information, including Protected Information (whether by way of a subpoena, discovery request, or request under any federal or state statute) shall use its best efforts, as permitted by applicable law, to provide notice, at least five (5) calendar days prior to the date on which response to such a request is due, to all Parties to the Agreement. Unless the other Parties consent to disclosure or release of Protected Information, the Party receiving the request for disclosure shall assert, to the extent authorized by law, and subject to any mandatory disclosure laws or court orders, all relevant and applicable privileges and other objections that the Party receiving the request determines are relevant and applicable to the disclosure of such information.

8. No Agency or Additional Attorney-Client Relationships. This Agreement shall not create any agency or similar relationship among the Parties. Nor shall this Agreement alter the existing attorney-client relationships among the Parties or create any new attorney-client relationships. No Party shall have authority to waive any applicable privilege or other confidentiality protection on behalf of any other Party; nor shall any waiver of an applicable privilege or protection by the conduct of any Party be construed to apply to any other Party. Nothing in this Agreement is intended or shall be construed to obligate any of the Parties to disclose or share any information or material relating to network change issues and litigations addressing such issues.

9. Enforcement. The Parties agree that a breach of a provision of this Agreement by a Party may cause irreparable harm to the other Parties and therefore agree that injunctive relief is the

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appropriate means to enforce this Agreement except as otherwise provided by a state's sovereign immunity. No Party shall be subject to any claim for damages as a result of a breach of this Agreement.

10. Modification. It is agreed that any modifications to this Agreement shall be in writing and signed by all Parties. The inclusion of additional states, municipalities, or other government entities as parties to this Agreement shall not be considered a modification and shall be accomplished by having such prospective party execute the attached Addendum and provide a copy to all Parties, provided however, that if any existing Party to this Agreement provides written notice (including by email) of its objection within five (5) business days of receipt of notice of the prospective party's execution of such Addendum, the execution of the Addendum by the prospective party shall be considered an amendment requiring the signature of all Parties in order to become effective.

11. Integration. This written Agreement memorializes the entirety of the Parties' pre-existing oral agreement regarding the confidentiality of their communications. It is agreed that this Agreement itself, any amendments thereto and all discussions among the Parties related to the Agreement are themselves subject to the attorney-client privilege, common interest privilege, and work product doctrine, except as otherwise provided in a Party's specific state law.

12. Termination. Any Party to this Agreement may terminate the Agreement upon written notice to the other Parties. In such instance, the terminating Party and its counsel will continue to be bound by this Agreement with regard to any Protected Information received prior to the termination in accordance with applicable records retention policies.

13. Non-disqualification Agreement. The Parties agree that no Party or attorney for a Party to this Agreement may attempt to use, in any other legal proceeding or case that is not related to the subject matter of this Agreement, either the fact of the Agreement or any information learned as a result of this joint effort as a reason to disqualify any other lawyer or law firm acting as counsel in any future legal proceedings involving network change issues and litigations addressing such issues, consistent with applicable Rules of Professional Conduct.

14. Disclosure of Potential Conflicts/Change in Law. The Parties agree to promptly disclose to each other if their respective positions relating to legal issues related to the Postal Service, including but not limited to issues arising from existing and future litigations challenging statutes, regulations, or other actions regarding network changes, including the Postal Service's failure to seek an advisory opinion from the PRC, may result in a material conflict. Parties also agree to promptly disclose to each other if they determine that they cannot maintain the non-disclosure obligations in paragraph 5, *supra,* due to a change in law, including, but not limited to, newly enacted legislation, regulation(s), or rule(s), a new interpretation of law, a court decision, or other legally significant development. In the event that such a conflict in position or change in law

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arises, the notifying Party agrees to promptly terminate this Agreement pursuant to Paragraph 12, *supra*, in conjunction with disclosure.

15. Counterparts. This Agreement may be executed in counterparts, including electronically, and all counterparts so executed shall collectively constitute one binding agreement of the parties, notwithstanding that all Parties are not signatory to the same counterpart. Counsel signing this Agreement on behalf of the named Party or Parties it represents, certifies that it has the authority to execute this Agreement on behalf of said Party or Parties.

16. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, in whole or in part, such determination shall not affect the validity of any other provision of this Agreement.

17. Effective Date. This Agreement becomes effective upon its execution by at least two Parties (whether in a signature block or execution of the attached Addendum), and shall, once executed, supersede any prior confidentiality agreements among the Parties on the same subject. It may be executed in counterparts, each of which shall be deemed an original for all purposes. All of the Parties' communications with each other concerning network change issues and litigations addressing such issues made prior to execution of this Agreement are fully subject to this Agreement. All additional parties added pursuant to Paragraph 10, *supra*, shall be effective on the 6th day after execution.

18. Successors and Assigns. This Agreement is binding upon, and inures to the benefit of, the Parties and their respective successors and assigns.

19. Substitution of Parties or Counsel. This Agreement shall automatically apply to substitute, additional, or associated counsel who may appear on behalf of a Party. This Agreement shall not be subject to abrogation by any heir, assign, or other successor in interest to any Party hereto. Nor shall such heir, assign, or successor in interest waive any privilege or doctrine with regard to information shared pursuant to this Agreement by, or among, the undersigned counsel and their respective clients. There are no third-party beneficiaries of this agreement.

20. Notification. All notices, in writing or by e-mail, shall be to the signed Parties and/or their designee(s).

It is so AGREED.

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Dated: _____

STATE OF MICHIGAN

DANA NESSEL
ATTORNEY GENERAL
By: Heather S. Meingast
Name: Heather S. Meingast
Email: meingasth@michigan.gov
525 W. Ottawa St.
Lansing, MI 48909

Dated: _____

STATE OF NEVADA
AARON D. FORD
ATTORNEY GENERAL
By: _____
Name: _____
Email: _____
555 E. Washington Ave.
Las Vegas, NV 89101

Dated: _____

STATE OF NEW YORK

LETITIA A. JAMES
ATTORNEY GENERAL
By: _____
Name: _____
Email: _____
Dept. of Law – The Capitol, 2nd fl.
Albany, NY 12224

Dated: _____

STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
By: _____
Name: _____
Email: _____
Justice Bldg. 1162 Court St., NE
Salem, OR 97301

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Dated: _____

STATE OF PENNSYLVANIA

MICHELLE A. HENRY
ATTORNEY GENERAL
By: _____
Name: _____
Email: _____
16th Floor, Strawberry Square
Harrisburg, PA 17120

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ADDENDUM: PARTICIPATION BY ADDITIONAL PARTIES IN COMMON INTEREST AGREEMENT

_____, by and through _____, desires to become a Party to the attached Agreement.

Now, therefore, counsel for _____, agrees to the terms of the Agreement (including Paragraph 10 thereof concerning modifications thereof) and agrees to deliver a copy of this executed Addendum to all Parties to the Agreement within five business days. Circulation of an electronic copy of the executed Addendum by e-mail to all known Parties to the Agreement shall satisfy this requirement.

DATED: _____

NAME OF PARTY:

By: _____
Name:
Title:

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/9/2024 3:49:14 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]
Subject: RE: PILF standing decision from W.D. La. - Privileged
Attachments: 39 ltr case submitted on briefs 10302024 no oral argument.pdf

Hi Jonathan,

Thanks for sharing. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 9, 2024 11:39 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>; Sally Marsh <Sally@statesuniteddemocracy.org>
Subject: PILF standing decision from W.D. La. - Privileged

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

I hope you had a good weekend. I wanted to share the attached recent standing decision from the Western District of Louisiana, which applied the Fifth Circuit's *Scott* decision you cited in the PILF answering brief to dismiss another PILF NVRA suit. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Thanks,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 3, 2024

Notice

Mr. Erik A. Grill
Office of the Attorney General
P.O. Box 30736
Lansing, MI 48909

Kaylan Phillips
Public Interest Legal Foundation
107 S. West Street, Suite 700
Alexandria, VA 22314

Mr. Robert Wiygul
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103

Re: No. 24-1255
Public Interest Legal Fndn v. Jocelyn Benson

Dear Counsel:

The Court has determined that oral argument is not required. See I.O.P. 34(a)(4). The case noted above is scheduled for submission to the Court on the briefs of the parties and the record on **Wednesday, October 30, 2024**. You will be promptly advised of the Court's decision, or any other order or direction it may issue.

Sincerely yours,

s/Lance A. Gifford
Senior Calendar Deputy

cc: Mr. John Christian Adams
Mr. Benjamin Michael Flowers
Mr. Noel Henry Johnson
Mr. Peter V. Keays
Mr. David Eric Lycan
Mr. Thomas Ryan McCarthy
Ms. Heather S. Meingast
Mr. Joseph M. Nixon
Mr. T. Russell Nobile

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/11/2024 9:37:13 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: MRP, et al v Benson
Attachments: 4889-4151-6003 v1 Verified Complaint (as-filed in MiCOC).pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Robert L. Avers <RAvers@dickinson-wright.com>
Sent: Tuesday, September 10, 2024 5:01 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Cc: Koch, Jonathan B. <jkoch@shrr.com>
Subject: MRP, et al v Benson

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good Afternoon Ms. Meingast and Mr. Grill,

Please see the attached courtesy copy of a verified complaint and supporting exhibits that were filed this afternoon with the Michigan Court of Claims. Please advise whether you'll accept service on behalf of your clients.

Thank you.

Robert L. Avers
Member
O:734-623-1672
RAvers@dickinsonwright.com

350 S. Main Street, Suite 300, Ann Arbor MI, 48104

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail. Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

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Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24- MB

Court address
Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.
517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, AND CINDY BERRY	v	JOCELYN BENSON, in her official capacity as Michigan Secretary of State 430 W. Allegan St. Richard H. Austin Building - 4th Floor Lansing, MI 48918
Plaintiff's attorney, bar no., address, and telephone no. Robert L. Avers (P75396) Joseph A. Vacante (P87036) 350 South Main Street, Suite 300 Ann Arbor, MI 48104 (734) 623-1672		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Summons (3/23) **Case No.** 24-

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the summons and complaint and file proof of service with the court clerk before the expiration date on the summons. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

Attachments (if any) on Date and time

Signature on behalf of

Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24- MB

Court address
Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.
517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, AND CINDY BERRY	v	JONATHAN BRATER, in his official capacity as Director of Elections 430 W. Allegan St. Richard H. Austin Building - 4th Floor Lansing, MI 48918
Plaintiff's attorney, bar no., address, and telephone no. Robert L. Avers (P75396) Joseph A. Vacante (P87036) 350 South Main Street, Suite 300 Ann Arbor, MI 48104 (734) 623-1672		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

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1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Summons (3/23) **Case No.** 24-

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the summons and complaint and file proof of service with the court clerk before the expiration date on the summons. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

Attachments (if any) on Date and time

Signature on behalf of

Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

EXPEDITED RELIEF REQUESTED

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com
Attorneys for Plaintiffs MRP and Cindy Berry

Jonathan B. Koch (P80408)
Drew W. Broaddus (P64658)
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
616-774-2461 (fax)
jkoch@shrr.com
dbroaddus@shrr.com
Attorneys for Plaintiff RNC

_____/

VERIFIED COMPLAINT FOR EXPEDITED DECLARATORY AND INJUNCTIVE RELIEF

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

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NOW COME Plaintiffs the Michigan Republican Party, the Republican National Committee, and Cindy Berry (collectively, "Plaintiffs"), by and through their undersigned counsel, and state as follows in support of their Verified Complaint against Michigan Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (collectively, the "Secretary"):

INTRODUCTION

1. Michigan law requires absent voters to sign absent voter ballot return envelopes and mandates that clerks verify those signatures before sending absent voter ballots to election inspectors for tabulation. That is the method by which clerks verify the identity of absent voters as required by the Michigan Constitution and Michigan law. But that's not all—Michigan law also requires clerks to mark those absent voter ballot return envelopes with a statement indicating that the corresponding voter's signature (and thus their identity) has been verified. It appears, however, that this requirement is not being universally observed. And it further appears that the Secretary contributed to this confusion by issuing incomplete guidance materials.

2. As recognized in the Carter-Baker Commission Report, absentee voting "has been one of the major sources of fraud." See, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform (*i.e.*, the "Carter-Baker Commission Report"), at 35, September 2005, available at https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF (last visited September 10, 2024). For that reason, the Carter-Baker Commission recommended that "[t]o *verify the identity* of voters who cast absentee ballots, the voter's signature on the absentee ballot can be matched with a digitized version of the signature that the election administrator maintains," and that this signature matching "should be done *consistently* in all cases, so that election officials can *verify the identity* of every new registrant who casts an absentee ballot." *Id.* at 20 (emphasis added).

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3. Under the Michigan Constitution, each "citizen of the United States who is an elector qualified to vote in Michigan" has the "right, once registered, to vote an absent voter ballot without giving a reason." Const 1963, art 2, § 4(1)(h). This action involves those provisions under the Michigan Constitution and the Michigan Election Law requiring that "election officials shall . . . verify the identity of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record." *Id.*

4. The Michigan Election Law requires any voter that chooses to vote by absent voter ballot to sign their absent voter ballot return envelope in order for their ballot to count. MCL 168.764a. Local clerks are then required to verify the signatures on the absent voter ballot return envelopes by comparing those signatures against the voter's "signature on file," which, depending on the circumstances, can mean the signature of the voter contained in the qualified voter file (the "QVF"), the signature of the voter contained on the master card, or, in some instances, the signature on the voter's absent voter ballot application. MCL 168.761. See also MCL 168.766a(7).

5. To that end, MCL 168.765 mandates that city and township clerks "shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with [MCL 168.766]." MCL 168.765(2). That mandated review and approval process includes "verifying the signature on each absent voter ballot return envelope in accordance with [MCL 168.766a]."

6. This suit focuses on two vital recordkeeping requirements in the above-referenced signature verification process. Specifically, MCL 168.765(2) mandates that: (1) clerks must write or stamp on each absent voter ballot return envelope the date that the ballot return envelope was received by the clerk (or, if received on Election Day, then clerks must write or stamp *both* the

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time and date that the ballot return envelope was received by the clerk); and (2) *after verifying each voter's signature*, clerks must include on *each* approved ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation." MCL 168.765(2).

7. The latter of these recordkeeping requirements under MCL 168.765(2)—*i.e.*, the requirement that *after* verifying a voter's signature, clerks must include on the corresponding ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation"—is a vital part of the absent voter ballot processing procedure because it enables precinct boards of election inspectors and absent voter counting boards ("AVCBs") to fulfill their statutory duty to confirm that a voter's signature has been verified by the clerk. See MCL 168.768.

8. To that end, absent voter ballots are processed in two different stages under Michigan law. First, the signature verification process is completed by local clerks outside the presence of election inspectors, election challengers, and poll watchers. See, e.g., MCL 168.765(2) (providing that signature verification must be completed by the "city or township clerk," and further providing that "a precinct board of election inspectors or an absent voter counting board must *not* make any further signature verification for an absent voter ballot return envelope.") (emphasis added). If during the signature verification process the "clerk determines that the elector's signature on the absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, the clerk shall reject the absent voter ballot and provide the elector with notice and the opportunity to cure the deficiency in accordance with [MCL 168.766(4)]." *Id.* If, on the other hand, the clerk has verified that the signature on the ballot return envelope sufficiently matches the voter's signature on file, the absent voter ballot is approved for

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tabulation and submitted to a precinct board of election inspectors or an AVCB to be processed on Election Day (*i.e.*, the second stage of the absent voter ballot processing procedure).

9. While the clerk is responsible for verifying the voter's signature on absent voter ballot return envelopes, the Michigan Election Law precludes election inspectors from tabulating an absent voter ballot on Election Day if (a) the elector's signature is missing from the return envelope, or (b) the clerk's statement that the absent voter ballot is approved for tabulation as required under MCL 168.765(2) is incomplete. MCL 168.768. Indeed, if either the elector's signature is missing from the return envelope or the clerk failed to compete the statement on the return envelope that the absent voter ballot is approved for tabulation, then election inspectors may *not* tabulate the ballot and "must immediately contact the city or township clerk." *Id.*

10. Put another way, MCL 168.765 requires *both* that a clerk mark the date on which the ballot was received *and* that the clerk provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified) in the section of the return envelope designated "for clerk's use only." A ballot is only eligible for tabulation upon signature verification, and so the clerk's statement of approval under MCL 168.765(2) functions as confirmation to those responsible for tabulating the ballots on Election Day—*i.e.*, either the precinct board of election inspectors or those election inspectors assigned to an AVCB—that the voter's signature on the ballot was, in fact, verified by the clerk. MCL 168.766(1)(b).

11. Together, the above-referenced provisions create a framework that (a) preserves the purity of elections and guards against abuses of the elective franchise by ensuring that each absent voter ballot originated from, and was completed by, the intended voter, while also (b) ensuring that those absentee voters whose identities could not be verified as a result of missing or

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mismatched signatures have an opportunity to cure their deficient ballot such that the signature verification process does not prevent any qualified elector from voting.

12. Despite this clear statutory framework, it appears that local clerks may not be complying with the requirement to mark absent voter ballot envelopes with a statement that the voter's signature has been verified. For example, Plaintiffs recently learned that thousands of absent voter ballots were apparently tabulated during the August 6, 2024 primary election in Warren, Michigan, despite the complete absence of a statement by the clerk on the corresponding return envelope that the absent voter ballot is approved for tabulation as expressly required under MCL 168.765(2).

13. Plaintiffs also recently learned that the Secretary's guidance document entitled "Election Officials' Manual, Chapter 8: Absent Voter Ballot Processing," (hereinafter, the "AV Ballot Processing Guidance"), which is attached hereto as **Exhibit A**, is likely contributing to the above-referenced confusion by providing incomplete advice. Indeed, while MCL 168.765(2) clearly requires *two* separate markings—*i.e.*, that a clerk mark the date on which the absent voter ballot return envelope was received *and* that the clerk provide a written statement on the return envelope confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified)—the Secretary's AV Ballot Processing Guidance omits the second of those two statutory requirements. See Ex A, at 5 (instructing clerks to "mark the ballot envelope in the 'Clerk Section' with the date of receipt," but omitting any instruction to include a written statement on the return envelope confirming the ballot is approved for tabulation as required under MCL 168.765(2)).

14. In other words, the Secretary's AV Ballot Processing Guidance fails to mention the clerk's statement of approval (*i.e.*, signature verification confirmation) as required under

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subsection 765(2), yet reads as if it contains the entire universe of requirements as to the information that a clerk must write or stamp on an absentee ballot return envelope such that the corresponding ballot can be tabulated. As a result, the AV Ballot Processing Guidance is fatally incomplete.

15. Given the complete absence of a statement by the clerk that the absent voter ballot was approved for tabulation as expressly required under MCL 168.765(2), it is an open question as to whether the clerk in Warren, Michigan, verified voters' signatures on those absent voter ballot return envelopes during the August 6, 2024 primary election.

16. Setting aside that absent voter ballots may have been tabulated even though the Warren clerk failed to provide any indication that it had verified the voter signatures, this apparent confusion is a symptom of a potentially larger issue of local election officials misconstruing the Secretary's incomplete and misleading AV Ballot Processing Guidance as the complete universe of requirements for approving absent voter signatures on ballot return envelopes.

17. Regardless, Plaintiffs' rights and abilities to participate in a free and fair elective franchise have already been damaged. By all accounts and absent the relief sought here, the Secretary's AV Ballot Processing Guidance will apparently remain in effect with respect to upcoming elections, further damaging Plaintiffs' rights and abilities to participate in a free and fair elective franchise in the November 5, 2024 general election and all those beyond.

18. As a result, and in light of the impending general election on November 5, 2024, Plaintiffs respectfully ask this Court to: **(a)** declare that city and township clerks must comply with MCL 168.765(2) by ***both*** (1) writing or stamping on each absent voter ballot return envelope the date that the ballot return envelope was received by the clerk (or, if received on Election Day, then clerks must write or stamp *both* the time and date that the ballot return envelope was received by

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the clerk); ***and*** (2) *after verifying each voter's signature*, clerks must also include on *each* approved ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation." MCL 168.765(2); **(b)** declare that if a clerk fails to include a statement on the ballot return envelope that the voter's signature has been verified, then election inspectors must reject the ballot and immediately notify the clerk as required by MCL 168.768; **(c)** order the Secretary to rescind her AV Ballot Processing Guidance and issue new guidance directing city and township clerks to mark the date on which the ballot was received ***and*** to provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified) in the section of the return envelope designated "for clerk's use only" as expressly required under MCL 168.765(2); and **(d)** enjoin the Secretary from implementing the February 2024 version of her AV Ballot Processing Guidance in advance of the November 5, 2024 general election.

19. Plaintiffs seek an expedited hearing on this matter under MCR 2.605(D), which expressly authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance [this case] on the calendar." Expedited consideration is warranted and necessary here. There can be no dispute that the voter signature and identification verification requirements under the Michigan Constitution and the Michigan Election Law are imperative to ensuring the integrity and accuracy of Michigan's elections. To be clear, the relief sought here is prospective in nature: Plaintiffs seek the above-described relief—including a declaration as to a discrepancy between the clear statutory language of MCL 168.765(2) and the Secretary's AV Ballot Processing Guidance—in advance of the November 5, 2024 general election to ensure that local election officials are instructed to follow the law in future elections. Absent declaratory and injunctive relief, the rights of Plaintiffs will continue to be violated and jeopardized by the Secretary's acts—including those

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acts relative to the Secretary's Guidance omitting one of two express statutory requirements under MCL 168.765(2)—in the forthcoming election.

20. Time remains to adjudicate this case and controversy on the merits in an expedited fashion prior to the November 5, 2024 general election, and without the need for temporary or preliminary injunctive relief.[1] Specifically, some jurisdictions will begin verifying absent voter ballot signatures for the general election on September 26, 2024. By seeking prospective relief eight (8) weeks in advance of the general election, there remains ample time for an expedited merits proceeding before this Court; for expedited appellate review (if necessary); for the Secretary to issue AV Ballot Processing Guidance that complies with the Michigan Constitution and the Michigan Election Law; and for local clerks and election officials to implement those instructions.

21. To that end, Plaintiffs will make best efforts to effectuate formal service of process as soon as possible upon the filing of this Verified Complaint and receipt of corresponding summonses from this Court, and will contact the Assistant Attorneys General that typically serve as elections counsel for the Secretary to discuss a briefing schedule regarding the motion practice necessary to promptly decide the questions of law presented in this case.

PARTIES, JURISDICTION, AND VENUE

22. Plaintiff the Michigan Republican Party ("MRP") is a "major political party" as that term is defined by the Michigan Election Law. See MCL 168.16. MRP maintains headquarters at 520 Seymour Street, Lansing, Michigan 48912. Among its general purposes, MRP promotes and assists Republican candidates who seek election or appointment to partisan federal, state, and local office in Michigan. MRP works to further its purpose by, *inter alia*, devoting substantial resources toward educating, mobilizing, assisting, and turning out voters in Michigan. To that end,

[1] Plaintiffs reserve the right to seek preliminary injunctive relief should the need arise.

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MRP has made significant contributions and expenditures in support of Republican candidates up and down the ballot in Michigan in past election cycles, and is doing so again in 2024. Further, MRP works to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and works to protect the fundamental constitutional right to vote of its members and its candidates, and to promote their participation in the political process. MRP brings this action on behalf of itself, its members, and its candidates. As a result, Plaintiff MRP has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and its members.

23. Plaintiff the Republican National Committee (the "RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14), with its principal place of business at 310 First Street, S.E., Washington D.C., 20003. The RNC manages the Republican Party's business at the national level, including the development and promotion of the Republican Party's national platform and election strategies. The RNC supports Republican candidates for public office at the federal and state levels across the country, including those on the ballot in Michigan's forthcoming November 5, 2024 general election. The RNC also assists state parties throughout the country, including Plaintiff MRP, to educate, mobilize, assist, and turn out voters, and also by supporting MRP's efforts to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and to protect the fundamental constitutional right to vote of the RNC's members and its candidates. The RNC made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Michigan in past election cycles, and is doing so again in 2024. The RNC has clear and obvious interests in the laws and rules under which it, and those it represents and supports, exercise their constitutional rights to vote and to participate in elections. The RNC brings this action on behalf

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of itself, its members, and its candidates. As a result, Plaintiff RNC has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and its members.

24. Both as representatives of their candidates and their voters, and as organizations in their own right, the Republican Committees (*i.e.*, Plaintiffs MRP and RNC) each have a substantial interest in getting Republican candidates elected to office—an interest that is unique and separate from any held by the public at large. That includes ensuring that Republicans can seek office in a fair, competitive environment where the Michigan Election Law is followed and the Legislature's identity and signature verification requirements aimed at protecting the integrity and reliability of Michigan's elections—including the ballot return envelope marking requirements under MCL 168.765(2)—are enforced. Given that the relief sought here would, among other things, enjoin the application of the current version of the Secretary's AV Ballot Processing Guidance in advance of the November 5, 2024 general election, and would also result in judicial declarations that clerks must comply with ***both*** of the ballot return envelope marking requirements under MCL 168.765(2) and also that election inspectors must reject ballots in accordance with MCL 168.768 where clerks fail to complete the ballot marking requirements under MCL 168.765(2), the interests of RNC and MRP in preventing an illegally structured and anti-competitive election environment is sufficient under MCR 2.605.

25. Plaintiff Cindy Berry serves as the Clerk for the Township of Chesterfield and resides in Macomb County. As township clerk, Mrs. Berry is responsible for running the Township's elections and, pertinent here, is also responsible for ensuring that the identity of all absent voters are verified through the absent voter signature verification process as required by the Michigan Constitution and the Michigan Election Law. Despite those legal duties to verify absent

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voter signatures—which include the ballot return envelope marking requirements under MCL 168.765(2)—the Secretary's AV Ballot Processing Guidance appears to require only one of the two marking requirements under MCL 168.765(2). As a local clerk, Mrs. Berry is subject to the Secretary's AV Ballot Processing Guidance. As a public official, however, Clerk Berry swore an oath to support the Michigan Constitution and to faithfully discharge the duties of her office. To that end, Plaintiff Berry has attempted to reconcile the Secretary's AV Ballot Processing Guidance against the text of the Michigan Election Law, but they appear to be inconsistent with one another for the reasons described in this Verified Complaint. As a result, Clerk Berry has been saddled with the impossible choice of whether to enforce state law (*i.e.*, MCL 168.765(2)) or the Secretary's AV Ballot Processing Guidance—all of which are binding on Clerk Berry. As a result, Clerk Berry is an "interested party" under MCR 2.605 for the purpose of seeking a declaration clarifying the discrepancy between the clear statutory language of MCL 168.765(2) and the Secretary's AV Ballot Processing Guidance.

26. Separately, Clerk Berry is also a registered voter that cast a ballot in the February 2024 presidential primary election through Michigan's early voting process, voted by absentee ballot in the August 6, 2024 primary election, and intends to vote by absentee ballot in future elections. Clerk Berry has a direct, personal, and substantial interest in ensuring that her vote counts and is not diluted.

27. Defendant Jocelyn Benson is Michigan's Secretary of State and is being sued in her official capacity. Secretary Benson is the "chief elections officer of the state" responsible for overseeing the conduct of Michigan elections, and has "supervisory control over local election officials in the performance of their duties under the [Michigan Election Law]." MCL 168.21.

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28. Defendant Jonathan Brater is Michigan's Director of Elections and is being sued in his official capacity.

29. This Court has exclusive jurisdiction to "hear and determine any claim or demand, statutory or constitutional . . . or any demand for . . . equitable[ ] or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Additionally, this Court has authority to grant injunctive relief under MCR 3.310.

30. Because Plaintiffs raise statutory and constitutional claims and because they ask this Court to order equitable and declaratory relief against Defendants Secretary Benson and Director Brater, this Court has exclusive jurisdiction to hear these claims. For the same reason, venue is appropriate in this Court.

31. An actual controversy is clearly present here. It is undisputed that MCL 168.765(2) expressly mandates that: (1) clerks must write or stamp on each absent voter ballot return envelope the date that the ballot return envelope was received by the clerk (or, if received on Election Day, then clerks must write or stamp *both* the time and date that the ballot return envelope was received by the clerk); **and** (2) *after verifying each voter's signature*, clerks must include on *each* approved ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation." MCL 168.765(2). Meanwhile, the Secretary's AV Ballot Processing Guidance clearly omits the latter of those two express statutory marking requirements under MCL 168.765(2), as the Guidance directs city and township clerks to mark the date on which the ballot was received, but fails to direct clerks to provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified). Ex A, at 5. The fact that the AV Ballot Processing Guidance includes the date requirement but omits the

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signature-verification-confirmation requirement indicates that the Secretary does not believe that MCL 168.765(2) requires clerks to mark absent voter ballot return envelopes with a statement that the voter's signature has been verified and the ballot is approved for tabulation. Given that Clerk Berry is subject to both MCL 168.765(2) and the Secretary's AV Ballot Processing Guidance, there is no question that an actual controversy exists here such that Clerk Berry (and the hundreds of other local clerks across Michigan) requires a declaratory judgment to guide her future conduct as it pertains to applying MCL 168.765(2).

32. Further, the fact that thousands of absent voter ballots were tabulated during the August 6, 2024 primary election in Warren, Michigan despite the absence of a statement by the clerk that the absent voter ballot is approved for tabulation (and that the voter's signature had been verified by the clerk) as expressly required under MCL 168.765(2), further evidences both the presence of an actual controversy here as well as the need for declaratory relief, *notwithstanding* any material omission in the Secretary's AV Ballot Processing Guidance. Indeed, it appears that, for example, the City of Warren may have tabulated absent voter ballots for which the voter's corresponding signature was not verified in accord with Michigan law, which in turn injures Plaintiffs where their members and candidates have their votes diluted by ballots for which the corresponding signatures did not meet the signature matching criteria under Michigan law but were accepted anyway, or where the interests of MRP and RNC in a fair and competitive electoral environment becomes a competitive *disadvantage* as a result of clerks' failure to verify signatures.

33. The injuries to Plaintiffs are at once completed and ongoing. Absent relief from this Court, these injuries will recur indefinitely because local election officials will continue misapplying MCL 168.765(2) due to confusion caused at least in part by the incomplete direction set forth in the Secretary's AV Ballot Processing Guidance. Therefore, a decision from this Court

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will redress the violation of Plaintiffs' rights under the Michigan Constitution and Michigan Election Law, and will also guide Plaintiffs' future conduct in this regard for the November 2024 general election and beyond.

LEGAL AND FACTUAL BACKGROUND

The Constitution and the Michigan Election Law expressly provide a framework for ensuring the accuracy and integrity of elections.

34. Under the Michigan Constitution, "[e]very citizen of the United States who is an elector qualified to vote in Michigan" has "[t]he fundamental right to vote, including but not limited to the right, once registered, to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a). To that end, qualified electors have the right to vote either in person or by absent voter ballot. *Id.* § 4(1)(g), (h). Exercising either right carries with it the electors' obligation to "prove their identity." *Id.*

35. An elector voting in person may prove their identity by "presenting their photo identification, including photo identification issued by a federal, state, local, or tribal government or an educational institution, or [] if they do not have photo identification or do not have it with them, executing an affidavit verifying their identity." *Id.* In any case, Michigan law requires that each in-person elector prove their identity *before* an election official gives that elector a ballot. See MCL 168.523(1) (requiring "at each election, before being given a ballot, [that] each registered elector offering to vote must identify himself or herself by presenting identification for election purposes"); MCL 168.523(2) (providing an elector the alternative of an affidavit which must be signed in the presence of an election inspector, and subjecting the elector to challenge under MCL 168.727).

36. The requirement that in person electors prove their identity by photo ID prior to receiving and casting a ballot is consistent with the Constitution's broader command that "the

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legislature shall" enact laws "to preserve the purity of elections . . . [and] to guard against abuses of the elective franchise." Const 1963, art 2, § 4(2). Indeed, the Supreme Court acknowledged that "[b]y instituting requirements," such as "the requirement that voters [] present photo identification . . . before voting," the State "guard[s] against abuse of the elective franchise [and] protects the right of lawful voters to exercise their full share of this franchise." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 7, 19; 740 NW2d 444 (2007).

37. As further acknowledged by the Supreme Court, Michigan's Purity of Elections Clause "[has] been a part of our constitution for almost as long as Michigan has been a state. As [the Michigan Supreme Court] noted in the nineteenth century, the purpose of a law enacted pursuant to these constitutional directives 'is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting*.' " *Id.* at 17. (Emphasis in original and internal citation omitted).

38. That balance is paramount to the electoral process. "In sum, while a citizen's right to vote is fundamental, this right is not unfettered. It competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, including ensuring that lawful voters not have their votes diluted." *Id.* at 20.

39. Not only is the mandate that an elector must "prove their identity" before receiving a ballot in a polling place constitutional, it is also overwhelmingly supported by public opinion. See Detroit Regional Chamber, *Statewide Poll Reveals Opinions on Political Landscape* (June 7, 2021) https://www.detroitchamber.com/statewide-poll-reveals-opinions-on-political-landscape-covid-19-and-vaccination-perceptions-ongoing-labor-shortage-and-voting-rights/ (last visited

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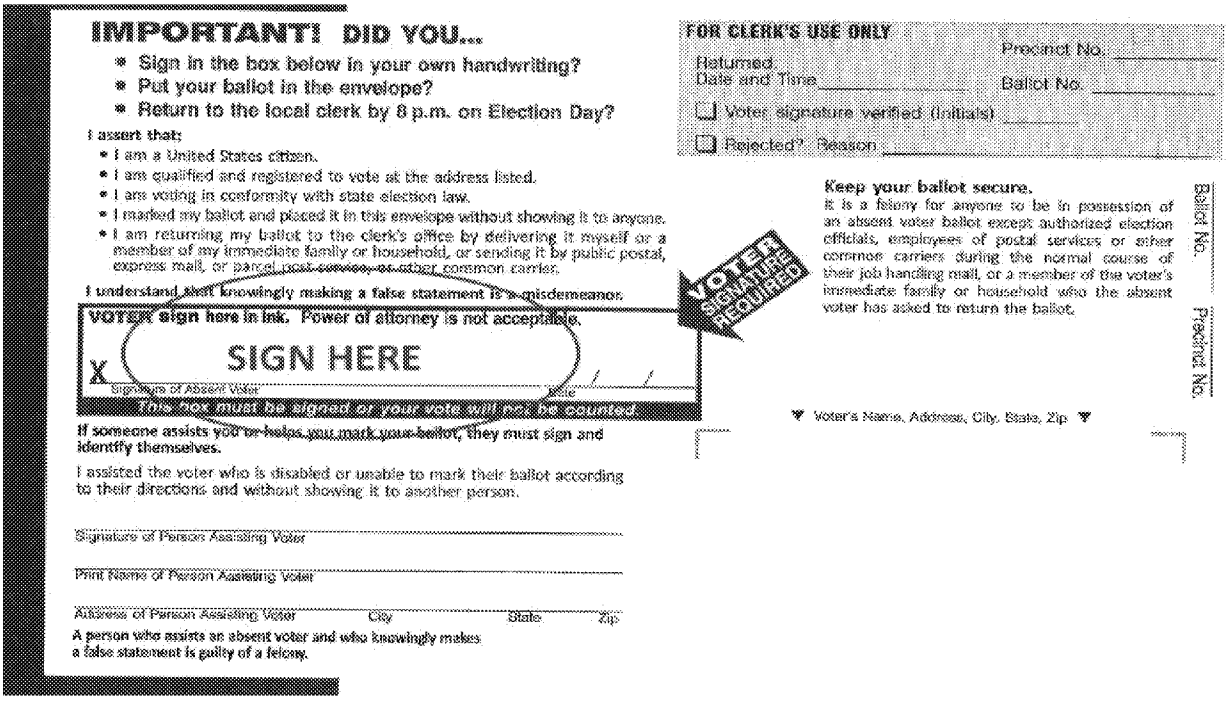
September 10, 2024) (finding that 79.7% of respondents in statewide poll support requiring "every voter coming to the polls present a government-issued identification to cast their ballot").

40. While the process is somewhat different for those voting by absent voter ballot, the Constitution nonetheless requires voters "to **prove their identity** when applying for or voting an absent voter ballot other than in person by providing their signature to the election official authorized to issue absent voter ballots." Const 1963, art 2, § 4(1)(h) (emphasis added); see also MCL 168.764a (requiring electors to sign and date their absent voter ballot return envelope). This identification verification process is often referenced as the "signature verification" process.

41. The ballot return envelope within which the absent voter's ballot must be returned to the clerk is central to the signature verification process. MCL 168.761(4) requires that the back of each return envelope contain printed statements, including one "TO BE COMPLETED BY THE CLERK" and another "TO BE COMPLETED BY THE ABSENT VOTER." *Id.*

42. A sample absent voter ballot return envelope bearing substantially similar language (as is allowed pursuant to MCL 168.761(4)) follows:



IMPORTANT! DID YOU...

- Sign in the box below in your own handwriting?
- Put your ballot in the envelope?
- Return to the local clerk by 8 p.m. on Election Day?

I assert that:

- I am a United States citizen.
- I am qualified and registered to vote at the address listed.
- I am voting in conformity with state election law.
- I marked my ballot and placed it in this envelope without showing it to anyone.
- I am returning my ballot to the clerk's office by delivering it myself or a member of my immediate family or household, or sending it by public postal, express mail, or parcel post common or other common carrier.

I understand that knowingly making a false statement is a misdemeanor.

VOTER sign here in ink. Power of attorney is not acceptable.

X SIGN HERE

Signature of Absent Voter Date

Ballot will not be counted.

If someone assists you or helps you mark your ballot, they must sign and identify themselves.

I assisted the voter who is disabled or unable to mark their ballot according to their directions and without showing it to another person.

Signature of Person Assisting Voter

Print Name of Person Assisting Voter

Address of Person Assisting Voter City State Zip

A person who assists an absent voter and who knowingly makes a false statement is guilty of a felony.

FOR CLERK'S USE ONLY

Precinct No.

Returned Date and Time

Ballot No.

Voter signature verified (initials)

Rejected? Reason

VOTER SIGNATURE REQUIRED

Keep your ballot secure.

It is a felony for anyone to be in possession of an absent voter ballot except authorized election officials, employees of postal services or other common carriers during the normal course of their job handling mail, or a member of the voter's immediate family or household who the absent voter has asked to return the ballot.

Ballot No.

Precinct No.

▼ Voter's Name, Address, City, State, Zip ▼

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See *Election and Voter Information*, City of Romulus https://www.romulusgov.com/332/Election-Voter-Information (accessed September 10, 2024).

43. The portion "to be completed by the absent voter" instructs the elector to sign the envelope on the line designated for that purpose. It is that signature that the clerk must verify for the purpose of confirming the voter's identity under Michigan law.

44. To that end, when an election official is provided a voter's signature for the purpose of proving that voter's identity as a precondition to voting an absent voter ballot, the Michigan Constitution mandates that the election official shall: "**verify the identity** of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record." Const 1963, art 2, § 4(1)(h) (emphasis added). See also MCL 168.765(2) ("The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with [MCL 168.766]. The review under this subsection includes **verifying** the signature on each absent voter ballot return envelope in accordance with [MCL 168.766a].") (emphasis added).

45. Specifically, MCL 168.766(1) mandates that city or township clerks "shall determine" whether an absent voter ballot is approved for tabulation "by **verifying** both of the following: (a) [t]he elector is a registered elector and has not voted in person in that election [and] (b) [u]sing the procedures required under [MCL 168.766a], the signature on the absent voter ballot return envelope agrees sufficiently with the elector's signature on file." (emphasis added).

46. As for verifying the signature on an elector's absent voter ballot envelope, MCL 168.766a sets forth the standard by which local clerks must determine whether the signature is valid. Specifically, section 766a provides that "[a]n elector's signature is invalid only if it differs

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in significant and obvious respects from the elector's signature on file. Slight dissimilarities must be resolved in favor of the elector. Exact signature matches are not required to determine that a signature agrees sufficiently with the signature on file." MCL 168.766a(2). There, a voter's "signature on file" means "any signature of an elector contained in the qualified voter file[,]" or, "[i]f the qualified voter file does not contain a copy of an elector's digitized signature, or is not accessible, [then] the signature of the elector contained on the master card [or] the signature on the elector's absent voter ballot application." MCL 168.766a(7)(a)-(c).

47. The Michigan Election Law also implements a timing requirement on local clerks' duty to verify signatures. Specifically, MCL 168.766b governs the amount of time a clerk has to verify a voter's signature on an absent voter ballot return envelope, providing in pertinent part:

> (1) Beginning 45 days before an election, if an . . . absent voter ballot return envelope is received 6 or more calendar days before an election, the clerk must make a reasonable effort to verify or reject the absent voter ballot application or absent voter ballot return envelope **by the end of *the next business day following the receipt* of that . . . return envelope**.
>
> (2) [If an] absent voter ballot return envelope is received 5 or fewer days before an election or on election day, the clerk must verify or reject the absent voter ballot application or absent voter ballot return envelope **by the end of *the calendar day of receiving* that . . . return envelope**. [MCL 168.766b(1)-(2) (emphasis added)]

48. For this reason, MCL 168.765(2) expressly mandates that "[w]ritten or stamped on each absent voter ballot return envelope must be the date, and the time and date if received on election day, that the absent voter ballot return envelope was received by the city or township clerk[.]" By mandating that clerks indicate the date of receipt on each ballot return envelope under MCL 168.765(2), the Legislature has further ensured that clerks comply with the signature verification timing requirements such that they know when each ballot return envelope was

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received and, as a direct result, the deadline by which the voter's signature on each of those ballot return envelopes must be verified under MCL 168.766b(1)-(2).

49. Moving on to the verification of signatures, if a clerk determines that the signature on an elector's absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, then that ballot must be rejected. MCL 168.766a(3); MCL 168.765(2); MCL 168.766(2).

50. When a clerk rejects an absent voter ballot due to a missing or mismatched signature—and to ensure that the election integrity measures under Michigan law do not prevent any qualified elector from voting—then that voter has the right to be promptly notified and afforded "an equitable opportunity to correct the issue with the signature." Const 1963, art 2, § 4(1)(h). Likewise, Michigan law requires the Secretary to maintain an electronic system for tracking absent voter ballots to ensure that voters are aware of the status of their ballot. See MCL 168.764c; see also Const 1963, art 2, § 4(1)(i). Separately, Michigan law also requires local election officials to notify voters when their ballot has been rejected due to a missing or mismatched signature so that the voter may cure their deficient signature. MCL 168.761; MCL 168.765; MCL 168.766(3)-(6); MCL 168.766a(3)-(6).

51. If, however, the clerk determines that a voter's signature on their ballot return envelope agrees sufficiently with the voter's signature on file, then Michigan law mandates that clerks "must" include on each approved ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation." MCL 168.765(2). That requirement may be satisfied by completing the corresponding field in the "FOR CLERK'S USE ONLY" section, such as by checking the box and inserting the clerk's initials in the "Voter signature verified (Initials) _____" field, as in the example provided here:

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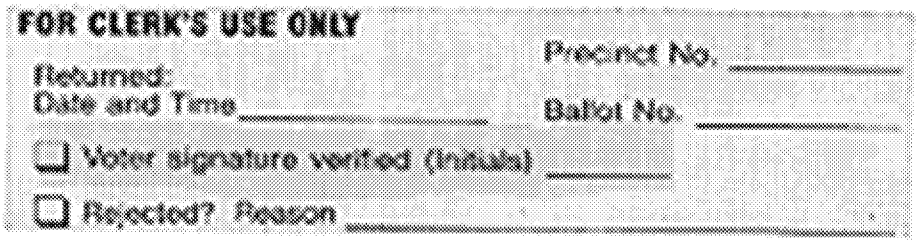
FOR CLERK'S USE ONLY
Returned:
Date and Time _____
Precinct No. _____
Ballot No. _____
☐ Voter signature verified (Initials) _____
☐ Rejected? Reason _____

See *Election and Voter Information*, City of Romulus https://www.romulusgov.com/332/Election-Voter-Information (accessed September 10, 2024) (highlighted emphasis added).

52. This particular recordkeeping requirement under MCL 168.765(2)—*i.e.*, the requirement that *after* verifying a voter's signature, clerks must include on the corresponding ballot return envelope "a statement . . . that the absent voter ballot is approved for tabulation"—is a vital aspect of the signature verification framework.

53. To reiterate, absent voter ballots are processed in two different stages under Michigan law. First, the above-referenced signature verification process is completed by local clerks outside the presence of election inspectors, election challengers, and poll watchers. See, e.g., MCL 168.765(2) (providing that signature verification must be completed by the "city or township clerk," and further providing that ". . . a precinct board of election inspectors or an absent voter counting board must *not* make any further signature verification for an absent voter ballot return envelope.") (emphasis added). If at that point the "clerk determines that the elector's signature on the absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, the clerk shall reject the absent voter ballot and provide the elector with notice and the opportunity to cure the deficiency in accordance with [MCL 168.766(4)]." *Id.* If, on the other hand, the clerk has verified that the signature on the ballot return envelope sufficiently matches the voter's signature on file, the absent voter ballot is approved for tabulation and submitted to a precinct board of election inspectors or an AVCB to be processed on Election Day.

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54. Therefore, while the clerk is responsible for verifying the voter's signature on each ballot return envelope, Michigan law precludes election inspectors from tabulating an absent voter ballot on Election Day if (a) the elector's signature is missing from the return envelope, or (b) the clerk's statement that the absent voter ballot is approved for tabulation as required under MCL 168.765(2) is incomplete. MCL 168.768. In other words, if the elector's signature is missing from the return envelope ***or*** if the clerk fails to complete the statement on the return envelope that the absent voter ballot is approved for tabulation, then election inspectors may ***not*** tabulate the ballot and "must immediately contact the city or township clerk." MCL 168.768.

55. Put another way, a ballot is only eligible for tabulation if the voter's signature has been verified by the clerk. So the clerk's statement of approval under MCL 168.765(2) functions as confirmation to those responsible for tabulating the ballots on Election Day—*i.e.*, either the precinct board of election inspectors or those election inspectors assigned to an AVCB—that the voter's signature on the ballot was, in fact, verified by the clerk. MCL 168.766(1)(b); MCL 168.768.

56. Given that the foregoing signature verification process for absent voter ballot return envelopes is conducted by local clerks behind closed doors and outside the presence of election inspectors or partisan poll challengers, those election inspectors responsible for tabulating the absent voter ballots on Election Day have no way of knowing whether the clerk verified the absent voter's signature in accord with Michigan law unless the clerk complies with MCL 168.765(2) by providing the required statement on the ballot return envelope. And if the clerk fails to provide that statement under MCL 168.765(2) confirming that the voter's signature has been verified and the absent voter ballot is approved for tabulation, then those election inspectors are required to reject the ballot and notify the clerk. See MCL 168.768 (mandating that election inspectors "shall

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verify . . . that the statement on the absent voter ballot return envelope that the ballot is approved for tabulation is complete" and that if "the statement that the absent voter ballot is approved for tabulation is incomplete, the [board] must immediately contact the city or township clerk.").

57. Michigan law is clear on this issue: for each and every absent voter ballot return envelope received by a local clerk, that clerk must (1) record on the envelope the date it was received by the clerk, and (2) once the clerk has verified the voter's signature and approved the ballot for tabulation, they must include a statement "that the absent voter ballot is approved for tabulation." MCL 168.765(2).

The August 6, 2024 primary election: the Clerk in at least one major Michigan city fails to include a statement on absent voter ballot return envelopes that the corresponding absent voter ballot is approved for tabulation—and yet those ballots were tabulated anyway without any apparent signature verification.

58. The City of Warren is the third largest city in the state of Michigan and is located within Macomb County, which boasts the third highest number of registered voters. *Warren*, State of Mich, PureMichigan.org https://www.michigan.org/city/warren (accessed September 10, 2024); see also *Voter registration statistics*, Dep't of State – Mich Voter Info Ctr https://mvic.sos.state.mi.us/VoterCount/Index (accessed September 10, 2024).

59. On August 6, 2024, the AVCB for the City of Warren processed and tabulated thousands of absent voter ballots for the Michigan primary election. In attendance were individuals serving as counting board chairs, including Madison Takala and Ron Takala (see Affidavit of Madison Takala, attached hereto as **Exhibit B**, and Affidavit of Ron Takala, attached hereto as **Exhibit C**). Also in attendance were credentialed poll challengers, such as Dawn Beattie (see Affidavit of Dawn Beattie, attached hereto as **Exhibit D**).

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60. Madison and Ron Takala are seasoned election workers, having served as election inspectors in August 2020 and November 2020, respectively, and in almost every election since then. Exs B at ¶ 4; C at ¶ 4.

61. On August 6, 2024, Madison and Ron served as counting board chairs, responsible for managing and overseeing multiple election inspectors tasked with processing and tabulating absent voter ballots for 12 to 13 voting precincts. Exs B at ¶ 14, C at ¶ 5. In total, Madison and Ron each oversaw the processing and counting of thousands of absent voter ballots, personally inspecting hundreds in the process. Exs B at ¶ 14, C at ¶¶ 5-6.

62. Meanwhile, Dawn Beattie—a Regional Election Integrity Director for the MRP—was duly credentialed to serve as a poll challenger at the Warren AVCB on August 6, 2024. Ex D at ¶ 2. With limited exception, Ms. Beattie was present at the AVCB that entire day, observing roughly 16 different tables of election inspectors as they processed and tabulated absent voter ballots and return envelopes. *Id.* at ¶¶ 4-6.

63. The absent voter ballot return envelopes received by the Warren AVCB contained a printed statement in the upper right corner, indicating that portion of the return envelope was "For Clerk's Use Only." Exs B at ¶ 12, C at ¶ 7, D at ¶ 7. The clerk's portion of the return envelope included text prompting the clerk to fill in the following information in the space provided: 1) the date and time of the ballot and envelope's receipt; 2) the applicable precinct number; 3) the returned ballot number; and 4) confirmation that the voter signature on the return envelope has been verified as indicated by the clerk's initials. *Id.*; see also *supra* ¶¶ 42, 51 (providing a similar example of the "for clerks use only" portion of a ballot return envelope). The return envelopes also contained a printed statement on the lower left side of the envelope directing the absent voter to sign the envelope on the line designated for that purpose. Ex B at ¶ 13, Ex C at ¶ 8.

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64. Throughout the day, election inspectors reviewed each absent voter ballot return envelope to confirm that the clerk had correctly completed all of the required fields designated "For Clerk's Use Only." Ex B at ¶ 11, Ex C at ¶ 9.

65. Even though they personally observed *hundreds* of absent voter ballot return envelopes, neither Madison Takala, Ron Takala, nor Dawn Beattie recall a *single* instance in which the clerk had included a statement on the envelope confirming that the voter's signature had been verified. Ex B ¶ 15-17, C at ¶¶ 10-12, D at ¶¶ 10-12.

66. Making matters worse, at least one poll challenger (Dawn Beattie) notified an election inspector (Madison Takala) that the "For Clerk's Use Only" section of the ballot envelopes were not marked with either the date received or a statement that the voter's signature had been verified. Ex B ¶ 23. Consistent with MCL 168.768, that election inspector directed the challenger to the deputy clerk. *Id.* The deputy clerk first responded that she was not sure about the verification process, then stated that she did not know why the "For Clerk's Use Only" section of the envelopes was incomplete, and finally stated that she was not able to answer the challenger's inquiry because she was busy. Ex D at ¶¶ 16-18. And while the deputy clerk did tell the challenger that she would follow up with her on this issue, the deputy clerk never explained why none of the "For Clerk's Use Only" sections of the ballot envelopes were marked with the date received by the clerk's office nor a statement that the voter's signature had been verified. Ex D at ¶¶ 18-19.

67. As expressly stated in MCL 168.765(2), anything less than written confirmation by the clerk that the absent voter ballot and return envelope were approved for tabulation is contrary to Michigan law. Upon information and belief, ballots for which there is no evidence or confirmation that clerks verified signatures on absentee ballot return envelopes were tabulated and counted in the August 6 Michigan primary election in derogation of the law.

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68. Moreover, the City of Warren's noncompliance with the marking requirements under MCL 168.765(2) appears to be longstanding. For example, while Ms. Takala worked as a temporary employee of the City of Warren clerk's office before the November 2020 general election and was responsible for receiving and handling AV ballots that had been returned to the clerk's office, she was never told to mark any portion of the ballot return envelope to indicate that the voter's signature had been verified. Ex B ¶¶ 5-8. So, upon information and belief, it appears that some local clerks have not been complying with MCL 168.765(2) for at least four years.

The Secretary's AV Ballot Processing Guidance.

69. A current version of the Secretary's guidance document entitled "Election Officials' Manual, Chapter 8: Absent Voter Ballot Processing" (referenced throughout as the Secretary's "AV Ballot Processing Guidance") attached hereto as **Exhibit A**.

70. While one portion of the AV Ballot Processing Guidance permissibly instructs that "upon receipt of the absent voter ballot envelope, the clerk should verify that the signature on a returned absent voter ballot envelope matches the voter's signature stored in the QVF," Ex A at 5, the Guidance fails to instruct local clerks to *record* such verification by written statement in the "to be completed by the clerk" portion of the ballot return envelope as required by MCL 168.765(2).

71. Worse, however, the AV Ballot Processing Guidance obfuscates section 765(2)'s recording requirements by only referencing the requirement that ballot envelopes be marked with the date the ballot was received, and wholly failing to mention the requirement that ballot envelopes be marked with a statement that the voter's signature has been verified and the ballot is approved for tabulation. The full text of the challenged provision of the AV Ballot Processing Guidance reads as follows:

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> **Signature verification**
>
> Immediately upon receipt of the absent voter ballot envelope, the clerk should verify that the signature on a returned absent voter ballot envelope matches the voter's signature stored in the QVF. If the signature does not match, or if the signature is missing, the clerk must immediately attempt to contact the voter and "cure" the signature. Voters have until 5 p.m. on the third day following the election to cure this issue. If the missing or mismatched signature is not cured by election day, the clerk should keep the ballot at their office and not send to the AVCB. If the missing or mismatched signature is not cured by third day after election day, the ballot should be rejected.
>
> **Once the ballot is verified and deemed valid, clerk should mark the "received" date in QVF and mark the ballot envelope in the "Clerk Section" with the date of receipt.**
>
> A voter may leave the date entry next to the signature on the absent voter ballot return envelope blank, so long as the voter has signed the absent voter return envelope. A signed absent voter ballot envelope that is missing a date is processed in the same way as an absent voter ballot envelope which is not missing the date.
>
> An absent voter ballot envelope whose signature has been determined to match the absent voter's signature on file is referred to as an "accepted absent voter ballot."

Ex. A at 5 (second emphasis added).

72. A plain reading of the foregoing "Signature verification" section of the AV Ballot Processing Guidance imparts two directions, both related to recording only the date on which a ballot was received—clerks must (i) mark the date the ballot envelope was received in the QVF, and (ii) mark the date received on the ballot envelope.

73. But the Secretary's guidance suffers from a material omission. MCL 169.765(2) unambiguously requires a clerk to record *both* the date an absent voter ballot return envelope was received *and* a statement by the clerk that the absent voter ballot is approved for tabulation (i.e., confirmation that the clerk, in fact, verified the signature and thus the elector's identity as required under Michigan law).

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74. In other words, the Secretary's Guidance reads-out the one accountability mechanism available to the one class of persons responsible and eligible under the law to "verify" a signature. *Id.* (prohibiting "**any further** signature verification for an absent voter ballot return envelope" after the clerk's approval) (emphasis added).

75. In Michigan, clerks are required to follow the law. But election inspectors processing absent voter ballots are not allowed to *assume* that the clerk's office verified a voter's signature. Rather, clerks are required to make a statement that the signature on "*each*" absent voter ballot return envelope had been verified and therefore approved for tabulation. MCL 168.765(2) (emphasis added). Only when that statement is present on a ballot return envelope are election inspectors permitted to tabulate a ballot; otherwise, the ballot must be rejected. MCL 168.768.

76. Because the Secretary's Guidance promotes a standard that wholly omits one of the requirements of MCL 168.765(2), it is inconsistent with and directly counter to the express requirements of the Michigan Constitution and Michigan Election Law.

Judicial intervention is necessary to ensure that the Michigan Constitution and the Michigan Election Law are enforced during the November 2024 general election.

77. This Court recently issued an opinion and order declaring inconsistent with Michigan law other guidance materials issued by the Secretary that diminished the constitutional and statutory requirement that clerks must "verify" signatures on absent voter ballot return envelopes. That case was captioned *Republican National Committee v Benson*, Case No 24-000041-MZ (June 12, 2024). In so holding, the Court reasoned that "[w]hether the guidance material includes a gentle nudge instead of a hip check, [its inconsistency with the Michigan Constitution and Michigan Election Law is] still a foul under Michigan law." *Id.* at p 6.

78. That reasoning applies here, too. The Secretary's omission gently nudges local clerks to an interpretation of MCL 168.765(2)'s recording requirements that only implicates the

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date on which an absentee ballot is received. What it leaves out is the accountability mechanism that is section 765(2)'s written statement of approval for tabulation—the one oversight on the consequential duty of a clerk to ensure the purity of elections and safeguard against abuses of the elective franchise by verifying signatures on absent voter ballots.

79. The occurrences at the Warren AVCB on August 6, 2024 are potentially indicative of a more widespread misunderstanding caused by the Secretary's AV Ballot Processing Guidance.

80. The Secretary's AV Ballot Processing Guidance arrived as one of a string of different directives and changes in the law that local clerks had to sort for themselves since the recent proliferation of absentee and early voting. For example, City of Lansing Clerk Chris Swope reportedly referred to the 2024 presidential primary on February 27 as "one of the craziest" he had seen in the last 18 years serving in that role. Gibbons, *Early voting a 'significant new option' for voters, 'significant challenge' for clerks*, Bridge Mich (February 16, 2024) https://www.bridgemi.com/michigan-government/early-voting-significant-new-option-voters-significant-challenge-clerks (accessed September 10, 2024). Swope continued, "[a]s election officials, our priority number one is the accuracy and integrity of the system itself. Sometimes, when you inject a lot of changes into a system, that can be really challenging." *Id.*

81. In any case, Plaintiffs' rights and ability to participate in a free and fair elective franchise has already been damaged. If absent voter ballot return envelopes are not marked with a statement that the voter's signature has been verified by the clerk during the first stage of the absent voter ballot processing procedure, there is no way for election inspectors conducting the second stage of the process at precinct boards and AVCBs to confirm that signature verification has actually occurred, which in turn means those election inspectors cannot fulfill their statutory duty to confirm that a voter's signature has been verified by the clerk. See MCL 168.768 ("The board

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of election inspectors ***shall*** verify . . . that the statement on the absent voter ballot return envelope that the ballot is approved for tabulation is complete.") (emphasis added).

82. Further, by all indications, the Secretary will maintain her fatally incomplete AV Ballot Processing Guidance into the November 5, 2024 general election, thereby damaging Plaintiffs' rights and abilities to participate in a free and fair elective franchise in that election, and all those beyond, by creating confusion for clerks and obfuscating the ballot envelope marking requirements imposed on clerks by MCL 168.765(2).

83. Plaintiffs collectively seek to ensure that local election officials are instructed to follow the law in advance of the general election on November 5, 2024.

84. Clerks like Plaintiff Berry are, and will continue to be, subject to this misleading and fatally incomplete Guidance.

85. Immediate declaratory relief is justified so that Plaintiffs receive a declaration of their rights and clarity as to the absent voter ballot processing procedure in advance of the November 5, 2024 general election.

86. Absent declaratory relief, the Secretary's AV Ballot Processing Guidance will, as it did during the August 6, 2024 primary election, violate and jeopardize the rights and interests of Plaintiffs in the forthcoming general election.

87. Plaintiffs, moreover, lack an adequate remedy at law to clarify the legal requirements of MCL 168.765(2) and prevent the enforcement of the Secretary's AV Ballot Processing Guidance directing incomplete recording by local clerks.

COUNT I – VIOLATIONS OF THE MICHIGAN CONSTITUTION

88. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

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89. As set forth in this Verified Complaint, city and township clerks' apparent practice of failing to satisfy their duties under MCL 168.765(2) which requires *both* that a clerk mark the date on which each absent voter ballot return envelope was received *and* that the clerk provide a written statement on the envelope confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified), and the apparent practice of election inspectors tabulating absent voter ballots despite the complete absence of the above-referenced statement by the clerk that the absent voter ballot is approved for tabulation (see MCL 168.768 (conditioning tabulation of absent voter ballots on the clerk's satisfaction of the ballot marking requirements under MCL 168.765(2))—all of which appears to be caused at least in part by a material omission in the Secretary's AV Ballot Processing Guidance—is inconsistent with the mandate in the Michigan Constitution requiring that election officials verify the identity of absentee voters. See Const 1963, art 2, § 4(1)(h) ("[E]lection officials shall [*inter alia*] verify the identity of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record.")

90. Injunctive and declaratory relief are therefore necessary to remedy these unlawful practices. Plaintiffs are unable to reconcile the above-described practices and the material omission in the Secretary's AV Ballot Guidance with the mandate under the Michigan Constitution requiring that election officials verify the identity of absentee voters through the signature verification process.

91. A current ripe case or controversy between the parties is clearly present here. The Michigan Constitution requires that election officials verify the identity of absentee voters through the signature verification process. Const 1963, art 2, § 4(1)(h). During the primary election on

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August 6, 2024, local clerks failed to include a statement on absent voter ballot return envelopes indicating that the ballot is approved for tabulation as required by MCL 168.765(2). Likewise, it further appears that those ballots were tabulated despite missing the statement required by MCL 168.765(2), which is a violation of MCL 168.768. Attributable, at least in part, to the Secretary's incomplete AV Ballot Processing Guidance, these unlawful acts undoubtedly have and will continue to result in absent voter ballots being counted despite not having passed through the entire signature verification process. Absent declaratory and injunctive relief from this Court, these practices will continue to be applied in future elections, in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized.

92. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's incomplete AV Ballot Processing Guidance remains in place, and justice requires the issuance of injunctive relief.

93. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Constitution, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters as required under the Michigan Constitution by completing the signature verification process required by Michigan law. Aside from being mandated by the Michigan Constitution, this signature verification process is critical to election security and designed to ensure that each absent voter ballot originated from, and was completed by, the intended voter.

94. Plaintiffs lack an adequate remedy at law to enforce the Michigan Constitution's express absent voter identity verification requirements, which have been and will continue to be violated by the unlawful acts such as those described *supra* ¶¶ 89, 91 and the Secretary's AV Ballot Processing Guidance.

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95. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's AV Ballot Processing Guidance would allow a single state officer to circumvent (and essentially amend) valid and enforceable constitutional mandates on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring the integrity and accuracy of Michigan's elections and that each absent voter ballot originated from and was completed by the intended voter as required by the Michigan Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the local clerk's failure to satisfy the absent voter ballot marking requirements under MCL 168.765(2), as well as the tabulation of absent voter ballots despite the absence of that required statement of clerk approval, are inconsistent with the Michigan Constitution; order that the Secretary rescind her AV Ballot Processing Guidance and issue new guidance directing clerks to mark the date on which the ballot was received *and* to provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified as required by the Michigan Constitution) in the section of the return envelope designated "for clerk's use only" as expressly required under MCL 168.765(2); enjoin the Secretary from implementing the February 2024 version of her AV Ballot Processing Guidance in advance of the November 5, 2024 general election; and award any other relief that this court deems just and equitable.

COUNT II – VIOLATIONS OF THE MICHIGAN ELECTION LAW

96. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

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97. As set forth in this Verified Complaint, city and township clerks' apparent practice of failing to satisfy their duties under MCL 168.765(2) which requires *both* that a clerk mark the date on which each absent voter ballot return envelope was received *and* that the clerk provide a written statement on the envelope confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified), and the apparent practice of election inspectors tabulating absent voter ballots despite the complete absence of the above-referenced statement by the clerk that the absent voter ballot is approved for tabulation (see MCL 168.768 (conditioning tabulation of absent voter ballots on the clerk's satisfaction of the ballot marking requirements under MCL 168.765(2))—all of which appears to be caused at least in part by a material omission in the Secretary's AV Ballot Processing Guidance—is inconsistent with the Michigan Election Law.

98. Injunctive and declaratory relief are therefore necessary to remedy these unlawful practices. Plaintiffs are unable to reconcile the practices such as those described *supra* ¶ 97 and the material omission in the Secretary's AV Ballot Guidance with provisions in the Michigan Election Law expressly mandating that clerks mark absent ballot return envelopes with "a statement by the city or township clerk that the absent voter ballot is approved for tabulation," MCL 168.765(2); precluding election inspectors from tabulating absent voter ballots if that clerk's statement of approval is missing from the ballot return envelope, see MCL 168.768; and mandating that clerks verify the signatures on the absent voter ballot return envelopes by comparing those signatures against the voter's "signature on file." See, e.g., MCL 168.766a.

99. A current ripe case or controversy between the parties is clearly present here. The Michigan Election Law requires that election officials verify the identity of absentee voters through the signature verification process. During the primary election on August 6, 2024, local

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clerks failed to include a statement on absent voter ballot return envelopes indicating that the ballot is approved for tabulation as required by MCL 168.765(2). Likewise, it further appears that those ballots were tabulated despite missing the statement required by MCL 168.765(2), which is a violation of MCL 168.768. Attributable, at least in part, to the Secretary's incomplete AV Ballot Processing Guidance, these unlawful acts undoubtedly have and will continue to result in absent voter ballots being counted despite not having passed through the entire signature verification process. Absent declaratory and injunctive relief from this Court, these practices will continue to be applied in future elections, in which case Plaintiffs' respective rights and interests will continue to be violated and jeopardized.

100. Relief is therefore necessary so that this Court can articulate the proper standards of recording dates of receipt and statements of approval for tabulation as to absent voter ballot return envelopes.

101. For the reasons explained above, Plaintiffs will face irreparable harm if the Secretary's incomplete AV Ballot Processing Guidance remains in place, and justice requires the issuance of injunctive relief.

102. It is in the public interest to issue injunctive relief to ensure that Michigan's elections are carried out in accordance with the Michigan Election Law, and specifically to ensure that, *inter alia*, election officials verify the identity of absentee voters by completing the signature verification process required by Michigan law. Aside from being mandated by the Michigan Election Law, this signature verification process is critical to election security and designed to ensure that each absent voter ballot originated from and was completed by the intended voter.

103. Plaintiffs lack an adequate remedy at law to enforce the Michigan Election Law's express absent voter identity verification requirements, which have been and will continue to be

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violated by the unlawful acts such as those described *supra* ¶ 97 and the Secretary's AV Ballot Processing Guidance.

104. Finally, the balance of harms clearly weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's AV Ballot Processing Guidance would allow a single state officer to circumvent (and essentially amend) valid and enforceable state law mandates on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they, too, have an interest in ensuring the integrity and accuracy of Michigan's elections and that each absent voter ballot originated from and was completed by the intended voter as required by Michigan law.

WHEREFORE, Plaintiffs respectfully request that this Court declare that the local clerk's failure to satisfy the absent voter ballot marking requirements under MCL 168.765(2), as well as the tabulation of absent voter ballots despite the absence of that required statement of clerk approval, are inconsistent with the Michigan Election Law; order that the Secretary rescind her AV Ballot Processing Guidance and issue new guidance directing clerks to mark the date on which the ballot was received *and* to provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified as required by the Michigan Constitution and Michigan Election Law) in the section of the return envelope designated "for clerk's use only" as expressly required under MCL 168.765(2); enjoin the Secretary from implementing the February 2024 version of her AV Ballot Processing Guidance in advance of the November 5, 2024 general election; and award any other relief that this court deems just and equitable.

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REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court order "a speedy hearing" of this action and "advance it on the calendar" as provided under MCR 2.605(D), and that it issue the following relief:

A. Declare that city and township clerks must comply with MCL 168.765(2) by ***both*** (1) writing or stamping on each absent voter ballot return envelope the date that the ballot return envelope was received by the clerk (or, if received on Election Day, then clerks must write or stamp *both* the time and date that the ballot return envelope was received by the clerk); ***and*** (2) *after verifying each voter's signature*, clerks must also include on *each* approved ballot return envelope "a statement by the city or township clerk that the absent voter ballot is approved for tabulation." MCL 168.765(2);

B. Declare that if a clerk fails to include a statement on the ballot return envelope that the voter's signature has been verified, then election inspectors must reject the ballot and immediately notify the clerk as required by MCL 168.768;

C. Order the Secretary to rescind her AV Ballot Processing Guidance and issue new guidance directing city and township clerks to mark the date on which the ballot was received ***and*** to provide a written statement confirming the ballot is approved for tabulation (*i.e.*, confirming that the voter's signature has been verified) in the section of the return envelope designated "for clerk's use only" as expressly required under MCL 168.765(2);

D. Enjoin the Secretary from implementing the February 2024 version of her AV Ballot Processing Guidance in advance of the November 5, 2024 general election.

E. Award Plaintiffs their costs, expenses, and attorney fees incurred in this action; and

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F. Award any other relief this Honorable Court deems just and equitable.

Dated: September 10, 2024

Respectfully submitted,

/s/ *Robert L. Avers*

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VERIFICATION

I, Cindy Berry, being first duly sworn, depose and declare that I am a resident of the state of Michigan and am a duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Verified Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Cindy Berry

Subscribed and sworn to before me this 10th day of September, 2024.

Michelle C. Nizza

Michelle C. Nizza Notary Public

Sanilac County, State of Michigan

My commission expires: 12-16-2029

Acting in Macomb County

MICHELLE C. NIZZA
Notary Public, State of Michigan
County of Sanilac
My Commission Expires 12-16-2029
Acting in the County of MACOMB

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VERIFICATION

I, Alex Latcham, a representative of the Republican National Committee (the "RNC"), being duly sworn and being authorized to give this Verification on behalf of the RNC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Alex Latcham

By: Alex Latcham
Its: Senior Deputy Political Director

Subscribed and sworn to before me this 10th day of September, 2024.

AMY M CUMBOW, Notary Public

Ingham County County, State of Michigan

My commission expires: 03/14/2029

AMY M CUMBOW
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
MY COMMISSION EXPIRES MARCH 14, 2029
ACTING IN THE COUNTY OF Ingham

Notarized remotely online using communication technology via Proof.

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VERIFICATION

I, Tyson Shepard, a representative of the Michigan Republican Party ("MRP"), being duly sworn and being authorized to give this Verification on behalf of the RNC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

By: Tyson Shepard
Its: Executive Director

Subscribed and sworn to before me this 10th day of September, 2024.

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

Kyle Hogendyk Notary Public
Kent County, State of Michigan
My commission expires: 2-2-2027

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, and CINDY BERRY

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

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/

EXHIBIT LIST TO VERIFIED COMPLAINT

Exhibit A	Election Officials' Manual, Chapter 8: Absent Voter Ballot Processing (the "AV Ballot Processing Guidance")
Exhibit B	Affidavit of Madison Takala
Exhibit C	Affidavit of Ron Takala
Exhibit D	Affidavit of Dawn Beattie

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Exhibit A

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Election Officials' Manual, Chapter 8: Absent Voter Ballot Processing

February 2024

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
(517) 335-3237

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I. Introduction

Every Michigan voter has the right to request, vote, and return an absent voter ballot. Chapter 6: Michigan's Absent Voter Process, lays out how a voter may apply for, receive, and return an absent voter ballot. This chapter explains how returned absent voter ballots are processed and tabulated. Questions about the content of this chapter should be directed to Elections@Michigan.gov.

II. Overview of absent voter ballot processing

Returned absent voter ballots may be processed in one of three ways. First, absent voter ballots may be counted by election inspectors at the polling place where the absent voter would otherwise have voted on Election Day. Second, the city or township's election commission may establish one or more absent voter counting boards for the purpose of processing and tabulating absent voter ballots separately from Election Day polling places. Eligible jurisdictions can establish absent voter counting boards in order to process and tabulate returned absent voter ballots. Tabulation can occur starting as early as 8 days before Election Day. Third, city or townships may enter into an agreement with their county clerk to form a combined absent voter counting board.

The absent voter counting board structure: reporting returns and sharing resources

Absent voter counting boards (AVCBs) are precincts specially established to process absent voter ballots. Because AVCBs are precincts separate from in-person polling places operating on Election Day, AVCBs must report their election results separately from in-person precincts. For the county canvass, however, election results that report the vote totals of all in-person ballots cast on Election Day at a particular precinct as well as the vote totals of all absent voters assigned to that precinct must be prepared.

Jurisdictions where absent voter ballots are processed in the precinct on Election Day report their absent voter ballot returns in the Poll Book and the *Statement of Votes*.

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Each AVCB must use their own poll book, ballot container, and tabulator. In addition, each AVCB must produce individual precinct ballot summaries and *Statement of Votes*. When time allows, a single tabulator may be used for multiple AVCBs, so long as the tabulator uses an appropriately assigned ballot program, front and back pages of the Poll Book, and ballot containers. If an AVCB uses a single ballot container to secure ballots from multiple precincts, special care shall be taken to sort and bundle each precinct's ballots separately within the ballot container.

Duties of the local election commission

The local election commission decides whether to establish AVCBs or to process returned absent voter ballots at the precinct on Election Day. If the election commission establishes AVCBs, the commission must appoint a minimum of three inspectors to each AVCB. A single group of precinct inspectors may process multiple AVCB precincts. Election inspector appointments must be made under the same procedures established for the appointment of the precinct inspectors who will serve at in person precincts on Election Day. The commission is also responsible for securing a suitable location for the AVCBs to meet to process and tabulate ballots on Election Day. This location, referred to as a "absent voter ballot processing facility" must be sequestered from all other Election Day activity. Multiple AVCBs can be located in the same building or room.

The election commission is required to set the time that election inspectors working at the AVCB must report to the absent voter ballot processing facility. The work of the AVCB may begin as early as 7 a.m., and election inspectors may be required to arrive prior to 7 a.m.

Duties of the local clerk

The city or township clerk is responsible for providing either the precincts or the AVCBs with all necessary supplies to process absent voter ballots, depending on the absent voter ballot processing method selected by the election commission. In addition, the clerk should provide instruction on the operation of the AVCB to election inspectors assigned to work at an AVCB.

Oath required of persons present in the AVCB

All election inspectors, election challengers, and any person other than a member of the clerk's staff present at the absent voter ballot processing facility at the time absent voter ballots begin to be tabulated must take and sign the following oath:

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> "I (name of individual taking oath) do solemnly swear (or affirm) that I shall not communicate in any way information relative to any ballots or the tabulation of votes that may come to me while in this counting place until after the polls are closed. Further, I shall not photograph, or audio or video record, within the counting place, except for posted election results."

The oath for election inspectors can be found and completed in the AVCB poll book. All others should complete the oath on a separate sheet and be placed in the local clerk envelope.

A person who discloses an election result or in any manner characterizes how any ballot being counted has been voted before 8:00 p.m. on Election Day is guilty of a felony.

Prohibition on recording video or audio in the absent voter ballot processing facility

Individuals may have a cell phone or other electronic device in an absent voter ballot processing facility. However, no person, including election inspectors and challengers, may record video or audio in an absent voter ballot processing facility at any point. This prohibition, unlike other prohibitions, extends to periods prior to the beginning of tabulation and after the close of polls. A clerk may, at their discretion, create a media area in the absent voter ballot processing area after 8 p.m. on Election Day where audio or video may be recorded, but no person may record audio or video anywhere else in the facility at any time.

Number of AVCBs required

One AVCB must be designated to correspond to each precinct in the jurisdiction. A single AVCB, however, can correspond to more than one precinct. Absent voter ballots should be processed on a precinct basis and should not be intermingled to allow for precinct-level absent voter ballot and combined results to be recorded, so long as absent voter ballots from different precincts are kept separated, a single AVCB can process ballots from multiple precincts.

Establishing early processing AVCBs

Any local election commission may establish an AVCB on the Monday immediately before Election Day to process and tabulate AV ballots. Additionally, the local election commission of a jurisdiction with a population

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of over 5,000 can establish an AVCB on any of the 8 days before Election Day, beginning on the second Monday before Election Day.

For each day of early processing and tabulation, the participating city or township clerk will deliver approved absent voter ballots to the AVCB. Absent voter ballots must be processed and tabulated in the same manner as on Election Day (described below).

Clerks should review the Early Absent Voter Ballot Processing and Tabulating procedures document on eLearning for additional and specific procedures.[1]

Challengers in an early absent voter counting board

Challengers are allowed in a facility where absent voter ballots are being processed and tabulated before election day, and have the same rights and responsibilities as challengers at an Election Day AVCB. Eligible entities may designate one challenger for every eight election inspectors or one challenger if seven or fewer election inspectors are present.

Notice and posting requirements

Eligible clerks wishing to process and/or tabulate absent voter ballots before Election Day must do the following:

- Provide written notice to the Secretary of State at least 28 days before Election Day.
- Post the hours and location of the AVCB, as well as the number of election inspectors working, on the city or township website and in the clerk's office at least 18 days before Election Day. If the time or location changes after the initial notice, post the revised details on the city or township website and in the clerk's office as soon as possible, but no later than 11 days before Election Day.
- If the time, location, or staffing change after early processing and tabulating begins, updated notice must be provided no later than 10 a.m. on the day before a change occurs.
    - If notice is provided after this time, and a staffing change would reduce the eligible number of challengers in the facility, the previous number of challengers must be allowed to remain.

[1] Available at https://mielections.csod.com/ui/lms-learning-details/app/material/e6ae8c33-685b-422f-87d3-cff8fa10e61e.

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III. Absent voter ballot counting procedures

The work performed by election inspectors processing AV ballots is divided into two separate tasks: processing absent voter ballots and tabulating absent voter ballots.

Signature verification

Immediately upon receipt of the absent voter ballot envelope, the clerk should verify that the signature on a returned absent voter ballot envelope matches the voter's signature stored in the QVF. If the signature does not match, or if the signature is missing, the clerk must immediately attempt to contact the voter and "cure" the signature. Voters have until 5 p.m. on the third day following the election to cure this issue. If the missing or mismatched signature is not cured by election day, the clerk should keep the ballot at their office and not send to the AVCB. If the missing or mismatched signature is not cured by third day after election day, the ballot should be rejected.

Once the ballot is verified and deemed valid, clerk should mark the "received" date in QVF and mark the ballot envelope in the "Clerk Section" with the date of receipt.

A voter may leave the date entry next to the signature on the absent voter ballot return envelope blank, so long as the voter has signed the absent voter return envelope. A signed absent voter ballot envelope that is missing a date is processed in the same way as an absent voter ballot envelope which is not missing the date.

An absent voter ballot envelope whose signature has been determined to match the absent voter's signature on file is referred to as an "accepted absent voter ballot."

Processing absent voter ballots

If a jurisdiction processes absent voter ballots using AVCBs, all absent voter ballots received by the clerk prior to Election Day are delivered to the absent voter ballot processing facility on Election Day or during the early tabulation period. The absent voter ballots are delivered to the AVCB at the time established by the election commission.

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If a jurisdiction processes absent voter ballots at the polling place, all absent voter ballots received by the clerk prior to Election Day, and all absent voter ballot applications corresponding to those ballots, are delivered to the appropriate polling place shortly after the opening of the polls.

After receipt of the absent voter ballots at the absent voter ballot processing facility, ballot processing begins. The processing of absent voter ballots is divided into the two steps explained below. While jurisdictions may deviate from the process described here, jurisdictions must take care that whatever process they settle on does not compromise ballot secrecy.

Ballot envelope verification using AVCBs

During this stage, election inspectors verify that the clerk's record area of the return envelope was completed. If the clerk's record area of the return envelope is incomplete, the election inspectors alert the clerk or a member of the clerk's staff present in the absent voter ballot processing facility of the issue. If the clerk's record area of the return envelope was completed, the election inspector should open the return envelope and continuing processing.

The election inspector should then highlight or place a check by the voter's name using the absent voter ballot button in the QVF Absent Voter List or the ePollbook, depending on which voter list is being used at the absent voter ballot processing facility, to indicate that an absent voter ballot envelope was received for processing. If the certificate for persons assisting an absent voter on the ballot envelope is completed, the election inspector should record the assistance in the Remarks page of the ePollbook. The note should include the name of the voter and the name of the individual who provided the assistance.

Ballot envelope verification at the polling place

After selecting an absent voter ballot envelope, the election inspector should check the ePollbook to confirm that the voter whose absent voter ballot envelope is being processed has not voted in person at the election. If the election inspector cannot confirm either that the voter whose absent voter ballot envelope is being processed has not voted in person at the election or cannot confirm that the signature on the absent voter ballot return envelope matches the signature on the corresponding absent voter ballot application, the election inspector should contact the city or township clerk.

Next, inspectors verify that the clerk's record area of the return envelope was completed. If the clerk's record area of the return envelope is

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incomplete, the election inspectors should contact the clerk and alert them of the issue. If the clerk's record area of the return envelope was completed, the election inspector should open the return envelope and continuing processing.

Ballot verification

After the absent voter ballot envelope has been verified at either an AVCB or a polling place, the election inspector should open the absent voter ballot envelope. Without exposing any votes, the election inspector should verify that the number on the ballot stub agrees with the ballot number recorded for the voter in the QVF Absent Voter List or the ePollbook.

If the ballot was returned in a secrecy envelope, the ballot and secrecy envelope may be removed from the return envelope to make the comparison. If the ballot was not returned in a secrecy envelope, the election inspector should first verify that the ballot was folded by the voter so that the votes are concealed before removing the ballot from the return envelope to make the comparison. If the ballot must be placed in a secrecy envelope, the election must take care placing the ballot into a secrecy sleeve to avoid exposing any votes cast on the ballot.

If the number on the ballot does not agree with the ballot number recorded for the voter in the QVF Absent Voter List or the ePollbook and no explanation for the discrepancy can be found, the ballot must be processed as a challenged ballot. Possible explanations for a discrepancy that do not require the ballot to be processed as a challenged ballot include that the voter lives in the same household as a second voter and that the voters accidentally switched absent ballot return envelopes.

If the ballot is missing its stub, the election inspector should check to see if the detached stub is included inside the absent voter ballot envelope. If the stub is inside the envelope, the stub should be treated as if it were attached to the ballot. If the stub is not inside the envelope, the ballot should be processed as a challenged ballot.

If the absent voter ballot envelope or secrecy sleeve is empty, the election inspector should note the missing ballot in the Remarks page of the ePollbook. The note should include the expected ballot number and the fact the ballot was not returned, but it should not include the voter's name.

Finally, the election inspector should remove the absent voter ballot from the absent voter ballot envelope. The envelope should be set aside. At the end of Election Day, all absent voter ballot envelopes should be returned to

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the clerk. Without removing the ballot from the secrecy sleeve, the election inspector should remove the numbered stub from the ballot. At the discretion of the clerk, the stub may be either discarded or retained for later review.

After the election inspector completes the above steps, the absent voter ballot in its secrecy sleeves are then sent for tabulation.

Tabulating absent voter ballots

To begin the tabulation process, an election inspector who was not involved in the ballot processing explained above should move the absent voter ballots with stubs detached to a different location within the absent voter ballot processing facility or the polling place. This maintains ballot secrecy by ensuring that the election inspectors who processed the ballots cannot see how a particular ballot was voted.

The election inspector should then remove the anonymized ballots from their secrecy sleeve and feed the ballot into the tabulator. If the ballot is accepted by the tabulator, the ballot's tabulation is complete.

If a ballot is rejected by the tabulator, the election inspector should visually inspect the ballot to determine the reason the ballot was rejected. If the reason for the ballot's rejection can be cured, for example because the ballot was damaged, the ballot should be duplicated using the normal duplication procedures explained below. Duplication cannot occur in an in person polling place until after the close of polls, but duplication can occur in an absent voter ballot counting facility at any time.

After the close of polls at 8:00 p.m., election inspectors should confirm with the clerk that no additional absent voter ballots will be delivered for processing. Once election inspectors have confirmed that no further absent voter ballots will be delivered, that all absent voter ballots have been processed and tabulated, and that all necessary ballot duplication has occurred and those duplicate ballots have been tabulated, election inspectors may begin closing the AVCB or polling place.

If tabulating early, no results can be generated prior to 8:00 p.m. on Election Day.

Closing procedures

Election inspectors processing absent voter ballots at the polling place should follow the regular closing procedures explained below. Election

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inspectors serving at AVCBs should follow the instructions below to close their AVCBs.

Once all ballots have been tabulated and all ballots requiring duplication have been duplicated and tabulated, the election inspectors should compare the total number of ballots tabulated displayed on the tabulator's public counter to the total number of absent voter ballots delivered to the board for processing. These totals should agree.

If the total number of ballots tabulated and total number of absent voter ballots received for processing do not agree, the election inspectors should attempt to identify the reason for the discrepancy. Possible explanations for a discrepancy may be noted in the Remarks page of the ePollbook, and may include that an absent voter ballot envelope that did not contain a ballot was opened at the AVCB. If the discrepancy cannot be reconciled after reviewing the Remarks page, the election inspectors should physically count all tabulated ballots. If the number of ballots differs from the number displayed on the tabulator's public counter, the ballots must be retabulated. The election inspectors should contact their clerk for instructions on how to conduct a retabulation.

Once the election inspectors have determined that the total number of tabulated ballots displayed on the tabulator's public counter and the total number of absent voter ballots delivered for processing agree, or the election inspectors have identified the specific reason for any discrepancies and noted those reasons in the *Remarks* page of the Poll Book, the election inspectors must prepare the *Statement of Votes* and *Ballot Summary*. The *Statement of Votes* and *Ballot Summary* for each AVCB should be completed in the same manner each document would be completed for an in person precinct on election day. A minimum of three copies of each document are required. Often, the Poll Book is designed so that completing each document once creates an original and two copies, satisfying the three copy requirement.

Next, the election inspectors should complete the *Certificate of Election Inspectors* included in the Poll Book. The election inspectors must fill in the following four blanks in the Poll Book:

- The number of voters who were issued absentee ballots (according to this Poll Book): _____
- The number of absent voter ballot return envelopes received by the Board: _____

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- The number of invalid absent voter ballot return envelopes that the clerk did not deliver to Board (according to this Poll Book): _____
- The number of absent voters who did not return their absent voter ballot to the clerk (according to this Poll Book): _____

The election inspectors should then complete any remaining required entry in the Poll Book.

After the Poll Book is complete, the election inspectors should seal all ballots into an approved ballot container and record the seal number in the Poll Book, on all three copies of the Statement of Votes, and on the *Ballot Container Certificate*. Two election inspectors who have expressed a preference for different political parties must attest to the sealing. If ballots for more than one AVCB are placed into the ballot container, election inspectors should sort and bundle each AVCB's ballots separately within the container. The absent voter ballot envelopes and the absent voter ballot applications should be placed in the Absent Voter Envelope.

The Poll Book and other materials prepared at the AVCB will be reviewed by a receiving board. If a mistake is found at the receiving board that requires the ballot container to be opened and resealed, the replacement seal number must be recorded on all documents where the original seal number was recorded. Once the Poll Book and other materials are verified by the receiving board, the ballot container may not be opened unless authorized by the Board of County Canvassers.

IV. Absent voter ballots received on Election Day

All accepted absent voter ballots received by the clerk through 8:00 p.m. on Election Day must be delivered to the location where absent voter ballots are being processed. If absent voter ballots are being processed using AVCBs, the election inspectors at the AVCB should record the date on which the absent voter ballot was returned in the QVF Absent Voter List. If absent voter ballots are being processed in the polling place, the election inspectors at the polling place should record the date that the absent voter ballot was returned in the ePollbook.

To ensure the secrecy of all votes cast, the election inspectors at the location where absent voter ballots are being processed should set aside several of

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the absent voter ballot envelopes that were returned prior to Election Day until after 8:00 p.m. These envelopes should then be intermingled with any absent voter ballot envelopes delivered by the clerk during or after the close of polls on Election Day. This intermingling preserves ballot secrecy and ensures the votes cast by persons returning their absent voter ballots remains anonymous.

V. Absent voter ballots rejected by tabulator

Tabulators are programmed to reject damaged and invalid ballots. Damaged and invalid absent voter ballots should be duplicated to remove the issue causing the tabulator to reject the ballot.

Damaged and improperly completed ballots

A damaged ballot is a ballot that is crumpled, is water damaged, or has another physical defect that prevents the tabulator from reading the ballot.

Blank ballots

Blank ballots occur when a voter does not complete their ballot, but a tabulator may also interpret a ballot as being blank if the voter attempts to complete their ballot with ink that is not black or blue or if the voter makes marks on the ballot which are insufficiently dark to be detected by the tabulator.

Ballots with overvotes

Overvotes occur when a voter votes for more candidates than permitted for a given office. An overvote may also occur if the voter has crossed out a candidate, attempted to erase a mark on a ballot, or otherwise made a mark on the ballot that the tabulator interprets as an attempt to vote for more candidates that prohibited.

Ballots with crossover votes

Crossover votes occur because a voter has voted in races for both parties during a partisan primary. In partisan primaries, although primary elections for the two major parties appear on the same ballot, the voter is only permitted to participate in one party's primary. The voter cannot participate in one party's primary for one office and the other party's primary for a

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second office. As with overvotes, inadvertent or erased marks may be interpreted by the tabulator as an attempt to cast a crossover vote.

Ballots with stray marks

A ballot with stray markings may be interpreted by the tabulator as an ballot with an overvote or a crossover vote.

Duplicating damaged or improperly completed ballots

If an absent ballot is rejected by the tabulator, the election inspector should check the tabulator to determine the reason for the rejection. The election inspector should then examine the ballot to determine where the issue on the ballot occurs.

Once the election inspector has determined what mark or marks are causing the tabulator to reject the absent voter ballot, the election inspector should set the ballot aside for duplication. In an absent voter ballot processing facility, particular teams of election inspectors are often assigned to duplicate ballots. In a precinct processing absent voter ballots on Election Day, the election inspectors should duplicate the ballot after the close of polls.

Two election inspectors, each of whom has expressed a preference for a different political party, must be present for every step of the ballot duplication process.

The duplication process consists of the following steps:

1. The election inspectors should obtain one blank ballot for each ballot which needs to be duplicated. The numbered stub should be removed from the blank ballot and discarded. The election inspectors should then identify the blank ballot and the corresponding ballot to be duplicated by writing numbering the two ballots, starting with the number one. The ballot to be duplicated should be identified with a numeral, and the corresponding blank ballot should be identified with "Dup." followed by the same numeral. For example, the first ballot to be duplicated would be labeled "1", and the corresponding blank ballot would be labeled "Dup. 1"
2. The votes recorded on the ballot to be duplicated should be transferred to the blank ballot using a reader-checker process. One election inspector should call out the valid votes on the original ballot, while

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the other election inspector records those votes on the duplicate ballot. If the voter's intent is uncertain, the election inspector should consult the section *Determining Ambiguous Voter Intent* below. If the voter has overvoted in a race, the election inspector should consult the section *Correcting an Overvote* below.

3. After completing the duplication process, both election inspectors should verify that the original ballot and the now-duplicated ballot are identified with the correct number and that all valid votes have been transferred from the original ballot to the duplicate ballot.

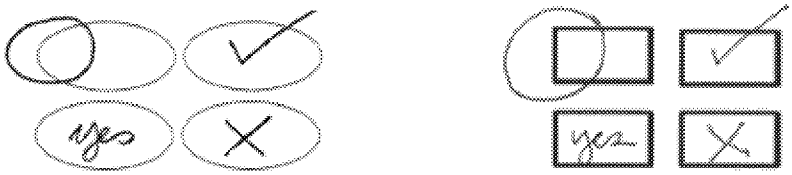
After all ballots requiring duplication have been duplicated, the original ballots are placed into an envelope designated to hold ballots rejected by the tabulator. The envelope is sealed into the ballot container with all other ballots. The newly-duplicated ballots are fed into the tabulator and tabulated.

Determining ambiguous voter intent

Different ballot styles require voters to fill in ovals or boxes. While voter intent is ultimately decided by the team of election inspectors assigned to the duplication process, the following are examples of valid and invalid ballot markings.

Valid markings

These are examples of markings on a ballot which may be rejected by a tabulator but which the election inspectors duplicating the ballot should interpret as votes for the candidate or ballot question at issue.



Invalid markings

These are examples of markings on a ballot which may be rejected by a tabulator and which the election inspectors duplicating the ballot should not interpret as votes for the candidate or ballot question at issue because the voter's intent cannot be clearly understood from the marking.

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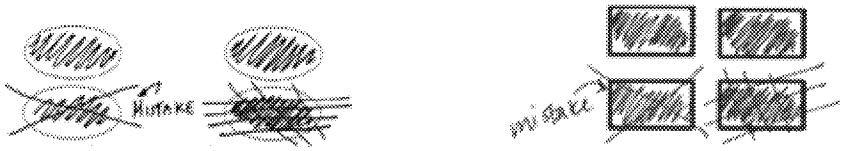
Corrections

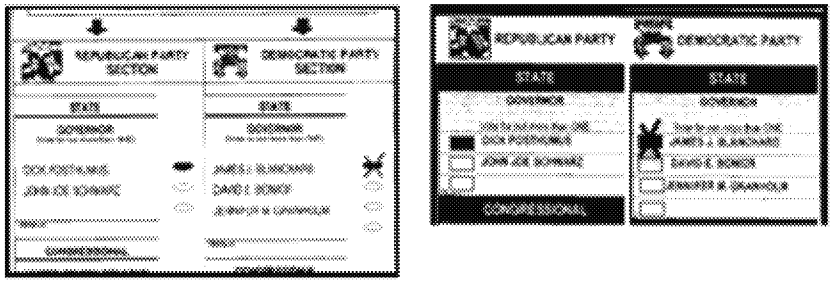
These are examples of markings on a ballot which may be rejected by a tabulator but which the election inspectors duplicating the ballot should interpret as a voter's attempt to correct a mistake on the voter's ballot. The election inspectors should duplicate these votes as being cast for the candidate or ballot question at issue.



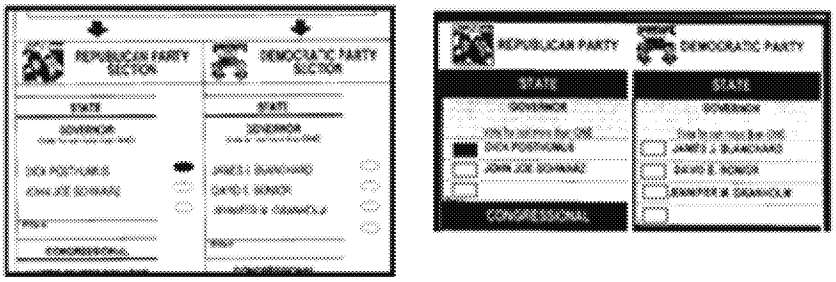
A corrected crossover vote may also cause a tabulator to reject a ballot. Election inspectors duplicating the ballot should interpret the correction as a voter's attempt to vote for only one party as permitted.

False Crossover/

Ballot Correction:



Proper Duplication:



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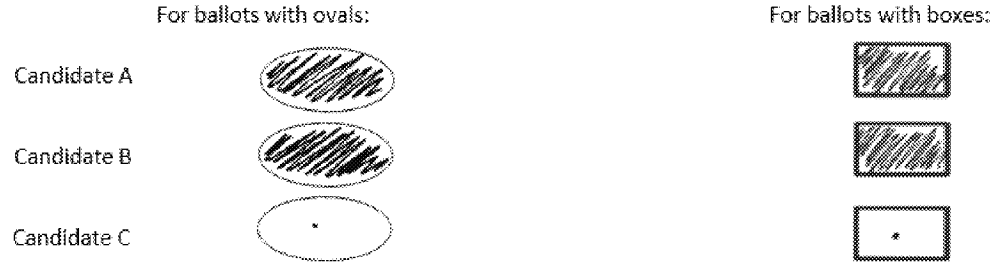
Stray marks

These are examples of stray marks on a ballot which may be rejected by a tabulator but which the election inspectors duplicating the ballot should not interpret as the voter's attempt to vote for the the candidate or ballot question at issue.



In all three examples above, count the top two positions only.

Correcting an overvote

A true overvote – one which is caused by a voter clearly and intentionally attempting to vote for more candidates that allowed for a particular office – on an absent voter ballot cannot be corrected, because the election inspector cannot determine for which candidate the voter intended to vote. The voter's other validly-cast votes on the ballot, however, can be read. To correct an overvote for one office on the ballot when the correct number of votes have been cast for other offices on the ballot, the election inspectors should leave the office for which the voter has overvoted entirely blank on the duplicate ballot.

Overvotes caused by write-in votes for a write-in candidate who has not submitted a *Declaration of Intent*, however, can be corrected by removing the write-in candidate during duplication.

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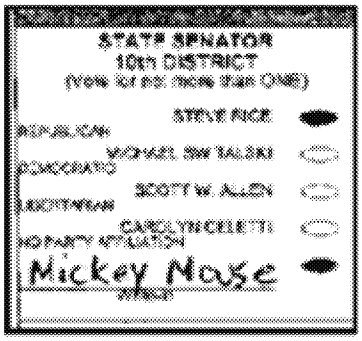
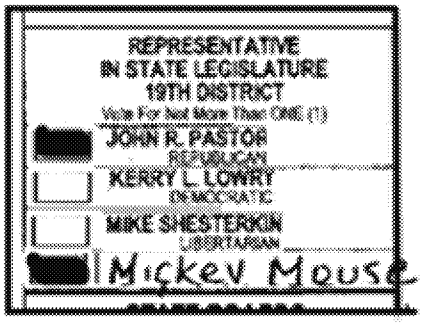
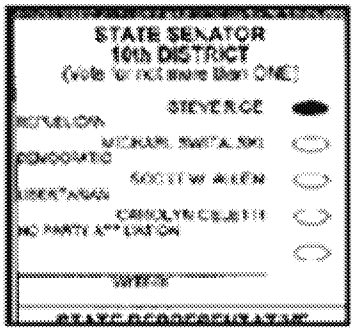
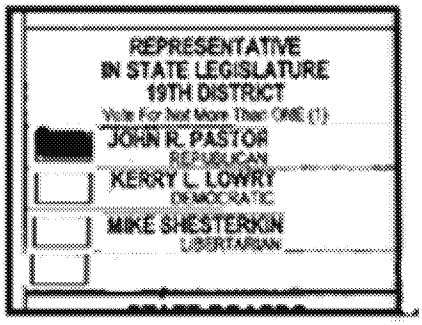
False Overvote/
Invalid Write-in:





Proper Duplication:

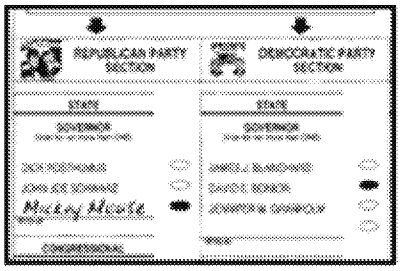


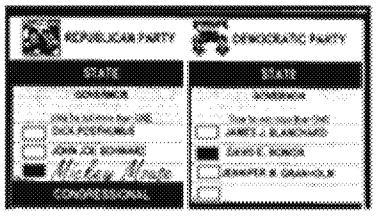


Likewise, a crossover write-in vote for a write-in candidate who has not submitted a *Declaration of Intent* may be corrected by removing the write-in candidate during duplication.

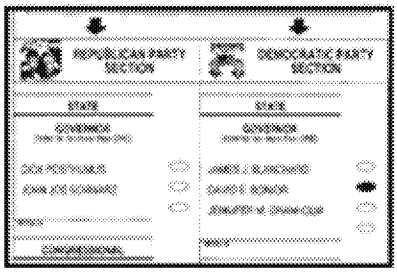
False Overvote/

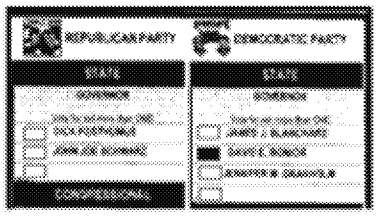
Invalid Write-in:





Proper Duplication:





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VI. Challengers and poll watchers at absent voter ballot processing facilities

Challengers have a right to be present at absent voter ballot processing facilities. Absent voter ballot processing facilities do not include a clerk's office or other locations where absent voter ballots are stored, signatures appearing on absent voter ballot envelopes are checked, or other activities are conducted prior to absent voter ballots being removed from absent voter ballot envelopes and prepared for tabulation.

Poll watchers should be allowed to observe the operation of the absent voter ballot processing facility if there is sufficient space to accommodate poll watchers within the facility without impeding the processing and tabulation of absent voter ballots.

For more information on challengers and poll watchers at absent voter ballot processing facilities, consult the Bureau of Elections publication *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*.[2]

Number of challengers at an absent voter ballot processing facility on Election Day

An absent voter ballot processing facility may contain a single absent voter counting board, multiple absent voter counting boards, a single combined absent voter counting board, or multiple combined absent voter counting boards. The Michigan Election Law uses the term "absent voter counting board" simultaneously to refer to a single absent voter counting board corresponding to an individual in-person precinct; a station within a facility processing absent voter ballots for multiple in-person precincts; the entire facility at which all absent voter ballots are processed for a jurisdiction; and an entire facility at which combined absent voter ballots are processed for multiple jurisdictions in a county. Michigan Election Law does not expressly state how many challengers may be present at an AVCB on election day. An early tabulation AVCB is limited to 1 challenger for every 8 election inspectors.

[2] Available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf.

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When determining how many challengers each credentialing organization is allowed to have in an absent voter ballot processing facility, clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility. Clerk considerations in setting the number of challengers each credentialing organization may field in the absent voter ballot processing facility should include:

- The number of processing teams and the number of election inspectors;
- The number of tables or discrete stations at which ballots are processed;
- The physical size and layout of the facility; and
- The number of rooms and areas used to process absent voter ballots within the facility.

The clerk must make publicly available the number of challengers each credentialing organization will be allowed to field in the absent voter ballot processing facility at least seven calendar days prior to the election.

Duties of challengers and poll watchers at absent voter ballot processing facilities

Challengers and Poll Watchers must take the same oath as any other person who is present at the absent voter ballot processing facility at the beginning of tabulation. A challenger or poll watcher present at the absent voter ballot processing facility at the beginning of tabulation is sequestered at that facility until the close of polls. Challengers and poll watchers, like all other persons present at the absent voter ballot processing facility, are not allowed to possess cell phones or other messaging devices in the facility before the close of polls.

Challenger liaisons

Every polling place or absent voter ballot processing facility should have an election inspector designated as the challenger liaison. Unless otherwise specified by the local clerk, the challenger liaison at a polling place is the precinct chairperson. The challenger liaison or precinct chairperson may designate one or more additional election inspectors to serve as challenger liaison, or as the challenger liaison's designees, at any time. Unless otherwise specified by the local clerk, the challenger liaison at an absent

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voter ballot processing facility is the most senior member of the clerk's staff present, or, if no members of the clerk's staff are present, the challenger liaison is the chairperson of the facility. Unless otherwise specified by the local clerk, the challenger liaison at the clerk's office is the most senior member of the clerk's staff present.

Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.

Permissible challenges at an absent voter ballot processing facility

Challengers at absent voter ballot processing facilities may make challenges to election processes. Permissible challenges at absent voter ballot processing facilities include challenges to ensure that the review of any portion of the absent voter ballot envelope reviewed at the absent voter ballot processing facility is properly completed. City and township clerks review the portion of the absent voter ballot envelope containing the absent voter's signature prior to Election Day, or when the ballot envelope is received by the clerk on Election Day, to ensure that the signature is genuine and the absent voter is eligible to cast a ballot. If the clerk has verified the signature and the absent voter's eligibility prior to the ballot envelope being transmitted to the absent voter ballot processing facility, neither challenges to the voter's signature nor to the voter's eligibility made at the absent ballot processing facility on Election Day are permissible.

Because an absent voter's eligibility is verified by the clerk prior to the absent voter ballot envelope being processed at the absent voter ballot processing facility on Election Day, election inspectors serving at the absent voter ballot processing facility are not responsible for verifying voter eligibility at the facility. Instead, election inspectors serving at the absent voter ballot processing facility confirm that the clerk has verified the absent voter's eligibility to cast a ballot by confirming that the clerk has reviewed the signature section of the absent voter ballot envelope. Additionally, because the voters are not present at the absent voter ballot processing facility, the oath administration and questioning process set out in the Michigan Election Law and explained above cannot be carried out at an absent voter ballot processing facility and a challenged voter would have no chance to refute the challenge leveled against them. For these reasons,

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challenges to voter eligibility at absent voter ballot processing facilities are not permissible and need not be recorded.

Challenging an election process

A challenger may challenge a voting process, including the way that election inspectors are operating a polling place or processing absent voter ballots at an absent voter ballot processing facility. A challenge to an election process must state the specific element or elements of the process that the challenger believes are being improperly performed and the basis for the challenger's belief.

Impermissible challenge to an election process

A challenge to an election process is impermissible and should not be recorded by the election inspectors if the challenger cannot identify a specific element or multiple elements of the process whose performance the challenger believes improper. A challenge to an election process is also impermissible if the challenger cannot adequately explain why the election process is being performed in a manner prohibited by state law. An explanation for a challenge to an election process must include an explanation of the proper performance of the element or elements in question but need not take the form of a direct citation to statute or election administration materials.

Rejecting a challenge to an election process

A permissible challenge to an election process will be rejected if the challenger liaison determines that the specific element or elements of the election process being challenged are being carried out in accordance with state law. A challenger liaison's determination that a challenge to an election process is rejected may be appealed using the process laid out at the end of this document.

Accepting a challenge to an election process

A permissible challenge to an election process will be accepted if the challenger liaison determines that the challenger is correct and that the specific element or elements of the election process being challenged are not being carried out in accordance with state law. The challenger liaison shall inform the relevant election inspectors how to properly carry out the process and take any other remedial action necessary to correct the error. Recording Challenges to an Election Processes A permissible challenge to an election

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process should be recorded in both the remarks section of the electronic poll book and on the "Challenged Procedures" section of the physical poll book. The record should include:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; or
- If the challenge was accepted, the reason the challenge was accepted, and any remedial actions taken in response to the challenge.

Challenges to Recurring Election Processes: Blanket Challenges

If a challenger wishes to challenge recurring elements of the election process, the challenger must make a blanket challenge. The blanket challenge shall be treated as a challenge to each occurrence of the process but need only be made and recorded in the poll book once. A challenger may only challenge recurring processes through a blanket challenge; a challenger may not challenge every occurrence of a recurring process in lieu of making a blanket challenge.

Warning and ejecting challengers or poll watchers

If a challenger or poll watcher acts in a prohibited manner or fails to follow a direction given by an election inspector serving at the location at which the challenger or poll watcher is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger or poll watcher is immediately ejected.

A challenger or poll watcher who repeatedly fails to follow any of the instructions or directions set out in *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* or issued by election inspectors may be ejected by any election inspector. A challenger or poll watcher who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may also be ejected by any election inspector. The ejection

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should be noted in the poll book. If the challenger or poll watcher refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the challenger or poll watcher from the polling place or absent voter ballot processing facility.

A challenger or poll watcher who is ejected from an absent voter ballot processing facility before the close of polls and while the challenger or poll watcher is subject to sequestration should, in lieu of being removed from the area containing the facility, be directed to remain in a room or area of the location separate from the area where absent voter ballots are being processed.

Challenger appeal of election inspector determinations

A challenger may appeal a decision by the challenger liaison or any other election inspector relating to the validity of a challenge, to a challenger's conduct, or to a challenger's ejection to the city or township clerk of the jurisdiction in which the challenger is serving. At the request of a challenger, the challenger liaison must provide the contact information of the city or township clerk. The appeal must be made outside of the hearing of voters. If the challenger is appealing their ejection, the appeal must be made after the challenger has left the polling place or absent voter ballot processing facility. If the city or township clerk rejects the challenger's ejection as improper, the clerk shall inform the challenger liaison and the challenger shall be allowed to reenter the polling place or absent voter ballot processing facility.

The challenger may appeal the decision of the local clerk to the Bureau of Elections.

A challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote. Appeals of an election inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day.

A poll watcher may not appeal any determination made by an election inspector.

VII. Emergency absent voter ballots

In certain emergency situations, a voter may apply for an emergency absent voter ballot. This application may be received as late as 4:00 p.m. on

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Election Day. If an emergency application is received by the clerk, the AVCB must be instructed to make the necessary entries on the QVF Absent Voter List that would otherwise be completed by the clerk. Once the necessary entries are made, the emergency absent voter application must be returned to the clerk to await the return of the ballot. If the requested ballot is voted and returned to the clerk by 8:00 p.m., the clerk should record the date of the return on the corresponding application and deliver the absent voter ballot envelope to the counting board; the counting board must then record the date of return on the QVF Absent Voter List.

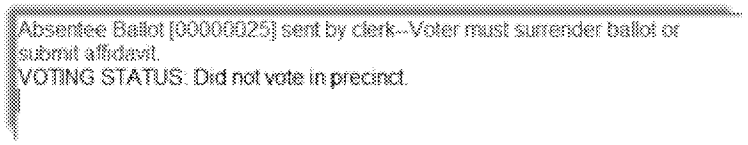
VIII. Absent voters appearing at the polls

If a voter who has been issued an absent voter ballot appears at an early voting site or an in-person precinct on Election Day to offer to vote, the ePollbook will alert the election inspector that the voter was issued an absent voter ballot. The election inspector should take the following actions, depending on whether the voter did not receive their absent voter ballot, received but did not return their absent voter ballot, received and returned their absent voter ballot to the clerk, or is appearing with the absent voter ballot in person.

Voter was sent but did not receive their absent voter ballot

A voter who requested but not receive their absent voter ballot may opt to vote in person at an early voting site or their polling place on Election Day instead of requesting a new absent voter ballot. The voter will be asked to complete an *Affidavit of Lost or Destroyed Absent Voter Ballot* at their precinct when they appear to vote, and then will be permitted to cast a normal ballot.

Such a voter will appear in the ePollbook with the following alert:



A voter who signs the *Affidavit of Lost or Destroyed Absent Voter Ballot* may be subject to challenge by a properly credentialed election challenger as an absent voter in the polls.

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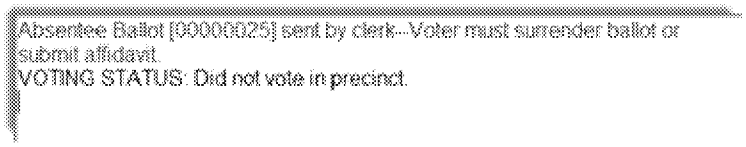
Voter was sent and received but did not return their absent voter ballot

A voter who requested and received, but did not return, their absent voter ballot may opt to vote in person at an early voting site or their polling place on Election Day instead of requesting a new absent voter ballot. The voter will be asked to complete an *Affidavit of Lost or Destroyed Absent Voter Ballot* at their precinct when they appear to vote, and then will be permitted to cast a normal ballot. Alternatively, the voter may surrender their absent voter ballot to the election inspectors at the precinct, and then will be permitted to cast a normal ballot.

Such a voter will appear in the ePollbook with the same alert as appears for a voter who was sent but did not receive their ballot:



A voter whose signature on their absent voter ballot was rejected by the clerk is treated as a voter who received but did not return their absent voter ballot. Such a voter is entitled to vote in person at a polling place on Election Day by following the procedures above.

A voter who surrenders their absent voter ballot to election inspectors in the polling place or who appears in person to cast their absent voter ballot is not subject to a challenge as an absent voter in the polls. A voter who signs the *Affidavit of Lost or Destroyed Absent Voter Ballot* may be subject to challenge by a properly credentialed election challenger as an absent voter in the polls.

Voter was sent, received, and returned their absent voter ballot

A voter who requested, received, and returned their absent voter ballot, and whose ballot was accepted by the clerk after the voter's signature was found to match the signature on file with the clerk, cannot request that their ballot be spoiled on Election Day. Such a voter is not eligible to cast a ballot at their precinct on Election Day.

Such a voter will appear in the ePollbook with the following alert:

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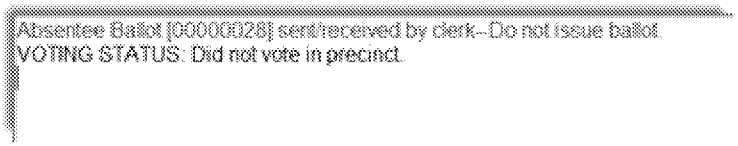

Voter appears in person with their absent voter ballot

A voter who requested and received their absent voter ballot may bring the ballot with them to an early voting site or their polling place on Election Day. The voter may either surrender their absent voter ballot or they may vote their absent voter ballot and place it into the tabulator[3].

After the voter completes the application to vote, the election inspector should verify that the ballot presented by the voter is the ballot that was issued by comparing the number on the ballot stub to the ballot number appearing in the ePollBook. During this, the election inspector should be careful to not expose the ballot. If the numbers match, the voter will be converted from an "absent voter" to an "election day" or "early" voter. The election inspector should provide the voter with a full-size secrecy sleeve to place their ballot in. The voter may then vote their ballot, if not done already, and place it into the tabulator.

Alternatively, the voter may surrender their ballot and be issued a new one. If the ballot is surrendered, the election inspector should write "surrendered" on the ballot, place it into the clerk envelope, and issue the voter a new ballot. A voter who surrenders their absent voter ballot to election inspectors in the polling place or who appears in person to cast their absent voter ballot is not subject to a challenge as an absent voter in the polls.

IX. Staffing absent voter counting boards and working in shifts

Multiple shifts of election inspectors may be assigned to AVCBs, so long as the following requirements are observed:

- The city or township's board of election commissioners must appoint all election inspectors who will serve on election day between 21 and

[3] If the tabulators in an election day polling place cannot be programmed to accept and tabulate absent voter ballots, the voter can instead surrender their AV ballot and be issued a new ballot.

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40 days prior to the election. The city or township clerk is responsible for determining how many election inspectors are required to staff each AVCB

- Every election inspector present at the absent voter ballot counting facility at the start of tabulation must take and sign the required oath, as explained above.

Additionally, to avoid delay in the processing of absent voter ballots and to allow the ending shift of election inspectors to instruct the new shift of inspectors, any replacement shift of election inspectors beginning their work after the close of polls should have at least a one hours overlap with the ending shift. This will allow a smooth transition of information from the earlier shift to the replacement shift, including the identification and documentation of any issues that may have arisen during the earlier shift. For AVCBs using high-speed scanners, shifts should overlap by two hours so that the new shift can be instructed on the use of the high-speed equipment.

Documenting shift changes

The shift change should be noted in the remarks section of the Poll Book. The election inspector ending their shift should note the name of the election inspector replacing them and should provide a brief description of the last tasks they completed and handed off to their relief election inspector. The new election inspector must take the oath and sign the oath section at the front of the Poll Book. Any election inspectors present at the close of the AVCB are required to sign both the totals tape and the *Certificate of Election Inspectors*. The signature of election inspectors relieved prior to the closing of the AVCB will not appear on either document, but those election inspectors should sign a separate sign-out sheet provided by the jurisdiction before leaving the absent voter ballot processing facility.

X. Combined absent voter counting boards

City or townships may enter into agreements with each other or with the county in which they are located to operate a combined absent voter counting board. In general, the same rules and procedures apply to combined AVCBs that apply to other AVCBs. To establish a combined AVCB, local and county clerks should enter into an agreement to establish a combined AVCB. The agreement must be entered into at least 75 days prior

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to Election Day. The Bureau provides model language for the agreement on eLearning.[4]

Additionally, local and county jurisdictions should agree in advance whether the local clerk or election inspectors working in the AVCB will complete the pre-tabulation processing of the absent voter ballots described above. If the local clerk completes the verification, the local clerk should provide a signed statement that the local clerk has verified that the names on the absent voter ballot envelopes and absent voter list or pollbook match, and that the number of envelopes delivered to the combined AVCB matches the number of names on the absent voter list or pollbook.

Finally, jurisdictions participating in a combined AVCB should also agree on answers to the following issues in advance of the operation of the combined AVCB:

- How and when all necessary equipment will be delivered by the local jurisdiction to the location of the combined AVCB.
- How equipment will be stored at the location of the AVCB and what security measures will be in place at the combined AVCB before Election Day.
- Procedures for the operation of the combined AVCB, including the number of challengers and poll watchers who will be permitted in the facility, how election inspectors will be selected, and shift schedules for election inspectors.
- In consultation with election management system vendors, establish procedures for how unofficial election results will be reported.
- How ballot containers will be used, sealed, and stored.
- How election equipment will be returned to local jurisdictions following the canvass.

[4] Available at https://mielections.csod.com/ui/lms-learning-details/app/material/5efeb893-d754-4472-bea5-4aa059b26408.

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Exhibit B

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Affidavit of Madison Takala

STATE OF MICHIGAN)
) ss
COUNTY OF MACOMB)

Madison Takala, being first duly sworn, deposes and says as follows:

1. If called as a witness, I would testify as follows based on my personal knowledge to the best of my information, knowledge, and belief.

2. I am employed by the City of Warren as an election inspector.

3. The first time I worked as an election inspector for the City of Warren was the August 2020 primary election. In that election, I was assigned to the Absent Voter Counting Board (AVCB).

4. Since August 2020, I have worked every subsequent election as an election inspector for the City of Warren. Following the November 2020 general election, I have always worked as a counting board precinct chair at the City of Warren AVCB. During the August 6, 2024 primary election, I was a precinct chair at the City of Warren AVCB.

5. Following the August 2020 primary election, I was asked by the City of Warren Deputy Clerk to work as a temporary employee in the clerk's office to help prepare for the November 2020 general election.

6. As part of that job, I was responsible for: (1) receiving and processing AV ballot applications; (2) preparing the ballot envelopes for being sent to voters on the AV ballot list; (3) putting ballots into the envelopes before being sent to voters.

7. As a temporary employee of the City of Warren clerk's office, I was also responsible for receiving and handling AV ballots that had been returned to the clerk's office. As soon as I received a ballot envelope, I would stamp the envelope with the date it was received.

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Then, after stamping the envelop, I would take the envelop to a computer and scan a bar code on it, which would pull up the voter's signature from the QVF so the signature on the envelop could be verified. If there were any questions about the signature on the envelope, I would set the envelop aside for additional review.

8. During the entire time I worked for the clerk's office before the November 2020 general election, I was never told to mark any portion of the ballot envelope to indicate that the voter's signature had been verified. Nor was I ever told to mark the date on the portion of the envelope for the clerk's use.

9. During the August 6, 2024 primary election, I worked as a counting board chair at the City of Warren AVCB. On that day, I arrived at the AVCB by 7:50 a.m. and left around 10:55 p.m. Because my group was short-staffed, I only took a 30 minute lunch break and a 10 minute dinner break.

10. As a counting board chair, I was responsible for managing the group of election inspectors assigned to my counting board and helping new workers get adjusted. After we were sworn in, I would also manage the pollbook for the precincts assigned to my counting board and, as the ballots were tabulated, I would make sure that the precincts were in balance.

11. One of the first steps of processing an absent voter ballot at the AVCB involves an election inspector looking at the envelope in which the absent voter ballot was returned to the clerk's office to check whether: (1) the precinct number is correct; (2) the ballot number matches the number on the envelope; (3) the clerk's office marked the envelop to indicate that the ballot was received on or before election day; and (4) the clerk's office marked the envelop to confirm that the voter's identity has been verified.

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12. To simplify this process, the envelopes in which the ballots are returned to the clerk's office include a grey rectangle in the upper right-hand corner that states "For Clerk's Use Only" and includes blanks for the clerk's office to fill in the following items: (1) Return Date and Time; (2) Precinct Number; (3) Ballot Number; and (4) Voter Signature Verified (Initials).

13. In addition to the "For Clerk's Use Only" section in the upper right-hand corner, the envelopes in which the ballots are returned to the clerk's office includes a section on the lower left-hand side of the envelope where the voter is directed to sign the envelope for the purpose of verifying their identity.

14. As a precinct chair on August 6, 2024, I personally observed a large number of AV ballots and ballot envelopes from the City of Warren. My counting board was assigned 12-13 precincts, which means we processed several thousand AV ballots.

15. All of the ballot envelopes I observed had the "For Clerk's Use Only" section only partially filled out. That is, while the precinct number and number blanks were filled in, I do not remember seeing a single envelope where the "Return Date and Time" or "Signature Verified (Initials)" blanks were filled in.

16. I do not remember ever seeing an envelope where the "For Clerk's Use Only" section was signed or initialed by the clerk's office, or otherwise marked with a statement that the voter's signature had been verified by the clerk's office. I did see a small number of ballot envelopes where the *voter* had signed in the "For Clerk's Use Only" section of the envelope.

17. I do not believe that any of the ballots that were forwarded from the clerk's office to the counting board included a statement—or signature or initials—indicating that the corresponding voter's signature had been verified by the clerk's office.

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18. I do remember seeing around 4 or 5 ballots where the envelopes indicated that the voter's identity had been verified. But the appearance of these ballot envelopes indicated to me that the voter's identity had been verified as part of the curing process by which, because of an issue with (or omission of) the voter's signature on the envelope, the voter had gone to the clerk's office in person to have their identity verified.

19. I do not remember ever seeing an envelope where the "For Clerk's Use Only" section was marked with the date that the ballot had been received. However, I do remember seeing some envelopes that were stamped with the date the envelope had been received the clerk's office.

20. Many of the ballots I observed on August 6, 2024 had a green highlighter mark running through the section of the envelope where the voter was supposed to put their signature.

21. I did not see any ballot where the highlighter mark was placed in the "For Clerk's Use Only" section of the envelope such that the highlighting would have indicated that the voter's signature had been verified by the clerk's office.

22. I believe that the highlighter mark is placed on the voter's signature line by the clerk's office *before* the envelopes are mailed to voters for the purpose of drawing the voter's attention to the signature line and limiting the number of AV ballots that require curing due to a missing signature.

23. On August 6, 2024, a poll challenger brought to my attention that the "For Clerk's Use Only" section of the ballot envelopes were not marked with either the date received or a statement that the voter's signature had been verified. I directed the challenger to the deputy clerk and believe they spoke, although I am not aware of the outcome of their conversation.

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Madison Takala

Madison Takala

Subscribed and sworn to before me, a Notary Public, this 10 day of SEPT, 2024.

NOTARY PUBLIC
My Commission Expires
1/27/2030
Marlea Z Wilson
Wayne County
ACTING IN THE COUNTY OF
STATE OF MICHIGAN

, Notary Public
County acting in WAYNE County, MI
My Commission Expires: 1/27/2030

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Exhibit C

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Affidavit of Ron Takala

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Ron Takala, being first duly sworn, deposes and says as follows:

1. If called as a witness, I would testify as follows based on my personal knowledge to the best of my information, knowledge, and belief.

2. I was employed by the City of Warren as an election inspector for the August 6, 2024 primary election.

3. The first time I worked as an election inspector for the City of Warren was the November 2020 general election. In that election, I was assigned to the Absent Voter Counting Board (AVCB).

4. I have worked as an election inspector for the City of Warren during almost every election since November 2020.

5. During the August 6, 2024 primary election, I worked as a counting board chair at the City of Warren AVCB. In that role, I was responsible for managing 6-10 election inspectors who were tasked with processing and counting the AV ballots for around 12 precincts.

6. My counting board processed around 2,000 ballots. I personally observed a large number of AV ballots and ballot envelopes during the August 6, 2024 primary election. I estimate that I visually observed and inspected around 500 to 600 individual ballots and ballot envelopes.

7. The envelopes in which the ballots are returned to the clerk's office include a grey rectangle in the upper right-hand corner that states "For Clerk's Use Only" and includes blanks for the clerk's office to fill in the following items: (1) Return Date and Time; (2) Precinct Number; (3) Ballot Number; and (4) Voter Signature Verified (Initials).

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8. In addition to the "For Clerk's Use Only" section in the upper right-hand corner, the envelopes in which the ballots are returned to the clerk's office includes a section on the lower left-hand side of the envelope where the voter is directed to sign the envelope for the purpose of verifying their identity.

9. One of the first steps of processing an absent voter ballot at the AVCB involves an election inspector looking at the envelope in which the absent voter ballot was returned to the clerk's office to check whether: (1) the precinct number is correct; (2) the ballot number matches the number on the envelope; (3) the clerk's office marked the envelop with the date on which the clerk received the envelope and that such date fell on or before Election Day; and (4) the clerk's office marked the envelop to confirm that the voter's identity has been verified.

10. For all of the 500-600 ballot envelopes I observed, the "For Clerk's Use Only" section of the envelope was only partially filled out. That is, the ballot envelopes I observed only had the precinct number and ballot number blanks "filled in," while the fields for "return date and time" and "voter signature verified" had not been completed by the clerk's office.

11. I do not remember seeing a single AV ballot envelope where the "Return Date and Time" or "Signature Verified (Initials)" blanks in the "For Clerk's Use Only" section were filled in. Nor do I remember a single ballot envelope that had any other indication that a clerk's office employee had verified the voter's signature on the envelope.

12. I also do not remember seeing any ballot envelopes that were stamped with the date and/or time the envelope was received.

13. There were a handful of ballots—less than 20—that had a paper attached to the envelope by paperclip that indicated that the voter's signature had been verified through the curing process.

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14. Many of the ballots I observed on August 6, 2024 had a highlighter mark running through the section of the envelope where the voter was supposed to put their signature.

15. I did not see any ballot where the highlighter mark was placed in the "For Clerk's Use Only" section of the envelope.

16. Although it is my understanding that the AV ballots that are brought to the City of Warren AVCB by the clerk's office have had the ballot envelope signature verified, that is an assumption—there was nothing on the face of any of the ballot envelopes I saw on August 6, 2024, indicating that the signatures had been verified.

Ron Takala

Ron Takala

Subscribed and sworn to before me, a Notary Public, this 10th day of September, 2024.

AMY M CUMBOW, Notary Public
Ingham County acting in Ingham County, MI
My Commission Expires: 03/14/2029

AMY M CUMBOW
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
MY COMMISSION EXPIRES MARCH 14, 2029
ACTING IN THE COUNTY OF Ingham

Notarized remotely online using communication technology via Proof.

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Exhibit D

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Affidavit of Dawn Beattie

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Dawn Beattie, being first duly sworn, deposes and says as follows:

1. If called as a witness, I would testify as follows based on my personal knowledge to the best of my information, knowledge, and belief.

2. I am employed by the Michigan Republican Party as a Regional Election Integrity Director in Michigan. I am also a member of the State Committee of the Michigan Republican Party. I have been credentialed as a poll challenger in multiple elections.

3. During the August 6, 2024 Primary Election, I was credentialed by the Michigan Republican Party to serve as a poll challenger at the Absent Voter Counting Board (AVCB) for the City of Warren in Macomb County, Michigan.

4. I arrived at the Warren AVCB at around 8:05 a.m. on election day. And, except for a quick lunch and a coffee run, I was present at the AVCB all day until past 9:00 p.m.

5. As a poll challenger at the AVCB, I watched several precinct tables performing multiple stages of the absent voter ballot counting process. Over the course of the day, I moved between and observed about 16 tables.

6. All told, I spent multiple hours on August 6, 2024 actually looking absent voter ballots being processed and tabulated.

7. The envelopes in which absent voter ballots are returned to the clerk's office include a grey rectangle in the upper right-hand corner that states "For Clerk's Use Only" and includes blanks for the clerk's office to fill in the following items: (1) Return Date and Time; (2) Precinct Number; (3) Ballot Number; and (4) Voter Signature Verified (Initials).

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8. In addition to the "For Clerk's Use Only" section in the upper right-hand corner, the envelopes in which the ballots are returned to the clerk's office includes a section on the lower left-hand side of the envelope where the voter is directed to sign the envelope for the purpose of verifying their identity.

9. As I watched the election inspectors process absent voter ballots on August 6, 2024, I noticed that, for every ballot envelope I remember looking at, the "For Clerk's Use Only" section was not fully filled out and was instead incomplete.

10. Although the precinct number and ballot number blanks were filled in on every ballot envelope I observed, I did not observe a single ballot envelope where either the "Return Date and Time" or "Voter Signature Verified (Initials)" blanks were filled in.

11. That is, I did not see a single ballot envelope where the clerk's office marked the envelope with the date and/or time when it was received as directed in the "For Clerk's Use Only" section of the return envelope.

12. I also did not see a single ballot envelope where the clerk's office signed, initialed, or otherwise marked the ballot envelope with a statement or indication that the voter's signature had been verified or that the voter's identity had otherwise been confirmed as directed in the "For Clerk's Use Only" section of the return envelope.

13. I did notice that many of the ballot return envelopes had a highlighter mark on the section where the voter is supposed to sign the envelope.

14. Although I initially speculated that the above-referenced highlighter marks on the section where a voter is supposed to sign the envelope might be evidence that the signature was verified, I was informed by one of the counting board chairs that this was not true.

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15. In fact, the highlighter marks I observed were exclusively located in the voter's section of the envelope. That is, I did not see a single highlighter mark in the "For Clerk's Use Only" section of a ballot return envelope.

16. I brought this issue to the attention of the Deputy City Clerk. I pointed out that the "For Clerk's Use Only" section was not filled out and asked her to help me understand the verification process.

17. The Deputy City Clerk responded that she was not sure about the verification process and did not know why the "For Clerk's Use Only" section of the envelopes was incomplete.

18. The Deputy City Clerk also told me that she was not able to find out the answer because she needed to do something else, but that she would follow up with me. However, she never followed up with me.

19. I was never provided with an explanation why none of the "For Clerk's Use Only" sections of the ballot envelopes were marked with either the date it was received by the clerk's office or a statement that the voter's signature and identity had been verified.

Dawn Beattie

Dawn Beattie

Subscribed and sworn to before me, a Notary Public, this 10th day of September, 2024.

AMY M CUMBOW, Notary Public

Ingham County acting in Ingham County, MI

My Commission Expires: 03/14/2029

AMY M CUMBOW
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
MY COMMISSION EXPIRES MARCH 14, 2029
ACTING IN THE COUNTY OF Ingham

Notarized remotely online using communication technology via Proof.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/16/2024 1:40:02 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Osher, Daniel [OsherD@michigan.gov]; Brady, Mike (MDOS) [BradyM@michigan.gov]
Subject: RE: Thursday Check-In

Looks like I can do either.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 16, 2024 9:10 AM
To: Osher, Daniel <OsherD@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Brady, Mike (MDOS) <BradyM@michigan.gov>
Subject: Re: Thursday Check-In

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Either works for me.

From: Osher, Daniel <OsherD@michigan.gov>
Date: Monday, September 16, 2024 at 9:08 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>, Brady, Mike (MDOS) <BradyM@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Thursday Check-In

Hi folks--any chance we could move Thursday's 10:30am check-in to 9am or 11am?

Daniel Osher
Deputy Legal Counsel
Executive Office of Governor Gretchen Whitmer
osherd@michigan.gov
(517) 242-0089

This email and any associated documents may contain information that is privileged or otherwise exempt from disclosure. It is intended for use only by the person to whom it is addressed. Please contact me before disclosure. If you have received this email in error, please (1) do not forward or use this information in any way; and (2) contact me immediately.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 8/30/2024 1:13:58 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: United Sovereign Citizens et al v Benson, et al - Michigan filing
Attachments: 2749-USA MFE complaint.pdf

It appears out turn has arrived…

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MICHIGAN

UNITED SOVEREIGN AMERICANS, INC.
167 Lamp and Lantern Village
Suite 194
Chesterfield, MO 63017

And

MICHIGAN FAIR ELECTIONS INSTITUTE
P.O. Box 41
Stockbridge, MI 49285

And

TIMOTHY MAURO-VETTER
6505 Arrowhead Ct
Davisburg, MI 48350

And

BRADEN GIACOBAZZI
6 Parakeet Hill Dr
Orion Twp, MI 48359

And

PHANI MANTRAVADI
8173 Hillside Lakes Dr
Brighton, MI 48116

And

PHILIP O'HALLORIN
294 Cayuga Rd
Lake Orion, MI 48362

And

DONNA BRANDENBURG,
6842 Byron Shores Ct SW

CIVIL ACTION

Case No.: _____

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Byron Center, MI 49315

And

NICK SOMBERG
1493 Rivona Dr
Waterford Twp, MI 48328

Petitioners,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF MICHIGAN
430 W Allegan Street
Richard H. Austin Building – 4th Floor
Lansing, MI 48918

And

MICHIGAN BUREAU OF ELECTIONS
1250 Wilson Street
Marquette, MI 49855

And

DANA NESSEL, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF MICHIGAN
525 W. Ottawa Street
Lansing, MI 48906

And

MERRICK GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES
950 Pennsylvania Avenue NW
Washington DC 20530

Respondents.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PETITION FOR RELIEF IN THE FORM OF WRIT OF *MANDAMUS* [1]

TO: The Honorable, the Judges of Said Court:

United Sovereign Americans, Inc., a Missouri nonprofit corporation, Michigan Fair Elections Institute, a Michigan nonprofit corporation, Timothy Maura-Vetter, individually, Braden Giacobazzi, individually, Phani Mantravadi, individually, Philip O'Hallorin, individually, and Donna Brandenburg, individually, Nick Somberg, individually, Petitioners, by counsel, van der Veen, Hartshorn, Levin, & Lindheim, through Bruce L. Castor, Jr., Esquire, and Michael T. van der Veen, Esquire, hereby submit this Petition for Relief in the Form of a Writ of *Mandamus*, directed to Respondents, Jocelyn Benson in her Official Capacity as the Secretary of Michigan, Dana Ness, in her Official Capacity as Attorney General of Michigan, and Merrick Garland, in his Official Capacity as Attorney General of the United States, and,

Respectfully Represents:

Summary of Petitioners' Argument and Examples of Relief Requested

1. The Congress of the United States has outlined the minimum standards which must be maintained by every state in order for a federal election to be considered reliable. As outlined below, in Michigan's 2022 federal election those minimum standards were not met by Michigan election officials rendering the certified election results that year unreliable. Respondents in their official capacities engaged in insufficient efforts to ensure that the 2022

[1] Petitioners are cognizant of Federal Rule of Civil Procedure 81(b) which abolished mandamus actions in United States District Court, but nonetheless authorizes "relief previously available through [writs of mandamus] by appropriate action or motion under these rules." F.R.C.P. 81(b). Petitioners herein are seeking relief via the All Writs Act (§ 1361) and an Action to Compel a United States Officer to Perform His/Her Duty (§ 1361).

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performance is not repeated in subsequent federal elections beginning in 2024.

2. If the 2022 election performance is repeated in 2024, Petitioners and all Michigan voters will suffer damages.

3. Apart from Court action in equity, no other mechanism exists in the law for Petitioners to require Respondents to perform their ministerial duties requiring that Michigan's federal elections be conducted in conformity with the law as Congress has set forth.

4. Only this Honorable Court has the power to require Respondents to act to bring the 2024 (and subsequent) federal elections supervised by Michigan authorities into conformity with the minimum standards for reliability set down by Congress and outlined *infra*.

5. Without the Court's action, Petitioners believe and therefore aver that the 2024 (and subsequent) Michigan federal election results will be unreliable in the same way, and thus unreliable for the same reasons that the 2022 results are unreliable.

6. Petitioners seek this Court's intervention to ensure that only properly registered voters cast votes in combined federal and state elections beginning in 2024.

7. Petitioners seek this Court's intervention to ensure that only votes properly cast are counted in combined federal and Michigan elections beginning in 2024.

8. Petitioners seek this Court's intervention to ensure that all votes properly cast are counted *correctly* in combined federal and Michigan elections in even numbered years beginning in 2024.

9. Petitioners seek this Court's intervention to ensure that only votes properly cast are counted in combined federal and Michigan elections beginning in 2024.

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10. Petitioners seek this Court's intervention to ensure that all voting systems are compliant with all critical infrastructure requirements and risk assessments are completed within the actual use context, thereby assuring that every ballot is correctly and uniformly processed, as well as accurately tabulated and secured in combined federal and Michigan elections beginning in 2024.

11. Petitioners seek this Court's intervention to ensure that the authenticity of every ballot counted is proven by the maintenance of a comprehensive, unbroken chain of custody from the voter's hand to the final certified result, and the Michigan election officials maintain records of said chain of custody post-election, in compliance with all legally prescribed safeguards in combined federal and Michigan elections beginning in 2024.

12. Petitioners seek this Court's intervention to ensure that combined federal and Michigan elections in even numbered years beginning in 2024 are conducted with the transparency required by law.

13. Petitioners seek this Court's intervention to ensure that only votes properly cast are counted in combined federal and Michigan elections beginning in 2024.

14. Petitioners seek this Court's intervention clarifying and ordering that the currently accepted Federal definition "to certify" is to attest that an official measurement is both accurate and the finding of accuracy was reaching in a fully compliant manner, thereby, directing that the "certification of elections" by Michigan election officials of combined federal and Michigan elections from 2024 onward constitutes an "attestation," ostensibly under penalty of perjury, by the certifying official(s) that the vote counts are accurate and the cast and counted votes and the election itself were all conducted in compliance with applicable federal and state law.

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15. Petitioners, upon review of the statutes cited below, believe and therefore aver that federal and state law specify what Michigan officials must conform to, *at a minimum*, to properly conduct a combined federal and state election and prior certifying that election.

16. Petitioners believe and therefore aver that based on the analysis below, combined with the various exhibits attached to this petition and incorporated by reference herein, that in the 2022 combined federal and state election, officials of the State of Michigan failed to ensure that **safeguards** were in place as mandated by various statutes designed to ensure the integrity of the elections.

17. Petitioners believe and therefore aver the failure by Michigan election officials to know of and implement the safeguards required by law in 2022 allowed Michigan election officials to certify that election despite analysis showing the election results were *per se* unreliable on account of apparent error rates exceeding those the law permits before the results in *any* federal election become unreliable.

18. Petitioners believe and therefore aver that apparent error rates that exceed the maximum error rate allowed by law destroyed the integrity of the 2022 election making full confidence in the accuracy of that election impossible.

19. While Petitioners cannot state with certainty that the 2022 Michigan General Election produced "winning" candidates who should not have won, Petitioners believe and therefore aver that Michigan cannot state with certainty that all "winning" candidates received more votes than their "losing" candidates because the election itself was compromised by the state's failure to conform to the requirements of federal law designed to ensure reliable election results.

20. Petitioners believe and therefore aver that Congress mandated the maximum

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number of election errors which were permissible in the 2022 combined federal and state elections in Michigan (and, indeed, in all states and voting territories). An error rate above the maximum permissible rate set by Congress renders an election *uncertifiable* because the results are unreliable. Nevertheless, Michigan officials certified the 2022 election.

21. Petitioners do not seek relief in this Court in a challenge to the outcome of the 2022 federal election in Michigan. Petitioners agree that it is possible that in every federal contested election supervised and certified by the State of Michigan in 2022 the "winner" received more votes than the "loser."

22. Petitioners believe and therefore aver, however, that the certification by Michigan officials of the 2022 election was done despite the integrity of the election being suspect on account of *apparent* error rates occurring in that election that exceeded the error rate Congress permits before federal election results cannot be relied upon as accurate, and the State of Michigan did nothing to investigate those apparent errors before certifying the election.

23. **Petitioners believe and therefore aver that it is reasonable to believe that systemic issues which occurred in the 2022 combined Federal and state election in Michigan will continue uncorrected in 2024, 2026, 2028, etc. absent intervention by this Court.**

24. Petitioners aver they have called the various issues with the 2022 election to the attention of Michigan officials who failed to take sufficient action to ensure no further repeats of those issues cited here affecting the integrity of the 2022 election.

25. The relief requested by Petitioners in the form of a Writ of *Mandamus* seeks, broadly speaking, this Court order Respondents to perform the *ministerial* functions their

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jobs require by taking actions to rectify reliability issues evident in the 2022 election.[2]

2022 Combined Federal and State Election in Michigan Produced Unreliable Results and Should Not Have Been Certified

26. In the Help America Vote Act ("HAVA") 52 US.C.A. § 21081, **Congress mandates as follows: HAVA - voting system error rate "...(5) Error RATES.—The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission ("FEC") which are in effect on the date of the enactment of this Act."**

27. Congress enacted and President Bush signed HAVA into law in 2002 and it remains the law of the United States to date.

28. The voting standards of the FEC in effect at the time Congress enacted HAVA in 2002 were the Voting Systems Standards Volume I: Performance Standards (2002).[3]

29. **Those voting standards, in effect at the time HAVA became law, allowed for one error per 500,000 ballot *positions*.**

30. Petitioners believe and therefore aver that a federal election that exceeded an error rate of one error per 500,000 ballot *positions* renders a federal election unreliable.

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[2] Petitioners do not request this Court order Respondents to exercise their *discretion* or make any decision at all apart from enforcing the specific, non-discretionary, requirements of the law outlined *inter alia* below.

[3] As of 2021, there have been five iterations of national level voting system standards. The Federal Election Commission published the first two sets of federal standards in 1990 and 2002 (VSS1990 and VSS2002). The Election Assistance Commission then adopted Version 1.0 of the Voluntary Voting System Guidelines (VVSG 1.0, or VVSG2005) on December 13, 2005. On March 31, 2015, the EAC commissioners approved VVSG 1.1 (VVSG2015). On February 10, 2021, the EAC approved VVSG 2.0 (VVSG2021).

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31. As the HAVA provision enacted in 2002 cited above has not changed, the error rate of one error per 500,000 ballot *positions* is currently the law of the United States.

32. A "ballot *position*" refers to the number of individual "choices" a voter could make on a single ballot. For example, if a particular ballot has thirty little circles for the voter to fill-in or not fill-in, that single ballot would be said to contain thirty ballot positions.

33. A voting system error occurs anytime the voting scanning machine should have discerned an error, not made by the voter, while counting one of those ballot positions on a scanned ballot.

34. Experts working for the FEC estimated that 500,000 ballot *positions* equaled 125,000 *individual ballots*. (See Election Assistance Commission Voluntary Voting System Guidelines of 2015, *U.S. Election Assistance Commission*. United States [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf

35. Petitioners believe and therefore aver that the EAC desired to clarify the meaning of 500,000 ballot *positions* in terms of how many individual ballots "make-up" 500,000 ballot *positions* in order to make easier understanding the election "error rates" permissible by HAVA.

36. Petitioners believe and therefore aver (and will present expert testimony to so substantiate) that the calculation made by the FEC that 500,000 ballot positions represents 125,000 individual ballots is correct and represents the proper interpretation of federal law and Congressional intent under HAVA.

37. In the 2022 Michigan General Election, 4,500,400 individual ballots were recorded by election officials as cast.

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38. For the 2022 General Election if 4,500,400 (ballots cast) is divided by 125,000 (because the law allows for one error per 125,000 ballots), that leaves thirty-seven (37) (rounded up) as the maximum number of errors permitted under federal law for that election. Only upon a showing of 37 of fewer errors, then, would HAVA permit Michigan election officials to certify the 2022 election as valid.

39. If there were more than thirty-seven (37) voting system errors in the entire ballot tabulation for all ballots cast in the 2022 election in Michigan, the election results are unreliable.

40. Michigan exceeded this benchmark of thirty-seven (37) voting system errors in the 2022 General Election as outlined below.

41. Petitioners believe and therefore aver that contributing to the unreliability of Michigan's 2022 election is the fact that Michigan's voter registration rolls, themselves, contained *hundreds of thousands* of potential errors at the time of the 2022 General Election.

42. These potential errors were in the form of illegal duplicate registrations, voters with invalid or illogical voter history, voters placed in inactive statuses on questionable authority, backdated registrations, registrations with a modified date prior to registration, invalid or illogical registration dates, age discrepant registrants, and registrants with questionable addresses.

43. While Congress may not have specifically intended for these types of errors to be included in the one out of 500,000 error rate, Petitioners believe and therefore aver that this figure provides a general benchmark for what the Legislature considered an acceptable degree of error in our elections.

44. Such errors jeopardize the validity of elections throughout Michigan, bring

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doubt as to the accuracy and integrity of Michigan's currently-in-place voting systems, undermine Michigan citizens' collective voting rights, all in violation of existing state and federal election laws.

45. Petitioners seek redress from these voter registration apparent errors, relief from blatantly inaccurate voter registration rolls, relief from discrepancies between votes cast and actual votes reported, and relief from extreme voting errors generally, which collectively and historically amount to violations of federal election laws, Michigan election laws, and various voting rights encompassed by the United States Constitution.

46. The aforesaid violations of federal and state law have in the past resulted in the certification of election results from provably flawed, inaccurate, and obscure processes outside the view of impartial witnesses or the public, and Respondents have refused collectively to maintain or enforce compliance with federal and state required transparency mandates.

47. Petitioners have brought this issue to the attention of Respondents, who have done absolutely nothing to address these errors ensuring future elections will suffer from the same deficiencies.

48. Furthermore, rather than alarmed by these apparent errors pursuant to prevailing election laws, Respondents instead have collectively ignored the issue of the unreliable election results therefore produced.

49. Petitioners believe and therefore aver Respondents have failed to adequately police and monitor problems with the voter rolls and failed to adequately fix voting registration errors within Michigan, despite being in the best position to ensure the reliability, integrity, and accuracy of Michigan's elections to ensure veracity of the state's election

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results.

50. Petitioners have repeatedly made good faith and sincere efforts to negotiate and get Respondents to respond to their legitimate concerns.

51. Petitioners have repeatedly shown Respondents evidence of potential violations of election law, regarding the conduct of elections by local and state officials charged with administering elections, on behalf of all citizens in accordance with the law.

52. The risk of election subversion is indisputable, but the State of Michigan has denied Petitioners denied a fair hearing, despite the serious nature of Petitioners' findings calling into question the reliability, integrity and accuracy of prior federal elections administered by the state.

53. The prayer for relief seeks the protection of Petitioners' rights, as well as those of every voting citizen of Michigan, to have their vote fairly counted in an open and reliable election as such elections are defined according to law as outlined below.

54. Respondents have denied Petitioners' their right to a fair vote.

55. Furthermore, Respondents appear to have followed procedures that have obscured the ability to audit the 2022 general election to render the outcomes factually unknowable, at the time of certification.

56. Petitioners believe and therefore aver Respondents have violated multiple federal and state laws, or negligently allowed such violations to occur, while loudly proclaiming the infallibility of Michigan's election results.

57. Respondents insist that Petitioners have adequate voting rights, while simultaneously fighting from every conceivable angle to prevent Petitioners from attempting to protect those rights. Respondents' collective actions in refusing to address

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the problem extinguishes and undermines the very meaning of the right to vote in a fair democracy.

58. Respondents can and should be compelled to address compliance with existing election law, specifically: compelled to adequately investigate the issue, prosecute anyone in violation of federal and/or state law, and actively work to bring Michigan back into compliance with federal and state election law mandates so that Michigan's constitutionally enshrined voting rights are upheld and preserved.

59. The All-Writs Act, 28 U.S.C. § 1651 provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law."

60. District Courts of the United States have original jurisdiction of any action in the nature of *mandamus* to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 28 U.S.C. § 1361.

Parties

61. United Sovereign Americans, Inc., is a nonprofit corporation incorporated in the state of Missouri.

62. Michigan Fair Elections Institute is a nonprofit corporation incorporated in the state of Michigan.

63. Timothy Mauro-Vetter is an individual who resides at 6505 Arrowhead Court, Davisburg, MI 48350.

64. Braden Giacobazzi is an individual who resides at 6 Parakeet Hill Drive, Orion Township, MI 48359.

65. Phani Mantravadi is an individual who resides at 8173 Hillside Lakes Drive,

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Brighton, MI 48116.

66. Philip O'Hallorin is an individual who resides at 294 Cayuga Road, Lake Orion, MI 48362.

67. Donna Brandenburg is an individual who resides at 6842 Byron Shores Court SW, Byron Center, MI 49315.

68. Nick Somberg is an individual who resides at 1493 Rivona Drive, |Waterford Township, MI 48328.

69. Jocelyn Benson, in her Official Capacity as the Secretary of the State of Michigan, was appointed by the governor to oversee the Department of State. She and her department are tasked with administering and ensuring Michigan's compliance with Michigan's Election Code, Michigan's compliance with federal law – namely the Help America Vote Act, and the National Voter Registration Act.

70. Dana Nessel, in her Official Capacity as the Attorney General of Michigan, is responsible for overseeing and managing the Office of the Attorney General of Michigan which is a government agency tasked with the enforcement and prosecution of state law in addition to ensuring that state actors, including those acting within the Michigan Department of State, are complying with Michigan law.

71. Merrick Garland, in his Official Capacity as the Attorney General of the United States, is the chief law enforcement official in the United States, and is responsible for overseeing and managing the Department of Justice of the United States which is a government agency tasked with the enforcement and prosecution of federal law in addition to ensuring that state and federal actors, including those acting in the various states within the United States, are complying with Federal law.

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Jurisdiction and Venue

72. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

73. This Court has jurisdiction pursuant to 28 U.S.C. § 1361.

74. This Court additionally has subject matter jurisdiction over this complaint because the case presents substantial questions of federal law, and the state claims are so related to the federal claims that they form part of the same case or controversy. 28 U.S.C. §§ 1331 and 1367.

75. This Court has personal jurisdiction as the Respondents are a collection of Michigan agencies and actors, and the State of Michigan is within the jurisdiction of the United States.

76. "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gray v. Sanders*, 372 U.S. 368, 372 (1963) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

77. Venue is proper in this district under 28 U.S.C. § 1391(e)(1).

Standing

78. Timothy Mauro-Vetter is a citizen of Michigan, Oakland County, and uncovered voting irregularities in Michigan's 2022 General Election through Freedom Of Information Act ("FOIA") requests, including vote switching, duplicates, delays, and manipulation of voting history. He also submitted FOIA requests for accurate voter and registration data which were ignored. *See* Exhibit "A" for a copy of Petitioner's FOIA requests.

79. Petitioner Braden Giacobazzi is a citizen of Michigan, Oakland County, and was a 2022 recount and poll challenger. Petitioner is a current candidate for Orion Township Clerk

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in the 2024 election season.

80. Petitioner Phani Mantravadi is a citizen of Michigan, Livingston County, and is the CEO of CheckMyVote.com, a for profit business which was impacted negatively due to the 2022 Michigan elections by data manipulation of vote history records, which led to a loss of customer base due to poor data integrity.

81. Petitioner Philip O'Hallorin is a citizen of Michigan, Oakland County, and was a 2022 election challenger whose rights were violated due to Respondents' failure to enforce federal and Michigan state election laws.

82. Petitioner Donna Brandenburg is a citizen of Michigan, Kent County, and was a candidate for Governor of Michigan in the 2022 election season. Petitioner suffered financial injury through campaign investments spent to run for office where the 2022 election was not held to the proper federal or state legal standards for election integrity.

83. Petitioner Nick Somberg is a citizen of Michigan, Oakland County.

84. Petitioner United Sovereign Americans also uncovered overwhelming evidence of registration issues in the 2020 and 2022 elections. In particular, they discovered that for the 2022 election:

a. 100,229 registrations contained invalid addresses;

b. 4,714 registrants were age discrepant (younger than 16 or older than 115)

c. 2,204 registrations were back-dated new registrations;

d. 7,481 registrations were illegal duplicates;

e. 6,069 registrations had the voter removed then added back;

f. 11,511 registrations had double votes added then removed;

g. 57,903,469 registrations had votes altered post certification;

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h. 152,047 registrations were processed on a non-business day;

i. 13,824 registrations had invalid registration status;

j. 4,235 registrations contained invalid names.

See Exhibit "B" for a copy of United Sovereign Americans' Michigan 2022 General Election Scorecard.

85. There is active litigation in this state concerning Michigan's compliance with the Help America Votes Act ("HAVA"), in that certain state directives violate United States federal election law.

86. Petitioners have been and are currently harmed by the State of Michigan voting systems currently and formerly in use in Michigan state and federal elections. Respondents have allowed, and continue to allow, violations of federal election laws, Michigan election laws, the United States Constitution, and federal civil rights laws pertaining to voter rights.

87. The violations of Michigan election laws, federal election laws, the U.S. Constitution, and federal civil rights laws pertaining to voter registration rolls, transparency, compliance, and certification of the voting systems, and the serious issues hereinafter discussed with the overall voting systems exemplify their injury.

88. The injury to Petitioners and all Michigan voters would cease to exist or be greatly relieved if the Court grants Petitioners' requested relief.

89. The Supreme Court has indicated that if one party to a lawsuit has standing, other entities can join as parties without having to independently satisfy the demands of Article III, provided those parties do not seek a distinct form of relief from the party with standing. *See, Horne v. Flores*, 557 U.S. 433, 446-47 (2009).

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90. United Sovereign Americans is not seeking a distinct form of relief from the other Petitioners and therefore has standing.

91. Michigan Fair Elections Institute is not seeking a distinct form of relief from the other Petitioners and therefore has standing.

Background

A. THE CONSTITUTIONALLY PROTECTED RIGHT TO VOTE

92. The United States Constitution grants the people the right to choose representatives to the people of several states, according to the voting eligibility requirements of the state. U.S. Const. art. 1, § 2.

93. The 14th Amendment of the United States Constitution, Section 1, defines a "citizen" as all people born or naturalized in the United States and subject to the jurisdiction thereof.

94. The 14th Amendment of the United States Constitution, Section 2, protects eligible citizen voters against denial or abridgment of their vote.

95. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 5 U.S., 137, 163 (1803).

96. Federal courts regard the right to vote in a fairly conducted election as a constitutionally protected feature of United States citizenship. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

97. After the 2020 Presidential Election, pervasive discussion reported on by the media focused on the validity of the presidential election results within the State of Michigan.

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98. Discussions and/or litigation in Michigan, as well as in other states around the Nation, centered on whether raw vote totals were accurate, with particular attention focused on the question: if all ballots in dispute were decided, hypothetically, in the favor of one candidate for president over the other, would that have changed the *outcome* of the election in that state?

99. Questions concerned whether the recorded vote totals, viewed in the light most favorable to the losing candidate in any given state, could have affected the awarding of electoral votes from said state, which, in turn, might have affected the determination of the "winner" of the elections for president and vice-president in the Electoral College.

100. The media widely reported that no court ruled that, even if all disputed ballots were assumed to have been found to be favorable to the Republican Candidate during the 2020 presidential election, the outcome in any disputed state would not have been affected. Furthermore, there was insufficient evidence produced such that a court could find that the outcome of the election in any disputed state was unreliable.

101. Petitioners do not seek to revisit the results of the 2020 presidential election, nor to re-examine the conclusions drawn by the various courts and media outlets as summarized above.

102. Petitioners posit a different question than that noted above: ***How many disputed ballots found to be improperly cast in any given federal election may occur before the reliability and integrity of the entire election becomes suspect?*** Petitioners respectfully represent that Congress has answered this very question as outlined further below and Congress' answer to this question forms much of the basis of the instant Petition.

103. In *In re: Coy*, 127 U.S. 731 (1888), the United States Supreme Court held that

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Congress had authority under the Constitution's Necessary and Proper Clause to regulate any activity during a mixed federal/state election that exposed the federal election to potential harm, whether that harm materialized or not. *Coy* is still good law. *See*, *United States v. Slone*, 411 F.3d 643, 647 (6th Cir. 2005); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States v. Malmay*, 671 F.2d 869, 874–75 (5th Cir. 1982); *Ex parte Yarborough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880).

104. In *Oregon v. Mitchell*, the Supreme Court stated:

> The right to vote is, of course, different in one respect from the other rights in the economic, social, or political field which, as indicated in the Appendix to this opinion, are under the Equal Protection Clause. The right to vote is a civil right deeply embedded in the Constitution. Article I, § 2, provides that the House is composed of members 'chosen . . . by the People' and the electors 'shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.' The Seventeenth Amendment states that Senators shall be 'elected by the people.' The Fifteenth Amendment speaks of the 'right of citizens of the United States to vote' -- not only in federal but in state elections.
>
> * * *
>
> [T]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that

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> right strike at the heart of representative government. This 'right to choose, secured by the Constitution,' *United States v. Classic*, 313 U.S. 299, is a civil right of the highest order. Voting concerns 'political' matters; but the right is not 'political' in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable.

Mitchell, 400 U.S. 112, at 138-39 (1970).

105. Justice Harlan also stated the following in his concurring opinion:

> [A]s the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by *Madison*, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people.

Mitchell, 400 U.S. at 185 (Harlan, J., concurring in part).

106. The Supreme Court further stated: "we are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds v Sims*, 377 U.S. 533, 566 (1964).

107. "Every voter in a federal . . . election . . . whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the

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Constitution to have his vote fairly counted, *without its being distorted by fraudulently cast votes*." *Anderson v. United States,* 417 U.S. 211, 227 (1974) (emphasis added).

B. NATIONAL VOTER REGISTRATION ACT ("NVRA")

108. The National Voter Registration Act ("NVRA") was passed for the purpose of ensuring accurate and current voter registration rolls to enhance the integrity of elections.

109. In so doing, Congress found that: (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities. 52 US.C.A. § 20501.

110. The NVRA exists in part to "protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 52 US.C.A. § 20501.

111. The NVRA *requires* states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" by reason of death or change of address. 52 U.S.C. § 20507(a)(4).

112. Similarly, the U.S. Election Assistance Commission ("EAC") is required by law to report to Congress its findings related to state voter registration practices. 52 U.S.C. § 20508(a)(3).

113. Federal regulations require states to provide data to the EAC for use in their reports, including the numbers of active voters, and the numbers of registered voters

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removed from the rolls for any reason. 11 C.F.R. § 9428.7(b)(1), (2), (5).

114. The NVRA requires the States to complete any program the purpose of which is to remove ineligible voters from the official lists of eligible voters not later than ninety (90) days prior to an election.

115. NVRA has two (2) methods of enforcement. First, the Attorney General can petition the court for declaratory and injunctive relief. Second, a private citizen can pursue a cause of action with certain requirements as follows. In a private action, notice is required, in that a person must notify the chief election official of the State involved. If the violation is not corrected within 90 days of receipt of the notice or within 20 days after receipt of the notice, if the violation occurred within 120 days before the date of an election for office, the aggrieved person may bring a civil action in an appropriate district court seeking relief. In the alternative, if the violation occurs 30 days before the date of an election for federal office, no notice is required.

116. Although the NVRA authorizes a private cause of action in the form of declaratory or injunctive relief, this "remedy" is largely toothless. Any Court in the United States would have great reluctance to formally order election officials to correct the NVRA error and/or decertify an election so close in time to an actual election or just after certification.

117. Additionally, to what extent the NVRA requires a hypothetical plaintiff to have suffered injury is not clear – standing could be a troublesome burden to prove particularly if the harm, such as voter fraud and dilution, has been committed on a class people, the electors as a whole, rather than on an individual person.

118. Furthermore, a Court could attempt to use the doctrine of laches to avoid the distasteful task of questioning election officials, inquiring into potentially fraudulent elections, and inaccurate voting rolls, despite a hypothetical plaintiff being in full compliance with the private

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NVRA notice requirements.

119. Congress's power to pass the NVRA comes from Article I, Section 8, Clause 18 of the United States Constitution, the Necessary and Proper Clause, making accurate voter rolls a requirement to uphold the right of the people to choose their representatives.

C. HELP AMERICA VOTE ACT ("HAVA")

120. The Help America Vote Act ("HAVA") exists in part to "establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and other purposes." H.R. 3295 (2002).

121. HAVA requires that voter roll databases contain only the registrations of qualified citizen voters residing in that state. 52 US.C.A. § 21083(a).

122. HAVA defines a voting system as "the total combination of mechanical, electromechanical, or electronic equipment (including software, firmware, and documentation required to program, control, and support the equipment) that is used to define ballots; to cast and count votes; to report or display election results; and to maintain and produce any audit trail information." 52 US.C.A. § 21081(b).

123. The purpose of any voting system is to accurately record, store, consolidate, and report the specific selections, and absence of selections, made by the voter as well as to accurately measure the intent of the total body of eligible voters that voted.

124. Petitioners believe and therefore aver the ability to "cast and count votes" begins with establishing eligibility and registering only qualified citizens into voter registration databases, thus assuring that all ballots granted, cast, and counted, are lawful.

125. Petitioners believe and therefore aver that inaccurate voter rolls have significant negative consequences in elections.

126. Per HAVA, in any given state, each qualified voter is granted a unique

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statewide identifier in a database, which averts the risk of double-voting or extra ballots being cast in the name of one individual voter.

127. HAVA furthermore requires that federal elections adhere to an accuracy standard established by the FEC through Section 3.2.1 of its Voting System Standards (2002), which states in relevant part that error rates are "*...set at a sufficiently stringent level such that the likelihood of voting system errors affecting the outcome of an election is exceptionally remote even in the closest of elections.*" United States (2002) *U.S. Federal Election Commission FEC.* United States [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (emphasis added).

128. Accuracy in a voting system is defined as the ability of the system to capture the intent of voters without error. United States. (2002) *U.S. Federal Election Commission FEC.* United States [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

129. Section 301 of HAVA regarding "Voting System Standards," states that the "error rate of [a] voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission." 52 US.C.A. § 21081(a)(5).

130. Petitioners ask this Court to recall that, the FEC voting systems standards of section 3.2.1 establish that "the system shall achieve a target error rate of no more than **one in**

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10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions." *See*, *supra*. at 30 (emphasis added).

131. The Voluntary Voting System Guidelines ("VVSG"), Version 1.1, Section 4.1.1 – Accuracy Requirements state, in part, **"[a]ll systems shall achieve a report total error rate of no more than one in 125,000."** Furthermore, "[t]he benchmark of one in 125,000 is derived from the 'maximum acceptable error rate' used as the lower test benchmark in the 2005 Voluntary Voting System Guidelines Version 1.0. That benchmark was defined as a ballot position error rate of one in 500,000. The benchmark of one in 125,000 is expressed in terms of votes, however, it is consistent with the previous benchmark that the estimated ratio of votes to ballot positions is ¼." United States (2015) *U.S. Election Assistance Commission.* United States [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf.[4]

132. HAVA also requires that states who receive payments for the administration of elections must use the funds "in a manner consistent with each of the laws described in Section 21145 . . . and the proposed uses are not inconsistent with the requirements of Title III." 52 U.S.C. § 20971(c).

133. A private cause of action may exist for HAVA through 42 U.S.C. § 1983. *Colon-Marreror v. Velez*, 813 F.3d 1, 22 (1st Cir. 2016) (finding a private action under §1983 for HAVA violations because the provision provided enforceable voting rights and imposes binding obligations on state officials).

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[4] In the latest version of the VVSG, or VVSG 2.0, the EAC adopted the position that "the value of 10,000,000 ballot positions is taken from VVSG 1.0 [VVSG2005], however it is used here as the minimum number of ballot positions to test without error. *If a larger number of ballot positions is used, there still can be no error.*" (emphasis added).

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134. Section 1983 provides a mechanism for enforcing individual rights secured elsewhere as in rights independently secured by the Constitution and laws of the United States. *Gonzaga University v. Doe*, 536 U.S. 273, 284-85 (2002). Importantly, a §1983 plaintiff must assert a violation of a federal right, not just a law. *Blessing v. Freestone,* 520 U.S. 329, 340 (1997).

135. A private cause of action pursuant to §1983 can be found for violations of HAVA, which requires voting systems to provide the voter with the opportunity to change the ballot or correct any apparent error before the ballot is cast and counted. 52 USC 21081(a)(1)(A)(ii). The violation could be produced by a configuration of the voting machines.

136. Section 1983 is currently the only mechanism where HAVA violations will receive any meaningful private review, yet it has proven thus far to be ineffectual at providing any real remedy for HAVA violations.

137. Congress's power to pass the HAVA comes from Article I, Section 8, Clause 18 of the United States Constitution, the Necessary and Proper Clause, making accurate voting systems a requirement to uphold the right of the people to choose their representatives.

MICHIGAN ELECTION CODE

138. Michigan law provides for the establishment of the State Bureau of Elections, which is an administrative body designed to assist the Secretary of State with the administration of federal and state elections. Mich. Comp. Laws § 168.32.

139. As such, the Michigan Secretary of State is responsible for overseeing Michigan elections and enforcing Michigan's Election Law. Mich. Comp. Laws § 168.21(1).

140. Per Michigan Statutes § 168.32, the State Bureau of Elections is vested with the

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powers and shall perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws, and, among other things, is required to do the following:

a. Issue instructions and promulgate rules pursuant to the administrative procedures act of 1969 for the conduct of elections and registrations in accordance with the laws of the state;

b. Advise and direct local election officials as to the proper methods of conducting elections;

c. Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act;

d. Publish indexed pamphlet copies of the registration, primary, and election laws and furnish to the various county, city, township, and village clerks, a sufficient number of copies for their own use and to enable them to include 1 copy with the election supplies furnished each precinct board of election inspectors under their respective jurisdictions. The secretary of state may furnish single copies of the publications to organizations or individuals who request the same for purposes of instruction or public reference;

e. Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations;

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f. Require reports from the local election officials the secretary of state considers necessary;

g. **Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.**

Mich. Comp. Laws §168.31. Secretary of state; duties as to elections; rules.

141. The election code describes numerous criminal penalties for failing to adhere to basic code guidelines, including making a materially false statement in a registration application – a misdemeanor. (Mich. Comp. Laws § 168.499(1)).

142. Michigan law requires the State Bureau of Elections, under the supervision of the Secretary of State, to issue instructions and promulgate rules pursuant to the administrative procedures act of 1969 for the conduct of elections and registrations in accordance with the laws of the state.

143. Petitioners believe and therefore aver that the State of Michigan cannot demonstrate effective control over voter eligibility in conformity with federal or state requirements, and Michigan has implemented a system that does not guarantee accuracy or compliance with legal mandates requiring the state to ensure that only eligible voters may register and vote.

D. ELECTION FRAUD CONGRESS SOUGHT TO GUARD AGAINST

144. Petitioners do not accuse any person or entity of engaging in election fraud in 2022, nor propose any person or entity will engage in such fraud in 2024 or in subsequent federal elections in Michigan. Petitioners' purpose in describing types of voter fraud is to set

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forth the harms Congress sought to avoid by implementation of HAVA and NVRA as well as the various statutes passed by the Michigan General Assembly and cited above.

145. Petitioners believe and therefore aver election fraud can occur in multiple diverse ways, not all of which are individualized to a specific actor.

146. Petitioners believe and therefore aver over the past fifty years, Congress has enacted criminal laws with broad jurisdictional basis to combat false voter registrations, vote-buying, multiple-voting, and fraudulent voting in elections in which a federal candidate is on the ballot. *See,* 52 U.S.C. §§ 10307(c), 10307(e), 20511.

147. The federal jurisdictional predicate underlying these statutes is satisfied as long as either the name of a federal candidate is on the ballot, or the fraud involves corruption of the voter registration process in a state where one registers to vote simultaneously for federal as well as other offices. *Slone*, 411 F.3d at 647–48; *United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999).

148. Voting in federal elections for individuals who do not personally participate in, and assent to, the voting act attributed to them, or impersonating voters, or casting ballots in the names of voters who do not vote in federal elections, can constitute prosecutable election fraud. *See,* 52 U.S.C. §§ 10307(c); 10307(e); 20511(2).

149. It is *possible* for election officials acting "under color of law" to commit election fraud by performing acts such as diluting ballots with invalid ones (ballot stuffing), rendering false tabulations of votes, or preventing valid voter registrations or votes from being given effect in any election, federal or non-federal (18 U.S.C. §§ 241, 242), as well as in elections in which federal candidates are on the ballot. *See* 52 U.S.C. §§ 10307(c), 10307(e),

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20511(2).[5]

150. An individual commits election fraud by submitting fictitious names to election officers for inclusion on voter registration rolls, thereby qualifying the fictious name to vote in federal elections. 52 U.S.C. §§ 10307(c), 20511(2).

151. An individual commits election fraud by knowingly procuring eligibility to vote for federal office by people who are not entitled to vote under applicable state law and/or people who are not United States Citizens. 52 U.S.C. §§ 10307(c), 20511(2); 18 U.S.C. §§ 1015(f).

152. An individual who makes a false claim of United States Citizenship to register to vote commits election fraud. 18 U.S.C. § 1015(f); 18 U.S.C. § 911.

153. A person who provides false information concerning a person's name, address, or period of residence in a voting district to establish voting eligibility commits election fraud. 52 U.S.C. §§ 10307(c), 20511(2).

154. Fraud can occur where an individual causes the production of voter registrations that qualify alleged voters to vote for federal candidates, where that individual knows the registrations are materially defective under applicable state law. 52 U.S.C. § 20511(2)

155. However, election fraud need not involve the participation of individual voters.

156. Election fraud can occur where an individual or organization places fictious

[5] For purposes of the present Petition, Petitioners do not suggest any Michigan election officials engaged in election fraud. Rather, Petitioners' point out the *possibility* of improper conduct by election officials as a harm against which Congress and the General Assembly have sought to guard by enacting the various statutes cited here. A reason Congress, especially in HAVA, set forth standards that must be met before an election is considered reliable is to counter potential election fraud and to thus produce presumptively reliable election results.

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names on voter rolls (allowing for fraudulent ballots which can later be used to stuff the ballot box, *supra.*), casting fake ballots in the names of people who did not vote, obtaining and marking absentee ballots without the input of the voter involved, and falsifying vote tallies.

157. When the federal government seeks to maintain the integrity of elections, it does so for specific federal interests *inter alia*: (1) the protection of the voting rights of racial, ethnic, or language minorities, a specific constitutional right; (2) the registration of voters to vote in federal elections; (3) the standardization and procurement of voting equipment purchased with federal funds; (4) the protection of the federal election process against corruption; (5) the protection of the voting process from corruption accomplished under color of law; and (6) the oversight of non-citizen and other voting by persons ineligible to vote under applicable state law. Richard C. Pilger, *Federal Prosecution of Election Offenses*, p. 30, 8th Edition (2017).

158. Congress has enacted a litany of specific crimes that can be prosecuted under a general definition as "election fraud":

a. Conspiracy Against Rights: 18 U.S.C. § 241. *See United States v. Saylor*, 322 U.S. 385 (1944) (stuffing a ballot box with forged ballots); *United States v. Classic*, 313 U.S. 299 (1941) (preventing the official count of ballots in primary elections); *United States v. Townsley*, 843 F.2d 1070, 1073–75 (8th Cir. 1988) (destroying ballots); *United States v. Morado*, 454 F.2d 167, 171 (5th Cir. 1972) (casting absentee ballots in elderly or handicapped peoples' names); *Crolich v. United States*, 196 F.2d 879, 879 (5th Cir. 1952) (impersonating qualified voters); *United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003) (conspiracy need not be successful nor need there be an overt

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act).

b. Deprivation of Rights under Color of Law: 18 U.S.C. § 242. *See United States v. Price*, 383 U.S. 787 (1966) (acted jointly with state agents); *Williams v. United States*, 341 U.S. 97 (1951) (actions clothed under Color of State Law).

c. False Information in, and Payments for, Registering and Voting: 52 U.S.C. § 10307(c).[6]

d. Voting More than Once: 52 U.S.C. § 10307(e).

e. Fraudulent Registration or Voting: 52 U.S.C. § 20511(2).

f. False claims to Register or Vote: 18 U.S.C. § 1015(f).

g. "Cost-of-Election" theory: 18 U.S.C. § 1341.

h. Improper Retention of Federal Election Returns: 52 U.S.C. § 20701.

159. In short, election fraud can constitute numerous different actions or inactions, and federal and state governments of the United States have an interest in guarding the integrity of elections, and ensuring election fraud is stopped, then prosecuted appropriately.

Facts and Summary of the Issues

160. Petitioner United Sovereign Americans received Michigan's voter registration data from the 2022 general election – the data contained millions of entries of voter registration data.

161. Thereafter, expert data analysists acting on behalf of Petitioner United Sovereign Americans performed a series of SQL database queries on the data to extrapolate

[6] "Section 10307(c) protects two distinct aspects of a federal election: the actual results of the election, and the integrity of the process of electing federal officials." *United States v. Cole*, 41 F.3d 303, 307 (7th Cir. 1994).

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and refine information about voter registrations in Michigan.

162. Thereafter, Petitioner United Sovereign Americans thoroughly reviewed the results.

163. United Sovereign Americans' SQL database queries revealed hundreds of thousands of voter registration apparent errors in the State of Michigan. See *Infra.*

164. The results from the SQL database queries allowed Petitioners' experts to produce a "Scorecard" reflecting Michigan's voter registration data detailing the hundreds of thousands of apparent errors contained within that registration data. *See* Exhibit "B" for a copy of United Sovereign American's Michigan 2022 General Election Validity Scorecard.

165. In addition, the results from the SQL Database Queries of Michigan's voter registration data allowed Petitioners' experts to compile a General Election Validity Reconciliation. *See* Exhibit "C" for a copy of United Sovereign American's Michigan 2022 General Election Validity Reconciliation.

166. The results from the SQL Database Queries of Michigan's voter registration data also revealed that apparent errors were not uniform across Michigan – some counties had far more registration apparent errors than others.

167. According to the data provided to Petitioner United Sovereign America for the 2022 election, Michigan had 7,587,952 voter registrations.

A. VOTER REGISTRATION ROLL INACCURACY

168. Expert analysis by Petitioner United Sovereign Americans of the official Michigan State Voter Registration Data for the 2022 election revealed that, out of 7,587,952 voter registrations, there was a total of **58,205,783** voter registration violations including:

7,481 Illegal duplicates, where the same voter has multiple registrations

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100,229 invalid addresses

4,714 Age discrepant registrants[7]

2,204 back-dated new registrations

6,069 registrations where the voter was removed and added back on

11,511 double votes added and removed

57,903,469 votes altered post certification

152,047 registrations processed on a non-business day

13,824 invalid registration statuses

4,235 invalid names

See, Exhibit "B" for a copy of United Sovereign American's Michigan 2022 General Election Validity Scorecard.

169. This data shows that in 2022 the voter rolls in Michigan were not accurate and current as required by NVRA, HAVA, nor in conformity with specific Michigan laws pertaining to voter registration. 52 U.S.C.A. § 20501(b)(4); 52 US.C.A. § 21081; and Mich. Comp. Laws, Chapter 168.

170. Thus far, Petitioners have exhausted every remedy known to them in advance of the 2024 general election to have these issues corrected. Petitioners continued in 2024 to seek redress and repair for these egregious violations through democratic means.

171. Respondents have dismissed, and continue to dismiss, Petitioners' concerns and, based on information and belief, did so without any meaningful review, action, or

[7]Registrants before the age of sixteen (16) or older than the age of one hundred fifteen (115).

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response.

172. Petitioners believe and therefore aver Respondents intend to administer and ultimately certify Michigan's 2024 general election (involving both state and federal contests) using the same inaccurate and flawed data and conditions.

B. VOTES FROM INELIGIBLE VOTERS

173. Expert analysis on behalf of Petitioner United Sovereign Americans of the official Michigan State Voter Registration Data for the 2022 election revealed that, out of the votes cast in the 2022 general election, there were a total of **379,130** evident voting violations, and **369,107** *unique* votes impacted by apparent voting violations.[8] These violations were in the form of:

506 Illegal Duplicates, where the same voter has multiple registrations.

92,708 Vote History Invalid or Illogical[9]

47,805 Illegal addresses

444 Votes from back-dated new registrations

3,646 Vote history moved to a new voter ID

10 Double votes

2 Age Discrepant Registrants[10]

226,928 Registrants With Altered Votes after Certification

[8] Some registered voters have more than one violation. The number of unique voters indicates how many individual registrations have apparent errors – whether it be one or multiple apparent errors.

[9] Voter history exists prior to the voter's birth or prior to the voter attaining the age of eighteen (18) years.

[10] Registrants younger than the age of sixteen (16) or older than the age of one hundred fifteen (115).

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1,582 Missing absentee voters on the Nov. 14, 2022, Absentee Ballot Tracking Report

2,995 Votes from Invalid Registrations

540 Missing votes

1,964 Invalid Names

See, Exhibit "B" for a copy of Petitioner United Sovereign American's Michigan 2022 General Election Validity Scorecard.

174. Petitioners believe and therefore aver this data shows that in 2022 the voter rolls in Michigan are not accurate and current as required by the NVRA, HAVA, and specific Michigan laws pertaining to voter registration. 52 U.S.C.A. § 20501(b)(4); 52 US.C.A. § 21081; and Mich. Comp. Laws, Chapter 168.

175. Thus far, Petitioners have exhausted every remedy known to them in advance of the 2024 general election to have these issues, and all issues raised below, addressed and remedied. Petitioners continued in 2024 to seek redress and repair for these egregious violations through democratic means.

176. Respondents have ignored or dismissed, and continue to ignore or dismiss, these concerns without apparent meaningful review, action, or response, and furthermore Petitioners believe and therefore aver Respondents intend to administer and certify Michigan's 2024 general election (involving both state and federal contests) under the same inaccurate and flawed conditions as that have utilized previously in conducting Michigan's combined federal and state elections.

C. ERROR RATES IN 2022 COMPARED TO RATES PERMITTED BY FEDERAL LAW

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177. Michigan's voting systems are subject to the permissible error rates set forth by Congress in HAVA and further elucidated in FEC Voting System Standards 3.2.1 and explained in the EAC's VVSG. *Supra*.

178. The *maximum* number of apparent voting system errors permissible in counting votes in the 2022 Michigan General Election using the calculations set forth by the Federal Election Commission upon mandate by Congress was thirty-seven (37) errors at most allowed. The total number of Unique Ballots impacted by voting system errors in the Michigan General Election, however, was 379,130 apparent errors. *See* Exhibit "B."

179. Even accounting for the possibility that of the 379,130 apparent errors, many were not true errors, Petitioners believe and therefore aver, that Michigan cannot reduce that number to thirty-seven (37) or less.

180. Under HAVA, an error rate of no more than one in 125,000 is permissible before the results of the *entire election* becomes suspect, and the integrity and reliability of the election compromised. As mentioned above, this figure is calculated by dividing the total number of Michigan votes in a given election by 125,000, to arrive at the number of permissible errors in any given election in order to create the error rate of no more than one in 125,000 mandated by the VVSG.

181. For the 2022 General Election this is 4,500,400 (votes cast) divided by 125,000 leaves thirty-seven (37) (rounded up) as the maximum errors permitted, meaning that in order for the election to be considered valid, there cannot have been more than 37 voting system apparent errors in the entire ballot tabulation for all ballots cast in that election in Michigan.

182. However, in the 2022 Michigan General Election, the number of voting system apparent errors in counting ballots for the 2022 general election was 379,130, a figure

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dramatically exceeding the maximum allowable apparent error rate of thirty-seven (37).

183. Because the voting system apparent error rate for the 2022 Michigan General Election was far above the maximum allowable error rates, Petitioners believe and therefore aver the reliability and credibility of the 2022 results are cast into doubt as a matter of law.

VOTER-TO-VOTE DEFICIT

184. The official canvas for the 2022 Michigan Election was 4,500,400 ballots cast yet the data shows there exist 4,482,427 total votes cast – a discrepancy of 17,973 votes. *See* Exhibit "B."

185. This discrepancy can best be defined as a Voter-to-Vote deficit.

186. Additionally, the official canvas for the 2022 Michigan Election was 4,500,400 votes (ballots counted) yet there exist only 4,482,427 *voters who actually voted* according to the data provided – a discrepancy of 17,973 votes that are completely unaccounted for and cannot be explained—a number far in excess of thirty-seven (37) and indisputably each constitution an "error."

187. Petitioners believe and therefore aver that the **17,973 more votes counted than voters who voted** means that either tabulators overcounted votes statewide, or there is an alternative source of the data discrepancy.[11]

D. MICHIGAN'S 2022 GENERAL ELECTION VALIDITY

188. For Michigan's 2022 General Election, out of the 7,587,952 total registrations,

[11] Petitioners accuse no one of engaging in fraud or deceit. Petitioners merely point out the discrepancy, which could be due to unintentional tabulator error, some fraud of unknown origin, a combination of both, or even fraud by the tabulators themselves. The discrepancy occurred in 2022 for an unknown reason. It is the deficit *itself*, regardless of the cause, that demonstrates an error rate in excess of that permitted by HAVA calling into question the integrity of the election. Petitioners propose to ask this Court to order Respondents to ascertain why the deficit occurred in 2022, ensure that a similar deficit does not re-occur in 2024, and in all federal elections thereafter in the future.

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of which Petitioners believe and therefore aver, there were 7,070,211 *valid* registrations, 26,332 uncertain/illogical/invalid registrations, 491,409 registrations which violated election laws, and 0 "Deadwood" registrations.[12] *See* Exhibit "B."

189. Petitioners believe and therefore avers that of the people holding the 7,070,211 valid registrations, 4,131,293 votes were counted in the 2022 General Election.

190. Petitioners believe and therefore avers that of the identified 26,332 uncertain/illogical/invalid registrations, 2,407 people voted and had their votes counted in the 2022 General Election.

191. Petitioners believe and therefore avers that of the 491,409 registrations that violated election laws, **366,700** people holding such registrations *cast votes that were counted* in the 2022 General Election.

192. Petitioners believes and therefore avers there were no "Deadwood" registrations, or fake name registrations, listed as having voted in the 2022 General Election.

193. Petitioners believe and therefore avers that the *registration* error rate in Michigan for the 2022 General Election was **six-and-eight-tenths percent (6.8%)** of the total registrations on Michigan's voter rolls. This figure is arrived at by taking 26,332 uncertain/illogical/invalid registrations, plus 491,409 registrations which violated election laws, as a percentage of 7,587,952 total registrations.

194. Petitioners believe and therefore avers that the *voter* system error rate in

[12] "Deadwood" is a concept dealing with election fraud and is defined as a fake voter registration record. These registrations could include a voter who is deceased, ineligible, moved, etc.

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Michigan for the 2022 General Election was **eight-and-two-tenths percent (8.2%)**, arrived at by taking 2,407 votes counted from uncertain/illogical/invalid registrations, plus 366,700 votes counted from illegal registrations, as a percentage of 4,482,427 votes cast.

195. For example, the margin of victory in MI Congressional District 7 in 2022 was five-and-five-tenths percent (5.5%), or 192,809 votes to the winner and 172,624 votes to the loser. The apparent error rate statewide in the 2022 federal election when applied to the Congressional Election in MI District 7 exceeds the margin of victory for this particular congressional district, meaning that if the apparent error rate in Michigan is evenly distributed by Congressional District (which *ordinarily might* be a reasonable assumption given that such districts must contain roughly the same number of people under the Constitution), the Congressional Election results in District 7 election would be considered unreliable.[13] That is not to say that the eventual "winner" there did not receive more votes than the eventual "loser." It simply means if the apparent error rate is assumed to be evenly distributed throughout Michigan, the winner in the 7th cannot be *confident* in his/her election, and the loser cannot be *confident* in his/her defeat *because the election itself* would not have produced results according to law that are reliable, meaning the integrity of the entire election process is called into question.

196. To expand on the above, Michigan's 2022 voter system error rate of 8.2% *exceeded* the margin of victory in two of Michigan's 13 Congressional Districts: 7 and 10. Thus, 15% of Michigan's *current* members of the United States House of Representatives *might* hold their seats owing to legally unreliable election results.

197. Per HAVA and the FEC, the legal standard of allowable registration errors for a

[13] This is merely a simplified example for illustrative purposes as Petitioners are aware that the apparent error rates are not evenly distributed county-by-county and thus cannot be evenly distributed by congressional district.

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federal election is 0.0008% (or 1 out of 125,000) yet the voter system error rate in Michigan's 2022 combined state and Federal General Election was 8.2%.

Requested Relief

ALL WRITS ACT RELIEF – 28 U.S.C. § 1651

198. Petitioners incorporate the previous paragraphs by reference as if set forth at length here.

199. Petitioners are not seeking to undermine official elections results previously certified. Petitioners have cited issues in prior Michigan federal elections to add weight to Petitioners' belief that absent intervention by this Honorable Court, Respondents will permit the same apparent errors to occur in the 2024 General Election in Michigan, and in all following federal elections in the state.

200. Petitioners seek redress from the constitutional harm brought upon them, and the Michigan electorate at large, by Respondents failure to comply with federal and state election law.

201. Petitioners believe and therefore aver that Respondents have done nothing or an inadequate job at addressing the issues presented in this Petition – particularly to address the inaccurate and likely fraudulent voter rolls and voter systems used in federal elections conducted by state authorities.

202. Respondents' inaction and/or failure to act compels Petitioners to ask that the Court to issue a Writ of *Mandamus* requiring Respondents to comply with the two federal statutes at issue (the NVRA and the HAVA) along with the Michigan Election Law, Mich. Comp. Laws, Chapter 168, while giving Respondents a reasonable time within which to bring Michigan into compliance in time for the 2024 General Election and all federal elections conducted by the state going forward while providing relief to 2024 voters if bringing

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Michigan into compliance in time is impossible upon showing by Respondents.

203. Specifically, Petitioners respectfully seek that the Court order Respondents take steps, both short term and long term, to ensure the apparent errors made during the 2022 elections do not recur and to bring Michiganinto compliance with HAVA's specific mandate of no greater than 1 voting error out of 125,000 votes.

204. This Honorable Court is authorized to issue a writ of *mandamus* under "The All-Writs Act," 28 U.S.C. § 1651 granting the power to United States Federal Courts to "issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law."

205. A writ of *mandamus* under 28 USC § 1651 is typically used to fill gaps in the law, and the Supreme Court has stated that The All-Writs Act is a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of the law.'" *Harris v. Nelson*, 394 U.S. 286 (1969) (All Writs Act *mandamus* properly used to conduct factual inquiries).

206. A writ of *mandamus* is warranted where "(1) no other adequate means exist to attain the relief, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*quoting Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380–81 (2004) (stay granted where district court likely did not follow federal law)).

207. A writ of *mandamus* is appropriate and necessary to vindicate the rights of citizens when a governmental agency or official has refused to perform a ministerial duty that the petitioner has established has a clear legal right to have the governmental agency or official, in this case Respondents, perform.

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208. A federal court may use all auxiliary writs as aids when it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 273 (1942) (writ of *habeas corpus* is available to the circuit courts of appeals).

209. A "ministerial action" is a duty in a particular situation so plainly prescribed as to be free from doubt and equivalent to a positive command. *Wilbur v. United States*, 281 U.S. 206, 218 (1930); *see also Will v. United States*, 389 U.S. 90 (1967).

210. "Mandamus is employed to compel the performance, when refused, of a ministerial duty . . . [i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." *Wilbur v. United States*, 281 U.S. 206, 218 (1930). *See also Decatur v. Paulding*, 39 U.S. 497, 514-17 (1840) (Secretary of the Navy's duty to approve of pensions was discretionary, and therefore, not ministerial); *Kendall v. United States*, 37 U.S. 524 (1838) (Postmaster General had a ministerial duty to make entries); *Work v. Rives*, 267 U.S. 175, 177 (1925).

211. Instantly, Petitioners have no other remedy than a writ of *mandamus*.

212. Petitioners argue that injunctive and/or declaratory relief is inapplicable or inappropriate in this issue because the harm from the 2024 election is not yet realized and Petitioners are seeking to have Michigan election officials and/or federal officials bring Michigan into compliance with federal and state law, specifically HAVA, NVRA, and the Michigan Election Law, Mich. Comp. Laws, Chapter 168, absent a specific existing private cause of action Petitioners could assert that affords Petitioners relief.

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213. Petitioners believe and therefore aver Respondents have allowed, and continue to allow, violations of federal election laws, Michigan election laws, the United States Constitution, and federal civil rights laws pertaining to voter rights, which include mandating accurate registration rolls, transparency, compliance, and proper certification of the voting systems. 52 US.C.A. § 20501; 52 US.C.A. § 21083.

214. Petitioners believe and therefore aver that the voter rolls within the State of Michigan are inaccurate, in violation of NVRA and HAVA. These are not list maintenance failures. The inaccuracies represent a failure to control the process of validating and registering only qualified citizen voters. These apparently invalid and/or illegal registrations voted in large numbers in Michigan's 2022 General Election.

215. Petitioners believe and therefore aver the Respondents have lost control of voter registration, leading to the distribution of ballots to what appear to be false registrants which results in a diluted vote and further harm to petitioners and the electorate at large. The voter-to- vote deficit is illustrative here in that the official canvas for the 2022 Michigan Election was 5,500,400 votes yet there exist 4,482,427 total votes in the data – a discrepancy of 17,973 votes. Upholding HAVA includes the risk assessments and proper certification of all system elements individually, and as a system as a whole.

216. Petitioners believe and therefore aver an election official's job is fidelity to the law in administering the electoral process, thereby protecting the integrity of an election, and the citizens from corruption in the election process.

217. Petitioners believe and therefore aver that Michigan officials' failure to follow the law has resulted in election outcomes that are untrustworthy. The voting system in its present form cannot be used to produce trustworthy reliable results without the requested

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judicial intervention.

218. Petitioners believe and therefore aver a writ of *mandamus* is appropriate in this case. Respondents have failed, and continue to fail, in complying with federal and state laws regarding voting – including voting accuracy and accountability. It is clear from the Respondents conduct before, during, and after, the 2022 elections that, absent judicial action, Respondents will do nothing to repair the deficiencies noted above to ensure the integrity of Michigan elections are conducted in compliance with federal and state law.

219. The scope of Petitioners' *mandamus* request is narrow: Petitioners seek this Court to order Respondents follow existing federal and state law designed by Congress and the Michigan General Assembly to ensure that Michigan's 2024 and subsequent combined federal and state general elections produce reliable results within the margin of error rate allowed.

220. Petitioners hold up the mathematically unreliable (according to, *inter alia*, HAVA) 2022 Michigan combined federal and state General Election as evidence that, should the writ not issue, the apparent error rate in the 2024 and subsequent combined general elections will continue to exceed the law's mandated maximum error rate permitted before an election is unreliable.

221. Petitioners seek that the requested writ direct Respondents to investigate and remedy the issues exposed in the 2022 elections to avoid repeating the same mistakes in future combined federal and state general elections which are constitutionally administered by Michigan pursuant to Article I, Section 4 (delegating to the state legislatures the power to regulate federal elections for members of the House of Representatives, with Congress

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reserving the power to "…alter such Regulations [made by the various state legislatures]…"),[14] and, generally, Article II, Section 1 (granting state legislatures the power to determine how presidential electors are chosen) of the United States Constitution.[15]

222. Petitioners believe and therefore aver that since the Constitution reserves to Congress the *ultimate* (as opposed to the *presumptive*) power to regulate the means by which Congress' own members are chosen, while the Constitution simultaneously delegates the presumptive power to regulate such elections to, in this case, the General Assembly of the State of Michigan to further delegate as it sees fit to do so by law, the Respondents who are not federal officers *per se*, become federal officers by agency requiring them to carry out not only Michigan election law, but additionally to carry out federal election statutes passed by Congress and duly signed into law by the President under Congress' ultimate authority laid out in Article I, Section 4.

223. Petitioners believe and therefore aver that delegations of authority by the General Assembly of powers to supervise federal elections to any Respondent Michigan officials

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[14] Petitioners aver that NVRA and HAVA are examples of Congress' exercising its power under Article I, Section 4 to "alter" Michigan's (and all other state's) otherwise absolute constitutional authority to regulate federal elections to the House of Representatives and, by application of the 17th Amendment to the U.S. Constitution providing for the direct election of two senators from each state, Congress may exercise its authority "…from time to time by Law make or alter such Regulations…" [of the various states…] to regulate the election of United States Senators as well the election of members of the House of Representatives.

[15] Petitioners include citation to Article II and the choosing of electors for president and vice-president, (later modified by the 12th Amendment), to again demonstrate the Framers' intent that the various states shall have presumptive authority to regulate and administer the election of all federal officers on the ballot for consideration in a federal election. Article 1, Section 4 (as later amended) and Article II, Section (as later amended) are examples of where the Framers intentionally intertwined the powers of the various states with those of Congress, while making certain Congress maintained the *ultimate* power to regulate the election of its members, the then-prevailing concepts of *Federalism* and *Dual Sovereignty* notwithstanding.

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pursuant to the General Assembly's power to regulate federal elections granted by Article I, Section 4, makes said Michigan Respondents into federal officers by agency or quasi- federal officials in the carrying out of their duties to regulate federal elections.

224. Petitioners believe and therefore aver that ordinary principles of federalism and dual sovereignty where a Federal District Court Judge would be reluctant to issue an order to a State official pertaining to how that state official may perform his/her official functions are inapplicable because the Respondent Michigan official is acting in his/her hybrid role as a quasi-federal officer as required by Article I, Section 4.

225. Petitioners believe and therefore aver, then, that this Honorable Court has authority to issue the requested writ of *mandamus* to compel, not just the Respondent Federal officers to ensure that federal election law is carried out in Michigan's 2024 and subsequent general elections, this Court also has the authority to compel Respondent Michigan officials because said officials are charged by the U.S. Constitution in the carrying out of federal law where Congress has asserted its power to "alter" existing Michigan federal election procedures as it did in enacting NVRA and HAVA.

226. Petitioners believe and therefore aver that any delegation from the Michigan General Assembly to the Executive Branch of Michigan government (e.g., to the Governor who in turn delegates power to the Secretary of State, or any delegation of the General Assembly's power to regulate federal elections to the Attorney General) still falls under this Court's authority which is derived through Article I, Section 4's grant to the various state legislatures of the power to supervise federal elections.

227. Petitioners believe and therefore aver that simply because the General Assembly may have chosen to delegate some of its authority to supervise federal elections to

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Respondent members of Michigan's Executive Branch of government, such delegation does not insulate such officials from the power of this Court, since this Court's power comes from its authority over the delegating entity, in this case the Michigan General Assembly.

ACTION TO COMPEL AN OFFICER OF THE UNITED STATES TO PERFORM HIS DUTY – 28 U.S.C. § 1361

228. Petitioners incorporate the previous paragraphs as if set forth at length here.

229. District Courts are empowered with the ability to compel an officer or employee of the United States or any agency thereof to perform a duty owed to a plaintiff. 28 U.S.C. § 1361.

230. Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice are parties responsible for the enforcement of federal election laws, specifically HAVA and NVRA.

231. Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice are officers, employees, or an agency of the United States.

232. Petitioners believe and therefore aver that Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice, have done nothing, or, at best, an inadequate job at addressing the issues presented above – namely, the inaccurate and likely fraudulent voter rolls and systems within Michigan.

233. The inaction and/or failure to act is harming Petitioners and the Michigan electorate at large warranting that the Court issue a Writ of *Mandamus* compelling Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice to enforce and police the two federal statutes at issue (NVRA and HAVA) for implementation in the Michigan 2024 General

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Election and subsequent combined federal and state elections administered by Michigan officials and giving Respondents a reasonable period of time in which to do so.

234. Specifically, the Court should order Respondents to take preventative measures to see the apparent errors evident the 2022 elections are not repeated in the 2024 and subsequent elections and bring Michigan into compliance with HAVA's specific mandate of no greater than 1 voting error out of 125,000 votes to ensure reliable election results as HAVA intended.

235. A writ of *mandamus* is warranted where "(1) no other adequate means exist to attain the relief, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)(quoting *Cheney v. United States* Dist. Ct., 542 U.S. 367, 380–81 (2004) (stay granted where district court likely did not follow federal law).

236. A writ of *mandamus* is appropriate and necessary to vindicate the rights of citizens when a governmental agency or official has refused to perform a ministerial duty that the petitioner has established has a clear legal right to have the governmental agency or official, in this case Respondents, perform.

237. A "ministerial action" is a duty in a particular situation so plainly prescribed as to be free from doubt and equivalent to a positive command. *Wilbur v. United States*, 281 U.S. 206, 218 (1930); *see also Will v. United States*, 389 U.S. 90 (1967).

238. Relief contemplated under statute providing that federal district courts shall have original jurisdiction of any action in nature of mandamus to compel an officer or employee of United States or any agency thereof to perform a duty owed to plaintiff is at least as broad as under common-law writ of mandamus. *Carey v. Local Bd. No. 2, Hartford,*

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Conn., 297 F.Supp. 252 (D. Conn. 1969), aff'd, 412 F.2d 71 (2d Cir. 1969).

239. Petitioners believe and therefore aver they have no other remedy than a writ of *mandamus* and to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff/petitioner.

240. Petitioners argue that an injunctive and/or declaratory relief is inapplicable or inappropriate in this issue because the harm from the 2024 election is not yet realized and Petitioners are seeking to have Michigan election officials and/or federal officials bring Michigan into compliance with federal and state law, specifically HAVA, NVRA, and the Election Code, absent a specific private cause of action that affords Petitioners relief.

241. Petitioners believe and therefore aver Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice have allowed, and continue to allow, violations of federal election laws, the United States Constitution, and federal civil rights laws pertaining to voter rights, which include mandating accurate registration rolls, transparency, compliance, and proper certification of the voting systems.

242. Petitioners believe and therefore aver the voter rolls within Michigan are inaccurate, in violation of NVRA and HAVA. That these are not list maintenance failures. Instead, the inaccuracies represent a failure to control the process of validating and registering only qualified citizen voters. Persons voted in the Michigan 2022 General Election in significant numbers who held apparently invalid and/or illegal registrations.

243. Petitioners believe and therefore aver that Respondents' failure to follow the law, or enforce the law, has resulted in election outcomes that are untrustworthy and unreliable. Michigan's voting system in its present form cannot be trusted to produce reliable

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results under HAVA, because Respondents will not follow the dictates of the Act necessitating judicial intervention.

244. A writ of *mandamus* against Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice is appropriate in this case. Respondents Merrick Garland, in his Official Capacity as Attorney General of the United States, and the United States Department of Justice have failed, and continue to fail, in forcing the State of Michigan to comply with federal laws regarding voting – including voting accuracy and accountability as is clear from how the 2022 Michigan General Election was conducted.

245. Petitioners believe and therefore aver that without judicial action, Respondents will do nothing to comply with HAVA and other federal and state statutes to ensure the integrity of Michigan's elections and the same issues evident from the 2022 General Election will call into question the validity of Michigan's 2024 General Election results.

246. The scope of this request for a writ of *mandamus* is narrow: Petitioners seek a judicial order requiring Respondents both federal and state to follow the laws cited herein in conducting the 2024 and subsequent federal elections, and adequately investigate and remedy the problems exposed in and 2022 elections and detailed above.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request Your Honorable Court formally recognize Michigan's voter registration rolls contained hundreds of thousands of apparent errors in the 2022 General Election. Further, that these apparent errors took the form of illegal duplicate

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registrations, incomplete or unknown addresses, registrations on or before the registrant's date of birth, age discrepant registrants, registrations on a federal holiday, registrations on Sunday, registrations with modified dates of birth, registrants whose voter history inexplicably changed, registrants with registration dates altered backwards, and registrants with altered "unique" state voter identification numbers. Petitioner asks this Court to enter an order in *mandamus* compelling Respondents to ministerially correct the apparent errors evident from the 2022 elections data, ascertain to the Court's satisfaction the reasons why the 2022 errors occurred, and prevent those same or similar ministerial errors from recurring during the Michigan 2024 General Election and all subsequent federal general elections to ensure the integrity of Michigan's combined federal and state elections going forward for years to come. Petitioners, additionally, seek pursuant to permissible causes of action under NVRA and HAVA, this Court order that the State of Michigan may not certify the 2024 General Election unless and until the relevant Respondents have demonstrated to the Court that the 2024 General Election and subsequent elections were conducted in conformity with federal and state law and with fewer than the maximum errors permissible. **Petitioners further request this Honorable Court order the state, and any subdivision thereof responsible for voter registrations, submit voter registration requests (and any existing registrations reasonably in question) to the Department of Homeland Security to verify the citizenship or immigration status of persons seeking registration to vote or who are presently on the state's voter rolls whenever there exist any reliable indicators that an applicant or registered voter may not be a U.S. citizen. (*see*: 8 U.S.C. secs.1644 & 1373(c)).** Lastly, Petitioners seek and order in *mandamus* requiring all public officials named as Respondents perform their duties as the law intended whether it be conducting federal elections in conformity with the law or investigating, and where warranted in their discretion, prosecuting persons or

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entities for failing to perform their duties in conformity to the law after being given timely notice to do so.

Respectfully Submitted,

van der Veen, Hartshorn, Levin, & Lindheim

Date: August 28, 2024

By: */s/ Bruce L. Castor, Jr.*

Bruce L. Castor, Jr.
PA I.D. No. 46370
Michael T. van der Veen
PA I.D. No. 75616
Attorneys for Petitioners

1219 Spruce Street
Philadelphia, PA 19107
Main: (215) 546-1000
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EXHIBIT "A"

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Tim Vetter
Sent: Thursday, February 2, 2023 6:01 PM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson
Subject: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Sarah,
I would like to request, via FOIA, a complete qualified voter file dated January 1st , 2023 and February 1st, 2023. At a minimum, this is the same typical data provided in the past via FOIA.

If possible to the standard data issued by your office, I am requesting the following items identified below. If any items can not be provided, please explain in detail why the SOS can not fulfil my FOIA request for this data. Thank you!

1. **A complete list of voters**: Registration status should include but not be limited to all registrants with active, challenged, verify, cancelled and rejected status. Therefore, I would anticipate **every voter** in the November, 2022 election (4,500,400 voters) would be listed in BOTH Jan and Feb QVFs for voting history. I anticipate many registrations will be removed due to death, moving out of state, or request for removal. **However, I want a complete voting history record**. Removed/deleted voting history is not desired. I want a complete voting history list with accurate voting locations of past elections.
2. **Locations**: Every voter should have the exact County, Jurisdiction, and Precinct not modified in their voting history. In the past we received only county and jurisdiction. Also, in the past the location is changed from original voting location to reflect ALL vote history at the current registration location. This past voter history location modification is **NOT** desired. I want the same vote history as maintained in the QVF as provided by the local clerks.
3. **VoterIDs**: Include the typical "Voter_Identification_Number" typical from your group **AND** "voterID" which is provided from the local jurisdictions. See the following screenshot showing two voterIDs per registration.

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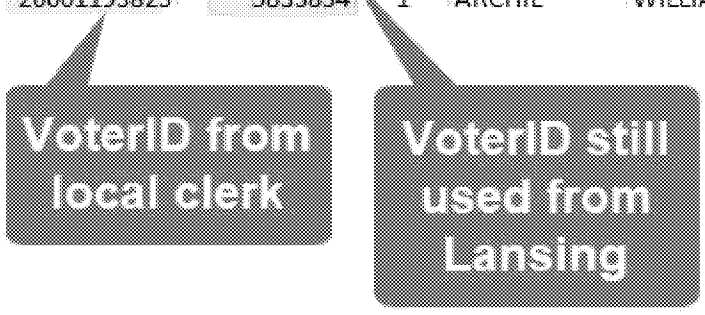
VOTERID	VOTERID_(QVF)	WARD PRECINCT	LASTNAME	FIRSTNAME	MIDDLENAME	SUFFIX	R
26014348925	33201362	1	ABRAHAM	DAVID			
26012583601	108962898	1	ALLEN	ANZYO	VENEIL		
26014510819	34459230	1	ALLEN FILES	KENNETH	MARCUS		
26010842240	34678079	1	ALSTON	MARTHA	LUCILLE		
26002390663	9853141	1	AMADI	NORMA	PAULETT-SMITH		
26014150990	160627525	1	AMERSON	TREVON	LEE		
26015145398	160009124	1	ANDERSON	JOYCE	NINA LAJEAN		
26008941716	4003541815	1	ANDERSON	MICHAEL	JAMES	JR	
26011566364	159662835	1	ANTAL	KARIN	LOUISE		
26008895467	4003225712	1	ANYANWU	NGOZI	CAROL		
26009777728	210013496	1	ANYANWU	PERRY			
26001193823	5833834	1	ARCHIE	WILLIAM	SYLVANUS		



In addition to the data normally provided with a qualified voter file request, please also include in this file all records in the qualified voter file for all voter statuses. The list of voter status should include but not be limited to all registrants with active, challenged, verify, cancelled and rejected status. If additional voter status' exist it should include those as well. Please include in this FOIA the complete voter record file and the complete voter history file. Additionally, please also include the AV file from the August 2022 primary.

Please note the data for this FOIA response should be on a USB drive and mailed to:

Tim Vetter
6505 Arrowhead Court
Davisburg, MI 48350

Take Care,
Tim

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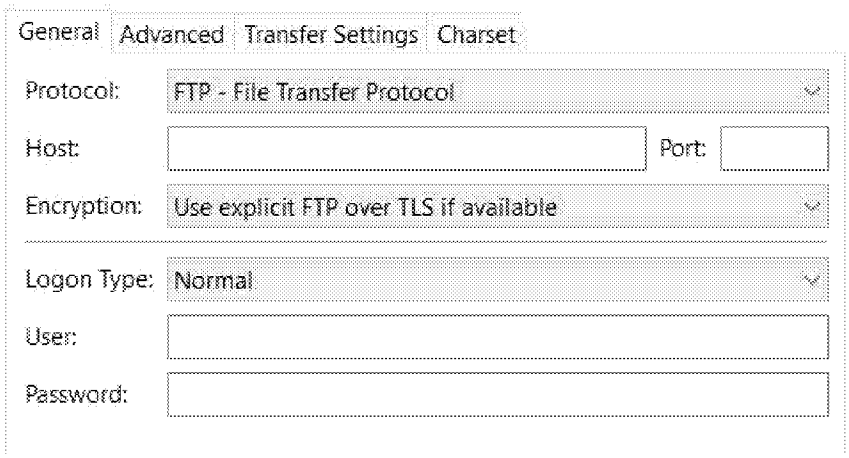
From: McMillan, Sarah (MDOS)
Sent: Friday, May 19, 2023 8:14 AM
To: Tim Vetter
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS); Elizabeth Nielsen <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Tim,

We can upload to a secure FTP if you provide me with the information below. I also realized never sent you the password for the flashdrive: Electi@n2022



As for your questions:

1. The file will contain all voters that we have record of voting in the Nov 2022 election. Local clerks are responsible for uploading voting history. If they haven't uploaded their history we will not have that data.
2. The file will contain voting location
3. This will have to be a separate request. I have attached an invoice for the estimated cost

Sarah McMillan

Operations Security Analyst
Michigan Department of State – Bureau of Elections
Register to vote or get important voter information at Michigan.gov/vote

From: Tim Vetter <timlovesann@me.com>
Sent: Wednesday, May 17, 2023 6:55 PM
To: McMillan, Sarah (MDOS) <McMillanS@michigan.gov>
Cc: Patrice Johnson <patricejohnson11@gmail.com>; Patrick Colbeck <patrick@migrassrootsalliance.org>; Janice Daniels <RadioJanice@protonmail.com>; Talsma, Stuart

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(MDOS) <talsmas@michigan.gov>; Elizabeth Nielsen <nielsen@mklaw.com> <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

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Hi Sarah,
I have not received the thumb drive yet which was, I assume, in the mail on May 9th . Can you upload this FOIA data to a secure FTP site if I do not receive it by tomorrow? Please confirm. Also, I did not received any confirmations to my questions, shown below, sent to your on May 8th.

Take Care,
Tim

From: Tim Vetter
Sent: Monday, May 8, 2023 8:34 AM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS); Elizabeth Nielsen <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Thank you Sarah,
In addition to sending the data tomorrow via flash drive, can you please confirm the following:

- Your data provided will contain the complete list of all 4,500,400 November 2022 voting records with a minimum of the column headers listed on my March 13th email?
- The voting history will contain County, Jurisdiction, and Precinct of the **voting location**. Not the current relocated address if the voter moved.
- If there are any clerks who have "failed to upload voting data" please list these clerks by name and jurisdiction and provide any past email documentation from the SOS attempting to get remaining election data.
- You stated: "We can include the "Voter_Identification_Number" , however we do not have record of "voterID" that is given out by jurisdictions so we will not be able to provide that." Please provide a response to my email dated April 28th. Why this voterID can not be provided.

Thank you Sarah I welcome your feedback to my FOIA questions.

Take Care,
Ti

From: McMillan, Sarah (MDOS)
Sent: Monday, May 8, 2023 8:05 AM
To: Tim Vetter
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS); Elizabeth Nielsen <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

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Hi Tim,

We did receive your payment and we have your file ready for you. For security reasons I can't upload it to your cloud folder. However, I will put it on an encrypted flashdrive and place it in the mail for you tomorrow.

Thank you

Sarah McMillan

Data & Programs Analyst/FOIA Coordinator
Michigan Department of State – Bureau of Elections
Register to vote or get important voter information at Michigan.gov/vote

From: Tim Vetter <timlovesann@me.com>
Sent: Monday, May 8, 2023 4:28 AM
To: McMillan, Sarah (MDOS) <McMillanS@michigan.gov>
Cc: Patrice Johnson <patricejohnson11@gmail.com>; Patrick Colbeck <patrick@migrassrootsalliance.org>; Janice Daniels <RadioJanice@protonmail.com>; Talsma, Stuart (MDOS) <talsmas@michigan.gov>; Elizabeth Nielsen <nielsen@mklaw.com> <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

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Hi Sarah,
Tomorrow will be a week since I mailed my check to your office. Has it been received by your Cashier Unit? If yes, when can I anticipate receiving the FOIA data requested on Feb 2nd 2023, clarified on March 13th, and further clarified on April 28th?

SARAH FOLDER – I created this cloud folder if you don't mind uploading my FOIA dataset of Nov. 2022 voters here.

Take Care,
Tim

From: Tim Vetter
Sent: Wednesday, May 3, 2023 6:23 AM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS); Elizabeth Nielsen <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Hi Sarah,
I put a check in the mail yesterday (Tuesday, May 2nd) for the amount you requested for my FOIA. Thank you!

Take Care,
Tim

From: McMillan, Sarah (MDOS)
Sent: Monday, May 1, 2023 1:12 PM
To: Tim Vetter
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS); Elizabeth Nielsen <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Tim,

Below is a fee letter and attached is an invoice for your request. Please let me know if you have any questions.

May 1, 2023

Tim Vetter
6505 Arrowhead Court
Davisburg, MI 48350

FREEDOM OF INFORMATION ACT NOTICE

The Michigan Department of State (Department) is in receipt of your recent request for documents dated February 2, 2023 submitted pursuant to the Michigan Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231 *et seq.* The Department received your request on February 3, 2023. MCL 15.235(1). The Department has begun to process the request under FOIA and issues this preliminary notice in response to your request, a copy of which is attached and incorporated herein.

Your FOIA request for *List of November 2022 Voters* is denied in part and granted in part as to existing, nonexempt public records that are determined to be responsive to your request. Your request is denied to the extent that it seeks "[r]ecords or information specially described and exempted from disclosure by statute." MCL 15.243(1)(d). Under Michigan Election Law, the following is exempt from disclosure:

(a) The record that a person declined to register to vote.
(b) The office that received a registered voter's application.
(c) A registered voter's driver's license or state personal identification card number.
(d) The month and day of birth of a registered voter.
(e) The telephone number provided by a registered voter.

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(f) The digitized signature of an elector that is captured or reproduced and transmitted to the Qualified Voter File.
(g) The last four digits of a registered voter's social security number contained in a registration record.

MCL 168.509gg(1) – (2). The Department is required to separate exempt from nonexempt material. MCL 15.244(1). Where a responsive record contains both exempt and nonexempt material, the Department will redact such material.

In order to process your request, please pay the total processing fee of $55.10. FOIA authorizes the Department to charge for mailing costs, copying, searching, reviewing, deleting and separating exempt from nonexempt information (MCL 15.234). The failure to charge a fee for the search, examination, review, and the deletion and separation of exempt from nonexempt information would result in unreasonably high costs to the Department in this particular instance because, your request requires Department employee(s) to be diverted from their regularly assigned duties in order to process your request.

Checks or money orders should be made payable to the STATE OF MICHIGAN and mailed to:

Michigan Bureau of Elections
PO Box 20126
Lansing, MI 48901-0726

As set forth under section 4(14) of the FOIA, MCL 15.234(14), the Department must receive the required deposit within 45 days after your receipt of this notice, which is June 15, 2023, otherwise the FOIA request will be considered abandoned and the Department will not be required to fulfill the request.

Regarding the partial denial of your request, under FOIA (MCL 15.240) you may do one of the following:

1. Appeal this decision in writing to the Secretary of State's designated appeals officer at:

   Secretary of State Jocelyn Benson
   Attn: Michael J. Brady
   Legal Services Administration
   Michigan Department of State
   P.O. Box 30204
   Lansing, Michigan 48918

   The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the denial should be reversed. The Department must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for a response may be extended by 10 business days.

2. File an action in the appropriate court within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs and disbursement, and possible damages.

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The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/sos, under the "FOIA" tab at the bottom of the page.

Sincerely,

Sarah McMillan

Data & Programs Analyst/FOIA Coordinator
Michigan Department of State – Bureau of Elections

From: Tim Vetter <timlovesann@me.com>
Sent: Friday, April 28, 2023 11:43 AM
To: McMillan, Sarah (MDOS) <McMillanS@michigan.gov>
Cc: Patrice Johnson <patricejohnson11@gmail.com>; Patrick Colbeck <patrick@migrassrootsalliance.org>; Janice Daniels <RadioJanice@protonmail.com>; Talsma, Stuart (MDOS) <talsmas@michigan.gov>; Elizabeth Nielsen <nielsen@mklaw.com> <nielsen@mklaw.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

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Hi Sarah,
I am not looking for the "entire state voter files from Jan 1, 2023 and Feb 1, 2023" which removed November 2022 general election voters. FYI-I already have these standard monthly QVF datasets that you issue. This is not what I asked for in my original FOIA dated February 2nd and clarification/follow-up to that same FOIA dated March 13th.

- As my original FOIA clearly stated, Yes, "just who voted in the Nov 2022 election". Header columns listed in the March 13th email intended for clarification/follow-up.
- If you **can not** provide the "voterID" that is given out by local jurisdictions, then per my original FOIA request dated Feb, 2nd, please do the following:
    - "If any items can not be provided, please explain in detail why the SOS can not fulfill my FOIA request for this data."
    - **Therefor, I want a clear explanation why the local jurisdictions can not provide the same "Voter_Identification_Number" you give from the SOS. Both of these voterID numbers are in the single QVF system maintained by the SOS.** The local jurisdictions has provided this same "Voter_Identification_Number" in the past using the QVF system managed by the SOS. Why was this statewide change made by the SOS to the QVF system? Can this clear change by the SOS be reversed/corrected so a common voterID number can be used for matching voter registration data?

Take Care,
Tim

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From: McMillan, Sarah (MDOS)
Sent: Wednesday, April 26, 2023 11:08 AM
To: Tim Vetter
Cc: Patrice Johnson; Patrick Colbeck; Janice Daniels; Talsma, Stuart (MDOS)
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Tim,

Sorry for delay. We have a couple things that we need you to clarify.

We can get you the entire state voter files from Jan 1, 2023 and Feb 1, 2023. Did you also want the complete voting history files with these? These files will not include any voters that have been cancelled, moved out of state, etc.

- Are you looking for a file of just who voted in the Nov 2022 election or are you looking for all past voting history for every voter?
- We can include the "Voter_Identification_Number" , however we do not have record of "voterID" that is given out by jurisdictions so we will not be able to provide that

Thank you

Sarah McMillan

Data & Programs Analyst/FOIA Coordinator
Michigan Department of State – Bureau of Elections
Register to vote or get important voter information at Michigan.gov/vote

From: Tim Vetter <timlovesann@me.com>
Sent: Saturday, April 22, 2023 4:02 PM
To: McMillan, Sarah (MDOS) <McMillanS@michigan.gov>
Cc: Patrice Johnson <patricejohnson11@gmail.com>; Patrick Colbeck <patrick@migrassrootsalliance.org>; Janice Daniels <RadioJanice@protonmail.com>
Subject: FW: FOIA request - Tim Vetter - Jan. Feb. 2023

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++Janice Daniels

Hi Sarah,
I am resending this request because I notice I did not CC Janice Daniels. I am still looking forward to your response.

Take Care,

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Tim

From: Tim Vetter
Sent: Monday, April 17, 2023 6:43 PM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson; Patrick Colbeck
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Sarah, I have not received any feedback from my February 2nd FOIA request. Can you please reply with any details why my FOIA request is delayed so long. Asking for a simple and accurate November 2022 vote history from our QVF should be a simple 15 minute export task. The December 2022 QVF was missing 17,974 voters. I would anticipate all 4,500,400 voters by now are all in the QVF with accurate voting history locations.

Please reply ASAP.

Take Care,
Tim

From: Tim Vetter
Sent: Monday, March 13, 2023 7:15 AM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson; Patrick Colbeck;
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Sarah,
I no longer need the standard January or February statewide lists you have provided to me in the past.

Are there any questions about my additional 3 FOIA requests listed below? I have not received any feedback from you since February 9th. Keep in mind my 3 FOIA requests can be fulfilled in one single dataset. Simply put, all I need is an accurate voting history file for our November 8th 2020 election with the following 7 headers and with the 4,500,400 records that are documented by the SOS as the official vote total by the SOS:

1. VoterID_Local – (All statewide local clerks provide this voterID number for each voter when we request a QVF)
2. voter_identification_number
3. County_Name
4. Jurisdiction_Name
5. Precinct
6. Election_Date (All dates should be Nov. 8, 2023)
7. is_absentee_voter

Items 3, 4, & 5 above should have the actual voting location NOT changed to the existing voter's registration location. Also, as documented in Patrick Colbeck's attached letter from Adam Fracassi, if there are any clerks who have "failed to upload voting data" please list these clerks by name and jurisdiction and provide any past email documentation from the SOS attempting to get remaining election data.

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I look forward to feedback ASAP

Take Care,
Tim

From: McMillan, Sarah (MDOS)
Sent: Thursday, February 9, 2023 7:50 AM
To: Tim Vetter
Cc: Patrice Johnson
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Tim,

I am looking into getting a cost and what we are able to provide for the special requests. As for the 2 standard files, I already uploaded the standard monthly files for January and February to your FTP after Joanne Bakale requested them. Would you also like them mailed on a flashdrive?

Thank you

Sarah McMillan

Data & Programs Analyst/FOIA Coordinator
Michigan Department of State – Bureau of Elections
Register to vote or get important voter information at Michigan.gov/vote

---

From: Tim Vetter <timlovesann@me.com>
Sent: Wednesday, February 8, 2023 9:10 AM
To: McMillan, Sarah (MDOS) <McMillanS@michigan.gov>
Cc: Patrice Johnson <patricejohnson11@gmail.com>
Subject: RE: FOIA request - Tim Vetter - Jan. Feb. 2023

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Hi Sarah,
For now please provide the FOIA cost for the standard monthly QVF data typically provided in the past. We plan to pay for both months ASAP and we want this election data ASAP. Thank you.

When time allows, please provide the requested special requested feedback to the below additional 3 FOIA questions ASAP.

Take Care,
Tim

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Tim Vetter
Sent: Thursday, February 2, 2023 6:01 PM
To: McMillan, Sarah (MDOS)
Cc: Patrice Johnson
Subject: FOIA request - Tim Vetter - Jan. Feb. 2023

Hi Sarah,
I would like to request, via FOIA, a complete qualified voter file dated January 1st , 2023 and February 1st, 2023. At a minimum, this is the same typical data provided in the past via FOIA.

If possible to the standard data issued by your office, I am requesting the following items identified below. If any items can not be provided, please explain in detail why the SOS can not fulfil my FOIA request for this data. Thank you!

1. **A complete list of voters**: Registration status should include but not be limited to all registrants with active, challenged, verify, cancelled and rejected status. Therefore, I would anticipate **every voter** in the November, 2022 election (4,500,400 voters) would be listed in BOTH Jan and Feb QVFs for voting history. I anticipate many registrations will be removed due to death, moving out of state, or request for removal. **However, I want a complete voting history record**. Removed/deleted voting history is not desired. I want a complete voting history list with accurate voting locations of past elections.
2. **Locations**: Every voter should have the exact County, Jurisdiction, and Precinct not modified in their voting history. In the past we received only county and jurisdiction. Also, in the past the location is changed from original voting location to reflect ALL vote history at the current registration location. This past voter history location modification is **NOT** desired. I want the same vote history as maintained in the QVF as provided by the local clerks.
3. **VoterIDs**: Include the typical "Voter_Identification_Number" typical from your group **AND** "voterID" which is provided from the local jurisdictions. See the following screenshot showing two voterIDs per registration.

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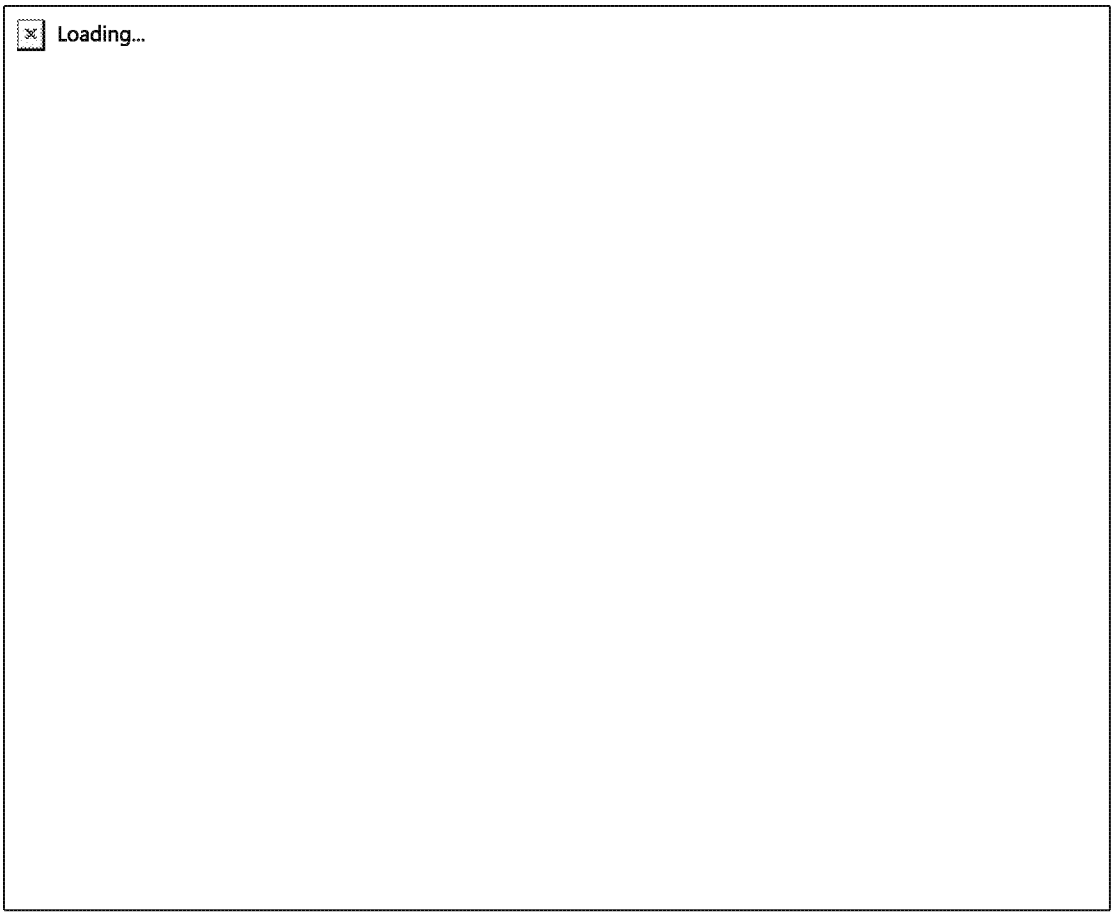

In addition to the data normally provided with a qualified voter file request, please also include in this file all records in the qualified voter file for all voter statuses. The list of voter status should include but not be limited to all registrants with active, challenged, verify, cancelled and rejected status. If additional voter status' exist it should include those as well. Please include in this FOIA the complete voter record file and the complete voter history file. Additionally, please also include the AV file from the August 2022 primary.
Please note the data for this FOIA response should be on a USB drive and mailed to:
Tim Vetter
6505 Arrowhead Court
Davisburg, MI 48350

Take Care,
Tim

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EXHIBIT "B"

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UNITED SOVEREIGN AMERICANS

Michigan's 2022 General Election Validity Scorecard

★ 1. Were the voter rolls accurate, as required by the National Voter Registration Act of 1993?

Ineligible or Uncertain Registration Type	Number of Instances *
Invalid addresses	100,229
Age discrepant (younger than 16, older than 115)	4,714
Back-dated new registrations	2,204
Illegal duplicates	7,481
Voter removed then added back.	6,069
Double votes ADDED and REMOVED	11,511
Votes altered post certification	57,903,469
Registration was processed on a non-business day	152,047
Invalid registration status	13,824
Invalid names	4,235
APPARENT REGISTRATION VIOLATIONS:	**58,205,783**

★ 2. Were the votes counted from eligible voters, as required by the US Constitution?

Ineligible or Uncertain Registration Type that Voted in 2022 GE	Votes cast in 2022 GE*
Illegal addresses	47,805
Age discrepant (younger than 16, older than 115)	2
Back-dated new registrations	444
Illegal duplicates	506
Votes altered post certification.	226,928
Vote history ADDED LATE and/or DELETED within 5 years	92,078
Vote history MOVED to a new voter ID	3,646
Double votes	10
Vote history removed but still active	630
MISSING absentee voters on the Nov 14th, 2022 Absentee Ballot Tracking Report	*** 1,582
Invalid status	2,995
Missing votes	540
Invalid names	1,964
APPARENT VOTING VIOLATIONS:	**379,130**
UNIQUE VOTES IMPACTED BY APPARENT VOTING VIOLATIONS:	**369,107**

★ 3. Was the number of votes counted equal to the number of voters who voted?

Official Source	Reported Total
MISBOE Official Tabulated & Certified Results	**** 4,500,400
Voters who voted according to the raw data - 2022 (12/01/2022)	* 4,482,427
DIFFERENCE: (more votes counted than voters who voted)	**17,973**
MISBOE Official Tabulated & Certified Results	**** 4,500,400
Voters who voted according to Poll Book Totals	4,497,232
DIFFERENCE: (more votes counted than voters who voted)	**3,168**
MISBOE Official Tabulated & Certified Results	**** 4,500,400
Voters who voted according to "Official" list of voters - 2022 (05/23/2023)	** 4,486,342
DIFFERENCE: (more votes counted than voters who voted)	**14,058**

★ 4. Was the number of ballots in error valid according to the Help America Vote Act of 2002?

Apparent voting violations	369,107
Allowable machine error rate is 1/10,000,000 ballot positions or 1/125,000 ballots	36
Unresolved vote errors: Provable accuracy fails to meet any protective legal standard	**369,071**

"Congress seeks. . . .to guard the election of members of Congress against any possible unfairness by compelling, under its pains and penalties, everyone concerned in holding the election to a strict and scrupulous observance of every duty devolved upon him while so engaged. . . . The evil intent consists in disobedience to the law." —In re Coy, 127 U.S. 731 (1888)

** Extracted from an official data source of the Michigan Voter database provided via FOIA request on December 1st, 2022.*
*** Extracted from an official data source of the Michigan Voter database provided via FOIA request on May 23rd, 2023.*
**** Extracted from an official data source of the Michigan Voter database provided via FOIA request on November 14th, 2022.*
***** November 2022 election certification date = 12/22/2022 - https://mielections.us/election/results/2022GEN_CENR.html#*

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EXHIBIT "C"

Obtained by Judicial Watch, Inc. v. Michigan FOIA

UNITED SOVEREIGN AMERICANS

Michigan's 2022 General Election Validity Reconciliation

GROUP	DESCRIPTION	REGISTRATIONS	2022 GENERAL ELECTION VOTES
Eligible	Records appear valid so voters are presumed **eligible** to vote. Results can be certified.	**7,070,211**	**4,131,293**
Uncertain	Records contain illogical and/or invalid information, so it is **uncertain** whether voters are eligible to vote. Investigation is required before results can be certified.	**26,332**	**2,407**
Ineligible	Records appear to violate black letter election laws, so voters are presumed **ineligible** to vote. Investigation is required before results can be certified.	**491,409**	**366,700**
Deadwood*		**0**	**0**
TOTAL		**7,587,952** **	**4,482,427** **
Total Database Records / Total Votes Counted per official published tallies		7,587,952	4,500,400 ***
DIFFERENCE		**0**	**17,973** +

Registration Error Rate 6.8%
Vote Error Rate 8.2%
Margin of Victory in MI Congressional District 7 (192,809/172,624 votes)** 5.5%
Legal Standard of Allowable Error for Federal Elections^ 0.0008%

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UNITED SOVEREIGN AMERICANS

Michigan's 2022 General Election Validity Reconciliation

The measured error rate of the electoral process in Michigan, from registration through certification, makes it impossible to legally certify any election in Michigan. Whether due to ignorance, arrogance or malice, the error rate simply outstrips the margins of victory. Countless unique investigations were required by law before certification could proceed. Election officials may never be able to prove that those granted the privilege of writing laws for the nation legitimately represented the will of eligible citizen voters.

The registration and voting error rates reported here represent minimums. We have ample reason for concern, after two years of careful study, that the actual error rates are higher.

2022 Federal Elections in which the error rate exceeded the margin of victory:

All US Senate, MI Congressional Districts

Every race in MI's 2022 GE was irretrievably impacted by an error rate 10,000 times the legal standard for system accuracy.

** "'Deadwood' allows for fraudulent ballots, which can be used to stuff the ballot box."* Federal Prosecution of Election Offenses, Eighth Edition, 2017, *US Department of Justice Public Integrity Section, Chapter 2 Corruption of the Election Process (B)(5)(a), Richard C. Pilger, ed., p. 28.*

˟ 17,973 votes counted are completely unaccounted for in the system. They are not associated with any voter.

*** Extracted from an official data source of the Michigan Voter database provided via FOIA request on December 1st, 2022.*

**** November 2022 election certification date = 12/22/2022 — https://mielections.us/election/results/2022GEN_CENR_TURNOUT.html*

***** November 2022 election results, US House of Representatives District 7 — https://mielections.us/election/results/2022GEN_CENR.html*

^ "This rate is set ot o sufficiently stringent level such that the likelihood of voting system errors affecting the outcome of an election is exceptionally remote even in the closest of elections." Voting System Standards, Volume I: Performance Standards. April, 2002, Federal Election Commission, United States of America. The accuracy requirement of the voting system is predicated on the voter rolls being accurate as required by the National Voter Registration Act, 1993.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/13/2024 3:53:26 PM
To: Robert Cotter [Robert@statesuniteddemocracy.org]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]
Subject: RE: Two new United Sovereign Americans NVRA cases

Thanks. Our due date for MTD is 10/1.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Robert Cotter <Robert@statesuniteddemocracy.org>
Sent: Friday, September 13, 2024 11:06 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>; Sally Marsh <Sally@statesuniteddemocracy.org>
Subject: Two new United Sovereign Americans NVRA cases

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Hi Heather,

Two additional United Sovereign Americans cases were filed this week in Colorado and Georgia. They raise similar allegations under the NVRA and HAVA as their suit in Michigan and others brought over these past few months.

United Sovereign Americans v. Griswold, No. 1:24-cv-02499-SBP (D. Colo. filed Sept. 10, 2024).

United Sovereign Americans v. Raffensperger, No. 2:24-cv-00104-LGW-BWC (S.D. Ga. filed Sept. 11, 2024).

--
Robert Cotter (he/him) | Counsel
States United Democracy Center
224-235-2606 | @statesunited
robert@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/5/2024 2:54:11 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: FW: Kalamazoo election case
Attachments: General Motion.pdf; Summons and Complaint - Civil - New Filing .pdf

Importance: High

I did not have Sally's email handy

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Nigel Crum <kncrum@kalcounty.com>
Sent: Wednesday, September 4, 2024 11:45 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Kalamazoo election case

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These are from our case.

K. Nigel Crum
Deputy Court Administrator
Ninth Circuit Court, Kalamazoo MI
269 383 8928

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Subject: FW: Kalamazoo election case
Attachments: General Motion.pdf; Summons and Complaint - Civil - New Filing .pdf

Importance: High

I did not have Sally's email handy

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Nigel Crum <kncrum@kalcounty.com>
Sent: Wednesday, September 4, 2024 11:45 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Kalamazoo election case

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These are from our case.

K. Nigel Crum
Deputy Court Administrator
Ninth Circuit Court, Kalamazoo MI
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FILED
SEP - 3 2024
9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, SHERIL KELLY, and SCOTT KELLY,

Plaintiffs,

v

ROBERT FROMAN, in his official capacity as Kalamazoo County Canvasser,

Defendant.
_____/

Case No. 2024-0533-CZ

Hon. Curtis J. Bell

PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
Delaney A. Barker (P87401)
American Civil Liberties Union Fund of Michigan
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Theresa J. Lee*
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Counsel for Plaintiffs

* *Pro hac vice* motions forthcoming

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PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

NOW COME the American Civil Liberties Union of Michigan (the "ACLU"), Sheril Kelly, and Scott Kelly (collectively, "Plaintiffs"), by and through their undersigned attorneys, and for their Motion for Expedited Discovery state as follows:

1. On September 3, 2024, Plaintiffs filed their Complaint, seeking a declaratory judgment that county canvassers must certify the results of the forthcoming election on November 5, 2024, based solely upon the returns under the Michigan Constitution and Michigan election law. See MCL 168.822(3); Const 1963, art 2, § 7(3).
2. The requested relief is necessary to guide the conduct of Defendant Robert Froman ("Defendant"), a member of the Kalamazoo Board of County Canvassers, which is responsible for certifying the results of the November election in the 14 days following election day. Defendant has been publicly reported to have made statements indicating that he will refuse to comply with his legal and constitutional obligations as a county canvasser. If relief is not granted prior to the November election, Defendant's actions may cause irreparable harm to the voters of Kalamazoo County and to Michigan's elections and democracy more generally.
3. In order to assure that this court is able to grant declaratory relief in time for it to be practicable in guiding Defendant's actions, Plaintiffs seek to file a motion for summary disposition by October 1, 2024.
4. Concurrently, Plaintiffs seek limited, expedited discovery in order to ensure that there is no basis for delaying resolution of Plaintiffs' request for a declaratory judgment beyond the election on November 5, 2024.
5. Plaintiffs request that Defendant make himself available for a deposition on September

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17, 2024 and produce a narrow category of documents no later than the date of said deposition.

6. Under the Michigan Court Rules, circuit courts have the authority to set a discovery schedule by issuing a scheduling order pursuant to MCR 2.401(B)(2)(a). MCR 2.301; see *Lopez-Negrete v Lopez-Negrete*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2009 (Docket No. 286247), 2009 WL 1506668, at *5 ("[T]he trial court has the authority to 'allow a longer or shorter time' for a party to serve a written response to a request for production of documents."), quoting MCR 2.310(C)(2); *Lundin v City of Benton Harbor*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2007 (Docket No. 264915) (SMOLENSKI, J., concurring in part and dissenting in part), p 3 n 1, 2007 WL 752154, at *4 ("[T]he trial court has the discretion to shorten or extend the period within which a request to admit must be answered.").
7. As discussed below, expedited discovery is necessary for Plaintiffs' urgent need for judicial relief and will not unduly burden Defendant.

WHEREFORE, Plaintiffs respectfully request that this court grant this motion for expedited discovery and order Defendant to make himself available for a deposition by September 17, 2024, for the reasons stated above and for the reasons set forth in the accompanying brief in support.

Respectfully submitted,

/s/

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
Delaney A. Barker (P87401)
American Civil Liberties Union Fund of Michigan
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Counsel for Plaintiffs

* *Pro hac vice* motions forthcoming

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, SHERIL KELLY, and SCOTT KELLY,

Plaintiffs,

v

ROBERT FROMAN, in his official capacity as Kalamazoo County Canvasser,

Defendants.

_____/

Case No.

Hon.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
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Counsel for Plaintiffs

* *Pro hac vice* motions forthcoming

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs American Civil Liberties Union of Michigan (the "ACLU"), and Sheril Kelly and Scott Kelly, voters in Kalamazoo, Michigan, (collectively, "Plaintiffs") have brought this action against Defendant Robert Froman, in his official capacity as a member of the Kalamazoo Board of County Canvassers, seeking a declaratory judgment that Defendant must perform his "ministerial, clerical, and nondiscretionary duty . . . , [as a] member[] of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns." MCL 168.822(3); Const 1963, art 2, § 7(3). In particular, a member of a Board of County Canvassers cannot refuse to certify the results of an election because the canvasser believes that election fraud has occurred.

Despite the unequivocal legal duty the statute imposes on him, Defendant is reported by *The Detroit News* to have asserted his willingness not to certify the results of the election, if he suspects that the results were affected by fraud, as he believes occurred during the 2020 presidential election. This was reported in an August 5, 2024 article in which it was also reported that Defendant has asserted that that the reason he is a member of the board of canvassers for Kalamazoo County is to block certification of the election results if the 2024 election unfolds in a similar matter to the 2020 election.

Defendant's reported willingness to violate his constitutional and statutory duty to certify presents a grave risk to the fundamental voting rights of the voters of Kalamazoo County, creates uncertainty as to the board's ability to perform its role at a crucial juncture of a presidential election, undermines the public's faith in Michigan's democracy and elections, and therefore merits swift judicial intervention.

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In an email to undersigned counsel, Defendant Froman has denied that he made the statements attributed to him in the *Detroit News* but refused to retract the statements. Most tellingly, at no point did he deny that he in fact would refuse to certify an election in which he believes fraud has occurred. The ACLU communicated Mr. Froman's denial of his comments to *The Detroit News*. *The Detroit News* responded with a letter to the ACLU, dated August 29, 2024, indicating that they stand by their story. See Ex. A.

Plaintiffs therefore seek an expedited deposition so that Defendant Froman can state his position under oath. The public needs a clear statement of where this official charged with certifying more than a hundred thousand votes stands and what he intends to do regarding the certification of the election in Kalamazoo County. Plaintiffs also seek a very limited set of directly relevant documents for use in that deposition.

It goes without saying that time is of the essence: the election is two months away. Plaintiffs have therefore filed the instant motion for expedited discovery, requesting that the Court use its broad authority over discovery to set an accelerated discovery schedule. Expedited discovery will permit Plaintiffs to gather information—through a deposition at which Defendant also produces a very limited set of documents—about Defendant's reported willingness to defy state law requiring him to vote to certify Kalamazoo County's returns in the days following the election.

The discovery requested is sought in furtherance of Plaintiffs' anticipated motion for summary disposition, which they expect to file by October 1 (or as ordered by this court), with sufficient time for the Court to render its decision in advance of the election. As discussed below, because the urgency of Plaintiffs' need vastly outweighs the minimal burden expedited

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discovery would place on Defendant, Plaintiffs' motion for expedited discovery should be granted.

I. STATEMENT OF FACTS

On August 5, 2024, Defendant, a member of the Kalamazoo County Board of Canvassers, was reported by *The Detroit News* to have stated that he believed that the 2020 election had been "most definitely" stolen from former President Trump. According to the article, when asked if he would certify the 2024 presidential election results if they unfolded the same way, he responded, "No. And that's why I'm there [i.e., serving on the Kalamazoo County Board]." See Ex. B. Later in the article, Defendant Froman is reported to have added, "I am not going to do anything that's illegal." *Id.* But this statement must be read in context of his immediately prior reported statements that the reason he now serves on the Kalamazoo County Board is to not certify if the election unfolds in the same way as the 2020 election. Defendant is also quoted as saying: "Many people within the framework or ideology of the Republican Party have realized that they have been sitting in their living rooms way too long, and the country that they know and love is being stolen out from under them . . . And they're not willing to sit in their living rooms any longer." *Id.*

Ten days later, on August 15, 2024, the ACLU wrote a letter to Defendant (the "ACLU Letter") in which the ACLU reminded Defendant of his certification responsibilities under the Michigan Constitution and Michigan election law, and pointed out that a refusal to certify would be an illegal act. See Ex. C. The ACLU Letter asked Defendant to clarify his position regarding the role of county canvassers, including (i) if he was misquoted, to notify *The Detroit News* that he was misquoted in the article and request a retraction of his statements, or (ii) if he was not

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misquoted, to rescind his statements and issue a public statement concerning the role of county canvassers in the election certification process.

Defendant responded to the ACLU Letter via email the next day. He stated, in full:

> I did not make any of the statements you say I did. I have not seen or approved any article by the Detroit News. I will make no public statement about what the Detroit News published. I believe the first amendment to the Constitution allows the press to publish any information they deem necessary." [*See* Ex D.]

Notably, Defendant did *not* state that he was, in fact, willing to do his legal and constitutional duty and certify an election result that he did not like or agree with. Nor did he even acknowledge the existence of that duty.

The ACLU communicated the entirety of Mr. Froman's denial to *The Detroit News* on August 19, 2024. On August 29, 2024, the Managing Editor of *The Detroit News* sent a letter to the ACLU, which read: "Regarding the article 'Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble' published on Aug. 5, 2024, we stand by our story." See Ex. A. Since Defendant's email, and as of the date of the instant motion, Defendant has not issued a public statement recognizing all county canvassers' duty, including his own duty, to certify the results of the election.

II. PROCEDURAL HISTORY

To ensure that Defendant will perform his constitutional and statutory obligations, Plaintiffs filed the instant action on September 3, 2024. Plaintiffs anticipate filing a motion for summary disposition by October 1 (or on a similar date as ordered by the Court) asking this court to enter a declaratory judgment that Defendant is legally required to comply with his constitutional and statutory duties under the Michigan Constitution and Michigan election law. See MCL 168.822(3); Const 1963, art 2, § 7(3). In order to ensure that there is no basis for

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delaying resolution of Plaintiffs' request for a declaratory judgment beyond the election on November 5, 2024, Plaintiffs seek limited discovery on an accelerated schedule.

To obtain the expedited discovery they seek, Plaintiffs are filing the instant motion and brief on September 3, 2024, along with their complaint.[1] Plaintiffs respectfully request that the Court order Defendant make himself available for deposition, as set forth in Plaintiffs' notice of deposition and subpoena, no later than September 17, 2024, and that he produce at or before the deposition the narrow range of documents specified therein. See Ex. E (Notice of Deposition); Ex F (Subpoena). The Notice of Deposition and Subpoena are being immediately served upon Defendant with the Summons, a copy of Plaintiffs' Complaint, Plaintiffs' initial disclosures, and a copy of the instant motion and brief.[2] The limited documents Plaintiffs seek are (1) communications by Defendant since he became a member of the board of canvassers regarding his willingness to certify the 2024 presidential election and (2) his communications regarding the August 5, 2024 *The Detroit News* article. *Id.*

III. ARGUMENT

A. This Court Has Explicit Statutory Authority to Expedite Discovery.

Michigan has "a broad discovery policy that permits the discovery of any matter" that is relevant and not privileged. *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336; 796 NW2d 490 (2010); see MCR 2.302(B)(1). The parties may begin discovery immediately after commencement of an action. MCR 2.301(A)(1); MCR 2.302(A)(1).

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[1] MCR 2.310(C)(1) (discovery requests "may, without leave of court, be served . . . on the defendant with or after the summons and complaint on that defendant.").

[2] A deposition date of September 17, 2024, is reasonable as it provides Defendant 14 days' notice—the length of time required by the Michigan Court Rules for discovery from a *non*-party. See MCR 2.305(A)(3) ("A [discovery] subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act."); MCR 2.305(A)(6) ("The subpoena shall be served at least 14 days prior to the scheduled deposition.").

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Under the Michigan Court Rules, circuit courts may generally set a discovery schedule by issuing a scheduling order pursuant to MCR 2.401(B)(2)(a). MCR 2.301; see *Lopez-Negrete v Lopez-Negrete*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2009 (Docket No. 286247), p 6, 2009 WL 1506668, at *5 (Ex. G) ("[T]he trial court has the authority to 'allow a longer or shorter time' for a party to serve a written response to a request for production of documents."), quoting MCR 2.310(C)(2); *Lundin v City of Benton Harbor*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2007 (Docket No. 264915) (SMOLENSKI, J., concurring in part and dissenting in part), 2007 WL 752154, at *4 n 1 (Ex. H) ("[T]he trial court has the discretion to shorten or extend the period within which a request to admit must be answered."). More specifically, the Michigan Court Rules envision that a court may order a party to sit for a deposition prior to the 21-day period generally provided for a defendant to file their answer.[3] MCR 2.306(A)(1). Moreover, expedited discovery is consistent with the Michigan Supreme Court's decisions that "ha[ve]repeatedly emphasized" that Michigan's "discovery rules are to be liberally construed[.]" *Daniels v Allen Industries, Inc*, 391 Mich 398, 403; 216 NW2d 762 (1974); accord MCR 1.105 ("[The court] rules are to be construed to secure the just, speedy, and economical determination of every action . . . .").

[3] Indeed, each of the rules that govern a specific means of discovery in addition to MCR 2.306(A)(1) explicitly grants the trial court the authority to shorten the time available to comply with a discovery request. See MCR 2.309(B)(4) (defendant's response to interrogatories due 42 days after service of summons and complaint unless time shortened by court); MCR 2.310(C)(2) (document requests due 42 days after service of summons and complaint unless time shortened by court); MCR 2.312(B)(1) (requests for admission due 28 days after service of request unless time shortened by court).

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B. Michigan Courts Routinely Grant Expedited Discovery Upon a Showing of "Good Cause."

Because "Michigan's rules of discovery largely track the federal discovery rules . . . , courts of this state routinely seek guidance from federal cases construing a similar federal rule." *Alberto*, 289 Mich App at 337-338, citing *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997). Federal courts in Michigan have also routinely granted motions to expedite discovery upon a showing of good cause. See *Dassault Systemes, SA v Childress*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued October 27, 2019 (Case No. 09-10534), 2009 WL 3602084, at *4 (Ex. I) (granting plaintiff's request for expedited discovery) aff'd 663 F3d 832 (CA 6, 2011); *Arista Records, LLC v Does 1-4*, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued November 20, 2007 (Case No. 1:07-cv-1115), 2007 WL 4178641, at *3 (Ex. J) (same). The moving party may establish good cause by demonstrating that its "need for expedited discovery . . . outweighs the prejudice to the responding party." *Lemkin v Bell's Precision Grinding*, unpublished opinion and order of the United States District Court for the Southern District of Ohio, issued June 2, 2009 (Case No. 2:08-cv-789), 2009 WL 1542731, at *2 (Ex. K) (granting expedited discovery motion, citing cases) (citation omitted). In making this determination, the court takes into account the procedural posture of the case as well as the scope of the requested discovery. *Id.*

Here, as discussed below, there is good cause for this court to order expedited discovery because Plaintiffs' need for judicial relief is urgent and greatly outweighs the minimal burden expedited discovery would place on Defendant.

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C. Good Cause Supports Plaintiffs' Request for Limited Expedited Discovery.

1. Expedited Discovery Is Necessary Because Plaintiffs Urgently Need Judicial Relief Before the 2024 Presidential Election.

Plaintiffs' need for judicial intervention is urgent: the November 2024 election is a mere two months away, and there is significant doubt that Defendant will perform his statutory, "ministerial, clerical, and nondiscretionary" duty in compliance with MCL 168.822(3) and the Michigan Constitution. For Plaintiffs—individual voters of Kalamazoo County and a civil-liberties organization with nearly 1,000 members who are voters in Kalamazoo County—the risk to their votes is palpable. With that risk comes uncertainty and the potential for broad disruption and the spread of unfounded conspiracy theories should the presidential election hinge on Michigan, as it well may, and should boards of county canvassers in places such as Kalamazoo County refuse to perform their legal duties in pursuit of what amounts to a political stunt designed to sow distrust in the election.

Defendant's apparent refusal to commit to certifying the election—indeed, his reported determination to *not* certify it if his preferred candidate does not prevail—at this late stage has forced Plaintiffs to bring suit. Every day that passes without a declaratory judgment that Defendant must follow the law regardless of which presidential candidate wins, according to the election returns, compounds the dangers of election denialism.

2. Expedited Discovery Is Important to Ensure There Is No Basis for Delaying Resolution of Plaintiffs' Request for a Declaratory Judgment Beyond November 5, 2024.

Plaintiffs' lawsuit and their request for expedited discovery seek to ensure that Defendant complies with his constitutional and legal obligation to certify the election and to deter the injury to the electoral process that his election denialism will inflict on the voters of Michigan if he acts in the manner he reportedly said that he would. But, in order to present their case for summary

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disposition, Plaintiffs must first conduct discovery so as to determine the full extent of Defendant's intention and willingness not to comply with his legal duties as a county canvasser. And such a deposition also presents the opportunity to put to rest Defendant's non-credible denial of the statements attributed to him in *The Detroit News*. An expedited deposition will bring clarity and likely allow Plaintiffs to develop a record sufficient to move for summary disposition by October 1 (or a similar date as ordered by this Court). The requested discovery ought to "'provide accurate information in advance of trial as to the actual facts and circumstances of a controversy . . . . [It] should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment.'" *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991) (citation omitted).

In actions requiring immediate relief, courts routinely grant expedited discovery to allow plaintiffs the opportunity to collect the information necessary to brief their arguments. See, e.g., *JPMorgan Chase Bank, NA v Clark*, unpublished order of the United States District Court for the Eastern District of Michigan, issued September 29, 2009 (Case No. 09-13815), 2009 WL 3190342, at *4 (Ex. L) (granting plaintiffs' expedited discovery request in preparation for preliminary injunction hearing); see also, e.g., *Russell v Lumpkin*, unpublished opinion and order of the United States District Court for the Southern District of Ohio, issued May 11, 2010 (Case No. 2:10-cv-00314), 2010 WL 1882139, at **1-2 (Ex. M) (similar).

Michigan courts have routinely granted expedited discovery for even broader and more accelerated discovery requests. See, e.g., *Detroit Free Press v City of Detroit*, unpublished opinion of the Wayne County Circuit Court, issued January 25, 2008 (Docket No. 08-100214 CZ), 2008 WL 701227 (Ex. N) (ordering expedited discovery within seven days including a

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deposition of attorney and related document requests that included confidential material); *Russell*, 2010 WL 1882139, at **1-2 (ordering deposition within 14 days).

Here, Plaintiffs' discovery requests are narrowly tailored to the central issue necessitating the instant action: namely, Defendant's willingness or lack thereof to certify the results of the 2024 presidential election in accord with his statutory and constitutional obligations. The election is fast approaching. In order for Plaintiffs to present their case and give the Court time to issue its ruling, Plaintiffs seek to depose Defendant by September 17, 2024.

In the instant case, the default pace of the discovery would not make Defendant available for a deposition until approximately September 24, 2024 at the earliest. See MCR 2.306(A)(1) (party may be deposed after defendant has filed answer); MCR 2.108(A)(1) (answer is due 21 days after service of process). Nor would Defendant be obligated to produce any documents until October 15, 2024. MCR 2.310(C)(2) (defendant may respond to document request 42 days after service of process). In turn, a motion for summary disposition must typically be filed at least 21 days prior to the motion being heard. MCR 2.116(G)(1)(a). Thus, even if Defendant responded to Plaintiffs' discovery requests promptly by October 15, and even if Plaintiffs filed a motion for summary disposition *the same day*, this court would not be able to hear the motion prior to the November election under the default rules. Therefore, discovery must be conducted on an expedited basis.

D. Plaintiffs' Request for Expedited Discovery Does Not Prejudice Defendant.

The scope of Plaintiffs' request for expedited discovery is narrow. Plaintiffs seek (1) to depose Defendant on the topic of election certification and (2) Defendant's personal communications discussing certification and regarding *The Detroit News* article. Complying with such discovery requests, tailored to Defendants' own views, statements, and

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communications about a single topic, poses little burden on Defendant. Defendant could easily comply with these discovery requests within the proposed expedited discovery period. Furthermore, Defendant has been on reasonable notice since receiving the ACLU's letter on August 15 that if he refused to retract or rescind his reported comments, he could be subject to legal action regarding the precise and narrow—but critically important—issues at stake here. Thus, he cannot claim undue surprise or burden in responding to Plaintiffs' narrow discovery requests within two weeks.

* * *

Defendant's minimal burden in responding to these discovery requests is vastly outweighed by Plaintiffs' urgent need for judicial relief and for the information necessary to brief anticipated motions before the election. Accordingly, there is good cause for the Court to order that discovery take place on an expedited basis.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for expedited discovery.

Dated: September 3, 2024

Respectfully submitted,

/s/

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EXHIBIT A

The Detroit News Letter (August 29, 2024)

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The Detroit News

DetroitNews.com

160 W. FORT STREET / DETROIT, MICHIGAN 48226

http://www.detroitnews.com

Aug. 29, 2024

Merissa Kovach, Political Director
American Civil Liberties Union of Michigan
2966 Woodward Ave. Detroit MI 48201

Regarding the article "Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble" published on Aug. 5, 2024, we stand by our story.

Sincerely,

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MediaNews Group

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EXHIBIT B

Mauger, *Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble*, Detroit News (August 5, 2024)

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The Detroit News
SERVING MICHIGAN SINCE 1873

POLITICS

Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble

Craig Mauger
The Detroit News

Published 11:00 a.m. ET Aug. 5, 2024 | Updated 11:00 a.m. ET Aug. 5, 2024

Lansing — Widespread change has struck the group of officials whose job is to certify Michigan's elections, igniting concerns about whether the new class is willing to sign off on the results the same way county canvassers in the battleground state did four years ago.

A first-of-its-kind, weeks-long analysis by The Detroit News found 55% of the 332 county canvassers in Michigan were not serving in November 2020 when boards in all 83 counties approved the outcome despite Republican then-President Donald Trump's unsuccessful attempt to overturn his loss to Democrat Joe Biden.

The turnover has been driven by Republicans. While 48% of the Democratic canvassers are new since 2020, 63% — nearly two out of every three — are new on the GOP side, according to The News' analysis.

The numbers point to a Michigan Republican Party that's been focused on false claims of widespread fraud aimed at the 2020 election and GOP canvassers who might interfere with the election process this fall, according to Democrats. But Republicans, such as Kalamazoo County canvasser Robert Froman, said the analysis demonstrates an increased and renewed interest in how elections are administered.

"Many people within the framework or the ideology of the Republican Party have realized that they have been sitting in their living rooms way too long, and the country that they know and love is being stolen out from under them," Froman said. "And they're not willing to sit in their living rooms any longer."

Froman, a 72-year-old retired postal service employee from Oshtemo Township, is one of the 105 new Republican county canvassers who are serving in 2024 but weren't in their positions in 2020.

Each county in Michigan has a four-person canvassing board, featuring two Republicans and two Democrats, in charge of approving election tallies before they're forwarded to the state for final authorization. The panels rarely get attention and, former Michigan elections director Chris Thomas said, their members often held the posts for many years at a time, making vast changes like what's occurred recently unusual.

Concerns about the 2020 election spurred Froman to get more actively involved in politics, he said. Froman started attending Kalamazoo County Republican Party meetings and volunteering with an entity named Check My Vote, which has been trying to examine and verify addresses used by Michigan residents in the state's official list of registered voters.

Froman, whom Republicans nominated to serve on the Kalamazoo County canvassing board and whose term began last year, said he's personally checked tens of thousands of voters' addresses. He said he "most definitely" believes the 2020 election was stolen from Trump.

Asked if he would certify the 2024 presidential election if it unfolded the same way the 2020 one did, Froman replied, "No. And that's why I'm there."

Froman is one of four so-called "county leaders" or "trainers" who have been working with Check My Vote to investigate the state's registered voter list and who have recently gotten county canvassing positions. The others are Bonnie Kellogg in Muskegon County, Maureen Hillary in Clinton County and Ron Palmgren in Genesee County, according to a list of "county leaders" in a July 2023 announcement from the Michigan Republican Party.

The belief system that there was widespread fraud in 2020 and a series of attempts to reject results in Michigan over the last four years have some election officials in Michigan expecting that Republicans on some local canvassing boards might try to block the certification process in November if Trump loses to likely Democratic nominee Kamala Harris.

County canvassing boards must have a bipartisan 3-1 or 4-0 vote to certify election results and advance them to the Board of State Canvassers, another panel comprised of two Republicans and two Democrats.

"At this point, shockingly, it wouldn't surprise me to see several counties deadlock," said Thomas, who served as Michigan's elections director for more than three decades.

'I do worry'

Each of Michigan's 83 county canvassing boards has the responsibility of reviewing the local vote totals and reporting the results to the Board of State Canvassers, according to a manual published by the Michigan Bureau of Elections.

The county boards, featuring two Republican slots and two Democratic slots, have 14 days following Election Day to certify the results for each of their precincts.

The canvassers serve staggered four-year terms, are nominated by their local political party and are picked, from among the party nominees, by the local board of commissioners. However, there is no official state list that tracks who sits on the key elections boards across Michigan.

The News compiled the names of Michigan's county canvassers — those serving now and those serving in 2020 — through questionnaires sent to county clerks in June and July and examining board member lists that were posted on some county websites.

Boards with vacancies are considered by The News to have new members because the positions are expected to be filled before the November election.

Of Michigan's 83 counties, 11 have completely new canvassing boards with four new members from 2020: Alger, Arenac, Clare, Dickinson, Iosco, Mackinac, Manistee, Montmorency, Muskegon, Roscommon and Wayne — the state's most populous county and the site of a brief November 2020 certification deadlock.

In Iosco County, which is located in northeastern Michigan and has a population of about 25,000, Clerk Nancy Huebel said one past board member died, two resigned for personal reasons, and one, Democrat Patti Casey, wasn't reappointed.

In neighboring Arenac County, Janice Grier, 69, of Standish said Democrats were having trouble finding people to serve on the canvassing board a couple of years ago, so she stepped up. In 2020, 67% of the votes in the county went to Trump.

Grier said she hasn't seen anything that would make her concerned about the county board not certifying the upcoming presidential election, but she's not so certain about elsewhere in Michigan.

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"I do worry about other parts of the state," Grier said.

Protect the vote?

Over the last four years, there have been three examples of canvassers in Michigan at least initially refusing to certify an election.

Most recently, in the spring, two Republicans on the Delta County canvassing board in the Upper Peninsula voted against certifying a May 7 recall election in which three incumbent Republican county commissioners lost their seats. However, days later, they changed course and approved the results.

"I am doing my best to protect the votes of all citizens of Delta County and to ensure free and fair elections by bringing transparency and reassurance to all Delta County citizens," one of the Republican canvassers, Bonnie Hakkola, said at the time.

Hakkola resigned from the board afterward.

The other Republican who initially voted against certification, LeeAnne Oman, was serving as an alternate for an absent GOP canvasser, Sema Deeds.

Jonathan Brater, Michigan's elections director, sent a letter to the Delta County canvassers on May 16, telling them that under the Michigan Constitution and state law, they had "a clear and nondiscretionary duty to certify election results based solely on election returns."

"The Constitution and Michigan election law do not authorize boards of county canvassers to refuse to certify election results based on claims made by third parties of alleged election irregularities or a general desire to conduct election investigations," Brater wrote in the letter.

In a statement in May, Attorney General Dana Nessel said "defying the will of the people based on conjecture, dissatisfaction in the results or any other reason not based on Michigan law" will not be tolerated.

"While the Delta County Board ultimately met their obligations, and as a result have avoided the legal consequences, let this serve as a warning to all of the boards of canvassers across the state that the willful neglect of your duties is a criminal act," added Nessel, a Democrat.

Canvassers' role

Asked about the statements from Nessel and Brater about the Delta County canvassers, new Republican Kalamazoo County canvasser Froman said he has a duty to ensure there is a free and fair election.

"I am not going to do anything that's illegal," Froman told The News.

Other new canvassers interviewed by The News in recent weeks made similar remarks.

Ron Palmgren, a Republican canvasser in Genesee County, has also served as a county leader for Check My Vote. Asked if the 2020 presidential election was stolen from Trump, Palmgren said he has "no idea whether it was stolen or not."

Biden won Michigan's election by 154,000 votes or 3 percentage points, 51%-48%. The outcome has been upheld by audits, a series of court rulings and an investigation by a Republican-controlled state Senate committee.

Palmgren, a 76-year-old retiree from Burton, said he views his role as a canvasser as being an "impartial arbiter."

"Based on my experience so far, there is no investigatory process," Palmgren said of his responsibilities. "It is strictly looking at the election results provided by all of the municipalities and making sure that all of the processes that were in place were followed."

Likewise, Jim Kargol, a 69-year-old from Petoskey who serves on the Emmet County Board of Canvassers, said he doesn't believe there's been fraud in local elections, but he questions what has happened in other places, such as Detroit.

Kargol mentioned a van dropping off loads of ballots in the night during the 2020 presidential election in Detroit, a Democratic stronghold. He appeared to be referencing about 16,000 ballots that had been delivered to the center where absentee ballots were being tallied in Detroit in the early morning hours of Nov. 4. The ballots had been verified by city Clerk Janice Winfrey's staff prior to delivery in a process prescribed by Michigan law, said Thomas, Michigan's former elections director who helped oversee voting in Detroit.

"I really think there was some foolishness that went on," said Kargol, a Republican.

Canvassing troubles

After the 2020 presidential election on Nov. 17, 2020, Wayne County's Republican then-canvassers Monica Palmer and William Hartmann questioned precincts in Detroit where the number of ballots cast and the number of votes tracked didn't match and initially voted against certifying the county's results.

But later in the meeting, they changed course and supported certifying the election based on the condition that an audit take place of some precincts within Wayne County.

Minutes after the meeting, Trump and Republican National Committee Chairwoman Ronna McDaniel called Palmer and Hartmann, and Trump personally pressured them not to sign the certification document, according to recordings previously reported on by The Detroit News.

"We've got to fight for our country," Trump said during the phone call, according to the recordings. "We can't let these people take our country away from us."

More: Trump recorded pressuring Wayne County canvassers not to certify 2020 vote

The Michigan Bureau of Elections determined the vote that occurred and the signatures of the chair or vice chair of the four-member canvassing board and the county clerk were the only things necessary to advance the certification to the Board of State Canvassers.

Hartmann died in 2021, and Republican Party officials didn't renominate Palmer to serve on the canvassing board when her term concluded in 2021. The new Republican canvassers are Katherine Riley and Robert Boyd.

Riley, who's now chair of the Wayne County Board of Canvassers, according to the county's website, didn't respond Monday to a request for comment.

There are also two new Democrats on the board, Richard W. Preuss and Frank Woods Jr.

Jonathan Kinloch, a Democrat who was serving on the Wayne County canvassing board in 2020 and is now a Wayne County commissioner, said the question of whether boards will certify the results this fall is at the forefront of his mind.

Wayne County Republicans initially denied that they were going to attempt to block certification in 2020, Kinloch said. Where there's smoke, people should be concerned, he said.

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"I think this is a tactic of theirs to create chaos," Kinloch said.

Legal backstops

If a county canvassing board refuses to certify an upcoming election, Michigan has legal "backstops" in place to deal with the development, Thomas said. But such an attempt could also further undermine people's faith in electoral outcomes, he acknowledged.

Under state processes, if a county board fails to determine a result, the job moves to the Board of State Canvassers, according to the Michigan Bureau of Elections.

The county board is supposed to immediately deliver all records and other information, including all necessary forms, to the Board of State Canvassers. A court could get involved to make sure that step happens.

When the 2020 presidential election reached the state board, one of the two Republicans on the statewide panel abstained: Norm Shinkle of Ingham County. But the other Republican, Aaron Van Langevelde, cast the deciding vote with the two Democrats in favor of certification.

At the time, Shinkle called for the Republican-led Legislature to conduct an in-depth review of election procedures, and he promoted theories about problems in Wayne County.

"I do not plan on voting for certification. I believe Wayne County's certification needs to be looked at," Shinkle said before abstaining.

Van Langevelde and Shinkle are both no longer on the board. They've been replaced by Tony Daunt and Richard Houskamp.

Daunt and Houskamp voted to certify the 2022 gubernatorial election, which Republican Tudor Dixon lost to Democratic Gov. Gretchen Whitmer by about 10 percentage points. Daunt also has openly criticized Trump for spreading "lies" that the 2020 election was rigged.

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Staff Writer Beth LeBlanc contributed.

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EXHIBIT C

ACLU Letter (August 15, 2024)

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August 15, 2024

Sent via email and certified mail

Robert Froman
Member, Kalamazoo Board of County Canvassers
201 West Kalamazoo Ave.
Kalamazoo, MI 49007
Rlfpersonal2017@gmail.com

Dear Mr. Froman:

We write to express our grave concerns about recent statements you made to the media regarding your duties and intentions as a duly appointed member of the Kalamazoo Board of County Canvassers. According to an article published in the Detroit News on August 5, 2024, you reportedly told the Detroit News that you "most definitely" believe that the 2020 election was stolen from former President Donald Trump. Further, when asked if you would certify the 2024 presidential election if it unfolded the same way the 2020 election did, you responded, "No. And that's why I'm there."[1]

Your legal obligation, and the obligation of every member of a board of canvassers under the Michigan Constitution and under binding Michigan law is to certify any election based solely upon the returns. The law does not authorize members of boards of canvassers to withhold certification based upon speculation, theories, or even evidence pertaining to the accuracy of the reported returns. The Michigan Constitution provides:

> It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on … in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. Const. 1963, Art II, § 7(3).

Michigan Election Law parallels this requirement. MCL 168.822(3) provides:

> It is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns. MCL 168.822(3).

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[1] Mauger, *Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble*, The Detroit News (August 5, 2024) <https://www.detroitnews.com/story/news/politics/2024/08/05/michigan-election-county-canvassers-boards-vote-certification-donald-trump-kamala-harris/74610733007/> (accessed August 14, 2024).

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Thus, members of county canvassing boards have a clear, non-discretionary duty to certify election results based solely on election returns. As you are likely aware, on May 16, 2024, Jonathan Brater, Director of the Bureau of Elections, wrote a letter to the Delta County Board of Canvassers following their initial refusal to certify a May recall election in that county (the "Brater Letter).[2] In this letter, Brater emphasizes that members of county canvassing boards are not permitted to refuse to certify election results based on claims by third parties of alleged election irregularities, or a desire to conduct election fraud investigations. Brater Letter 1. Canvassers are legally required to certify the election results that are brought before them once the legal requirements have been met.

Even before the people of Michigan enacted the constitutional language quoted above in the 2022 election, the Michigan Supreme Court consistently held that members of county and state canvassing boards have a clear, nondiscretionary legal duty to certify the election based solely on election returns. See *Johnson v Secretary of State*, 506 Mich 975; 951 NW2d 310, 311-312 (2020) (CLEMENT, J., concurring). Indeed, as early as 1892, the Michigan Supreme Court held that "it is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical." *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892). See also *People ex rel Attorney General v Van Cleve*, 1 Mich 362, 366 (1850) ("The duties of these [canvassing] boards are simply ministerial . . . .").

Your comments are directly contrary to the law. Not only do they demonstrate a willingness to violate your oath of office, the constitution, and the laws of the state of Michigan, but they also indicate a willingness to commit a criminal offense. On May 24, 2024, Attorney General Nessel issued a press release regarding the duty of canvassers to certify election results. In this release, Attorney General Nessel warned all members of Michigan Boards of County Canvassers that Willful Neglect of Duty is a criminal act.[3] MCL 168.931(h) provides that "A person shall not willfully fail to perform a duty imposed upon that person by this act." A person who fails to perform their duty as required by Michigan Election Law may be guilty of a misdemeanor. MCL 169.931(2). Consequently, as it is a nondiscretionary legal duty for a Board of County Canvassers member to certify the election based on election returns, to refuse to do so because of rumors, allegations, or even evidence of fraud would expose that member to criminal liability.

While we recognize that in the above cited Detroit News article you also stated that you would not do anything illegal, you evidently made that statement after openly declaring that the

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[2] Michigan Department of State, *Letter to Delta County Board of Canvassers* <https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2024/May/Delta-County-Canvassers-Letter-05-16-2024.pdf> (accessed August 15, 2024).

[3] Michigan Department of Attorney General, AG Nessel, Secretary Benson on Duty of Canvassers to Certify Election Results <https://www.michigan.gov/ag/news/press-releases/2024/05/24/ag-nessel-secretary-benson-on-duty-of-canvassers-to-certify-election-results> (accessed August 14, 2024).

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reason you were in your position on the canvassing board was, precisely, to do something that would be illegal.[4] Accordingly, by this letter, we are requesting that you take the following action(s). If you were misquoted in the Detroit News, please notify the Detroit News, in writing, that this was the case and request a retraction, copying us at the email address below. If you were not, then your statements demonstrate a willingness to violate Michigan law that could subject you to legal liability both now and following the election. To avoid legal liability, you should rescind your statements immediately. We expect you to issue a public statement, to provide that statement to the Detroit News, and to copy us on any such communication by August 23, 2024. If you do not, we anticipate examining appropriate legal remedies and you may be liable for our attorneys' fees if we are forced to do so.

Sincerely,

Philip Mayor (P81691)
Delaney Barker (P87401)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org

cc: Robert Froman
1570 Tanager Lane
Kalamazoo, MI 49009

[4] Supra note 1.

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EXHIBIT D

Froman Email (August 16, 2024)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Robert Froman
To: Philip Mayor
Subject: Re: [External] Letter from ACLU of Michigan
Date: Friday, August 16, 2024 1:44:17 PM
Attachments: image001.png

I did not make any of the statements you say I did. I have not seen or approved any article by the Detroit news. I will make no public statement about what the Detroit News published. I believe the first amendment to the Constitution allows the press to publish any information they deem necessary.

Robert

On Thu, Aug 15, 2024 at 4:55 PM Philip Mayor <pmayor@aclumich.org> wrote:

> Mr. Froman,
>
> Please find enclosed a letter from the ACLU of Michigan regarding your recent statements to the *Detroit News*. We look forward to receiving your response by next Friday, August 23, as provided in the concluding paragraph of the letter.
>
> Sincerely,
>
> **Phil Mayor**
>
> Pronouns: he, him
>
> Senior Staff Attorney
>
> American Civil Liberties Union of Michigan
>
> 2966 Woodward Ave. Detroit MI 48201
>
> *(Offices in Detroit, Grand Rapids and Lansing)*
>
> 313.578.6803 | pmayor@aclumich.org
>
> "O! it is excellent
>
> To have a giant's strength; but it is tyrannous

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To use it like a giant."

ACLU
Michigan

This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.

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EXHIBIT E

Notice of Deposition

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, SHERIL KELLY, and SCOTT KELLY,

Plaintiffs,

v

ROBERT FROMAN, in his official capacity as Kalamazoo County Canvasser,

Defendant.

_____/

Case No.

Hon.

NOTICE OF DEPOSITION

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
Delaney A. Barker (P87401)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6800
pmayor@aclumich.org
dkorobkin@aclumich.org
dbarker@aclumich.org

Theresa J. Lee*
Sophia Lin Lakin*
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
tlee@aclu.org
slakin@aclu.org

Counsel for Plaintiffs

* *Pro hac vice* motions forthcoming

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NOTICE OF TAKING OF DEPOSITION OF ROBERT FROMAN

TO: Robert Froman

PLEASE TAKE NOTICE that Plaintiffs will take the deposition of Robert Froman ("Defendant"), pursuant to the Michigan Court Rules and before a duly qualified court reporter, on Tuesday, September 17, 2024 at 11:00 AM. The deposition will take place at the American Civil Liberties Union of Michigan Grand Rapids Office, located at 1514 Wealthy St., Ste. 260, Grand Rapids, MI 49506.

Defendant must produce the following documents to Plaintiffs' counsel at or before his deposition:

1. All communications from November 1, 2023 to present discussing the possible certification of the 2024 Presidential election, including communications to which Defendant is a recipient. "Communications" includes all correspondence including, but not limited to, email, text messages, social media posts, and direct messages.
2. All communications referencing the August 5, 2024 *Detroit News* article, "Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble," or the article's contents, including communications to which Defendant is a recipient. "Communications" includes all correspondence including, but not limited to, email, text messages, social media posts, and direct messages.

Respectfully submitted,

/s/_____

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
Delaney A. Barker (P87401)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201

Obtained by Judicial Watch, Inc. v. Michigan FOIA

(313) 578-6800
pmayor@aclumich.org
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Theresa J. Lee*
Sophia Lin Lakin*
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
tlee@aclu.org

Counsel for Plaintiffs

* *Pro hac vice* motions forthcoming

Dated: September 3, 2024

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EXHIBIT F

Subpoena

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN 9th JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUBPOENA Order to Appear and/or Produce	CASE NO. and JUDGE

Court address 330 Eleanor St., Kalamazoo, MI 49007

Court telephone no. (269) 383-8837

Police Report No. (if applicable):

Plaintiff(s)/Petitioner(s)		Defendant(s)/Respondent(s)
☐ People of the State of Michigan ☑ American Civil Liberties Union of Michigan, Sheril Kelly, and Scott Kelly	v	Robert Froman, in his official capacity as Kalamazoo County Canvasser
☑ Civil ☐ Criminal		Charge

In the matter of _____

In the Name of the People of the State of Michigan. TO:

Robert Froman

If you require accommodations to use the court because of a disability, or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

YOU ARE ORDERED TO:

☑ 1. Appear personally at the time and place stated below: You may be required to appear from time to time and day to day until excused.

☐ The court address above ☐ Other: 1514 Wealthy St., Ste. 260, Grand Rapids, MI 49506

Day	Date	Time
Tuesday	September 17	11:00 AM

☐ 2. Testify at trial / examination / hearing.

☑ 3. ☑ Produce copies* of the following items: (Use additional pages if necessary.) See attached page.

*Note: Requesting party must pay reasonable copying costs, which cannot be waived under MCR 2.002.

☐ Permit inspection or copying of the following items: (Use additional pages if necessary.) _____

☐ 4. Testify as to your assets, and bring with you the items listed in line 3 above.

☑ 5. Testify at deposition.

☐ 6. Abide by the attached prohibition against transferring or disposing of property. (MCL 600.6104(2), 600.6116, or 600.6119.)

☐ 7. Other: _____

Distribute form to:
Return
Witness
File
Plaintiff(s)/Petitioner(s)
Defendant(s)/Respondent(s)

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Case No. _____

☑ 8.

Person requesting subpoena		Telephone no.
Philip Mayor (P81691)		(313) 578-6803
Address		
2966 Woodward Ave.		
City	State	Zip
Detroit	MI	48201

NOTE: If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6, this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination below must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR TO APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.

Court use only
☐ Served ☐ Not served

_____
Judge/Clerk/Attorney signature and date

AFFIDAVIT FOR JUDGMENT DEBTOR EXAMINATION

I request that the court issue a subpoena that orders the party named on this form to be examined under oath before a judge concerning the money or property of _____

for the following reasons: _____

_____
Signature

Subscribed and sworn to before me on _____ (Date).

_____
Deputy clerk/Notary public signature

My commission expires on _____.

_____
Name (type or print)

Notary public, State of Michigan, County of _____. ☐ Acting in the County of _____.
☐ This notarial act was performed using an electronic notarization system or a remote electronic notarization platform.

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Subpoena, Order to Appear and/or Produce (9/23) **Case No.** _____

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the subpoena and file proof of service with the court clerk. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the addressee (copy of return receipt attached) a copy of the subpoena, together with any required fees and the attachments listed below, on:

☐ I have attempted to serve a copy of the subpoena, together with any required fees and the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	TOTAL FEE
$		$	$

_____
Signature

_____
Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the subpoena, together with any required fees and

_____ on _____.
Attachments (if any) Date and time

_____ on behalf of _____
Signature

_____
Name (type or print)

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ATTACHMENT TO SUBPOENA

You are ordered to produce copies of the following items at or before the deposition on September 17, 2024:

1. All communications from November 1, 2023 to present discussing the possible certification of the 2024 Presidential election, including communications to which Defendant is a recipient. "Communications" includes all correspondence including, but not limited to, email, text messages, social media posts, and direct messages.
2. All communications referencing the August 5, 2024 *Detroit News* article, "Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble," or the article's contents, including communications to which Defendant is a recipient. "Communications" includes all correspondence including, but not limited to, email, text messages, social media posts, and direct messages.

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EXHIBIT G

Lopez-Negrete v Lopez-Negrete, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2009 (Docket No. 286247), 2009 WL 1506668

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2009 WL 1506668
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Carlos LOPEZ–NEGRETE, Plaintiff–Appellee,

v.

Kariann LOPEZ–NEGRETE, Defendant–Appellant.

Docket No. 286247.
|
May 26, 2009.

West KeySummary

1 **Child Custody** ⇨ Previous interference with lawful custody or visitation

Child Custody ⇨ Ability of parents to cooperate

Sole legal custody of a minor child was awarded to her father when it was not possible for joint custody to be awarded to the divorced couple due to the ex-wife's anger issues towards the ex-husband. The ex-wife's anger toward the ex-husband had manifested into deliberate attempts to sabotage his relationship with their minor child. In addition, the ex-wife had made several attempts to prevent the ex-husband from having parenting time with the minor child by refusing his requests to see his daughter and refusing to tell him the location for exchanging custody of his daughter. M.C.L.A. § 722.23.

1 Case that cites this headnote

Genesee Circuit Court; LC No. 06–271816–DM.

Before: BORRELLO, P.J., and MURPHY and M.J. KELLY, JJ.

Opinion

PER CURIAM.

*1 Defendant Kariann Lopez–Negrete appeals as of right the judgment of divorce awarding plaintiff Carlos Lopez–Negrete sole legal custody of the minor child (d/o/b/ 3/11/05) and plaintiff and defendant joint physical custody of the minor child. Defendant also appeals the trial court's assignment of debt. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Plaintiff and defendant were married on May 24, 2003. The minor child, a daughter, was born almost two years later. For most of the marriage, plaintiff attended law school part-time. He did not work during this time. Defendant began working as a school psychologist for Flushing Community Schools during the marriage. Plaintiff and defendant separated in October 2006, and plaintiff filed for divorce in December 2006.

Following a lengthy bench trial, the trial court issued an Opinion and Order After Divorce Trial on March 14, 2008. The order and opinion contained findings of fact and conclusions of law regarding the minor child and property. The trial court found that an established custodial environment existed with respect to both plaintiff and defendant. The order and opinion addressed the best interest factors in MCL 722.23 and made findings regarding those factors. The trial court also made findings regarding the minor child's best interests. The trial court found that "[b]oth parties are capable, nurturing parents who love their daughter very much." However, the trial court noted its concern with defendant's anger issue, stating: "The Court's most significant concern ... is Defendant's anger issue, which has the potential to undermine the father/daughter relationship and do serious psychological damage to the child. Defendant is otherwise a good parent, but she is allowing this problem to poison everything." The trial court ordered that plaintiff and defendant would have joint physical custody with equal time for each parent, but ordered defendant to participate in counseling to address her anger issue. Regarding legal custody, the trial court noted that it generally prefers to award joint legal custody. However, the trial court found that because of defendant's anger issue, the parties would be unable to cooperate and generally agree concerning important decisions affecting the welfare of the child. The trial court

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stated that "[i]f Defendant were the sole legal custodian ... she would use her status to marginalize plaintiff. On the other hand, if Plaintiff were the sole legal custodian ... he would consult, involve and advise Defendant regarding all decisions." Therefore, the trial court determined that it would be in the child's best interest to award sole legal custody to plaintiff.

The trial court also made findings regarding the division of property. The trial court essentially divided the marital assets equally. The trial court awarded each party the property in their possession and specifically awarded defendant her wedding ring, wedding dress and veil. The trial court determined that defendant's unvested pension had an approximate value of $8,000 and awarded it solely to defendant. Each party claimed that their parents had loaned the couple money; the trial court ordered each party to repay their parents. Regarding debt, the trial court noted that the parties did not have joint debt and ordered "that each party is responsible for whatever debts are in their respective names." The court did not order any child or spousal support.

*2 On April 14, 2008, the judgment of divorce was entered. The provisions in the divorce judgment were consistent with the Opinion and Order After Divorce Trial. Thereafter, defendant filed a "Motion for Reconsideration of, Relief from, and To Amend Judgment," arguing that plaintiff, after asserting privilege, then elicited evidence in violation of MCR 2.314(B)(2), that this evidence impacted the trial court's determination of the best interest factors under MCL 722.23 and that the trial court's assignment of certain debt was inequitable. Defendant also sought joint legal custody of the minor child. The trial court denied the motion, stating in relevant part:

> Defendant seeks relief based upon her inability to procure Plaintiff's medical records relevant to the "underlying issue of Plaintiff's mental and emotional stability". She claims that, because Plaintiff asserted his privilege, and then raised the issue himself, that this is a violation of MCR 2.314(B)(2).
>
> Should there have been any concern that Plaintiff was improperly "raising" the issue of his mental health pursuant to MCR 2.314(B)(2), one would think that such would draw a timely objection. The Court does not remember any such objection, nor does Defendant claim that such was made.
>
> If a timely objection would have been made, however, the language "[u]nless the court orders otherwise" provides the Court with discretion as to what evidence can be introduced by a party that claims privilege. In this case, the Court finds absolutely no issue here.
>
> Plaintiff's "mental and emotional stability" was raised early and often by Defendant during the course of the litigation, and to the extent that it was "raised" by Plaintiff at all, it was only as a shield. It may have been mentioned by Plaintiff first at trial, but only because his case went first and he knew that the issue was going to be raised by Defendant. Although Defendant did not have Plaintiff's medical records from many years ago, several witnesses testified about the suicide/mental instability issue. Further, Plaintiff underwent a complete psychological exam, where Dr. Hobbs was well aware of the history, and she testified about it at trial. As such, Plaintiff's mental health in this regard was well covered by many other sources, and it is highly doubtful that medical records from years ago would have made any difference at all. In fact, there was much more information made available to the parties and the Court in this case than there was in *Navarre v. Navarre*, 191 Mich.App. 395, 479 N.W.2d 357 (1991).

The trial court also denied defendant's request for joint legal custody, finding that she had not had sufficient time to remediate her anger issue, and for a modification of the assignment of debt.

II. Analysis

A. Privilege

Defendant makes numerous arguments regarding plaintiff's assertion of privilege. The applicability of a privilege is a question of law that this Court reviews de novo. *Baker v. Oakwood Hosp. Corp.*, 239 Mich.App. 461, 468, 608 N.W.2d 823 (2000). This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Waknin v. Chamberlain*, 467 Mich. 329, 332, 653 N.W.2d 176 (2002). The abuse of discretion standard recognizes that " 'there will be circumstances in which ... there will be more than one reasonable and principled outcome.' " *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388, 719 N.W.2d 809 (2006), quoting *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside

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the principled range of outcomes." *Woodard v. Custer*, 476 Mich. 545, 557, 719 N.W.2d 842 (2006).

*3 MCR 2.314 addresses the discovery of medical information concerning a party. MCR 2.314(A) provides, in relevant part:

> (1) When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that
>
> (a) the information is otherwise discoverable under MCR 2.302(B), and
>
> (b) the party does not assert that the information is subject to a valid privilege.

Defendant argues that the trial court erred in allowing plaintiff to assert privilege after he failed to raise it as required under MCR 2.314(B)(1), which provides:

> A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

MCR 2.310(C)(2) provides that a party on whom a request for production of documents is served must serve a written response within 28 days after service of the request; however, the court rule permits the trial court to give the responding party "a longer or shorter time" to serve its written response.

On December 28, 2006, defendant filed a written request for production of documents pursuant to MCR 2.310, in which she sought copies "of all psychological, counseling and/or medical records" for plaintiff, including "all histories and notes pertaining to any mental health counseling" from various health care providers and professionals from October 1998 to the present. Defendant also sought "a complete and accurate list of all other doctors, psychologists, physicians, physiatrists [sic], counselors, and/or mental health professionals who have treated and/or consulted with [plaintiff]" from October 1998 to the present. At a hearing on January 8, 2007, counsel for plaintiff did not explicitly invoke the physician-patient or psychologist patient privilege on behalf of plaintiff, but requested that the trial court quash defendant's request for plaintiff's medical records, arguing that under *Navarre v. Navarre*, 191 Mich.App. 395, 479 N.W.2d 357 (1991), only plaintiff's current psychological condition was relevant. Plaintiff did not file a written response to defendant's request for documents. On January 24, 2007, defense counsel sent a letter to plaintiff's counsel reminding her that defendant had served plaintiff with a written request for production of documents and that defendant had not received a response or objection to defendant's request and advising counsel for plaintiff that defense counsel would seek an order to compel discovery and for costs if defendant did not receive the documents by January 25, 2007, at 5:00 p.m. Plaintiff still did not respond, and on January 29, 2007, defendant filed a motion to compel production of documents under MCR 2.310 and MCR 2.313.

*4 The trial court held a hearing on defendant's motion to compel on February 5, 2007. At the hearing, the trial court stated:

> Now, with regard to the medical records ... I think it's clear that medical records, psychological records, psychiatric records are privileged. The privilege—this is under MCR 2.314(B), the privilege has to be asserted in the response to the discovery request or it is waived. So, if there's going to be a privilege, it needs to be in the response to the discovery request.
>
> If there's a request for documents and the documents are not in the possession of the party, then that needs to be stated formally, properly pursuant to the court rule. So, that's what's going to happen here, again, within seven days from today's date.
>
> But with regard to the psychologicals, I will also refer both parties to (2) under 2.314(B), if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable, the party may not thereafter present or produce any physical, documentary or testimonial evidence relating to the party's medical history or mental or physical condition. So, that's what the court rule says. If they're going to assert the privilege, then they can't utilize—they can't present that evidence in Court.

Following the hearing, the trial court entered an order requiring plaintiff to "produce all documents and information set forth in Defendant's Written Request For Production of

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Documents Directed to Plaintiff dated December 27, 2006, or otherwise respond as directed by Michigan Court Rule, by not later than February 12, 2007, at 5 p.m." The trial court's order indicates that it was aware that plaintiff had missed the 28 day deadline to respond to defendant's request for production of documents. However, the court, apparently acting pursuant to its authority to modify discovery periods under MCR 2.310(C)(2), granted plaintiff a seven-day extension to file a response, thus allowing plaintiff to avoid waiving the privilege due to his failure to comply with defendant's discovery request within 28 days. On about February 8, 2007, plaintiff filed a verified response to defendant's written request for production of documents. In his response, plaintiff asserted that the evidence sought by defendant was "privileged," irrelevant, and "intended to embarrass, harass and unduly cause attorney fees to be incurred[.]" In claiming privilege, plaintiff did not specify whether the documents sought by defendant were privileged under the physician-patient privilege, MCL 600.2157,[1] or the psychologist-patient privilege, MCL 333.18237.[2] However, plaintiff did state: "[plaintiff] does not waive the right to introduce any relevant admissible *current* information regarding the mental and physical condition of either party by asserting privilege to any *previous* mental or physical medical providers consistent with the ruling in *Navarre v. Navarre*." (Emphasis added.)

*5 After plaintiff filed his verified response to defendant's request, the trial court did not make any further pre-trial rulings regarding the privilege issue. Thus, although the trial court never entered an order specifically finding the privilege applicable and specifically excluding certain evidence, it did state on the record at the February 5, 2007, hearing that plaintiff's medical, psychological and psychiatric records were privileged. The trial court did not, however, specify under what privilege or privileges the evidence sought by defendant was barred.

It is true that under MCR 2.314(B)(1), a privilege is waived when a party does not assert the privilege in a written response to a request for production of documents. In *Domako v. Rowe*, 438 Mich. 347, 356, 475 N.W.2d 30 (1991), the Supreme Court stated that "the plain language of MCR 2.314(B)(1) declares that if the privilege is not asserted in a written response to a request to produce, it is waived for purposes of that action." While plaintiff did not respond or object to defendant's request for the production of documents within 28 days as required by MCR 2.310(C)(2), this does not amount to a waiver of the physician-patient privilege because in its February 5, 2007, order compelling production of documents, the trial court specifically gave plaintiff until February 12, 2007, to produce the documents or respond to plaintiff's written request for production of documents. Under MCR 2.310(C)(2), the trial court has the authority to "allow a longer or shorter time" for a party to serve a written response to a request for production of documents. Therefore, contrary to defendant's argument, plaintiff did not waive the medical privilege and has not lost the privilege for purposes of the action.

Defendant next argues that the trial court erred in permitting plaintiff to assert privilege because plaintiff's assertion of the psychologist-patient privilege is contrary to the purpose of the Child Custody Act, MCL 330.1750 and MCR 2.314(B)(2). In *Navarre*, this Court addressed the interplay between the Child Custody Act and the physician-patient privilege. According to the Court:

> The question before the Court is whether the Legislature intended to suspend the medical privilege in custody disputes. The defendant's statutory-construction argument that the specific should dominate over the general is inapposite unless the statutes are found to be conflicting. In other words, they must be in pari materia, i.e., they must cover the same subject matter.... Here, the purposes of the Child Custody Act and the medical privilege statute are different. The former seeks to provide a procedural framework for resolving custody disputes and requires the court to consider the mental and physical conditions of the parties. It does not, however, address the evidentiary routes by which such information may come to the attention of the court. The privilege statute, on the other hand, relates only to the right of a patient to prevent a physician from revealing a certain type of information, and it includes a few carefully delineated situations in which the evidence may be used notwithstanding the objection of the holder of the privilege.

*6 All privileges exist at the expense of suppressing valuable evidence. Indeed, were this not the case, there would be no need for privileges at all. In this context, potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships. Moreover, the court in this case was able, with the plaintiff's participation, to gather information with regard to her mental condition. See MCR 2.311. The privilege, therefore, did not block the presentation of the only evidence of plaintiff's condition. Additionally, we do not find relevant to a party's present condition the testimony

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> of a physician who has not treated the party for years. [*Navarre, supra* at 398–399, 479 N.W.2d 357.]

Defendant attempts to distinguish the instant case from *Navarre* by arguing that the instant case involves the psychologist-patient privilege, whereas *Navarre* involved the physician-patient privilege. It is true that *Navarre* addressed the interplay between the Child Custody Act and the physician-patient privilege, not the psychologist-patient privilege. However, in asserting privilege before the trial court, plaintiff generally asserted "privilege" without specifically identifying which statutory privilege precluded defendant from obtaining the documents she sought. Also, in ruling that the evidence sought by defendant was barred by privilege, the trial court did not specify whether the physician-patient privilege, psychologist-patient privilege, or both, barred the evidence. There is some overlap in the privilege statutes, and both privileges are arguably relevant and applicable to the facts of this case. Cf. MCL 600.2157; MCL 333 .18237. In *Navarre,* the physician-patient privilege was asserted to block evidence of the plaintiff's mental condition. Even if the evidence in this case was precluded because of the psychologist-patient privilege, the reasoning of *Navarre,* that potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships, is no less applicable if the relationship is between a psychologist and patient than it is if the relationship is between a physician and patient. The purpose behind both privileges is the same: to protect the confidential nature of the doctor-patient relationship and to encourage the patient to make a full disclosure of symptoms and conditions to those from whom they seek help. See *Domako, supra* at 354, 475 N.W.2d 30; *People v. Adamski,* 198 Mich.App. 133, 138, 497 N.W.2d 546 (1993). Thus, the reasoning in *Navarre* is not uniquely applicable or limited to the physician-patient privilege and can be extended to the psychologist-patient privilege. As the *Navarre* Court noted, "*[a]ll* privileges exist at the expense of suppressing valuable evidence." *Id.* (emphasis added.)

Defendant argues that under MCL 330.1750(2)(a), privileged communications must be disclosed if relevant to an element of the party's claim and that plaintiff's mental and physical health is a specific element in child custody determinations under MCL 722.23(g). We disagree that the best interest factors in MCL 722.23 constitute elements of a claim under MCL 330.1750(2)(a). Rather, MCL 722.23(a)-(l) constitute the factors that the trial court must consider, evaluate and determine in determining the best interest of a child in a child custody dispute. In any event, the Court in *Navarre* implicitly rejected any argument compelling disclosure of privileged information in a child custody case under MCL 330.1750(2)(a) because it held that a party's privileged medical information was not admissible even as bearing on factor (g) of the best interest factors under the Child Custody Act. This constitutes an implicit rejection of defendant's argument. The Court phrased the issue before it as "whether the Legislature intended to suspend the medical privilege in custody disputes" and clearly answered the question in the negative, stating that "potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships." *Id.* at 398, 399, 479 N.W.2d 357. Thus, defendant's argument regarding MCL 330.1750(2)(a) is without merit.

*7 Defendant argues that the trial court failed to enforce MCR 2.314(B)(2) because it permitted plaintiff to testify regarding aspects of his mental and psychological health or conditions. MCR 2 .314(B)(2) provides:

> Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

In spite of MCR 2.314(B)(2), plaintiff testified at length regarding his mental and psychological health, both present and past. Plaintiff does not argue that his testimony did not constitute "testimonial evidence related to ... [his] medical history or mental or physical condition" under MCR 2.314(B)(2). However, plaintiff asserts that defendant waived this issue by failing to object to plaintiff's evidence regarding his mental and emotional health. To preserve an issue regarding the admission of evidence on appeal, a party must object to the evidence at trial and specify the same ground for objection on appeal that was asserted in the trial court. MRE 103(a)(1); *People v. Aldrich,* 246 Mich.App. 101, 113, 631 N.W.2d 67 (2001). Not only did defendant fail to object to plaintiff's testimony regarding his mental and emotional health, defendant herself elicited, on direct and cross-examination, a significant amount of testimony regarding plaintiff's mental and emotional health. Defendant has failed to preserve this issue for review.

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Because defendant failed to preserve this issue for appeal, this Court's review is for plain error affecting defendant's substantial rights. *People v. Carines*, 460 Mich. 750, 763, 774, 597 N.W.2d 130 (1999). To avoid forfeiture under the plain error rule, error must have occurred, the error must have been plain (clear or obvious), and the plain error must have affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings. *Id.*

We find that error occurred in this case because the trial court ruled that plaintiff could assert privilege and then permitted plaintiff to testify at length regarding his mental and psychological health in violation of MCR 2.314(B)(2). MCR 2.314(B)(2) prohibits a party who has asserted privilege from testifying or introducing evidence regarding the party's mental or physical condition "[u]nless the court orders otherwise[.]" In this case, there is no indication that the trial court entered an order changing the effect of privilege under MCR 2.314. Furthermore, because defendant failed to object to such evidence, the trial court did not make any ruling regarding the evidence on the record. We further find that the violation of MCR 2.314(B)(2) was plain and obvious. However, we find that the error did not affect defendant's substantial rights, and defendant was not prejudiced by the admission of this evidence for several reasons.

***8** First, contrary to defendant's assertion, the violation of MCR 2.314(B)(2) did not deprive defendant of her Sixth Amendment right to confront and cross-examine plaintiff because defendant did cross-examine plaintiff regarding his mental and psychological health. Furthermore, this case involved a child custody determination, which is a civil matter. The Sixth Amendment applies to "all criminal prosecutions[.]" US Const, Am VI. The Sixth Amendment right to confront and cross-examine witnesses does not apply to civil matters. See *In re Brock*, 442 Mich. 101, 107–108, 499 N.W.2d 752 (1993).

Second, defendant elicited evidence, on direct and cross-examination, regarding plaintiff's mental and psychological condition. Even before plaintiff gave detailed testimony regarding his attempt to commit suicide when he was eighteen years old, defendant elicited testimony on cross-examination from several defense witnesses regarding plaintiff's mental and psychological condition. For example, defendant asked Thomas Joseph Wood if plaintiff ever told him about his many emotional problems or about having an obsessive compulsive disorder. In addition, defense counsel elicited testimony from Wood that plaintiff told him that he (plaintiff) was in therapy and that he had attempted suicide before. Defense counsel also elicited testimony from Wood that plaintiff took medication for attention deficit hyperactivity disorder (ADHD). Defense counsel elicited similar testimony from Aaron Pyciak. In addition, defense counsel also asked plaintiff's sister, Diana Lopez–Negrete, about plaintiff's ADHD and whether he took medication. Defense counsel also attempted to elicit testimony from plaintiff's sister about plaintiff's suicide attempt. When defense counsel asked plaintiff's sister if plaintiff had attempted suicide since his first attempt, she responded in the negative.

Defense counsel also cross-examined plaintiff at length regarding his mental and psychological condition. Counsel for plaintiff elicited testimony from plaintiff that he had ADHD and took medication for the condition, that he had not been diagnosed with obsessive compulsive disorder or any other mental or emotional impairments and that he was fine from a mental health standpoint. She further cross-examined plaintiff regarding his suicide attempt while he was at college in 1998 and other threats of suicide, eliciting testimony that he only threatened suicide one time, that other family members had not threatened suicide and that he was not depressed. Defendant also elicited testimony from plaintiff that on one occasion when he told defendant he should just kill himself, he did not mean it and did not attempt suicide; he stated that defendant was pushing him and being hostile and nasty and that he said something that he did not mean and should not have said because he was upset.

In addition, defendant herself testified regarding plaintiff's mental and psychological condition. Defendant testified regarding plaintiff's suicide attempt in 1998 and stated that plaintiff told her that he had tried to kill himself by jumping out of a window. Defense counsel asked defendant about recent suicide threats or attempts on plaintiff's part, and defendant responded: "He has on several occasions threatened to kill himself by either holding a knife to his throat and saying he was going to end his life, or that he was going to run the car—he had a plan to run the car into a tree." According to defendant, plaintiff's threats of suicide occurred in the fall of 1999, after the couple was evicted from an apartment, twice in October 2006, and once in November 2006. According to defendant, plaintiff's suicide threats would typically be brought on by significant emotional events, such as arguments with plaintiff's mother or family stress. Defendant described plaintiff's alleged suicide threats in detail. For example she stated that on one occasion, plaintiff

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"grabbed the knife out of the drawer, and ... [h]e held it to his throat, and he said he was just going to end it, and to not try to stop him because if I tried to stop him, then he was really going to do it...." Defendant asserted that plaintiff put the knife back after she called plaintiff's mother, and then plaintiff crumpled to the floor, cried and slept for a day and a half.

*9 In addition to her own testimony, defendant also introduced the testimony of Dr. Sharon Hobbs, a clinical psychologist who, at defendant's request, conducted a psychological evaluation of both plaintiff and defendant and gave detailed testimony regarding her findings.

In light of defendant's introduction of evidence regarding plaintiff's mental and psychological condition, she cannot complain that plaintiff introduced evidence regarding his mental and psychological condition in violation of MCR 2.314(B)(2). Defendant failed to object to plaintiff's testimony regarding his mental and psychological health. If she had, the trial court might have entered an order otherwise modifying the effect of plaintiff's privilege as it was authorized to do under MCR 2.314(B)(2). Furthermore, defendant benefited from the trial court's failure to preclude the admission of evidence regarding plaintiff's mental and psychological health in that she was able to cross-examine plaintiff regarding his mental and psychological condition. Thus, the trial court's error in admitting the privileged evidence gave defendant an opportunity that she would not have otherwise had to explore plaintiff's mental and psychological health. Defendant contributed to the error by cross-examining plaintiff in this regard. A party may not harbor error, to which she consented, as an appellate parachute. *In re Gazella*, 264 Mich.App. 668, 679, 692 N.W.2d 708 (2005). Because defendant benefited from the trial court's error admitting evidence, she may not be heard to complain on appeal.

Third, evidence from years ago would not have been relevant to plaintiff's current mental and psychological health. Defendant sought to discover evidence regarding plaintiff's mental and psychological health from as far back as 1998. Under *Navarre*, the testimony of a physician who has not treated a party for years is irrelevant to the party's present condition. *Navarre*, *supra* at 399, 479 N.W.2d 357. Furthermore, this Court observed in *Navarre* that "[t]he privilege ... did not block the presentation of the only evidence of plaintiff's condition." Similarly, in the instant case plaintiff's assertion of privilege did not block the only evidence of plaintiff's medical condition. As indicated above, both parties testified at length about plaintiff's current and past mental state, defendant cross-examined several witnesses regarding plaintiff's mental and psychological condition and Dr. Hobbs conducted a psychological evaluation of plaintiff and testified regarding her findings. Therefore, like in *Navarre*, plaintiff's assertion of privilege did not block the only evidence of plaintiff's mental and psychological condition.

In sum, plaintiff did not waive his privilege by failing to assert it within 28 days as required by MCR 2.310(C)(2) because the trial court properly gave plaintiff a longer time to assert privilege, as it was authorized to do under MCR 2.310(C)(2). Although the trial court violated MCR 2.314(B)(1) by allowing the admission of evidence of plaintiff's mental and psychological condition at trial when plaintiff had asserted privilege, this unpreserved error did not affect defendant's substantial rights.

B. Best Interest Factors and Custody Ruling

*10 Defendant argues that the trial court's error in its ruling regarding privilege tainted the trial court's determinations regarding the statutory best interest factors, as well as the trial court's determination regarding the existence of an established custodial environment and the trial court's ultimate custody decision.

MCL 722.28 governs child custody disputes on appeal and provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

This Court applies three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the "great weight" standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v. Fletcher (Fletcher I)*, 447 Mich. 871, 877–878, 526 N.W.2d 889 (1994). The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. *MacIntyre v. MacIntyre (On Remand)*, 267 Mich.App. 449,

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452, 705 N.W.2d 144 (2005). A trial court's findings regarding the best interest factors are reviewed under the great weight of the evidence standard. *Berger v. Berger*, 277 Mich.App. 700, 705, 747 N.W. 2 336 (2008). This Court defers to the trial court's determinations of credibility. *Id.*; *Fletcher v. Fletcher (Fletcher II)*, 229 Mich.App. 19, 25, 581 N.W.2d 11 (1998). Second, this Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. *Berger*, *supra* at 706, 747 N.W.2d 336. Third, discretionary rulings, such as custody decisions, are reviewed for an abuse of discretion. *Fletcher I*, *supra* at 879, 526 N.W.2d 889; *Shulick v. Richards*, 273 Mich.App. 320, 323–325, 729 N.W.2d 533 (2006). The overriding concern is the child's best interests. *Fletcher II*, *supra* at 29.

To determine child custody, the trial court must consider the statutory best interest factors in MCL 722.23:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care and other material needs.
>
> *11 (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial court found the parties equal for factors (a), (b), (d), (e) and (h). The trial court found in defendant's favor for factor (c) and found in plaintiff's favor for factors (f), (g), (j), and (k). On appeal, defendant challenges the trial court's findings regarding factors (b), (d), (e), (f), (g), (j) and (k).

The trial court found the parties equal with respect to factor (b), the parties' capacity and disposition to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion. Defendant argues that the trial court should have found in her favor regarding this factor and that she raised questions regarding plaintiff's capacity to care for and guide the minor child because of his mental health issues. Defendant claims that plaintiff did not have the capacity to care for the minor child on a daily basis because of his ADHD and obsessive compulsive issues and because of his inability to focus. There was evidence that plaintiff had ADHD and obsessive compulsive issues. However, the evidence indicates that these conditions did not render plaintiff incapable of providing the minor child with love, affection and guidance. Defendant also argues that the trial court's findings under factor (c) that plaintiff was unable or unwilling to hold down a job and was completely financially dependent upon his parents are inconsistent with the trial court's conclusion that plaintiff was able to give the minor child love, affection and guidance under factor (b). We disagree. Factors (b) and (c) address different parental abilities. Factor (b) addresses the ability to provide the child with love, affection and guidance, while factor (c) addresses the ability to provide the child with basic material things, such as food, clothing and medical care. The trial court had "concerns about Plaintiff's ability to provide the child with the necessities of life without continued support from his parents" and found that factor (c) favored defendant. The trial court's

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findings regarding factor (c) were accurate and not against the great weight of the evidence. However, plaintiff's financial dependence on his parents and lack of employment do not affect plaintiff's ability to give the child love, affection and guidance. Therefore, defendant's argument in this regard is without merit. The trial court's finding regarding factor (b) was not against the great weight of the evidence.

*12 The trial court also found plaintiff and defendant equal with respect to factor (d), the length of time the child has lived in a stable environment. According to defendant, she should have been favored under this factor. The trial court found that plaintiff lived in an apartment and planned to conduct parenting time at his parents' home and that plaintiff's "family is a stable and nurturing one." The trial court also found that "[d]efendant also has an appropriate home with stability." Defendant testified regarding dysfunction and instability within plaintiff's family, asserting that on one occasion plaintiff threatened to kill his mother and burn her house down, that plaintiff's parents had a verbal and physical altercation one Thanksgiving over finances, that "[t]here was a lot of marital discord as far as yelling and arguing between Dr. and Mrs. Lopez Negrete[,]" that typical conversations in the household included "a significant amount of yelling and swearing in both English and in Spanish[,]" and that the family did not sit down to dinner together every night. According to plaintiff, the family relationships were "very contentious" and there was a lot of tension in the household. The trial court found defendant's testimony in this regard incredible, stating "that Defendant's criticisms of ... [plaintiff's] parents and their home are completely without merit and motivated by her anger issue." Whether defendant's claims regarding the alleged instability of plaintiff's family were believable was a credibility determination for the trial court. It is the function of the factfinder to determine the weight of the evidence and credibility of witnesses; this Court should not interfere with that function. *People v. Wolfe*, 440 Mich. 508, 514–515, 489 N.W.2d 748 (1992), amended 441 Mich. 1201, 489 N.W.2d 748 (1992).

Defendant argues that the focus under factor (d) is on the relationship between the minor child and her parents, not the relationship with the minor child and her grandparents. Defendant suggests that the trial court improperly recognized the child's grandparents as *de facto* custodians or caretakers for the minor child. This suggestion is simply not supported by the record. The trial court's ruling did not give plaintiff's parents custody of the minor child, and the trial court's findings regarding factor (d) do not, as defendant suggests, focus on the grandparents as the caretakers of the minor child, but rather focus on the environment in which plaintiff intended to conduct his parenting time with the minor child. While there was evidence that plaintiff's parents were involved with helping plaintiff care for the minor child, there was ample evidence that plaintiff cared for the minor child. We reject defendant's argument that the trial court awarded *de facto* custody to plaintiff's parents.

The trial court also found the parties equal with respect to factor (e), the permanence, as a family unit, of the existing or proposed custodial homes. Regarding factor (e), the trial court found that "[p]laintiff's proposed family unit will consist of himself and the child, living at his parents' home" and that "[d]efendant's proposed family unit will be her and the child at her home." Factors (d) and (e) have a degree of overlap, but "the focus of factor e is the child's prospects for a stable family environment." *Ireland v. Smith*, 451 Mich. 457, 465, 547 N.W.2d 686 (1996). The trial court should examine any "potential disruptions" to the minor's environment, such as frequent moves to unfamiliar settings, a succession of persons residing in the home, or live-in romantic companions for the custodial parent. *Id.* at 465 n. 9, 547 N.W.2d 686. The only potential disruption to plaintiff's parents' home serving as the custodial home concerns plaintiff's statements that he did not intend to conduct his parenting time at his parents for the rest of his life and that he hoped to buy his own house at some point. According to plaintiff, parenting time at his parents' home was desirable because it was convenient, the home was nice, it was economically feasible and his parents desired to see their granddaughter. In addition, it was a logical place to conduct parenting time because the location where he exercised his parenting time was an issue for defendant. At the time of trial, plaintiff had completed law school but had not passed the bar examination and was not employed. Based on the evidence regarding plaintiff's parents' financial support of him and his family, it is clear that plaintiff did not have immediate plans to purchase a home and he said as much on the record. Thus, there were no definite or immediate plans to change the location where he exercised his parenting time with the minor child. Furthermore, based on the evidence, there is every indication that plaintiff's parents would be willing to host plaintiff and their granddaughter during his custody times as long as necessary and that this was a stable environment for the child. Plaintiff's parents' conduct demonstrates that they are committed to hosting plaintiff and their granddaughter; they have created a safe environment for her in their home, and the home has a bedroom for her with a child's bed and toys. In *Ireland*, the Supreme Court ruled

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that changes in a young adult parent's residency, as a result of completing college, do not disqualify the parent for custody under factor (e), but cannot be ignored. *Id.* at 465, 547 N.W.2d 686. Given the lack of specificity regarding when plaintiff intends to purchase his own home, coupled with his financial dependence on his parents, the trial court's determination of this factor was not against the great weight of the evidence.

*13 Defendant also argues that the trial court erred in finding in favor of plaintiff under factor (f), the moral fitness of the parties involved. This factor relates to the parties' moral fitness as a parent. *Fletcher I, supra* at 886–887, 526 N.W.2d 889. Conduct relevant to this factor includes "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 887 n. 6, 526 N.W.2d 889. The trial court found in favor of plaintiff for this factor based on defendant's lack of credibility. In so finding, the trial court stated: "This Court rarely will made a specific finding under this factor that a parent's lack of credibility impacts their moral fitness to parent. However, such a finding is warranted here." Defendant again takes issue with the trial court's conclusions regarding the parties' credibility, arguing that the trial court erred in finding her claims regarding domestic violence, incidents in which the minor child witnessed plaintiff masturbating to pornography on a computer, and plaintiff's alleged recent suicide threats to be incredible. She claims that evidence that was precluded because of the trial court's improper privilege ruling would have corroborated her testimony regarding these incidents and that the trial court's credibility determinations were made without the benefit of crucial evidence that was improperly excluded. Despite the trial court's privilege ruling, both parties introduced evidence regarding plaintiff's mental and psychological condition. Thus, the privilege did not block the presentation of the only evidence of plaintiff's condition. See *Navarre, supra* at 399, 479 N.W.2d 357. Furthermore, some of the medical evidence sought by defendant was from 1998; the testimony of a physician who has not treated a party for years is irrelevant to the party's present condition. *Id.* In any event, the trial court specifically noted that it found in plaintiff's favor for this factor based on defendant's lack of credibility. It is the function of the factfinder to determine the weight of the evidence and credibility of witnesses. *Wolfe, supra* at 514–515, 489 N.W.2d 748. Therefore, defendant's arguments regarding the trial court's findings with respect to factor (f) are unavailing. The findings were not against the great weight of the evidence.

Defendant also asserts that the trial court improperly found in plaintiff's favor with respect to factor (g), the parties' mental and physical health. In finding in favor of plaintiff regarding this factor, the trial court found that "both parties have issues ... regarding mental health," but concluded that defendant's anger issue, which the court observed "had the potential to undermine the father/daughter relationship and do serious psychological damage to the child[,]" was more of a concern than plaintiff's ADHD, obsessive personality features, indecision and one documented suicide attempt many years before. The trial court noted that defendant's allegations regarding plaintiff's recent suicide thoughts or attempts were uncorroborated. Still, the trial court considered plaintiff's history and concluded "that it does not present a significant risk or a barrier to effective parenting." Regarding defendant's anger, the trial court noted that "Dr. Hobbs asserts that the overarching issue for Defendant is her anger" and that "Dr. Hobbs expressed concern that Defendant is becoming consumed by her anger to the point where 'the air he [plaintiff] breathes is toxic.' "

*14 Despite the trial court's ruling on the record that plaintiff's medical, psychological and psychiatric records were privileged, a great deal of evidence regarding plaintiff's mental and psychological health was admitted at trial. Plaintiff himself testified that he has had ADHD since he was very young and that he took medication for the condition and received accommodations for his ADHD both in college and in law school. Plaintiff also testified regarding his alleged suicide attempt, which occurred in 1998 when he was 18 years old and attending Loyola College. Plaintiff denied that he attempted suicide, stating that he did not think he was really attempting to take his life, but acknowledging that he was very sad and upset at the time because he was lonely, had gotten mugged, had conflicts with his roommate and other men on his floor, and his grandmother was going to die. According to plaintiff:

> I was very upset, and I had—a couple of my friends were around, and I said to them, you know, I just can't take it anymore. I'm under a lot of stress. I'm just going to jump out the damn window, and I was like—and I was crying at this point, and they were worried about me. One of the guys was Moses Ortiz ... and the other guy, his name was Pete ... and we just sat down and talked, and I mean I told them like how I felt, and how I felt like crap, and these guys were pretty nice guys. We were good friends and they basically talked me out of it. You know, I never got outside of a building. I was never on a ledge. I was never in a place that, you know, I was about to jump off a precipice of any

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> kind. I was just very upset. I really thought about doing it. It really hurt, but I never really took serious action towards actually doing it. I mean I got towards the window, and that's probably why they took me to the hospital, just in case, but I never actually got on any edge of anything.

Plaintiff stated that after one day of hospitalization, he was released into the care of his psychologist and that he quit attending Loyola and received regular counseling. He asserted that at the time of the incident, he was only 18 years old, and it "was just a one time incident that, you know, I really regret, but it's not something that, you know, is the end all and be all of who I am." Plaintiff also testified that he had been going to counseling because of the divorce.

Furthermore, as explained previously, defendant also testified regarding plaintiff's past suicide attempt and several more recent suicide threats made by plaintiff and described in detail how plaintiff allegedly stated that he would kill himself. In addition, Dr. Hobbs performed psychological evaluations of both plaintiff and defendant and testified regarding her findings. Dr. Hobbs testified that neither plaintiff nor defendant had any "red flags" and that she did not think either was incompetent or needed to be institutionalized. She testified that plaintiff admitted that he had suicidal ideations ten years ago. She also testified that plaintiff had some obsessive compulsive features to his personality and an indecisiveness that made it difficult for him to commit to answers on the psychological tests. Dr. Hobbs testified that this behavior would create a problem in co-parenting, but that just because a person has an obsessive compulsive disorder does not mean that they cannot effectively parent. Dr. Hobbs also testified that plaintiff had self-esteem issues.

*15 Dr. Hobbs also testified regarding her psychological evaluation of defendant. According to Dr. Hobbs, defendant had problems with anger and "her distaste for her husband negates his being in a sense." She further stated that defendant was "so consumed with her negativity and her anger at her husband that the air he breathes is toxic." Dr. Hobbs also stated that defendant's anger toward plaintiff could lead to a situation called parental alienation, in which a child will not acknowledge a single positive thing about the other parent.

The trial court's conclusion that factor (g) favored plaintiff was not against the great weight of the evidence, and the trial court's finding that defendant had an anger issue and that her anger had the potential to undermine plaintiff's relationship with the minor child was supported by Dr. Hobbs' testimony. Furthermore, while there was evidence that both plaintiff and defendant had mental health issues, the trial court's conclusion that defendant's anger problem was more of a concern than plaintiff's mental health issues was proper because determinations regarding the weight of the evidence are properly left to the trial court. *Wolfe, supra* at 514–515, 489 N.W.2d 748. The trial court may give the competent evidence the weight it deems appropriate.

Plaintiff also contends that the trial court erred in finding in plaintiff's favor under factor (j), "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent[.]" The trial court found that "[d]efendant's anger issue has manifested into a deliberate attempt to sabotage Plaintiff's relationship with the child" and that "[d]efendant did everything possible to freeze [plaintiff] out of his child's life[.]" The trial court further found:

> [Defendant's conduct toward plaintiff] has already had a harmful effect on the child. There has been testimony as to the child's reserved demeanor at exchanges: she waits until Defendant leaves until she becomes joyful with Plaintiff. She apparently has learned that her mother disapproves of any shows of affection toward her father. How very sad.
>
> The Court finds that Defendant is engaged in a deliberate effort to undermine Plaintiff's relationship with the child. This is a manifestation of Dr. Hobbs' findings regarding Defendant's anger issue toward Plaintiff, whereby the [sic] "the air he breathes is toxic."
>
> With regard to Plaintiff, the Court does not find any issues regarding his fostering of the child's relationship with Defendant.
>
> * * *
>
> Therefore, the Court finds an intentional effort to undermine Plaintiff's role as a father. As such, this factor favors Plaintiff, and strongly so. Further, this is an important factor in the overall analysis.

There was evidence that defendant did not facilitate a continuing relationship between plaintiff and the minor child. For example, plaintiff testified that defendant prevented or attempted to prevent him from having parenting time on several occasions. According to plaintiff, defendant would ask for the address and telephone number of the location at which he was exercising his parenting time when she already knew that information. He also testified that when

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the parties first separated, defendant refused more than 15 requests that he made to see the minor child. Plaintiff also stated that defendant refused to tell her the location for exchanging custody of the minor child. In addition, plaintiff's mother testified that during one custody transfer, she went with plaintiff to pick up the minor child from defendant, but defendant refused to transfer the minor child, saying that she did not know who plaintiff's mother was and asking for plaintiff's mother's identification. There was also evidence that defendant attempted to interfere with or preclude plaintiff's involvement with medical care and treatment for the minor child.

*16 Defendant takes issue with the fact that the trial court emphasized factor (j) above the rest. However, "the statutory best interest factors need *not* be given equal weight. Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." *McCain v. McCain*, 229 Mich.App. 123, 131, 580 N.W.2d 485 (1998). The controlling consideration in child custody determinations is the best interest of the child. MCL 722.25(1); *Lombardo v. Lombard*, 202 Mich.App. 151, 159–160, 507 N.W.2d 788 (1993). Therefore, it was not error for the trial court to give factor (j) important, or extra, consideration in the overall analysis of best interest factors.

Defendant's remaining argument with respect to factor (j) concerns her allegations that she was improperly denied the opportunity to prove that plaintiff was mentally unstable and a bad influence and possibly a danger to the minor child. Once again, this involves a credibility determination, which was properly for the trial court to decide. For the same reasons as those stated previously, defendant's arguments in this regard are not persuasive.

Defendant also contends that the trial court improperly found in plaintiff's favor with respect to factor (k), domestic violence. The trial court found that there was evidence to support several incidents of domestic violence by defendant against plaintiff, and the record supports the trial court's conclusion in this regard. Two of plaintiff and defendant's friends testified regarding defendant's acts of violence against plaintiff. Plaintiff himself testified that defendant would knee or punch him in the testicles if she wanted something and that she hit him with a fire poker, a brass paper weight and a belt, and threatened him with a knife. Defendant denied abusing plaintiff and asserted that plaintiff physically assaulted her on several occasions. She described one occasion in May or June 2005, when plaintiff became angry at her and threw a humidifier against the wall and then pushed her down the stairs. She further stated that plaintiff pushed her down the stairs again about a year later. Defendant also testified that after the parties separated, plaintiff became angry and again threw a humidifier and pushed her out of the way. Although both parties each denied physically abusing the other, the trial court found "[p]laintiff's version much more credible" and concluded that this factor favored plaintiff. Once again, this factor involved an issue of credibility, and it is the function of the factfinder to determine the credibility of witnesses. *Wolfe, supra* at 514–515, 489 N.W.2d 748. The trial court's finding regarding this factor was not against the great weight of the evidence.

In sum, the trial court's factual findings were not against the great weight of the evidence. Contrary to defendant's argument, the trial court's findings regarding the best interest factors were not tainted by the trial court's privilege ruling. Furthermore, the trial court's decision awarding sole legal custody of the minor child to plaintiff was not an abuse of discretion. In awarding legal custody, the trial court noted that it prefers to award joint legal custody, but could not do so in this case because of the parties' inability to cooperate, which the court stated was "caused primarily by Defendant's anger issues." The trial court stated that it would like to see defendant "remediate her problem so that the parties could effectively co-parent. Should that occur, Defendant may petition the Court to request joint legal custody." If the parties are unable to cooperate, joint custody is not an option. *Wright v. Wright*, 279 Mich.App. 291, 299–300, 761 N.W.2d 443 (2008). The trial court's finding that defendant had an anger issue was supported by the evidence. The trial court did not abuse its discretion in awarding sole legal custody to plaintiff.

C. Disqualification of the Trial Judge

*17 Defendant argues that further proceedings in this case should be decided by a different trial judge because the trial judge has formed an opinion regarding defendant and can no longer impartially adjudicate this divorce matter.

The proper way to raise a concern regarding alleged bias on the part of a trial judge is by a motion in the trial court pursuant to MCR 2.003, and not by attacks in an appellate brief. *Bracco v. Michigan Tech Univ.*, 231 Mich.App. 578, 601 n. 16, 588 N.W.2d 467 (1998). A party who does not move to disqualify the judge in the trial court has not preserved

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the issue for appellate review. MCR 2 .003; *In re Schmeltzer,* 175 Mich.App. 666, 673, 438 N.W.2d 866 (1989). Defendant does not dispute that she did not move to disqualify the trial judge under MCR 2.003, but urges this Court to rule that further decisions regarding the parties' divorce be decided by a different judge under this Court's authority to "enter any judgment or order or grant further or different relief as the case may require" pursuant to MCR 7.216(A)(7).

MCR 2.003(B)(1) provides that a judge is disqualified when "[t]he judge is personally biased or prejudiced for or against a party or attorney." Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v. Gates,* 256 Mich.App. 420, 440, 664 N.W.2d 231 (2003). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a " 'deep-seated favoritism or antagonism that would make fair judgment impossible' " and overcomes a heavy presumption of judicial impartiality." *Armstrong v. Ypsilanti Charter Twp.,* 248 Mich.App. 573, 597, 640 N.W.2d 321 (2001).

A ruling disqualifying the trial judge from making further decisions regarding this case is not warranted. The bases for defendant's claims that the trial judge must be disqualified are the trial court's "fundamental privilege error" and the trial court's inequitable division of debt, specifically the assignment of credit card debt to defendant. Even though the trial court's ruling regarding the admission of evidence following plaintiff's assertion of privilege was technically erroneous, this error benefited defendant as much as plaintiff in that it allowed defendant to explore defendant's mental and psychological condition. In addition, for reasons that will be explained more fully in this opinion *infra,* the trial court's division of debt was not inequitable, and the trial court did not err in ordering the parties to each repay their own debt. Contrary to defendant's contention, nothing in the record indicates that the trial court was fundamentally predisposed against defendant or actually biased or prejudiced against defendant. It is true that there was a great deal of conflicting testimony and that the trial court repeatedly resolved credibility issues in plaintiff's favor and against defendant. However, it is the function of the trial court to make credibility determinations. *Berger, supra* at 705, 747 N.W.2d 336. It is also true that the trial court used harsh language regarding defendant's credibility, stating that that it had "caught [defendant] in several lies in the course of the trial [,]" "that Defendant lied[,]" that "[t]he list of [defendant's] lies is long indeed[,]" and that "[d]efendant has repeatedly lied in her testimony." However, these opinions and conclusions were formed over the course of trial on the basis of facts introduced in evidence or events that occurred during trial and do not constitute a basis for disqualification. *People v. Wells,* 238 Mich.App. 383, 391, 605 N.W.2d 374 (1999). Because there is no indication in the trial court's findings or rulings that the trial judge was actually biased or prejudiced against defendant, there is no basis to disqualify the trial court from hearing further matters in this case.

D. Trial Court's Ruling Regarding Division of Debt

*18 Defendant argues that the trial court erred in ordering her to be solely responsible for debt on credit cards in her name. On appeal from a property division in a divorce action, an appellate court must first review the trial court's findings of fact for clear error. *Berger, supra* at 717, 747 N.W.2d 336. A finding is clearly erroneous if, after a review of the entire record, the court is left with the definite and firm conviction that a mistake was made. *Id.* The trial court's factual findings are accorded substantial deference. *Id.;* MCR 2.613(C). If the trial court's findings of fact are upheld, the appellate court must then decide whether the trial court's dispositional ruling was fair and equitable in light of those facts, and it will affirm the trial court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. *Berger, supra* at 717–718, 747 N.W.2d 336.

The trial court made the following ruling regarding the parties' debt:

> With regard to any other debt, although there was some testimony about credit card debt at an earlier time period of the marriage, there was no specific presentation regarding current debts along with a rationale for division. Rather, each had sources of income coming into the household and each contributed to expenses. As far as the Court understands there is no debt in both of the parties' names. Therefore, the Court will not divide debt, but merely order that each party is responsible for whatever debts are in their respective names.

In addition, the trial court ordered that each party was responsible to repay any monies loaned to the couple by their parents.

Defendant argues that the trial court erred in making her solely responsible to pay off credit cards in her name because she used the credit cards to support the parties and

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plaintiff's education. She testified that at the time of trial, there was a $30,000 balance on four credit cards that were in her name. She asserted that the cards were used to pay family expenses. According to plaintiff, defendant had about $40,000 in credit card debt when the parties married. Plaintiff further testified that his parents primarily paid the parties' living expenses after they were married. In addition, plaintiff's mother testified that she and plaintiff's father, a neurosurgeon, assisted plaintiff and defendant financially by giving them $24,000 for a down payment for a home, $12,000 to $15,000 for appliances and remodeling, and $10,000 to $12,000 for furniture. Furthermore, plaintiff's mother testified that she and plaintiff's father paid for plaintiff's law school out of an educational fund they established and funded for him.

In addition, there was also evidence that during the marriage, plaintiff had a credit card in his name for which his parents were paying the bill. Plaintiff's mother guessed that she and plaintiff's father had paid $100,000 total for plaintiff's credit card purchases. Some of the charges to plaintiff's credit card included charges to Bed, Bath and Beyond, Gymboree (a children's clothing store), and restaurants. Defendant acknowledged that plaintiff's parents gave the parties funds in the amount of $165,000 over the course of the parties' relationship. However, she claimed that less than ten per cent of plaintiff's credit card purchases were for household use and that 90 percent of his credit card purchases were personal in nature. Plaintiff's mother testified that while plaintiff had not signed a promissory note, she reasonably expected plaintiff to repay the money and thought that he had a moral obligation to do so. Plaintiff testified that the financial assistance provided by his parents was not a gift and that he and defendant had discussions regarding repaying his parents during the marriage and that defendant agreed that the couple should repay plaintiff's parents when they had more money. Defendant denied such conversations, however, claiming that plaintiff said he deserved the money his parents gave them and that he was "going to ride this until I can't ride it any longer, so just leave it alone." Defendant also stated that plaintiff's parents never made any demand upon plaintiff and defendant to repay any money. According to defendant, the first time there was any suggestion that the monies provided by plaintiff's parents was a loan rather than a gift was after plaintiff filed for divorce.

*19 The effect of the trial court's ruling ordering each party to pay any debts in their name, according to plaintiff, is that she was burdened with credit card debt that was marital debt and furthermore, that the trial court inequitably placed the greater debt burden on her. The trial court has the power to make credibility determinations regarding disputed joint debts, determine whether debts are joint debts or the individual responsibility of one party, and assign the debt to the party who incurred it. See *Lesko v. Lesko*, 184 Mich.App. 395, 401, 457 N.W.2d 695 (1990), overruled on other grounds sub nom 194 Mich.App. 284, 486 N.W.2d 116 (1992). In this case, the trial court appears to have rejected defendant's contention that she used the credit cards to support the parties and pay for plaintiff's education. To the extent that the evidence conflicted regarding the source of defendant's credit card debt, the issue involves a credibility contest between the parties, and this Court must defer to the trial court's determinations regarding witness credibility. *Johnson v. Johnson*, 276 Mich.App. 1, 11, 739 N.W.2d 877 (2007). In light of the conflicting evidence, this Court must not substitute its judgment for that of the trial court. *Id.*

Furthermore, the trial court ordered each party to repay any debts to their respective parents. There was evidence that plaintiff's parents paid $100,000 for a credit card in plaintiff's name, and some of the purchases on this card were made from stores like Bed, Bath and Beyond, Gymboree and restaurants and certainly sound like household expenses. There was also evidence that defendant's parents had gifted or loaned money to the parties, but the amount of money was not nearly as great as the money provided to the parties by plaintiff's parents. Although we concur with the trial court's assessment that it is questionable whether plaintiff would ever repay his parents, there was evidence that plaintiff's parents expected to be repaid. The amount of money provided by plaintiff's parents was more than three times the amount of defendant's credit card debt. Therefore, contrary to defendant's argument on appeal, the trial court's division of debt was arguably even more favorable to defendant than plaintiff. In sum, the trial court's division of debt was not inequitable, and it was not inequitable for defendant to be charged with paying off credit cards in her name.

In support of her argument on appeal, defendant has attached to her appellate brief numerous pages of credit card account information, apparently to bolster her argument that the debt accumulated on her credit card during the marriage was, at least in part, marital debt. This credit card account information was not part of the lower court record. This Court is limited on appeal to reviewing only the trial court record, MCR 7.210(A), and a party may not enlarge the record on appeal. *People v. Williams*, 241 Mich.App. 519, 524 n. 1, 616 N.W.2d

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710 (2000). Accordingly, we decline to consider defendant's evidence regarding her credit card account.

III. Conclusion

***20** In sum, for all the reasons articulated in this opinion, we affirm the judgment of divorce.

Affirmed.

All Citations

Not Reported in N.W.2d, 2009 WL 1506668

Footnotes

1 The physician-patient privilege, MCL 600.2157, provides, in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon....

2 The psychologist-patient privilege, MCL 333.18237, provides, in relevant part:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services....

In addition, the admissibility of privileged communications is governed by MCL 330.1750, which provides:

> (1) Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.
>
> (2) Privileged communications shall be disclosed upon request under 1 or more of the following circumstances:
>
> (a) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding....
>
> * * *
>
> (3) In a proceeding in which subsections (1) and (2) prohibit disclosure of a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, the fact that the patient has been examined or treated or undergone a diagnosis also shall not be disclosed unless that fact is relevant to a determination by a health care insurer, health care corporation, nonprofit dental care corporation, or health maintenance organization of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits.

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EXHIBIT H

Lundin v City of Benton Harbor, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2007 (Docket No. 264915), 2007 WL 752154

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2007 WL 752154
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Sharon LUNDIN, Plaintiff-Appellant,

v.

CITY OF BENTON HARBOR, Defendant-Appellee.

Docket No. 264915.

March 13, 2007.

Berrien Circuit Court; LC No.2004-003312-CZ.

Before: FORT HOOD, P.J., and SMOLENSKI and MURRAY, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right a judgment of no cause of action entered after a bench trial on her discrimination claim and claim for writ of superintending control. We affirm the judgment on plaintiff's claim for superintending control, vacate the judgment on her discrimination claim, and remand for further proceedings consistent with this opinion.

If the merits of plaintiff's case were the only issue on appeal, we would have no difficulty affirming the trial court's judgment of no cause of action. The trial court's decision was supported by the evidence presented during the bench trial, and the trial court did not misapply the law. However, that is not the only issue on appeal. Instead, plaintiff has also raised a very interesting issue regarding the application of MCR 2.312(A). In our view, the plain language of that court rule allowed plaintiff to serve the request for admission when she did. By operation of the rule, defendant's failure to answer or object to the request deemed all the matters admitted, which could have caused the trial court to reach a different conclusion on the merits of plaintiff's discrimination claim.[1] Therefore, for the reasons explained more fully below, we vacate the trial court's judgment on plaintiff's discrimination claim.

MCR 2.312(A) provides in pertinent part that,

Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. [Emphasis added.]

MCR 2.312(B)(1) then provides that in the normal course the responding party has 28 days in which to answer or object (or both) to the request.

The trial court's decision seemed to rest exclusively on its interpretation of MCR 2.312(A), which is a legal issue subject to de novo review. *Kmie v. Smith*, 269 Mich.App 217, 220; 711 NW2d 84 (2005). We use the canons of statutory construction when interpreting court rules, *Hyslop v. Wojjusik*, 252 Mich.App 500, 505; 652 NW2d 517 (2002), so our duty is to apply the plain and unambiguous language of the court rule. *Yudashkin v. Linzmeyer*, 247 Mich.App 642, 649; 637 NW2d 257 (2001). The trial court concluded that plaintiff had to serve the request to admit so as to allow defendant time to respond before discovery closed. However, MCR 2.312(A) clearly states that "within the time set for completion of discovery", ie., before the discovery cut-off date, a party may *serve* requests for admissions on another party. There are no exceptions, caveats, or limitations to the language within subrule A. Thus, plaintiff properly served the request to admit because service was accomplished before the discovery completion date.

Although the 28 day deadline for responding to the request came after the discovery completion date, "[a] request for admission is not a typical discovery device ... because the purpose 'is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial....' " *Radtke v. Miller, Canfield, Paddock & Stone*, 453 Mich. 413, 420 n 6; 551 NW2d 698 (1996). As this is the primary tool for a request for admission,[2] it could be served anytime up to the end of discovery, for the forthcoming responses would not be providing additional information, but only objections, admissions or denials with explanation. MCR 2.312(B)(1)-(4). And, if motions are filed over the requests or responses, MCR 2.312(D) specifically indicates that the court may resolve the issue at a pretrial conference or at any other time before trial. Hence, the court rule contemplates that issues surrounding the requests or responses will need to be addressed after the close of

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discovery, ie., at a pretrial conference or at any other time before trial.

*2 Pursuant to this analysis, defendant had an obligation to respond to plaintiff's properly served request for admissions. By failing to do so "the matters in the request are deemed admitted," *Medbury v. Walsh*, 190 Mich.App 554, 556; 476 NW2d 470 (1991), "unless the trial court, on motion, permits withdrawal or amendment for good cause shown." *Employers Mutual Casualty Co v. Petroleum Equip Inc*, 190 Mich.App 57, 62; 475 NW2d 418 (1991). Defendant never filed anything that could be amended, and even if it did, it never moved the trial court to do so.[3] Accordingly, all the matters within plaintiff's request for admissions should have been deemed admitted.

Accepting these matters as admitted would not necessarily result in a different decision by the trial court on the merits of plaintiff's discrimination claim. Most of the requests establish procedural type facts that would likely have no bearing on a decision on the merits, except perhaps for the matters requested to be admitted in numbers nine and twelve. Nevertheless, the trial court is the proper forum to make that initial decision. Accordingly, we vacate in part the trial court's judgment and remand for further proceedings on plaintiff's discrimination claim.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

SMOLENSKI, J. (concurring in part and dissenting in part). In this hiring dispute, plaintiff appeals as of right from the entry of judgment in favor of defendant after a bench trial.

I. Facts and Procedural History

In August 2002, plaintiff applied for a police officer position with the Benton Harbor Police Department (the Department). At the time plaintiff applied, the Department was operating under a hiring policy adopted in February 1998. The hiring policy required applicants to submit a completed application form and achieve a 70 percent or higher score on a written examination, after which they were required to submit to a background check. Those who passed the background check were invited for an oral interview. Applicants who passed the oral interview were then placed on an eligibility list. The applicants on the list were ranked by their combined written examination and oral interview scores. After the Civil Service Board certified the list, and a position that the city decided to fill became available, the Department had to make an offer of employment to the first person on the eligibility list. However, the offer was conditional upon the candidate receiving police certification from the Michigan Law Enforcement Officers Training Council (MLEOTC) and passing a physical examination, a psychological evaluation, a drug test, and vision and hearing tests. Subsequent vacancies were to be filled by the remaining candidates on the eligibility list. Once an eligibility list was certified, it remained in effect for two years or until there were no more candidates on the list.

Under the hiring policy, if a candidate was not certified by the MLEOTC, the Department was required to send the candidate to the first available MLEOTC Regional Police academy at the Department's expense. While the candidate attended the academy, the Department paid the candidate a training wage and provided benefits. Milton Agay, the former Public Safety Director for Benton Harbor, testified that the policy was designed to give community members the opportunity to become Benton Harbor police officers, and it specifically targeted women and minorities who could not afford to be certified.

*3 Plaintiff passed the written examination, the oral interview and the background check. Based on her combined written and oral scores, she was placed on the eligibility list. She was ranked number four. The Department submitted the list to the Civil Service Commission for certification in October 2002. The Civil Service Commission certified the list. The first two candidates on the list, who had their certifications, were hired. The next candidate on the eligibility list, who was also certified, was offered a job but failed one of the examinations and the offer was withdrawn. At this point, plaintiff was the only remaining candidate on the eligibility list.

The Department, however, never contacted her. In December 2002, plaintiff contacted the chief of police to discuss attending the police academy. His secretary informed plaintiff that she would need to speak to the city personnel director, who told plaintiff that the city was no longer sending people to the police academy. When plaintiff complained that the city was not following the hiring policy, the city personnel director told her that the decision came directly from the police chief. He also told plaintiff that the city's decision was based on

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the fact that the city had sent too many people to the police academy who then left for better jobs. At trial, the police chief testified that another reason for the policy change was that it cost too much money to send people to the academy and, if the city hired certified candidates, they would be on the job much more quickly.

In August 2004, plaintiff sued the City of Benton Harbor. In her complaint, plaintiff alleged that the Department refused to hire based on her gender or age in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, and, in a separate count, petitioned the trial court to exercise its superintending control to order defendant to place her at the top of the hiring list. After a bench trial, the court determined that plaintiff failed to state a cause of action for either of her claims.

This appeal followed.

II. Admissions

Plaintiff first argues that the trial court erred when it refused to admit into evidence a request for admissions that plaintiff had served on defendant prior to the close of discovery, but that defendant had not answered. Because I believe plaintiff's request was untimely, I conclude that it was within the trial court's discretion to refuse to consider it as evidence. Therefore, I must respectfully dissent from the majority opinion on this issue.

Whether the trial court properly interpreted the applicable court rules is a question of law that this Court reviews de novo. *CAM Construction v. Lake Edgewood Condo Assoc*, 465 Mich. 549, 553; 640 NW2d 256 (2002). When construing a court rule, this Court applies the same legal principles that govern the construction and application of statutes. *People v. Phillips*, 468 Mich. 583, 589; 663 NW2d 463 (2003). Accordingly, when the language of the court rule is unambiguous, this Court will enforce it as written, without further judicial construction or interpretation. *Grievance Administrator v. Underwood*, 462 Mich. 188, 194; 612 NW2d 116 (2000).

*4 Under MCR 2.312(A), a party may, within the time for completion of discovery, "serve on another party a written request for the admission of the truth of a matter ... stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request." A party served with a request to admit must normally object to the request or answer it in writing within 28 days of being served or the request is deemed admitted. MCR 2.312(B)(1). However, it is within the discretion of the trial court to shorten or lengthen the time within which a party is required to answer a request to admit. *Id.*

In the present case, plaintiff served defendant with a request to admit on May 11, 2005. Hence, defendant would normally have had to object or answer the request by June 8, 2005. Defendant elected not to respond to the request. At the bench trial, plaintiff moved for the admission of the request to admit. Defendant responded by arguing that it was not required to answer because the request was served less than 28 days before the close of discovery and, therefore, was untimely. Plaintiff responded that MCR 2.312(A) only required the requesting party to serve the request before the close of discovery. It did not require the requesting party to leave adequate time for the served party to answer within the time set for discovery. The trial court disagreed and concluded that the request was untimely. Therefore, it refused to admit the request for admissions into evidence.

Admissions under MCR 2.312 are " 'formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Radtke v. Miller, Canfield, Paddock & Stone*, 453 Mich. 413, 420; 551 NW2d 698 (1996), quoting 2 McCormick, Evidence (4th ed), § 254, p 142. Because a request to admit does not seek to discover a fact or opinion that is unknown to the requesting party, it is not, in a technical sense, a discovery procedure. See *Gluck v. Ansett Australia, Ltd.*, 204 FRD 217, 218-219 (D DC, 2001) (noting that there was a split of opinion within the federal courts as to whether a request to admit was a discovery procedure subject to the discovery deadline under the federal rules of procedure). However, because MCR 2.312 serves the purpose of narrowing the disputed factual issues, when used properly, it serves as a tool to limit and define the areas that are subject to discovery. In this sense, it is a discovery tool. This is consistent with the placement of MCR 2.312 in the subchapter of the court rules dedicated to discovery. In addition, by its own terms, MCR 2.312 is limited to matters within the scope of discovery, as provided by MCR 2.302(B), and must be served "[w]ithin the time for completion of discovery...." See MCR 2.312(A). Finally, treating a request to admit as a discovery procedure subject to the discovery deadline is consistent with the "just,

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speedy, and economical determination of every action...." MCR 1.105; see also *Gluck, supra* at 219. For these reasons, I conclude that MCR 2.312 is, for purposes of the court rules, a discovery procedure subject to the general rules applicable to discovery, including MCR 2.301(A), which requires the trial court to issue an order setting the time for the completion of discovery under MCR 2.401(B)(2)(a). Because discovery must be *completed* by the date established by the scheduling order, see MCR 2.401(B)(2)(a), a party serving a request to admit must serve the request at least 28 days before the discovery deadline or it will be untimely.[1] For these reasons, I would conclude that the trial court did not err when it determined that plaintiff's request to admit was untimely and, on that basis, declined to admit the request into evidence.

III. Elliott-Larsen Civil Rights Claim

***5** Having concluded that the trial court did not err in refusing to admit plaintiff's request for admissions into evidence, I would also conclude that the trial court did not err when it found that plaintiff failed to establish a prima facie case of discrimination under ELCRA. Therefore, I would affirm the trial court's judgment of no cause for action on that claim.

MCL 37.2202(1)(a) provides, in relevant part, that an employer may not discriminate against an individual because of the individual's sex or age. A plaintiff may establish proof of discriminatory treatment in violation of the ELCRA either by direct evidence or by indirect or circumstantial evidence. *Sniecinski v. Blue Cross & Blue Shield of Michigan*, 469 Mich. 124, 132; 666 NW2d 186 (2003). In the present case, plaintiff attempted to establish discrimination through indirect evidence.

In an action alleging employment discrimination based on indirect evidence of discrimination, the plaintiff must present a rebuttable prima facie case through proofs that would allow a fact-finder to infer that the plaintiff was the victim of unlawful discrimination. *Id.* at 134. In Michigan, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v. Green*, 411 U.S. 792; 93 S Ct 1817; 36 L.Ed.2d 668 (1973). *Sniecinski, supra* at 133-134. Under *McDonnell Douglas*, a plaintiff can make a prima facie showing of discrimination by showing that (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the employment position; and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v. Ford Motor Co*, 464 Mich. 456, 463; 628 NW2d 515 (2001). A plaintiff has made a showing on the fourth element, for example, when the plaintiff has presented proof that either the job was given to someone under circumstances that create an inference of unlawful discrimination or that the defendant treated the plaintiff differently than persons of a different class for the same or similar conduct. *Id.* at 468.

After the close of proofs, the trial court made the following findings of fact and conclusions of law:
In the instant case, the court ... finds that frankly I don't think the plaintiff has even made out a prima facie proof-case of discrimination on the basis of age or gender, for a couple reasons.

For one thing, there was no evidence of her age in the record, or that her age was a factor in anything. However, I think the city acquiesces that she was-she was 40 or over. I don't know if she was or wasn't, but I guess the city acquiesces in that because it was referred to by counsel in closing statement-closing argument. So I'm going to assume that she's 40 or over, although I didn't actually hear testimony to that effect.

Secondly, the record indicates that there have been a number of females that have been hired in various positions during Chief Harris' administration. I counted 23 patrolmen-patrol officers hired during his administration, of which [ ] six were female, which is a little over 25 percent.

***6** With regard to the age factor, in looking over hires, these aren't necessarily all patrol officers, but it looks like there were a number of people hired, one, two, three, four, five, six at least, that are over 40 during Chief Harris' administration.... So it just doesn't look like gender or age are a factor here in any employment decisions.

* * *

There's just nothing in the record to indicate that either plaintiff's gender or her age were adverse employment factors that were used to discriminate against her, and not send her back a second time to the police academy, or hire her as a cadet, pending going back to the police academy.

Bottom line is, you know, I just don't think a prima facie case has been made. Even if I'm-if I would say that it did, I would say that the city has come forward with, and articulated, a

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legitimate non-discriminatory reason, which is we needed to get people in the cars, on the road, in the streets, as soon as possible....

So for that reason the court finds no cause of action in this matter.

The trial court's factual findings are not clearly erroneous. Plaintiff argued, and the trial court acknowledged, that she was a member of two different protected classes: she testified that she was born in 1962, making her 40 years of age when she applied for the position, and she is clearly a woman. It was also demonstrated that she suffered an adverse employment action when defendant refused to hire her. With respect to job qualification, plaintiff was qualified for the position under the 1998 hiring policy, which was in place when she applied. The evidence did not, however, clearly establish that the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. Every person who was hired as an entry level police officer after plaintiff applied was certified-a qualification plaintiff did not possess. Moreover, the man first hired after plaintiff was passed over was hired under the new hiring policy. Also, the police chief testified that he had hired three women and four men over the age of 40 during his tenure. Plaintiff admits that many police officer candidates were hired during the two-year time period during which she was eligible and that, at least three were women, although the women were younger than 40 years of age. She also admits that males over age 40 were hired and all had established law enforcement experience. Under the circumstances, plaintiff failed to establish an inference of discrimination as to her age or sex.

Further, even if the trial court clearly erred when it found that plaintiff had not established a prima facie case a discrimination based on her sex combined with her age, see e.g. *Hall v. Missouri Hwy and Trans Comm*, 995 F Supp 1001, 1005 (ED Mo, 1998); *Meyers v. Goodwill Industries of Akron, Inc*, 701 N.E.2d 738, 743 (Ohio App, 1997), I would conclude that the trial court did not clearly err when it determined that defendant advanced legitimate, nondiscriminatory reasons for not hiring plaintiff, which plaintiff failed to rebut. Specifically, defendant stated that it had a need for officers who were available for immediate deployment and could not afford either the time or resources to send plaintiff to the police academy. Once defendant produced legitimate nondiscriminatory reasons for not hiring plaintiff, the burden shifted to plaintiff to prove by a preponderance that the stated reason was merely a pretext. *Meagher v. Wayne State Univ*, 222 Mich.App 700, 711; 565 NW2d 401 (1997). Plaintiff failed to present any evidence that these reasons were merely pretexts. Therefore, I would conclude that the trial court properly granted judgment in favor of defendant on this issue.

IV. Superintending Control

*7 Finally, plaintiff argues that the trial court erred when it determined that plaintiff had no cause for action on her claim that defendant failed to properly follow its hiring policy and the requirements of the civil service act applicable to the hiring of fire fighters and police officers. See MCL 38.501 *et seq.* We disagree.

Although MCL 38.511 governs the hiring of police officers by municipalities that are subject to the civil service act, the act does not itself provide civil remedies for violations of its terms. See *Fraternal Order of Police Labor Council v. Flint Twp*, 425 Mich. 382, 389; 390 NW2d 146 (1986) (noting that the only remedies codified in the act are the criminal penalties provided under MCL 38 .516). Presumably for this reason, plaintiff characterized her claim that defendant violated MCL 38.511 as a petition asking the trial court to exercise its power of superintending control to order defendant to place plaintiff at the top of the current hiring list.

A writ of superintending control is an original action designed to order a lower court or tribunal to perform a legal duty. See MCR 3.302; *Shepherd Montessori v. Ann Arbor Twp*, 259 Mich.App 315, 346-347; 675 NW2d 271 (2003). Although decisions of municipal civil service commissions are subject to review through original actions for superintending control, see *In re Payne*, 444 Mich. 679, 687; 514 NW2d 121 (1994) (opinion of Boyle, J.), plaintiff did not and has not alleged that the civil service commission failed to perform a legal duty. Instead, plaintiff claims that, because she was next on the list certified by the civil service commission in 2002, the Department was legally obligated to hire her once it elected to hire a new officer during the period that the list was in force. See *DeGrace v. Shelby Twp*, 150 Mich.App 587; 389 NW2d 137 (1986). Because the Department and its agents are not lower courts or tribunals, their decisions are not subject to the writ of superintending control. Therefore, the trial court properly determined that plaintiff was not entitled to relief under a writ of superintending control.

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For the reasons stated above, I would conclude that there were no errors warranting relief. Therefore, I would affirm the trial court's judgment in full.

All Citations

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Footnotes

1 For the reasons stated by the dissent, with which we are in full agreement, plaintiff's claim for superintending control was properly dismissed and would have no chance of success on a remand.

2 While a request to admit can also be used to refine the issues for discovery, if that is the intended purpose the request would naturally be served well before the discovery cut-off date (likely at the commencement of discovery), which would still be "within the time for completion of discovery." MCR 2.312(A).

3 Unfortunately, defendant has also not filed a brief with this Court.

1 As already noted, the trial court has the discretion to shorten or extend the period within which a request to admit must be answered. See MCR 2.312(B)(1).

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EXHIBIT I

Dassault Systemes, SA v Childress, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued October 27, 2019 (Case No. 09-10534), 2009 WL 3602084

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2009 WL 3602084
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

DASSAULT SYSTEMES, S.A., Plaintiff,

v.

Keith CHILDRESS d/b/a Practical Catia Training, Defendant.

No. 09–10534.
|
Oct. 27, 2009.

Attorneys and Law Firms

Douglas P. Lalone, Rader, Fishman, Bloomfield Hills, MI, for Plaintiff.

Keith Childress Algonac, MI, pro se.

OPINION AND ORDER

LAWRENCE P. ZATKOFF, District Judge.

I. INTRODUCTION

*1 This matter is before the Court on Plaintiff's "Motion for Protective Order and Privacy Act Order and for Leave to Serve Subpoena on FBI" [dkt 12]; Defendant's "Motion for Protective Order and to Strike Certain Information from Complaint" [dkt 16]; and Plaintiff's motion for default judgment [dkt 19]. The parties have fully briefed the motions.[1] The Court finds that the facts and legal arguments are adequately presented in the parties' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(e)(2), it is hereby ORDERED that the motions be resolved on the briefs submitted. For the following reasons, Plaintiff's Motion for Protective Order and Privacy Act Order and for Leave to Serve Subpoena on FBI [dkt 12] is GRANTED; Defendant's Motion for Protective Order and to Strike Certain Information from Complaint [dkt 16] is DENIED; and Defendant is ordered to SHOW CAUSE as to why Plaintiff's motion for default judgment [dkt 19] should not be granted.

II. BACKGROUND

Plaintiff, a French corporation, is the developer of a computer software design program known as CATIA. Plaintiff has held a registered trademark, U.S. Reg. No. 1,274,136, on its CATIA software since 1984. *See* Compl. Ex. A. Plaintiff also holds a registered copyright on CATIA Version 5, Release 12 ("Release 12"), Registration No. 5–856–769, and has a pending copyright registration for its most recent release, CATIA Version 5, Release 14 ("Release 14"). *See* Compl. Ex. C; ¶ 16.

Defendant, appearing *pro se,* is a design engineer. Defendant, along with some familial assistance, operates a business under the name of Practical CATIA Training. Practical CATIA Training provides its customers instruction in the use of CATIA software.

CATIA software requires a license and Target ID in order to execute the program on a computer. Plaintiff alleges that Defendant purchased one license for Release 12 and was assigned a corresponding Target ID. Plaintiff further contends that Defendant cloned the software and Target IDs onto 20 computers, which Defendant used to operate his business. Plaintiff maintains that these actions infringe its copyright and trademark rights and violate the Michigan Consumer Protection Act, Mich. Comp. Laws. § 445.901.

Defendant responded to Plaintiff's complaint by filing a motion for a more definite statement, stay of the proceedings, and evidentiary hearing. In that motion, Defendant alleged that Plaintiff was in possession of secret grand jury information and had used said information in its complaint, all in violation of Fed.R.Crim.P. 6(e)(2). The Court denied the motion, finding that Defendant had not adequately explained how the information contained in the complaint implicated matters occurring before a grand jury or how Plaintiff was subject to discipline under Fed.R.Crim.P. 6(e) (2).

While Defendant's motion was pending, Defendant became aware that Plaintiff had served a subpoena on the Federal Bureau of Investigation (FBI) seeking access to evidence that the FBI had seized from Defendant. Defendant filed a motion to quash the subpoena [dkt 10], arguing that the subpoena was untimely under Fed.R.Civ.P. 26 and that the information sought by Plaintiff was protected under Fed.R.Crim.P. 6(e) (2). The parties stipulated [dkt 11] that Plaintiff would

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withdraw its subpoena and Defendant would withdraw his motion to quash, and the Court entered a corresponding order [dkt 13].

*2 Plaintiff has now moved for the Court's permission to serve its subpoena prior to a Rule 26(f) conference and for a protective order and Privacy Act order. Defendant challenges this motion and has filed his own motion for a protective order, and he seeks to strike certain information from the complaint. Plaintiff also seeks a default judgment because Defendant has not yet filed an answer to the complaint.

III. ANALYSIS

A. Plaintiff's Motion for Leave to File Subpoena

Plaintiff seeks leave pursuant to Fed.R.Civ.P. 26(d) to serve a subpoena on the FBI to procure computers and documents seized from Defendant. Plaintiff also seeks the entry of a protective order under Rule 26(c)(1), and a Privacy Act order pursuant to a FBI request. Defendant continues to insist that this evidence is protected by Fed.R.Crim.P. 6(e)(2).

i. Fed.R.Crim.P. 6(e)

This analysis requires a detailed discussion of *In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir.1988), this circuit's seminal case on the subject. In that case, the Sixth Circuit adopted a "rebuttable presumption" approach to issues of grand jury secrecy:

> The general rule, however, must be that confidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be "matters occurring before the grand jury" just as much as testimony before the grand jury. The moving party may seek to rebut that presumption by showing that the information is public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry, but it must bear the burden of making that showing, just as it bears the burden of showing that there is a "particularized need ."

Id. at 866–67.

The Court denied Defendant's original motion because Defendant had not presented any evidence that the alleged secret grand jury information was procured through the grand jury's coercive powers. Defendant now presents evidence strongly suggesting that the FBI and grand jury investigations are intertwined. Attached to Defendant's response to Plaintiff's motion are three grand jury subpoenas to produce documents, along with a search warrant for Defendant's business address. *See* Def.'s Resp. Br. Exs. 1–4. All four documents bear the same date of issuance. The search warrant was issued to the same FBI special agent who is listed as the investigative agent on the subpoenas. Thus, the Court finds that Defendant's computers and documents were procured by the grand jury's coercive powers as defined by the Sixth Circuit.

As the evidence Plaintiff seeks was not public information, and Defendant has proffered evidence suggesting that his computers were seized by the coercive powers of the grand jury, the Court is constrained by the Sixth Circuit's holding in *In re Grand Jury Proceedings*—a rule more stringent than those of its sister circuits. *Compare id. with United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir.1993) ("[W]e think that the disclosure of business records independently generated and sought for legitimate purposes would not 'seriously compromise the secrecy of the grand jury's deliberations' ") (citations omitted); *DiLeo v. C.I.R.*, 959 F.2d 16, 20 (2d Cir.1992) ("The records ... were sought for their own sake and not to learn what took place before the grand jury and clearly did not compromise the secrecy of the grand jury's deliberations."). Accordingly, the presumption of non-disclosure applies.

*3 "Mere contact with a grand jury, however, does not change every document into a matter 'occurring before a grand jury' within the meaning of Rule 6," and the seeking party has the opportunity to rebut the presumption of non-disclosure. *United States v. Rutherford*, 509 F.3d 791, 795 (6th Cir.2007); *see also In re Grand Jury Proceedings*, 196 F.R.D. 57, 64 (S.D.Ohio 2000) (moving party met burden that subpoenaed documents were available through civil discovery and did not reveal the scope or direction of the grand jury's inquiry).

Plaintiff contends that the evidence which it seeks is otherwise discoverable because it consists of Defendant's business records and was prepared prior to any grand jury action. Further, Plaintiff disputes that the evidence at issue would reveal the nature, scope, or direction of the grand jury's inquiry.

The Court agrees that the seized evidence is otherwise available through civil discovery. Defendant's business records are undoubtedly discoverable evidence. *See, e.g.,*

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In re Grand Jury Proceedings, 196 F.R.D. at 64 (holding that presumption of grand jury secrecy was rebutted because business records were otherwise available through discovery). Furthermore, inspection of a computer's contents is frequently permitted in cases involving copyright infringement of computer files or programs. *See, e.g., Capitol Records, Inc. v. Alaujan*, Nos. 03CV11661–NG, 07cv11446–NG, 2009 WL 1292977, at *2 (D.Mass. May 6, 2009) (ordering inspection of computer that had a "sufficiently close" connection to the alleged copyright violation); *Pharmacy Records v. Nassar*, 248 F.R.D. 507, 516 (E.D.Mich.2008) (noting that magistrate judge had granted motion to compel production of computers in music copyright case); *Xpel Techs. Corp. v. Amer. Filter Film Distribs.*, No. SA–08–CV–0175, 2008 WL 744837, at *1 (W.D.Tex. Mar.17, 2008) (granting order for expedited computer forensic imaging in copyright case). Finally, the Court cannot conceive how allowing Plaintiff access to this evidence would reveal anything about the nature, direction, or scope of the grand jury's inquiry.

Therefore, Plaintiff has overcome the presumption of non-disclosure, and the evidence at issue is not protected by Fed.R.Civ.P. 6(e)(2). *See In re Grand Jury Subpoenas*, 454 F.3d 511, 522 (6th Cir.2006) (noting that the "discovery exception to grand jury secrecy has been interpreted somewhat broadly"). To hold otherwise would allow Defendant to use the shield of Fed.R.Crim.P. 6(e)(2) as a sword to prevent Plaintiff from obtaining evidence that would be discoverable but for the grand jury proceedings.

ii. Fed.R.Civ.P. 26(d)(1)

Plaintiff maintains that Defendant refuses to participate in a Rule 26(f) conference until the outstanding motions have been decided. Plaintiff insists that expedited discovery is necessary to obtain access to the computers before they are returned to Defendant in order to "preserve the integrity of the original material that was seized by the FBI." Plaintiff's proposed subpoena seeks "[a]ll computers, materials, and documents that were seized at Keith Childress' business, Practical Catia."

*4 Rule 26(d)(1) prevents a party from seeking discovery materials "from any source before the parties have conferred as required by Rule 26(f) except ... when authorized by these rules, by stipulation, or by court order." A party must show good cause when seeking expedited discovery prior to a Rule 26(f) conference. *See Arista Records, LLC v. Does 1–4*, No. 1:07–cv–1115, 2007 WL 4178641, at *1 (W.D.Mich. Nov.20, 2008).

The Court finds that Plaintiff has shown good cause for expedited discovery in this matter. Defendant's refusal to file an answer or participate in a Rule 26(f) conference has greatly impeded discovery. Further, Defendant's argument that Plaintiff's proposed subpoena is not "narrowly tailored" is without merit. The Court finds that Plaintiff's request is narrowly tailored to include evidence that is available through civil discovery and relevant to its allegations of copyright infringement.

Therefore, Plaintiff's motion for leave to serve subpoena on the FBI is GRANTED. The Court also GRANTS Plaintiff's motion for a protective order and Privacy Act order, and it will enter Plaintiff's proposed protective order contemporaneously with this order. In addition to the requirements and limitations contained in the protective order, Plaintiff shall not in any manner destroy, alter, or otherwise tamper with Defendant's computers and other materials, and the evidence shall be returned in the same condition as it was received.

B. Defendant's Motion for Protective Order and to Strike

Defendant has moved (1) for a protective order barring Plaintiff from acquiring secret grand jury information; and (2) to strike certain paragraphs of Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(f). Plaintiff challenges the motion on several procedural grounds.

1. Motion for Protective Order

The Court construes Defendant's motion for a protective order as a request to protect the evidence currently in the possession of the FBI. As discussed *supra*, the seized evidence is not protected by Fed.R.Civ.P. 6(e)(2) as matters occurring before a grand jury. Therefore, Defendant's motion for a protective order is DENIED.

2. Motion to Strike

Defendant also requests that the Court strike paragraphs 17, 18, 19, and 21 from Plaintiff's complaint. These paragraphs state as follows:

> 17. In 2003, Defendant Keith Childress, purchased one license for CATIA® Version 5, Release 12. On information and belief, Defendant Childress and his company were able to crack and clone the Target IDs on the license and clone

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the software on twenty machines on order to train students on the software.

18. On October 30, 2006, Defendant Childress and his company Practical Catia were raided by the Federal Bureau of Investigation. The Federal Bureau of Investigation confiscated 20 computers with the cloned software which are reproductions of, or derivations of, Plaintiff's CATIA® software. The raid took place at Defendants' office which continues to be located in Algonac, Michigan.

*5 19. Following the raid in Defendants' office, the FBI discovered that computers that were confiscated at Defendants' office had installed thereon Plaintiff's CATIA® Version 5, Release 14 software. Each computer had the same license information and Target ID for the one license Defendants had purchased. The same Target ID on each of the machines indicates that the software was cloned and is a bootlegged copy.

21. On or about April 2007, Defendants requested a license to use the CATIA® software on multiple machines. The request was denied because of the FBI's investigation of Defendant's illegal usage of Plaintiff's software.

In support of his motion to strike, Defendant cites *Finn v. Schiller*, 72 F.3d 1182 (4th Cir.1996), and he avers that many similarities exist between information withdrawn from the record in that case and the information Defendant seeks to strike.

Defendant fails to note a detail of great importance, however, that distinguishes *Finn* from the present case. In *Finn*, the defendant was an Assistant United States Attorney (*i.e.*, a party subject to Rule 6(e)(2)). Plaintiff here is a private corporation not implicated by the restrictions of Rule (6)(e)(2). "No obligation of secrecy can be imposed on any person except those listed in the Rule [ ]." 1 Charles Alan Wright and Andrew D. Leipold, *Federal Practice and Procedure*, § 106 pp. 362–63 (4th ed.2008). That is, Plaintiff cannot be sanctioned under Rule 6(e)(2) for further dissipating secret grand jury material even if the complaint contained such information. *See United States v. Jeter*, 775 F.2d 670, 675 (6th Cir.1985); *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 689 (N.D.Ga.1998).

Defendant also contends that the allegations in the complaint are "immaterial" and "scandalous" within the meaning of Fed.R.Civ.P. 12(f). Defendant argues that the paragraphs at issue are immaterial because any evidence relating to the FBI search and grand jury investigation is undiscoverable and inadmissible. Pleadings are immaterial when the material contained within "has no essential or important relationship to the claim for relief...." 5C Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1382 p. 458 (4th ed.2008). The referenced allegations form the basis of Plaintiff's claim for relief and are therefore material to the pleadings.

Nor are the allegations scandalous within the meaning of Rule 12(f). Under the Rule, "[i]t is not enough that the matter offends the sensibilities of the objecting party of the person who is the subject of the statement in the pleading, if the challenged allegations describe acts or events that are relevant to the action." *Id.* at 466–67. The allegations in the challenged paragraphs are highly relevant to Plaintiff's claim; in fact, striking the paragraphs would eviscerate Plaintiff's cause of action. Therefore, the allegations are not scandalous.

*6 Plaintiff cites other procedural violations to support a denial of Defendant's motion, including Defendant's alleged failure to seek concurrence pursuant to Fed.R.Civ.P. 26(c)(1) and E.D. Mich. L.R. 7.1, and it observes that Defendant is barred from seeking further relief by Fed.R.Civ.P. 12(g)(2) (limiting further Rule 12 motions). The Court finds that the above reasons fully justify the denial of Defendant's motion, and Plaintiff's additional arguments need not be addressed.

C. Plaintiff's Motion for Default Judgment

Plaintiff has requested that the Court enter a default judgment, noting that Defendant did not comply with the Court's May 22, 2009, order requiring Defendant to file an answer to Plaintiff's complaint within 30 days. Defendant maintains that he did not file his answer because of the outstanding issues that necessitated the current motions.

Defendant violated the Court's direct order that he file his answer within 30 days of the May 22, 2009, order. Accordingly, it is **HEREBY ORDERED** that Defendant **SHOW CAUSE**, in writing, no later than 5 p.m. on Tuesday, November 3, 2009, as to why the Court should not grant Plaintiff's motion for default judgment. Failure to comply with this order may result in the entry of a default judgment and/or the imposition of sanctions. Defendant's response shall contain specific and accurate legal support, including pinpoint citations to authority relied on and shall be limited to five pages and comply with E.D. Mich. L.R. 5.1. Additionally, Defendant shall fax his response to Judge Zatkoff's Chambers in Port Huron, at 810–984–1480.

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IV. CONCLUSION

Accordingly, and for the above reasons, IT IS HEREBY ORDERED that Plaintiff's Motion for Protective Order and Privacy Act Order and for Leave to Serve Subpoena on FBI [dkt 12] is GRANTED;

IT IS FURTHER ORDERED that Defendant's Motion for Protective Order and to Strike Certain Information from Complaint [dkt 16] is DENIED;

IT IS FURTHER ORDERED that Defendant SHOW CAUSE by 5 p.m. on Tuesday, November 3, 2009, as to why Plaintiff's motion for default judgment [dkt 19] should not be granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3602084

Footnotes

1 The Court DENIES Defendant's motion to exceed the 5--page limit on reply briefs [dkt 22] and has considered only the first 5 pages of that brief. The Court also DENIES Defendant's motions for leave to file sur-replies [dkts 24 & 27], as such filings are not anticipated by the local pleading rules. Finally, the Court ORDERS that Defendant's sur-replies [dkts 24 & 27] be STRICKEN from the record.

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EXHIBIT J

Arista Records, LLC v Does 1-4, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued November 20, 2007 (Case No. 1:07-cv-1115), 2007 WL 4178641

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2007 WL 4178641
United States District Court,
W.D. Michigan,
Southern Division.

ARISTA RECORDS, LLC, a Delaware limited liability company; Atlantic Recording Corporation, a Delaware corporation; BMG Music, a New York general partnership; Capitol Records, Inc., a Delaware corporation; Elektra Entertainment Group Inc., a Delaware corporation; Laface Records LLC, a Delaware limited liability company; Sony BMG Music Entertainment, a Delaware general partnership, UMG Recordings, Inc., a Delaware corporation; Virgin Records America, Inc., a California corporation; and Warner Bros. Records Inc., a Delaware corporation, Plaintiffs,
v.
DOES 1-4, Defendants.

No. 1:07-cv-1115.
|
Nov. 20, 2007.

Attorneys and Law Firms

Jason Randall Gourley, Soble Rowe & Krichbaum LLP, Ann Arbor, MI, for Plaintiffs.

OPINION AND ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION FOR LEAVE TO TAKE IMMEDIATE DISCOVERY

PAUL L. MALONEY, District Judge.

*1 Plaintiffs, various members of the music recording industry, filed a complaint against four unknown individuals for copyright infringement. With the complaint, Plaintiffs filed an application for leave to take immediate discovery under Federal Rules of Civil Procedure 26 and 45. (Dkt. No. 2).

Plaintiffs allege the four unknown Defendants used peer-to-peer (P2P) online file sharing systems to download or distribute Plaintiffs' copyrighted music. Plaintiffs have identified the computer used by each of the four defendants for the infringing activities through the unique numerical Internet Protocol (IP) address assigned to each computer. Furthermore, Plaintiffs have provided a list of some of the songs that were improperly downloaded or distributed at each IP address. (Exhibit A to complaint). Plaintiffs allege Defendants have illegally downloaded or distributed between 70 and 150 files each. (Exhibit A to complaint). The IP addresses were distributed by Michigan State University (MSU), the third party internet service provider (ISP). Plaintiffs request leave to subpoena information identifying Defendants from MSU.

I. DISCOVERY RULES

A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Fed.R.Civ.P. 26(d). Some courts, under their broad discretion to manage discovery, have allowed expedited discovery prior to a Rule 26 hearing upon a showing of good cause. *Quest Commc'n Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003); *Pod-ners, LLC v. N. Feed & Bean of Lucern LLC*, 204 F.R.D. 675, 676 (D.Colo.2002). This Court has found no published cases addressing this proposition of law within the Sixth Circuit, although there are several unpublished cases. *See e.g. In re Paradise Valley Holdings*, No. 03-34704, 2005 WL 3841866 (Bankr.E.D.Tenn. Dec.29, 2005) and *Whitfield v. Hochsheid*, No. C-1-02-218, 2002 WL 1560267 (S.D.Ohio 2002). This Court notes the pending changes to Rule 26(d) specifically authorize discovery prior to a Rule 26 hearing "by court order." Fed.R.Civ.P. 26(d)(1) (proposed amendment effective Dec. 1, 2007 absent contrary Congressional action). This Court finds the reasoning in *Quest* persuasive and adopts the holding. Plaintiffs have been able to establish good cause in situations involving requests for a preliminary injunction where the moving party alleges infringement. *Quest*, 213 F.R.D. at 419.

A number of district courts have found good cause to permit expedited discovery where the recording industry has IP addresses for individuals who have illegally

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distributed or downloaded music, but do not have the name of the person whose computer was assigned that address. *See Capitol Records, Inc. v. Doe,* No. 07-cv-1570, 2007 WL 2429830 (S.D.Cal. Aug.24, 2007) (granting subpoena for information from University of California, San Diego); *Warner Bros ., Records Inc. v. Does 1-4,* No. 2:07-cv-424, 2007 WL 1960602 (D.Utah July 5, 2007) (granting subpoena for information from Off Campus Telecommunications); *Warner Bros. Records, Inc. v. Does 1-20,* No. 07-cv-1131, 2007 WL 1655365 (D.Colo. June 5, 2007) (granting subpoena for information from Quest Communications); *Arista Records, LLC v. Does 1-9,* No. 07-cv-628, 2007 WL 1059049 (D.Colo. April 4, 2007). Courts typically find good cause based upon (1) allegations of copyright infringement, (2) the danger that the ISP will not preserve the information sought, (3) the narrow scope of the information sought, and (4) the conclusion that expedited discovery would substantially contribute to moving the case forward. *See e.g. Capital Records, Inc.* 2007 WL 2429830 at *1. Plaintiffs have also provided this Court with copies of eight orders issued over the past three years by district courts within the Sixth Circuit permitting expedited discovery under almost identical circumstances. (Exhibit B to memorandum). In addition, this Court granted expedited discovery in a prior case involving an almost identical set of facts. *See LaFace Records, LLC v. Does 1-5,* No. 2:07-cv-187, 2007 WL 2867351 (W.D.Mich. Sept.27, 2007).

*2 Plaintiffs have not acknowledged that courts occasionally deny similar requests. Based on the authority cited above, this Court agrees with Plaintiffs that discovery to allow the identitification of "Doe" defendants is "routine." (Plaintiffs' memorandum in support at 5). However, this Court would be remiss if it did not discuss authority counter to Plaintiffs' request. In *Capital Records, Inc. v. Does 1-16,* No. 07-485, 2007 WL 1893603 (D.N.M. May 24, 2007), the court denied an almost identical request to issue a subpoena for information from the University of New Mexico. The court cited privacy concerns of the individuals whose names were sought and the plaintiffs' inability to identify an irreparable harm as damages could easily cure any alleged copyright infringement. *Id.* at *1. Two circuit courts have rejected subpoenas sought by the recording industry under the Digital Millennium Copyright Act (DMCA). *Charter Commc'n Inc., Subpoena Enforcement Matter,* 393 F.3d 771 (8th Cir.2005); *Recording Indust. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.,* 351 F.3d 1229 (D.C.Cir.2003). In both cases the courts concluded the ISP was only a conduit for file sharing in P2P systems and that conduit ISPs were not one of the types of ISPs for which subpoenas could be issued. *See also In re Subpoena to Univ. of North Carolina at Chapel Hill,* 367 F.Supp.2d 945 (M.D.N.C.2005). This Court is also aware that the recording industry has sought subpoenas under the Cable Communication Policy Act (CCPA). *Interscope Records v. Does 1-7,* 494 F.Supp.2d 388 (E.D.Va.2007) (denying request for subpoena for information from William and Mary College under CCPA and DMCA); *UMG Recordings, Inc. v. Does 1-4,* No. 06-652, 2006 WL 1343597 (N.D.Cal. March 6, 2006) (finding it unnecessary to decide the request under the CCPA and ordering the ISP to provide its subscribers with a copy of the subpoena before releasing the information, a protection which would be consistent with both the provisions of the CCPA and Rule 45).

The provisions and guidelines for issuing a subpoena are found under Fed.R.Civ.P. 45. Rule 45 permits persons subject to a subpoena to file a motion to quash or modify the subpoena on various grounds. Fed. R. Civ. P. 45(c)(3)(A). Two courts have upheld subpoenas issued under remarkably similar circumstances. *See Elektra Entm't Group, Inc. v. Does 1-9,* No. 04-cv-2289, 2004 WL 2095581 (S.D.N.Y. Sept.8, 2004) (upholding subpoena as not overburdening rights under the First Amendment) and *Sony Music Entm't Inc. v. Does 1-40,* 326 F.Supp.2d 556 (S.D.N.Y.2004) (finding that P2P file sharing is entitled to some level of First Amendment protection, but that the balance of interests weighed in favor of the subpoena because (1) plaintiff made a prima facia claim of copyright infringement, (2) the discovery request was sufficiently specific, (3) there was an absence of alternative means of obtaining the information, (4) there was a need for the information in order to pursue the action, and (5) there was only a minimal expectation of privacy under the ISP's terms of service).

II. ANALYSIS

*3 Plaintiffs argue P2P networks allow users to distribute and download millions of music files every month in violation of copyright laws. Plaintiffs assert they have good cause for this Court to issue a subpoena because (1) they have alleged a prima facia claim of copyright infringement, (2) ISPs typically retain activity logs for a limited period of time, (3) the discovery request is narrowly tailored, and (4) the information is necessary to move the case forward. Plaintiffs also request this Court clarify that the subpoena would not interfere with MSU's obligations under the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g (FERPA). Plaintiffs intend to serve a subpoena on MSU requesting documents that would identify each Defendant's true name, address

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(current and permanent), telephone number, email address, and Media Access Control (MAC) address.

This Court finds Plaintiffs have established good cause for departing from the usual course of discovery. Specifically, this Court finds (1) Plaintiffs have alleged copyright infringement, (2) there is a possibility that the ISP might delete or otherwise destroy the activity logs which are necessary to identify the individuals who have been downloading or distributing music files, (3) the discovery request is narrowly tailored, and (4) the identity of the individuals is necessary to move the case forward and without this information, Plaintiffs would not be able to determine the identities of Defendants. This Court declines to find that the subpoena is consistent with Michigan State University's obligations under FERPA. The issue has not been briefed, it is unnecessary for this order, and MSU should be afforded an opportunity to speak on the issue if it elects to do so.

This Court also finds merit in the District Court of New Mexico's concern for the privacy of the various individuals who may be identified. This Court agrees it would be preferable for Plaintiffs to request the information from the ISP *prior* to filing this request in an effort to secure the information without resort to the courts. Therefore, this Court **GRANTS** Plaintiffs' Application for Leave to Take Immediate Discovery (Dkt. No. 2), **WITH MODIFICATIONS.** As the application was brought ex parte, both the ISP and the individuals implicated should have an opportunity to move to quash the subpoena.

ORDER

(1) Plaintiffs may take immediate discovery by serving a Rule 45 subpoena on Michigan State University seeking information sufficient to identify Does 1-4, including the name, current and permanent addresses, telephone numbers, email addresses, and Media Access Control addresses for each Defendant.

(2) Any information disclosed to Plaintiffs in response to the subpoena may be used solely for the purpose of protecting Plaintiffs' rights under the Copyright Act as set forth in the complaint.

(3) Plaintiffs shall serve Michigan State University a copy of the opinion and order along with the subpoena.

*4 (4) Michigan State University may move to quash or modify the subpoena at any time before the return date of the subpoena. Michigan State University shall preserve the information sought in the subpoena until it has been provided to Plaintiffs or until otherwise ordered by the Court.

(5) Michigan State University shall make a reasonable effort to inform the individuals whose identities are revealed as a result of the information sought by the subpoena of the subpoena within seven days after service of the subpoena. Where possible, Michigan State University shall provide a copy of the subpoena and the opinion and order to those individuals.

(6) Those individuals who receive notice of the subpoena from Michigan State University may move to quash or modify the subpoena at any time before the return date of the subpoena.

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EXHIBIT K

Lemkin v Bell's Precision Grinding, unpublished opinion and order of the United States District Court for the Southern District of Ohio, issued June 2, 2009 (Case No. 2:08-cv-789), 2009 WL 1542731

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2009 WL 1542731
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Eastern Division.

Jack LEMKIN, Plaintiff,
v.
BELL'S PRECISION GRINDING, Defendant.

No. Civil Action 2:08-CV-789.
|
June 2, 2009.

Attorneys and Law Firms

Jack Lemkin, Columbus, OH, pro se.

James Hale Gordon, Columbus, OH, Laurence C. Begin, L.C. Begin & Associates, PLLC, Milford, MI, for Defendant.

OPINION AND ORDER

NORAH McCANN KING, United States Magistrate Judge.

*1 Plaintiff, who is proceeding without the assistance of counsel, seeks recovery for the alleged infringement of plaintiff's patent for mold locks. Plaintiff also seeks a permanent injunction against defendant to prevent further infringements of plaintiff's patent. Defendant denies infringing the patent and asserts that it has not sold or distributed mold locks through any entity in Ohio. This matter is before the Court on plaintiff's *Motion to Require Expedited Responses to Discovery,* Doc. No. 17 (*"Plaintiff's Motion"*).[1]

This action was filed on August 15, 2008. *Complaint,* Doc. No. 2. The parties have not yet met and conferred pursuant to Fed.R.Civ.P. 26(f). Defendant has moved to dismiss this action for lack of personal jurisdiction and for improper venue. Doc. No. 21.

Plaintiff argues that the Federal Rules of Civil Procedure authorize expedited discovery upon good cause shown. *Plaintiff's Motion,* p. 2. Plaintiff contends that "[a] party's need for timely information constitutes good cause." *Id.* Plaintiff argues that the Court should permit expedited discovery in this case because " '[i]t is [in] the best interest of all parties to have this case resolved as soon as possible.' " *Id.* (quoting *Optic-Elec. Corp. v. United States,* 683 F.Supp. 269, 271 (D.D.C.1987)). Plaintiff argues that the discovery "is directly related to defendant's motion for a change of venue." *Id.*

Defendant opposes *Plaintiff's Motion,* arguing that plaintiff has failed to establish good cause; specifically, that he has failed to show that his overbroad discovery requests are related to the issues of venue and personal jurisdiction. *Defendant's Response to Plaintiff's Motion to Require Expedited Responses to Discovery (Doc. # 17),* pp. 1-2, Doc. No. 19 (*"Memo.Contra"*). Defendant also contends that plaintiff has not established that the information requested is in danger of being lost. *Id.* at 5. Defendant further argues that responding to plaintiff's requests would constitute a substantial burden. *Id.* at 6. Finally, defendant contends that plaintiff will not be "unduly harmed" by denial of his motion. *Id.*

Rule 26 of the Federal Rules of Civil Procedure governs discovery. Rule 26(d) provides as follows:

> (1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a) (1)(B), or when authorized by these rules, by stipulation, or by court order.
>
> (2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
>
> > (A) methods of discovery may be used in any sequence; and
> >
> > (B) discovery by one party does not require any other party to delay its discovery.

Rule 26(d) therefore permits the district court to order expedited discovery. *See, e.g., Qwest Communs. Int'l Inc. v. Worldquest Networks, Inc.,* 213 F.R.D. 418, 419 (D.Colo.2003).

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*2 Although there is no binding authority on point, unpublished decisions from this and other district courts within this circuit have applied a good cause standard in determining whether or not to permit expedited discovery. *See, e.g., Giltnane v. Tennessee Valley Auth.*, No. 3:09-cv-14, 2009 U.S. Dist. LEXIS 6734, 2009 WL 230594 (E.D.Tenn. Jan. 30, 2009); *Arista Records, LLC v. Does 1-4*, No. 1:07-cv-1115, 2007 U.S. Dist. LEXIS 85652, 2007 WL 4178641 (W.D.Mich. Nov. 20, 2007); *Whitfield v. Hochfield*, No. C1-02-218, 2002 U.S. Dist. LEXIS 12661 (S.D.Ohio July 2, 2002). "[A] party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause for the requested departure from usual discovery procedures." *Qwest Commc'n Int'l, Inc.*, 213 F.R.D. at 419. "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.Cal.2002). Good cause is often found in cases alleging infringement, unfair competition, or where evidence may be lost or destroyed with time. *See, e.g., id.; Qwest Commc'n Int'l, Inc.*, 213 F.R.D. at 419; *Warner Bros, Records, Inc. v. Does 1-4*, No. 2:07-cv-0424 TC, 2007 U.S. Dist. LEXIS 48829, at *2-3, 2007 WL 1960602 (D.Utah July 5, 2007). The scope of the discovery request is also relevant to whether or not good cause exists. *See, e.g., Qwest Commc'n Int'l, Inc.*, 213 F.R.D. at 420. Finally, the trial court retains broad discretion in establishing the timing of discovery. Fed.R.Civ.P. 26(d)(2).

For the reasons that follow, the Court concludes that plaintiff has established good cause for expedited discovery limited to the narrow issue of personal jurisdiction. First, plaintiff asserts a patent infringement claim. *Complaint.* This type of claim generally supports a finding of good cause. *See, e.g., Semitool, Inc.*, 208 F.R.D. at 276; *Qwest Commc'n Int'l, Inc.*, 213 F.R.D. at 419.

Second, defendant has moved to dismiss this action based, in part, on an alleged lack of personal jurisdiction. Doc. No. 21. Other courts have concluded that good cause exists in cases involving challenges to personal jurisdiction. *See, e.g., El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F.Supp.2d 986, 991 (S.D.Tex. Nov.3, 2004) ("Expedited discovery would be appropriate in cases involving preliminary injunctions or challenges to personal jurisdiction."); *Moldflow Corp. v. Simcon, Inc.*, 296 F.Supp.2d 34, 37 (D.Mass. Dec.22, 2003) (noting that prior order permitted expedited discovery on narrow issue of personal jurisdiction); *Second Amendment Found. v. United States Conf. of Mayors*, 274 F.3d 521, 525 (D.D.C. Dec. 21, 2001) ("Certainly, '[a] plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery[.]' ") (quoting *El-Fadl v. Central Bank of Jordan*, 316 U.S.App. D.C. 86, 75 F.3d 668, 676 (D.C.Cir.1996)). Here, defendant has attached and relied upon an affidavit related to defendant's contacts in Ohio. Doc. No. 21. In responding to this motion to dismiss, plaintiff argues that defendant has sold its products in Ohio and that discovery would establish the extent of defendant's contacts. Doc. No. 22. In his requests, plaintiff asks for information regarding, *inter alia*, customers and purchase orders. Exhibit, attached to *Plaintiff's Motion.* This information may contain information relevant to defendant's pending motion to dismiss for lack of personal jurisdiction. Based on the present record, it appears that deferring discovery on the narrow issue of personal jurisdiction would work to plaintiff's prejudice.

*3 Third, defendant's contention that plaintiff's requests are overbroad may be properly addressed by limiting discovery to the narrow issue of personal jurisdiction. For example, plaintiff seeks, *inter alia*, detailed information regarding drawings and blue prints as well as documents and witnesses to be produced at trial. Exhibit, attached to *Plaintiff's Motion.* It is unclear to the Court why this type of information is necessary at this time to resolve defendant's pending motion to dismiss. Accordingly, as presently formulated, many of plaintiff's discovery requests are overbroad and irrelevant to plaintiff's defense of the pending motion to dismiss. However, as discussed *supra*, the plaintiff may propose more narrowly tailored requests seeking information directly related to defendant's contact with Ohio, if any. Such requests would be relevant to plaintiff's defense of the pending motion and the issue of personal jurisdiction.

Fourth, defendant represents that the information requested by plaintiff does not exist or that its production would place a substantial burden on defendant. *Memo. Contra.* This argument is unpersuasive. If the requested information does not exist, it would not be burdensome for defendant to so indicate in its response to plaintiff's discovery request. In addition, there is no evidence that more narrowly tailored requests directed at the issue of personal jurisdiction would impose a substantial burden on defendant. Accordingly, based on the record before it, this Court concludes that the value of discovery specifically related to the issue of personal jurisdiction outweighs the alleged burden imposed on defendant.

Finally, the defendant correctly observes that there is currently no protective order in place. *Memo. Contra*, p.

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4. However, the parties remain free to consider terms of a protective order to address defendant's concerns.

WHEREUPON, plaintiff's *Motion to Require Expedited Responses to Discovery,* Doc. No. 17, as presently formulated, is **DENIED without prejudice** to the right to conduct discovery narrowly tailored to the factual issues presented in defendant's pending motion to dismiss.

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Not Reported in F.Supp.2d, 2009 WL 1542731

Footnotes

1 Plaintiff styles his motion as one seeking "expedited responses" to his discovery requests. However, construing *Plaintiff's Motion* liberally, *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), the Court interprets plaintiff's request as a motion for leave to conduct expedited discovery in this case.

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EXHIBIT L

JPMorgan Chase Bank, NA v Clark, unpublished order of the United States District Court for the Eastern District of Michigan, issued September 29, 2009 (Case No. 09-13815), 2009 WL 3190342

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2009 WL 3190342

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. Michigan,
Southern Division.

JPMORGAN CHASE BANK, N.A. and J.P. Morgan Securities, Inc., Plaintiffs,

v.

David G. CLARK, Tabb M. Wile, Virginia A. Wisely, John R. Buller, Brett M. Beres, and David J. Runyon, Defendants.

No. 09–13815.

Sept. 29, 2009.

Attorneys and Law Firms

Daniel G. Kielczewski, Abbott Nicholson, Detroit, MI, for Plaintiffs.

Eric S. Richards, Nathaniel R. Wolf, Mika, Meyers, Grand Rapids, MI, for Defendants.

ORDER

JULIAN ABELE COOK, JR., District Judge.

*1 On September 28, 2009, the Plaintiffs, JPMorgan Chase Bank, N.A. and J.P. Morgan Securities, Inc., filed a complaint in which they accused the Defendants, David G. Clark, Tabb M. Wile, Virginia A. Wisely, John R. Buller, Brett M. Beres, and David J. Runyon of violating their contractual and ethical obligations to avoid, *inter alia,* the misappropriation of confidential client information to any business competitor. On the same date, the Plaintiffs also filed a motion in an effort to obtain a temporary restraining order, a preliminary injunction, as well as an order that will create an expedited discovery schedule for the respective parties. The Defendants filed a response in opposition on the same day.

I.

The Plaintiffs are subsidiaries of JPMorgan Chase & Co., a large banking institution with offices across the country and its principal place of business in New York, New York. According to the Plaintiffs, they provide banking, investment, and trust and estate services to customers throughout the nation including the metropolitan area of Detroit, Michigan.

In their complaint, the Plaintiffs assert that the Defendants had been employed as financial advisors until September 25, 2009 when all of them voluntarily terminated their employment tenure and immediately thereafter joined the work force of a competitor, Morgan Stanley, in the same or similar employment capacities. The Plaintiffs also maintain that these Defendants wrongfully garnered confidential client information and utilized it to solicit new clients. Feeling aggrieved, the Plaintiffs filed the instant lawsuit.

II.

In 2006, the Sixth Circuit Court of Appeals reiterated the long-standing factors that courts must consider when determining whether to grant injunctive relief; namely, (1) the movant's likelihood of success on the merits, (2) if the movant will suffer irreparable harm without the issuance of an injunction, (3) whether granting the injunction will cause substantial harm to others, and (4) the impact of the injunction on the public interest. *Abney v. Amgen, Inc.*, 443 F.3d 540, 547 (6th Cir.2006) (citing *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Co.*, 274 F.3d 377, 400 (6th Cir.2001)). "In making its determination, the district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Lorillard Tobacco Co. v. Amouri's Grand Foods, Inc.*, 453 F.3d 377, 380 (6th Cir.2006).

A.

In this case, the Plaintiffs submit that they are likely to succeed on the merits because all of the Defendants entered into separate "Supervision, Confidentiality, and Non–Solicitation Agreements" at the commencement of their respective employments wherein they agreed, among other things, not to solicit their then-current employer's clients for a period of one year following the termination of employment. Moreover, it is their contention that this confidential client information, about which they complain, constitutes a trade secret under Michigan law.

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*2 In their opposition pleading, the Defendants contend that the names, addresses, and telephone numbers of the clients which have been targeted by the Plaintiffs are not trade secrets under Michigan law. Furthermore, the Defendants, while acknowledging that they have contacted their former clients, insist that its purpose was only to announce the cessation of employment with the Plaintiffs, but not to solicit business.

The Michigan Uniform Trade Secrets Act defines a trade secret as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Mich. Comp. Laws § 445.1902(d). The Michigan Supreme Court has held that "there is nothing improper in an employee establishing his own business and communicating with customers for whom he had formerly done work in his previous employment." *Hayes–Albion v. Kuberski*, 421 Mich. 170, 183, 364 N.W.2d 609 (1984). However, "an employer may have a protectable interest in information about client needs that an employee gains by virtue of his employment." *Id.* at 184, 364 N.W.2d 609.

Based on the arguments and information within the parties' briefs, the Court believes that the information which the Defendants have utilized constitutes a presumptive trade secret. While the Defendants are correct in asserting that an individual's address and telephone number may be easily obtained through the internet or telephone book, the identity of a client and his or her financial needs is not. As such, the Court determines, for purposes of the Plaintiffs' request for a temporary injunction only, that they have shown a likelihood of success on the merits on their claim of misappropriation of a trade secret.

Even if the client information which was referenced by the parties does not constitute a trade secret under Michigan law, the Court is nevertheless satisfied that the Plaintiffs have shown that they are likely to succeed on the merits with respect to their breach of contract claim. The Defendants do not deny (1) having entered into non-solicitation agreements[1] or (2) contacting clients whose accounts had been handled by them while working for the Plaintiffs. These non-solicitation agreements stated, in pertinent part, that any employee, or former employee, of the Plaintiffs cannot use confidential information, including "confidential customer data, including but not limited to customer and prospect names, addresses, phone numbers, [etc.]" for their "own benefit or for the benefit of a third party." Based on the language in this agreement, and the preliminary representations by the parties, it appears that the Defendants have used the confidential information (as defined in the non-solicitation agreements) for their benefit (i.e., to announce to their clients that they are no longer employed by the Plaintiff and, most probably, to encourage the clients to transfer their accounts to Morgan Stanley). Hence, the Court concludes that the Plaintiffs have shown a likelihood of success on the merits with respect to their breach of contract claim.

B.

*3 The Plaintiffs also assert that (1) they have no adequate remedy at law and (2) they will suffer irreparable harm if their request for a temporary restraining order is not granted. They submit that it is "extremely difficult" to identify the degree of economic detriment which will be sustained by them from the loss of clients, goodwill, and client confidence. The Defendants deny these allegations, insisting that they have not "taken any confidential or nonpublic information and have not in any way impaired [the Plaintiffs'] ability to aggressively solicit these clients." Moreover, they maintain that any damages which the Plaintiffs claimed to have been caused by a loss of clients can be easily determined because the revenue generated by each client is known for each account.

Although the revenue garnered for each client account may be readily determinable, the Defendants have not addressed another legitimate claim in the complaint (i.e., clients may lose confidence in the ability of the Plaintiffs to maintain control over confidential information). The Sixth Circuit Court of Appeals has held that "an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). The court further opined that the "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult

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to compute." *Id.* Thus, based on the Plaintiffs' claims that they have suffered or will suffer the loss of client confidence, as well as incalculable losses, the Court concludes that the Plaintiffs have satisfactorily shown the probability of an irreparable harm in the absence of injunctive relief.

C.

The Plaintiffs further assert that the benefit of injunctive relief will outweigh any possible detriment to the Defendants. In their opposition papers, the Defendants argue that the hardship that they will face if an injunction is issued by the Court would outweigh any fiscal burdens on the Plaintiffs who allegedly possess $13.7 trillion in assets.

Having reviewed the respective positions of the parties, the Court believes that, inasmuch as the relief sought by the Plaintiffs would be in effect only until the hearing for preliminary injunction, this temporary injunctive relief will not cause any substantial harm to the Defendants. On the other hand, if the requested temporary restraining order is rejected, the confidential client information which the Plaintiffs seek to protect may have already been disclosed prior to the convening of a preliminary injunction hearing. Thus, the Court concludes that the issuance of a temporary injunction will not cause significant harm to the Defendants. However, without an injunction, the Plaintiffs could suffer an irreparable harm.

D.

Finally, the Plaintiffs contend that the injunctive relief which they seek would advance the public interest in the enforcement of contractual agreements and the protection of investments by businesses in the development of their client base. The Defendants submit that an injunction would harm the public interest because it would restrict a client's right to work with the financial advisor of their choosing.

*4 The Court concludes that this factor does not clearly militate in favor of, or against, the position of either party. The Court believes that each party has set forth legitimate concerns that can be more fully explored at the preliminary injunction hearing.

III.

With respect to the Plaintiffs' request for expedited discovery, the Court directs the parties to commence discovery forthwith in aid of their preparation for the preliminary injunction hearing.

IV.

For the reasons which have stated above, the Court grants the Plaintiffs' request for a temporary restraining order which will expire after the expiration of a period of ten days or until further order of the Court, whichever occurs sooner. Pursuant to Fed.R.Civ.P. 65(c),[2] the Plaintiffs shall post security in the amount of $100,000 not later than October 1, 2009.

Furthermore, the Defendants and all those acting in concert with them, are temporarily enjoined and restrained from:

(a) soliciting, attempting to solicit, or attempting to induce any customers, whose accounts had been handled by the Defendants during their employment with the Plaintiffs, to transfer their assets to a competing business entity;

(b) disclosing or attempting to disclose confidential client information to any person or business enterprise without the express consent of the Plaintiffs; and

(c) using, disclosing or transmitting documents, materials and/or confidential and proprietary information pertaining to the Plaintiffs, their employees, and/or clients.

Finally, the Defendants are directed to immediately return, release and surrender all lists, records, documents, and/or information to the Plaintiffs or their counsel (original, copied, computerized, electronically stored, or handwritten material), which pertain to their clients on or before September 30, 2009.

The parties shall appear before this Court on October 5, 2009 at 1:00 p.m. for a hearing relating to the Plaintiffs' motion for a preliminary injunction. Inasmuch as the Defendants have already submitted their response to the pending motion, the Plaintiffs are authorized to file a reply not later than Wednesday, September 30, 2009 at 5:00 p.m.

IT IS SO ORDERED.

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Footnotes

1 Moreover, Michigan law has explicitly sanctioned agreements or covenants "which protect[ ] an employer's reasonable competitive business interests and expressly prohibit[ ] an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." Mich. Comp. Laws § 445.774a(1).

2 Fed.R.Civ.P. 65(c) provides, in pertinent part: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

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EXHIBIT M

Russell v Lumpkin, unpublished opinion and order of the United States District Court for the Southern District of Ohio, issued May 11, 2010 (Case No. 2:10-cv-00314), 2010 WL 1882139

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Union Home Mortgage Corp. v. Everett Financial Inc., N.D.Ohio, June 27, 2023

2010 WL 1882139
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Ohio,
Eastern Division.

Annette RUSSELL, et al., Plaintiffs,

v.

Douglas E. LUMPKIN, et al., Defendants.

Civil Action No. 2:10–cv–00314.
|
May 11, 2010.

Attorneys and Law Firms

Douglas Langston Rogers, Vorys Sater Seymour & Pease, Columbus, OH, Anne Sessums Rubin, Rebecca R. Gonzales, Southeastern Ohio Legal Services, Athens, OH, for Plaintiff.

OPINION AND ORDER

ELIZABETH A. PRESTON DEAVERS, United States Magistrate Judge.

*1 This matter is before the Court for consideration of Plaintiffs' Motion for Expedited Discovery (Doc. 15). For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion.

I. BACKGROUND

Plaintiffs, Annette Russell, Linda Kent, Sherry Hylton and April Gonzalez, are four individuals who each applied independently for Medicaid for the disabled. Plaintiffs filed a Complaint against Douglas E. Lumkin, the Director of the Ohio Department of Job and Family Services ("ODJFS"), Tracy J. Plouck, the Director of Medicaid in ODJFS, and Ruth E. Svarda, the Director of the Disability Determination Area, alleging that Defendants and their agents failed to process Plaintiffs' Medicaid applications with reasonable promptness in violation of federal law.

On May 3, 2010, Plaintiffs filed a Motion for Preliminary Injunction (Doc. 12), seeking an order: (A) prohibiting Defendants from denying Plaintiffs' applications due to lack of information; (B) ordering Defendants to arrange and pay for the evaluations and tests that Defendants have identified as necessary; (C) ordering Defendants to proceed through the evaluation process; and (D) ordering Defendants to produce certain documents and electronically stored information. The Court scheduled a hearing on this motion for May 27, 2010.

On May 4, 2010, Plaintiffs filed the subject Motion for Expedited Discovery, seeking limited expedited discovery pursuant to Federal Rule of Civil Procedure 26(d). Specifically, Plaintiffs request the following expedited discovery:

> A deposition of Defendant Ruth Svarda within 14 business days on the documents attached to Plaintiff's [*sic*] Motion for Preliminary Injunction, on the practices of the Disability Determination Area with respect to ABD Medicaid, on the processing of Plaintiff's [*sic*] applications for ABD Medicaid and on the status of those applications.

(Pls.' Mot. for Prelim. Inj. at 1). Plaintiffs represent that Defendants have rejected their requests for expedited discovery.

II. ANALYSIS

Plaintiffs' request for expedited discovery is well-taken.

Federal Rule of Civil Proecedure 26 governs the timing and sequence of discovery. Rule 26(d) provides as follows:

> (1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a) (1)(B), or when authorized by these rules, by stipulation, or by court order.
>
> (2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
>
> (A) methods of discovery may be used in any sequence; and

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(B) discovery by one party does not require any other party to delay its discovery.

Fed.R.Civ.P. 26(d). Thus, Rule 26(d) vests the district court with discretion to order expedited discovery. *See Lemkin v. Bell's Precision Grinding*, No. 2:08–CV–789, 2009 WL 1542731, at * 1 (S.D. Ohio June 2, 2009) (citing *Qwest Communs. Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003)).

***2** Courts considering motions for expedited discovery typically apply a good cause standard. *Lemkin*, 2009 WL 1542731, at *2 (citations omitted). The burden of demonstrating good cause rests with the party seeking the expedited discovery. *Id.* (citation omitted). The moving party may establish good cause by demonstrating that "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *See id.* (quoting *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.Cal.2002)). Good cause is often found when there is a request for a preliminary injunction. *See, e.g., Hydropartners, LLC v. Ecoenergy Energy Generation Ltd.*, No. 1:08–CV–819, 2008 WL 1775411, at *2 (N.D.Ohio April 16, 2008) ("[S]uch limited discovery in advance of [a preliminary] injunction hearing is supported by applicable law."); *Hausser Taylor LLC v. RSM McGladrey, Inc.*, No. 1:07–CV–2832, 2007 WL 2778659, at *3 (N.D.Ohio Sept.21, 2007) (permitting expedited discovery to "allow Plaintiff the opportunity to present evidence warranting a preliminary injunction"); *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F.Supp.2d 986, 991 (S.D.Tex.2004) ("Expedited discovery would be appropriate in cases involving preliminary injunctions or challenges to personal jurisdiction." (citation omitted)). Finally, the scope of the requested discovery is also relevant to a good cause determination. *Lemkin*, 2009 WL 1542731, at *2 (citation omitted).

In the instant case, the requested discovery is limited and narrowly tailored to the issue central to Plaintiffs' requested injunctive relief. Specifically, Plaintiffs seek to depose a single individual to authenticate documents attached to their preliminary injunction motion and to "establish in more detail ... the steps Defendants and their agents took in processing the applications of Plaintiffs." (Pl.'s Mot. for Expedited Disc. at 7). Plaintiffs assert that permitting this limited discovery "will save the amount of time needed for a hearing ..., will better enable the Court and will not burden or prejudice Defendants." (*Id.*). The Court agrees and consequently finds that Plaintiffs have demonstrated that good cause exists for the requested expedited discovery.

III. DISPOSITION

Accordingly, the Court **GRANTS** Plaintiffs' Motion for Expedited Discovery. Plaintiffs may take the deposition of Defendant Ruth Svarda as described in their Motion for Expedited Discovery. **The Deposition shall be taken by May 18, 2010.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1882139

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EXHIBIT N

Detroit Free Press v City of Detroit, unpublished opinion of the Wayne County Circuit Court, issued January 25, 2008 (Docket No. 08-100214 CZ), 2008 WL 701227

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2008 WL 701227 (Mich.Cir.Ct.) (Trial Order)
Circuit Court of Michigan.
Wayne County

DETROIT FREE PRESS, INC., a Michigan corporation, Plaintiff,
v.
CITY OF DETROIT, Defendant.

No. 08-100214 CZ.
January 25, 2008.

Order for Deposition

Hon. Robert J. Colombo, Jr.

The Court on January 25, 2008 having considered the request of plaintiff Detroit Free Press, Inc. for expedited discovery in this action under the Michigan Freedom of Information Act, and having heard the parties and considered the matter,

IT IS ORDERED that attorney Michael Stefani shall, on or before February 1, 2008, submit to deposition with regard to the existence of the following documents requested by plaintiff Detroit Free Press in its Freedom of Information Act request dated November 13, 2007:

> The entire settlement agreements in the two separate Wayne County Circuit Court lawsuits between the above-mentioned parties. This request includes but is not limited to all documents, attachments, exhibits, notes, records or other information related to the conclusion of the cases. This request includes any and all documents that the City or its lawyers may consider or have labeled "confidential." It also includes but is not limited to all such documents or records produced by or for city officials, staff attorneys or lawyers contracted by the city.

IT IS FURTHER ORDERED that Mr. Stefani shall produce at the deposition any and all responsive documents in his possession, including but not limited to any confidential agreements relating to the settlement of *Brown and Nelthrope v Kilpatrick and City of Detroit and Harris v Kilpatrick and City of Detroit;*

IT IS FURTHER ORDERED that, to the extent any such confidential agreement provides that its disclosure is a breach of confidentiality, disclosure of any such agreement pursuant to this order is not a breach of the agreement.

IT IS FURTHER ORDERED that the deposition may take place in Mr. Stefani's office in Royal Oak, Michigan, unless Mr. Stefani shall agree to another location.

It is Forther Ordered That THE TRANSCRIPT OF THE DEPOSITION AND ANY DOCUMENTS PRODUCED SHALL NOT BE DISCLOSED UNTIL FORTHER ORDER OF THE COURT.

<<signature>>

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Wayne County Circuit Court Judge

Approved as to form:

<<signature>>

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Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN 9th JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 2024-053-CZ Curtis J. Bell

Court address
330 Eleanor St., Kalamazoo, MI 49007

Court telephone no.
(269) 383-8837

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
American Civil Liberties Union of Michigan, Sheril Kelly, and Scott Kelly	v	Robert Froman, in his official capacity as Kalamazoo County Canvasser
Plaintiff's attorney, bar no., address, and telephone no. Philip Mayor (P81691), Daniel S. Korobkin (P72842), Delaney Barker (87401) American Civil Liberties Union Fund of Michigan 2966 Woodward Ave., Detroit, MI 48201 (313) 578-6800		FILED SEP - 3 2024 9TH JUDICIAL CIRCUIT COUNTY OF KALAMAZOO KALAMAZOO, MICHIGAN

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.
☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
9-3-24	12-3-24	Tracie D. Lewis

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, SHERIL KELLY, and SCOTT KELLY,

Plaintiffs,

v

ROBERT FROMAN, in his official capacity as Kalamazoo County Canvasser,

Defendant.

_____/

Case No. 2024-0533-CZ

Hon. Curtis J. Bell

COMPLAINT FOR DECLARATORY RELIEF

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There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

/s/ Philip Mayor
Philip Mayor (P81691)

NOW COME the American Civil Liberties Union of Michigan (the "ACLU"), Sheril Kelly, and Scott Kelly (collectively, "Plaintiffs"), by and through their undersigned attorneys, and for their Complaint against Robert Froman, in his official capacity as Kalamazoo County Canvasser ("Defendant"), state as follows:

INTRODUCTION

1. Robert Froman is a member of the Kalamazoo Board of County Canvassers. That body is charged with certifying the results of all elections in Kalamazoo County, including Kalamazoo's share of the vote for statewide and national offices, including the 2024 presidential election. It is a critical part of the electoral process.

2. In August 2024, Defendant Froman informed a *Detroit News* reporter that he believed that the 2020 election had "most definitely" been stolen from former President Trump. When asked if he would certify the 2024 presidential election results if they unfolded the same way, he responded succinctly: "No. And that's why I'm there."

3. While subsequently contending that he had not made these particular statements in a private message to the ACLU, Defendant Froman never denied the substance of these remarks and refused to seek a correction from the newspaper. Even when his legal obligation to vote to certify the results of the election was brought to his attention, at no point did he confirm that he would certify the results of the 2024 election regardless of allegations or evidence of election fraud.

4. The law could not be clearer. It is the ministerial, nondiscretionary duty of the members of a county board of canvassers to certify the presidential election based on the returns

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from the precincts, absent voter counting boards, and early voting sites. See MCL 168.822(3); see also Const 1963, art 2, § 7(3).

5. This legal obligation is not new. Since at least 1892, Michigan courts have held that canvassers cannot "go behind" the returns and challenge the results based on allegations (or even evidence) of voter fraud. A failure to certify based on a canvasser's belief or theory that the election was somehow "stolen" would be flatly impermissible.

6. There are other avenues in Michigan for issues of voter fraud to be litigated. The county boards of canvassers are not the fora for those disputes.

7. This makes good sense. The boards of county canvassers must work on a tight schedule. The canvassers are required by law to complete their task within fourteen days of the election. It is critical to the smooth functioning of the electoral system that the tabulation and certification of the election results not be disrupted by charges and counter-charges of alleged voter fraud.

8. Although boards of canvassers have traditionally behaved in ways consistent with their ministerial nature, given their composition, the boards of canvassers are potentially prone to partisan disruption. They are inherently partisan bodies, comprised of two Republicans and two Democrats. The canvassers are chosen from a list provided by their respective parties. To allow the county canvassers to engage in determinations regarding alleged voter fraud would invite bitter disagreements that risk deadlocking the tabulation and certification of the election results. That is why the ministerial and clerical task of tabulating the returns is the *only* task that the boards of county canvassers are charged with performing during the certification period.

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9. This limited and specific role of the canvasser boards has been recognized for over 135 years. Thus, in *Attorney General v Board of County Canvassers*, the Michigan Supreme Court said of the canvassers:

> They are not a judicial or quasi judicial body. They are not a permanent body with administrative functions. They are created for a single occasion and for a single object. *They have no means given them to inquire, and no right to inquire, beyond the returns of the local election boards. They have no right to raise outside issues to decide themselves,* or to ask us to decide. When they have figured up the returns exactly as handed over to them, they have completed their task, and exhausted their powers. [64 Mich 607, 611; 31 NW 539 (1887) (emphasis added).]

10. Kalamazoo County is not the only county in Michigan where there is a genuine threat of a certification dispute. In fact, other counties in Michigan have already experienced certification disputes. In 2020, the issue dramatically flared in Wayne County, a dispute in which former President Trump was personally involved. And just this year, a dispute arose in Delta County where the county canvass was initially deadlocked along partisan lines. Certification only proceeded following an intervention by the Director of the Bureau of Elections.

11. Since 2020, election deniers have increasingly been appointed to positions in various county boards, including at least in Wayne, Antrim, Muskegon, Berrien, and Kalamazoo counties. The threat of a disruption of the electoral system in Michigan this November is very real. A failure to certify in even a single county imposes significant costs and difficulty for the Board of State Canvassers and the Secretary of State. Such a failure also gives oxygen to conspiracy theories and promotes a false narrative that Michigan's election are unreliable, untrustworthy, and not free and fair exercises in democracy. And, for taxpayers of Kalamazoo County, including the Kellys and nearly one thousand other ACLU members in Kalamazoo County, a failure to certify imposes significant financial costs, squandering taxpayer dollars on what amounts to a partisan political stunt.

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12. In this way, Michigan is part of an emerging national controversy regarding the role of canvassing boards. Throughout the country, election deniers are poised to disrupt the certification process, seeking to place the results of the presidential election in doubt.

13. To prevent this threat to the electoral system, Plaintiffs seek an unequivocal declaration from this Court. Boards of county canvassers must be put on notice of their obligation to certify the results of the election, notwithstanding allegations (or even evidence) of voter fraud. Such a declaration is necessary to deter the injury to the electoral process that election deniers would inflict on the voters of Michigan.

I. JURISDICTION

14. This Court has jurisdiction over this action because it is a civil action, no other court has exclusive jurisdiction over this action, and no law denies the circuit court's jurisdiction over this action.

15. This Court also has jurisdiction over this civil action as "the circuit court for the county in which a plaintiff resides" because this is "an action for declaratory, injunctive, and/or monetary relief to enforce" "[t]he fundamental right to vote." Const 1963, art 2, § 4(1)(a).

16. This Court has authority to grant a declaratory judgment as provided by MCR 2.605 because this case presents an actual controversy. As outlined below, there exists substantial uncertainty about whether Defendant Froman and, thus, the Kalamazoo Board of County Canvassers (the "Kalamazoo County Board") will fulfill its legal obligation to certify the results of the November 2024 general election.

17. Uncertainty as to whether the Kalamazoo County Board will comply with its constitutional and statutory obligation to certify the results must be resolved ahead of the November 2024 election. According to *The Detroit News*, Defendant Froman has openly declared his willingness to defy his legal obligations and his oath of office in contravention of the Michigan

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Constitution and centuries of legal precedent. And publicly reported comments by Tony Lorentz, another member of the Kalamazoo County Board, also call into question his willingness to perform his legal obligations. Yet, as explained below, statutory deadlines will make it impractical for this Court to grant plaintiffs meaningful relief during the short 14-day period after the election when the Kalamazoo County Board is required to perform its duties. A declaratory judgment is therefore necessary, as it would set out Defendant's legal obligation and direct the future conduct of the parties prospectively. Accordingly, this Complaint "plead[s] and prove[s] facts which indicate an adverse interest necessitating the sharpening of the issues raised," and declaratory relief is appropriate. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 n 20; 792 NW2d 686 (2010).

18. Venue is proper in this Court pursuant to MCL 600.1621, MCL 600.1615, MCR 3.305(A)(2), and Const 1963, art 2, § 4. Members of Plaintiff American Civil Liberties Union of Michigan reside in Kalamazoo County, Plaintiffs Sheril Kelly and Scott Kelly reside in Kalamazoo County, Defendant Robert Froman conducts business in Kalamazoo County, and the Kalamazoo County Board exercises its governmental authority in Kalamazoo County.

II. PARTIES

19. Established in 1959, Plaintiff American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of the American Civil Liberties Union. The ACLU is a domestic, nonpartisan, and nonprofit corporation organized for the civic, protective, or improvement purpose of protecting rights guaranteed by the United States and Michigan Constitutions. The mission of the ACLU is to realize the promise of the Bill of Rights for all citizens and expand the reach of its guarantees to new areas through public education, advocacy, and organization.

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20. The ACLU seeks to ensure an easy and equal right to vote for every citizen and encourages its members and the people of Michigan to exercise their right to vote. The ACLU works to shape public policy and promotes full and fair access to the ballot, including, for example, by supporting and advocating for the 2022 ballot proposal that expanded protections for the fundamental right to vote in the Michigan Constitution and added text to Article 2, § 7 of that Constitution that is central to this lawsuit.

21. The ACLU is also a membership organization. At present, the ACLU has approximately 987 members in Kalamazoo County, most or all of whom, on information and belief, are registered to vote. The ACLU dedicates substantial time, effort, and resources to voter education and the protection of voting rights. Defendant's refusal to commit to certify the results of the election as required by law harms the ACLU's ability to fulfill its mission to educate and encourage voting. It diverts ACLU resources from other aspects of its mission. The ACLU has organizational standing and associational standing to represent its members who vote in Kalamazoo County and who do not want their vote to be ignored, discarded, exploited, and undermined by a failure to certify the election in Kalamazoo County.

22. Plaintiff Sheril Kelly is a registered voter in Kalamazoo, Michigan. She has lived in Kalamazoo County for over thirty years. She plans to vote in the November 2024 election.

23. Plaintiff Scott Kelly is a registered voter in Kalamazoo, Michigan. He has lived in Kalamazoo County his entire life. He plans to vote in the November 2024 election.

24. Defendant Robert Froman is a member of the Kalamazoo County Board of Canvassers. Defendant Froman and the other county canvassers are responsible for canvassing and certifying election returns for Kalamazoo County. As set forth below, it is his "ministerial, clerical, and nondiscretionary duty . . . [as a] member[] of the board of county canvassers, to certify

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election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns." MCL 168.822(3); Const 1963, art 2, § 7(3). Defendant Froman is sued in his official capacity.

25.

III. FACTUAL ALLEGATIONS

26. There is a clear danger that members of Michigan's various boards of county canvassers will refuse to certify the 2024 general election results, and Kalamazoo County appears to have turned into an epicenter for this danger. In August 2024, Defendant Froman, a member of the Kalamazoo County Board, was reported by *The Detroit News* to have stated that he believed that the 2020 election had been "most definitely" stolen from former President Trump. When asked if he would certify the 2024 presidential election results if they unfolded the same way, he responded, "No. And that's why I'm there [i.e., serving on the Kalamazoo County Board]." See Ex. 1[1] .

27. At no point has Defendant Froman stated that he would comply with his legal obligation to certify.

A. The Legacy of the 2020 Election

28. On November 17, 2020, in response to completely baseless allegations and rumors about election fraud in Detroit during the 2020 election, two members on the four-member Wayne County Board of Canvassers (the "Wayne County Board")—Monica Palmer and William

[1] Mauger, *Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble*, The Detroit News (August 5, 2024) < https://www.detroitnews.com/story/news/politics/2024/08/05/michigan-election-county-canvassers-boards-vote-certification-donald-trump-kamala-harris/74610733007/>.

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Hartman—initially voted against certifying county vote totals in the 2020 general election, resulting in a 2-2 deadlock preventing certification.[2]

29. The two board members failing to certify pointed to what they alleged were irregularities in Detroit and surrounding suburban communities.[3] Palmer told the *Washington Post*, "I believe we do not have complete and accurate information in those poll books."[4]

30. This initial refusal to certify election results sparked a local and national firestorm.

31. The initial deadlock of that board was highlighted by former President Trump, who stated on social media that "Michigan just refused to certify the election results" and praised the "courage" of the board members who voted against certification on social media.[5]

32. Trump legal adviser Jenna Ellis—who has since had her law license suspended and pleaded guilty in a Georgia election subversion criminal case—trumpeted the initial certification deadlock on social media as the first step in a plan to have the Michigan Legislature select the presidential electors and overturn the will of Michigan voters.[6]

33. The certification dispute in Wayne County was just one of many unprecedented certification disputes around the country, and the *New York Times* reported that the deadlock "was

---

[2] Cheney & Montellaro, *In Abrupt Reversal, Michigan's Largest County Certifies Election Results*, Politico (November 17, 2020) <https://www.politico.com/news/2020/11/17/wayne-county-michigan-election-certification-437181>.

[3] Brewster, *Michigan's Wayne County Certifies Election Results After Initially Deadlocking*, CBS News (November 18, 2020) <https://www.cbsnews.com/news/michigan-election-results-wayne-county-certifies-deadlock/>.

[4] Ruble & Hamburger, *Board in Key Michigan County Fails, Then Agrees, To Certify Vote Totals By Deadline*, Washington Post (November 17, 2020) <https://www.washingtonpost.com/politics/michigan-vote-canvassing-board/2020/11/17/12141222-287c-11eb-8fa2-06e7cbb145c0_story.html>.

[5] *In Abrupt Reversal, Michigan's Largest County Certifies Election Results*, *supra*.

[6] Jenna Ellis (@realJennaEllis), X.com (November 17, 2020, 6:37 PM) <https://x.com/realJennaEllis/status/1328844700883808260>.

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among the starkest examples of how previously routine aspects of the nation's voting system have been tainted by [former President] Trump's monthslong effort to undermine confidence in the election."[7]

34. After the failed initial certification vote, the Wayne County Board heard several hours of public comment from residents of Wayne County, as well as non-partisan poll observers. The board members who refused to certify faced particular criticism for their singling out of purported irregularities in the majority-Black city of Detroit—drawing accusations of both partisan and racial bias.[8]

35. Following hours of criticism, the Wayne County Board reversed course and certified the county election results.[9]

36. The Wayne County Board's initial failure to certify was despite the fact that, even in 2020, Michigan law was clear that canvassing boards have a ministerial duty to certify election based only on the returns.

37. In the days following the certification of the Wayne County election results, two board members tried and failed to "rescind" their votes to certify after being pressured directly by former President Trump and Republican National Committee Chairwoman Ronna McDaniel to block certification in a phone call in which former President Trump told them "[w]e can't let these people take our country away from us."[10]

---

[7] *Presidential Transition: Georgia Nears Its Recount Deadline, With Biden Ahead by Over 12,000 Votes,* New York Times (November 18, 2020) <https://www.nytimes.com/live/2020/11/18/us/joe-biden-trump-updates>.

[8] *Michigan's Wayne County Certifies Election Results After Initially Deadlocking, supra.*

[9] *In Abrupt Reversal, Michigan's Largest County Certifies Election Results, supra.*

[10] Mauger, *Trump Recorded Pressuring Wayne County Canvassers Not to Certify 2020 Vote*, The Detroit News (December 22, 2023) (continued…)

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38. On November 20, 2020, former President Trump held a meeting in the White House with the two Republican leaders of the Michigan Legislature, Senate Majority Leader Mike Shirkey and House Speaker Lee Chatfield. According to CNN, "Trump . . . had invited the lawmakers to the White House this week, as he seeks to subvert the will of voters in a long-shot effort to overturn the results of an election he lost," reportedly urging them to overturn the results of the election.[11]

39. The meeting was held three days before the Board of State Canvassers was scheduled to vote on the certification of the presidential election. On November 23, 2020, notwithstanding the White House meeting, the Board of State Canvassers narrowly voted to certify the results of the election with one of the members of the board abstaining after "he asked questions about Detroit and clearly indicated he did not trust the Michigan election system."[12]

40. In light of the disruption caused by anti-democracy forces in 2020 and the threatened misuse of the canvass process, Michigan's voters in 2022 forcefully re-emphasized the limited role of canvassers, voting by an overwhelming majority to enshrine such principles in the Michigan Constitution—as well as including a fundamental right to vote in the Constitution and

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<https://www.detroitnews.com/story/news/politics/2023/12/21/donald-trump-recorded-pressuring-wayne-canvassers-not-to-certify-2020-vote-michigan/72004514007/>.

[11] Grayer, Kelly, & Vazquez, *Michigan Lawmakers Who Met with Trump Say They See Nothing to Change Election Outcome*, CNN (November 21, 2020) <https://www.cnn.com/2020/11/20/politics/michigan-house-speaker-will-meet-trump/index.html>.

[12] Boucher, *Michigan Board Votes to Certify Election Results Despite GOP Calls to Delay*, Detroit Free Press (November 23, 2020) <https://www.freep.com/story/news/politics/elections/2020/11/23/did-michigan-certify-election-results-board-canvassers/6388768002/>.

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establishing a right of action against anyone who attempts to unreasonably burden or interfere with that right.[13]

41. As a result, the Michigan Constitution was amended and the Michigan election law revised by the Legislature to codify what was already established in the case law—that the canvassers' role is a purely ministerial, clerical, and nondiscretionary one. See Const 1963, art 2, § 7(3) (stating members of boards of canvassers have "the ministerial, clerical, nondiscretionary duty . . . to certify election results"); see also MCL 168.822 (similar).

B. The Threat in 2024 in Michigan

42. In 2024, there are strong indicators that certain members of the boards of county canvassers, citing baseless allegations of election fraud or other election defects as their justification, will refuse to certify election results.

1. Numerous County Canvass Board Members Continue to Question the Legitimacy of the 2020 Election

43. Across the state, there has been significant turnover of individuals serving on boards of county canvassers. In August 2024, *The Detroit News* reported that 55% of the 332 current Michigan county canvassers had not served as canvassers in November 2020, including 63% of the current Republican county canvassers.[14]

44. Among the new county canvassers are multiple individuals who have (i) publicly expressed the false view that the 2020 presidential election in Michigan was tainted by election

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[13] *Voters Approve Proposal 2, a Constitutional Amendment Expanding Voting Rights*, Michigan Public (November 9, 2022) <https://www.michiganpublic.org/politics-government/2022-11-09/voters-approve-proposal-2-a-constitutional-amendment-expanding-voting-rights>.

[14] *Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble*, *supra.*

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fraud and/or (ii) publicly called into question whether President Biden prevailed over former President Trump in Michigan.

45. An April 21, 2021 audit of the 2020 presidential election conducted by the Michigan Secretary of State "found no examples of fraud or intentional misconduct by election officials and no evidence that equipment used to tabulate or report election results did not function properly when properly programmed and tested."[15] And the Wayne County Circuit Court found such claims to be "incorrect and not credible." Ex. 2.

46. Despite the audit results, multiple new county canvassers have publicly pushed discredited theories questioning the integrity and security of the 2020 election in Michigan. For example:

a. Two members of the Wayne County Board—neither of whom served on the Board in 2020—have each made public statements casting doubt on the legitimacy of the 2020 election. One canvasser said that he would not have certified the results of the 2020 election; in October 2021, he claimed, without basis, that the vote was "inaccurate."[16] The other has also repeatedly denied the results of the 2020 election.[17]

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[15] Secretary of State, *Audits of the November 3, 2020 General Election* (April 21, 2021), p 2, available at <https://www.michigan.gov/-/media/Project/Websites/sos/30lawens/BOE_2020_Post_Election_Audit_Report_04_21_21.pdf>

[16] Hendrickson, *New GOP Canvassers Who Embrace Election Lies Raise Prospects of Chaotic Certification*, Detroit Free Press (January 24, 2022) <https://www.freep.com/story/news/local/michigan/detroit/2022/01/24/michigan-gop-canvassers-election-misinformation/6584205001/>.

[17] Shah, *Election Deniers Are Embedded in Michigan Canvassing Boards – Advocates Say They're Ready*, Salon (November 8, 2022) < https://www.salon.com/2022/11/08/deniers-are-embedded-in-michigan-canvassing-boards--advocates-say-theyre-ready/>.

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b. A January 2022 article reported that a member of the Antrim County Board of Canvassers who began his term in 2023 has deemed former President Trump's contention that the 2020 election was stolen from him a "credible accusation."[18]

c. A member of the Muskegon County Board of Canvassers who began her term in 2023 shared a false news story in November 2020 headlined "Breaking Down the Greatest Electoral Heist in American History."[19]

d. A member of the Berrien County Board of Canvassers who began her term in 2023 has shared multiple social media posts calling into doubt the legitimacy of the 2020 election, including re-posting on Facebook a post that reads, "January 6th will be forever remembered as the day the government setup a staged riot to cover up the fact that they certified a fraudulent election."[20]

47. Public assertions of uncertainty regarding who won the presidential election in Michigan in 2020, made despite the fact that those assertions have been conclusively discredited, indicates that many canvassers will be inclined to improperly refuse to certify the results of the 2024 election based on their belief that election fraud may have occurred during the election.

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[18] *New GOP Canvassers Who Embrace Election Lies Raise Prospects of Chaotic Certification, supra.*

[19] Glawe, *These Swing State Election Officials are Pro-Trump Election Deniers*, Rolling Stone (July 29, 2024) <https://www.rollingstone.com/politics/politics-features/trump-swing-state-officials-election-deniers-1235069692/>.

[20] Deb Frank, They Know it. We know it., Facebook (June 2, 2023) <https://www.facebook.com/permalink.php?story_fbid=pfbid02HEoYB7RQkTEWHpDotqhsnsFaHoqGbYFK5RNHmptNfXiDyBbCvy1AYVzn5UT28iDul&id=1183871593&rdid=e7Blv2sReHePioEB>.

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2. Delta County: A Recent Certification Dispute

48. The threat of county canvassing boards refusing to fulfill their legal and constitutional duty to certify elections is demonstrably real. County canvassers recently abrogated their legal duties following the May 2024 election for the Delta County Board of Commissioners.

49. On May 7, 2024, three incumbents on the Delta County Board of Commissioners faced a recall election. All three of these incumbents lost by significant margins.[21]

50. On May 14, 2024, two members of the Delta County Board of Canvassers (the "Delta County Board") voted against certifying the May 7 recall election results, resulting in a 2-2 deadlock.

51. The canvassers who opposed certification contended that there were irregularities in the vote counts, a supposition that they apparently based on the similarities in vote totals across the three races that they inexplicably found suspicious.[22] However, Nancy Przewrocki, the county clerk in Delta County, said, "we matched the numbers of voters . . . to the numbers of ballots counted by tabulators—all the numbers match 100%."[23]

52. Two days after the Delta County Board failed to certify, Michigan Bureau of Elections Director Jonathan Brater wrote a letter to the Delta County Board members in which he urged the canvassers to fulfill their "ministerial, clerical, [and] nondiscretionary" duty to certify

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[21] Lobo, *After Initial Deadlock, Delta County Board Votes to Certify Recall Election Results*, Detroit Free Press (May 20, 2024) <https://www.freep.com/story/news/politics/elections/2024/05/20/michigan-delta-county-certifies-election-results/73731427007/>.

[22] LeBlanc, *In Delta County, Canvassers Decline to Certify Election, Delay Start for New Commissioners*, The Detroit News (May 16, 2024) <https://www.detroitnews.com/story/news/politics/2024/05/16/delta-county-canvassers-reject-certification-of-recall-election/73716383007/>.

[23] May, *Michigan County Refused to Certify Vote, Prompting Fears of a Growing Election Threat This Fall*, CBS News (May 21, 2024) <https://www.cbsnews.com/news/michigan-county-refuses-to-certify-vote-growing-election-threat/>.

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the results of the election.[24] Brater explained the consequences if the Delta County Board failed to certify, including that it would be required to personally deliver to the Secretary of the Board of State Canvassers all information pertaining to the election and that Delta County would be responsible for covering the "substantial" costs associated with the state certification.[25] Finally, Brater reminded the Delta County Board that while "there are multiple separate, independent ways for election records to be reviewed and investigations to be conducted," the job of the Delta County Board "is to review the election returns and certify the election solely based on the returns."[26]

53. On May 17, 2024, one of the members of the Delta County Board who had refused to certify relented, and the election was certified by a vote of 3-0.[27] The other canvasser abstained from the final certification vote without any legal basis for doing so.[28]

54. Following the certification, another member of the Delta County Board called on one of the members who initially voted against certification to step down, noting that she "didn't follow our oath—[she] didn't do her job."[29] He added that it could be a "real problem" if certification issues persisted during the 2024 presidential election.[30]

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[24] Letter from Jonathan Brater, Michigan Bureau of Elections Director, to Delta County Board of Canvassers (May 16, 2024), available at <https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2024/May/Delta-County-Canvassers-Letter-05-16-2024.pdf> (hereinafter "Brater Letter").

[25] *Id.*, p 3.

[26] *Id.*, p 4.

[27] *After Initial Deadlock, Delta County Board Votes to Certify Recall Election Results, supra.*

[28] *Id.*

[29] Minor, *Calls Out to Remove Board of Canvassers Member*, Daily Press (May 24, 2024) <https://www.dailypress.net/news/local-news/2024/05/calls-out-to-remove-board-of-canvassers-member/>.

[30] *Id.*

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55. A subsequent partial audit of the Delta County Board of Commissioners election found no irregularities and confirmed the accuracy of the vote totals.[31]

3. The Threat at the Kalamazoo County Board

56. The risk of non-certification in the November 2024 is now perhaps most pronounced in Kalamazoo County.

57. Neither Republican appointee on the Kalamazoo County Board served in 2020. Both have made statements casting doubt on whether they will exercise their constitutional and statutory mandate to certify elections based solely on the returns.

58. Defendant Froman began his term on November 1, 2023.

59. According to an August 5, 2024 article by *The Detroit News*, Defendant Froman expressed the view that the 2020 election was "most definitely" stolen from former President Trump.[32] When asked if he would certify the 2024 presidential election if it unfolded the same way as the 2020 election, he responded, "No. And that's why I'm there [i.e., serving on the Kalamazoo County Board]."[33]

60. Later in the article, Defendant Froman is reported to have added, "I am not going to do anything that's illegal."[34] But this obviously must be read in context of his prior reported statements that the reason he now serves on the Kalamazoo County Board is to not certify if the election unfolds in the same way as the 2020 election.

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[31] Minor, *Vote Audit Shows No Irregularities*, Daily Press (May 31, 2024) <https://www.dailypress.net/news/local-news/2024/05/vote-audit-shows-no-irregularities/>.

[32] *Most Election Officials Who Certified Michigan's 2020 Race Are Gone*, *supra*.

[33] *Id.*

[34] *Id.*

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61. Indeed, Defendant Froman is further quoted in the same article as saying that he sees his intended actions as part of a commitment to preventing a replay of the 2020 election. Defendant Froman is quoted as saying: "Many people within the framework or ideology of the Republican Party have realized that they have been sitting in their living rooms way too long, and the country that they know and love is being stolen out from under them . . . And they're not willing to sit in their living rooms any longer."[35]

62. Defendant Froman has reportedly acted in just that manner. Per *The Detroit News*: "Concerns about the 2020 election spurred Froman to get more actively involved in politics" and he "started attending Kalamazoo County Republican Party meetings and volunteering with an entity named Check My Vote, which has been trying to examine and verify addresses used by Michigan residents in the state's official list of registered voters."[36]

63. Following *The Detroit News* reporting, on August 15, 2024, the ACLU wrote a letter to Defendant Froman (the "ACLU Letter") in which the ACLU reminded Defendant Froman of his certification responsibilities under the Michigan Constitution and Michigan election law, and pointed out that a refusal to certify would be an illegal act. See Ex. 3.

64. The ACLU Letter raised key points about the responsibility of county canvassers. Specifically, it included:

a. A reminder that "[t]he law does not authorize members of boards of canvassers to withhold certification based upon speculation, theories, or even evidence pertaining to the accuracy of the reported returns," *id.* p 1;

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[35] *Id.*

[36] *Id.*

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b. Reference to the Brater Letter which "emphasize[d] that members of county canvassing boards are not permitted to refuse to certify election results based on claims by third parties of alleged election irregularities, or a desire to conduct election fraud investigations," *id.* p 2;

c. Cases establishing that even before the 2022 constitutional and statutory changes to Michigan election law, the Michigan Supreme Court held that "it is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical," *id.* (collecting cases); and

d. A reminder that "it is a nondiscretionary legal duty for a Board of County Canvassers member to certify the election based on election returns, to refuse to do so because of rumors, allegations, or even evidence of fraud would expose that member to criminal liability," *id.*

65. The ACLU Letter asked Defendant Froman to clarify his position regarding the role of county canvassers, including (i) if he was misquoted, to notify *The Detroit News* that he was misquoted in the article and request a retraction of his statements, or (ii) if he was not misquoted, to rescind his statements and issue a public statement concerning the role of county canvassers in the election certification process.

66. Defendant Froman responded to the ACLU Letter via email the next day. He stated, "I did not make any of the statements you say I did. I have not seen or approved any article by the Detroit News. I will make no public statement about what the Detroit News published. I believe

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the first amendment to the Constitution allows the press to publish any information they deem necessary." See Ex. 4.

67. Critically, Defendant Froman provided no assurances that he would certify the election if faced with allegations or evidence of fraud, even after being confronted with repeated statements regarding his legal duties in this regard.

68. Defendant Froman's claim that he did not make the statements quoted in *The Detroit News* lacks credibility given his simultaneous refusal to contact *The Detroit News* to seek a retraction. If a public official were inaccurately quoted in a major publication declaring their intention to violate their constitutional and legal obligations, it is highly unlikely that the official would not seek a retraction, particularly under threat of litigation.

69. The ACLU communicated Mr. Froman's denial of his comments to *The Detroit News*. *The Detroit News* responded with a letter to the ACLU, dated August 29, indicating that they stand by their story. See Ex. 5.

70. Defendant Froman has now had a clear opportunity to clarify his understanding of the role of county canvassers and to affirm that the decision to certify must be based solely on the returns. And yet, his statements and subsequent dubious denial of those statements make it uncertain that he will lawfully carry out his duties as a county canvasser.

71. The other Republican on the Kalamazoo County Board, Tony Lorentz, has also expressed doubt about whether President Biden won the election in 2020. He has also made public comments raising concerns whether he will faithfully execute his duty to certify the elections based on the returns alone.

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72. According to a January 2022 *Detroit Free Press* article, when asked whether he would vote to certify elections, Lorentz responded that it "depends how they look."[37]

73. In the event that these two canvassers on the Kalamazoo County Board fail to exercise their ministerial, clerical, and nondiscretionary duty to certify the 2024 election result in Kalamazoo County, it would likely result in a 2-2 deadlock at the Kalamazoo County Board.

74. A certification deadlock at the county level would shift responsibility to the Board of State Canvassers to complete the task of certifying the election for Kalamazoo County.

75. While Michigan election law empowers the Board of State Canvassers to carry out that responsibility, having to do so would increase the burden on the Board of State Canvassers at a time when it has other significant responsibilities of its own relating to administration of the election in Michigan and a narrow window of time to carry out those duties.

76. Moreover, the failure of county canvassers to carry out their ministerial, clerical, nondiscretionary duty to certify would sow confusion in the election process and increase distrust in the integrity of the election.

77. Such a failure would also impose significant costs on the taxpayers of Kalamazoo County, including the Kelly Plaintiffs and other ACLU members in Kalamazoo County, as they would be forced to fund the costs of having the Board of State Canvassers undertake the certification.

78. The prospect of certification issues is not merely an administrative inconvenience. As Aghogho Edevbie, Michigan Deputy Secretary of State, has previously stated before becoming

[37] *New GOP Canvassers Who Embrace Election Lies Raise Prospects of Chaotic Certification, supra.*

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Deputy Secretary, county canvassers' failure to timely certify election results "would be tremendously destabilizing."[38]

4. Check My Vote and Election Deniers on the Boards of County Canvassers.

79. The concerns regarding Defendant Froman's likely course of conduct are heightened by Defendant Froman's connections with Check My Vote ("CMV"). As reported in *The Detroit News*, Defendant Froman is a CMV "county leader" or "trainer" working with CMV to investigate the state's registered voter list.[39]

80. CMV is a software tool supported by Election Eagle QC, LLC ("Election Eagle"). CMV's stated mission is to "help[] identify and rectify irregularities in voter rolls." To that end, CMV has created a software tool used by the election denial movement to identify supposedly questionable voters and prevent them from freely exercising their right to vote.

81. The articles of organization for Election Eagle identify two co-founders, one of whom failed to secure a position on the Oakland County Board of Canvassers after he declined to answer whether he believes that the 2020 election was properly certified.[40]

82. Defendant Froman is not a passive member of CMV, as he has reportedly said that he had personally checked tens of thousands of addresses.[41]

83. Defendant Froman is not the only CMV activist now serving on a board of county canvassers. According to a July 2023 announcement from the Michigan Republican Party, other

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[38] *Id.*

[39] *Most Election Officials Who Certified Michigan's 2020 Race Are Gone, supra.*

[40] Mackay, *Election Claims Led to Oakland County Struggle in Finding GOP Canvasser*, The Detroit News (November 2, 2023) <https://www.detroitnews.com/story/news/politics/2023/11/01/election-claims-led-to-oakland-county-struggle-in-finding-gop-republican-canvasser-trump-2020/71303344007/>.

[41] *Most Election Officials Who Certified Michigan's 2020 Race Are Gone, supra.*

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CMV "county leaders" who now serve on boards of county canvassers include Bonnie Kellog in Muskegon County, Maureen Hillary in Clinton County, and Ron Palmgren in Genesee County.[42]

C. National Context: Election Denialism Has Created a Nationwide Movement Undermining the Apolitical Task of Vote Certification.

84. The movement by members of canvassing boards to refuse to perform their ministerial duties is not limited to Michigan and is part of a rising national tide of election denialist activity.

85. Citizens for Responsibility and Ethics in Washington ("CREW") has identified eight states under threat of non-certification, including Michigan, and "35 rogue election officials across the country who have already refused to certify election results and may be in a position to do so again."[43] Two salient examples illustrate the nature of this threat.

86. In Nevada, an official recommended against certifying a 2023 election and stated that "[t]he elections of 2024 will be an epic battle." He suggested that election officials should "reject the corruption" in 2024 by declining to certify elections.[44] Nevada faced certification issues again this cycle when Washoe County declined to certify the 2024 primary results.[45]

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[42] *Id.*

[43] CREW, *Election Certification Under Threat* (updated August 15, 2024) <https://www.citizensforethics.org/reports-investigations/crew-investigations/election-certification-under-threat/> (accessed August 30, 2024) (hereinafter the "Crew Report").

[44] Hanks, *Statement to 2023 Election Canvass Boards*, available at <https://www.documentcloud.org/documents/24955894-cogop-ballot-and-election-security-chairman-letter-to-canvass-boards> (accessed August 30, 2024).

[45] Stern, *Nevada County Reverses Controversial Vote and Certifies Two Recounts While Legal Action Looms*, Associated Press (July 16, 2024) <https://apnews.com/article/washoe-county-cisco-aguilar-aaron-ford-427cb4cbb840f6f9d995403d52e63419>.

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87. In Georgia, a new state rule changed the authority of election canvassers and will potentially "allow some local election boards to refuse to certify."[46] This rule change is being challenged in court amid allegations that it increases the prospect of certification disputes in Georgia, which could cause "chaos" in November.[47]

88. Additional public reporting confirms the trend and suggests coordination among these election deniers. Just last week, *USA Today* reported that leaders of the Republican Party in Colorado have sent notices to local canvassing board members urging them not to certify the vote in their regions. The Colorado GOP's "election integrity unit" was quoted using language eerily similar to that from Nevada election officials: "The elections of 2024 will be an epic battle" and "Our standing and credibility will be upheld if we reject the corruption of the unchanged voting process—in Colorado and throughout the nation."[48]

89. As set forth in the CREW Report: "The threat of disruption looms large in this year's elections. If county officials successfully obstruct certification, it could have a cascading effect on state and federal certification deadlines. It could also lead to mass disenfranchisement of qualified voters."

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[46] Gringlas, *A New Rule in Georgia Could Allow Local Election Boards to Refuse to Certify Results*, NPR (August 9, 2024) <https://www.npr.org/2024/08/08/nx-s1-5065909/a-new-rule-in-georgia-could-allow-some-election-boards-to-refuse-to-certify-results>.

[47] Petition for Declaratory Relief at 4, *Abhiraman v State Election Board*, Docket No. 24-CV-010786 (Sup Ct of Fulton County, Ga, Aug. 26, 2024) (available at <https://s3.documentcloud.org/documents/25074852/georgia-state-election-board-rules-lawsuit.pdf>).

[48] Mansfield & Lovato, *With Eyes on November, Colorado Republicans Keep Voting Against Certifying Elections*, USA Today (August 24, 2024) <https://www.usatoday.com/story/news/politics/elections/2024/08/25/colorado-republicans-election-certification-2024/74872375007/>.

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IV. LEGAL CONTEXT AND RELEVANT PROCEDURES GOVERNING MICHIGAN'S ELECTIONS

A. The Canvass at the County Level

1. Precinct-Level Canvass

90. After the polls close on election day, election inspectors (the formal term for poll workers in Michigan) in each precinct immediately perform the precinct-level canvass. MCL 168.801. The election inspectors compare poll lists and correct any mistakes. *Id.* They seal all of the ballots in a designated container that is delivered to the township or city clerk. MCL 168.805.

91. The election inspectors then "prepare duplicate statements of the returns showing the whole number of votes cast for all offices voted that are to be canvassed by the board of county canvassers, the names of the persons for whom the votes were given, and the number each person received." MCL 168.806(1). Each member of the board of election inspectors[49] "sign[s] the certificate on the statement of returns" attesting to the correctness of the returns and the packaging, sealing, and indorsing of the ballots. MCL 168.806(2). The results of the election inspectors' canvass are immediately available to interested persons present at the precinct, including election challengers. MCL 168.807.

92. Two election inspectors from each precinct, one from each of the major political parties, then deliver the sealed ballot container, along with the poll book and statement of returns, to the city or town's receiving board. MCL 168.679a. The receiving board ensures that the ballot container is properly sealed, that the seal number is properly recorded in the poll book and

[49] The term "board of election inspectors" is a term of art used throughout Michigan's election law which refers to the group of election inspectors assigned to any particular precinct, counting board, or other location relating to election administration. See, e.g., MCL 168.677 (governing the appointment of boards of election inspectors).

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statement of returns, and that the number of voters recorded in the poll book is equal to the number of ballots. MCL 168.679a(3).

93. The board of election inspectors seals one copy of the statement of returns and one tally return sheet in an envelope addressed to the board of county canvassers, care of the judge of probate. MCL 168.809(1). The board of election inspectors then delivers this envelope to the clerk of the township or city, which delivers it to the probate judge. *Id.* The probate judge provides the sealed envelope to the board of county canvassers when it meets. *Id.*

94. The other statement of returns and the precinct's poll list are sealed in an envelope addressed to the county clerk. MCL 168.809(2). The board of election inspectors delivers this envelope to the clerk upon completion of the count. *Id.* The clerk then opens the envelope, compiles unofficial returns, and makes the returns available to the public. *Id.*

95. Ballots, ballot boxes, and other election materials are kept in the possession of the city or township clerk until otherwise directed by the board of county canvassers. MCL 168.810a(1). Major political parties may designate individuals to monitor access points to the location where the materials are kept until 1:00 p.m. on the day after the election unless additional security is required by the board of county canvassers. MCL 168.810a(2).

2. Absent Voter Counting Boards

96. Michigan law provides that "not less than 75 days before the day of an election, the clerk of a city or township may . . . [e]nter into an agreement with the clerk of the county . . . to establish an absent voter counting board to count the absent voter ballots for that city or township." MCL 168.764d(1), (3).

97. Absent voter county boards ("AVCBs") must consist of at least two election inspectors. MCL 168.764d(8)(a). Absent voter ballots must always be monitored by election inspectors during processing and tabulation. MCL 168.765a(8). During this early counting

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process, election inspectors are charged with securing the tabulated ballots in sealed ballot containers at the end of each day. MCL 168.765a(15). Election inspectors are also charged with creating a "poll book ballot summary at the conclusion of each day to account for absent voter ballot return envelopes and absent voter ballots processed and tabulated on that day." *Id.*

98. With a few exceptions, AVCBs are required to process ballots and returns in a manner that "as nearly as possible" reflects the manner that ballots are processed in election day precincts. MCL 168.765a(6). Jurisdictions with a population of at least 5,000 may begin processing and tabulating absentee votes up to eight days prior to the election, while smaller jurisdictions must tabulate them on election day. MCL 168.765a(6), (11).

99. "For each day of processing and tabulation of absent voter ballots before election day, a participating city or township clerk shall deliver the absent voter ballots approved for tabulation to an absent voter counting board." MCL 168.765a(13).

3. The County Boards: How They Are Constituted

100. By law, every county must have a four-person board of canvassers. MCL 168.24a(1).[50]

101. The participants in the four-member board are selected from "each of the 2 political parties casting the greatest number of votes for secretary of state at the preceding general November election in that county." MCL 168.24c(1). In the ordinary course, each county board is comprised of two Democrats and two Republicans.

[50] See also Secretary of State, *Procedures and Duties of the Boards of County Canvassers* (July 2024), p 2, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/02lehman/BCC_Manual.pdf> (hereinafter "County Canvassers Manual").

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4. The County Boards: What They Do

102. No later than 9:00 a.m. on the Thursday following election day, the board of county canvassers for each county begins the county-level canvass. MCL 168.821(1). The board of county canvassers must perform this canvass based solely on the statements of returns from the precincts and AVCB and any corrected returns. Const 1963, art 2, § 7(3); MCL 168.822(3).

103. "Statements of returns" refers to the statements prepared and certified by the precinct election inspectors showing the total number of votes cast, the names for whom those votes were casts, and the number of votes that each person received. MCL 168.806. The forms for these statements must be provided by the county election commissioners to each precinct and must be "as prescribed by the secretary of state for use by the precinct election inspectors in making returns of any primary or election to the boards of county canvassers." MCL 168.667(a).

104. The county canvass must be completed "at the earliest possible time," and no later than fourteenth day after the election. MCL 168.822(1).

105. Although these duties are clerical and ministerial in nature, they are time-consuming. In a large county such as Kalamazoo, for example, there were 107 precincts that had to be canvassed in 2020.[51]

106. For *each* precinct, the board must separately check the precinct's pollbook for completion, check the statement of votes for internal consistency, and tally all write-in votes.[52]

107. As such, it is not uncommon for large counties to require the entire 14-day period to complete the canvas, despite exercising their authority to employ the assistance of multiple election inspectors.

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[51] See Michigan Department of State, *2020 Biennial Precinct Report* <https://www.michigan.gov/-/media/Project/Websites/sos/02mcalpine/Biennial_Precinct_Report_for_2020.pdf>.

[52] County Canvassers Manual, p 18.

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5. The Post-Canvass Statements and Report

108. Upon completing the canvass, the board of county canvassers prepares a statement of votes showing the number of votes cast for each office, the names for whom the votes were cast, and the number of votes given to each person, "as shown by the returns of the boards of inspectors of election of the various voting precincts of the county." MCL 168.824(1). The statement of votes must include the "total number of votes cast for each candidate for each office in the county." See County Canvassers Manual, pp 58–59.

109. No later than twenty-four hours after the completion of the canvass, the clerk of the board of county canvassers must transmit a certified copy of these statements to the Secretary of State. MCL 168.828.

110. These statements are compiled into a "County Canvassers' Report." County Canvassers Manual, p 57. This report includes, *inter alia*, "[t]he votes cast for offices and ballot questions for which the Board of State Canvassers is responsible for certifying," *id.*, p 58, which includes the President of the United States, *id.*, p 62.

111. If a board of county canvassers fails to certify by the fourteenth day after the election, it must immediately deliver all records pertaining to the election to the secretary of the Board of State Canvassers. MCL 168.82.

B. The Canvass at the State Level

112. The Board of State Canvassers consists of four members appointed by the Governor with the advice and consent of the Senate. The Board of State Canvassers consists of two members from each major political party. MCL 168.22(3). The Governor selects members from lists of nominees provided by the two major political parties. MCL 168.22a(1).

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113. The Board of State Canvassers' duty includes the responsibility to "canvass the returns and determine the result of all elections for electors of president and vice president of the United States." MCL 168.841(1).

114. The Board of State Canvassers is required to meet as soon as practicable following the receipt of returns from the boards of county canvassers, but in no event later than twenty days after the date of the election. MCL 168.42(1).

115. During the Board of State Canvassers' meeting, the board is required to examine the certified statements of votes from the boards of county canvassers and prepare a statement showing the total number of votes cast for all candidates for each office and the number of votes for each such candidate. MCL 168.844.

116. When the boards of county canvassers have submitted a certified statement of votes, it is the "ministerial, clerical, [and] nondiscretionary duty" of the Board of State Canvassers to certify the election results based on such certified statements. Const 1963, art 2, § 7; MCL 168.842(4).

117. The results must be certified no later than the twentieth day after the election, which means that in instances where the Board of State Canvassers has to step in after the failure by a county board to certify, the state board has only six additional days to complete the county canvass in addition to performing its own statutorily mandated tasks. MCL 168.822(2).

118. Following the canvass, the Board of State Canvassers must "determine which persons have been duly elected." MCL 168.845. The Board of State Canvassers then certifies that determination and submits the certificate of determination along with the statement of votes to the Michigan Secretary of State. *Id.*

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119. If the Board of State Canvassers is required to take over the duties of a board of county canvassers, "[a]ll costs associated with the completion of the canvass must be borne by the county involved." MCL 168.822(2). These costs may include "costs needed for transportation, lodging, meals, [and] all costs incurred by the Michigan Department of State, Michigan Department of Attorney General, Michigan State Police, and any other state agency." County Canvassers Manual, p 18; see also Brater Letter, p 3.

120. Because the Board of State Canvassers likely would have as little as six days following a board of county canvassers' refusal to certify, and because of the time-intensive nature of the ministerial duties involved with certification, the refusal by a single board of county canvassers, including the Kalamazoo County Board, would foist an unjustified and cumbersome responsibility upon the Board of State Canvassers at a time when the Board of State Canvassers already has significant and critical obligations of its own to which it must attend. Should numerous county boards simultaneously refuse to certify, the burden on the Board of State Canvassers would increase exponentially, and would create a high-pressure environment that would present particularly fertile ground for the sprouting of election-related conspiracy theories. As Michigan, and the entire United States, have witnessed since 2020, such dangerous and febrile theories cannot be easily pruned once they have grown, no matter how many times they are proven false.

C. The County Canvassers Must Consider *Only* the Formal Returns and Have No Authority to Consider Claims of Fraud When Performing the Canvass.

121. Michigan election law states the obligation of the county boards when conducting the canvass. In particular, the county board is to limit the canvass to "the precinct returns, early voting returns, and absent voter counting board returns." Per MCL 168.822(1):

> The board of county canvassers shall . . . canvass the returns of votes cast for all candidates for offices voted for . . . according to the precinct returns, early voting returns, and absent voter counting

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> board returns filed with the probate judge or presiding probate judge by the several city and township clerks . . . .

122. These duties include "[c]anvassing each of the county's precincts by carefully reviewing the vote totals reported and ensuring consistency across all election forms and certificates."[53] County Canvassers Manual, p 1.

123. If, during the canvass, the board of county canvassers finds that the returns from any election precinct "are missing, incomplete, or incorrect, or for any other reason it is found necessary," the board of county canvassers may "adjourn from day to day until the returns shall have been procured or corrected." MCL 168.823(1).

124. The board of county canvassers may also require the person in possession of the ballots or the returns and poll lists to bring those materials before the county board. MCL 168.823(2). The members of the board may open the ballot boxes and remove "any books or papers bearing upon the count and return of the election inspectors of the election precincts." *Id.* They may not, however, "remove or mark the ballots." *Id.*

125. The board of county canvassers is obligated to "correct *obvious* mathematical errors in the tallies and returns." MCL 168.823(3) (emphasis added). If the board of county canvassers determines, after examining the returns, poll lists, or tally sheets, that the returns are incorrect or incomplete, it may take one of two courses of action: It may "summon the election inspectors," and require the election inspectors "to count any ballots that the election inspectors failed to count." *Id.* Alternatively, it may "designate staff members from the county clerk's office to count any

[53] "Canvass" is defined by the United States Election Assistance Commission as "[a]ggregating or confirming every valid ballot cast and counted." United States Election Assistance Commission, *Glossary of Terms*, (July 26, 2021), p 18, available at https://www.eac.gov/sites/default/files/glossary_files/Glossary_of_Election_Terms_EAC.pdf>.

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ballots that the election inspectors failed to count." *Id.* In either case, the board of county canvassers then canvasses the votes from the corrected returns. *Id.*

126. "It is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns." MCL 168.822(3). The "ministerial, clerical, [and] nondiscretionary" nature of these duties is confirmed and reinforced by the Michigan Constitution. Const 1963, art 2, § 7.

127. In Michigan, "[a] ministerial act . . . leave[s] nothing to the exercise of discretion or judgment." *Barrow v Wayne Co Bd of Canvassers*, 341 Mich App 473, 486; 991 NW2d 610 (2022); *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82; 972 NW2d 738 (2021).

128. These provisions of the Michigan election law and the Michigan Constitution are consistent with the longstanding law in Michigan. As early as 1892, the Michigan Supreme Court held "it is the settled law of this state that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical. They must be governed by the return." *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892); see also *Attorney General v Bd of Co Canvassers*, 64 Mich 607, 611; 31 NW 539 (1887).

129. This view of the law has repeatedly been reaffirmed over the past 100 years. See *Johnson v Secretary of State*, 506 Mich 975, 975 (2020) (CLEMENT, J., concurring) ("At no point in this process is it even proper for [the county boards of canvassers] to investigate fraud, illegally cast votes, or the like."); *McLeod v Kelly*, 304 Mich 120, 127; 7 NW2d 240 (1942) (similar).

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130. Thus, boards of county canvassers "do not have any discretion to consider" evidence or information other than the returns. County Canvassers Manual, p 2. County boards cannot, for example "refuse to certify election results based on third party claims alleging election irregularities, or a general desire to conduct election investigations." *Id.*

D. Michigan Election Law Provides Alternative Recourse for Investigating Fraud

131. While it is not within the boards of county canvassers' mandate to investigate allegations of election fraud, Michigan election law provides appropriate legal avenues and recourse to candidates to pursue investigations into alleged fraud.

132. For example, an aggrieved candidate may petition for a recount, MCL 168.862; the Secretary of State may investigate violations of election laws, MCL 168.31(h); the Secretary of State can audit the results of an election, MCL 168.31a; the Attorney General can bring an action seeking quo warranto, MCL 600.4501, as may an aggrieved person in any election other than for the offices of electors of President or Vice President if the Attorney General refuses to do so, *id.*; and/or an aggrieved presidential candidate may seek review of the certification by the Board of State Canvassers by filing a mandamus action in the Supreme Court, MCL 168.845a.

133. What is clear under the law, however, is that investigations into allegations of election fraud are to occur post-county certification and have no role to play in the county certification process.

134. This action is necessary because Defendant Froman has been reported by *The Detroit News* to have publicly declared that he will act in defiance of these well-established principles, creating uncertainty as to whether the Kalamazoo County Board will carry out its legal duty under Michigan law.

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V. CLAIMS FOR RELIEF

COUNT I
Declaratory Judgment
Const 1963, art 2, § 7
MCR 2.605

135. Plaintiffs hereby incorporate by reference all foregoing paragraphs as though fully set forth herein.

136. Pursuant to MCR 2.605, this Court has the authority to declare the rights and legal relations of the parties to this action.

137. There exists an actual case and controversy between the parties because Defendant has expressed an intent to violate the Michigan Constitution.

138. The Constitution establishes that "[i]t shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: . . . in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns." Const 1963, art 2, § 7(3). "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82; 972 NW2d 738 (2021), quoting *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013).

139. By law, county canvassers must tally the vote counts reported in the returns and certify the results of the election. They may not consider any other evidence, including any allegations of suspected fraud, that they receive from precincts or any other source. See *McLeod v Kelly*, 304 Mich 120, 127; 7 NW2d 240 (1942).

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140. Nonetheless, Defendant has stated that he will not certify the election if it unfolds in the same manner as 2020. Indeed, Defendant Froman is reported to have told *The Detroit News* that blocking certification of the election results is "why [he is] there," meaning why he is on the Kalamazoo County Board.[54] While he denied making that statement in an unsworn email to the ACLU, he also did not contact *The Detroit News* to retract the statement, and did not deny that he actually would not certify the election in 2024 if it were to unfold in the same manner as it did in 2020. Defendant Froman's denial as to what he actually said is simply not credible.

141. Defendant's stated willingness to violate his constitutional and statutory duty creates an actual controversy that requires the Court to intervene. A declaratory judgment that county canvassers may not refuse to certify election results based on information extrinsic to the statements of returns—including any allegations of fraud—would direct the parties' conduct prospectively and would ensure that Defendant Froman does not abuse his office to propagate baseless conspiracy theories and unlawfully foist his obligations onto members of the Board of State Canvassers at significant expense to Kalamazoo County's taxpayers, including the Kelly Plaintiffs and nearly 1,000 other ACLU members residing in the county.

142. Accordingly, Plaintiffs are entitled to declaratory relief.

COUNT II
Declaratory Judgment
MCL 168.822
MCR 2.605

143. Plaintiffs hereby incorporate by reference all foregoing paragraphs as though fully set forth herein.

[54] *Most Election Officials Who Certified Michigan's 2020 Race Are Gone, supra.*

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144. Pursuant to MCR 2.605, this Court has the authority to declare the rights and legal relations of the parties to this action.

145. There exists an actual case and controversy between the parties because Defendant has expressed an intent to violate Michigan election law.

146. Michigan election law dictates that "[i]t is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns." MCL 168.822(3).

147. For the same reasons that Defendant's planned course of action violates Article 2, § 7 of the Michigan Constitution, it also violates MCL 168.822.

148. Defendant's stated willingness to violate Michigan election law creates an actual controversy that necessitates this Court's intervention. A declaratory judgment that county canvassers may not refuse to certify election results based on extrinsic information outside the four corners of the statements of returns would direct the parties' conduct prospectively and would ensure that Defendant Froman does not abuse his office to propagate baseless conspiracy theories and unlawfully foist his obligations onto members of the Board of State Canvassers at significant expense to Kalamazoo County's taxpayers, including the Kelly Plaintiffs and nearly 1,000 other ACLU members residing in the county.

149. Accordingly, Plaintiffs are entitled to declaratory relief.

COUNT III
Violation of the Fundamental Right to Vote
Const 1963, art 2, § 4(1)(a)

150. Plaintiffs hereby incorporate by reference all foregoing paragraphs as though fully set forth herein.

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151. The Michigan Constitution protects "[t]he fundamental right to vote," and prohibits any person from "us[ing] any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1)(a). It also provides that "[a]ny Michigan citizen or citizens shall have standing to bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by this part (a) of subsection (4)(1) on behalf of themselves." *Id.*

152. Defendant has asserted his willingness not to certify the results of the election if he suspects that the results were affected by fraud. Such a failure to certify would be contrary to both the Michigan Constitution and Michigan election law. It would also have the intent and effect of interfering with the fundamental right to vote of every citizen in Kalamazoo County. Indeed, by delaying and stonewalling the required certification, a refusal to certify would constitute an intent to disenfranchise all Kalamazoo County voters for an indeterminate period of time after the election. It would also unreasonably burden every Kalamazoo County voter's fundamental right to vote by forcing them to foot the bill, through their taxpayer dollars, for the costs of having the Board of State Canvassers take over the duties of the Kalamazoo County Board.

153. Accordingly, this Court should declare that Defendant must abide by his statutory and constitutional duties and certify the results of the election.

154. This Court should also award Plaintiffs reasonable attorneys' fees, costs, and disbursements, as required by Article 2, § 4 of the Michigan Constitution. Const 1963, art 2, § 4(1)(a).

VI. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests that this Court:

A. Enter judgment in favor of Plaintiffs and against Defendant;

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B. Declare that Article 2, § 7 of the Michigan Constitution requires Defendant to certify the results of the election based solely on the statements of returns from the precincts and absent voter counting boards in the county and any corrected returns, and that Defendant may not refuse to certify the results of the election based on any information extrinsic to the statements of returns;

C. Declare that MCL 168.822(3) requires Defendant to certify the results of the election based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns, and that Defendant may not refuse to certify the results of the election based on any information extrinsic to the statements of returns;

D. Declare that Defendant's stated willingness to refuse to certify the results of the election based on information extrinsic to the statements of returns violates Plaintiffs' fundamental right to vote protected by Article 2, § 4(1)(a) of the Michigan Constitution;

E. Award Plaintiffs reasonable attorneys' fees, costs, and disbursements, as required by Article 2, § 4(1)(a) of the Michigan Constitution;

F. Grant Plaintiffs any such further relief as the Court deems equitable and just under the circumstances.

Respectfully submitted,

/s/

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Dated: September 3, 2024

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EXHIBIT 1

Mauger, *Most Election Officials Who Certified Michigan's 2020 Race Are Gone. Expert Sees Trouble*, Detroit News (August 5, 2024)

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The Detroit News
SERVING MICHIGAN SINCE 1873

POLITICS

Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble

Craig Mauger
The Detroit News

Published 11:00 p.m. ET Aug. 5, 2024 | Updated 11:00 p.m. ET Aug. 5, 2024

Lansing — Widespread change has struck the group of officials whose job is to certify Michigan's elections, igniting concerns about whether the new class is willing to sign off on the results the same way county canvassers in the battleground state did four years ago.

A first-of-its-kind, weeks-long analysis by The Detroit News found 55% of the 332 county canvassers in Michigan were not serving in November 2020 when boards in all 83 counties approved the outcome despite Republican then-President Donald Trump's unsuccessful attempt to overturn his loss to Democrat Joe Biden.

The turnover has been driven by Republicans. While 48% of the Democratic canvassers are new since 2020, 63% — nearly two out of every three — are new on the GOP side, according to The News' analysis.

The numbers point to a Michigan Republican Party that's been focused on false claims of widespread fraud aimed at the 2020 election and GOP canvassers who might interfere with the election process this fall, according to Democrats. But Republicans, such as Kalamazoo County canvasser Robert Froman, said the analysis demonstrates an increased and renewed interest in how elections are administered.

"Many people within the framework or the ideology of the Republican Party have realized that they have been sitting in their living rooms way too long, and the country that they know and love is being stolen out from under them," Froman said. "And they're not willing to sit in their living rooms any longer."

Froman, a 72-year-old retired postal service employee from Oshtemo Township, is one of the 105 new Republican county canvassers who are serving in 2024 but weren't in their positions in 2020.

Each county in Michigan has a four-person canvassing board, featuring two Republicans and two Democrats, in charge of approving election tallies before they're forwarded to the state for final authorization. The panels rarely get attention and, former Michigan elections director Chris Thomas said, their members often held the posts for many years at a time, making vast changes like what's occurred recently unusual.

Concerns about the 2020 election spurred Froman to get more actively involved in politics, he said. Froman started attending Kalamazoo County Republican Party meetings and volunteering with an entity named Check My Vote, which has been trying to examine and verify addresses used by Michigan residents in the state's official list of registered voters.

Froman, whom Republicans nominated to serve on the Kalamazoo County canvassing board and whose term began last year, said he's personally checked tens of thousands of voters' addresses. He said he "most definitely" believes the 2020 election was stolen from Trump.

Asked if he would certify the 2024 presidential election if it unfolded the same way the 2020 one did, Froman replied, "No. And that's why I'm there."

Froman is one of four so-called "county leaders" or "trainers" who have been working with Check My Vote to investigate the state's registered voter list and who have recently gotten county canvassing positions. The others are Bonnie Kellogg in Muskegon County, Maureen Hillary in Clinton County and Ron Palmgren in Genesee County, according to a list of "county leaders" in a July 2023 announcement from the Michigan Republican Party.

The belief system that there was widespread fraud in 2020 and a series of attempts to reject results in Michigan over the last four years have some election officials in Michigan expecting that Republicans on some local canvassing boards might try to block the certification process in November if Trump loses to likely Democratic nominee Kamala Harris.

County canvassing boards must have a bipartisan 3-1 or 4-0 vote to certify election results and advance them to the Board of State Canvassers, another panel comprised of two Republicans and two Democrats.

"At this point, shockingly, it wouldn't surprise me to see several counties deadlock," said Thomas, who served as Michigan's elections director for more than three decades.

'I do worry'

Each of Michigan's 83 county canvassing boards has the responsibility of reviewing the local vote totals and reporting the results to the Board of State Canvassers, according to a manual published by the Michigan Bureau of Elections.

The county boards, featuring two Republican slots and two Democratic slots, have 14 days following Election Day to certify the results for each of their precincts.

The canvassers serve staggered four-year terms, are nominated by their local political party and are picked, from among the party nominees, by the local board of commissioners. However, there is no official state list that tracks who sits on the key elections boards across Michigan.

The News compiled the names of Michigan's county canvassers — those serving now and those serving in 2020 — through questionnaires sent to county clerks in June and July and examining board member lists that were posted on some county websites.

Boards with vacancies are considered by The News to have new members because the positions are expected to be filled before the November election.

Of Michigan's 83 counties, 11 have completely new canvassing boards with four new members from 2020: Alger, Arenac, Clare, Dickinson, Iosco, Mackinac, Manistee, Montmorency, Muskegon, Roscommon and Wayne — the state's most populous county and the site of a brief November 2020 certification deadlock.

In Iosco County, which is located in northeastern Michigan and has a population of about 25,000, Clerk Nancy Huebel said one past board member died, two resigned for personal reasons, and one, Democrat Patti Casey, wasn't reappointed.

In neighboring Arenac County, Janice Grier, 69, of Standish said Democrats were having trouble finding people to serve on the canvassing board a couple of years ago, so she stepped up. In 2020, 67% of the votes in the county went to Trump.

Grier said she hasn't seen anything that would make her concerned about the county board not certifying the upcoming presidential election, but she's not so certain about elsewhere in Michigan.

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"I do worry about other parts of the state," Grier said.

Protect the vote?

Over the last four years, there have been three examples of canvassers in Michigan at least initially refusing to certify an election.

Most recently, in the spring, two Republicans on the Delta County canvassing board in the Upper Peninsula voted against certifying a May 7 recall election in which three incumbent Republican county commissioners lost their seats. However, days later, they changed course and approved the results.

"I am doing my best to protect the votes of all citizens of Delta County and to ensure free and fair elections by bringing transparency and reassurance to all Delta County citizens," one of the Republican canvassers, Bonnie Hakkola, said at the time.

Hakkola resigned from the board afterward.

The other Republican who initially voted against certification, LeeAnne Oman, was serving as an alternate for an absent GOP canvasser, Sema Deeds.

Jonathan Brater, Michigan's elections director, sent a letter to the Delta County canvassers on May 16, telling them that under the Michigan Constitution and state law, they had "a clear and nondiscretionary duty to certify election results based solely on election returns."

"The Constitution and Michigan election law do not authorize boards of county canvassers to refuse to certify election results based on claims made by third parties of alleged election irregularities or a general desire to conduct election investigations," Brater wrote in the letter.

In a statement in May, Attorney General Dana Nessel said "defying the will of the people based on conjecture, dissatisfaction in the results or any other reason not based on Michigan law" will not be tolerated.

"While the Delta County Board ultimately met their obligations, and as a result have avoided the legal consequences, let this serve as a warning to all of the boards of canvassers across the state that the willful neglect of your duties is a criminal act," added Nessel, a Democrat.

Canvassers' role

Asked about the statements from Nessel and Brater about the Delta County canvassers, new Republican Kalamazoo County canvasser Froman said he has a duty to ensure there is a free and fair election.

"I am not going to do anything that's illegal," Froman told The News.

Other new canvassers interviewed by The News in recent weeks made similar remarks.

Ron Palmgren, a Republican canvasser in Genesee County, has also served as a county leader for Check My Vote. Asked if the 2020 presidential election was stolen from Trump, Palmgren said he has "no idea whether it was stolen or not."

Biden won Michigan's election by 154,000 votes or 3 percentage points, 51%-48%. The outcome has been upheld by audits, a series of court rulings and an investigation by a Republican-controlled state Senate committee.

Palmgren, a 76-year-old retiree from Burton, said he views his role as a canvasser as being an "impartial arbiter."

"Based on my experience so far, there is no investigatory process," Palmgren said of his responsibilities. "It is strictly looking at the election results provided by all of the municipalities and making sure that all of the processes that were in place were followed."

Likewise, Jim Kargol, a 69-year-old from Petoskey who serves on the Emmet County Board of Canvassers, said he doesn't believe there's been fraud in local elections, but he questions what has happened in other places, such as Detroit.

Kargol mentioned a van dropping off loads of ballots in the night during the 2020 presidential election in Detroit, a Democratic stronghold. He appeared to be referencing about 16,000 ballots that had been delivered to the center where absentee ballots were being tallied in Detroit in the early morning hours of Nov. 4. The ballots had been verified by city Clerk Janice Winfrey's staff prior to delivery in a process prescribed by Michigan law, said Thomas, Michigan's former elections director who helped oversee voting in Detroit.

"I really think there was some foolishness that went on," said Kargol, a Republican.

Canvassing troubles

After the 2020 presidential election on Nov. 17, 2020, Wayne County's Republican then-canvassers Monica Palmer and William Hartmann questioned precincts in Detroit where the number of ballots cast and the number of votes tracked didn't match and initially voted against certifying the county's results.

But later in the meeting, they changed course and supported certifying the election based on the condition that an audit take place of some precincts within Wayne County.

Minutes after the meeting, Trump and Republican National Committee Chairwoman Ronna McDaniel called Palmer and Hartmann, and Trump personally pressured them not to sign the certification document, according to recordings previously reported on by The Detroit News.

"We've got to fight for our country," Trump said during the phone call, according to the recordings. "We can't let these people take our country away from us."

More: Trump recorded pressuring Wayne County canvassers not to certify 2020 vote

The Michigan Bureau of Elections determined the vote that occurred and the signatures of the chair or vice chair of the four-member canvassing board and the county clerk were the only things necessary to advance the certification to the Board of State Canvassers.

Hartmann died in 2021, and Republican Party officials didn't renominate Palmer to serve on the canvassing board when her term concluded in 2021. The new Republican canvassers are Katherine Riley and Robert Boyd.

Riley, who's now chair of the Wayne County Board of Canvassers, according to the county's website, didn't respond Monday to a request for comment.

There are also two new Democrats on the board, Richard W. Preuss and Frank Woods Jr.

Jonathan Kinloch, a Democrat who was serving on the Wayne County canvassing board in 2020 and is now a Wayne County commissioner, said the question of whether boards will certify the results this fall is at the forefront of his mind.

Wayne County Republicans initially denied that they were going to attempt to block certification in 2020, Kinloch said. Where there's smoke, people should be concerned, he said.

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"I think this is a tactic of theirs to create chaos," Kinloch said.

Legal backstops

If a county canvassing board refuses to certify an upcoming election, Michigan has legal "backstops" in place to deal with the development, Thomas said. But such an attempt could also further undermine people's faith in electoral outcomes, he acknowledged.

Under state processes, if a county board fails to determine a result, the job moves to the Board of State Canvassers, according to the Michigan Bureau of Elections.

The county board is supposed to immediately deliver all records and other information, including all necessary forms, to the Board of State Canvassers. A court could get involved to make sure that step happens.

When the 2020 presidential election reached the state board, one of the two Republicans on the statewide panel abstained: Norm Shinkle of Ingham County. But the other Republican, Aaron Van Langevelde, cast the deciding vote with the two Democrats in favor of certification.

At the time, Shinkle called for the Republican-led Legislature to conduct an in-depth review of election procedures, and he promoted theories about problems in Wayne County.

"I do not plan on voting for certification. I believe Wayne County's certification needs to be looked at," Shinkle said before abstaining.

Van Langevelde and Shinkle are both no longer on the board. They've been replaced by Tony Daunt and Richard Houskamp.

Daunt and Houskamp voted to certify the 2022 gubernatorial election, which Republican Tudor Dixon lost to Democratic Gov. Gretchen Whitmer by about 10 percentage points. Daunt also has openly criticized Trump for spreading "lies" that the 2020 election was rigged.

cmauger@detroitnews.com

Staff Writer Beth LeBlanc contributed.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 2

Costantino v Detroit,
Opinion and Order of the Third Judicial Circuit Court, issued November 13, 2020
(Docket No. 20-014780-AW)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Cheryl A. Costantino and
Edward P. McCall, Jr.
Plaintiffs,

Hon. Timothy M. Kenny
Case No. 20-014780-AW

City of Detroit; Detroit Election Commission; Janice M. Winfrey, in her official capacity as the Clerk of the City of Detroit and the Chairperson and the Detroit Election Commission; Cathy Garrett, In her official capacity as the Clerk of Wayne County; and the Wayne County Board of Canvassers,
Defendants.

_____/

OPINION & ORDER

At a session of this Court
Held on: November 13, 2020
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

This matter comes before the Court on Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the November 3, 2020 election. The Court having read the parties' filing and heard oral arguments, finds:

With the exception of a portion of Jessy Jacob affidavit, all alleged fraudulent claims brought by the Plaintiffs related to activity at the TCF Center. Nothing was alleged to

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have occurred at the Detroit Election Headquarters on West Grand Blvd. or at any polling place on November 3, 2020.

The Defendants all contend Plaintiffs cannot meet the requirements for injunctive relief and request the Court deny the motion.

When considering a petition for injunction relief, the Court must apply the following four-pronged test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2nd 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* at 612 fn 135 quoting *Senior Accountants, Analysts and Appraisers Association v Detroit*, 218 Mich. App. 263, 269; 553 NW2nd 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) states that the Plaintiffs bear the burden of proving the preliminary injunction should be granted. In cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud. MCR 2.112 (B) (1)

Plaintiffs must establish they will likely prevail on the merits. Plaintiffs submitted seven affidavits in support of their petition for injunctive relief claiming widespread voter

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fraud took place at the TCF Center. One of the affidavits also contended that there was blatant voter fraud at one of the satellite offices of the Detroit City Clerk. An additional affidavit supplied by current Republican State Senator and former Secretary of State Ruth Johnson, expressed concern about allegations of voter fraud and urged "Court intervention", as well as an audit of the votes.

In opposition to Plaintiffs' assertion that they will prevail, Defendants offered six affidavits from individuals who spent an extensive period of time at the TCF Center. In addition to disputing claims of voter fraud, six affidavits indicated there were numerous instances of disruptive and intimidating behavior by Republican challengers. Some behavior necessitated removing Republican challengers from the TCF Center by police.

After analyzing the affidavits and briefs submitted by the parties, this Court concludes the Defendants offered a more accurate and persuasive explanation of activity within the Absent Voter Counting Board (AVCB) at the TCF Center.

Affiant Jessy Jacob asserts Michigan election laws were violated prior to November 3, 2020, when City of Detroit election workers and employees allegedly coached voters to vote for Biden and the Democratic Party. Ms. Jacob, a furloughed City worker temporarily assigned to the Clerk's Office, indicated she witnessed workers and employees encouraging voters to vote a straight Democratic ticket and also witnessed election workers and employees going over to the voting booths with voters in order to encourage as well as watch them vote. Ms. Jacob additionally indicated while she was working at the satellite location, she was specifically instructed by superiors not to ask for driver's license or any photo ID when a person was trying to vote.

The allegations made by Ms. Jacob are serious. In the affidavit, however, Ms. Jacob does not name the location of the satellite office, the September or October date these

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acts of fraud took place, nor does she state the number of occasions she witnessed the alleged misconduct. Ms. Jacob in her affidavit fails to name the city employees responsible for the voter fraud and never told a supervisor about the misconduct.

Ms. Jacob's information is generalized. It asserts behavior with no date, location, frequency, or names of employees. In addition, Ms. Jacob's offers no indication of whether she took steps to address the alleged misconduct or to alter any supervisor about the alleged voter fraud. Ms. Jacob only came forward after the unofficial results of the voting indicated former Vice President Biden was the winner in the state of Michigan.

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

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The affidavit of current State Senator and former Secretary of State Ruth Johnson essentially focuses on the affidavits of Ms. Jacob and Zachery Larsen. Senator Johnson believed the information was concerning to the point that judicial intervention was needed and an audit of the ballots was required. Senator Johnson bases her assessment entirely on the contents of the Plaintiffs' affidavits and Mr. Thomas' affidavit. Nothing in Senator Johnson's affidavit indicates she was at the TCF Center and witnessed the established protocols and how the AVCB activity was carried out. Similarly, she offers no explanation as to her apparent dismissal of Mr. Thomas' affidavit. Senator Johnson's conclusion stands in significant contrast to the affidavit of Christopher Thomas, who was present for many hours at TCF Center on November 2, 3 and 4. In this Court's view, Mr. Thomas provided compelling evidence regarding the activity at the TCF Center's AVCB workplace. This Court found Mr. Thomas' background, expertise, role at the TCF Center during the election, and history of bipartisan work persuasive.

Affiant Andrew Sitto was a Republican challenger who did not attend the October 29th walk- through meeting provided to all challengers and organizations that would be appearing at the TCF Center on November 3 and 4, 2020. Mr. Sitto offers an affidavit indicating that he heard other challengers state that several vehicles with out-of-state license plates pulled up to the TCF Center at approximately 4:30 AM on November 4th. Mr. Sitto states that "tens of thousands of ballots" were brought in and placed on eight long tables and, unlike other ballots, they were brought in from the rear of the room. Sitto also indicated that every ballot that he saw after 4:30 AM was cast for former Vice President Biden.

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Mr. Sitto's affidavit, while stating a few general facts, is rife with speculation and guess-work about sinister motives. Mr. Sitto knew little about the process of the absentee voter counting board activity. His sinister motives attributed to the City of Detroit were negated by Christopher Thomas' explanation that all ballots were delivered to the back of Hall E at the TCF Center. Thomas also indicated that the City utilized a rental truck to deliver ballots. There is no evidentiary basis to attribute any evil activity by virtue of the city using a rental truck with out-of-state license plates.

Mr. Sitto contends that tens of thousands of ballots were brought in to the TCF Center at approximately 4:30 AM on November 4, 2020. A number of ballots speculative on Mr. Sitto's part, as is his speculation that all of the ballots delivered were cast for Mr. Biden. It is not surprising that many of the votes being observed by Mr. Sitto were votes cast for Mr. Biden in light of the fact that former Vice President Biden received approximately 220,000 more votes than President Trump.

Daniel Gustafson, another affiant, offers little other than to indicate that he witnessed "large quantities of ballots" delivered to the TCF Center in containers that did not have lids were not sealed, or did not have marking indicating their source of origin. Mr. Gustafson's affidavit is another example of generalized speculation fueled by the belief that there was a Michigan legal requirement that all ballots had to be delivered in a sealed box. Plaintiffs have not supplied any statutory requirement supporting Mr. Gustafson's speculative suspicion of fraud.

Patrick Colbeck's affidavit centered around concern about whether any of the computers at the absent voter counting board were connected to the internet. The answer given by a David Nathan indicated the computers were not connected to the

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internet. Mr. Colbeck implies that there was internet connectivity because of an icon that appeared on one of the computers. Christopher Thomas indicated computers were not connected for workers, only the essential tables had computer connectivity. Mr. Colbeck, in his affidavit, speculates that there was in fact Wi-Fi connection for workers use at the TCF Center. No evidence supports Mr. Colbeck's position.

This Court also reads Mr. Colbeck's affidavit in light of his pre-election day Facebook posts. In a post before the November 3, 2020 election, Mr. Colbeck stated on Facebook that the Democrats were using COVID as a cover for Election Day fraud. His predilection to believe fraud was occurring undermines his credibility as a witness.

Affiant Melissa Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she "witnessed nothing but fraudulent actions take place" during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone's description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.

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Lastly, Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. Mr. Larsen is a former Assistant Attorney General for the State of Michigan who alleged mistreatment by city workers at the TCF Center, as well as fraudulent activity by election workers. Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4th. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4th as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was

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at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

In contrast to Plaintiffs' witnesses, Christopher Thomas served in the Secretary of State's Bureau of Elections for 40 years, from 1977 through 2017. In 1981, he was appointed Director of Elections and in that capacity implemented Secretary of State Election Administration Campaign Finance and Lobbyist disclosure programs. On September 3, 2020 he was appointed as Senior Advisor to Detroit City Clerk Janice Winfrey and provided advice to her and her management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes. Mr. Thomas helped prepare the City of Detroit for the November 3, 2020 General Election.

As part of the City's preparation for the November 3rd election Mr. Thomas invited challenger organizations and political parties to the TCF Center on October 29, 2020 to have a walk-through of the entire absent voter counting facility and process. None of Plaintiff challenger affiants attended the session.

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On November 2, 3, and 4, 2020, Mr. Thomas worked at the TCF Center absent voter counting boards primarily as a liaison with Challenger Organizations and Parties. Mr. Thomas indicated that he "provided answers to questions about processes at the counting board's resolved dispute about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers."

Additionally, Mr. Thomas resolved disputes about the processes and satisfactorily reduced the number of challenges raised at the TCF Center.

In determining whether injunctive relief is required, the Court must also determine whether the Plaintiffs sustained their burden of establishing they would suffer irreparable harm if an injunction were not granted. Irreparable harm does not exist if there is a legal remedy provided to Plaintiffs.

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part "the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections." Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase "in such as manner as prescribed by law" requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner "as prescribed by law".

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least

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one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditor because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results. Remedies are provided to the Plaintiffs. Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

As stated above, Plaintiffs have multiple remedies at law. Plaintiffs are free to petition the Wayne County Board of Canvassers who are responsible for certifying the votes. (MCL 168.801 and 168.821 et seq.) Fraud claims can be brought to the Board of Canvassers, a panel that consists of two Republicans and two Democrats. If dissatisfied with the results, Plaintiffs also can avail themselves of the legal remedy of a recount and a Secretary of State audit pursuant to MCL 168.31a.

Plaintiff's petition for injunctive relief and for a protective order is not required at this time in light of the legal remedy found at 52 USC § 20701 and Michigan's General Schedule #23 – Election Records, Item Number 306, which imposes a statutory obligation to preserve all federal ballots for 22 months after the election.

In assessing the petition for injunctive relief, the Court must determine whether there will be harm to the Plaintiff if the injunction is not granted, as Plaintiffs' existing legal

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remedies would remain in place unaltered. There would be harm, however, to the Defendants if the Court were to grant the requested injunction. This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Finally, the Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding yes. Granting Plaintiffs' requested relief would interfere with the Michigan's selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.

Conclusion

Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities occurring both openly in the TCF Center and under the cloak of darkness. The challengers' conclusions are decidedly contradicted by the highly-respected former State Elections Director Christopher Thomas who spent hours and hours at the TCF Center November 3rd and 4th explaining processes to challengers and resolving disputes. Mr. Thomas' account of the November 3rd and 4th events at the TCF Center is consistent with the affidavits of challengers David Jaffe, Donna MacKenzie and Jeffrey Zimmerman, as well as former Detroit City Election Official, now contractor, Daniel Baxter and City of Detroit Corporation Counsel Lawrence Garcia.

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Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020 walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretation of events is incorrect and not credible.

Plaintiffs are unable to meet their burden for the relief sought and for the above mentioned reasons, the Plaintiffs' petition for injunctive relief is DENIED. The Court further finds that no basis exists for the protective order for the reasons identified above. Therefore, that motion is DENIED. Finally, the Court finds that MCL 168.31a governs the audit process. The motion for an independent audit is DENIED.

It is so ordered.

This is not a final order and does not close the case.

November 13, 2020

Hon. Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

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EXHIBIT 3

ACLU Letter
(August 15, 2024)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

ACLU Michigan

State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
Phone 313.578.6800
Fax 313.578.6811
E-mail aclu@aclumich.org
www.aclumich.org

Legislative Office
115 West Allegan Street
Lansing, MI 48933
Phone 517.372.8503
Fax 517.372.5121
E-mail aclu@aclumich.org
www.aclumich.org

West Michigan Regional Office
1514 Wealthy St. SE, Suite 260
Grand Rapids, MI 49506
Phone 616.301.0930
Fax 616.301.0640
Email aclu@aclumich.org
www.aclumich.org

August 15, 2024

Sent via email and certified mail

Robert Froman
Member, Kalamazoo Board of County Canvassers
201 West Kalamazoo Ave.
Kalamazoo, MI 49007
Rlfpersonal2017@gmail.com

Dear Mr. Froman:

We write to express our grave concerns about recent statements you made to the media regarding your duties and intentions as a duly appointed member of the Kalamazoo Board of County Canvassers. According to an article published in the Detroit News on August 5, 2024, you reportedly told the Detroit News that you "most definitely" believe that the 2020 election was stolen from former President Donald Trump. Further, when asked if you would certify the 2024 presidential election if it unfolded the same way the 2020 election did, you responded, "No. And that's why I'm there."[1]

Your legal obligation, and the obligation of every member of a board of canvassers under the Michigan Constitution and under binding Michigan law is to certify any election based solely upon the returns. The law does not authorize members of boards of canvassers to withhold certification based upon speculation, theories, or even evidence pertaining to the accuracy of the reported returns. The Michigan Constitution provides:

> It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on … in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. Const. 1963, Art II, § 7(3).

Michigan Election Law parallels this requirement. MCL 168.822(3) provides:

> It is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns. MCL 168.822(3).

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[1] Mauger, *Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble*, The Detroit News (August 5, 2024) <https://www.detroitnews.com/story/news/politics/2024/08/05/michigan-election-county-canvassers-boards-vote-certification-donald-trump-kamala-harris/74610733007/> (accessed August 14, 2024).

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Thus, members of county canvassing boards have a clear, non-discretionary duty to certify election results based solely on election returns. As you are likely aware, on May 16, 2024, Jonathan Brater, Director of the Bureau of Elections, wrote a letter to the Delta County Board of Canvassers following their initial refusal to certify a May recall election in that county (the "Brater Letter).[2] In this letter, Brater emphasizes that members of county canvassing boards are not permitted to refuse to certify election results based on claims by third parties of alleged election irregularities, or a desire to conduct election fraud investigations. Brater Letter 1. Canvassers are legally required to certify the election results that are brought before them once the legal requirements have been met.

Even before the people of Michigan enacted the constitutional language quoted above in the 2022 election, the Michigan Supreme Court consistently held that members of county and state canvassing boards have a clear, nondiscretionary legal duty to certify the election based solely on election returns. See *Johnson v Secretary of State*, 506 Mich 975; 951 NW2d 310, 311-312 (2020) (CLEMENT, J., concurring). Indeed, as early as 1892, the Michigan Supreme Court held that "it is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical." *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892). See also *People ex rel Attorney General v Van Cleve*, 1 Mich 362, 366 (1850) ("The duties of these [canvassing] boards are simply ministerial . . . .").

Your comments are directly contrary to the law. Not only do they demonstrate a willingness to violate your oath of office, the constitution, and the laws of the state of Michigan, but they also indicate a willingness to commit a criminal offense. On May 24, 2024, Attorney General Nessel issued a press release regarding the duty of canvassers to certify election results. In this release, Attorney General Nessel warned all members of Michigan Boards of County Canvassers that Willful Neglect of Duty is a criminal act.[3] MCL 168.931(h) provides that "A person shall not willfully fail to perform a duty imposed upon that person by this act." A person who fails to perform their duty as required by Michigan Election Law may be guilty of a misdemeanor. MCL 169.931(2). Consequently, as it is a nondiscretionary legal duty for a Board of County Canvassers member to certify the election based on election returns, to refuse to do so because of rumors, allegations, or even evidence of fraud would expose that member to criminal liability.

While we recognize that in the above cited Detroit News article you also stated that you would not do anything illegal, you evidently made that statement after openly declaring that the

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[2] Michigan Department of State, *Letter to Delta County Board of Canvassers* <https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2024/May/Delta-County-Canvassers-Letter-05-16-2024.pdf> (accessed August 15, 2024).

[3] Michigan Department of Attorney General, AG Nessel, Secretary Benson on Duty of Canvassers to Certify Election Results <https://www.michigan.gov/ag/news/press-releases/2024/05/24/ag-nessel-secretary-benson-on-duty-of-canvassers-to-certify-election-results> (accessed August 14, 2024).

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reason you were in your position on the canvassing board was, precisely, to do something that would be illegal.[4] Accordingly, by this letter, we are requesting that you take the following action(s). If you were misquoted in the Detroit News, please notify the Detroit News, in writing, that this was the case and request a retraction, copying us at the email address below. If you were not, then your statements demonstrate a willingness to violate Michigan law that could subject you to legal liability both now and following the election. To avoid legal liability, you should rescind your statements immediately. We expect you to issue a public statement, to provide that statement to the Detroit News, and to copy us on any such communication by August 23, 2024. If you do not, we anticipate examining appropriate legal remedies and you may be liable for our attorneys' fees if we are forced to do so.

Sincerely,

Philip Mayor (P81691)
Delaney Barker (P87401)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org

cc: Robert Froman
1570 Tanager Lane
Kalamazoo, MI 49009

[4] Supra note 1.

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EXHIBIT 4

Froman Email
(August 16, 2024)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Robert Froman
To: Philip Mayor
Subject: Re: [External] Letter from ACLU of Michigan
Date: Friday, August 16, 2024 1:44:17 PM
Attachments: image001.png

I did not make any of the statements you say I did. I have not seen or approved any article by the Detroit news. I will make no public statement about what the Detroit News published. I believe the first amendment to the Constitution allows the press to publish any information they deem necessary.

Robert

On Thu, Aug 15, 2024 at 4:55 PM Philip Mayor <pmayor@aclumich.org> wrote:

> Mr. Froman,
>
> Please find enclosed a letter from the ACLU of Michigan regarding your recent statements to the *Detroit News*. We look forward to receiving your response by next Friday, August 23, as provided in the concluding paragraph of the letter.
>
> Sincerely,
>
> **Phil Mayor**
>
> Pronouns: he, him
>
> Senior Staff Attorney
>
> American Civil Liberties Union of Michigan
>
> 2966 Woodward Ave. Detroit MI 48201
>
> *(Offices in Detroit, Grand Rapids and Lansing)*
>
> 313.578.6803 | pmayor@aclumich.org
>
> "O! it is excellent
>
> To have a giant's strength; but it is tyrannous

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To use it like a giant."

ACLU
Michigan

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EXHIBIT 5

The Detroit News letter
(August 29, 2024)

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The Detroit News DetroitNews.com

160 W. FORT STREET / DETROIT, MICHIGAN 48226 http://www.detroitnews.com

Aug. 29, 2024

Merissa Kovach, Political Director
American Civil Liberties Union of Michigan
2966 Woodward Ave. Detroit MI 48201

Regarding the article "Most election officials who certified Michigan's 2020 race are gone. Expert sees trouble" published on Aug. 5, 2024, we stand by our story.

Sincerely,

Kevin J. Hardy
Managing Editor
kjhardy@detroitnews.com
(313) 222-2526

MediaNews Group

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 6/15/2023 4:03:27 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Bailey v Antrim County & Benson - per our discussion
Attachments: mot23 lift stay w exhibits.pdf

Hi Jonathan, see attached.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 13TH JUDICIAL CIRCUIT
ANTRIM COUNTY

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.

No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

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INTERVENING DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S MOTION TO LIFT STAY FOR LIMITED PURPOSE

NOW COMES Intervening Defendant Secretary of State Jocelyn Benson, by her attorneys, and requests that this Court enter an order lifting the stay entered on September 4, 2021 for the limited purpose of receiving a motion to show cause

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related to an apparent violation of an earlier order of this Court. In support thereof, Defendant Benson states:

1. On January 11, 2021, this Court ruled from the bench that the forensic images taken from Antrim County election equipment that had not been published in the Plaintiff's expert report (which had been released pursuant to this Court's December 15, 2020 order) were not to be publicly released.

2. On or about August 12, 2021, counsel for Intervening-Defendant Secretary of State Benson received information that copies of the forensic images of Antrim County's voting equipment obtained by Plaintiff in this case were being distributed publicly.

3. Counsel immediately began gathering information to determine what information had been distributed and confirming that it was virtually identical to the forensic images reviewed in this case.

4. On September 3, 2021, counsel was in the process of filing a motion to show cause why one of Plaintiff's experts should not be held in contempt for violating this Court's January 11, 2021 order. A copy of that proposed motion and its supporting exhibits is attached to this motion as Exhibit 1.

5. On September 3, 2021 at 1:59 p.m.—moments before the above motion to show cause would be filed—this Court entered an order staying "all matters" pending a determination of Plaintiff's appeals.

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6. The September 3 order was unexpected, as a hearing on Plaintiff's objection to the Intervening-Defendant's filing of an errata on the subject of the stay had already been scheduled by the Court for September 13, 2021.

7. The same security risks and public interests that prompted this Court's January 11, 2021 order prohibiting distribution of the forensic images urge prompt action to hear and redress an apparent violation of that order.

RELIEF REQUESTED

For these reasons, Intervening Defendant Secretary of State Jocelyn Benson moves and respectfully requests that this Honorable Court enter an Order lifting the September 3, 2021 stay of proceedings for the limited purpose of filing and hearing Intervening-Defendant's above-described motion to show cause.

Respectfully submitted,

Dana Nessel
Attorney General

/s/Erik A. Grill
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Dated: September 7, 2021

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PROOF OF SERVICE

On September 7, 2021, I electronically filed the foregoing papers with the Antrim County Circuit Court using the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Erik A. Grill

Erik A. Grill (P64713)
Attorney for Intervenor-Defendant
Assistant Attorney General
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EXHIBIT 1

Document received by the MI Antrim 13th Circuit Court.

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 13TH JUDICIAL CIRCUIT
ANTRIM COUNTY

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.

No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

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INTERVENING DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S EX PARTE MOTION FOR ORDER TO SHOW CAUSE

NOW COMES Intervening Defendant Secretary of State Jocelyn Benson, by her attorneys, and requests that pursuant to this Court's inherent authority, MCL 600.1701, and MCR 3.606, this Court enter an Order directing Colonel James

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Waldron to show cause why he should not be held in contempt for violating this Court's January 11, 2021 order prohibiting the distribution of the forensic images obtained from Antrim County's election equipment outside of the parties to this litigation and the experts specifically identified in the parties' pleadings filed in this matter. In support thereof, Defendant Benson states:

1. On December 23, 2020, Plaintiff filed an expert witness list in this matter in which he identified Colonel James P. Waldron as an expert witness and stated that Colonel Waldron could be contacted through Plaintiff's counsel. (Ex A, 12/23/20 Witness List).

2. On January 11, 2021, this Court ruled from the bench that the forensic images taken from Antrim County election equipment that had not been published in the Plaintiff's expert report (which had been released pursuant to this Court's December 15, 2020 order) were not to be publicly released. While Plaintiff's experts could review those forensic images, "mass distribution of that information is not something that the Court is countenancing at this time." (Ex B, Excerpt 1/11/21 Transcript, pp 43-44.)

3. Between August 10 and August 12, 2021, Colonel Waldron appeared at an event referred to as "Mike Lindell's Cyber Symposium." Speakers at the event discussed various theories and arguments disputing the results of the November 2020 general election. Colonel Waldron was a speaker at the event—as was Dr. Douglas Frank, who was listed on Plaintiff's April 16, 2021 proposed amended expert witness list. (Ex C, 4/15/21 Prop Amend Witness List).

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4. Harri Hursti, an attendee of the "Cyber Symposium," has averred in a sworn declaration filed in federal court that event organizers made copies of three (3) separate Dominion Election Management System Server installations available to people in attendance. (Ex D, Hursti Decl., ¶4.) Two of the images appeared to originate from Mesa County, Colorado, but the third was from Antrim County, Michigan. (Ex D, ¶ 6.) A copy of the header from the Antrim County image is attached to Hursti's declaration as its exhibit 2.

5. According to Hursti, all three images—including the Antrim County image—were made globally available for download. (Ex D, ¶9.)

6. Defendant's expert, Professor Alex J. Halderman, was provided with a copy of the data from the "Cyber Symposium" by another attendee. Professor Halderman can confirm that the data is authentic and that it contains material from the Antrim County forensic images he reviewed in this case. (Ex E, Halderman Aff.)

7. During a presentation during the "Cyber Symposium," Colonel Waldron stated that, "the Antrim information," would be available to attendees. He further referred to "the breakout rooms" as having the Antrim County images, and invited attendees to look at the images. He also stated that, "this is going to be like a training book on how to look at server logs." These statements were recorded on video (click on image below):

jFELKrwjYLsTrdyL.mp4

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8. It is not clear who provided the Antrim County forensic images to the "Cyber Symposium," but Colonel Waldron was clearly aware that the Antrim County forensic images were being distributed and he encouraged that distribution.

9. Contempt is defined as a "willful act, omission, or statement that tends to . . . impede the functioning of a court." *In re Contempt of Robertson*, 209 Mich App 433, 436 (1995). "[T]he primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts." *In re Contempt of Auto Club Ass'n*, 243 Mich App 697, 708 (2000) (citation omitted).

10. This Court has inherent and statutory authority to hold attorneys, parties, and other persons in contempt for violating any order or process of the Court, see *In re Contempt of Auto Club Ass'n*, 243 Mich App at 708-709; MCL 600.1701(c), (g), and to impose penalties as provided in MCL 600.1715.

11. As an expert retained by Plaintiff, Colonel Waldron was given access to the Antrim County forensic images only for the purpose of advising the Plaintiff and providing testimony in this matter. Colonel Waldron knew, or should have known, the restrictions this Court had placed on the use and distribution of the forensic images.

12. Further, as averred by Professor Halderman the public release of the Antrim County data presents a security risk in that it is sufficiently detailed such

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that it would facilitate the planning or development of methods or means to compromise voting systems in communities using similar systems. (Ex E, ¶ 7.)[1]

13. On August 12, 2021, counsel for Secretary Benson e-mailed Plaintiff's counsel to advise of the distribution of the Antrim County data. Plaintiff's counsel replied that he had already sent a demand to Mike Lindell to cease and desist distribution of the images, and further quoted his demand as stating:

> This is a demand that you immediately cease and desist disclosing or displaying any forensic images of Antrim County. Those images are under protective order. Neither you or your team are permitted to display or use those images.

(Ex F, E-mail 8/12/2021.)

14. Defendant Secretary of State Benson has no ability to further investigate this incident, but given the seriousness of the matter felt compelled to provide the available information to the Court for it to take appropriate action to enforce its orders.

RELIEF REQUESTED

For these reasons, Intervening Defendant Secretary of State Jocelyn Benson moves and respectfully requests that this Honorable Court enter an Order directing Colonel James Waldron to show cause why he should not be held in contempt for violating this Court's January 11, 2021 order prohibiting the mass distribution of the Antrim County forensic images.

[1] As Professor Halderman is presently out of state, a signed and notarized version of the Affidavit will be filed with the Court as quickly as possible upon his return during the week of September 6, 2021.

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Respectfully submitted,

Dana Nessel
Attorney General

/s/Erik A. Grill
Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
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meingasth@michigan.gov
grille@michigan.gov

Dated: _____, 2021

PROOF OF SERVICE

On _____, 2021, I electronically filed the foregoing papers with the Antrim County Circuit Court using the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Erik A. Grill
Erik A. Grill (P64713)
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EXHIBIT A

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY Plaintiff	Case No. 20-9238-CZ
v.	
ANTRIM COUNTY Defendant,	HON. KEVIN A. ELSENHEIMER
SECRETARY OF STATE JOCELYN BENSON Intervenor-Defendant,	

Matthew S. DePerno (P52622)
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PLAINTIFF'S EXPERT WITNESS LIST

Plaintiff WILLIAM BAILEY, by and through his attorney, DePERNO LAW OFFICE, PLLC, submit for his Expert Witness List the following:

1. Russel Ramsland; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

   Mr. Ramsland is expected to testify as to election integrity, systems, process, generally accepted practices, standards of care, and election voting systems, including the Dominion Voting Systems. He is expected to testify regarding adjudication logs, systems files, applications security issues, and the review and preparation of the Antrim Michigan

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Forensics Report, Revised Preliminary Summary, v2, dated December 13, 2020 ("ASOG Report"). He is expected to testify regarding cyber/computer network operations, data analysis, and operations integration in computer and voting systems. He is expected to testify on how the Dominion Voting Systems affects elections. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throught course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

2. Col. James P. (Phil) Wadron; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Col. Waldron is expected to testify as to election integrity, systems, process, generally accepted practices, standards of care, and election voting systems, including the Dominion Voting Systems. He is expected to testify regarding adjudication logs, systems files, applications security issues, and the review and preparation of the Antrim Michigan Forensics Report, Revised Preliminary Summary, v2, dated December 13, 2020 ("ASOG Report"). He is expected to testify regarding cyber/computer network operations, data analysis, and operations integration in computer and voting systems. He is expected to testify on how the Dominion Voting Systems affects elections. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throught course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

3. Doug Logan; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Logan is expected to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic image. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

4. Greg Freemyer; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Freemyer is expected to testify regarding the identification and forensic imaging and preservation of the Antrim County enlection management server, thumb drives, and compact flash cards performed in this case. He is expected to base his testimony on his knowledge and review of the forensic imaging process obtained from the Antrim County

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computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throught course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

5. Paul Maggio; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

   Mr. Maggio is expected to testify regarding the identification and forensic imaging and preservation of the Antrim County enlection management server, thumb drives, and compact flash cards performed in this case. He is expected to base his testimony on his knowledge and review of the forensic imaging process obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throught course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

6. Any rebuttal or impreachment witness necessary to rebut any evidence or testimony presented by any other party to this lawsuit.

7. Any expert witness required to rebut evidence presented by Defendants

8. Plaintiff reserve all rights to identify further witnesses as they become known.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: December 23, 2020

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff

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EXHIBIT B

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STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,

Plaintiff,

Case No. 20-9238-CZ

v.

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.
----------/

PLAINTIFF'S MOTION FOR PROTECTIVE ORDER
AND PLAINTIFF'S MOTION TO COMPEL DISCOVERY AGAINST
INTERVENOR-DEFENDANT BENSON
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge

Bellaire, Michigan - Monday, January 11th, 2021.

APPEARANCES:

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For the Defendant: MR. HAIDER A. KAZIM (P66146)
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Reported By:
Ms. Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
(231) 922-4576

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APPEARANCES CONTINUED:

For Intervenor-Defendant MR. ERIK A. GRILL (P55439)
Assistant Attorneys General
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Mr. Grill?

MR. GRILL: I don't have any -- any questions, I think, at this point about what the Court has laid out in regards to the discovery request from Mr. Deperno. I do have two -- I do have some additional matters related to discovery I would like to bring to the Court's attention, if the Court wants to handle that now or just give me a minute afterwards.

THE COURT: Let's talk about that in just a moment. I'd also like to remind the parties I did make a decision with regard to the request for protective order with regards to Dominion information or the ElectionSource information as well, that should be included in the order.

And, Mr. Deperno, I'd like you to prepare that order, please. But let's go ahead and discuss the additional issues with regard to discovery, starting with you, Mr. Grill.

MR. GRILL: Thank you, your Honor.

First, the original requests we were under the -- the one-week response time with Mr. -- with the narrowing construction given today, what -- when would our responses be due to the discovery requests? That's the first issue. The second issue comes to in

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regards to the forensic data that was taken by Mr. Deperno's experts originally, when we lifted or when we agreed to lift the protective order for the purpose of Mr. Deperno's expert report being released, I don't think it was quite our understanding that those forensic files themselves would be subject to public release as well.

I know we spent some time during the hearing talking about how code should be redacted from the report. So I guess I just wanted to raise the issue to the Court and clarify that the original forensic images that Mr. Deperno obtained should still be kept confidential. And then lastly, just bringing to the Court's attention, last week we sent Mr. Deperno two emails requesting deposition dates for witnesses. Mr. Deperno has not given us any reply.

THE COURT: All right. Let's go ahead and talk to Mr. Deperno.

Mr. Deperno -- well, first, Mr. Grill, how much time do you need to respond to the updated discovery requests?

MR. GRILL: I think given -- even with the narrowing that we've got today, the Secretary of State's administrative offices and the Bureau of Elections with a number of parties, coordination with

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the Department of Management and Budget is usually required to conduct email searches and those can take some time. I, frankly, would welcome as much time as the Court would be willing to give us, but I would say at least two weeks.

THE COURT: All right.

Mr. Deperno, in response to the issues that have been raised by Mr. Grill? How much time is appropriate, do you think?

MR. DEPERNO: If he needs two weeks, he needs two weeks. I don't want to argue with him about that. He knows his schedule and the constraints of his client better than I do.

THE COURT: All right.

And as to the availability of the forensic imaging?

MR. DEPERNO: Well, the -- the forensic imaging there's no protective order on any of that information right now and it's not source code. The images are not source code. And certainly if we want to have other people look at that, we should be able to have other people look at that information to get -- you know, more analysis, more data from people. I wouldn't see the harm in allowing other people to examine the forensic images. But there is no

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protective order right now covering that information.

THE COURT: Mr. Grill?

MR. GRILL: And I think that kind of underscores our concern, your Honor. We had heard reports that there was a website somewhere that had obtained copies and had published them, and I think that has subsequently been taken down. Be that as it may, our concern at this point is when we're -- when we were before this Court talking about the protective order for the purposes of releasing Mr. Deperno's report, that was the understanding of the parties was that we were talking about the release of the report.

I don't see that there is much to be accomplished through the publication of the forensic images taken from Mr. Deperno's experts. If Mr. Deperno wants to consult with additional experts, he's free to do so, of course; but, you know, obviously they would be subject to the same constraints that Mr. Deperno would be under.

I think that this -- the fact that there seems to be some pushback on this I think underscores that there probably needs to be some level of control placed on the distribution of these files.

THE COURT: All right. Well, we did discuss this matter to some degree, but I don't think we quite

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reached the issue of distribution of forensic images, but for those matters that were contained in the expert opinion that was prepared for Mr. Deperno.

Those matters are already open. They're available to the public. However, anything that is not included, including individual images in the report, is still subject to in a -- a protective order. And should Mr. Deperno need to provide those images to other experts that he's already identified, then that certainly would be appropriate.

However, the Court is not interested in creating unnecessary intrusions into source code, number one, that may be retained, or controlled, or owned by parties that are not part of this litigation, including Dominion. And to the extent that includes forensic imaging -- pardon me, to the extent that includes imaging -- forensic implies some level of analysis, then it makes sense that we -- we also protect that information.

So the line I'm trying to draw here, gentlemen, is between matters that are owned as intellectual property by parties that are not part of this litigation, Dominion, et cetera, and those matters that have been released pursuant to my order that have been part of the analysis performed by

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experts in this case. Again, Mr. Deperno's experts should have the opportunity to review those materials, as should the experts of any other entity -- be it the intervenor, or the county, or any of the other defendants in this case. But mass distribution of that information is not something that the Court is countenancing at this time.

Does that make sense, gentlemen? Or do you need more information from me?

MR. GRILL: I understand the Court, your Honor.

THE COURT: Mr. Deperno, do you understand the Court?

MR. DEPERNO: I do understand the Court, yes.

THE COURT: Okay.

Mr. Deperno, I'd like you to go ahead, as I said, and prepare an order with regard to my decisions with regard to discovery today. We'll go ahead and grant the state -- pardon me, the Secretary of State three weeks to prepare the materials and to respond to the -- to the requests for production, and that will be as of -- three weeks as of today. So you're looking at the 25th will be the time for the response.

All right. Is there anything else that we

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can address today? Let's start with you, Mr. Deperno.

MR. DEPERNO: Nothing from the plaintiff, your Honor.

THE COURT: All right.

Mr. Kazim, anything for you?

MR. KAZIM: Your Honor, just, I think, echoing Mr. Grill's comment, there was a request that was made requesting depositions of the forensic team. Those -- Mr. Grill's office sent two emails to Mr. Deperno last week requesting availability and we have not received a response to those -- to that request.

THE COURT: Well, let's short-circuit any -- any potential motion on the point.

Mr. Deperno, where do we stand with regard to dates for depositions?

MR. DEPERNO: Yeah. I'm getting dates. I'm not ignoring them, but it takes more than just a couple days to coordinate all that. I will respond to them within the next couple of days.

THE COURT: All right.

Anything further, Mr. Kazim?

MR. KAZIM: Nothing further. Thank you, your Honor.

THE COURT: Anything further, Mr. Grill?

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MR. GRILL: Just a point of clarification, your Honor. A moment ago the Court said three weeks from today, which would be the 25th. The 25th is actually two weeks from today. Three weeks would be February 1st. So I just want to seek clarification when our responses are due.

THE COURT: All right. Your math is better than mine. Thank you. It would be February 1st, did you say?

MR. GRILL: February 1st would be three weeks, your Honor, yes.

THE COURT: Very good. It's February 1st. Okay. Thank you, all.

MR. DEPERNO: Thank you.

MR. GRILL: Thank you, your Honor.

MR. KAZIM: Thank you, your Honor.

(At 10:31 AM., proceedings concluded)

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State of Michigan)
County of Antrim)

I, JESSICA L. JAYNES, certified Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that the foregoing proceedings, consisting of 47 pages, held before the Honorable KEVIN A. ELSENHEIMER, Circuit Court Judge, is a true and correct transcript of my stenotype notes with the assistance of computer-aided transcription, to the best of my ability, in the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File No. 20-9238-CZ. Held Monday, January 11th, 2021.

Date: Friday, January 22nd, 2021

/s/Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
328 Washington Street
Suite 300
Traverse City, Michigan 49684
(231) 922-4576

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EXHIBIT C

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY Plaintiff	Case No. 20-9238-CZ
v.	
ANTRIM COUNTY Defendant,	HON. KEVIN A. ELSENHEIMER
SECRETARY OF STATE JOCELYN BENSON Intervenor-Defendant,	

Matthew S. DePerno (P52622)
DEPERNO LAW OFFICE, PLLC
Attorney for Plaintiff
951 W. Milham Avenue
PO Box 1595
Portage, MI 49081
(269) 321-5064

Haider A. Kazim (P66146)
CUMMINGS, MCCLOREY, DAVIS & ACHO, PLC
Attorney for Defendant
319 West Front Street
Suite 221
Traverse City, MI 49684
(231) 922-1888

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Proposed Intervenor-Defendant Benson
PO Box 30736
Lansing, MI 48909
(517) 335-7659

PLAINTIFF'S FIRST AMENDED EXPERT WITNESS LIST

Plaintiff WILLIAM BAILEY, by and through his attorney, DePERNO LAW OFFICE, PLLC, submit for his First Amended Expert Witness List the following:

1. James Penrose; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

   Mr. Penrose is expected to testify as to election integrity, systems, process, generally accepted practices, standards of care, and election voting systems, including the Dominion Voting Systems. He is expected to testify regarding adjudication logs, systems

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files, applications security issues, cyber/computer network operations, data analysis, and operations integration in computer and voting systems. He is expected to base his testimony on his review and analysis of election data and materials, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available through the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

2. Ben Cotton; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Cotton is expected to testify to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic images of voting equipment used in Michigan in the November 3, 2020 election. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will be generated in this matter, documentation regarding the forensic images, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available through the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

3. Doug Logan; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Logan is expected to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic image. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will be generated in this matter, documentation regarding the forensic images, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

4. Greg Freemyer; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Freemyer is expected to testify regarding the identification and forensic imaging and preservation of the Antrim County election management server, thumb drives, and compact flash cards performed in this case. He is expected to base his testimony on his knowledge and review of the forensic imaging process obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout

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(269) 321-5064 (phone) • (269) 353-2726 (Fax)

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course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

5. Paul Maggio; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Maggio is expected to testify regarding the identification and forensic imaging and preservation of the Antrim County election management server, thumb drives, and compact flash cards performed in this case. He is expected to base his testimony on his knowledge and review of the forensic imaging process obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

6. Col. James P. (Phil) Waldron; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Col. Waldron is expected to testify as to election integrity, systems, process, generally accepted practices, standards of care, and election voting systems, including the Dominion Voting Systems. He is expected to testify regarding adjudication logs, systems files, applications security issues, and the review and preparation of the Antrim Michigan Forensics Report, Revised Preliminary Summary, v2, dated December 13, 2020 ("ASOG Report"). He is expected to testify regarding cyber/computer network operations, data analysis, and operations integration in computer and voting systems. He is expected to documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

7. Russel Ramsland; **EXPERT WITNESS**; c/o DePerno Law Office, PLLC

Mr. Ramsland is expected to testify as to election integrity, systems, process, generally accepted practices, standards of care, and election voting systems, including the Dominion Voting Systems. He is expected to testify regarding adjudication logs, systems files, applications security issues, and the review and preparation of the Antrim Michigan Forensics Report, Revised Preliminary Summary, v2, dated December 13, 2020 ("ASOG Report"). He is expected to testify regarding cyber/computer network operations, data analysis, and operations integration in computer and voting systems. He is expected to testify on how the Dominion Voting Systems affects elections. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, deposition testimony that will be generated in this matter, documentation regarding the forensic images, the ASOG Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available through course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

8. Dr. Douglas G. Frank; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

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Dr. Frank is expected to testify as to his analysis of data, conclusions, and his Report pertaining to the November 3, 2020 election.

9. Seth Keshel; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

Mr. Keshel is expected to testify as to his analysis of data, and conclusions pertaining to the November 3, 2020 election.

10. Jeffrey Lenberg; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

Mr. Lenberg is expected to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic image. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will be generated in this matter, documentation regarding the forensic images, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

11. Todd Sanders; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

Mr. Sanders is expected to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic image. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will be generated in this matter, documentation regarding the forensic images, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

12. Conan Hayes; **EXPERT WITNESS**; c/o Deperno Law Office, PLLC

Mr. Sanders is expected to testify as to application security, systems, process, generally accepted programming practices, standards of care, as it relates to application development of sensitive systems. He is expected to testify regarding best practices for access control, exception handling, error handling, auditing, and logging. He is expected to testify on the adjudication process, and the lack of adjudication logs found on the forensic image. He is expected to base his testimony on his review of the forensics images obtained from the Antrim County computer system, a review of Dominion Voting Systems publicly available documentation and resources, deposition testimony that will

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be generated in this matter, documentation regarding the forensic images, his Report, Plaintiff's claims, Defendants' defenses, and any other information that becomes available throughout the course of discovery with respect to this case. Plaintiff reserves the right to supplement this disclosure.

13. Any rebuttal or impeachment witness necessary to rebut any evidence or testimony presented by any other party to this lawsuit.

14. Any expert witness required to rebut evidence presented by Defendants

15. Plaintiffs reserve all rights to identify further witnesses as they become known.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: April 8, 2020

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff

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EXHIBIT D

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DECLARATION OF HARRI HURSTI

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct:

1. My name is Harri Hursti. I am over the age of 21 and competent to give this testimony. The facts stated in this declaration are based on my personal knowledge, unless stated otherwise.
2. This declaration supplements my prior declarations and I stand by the statements in those declarations.
3. I have been in Sioux Falls, South Dakota since the 9th of August 2021 to participate in "Mike Lindell's Cyber Symposium", which took place from August 10th to 12th.
4. During the event, the organizers of the event made copies of forensic images of 3 separate Dominion Election Management System Server installations available to me and others in attendance.
5. The organizers did not give consistent explanations for how the images were made, where they were made, or any other details.
6. Two of the images appear to have originated from Mesa County, Colorado and one from Antrim County, Michigan.
7. The forensic image headers from the Antrim County image are shown in Exhibit 1.
8. The forensic image headers from the Mesa County images are shown in Exhibit 2 and Exhibit 3.
9. All three images were additionally made available globally for download by the public over a peer-to-peer file sharing system called BitTorrent. At least one of the speakers of the symposium, Ron Watkins a.k.a. "CodeMonkeyZ", posted links to download the files (https://t.me/s/CodeMonkeyZ) on a social media platform where he has almost 400,000 followers. Attendees at the event mentioned that "thousands" of people were downloading the files.
10. In my professional opinion, global public release of the server images lowers the barrier to planning an attack against any election management system running this Dominion software, and therefore makes future attacks against such systems more likely.

I declare under penalty of the perjury laws of the State of Colorado and the United States that the foregoing is true and correct and that this declaration was executed this 13th day of August, 2021 in Sioux Falls, South Dakota.

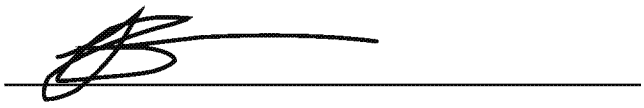

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Exhibit 1

```
┌─[scofield@parrot]─[/media/scofield/easystore/Antrim/C1-Election-Management-Server/SDA]
└──╼ $ewfinfo SSA1722_C1-Election_Server-SDA.E01
ewfinfo 20140807
```

Acquiry information

Case number:	SSA1722
Description:	Dell Precision Tower 3420
Examiner name:	Greg Freemyer
Evidence number:	C1-Election_Server-SDA
Notes:	Drive 1 of 2
Acquisition date:	Sun Dec 6 04:50:18 2020
System date:	Sun Dec 6 04:50:18 2020
Operating system used:	Linux
Software version used:	20140608
Password:	N/A
Model:	ST500LM021-1KJ152
Serial number:	W62HL9M8

EWF information

File format:	EnCase 6
Sectors per chunk:	64
Error granularity:	1
Compression method:	deflate
Compression level:	no compression
Set identifier:	1c03776e-207c-034b-8a0b-8239890c80d2
Is corrupted:	yes

Media information

Media type:	fixed disk
Is physical:	yes
Bytes per sector:	512
Number of sectors:	976773168
Media size:	465 GiB (500107862016 bytes)

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Exhibit 2

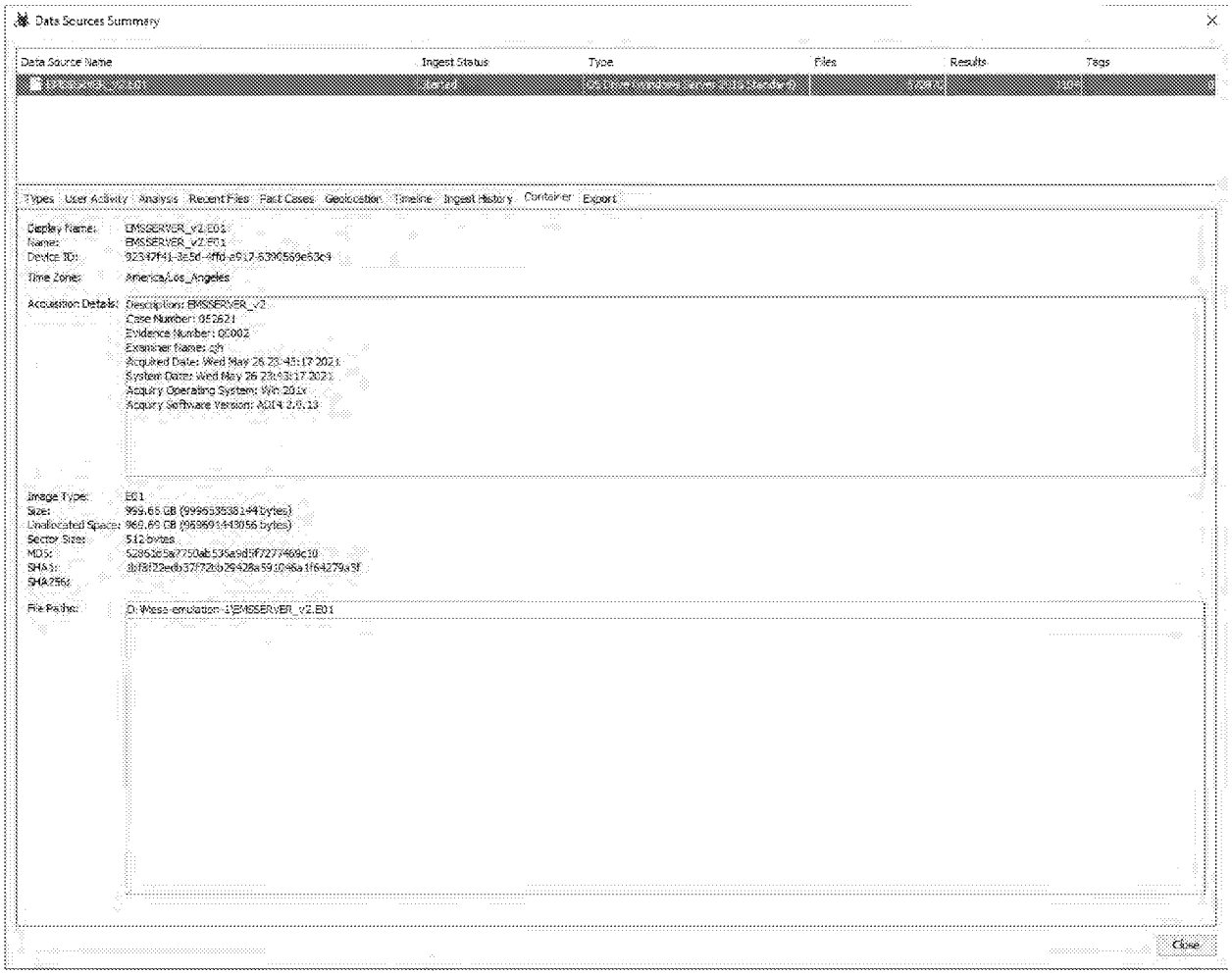

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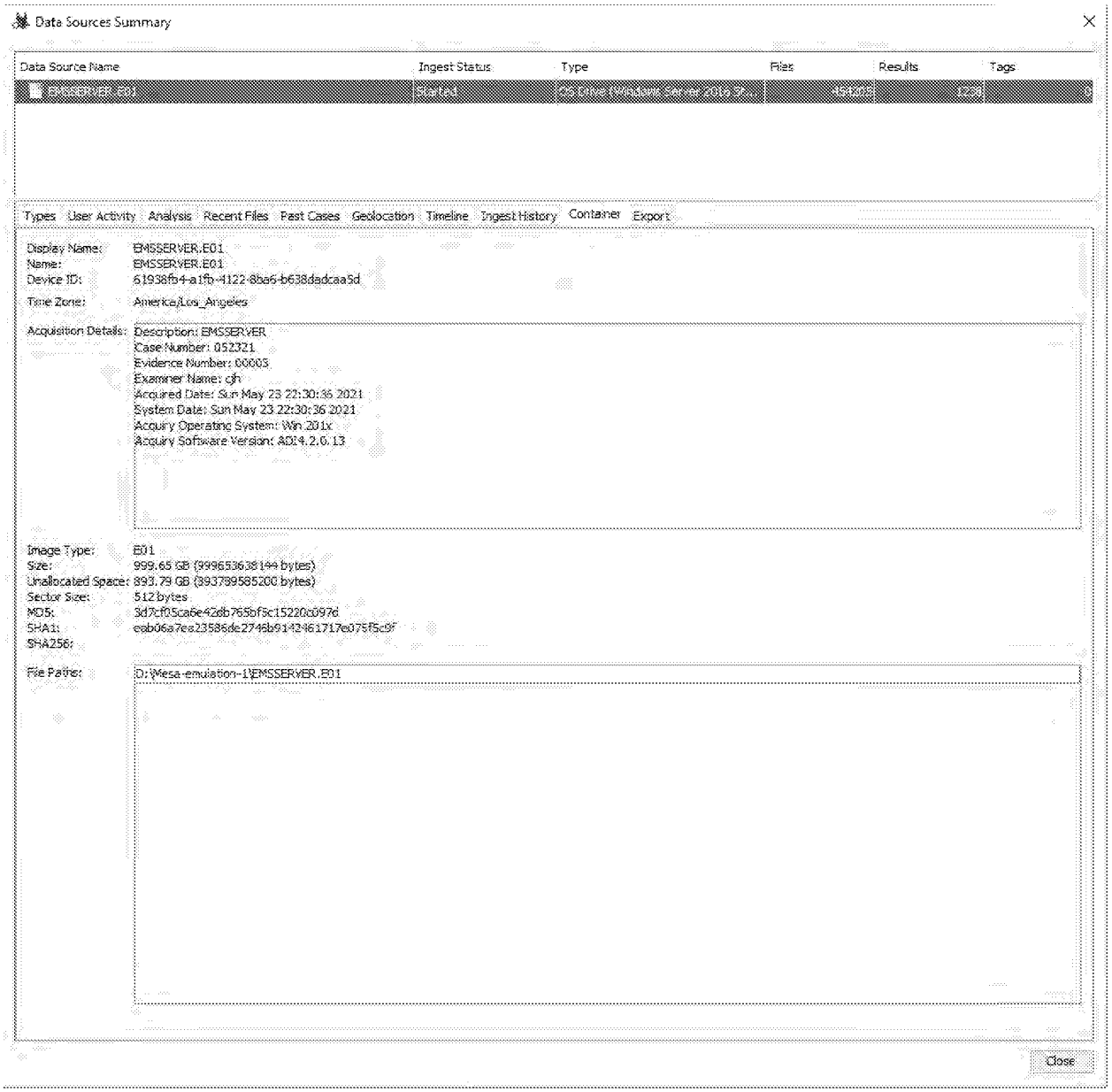
Exhibit 3



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A signed and notarized version of the Affidavit will be filed with the Court, next week.

EXHIBIT E

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 13TH JUDICIAL CIRCUIT
ANTRIM COUNTY

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.

No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

Matthew S. DePerno (P52622)
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matthew@depernolaw.com

Allan C. Vander Laan (P33893)
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231.922.1888
avanderlaan@cmda-law.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Intervenor-Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

/

AFFIDAVIT OF J. ALEX HALDERMAN IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE

I, J. Alex Halderman, being duly sworn, voluntarily state as follows:

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1. I am Professor of Computer Science and Engineering, Director of the Center for Computer Security and Society, and Director of the Software Systems Laboratory at the University of Michigan in Ann Arbor.

2. On March 26, 2021, I provided my expert report in this lawsuit based in part on my review of data collected by Plaintiff's forensic team from Antrim County voting equipment.

3. An attendee of an event referred to as "Mike Lindell's Cyber Symposium" held during the days of August 10 through August 12, 2021, provided me with a copy of data that was distributed through that event, and I have reviewed that data.

4. The data distributed at the "Cyber Symposium" and represented as being from Antrim County is authentic, and contains almost the entirety of the material collected by Plaintiff's forensic team that I reviewed as part of my expert report in this case.

5. The data obtained from the "Cyber Symposium" includes a nearly complete forensic image of the Antrim County Election Management System (EMS). It is missing only one file (out of 37), but is otherwise a complete copy of the forensic image collected by Plaintiff's forensic team and provided to me for review in this case. The data also includes complete forensic images of the Antrim County tabulator memory cards that were provided to me for review in this case.

6. In addition, the data distributed at the "Cyber Symposium" includes forensic images of thumb drives that purport to be from Antrim County and include

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metadata indicating that they were collected by Plaintiff's forensic team, but which were not provided to me for review in this case.

7. The material contained in the data from the "Cyber Symposium" is sufficiently detailed that it would facilitate the planning or development of methods or means to compromise voting systems—not just in Antrim County—but anywhere that uses similar systems.

_____ Dated: September __, 2021

Subscribed and sworn to before me
September _____, 2021.

_____

_____
Print name exactly as it appears on application for commission as a notary public

Notary Public, State of _____, County of _____
My Commission Expires _____
Acting in the County of _____

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EXHIBIT F

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Matthew DePerno
To: Grill, Erik (AG)
Cc: Allan C. Vander Laan; Meingast, Heather (AG); Richards, Margaret (AG)
Subject: Re: Bailey v Antrim Co -- Protective Order
Date: Thursday, August 12, 2021 11:21:23 AM
Attachments: image001.png

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Eric,

Understood and just to be clear, on Wednesday at 9:49 am, as soon as I heard, I sent the following cease and desist demand to Mike Lindell.

"This is a demand that you immediately cease and desist disclosing or displaying any forensic images of Antrim County. Those images are under protective order. Neither you or your team are permitted to display or use those images."

Matt

On Thu, Aug 12, 2021 at 7:44 AM Grill, Erik (AG) <GrillE@michigan.gov> wrote:

> We have received information that during an event earlier this week, Mike Lindell publicly displayed or distributed images of the Antrim County EMS software. As a result, we are taking this opportunity to remind all parties of Judge Elsenheimer's January 11, 2021 order from the bench:
>
> THE COURT: All right. Well, we did discuss
> 25 this matter to some degree, but I don't think we quite
> 1 reached the issue of distribution of forensic images,
> 2 but for those matters that were contained in the
> 3 expert opinion that was prepared for Mr. Deperno.
> 4 Those matters are already open. They're
> 5 available to the public. However, anything that is
> 6 not included, including individual images in the
> 7 report, is still subject to in a -- a protective

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order. And should Mr. Deperno need to provide those images to other experts that he's already identified, then that certainly would be appropriate. However, the Court is not interested in creating unnecessary intrusions into source code, number one, that may be retained, or controlled, or owned by parties that are not part of this litigation, including Dominion. And to the extent that includes forensic imaging -- pardon me, to the extent that includes imaging -- forensic implies some level of analysis, then it makes sense that we -- we also protect that information.

So the line I'm trying to draw here, gentlemen, is between matters that are owned as intellectual property by parties that are not part of this litigation, Dominion, et cetera, and those matters that have been released pursuant to my order that have been part of the analysis performed by experts in this case. Again, Mr. Deperno's experts should have the opportunity to review those materials, as should the experts of any other entity -- be it the intervenor, or the county, or any of the other defendants in this case. But mass distribution of that information is not something that the Court is countenancing at this time.

Pages 42-44 of Transcript.

Please ensure that all experts, or individuals working with or for experts, are taking

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appropriate action to protect confidential information.

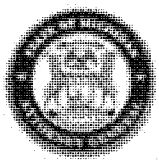
Erik A. Grill

Assistant Attorney General

Civil Litigation, Elections, & Employment Division

517.335.7193

517.335.335.7640 (fax)



--
Sent from Gmail Mobile

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 4/23/2024 2:24:47 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: Public records litigation (Butz v City of Roseville, et al, Macomb Co Circuit Court)
Attachments: pl amended supp brief w exhibits.pdf; brief02 exhibits.pdf; brief02 MSD and resp supp brief Butz.pdf

Attached is Plaintiff's first brief filed by Stefanie Lambert and then our MSD brief and exhibits. We will file a reply brief in support of our motion. Hearing is scheduled for 5/20. All the municipalities have filed motions to dismiss and/or concurrences in our motion. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Stefanie's response to our MSD is due 5/6. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, April 23, 2024 9:46 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: Public records litigation

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I don't believe so.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, April 23, 2024 at 9:44 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>, Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: Public records litigation

Did I send you briefs for this yet?

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, April 18, 2024 3:07 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Public records litigation

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

When you have a chance, could you send us the briefing from the Macomb County case where Lambert's representing the plaintiff, in addition to the Court of Claims complaint you mentioned? DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

(AMENDED)
SUPPLEMENTAL BRIEF

JENNIFER ZELMANSKI, et al.

Defendants.

_____/

STEFANIE LAMBERT, PLLC
Stefanie Lambert (P71303)
Attorney for Plaintiff
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ttomlinson@yorkdolanlaw.com

KERR, RUSSELL AND WEBER, PLC
James E. Tamm (P38154)
Kevin A. McQuillan (P79083)
Attorneys for Defendants Macomb Twp., Kristi Pozzi, City of Center Line, and Janice Pockrandt
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/

(AMENDED)[1] SUPPLEMENTAL BRIEF OF PLAINTIFF

INTRODUCTION

Plaintiff has filed numerous FOIA requests for EPB data. Without legal authority to do so, Secretary Benson has ordered all defendants to deny these EPB FOIA requests. (**ATTACHMENT A**). In 2020, Benson ordered all clerks to delete the EPB data in violation of state and federal law. (**ATTACHMENT B**). Many clerks refused to violate law and did not delete the EPB data. (**ATTACHMENT C**, Affidavit of Stephanie Scott, Correspondence and Supporting Expert Report); (**ATTACHMENT D**, Affidavit of Kim Meltzer and Exhibits). Analysis currently under law enforcement investigation revealed that original data is preserved on the EPB drive that is not contained in end of the night

[1] This supplemental memorandum was amended to correct **a statement of fact** on page 20. The correction is as follows: ~~And in the case of Adams Township, someone falsely utilizing Stephanie Scotts User Code.~~ And, in the case of Adams Township, someone blocking Stephanie Scott's access to user codes and locking her out of the qualified voter file (QVF) voter registration.

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print outs as suggested by SOS Benson. In fact, analysis of the correctly preserved EPB data reflects who voted in a particular township. The EPB data analyzed by law enforcement proves that it matches what the local jurisdiction certified in the past election. The data should match and this is correct.

When this same data is then compared to the data certified in FOIA requests from the state as to who SOS Benson has recorded as voting in the same election- ***it varies by up to 12%***. The data should match and it does not.

Local clerks must maintain accurate registrations and the registration on the EPB drive. SOS Benson inflated the state registration by 700000 just weeks before the 2020 election and told local clerks they wouldn't see a paper trail at their level because the registration was being modified through the driver database. (**ATTACHMENT E**). Now we know that non-citizens are being enrolled on the voter roll through the driver database. (**ATTACHMENT F**, Affidavit of [redacted]). When these discrepancies were questioned by clerks and citizens, SOS Benson encrypted the EPB data so that clerks can no longer reconcile it despite local clerks having civil liability in the event that it is not accurate.

This action involves a simple request for documents under Michigan's Freedom of Information Act (FOIA), MCL 15.231 et seq. Pursuant to the express terms of that act, certain information may be exempted from disclosure, but the exemptions must explicitly and specifically apply to the withheld information.

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MCL 15.243(1)(d). This statute provides that "[a] public body may exempt from disclosure…[r]ecords or information *specifically described and exempted from disclosure by statute*." *ACLU of Mich v Calhoun Co Sheriff's Office*, 509 Mich 1, 4-5; 983 NW2d 300 (2022). An agency "regulation," or a "directive," or "guidance" or an "opinion," or a "statement" in a legal brief, or an "email", cannot serve as the basis for a FOIA denials under MCL 15.243(1)(d). *Id.* Such are not "*statutes*," and therefore, the only basis for denial of a FOIA request must be based on the express and plain language of the statute's exemptions. *Id.*

Intervenor Secretary of State (SOS Benson) has no real "standing" in this matter. The public official who receives a FOIA request and who denies a FOIA request, and who is required by law to decide on denial based on the statute, not on the basis of regulations, opinions, "memos" or "emails" or direction of another state agency, i.e., SOS Benson, see *ACLU*, *supra*, is the only individual who is subject to FOIA's requirements and restrictions, and who must comply with its statutory mandate. See *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 458; 789 NW2d 178 (2010). Defendants cannot therefore say, as they have, that they are "waiting" on the research and guidance from the SOS or any other entity for that matter to tell them what to withhold, what exemption applies, or what exemption might be asserted, or what might be exempt *in the future*, because "***only the circumstances known to the public body at the time of***

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the request are relevant to whether an exemption precludes disclosure," not any "waiting to hear from" the SOS, or any entity other than the Legislature. *Id.* SOS Benson is simply not authorized by law to prohibit public officials from fulfilling their constitutional and statutory duties of disclosing public information under FOIA – no "guidance," "regulation," "directive," "opinion," legal argument, memo, or email can do that – a denial must be based on a legitimate, valid, and applicable, statutory exemption found in the FOIA statutes themselves. See *ACLU of Mich*, 509 Mich at 4-5. Here that is not present.

SOS Benson originally acknowledged that this information was public information under FOIA subject to disclosure because she had no other choice by law. (**ATTACHMENT G**). When she realized that some public officials were properly releasing this information under FOIA, she ordered them to "delete" the data (**ATTACHMENT C**), even though destruction of this data is contrary to and a violation of Michigan and federal criminal law. (**ATTACHMENT H**, Correspondence from Bourbonais Instructing to Delete); see, e.g., 52 U.S.C. § 20701 (requiring "all records and papers which come into [the] possession [of "[e]very officer of election"] relating to any application, registration, payment of poll tax, or other act requisite to voting in such election," to be "retained and preserved" for a period of 22 months following an election" and, 52 U.S.C. § 20702, making it a crime…for "any person" whether or not an election officer to

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"willfully steal[], destroy[], conceal[], mutilate[], or alter[] any record or paper required by" § 20701 to be retained and preserved. Of course, the latter applies to orders to and the act of deleting or concealing such information. See also, MCL 750.248, which provides that "[a] person who falsely makes, alters, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation may be received as legal proof… with intent to injure or defraud another person is guilty of a felony punishable by imprisonment for not more than 14 years.

Those public officials who complied with SOS Benson's ***unlawful order*** to delete this information were themselves violating state and federal criminal laws. Finally, after some of the clerks held onto this data, SOS Benson unilaterally, and without legal authority, "encrypted" it and concealed it from the public. SOS Benson's prohibited local governments from having access to this data, thereby preventing local election officials and county and township clerks from performing their duties pursuant to state and federal law.

Plaintiff demonstrates herein that not only were Defendants wrong in withholding his FOIA request, but also that local governments are required by law to maintain accurate registration and election roll records. Indeed, MCL 15.244 *requires* public officials to disclose non-exempt information; if there is "exempt"

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information combined with said "non-exempt" information, then the public official *cannot* use the excuse that redaction or separation is not possible. See, e.g., *Evening News Asso v Troy*, 417 Mich 481, 486; 339 NW2d 421 (1983). Indeed, the statute itself says: "the public body ***shall separate the exempt and nonexempt material*** and make the nonexempt material available for examination and copying." *Id.*, (emphasis in original), citing MCL 15.244. As this Court is well aware, "[u]se of the word 'shall' connotes ***a mandatory duty imposed by law***," especially as it relates to a command directed at public officials and their public duties to disclose public information under FOIA. *Sharp v Huron Valley Bd of Ed*, 112 Mich App 18, 20; 314 NW2d 785 (1981), citing *Southfield Twp v Drainage Board for Twelve Towns Relief Drains*, 357 Mich 59, 76; 97 NW2d 821 (1959), *King v Director of the Midland County Department of Social Services*, 73 Mich App 253, 259; 251 NW2d 270 (1977). See also, *Anklam v Delta College Dist, et al.*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 317692 (June 26, 2014) (**ATTACHMENT I**).

Plaintiff's request is simple, straightforward, and compliant with FOIA. (**ATTACHMENT J**). He agreed that certain of the information that *might* be exempt can be redacted (i.e., separated from the non-exempt information), and he has also shown that *none* of the remaining information that he requests is exempt under those exemptions that have been asserted by the Defendants. *Id.*

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The information requested by Plaintiff is public information, subject to disclosure under FOIA, and not covered by any of the exemptions cited by any of the Defendants.

FACTUAL BACKGROUND

Plaintiff requested Defendants to release files from the electronic poll books (EPB) for all registrants for all voting precincts for elections on November 8, 2022 and May 2, 2023. (**ATTACHMENT J**). Plaintiff agreed that some of the information contained in the poll books were exempt from disclosure and asked that this information be redacted prior to disclosure. *Id.* The specific information Plaintiff sought included election returns and the poll lists. These are required to be delivered to the clerk of the township or city, as the case may be, and shall be by him filed in his office, MCLA 168.810. The EPB poll list must be carefully preserved and may be destroyed after the expiration of 2 years following the primary or election at which the same were used, MCL 168.811. Registration records, which Plaintiff also requested, are required by law to be open for public inspection. MCL 168.516. Plaintiff also cited MCL 750.492, requires public officials, after request, to permit inspection of the official records of said public office. Failure to do so is a violation of Michigan Law.

Plaintiff's FOIA request only asked for raw text data to be placed on a spreadsheet in .csv or Microsoft "Excel" format (.xls). In other words, Plaintiff's

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request pertained only to the text of the information from the EPB. In fact, in his specific FOIA request, dated May 2, 2023, Plaintiff explicitly acknowledged that under MCL 168.509gg "birthdate and driver's license numbers" were exempt from the FOIA request, and/or could be redacted. *Id.* Plaintiff also asked whether only the date of birth could be left in the response. *Id.*

Finally, after acknowledging the necessity of certain redactions to comply with FOIA's exemptions under MCL 168.509gg, Plaintiff correctly stated that "there should be no other FOIA exempt information in the EPB digital records requested. *Id.* Plaintiff then specifically stated: "***I am not requesting any software or information which would somehow be deemed proprietary. I am only requesting public record information as is my right.***" *Id.* (emphasis added). Plaintiff further reminded Defendants that the EPB .csv files "are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 U.S.C. § 207[20701])[2] and a state minimum of 24 months (MCL 168.811).

[2] Federal law requires "***all records and papers*** which come into [the] possession [of "[e]very officer of election"] relating to any ***application***, ***registration***, payment of poll tax, or ***other act requisite to voting*** in such election," to be "***retained and preserved***" for a period of 22 months following an election. 52 U.S.C. § 20701. Further, 52 U.S.C. § 20702 makes it a crime for "***any person***" whether or not an election officer to "***willfully steal[], destroy[], conceal[], mutilate[], or alter[] any record or paper*** *required by*" § 20701 to be retained and preserved.

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On May 9, 2023, Defendants sent a letter exercising the 10-day extension under FOIA explaining that the request was complex due to the nature of the information sought and estimated that a response would be complete by May 23, 2023. (**ATTACHMENT K**). Also, in the letter exercising the extension, while they have no right to do so, Defendants cryptically stated: "We are continuing to investigate and research issues involving whether a request would create an exposure to the operating system resulting in injury. We are also reviewing our methods and capabilities in responding, including likely time involved." *Id.*

On May 23, 2023, Defendants sent a letter attached to an email denying, *in toto*, Plaintiff's request. (**ATTACHMENT K**). Defendant stated: "[i]n response to your FOIA requested[sic] submitted on May 2, 2023 for a copy of the extract files from the electronic poll book (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023…[t]he following Action has been taken pursuant to your request for a public record: Denied all portions of your request (Please see below for reason). *Id.* The denial further provided:

> Per the Michigan Bureau of Elections, clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections ability to secure and safeguard the software and data from hacking, theft, loss, or destruction. In response to previous FOIA request regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from

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> disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.2431(y). In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z).
>
> Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software program files are disclosed.
>
> Please contact the Macomb County Clerk for the paper pollbook copies or the Michigan Bureau of Elections for the log files or voter history. [*Id.*]

The original election records subject to this FOIA appeal submitted by Michael Butz concerns the .csv file referenced as the Electronic Pollbook Voter History file dated October 2021. The poll book and poll list are defined in MCL 168.735. They compile the record of the voter and the ballot number provided at the time a voter is provided a vote to cast. This activity occurs after a voter shows valid identification or signs an affidavit of a lost identification card at the time of an election. The responsibility is on the election inspectors to keep and an accurate list of these activities. In the case of absentee ballots, upon opening the envelope, the election inspector must record the name of the voter and the number of the

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ballot, which also is to be used to compare with the data on the EPB. MCL 168.375.

The election inspectors use the EPB in the format as it is downloaded on the election day laptops by the local clerk. The EPB is downloaded from the Qualified Voter File (QVF) and is loaded to a laptop prior to each election. Once the EPB is loaded on the laptop, the software allows election inspectors to look up a voter's registration record, confirm their registration is correct, and assign a ballot to that voter, essentially automating the typical paper process. After the election is complete, the EPB software will generate reports to complete the official precinct record (paper binder pollbook) and a voter history file that can be uploaded into the QVF to update voter history in a matter of minutes." This guidance and information is taken directly from the Electronic Pollbook Refresh Election Inspector Manual. (**ATTACHMENT L**).

The EPB software is downloaded by the local clerk from the state's QVF after 4pm the night before the election. *Id.* It is downloaded onto a USB storage device (USB flash drive) and the clerk then uploads that into the election day laptops. *Id.* It is within this software that the activities required by election inspectors to record voters and ballot numbers occurs throughout election day. *Id.* At the close of the election, the election inspectors close out the EPB and save the reports back onto the USB flash drive that was utilized for the EPB install onto the

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laptop. *Id.* Three (3) end of night reports are printed and included per MCL 168.375 into the final election records envelopes provided to county and local clerks. *Id.* The election inspectors return the USB flash drive of the EPB download to the clerk at the end of the election per MCL 168.811. *Id.* The USB stick contains the following election record files:

1. EPB Package. This zipped file presumably contains the poll book software programming files. It is encrypted/ password protected;

2. Three (3) PDF reports that are generated at poll closing: Ballot Summary, Remarks, Voter List;

3. EPB History. This is a .csv file of the poll book which is the subject of the FOIA request in this case. [*Id.*]

The Electronic Pollbook Refresh Clerk's Manual describe this duty as 'Post-election Tasks: Import Voter History (within 7 days) The clerk or a designated QVF user (either Basic or Complete) must upload voter history into the QVF within seven days of the election. *Id.* To enter voter history via the QVF, they are to insert the encrypted flash drive into a USB port and log into the flash drive, then log into QVF. *Id.*

As explained herein, this raw data (the voter registration records of qualified voters), and all other election records, that data which is the subject of Plaintiff's FOIA request, are the responsibility of the local clerk to maintain per, inter alia, MCL 168.811, 52 U.S.C. § 20701 and 52 U.S.C. § 20702. See also, footnote 1, *supra*.

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SUMMARY OF ARGUMENT

Federal and state election laws provide that election officials have duties to maintain election records ***precisely because*** they constitute public information that is subject to public access and examination upon request – i.e., they are subject to public disclosure. Therefore, these records enjoy a prima facie presumption of disclosable information under FOIA. Indeed, the presumption is written into the act because "[t]he FOIA is an act ***requiring full disclosure*** of public records ***unless a statutory exemption precludes the disclosure*** of information." *Messenger v Consumer & Industry Services*, 238 Mich App 524, 531; 606 NW2d 38 (1999) (emphasis added). See also, MCL 15.243(1)(d). "Rather than specifying which records would be subject to disclosure, the Legislature chose to provide that, ***unless expressly exempt*** under Section 13 of the FOIA, ***all public records are subject to public disclosure***." *Penokie v Michigan Technological Univ*, 93 Mich App 650, 657; 287 NW2d 304 (1979) (emphasis added). See also, *Detroit News v Co of Wayne*, ___NW2d___; 2002 Mich. App. LEXIS 3409, at *10 (Ct App, Mar. 15, 2002), Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 235831 (March 15, 2002) (**ATTACHMENT M**). See also, *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 455-62; 789 NW2d 178 (2010) (noting the presumption and that the purpose of FOIA is to provide the people of this state with full and complete information regarding the

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government's affairs and the official actions of governmental officials and employees and where the SOS conceded that the names and addresses of registered voters in were public records subject to public disclosure without exemption).

Moreover, the exemptions cited by the Defendants ***do not apply*** to Plaintiff's FOIA request. First, and foremost, Plaintiff specifically only asked for raw text data from the files. He specifically stated that he was not asking for "any software or information which would somehow be deemed proprietary" and that he was "only requesting public record information as is my right." (**ATTACHMENT J**). Plaintiff further reminded Defendants that the EPB .csv files "are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 U.S.C. § 207[20701]) and a state minimum of 24 months (MCL 168.811). *Id.* Secondly, Plaintiff specifically conceded to redaction of private information (personal identifying information). Defendants cannot say that they are "waiting" on the SOS or any other entity to tell them what an exemption is or might be, or what might be exempt in the future because "only the circumstances known to the public body at the time of the request are relevant to whether an exemption precludes disclosure, not any "waiting to hear from" the SOS, or any entity other than the Legislature. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 458; 789 NW2d 178 (2010).

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"The Legislature when enacting, and courts when interpreting, the privacy exemption of FOIA have weighted the scales heavily in favor of disclosure: the balance to be struck is between the public's ongoing interest in governmental accountability, on the one hand, and clearly unwarranted invasions of privacy on the other. Under this exemption, the scales are not balanced equally at the outset, and for good reason. In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 464; 789 NW2d 178 (2010) (information about registered voters was public information subject to disclosure under FOIA and holding "FOIA is a pro disclosure statute that we are to interpret broadly to allow public access. Conversely, we are to interpret its exemptions narrowly so that we do not undermine its disclosure provisions. Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials. Here, there is no question that the "separate record[s]"… that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary ***are public records***. And there is no question that these "separate record[s] were also the public records that Practical Political Consulting sought in its March 26, 2008 FOIA request.").

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Finally, even if Defendants' argument were to be considered despite the presumptive prima facie availability to the public of this information, and notwithstanding that the exemptions cited simply do not apply, there are genuine issues of material fact which make summary dismissal impossible. The burden of proof lies on the denying party to demonstrate that exemptions apply. *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999).

Here, Plaintiff has specifically tailored his request *not to include* personal identifying information and *not to include* "software" and/or "proprietary" information. It is for the Defendants to demonstrate through factual presentation and/or expert presentation to the court under MCR 2.116(C)(10) that the requested records are exempt, and then, why Defendants cannot tailor their response to provide that information that is disclosable, as Plaintiff has requested, and how disclosing same would implicate any of the exemptions.

The matter in contest is the voter history file and it's accessibility to citizens via state FOIA statutes. MCL 168.509gg defines election data exempt from FOIA. It exempts six items from FOIA disclosure of election related information and cannot be construed to exclude the data requested in Mr. Butz's FOIA request. The pollbook for each jurisdiction is maintained by the local clerk. The poll book is an electronic record produced through the electronic pollbook software distributed by the bureau of elections. Per MCL 168.668b (2019 version), each

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city or township "shall use the electronic poll book software developed by the bureau of elections."

Secretary of State Jocelyn Benson and the Bureau of Elections (BOE) assert that the information contained in the EPB history file (.csv) is contained in its entirety in the Voter List Report produced at the end of night, but this is simply not the case. In review of the EPB data preserved from Adams Township November 2020 election, it is apparent that it contains data unique to the EPB file; including Same Day Voting data, data elements specific to the laptop and it's security and internet connectivity, and ten data fields of voter information. (**ATTACHMENT C**, Stephanie Scott Affidavit, Correspondence, and Expert Reports).

To further convolute the voter records, Secretary of State Jocelyn Benson admits to inflating voter rolls prior to the November 2002 Presidential election. Local clerks were notified via the BOE newsletter, that there would be no paper trail, and hence no ability to verify the eligibility of voter names added to his/her local poll list. (**ATTACHMENT E**). MCL 168.509r states " The county, city, and township clerks shall verify the accuracy of the names and addresses of registered electors in the qualified voter file." Through the actions of the SOS, the local clerk's voter registration file is thus compromised and out of the control of local clerks.

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This series of events will show how it has become apparent that local clerks are instructed to delete original election records in violation of Federal and State statutes of records retention. The blind obedience of local clerks to the unlawful directives of the BOE is the actual reason that the FOIA requests presented by Michael Butz were denied.

The Electronic Pollbook flash drive contains corroborating evidence that public records have been deleted, altered, or produced with fraudulent data. The above two examples show users other than the local clerk within the voter's registration file. ~~And in the case of Adams Township, someone falsely utilizing Stephanie Scotts User Code.~~ And, in the case of Adams Township, someone blocking Stephanie Scott's access to user codes and locking her out of the qualified voter file (QVF) voter registration.

This is in direct violation of MCL 750.248 (1) which reads "A person who falsely makes, alters, forges, or counterfeits a public record.... with intent to injure or defraud another person is guilty of a felony punishable by imprisonment for not more than 14 years.

As a result, the Bureau of Elections and Secretary of State have gone out of their way to keep this information from the public by controlling responses to FOIA requests such as Michel Butz's.

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In 2022 individuals such as Michael Butz began to FOIA for the EPB Voter file (.csv) from local clerks per MCL 168.509ff, which states: "The secretary of state and each county, city, township, or village clerk shall maintain all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of registration records under this chapter for 2 years or more. Except to the extent that the records maintained pursuant to this section relate to a declination to register to vote or to the identity of a designated voter registration agency through which any particular voter applied for registration pursuant to section 509gg, the secretary of state or a county, city, township, or village clerk ***shall make the records available*** for public inspection under reasonable conditions and, if available, for photocopying at a reasonable cost." (emphasis added).

While some FOIA requests were fulfilled, it became apparent that the BOE was intervening to discourage and prevent the lawful fulfillment of FOIA requests for pertinent election records. As early as February, 12, 2021, BOE directed County Clerks that "[t]he EPB software and ***associated files*** must be deleted unless a post-election audit is planned but has not yet been completed or the deletion of the data has been stayed by an order of the court or the Secretary of State." (**ATTACHMENT B**).

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In February of 2021, Stephanie Scott, former Township Clerk for Adams Township in Hillsdale County was instructed by the Deputy County Clerk, Abe Dane to comply with the BOE's letter. (**ATTACHMENT C**). In a follow-up email, it was confirmed that the folder in the EPB drive from the November 2020 election was the one that the local clerks, including Scott, were being told to delete. (**ATTACHMENT C**).

FOIA requests for EPB information began to be sent to county and local clerks. A July 20, 2022 email from Lori Bourbonais advised clerks to consult with counsel before responding to FOIAs. On August 26, 2022, Lori Bourbonnais with BOE sent email to clerks asserting their instructions to delete records are lawful. (**ATTACHMENT H**).

On November 14, 2022 Lori Bourbonais released a letter to clerks instructing that local counsel should be consulted before fulfilling FOIA requests. (**ATTACHMENT G**). The letter asserts that the release of the .csv file contains software programming and the BOE interest in 'maximizing the protection and defense of its information system which outweigh the public interest in the disclosure of this information". *Id.*

As further discussed herein, MCL 168.509gg defines election information that is exempt from freedom of information act. Lawful redaction of the appropriate items is expected, but BOE is not allowed to define what is acceptable

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FOIA material in opposition to statute. In July 2023 the Bureau of Elections released a seven-page letter to county clerks and a handful of local clerks that had received FOIA requests for the EPB Voter file (.csv).

As of the 2022 elections, all files on the USB Drive for the EPB flash drive are now fully encrypted. This blatantly usurps a locals clerk's control and responsibility of local election records and appears to be the BOE's attempt to further prevent release of election records.

The electronic pollbook is an inherent component of the election audit trail and associated public election records. The public records derived from the EPB must, by law, be retained in their entirety and be accessible to the public. The Bureau of Elections has displayed a pattern of oversight that shows disregard for State and Federal Laws applicable to the election process. This FOIA appeal should be upheld and local clerks should testify as to the status of their EPB Voter file (.csv) format. Any interjection of responsibility by the Secretary of State should be denied.

ARGUMENT AND ANALYSIS

A. FOIA and Its Interpretation

Michigan's Freedom of Information Act (FOIA), MCL 15.231, et seq., "is a manifestation this state's public policy ***favoring public access to government information***, recognizing the need that citizens be informed ***as they participate in***

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democratic governance, and ***the need that public officials be held accountable for the manner in which they perform their duties***." *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999) (emphasis supplied). Our Supreme Court has repeatedly described FOIA as " a ***pro-disclosure statute***," *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), and, as a result, Michigan courts have held "that FOIA's disclosure provisions ***must be interpreted broadly to ensure public access***." *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010) (emphasis supplied). The Legislature placed its imprimatur on this policy of broad public access and narrow construction of asserted statutory exemptions, when it stated:

> It is the public policy of this state that all persons…are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. ***The people shall be informed so that they may fully participate in the democratic process***. MCL 15.231(2) (emphasis added).

While it is true that FOIA contains several exceptions to the duty to disclose, MCL 15.243, "these exemptions ***must be construed narrowly***, and t***he burden of proof rests with the party asserting an exemption***," *Manning*, 234 Mich App at 248 (emphasis added); see also *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). "Under FOIA, a public body ***must disclose all public records that are not specifically exempt*** under the act."

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Hopkins v Duncan Twp, 294 Mich App 401, 409; 812 NW2d 27 (2011); see also MCL 15.233(1) (emphasis added). See also, *Rataj v City of Romulus*, 306 Mich App 735, 748-49; 858 NW2d 116 (2014).

With the legislative policy of ***broadly*** interpreting public disclosure statutes ***in favor of public access***, ***narrowly*** construing asserted exemptions, and placing the burden of proof always on the party so asserting them, the overarching framework for interpretation of the statutes at issue is established.

"FOIA is a pro disclosure statute that we are to interpret broadly to allow public access. Conversely, [courts] are to interpret its exemptions narrowly so that we do not undermine its disclosure provisions. Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010) ("record[s]" created...for the 2008 presidential primary that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary are public records" as these are not "specifically exempt" they are subject to public access and required to be disclosed).

Indeed, the presumption is written into the act because "[t]he FOIA is an act ***requiring full disclosure*** of public records ***unless a statutory exemption precludes the disclosure*** of information. *Messenger v Consumer & Industry Services*, 238

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Mich App 524, 531; 606 NW2d 38 (1999) (emphasis added). See also, MCL 15.243(1)(d). "Rather than specifying which records would be subject to disclosure, the Legislature chose to provide that, ***unless expressly exempt*** under Section 13 of the FOIA, all public records are subject to public disclosure." *Penokie v Michigan Technological Univ*, 93 Mich App 650, 657; 287 NW2d 304 (1979) (emphasis added). See also, *Detroit News v Co of Wayne*, ___NW2d___; 2002 Mich. App. LEXIS 3409, at *10 (Ct App, Mar. 15, 2002), Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 235831 (March 15, 2002) (**ATTACHMENT M**). See also, *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 455-62; 789 NW2d 178 (2010) (noting the presumption and that the purpose of FOIA is to provide the people of this state with full and complete information regarding the government's affairs and the official actions of governmental officials and employees and where the SOS conceded that the names and addresses of registered voters in were public records subject to public disclosure without exemption).

B. The General Rules of Statutory Interpretation Applicable to the FOIA Statute

"The primary goal of statutory interpretation is to 'ascertain the legislative intent that may reasonably be inferred from the statutory language.'" *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-57; 802 NW2d 281 (2011) (internal citations omitted). "The first step in that determination is to review the language of

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the statute itself." *Id.* See also, *In re MCI Telecom Complaint*, 460 Mich. 396, 411; 596 N.W.2d 164 (1999), citing *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

By statute, the Michigan Legislature requires that "[a]ll words and phrases [of statutes] shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a (LexisNexis, Lexis Advance through Act 11 of the 2024 Regular Legislative Session). "Unless ***statutorily*** defined, every word or phrase of a statute should be accorded its plain and ordinary meaning," *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "taking into account the context in which the words are used." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-57; 802 NW2d 281 (2011). It is not the judiciary or any executive or administrative agency that can "decide" what words in statutes mean if they are plain and understandable. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. *Id.* Additionally, it is important to ensure that words in a statute are not ignored, treated as surplusage, or rendered nugatory.

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Hoste v Shanty Creek Management, Inc, 459 Mich. 561, 574; 592 N.W.2d 360 (1999).

ANALYSIS

1. The statutes related to the voting records and the Secretary of States' and Defendants' duties to maintain such information provide a prima facie presumption that the records sought by Plaintiff are open for public access.

To begin with, the information sought by Plaintiff already enjoys a statutory presumption of being open and accessible for public access. These requirements must factor into any assessment of a FOIA request, and, particularly, the statutory exemptions asserted as the reasons for withholding them. For example, MCL 168.810 provides that "[o]ne of the poll lists shall be ***delivered to the clerk of the township or city***, as the case may be, ***and shall be by him filed in his office***." (emphasis added). In other words, these records are to be entered *and* filed in the public records of the relevant official. Further, MCL 168.811 provides, explicitly, that:

> All election returns, including poll lists, statements, tally sheets, absent voters' return envelopes bearing the statement required by [MCL 168.]761, absent voters' records required by [MCL 168.760], and other returns made by the election inspectors of the several precincts must be carefully preserved and may be destroyed after the expiration of 22 months following the primary or election at which the same were used. All applications executed under [MCL 168.]523, all voter registration applications executed by applicants under [MCL

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> 168.]497(3) and (4), and all absent voters' applications must be carefully preserved and may be destroyed after the expiration of 6 years following the primary or election at which those applications were executed. All ballots used at any primary or election, other than ballots containing a federal office, may be destroyed after 30 days following the final determination of the board of canvassers with respect to the primary or election unless a petition for recount has been filed and not completed or unless the destruction of the ballots is stayed by an order of a court. All ballots containing a federal office, and all presidential primary ballot selection forms, may be destroyed after the expiration of 22 months following the primary or election at which those ballots were cast or forms were used.

Further, all voter registration records are required by law ***to be open for public inspection***. MCL 168.516. Further, MCL 750.492 requires public officials ***to permit inspection*** of the official records of said public office. Finally, federal law requires "***all records and papers*** which come into [the] possession [of "[e]very officer of election"] relating to any ***application***, ***registration***, payment of poll tax, or ***other act requisite to voting*** in such election," to be "retained and preserved" for a period of 22 months following an election. 52 U.S.C. § 20701. Further, 52 U.S.C. § 20702 makes it a crime for "any person" whether or not an election officer to "willfully steal[], destroy[], conceal[], mutilate[], or alter[] any record or paper required by" § 20701 to be retained and preserved. Moreover, MCL 750.248 provides that (1) ***A person*** who falsely ***makes***, ***alters***, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation ***may be received as legal***

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proof, ...with intent to injure or defraud another person is guilty of a felony punishable by imprisonment for not more than 14 years." This statute (1) applies to government officials by its plain language ("*a person*"), and (2) it "applies to public records." *People v Carter*, 106 Mich App 765, 767-68; 309 NW2d 33 (1981). Indeed, there is even more reason to hold government officials responsible for deleting, altering, and/or concealing public information and public records because of the tight control and monopoly of possession that the government exercises over such data. See, e.g., *People v Hall*, 391 Mich 175, 215 NW2d 166 (1974).

These and additional statutes therefore demonstrate that these records are public records, required to be kept on file and retained and preserved for public inspection. These records therefore enjoy a presumption of disclosure under FOIA. "FOIA is a ***pro disclosure*** statute that [courts] are to interpret broadly to allow public access. Conversely, [courts] are to interpret its exemptions narrowly so that [they] ***do not*** undermine its disclosure provisions. Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010) (emphasis added) ("record[s]" created...for the 2008 presidential primary that contain the printed name, address, and qualified voter file number of each elector and the participating

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political party ballot selected by that elector at the 2008 presidential primary are public records" as these are not "specifically exempt" they are subject to public access and required to be disclosed). Therefore, generally sweeping assertions of whole swaths of excluded information will not satisfy the pro-disclosure nature of FOIA. Indeed, the responding agency is responsible and liable for the decisions made respecting FOIA requests – they cannot rely on guidance, regulations, memoranda, or emails from any other entity to make this decision. *ACLU*, *supra* (the only basis for a FOIA denial is if it is in the statute's exemptions, which must be narrowly construed to ensure that the public has presumptive access to public information). See also, *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 458; 789 NW2d 178 (2010).

Defendants cannot therefore say, as they have, that they are "waiting" on the research and guidance from the SOS or any other entity for that matter to tell them what to withhold, what exemption applies, or what exemption might be asserted, or what might be exempt in the future, because "only the circumstances known to the public body at the time of the request are relevant to whether an exemption precludes disclosure," not any "waiting to hear from" the SOS, or any entity other than the Legislature. *Id.*

2. <u>There is no statutory basis for Defendants' denial of the public records requested by Plaintiff's FOIA</u>

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The public record / public information sought does have to be factually analyzed – some personal information, etc. (which Plaintiff has already conceded can be "redacted") might be subject to one or more exemptions cited, but on balance, the information can and should be disclosed without concern that any of the reasons for the exemptions will be triggered. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010) ("record[s]" created…for the 2008 presidential primary that contain the printed name, address, and qualified voter file, number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary are public records" as these are not "specifically exempt" they are subject to public access and required to be disclosed).

Moreover, Plaintiff specifically stated he was not asking for any proprietary software or any technical information that would require disclosure of such. In other words, there is no threat to a cyber-attack, hacking methods software, hardware tech data, because this is ostensibly "static" information that is sought to report on and record and classify that which appeared at a specific place and a specific time in history. These are quintessentially kept and preserved public records that record and document the passage of a public event – an election. See *Political Consulting Inc*, *supra*. And, in any event, the Defendants (counties and clerks) cannot rely on the sweeping, ultra-vires decision of the Secretary of State to

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make a FOIA decision on behalf of each and every individual who in their own right are responsible for, and will be held liable for, errant decisions made upon receipt of a FOIA request.

The data sought in Plaintiff's FOIA requests must be subject to redaction, if necessary, as Plaintiff has conceded, but also must be tailored to the request to fulfill the pro-disclosure meaning and intent of Michigan's FOIA. However, the information sought fits nowhere within the meaning of MCL 15.2431(y) (threatening Michigan's election security – quite the contrary, it is sought precisely to prevent unlawful breaches in Michigan's *election security* as defined in the Michigan Constitution and statutory law – not as envisioned and conceived by SOS Benson); or MCL 15.243(1)(z) (it simply would not "disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software."). The data will be used to compare the results with voter information, and data provided by the state – where several alarming discrepancies have already been found. (**ATTACHMENT C**).

3. Genuine issues of material fact about the categorization of the items subject to Defendants' denial and the scope of the exemptions as applied thereto prohibit summary dismissal of Plaintiff's claims.

Finally, Defendants' cannot be entitled to summary dismissal because there are genuine issues of material fact that require factual, expert, and legal

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determinations concerning whether (and to what extent, i.e., scope), Defendants' exemptions are valid. Moreover, FOIA provides a right of action – to sue the denying parties in court to determine the fact and apply the law to them. This is the process *required by the statute*. SOS Benson and Defendants cannot get a "free pass" from compliance with FOIA just because SOS Benson "intervened," even though she has no standing to do so in this FOIA proceeding, and seeks to apply her own administrative agency's "interpretations" and "*broadly construed*," i.e., sweeping idea of exemptions. *ACLU*, *supra*. Denial of FOIA must come from the public official who receives the request. And, the broadly construed permissibility, and narrowly construed exemptions must also be applied by these officials.

Aside from the fact that the records Plaintiff has requested (1) enjoy a prima facie presumption of being open public records due to their independent treatment under Michigan and federal election laws as public information required to be retained, preserved, and protected, and therefore, are subject to disclosure, and (2) do not fall within any of the asserted exemptions cited by Defendants when the broadly permissive interpretive principles and the narrow construction of the asserted exemptions are applied, see analysis *supra*, genuine issues of material fact exist sufficient to prohibit summary dismissal based on Defendants' sweeping interpretation of the exemptions cited as applied to the precise information sought.

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Indeed, MCL 15.244 *requires* public officials to disclose non-exempt information; if there is "exempt" information combined with said "non-exempt" information, then the public official *cannot* use the excuse that redaction or separation is not possible. See, e.g., *Evening News Asso v Troy*, 417 Mich 481, 486; 339 NW2d 421 (1983). Indeed, the statute itself says: "the public body ***shall separate the exempt and nonexempt material*** and make the nonexempt material available for examination and copying." *Id.*, (emphasis in original), citing MCL 15.244. As this Court is well aware, "[u]se of the word 'shall' connotes ***a mandatory duty imposed by law***," especially as it relates to a command directed at public officials and their public duties to disclose public information under FOIA. *Sharp v Huron Valley Bd of Ed*, 112 Mich App 18, 20; 314 NW2d 785 (1981), citing *Southfield Twp v Drainage Board for Twelve Towns Relief Drains*, 357 Mich 59, 76; 97 NW2d 821 (1959), *King v Director of the Midland County Department of Social Services*, 73 Mich App 253, 259; 251 NW2d 270 (1977). See also, *Anklam v Delta College Dist, et al.*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 317692 (June 26, 2014) (**ATTACHMENT I**).

CONCLUSION

As of the 2022 elections, all files on the USB Drive for the EPB flash drive are now fully encrypted. This blatantly usurps a locals clerk's control and

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responsibility of local election records and appears to be the BOE's attempt to further prevent release of election records. Plaintiff is entitled to the information he seeks to keep the state in check, and to ensure that elections are secure and properly run in accordance with the laws that county and local clerks, and local election officials *must follow*. The very pro disclosure purpose behind Plaintiff's request is not to make elections less secure, but more secure, not to invade privacy or infringe on copyright and proprietary matters, but to make elections and the manner in which they are conducted transparent and honest.

The electronic pollbook is an inherent component of the election audit trail and associated public election records. The public records derived from the EPB must, by law, be retained in their entirety and be accessible to the public. The Bureau of Elections has displayed a pattern of oversight, at best, and downright intentional neglect, at worst, that shows disregard for State and Federal Laws applicable to the election process. Plaintiff's FOIA should be honored, and there should be a full litigation and hearing so that local clerks and other witnesses called by the parties can testify as to the status of their EPB Voter file (.csv) format and/or as to their own experiences with voter registration fraud and/or mistakes. Any interjection of responsibility by the Secretary of State should be denied.

RELIEF REQUESTED

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WHEREFORE, Plaintiff requests this Honorable Court to deny Defendants' rejection of the FOIA requests, and to ORDER that Defendants disclose or provide copies of all or a portion of the public records requested, and further enter JUDGMENT in favor of Plaintiff, and to award attorneys' fees and costs as required by statute, and any and all other relief to which Plaintiff is entitled.

Respectfully submitted,

/s/ Stefanie Lambert
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Dated: March 20, 2024 (AMENDED)

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STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT A

Secretary of State and Bureau of Elections Instructions Regarding FOIA Responses

_____/

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

MEMORANDUM

Date: July 10, 2023
To: Municipal and County Election Officials
From: Jonathan Brater, Director of Elections
Subject: Security of Qualified Voter File and Electronic Pollbooks

Introduction

Election officials have experienced a series of attempts to access election materials that, if disclosed, pose privacy threats to Michigan voters and security threats to Michigan's election system. At times, these attempts have been accompanied by aggressive and even threatening language and behavior. Consistent with the Michigan Election Law and its responsibility to safeguard election security in Michigan, the Bureau of Elections (the Bureau) has instructed clerks that while Qualified Voter File (QVF) and Electronic Pollbook (EPB) records are public and subject to disclosure, certain components of these systems cannot be released without compromising voter privacy and election system security.

This memorandum provides further explanation of these issues and information for clerks to consider when reviewing public records requests with their legal counsel. It also describes the potential consequences of providing inappropriate access to election equipment to unauthorized individuals. Additionally, the memorandum addresses several false claims that have been made about QVF and EPB data and election administration in Michigan.

Record Requests Seeking QVF and EPB Data

Clerks have received requests for access to QVF and EPB data in a variety of different formats, including:

- Requests under the Michigan Freedom of Information Act (FOIA)
- Demands that records be preserved for "investigation"
- Demands to perform "inspections" of election records or equipment

Regardless of the format of any request to inspect QVF or EPB data, clerks should consult with their own counsel for legal questions regarding any of these requests.[1] The Bureau provides the following information in this memorandum: a summary of applicable provisions of FOIA and the Michigan Election Law; a description of the manner in which the Bureau has responded to

[1] Any clerk who receives a subpoena, request to preserve records pursuant to a lawsuit, or a request to inspect records from law enforcement should consult with legal counsel and inform the Bureau of Elections and the Michigan Department of Attorney General.

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specific requests, and; instructions not to disclose certain materials that pose a threat to election system security if released.

Requests for Electronic EPB Files

Clerks have received requests for electronic copies of EPB materials in various formats. These include requests for "an electronic copy of the Qualified Voter File (QVF) extract"; an "electronic pollbook flash drive", a "CSV- Comma separate value format", or other similar requests. At times, these requests have been accompanied by "helpful" instructions showing clerks how to potentially compromise the security of their election systems and render their election equipment unusable by illegally providing security-compromising information to unauthorized individuals.

Before responding to these or any FOIA requests, clerks should consult with their legal counsel regarding the requests and exemptions that may apply. Under FOIA, officials may shield sensitive information from disclosure. In the case of EPB files, the Bureau of Elections instructs clerks that they must not publicly release data or files that would reveal the software design or data architecture of the EPB. The Bureau gives this lawful instruction[2] under its supervisory authority pursuant to MCL 168.21, 168.31, and 168.32, as doing so could compromise the Bureau's ability to secure and safeguard the software and data from hacking, theft, loss or destruction, and accordingly interfere with the Bureau's obligation under the Michigan Election law to provide EPB software to clerks. MCL 168.668b.

In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(y). In addition, the responsive records include proprietary software information, security feature information, and sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z). Additionally, these files contain sensitive information regarding jurisdictions' EPB laptop(s) that might compromise the security of these laptops.

EPB files also contain personal identifying information such as full birth dates for voters, which are exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

[2] See MCL 168.931(h) ("A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer[.]""

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If clerks receive a FOIA request for EPB data, the requestor can be directed to the county clerk for paper pollbook copies or to the Bureau for the log file or voter history.

Notwithstanding the above restrictions on the release of certain information, there are numerous ways in which members of the public can review public QVF and EPB data. Clerks can provide the paper records they are legally obligated to maintain for the required retention period after each election, as soon as the security period has elapsed. Certain specific data derived from the QVF and EPB is subject to disclosure under FOIA, including the lists of registered voters from the QVF and the paper printout of the EPB generated on election night.

If members of the public are interested in verifying the names of individuals registered to vote on a certain date or included in the EPB, they may obtain this information by submitting a FOIA request for publicly available records. If members of the public with concerns about EPB data wish to verify the names of individuals who cast ballots, they can also do so by submitting a FOIA request and reviewing the paper applications to vote completed by all in-person voters and the absent voter ballot applications submitted by all absentee voters.

Electronic records such as the EPB log file or voter history can be requested from the Bureau. Requests for EPB data must be directed to the Bureau to ensure that sensitive information related to both individual voters and the EPB are removed before public disclosure of otherwise available information. Even if clerks were to attempt to redact a voter's date of birth and other personally identifiable information, the disclosure of security and technical information is also exempt from FOIA and may not be properly redacted if produced by clerks, instead of the Bureau.

Demands to Disregard Lawful Instructions from the Bureau of Elections

Clerks have also received communications demanding that they disregard instructions contained in the Bureau of Elections communications, including the Recount/Release of Security Memorandum circulated after each election. The Bureau's instructions are lawful directives in compliance with state and federal law.

Going back to at least 2012 (under Secretary of State Ruth Johnson), the Bureau has issued a directive to destroy electronic copies of the EPB and flash drive. As clerks are no doubt aware, numerous candidates of both major political parties have won statewide elections since 2012. This procedure is necessary to safeguard security and voter privacy. Clerks destroy electronic copies only after they have already printed the paper copy of pollbook information (which must be retained for the required retention period).

Clerks must comply with this instruction regardless of whatever claims private individuals make. A private individual has no authority to instruct clerks on their duties. Whatever "investigation" these individuals claim to be conducting or threats of "prosecution" they may make toward local or state officials, in the absence of a court-issued subpoena or other court order, clerks are not required to comply with their demands. If clerks do receive one of these demands, they should consult with their attorney on how to respond.

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Clerks should also be wary of private individuals, including self-proclaimed "experts," attempting to instruct them on the issue of whether disclosure of electronic materials would or would not constitute a security concern. In reality, it is often not possible for an individual unfamiliar with a system to determine whether any one individual piece of information, if known, would be useful in compromising that system. This is one of the reasons software and data elements which may, on their own or in combination with other elements, jeopardize security are not disclosed. Similarly, clerks should not accept at face value claims from private individuals, whatever expertise they claim to have, that clerks can easily redact security-related or personal identifying information.

Consequences of Improper Disclosure

Clerks should understand that the disclosure of this sensitive information may compromise the integrity of Michigan's elections and may warrant an investigation by the Department of State, Department of Attorney General, or Michigan State Police. Improper disclosure may also result in fiscal implications for the jurisdiction. Specifically, disclosure could require the purchase of new EPB laptops for each precinct for which data was compromised.

False and Misleading Claims About QVF and EPB Data

Individuals seeking improper access to QVF and EPB records have made numerous false or misleading claims about QVF and EPB data and election administration in Michigan. Although making or believing false statements has no bearing on whether individuals are permitted to access a record, clerks may find these explanations useful in communicating with the public or other local and county officials, including law enforcement.

Election Turnout and Voter History

Some individuals have claimed that because, in past elections, the total number of ballots tabulated statewide does not exactly match the number of voters with a voter history indicator in QVF, this means that election results and files cannot be trusted, or that there is some sort of unknown or unexplained irregularity involving voter data.

In reality, these numbers do not match exactly because they come from two different sources. County-certified election results are based on the number of ballots cast and tabulated in each jurisdiction, as determined by the county canvass. This includes canvasser review of tabulator tapes showing election night results, in addition to any corrections or adjustments at the county canvass and recounts, if applicable.

Voter history in QVF is based on entry of voter history data from the EPBs (for in-person voters) and absent voter ballot return envelopes (for absentee voters). Following each election, each clerk uploads their EPB data for each of their precincts to the QVF. This automatically updates the voter history in QVF for all voters recorded in the EPB as voting at the polling place. Alternatively, clerks can manually add voter history to the QVF using the paper printout of the EPB.

If any of Michigan's 1,520 municipal clerks do not update QVF with EPB data for any of their precincts, voter history for voters in those precincts will not appear in QVF even though those voters did in fact appear at the precinct, apply to vote, get recorded in the poll book, and cast

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ballots. Following each election, the Bureau sends multiple communications and reminders to clerks to add voter history data to the QVF. Most clerks do so promptly, but some are delayed and some fail to do so.

This was the case in the November 2020 election, as it was in other past elections. Approximately 5.57 million ballots were cast in the November 2020 election according to certified results. As of April 2021, when the Office of the Auditor General reviewed QVF data for its audit of the Bureau, voter history for approximately 5.53 million voters had been uploaded to the QVF. In subsequent months, the Bureau sent additional communications to clerks reminding them to add voter history data to the QVF, and more clerks did so. As of 2022, the number of voters showing history in QVF for the November 2020 election was approximately 5.55 million.

Ultimately, a small percentage of jurisdictions did not add QVF data for at least one of their precincts in 2020 which meant that a small percentage of voter history was not recorded in QVF. Approximately 99.6% of voter history was uploaded in the QVF for the November 2020 election, which is a higher percentage than was uploaded for the November 2016 election (approximately 99.0%) and November 2018 election (approximately 98.5%). In subsequent elections, the percentage of voter history uploaded has increased even further.

EPB Time and Date Records

Individuals have claimed that the absence of a specific "time stamp" on some voter history tables is suspicious because, on election day, the EPB records the specific time at which a voter appeared on Election Day. These individuals misunderstand the table they are viewing. In reality, some QVF tables include "00:00" in the time field because the record is referring to an election *date,* not a *time* on election day. Elections occur all day, so it does not make sense for QVF to display any specific time. Like other programs that include voluminous amounts of data, QVF generates tables of data that are programmed and populated using numerous databases.[3] When there is no entry needed for a field (for example, a time field corresponding to election day), the default value that databases display is "00:00."

Voter History from Previous Addresses

Some voters who have moved from one jurisdiction to another in Michigan have noticed that voter history from prior elections, when they voted at their prior address, may appear as voter history from their current address. This is because the old version of QVF (QVF Legacy) did not track the jurisdiction where a past vote occurred. One of the many benefits of QVF Refresh, released in 2019, is that voter history from prior addresses can be tracked at the prior address. Therefore, voters who moved to and voted from prior addresses in elections that occurred after QVF Refresh was released will see voter history appear as having voted at the prior address.

[3] Some individuals have claimed that there are multiple QVF "databases" and that this is somehow being used to perpetuate fraud. Aside from being impossible for the reasons described later in the memo, this claim is based on misconceptions regarding the QVF. The QVF is not a single "database" but instead a program used by the Bureau and Clerks for many purposes, requiring numerous tables and reports, which are in turn programmed and populated by numerous databases. For an explanation of what a database actually is, see this explanation from Microsoft: https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-are-databases/.

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However, votes that occurred at addresses when the voter's move predated QVF Refresh will display at the current address. This is not because of some nefarious purpose, but because QVF Legacy did not have the data capability as the current system.

QVF Record Identifying and Voter ID Numbers

Some individuals have claimed that the fact that there are multiple identifying numbers corresponding to voter records in QVF suspicious. In reality, there are multiple numbers for security reasons. Voters have a public voter ID number in QVF and the EPB, which is public and disclosed in public record requests. QVF also contains separate record-identifying numbers that correspond to voter records, which are used for security and verification purposes (and which are not publicly disclosed for security reasons). Again, the non-disclosed record-identifying number is not different from the voter ID number for some nefarious purpose, but as an internal verification and security measure.

Security Procedures Used to Verify EPB is Offline

As clerks are aware, the EPB used on Election Day must be offline and laptops operating the EPB software must be turned to "airplane mode" to ensure there is no internet connection. In order to make sure that EPBs are offline, the EPB software is designed to receive a periodic "Ping" from the State of Michigan network on Election Day to check for improper internet connectivity. If the Ping detects an internet connection on the EPB laptop, the EPB software displays a warning message instructing the user to disconnect the laptop from an internet connection by turning the laptop to airplane mode. Some individuals have suggested this connection is suspicious, when in fact it is a security feature designed to ensure EPB laptops remain offline throughout Election Day.

General QVF-Related Conspiracy Theories

In general, some individuals have pointed to various data or program elements in QVF and claimed – whether because QVF data is imperfect or incomplete, because these individuals do not understand what they are looking at, or some combination of the above – that this shows some broad conspiracy to perpetrate election fraud. While it is of course true that QVF – a constantly changing voter file that needs to be updated whenever a voter registers, moves, cancels a registration, dies, applies for an absentee ballot, or various other activities – will never be 100 percent accurate or up to date, this does not mean there is some conspiracy to manipulate QVF data to perpetrate fraud. In fact, in recent years the Bureau and clerks have done more than ever before to keep QVF accurate and up to date.[4]

Regardless of how accurate or up to date QVF is at any given time, however, the suggestion that QVF could be used to perpetuate massive undetected election fraud is without merit. Even if one were to assume that Bureau staff (many of whom have worked at the nonpartisan Bureau of Elections for years or decades under multiple Secretaries of State of both political parties) and staff at the nonpartisan Department of Technology, Management, and Budget were involved in such a scheme, it would require thousands of clerks and election inspectors of both political parties to be involved as well.

[4] For more information on how QVF is kept up to date, see https://www.michigan.gov/sos/elections/voting/voters/voter-registration-cancellation-procedures.

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This is because while QVF is used to maintain *electronic* registration and voting records, voting is done by human beings using *paper* ballots, in elections that are run by municipal clerks across the state. In addition to the paper ballots, there are also polling place applications to vote (which must be completed by in-person voters, and which are retained by clerks after election) and absentee ballot applications (which must be completed by absentee voters, and which are also retained by clerks after elections). These materials provide an independent, *paper* record of all the individuals who cast ballots in an election. If there were actually some kind of fraud being perpetrated using QVF, this could be easily proven by reviewing these paper records.

In many respects, these nonsensical claims about QVF are similar to the false claims previously made about ballot tabulation equipment, which if true could have been proven by reviewing paper ballots (when in fact, reviews of paper ballots all confirmed that tabulators counted ballots accurately).

Additional Information and Support Available

It is unfortunate that election officials continue to be subjected to false claims, abusive behavior, and even threats. Whatever assertions individuals make about election officials, clerks should be mindful that there are legal avenues for individuals to pursue these assertions. If individuals disagree with a FOIA determination by a local or state official, they can file a lawsuit. If they believe criminal activity occurred, they can make a complaint in writing to law enforcement.

The Bureau encourages election officials to communicate with local and state law enforcement regarding any threats they may have received, and to continue to communicate with law enforcement regarding the various false claims and allegations of criminal activity that some individuals continue to make. Clerks are also encouraged to communicate with municipal and county government associations for additional independent support and advice. Finally, the Bureau of Elections remains available for any additional questions you have or support you may need. If clerks believe that any unauthorized or unsupervised access to their equipment may have occurred, they should contact the Bureau immediately. Please do not hesitate to contact the Bureau if we can be of further assistance.

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Gmail

Stephanie Scott <stephiedscott@gmail.com>

FOIA Requests to Review QVF Records, Master Cards, and AV Records

Michigan Bureau of Elections <MISOS@public.govdelivery.com> Wed, Jul 20, 2022 at 11:25 AM
Reply-To: MISOS@public.govdelivery.com
To: stephiedscott@gmail.com

Having trouble viewing this email? View it as a Web page.

SHARE

City and Township Clerks,

Jurisdictions have received Freedom of Information Act Requests to view Qualified Voter File (QVF) records, voter registration records, and absent voter ballot records for registered voters in Michigan. You should consult with your local legal counsel regarding any public records requests. The Bureau of Elections' position is that the Michigan Election Law prohibits the release of the digitized voter signature images from the Qualified Voter File. MCL 168.509gg(f). The Bureau's position is that the Michigan Election Law does not prohibit clerks from allowing members of the public to view voter registration forms, voter registration master cards, absent voter ballot applications, or absent voter ballot applications that include a voter's handwritten signature.

Lori A. Bourbonais, Director
Election Administration Division
Bureau of Elections

This email was sent to stephiedscott@gmail.com using GovDelivery Communications Cloud on behalf of: Michigan Secretary of State · 430 W. Allegan Street · Lansing, MI 48918 · 1-888-767-6424

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STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT B

Bureau of Elections Direction to Delete the EPB Files / Data

_____/

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
BUREAU OF ELECTIONS
LANSING

MEMORANDUM

DATE: February 12, 2021
TO: County Clerks
FROM: Michigan Bureau of Elections
SUBJECT: Release of Voting Equipment

Please be advised of the following:

RELEASE OF VOTING EQUIPMENT: The security of ballots and election equipment is released as follows:

Ballots, programs and related materials: The security of all optical scan ballots, programs, test decks, accuracy test results, edit listings and any other related materials are released.

E-Pollbook laptops and flash drives: The EPB software and associated files must be deleted unless a post-election audit is planned but has not yet been completed or the deletion of the data has been stayed by an order of the court or the Secretary of State. Jurisdictions should consult with city, township, or county counsel regarding any pending court orders, subpoenas, or records requests regarding these materials.

FEDERAL BALLOT RETENTION REQUIREMENT: If the office of President, U.S. Senator or U.S. Representative in Congress appears on the ballot (all appeared on the November 3, 2020 general election ballot), federal law requires that all documents relating to the election -- including optical scan ballots and the programs used to tabulate optical scan ballots -- be retained for 22 months from the date of the certification of the election. To comply with the requirement, the Bureau of Elections recommends that optical scan ballots and the programs relating to federal elections be stored in **sealed ballot bags** in a secure place during the 22-month retention period. The documents subject to the federal retention requirement must not be transferred to ballot bags for extended retention until after they are released under Michigan election law as detailed in this memo.

Questions?

If you have any questions, please contact us via email at elections@michigan.gov, or by phone at (517) 335-3234 or (800) 292-5973.

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STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT C

Affidavit of Stephanie Scott and Supporting Exhibits

_____/

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Affidavit of Stephanie Scott

State of Michigan

County of Hillsdale

Stephanie Scott, being duly sworn deposes and states as follows under penalty of perjury:

1. My name is Stephanie Scott. I am presently 52 years old, and my current address of residence is 3571 State Road, Hillsdale MI 49242.
2. I am the former Adams Township Clerk.
3. I assumed office of Adams Township Clerk early December 2020.
4. I immediately began to prepare to run a local school millage election by completing the State of Michigan's online election training and certification program. Upon completion I was then allowed access to the State of Michigan Qualified Voting File (QVF).
5. To my understanding, Adams Township was holding the first and only election in the state following the November 2020 presidential election.
6. During election preparation, I received instructions from the Hillsdale County clerks office, Deputy Clerk Abe Dane, that I was to locate the USB flash drive from November 2020 election. Once located I was instructed to delete the files and return the USB flash drive to him for the programming files of the Electronic Pollbook (EPB) for the next election.
7. In December 2020, an email was sent out from the Michigan Bureau of Elections at the direction of Jocelyn Benson directing the deletion of the EPB data from the November 3, 2020 election.
8. I reviewed the law and discovered that deleting the EPB data would be a violation of state and federal law. I did not delete the EPB data.
9. I questioned the direction from the Secretary of State to delete the EPB data because the USB sticks that store the EPB data cost less than $10.00. Additionally, election records that I am required to maintain pursuant to the Michigan Constitution, Michigan law, and federal law would be deleted.
10. I raised this concern with the Secretary of State's Office. I was told by the Bureau of Elections that the records contained on the EPB USB drive were preserved by 3 print outs from the pollbook (the laptop that the EPB USB drive is inserted into) that occur on election night.
11. I subsequently learned this statement from the BOE is FALSE!
12. I had the Adams Township EPB data analyzed by a forensic expert, and I learned that the EPB data is original evidence that has information not contained anywhere else including

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the 3 print outs referred to by the BOE. It is original evidence that had I deleted that I would have violated state and federal law.

13. The forensic expert further verified that the registration (QVF) files were on the EPB USB drive. I then reconciled the data with the Adams Township certified and recorded data for the November 3, 2020 election. It matched. As it should.
14. I then compared the EPB data and the Adams Township data that was recorded for the November 3, 2020 election to the certified and recorded data that Hillsdale County had for Adams Township for the November 3, 2020 election. It matched. As it should.
15. I then compared the EPB data, and Adams Township data, Hillsdale data to the certified data obtained by FOIA request from the BOE as to who the state had recorded for voting in Adams Township for the November 3, 2020 election. It differed by 11.5%
16. Again, it differed by 11.5%.
17. In other words, the State final certified data had 11.5% unique voters recorded as voting in Adams Township that Adams Township, and Hillsdale County did not have recorded.
18. This was ONLY discovered by looking at the EPB data. The same data that the SOS ordered to be deleted.
19. voter records (FOIA records) from 2009 thru October 2021. We began to examine the numbers for Adams Township.
20. The first discrepancy identified was the fact that the FOIA records illustrate 1332 people voted
21. I wanted to find who the 30 people were that the state FOIA records did not have record of voting. We created a query to compare the EPB record to the state FOIA records.
22. Pertaining to the timestamps. There is no other documentation to my knowledge that records this. It would represent when the election inspector ' checked in' the voter to the electronic pollbook on the laptop and provided him/her a ballot. The ballot number would be entered at this time as well.
23. I noticed the Voter IDs had different lengths of numbers. Upon closer review, the Voter IDs did not match the Voter IDs on the state FOIA records.
24. The BOE responded in the October 15, 2021 letter to my concerns of deleting the EPB to me that "all electronic pollbook data is printed in paper form on election night". That is clearly not the case with my findings.
    a. The 14 names listed as same day registers are not delineated on the .pdf file of the Voter List.
    b. There are 10 data fields not included on the .pdf of the Voter List including the time stamp and the Voter ID.
    c. No information regarding the laptop is recorded in any of the night end .pdf reports.
25. These discrepancies are repeatable in other precincts in which the clerks lawfully retained their EPB flash drives. And because of this, citizens began writing FOIAs for the .csv EPB Voter file.

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26. The BOE responded to the FOIAs with a variety of emails and memos discouraging clerks from providing the information and claiming security concerns. Included are emails/memos dated 8/26/22, 7/20/22, 11/14/2022.
27. These take the same authoritarian tone by the BOE advising clerks to consult with their legal counsel before complying with FOIA.
28. Election records exempt from FOIA release are identified in MCL 168.509gg. BOE has no authority to intimidate clerks into non-compliance with statute.
29. The BOE continued to send out letters instructing clerks to delete the EPB flash drive data off laptops and off the USB flash drive, justifying it as a necessary security issue.
30. EPB sticks of 2022 election show 'pings' of internet connectivity attempts. Although I do not have physical prints of the evidence I saw, you will see reference to this fact in the July 10, 2023 BOE letter to clerks. While the BOE attempts to explain the internet connection attempts as their 'ping' to check if election laptop is in airplane mode, it is not logical to believe that the EPB software installed on local laptops can record inbound 'pings'. But it is completely reasonable that it would record it's own outbound 'pings' of failed IP address connection attempts.
31. As the momentum increased around the state, and as clerks denied FOIAs and were on record of not having the files, the BOE released a memo dated July 10, 2023 which contains many refutations to the election result findings of the EPB voter files verifies.
32. As of the 2023 election, the EPB history file is encrypted. The clerk has no ability to access her own pollbook records.
33. It is my opinion that the mantra to compare tabulator tapes to paper ballots is NOT sufficient to an audit of actual election results. It completely disregards WHO voted. Adams Township records from the USB flash drive document the complete misstatement of the state QVF voter database. It contains a litany of bad and potentially fraudulent records.
34. MCL168.509ff states *"The secretary of state and each county, city, township, or village clerk* ***shall maintain all records*** *concerning the implementation of programs and activities* ***conducted for the purpose of ensuring the accuracy and currency of registration records under this chapter for 2 years or more****. Except to the extent that the records maintained pursuant to this section relate to a declination to register to vote or to the identity of a designated voter registration agency through which any particular voter applied for registration pursuant to section 509gg, the secretary of state or a* ***county, city, township, or village clerk shall make the records available for public inspection under reasonable conditions*** *and, if available, for photocopying at a reasonable cost."* While some FOIA requests were fulfilled, it became apparent that the BOE was intervening to discourage and prevent the lawful fulfillment of FOIA requests for pertinent election records.
35. The EPB flash drive files MUST be maintained and utilized for election accountability.

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36. I hereby affirm that the information above is true and accurate and complete to the best of my knowledge, and that no relevant information has been omitted.

Dated:

3/11/24

Signature:

Jon Paul Rutan
Notary Public State of Michigan
Hillsdale County
My Commission Expires 2/15/2030
Acting in the County of Hillsdale

03/11/2024

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Gmail

Stephanie Scott <stephiedscott@gmail.com>

Release of Voting Equipment/Ballots

Stephanie Scott <stephiedscott@gmail.com> Wed, Feb 24, 2021 at 9:42 AM
To: Abe Dane <a.dane@co.hillsdale.mi.us>

:)

On Wed, Feb 24, 2021 at 9:36 AM Abe Dane <a.dane@co.hillsdale.mi.us> wrote:

> You have a point there. I won't disagree.
>
> *Abe Dane*
>
> Chief Deputy Clerk
>
> Hillsdale County
>
> 517-437-3391
>
> **From:** Stephanie Scott <stephiedscott@gmail.com>
> **Sent:** Wednesday, February 24, 2021 9:34 AM
> **To:** Abe Dane <a.dane@co.hillsdale.mi.us>
> **Subject:** Re: Release of Voting Equipment/Ballots
>
> Yes, I am sure this is the common practice but this past year appears quite different than past years. With all the accusations of voting irregularities and a SOS that is certified despite of this, it seems premature for the Bureau of Election to have us destroy potential evidence by breaking seals.
>
> On Wed, Feb 24, 2021 at 9:18 AM Abe Dane <a.dane@co.hillsdale.mi.us> wrote:
>
> > Good morning Stephanie,
> >
> > From what Marney has said it sounds like this is common practice. They just want them to stay sealed so they can maintain their integrity in case there is a recount or audit. Since we are past that point, all we need to do is keep them retained for 22 months and then after that they can be destroyed.
> >
> > *Abe Dane*
> >
> > Chief Deputy Clerk
> >
> > Hillsdale County

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From: Stephanie Scott <stephiedscott@gmail.com>
Sent: Wednesday, February 24, 2021 7:52 AM
To: Abe Dane <a.dane@co.hillsdale.mi.us>
Subject: Re: Release of Voting Equipment/Ballots

Hi Abe-

I am surprised that this direction isn't coming from the Secretary of State. Incredible that all are being directed to remove seals and loose the integrity of the paper trail. I suppose this came out because the Supreme Court declined case?

On Tue, Feb 23, 2021 at 5:00 PM Abe Dane <a.dane@co.hillsdale.mi.us> wrote:

> Clerks,
>
> We received word from the state's Bureau of Elections (attached) that the security of ballots and election equipment is released. So you are free to remove seals and store your ballots somewhere more convenient if you want to free up your nice ballot storage containers for the next election. PLEASE LET MARNEY OR I KNOW IF YOU NEED NEW BALLOT STORAGE BAGS. Our current bags are between 15 and 20 years old and are showing a lot of age. We are in the process of researching prices for new bags and if you are interested these bags can include wheels for easier transport.
>
> These presidential election ballots should still remain in your possession until September of 2022 (22 month retention period).
>
> The state also wants you to UNINSTALL the EPB software from your laptops (NOT just delete the icon from the desktop) and remove the election folder from your EPB flash drive.
>
> Please see the attached memorandum from the BOE for more information. Thank you all!
>
> *Abe Dane*
>
> Chief Deputy Clerk
>
> Hillsdale County
>
> 517-437-3391

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Gmail

Stephanie Scott <stephiedscott@gmail.com>

EPB Flash Drive for Adams Twp

Abe Dane <a.dane@co.hillsdale.mi.us> Wed, Mar 3, 2021 at 9:20 AM
Reply-To: a.dane@co.hillsdale.mi.us
To: Stephanie Scott <stephiedscott@gmail.com>

Thank you Stephanie!

Abe Dane

Chief Deputy Clerk

Hillsdale County

517-437-3391

From: Stephanie Scott <stephiedscott@gmail.com>
Sent: Wednesday, March 03, 2021 8:51 AM
To: Abe Dane <a.dane@co.hillsdale.mi.us>
Cc: Zinser, John <bluke26@yahoo.com>; Kast, Marney <mkast@co.hillsdale.mi.us>
Subject: Re: EPB Flash Drive for Adams Twp

I located the EPB flash drive so I shouldn't need another. :)

On Tue, Mar 2, 2021 at 4:12 PM Stephanie Scott <stephiedscott@gmail.com> wrote:

> Hi Abe-
>
> I will look tonight when I get to the townhall and let you know.
>
> Stephanie
>
> On Tue, Mar 2, 2021 at 4:08 PM Abe Dane <a.dane@co.hillsdale.mi.us> wrote:
>
> > Stephanie and Scott,
> >
> > We are preparing your precinct kit for the March 23rd election. Can either of you check to see if Adams Township is in possession of their Electronic Poll Book (EPB) Flash Drive? It would probably be in a labeled medium sized white envelope.

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This would be used on Monday March 22nd to download the EPB from QVF for transfer to your EPB laptop for election day.

If you already have your EPB Flash Drive, please delete the November 3rd, 2020 election folder within the drive.

If you do not have an EPB Flash Drive, I will provide one in your precinct kit.

Please let me know either way. Thank you.

Abe Dane

Chief Deputy Clerk

Hillsdale County

(517) 437-3391

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AFFIDAVIT OF BENJAMIN R. COTTON 11 JULY 2022

I, Ben Cotton, being duly sworn, hereby depose and state as follows:

1) I am over the age of 18, and I understand and believe in the obligations of an oath. I make this affidavit of my own free will and based on first-hand information and my own personal observations.

2) I am the founder of CyFIR, LLC (CyFIR).

3) I have a master's degree in Information Technology Management from the University of Maryland University College. I have numerous technical certifications, including the Certified Information Systems Security Professional (CISSP), Microsoft Certified Professional (MCP), Network+, and Certified CyFIR Forensics and Incident Response Examiner.

4) I have over twenty-five (25) years of experience performing computer forensics and other digital systems analysis.

5) I have over eighteen (18) years of experience as an instructor of computer forensics and incident response. This experience includes thirteen (13) years of experience teaching students on the Guidance Software (now OpenText) EnCase Investigator and EnCase Enterprise software.

6) I have testified as an expert witness in state and federal courts and before the United States Congress.

7) I regularly lead engagements involving digital forensics for law firms, corporations, and government agencies and am experienced with the digital acquisition of evidence under the under the Federal Rules of Evidence.

8) I reviewed the Administrator manual for the Hart Verity system for the version of software that was purchased by the State of Michigan under contract number #071B7700128.

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9) I reviewed the State of Michigan contract number #071B7700128, which is specific to the State of Michigan acquisition, deployment and operation of the Hart voting systems from March 1, 2017 to February 28, 2027 and was in effect during the November 3, 2020 general election.

10) I reviewed the Voting System Examination of Hart InterCivic Verity Voting 2.4 report dated May 16, 2020 the was conducted by Brian Mechler on behalf of the State of Texas.

11) The analysis and review of the Hart InterCivic contract, administrative and user manuals state the following:

a) State Michigan contract number #071B7700128 documents the inclusion of the State of MI Qualified Voter Files (QVF) loaded onto the tabulators on page 59 and are illustrated in the diagram on page 60.

b) This download of QVF occurs 4-5 weeks prior to election via the Verity Drive USB stick (V-Drive). This data is loaded onto the tabulator prior to the Public Accuracy Test and not modified by the clerk prior to election day.

c) The Verity drive is provided by the County to the township clerk.

d) The Hart InterCivic tabulator includes WIFI and ethernet local area network (LAN) network support coupled with an automatic transmission process to connect to the internet. (Page 61)

e) The ballot images are stored on the tabulator in PNG format. (page 77)

f) The time stamp of the ballot insertion into the tabulator is removed per paragraph 1.1.A.24 of Hart contract.

g) Ballot information is recorded in 3 physically separate locations: internal memory, the paper ballot itself and on the V-drive.

h) Given that the ballot images are stored on the tabulator, the QVF is stored on the tabulator, the ballot images are stored on the tabulator and the tabulator has multiple

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modes of internet connectivity with few if any cyber security protections, a huge vulnerability to the integrity of the voting process exists. If an unauthorized person were to gain remote access to the tabulators the vote as recorded on the tabulator could be modified or additional votes entered into the system.

12) The Adams Township tabulator was confiscated by MI State Police and remains in their custody. Since maintenance was not performed prior to the seizure, the ballot information from the 2018 thru March 2021 elections should remain on the device.

13) I have had the opportunity, with the permission of Adams Township, Michigan officials, to examine the contents of the Electronic Poll Book (EPB) USB drive from the November 2020 General Election.

14) I have reviewed the letter from Jonathan Brater, Director of Elections, dated 15 October 2021 to Stephanie Scott.

15) I have reviewed a series of emails between Stephanie Scott and Abe Dane dated 23 February 2021 through 24 February 2021.

16) I have reviewed the Memorandum dated 12 February 2021 named 2021.02.12 Final Release of Security Memo Nov 2020.pdf. This memorandum is unsigned but is written on Michigan Bureau of Elections letterhead.

17) I have had the opportunity to review the reports that are generated and printed by the Secretary of State following the submission of precinct results for a given election. These reports are referenced in the Jonathan Brater document dated 15 October 2021.

18) The administrative and operator manuals for the Hart InterCivic voting system clearly state that the Qualified Voter Record is stored on the voting machines and poll books..

19) The epb.accdb file on the EPB USB is a password-protected data base that contains the election definition data as well as qualified voter data. At the point that these files are utilized in

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the course of the election, the data contained in these files becomes unique to that machine and election. For example, when a qualified voter casts a vote the exact date and time that the vote is cast is added to the voter's record. At this point, the data on the devices and the EPB USB becomes original evidence for the voting process.

20) Under the Federal Rules of Evidence Rule 902 paragraph 14, data copied from an electronic device, storage medium or file is admissible if authenticated by a process of digital identification and certified by a qualified person. This presumes that all data contained on the device is copied and reproduced. I saw no evidence that there is any such certification attesting to the completeness of the copied data associated with the conversion of the electronic EPB USB to the printed format that is produced by the Secretary of State. Without this certification, the original evidence must be preserved. In this case that would require that the systems involved in the election and the removable media used in the election be preserved in their digital state following the closure of the polls. There are forensic preservation processes that could have preserved the data, but there are no current processes or procedures approved by the Secretary of State to perform these operations.

21) The EPB USB is original evidence. The basic principle governing the preservation of electronic data and ensuring that digital evidence is admissible in court is that original evidence is the best evidence. Preserving a digital device in an original state ensures that the evidence is reliable, dates and times are factual, and that the data has not been altered. Failure to preserve digital evidence in a forensically sound manner can result in charges of spoliation and the inadmissibility of that evidence in court. Based on my review of the Hart InterCivic manuals and the Secretary of State's instructions to the municipality election officials, I do not see any

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method or procedure to forensically preserve the voting systems or the digital media used in a Michigan election.

22) The EPB USB contains data that is unique to that specific EPB USB and to the equipment that the USB is plugged into. The following items are not recorded anywhere else in the night-end reporting:

a. Same Day Voting Data. The quantity of same-day in-person registrations is not summarized on night-end reports.

b. Same Day Voting Data. The voter identification/ information is not recorded in the printed total votes cast nor is this information delineated in the end-of-night voter list.

c. Same Day votes. These votes are not separated out on the night-end ballot summary report.

d. The reports produced at the closing of the polls will reconcile the voting numbers, but there is no method to separate out the same-day registers without the original EPB USB.

23) I have analyzed reports produced by the Secretary of State for the preservation of voting data and materials under the Federal Statute and have determined that those reports do not capture and preserve all the data contained on the EBP USB. The following data elements for and Electronic Pollbook and other voting equipment used in the election are not part of these reports:

a) Computer Name that the Vote was Conducted On

b) The Domain of the Computer

c) Manufacturer of the Computer

d) The Model of the Computer

e) Processor Name

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f) Total Virtual Memory Size

g) Free Virtual Memory

h) Free Physical Memory

i) Internet Connection Status

j) Internet Connection Type

k) Cable Internet Speed

l) Cable Internet MAC Address

m) Wifi Internet Speed

n) Wifi Internet Mac Address

o) Windows Operating System Version

p) AntiVirus Program and Status

q) Firewall Type and Status

r) Bit Locker Disk Encryption Status

s) Bitlocker Hard Disk Status

t) Bitlocker Removeable Drive Status

u) .Net Version

v) Dymo Lable Version.

Once again, these data elements are not part of the reports that are produced for preservation by the Secretary of State, but would be data that should be preserved under the Federal statutes. Should an audit of the election or should the voting records be produced in support of a legal action, the above components would be critical to prove compliance with election law, validate voting system configurations and the demonstrate the fairness of the election. Failure to

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forensically preserve the EPB USB would have effectively deleted and wiped these elements of information, as they are not present or preserved on any other component of the voting system.

24) The following data fields for voter information from election day are not part of the night end reports:

a) VOTERID
b) BALLOTTYPE
c) PRECINCT
d) CREATE DATE – Recorded date of election.
e) ADDRESS_ID
f) LICENSE_NUMBER
g) IDENTIFICATION_STATUS_ID
h) DISTINCT_POLITIAL_AREA_ID
i) CODE
j) PARTYID

25) I had the opportunity to review FOIA documents produced by the Secretary of State's office to Scott Aughney. These documents included the official vote totals for Adams Township. Analysis of these official totals revealed some significant deviations from the data contained on the voting media at the local Township level.

a) The Electronic Poll Book USB data for Adams Township recorded 1,362 voters in night end reporting. This includes the same-day registered voters.
b) The Hillsdale County Canvassing Board confirms the quantity of 1362 votes in Adams Twp
c) The State records indicate 1332 votes recorded in Adams Township. This is short 30 votes from the end-of-day totals in the Adams Township data. These numbers do not include the fourteen (14) same-day registration voters.

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d) A comparison of names between the two data sources illustrates seventy-nine (79) unique names on the Electronic Poll Book data for Adams township that are not listed on the State's official records.

e) Conversely, there are sixty-four (64) names unique to the State's records that are not represented on the Adams Township Electronic Poll Book records.

f) The combination of these report discrepancies documents an 11.5% difference in votes between township and state.

Without the data contained on the EPB USB data there is no manner by which these discrepancies could be investigated and reconciled. The EPB USB data is essential to any audit or reconciliation.

I have had the opportunity to review two reports created by Scott Aughney. The first report titled "BALLOTS CAST HILLSDALE COUNTY ADAMS TOWNSHIP ELECTION DATE 2020-11-03 was printed on I/13/2022. The second report titled "BALLOTS CAST HILLSDALE COUNTY ADAMS TOWNSHIP ELECTION DATE 2020-11-03" was produced on 1/13/2022 as well. Both reports were produced in an Adobe Acrobat .pdf format document. Highlighting was applied to the "BALLOTS CAST HILLSDALE COUNTY ADAMS TOWNSHIP ELECTION DATE 2020-11-03" document on 1/17/2022. This was done to highlight voters, who according to the report, voted in the November 3, 2020 election but were not registered until after that date. In some cased these voters data of registration reflects registering to vote 7 months after the election. Figure one is a screen capture of this report. Voter identification data has been blocked to preserve privacy. The original document is available for review.

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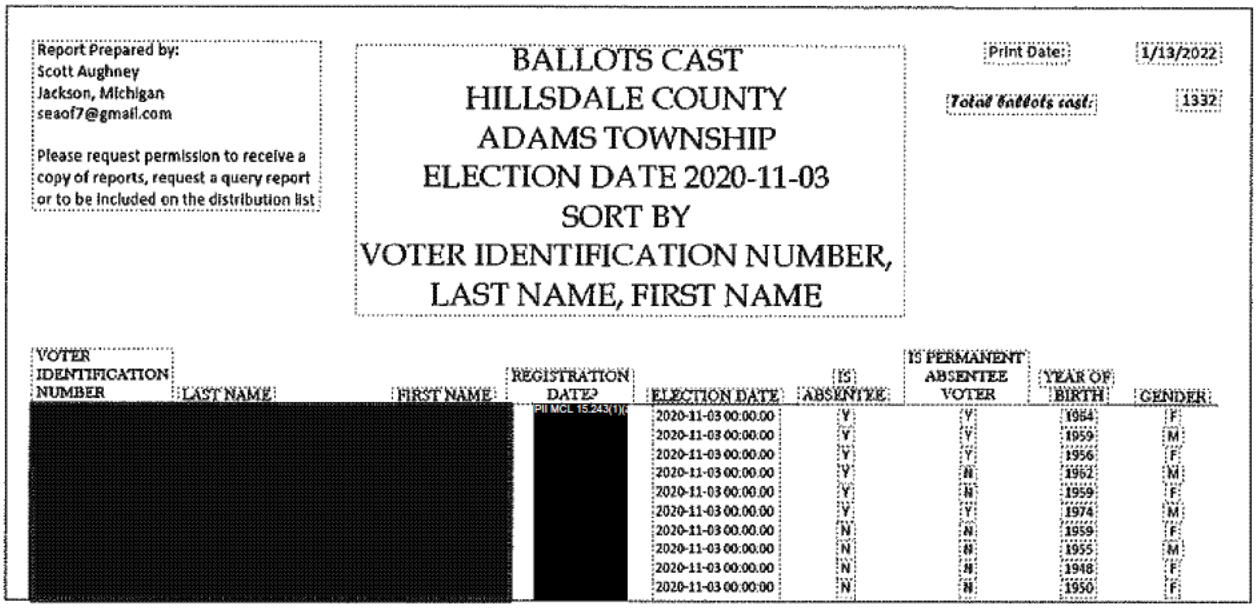

Report Prepared by:
Scott Aughney
Jackson, Michigan
seaof7@gmail.com

Please request permission to receive a copy of reports, request a query report or to be included on the distribution list

BALLOTS CAST
HILLSDALE COUNTY
ADAMS TOWNSHIP
ELECTION DATE 2020-11-03
SORT BY
VOTER IDENTIFICATION NUMBER, LAST NAME, FIRST NAME

Print Date: 1/13/2022

Total ballots cast: 1332

VOTER IDENTIFICATION NUMBER	LAST NAME	FIRST NAME	REGISTRATION DATE? PII MCL 15.243(1)(	ELECTION DATE	IS ABSENTEE	IS PERMANENT ABSENTEE VOTER	YEAR OF BIRTH	GENDER
[redacted]				2020-11-03 00:00:00	Y	Y	1964	F
				2020-11-03 00:00:00	Y	Y	1959	M
				2020-11-03 00:00:00	Y	Y	1956	F
				2020-11-03 00:00:00	Y	N	1962	M
				2020-11-03 00:00:00	Y	N	1959	F
				2020-11-03 00:00:00	Y	Y	1974	M
				2020-11-03 00:00:00	N	N	1959	F
				2020-11-03 00:00:00	N	N	1955	M
				2020-11-03 00:00:00	N	N	1948	F
				2020-11-03 00:00:00	N	N	1950	F

Figure 1 - Voter Registration After the Election

It is evident that the election date column reflects the date of the November 2020 general election and it is also apparent that on this one snippet of the report four (4) individuals registered well after the election date. A search was conducted on the QVR from the EPB.accdb file and none of these individuals were shown to have been registered before the election. A review of the total information contained in this report indicates that thirteen (13) individuals are recorded as successfully voting in the November 2020 general election that were not registered to vote until well after the election.

26) I have had the opportunity to examine multiple voting systems from multiple software vendors. It is clear from my experience that there is a blatant lack of cyber security protection within the election systems. In the case of Adams Township I have had a limited opportunity to examine the complete voting system, but the items that I have been able to examine confirmed that there are shared passwords utilized by the personnel supporting the election process. Specifically the primary data base that is utilized on the EPB USB is a Microsoft Access database named epb.accdb. This file is password protected, which is sound security practices, but Microsoft Access only support a single password for multiple users. Each person using this

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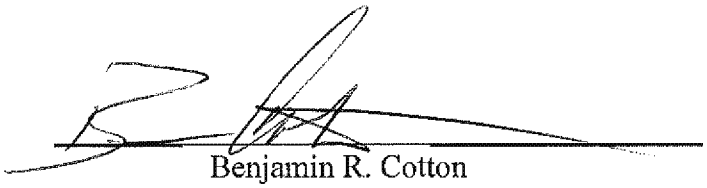
data base would have had to have possession of this single password. This is known as a shared password. Sharing passwords is a violation of one of the basic tenants of sound cyber security practices.

27) It is clear from my examination of the materials, the Secretary of State's election reports and the digital EPB USB data that had Ms. Scott followed the directive from the Secretary of State's to delete the EPB USB data, none of these discrepancies could have been detected or substantiated.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 14th DAY OF July 2022.



Benjamin R. Cotton

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NOTARIAL CERTIFICATE

Acknowledgment

State of Montana

County of Lake

The attached record was acknowledged before me on 7-16-2022
(Date)

by Benjamin Richard Cotton.
(Name of signer(s).)

SINDEE SMITH
NOTARY PUBLIC for the
State of Montana
Residing at
Ronan, Montana
My Commission Expires
September 09, 2024

(Notary Signature)

[Affix stamp above]

This certificate has been attached to the Affidavit of Benjamin Richard Cotton
(Type of record or document)

consisting of 10 page(s), dated July 11, 2022.

Any evidence that this certificate has been detached or removed from the above described document may render the notarization invalid or unacceptable.

REV 10/19

1-5-610(1), MCA

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 25, 2021

Stephanie Scott, Clerk
Adams Township
5675 Knowles Road
P.O. Box 336
North Adams, MI 49262
Via U.S. Mail and email: ***stephiedscott@gmail.com***

Dear Clerk Scott:

As of this date, you have not responded sufficiently to my previous letter directing you to confirm by October 22, 2021, that you would fulfill your legal responsibilities and comply with instructions from the Bureau of Elections. I previously directed you, in a letter dated October 15, 2021 (attached for your reference), to confirm that you would do the following:

- Permit Hart Intercivic, Inc. to perform preventative maintenance on your voting equipment.
- Conduct Public Accuracy Testing and sign required certificates.
- Conduct all future elections in Adams Township using certified Hart Intercivic, Inc. voting equipment, until such time as the Hillsdale County Clerk chooses a different certified voting system vendor.

On October 17, 2021 you responded by email stating that Public Accuracy Testing had been scheduled for October 27, 2021; however, in response to a follow-up email you did *not* confirm that you would sign certificates confirming Public Accuracy Testing had been completed, which you, as Township Clerk, are required to do. You also did not respond to either of the other two matters raised in the directive.

Your past statements, detailed in prior letters, indicate that you are unwilling to fulfill your responsibilities as clerk, and you have failed to confirm that you will fulfill them in response to recent correspondence. Accordingly, in order to ensure public trust and confidence in the integrity and security of elections, and to ensure that elections in Adams Township are conducted in accordance with the Michigan Election Law, I am directing you to refrain from administering any elections held in Adams Township, including the upcoming November 2, 2021 election. These functions will be fulfilled by the Hillsdale County Clerk or her designee until further notice.

Under the Michigan Election Law, 1954 PA 116, as amended, MCL 168.1*et seq.,* the Secretary of State is the Chief Election Officer of this State and "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. The Secretary of State is required by law to "issue instructions" and "[a]dvise and

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direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(a),(b). County clerks and Boards of Commissioners are required to comply with theinstructions given by the Secretary of State. *Secretary of State v Berrien Co Bd of Election Comm'rs,* 373 Mich 526, 530-531 (1964). The Director of Elections is authorized to act at the Secretary's behest "with respect to the supervision and administration of the election laws." MCL 168.32.

In accordance with my authority under the Michigan Election Law, you are directed to refrain from any election administration activities, including the duties described below pertaining to voter registration and routine list maintenance; preparation, issuance, and processing of ballots (including absent voter ballots) and absent voter ballot applications; ordering or assembling election supplies and precinct supply kits; recruiting, placing, and training election inspectors; logic and accuracy testing; voter registration before the 14th day prior to Election Day and the close of polls; handling any Election Day issues that may arise; generation of unofficial election results, and responsibilities related to the post-election canvass process.

- **Performing Voter Registration and Routine List Maintenance.** You must refrain from any duties associated with processing voter registration applications and performing routine list maintenance. These functions must be performed by the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections.

- **Ordering Election Supplies and Ballots.** You are prohibited from ordering election supplies and ballots; the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections must order supplies and prepare the precinct materials. You are prohibited from handling any ballots, including blank ballots. The Hillsdale County Clerk or an individual designated by her or the Bureau of Elections must secure and track all ballots, including blank ballots, that are ordered or delivered to your office.

- **Processing Absent Voter Ballot Applications and Issuing Absent Voter Ballots.** You are barred from issuing, handling, and processing any absent voter ballot applications, and prohibited from preparing, issuing, delivering, receiving, and handling any absent voter ballots, including the recording of issuance and receipt of ballots in the Qualified Voter File (QVF). Only the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections are permitted to perform any of these functions.

- **Preparing Polling Locations.** You must not set up (or supervise the set up of) polling locations. The Hillsdale County Clerk or an individual designated by her or the Bureau of Elections must perform (or supervise) the set up.

- **Recruiting, Assigning and Training Election Inspectors.** You must refrain from performing any tasks associated with poll worker recruitment, placement and training. Training must be conducted by an individual who is certified to train election inspectors. If supplemental training is necessary, it may be taught by the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections.

- **Membership on the Election Commission.** The Hillsdale County Clerk or an individual designated by her or the Bureau of Elections shall replace you as a member

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of the Township Election Commission.

- **Role in Logic and Accuracy Testing.** You must not perform any duties in relation to logic and accuracy testing. Individuals designated by the Election Commission (other than yourself) may be authorized to complete the test decks, ballot charts, and initial testing for the preliminary logic and accuracy testing. The public accuracy test shall be conducted by the Election Commission, which is also responsible for sealing the equipment, recording seal numbers, and completing the required paperwork. Duties that would otherwise be performed by you will be performed by the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections.

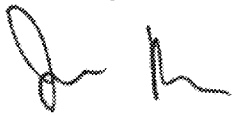
- **Addressing Election Day Issues.** Issues that arise on Election Day must be addressed by the Hillsdale County Clerk or an individual designated by her or the Bureau of Elections as appropriate.

- **Compiling Unofficial Results/ Post-Election Canvass.** The Hillsdale County Clerk or an individual designated by her or the Bureau of Elections will act as the Township's point of contact regarding involving all duties related to the compiling of unofficial results and the 14-day post-election canvass process.

You are directed to provide immediate access to all election equipment and records, including tabulators, voter assist terminals, absent voter ballot applications and ballot envelopes, and polling place materials, to the Hillsdale County Clerk or her designee at a time and place specified by the County Clerk or her designee. Your access to the Qualified Voter File will be suspended until further notice. Adams Township will be billed for all costs incurred by Hillsdale County and the State of Michigan, including staff time, for administering elections in Adams Township.

This directive remains in effect until further notice. Be advised that willfully failing to comply with a lawful order from the Secretary of State is a misdemeanor. MCL 168.931(h). Please contact my office if you require additional information or clarification regarding these instructions.

Sincerely,



Jonathan Brater
Director of Elections

c: Marney Kast, Hillsdale County Clerk
Heather Meingast, Michigan Department of Attorney General
Adams Township Board

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STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT D

Affidavit of Kim Meltzer and Supporting Exhibits

_____/

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

vs

JENNIFER ZELMANSKI, Clerk – City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants,

and

JOCELYN BENSON,

Intervenor-Defendant

Case No.: 2023-002852-CZ

Hon. Edward A. Servitto

Consolidated with:
2023-002835-CZ; 2023-002836-CZ;
2023-002837-CZ; 2023-002838-CZ;
2023-002839-CZ; 2023-002840-CZ;
2023-002841-CZ; 2023-002842-CZ;
2023-002843-CZ; 2023-002844-CZ;
2023-002845-CZ; 2023-002847-CZ;
2023-002848-CZ; 2023-002850-CZ;
2023-002851-CZ

Michael Lewis Butz
Plaintiff, In Pro Per
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243
586-596 PII MCL 15.24
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tlanda@mcgrawmorris.com

AFFIDAVIT OF KIM MELTZER, CLERK FOR THE CHARTER TOWNSHIP OF CLINTON, CONCERNING FREEDOM OF INFORMATION ACT REQUEST MADE BY MICHAEL BUTZ AND INFORMATION RECEIVED FROM THE MICHIGAN SECRETARY OF STATE

County of Macomb)
)SS
State of Michigan)

NOW COMES, Kim Meltzer, Clerk for the Charter Township of Clinton, who having been sworn, deposes and states as follows:

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

1. That I am competent to testify to the following facts based on my personal knowledge if called as a witness at trial, unless stated otherwise upon information and belief.

2. That I am presently the Clerk for the Charter Township of Clinton, and in my role as clerk undertook an oath of office to support the Constitution of the United States and of the State of Michigan, and to faithfully perform the duties of the office of clerk.

3. That I have received the following communications attached, marked and signed by me from the Michigan Secretary of State Election Division involving the electronic poll book. Exhibit A.

4. That I have been made aware of the requirements of 52 USCA 20701 and 20702, copies of which are attached as Exhibit B.

5. That I am aware of obligations as a clerk associated with my duties as an election official provided under MCL 168.520 which is attached as Exhibit C.

6. That I have been advised by the Secretary of State that the content of the electronic poll book in its electronic format as existing on the poll book should not be disclosed as such disclosure reasonably could result in harm to the confidentiality, integrity or availability of information systems which are part of the electronic poll book.

7. That I have also been advised by the Secretary of State that disclosure of the information in electronic form from the electronic poll book (extract file) as its assembled in the electronic poll book would furnish information that would identify or provide a means of identifying a person that may, as a result of disclosure of information, become a victim of a cybersecurity incident, or it may disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware or software.

8. That I have an obligation as clerk to comply with MCLA 168.520, a copy of which is attached as Ex. C, if I have knowledge that there is a probable illegal or fraudulent registration in the Township or in any precinct of the Township.

9. The Secretary of State has the ability to register voters through the driver database, and increase the number of new voter registrations in the QVF without a voter

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registration form mailed or filed with my office. I only have personal knowledge as to the manner in which a voter registration has been completed for voter registrations I have personally done myself, or those which have been done under my supervision within the Clerk's office of the Charter Township of Clinton.

Further deponent sayeth not.

CHARTER TOWNSHIP OF CLINTON

K. Meltzer

Kim Meltzer, Clerk

Subscribed and sworn to before me
this 6th day of December, 2023.

Kimberly Jo Irvine

Notary Public
Macomb County, Michigan
My commission expires: 1-11-2024
Acting in Macomb County, Michigan

KIMBERLY JO IRVINE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF MACOMB
My Commission Expires Jan. 11, 2024
Acting in the County of Macomb

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RELEASE OF ALL CLAIMS AND HOLD HARMLESS AGREEMENT
By and Between
CHARTER TOWNSHIP OF CLINTON and SHEILA GOLDSTEIN

This Release of All Claims and Hold Harmless Agreement (hereinafter "Release") is made and entered into this 6th day of December, 2023, by and between the Charter Township of Clinton, a Michigan municipal corporation, whose address is 40700 Romeo Plank Road, Clinton Township, Michigan 48038 (hereinafter "Township") and Sheila Goldstein ("Goldstein"), whose address is 38135 S Julian St Clinton Twp, Michigan 48036.

WHEREAS, for receipt of an executed Affidavit, an unexecuted copy of which is attached to this Release, Goldstein desires to release the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release. Further, Goldstein desires to release the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections or record retention or preservation.

NOW, THEREFORE, in consideration of an executed Affidavit, Goldstein hereby releases the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release.

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

FURTHER, Goldstein releases the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections or record retention or preservation.

Goldstein shall not encourage, promote or furnish assistance, whether financial or otherwise, to any person or entity in order to pursue any action against the released parties which she otherwise has forgone pursuant to the terms of this Release. Goldstein shall hold harmless the released parties for any breach of this provision from all damages, costs and expenses.

The parties mutually agree that they have had the opportunity to review this Release with counsel of their own choosing, and that the Release is freely and voluntarily being executed by them. This Release contains the entire understanding of the parties and that there are no other promises or conditions other than those described in this Release.

Robert J. Cannon, Supervisor
Charter Township of Clinton

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

On this 14 day of December, 2023, before me personally appeared Robert J. Cannon, Supervisor for the Charter Township of Clinton, to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Notary Public
County of Macomb
My Commission Expires: 1-11-2024
Acting in Macomb County, Michigan

KIMBERLY JO IRVINE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF MACOMB
My Commission Expires Jan. 11, 2024
Acting in the County of Macomb

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Sheila M Goldstein
Sheila Goldstein

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

On this 10th day of December, 2023, before me personally appeared Sheila Goldstein to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Jessica Glynn
Notary Public
County of Macomb
My Commission Expires:
Acting in Macomb County, Michigan

JESSICA GLYNN
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Mar 6, 2024
ACTING IN COUNTY OF Macomb

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

RELEASE OF ALL CLAIMS AND HOLD HARMLESS AGREEMENT
By and Between
CHARTER TOWNSHIP OF CLINTON and LINDA SHARLOW

This Release of All Claims and Hold Harmless Agreement (hereinafter "Release") is made and entered into this 6th day of December, 2023, by and between the Charter Township of Clinton, a Michigan municipal corporation, whose address is 40700 Romeo Plank Road, Clinton Township, Michigan 48038 (hereinafter "Township") and Linda Sharlow ("Sharlow"), whose address is 18000 ELLERY Dr. Clinton Twp., Michigan 48035

WHEREAS, for receipt of an executed Affidavit, an unexecuted copy of which is attached to this Release, Sharlow desires to release the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release. Further, Sharlow desires to release the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections or record retention or preservation.

NOW, THEREFORE, in consideration of an executed Affidavit, Sharlow hereby releases both the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release.

FURTHER, Sharlow releases the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections or record retention or preservation.

Sharlow shall not encourage, promote or furnish assistance, whether financial or otherwise, to any person or entity in order to pursue any action against the released parties which she otherwise has forgone pursuant to the terms of this Release. Sharlow shall hold harmless the released parties for any breach of this provision from all damages, costs and expenses.

The parties mutually agree that they have had the opportunity to review this Release with counsel of their own choosing, and that the Release is freely and voluntarily being executed by them. This Release contains the entire understanding of the parties and that there are no other promises or conditions other than those described in this Release.

Robert J. Cannon, Supervisor
Charter Township of Clinton

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

Document received by the MI Macomb 16th Circuit Court.

On this 14 day of December, 2023, before me personally appeared Robert J. Cannon, Supervisor for the Charter Township of Clinton, to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Obtained by Judicial Watch

Kimberly Jo Irvine

Notary Public

County of Macomb

My Commission Expires: 1-11-2024

Acting in Macomb County, Michigan

KIMBERLY JO IRVINE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF MACOMB
My Commission Expires Jan. 11, 2024
Acting in the County of Macomb

Linda Sharlow

Linda Sharlow

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

On this 6th day of December, 2023, before me personally appeared Linda Sharlow to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Crystal Cook

Notary Public

Crystal Cook
Notary Public of Michigan
Macomb County
Expires 03/24/2026
Acting in the County of Macomb

County of Macomb

My Commission Expires: 03/24/2026

Acting in Macomb County, Michigan

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

RELEASE OF ALL CLAIMS AND HOLD HARMLESS AGREEMENT
By and Between
CHARTER TOWNSHIP OF CLINTON and MICHAEL BUTZ

This Release of All Claims and Hold Harmless Agreement (hereinafter "Release") is made and entered into this 5th day of December, 2023, by and between the Charter Township of Clinton, a Michigan municipal corporation, whose address is 40700 Romeo Plank Road, Clinton Township, Michigan 48038 (hereinafter "Township") and Michael Butz ("Butz"), whose address is PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)

WHEREAS, for receipt of an executed Affidavit, an unexecuted copy of which is attached to this Release, Butz desires to release the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release. Further, Butz desires to release the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections, record retention, inspection, or preservation.

NOW, THEREFORE, in consideration of an executed Affidavit, Butz hereby releases both the Township from any and all claims relating to damages, injuries, causes of action or claims arising from any acts and omissions of the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates for any and all claims, damages, injuries, causes of action or claims of any kind known, or unknown whatsoever relating to the production or failure to produce documents associated with any requests under the Michigan Freedom of Information Act, or failure to preserve or produce election records or for any errors or omissions or failures to preserve or produce election related records for elections occurring up until the date of this Release.

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

FURTHER, Butz releases the Township, Kim Meltzer, and its elected officials, employees, attorneys, agents, and affiliates from any and all claims known or unknown, injuries or damages, claims or causes of action known or unknown associated with elections, record retention, inspection, or preservation.

Butz shall not encourage, promote or furnish assistance, whether financial or otherwise, to any person or entity in order to pursue any action against the released parties which he otherwise has forgone pursuant to the terms of this Release. Butz shall hold harmless the released parties for any breach of this provision from all damages, costs and expenses.

The parties mutually agree that they have had the opportunity to review this Release with counsel of their own choosing, and that the Release is freely and voluntarily being executed by them. This Release contains the entire understanding of the parties and that there are no other promises or conditions other than those described in this Release.

Robert J. Cannon, Supervisor
Charter Township of Clinton

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

On this 14 day of December, 2023, before me personally appeared Robert J. Cannon, Supervisor for the Charter Township of Clinton, to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Notary Public

KIMBERLY JO IRVINE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF MACOMB
My Commission Expires Jan. 11, 2024
Acting in the County of Macomb

County of Macomb
My Commission Expires: 1-11-2024
Acting in Macomb County, Michigan

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Michael Butz

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

On this 5th day of December, 2023, before me personally appeared Michael Butz to me known to be the person described and who executed the foregoing document and who acknowledged that he voluntarily executed same.

Constance Naudsch
Notary Public

CONSTANCE NAUDSCH
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Sep 18, 2026
ACTING IN COUNTY OF Macomb

County of Macomb
My Commission Expires: Sep 18, 2026
Acting in Macomb County, Michigan

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT E

Secretary of State's Addition of 700,000 Voters to Voter Rolls

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Having trouble viewing this email? View it as a Web page.

Michigan Bureau of Elections
News Update
for Election Administrators

September 8, 2020

IN THIS ISSUE

- Michigan Department of State Voter Registration Mailings
- Reminder: Ballot Scout Webinar Today at 3 p.m.
- Michigan Department of State AV Postcards Begin Mailing this Week
- Reminder: Center for Tech and Civic Life Grand Funding Available

Michigan Department of State Voter Registration Mailings

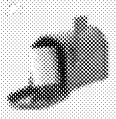
This week, the Michigan Department of State will begin sending voter registration mailings to eligible but unregistered individuals with a Michigan driver's license or state ID card. The mailings are part of Michigan's participation in the Electronic Registration Information Center (ERIC) program. Through the ERIC program, Michigan obtains information about individuals who are eligible but not registered to vote in Michigan, as well as information about registered voters who may have left the state or otherwise become ineligible.

Based on data received from ERIC, the Bureau of Elections will be sending voter registration mailers to approximately 700,000 individuals. These mailers will notify Michigan residents of their voter registration eligibility and offer options to register online or to return the inserted card to the Secretary of State to be registered. Registration will occur through the driver database – clerks will not be mailed forms. However, the mailer also gives voters information on how to contact their local clerk to register to vote if the voter prefers that method of registration. Individuals on the mailing list who had Secretary of State transactions after Proposal 2018-3 went into effect but before it was implemented in September 2019, and are marked on the driver file as U.S. citizens, will receive an automatic voter registration mailer

Reminder: Ballot Scout Webinar Today at 3 p.m.

As a reminder, the Bureau of Elections and Democracy Works will be hosting a live Zoom webinar on the Ballot Scout ballot-tracking system. Clerks who are deciding whether to use the software for November AV ballots are invited to attend and learn more.

Topic: Discussing Ballot Tracking & Ballot Scout Time: Sep 8, 2020 3:00 PM Eastern Time Join Zoom Meeting: https://us02web.zoom.us/j/81148500204 **Meeting ID:** 811 4850 0204



Michigan Department of State AV Postcards Begin Mailing this Week

As announced in the August 12 News Update, the Michigan Department of

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similar to the form currently used when these eligible individuals renew their driver's license.

Because voter registration through these mailers will occur primarily through the driver database, clerks should not expect an increase in voter registration forms mailed to their offices as a result of these mailings. However, you may see an increased number of new voter registrations in QVF as a result of these mailers between September 21 and October 20. These mailers can be identified by their green color and *Be a Voter* message across the top. Our office will be tracking the registration response to improve our future efforts. If you have any questions or feedback, please email Shelly Belton beltons@michigan.gov with "ERIC Mailer" in the subject line.

State will be mailing postcards to voters who have not requested absent voter ballots informing them of opportunities to apply for absent voter ballots for November. More information about the postcards is available in an August press release from the Secretary of State. Unlike the mailers sent before the August primary, these postcards are not absent voter ballot applications and will not be mailed to the local clerk. However, as is the case with the voter registration mailers discussed above, clerks may see an increase in absent voter ballot applications as a result of these postcards.

Reminder: Center for Tech and Civic Life Grant Funding Available!

Funding to support voter education efforts – including mailings and public service announcements, and technology, tabulators, and other equipment – is available through a grant from the Center for Tech and Civic Life. Jurisdictions should act quickly if they are interested in this funding, which is separate from state reimbursement and grant programs (you can apply for both).

You can find more information and request an application on the Center for Tech and Civic Life's COVID-19 Response Grant webpage.

Helpful Links

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT F

Affidavit of PII MCL 15.243(1)(a)

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Affidavit of PII MCL 15.243(1)(a)

I, PII MCL 15.243(1)(a), being duly sworn deposes and states as follows under penalty of perjury:

1. My name is PII MCL 15.243(1)(a). I am currently PII MC years old, and my current address is PII MCL 15.24 MI PII MCL 15.243(1)(
2. I was born in Dublin, Ireland, and live in the United States with Permanent Resident status (attached).
3. I am married to PII MCL 15.243(1)(a) who is a US citizen.
4. My wife and I moved from a house in PII MCL 15.243(1)(a) MI to a condominium in PII MCL 15.243(1)(a) MI, in late 2019.
5. In 2022 I received an absentee ballot application.
6. In 2022, we received a registration card for the son of the previous owner, PII MCL 15.243(1)(a) at our new address (attached).
7. I have never requested to be registered to vote.
8. PII MCL 15.243(1)(a) advised our local clerk in July 2022 to remove PII MCL 15.243(1)(a) and myself.
9. She was directed by the clerk that I would need to send an email to that effect.
10. We sent an email to the clerk August 19, 2022 to remove my name from the state voter roll (attached).
11. Additionally, we asked for confirmation of removal from the voter roll. To the best of my recollection, I did not receive confirmation of removal.
12. The Qualified Voter File in the state of Michigan as of 11/1/2020 indicates the following:
    a. Voter: PII MCL 15.243(1)(a)
    b. Voter ID: PII MCL 15.243(1)(a)
    c. Voter Registration date: 9/29/03
    d. Address: PII MCL 15.243(1)(a), MI PII MCL 15.243(1
13. The Qualified Voter file does not reflect me of having voted in any elections.

I hereby affirm that the information above is true and accurate and complete to the best of my knowledge, and that no relevant information has been omitted.

Signature: PII MCL 15.243(1)(a) Date: 2-27-2024

State of Florida
County of Sarasota

This record was signed and sworn before me by PII MCL 15.243(1)(a) on February 27th, 2024

DANNIELLE VICTORIA GOLDMAN
Notary Public - State of Florida
Commission # HH 283079
My Comm. Expires Jun 30, 2026
Bonded through National Notary Assn.

Notary Signature
Danielle V Goldman
My Comm. Expires:
June 30, 2026

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.

_____/

ATTACHMENT G

Email from Laurie Bourbonais from Secretary of State's Office Instructing Local Governments on How to Respond to FOIA Requests, dated November 14, 2022

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Bourbonais, Lori (MDOS)

From: Bourbonais, Lori (MDOS)
Sent: Monday, November 14, 2022 1:17 PM
To: Bourbonais, Lori (MDOS)
Subject: Recent FOIA Requests

Clerks,

We are aware that clerks have received a request for the following:

"1. An electronic copy of the Qualified Voter File (QVF) extract for all precincts completed on Monday November 7, 2022 and loaded to the electronic pollbooks.

2. The historical electronic pollbook flash drive for all voting precincts in the jurisdiction for the election concluding November 8, 2022. (This is likely in a CSV – comma separated value format).

3. An electronic copy of the Qualified Voter File extract for all precincts completed as soon as the November midterm election voter history is uploaded to the QVF which must be within 7 days pursuant to MCL 168.813."

Before responding to these FOIA requests, you should consult with your city or township attorney regarding the requests and exemptions that may apply including those contained in MCL 15.243(1)(y) and (z). Under FOIA, you may shield sensitive information from disclosure. Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(y). In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z).

Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

Please note that certain specific data derived from the qualified voter file electronic pollbook is subject to disclosure under FOIA, including the lists of registered voters from the Qualified Voter File and the paper printout of the electronic pollbook generated on election night. If members of the public are interested in verifying the names of individuals registered to vote on a certain date or included in the electronic pollbook, they may obtain this information by submitting a FOIA for publicly available records.

Additionally, we are aware that clerks received FOIA requests for a copy of or the opportunity to view tabulator tapes. While the tapes are a public record that can be provided, they are election records that should remain secured until security is released after the final canvass and certification, recounts, and audits. Once you are notified that security has been released in your jurisdiction, you can fulfill these requests.

Lori A. Bourbonais, Director
Election Administration Division

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.

_____/

ATTACHMENT H

Email from Laurie Bourbonais from Secretary of State's Office Instructing Local Governments to Destroy Electronic Copies of Epollbook and Flash Drives Used in Elections, dated August 26, 2022

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Stephanie Scott <stephiedscott@gmail.com>

Communication to Clerks Regarding BOE Instructions

Michigan Secretary of State <MISOS@govsubscriptions.michigan.gov> Fri, Aug 26, 2022 at 11:18 AM
Reply-To: MISOS@govsubscriptions.michigan.gov
To: stephiedscott@gmail.com

County, City, and Township Clerks:

Many clerks have reported receiving a communication from a private individual or group demanding that they disregard instructions contained in the Bureau of Elections' recent Recount/Release of Security Memo. The Bureau's instructions are lawful directives in compliance with state and federal law.

As has been done in past elections, the Bureau has issued a directive to destroy electronic copies of your epollbook and flash drive. This is procedure is necessary to safeguard security and voter privacy. You have already printed, and must retain for the required retention period, the paper copy of pollbook information for the August 2, 2022 primary election.

A private individual has no authority to instruct you on your duties. The circulated communication is not a subpoena, court order, or lawsuit. If you do receive one of these, please consult with your attorney on how to respond.

Lori A. Bourbonais, Director
Election Administration Division
Michigan Bureau of Elections

Manage Subscriptions | Unsubscribe All | Help

STAY CONNECTED:

This email was sent to stephiedscott@gmail.com using GovDelivery Communications Cloud on behalf of: Michigan Secretary of State · 430 W. Allegan Street · Lansing, MI 48918 · 1-888-767-6424

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.

_____/

ATTACHMENT I

Anklam v Delta College Dist, et al., Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 317692 (June 26, 2014)2

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

COURT OF APPEALS

ANN ANKLAM,

Plaintiff-Appellant,

v

DELTA COLLEGE DISTRICT and DELTA COLLEGE BOARD OF TRUSTEES,

Defendants-Appellees.

UNPUBLISHED
June 26, 2014

No. 317962
Kent Circuit Court
LC No. 12-009608-CZ

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff filed a complaint against defendants, alleging various violations of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. She now appeals as of right the trial court's order granting defendants' motion for summary disposition and denying plaintiff's own motion for summary disposition. Except for one issue that we conclude is not justiciable, we reverse and remand for further proceedings.

On August 9, 2012, and August 10, 2012, plaintiff sent defendants two FOIA requests, each of which requested multiple records. On August 31, 2012, defendants granted in part and denied in part plaintiff's FOIA requests. In general, the two sets of FOIA requests sought information regarding the compensation and benefits of Jean Goodnow, who holds the position of Delta College President. After defendants' decision to grant in part and deny in part plaintiff's FOIA requests, plaintiff filed the instant action claiming that defendants committed multiple violations of the FOIA. The parties subsequently filed competing motions for summary disposition under MCR 2.116(C)(10). The trial court granted defendants' motion and denied plaintiff's motion.

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).[1]

[1] In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court recited the well-established principles governing a motion for summary disposition brought pursuant to MCR 2.116(C)(10):

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Interpretation of the FOIA is a question of law that is also subject to de novo review. *Thomas v City of New Baltimore*, 254 Mich App 196, 200; 657 NW2d 530 (2002). With respect to the principles applicable to statutory construction, our Supreme Court in *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), observed:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

In MCL 15.231(2), the Legislature expressly declared the public policy and purpose behind enactment of the FOIA:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

"[T]he FOIA is a prodisclosure statute; a public body must disclose all public records not specifically exempt under the act." *Thomas*, 254 Mich App at 201, citing MCL 15.233(1); see

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> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and internal quotation marks omitted.]

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also *Nicita v Detroit*, 194 Mich App 657, 661-662; 487 NW2d 814 (1992). "[I]f a public body makes a final determination to deny a request, the requesting person may either appeal the denial to the head of the public body or commence an action in the circuit court within 180 days." *Scharret v City of Berkley*, 249 Mich App 405, 412-413; 642 NW2d 685 (2002), citing MCL 15.235(7).

Plaintiff first argues that the trial court erred when it determined that defendants had not violated MCL 15.235(4)(c). We agree. MCL 15.235(4)(c) provides that a public body's "written notice denying a request for a public record in whole or in part . . . shall contain . . . [a] description of a public record or information on a public record that is separated or deleted pursuant to [MCL 15.244[2]], if a separation or deletion is made." Here, on August 31, 2012, defendants partially denied the FOIA request in ¶ 10 of plaintiff's first set of requests on the basis that the withheld information fell under the attorney-client privilege exemption of MCL 15.243(1)(g).[3] The FOIA does exempt from disclosure "[i]nformation or records subject to the

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[2] MCL 15.244 provides:

> (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
>
> (2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

[3] Plaintiff had requested:

> Copies of any and all communications (in any form, including e-mail communications) that were exchanged between any member of the President's Compensation Committee, the Delta College Board of Trustees and any Delta College staff, including Board Secretary and the President for a period from May 1, 2008[,] to November 11, 2008[,] regarding the President's Employment Contract and/or her compensation.

Defendants' FOIA coordinator responded:

> This request is GRANTED IN PART and DENIED IN PART. The information is exempt from disclosure under Section 13(1)(g) of the [FOIA], for information or records subject to the attorney-client privilege.

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attorney-client privilege." MCL 15.243(1)(g). However, defendants' written notice of partial denial did not describe or otherwise identify the information that was separated or deleted based on the attorney-client privilege. Defendants did not provide such a description until they attached an affidavit executed by their FOIA coordinator to their June 2013 motion for summary disposition, which, of course, was after plaintiff commenced the litigation seeking FOIA compliance. The trial court found that the FOIA coordinator's affidavit cured any deficiency in defendants' written notice, and it granted summary disposition in favor of defendants regarding plaintiff's claim of a violation of MCL 15.235(4)(c). The plain language of MCL 15.235(4)(c), however, requires that a public body's written notice denying a FOIA request "shall contain" a description of the public record that was separated or deleted. The word "shall" denotes a mandatory directive, not a discretionary act. *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013). There is no language in MCL 15.235(4)(c) remotely suggesting that compliance may be achieved at a later date or that compliance is excusable if the public body eventually provides the required description. Compliance certainly cannot be found when the public body communicates the description of the separated or deleted records after the requesting party is forced to initiate litigation to obtain FOIA compliance. On the record before us, there is no genuine issue of material fact regarding defendants' failure to comply with MCL 15.235(4)(c). Thus, with respect to plaintiff's claim under MCL 15.235(4)(c), the trial court erred in granting defendants' motion for summary disposition and in denying plaintiff's own summary disposition motion relative to the claim. We reverse the trial court's grant of summary disposition in favor of defendants and remand for entry of judgment in favor of plaintiff, declaring that defendants violated MCL 15.235(4)(c). See *Scharret*, 249 Mich App at 416.

On a related issue, plaintiff next argues that defendants improperly withheld requested information under the attorney-client privilege exemption of MCL 15.243(1)(g). Section 13 of the FOIA sets forth several exemptions to a public body's duty to disclose under the FOIA. *Manning v City of East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). "[T]hese exemptions must be construed narrowly, and the burden of proof rests with the party asserting an exemption." *Id.* (citation omitted). In order for a public body to meet its burden of proof in asserting an exemption, "'the public body should provide a complete particularized justification for the claimed exemption[].'" *Nicita*, 194 Mich App at 662 (citation omitted); see also *The Evening News Ass'n v City of Troy*, 417 Mich 481, 503, 516; 339 NW2d 421 (1983). The public body should provide "'[d]etailed affidavits describing the matters withheld'" and show that it complied with the requirement to separate exempt and non-exempt material under MCL 15.244. *Evening News Ass'n*, 417 Mich at 503 (citation omitted); *Nicita*, 194 Mich App at 662-663. The public body's "[j]ustification of exemption must be more than 'conclusory,' i.e., simple repetition of statutory language." *Evening News Ass'n*, 417 Mich at 503. Moreover, "'a trial court may not make conclusory or 'generic determinations' when deciding whether the claimed exemptions are justified.'" *Nicita*, 194 Mich App at 662 (quotation omitted). Rather, "before determining that the defendant sustained its claim of exemption, the court must specifically find that the particular sections of the public record requested by the plaintiff would for particular reasons fall within the claimed exemptions." *Id.*

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Here, defendants partially denied plaintiff's record requests in ¶ 10 of her first set of requests, as alluded to earlier, and ¶ 2 of her second set of requests, asserting that the withheld information was exempt under the attorney-client privilege exemption in MCL 15.243(1)(g).[4] In *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 279; 568 NW2d 411 (1997), this Court examined the exemption, explaining:

> The attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice. The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed. The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice. [Citations omitted.]

The FOIA coordinator's affidavit averred that, pursuant to the attorney-client privilege exemption, defendants withheld six e-mails from the records they produced in response to ¶ 10 of plaintiff's first set of FOIA requests and that they redacted certain information on billing records produced in response to ¶ 2 of the second set of FOIA requests. According to the affidavit, the e-mails were communications between defendants' general counsel and members of the Compensation Committee "and/or" President Goodnow. However, the FOIA coordinator did not describe the substance of the withheld e-mails or redacted information in the billing statements as being exempted on the basis that the withheld information reflected confidential communications made to counsel for the purpose of obtaining legal advice. The affidavit cursorily indicated that the coordinator relied on counsel to redact information and to withhold communications under the attorney-client privilege exemption. Defendants' motion for summary disposition relied on the coordinator's affidavit to justify their claimed exemptions under MCL 15.243(1)(g).

"When a public body's statements alone are inadequate to determine, upon review de novo, if disclosure should be compelled, a trial court should examine the disputed documents in camera to resolve the question." *Manning*, 234 Mich App at 248. Here, at the hearing on the

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[4] Plaintiff had requested the following records in ¶ 2 of the second set of requests:

> Copies of itemized billing statements, including a description of all services performed and all costs charged, which were submitted to Delta College by any attorneys who performed services for the Delta Board of Trustees President's Compensation Committee for the years 2008 and 2009.

Defendants' FOIA coordinator responded:

> This request is GRANTED IN PART and DENIED IN PART. The information redacted is exempt from disclosure under Section 13(1)(g) of the [FOIA], for information or records subject to the attorney-client privilege.

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parties' competing motions for summary disposition, plaintiff asked the trial court to conduct an in-camera review of the materials withheld under MCL 15.243(1)(g). However, the record does not indicate that the trial court undertook any in-camera review of the six withheld e-mails, but rather merely relied on the FOIA coordinator's affidavit and the assertions defendants made in their motion for summary disposition. But defendants' assertions ultimately relied on the coordinator's affidavit for support, which in turn did not aver that the withheld e-mails were confidential communications made to counsel for the purpose of obtaining legal advice. Given that the trial must construe a claimed exemption narrowly and defendants were required to provide "detailed" affidavits describing the matters withheld, *Evening News Ass'n*, 417 Mich at 503, we are compelled to conclude that the trial court erred in finding that defendants met their burden of proof regarding whether the withheld e-mails were exempt under the attorney-client privilege exemption.

Furthermore, with respect to ¶ 2 of the second set of requests in which plaintiff sought detailed copies of attorney billing statements, defendants provided redacted billing statements, but did not provide any justification for the redactions other than to state that the information was covered by the attorney-client privilege exemption. The public body's "[j]ustification of exemption must be more than 'conclusory,' i.e., simple repetition of statutory language." *Evening News Ass'n*, 417 Mich at 503. Here, the trial court relied on its review of the redacted documents to make its ruling. The trial court found that "[m]ost of the redacted information related to" the substance of the communications and that there were "very few instances where the redacted information is who the attorney had a conversation with." The trial court concluded that because "in some instances it is possible that who an attorney had a conversation with" could be covered by the attorney-client privilege, defendants properly exempted the redacted information under MCL 15.243(1)(g). Again, a trial court must construe a claimed exemption narrowly and is not permitted to render conclusory or generic determinations in deciding whether a claimed exemption is justified. *Nicita*, 194 Mich App at 662. Rather, the trial court "'must specifically find that the particular sections of the public record requested by the plaintiff would for particular reasons fall within the claimed exemptions.'" *Id.* (citation omitted). The attorney-client privilege exemption is only triggered in regard to confidential communications made by a client to an attorney that are made for the purpose of obtaining legal advice. *Herald Co,* 224 Mich App at 279. In the case at bar, the trial court did not speak in terms of the required finding for purposes of the attorney-client privilege exemption.

Ultimately, the record before us is insufficient to determine whether the information defendants withheld and redacted under the attorney-client privilege exemption was properly exempted under MCL 15.243(1)(g). We reverse the trial court's grant of summary disposition with respect to plaintiff's claims relative to MCL 15.243(1)(g) and remand for further factual findings as to this issue, which may require an in-camera review of the withheld e-mails and/or unredacted billing statements.

Plaintiff next argues that defendants improperly withheld requested information under the privacy exemption of MCL 15.243(1)(a). We agree. MCL 15.243(1)(a) provides that "[a] public body may exempt from disclosure as a public record under this act any . . . [i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." In *State News v Michigan State Univ*, 274 Mich App 558,

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576-577; 735 NW2d 649 (2007), rev'd in part on other grounds 481 Mich 692 (2008), this Court examined the privacy exemption, stating:

> [T]he privacy exemption consists of two distinct elements, both of which must be satisfied for the exemption to apply. First, the information must be of a "personal nature," and, second, the disclosure of such information must constitute a "clearly unwarranted" invasion of privacy. Information that is not of a personal nature is subject to disclosure without considering the second prong of the exemption. [Citations omitted.]

Under the first prong, information is of a personal nature when it is intimate, embarrassing, private, or confidential information. *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 676; 753 NW2d 28 (2008). Regarding the second prong, this Court in *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 282; 713 NW2d 28 (2006), observed:

> Determining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. The only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens' ability to be informed about the decisions and priorities of their government. This interest is best served through information about the workings of government or information concerning whether a public body is performing its core function. [Citations omitted.]

In ¶ 2 of plaintiff's first set of requests, she asked for a "[c]opy of the 403(b) salary reduction agreement signed by President Goodnow which allowed her participation in a 403(b) plan." In response, the FOIA coordinator indicated:

> This request is GRANTED IN PART and DENIED IN PART. The redacted information is exempt from disclosure under Section 13(1)(a). President Goodnow's personal financial decisions are information of a personal nature the public disclosure of which would constitute a clearly unwarranted invasion of Dr. Goodnow's privacy.

Defendants produced President Goodnow's salary reduction agreements, but they redacted information revealing the amount of her salary that President Goodnow elected to contribute to her 403(b) retirement account ("Bi-Weekly Reduction $ [redacted] or % [redacted]").

Plaintiff argues that the 403(b) information was subject to disclosure under MCL 15.243a and that, additionally, in regard to the claimed privacy exemption, the information was necessary to determine whether the total annual contributions to President Goodnow's 403(b) account exceeded IRS limitations. MCL 15.243a provides, in relevant part, that a community college "shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or

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community college." MCL 15.243a is prefaced by the language, "Notwithstanding section 13," which is the exemption section that encompasses the privacy exemption, MCL 15.243(1)(a). Accordingly, if a record comes within the parameters of MCL 15.243a, it must be disclosed regardless of whether it otherwise reveals information of a personal nature that, if disclosed, would constitute a clearly unwarranted invasion of privacy.

Defendants fail to even address or acknowledge MCL 15.243a in their appellate brief, let alone present an argument with respect to why it would not be applicable. The full title of the salary reduction agreements is the "DELTA COLLEGE 403(b) RETIREMENT PLAN SALARY REDUCTION AGREEMENT FOR ELECTIVE DEFERRAL." The *salary* reduction agreements, in general, would appear to qualify as "salary records" for purposes of MCL 15.243a. A somewhat more difficult question is whether a redaction within a salary record is nonetheless permissible under MCL 15.243a with respect to information concerning the nature or extent of an employee's 403(b) contributions, which information does not truly reflect or identify the employee's "salary"[5] but rather a type of salary spending decision by the employee. We note that MCL 15.243a's requirement to make available an employee's salary records does not necessarily mean that every piece of information contained within a salary record must be disclosed. For example, a person's full social security number cannot be disclosed pursuant to a FOIA request, MCL 445.85, and President Goodnow's social security number was redacted in the salary reduction agreements without dispute. We decline to resolve the issue posed above, given that, as we shall explain below, the information regarding President Goodnow's contributions is not subject to the privacy exemption under the particular circumstances of this case.

Although the extent of President Goodnow's contributions to her 403(b) retirement account constitutes information of a personal nature, we cannot conclude that disclosure of the information would be a clearly unwarranted invasion of her privacy, which is the second prong of the privacy-exemption test. *State News*, 274 Mich App at 576-577. In balancing the public interest in disclosure against the interest the Legislature intended the exemption to protect, *Detroit Free Press*, 269 Mich App at 282, we find in favor of disclosure. The salary reduction agreements provided, "The Employee must ensure that he/she is not exceeding the lower of the annual elective deferral limit or the annual addition limit established by the IRS[.]" They further provided, "In the event that contributions are made on behalf of the Employee which exceed the limits permitted by Sections 403(b), 402(g), 414(v) and/or 415 of the Internal Revenue Code, the Employee must assure that such excess deferrals, contributions and income on these amounts are returned to the Employee as required by the Internal Revenue Code." Finally, the salary reduction agreements provided:

> I fully understand my responsibilities as a participant in the Delta College 403(b) Retirement Plan and agree to provide both the Delta College 403(b) Plan Administrator and my 403(b) Account Service Provider(s) with accurate, timely

[5] The term "salary" is defined as "a fixed compensation paid periodically to a person for regular work or services." *Random House Webster's College Dictionary* (2001).

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> information. I accept full responsibility for determining that the annual elective deferral amount(s) elected in my Salary Reduction Agreement(s) under the Delta College 403(b) Retirement Plan do not exceed the legal limits. Furthermore, I agree to indemnify and hold Delta College, its Board of Trustees, agents, employees and representatives and the Delta College 403(b) Plan Administrator harmless in any case, matter or proceeding involving or relating to alleged adverse tax consequences affecting any tax sheltered annuity or custodial account sold to me, including, but not limited to, any case, matter or proceeding in which it is alleged that there was a failure to calculate or improper calculation of the permissible limitations under current Code §§ 403(b), 402(g), 414(v) or 415 or under corresponding provisions of future tax laws.

We hold that disclosure of the 403(b) information at issue would facilitate the ability of citizens to be informed regarding President Goodnow's compliance with her contractual obligations, regarding any Internal Revenue Code (IRC) violations and President Goodnow's need to take remedial steps, and regarding any IRC violations and defendants' potential liability and need to seek indemnification under the salary reduction agreements. See *Detroit Free Press*, 269 Mich App at 282 (there is a public interest in facilitating a citizen's ability to be informed about the decisions and priorities of the government, which interest is best served through the disclosure of information concerning the workings of government or whether a public body is performing its functions). When balanced against President Goodnow's privacy interests relative to the extent of her 403(b) contributions, public disclosure governs; therefore, any invasion of privacy is not clearly unwarranted.

Defendants argue that "there is no merit to [plaintiff's] assertion that President Goodnow's personal financial information falls within the public interest due to an alleged potential for 'excess' annual contributions to her 403(b) retirement plan that could subject [defendants] to IRS fines and refunds." In support, defendants simply contend that they have specific accounting controls in their payroll management software that would prevent excess retirement contributions to the 403(b) plan. This argument, in our view, is irrelevant and is akin to claiming that the public interest in obtaining information on a matter of concern can be negated by promises or assurances of the public body that there is no need for the information or no need to be concerned about a matter, as the public body is up to the task of preventing an error; the public body cannot be left to dictate and define what is or what should be in the public's interest. The FOIA does not support defendants' self-accountability argument; rather, the FOIA seeks to achieve public-body accountability by permitting open access to public-body records by the citizens of the state, so as to keep the citizenry informed and on guard. In sum, the redacted information at issue is to be disclosed, and the trial court erred in ruling to the contrary.

Plaintiff next argues that defendants violated MCL 15.235(4)(d)(*i*) by failing to advise her that she had the right to file an appeal with the board of trustees, which, according to plaintiff, is the head of the public body in this case. We agree. MCL 15.235(4)(d)(*i*) provides in relevant part that "[a] written notice denying a request for a public record in whole or in part . . . shall contain . . . [a] full explanation of the requesting person's right to . . . [s]ubmit to the head of the public body a written appeal . . . ." Here, defendants' written notice of partial denial informed plaintiff that she could appeal to President Goodnow. Plaintiff contends that President

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Goodnow was not the head of Delta College and, thus, defendants violated MCL 15.235(4)(d)(*i*) when they incorrectly instructed her to direct her appeal to President Goodnow.

Under the Community College Act of 1966 ("the CCA"), MCL 389.1 *et seq.*, it is abundantly clear that the head of the Delta College District is the Delta College District Board of Trustees. See, e.g., MCL 389.14(1) ("A community college district is directed and governed by a board of trustees[.]"). Accordingly, for purposes of MCL 15.235(4)(d)(*i*), the written notice of denial had to include language explaining that plaintiff had a right to submit a written appeal to the Delta College District Board of Trustees. Assuming for the moment that the board of trustees had the authority to delegate its duty or authority to hear FOIA appeals to President Goodnow under MCL 389.123(d) and/or MCL 389.124(a) and (b), there is nothing in the record, including her employment agreement, that indicates that she was specifically delegated the duty or authority to hear FOIA appeals. Moreover, assuming such a delegation and the ability to do so under MCL 389.123(d) and/or MCL 389.124(a) and (b), it would not change the fact that, for purposes of MCL 15.235(4)(d)(*i*) and the notice of a right to appeal, the board of trustees is the head of the public body and needed to be identified as such; any delegation would merely be in a representative capacity for and on behalf of the board of trustees. While we question whether the FOIA would permit the head of a public body to delegate the duty or authority to hear a FOIA appeal, we ultimately need not answer that question, given that we have only been asked to rule on whether President Goodnow should have been identified as head of the public body in connection with the required notice under MCL 15.235(4)(d)(*i*) and that plaintiff only pursued an appeal in the circuit court.

Next, plaintiff argues that defendants violated MCL 15.234(3) by failing to establish and publish procedures and guidelines to allow them to charge FOIA fees. MCL 15.234(1) provides that "[a] public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record." MCL 15.234(3) provides, in relevant part, that "[a] public body shall establish and publish procedures and guidelines to implement this subsection." Here, although defendants waived plaintiff's FOIA fees, plaintiff still sought declaratory and injunctive relief precluding defendants from charging FOIA fees under MCL 15.234, where defendants allegedly failed to properly establish and publish procedures and guidelines regarding FOIA fees as required by MCL 15.234(3). It is uncontroverted that at all times relevant to this case, defendants had procedures and guidelines regarding FOIA fees posted on the official website of Delta College.

Whether under the doctrine of ripeness, mootness, or standing, or a combination of two or more of those doctrines, we decline to address the issue presented. Plaintiff acknowledges that her associated claim for money damages was rendered moot because the fees were waived, but she asserts that her "request for declaratory and injunctive relief is not moot because Delta College is still imposing fees for FOIA requests . . . ." Plaintiff does not claim, nor provide evidence, that defendants are imposing fees on her. Whether defendants properly established and published procedures and guidelines to allow for the imposition of fees is only relevant if fees have actually been imposed on a party. There is no actual controversy over the payment of fees that requires judicial resolution and thus the issue is moot. See *State News v Mich State Univ*, 481 Mich 692, 704 n 25; 753 NW2d 20 (2008) (FOIA appeal would be rendered moot if a requested record were released as there would no longer be a controversy requiring judicial resolution); *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich

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363, 371 n 15; 716 NW2d 561 (2006) (an issue is moot if it is no longer "live" or the parties lack a legally cognizable interest in the issue's outcome), overruled in part on other grounds *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010); see also MCR 2.605(A)(1) (declaratory judgment may be rendered "[i]n a case of actual controversy"). An issue regarding any fees that might be imposed on plaintiff in the future is not ripe for consideration. *Mich Chiropractic Council*, 475 Mich at 371 n 14 (ripeness precludes adjudication of hypothetical or contingent claims prior to an actual injury; a claim is not ripe if it rests on contingent future events that may never occur). And, as to this particular issue, plaintiff does not have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Ed*, 487 Mich at 372 (discussing the requirements to establish "standing").[6]

Finally, plaintiff asks us to enter an award of reasonable attorney fees and costs under MCL 15.240(6), which provides:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. . . .
> .

Considering that further proceedings and findings are necessary as discussed above, we leave it to the trial court, after resolution of all matters, to rule on any request for attorney fees and costs made by plaintiff, with the court to employ MCL 15.240(6) and to take into consideration conclusive rulings in this opinion.

We reverse and remand for further proceedings, except as to the public-body fee issue under MCL 15.234, which we conclude is not justiciable. Plaintiff, having predominantly prevailed on appeal, is awarded taxable costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

[6] If steps have not already been taken, it might be wise for defendants to publish procedures and guidelines regarding FOIA fees in a setting other than solely the Internet.

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STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT J

Plaintiff, Michael Butz's FOIA Requests

_____/

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Gmail

Michael Butz [PII MCL 15.243(1)(a)]@gmail.com>

Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

1 message

Michael Butz [PII MCL 15.243(1)(a)]@gmail.com> Tue, May 2, 2023 at 3:31 PM
To: jzelmanski@roseville-mi.gov
Bcc: Mercede Scargall <mercede.scargall@gmail.com>, Melissa Pehlis <mptorch@gmail.com>, Michelle Franzen <mfranzen86@yahoo.com>, Brian <brian_c1959@yahoo.com>, Sue Vandeberghe <lacybell1958@gmail.com>, Scott Aughney <seaof7@gmail.com>, Joanne Bakale <Joanne.electioninfo@gmail.com>

Good afternoon,

Attached is a FOIA request for your jurisdiction's Electronic Poll Book raw data files for the elections concluding November 8, 2022 and May 2, 2023 along with relevant supporting documents:

- MCL 168.509gg
- MCL 168.813
- 52 USC Chapter 207

Please don't hesitate to contact me with any questions or concerns.

Sincerely,

Michael Butz

4 attachments

mcl-168-509gg.pdf
8K

mcl-168-811.pdf
7K

52 USC Chapter 207.pdf
96K

(Roseville) Butz Michael Lewis - Clerk Letter - EPB-FOIA Request - 20230502r.pdf
271K

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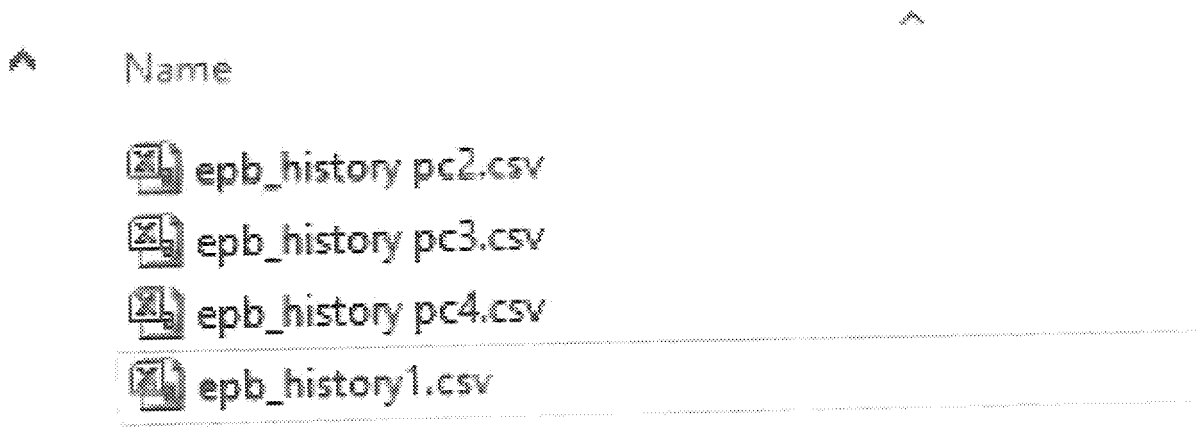
May 2, 2023

Roseville Clerk's Office
Attn Jennifer Zelmanski

Re: Freedom of Information Act ("FOIA") Request

Dear Jennifer Zelmanski:

Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023. These files should be in .CSV or .XLS format and typically have a file name beginning with "EPB_History" (see below screenshot).



Please note that these files likely contain the full birthdate (month, day and year) and driver's license number of the registrants in your jurisdiction, which is exempt from FOIA release (MCL 168.509gg). Therefore, please open the copy of the digital file(s), remove or redact the birth month, birth day and drivers license number information, and save your changes before sending the file(s) to me. If you are able to retain the year of birth for the registrants as is permissible per MCL 168.509gg, it will be greatly appreciated.

Instructions on how to locate the requested information is available on pages 40-41 of the Electronic Poll Book Refresh Manual provided by the Michigan Board of Elections. These pages are included in Exhibit 1 below for your convenience.

Once the above redactions have been made, there should be no other FOIA exempt information in the EPB digital records requested. I am not requesting any software or information which would somehow be deemed proprietary. I am only requesting public record information as is my right.

Please note that the EPB .CSV files are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 USC 207) and a state minimum of 24 months (MCL 168.811).

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I prefer to receive the requested information via email as a file attachment. If email is unavailable, please contact me to coordinate an alternative method to fulfill my FOIA request since I would be happy to bring a USB drive to your office so that you or your staff can copy the file(s) to.

Please don't hesitate to contact me if you have any questions.

Thank you.

Sincerely,

Michael Lewis Butz
[redacted] [redacted] PII MCL
PII MCL 15.24 [redacted], MI PII MCL 15.243
586.596 PII MCL 15.2
[redacted]@gmail.com

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Exhibit 1:

Electronic Pollbook Manual (MMT)
Provided by the Michigan Bureau of Elections
Updated as of 10/19/2021

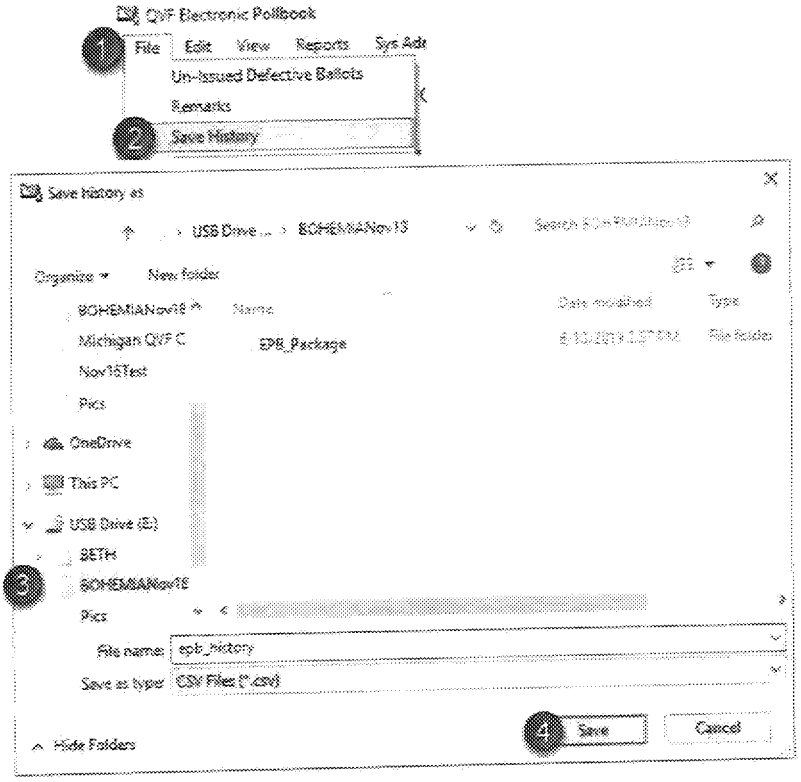
Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

1. Click File
2. Click Save History
3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\
4. Click Save



RECEIVED
AUG 23 2023
ANTHONY G. FORLINI
Macomb County Clerk

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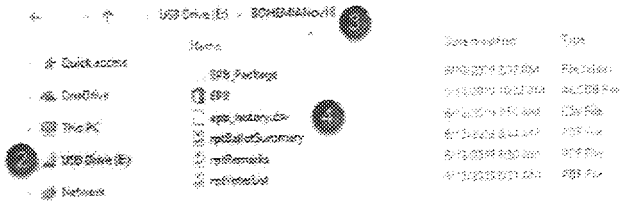
Ensure Files are on Flash Drive

To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB_History	CSV file
rptPrecinctAll	PDF file

The EPB_History.CSV file is what is being requested

You may also see the following files in your folder:

File Name	File Type
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT K

Defendants' FOIA Rejection and Denial

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Michael Butz [redacted]@gmail.com>

FOIA request

1 message

Jennifer Zelmanski (City of Roseville) <jzelmanski@roseville-mi.gov> Tue, May 9, 2023 at 7:35 AM
To: [redacted]@gmail.com" [redacted]@gmail.com>
Cc: "Jackie Crimboli (City of Roseville)" <jcrimboli@roseville-mi.gov>

Hello Michael,
Please see attached information

Jennifer Zelmanski
City Clerk
Phone: 586 447-4615
Fax: 586 774-8048

-----Original Message-----
From: Scans Roseville <scans@roseville-mi.gov>
Sent: Tuesday, May 9, 2023 7:33 AM
To: Jennifer Zelmanski (City of Roseville) <jzelmanski@Roseville-mi.gov>
Subject: Scan from Roseville Clerks office

Please do not reply to this MFP email address.
Please do not reply to this email address.

doc01660520230509063232.pdf
526K

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

City of Roseville
Jennifer A. Zelmanski
City Clerk

FOIA - NOTICE OF TEN DAY EXTENSION

May 9, 2023

Michael Lewis Butz
[redacted] PII MCL 15.243(1)(a)
[redacted] PII MCL 15.243(1)(a), MI [redacted] PII MCL 15.243(1)(a)

The time for responding to your request for disclosure of public record(s) dated May 2, 2023 has been extended to the 15th working day following the date of your request for the following reason(s):

_____ The need to search for, collect, or appropriately examine or review a potential voluminous amount of separate and distinct public record(s) pursuant to a single request.

_____ The need to collect the requested public record(s) from numerous other offices.

__X__ Due to the complexity of your request, a 10-day extension is necessary. The estimated date to complete response from date of receipt of first response is – May 23, 2023 (Additional time requirement for review/collection of information). *We are continuing to investigate and research issues involving whether a request would create an exposure to the operating system resulting in injury. We are also reviewing our methods and capabilities in responding, including likely time involved.*

Jennifer A. Zelmanski

FOIA Coordinator, Jennifer A. Zelmanski, City Clerk

Document received by the MI Macomb 16th Circuit Court.

29777 GRATIOT AVENUE • ROSEVILLE, MICHIGAN 48066-9021 • FAX (586) 774-8048 • www.cityclerk@roseville-mi.gov

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Gmail

Michael Butz [redacted]@gmail.com>

RE: Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

1 message

Jennifer Zelmanski (City of Roseville) <jzelmanski@roseville-mi.gov> Tue, May 23, 2023 at 8:40 AM
To: Michael Butz [redacted]@gmail.com>
Cc: "Jackie Crimboli (City of Roseville)" <jcrimboli@roseville-mi.gov>

Good Morning,

Please see attachment.

Jennifer Zelmanski

City Clerk

Phone: 586 447-4615

Fax: 586 774-8048

City of Roseville Michigan

From: Michael Butz [redacted]@gmail.com>
Sent: Tuesday, May 2, 2023 3:31 PM
To: Jennifer Zelmanski (City of Roseville) <jzelmanski@Roseville-mi.gov>
Subject: Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)

Good afternoon,

Attached is a FOIA request for your jurisdiction's Electronic Poll Book raw data files for the elections concluding November 8, 2022 and May 2, 2023 along with relevant supporting documents:

- MCL 168.509gg
- MCL 168.813
- 52 USC Chapter 207

Please don't hesitate to contact me with any questions or concerns.

Sincerely,

Michael Butz

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1260K

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

City of Roseville
Jennifer A. Zelmanski
City Clerk

May 23, 2023

Michael Lewis Butz
PII MCL 15.2 3(1)(a) [redacted],
[redacted] PII MCL 15.243(1)(a), MI PII MCL 15.243(
(586)596-PII MCL 15.2
PII MCL 15.243(1)(a) @gmail.com

FOIA - NOTICE OF DENIAL OF REQUEST FOR DISCLOSURE OF INFORMATION

In response regarding your FOIA requested submitted on May 2, 2023 for a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023.

The following Action has been taken pursuant to your request for a public record:

✓ Denied all portions of your request (Please see below for reason)

November 8, 2022, Election:

Per the Michigan Bureau of Elections, Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. **MCL 15.243(1)(y).** In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." **MCL 15.243(1)(z).**

Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. **MCL 168.509gg**. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

Please contact the Macomb County Clerk for the paper pollbook copies or the Michigan Bureau of Elections for the log file or voter history.

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

May 2, 2023, Election:

Per the Michigan Bureau of Elections, Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. **MCL 15.243(1)(y).** In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." **MCL 15.243(1)(z).**

Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. **MCL 168.509gg**. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

Please contact the Macomb County Clerk for the paper pollbook copies or the Michigan Bureau of Elections for the log file or voter history.

If your request for record(s) is denied, you may submit a written appeal, specifically stating Aappeal@ and stating the reasons for appeal, to the attention of the City Council, or seek judicial review under Section 10 of the Act within 180 days after the public body's final determination. Within 10 days of receiving a request for an appeal, the City Council shall: a) reverse the denial; b) issue a written notice upholding the denial; c) reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part; or d) issue a notice extending by 10 business days the time to decide the appeal. (Note: If a board of commission is the head of the public body it is not considered to have received a written appeal until the first regularly scheduled meeting following submission of the written appeal.)

If after judicial review, the Circuit Court determines that the public body has not complied fully with the disclosure requirements, the Court shall award reasonable attorney's fees, costs and disbursements. If the Court determines that the public body has arbitrary and capriciously violated the Act, the Court shall award punitive damages in the amount of $500.00.

A copy of this request will be kept on file for no less than one (1) year.

Jennifer A. Zelmanski

Jennifer A. Zelmanski, City Clerk FOIA Coordinator

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.
_____/

ATTACHMENT L

Electronic Pollbook Manual

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Electronic Pollbook Refresh
Election Inspector Manual
For Windows 10 & BitLocker Flash Drives

Michigan Department of State
Bureau of Elections

October 2021

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Electronic Pollbook User Manual - Table of Contents

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Election Day EPB Tasks: Election Inspector's Guide 6
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Log into the encrypted flash drive 6
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Save the First EPB Backup: Redirection Action Required! 7
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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Introduction to the Electronic Pollbook

The Bureau of Elections developed computer software that can be used in the polling place on Election Day to process voters and generate precinct reports. The electronic pollbook (EPB) software is downloaded from the Qualified Voter File (QVF) software and is loaded to a laptop prior to each election. Once the EPB software is loaded on the laptop, the software allows election inspectors to look up a voter's registration record, confirm their registration is correct, and assign a ballot to that voter, essentially automating the typical paper process. After the election is complete, the EPB software will generate reports to complete the official precinct record (paper binder pollbook) and a voter history file that can be uploaded into the QVF to update voter history in a matter of minutes.

Key Features

- ☆ Access current voter registration and absent voter information in the precincts (from the day prior to the election, in most cases)
- ☆ Locate a voter's registration record by swiping their driver's license with a magnetic card reader
- ☆ Assign and record the voter's ballot immediately upon registration confirmation
- ☆ Look up voters registered within the jurisdiction but not in the assigned precinct
- ☆ Print accurate reports, including a ballot summary that calculates, the list of voters, and remarks
- ☆ Upload voting history quickly and accurately

Important Considerations

Maintain security throughout the EPB process by using an encrypted flash drive. The flash drive must be password protected, and passwords should **never** be kept with flash drives. The encrypted flash drive must be used to transfer files back and forth between the QVF computer and the EPB laptop.

Pre-election file transfer: QVF to EPB

Post-election file transfer: EPB to QVF

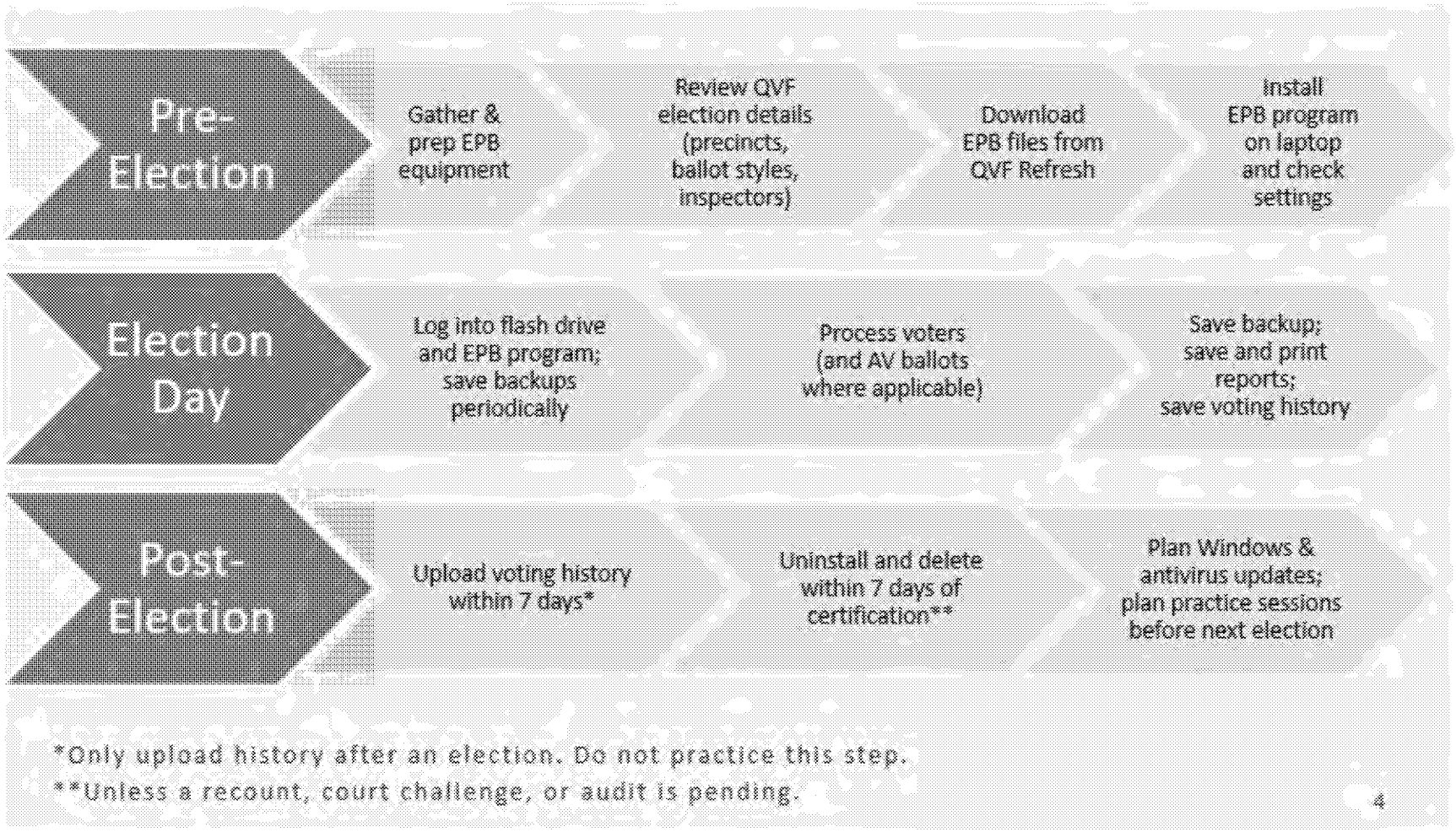
The laptop must not be connected to any networks (must be in "airplane mode") when the EPB software is installed on the laptop. Windows Updates and antivirus updates must be done regularly between elections.

It is also important to understand when to delete files. Delete all EPB files seven days after the final canvas (unless there is a pending recount, court challenge, or audit/Secretary of State order). This keeps voter data secure and prevents the wrong files from being used in future elections.

Most importantly, practice! Walking through the manual well before every election will ensure you understand all of the features of the EPB software and will prepare you for successful implementation come election day. Remember it is important to delete all practice files, too!

Document received by the MI Macomb 16th Circuit Court.

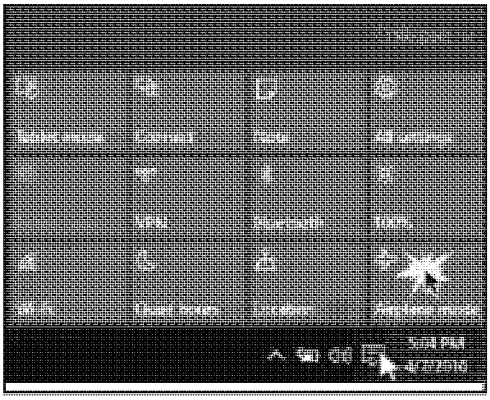
EPB PROCESS OVERVIEW



Obtained by Judicial Watch, Inc. v. Michigan FOIA
Electronic Pollbook Manual WIN10
Provided by the Michigan Bureau of Elections
Updated as of 10.19.2021
Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Getting Started: Election Day Reminders



1. **Wireless internet access** – ***The laptop must be in airplane mode on election day.*** To verify airplane mode is enabled, click the notifications icon and make sure the Airplane mode is blue and that the Wi-Fi button is gray.

2. **Don't skip page 7, Step 3** – It is important when you save the backup file that you browse to the location that the file is supposed to be saved to, which is the flash drive. It does not automatically save to the flash drive.

3. **Unable to Record an Absentee Ballot** – Click the File menu, click Options, and add a checkmark to "Allow the recording of Absentee Ballots."

4. **Spoiling an Absentee Ballot** – Absentee ballots are never spoiled in the EPB on Election Day. There are other procedures in place for a voter surrendering their absentee ballot. The duplication process does not include spoiling the original ballot number; see FAQ # 11 on p. 31.

5. **Recording PDF ballots / ballots sent electronically** – An absent voter issued an electronic ballot is processed in the EPB with the same ballot number originally recorded by the clerk. Electronically issued MOVE ballots returned by the voter on 8 ½ x 11 paper are recorded in the EPB using the original "ET#." The number of the ballot onto which the votes are duplicated is NEVER assigned to the absent voter in the EPB. Simply use the duplication process established for other absent voter ballots that require duplication and record the number of ballots used in duplication on line H of the Ballot Summary.

6. **Don't forget page 27** – The Voting History file (epb_history.csv) must be saved to the flash drive in addition to the 3 PDF reports and the backup file at the end of the night.

7. **Even if your laptop freezes, it's going to be OK!** This reminder is also FAQ # 15 on p. 31.

   While other workers continue to process voters using the paper backup:

   First, try to close and reopen the EPB program, using Ctrl + Alt + Delete if necessary to use the Task Manager to end the task and close the EPB application. If that doesn't work, you may restart the computer. Remember to log back into the flash drive as well as the EPB program before you begin working again.

Document received by the MI Macomb 16th Circuit Court.

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Election Day EPB Tasks: Election Inspector's Guide

Prepare the EPB for Opening the Polls

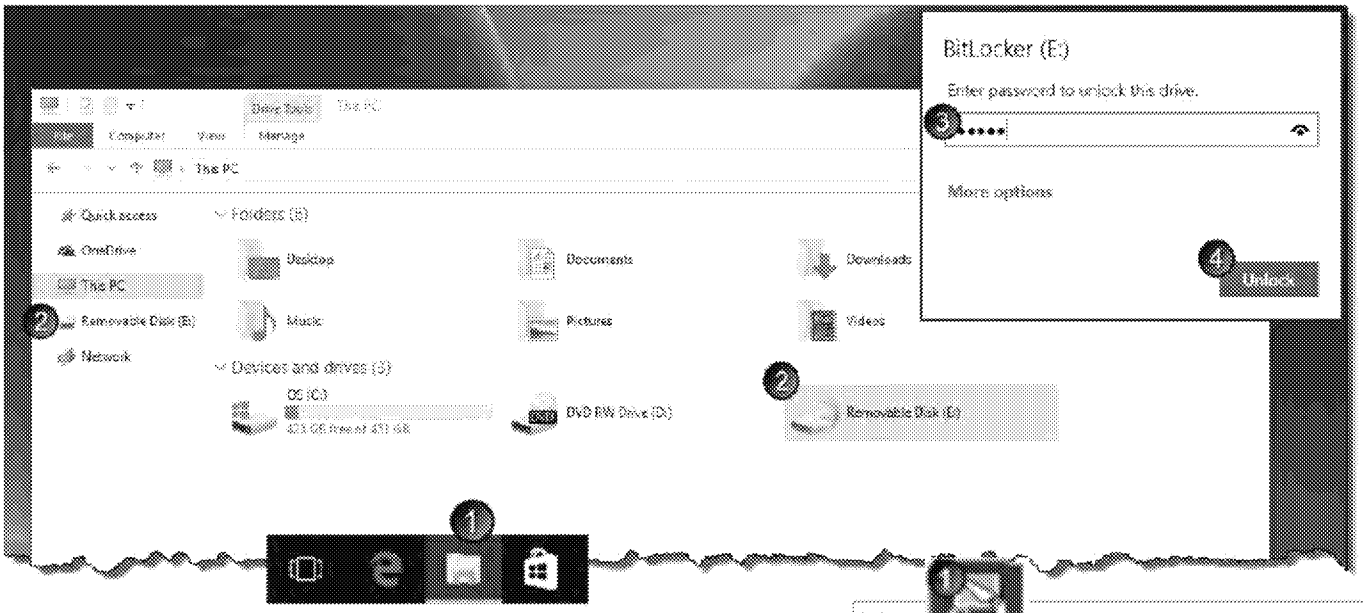
Pull the laptop out of the case, plug it into a surge protector, and plug the surge protector into the wall. The power cord may have two pieces. Keep the power cord plugged in throughout the day to maintain a 100% charged battery. Plug the magnetic card reader and mouse into USB ports. Then turn the laptop on. Once the laptop has booted up, make sure that the laptop cannot connect to the internet by turning on Airplane Mode (see pg. 5).

Log into the encrypted flash drive

The encrypted flash drive is a vital component of the EPB software program. Use this password-protected file storage device to protect voter data, store the backup file, and store all the work done on Election Day so the Clerk can update voter history and create precinct reports. When saving files, make sure the files are being saved to the encrypted flash drive.

To log into the flash drive, insert it into a USB port and:

1. Click the Windows Explorer folder icon
2. Click Removable Disk
3. Enter the password
4. Click Unlock

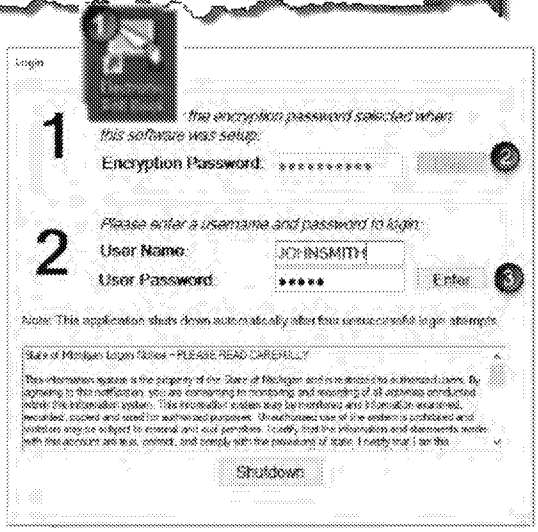


Log into the EPB software

After you have inserted and logged into the encrypted flash drive with its password, you can open the EPB program.

To log into the EPB software:

1. Double click on the Electronic Poll Book icon in the upper left corner of the desktop
2. Enter Encryption Password and click Enter
3. Enter Username and User Password and click Enter



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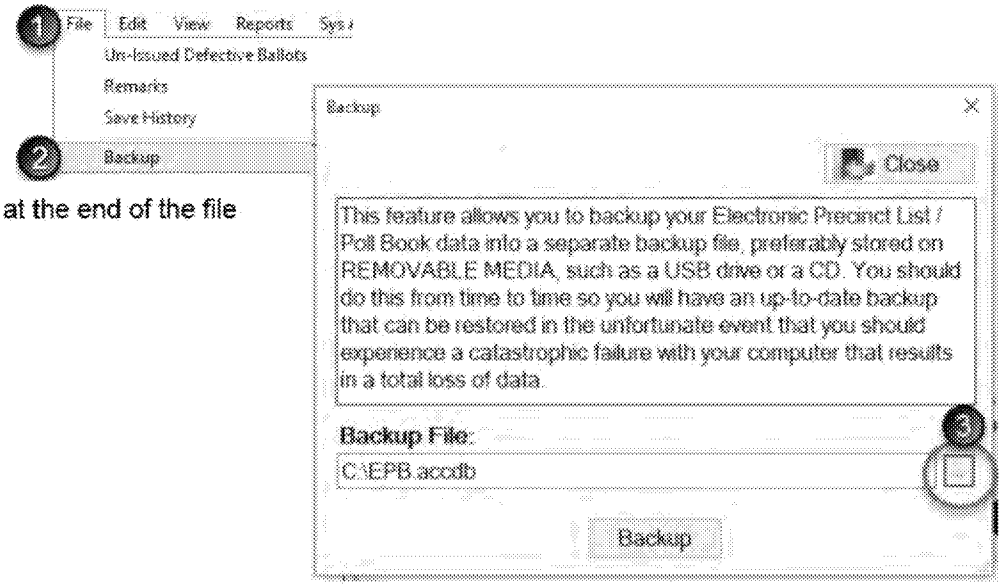
Obtained by Judicial Watch, Inc. v. Michigan FOIA

Save the First EPB Backup: Redirection Action Required!

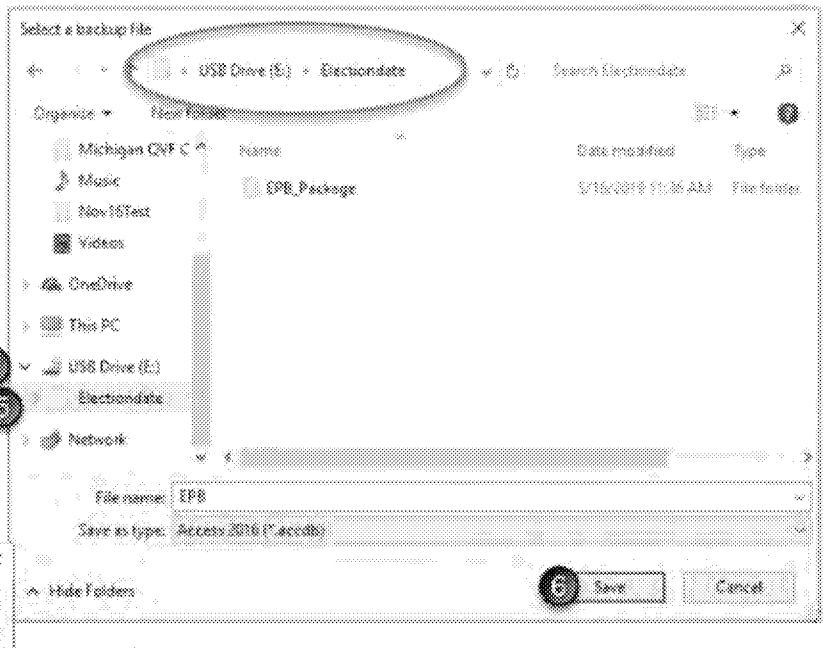
You must keep the encrypted flash drive plugged into the laptop all day. Save a **Backup** periodically throughout the day to save voters that have been processed. This ensures that data will not be lost if there is a hardware failure. Pay attention to your laptop's settings when performing the initial **Backup**. The letter labeling your encrypted flash drive in Windows Explorer may vary since it is dependent on the laptop and port being used.

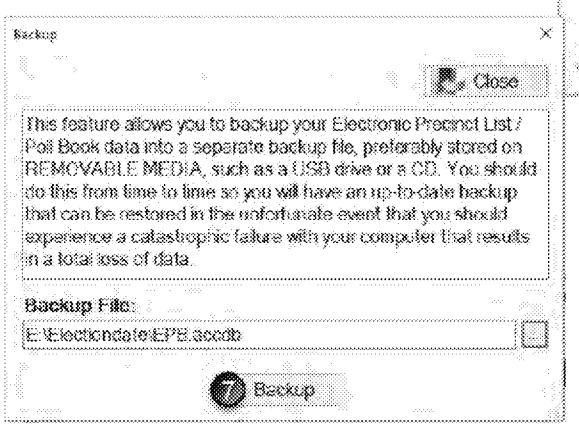
To Back up the EPB:

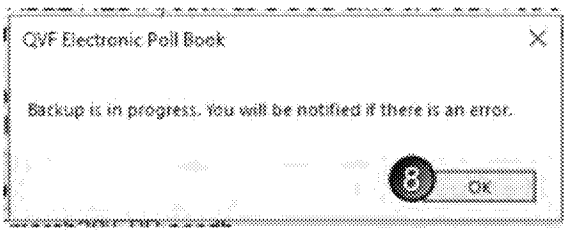
1. Click File
2. Click Backup
3. Click this button … at the end of the file path field



4. Select Removable Disk (Drive letter may vary). Use the encrypted flash drive to save files throughout the day and after the polls close. Future backups should remember the drive you select in this step.
5. Double-click the [ElectionDate] folder
6. Click Save
7. Click Backup
8. After a few seconds, the Backup is in progress message will appear, and the backup continues briefly in the background.







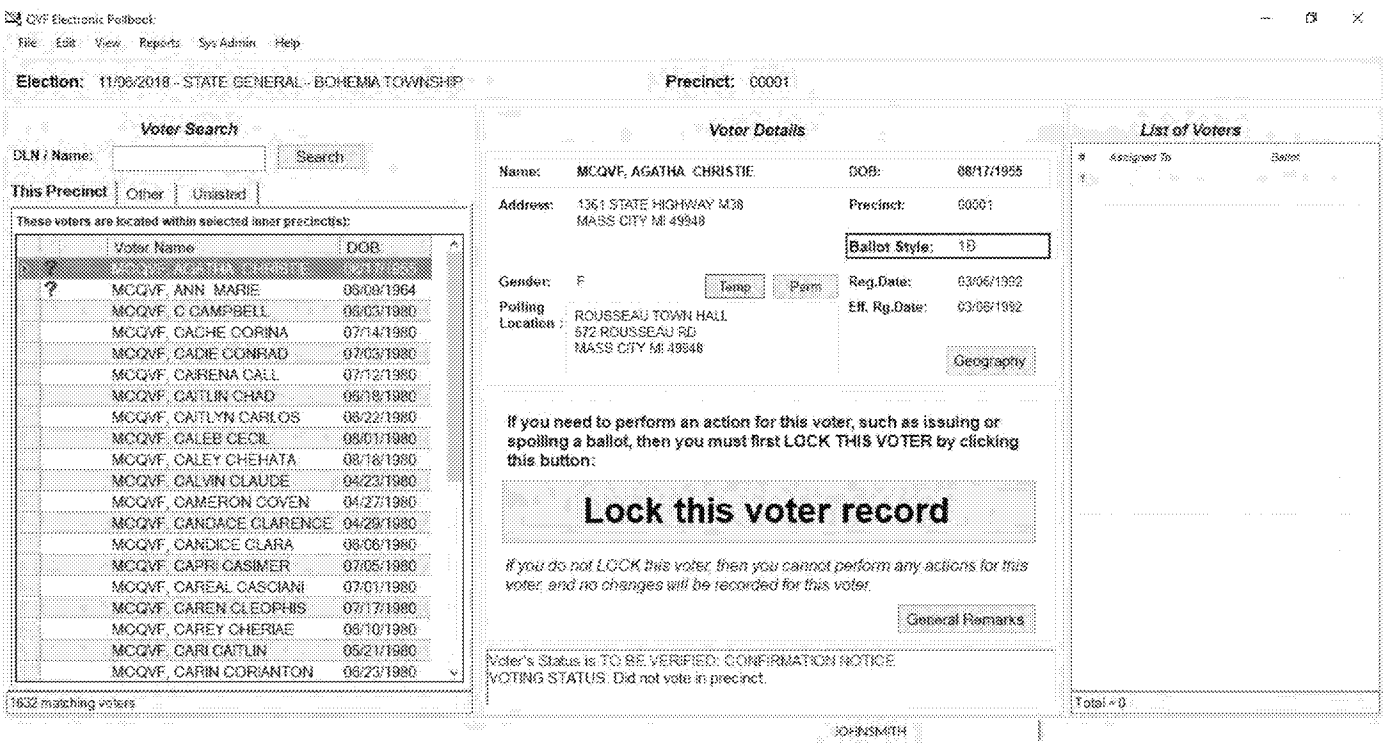
The laptop and EPB software are now ready for voters!

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Read and Use the EPB Main Screen to Process each Voter

The EPB main screen is divided into three sections. Take a moment to become familiar with the various parts of the screen. **Make sure the top line lists the correct election and precinct number.**



Voter Search: The Voter Search section of the screen is the precinct list. All voters in your precinct will be listed under **This Precinct** tab**.** The **Other** tab provides access to the lists of other precincts in the jurisdiction. The **Unlisted** tab is available to add voters not found in either list in certain situations.

Voter Details: The Voter Details section of the screen shows the voter's registration information at the top, including the appropriate **Ballot Style** that should be issued to the voter. The Geography button provides detailed district information for each voter. The middle of the screen is the "Lock this Voter Record" action box where ballots will be assigned and recorded. Voting status flags appear at the bottom of the screen. This portion of the screen is important to verify the status before issuing a voter a ballot.

List of Voters: The List of Voters section records the voter's name and what ballot number was assigned to them in a running list. This section is for reference; use it throughout the day to balance with the tabulator.

The EPB software contains the voter list for the precinct, records the ballots issued, and creates the List of Voters for the permanent record of the precinct. With a few clicks, a voter may be verified and assigned a ballot.

Important Note: If a voter does not wish to have their driver's license scanned, their name should be typed into the EPB software.

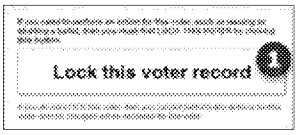
Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

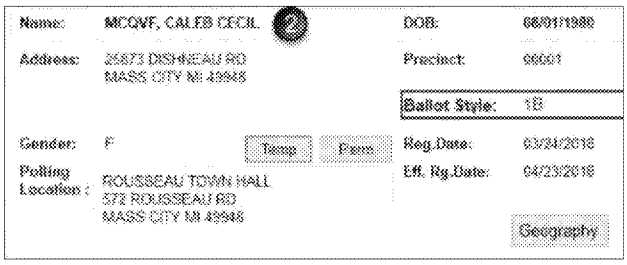
Assign a Ballot

The voter must complete an *Application to Vote,* and their photo identification must be verified or the *Affidavit of Voter Not in Possession of Picture Identification* must be completed before processing a ballot in the EPB software. Once those steps have been taken, process the voter in the EPB by following these steps:

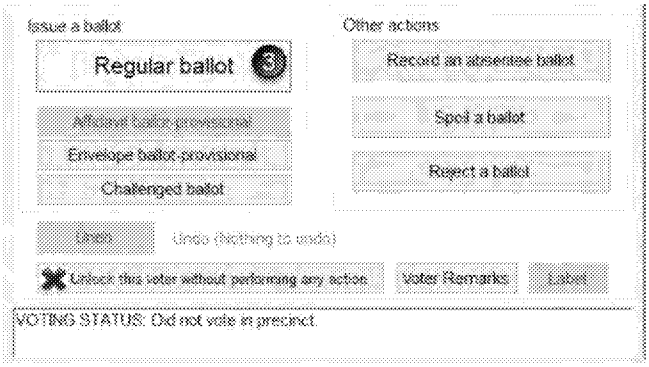
1. Swipe the voter's driver's license through the magnetic card reader or type the voter's name into the DLN/Name field, entering the last name first. If typing, select the correct voter and then you must click on "Lock this voter record," otherwise skip to Step 2.

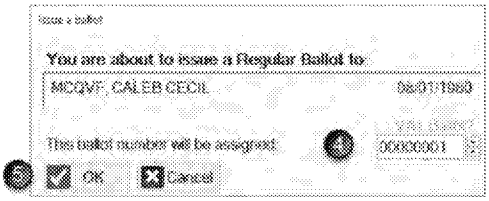


2. Verify the voter's information on the *Application to Vote* matches EPB.



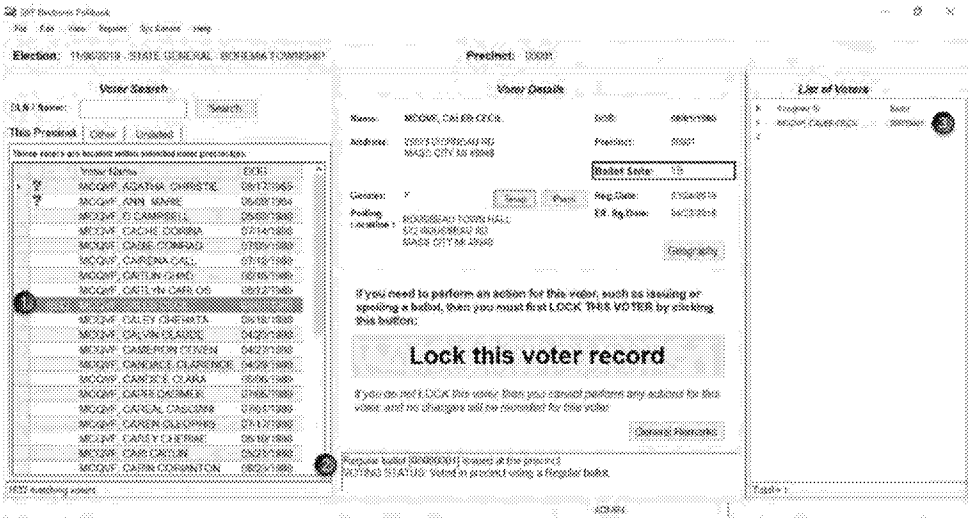
3. Click Regular ballot
4. Enter the next available ballot number in the **This ballot number will be assigned** box (this number will auto fill after the first number for the ballot style has been entered)
5. Click OK, and the voter's name will now be added to the List of Voters.





Verify the ballot was issued

Click OK on the confirmation window (if enabled). After you assign the ballot, the main screen returns. Three places verify the ballot was processed in the EPB software. Further duties may be divided amongst election inspectors, including completing the *Election Inspector Completes* portion of the *Application to Vote* and providing the voter a ballot in a secrecy sleeve. The voter will then go to a voting booth to vote their ballot and return the ballot to the tabulator.



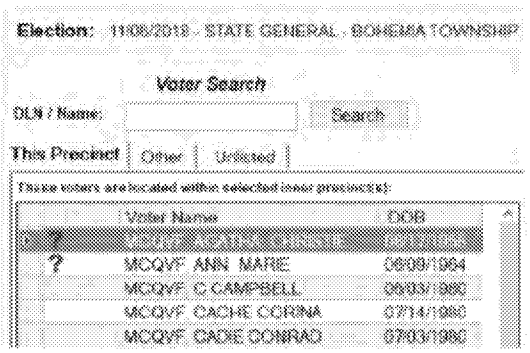
Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Process Voter with Status Flag(s)

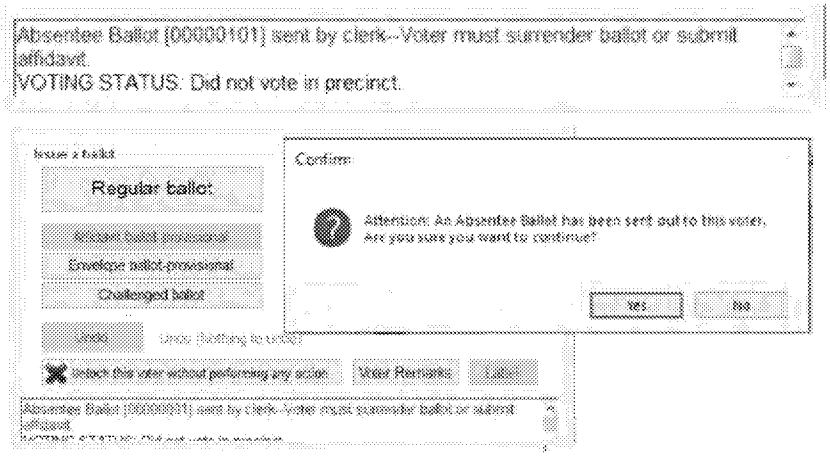
Some voters have status flags that need to be addressed prior to issuing a ballot. On the paper precinct list, these were indicated with a code. Something happened in the registration process or in subsequent mailings that needs follow-up. For example, a signature was not obtained, the voter missed checking an answer to the citizenship question, an absentee ballot was issued, the clerk received reliable information the voter may have moved, etc.

A voter has a status flag if he or she has a red question mark next to his or her name. When a red question mark is found, read the message in the Voter Status window at the bottom of the Voter Details screen to determine the issue.

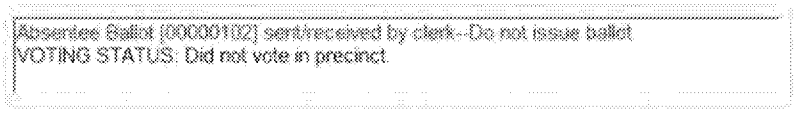


Absentee Ballot sent by clerk

This voter was sent an absentee ballot. The voter must surrender the absentee ballot or complete the *Affidavit of Lost or Destroyed Absentee Ballot* **after approval from the Clerk**. Process as a Regular ballot and click through the warning. Place the AV ballot in the Local Clerk envelope.



Absentee Ballot sent/received by clerk

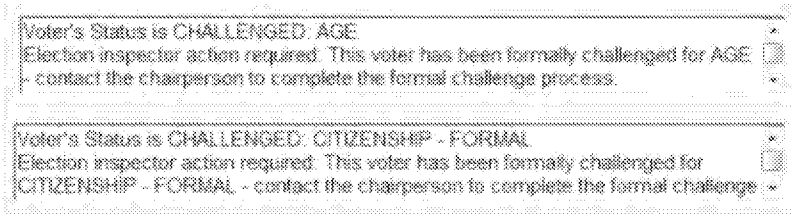


This voter was sent an absentee ballot and returned it to the Clerk. **DO NOT** issue this voter a ballot as they have already voted.

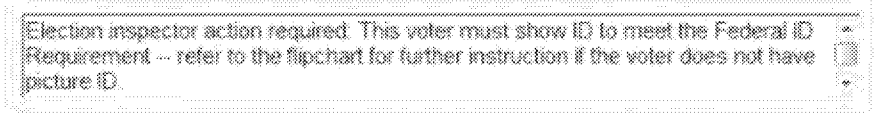
In the extremely rare case of a clerical error (such as if a ballot was recorded in QVF for the wrong voter), ***after approval from the clerk*** *a ballot may be issued. Process as instructed and click through the warning.*

Voter's status is Challenge: Age, Citizenship Formal or Residency Formal

This voter has been formally challenged and must complete the challenge process before being issued a challenged ballot. Seek assistance from the precinct chairperson to complete this process. The EPB processing is the same as a regular voter except Challenged ballot is selected in the Issue a ballot box. A CHAL will appear next to the voter's name after processed.



Must show ID before voting (Federal Requirement)



This voter must show photo ID or a paycheck, government check, utility bill, bank statement, or a government document which lists his or her name and address (if no photo ID but provides one of the documents listed above, must sign the *Affidavit of Voter Not in Possession of Photo ID* as well) prior to being issued a ballot.

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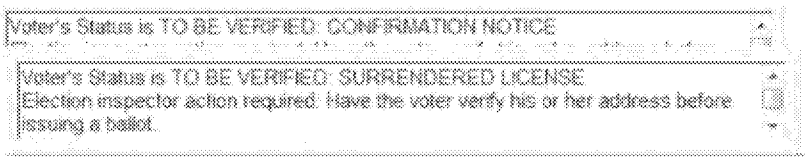
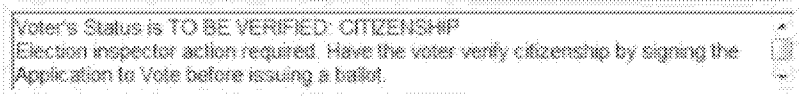
Voter's Status is V: Address Unclear, Confirmation Notice, or Surrendered License

This voter must verbally confirm the address listed in the EPB. If the voter does not confirm the address, the procedure for voters that have moved must be taken.

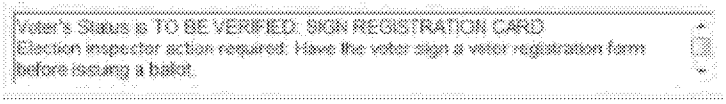


Voter's Status is V: Confirm Citizenship

This voter must verify their citizenship by signing the Application to Vote. If the voter does not complete the Application to Vote, DO NOT issue a ballot.

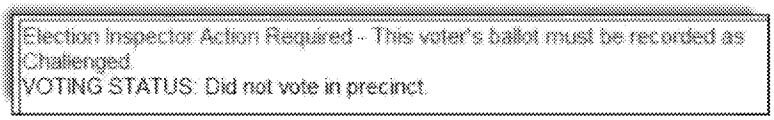


Voter's Status is V: Sign Registration Card



This voter must sign a voter registration form prior to being issued a ballot.

Voter Message: Challenged Ballot



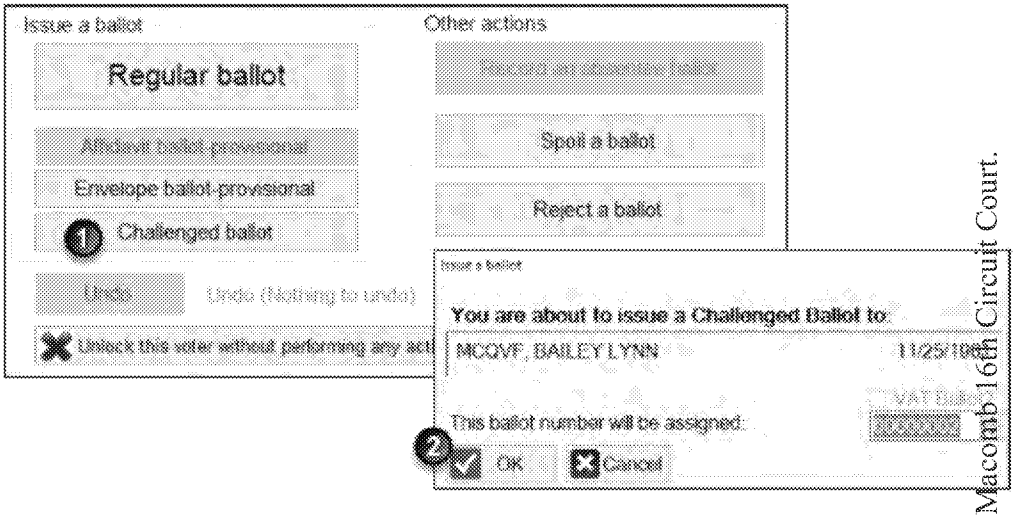
When the EPB indicates in red text that an inspector action is required to record a voter's ballot as challenged (shown above), perform the actions listed below.

(These voters registered within 14 days of the election with an alternative form of residency verification.)

To issue a Challenged ballot:

Pull the voter's record up in the EPB software, lock it in if necessary and:

1. Click Challenged ballot
2. Verify the ballot number being issued is correct or enter the ballot number and click OK



Important note:
The Challenged ballot procedure for these voters is *different* than formal challenges. Outside of the EPB, perform the following steps when issuing the challenged ballot:

1. Write the ballot number in pencil on the upper left-hand corner of the ballot, being sure to avoid any barcodes or timing marks (**not** on the ballot stub).
2. Conceal this number with a small piece of white paper taped over the number.
3. Use the Challenged ballot button to enter the voter's ballot number into the e-Pollbook. If your precinct has more than one ballot style, issue the ballot style noted on the receipt.
4. The voter will then vote the ballot and place the ballot in the tabulator as usual.

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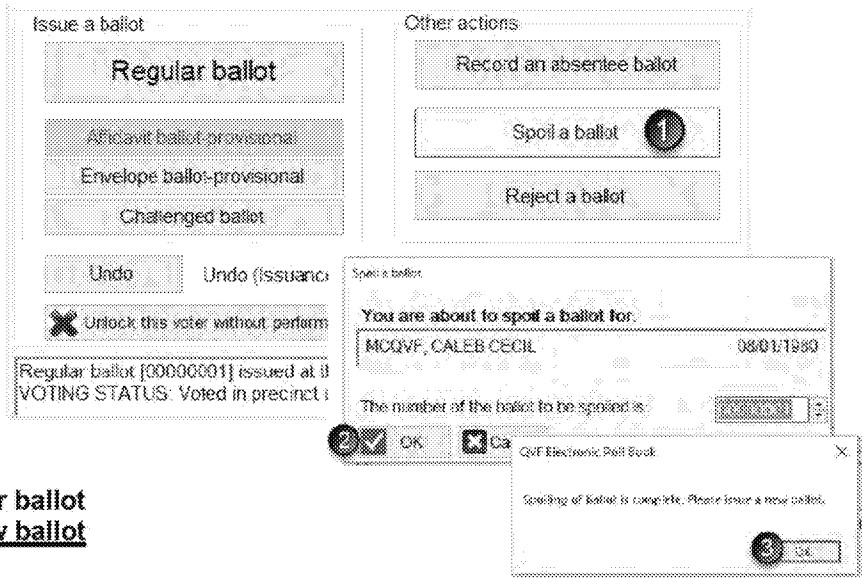
Process a Spoiled Ballot

A voter may request a new ballot if needed and a new ballot must be issued, no matter how many times the voter requests a new one. The voter should write "SPOILED" at the top of their ballot, remove the ballot stub, and place in the Spoiled Ballot Envelope. Change the *Application to Vote* to note the new ballot number and record the new ballot in the EPB software.

To spoil a ballot:

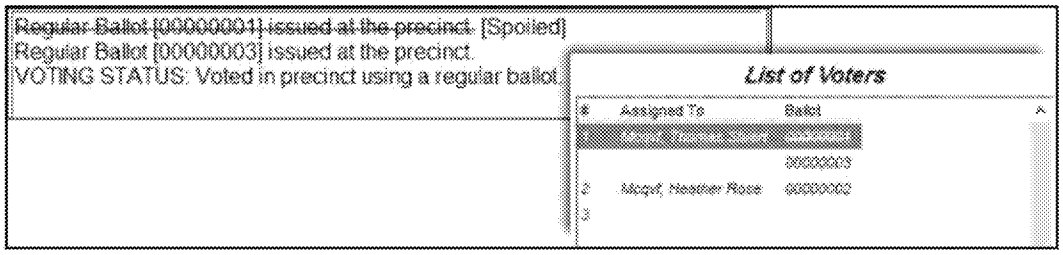
Pull the voter's record up in the EPB software by typing the voter's name into the DLN/Name field, entering the last name first, select the voter's name, click Lock this Voter Record and:

1. Click Spoil a ballot
2. Click OK – the software will automatically enter the ballot number you are spoiling.
3. Click OK



After the ballot is spoiled, the regular ballot process must be used to <u>issue a new ballot to the voter.</u>

Once the process is complete, verify the recording was done properly by looking at the Voter Status screen and the List of Voters.



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Find a Voter Not Appearing On This Precinct List

Find a Voter in Other Precinct in Other Tab

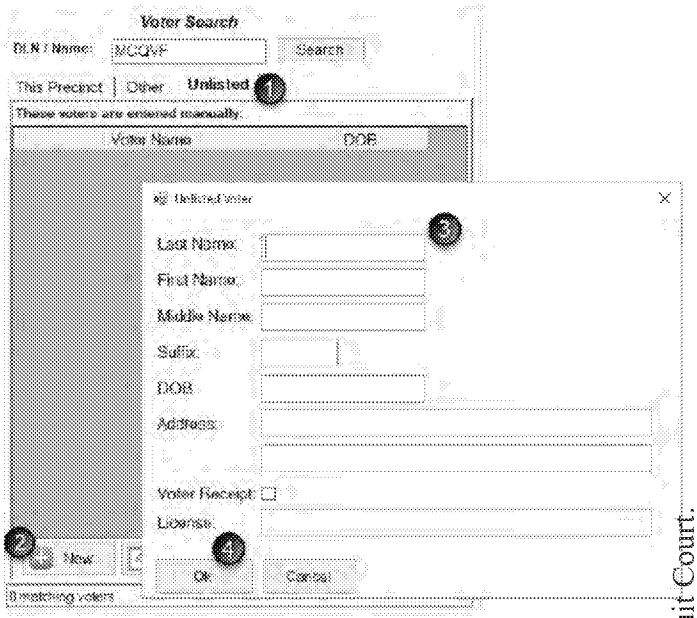
Election inspectors can look up voters throughout the jurisdiction, not just in the precinct they are working. If the voter does not pop up after a search, click on the **Other** tab. If the voter is registered to vote within the jurisdiction, click on their name and view their polling location. Explain to the voter that they are registered in a different polling location and/or precinct and direct them to the appropriate location. Be sure to click back to the **This Precinct** tab before processing the next voter.

Add an Unlisted Voter

If a voter is not found under the **This Precinct** tab or the **Other** tab, the citizen was not registered to vote in the Qualified Voter File (QVF) for that jurisdiction at the time of the EPB download.

If the voter registered at the local clerk's office after the EPB was downloaded and has a receipt, add the voter to the list (steps 1-4) and see the next section of this manual, *Process Unlisted Voter with a Receipt*.

The chairperson, with the assistance of the Clerk (and utilizing the *Election Inspectors' Procedural Manual Flipchart* and *Missing Voters Flow Chart* listing options including a provisional ballot) should determine whether the citizen is eligible to vote. If it is determined that the citizen is a qualified voter that should vote in that precinct, they must be added to the list.



To add a voter to the list:

1. Click the Unlisted tab
2. Click New
3. Enter the voter's information
4. Click OK

After the voter is added, a ballot number must be assigned.

The Clerk will provide guidance on the type of ballot to issue the voter.

Important note: You must manually enter ballot numbers for unlisted voters, and the next regular ballot issued (for that ballot style) will need to be adjusted; it will not auto advance correctly.

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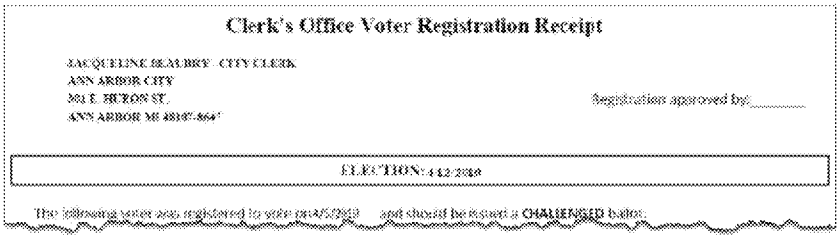
Process an Unlisted Voter with a Receipt

When a voter is not found under the **This Precinct** tab or the **Other** tab and they were registered by the local clerk's office after the e-Pollbook was downloaded for the election they must present the Clerk's Office Voter Registration Receipt. The voter must be added to the EPB from the Unlisted tab, then a ballot can be issued per the instructions on the receipt.


Clerk's Office Voter Registration Receipt

JACQUELINE BEAUBIEN, CITY CLERK
ANN ARBOR CITY
301 E. HURON ST.
ANN ARBOR MI 48107-8647

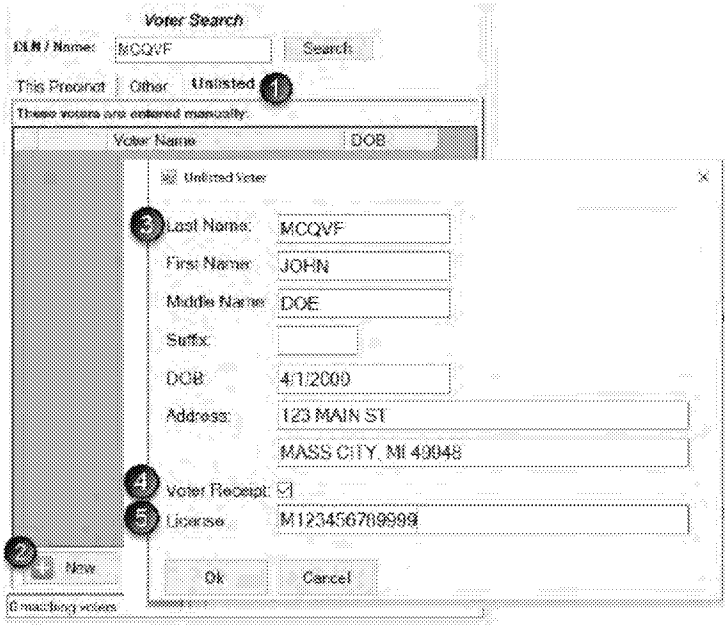
Registration approved by:_____

ELECTION: 11/2/2010

The following voter was registered by voter on 9/5/2010 and should be issued a CHALLENGED ballot.

To add a voter to the list:

1. Click the Unlisted tab
2. Click New
3. Enter the voter's information
4. Click the "Voter Receipt" box to enable the option and the cursor automatically moves to the License field
5. If the voter has a DL/PID, swipe the DL/PID or scan the barcode to add the id number and the Unlisted Voter window will automatically close. The ID number can also be hand-typed, then click OK.



After the voter is added, a ballot number must be assigned. Follow the instructions provided on the receipt to select the correct ballot type button (Regular or Challenged).

If the receipt says that the ballot must be prepared as "challenged" perform the following steps:

1. Write the ballot number in pencil on the upper left-hand corner of the ballot, being sure to avoid any barcodes or timing marks (**not** on the ballot stub).
2. Conceal this number with a small piece of white paper taped over the number.
3. Use the Challenged ballot button to enter the voter's ballot number into the e-Pollbook. If your precinct has more than one ballot style, issue the ballot style noted on the receipt.
4. The voter will then vote the ballot and place the ballot in the tabulator as usual.

Important note: You must manually enter ballot numbers for unlisted voters, and the next regular ballot issued (for that ballot style) will need to be adjusted; it will not auto advance correctly.

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Process Other Voter Types

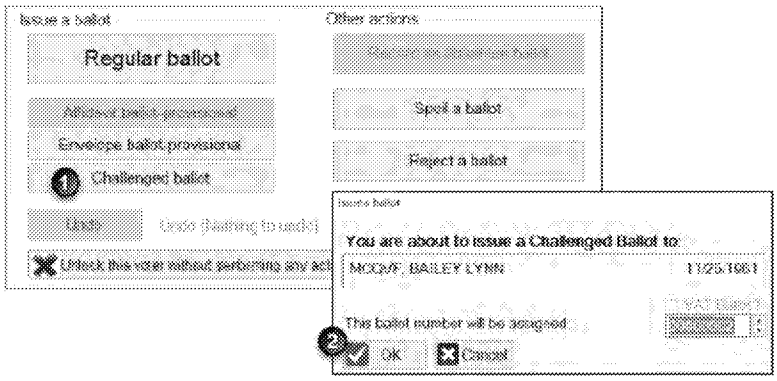
Process a Voter Challenged by a Challenger

If a voter is challenged by a Challenger, the voter must be issued a Challenged ballot and that Challenged ballot must be recorded in the EPB. Please note, the Challenge must be directed to the chairperson and all steps must be carried out prior to issuing the challenged ballot. Follow the instructions below to issue a challenged ballot in the EPB software.

To issue a Ballot to a Challenged Voter:

Pull the voter's record up in the EPB software, lock it in if necessary and:

1. Click Challenged ballot
2. Verify the ballot number being issued is correct or enter the ballot number and Click OK



Important note: The ballot number must be written on the physical ballot and covered with a piece of paper or post-it tapes. In addition, full documentation of the challenge must be recorded in the paper binder pollbook.

Record an Absentee Ballot

If absentee ballots are processed in the precinct and the Clerk has instructed entry into the EPB software versus using the paper Addendum List of AV voters, follow the instructions below to process the ballots in the EPB software.

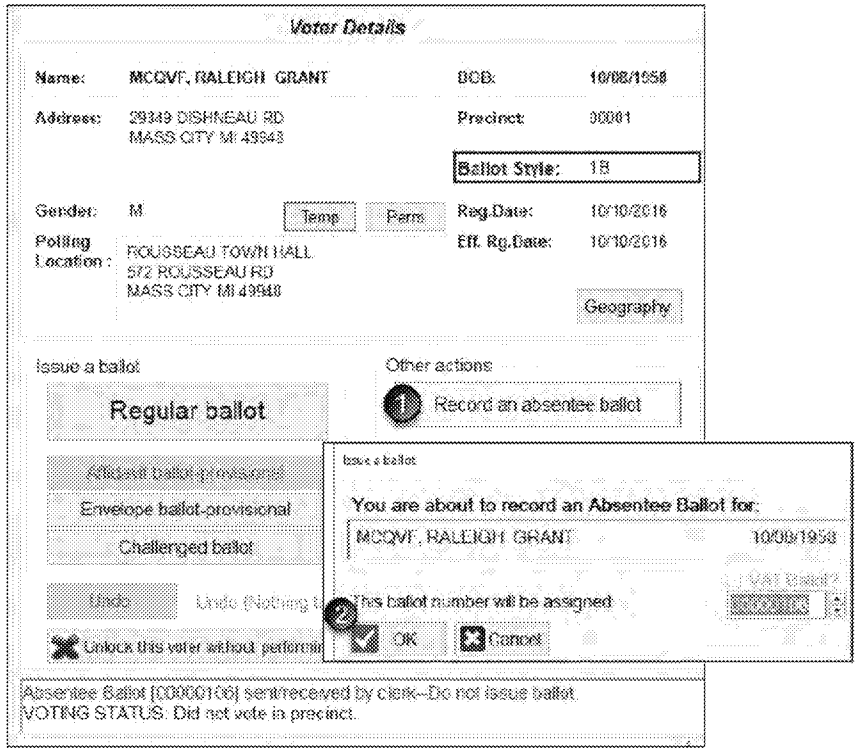
To record an absentee ballot:

Pull the absent voter's record up in the EPB software, lock it in if necessary and:

1. Click Record an absentee ballot
2. Verify ballot number (enter if not auto filled) is the same as assigned and click OK

Once the process is complete, verify the recording was done properly by looking for AV next to the voter's name, the Voter Status screen and the List of Voters.

NOTE: If processing a FWAB or electronic MOVE ballot, simply accept the regular AV ballot number assigned or enter the AV ballot number assigned by the clerk.



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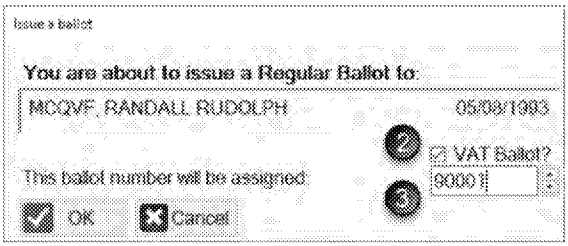
Record a Voter Assist Terminal (VAT) Ballot

When a voter requests to use the Voter Assist Terminal (VAT) to vote, issue a blank ballot (with a numbered stub). Since they will make their selections using the VAT which prints their votes on a blank ballot, they will not receive a regular ballot with a traditional number sequence.

To record such ballots in the Electronic Pollbook, search for the voter in the EPB as usual and select a ballot type to record. When assigning this voter's ballot number, indicate that it is a VAT Ballot by checking the VAT box. This action tells the system to use the blank ballot numbering sequence when auto advancing. If it is the first VAT ballot of the day, enter the first ballot number of the blank ballot stock. VAT ballot numbers will advance automatically like other ballots do when the Auto Advance option is enabled and after the first number is entered.

To record a VAT ballot:

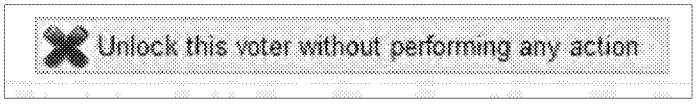
1. Click the button for the kind of ballot being assigned (Regular, Provisional…)
2. Add a checkmark to the VAT box
3. If this is the first VAT ballot of the day, enter the ballot number in, otherwise, confirm the VAT ballot number matches the sequence and click OK.



Document received by the MI Macomb 16th Circuit Court.

Avoid or Correct Mistakes

If a voter is selected in error, simply click **Unlock this voter without performing any action** to return to the main screen.



If an entry mistake occurs, whether the wrong ballot number or the wrong voter was issued a ballot, using the **Undo** function will aid in correcting the mistake.

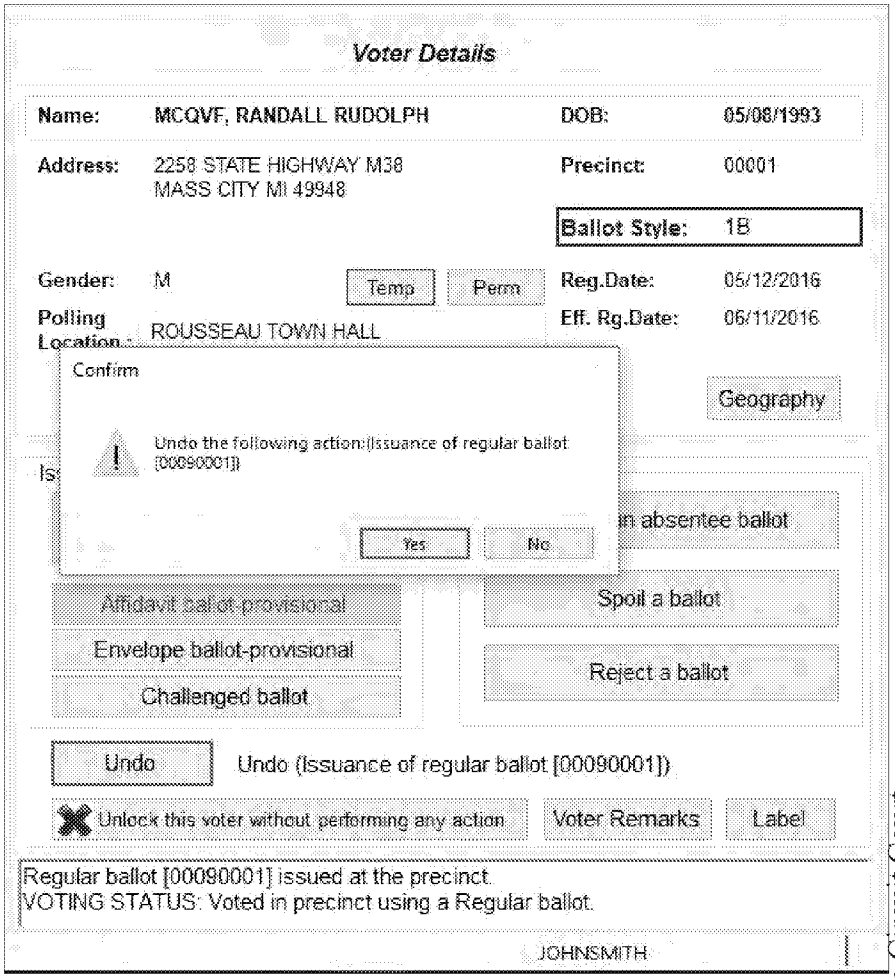
To correct a mistake:

1. Search for the voter, using the DLN/Name search box
2. Select the voter
3. Click Lock this voter record
4. Click Undo
5. Click Yes

Notice the action you are undoing is in brackets next to the Undo button and in the confirmation box. Use the *Application(s) to Vote* to ensure you are making the correction properly. The **Undo** function should not be used to attempt to fix major mistakes. If several ballots have been issued out of sequence, correct this type of error with a remark and by ensuring the next voter is correct from that point forward.

Important note: The **Undo** feature is **NOT** for spoiling ballots (see *Spoiled Ballots* section for detail). If you have questions as to when the **Undo** function is appropriate to use, consult your local Clerk.

See FAQ #1 at the back of this manual, if a voter was issued an incorrect ballot style.



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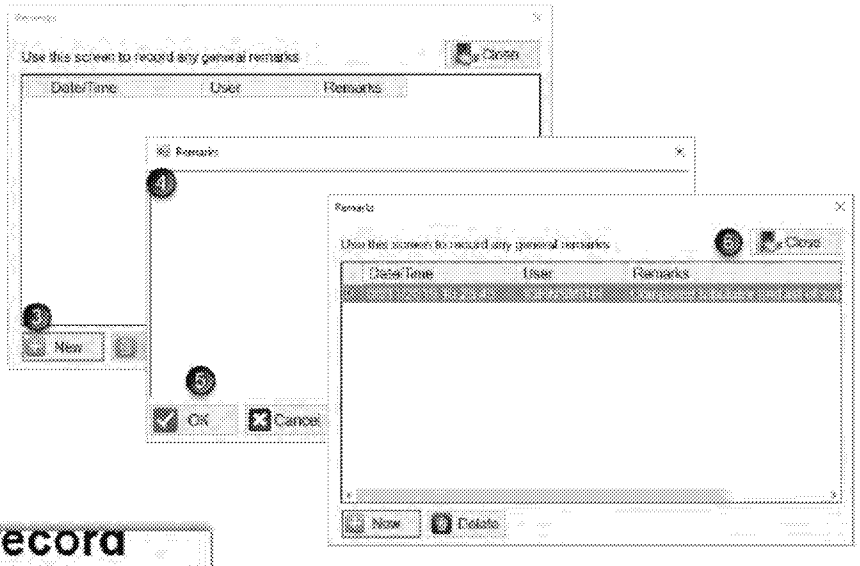
Obtained by Judicial Watch, Inc. v. Michigan FOIA

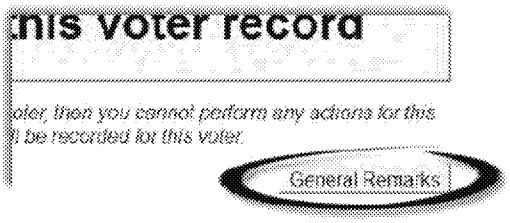
Make a Remark

Any time a correction is made, a remark should be entered. In addition, remarks should be made throughout the day to document events that happened in the polling place that are significant. Providing this information aids the Clerk in understanding what took place throughout the day. There are two types of remarks General or Specific, be sure to use the correct type based on the comment you need to make.

To make a general remark:

1. Click File (or the *General Remarks* button and skip to step 3)
2. Click Remarks
3. Click New
4. Enter Remark, the EPB automatically records the date and time of the entry; however, if entry of the remark is delayed from the time the event occurred, then include the time the event took place in the remark.
5. Click OK
6. Click Close



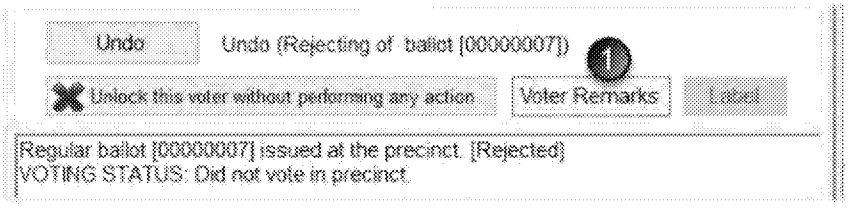


To make a voter remark:

Pull the voter's record up in the EPB software, by typing the voter's name into the DLN/Name field, entering the last name first, click Lock this Voter Record and:

1. Click Voter Remarks
2. Enter Remark, the EPB automatically records the Voter Name, Voter Number, and date and time of the entry, however, adding the time is recommended as the EPB is not always available for remark entry at the time the event took place.
3. Click OK

If there are no other actions to perform on that voter, Unlock the voter and proceed to process the next voter.



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Reject a Ballot

A ballot is rejected only in a situation where a voter will not be issued a new ballot. Valid reasons for rejection are:

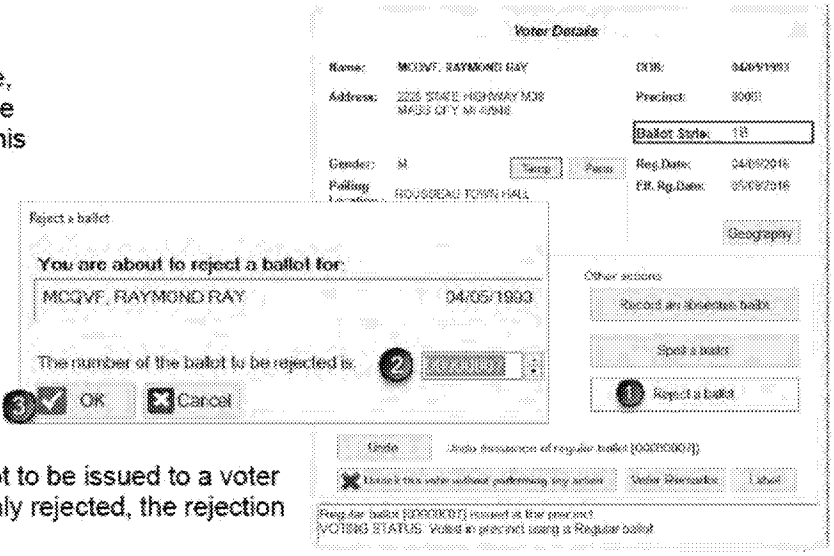
- **Exposure** – A voter intentionally exposed his or her marked ballot to others at the polling place.
- **Missing stub/ballot number does not agree** – It is discovered during the ballot serial number verification process that the stub on the ballot that was issued to the voter at the polls is missing or bears a different number than the number recorded on the voter's *Application to Vote*.
- **Ballot was left in booth/voter did not tabulate** – A voter neglected or refused to tabulate his or her ballot.

If any of these situations arise, a voter may not be issued a replacement ballot. The ballot must be rejected.

To Reject a ballot:

Pull the voter's record up in the EPB software, by typing the voter's name into the DLN/Name field, entering the last name first, click Lock this Voter Record and:

1. Click Reject a ballot
2. Verify ballot number is the same as assigned - Click OK
3. Click OK
4. Record a Voter Remark (See previous page) that includes the reason for rejection



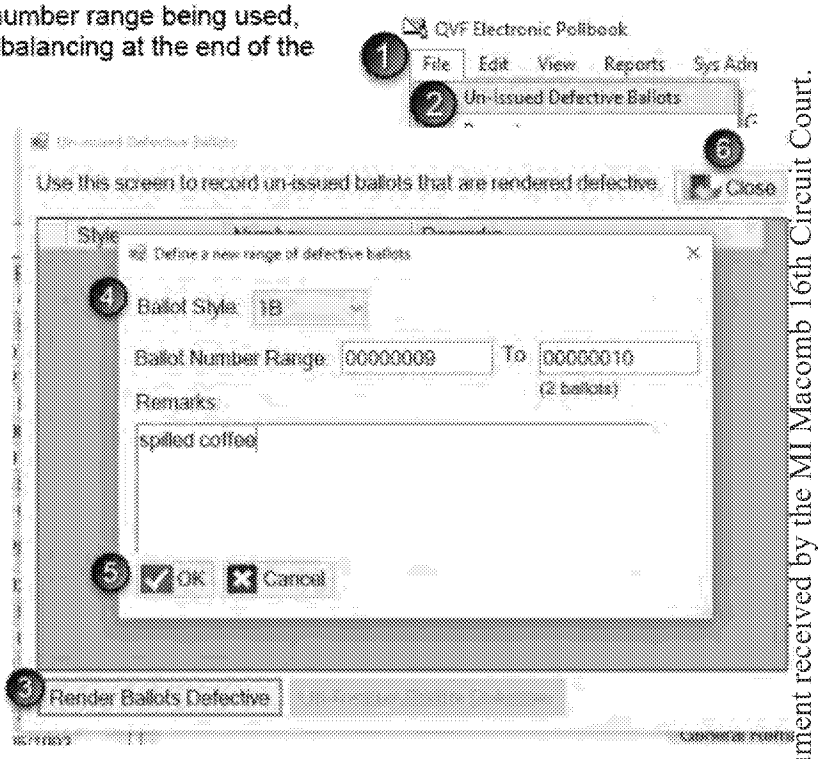
The EPB software will not allow another ballot to be issued to a voter with a rejected ballot. If a ballot was mistakenly rejected, the rejection must be removed by using the Undo button.

Mark Unissued Ballots Defective

If a ballot becomes unusable and it is within the number range being used, record it defective in the EPB software to ensure balancing at the end of the night.

To record defective ballots:

1. Click File
2. Click Un-issued Defective Ballots
3. Click Render Ballots Defective
4. Select the ballot style, enter the ballot number range, and record the reason the ballot is defective.
5. Click OK
6. Click Close



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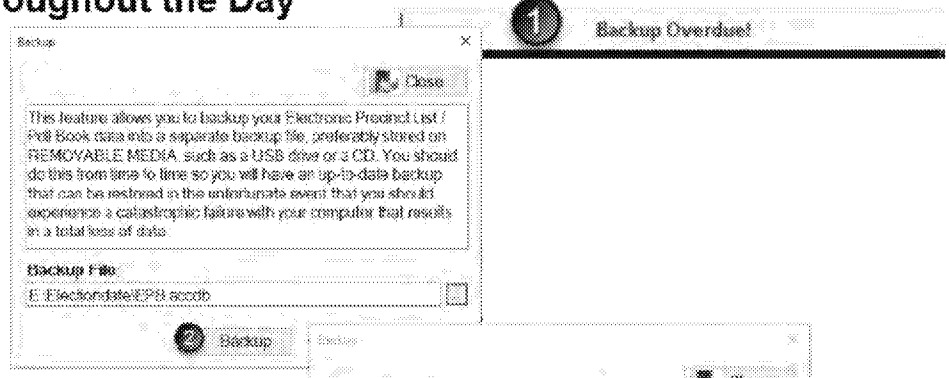
Obtained by Judicial Watch, Inc. v. Michigan FOIA

Back up Regularly Throughout the Day

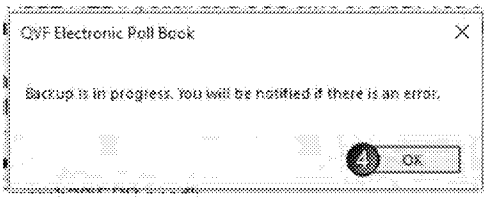
Approximately every half hour, the EPB software will notify the user that a backup is overdue. It is important to take a moment after processing a voter to update the backup. This will ensure the flash drive has the most recent data entered into the EPB in the event of a hardware failure.



To Backup:

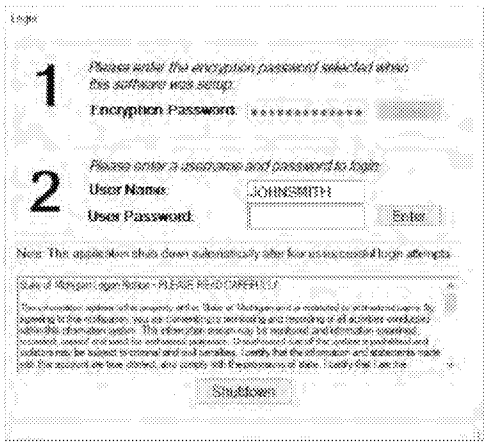
1. Click Backup Overdue
2. Click Backup – the file path should default to the encrypted flash drive and [ElectionDate] folder once the first backup has been completed
3. Click Yes to overwrite the existing backup file
4. Click OK

If you get an error that the drive or path is not accessible, log into your flash drive and try again



Understand Timeout Features

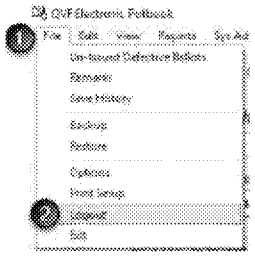
For security reasons, the EPB software will logout a user after thirty minutes of inactivity. This can be avoided by moving the mouse and/or clicking into the DLN/Name field if there are long periods of inactivity. If the EPB software logs out the user, simply reenter the User Name and User Password and click Enter.



Switch Users

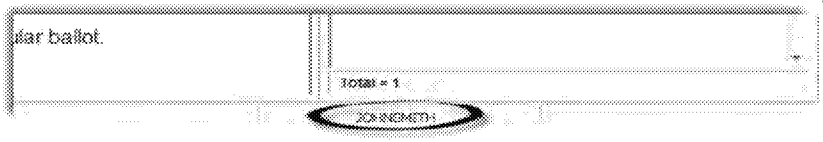
To switch users, simply use the **Logout** function by:

1. Click File
2. Click Logout



Then simply log in with the new username and password.

The current user is listed in the lower right hand corner of the screen as illustrated:



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Restore the Database

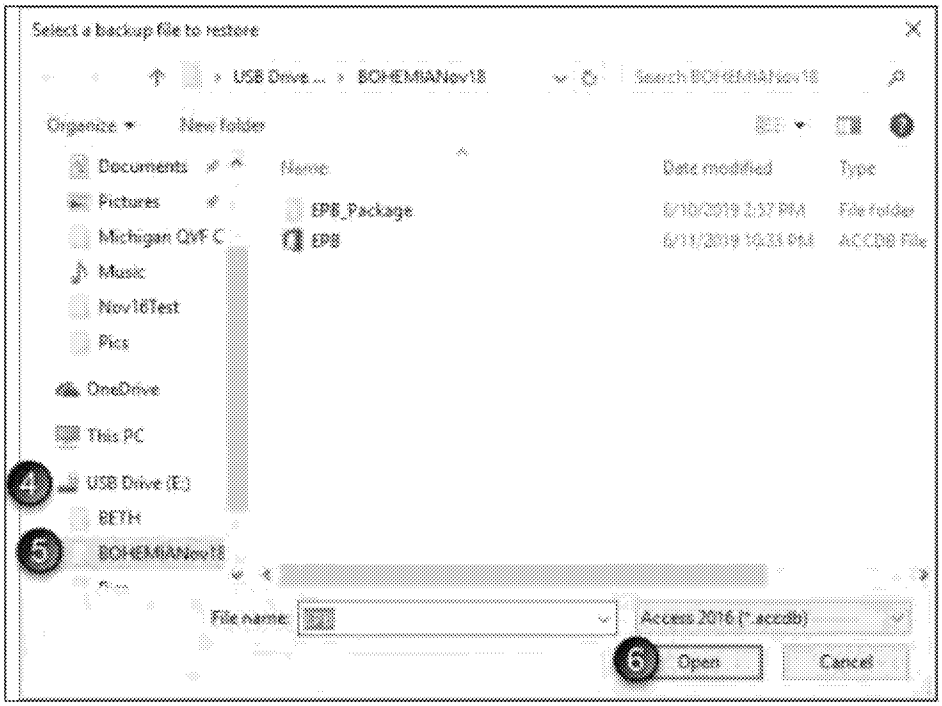
In the event the laptop fails and the EPB needs to be reinstalled on a new laptop on election day, the **Restore** feature will reload all of the information entered up to the point of the last backup. The only voter data missing would be entries made in the EPB since the last backup. That information can be added back in using the *Applications to Vote*. The Administrator username and password must be obtained from the Clerk for the initial login when the software is re-installed.

Once the EPB software has been installed onto the new laptop, login to the EPB software, and perform the following steps:

1. Click File
2. Click Restore

3. Click this button … at the end of the path field

4. Make sure the encrypted flash drive is selected (Removable Disk E:) Drive letters may vary.
5. Double click [ElectionDate] folder
6. Click Open



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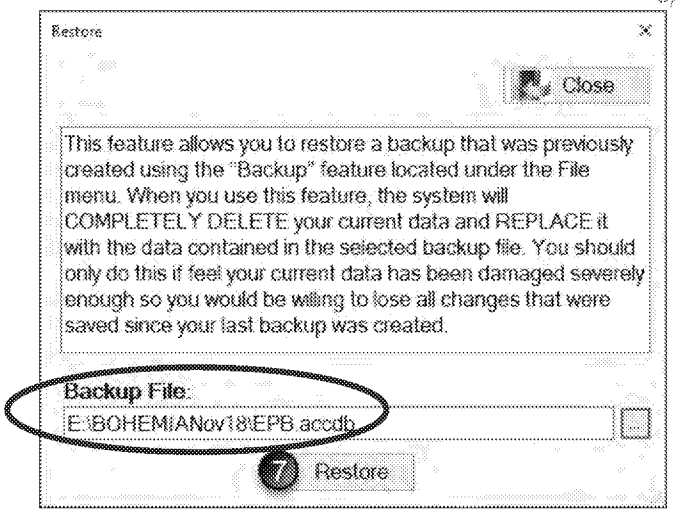
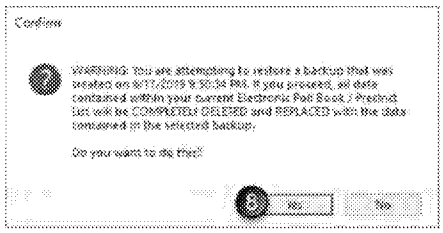
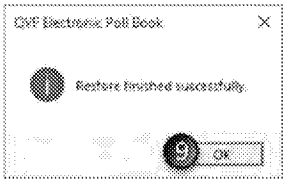
7. Click Restore
8. Click Yes
9. Click OK

After restoration is complete, the election inspectors should review the Options under File>Options, then log out of the EPB and log back in with the username and password they had used prior to the laptop/software failure.

If time elapsed between the last backup and the restoring of data, use the *Application(s) to Vote* to re-enter voter(s) and process new voters.







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Election Day: Close the Polls

After the close of polls on Election Day, data processed in the EPB software must be saved one last time to the encrypted flash drive and reports must be generated to complete the paper binder pollbook. The EPB software generates the three reports necessary for completion of the paper binder pollbook/official record of the precinct in just a few steps. Those reports include the Ballot Summary, the List of Voters, and the Remarks report. After reports are saved and printed, save voter history in a manner that can easily be uploaded into the Qualified Voter File (QVF) in a matter of seconds, ensuring accurate recording of voters in the master voter registration database.

Review and complete the next six required steps. If your receiving board prints the reports, simply save each report.

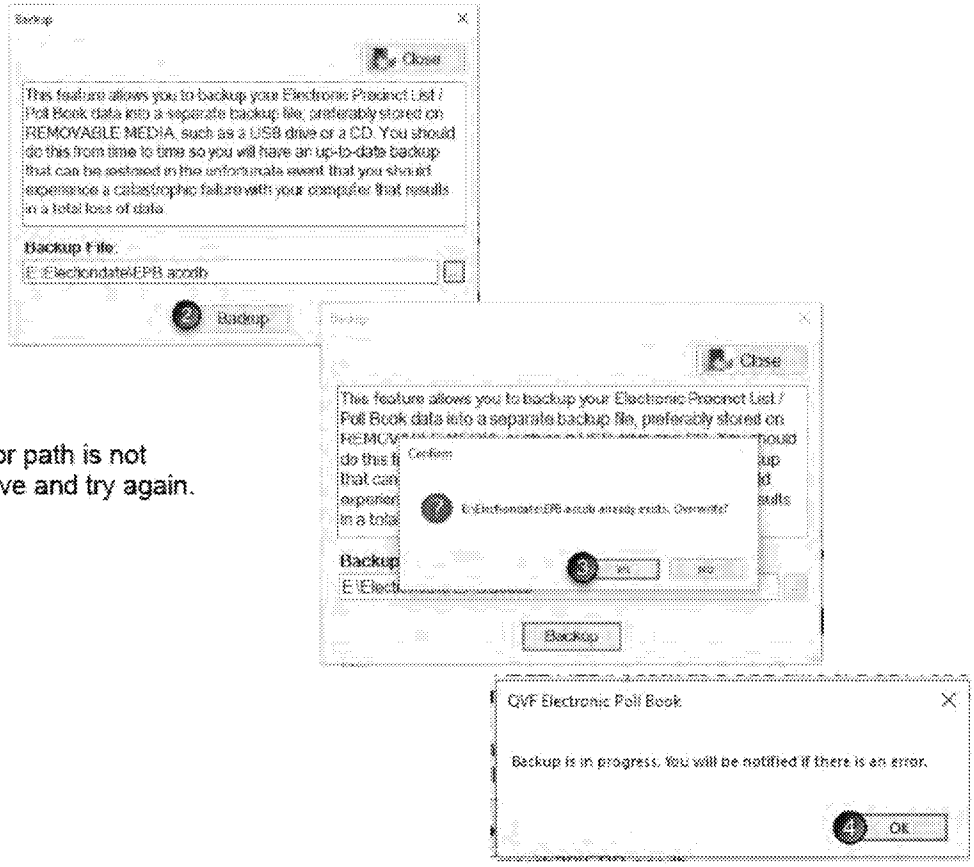
1. Save one last **Backup** file
2. Save and print the **Ballot Summary** Report
3. Save and print the **List of Voters** Report
4. Save and print the **Remarks** Report
5. Save **Voting History** (This is a frequently missed step, so please pay extra attention here!)
6. Look at the files saved on the flash drive and go back to save anything that was missed.

Save Backup

After all voters have been processed in the EPB, perform one last **Backup** to ensure all data is saved to the encrypted flash drive.

1. Click File
2. Click Backup
3. Click Backup
4. Click Yes
5. Click OK

If you get an error that the drive or path is not accessible, log into your flash drive and try again.



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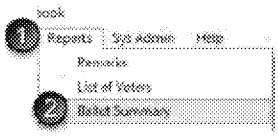
Save and Print Reports

Save and print Ballot Summary Report

The **Ballot Summary** documents the total number of ballots assigned to the precinct and how each ballot was used. You already recorded spoiled or defective (F), rejected (G) and Provisional "envelope" (I) ballots and the software enters those numbers. The designated inspector enters the remaining numbers, and the EPB software will calculate and balance the **Ballot Summary.** Type in numbers carefully and use the Tab key to move between fields.

To complete the Ballot Summary:

1. Click Reports
2. Click Ballot Summary



Enter the Number of ballots delivered to the precinct for each ballot style:

3. (A) Enter the Starting number and the Ending number of the first ballot style. If using more than one ballot style or if any VAT ballots were used, tab to create a new line and repeat the process until all styles are listed. The Count will be calculated automatically.

4. (B) Enter the Number of AV return envelopes received by board, if absentee ballots are being processed in the precinct. If absentee ballots are not being processed in the precinct, this box will already be completed with a 0.

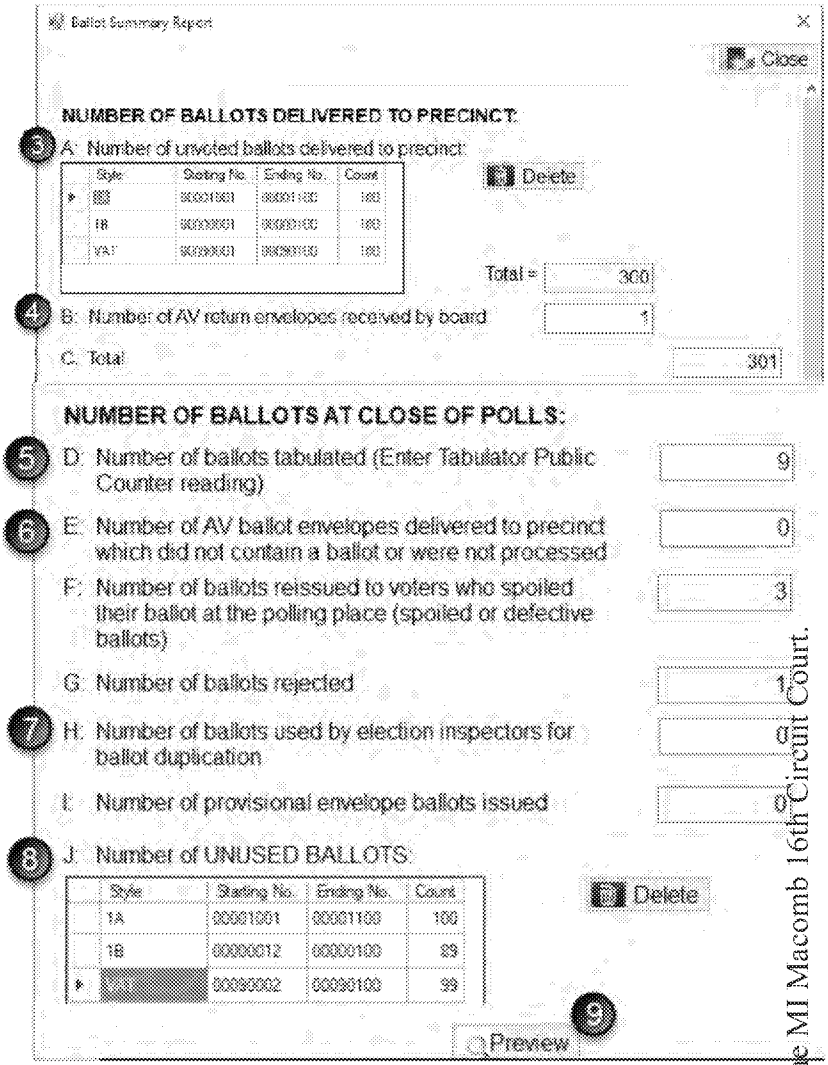
Enter the Number of ballots at close of polls:

5. (D) Enter Number of ballots tabulated from the Tabulator Public Counter reading

6. (E) Enter the Number of AV ballot envelopes delivered to precinct which did not contain a ballot or were not processed for any reason, if absentee ballots are being processed in the precinct. If absentee ballots are not being processed in the precinct, this box will already be completed with a 0.

7. (H) Enter the Number of ballots used by election inspectors for ballot duplication.

8. (J) Enter the Number of Unused Ballots by entering the Starting Number (the next ballot that would be issued) and the Ending Number of the unused ballots. If using more than one ballot style, tab to create a new line and repeat the process until all styles are listed. Tab out of the box or place the cursor in a different box to make the totals calculate.



SCROLL DOWN AND STOP – L must be 0. If L is not 0, double check items 3-8 and ensure everything was entered correctly. If there is a known reason for not balancing and it is unable to be resolved, a detailed *Remark* must be made to explain to the Board of Canvassers why the precinct does not balance.

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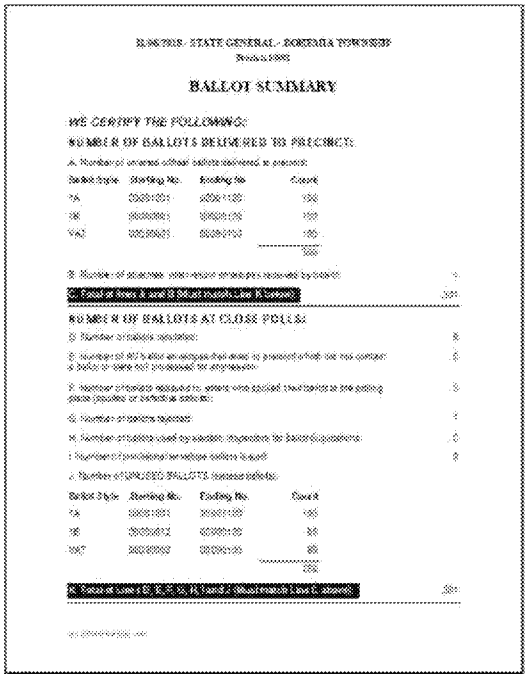
9. Click **Preview**

The **Ballot Summary** report will pop-up after clicking **Preview**. Be sure to review the summary to ensure all information was entered correctly and that the summary balances **(Line L = 0).** Line L may appear on a second page, so click the arrow to view the next page if necessary.

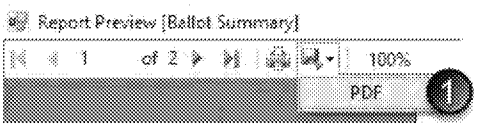

BALLOT SUMMARY

WE CERTIFY THE FOLLOWING:

NUMBER OF BALLOTS DELIVERED TO PRECINCT:

NUMBER OF BALLOTS AT CLOSE POLLS:

At this point, the **Ballot Summary** must be saved to the encrypted flash drive. If your precinct has the ability to print, the **Ballot Summary** should be printed as well. Otherwise, the reports will be printed at the Receiving Board.

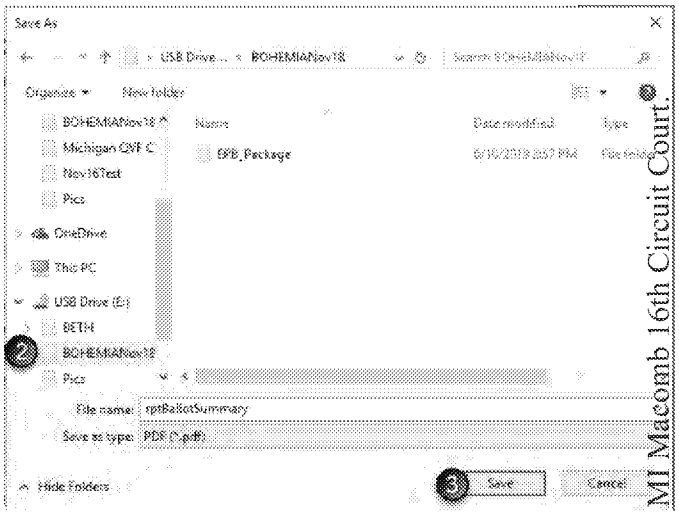


To save the Ballot Summary:

1. Click the disk icon and PDF

2. Double click the [ElectionDate] folder in the encrypted flash drive (Removable Disk E:). Drive letters may vary.

3. Click Save



After the **Ballot Summary** has been saved, print the report (if applicable), close out of the preview screen, and close the Ballot Summary screen as well.

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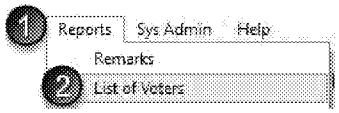
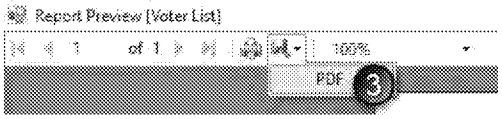
Save and Print List of Voters Report

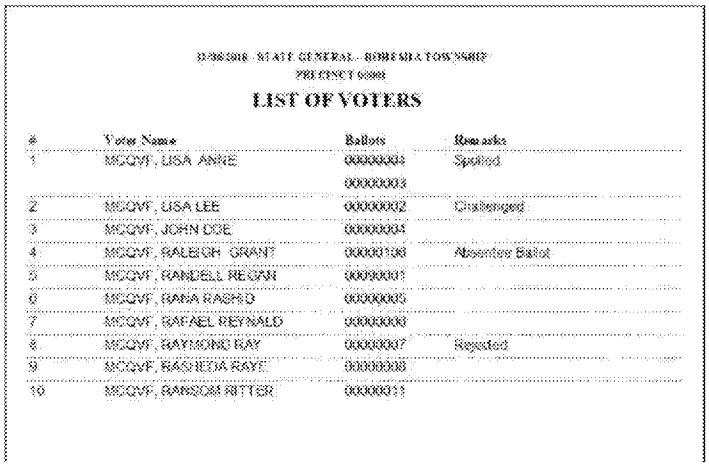




To save the List of Voters:

1. Click Reports
2. Click List of Voters
3. Click the disk icon and PDF
4. The [ElectionDate] folder selected for the Ballot Summary should automatically pop up. Always check to make sure you are in the encrypted flash drive and the correct folder before clicking Save

After the **List of Voters** has been saved, print the report (if printing in the precinct) and close out of the preview screen.



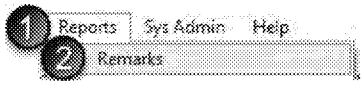
LIST OF VOTERS

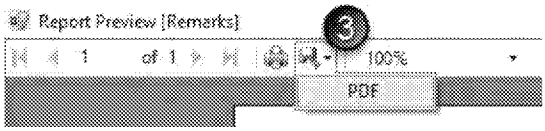
#	Voter Name	Ballot	Remarks
1	MCQVF, LISA ANNE	00000004	Spoiled
		00000003	
2	MCQVF, LISA LEE	00000002	Challenged
3	MCQVF, JOHN DOE	00000004	
4	MCQVF, RALEIGH GRANT	00000100	Absentee Ballot
5	MCQVF, RANDELL REGAN	00000001	
6	MCQVF, RANA RASHID	00000005	
7	MCQVF, RAFAEL REYNALD	00000006	
8	MCQVF, RAYMOND RAY	00000007	Rejected
9	MCQVF, RASHEDA RAYE	00000008	
10	MCQVF, RANSOM RITTER	00000011	

Save and Print Remarks Report

Remarks recorded in the EPB software using the General Remarks and/or Voter Remarks are saved in a report also and must be saved to the encrypted flash drive. If your precinct has the ability to print, the **Remarks** should be printed as well.

To save the Remarks report:

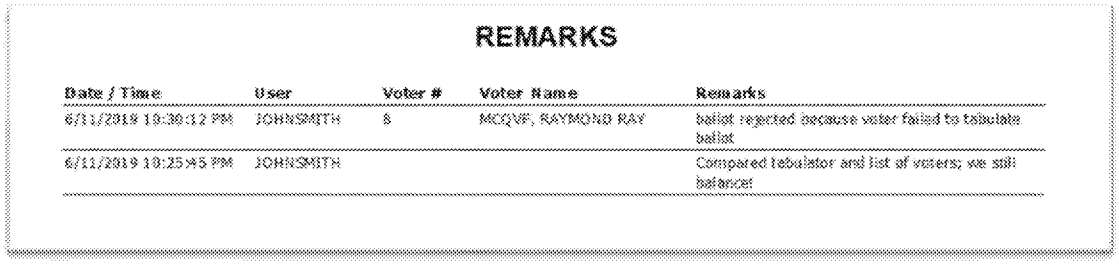




1. Click Reports
2. Click Remarks
3. Click the disk icon and PDF

4. The [ElectionDate] folder selected for the last two reports should automatically pop up. Always check to make sure you are in the encrypted flash drive and the correct folder before clicking Save

Note: There must be one recorded **Remark** for the report to save.



REMARKS

Date / Time	User	Voter #	Voter Name	Remarks
6/11/2019 10:30:12 PM	JOHNSMITH	8	MCQVF, RAYMOND RAY	ballot rejected because voter failed to tabulate ballot
6/11/2019 10:25:45 PM	JOHNSMITH			Compared tabulator and list of voters; we still balance!

After the **Remarks** report has been saved, print the report (if using printers in the precinct) and close out of the preview screen.

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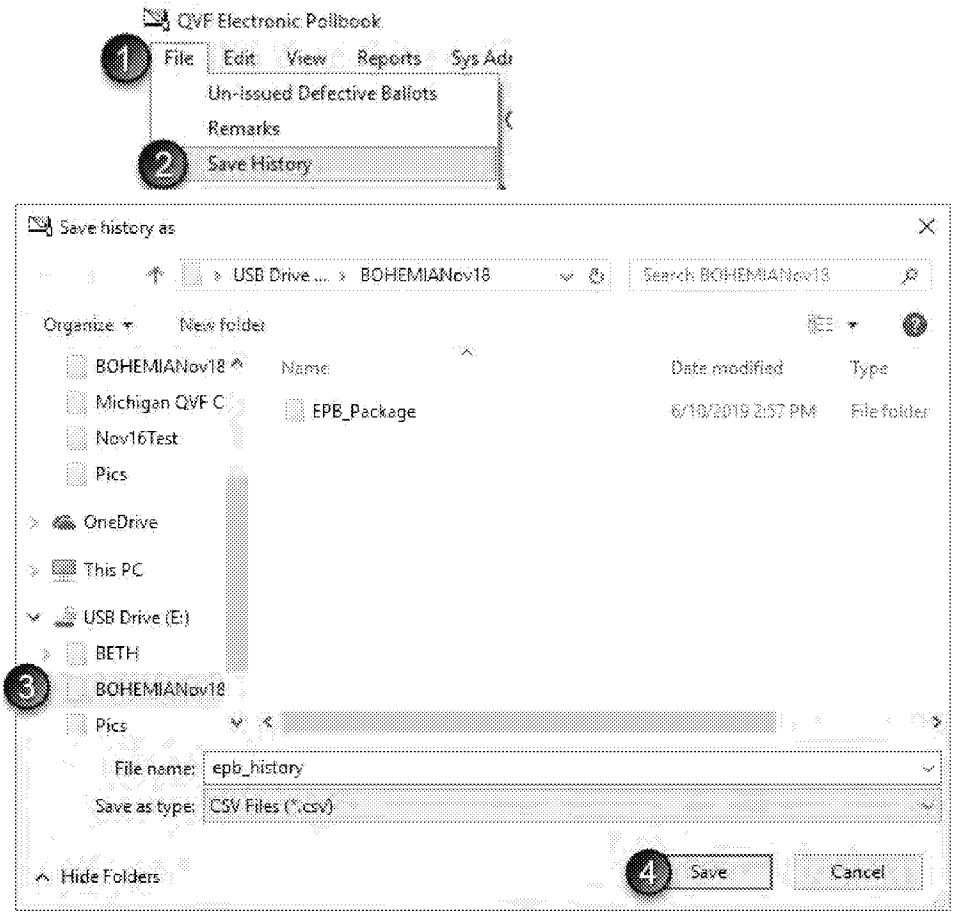
Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:

1. Click File
2. Click Save History
3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\
4. Click Save



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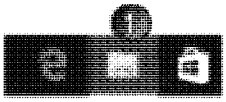
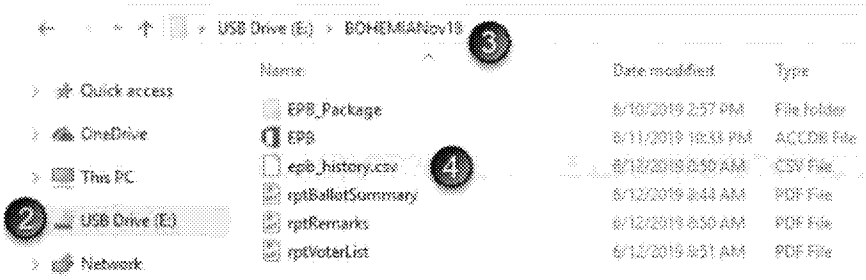
Ensure Files are on Flash Drive

To verify files have been saved on the encrypted flash drive:



1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB Back Up	ACCDB file
EPB_History	CSV file
rptBallot Summary	PDF file
rptRemarks	PDF file
rptVoter List	PDF file

You may also see the following files in your folder:

File Name	File Type
EPB_Package	File Folder
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

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Helpful Hints

Bar Code Scanners and Absent Voter Ballots
When processing absent voter ballots in the precinct, bar code scanners may be used to scan the absentee ballot application for voter look-up. If the laptop has 4 USB ports, the bar code scanner may be used along with the magnetic card reader. If the laptop only has 3 USB ports, the bar code scanner can be used to scan the back of a driver's license, replacing the need for a magnetic card reader.

Screen Resolution
Optimal screen resolution for the EPB laptop has been 1366x768. If your list of voters is not displaying on the right-hand side of your screen, the resolution needs to be adjusted.

To adjust the screen resolution:

1. Go to the desktop and right click
2. Click screen resolution
3. Select 1366x768

Additional Resources

This EPB Inspector Manual is now available in the EPB under Help.

Your clerk may have provided you with a set of EPB Procedural Videos downloaded onto this laptop. These provide quick reminders of how to perform various Election Day tasks.

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Frequently Asked Questions

1. The wrong ballot style was issued to a voter, how can it be corrected?

   Answer: If using different ballot numbers for each ballot style, no action is required except to remark the situation in the **Remarks**. If your ballot styles are numbered with the same ballot number series, open the voter's record, undo the issuance of the ballot with the incorrect ballot style, and reissue a Regular Ballot with a modified number using a letter before the number (for example, X0000012) and remark the situation in the **Remarks.**

2. Is there a way to setup all election inspector usernames and passwords into the software before the EPB software is downloaded on to the encrypted flash drive?

   Answer: Yes, QVF Basic or Complete users can set up usernames and passwords in QVF.

3. If using the QVF AV module, do I have to extract the EPB software from QVF **after 4:00 p.m.** on the Monday before the election to get the most up to date absent voter information?

   Answer: Yes, this is now required by law. Jurisdictions with over 50 precincts are required to do so on the Saturday prior to Election Day **after 2:00 p.m.**

4. Is there a way to update absent voter activity on the encrypted flash drive or in the Voter List portion of the EPB software after it has been installed on the laptop?

   Answer: No, not at this time. Also, remember that election inspectors record AV ballots in the EPB software (unless using the addendum list or an AVCB), but they must **not** record AV ballots in the EPB software before the opening of the polls.

5. Do I have to print the paper binder pollbook reports in the precinct?

   Answer: No, in fact, having the Receiving Board print the reports is highly recommended. Reports must be delivered to the Receiving Board on the encrypted flash drive in a sealed container by two election inspectors of opposing political party after the polls close. The Receiving Board then prints the reports and completes the paper binder pollbook.

6. Do I need to use a particular type of printer with the laptops?

   Answer: No. Most printers will work with the laptops as long as the proper printer driver is installed. Complete the installation as soon as possible to verify the laptop and printer are compatible.

7. Do I have to have a hardcopy precinct list and full paper binder pollbook with a List of Voters, Ballot Summary and a Remarks section at each precinct if I use the EPB software?

   Answer: Under the terms of your User Agreement, you are required to have a hardcopy Precinct List and a hardcopy List of Voters, Ballot Summary, and Remarks Section available for immediate delivery to the precinct in the event of a system failure. One may be printed from the Elections eLearning Center; see *Election Day Use of the QVF Precinct List*.

8. The EPB software allows me to issue a ballot to a voter who has already returned an absent voter ballot. Why is this permitted?

   Answer: Under rare circumstances, an absentee ballot may have been recorded incorrectly in QVF. Election inspectors **MUST** contact the local clerk to verify the status of the absentee ballot before issuing a ballot to a voter who, according to the EPB software, has already returned an absent voter ballot.

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9. How do I change the time and time zone on my laptop?

   Answer: Right-click on the time and date, click Date and Time Settings. Here you can select the appropriate time zone. If you need to adjust the time, turn off the "Set time automatically" option, then click the Change button. Once the time is corrected, you can turn the "Set time automatically" option back on.

10. Do I have to use the EPB software to process absent voters in the precinct?

    Answer: No, you may use the Addendum List of Absent Voters method and add the list to the paper binder pollbook.

11. What if an absent voter does not return their ballot? Or if the absent voter surrenders their AV ballot in the polls? Do I need to indicate this in the EPB software?

    Answer: No. Only process an absentee ballot in the voter's record when the ballot has been received for processing. If the voter has surrendered their absent voter ballot, simply issue a precinct ballot using the normal process. The Spoil a ballot function should never be used for an absent voter ballot in the EPB software.

12. Will Unlisted Voters transfer to QVF after the Voter History has been updated?

    Answer: Some may, and some may not. Unlisted voters without a driver's license or state ID number will not transfer into QVF after Voter History has been updated. The registration of an Unlisted voter must be added to QVF if it has not been already added, and then Voter History for the Unlisted voter can be entered manually in QVF under Voter>Voting History.

13. Is there a way to view all actions taken in the EPB on Election Day?

    Answer: Yes. An Activity Log Report can be viewed at any time by selecting Reports > Activity Log Report. This Report may be printed as well.

14. Is there a way to convert the List of Voters into a .csv file?

    Answer: Not at this time.

15. What if my laptop "freezes up" and stops responding?

    Answer: First, try to close and reopen the EPB program, using Ctrl + Alt + Delete if necessary to use the Task Manager to end the task and close the EPB application. If that doesn't work, you may restart the computer. Remember to log back into the flash drive as well as the EPB program before you begin working again.

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Glossary

Antivirus Software is a software program that helps protect the laptop from viruses that could damage or shut down the machine.

Backup is a file that replicates and saves entered data for use in the event of a system failure.

Ballot Style is a designation to distinguish amongst ballots in a precinct that has a District split. For example, Precinct One represents voters from County Commission District 5 and 7. If the County Commission position is on the ballot, Precinct One will have two ballot styles, one for District 5 and one for District 7.

BitLocker is free encryption software from Microsoft. For the E-Pollbook, it is software on flash drives issued by the State after 2015, used to protect data on a flash drive with a password.

Data Security is the means of ensuring that data is kept safe from corruption and that access to it is suitably controlled. Thus, data security helps to ensure privacy. It also helps in protecting personal data.

e-Pollbook Software is a computer software program created in the Qualified Voter File (QVF) to be loaded on a laptop and used in the precinct on election day to record voters and the ballots they are issued.

Encryption is the process of transforming information using an algorithm to make it unreadable to anyone except those possessing the password.

Encrypted Flash Drive is a digital storage device that has the ability to encrypt data and keep the data secure.

Encryption Password is a password created to allow access to the encrypted e-pollbook software once downloaded from QVF.

Election Geography is a function of QVF where precinct combinations and ballot style names can be set for an election. The information entered in the QVF Election Geography module will then tell the EPB software which precincts have been combined and the preferred name for ballot styles in split precincts.

Lockout is an e-pollbook software feature that disallows the issuance of a ballot number more than once per ballot style.

Privacy Zone is a term the V-Safe 100 software uses to define the encrypted area of the flash drive. This only applies to flash drives issued by the State prior to 2015.

Receiving Board is a board established by the local Election Commission responsible for ensuring 1) all ballot containers delivered to the clerk after the polls close are properly sealed 2) all seal numbers are properly recorded and 3) the number of names entered in the Poll Book balances with the number of ballots counted in the precinct. For more information visit michigan.gov/elections and click on "Information for Election Administrators."

Strong Password is a password that contains a combination of 8-16 characters, mixed case with at least one number.

V-Safe 100 is the name of the encryption software installed on earlier versions of the State issued flash drive prior to 2015.

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Quick Reference Checklists

Pre-Election Day – Clerk Setup

General Laptop Preparation

- ❒ Update antivirus software
- ❒ Ensure print driver software has been installed (if applicable)
- ❒ Update Windows
- ❒ Fully charge battery

EPB Software Download from QVF

- ❒ Review Election Geography
- ❒ Set up EPB inspector accounts in QVF
- ❒ Insert the encrypted flash drive into a USB port on the QVF computer
- ❒ Login to encrypted flash drive
- ❒ Create a folder on the desktop
- ❒ Log into QVF and create the EPB software
- ❒ Move EPB software to encrypted flash drive

EPB Installation on laptop

- ❒ Take encrypted flash drive to laptop and plug in to a USB port
- ❒ Log into encrypted flash drive
- ❒ Copy folder to the desktop
- ❒ Run the EPB software setup file
- ❒ Log into the EPB software and select the precinct
- ❒ Set Options
- ❒ Setup Users

Election Day – Election Inspector Setup

Preparing the EPB for Opening the Polls

- ❒ Power laptop on
- ❒ Make sure the laptop is not connected to the internet and is in Airplane Mode
- ❒ Insert the encrypted flash drive into a USB port
- ❒ Log into the encrypted flash drive
- ❒ Log into the EPB software
- ❒ Change options and setup users as recommended by the Clerk, e.g., allow the recording of AV Ballots
- ❒ Perform the first EPB backup to establish correct file path to the flash drive.

Throughout the Day

- ❒ Assign ballots and ensure all voters are documented in the EPB software
- ❒ Verify status problems
- ❒ Backup the EPB software regularly
- ❒ Record Remarks as necessary

Closing the Polls

- ❒ Perform one final Backup
- ❒ Complete the Ballot Summary Report, ensure it balances (L=0) and save to the encrypted flash drive
- ❒ Save the List of Voters Report to the encrypted flash drive
- ❒ Save the Remarks Report to the encrypted flash drive
- ❒ Save Voter History file to the encrypted flash drive
- ❒ Ensure all files are on the encrypted flash drive
- ❒ Print reports (if applicable)
- ❒ Deliver encrypted flash drive under seal in the Clerk-recommended container to the Receiving Board or Clerk

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Post Close of Polls

Receiving Board

- ❒ Print Ballot Summary
- ❒ Print List of Voters
- ❒ Print Remarks

Clerk

- ❒ Upload Voter History *within* 7 days of the election
- ❒ Uninstall the EPB software from the laptop 7 days *after* the canvas of the election
- ❒ Delete the [ElectionDate] folder from the encrypted flash drive 7 days *after* the canvas of the election
- ❒ Delete the [ElectionDate] folder from the QVF desktop 7 days *after* the canvas of the election (if applicable)
- ❒ Delete any other EPB file(s) that may have been saved
- ❒ Properly store the laptop and associated battery

Maintenance

- ❒ Calendar and update antivirus software
- ❒ Calendar and update Windows updates

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH CIRCUIT COURT
COUNTY OF MACOMB

MICHAEL LEWIS BUTZ,

Plaintiff,

v.

Case No. 2023-002852-CZ
Hon. Edward A. Servitto, Jr.

JENNIFER ZELMANSKI, et al.

Defendants.

_____/

ATTACHMENT M

Detroit News v Co of Wayne, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 235831 (March 15, 2002)

_____/

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

COURT OF APPEALS

DETROIT NEWS,

Plaintiff-Appellee,

v

COUNTY OF WAYNE,

Defendant-Appellant.

UNPUBLISHED
March 15, 2002

No. 235831
Wayne Circuit Court
LC No. 01-118800-CZ

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff brought this action alleging defendant violated Michigan's Freedom of Information Act, MCL 15.231 *et seq.* ("FOIA") by refusing to disclose certain employee information about Wayne County employees. The trial court determined that the requested information was not exempt from disclosure and ordered defendant to produce the requested records. Defendant appeals by right. We affirm.

Pursuant to the FOIA, plaintiff requested the following information from defendant: (1) the name, job title, and salary or hourly pay rate for all Wayne County officials and employees for the calendar years 2000 and 2001, (2) the names of all employees who received longevity pay, and the amount of each payment for the calendar years 1999 and 2000, (3) the names of all employees who received pay for annual leave, accumulative leave, and the amount of leave pay each received for the calendar years 1999 and 2000, (4) the names of all employees who received pay for accumulated sick leave and the amount of sick pay each received during the calendar years 1999 and 2000, (5) the names of all employees who received flat rate mileage reimbursements and the monthly amount each received as of April 2, 2001, and (6) the names of all employees who had a county vehicle assigned to them as of April 2, 2001, and the year, make and model of each assigned vehicle.

Defendant denied plaintiff's request. Defendant relied on MCL 15.243(1)(d) of the FOIA, which provides that "[r]ecords or information specifically described and exempted from disclosure by statute" may be exempted from disclosure as a public record under the FOIA. Defendant maintained that the records plaintiff sought were part of the records of the Department of Personnel/Human Resources, a division created under the Wayne County Charter ("The Charter"). Defendant asserted that the Charter is controlled by the Civil Service Act, MCL 38.401 *et seq.*, which provides that "employees' records shall be confidential and not open for public inspection." MCL 38.412(g).

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Plaintiff filed a complaint against defendant for an alleged FOIA violation along with a motion for an expedited order to show cause. The trial court proceeded on the assumption that the Civil Service Act governs the Charter, but the court concluded that the requested records did not fall within the exemptions of MCL 38.412(g), and ordered defendant to produce the records.

Defendant's appeal raises two legal issues: (1) Does the County Employees Civil Service Act ("Civil Service Act"), MCL 38.412(g), exempt the requested information from FOIA disclosure, and (2) can a negative inference be made that the Legislature intended to protect from disclosure other public employee salaries when it amended the FOIA, Section 13a, MCL 15.243a, to expressly provide for the disclosure of the salaries of public education employees? We conclude that the Civil Service Act does not exempt the requested information from FOIA disclosure, and that the Legislature, by amending the FOIA, did not intend to bar the FOIA disclosure of public employee salaries.

I

Section 13 of the FOIA, MCL 15.243(1)(d), provides that "[r]ecords or information specifically described and exempted from disclosure by statute" may be exempted from disclosure as a public record. Defendant contends that MCL 38.412(g), of the Civil Service Act exempts the requested information from disclosure. We conclude that MCL 38.412(g) is inapplicable to the requested records.

A determination whether a public record is exempt from disclosure under the FOIA is a mixed question of law and fact. *Schroeder v City of Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). We review the trial court's factual findings for clear error and review the questions of law de novo on appeal. *Id.* Statutory interpretation is a question of law that is also subject to review de novo on appeal. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

The trial court did not rule on the question whether the Civil Service Act governs the current civil service system in Wayne County, in light of the Wayne County Charter and Reorganization Plan ("Charter"), adopted by the electorate on November 3, 1981, effective January 1, 1983.[1] However, even assuming arguendo, as did the trial court in this case, that the Civil Service Act applies, a reading of the plain language of MCL 38.412(g) shows that it does

---

[1] At the request of the trial court, the parties orally argued the issue of whether the Civil Service Act governed the Charter, but the trial court did not decide the issue, and it proceeded under the assumption that the Civil Service Act applied. Because the argument was not decided by the court, it is not preserved for appeal. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 562; 475 NW2d 304 (1991); *Herald Co, Inc, v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). Further, defendant failed to brief, and plaintiff did not fully brief, this issue in the trial court, and both parties have not fully briefed this question on appeal, giving their arguments only cursory attention. We decline to address the issue when the record relating to it is not fully developed and when the issue is unnecessary for this Court's review. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 356 n7; 616 NW2d 677 (2000).

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not exclude the requested records from FOIA disclosure. Section 13 of the Civil Service Act, MCL 38.412, provides that the Civil Service Commission:

> (g) . . . Shall have such other powers and perform such other duties as may be necessary to carry out the provisions hereof.
>
> * * *
>
> **Service records**. It shall cause to be kept in each department and division thereof, records of the service of each employee, known as "service records". These records shall contain fact statements on all matters relating to the character and quality of the work done and the attitude of the individual to his work.
>
> **Service records; armed services records; confidential records.** It shall keep a roster of the employees of the county, together with a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge. *All such "service records" and employees' records shall be confidential and not open for public inspection.* [Emphasis added.]

Defendant argues that the requested information qualifies as a "service record," defined by MCL 38.412(g) as those records that "contain fact statements on all matters relating to the character and quality of the work done and the attitude of the individual to his work." In support of its argument, defendant merely offers a generalized statement that "[c]ompensation and benefit information include facts related to the employee's work and attitude."[2]

The exemptions in the FOIA are to be narrowly construed, and the burden of proving their applicability rests with the public body. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993). To meet the burden of proving that public records are exempt from disclosure, the public body claiming the exemption should provide complete particularized justification, rather than simply repeat statutory language. *Hyson v Dep't of Corrections*, 205 Mich App 422, 424; 521 NW2d 841 (1994). Because defendant failed to support its claim with a complete particularized justification, it failed to carry its burden of showing that the requested records qualify as "service records."

Defendant also argues that MCL 38.412(g) does not define the term "employees' records" and that the plain meaning of the term encompasses the requested records. We disagree. A plain reading of the language of the statute shows that it does point to the definition of the term "employees' records" and excludes the requested records from its statutory exemption.

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first criterion in determining intent is the specific language of the statute. *Indenbaum v Michigan*

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[2] We note that during oral argument, defense counsel conceded that the statute adequately defines the term "service records."

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Bd of Medicine (After Remand), 213 Mich App 263, 270; 539 NW2d 574 (1995). The Legislature is presumed to have intended the meaning it plainly expressed. *Id.* In determining legislative intent, we look first at the words of the statute. *Id.* The words of the statute must be given their ordinary and plain meaning; only if the language is ambiguous may the courts look beyond the statute to determine the intent of the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). When statutory language is clear and unambiguous, this Court must honor the legislative intent as clearly indicated in that language. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). No further construction is required or permitted. *Id.*

The statutory language at issue is the following sentence: "All such 'service records' and employees' records shall be confidential and not open for public inspection." MCL 38.412(g). Plaintiff argues that the word "such" modifies the term "employees' records." Defendant argues that it does not. The only logical conclusion that can be drawn from a reading of the sentence is that the word "such" modifies the term "employees' records" because of the absence of a separating comma after the term "service records" and before the connective word "and." Punctuation is an important factor in determining legislative intent, and the rules of grammar are presumed to have been known to the Legislature. *Kizer v Livingston Co Board of Comm'rs*, 38 Mich App 239, 251; 195 NW2d 884 (1972). Therefore, the absence of a separating comma before the connective conjunction suggests that the word "such" was intended to modify the term "employees' records."

The word "such" is not defined in the statute. Therefore, we look to the dictionary definition for its ordinary and plain meaning. *DiBenedetto, supra* at 402. The relevant dictionary definitions of the adjective "such" include "of the kind, character, degree . . . indicated or implied" or "being the . . . things indicated." *Random House Webster's College Dictionary* (1997). The word "such" is properly used as an adjective when reference has previously been made to a category of persons or things, meaning "of that kind." *Garner, A Dictionary of Modern American Usage* (Oxford University Press, 1998). Furthermore, "such" is a pointing word that must refer to a clear antecedent. *Id.* A pointing word should always have an identifiable referent. *Id.* A "pointing word" is a word like *this*, *that*, *these*, *those*, and *it*, which points directly to an antecedent. *Id.* An "antecedent" is a word, phrase, or clause that is replaced later by a pronoun or other substitute. *Random House Webster's College Dictionary* (1997). A reading of the sentence in question points directly to two antecedents: the "service records" in the immediately preceding paragraph, and the "roster of the employees of the county, together with a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge" in the immediately preceding sentence. Because it is clear that the term "service records" in the sentence at issue refers to the "service records" defined in the preceding paragraph in the statute, the only conclusion to be made is that the term "employees' records" in the sentence at issue is the term that the Legislature chose to describe the second antecedent. Contrary to defendant's contention that the term "employees' records" was not defined in the statute, we conclude that a plain reading of the statute shows that it is defined, albeit indirectly.

We reject defendant's argument that had the Legislature intended to restrict "employees' records" to the items described in the preceding sentence, the Act would have read "these records shall be confidential" or "the foregoing records shall be confidential." Defendant does not

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explain the basis of its conclusion that the above sentence structures are the only syntax usages that the Legislature employs or should employ.

We find no ambiguity in the language of MCL 38.412(g), and therefore we may not look beyond the statute to determine the intent of the Legislature. *DiBenedetto, supra* at 402. Thus, an "employee record" as defined by MCL 38.412(g) is a record that contains "a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge." Defendant failed to show that the requested records of employee job title, salary, paid or used sick and annual leave, mileage reimbursement or the use of assigned county vehicles, have "a bearing on promotion, transfer or discharge." Therefore, the requested records do not fall within the definition of "employees' records" pursuant to MCL 38.412(g), and are not exempt from FOIA disclosure.[3]

II

Defendant next argues that when the Legislature amended the FOIA, section 13a, MCL 15.243a,[4] to expressly require only the disclosure of the salaries of public education employees, it did not expressly include the disclosure of other public employee salaries, and, consequently, a negative inference may be made that the Legislature did not intend that the salaries of other government employees be disclosed to the public. We disagree.

The FOIA is an act requiring full disclosure of public records unless a statutory exemption precludes the disclosure of information. *Messenger v Consumer & Industry Services*, 238 Mich App 524, 531; 606 NW2d 38 (1999); MCL 15.243(1)(d). Rather than specifying which records would be subject to disclosure, the Legislature chose to provide that, unless expressly exempt under Section 13 of the FOIA, all public records are subject to public disclosure. *Penokie v Michigan Technological Univ*, 93 Mich App 650, 657; 287 NW2d 304 (1979).

Here, it is undisputed that salary information of Wayne County employees are public records. However, defendant cites no statutory exemption that expressly exempts the release of

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[3] We do not address here the issue whether the disclosure of the requested information would constitute an invasion of individual privacy, subsection 13(1)(a) of the FOIA, MCL 15.243(1)(a), because defendant does not raise it on appeal. We note, however, that defense counsel alluded to the question during oral argument.

[4] Section 13a of MCL 15.243a reads as follows:

> Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college. [Footnote omitted.]

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the Wayne County employee salaries, other than MCL 38.412(g), which, as previously discussed, is inapplicable. In construing a statute, a court may consider a variety of factors and apply principles of statutory construction, but should not ignore common sense. *Marquis v Hartford Accident & Indemnity (After Remand),* 444 Mich 638, 644; 513 NW2d 799 (1994). Common sense dictates that the manner in which Wayne County allocates taxpayer monies in the form of salaries is "information regarding the affairs of government and the official acts of those who represent [the people] as public officials and public employees." MCL 15.231(2).

The Legislature enacted 1979 PA 130, effective October 26, 1979, which amended the FOIA by adding Section 13a, MCL 15.243a. *Penokie, supra* at 664 n 7. The addition mandates the disclosure of the salary records of employees of institutions of higher education, school districts, intermediate school districts and community colleges. MCL 15.243a. In *Penokie*, this Court noted that MCL 15.432a represents a clarification of, rather than a substantive change in, prior law.[5] *Id.* at 664 n 7. The legislative history of the amendment indicates that the purpose of the amendment was to remove from the public educational institutions the discretion whether to disclose salary information, and make the disclosure mandatory pursuant to the FOIA. As noted in the House Legislative Analysis Section regarding the release of school salary information, the proponents of the bill argued that because other public employee salary information was available, there was no reason to provide an exemption for the disclosure of school teacher salaries. Thus, because the FOIA does not expressly exempt the disclosure of records of public employee salaries, defendant's argument is without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder

[5] It must be noted here that the Legislature enacted MCL 15.234a subsequently to the decision in *Penokie*, but prior to the release date of the opinion. *Penokie, supra* at 664 n 7. The issue in *Penokie* was the disclosure of salary records of university employees pursuant to the privacy provision of FOIA, MCL 15.243(1)(a).

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S EXHIBITS TO 03/25/2024 BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 1

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Jennifer Zelmanski (City of Roseville)

From: Michael Butz [redacted]@gmail.com>
Sent: Tuesday, May 2, 2023 3:31 PM
To: Jennifer Zelmanski (City of Roseville)
Subject: Michael Butz FOIA Request - Electronic Poll Book raw data files (EPB_History.CSV)
Attachments: mcl-168-509gg.pdf; mcl-168-811.pdf; 52 USC Chapter 207.pdf; (Roseville) Butz Michael Lewis - Clerk Letter - EPB-FOIA Request - 20230502r.pdf

Good afternoon,

Attached is a FOIA request for your jurisdiction's Electronic Poll Book raw data files for the elections concluding November 8, 2022 and May 2, 2023 along with relevant supporting documents:

- MCL 168.509gg
- MCL 168.813
- 52 USC Chapter 207

Please don't hesitate to contact me with any questions or concerns.

Sincerely,

Michael Butz

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

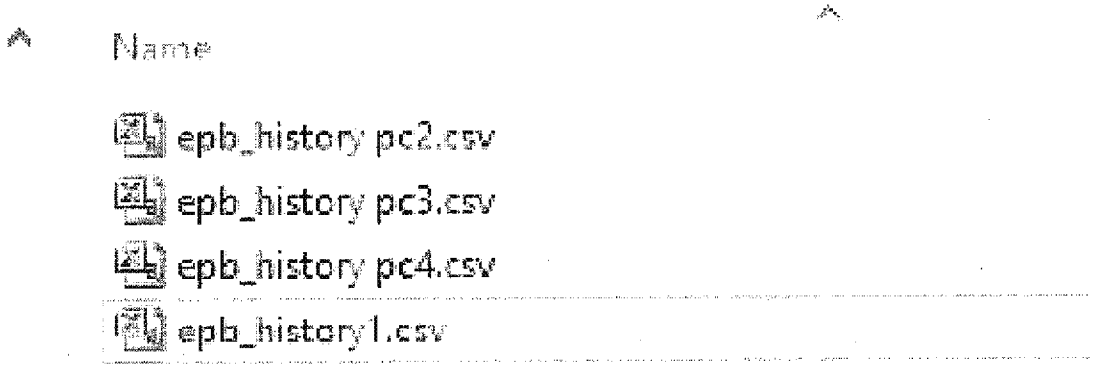
May 2, 2023

Roseville Clerk's Office
Attn Jennifer Zelmanski

Re: Freedom of Information Act ("FOIA") Request

Dear Jennifer Zelmanski:

Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023. These files should be in .CSV or .XLS format and typically have a file name beginning with "EPB_History" (see below screenshot).



Please note that these files likely contain the full birthdate (month, day and year) and driver's license number of the registrants in your jurisdiction, which is exempt from FOIA release (MCL 168.509gg). Therefore, please open the copy of the digital file(s), remove or redact the birth month, birth day and drivers license number information, and save your changes before sending the file(s) to me. If you are able to retain the year of birth for the registrants as is permissible per MCL 168.509gg, it will be greatly appreciated.

Instructions on how to locate the requested information is available on pages 40-41 of the Electronic Poll Book Refresh Manual provided by the Michigan Board of Elections. These pages are included in Exhibit 1 below for your convenience.

Once the above redactions have been made, there should be no other FOIA exempt information in the EPB digital records requested. I am not requesting any software or information which would somehow be deemed proprietary. I am only requesting public record information as is my right.

Please note that the EPB .CSV files are an original record and a component of the electronic voting system audit trail. As such, these digital records should be retained by your office for a federal minimum of 22 months (52 USC 207) and a state minimum of 24 months (MCL 168.811).

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

I prefer to receive the requested information via email as a file attachment. If email is unavailable, please contact me to coordinate an alternative method to fulfill my FOIA request since I would be happy to bring a USB drive to your office so that you or your staff can copy the file(s) to.

Please don't hesitate to contact me if you have any questions.

Thank you.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a)d.
PII MCL 15.243(1)(a) nship, MI PII MCL 15.243
586.596 PII MCL 15.
PII MCL 15.243(1)(@gmail.com

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 2

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

MDOS-FOIA

From: Michael Butz <[redacted]@gmail.com>
Sent: Saturday, May 13, 2023 5:29 PM
To: MDOS-FOIA; foia@macombgov.org
Subject: FOIA Request for Electronic Poll Book public records for 11/8/2022 and 5/2/2023 Elections

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Greetings,

I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for each voting jurisdiction within Macomb County for the November 8, 2022 and May 2, 2023 elections. As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.

Below are the specific data elements requested:

1. Voter full name (First, Middle, Last, Suffix)
2. Voter ID
3. Voter number
4. Voter ballot number
5. Date/time of poll book record entry
6. Voter ballot type
7. Voter school district code
8. Voter birth year
9. Precinct
10. Action Description
    a. Issue Regular ballot
    b. Record AV Ballot
    c. UNDO: Issue Regular Ballot
    d. Spoil Ballot
    e. Add standalone remark
    f. Other?
11. Is Undone (True or False)
12. Unlisted voter name (if applicable)

This request includes absentee voter counting boards within Macomb County.

I recognize that the Electronic Pollbook contains personal information that is exempt from disclosure per MCL168.509gg such as driver's license number, day of birth and month of birth. Please redact this information as is required in fulfilling this request.

Please understand that I have no desire to obtain any details relating to cybersecurity plans, cyber security methods, voting software coding, voting software infrastructure, voting software configuration

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

or anything else specific to voting software in use for these elections with this specific FOIA request. I seek only the information contained within the Electronic Poll Book related to the elections for November 8, 2022 and May 2, 2023.

Don't hesitate to contact me if it is necessary to refine or clarify this request any further.

Please be advised that I have carbon copied additional persons on this request.

Sincerely,

Michael Lewis Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1)(
(586) 596 PII MCL 15.243(1)
PII MCL 15.243(1)(a)@gmail.com

Document received by the MI Macomb 16th Circuit Court.

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EXHIBIT 3

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

FREEDOM OF INFORMATION ACT NOTICE

September 6, 2023

Michael Butz
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), MI PII MCL 15.243(1

Via Email: PII MCL 15.243(1)(a)***@gmail.com***

Michael Butz:

The Michigan Department of State (Department) has finished processing your request for records received via email on May 13, 2023, made pursuant to the Michigan Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231 *et seq*. A request sent electronically is considered received on the business day following its transmission; here, May 15, 2023, with an extension sent for a due date of June 5, 2023. MCL 15.235(1). This notice is issued in response to your request, a copy of which is enclosed and incorporated herein.

Your request seeks *"…Electronic Poll Book for each voting jurisdiction within Macomb County on November 8, 202 and May 2, 2023"*.

The Department has received your full non-refundable processing fee in the amount of **$193.72**. The information is provided on the enclosed encrypted flashdrive. The password will be sent separately.

If you have any questions, please contact me. The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/sos, under the "FOIA" tab at the bottom of the page.

Sincerely,

Sherri Hines

Sherri Hines
FOIA Coordinator
Bureau of Elections
BOERegulatory@michigan.gov

Enclosures

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Freedom of Information Act Detailed Itemization of Fees

FINAL

Date: September 6, 2023 **Request ID: 628**

Michael Butz
PII MCL 15.243(1)(a) Rd
PII MCL 15.243(1)(a), MI PII MCL 15.243(1
PII MCL 15.243(1)(a)*@gmail.com*

PAID

Cashier: Please email *BOERegulatory@michigan.gov* when fees are received.

DESCRIPTION	QUANITY	UNIT COST	AMOUNT
Labor costs* to search, locate, and examine** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	2	$55.09	$ 110.18
Labor costs* to search, locate, and examine** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	1	$33.33	$33.33
Labor costs* for review and separation of exempt from non-exempt material**	0.5	$55.09	$ 27.55
Non-paper physical media - encrypted flash drive	1	$6.00	$ 6.00
Duplication and publication (copying, scanning, etc.)		$0.10	$ -
Labor costs* to duplicate or publish** - Electronic Poll Book for Macomb County 11/8/2022 & 5/2/2023 elections	0.5	$33.33	$ 16.67
Mailing padded pouch and postage		$9.90	$ -
SUBTOTAL			$ 193.72
DEPOSIT RECEIVED			$ 193.72
TOTAL BALANCE DUE			$ -

Make check payable to State of Michigan and mail to: Michigan Department of State, Cashier Unit, 7064 Crowner Drive, Lansing, MI 48918

*Labor costs will be calculated using the lowest paid Department employee capable of each task. If more than one hourly rate is used, each will be listed on other copies of this form.

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EXHIBIT 4

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STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ; 2023-002837-CZ; 2023-002838-CZ; 2023-002839-CZ; 2023-002840-CZ; 2023-002841-CZ; 2023-002842-CZ; 2023-002843-CZ; 2023-002844-CZ; 2023-002845-CZ; 2023-002847-CZ; 2023-002848-CZ; 2023-002850-CZ; 2023-002851-CZ

AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

Michael Lewis Butz, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)
586.596 PII MCL 15.243

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_____/

AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

I, Jonathan Brater, state as follows:

1. I have been employed by the Department of State as Director of Elections since January 2, 2020, and in such capacity serve as Director of the Bureau of Elections (Bureau).

2. I bring this declaration in support of Defendant Secretary of State Jocelyn Benson's motion for summary disposition.

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3. I am personally knowledgeable of the programming and operation of electronic poll books (EPB) and the instructions to election officials for the operation of EPBs, as well as associated laws and retention schedules.

ELECTRONIC POLL BOOK (EPB) PROCEDURES

4. The Department of State's Bureau of Elections developed the computer software in the EPB as a tool for local clerks and election inspectors to assist in election day operations. MCL 168.668b. The EPB contains built-in security to protect the integrity of our elections and the privacy of voters.

5. The Bureau of Elections provided each precinct with a laptop computer, encrypted flash drive, a mouse, a magnetic card reader, and a case to administer the EPB program (hereafter also referred to as "software"). Clerks can also buy their own compatible laptop and download the EPB software onto that laptop; clerks can also buy their own compatible peripheral devices such as encrypted flash drives. (Attachment A, Electronic Pollbook Refresh Clerk's Manual for Windows 10 & BitLocker Flash Drives, p 5.)

6. The Bureau of Elections' laptop containing the EPB software and encrypted flash drive are essential components to protecting sensitive voter information.

7. Clerks are instructed to use the EPB software to download files from the Qualified Voter File (QVF) after 4 p.m. on the day before the election to ensure an accurate voter list is downloaded (with the exception of the City of Detroit, which may begin downloading on the Saturday before the election). MCL 168.668b.

8. The EPB software takes the live voter registration data in the QVF and generates an offline voter list for election day that allows election inspectors to easily look-up voters and assign ballot numbers.

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9. To ensure security of the EPB software and voter information, clerks are directed to create an EPB login for each election inspector on election day.

10. The EPB is used on election day to process voters by assigning ballots, verifying voter information, and recording voter history (which helps prevent double voting). The EPB contains a status "flag" for any voter that has an issue, such as an outstanding absentee ballot, that needs to be addressed before voting in-person. (Election Officials' Manual, Chapter 11, p 11.)[1]

11. The EPB software allows election inspectors to make notations for spoiled ballots, surrendered absentee ballots, rejected ballots, challenged ballots, and provisional ballots to ensure accurate reports are generated after the polls close. (Managing Your Precinct on Election Day Election Inspectors' Procedure Manual, p 38.)[2]

12. After the polls close on election day, the clerks are instructed to save data in the EPB software to the flash drive and generate and print reports for the paper binder pollbook.

13. The EPB software generates the three reports necessary to print and complete the paper binder pollbook/official record for each precinct. These reports are the Ballot Summary, Voter List, and the Remarks report. (Election Officials' Manual, Chapter 12, p 19.)[3]

14. The Ballot Summary report generates a breakdown of all ballots that were processed at that precinct. This includes tabulated, absentee, spoiled, defective, rejected,

[1] See Election Officials' Manual, Chapter 11: Election Day (michigan.gov) (accessed March 25, 2024.)
[2] See Managing-Your-Precinct-on-Election-Day-July-2022.pdf (michigan.gov) (accessed March 25, 2024.)
[3] See Election Officials' Manual, Chapter 12: XII_Precinct_Canvass__Closing_the_Polls.pdf (michigan.gov) (accessed March 25, 2024.)

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provisional ballots, and unused ballots at that precinct. This report is saved to the encrypted flash drive.

15. The Remarks Summary report includes all remarks entered by election inspectors on election day. This allows any unusual circumstances for which there is not another recording function in the EPB to be documented and saved to the encrypted flash drive.

16. The Voter List report identifies the voters at the precinct and the type of ballot that they were issued. This is downloaded and saved to the encrypted flash drive. Notably, the list of voters who appeared at the precinct can also be determined by reviewing the paper applications to vote completed by voters who vote at the precinct; these paper applications are also saved. (Attachment A, Electronic Pollbook Refresh Clerk's Manual for Windows 10 & BitLocker Flash Drives, p 38.)

17. Paper reports are printed either at the precinct or the receiving board. If the election inspectors at the precinct do not print the report at the precinct, the electronic copy of the report is sent to a designated receiving board that prints the files and creates the paper binder pollbook or official record. (Election Officials Manual, Chapter 12, p 19.)[4]

18. Within seven days after election day, the clerk or designated QVF users must upload data from the encrypted flash drive into QVF. This uploads voter history for each voter on the EPB voter list into the voter's QVF record. (Attachment A, Electronic Pollbook Refresh Clerk's Manual for Windows 10 & BitLocker Flash Drives, p 46.)

19. Clerks or designated QVF users are instructed to, *after* uploading data to QVF, delete the EPB software and associated files from all devices, including the laptop and encrypted

[4] See Election Officials' Manual, Chapter 12: XII_Precinct_Canvass__Closing_the_Polls.pdf (michigan.gov) (accessed March 25, 2024.)

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flash drive, by the seventh day following the final (state or county, as applicable) canvass unless there is a court order to preserve the documents; the Secretary of State requests the data be preserved; or there is a pending recount. Deleting the EPB software and data is only done after paper copies have been printed and the information has been uploaded to the QVF. Retention of these documents satisfies the requirements that election returns and records be preserved under MCL 168.811 and 52 US 20701. Only after these records are preserved are the software and data file copies deleted from the encrypted flash drives. (Attachment A, p 48.)

20. Deleting the EPB software and associated data is essential to ensure the security of voter information because the EPB data includes personal identifying information for voters. Deleting the EPB is also essential in preventing outdated versions of the software or data files from being used accidentally in subsequent elections, which could lead to errors or out-of-date voter data appearing in the electronic pollbook.

FREEDOM OF INFORMATION ACT REQUESTS

21. On February 12, 2021, prior to the FOIA requests by the Plaintiff, the Bureau of Elections sent a communication to County Clerks reminding them that the EPB software provided by the Bureau of Elections contains sensitive voter information that should be deleted absent one of the exceptions noted in the EPB manual. (Attachment B, 2/12/21 memo.) This instruction was provided in a memorandum to clerks, a routine communication that had been sent after elections for many years. (Attachment A, Electronic Pollbook Refresh Clerk's Manual for Windows 10 & BitLocker Flash Drives, p 3, 48.)

22. On November 14, 2022, Bureau or Elections staff emailed local clerks regarding FOIA requests concerning the EPB. The email instructed clerks to consult with their local

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attorney but indicated that "some" of the information being requested may be exempt from the FOIA requests. (Attachment C, 11/14/22 email.)

23. Beginning May 2023, Plaintiff began requesting documents under the Freedom of Information Act from local clerks for the November 2022 election and the May 2023 election. The requests specifically included the extracted files from the EPB, which includes the EPB software used for the EPB program. The request was made for the files to be sent in either .CSV or .XLS formats. Similar requests were and had been occurring around the state.

24. On May 13, 2023, Plaintiff sent a similar FOIA request to the Department of State for the EPB history of all precincts in Macomb County for elections held in November 2022 and May 2023.

25. The EPB software and files that clerks download and use temporarily for each election do not enable clerks to ensure that all information that should not be shared in a FOIA request can be removed before data or files are shared. Clerks can run reports in a .CSV file, but the file will contain personal identifying information that must be carefully removed. The disclosure of personal identifying information for voters not only threatens the privacy of voters but also increases the likelihood this data could be misused to compromise the security of the electoral system. Further, even assuming clerks can remove all personal identifying information, the release would also include propriety software information, security feature information, and sensitive information, the release of which could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(d), (y), (z), MCL 168.509gg.

26. Because of the complexity of these new types of FOIA requests, concerns over the security of the EPB software and personal identifying information of voters being disclosed, and the limited ability of clerks to ensure this information is not disclosed while responding to FOIA

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requests, the Bureau of Elections began instructing local clerks to not release the information and to direct requestors to the Bureau of Elections. (Attachment D, July 2023 memo.)

27. The Bureau of Elections has the capability to convert the .CSV files from the EPB to .XLS files and not disclose the information that is exempt from FOIA.

28. On September 6, 2023, the Bureau of Elections sent the Plaintiff a thumb drive containing .XLS files in response to his May 13th FOIA request.

29. The thumb drive sent to the Plaintiff included EPB history for all jurisdictions in Macomb County specific to the November 2022 election, including the jurisdictions at issue in the consolidated cases.

30. Additionally, the thumb drive included EPB history for only the jurisdictions in Macomb County that held May 2023 elections, including the Cities of Roseville, Centerline, Warren, and Sterling Heights, and for Richmond, Bruce, Macomb, Shelby, Washington, and Clinton Townships.

31. This declaration is based on personal knowledge. If called as a witness, I can testify competently to the facts stated in this declaration.

Jonathan Brater, Director of Elections
Michigan Department of State

Darci Seamon
Subscribed and sworn to before me, a Notary Public, on March 25, 2024.

Darci Seamon
PRINTED OR TYPED NAME OF NOTARY
Alger County, Michigan
Acting in Ingham County, Michigan
My commission expires: 2/4/2030

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ATTACHMENT A

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Electronic Pollbook Refresh
Clerk's Manual
For Windows 10 & BitLocker Flash Drives

Michigan Department of State
Bureau of Elections
August 2023

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Electronic Pollbook User Manual - Table of Contents

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Introduction to the Electronic Pollbook

The Bureau of Elections developed computer software that can be used in the polling place on Election Day to process voters and generate precinct reports. The electronic pollbook (EPB) software is downloaded from the Qualified Voter File (QVF) software and is loaded to a laptop prior to each election. Once the EPB software is loaded on the laptop, the software allows election inspectors to look up a voter's registration record, confirm their registration is correct, and assign a ballot to that voter, essentially automating the typical paper process. After the election is complete, the EPB software will generate reports to complete the official precinct record (paper binder pollbook) and a voter history file that can be uploaded into the QVF to update voter history in a matter of minutes.

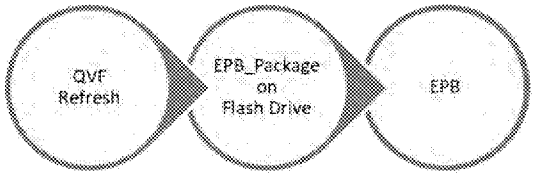
Key Features

- ☆ Access current voter registration and absent voter information in the precincts (from the day prior to the election, in most cases)
- ☆ Locate a voter's registration record by swiping their driver's license with a magnetic card reader
- ☆ Assign and record the voter's ballot immediately upon registration confirmation
- ☆ Look up voters registered within the jurisdiction but not in the assigned precinct
- ☆ Print accurate reports, including a calculated ballot summary, the list of voters, and remarks
- ☆ Upload voting history quickly and accurately

Important Considerations

Maintain security throughout the EPB process by using an encrypted flash drive. The flash drive must be password protected, and passwords should **never** be kept with flash drives. The encrypted flash drive must be used to transfer files back and forth between the QVF computer and the EPB laptop.

Pre-election file transfer: QVF to EPB



Post-election file transfer: EPB to QVF

The laptop must not be connected to any networks (must be in "airplane mode" with Wi-Fi disabled) when the EPB software is installed on the laptop. Windows Updates and antivirus updates must be done regularly between elections.

It is also important to understand when to delete files. After uploading EPB data to QVF and ensuring a paper copy of EPB files has been retained, delete all EPB files seven days after the final canvass (unless there is a pending recount, court challenge, or audit/Secretary of State order). This keeps voter data secure and prevents the wrong files from being used in future elections.

Most importantly, practice! Walking through the manual well before every election will ensure you understand the features of the EPB software and will prepare you for successful implementation come election day. Remember it is important to delete all practice files, too!

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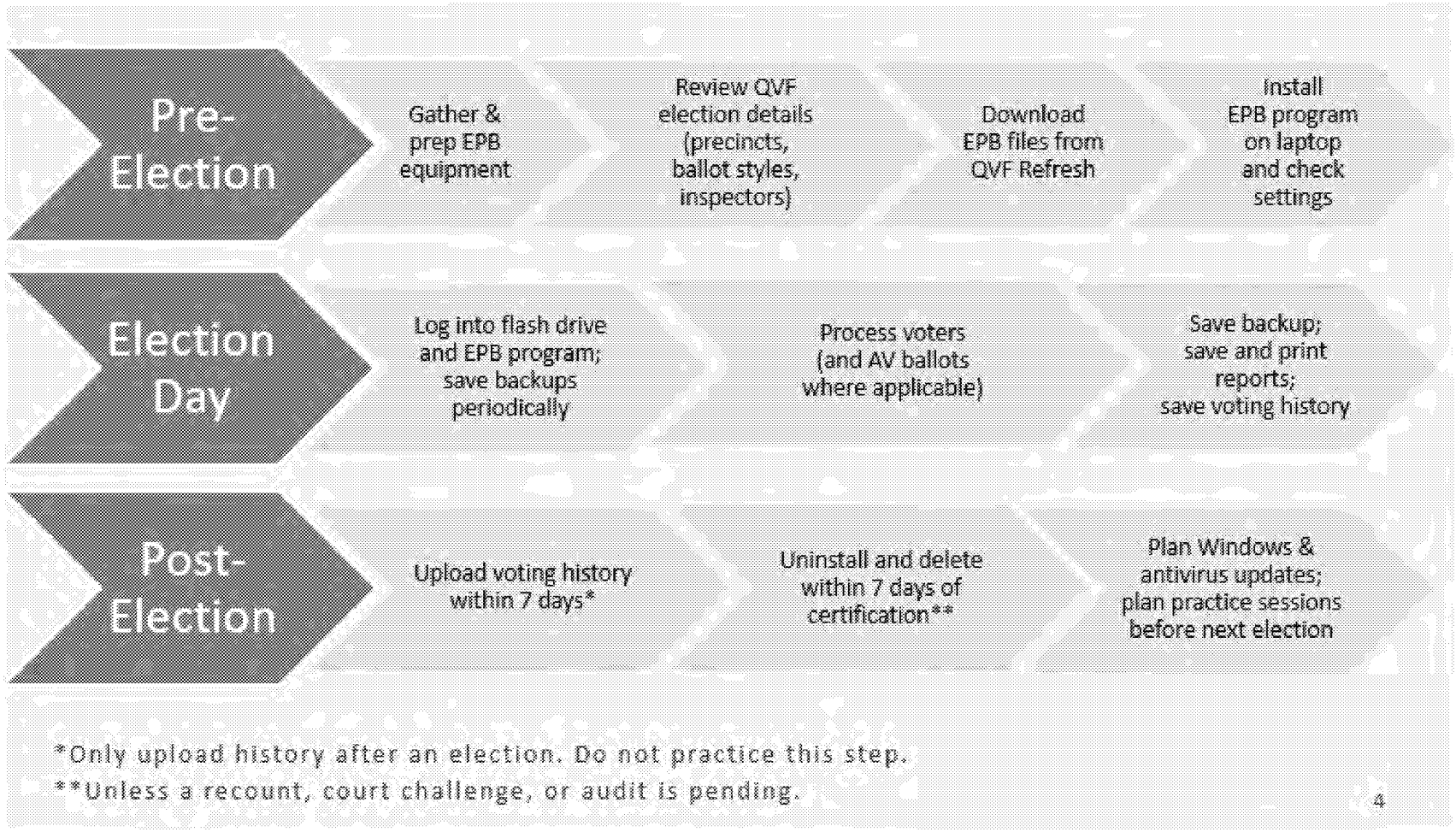
EPB PROCESS OVERVIEW



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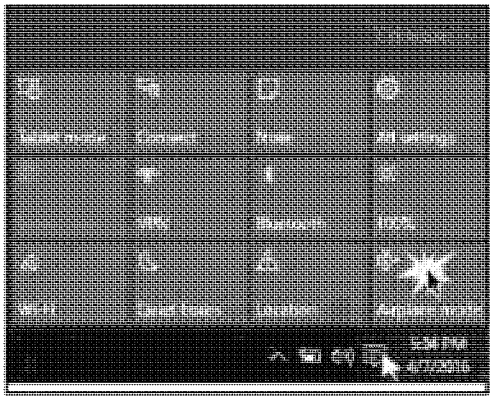
Electronic Pollbook Manual WIN10
Provided by the Michigan Bureau of Elections
Updated 08.2023

Getting Started: Pre-Election Day Tasks

The Bureau of Elections Electronic Pollbook (EPB) program provided each precinct with a laptop computer, an encrypted flash drive, a mouse, a magnetic card reader, and a case. Install and update antivirus software and printer driver software (if applicable) well in advance of the first election. Take time to perform these steps prior to installing EPB software.

Gather and Prepare Electronic Pollbook Equipment

Review and complete these tasks well before Election Day. Most are one time installations but can be time consuming. Please ensure you have completed the tasks prior to installing the EPB software.



1. **Wireless internet access** – Connect the laptop to the internet periodically to perform the necessary software and antivirus updates before election day; however, ***the laptop must be in airplane mode with Wi-Fi disabled on election day.*** To verify airplane mode is enabled, click the notifications icon, and make sure the Airplane mode is blue and that the Wi-Fi button is gray.

2. **Laptop Security** - You must maintain a secure laptop. This includes turning on the Windows firewall and installing and updating antivirus software. Load antivirus software (any commercially available antivirus product is acceptable) on each EPB laptop, update and regularly run the antivirus update, and scan at least once within a week of an election on the laptop and flash drive. The closer it is run to Election Day, the better. Keep in mind, antivirus software is updated frequently. If the laptop has been in storage for a long time, it may be quicker to uninstall the antivirus software and reinstall versus loading updates.

3. **Printer driver software** - If inspectors or the receiving board will print reports from the EPB laptop, select any standard printer and install its printer driver software on the laptop prior to election day. Printer driver software may be on a CD, but many laptops do **not** have CD drives so the software will have to be installed through the wireless internet connection or by saving the software to a flash drive. The printer will come with instructions on how to install printer driver software. Print a test document from the laptop to ensure the software was installed properly.

4. **Windows Updates** – The Windows operating system is updated on a regular basis. Budget time to download and install the updates prior to Election Day. *To find updates, make sure the laptop is connected to the internet; then, click on the Windows Home button, click Settings, click Update & Security, click Windows Update, and click Check for Updates.* Perform this task often to avoid long updates.

5. **Batteries** – Charge laptop batteries fully prior to use on Election Day.

6. **Check for old data** – There should not be an Electronic Pollbook installed on your laptop when you begin to prepare for the next election. Check for the EPB desktop icon and if a prior installation is present, use the uninstall feature to remove it.

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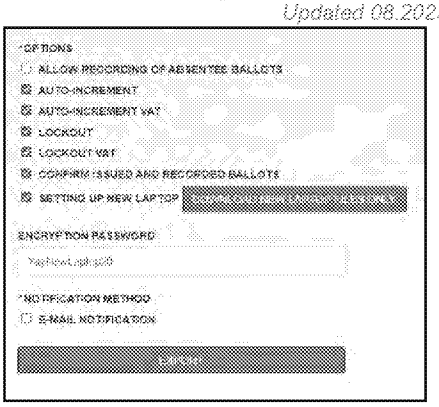
7. **Install New Laptop Files**– Each new laptop which has never had EPB installed on it needs to have EPB New Laptop Files installed. This may be done as part of the first test export of EPB (by just checking the box) or as a separate task (by checking the box to get the blue button and clicking the blue button to start their download), but these files typically only need to be installed once. EPB New Laptop Files do not contain election- or voter-specific data and will not be uninstalled by the Uninstall EPB tool. See p. 13 for information about installing as part of the first EPB download; see p. 50 for information about downloading, unzipping, and installing only prerequisites if you prefer to do this step separately. This process ensures faster Election Night downloads without prerequisites.



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Review Election Details in QVF

You must download the EPB files after 4 p.m. on the Monday before the election unless the jurisdiction has more than 50 precincts; jurisdictions with more than 50 precincts that download earlier must provide a supplemental list of absent voter ballots issued after the EPB download to the precinct(s), and elections inspectors must check that list for each voter. There is not a way to add absent voter information electronically after the EPB download. Please practice the following steps prior to Election Day.

Set Up Election Geography in QVF

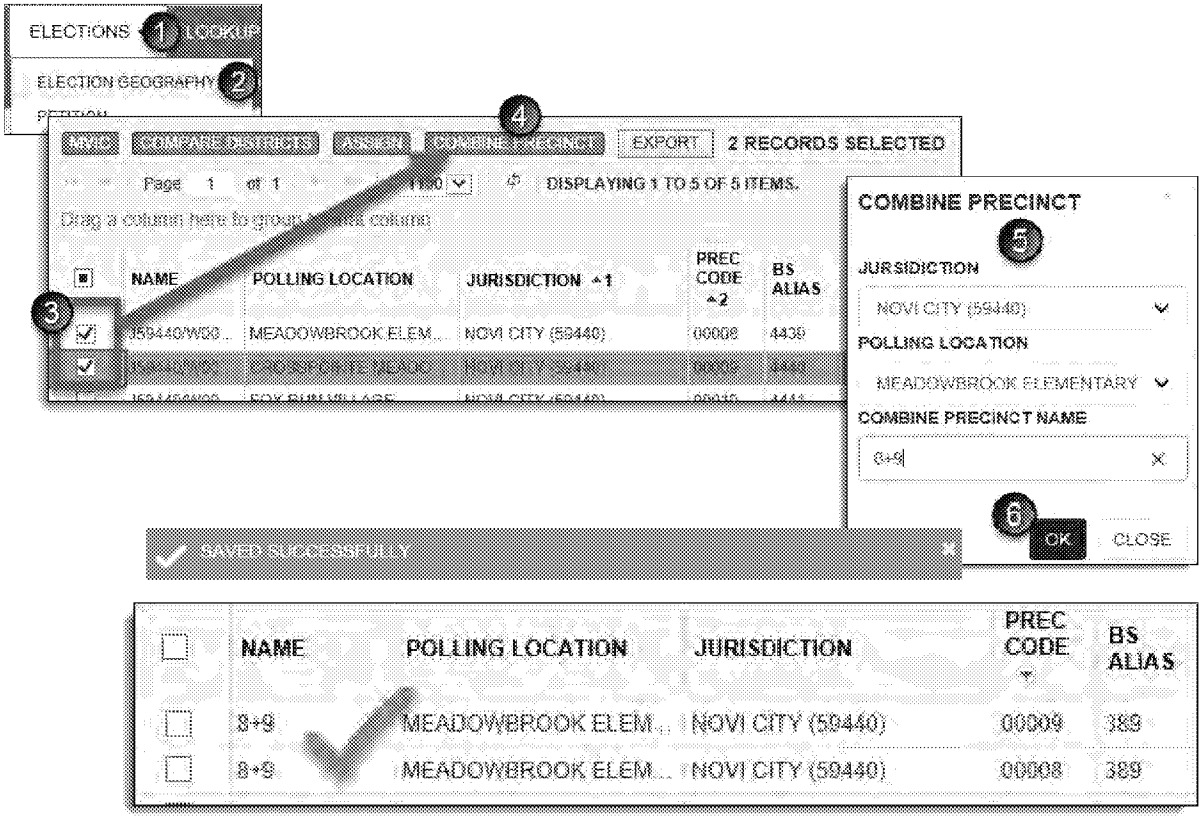
Review QVF Election Details

Prior to export, ensure Election Geography settings have been previously set in QVF (either by your County Clerk or yourself). If using combined precincts, see below. If using temporary polling locations or split precincts with more than one ballot style, see the next page.

Create a Combined Precinct for a Consolidated Election:

1. Click Elections
2. Click Election Geography
3. Select the rows for the distinct political areas (DPA) you wish to consolidate
4. Click Combine Precinct
5. Make desired changes to Polling Location and/or Combine Precinct Name
6. Click OK

A green banner appears when the changes have been saved successfully. Note the changes applied to the DPAs for the selected election.



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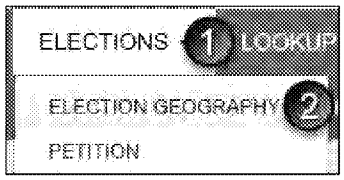
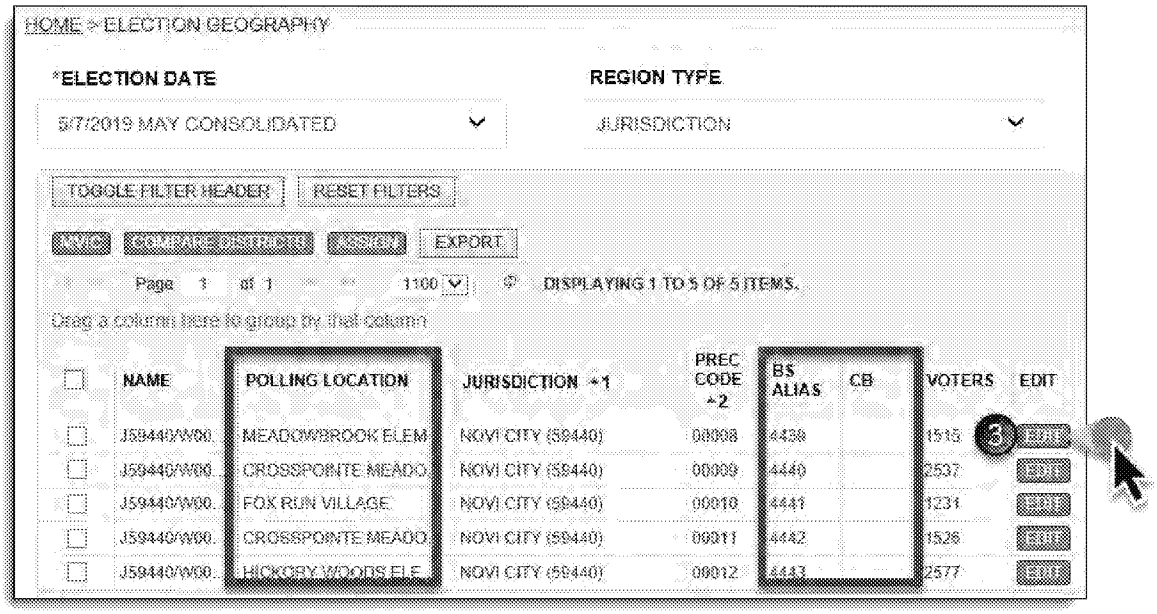
Change a Polling Location, Assign a Ballot Style Alias, and to Assign a Counting Board:

1. Click Elections
2. Click Election Geography
3. Find the row for the distinct political area (DPA) you wish to update and click Edit
4. Make the desired changes to the appropriate fields and click Save





Document received by the MI Macomb 16th Circuit Court.

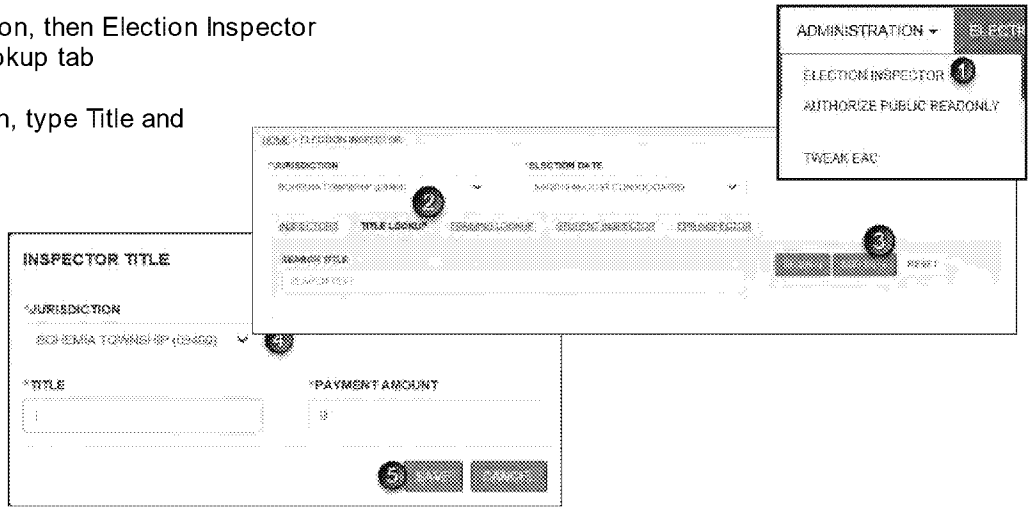
EPB Inspectors in QVF (This Step is Required)

Prior to exporting the EPB, QVF Complete users must work in QVF to mark voters as Election Inspectors (as well as add those who are ineligible to register to vote as "Student Inspectors") and indicate whether they will be an Electronic Pollbook user. Once you flag an inspector as "Is EPB," you can create their EPB username and password in QVF and the accounts will be part of the EPB export and setup file. You must now set up at least one admin and at least one non-admin user in QVF prior to download. You have been provided EPBAdmin and EPBUser accounts to which you may assign passwords.

An administrative EPB user (EPBAdmin) may still create additional EPB user accounts in the EPB software after the program is installed on the laptop. For those instructions, refer to "Preparing the Software for Election Day Use."

Set up Election Inspector Titles (if not already set up for your jurisdiction):

1. Click Administration, then Election Inspector
2. Click the Title Lookup tab
3. Click Add Title
4. Select Jurisdiction, type Title and Payment Amount
5. Click Save



Add a user before exporting the EPB files:

1. Search for voter in Voter Search
2. Open voter by clicking "edit"
3. Go to inspector tab on voter
4. Check the "Is Active" and "Is EPB" boxes
5. If creating a new inspector, fill in the required fields and add other contact information
6. Click Save

Once an inspector has been flagged as "Is EPB" their EPB username and password can be created in QVF's Election Inspector module, but you should also assign the inspector to a precinct.

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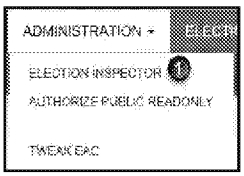
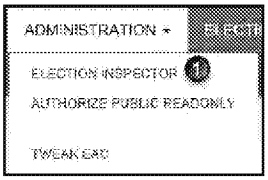
Assign an inspector to a precinct:

1. Click Administration and Election Inspector
2. Select the Precinct Type and Precinct
3. Check box(es) to select and highlight Inspector(s)
4. Click the double-arrow to assign inspector(s) to precinct

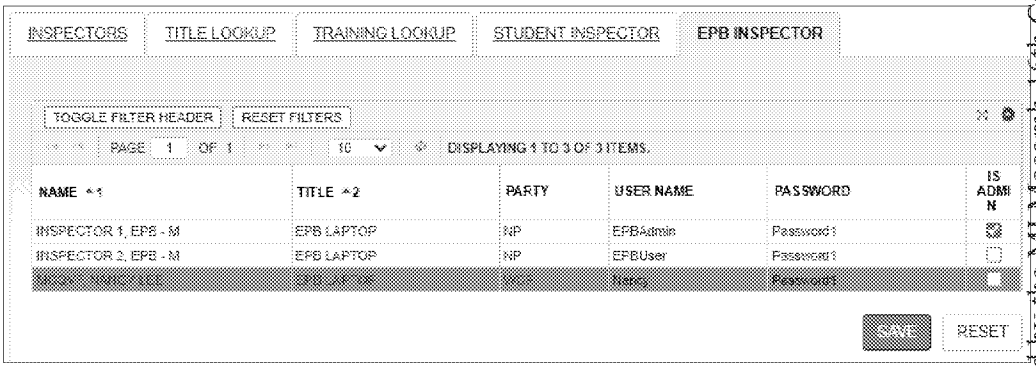


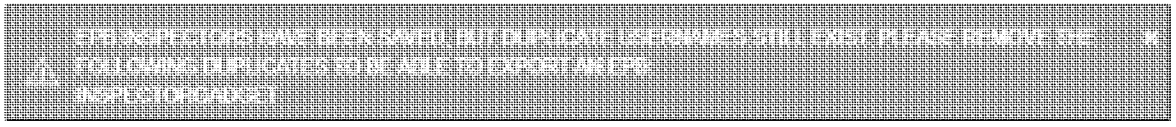
REQUIRED: Create EPB usernames and passwords in QVF prior to download:



1. From the Administration menu, select Election Inspector
2. Click the EPB Inspector tab in the Election Inspector module
3. With your mouse, click in the username and password fields for each inspector to finish creating their EPB accounts.
   a. The username is not case sensitive.
   b. The password is case sensitive and must meet the criteria for a strong password: 8-16 characters long, mixed case, and at least one number. You cannot use the sample password of Password1.
4. Click Save

The Bureau of Elections requires using a unique username for each EPB Inspector and recommends using a unique "pass phrase" for each EPB election inspector. A warning will appear upon clicking Save if duplicate usernames have been assigned.





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Obtained by Judicial Watch, Inc. v. Michigan FOIA

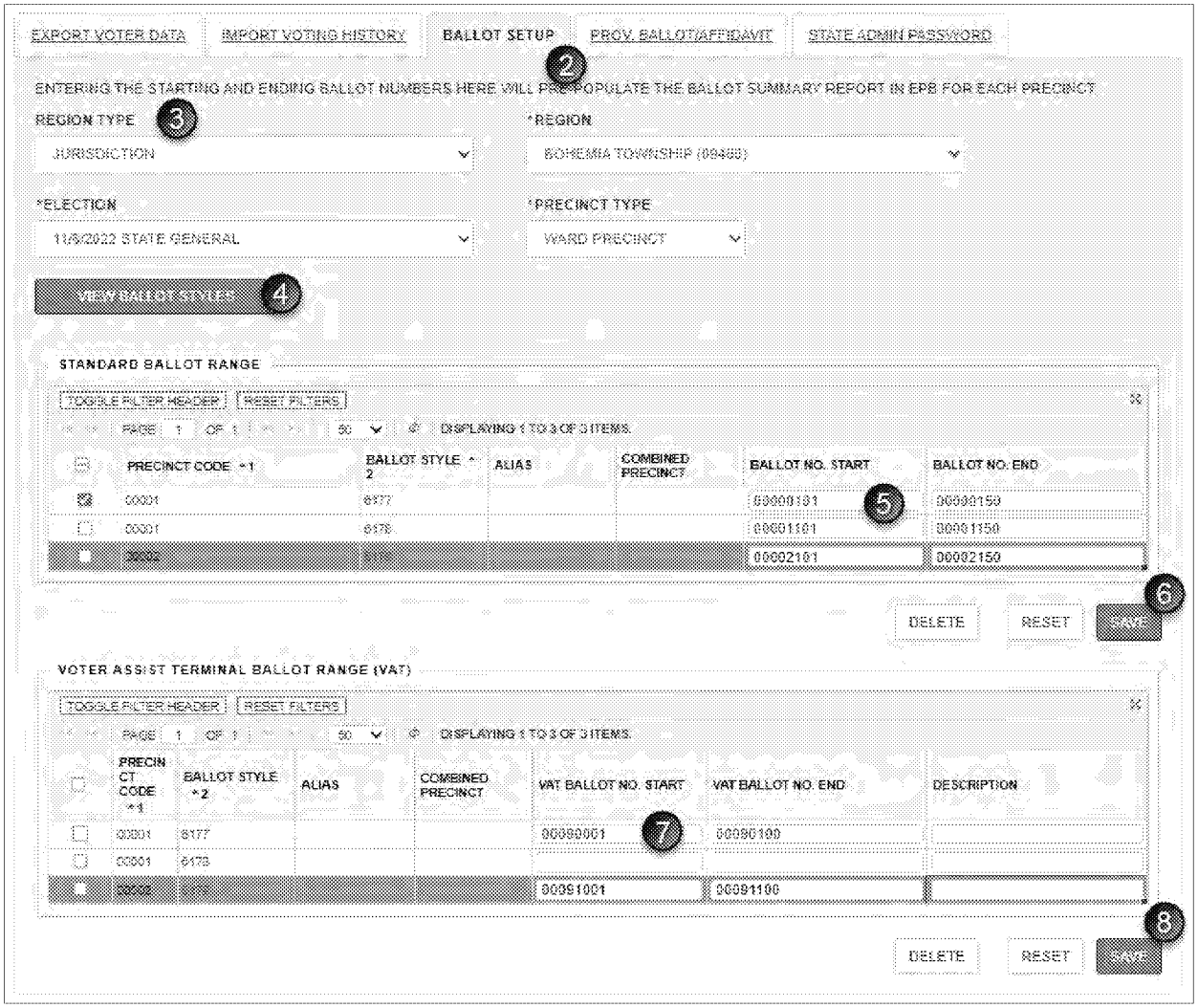
(Optional Step) Set up Ballot Style Number Ranges in QVF

QVF Complete and Basic users may use Ballot Setup to enter their ballot number ranges to prepopulate their EPB Ballot Summary line A.

This is an optional setup step and numbers can always be added or corrected in the EPB Ballot Summary.

To Set Up Ballot Style Number Ranges (for Ballot Summary Line A) in QVF prior to download:

1. Click Elections, then Electronic Pollbook
2. Click the Ballot Setup tab
3. Select Region Type, Region, Election, and Precinct Type (if not present from Preferences)
4. Click View Ballot Styles
5. Click into a field and enter starting and ending ballot numbers for each style, tabbing between fields
6. Click Save
7. Voter Assist Terminal (VAT) ranges are only needed where VAT ballots stock has ballot numbers printed
8. Click Save, if needed



After these steps are completed, you can proceed to *Download the EPB Software*.

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Download the EPB Software

The QVF software creates the EPB software, essentially taking the voter registration data in QVF and putting it in an easy-to-use, offline format for election inspectors to use on a laptop. Remember, most jurisdictions must download the EPB software **after 4 p.m. on the Monday prior to the election**. There is not a way to add absent voter information electronically after the EPB download. Practice the following steps prior to Election Day to

- **create** an Election Day folder on your desktop
- **export** the EPB software
- **extract zipped files,** and
- **copy** the files you need to your flash drives

Please note download and extraction instructions vary slightly depending on whether QVF users are in jurisdictions with **more than one** precinct or in jurisdictions with **one precinct**.

Create an Election Date folder on your QVF computer's Desktop to keep your E-Pollbook files organized, especially if you have more than one precinct. You will copy and paste the folder to each precinct's flash drive.

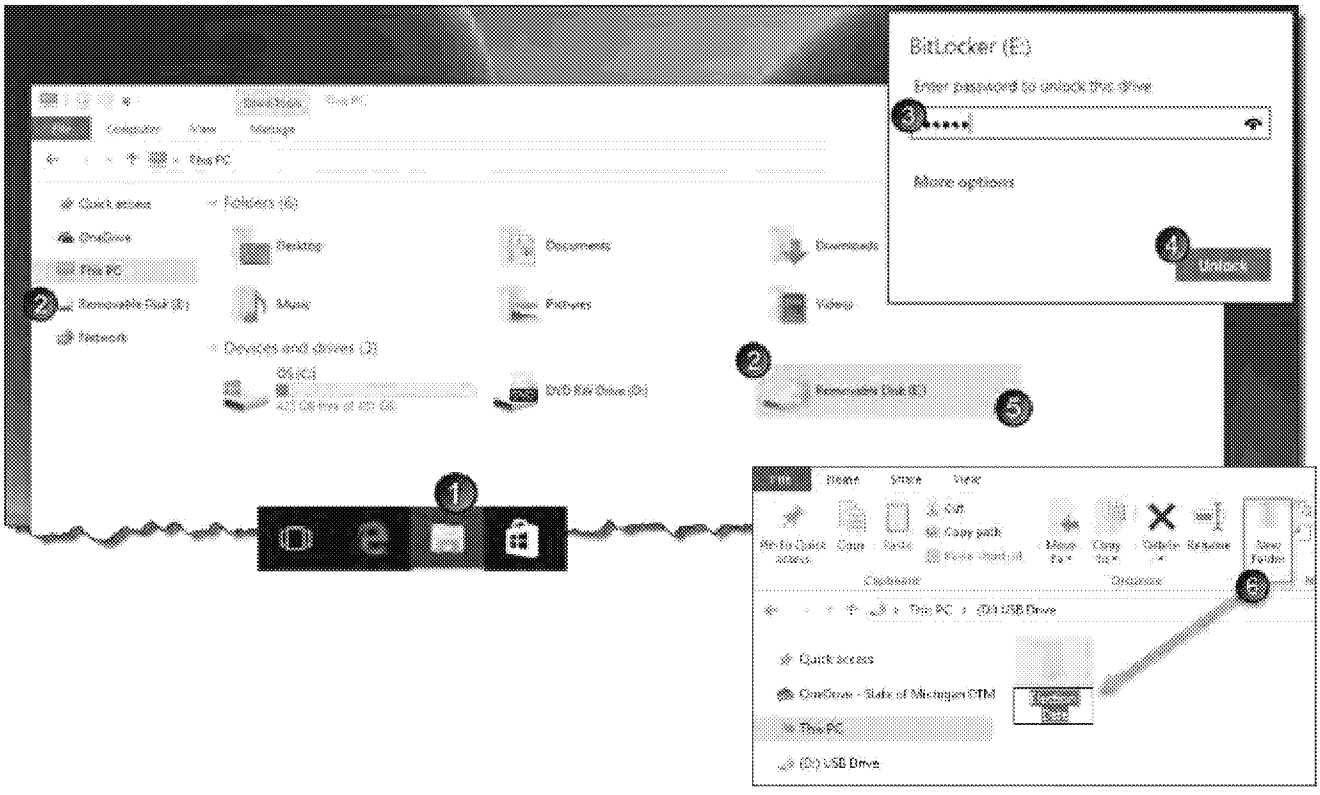
1. Using your mouse, right-click on the Desktop
2. Go to New
3. Left click Folder
4. Name the folder after the election date (for example: Nov2021EPB, NovEPBTest....)

Insert the encrypted flash drive into a USB port and unlock by entering the password.

To log into the flash drive, insert it into a USB port and:

* If a window saying "...is not accessible. Access is denied" appears, click OK

1. Click the Windows Explorer folder icon
2. Click Removable Disk (E:)
3. Enter the password
4. Click Unlock
5. Double click the Removable Disk (E:)
6. Create a New Folder with the Election Date



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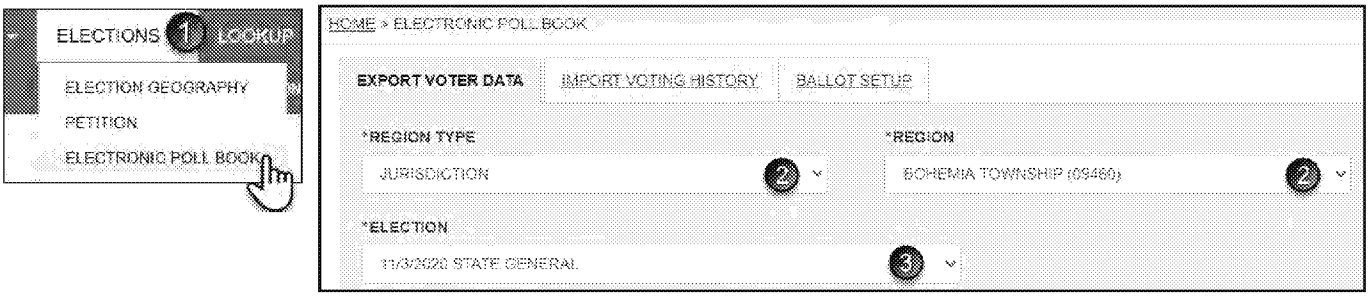
Export EPB software

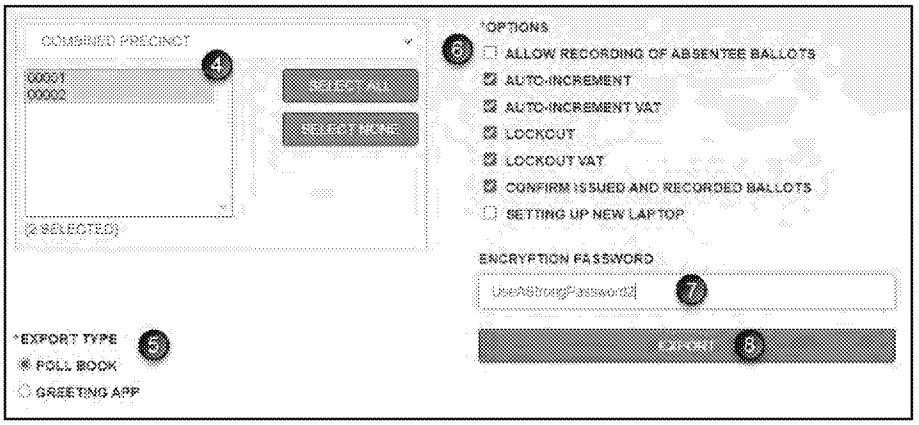
NOTE: Export the EPB file once per jurisdiction, extract files, and then copy to each precinct's flash drive.

To export the EPB software, login to QVF and:

1. Open the Elections menu and select Electronic Pollbook
2. Select the correct Jurisdiction from the drop-down menus.
3. Select the correct Election Date from the drop-down menu if not already populated from Preferences.



4. Select the precinct type and **select all** precincts. Combined Precinct is the default; you may change if not using combined precincts. Note: combined precincts must be setup in the QVF Election Geography module (see *Election Geography* section in this manual) prior to this download.
5. Export Type defaults to Poll Book. Only change this selection to Greeting App when using that app.
6. Select the options you want enabled on the e-Pollbook for use in the polls. By default, Auto-Increment and Lockout are already enabled.
   a. **Allow recording of absentee ballots: Check this box to process absentee ballots in the precinct(s) on Election Day.**
   b. **Auto-Increment:** This option tells the software to auto fill the ballot number box with the next ballot number. Unchecking this box requires election inspectors to enter the ballot number for each transaction.
   c. **Auto-Increment VAT**: This enables auto-increment for a separate ballot style/number range of Voter Assist Terminal ballots.
   d. **Lockout**: This option prevents the issuance of a ballot number for each ballot style to multiple voters.
   e. **Lockout VAT**: This option includes VAT number series as a ballot style in the lockout function to avoid duplication of a VAT ballot number.
   f. **Confirm Issued and Recorded Ballots**: This option enables the confirmation screen in EPB reiterating the voter name, voter number, and ballot number issued.
   g. **Setting Up New Laptop**: This option should only be enabled for installations on new EPB laptops which have never had EPB installed before unless you have already tried installing and are encountering errors. Checking the box includes those files with the download upon clicking Export, or the blue button becomes available for a separate download if that is preferred (see p. 47 for step-by-step instructions).



7. Create a strong **Encryption Password** that is different from the sample password.
   a. A strong password contains 8-16 characters, mixed case (lower-case and upper-case letters), and at least one number.

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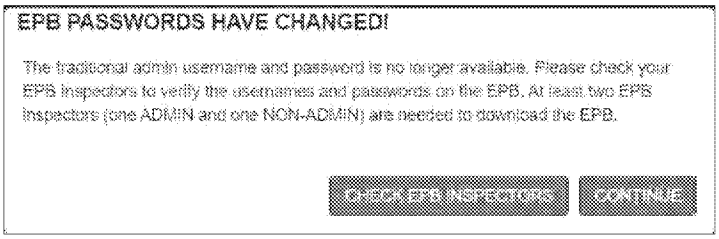
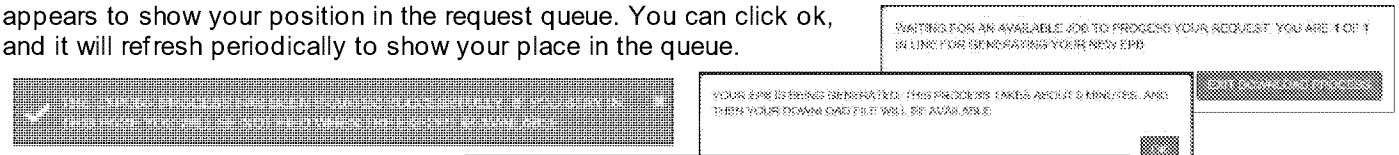
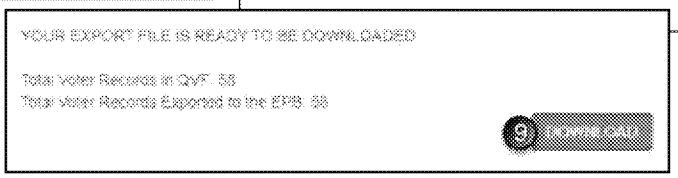
8. Click Export and a message appears, reminding you that it is now required to set up at least two EPB Inspectors prior to download. To review, click Check EPB Inspectors (and see p. 8-9); **if you have already set them up, and are ready to proceed, click Continue.**



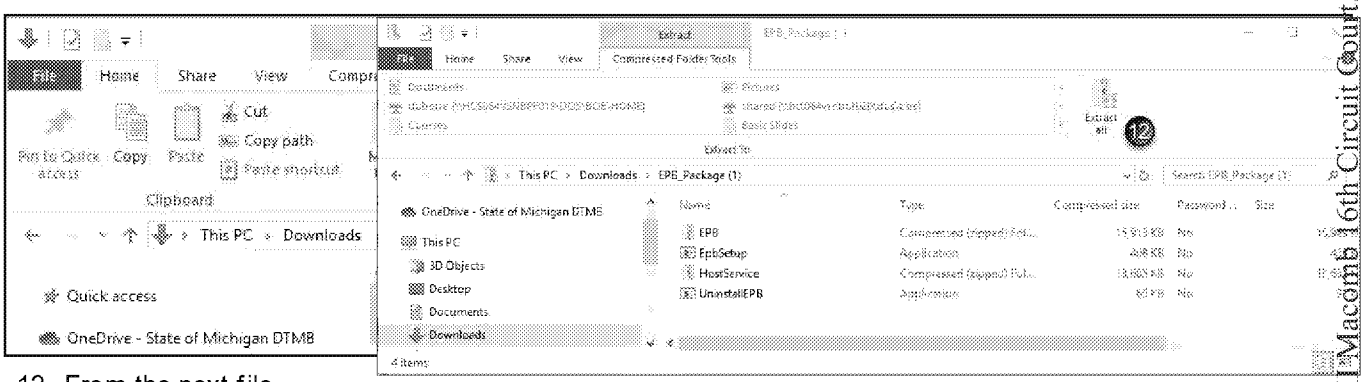
A temporary green message appears, confirming the request has been received and you will be notified when the export is available for download. Another window appears to show your position in the request queue. You can click ok, and it will refresh periodically to show your place in the queue.



A new window will appear when the file is ready to be downloaded and will show a count of the voter records for the jurisdiction/region in QVF and the number exported.



9. Click Download. (If in Edge, you may click Save As and redirect download to Desktop>[Election Date] folder, or you may let the file download in its default destination.) When the download is complete, the web browser will have a notification at the top or bottom of the screen.
10. Click the arrow or folder next to the download and select **Show in folder** to verify that the EPB_Package.zip file has been saved correctly (to the default download location, usually to the Downloads folder in Chrome) and proceed to decompress (unzip) the zipped file folder.
11. From the "Open" menu, select Windows Explorer (unless your screen already looks like step 12 below). (Note that if you have exported this before and didn't delete prior versions as recommended, your subsequent files named "EPB_Package" will have numbers in the file names. In a time crunch, work with the newest one and clean up soon but not now.)



12. From the next file explorer window that opens, click Extract All.

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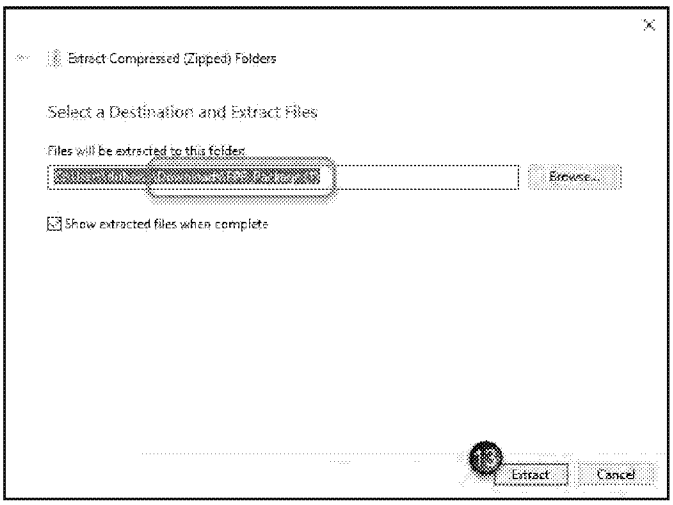
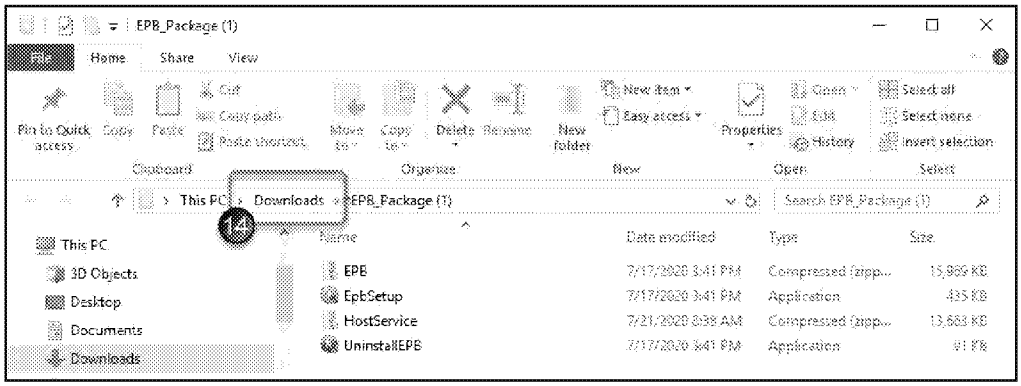
13. From the Extract Compressed (Zipped) Folders window, click Extract. The extracted EPB_Package folder will be saved to the location specified (which should default to the same Downloads folder.

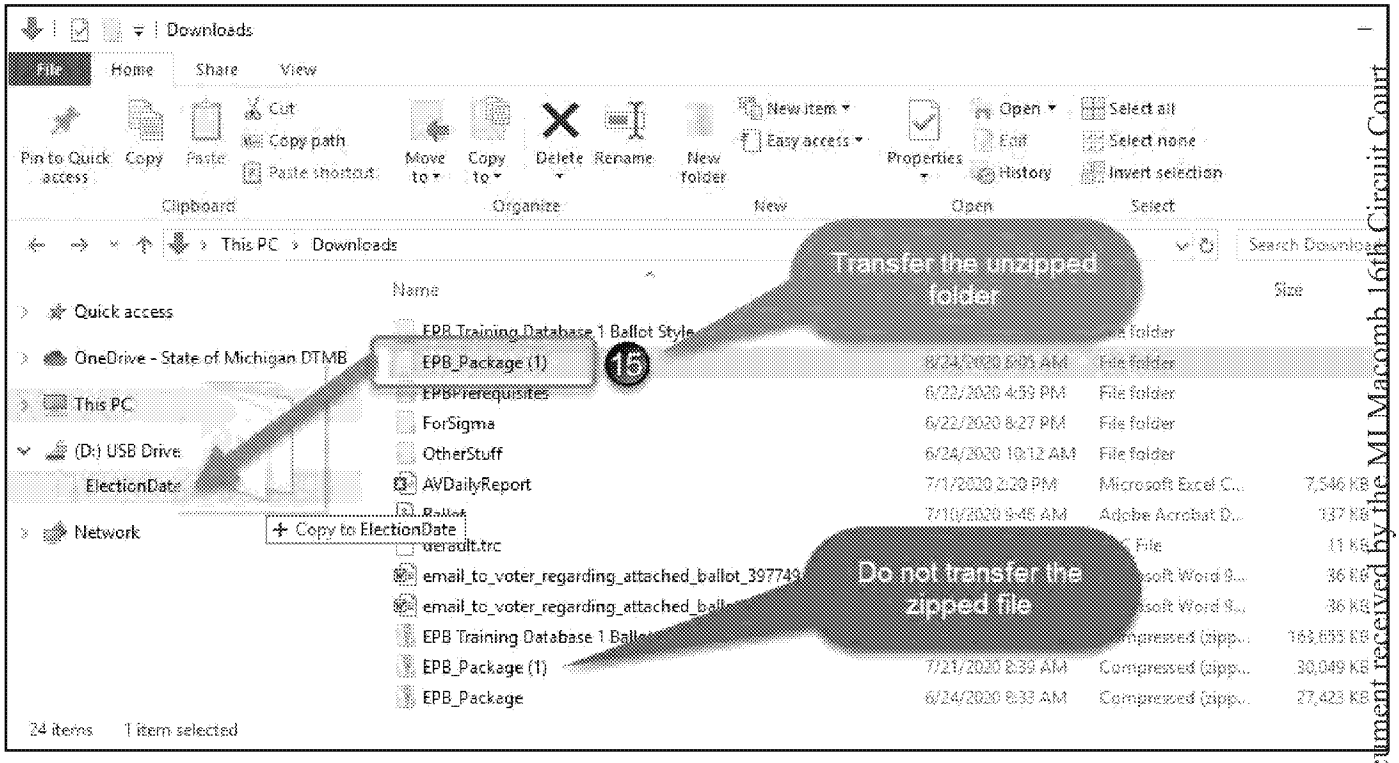


14. Click on the name of the Downloads folder to go up a level in the flash drive. You will see the original zipped folder and the uncompressed/ unzipped EPB_Package folder.

15. Copy and paste the unzipped EPB_Package folder to the Election Date folder on the encrypted flash drive. When the copy is complete, remove the flash drive.

16. For jurisdictions with more than one precinct, for each remaining precinct's flash drive, log into the flash drive, create its Election Date folder, and repeat step 15 to copy and paste the unzipped EPB_Package folder to the Election Date folder on the encrypted flash drive.





You can now insert the flash drive into a laptop, unlock the drive, and proceed to install the EPB software.

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Install EPB Software on Laptop

Turn the EPB laptop on. Once the laptop has booted up, insert the encrypted flash drive into a USB port.

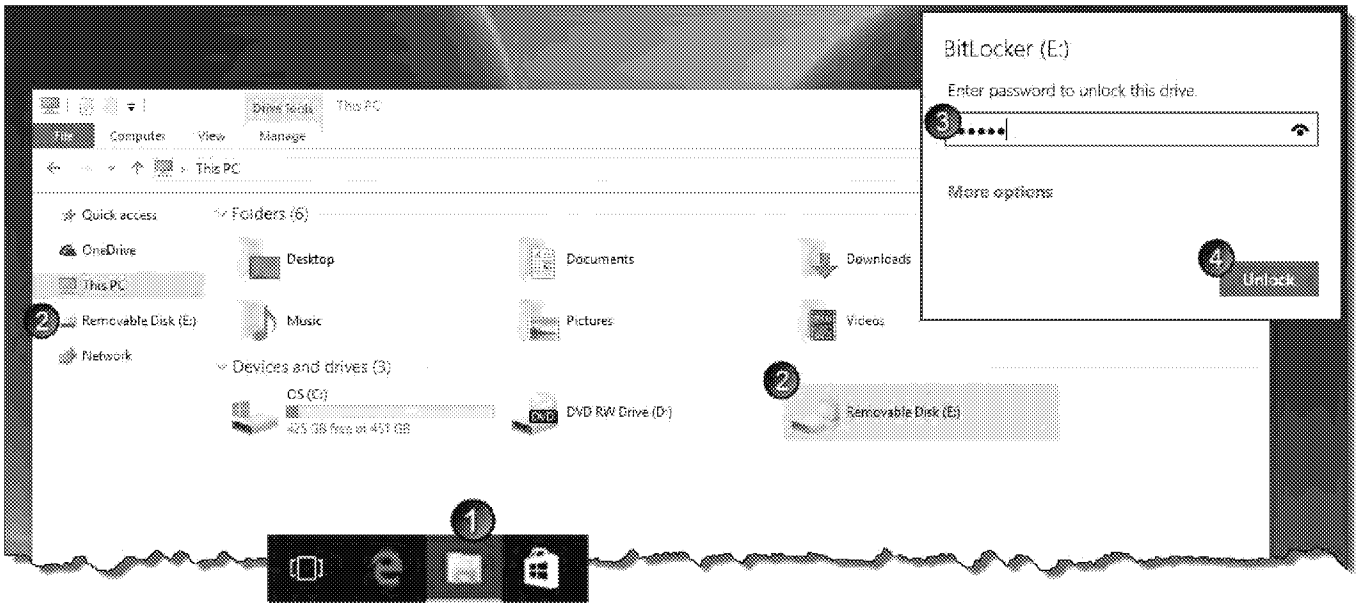
Log into the encrypted flash drive

The encrypted flash drive is a vital component of the EPB software program. Use this password-protected file storage device to protect voter data, store the backup file, and store all the work done on Election Day so the Clerk can update voter history and create precinct reports. When saving files, make sure the files are being saved to the encrypted flash drive.

To log into the flash drive, insert it into a USB port and:

1. Click the Windows Explorer folder icon
2. Click (D:) USB Drive (Drive letter may vary, D: or E:)
3. Enter the password
4. Click Unlock

Note: If using the Verbatim flash drive with Store-n-Go/V-Safe100 encryption software, refer to the *EPB User Manual for Windows 7 and V-Safe 100* for detailed instructions on logging into the Privacy Zone.



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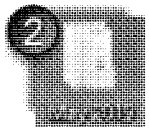
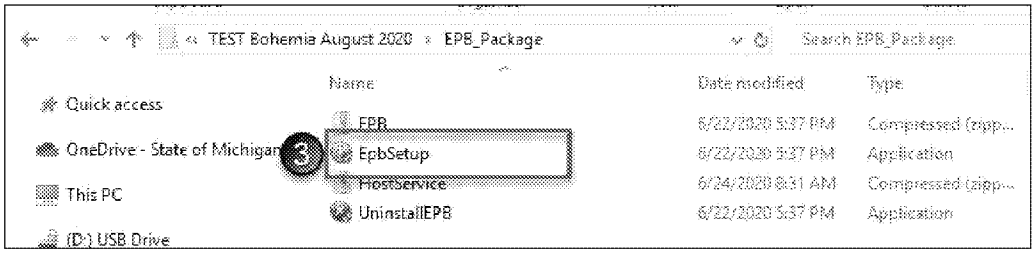
Run the setup file



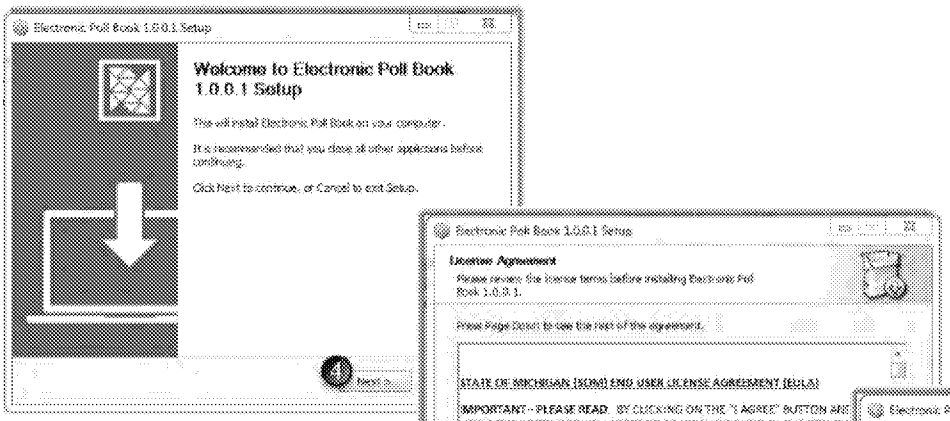
To install the EPB software:

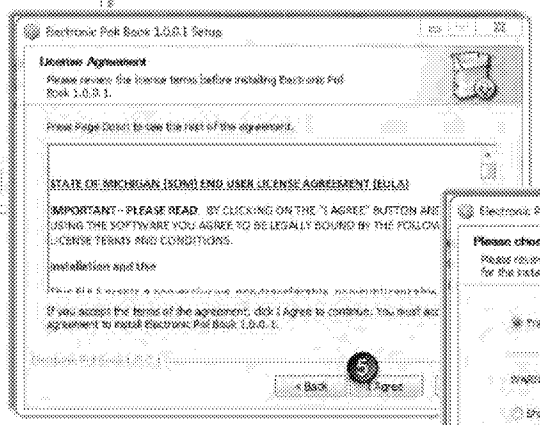
1. Copy and paste the [ElectionDate] folder from the flash drive to the Desktop
2. Double-click the [ElectionDate] folder on the desktop and open the EPB_Package folder
3. Double-click the EPBSetup file to begin installation

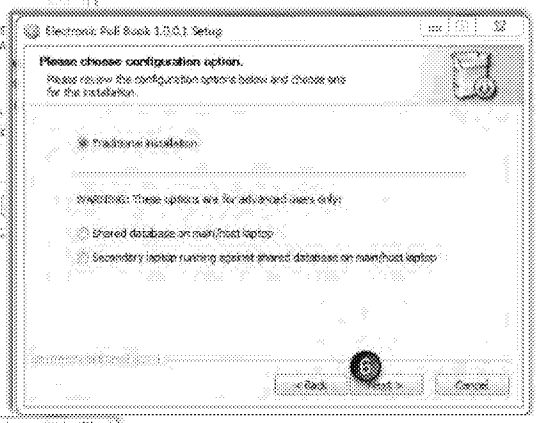


If a warning screen about the publisher pops up and requests you to confirm installation, it is ok to click yes.

4. Click Next
5. Click I Agree
6. Click Next for a traditional installation (default). *For Dual e-Pollbooks, refer to the Dual e-Pollbook Manual*

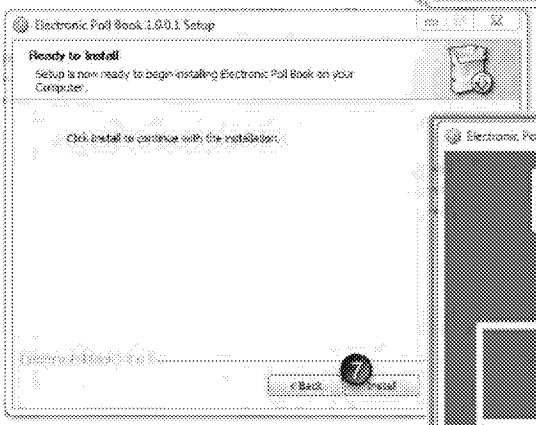




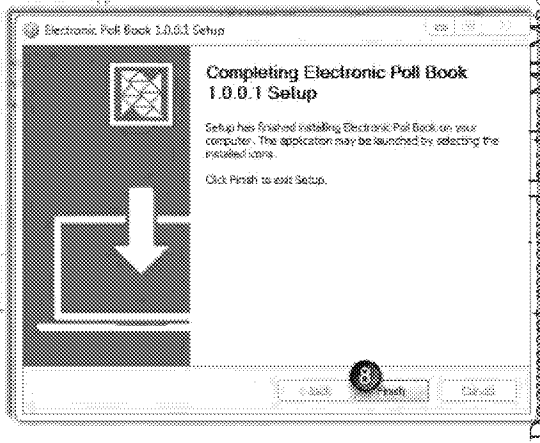


7. Click Install

A window showing the progress of the installation will appear, along with a command window (black screen). The command window will automatically close.



8. Click Finish; this will place a shortcut icon to the Electronic Poll Book on your desktop
9. Close the File Explorer window (as seen partially in Step 3)



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Check Settings to Prepare the Software for Election Day Use

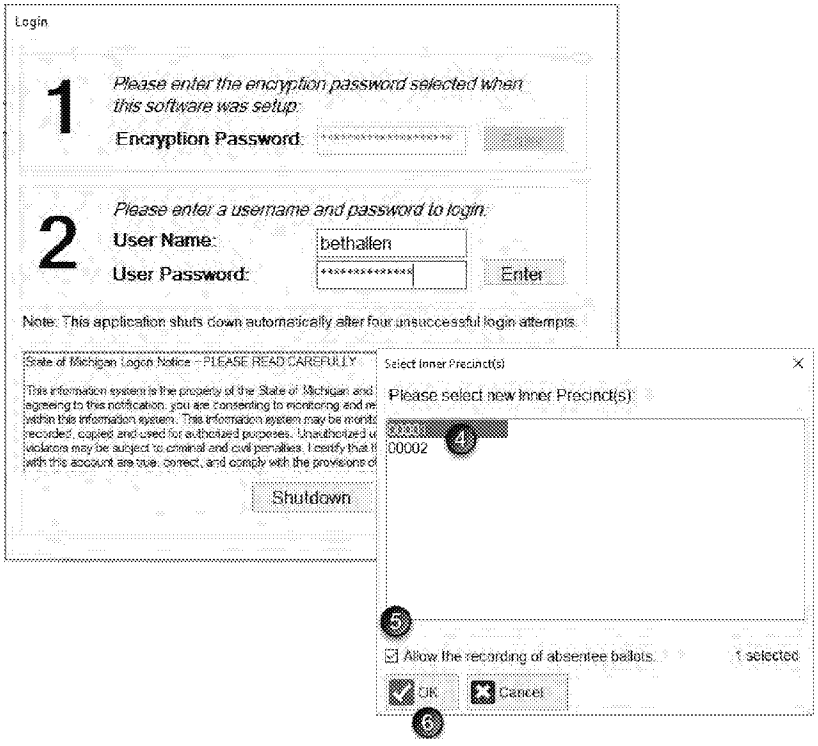
On the Monday before the Election or before training, confirm that the correct election was downloaded. If EPB options were not set in QVF, set options to assist election inspectors and minimize their tasks.

Select Precinct

The precinct the laptop will be used in needs to be selected in the EPB software.

To select the Precinct:

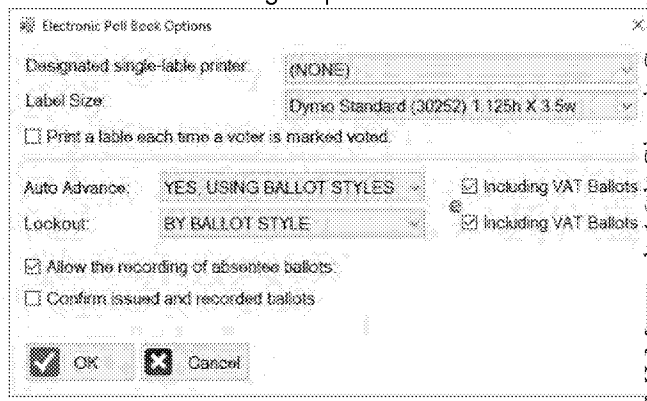
1. Double click the Electronic Poll Book icon on the desktop
2. Enter the Encryption Password and click Enter.
3. Enter the User Name and User Password that was set up in QVF (see p. 8-9) and click Enter.
4. Select the Inner Precinct where the laptop is used.
5. If AVs are processed in the precinct, check the Allow the recording of absentee ballots box.
6. Click OK



If the options and users were already set up in QVF prior to exporting the EPB files, the Election Day preparation is complete. Skip to the Election Day EPB Tasks: Election Inspector's Guide section of this manual for opening of the polls. If these steps were not already done in QVF please continue with the following steps:

Review EPB Options

To manage options, select **File** and then **Options** from the EPB menu. The most used options are set as defaults.



a. **Auto Advance**: This option tells the software to auto fill the ballot number box with the next ballot number. Unchecking this box requires election inspectors to enter each ballot number.

b. **Lockout:** This option is used to prevent the issuance of a ballot number for each ballot style to multiple voters.

c. Allow the recording of absentee ballots: <u>Check this box to process absentee ballots in the precinct(s) on Election Day.</u>

d. **Confirm issued and recorded ballots**: Check this box for a pop-up confirmation screen after issuing each ballot.

e. **Including VAT Ballots**: Check these boxes to enable the recording of Voter Assist Terminal ballots and to include them in the Auto Advance and Lockout functions.

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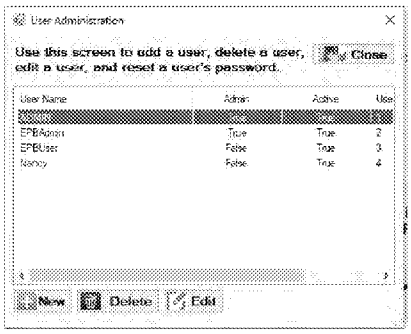
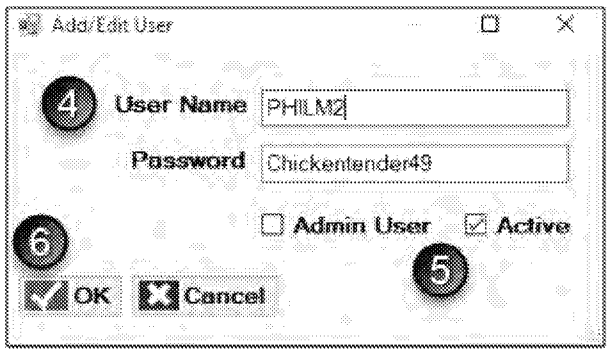
Review User Account Setup

User setup in the EPB is an important security step. If more accounts are needed than were set up in QVF, create those user accounts now. Set up the main EPB user or precinct chairperson as an active Admin User. All other election inspectors that will use the EPB should be setup as Active users. Setting up a unique username and password for each EPB user allows tracking of use on Election Day. The administrator account(s) set up in QVF **should not be used by election inspectors**.
Note: passwords are case sensitive.



To add a user:
1. Click Sys Admin
2. Click User Administration
3. Click New
4. Enter a Username (must be at least 5 characters long and cannot contain any spaces – no longer has to be all caps) and a strong password.
5. Select user type
6. Click OK, Repeat Steps 3-6 until all users are setup
7. Click Close



Editing or deleting a user: Admin users can delete or edit a user by highlighting the name and clicking either Delete or Edit. The User Name, Password and user type can all be changed in the User Administration Edit screen. If deleting, a confirmation screen will pop up to confirm the deletion.

At this point, close the EPB software, shut down the laptop and pack laptop items up for Election Day.

You must include the encrypted flash drive with the laptop in the appropriate case.

Document received by the MI Macomb 16th Circuit Court.

Election Day EPB Tasks: Election Inspector's Guide

Prepare the EPB for Opening the Polls

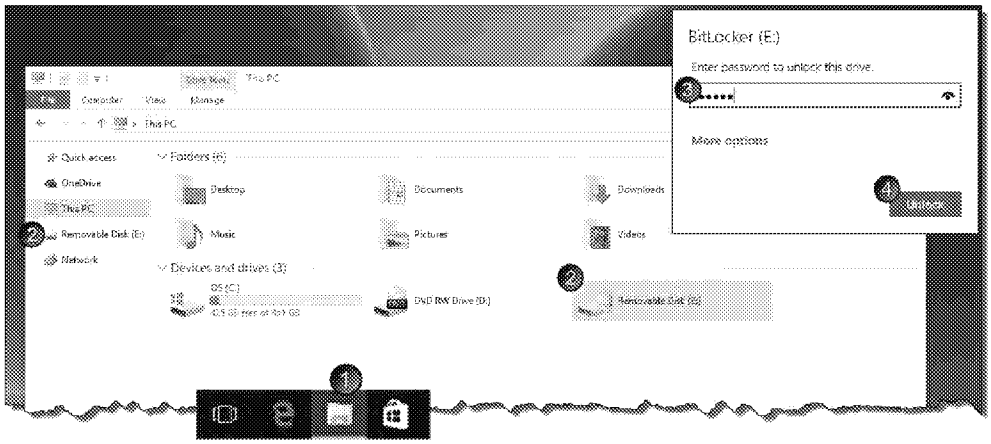
Pull the laptop out of the case, plug it into a surge protector, and plug the surge protector into the wall. The power cord may have two pieces. Keep the power cord plugged in throughout the day to maintain a 100% charged battery. Plug the magnetic card reader and mouse into USB ports. Then turn the laptop on. Once the laptop has booted up, make sure that the laptop cannot connect to the internet by turning on Airplane mode with wifi disabled (see pg. 5).

Log into the encrypted flash drive

The encrypted flash drive is a vital component of the EPB software program. Use this password-protected file storage device to protect voter data, store the backup file, and store all the work done on Election Day so the Clerk can update voter history and create precinct reports. When saving files, make sure the files are being saved to the encrypted flash drive.

To log into the flash drive, insert it into a USB port and:

1. Click the Windows Explorer folder icon
2. Click Removable Disk
3. Enter the password
4. Click Unlock

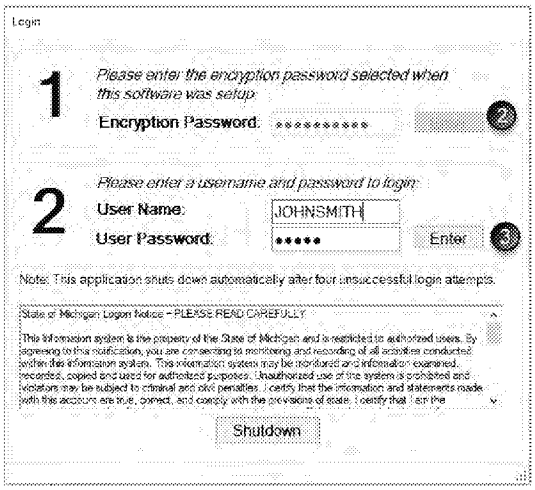


Log into the EPB software

After you have inserted and logged into the encrypted flash drive with its password, you can open the EPB program.

To log into the EPB software:

1. Double click on the Electronic Poll Book icon in the upper left corner of the desktop
2. Enter Encryption Password and click Enter
3. Enter Username and User Password and click Enter



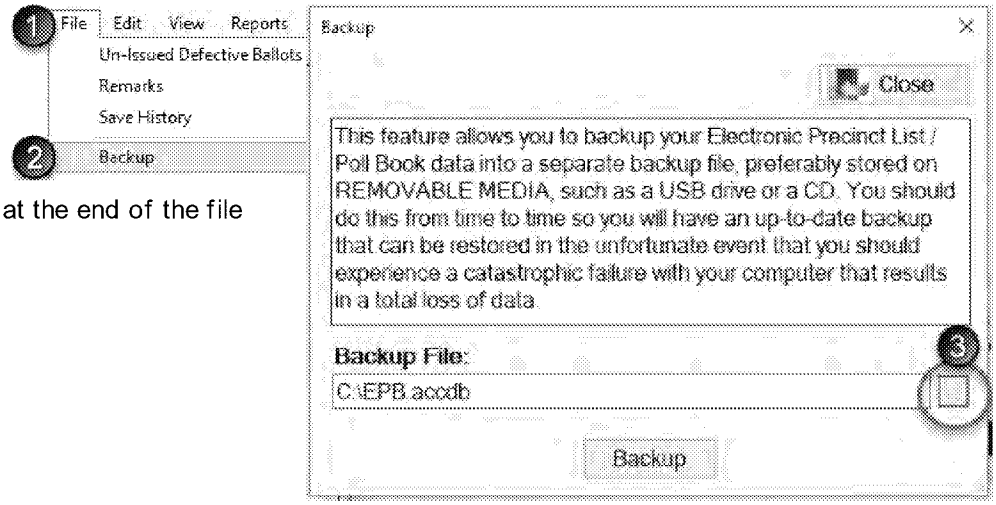
Document received by the MI Macomb 16th Circuit Court.

Save the First EPB Backup: Redirection Action Required!

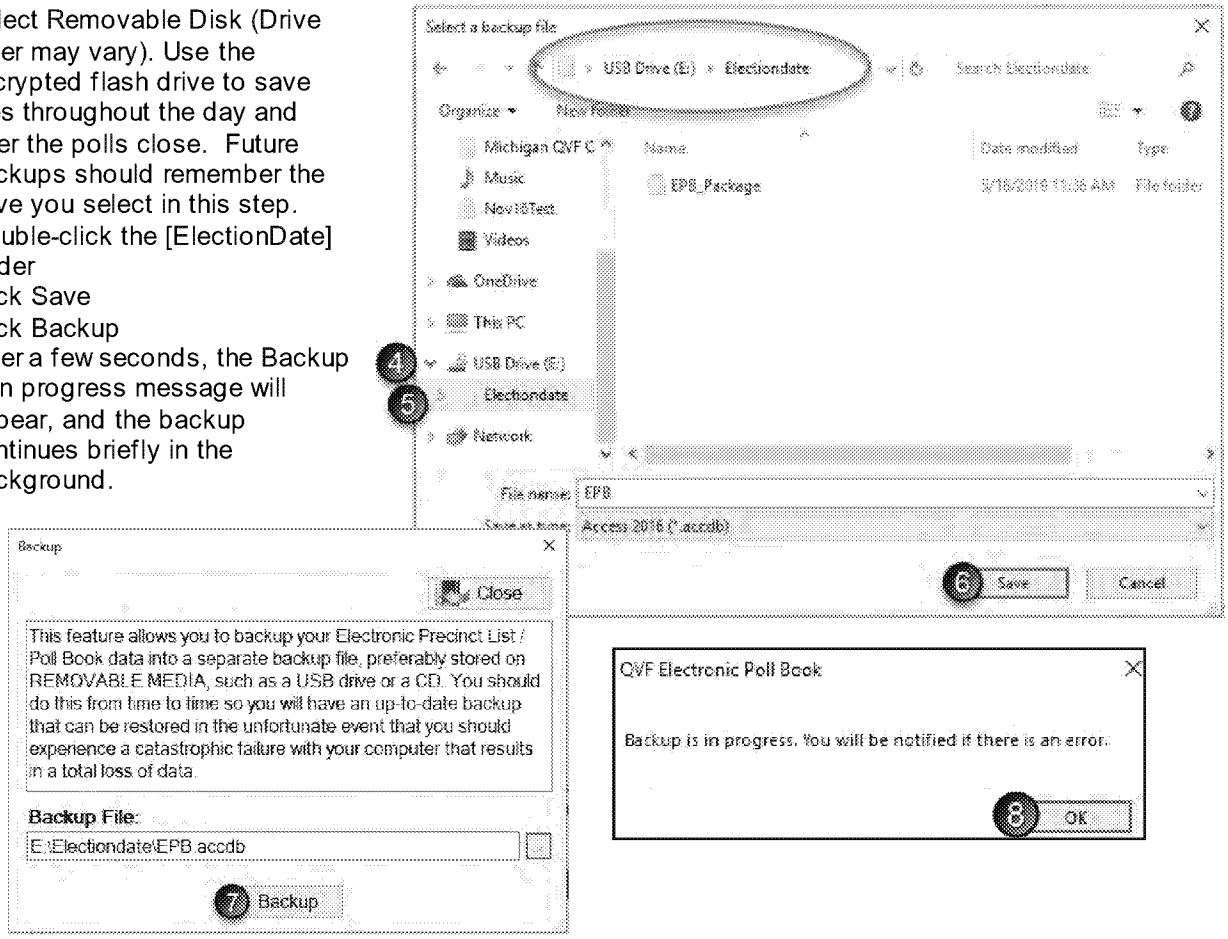
You must keep the encrypted flash drive plugged into the laptop all day. Save a **Backup** periodically throughout the day to save voters that have been processed. This ensures that data will not be lost if there is a hardware failure. Pay attention to your laptop's settings when performing the initial **Backup**. The letter labeling your encrypted flash drive in Windows Explorer may vary since it is dependent on the laptop and port being used.

To Back up the EPB:

1. Click File
2. Click Backup
3. Click this button ... at the end of the file path field



4. Select Removable Disk (Drive letter may vary). Use the encrypted flash drive to save files throughout the day and after the polls close. Future backups should remember the drive you select in this step.
5. Double-click the [ElectionDate] folder
6. Click Save
7. Click Backup
8. After a few seconds, the Backup is in progress message will appear, and the backup continues briefly in the background.

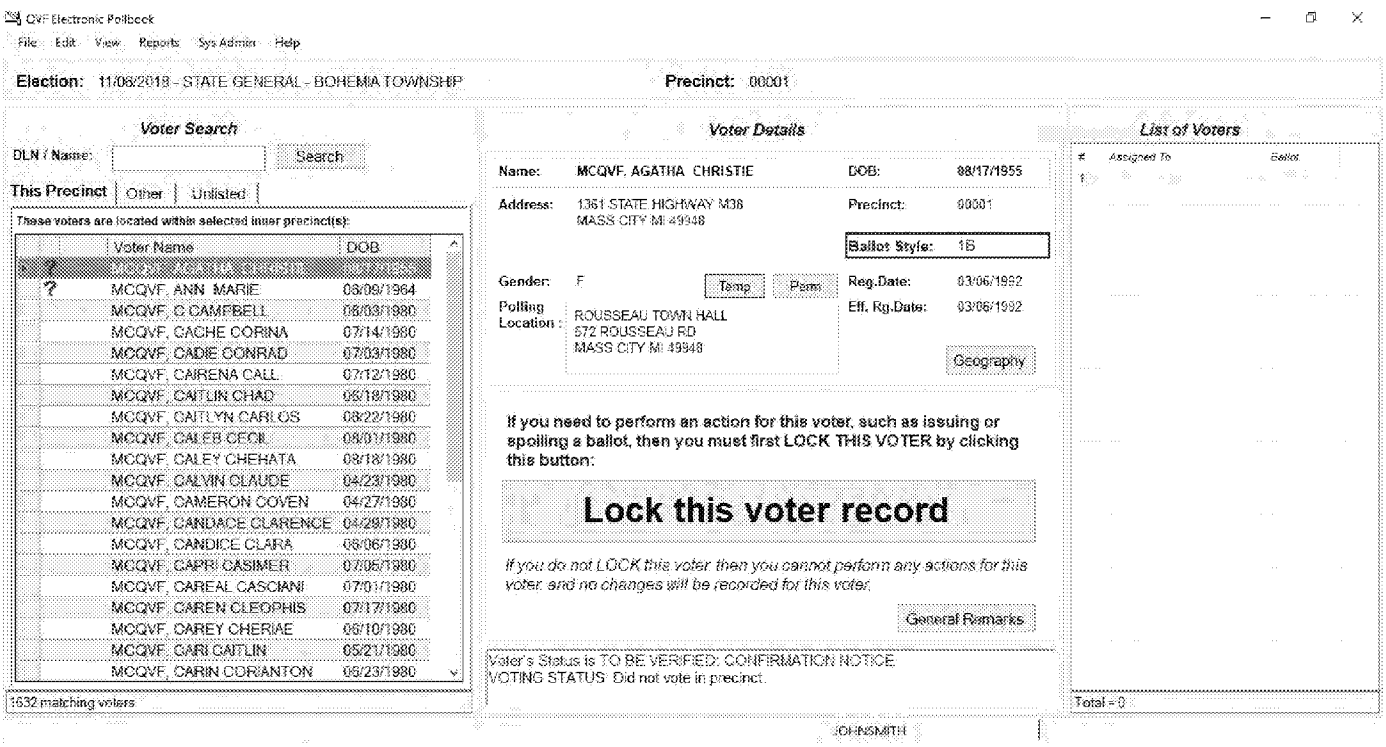


The laptop and EPB software are now ready for voters!

Document received by the MI Macomb 16th Circuit Court.

Read and Use the EPB Main Screen to Process each Voter

The EPB main screen is divided into three sections. Take a moment to become familiar with the various parts of the screen. **Make sure the top line lists the correct election date and precinct number.**



Voter Search: The Voter Search section of the screen is the precinct list. All voters in your precinct will be listed under **This Precinct** tab. The **Other** tab provides access to the lists of other precincts in the jurisdiction. The **Unlisted** tab is available to add voters not found in either list in certain situations.

Voter Details: The Voter Details section of the screen shows the voter's registration information at the top, including the appropriate **Ballot Style** that should be issued to the voter. The Geography button provides detailed district information for each voter. The middle of the screen is the "Lock this Voter Record" action box where ballots will be assigned and recorded. Voting status flags appear at the bottom of the screen. This portion of the screen is important to verify the status before issuing a voter a ballot.

List of Voters: The List of Voters section records the voter's name and what ballot number was assigned to them in a running list. This section is for reference; use it throughout the day to balance with the tabulator.

The EPB software contains the voter list for the precinct, records the ballots issued, and creates the List of Voters for the permanent record of the precinct. With a few clicks, a voter may be verified and assigned a ballot.

Important Note: If a voter does not wish to have their driver's license scanned, their name should be typed into the EPB software.

Document received by the MI Macomb 16th Circuit Court.

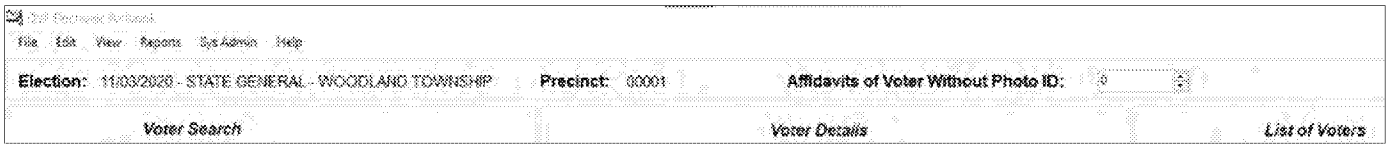
Record a Voter Not in Possession of Photo ID

The voter must complete an *Application to Vote,* and their photo identification must be verified or the *Affidavit of Voter Not in Possession of Picture Identification* must be completed, before processing a ballot in the EPB software. When a voter uses the Affidavit of Voter Not in Possession of Picture Identification, click the up arrow to increment the Affidavits of Voter Without Photo ID counter, or click into the box, delete the number, and type in the new total. This count is not tied to an individual voter but is the running total for the precinct for the election.

This number will be uploaded to the Qualified Voter File with voting history, and clerk's office staff will be able to review and correct this number in QVF after the election.

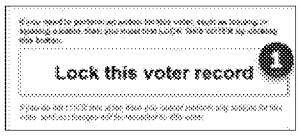
To record a Voter Not in Possession of Photo ID:

1. Click the up-arrow button next to the Affidavits of Voter Without Photo ID (or click in the field, delete the number that's there, and type the new total)



Assign a Ballot

After reviewing the voter's *Application to Vote* and verifying their photo identification or *Affidavit of Voter Not in Possession of Picture Identification*, process the voter in the EPB by following these steps:



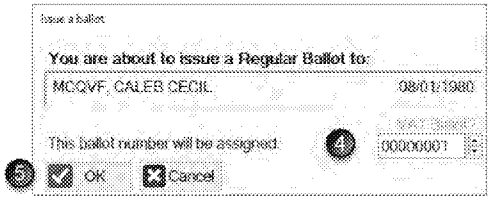
1. Swipe the voter's driver's license through the magnetic card reader or type the voter's name into the DLN/Name field, entering the last name first. If typing, select the correct voter and then you must click on "Lock this voter record," otherwise skip to Step 2.

2. Verify the voter's information on the *Application to Vote* matches EPB.

3. Click Regular ballot

4. Enter the next available ballot number in the **This ballot number will be assigned** box (this number will auto fill after the first number for the ballot style has been entered)

5. Click OK, and the voter's name will now be added to the List of Voters.



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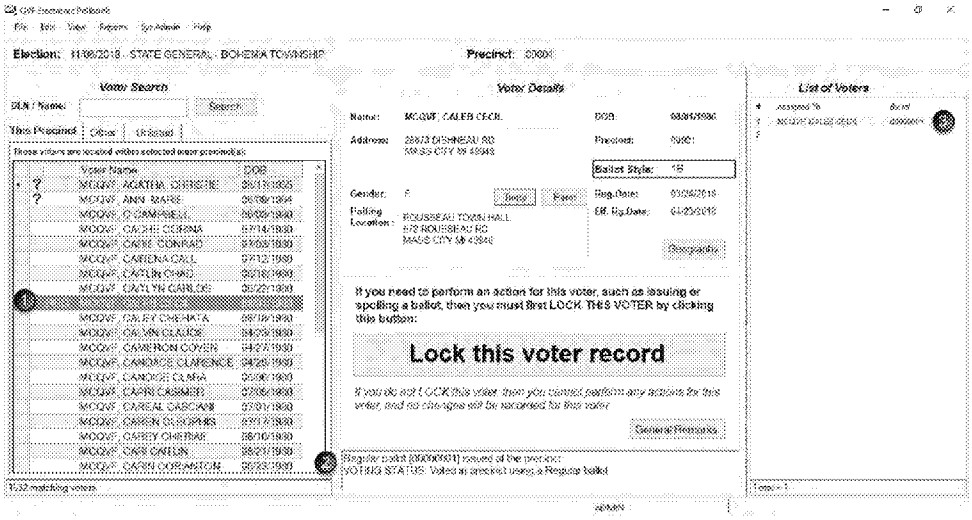
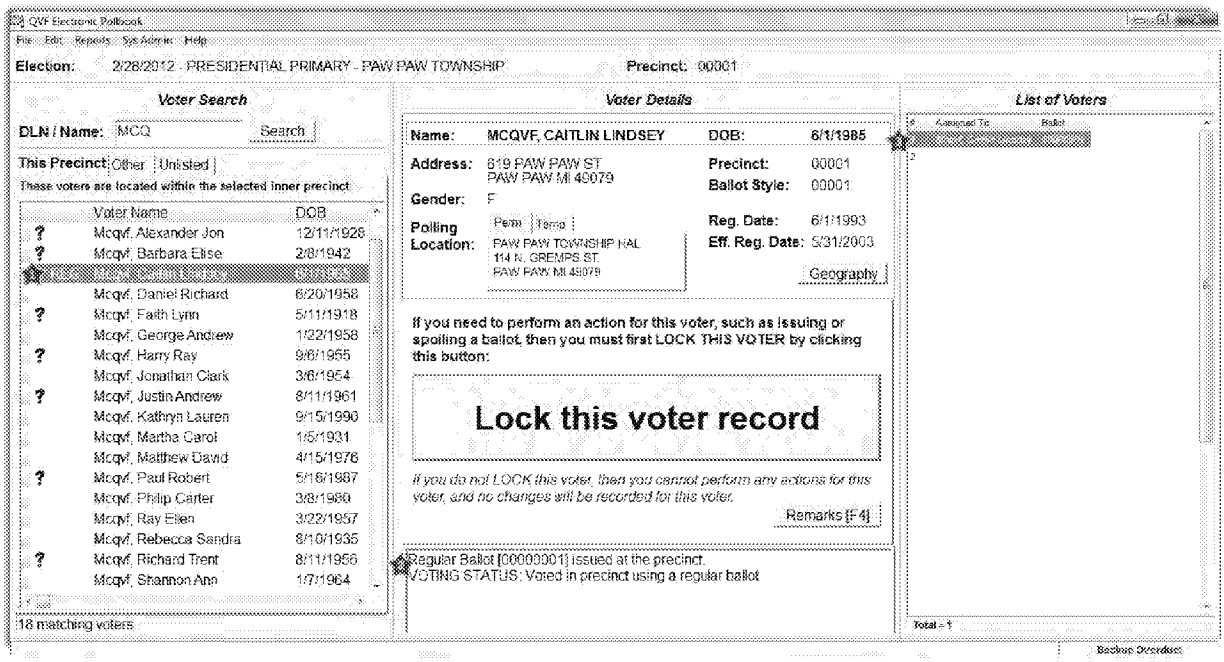
Verify the ballot was issued

Click OK on the confirmation window (if enabled). After you assign the ballot, the main screen returns. Three places verify the ballot was processed in the EPB software. Further duties may be divided amongst election inspectors, including completing the *Election Inspector Completes* portion of the *Application to Vote* and providing the voter a ballot in a secrecy sleeve. The voter will then go to a voting booth to vote their ballot and return the ballot to the tabulator.





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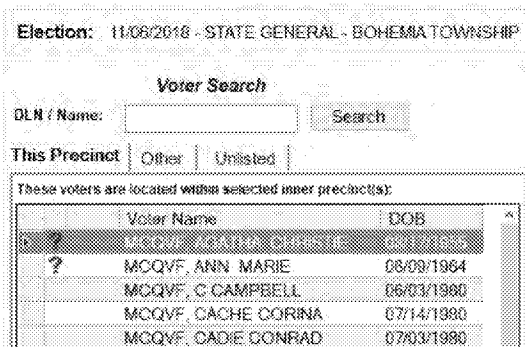
Process Voter with Status Flag(s)

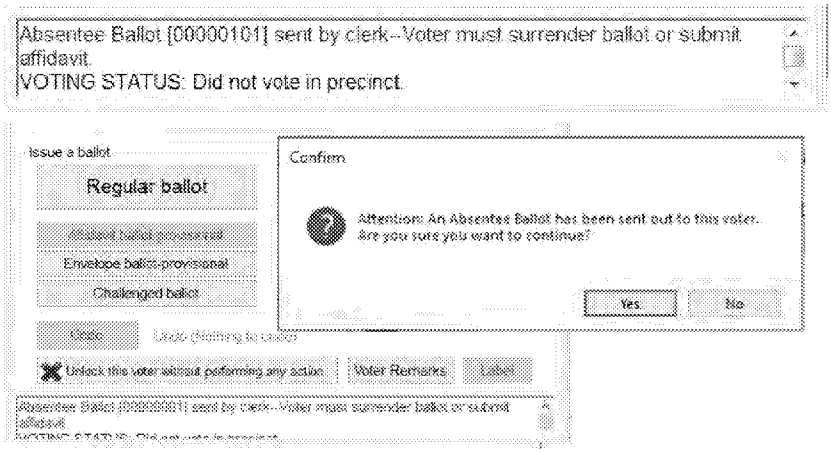
Some voters have status flags that need to be addressed prior to issuing a ballot. On the paper precinct list, these were indicated with a code. Something happened in the registration process or in subsequent mailings that needs follow-up. For example, a signature was not obtained, the voter missed checking an answer to the citizenship question, an absentee ballot was issued, the clerk received reliable information the voter may have moved, etc.



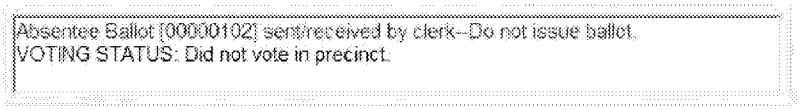
A voter has a status flag if he or she has a red question mark next to his or her name. When a red question mark is found, read the message in the Voter Status window at the bottom of the Voter Details screen to determine the issue.

Absentee Ballot sent by clerk

This voter was sent an absentee ballot. The voter must surrender the absentee ballot or complete the *Affidavit of Lost or Destroyed Absentee Ballot* **after approval from the Clerk**. Process as a Regular ballot and click through the warning. Place the AV ballot in the Local Clerk envelope. **Do not issue a ballot unless the Clerk has confirmed that the voter's absentee ballot was not received.**



Absentee Ballot sent/received by clerk

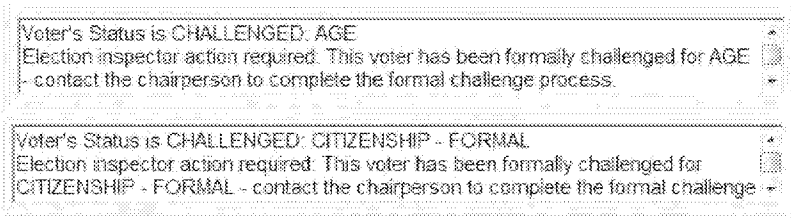


This voter was sent an absentee ballot and returned it to the Clerk. **DO NOT** issue this voter a ballot as they have already voted.

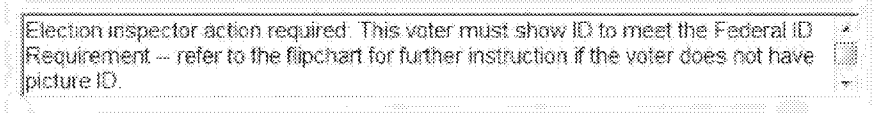
*In the extremely rare case of a clerical error (such as if a ballot was recorded in QVF for the wrong voter), **after approval from the clerk** a ballot may be issued. Process as instructed and click through the warning.*

Voter's status is Challenge: Age, Citizenship Formal or Residency Formal

This voter has been formally challenged and must complete the challenge process before being issued a challenged ballot. Seek assistance from the precinct chairperson to complete this process. The EPB processing is the same as a regular voter except Challenged ballot is selected in the Issue a ballot box. A CHAL will appear next to the voter's name after processed.



Must show ID before voting (Federal Requirement)

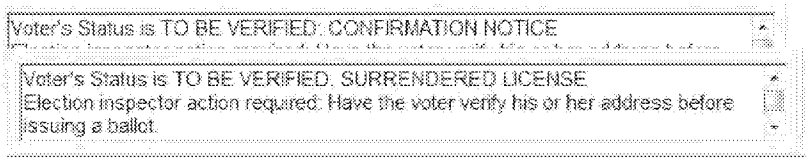


This voter must show photo ID or a paycheck, government check, utility bill, bank statement, or a government document which lists his or her name and address (if no photo ID but provides one of the documents listed above, must sign the *Affidavit of Voter Not in Possession of Photo ID* as well) prior to being issued a ballot.

Document Received by the MI Macomb 16th Circuit Court.

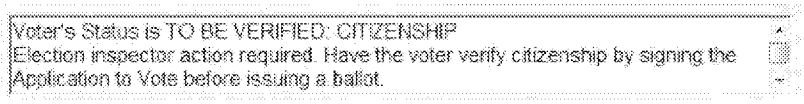
Voter's Status is V: Address Unclear, Confirmation Notice, or Surrendered License

This voter must verbally confirm the address listed in the EPB. If the voter does not confirm the address, the procedure for voters that have moved must be taken.

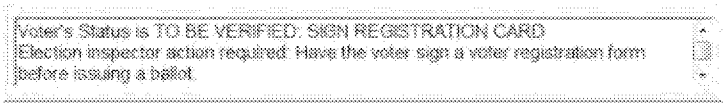


Voter's Status is V: Confirm Citizenship

This voter must verify their citizenship by signing the Application to Vote. If the voter does not complete the Application to Vote, DO NOT issue a ballot.

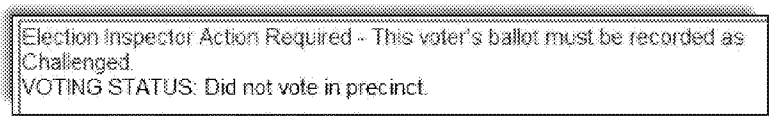


Voter's Status is V: Sign Registration Card



This voter must sign a voter registration form prior to being issued a ballot.

Voter Message: Challenged Ballot



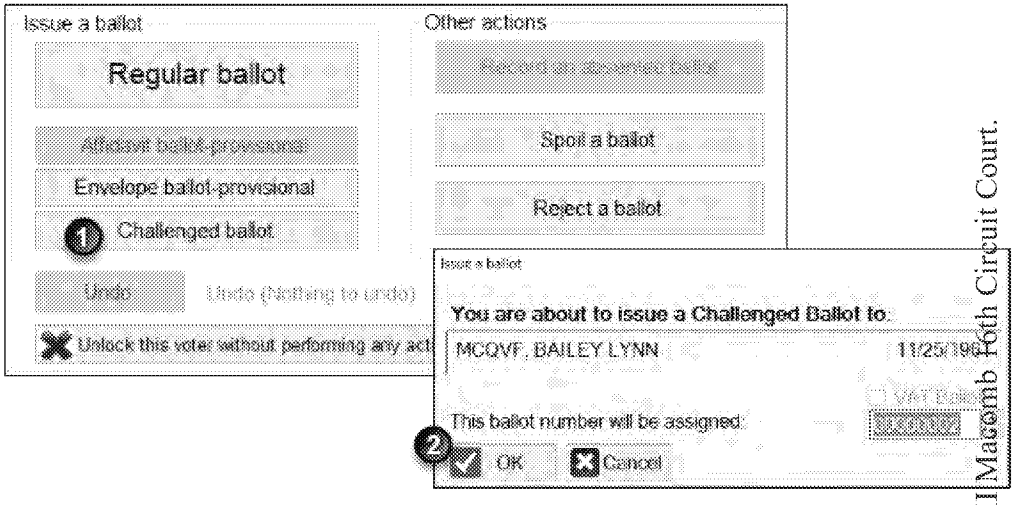
When the EPB indicates in red text that an inspector action is required to record a voter's ballot as challenged (shown above), perform the actions listed below.

(These voters registered within 14 days of the election with an alternative form of residency verification.)

To issue a Challenged ballot:

Pull the voter's record up in the EPB software, lock it in if necessary and:

1. Click Challenged ballot
2. Verify the ballot number being issued is correct or enter the ballot number and click OK



Important note:
The Challenged ballot procedure for these voters is *different* than formal challenges. Outside of the EPB, perform the following steps when issuing the challenged ballot:

1. Write the ballot number in pencil on the upper left-hand corner of the ballot, being sure to avoid any barcodes or timing marks (**not** on the ballot stub).
2. Conceal this number with a small piece of white paper taped over the number.
3. Use the Challenged ballot button to enter the voter's ballot number into the e-Pollbook. If your precinct has more than one ballot style, issue the ballot style noted on the receipt.
4. The voter will then vote the ballot and place the ballot in the tabulator as usual.

Document received by the MI Macomb 16th Circuit Court.

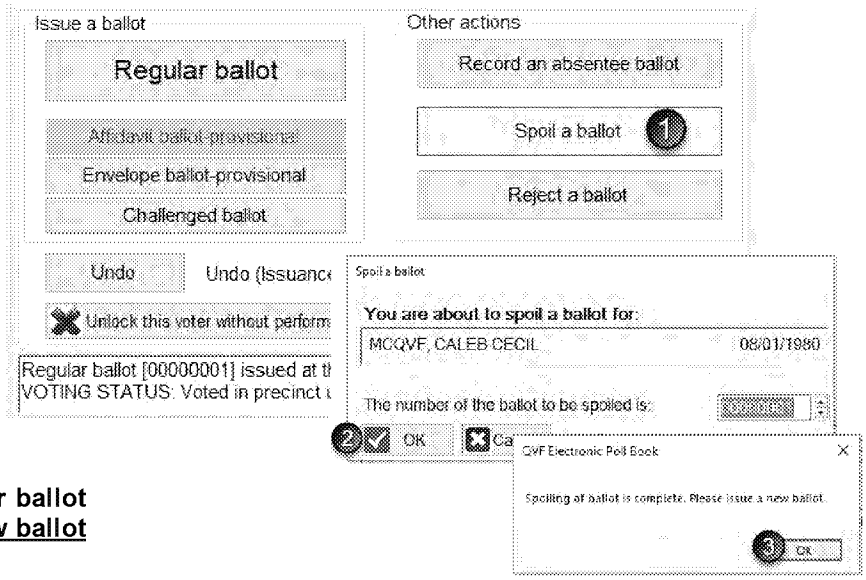
Process a Spoiled Ballot

A voter may request a new ballot if needed and a new ballot must be issued, no matter how many times the voter requests a new one. The voter should write "SPOILED" at the top of their ballot, remove the ballot stub, and place in the Spoiled Ballot Envelope. Change the *Application to Vote* to note the new ballot number and record the new ballot in the EPB software.

To spoil a ballot:

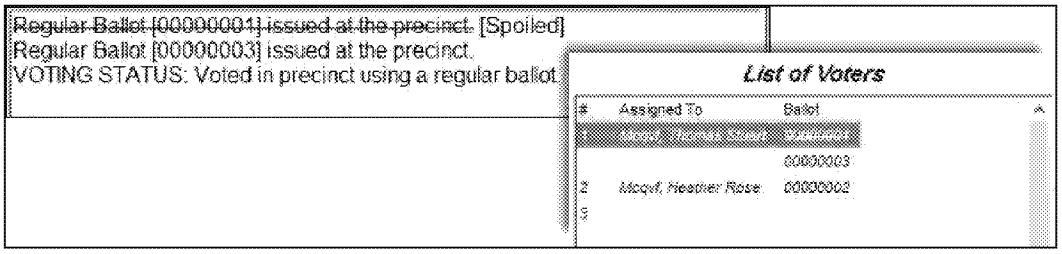
Pull the voter's record up in the EPB software by typing the voter's name into the DLN/Name field, entering the last name first, select the voter's name, click Lock this Voter Record and:

1. Click Spoil a ballot
2. Click OK – the software will automatically enter the ballot number you are spoiling.
3. Click OK



After the ballot is spoiled, the regular ballot process must be used to <u>issue a new ballot to the voter.</u>

Once the process is complete, verify the recording was done properly by looking at the Voter Status screen and the List of Voters.

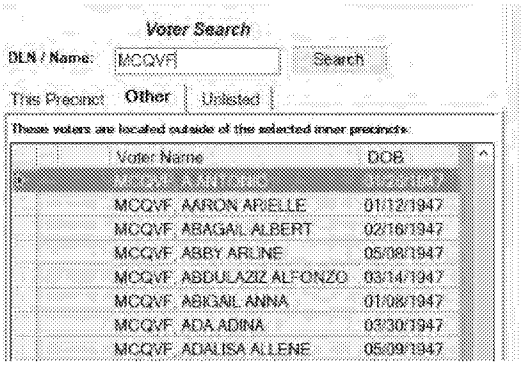


Document received by the MI Macomb 16th Circuit Court.

Find a Voter Not Appearing On This Precinct List

Find a Voter in Other Precinct in Other Tab

Election inspectors can look up voters throughout the jurisdiction, not just in the precinct they are working. If the voter does not pop up after a search, click on the **Other** tab. If the voter is registered to vote within the jurisdiction, click on their name and view their polling location. Explain to the voter that they are registered in a different polling location and/or precinct and direct them to the appropriate location. Be sure to click back to the **This Precinct** tab before processing the next voter.

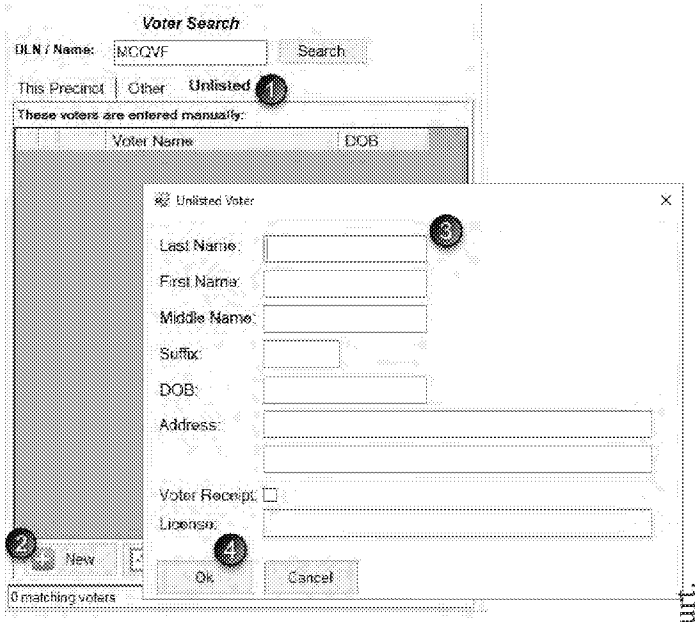


Add an Unlisted Voter

If a voter is not found under the **This Precinct** tab or the **Other** tab, the citizen was not registered to vote in the Qualified Voter File (QVF) for that jurisdiction at the time of the EPB download.

If the voter registered at the local clerk's office after the EPB was downloaded and has a receipt, add the voter to the list (steps 1-4) and see the next section of this manual, *Process Unlisted Voter with a Receipt*.

The chairperson, with the assistance of the Clerk (and utilizing the *Election Inspectors' Procedural Manual Flipchart* and *Missing Voters Flow Chart* listing options including a provisional ballot) should determine whether the citizen is eligible to vote. If it is determined that the citizen is a qualified voter that should vote in that precinct, they must be added to the list.



To add a voter to the list:

1. Click the Unlisted tab
2. Click New
3. Enter the voter's information
4. Click OK

After the voter is added, a ballot number must be assigned.

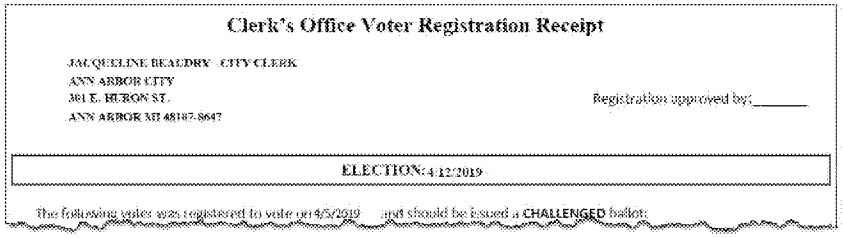
The Clerk will provide guidance on the type of ballot to issue the voter.

Important note: You must manually enter ballot numbers for unlisted voters, and the next regular ballot issued (for that ballot style) will need to be adjusted; it will not auto advance correctly.

Document received by the MI Macomb 16th Circuit Court.

Process an Unlisted Voter with a Receipt

When a voter is not found under the **This Precinct** tab or the **Other** tab, and they were registered by the local clerk's office after the e-Pollbook was downloaded for the election they must present the Clerk's Office Voter Registration Receipt. The voter must be added to the EPB from the Unlisted tab, then a ballot can be issued per the instructions on the receipt.


Clerk's Office Voter Registration Receipt

JACQUELINE BEAUDRY - CITY CLERK
ANN ARBOR CITY
301 E. HURON ST.
ANN ARBOR MI 48107-8647

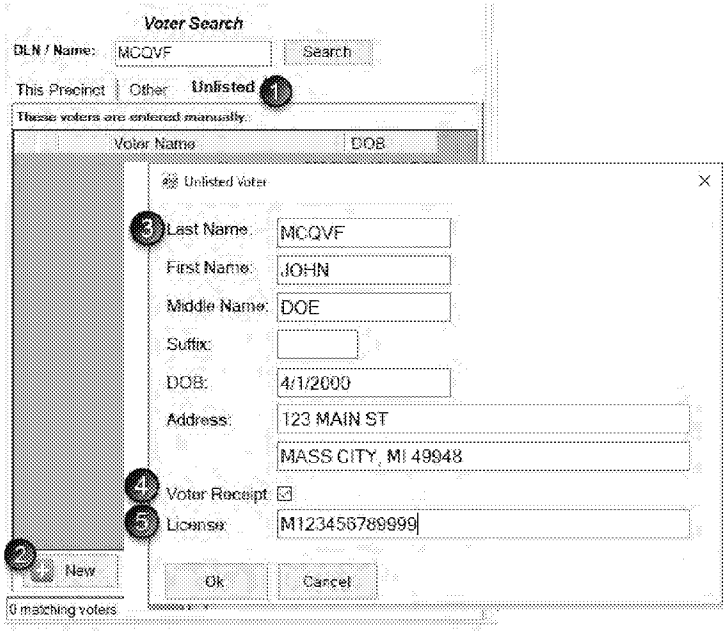
Registration approved by:_____

ELECTION: 4/12/2019

The following voter was registered to vote on 4/5/2019 and should be issued a CHALLENGED ballot:

To add a voter to the list:

1. Click the Unlisted tab
2. Click New
3. Enter the voter's information
4. Click the "Voter Receipt" box to enable the option and the cursor automatically moves to the License field
5. If the voter has a DL/PID, swipe the DL/PID or scan the barcode to add the id number and the Unlisted Voter window will automatically close. The ID number can also be hand-typed, then click OK.



After the voter is added, a ballot number must be assigned. Follow the instructions provided on the receipt to select the correct ballot type button (Regular or Challenged).

If the receipt says that the ballot must be prepared as "challenged" perform the following steps:

1. Write the ballot number in pencil on the upper left-hand corner of the ballot, being sure to avoid any barcodes or timing marks (**not** on the ballot stub).
2. Conceal this number with a small piece of white paper taped over the number.
3. Use the Challenged ballot button to enter the voter's ballot number into the e-Pollbook. If your precinct has more than one ballot style, issue the ballot style noted on the receipt.
4. The voter will then vote the ballot and place the ballot in the tabulator as usual.

Important note: You must manually enter ballot numbers for unlisted voters, and the next regular ballot issued (for that ballot style) will need to be adjusted; it will not auto advance correctly.

Document received by the MI Macomb 16th Circuit Court.

Process Other Voter Types

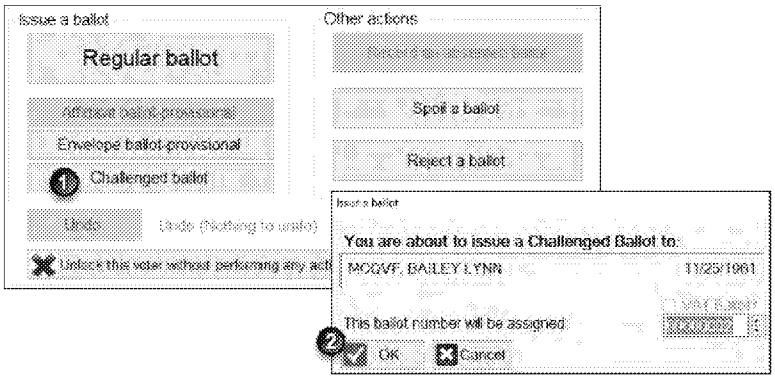
Process a Voter Challenged by a Challenger

If a voter is challenged by a Challenger, the voter must be issued a Challenged ballot and that Challenged ballot must be recorded in the EPB. Please note, the Challenge must be directed to the chairperson and all steps must be carried out prior to issuing the challenged ballot. Follow the instructions below to issue a challenged ballot in the EPB software.

To issue a Ballot to a Challenged Voter:

Pull the voter's record up in the EPB software, lock it in if necessary and:

1. Click Challenged ballot
2. Verify the ballot number being issued is correct or enter the ballot number and Click OK



Important note: The ballot number must be written on the physical ballot and covered with a piece of paper or post-it tapes. In addition, full documentation of the challenge must be recorded in the paper binder pollbook.

Record an Absentee Ballot

If absentee ballots are processed in the precinct and the Clerk has instructed entry into the EPB software versus using the paper Addendum List of AV voters, follow the instructions below to process the ballots in the EPB software.

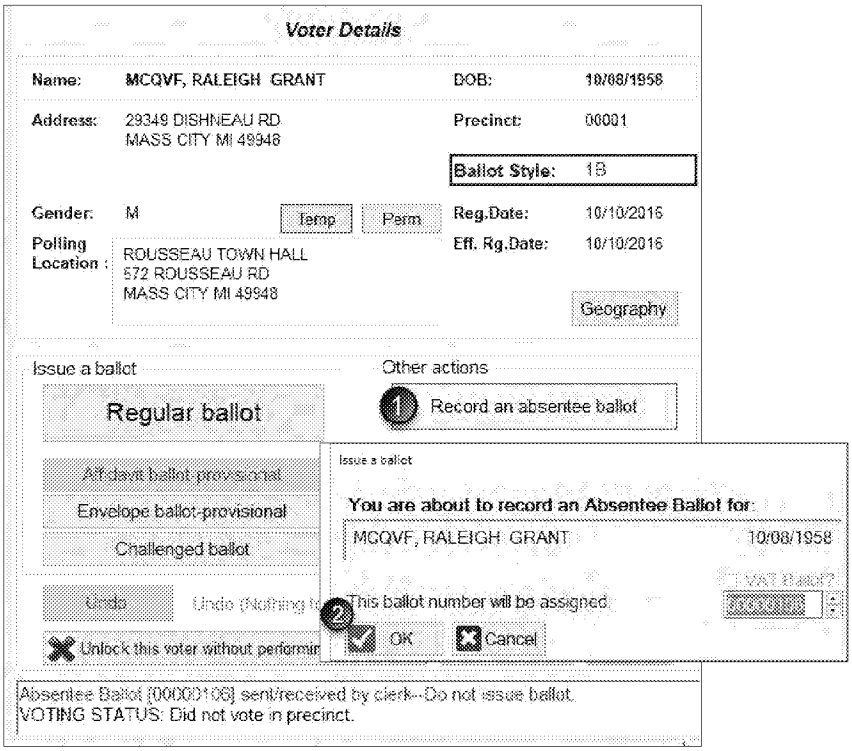
To record an absentee ballot:

Pull the absent voter's record up in the EPB software, lock it in if necessary and:

1. Click Record an absentee ballot
2. Verify ballot number (enter if not auto filled) is the same as assigned and click OK

Once the process is complete, verify the recording was done properly by looking for AV next to the voter's name, the Voter Status screen and the List of Voters.

NOTE: If processing a FWAB or electronic MOVE or ACCESSIBLE ballot, simply accept the regular AV ballot number assigned or enter the AV ballot number assigned by the clerk.



Document received by the MI Macomb 16th Circuit Court.

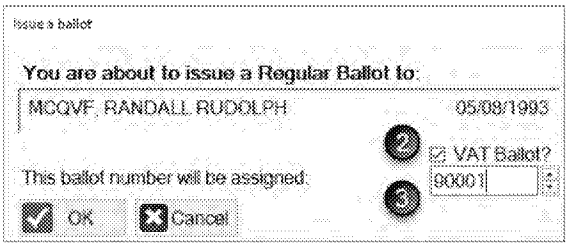
Record a Voter Assist Terminal (VAT) Ballot

When a voter requests to use the Voter Assist Terminal (VAT) to vote, issue a blank ballot (with a numbered stub). Since they will make their selections using the VAT which prints their votes on a blank ballot, they will not receive a regular ballot with a traditional number sequence.

To record such ballots in the Electronic Pollbook, search for the voter in the EPB as usual and select a ballot type to record. When assigning this voter's ballot number, indicate that it is a VAT Ballot by checking the VAT box. This action tells the system to use the blank ballot numbering sequence when auto advancing. If it is the first VAT ballot of the day, enter the first ballot number of the blank ballot stock. VAT ballot numbers will advance automatically like other ballots do when the Auto Advance option is enabled and after the first number is entered.

To record a VAT ballot:

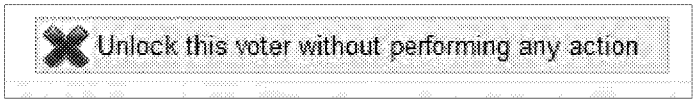
1. Click the button for the kind of ballot being assigned (Regular, Provisional…)
2. Add a checkmark to the VAT box
3. If this is the first VAT ballot of the day, enter the ballot number in, otherwise, confirm the VAT ballot number matches the sequence and click OK.



Document received by the MI Macomb 16th Circuit Court.

Avoid or Correct Mistakes

If a voter is selected in error, simply click **Unlock this voter without performing any action** to return to the main screen.



If an entry mistake occurs, whether the wrong ballot number or the wrong voter was issued a ballot, using the **Undo** function will aid in correcting the mistake.

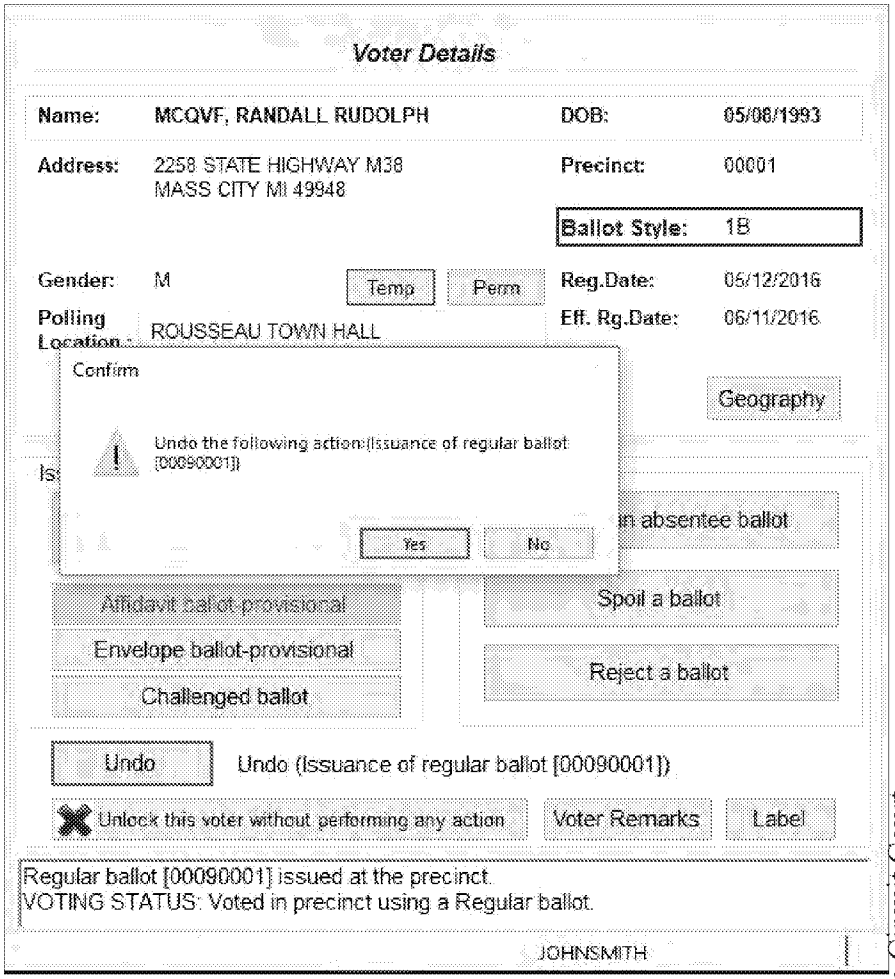
To correct a mistake:

1. Search for the voter, using the DLN/Name search box
2. Select the voter
3. Click Lock this voter record
4. Click Undo
5. Click Yes

Notice the action you are undoing is in brackets next to the Undo button and in the confirmation box. Use the *Application(s) to Vote* to ensure you are making the correction properly. The **Undo** function should not be used to attempt to fix major mistakes. If several ballots have been issued out of sequence, correct this type of error with a remark and by ensuring the next voter is correct from that point forward.

Important note: The **Undo** feature is **NOT** for spoiling ballots (see *Spoiled Ballots* section for detail). If you have questions as to when the **Undo** function is appropriate to use, consult your local Clerk.

See FAQ #1 at the back of this manual if a voter was issued an incorrect ballot style.



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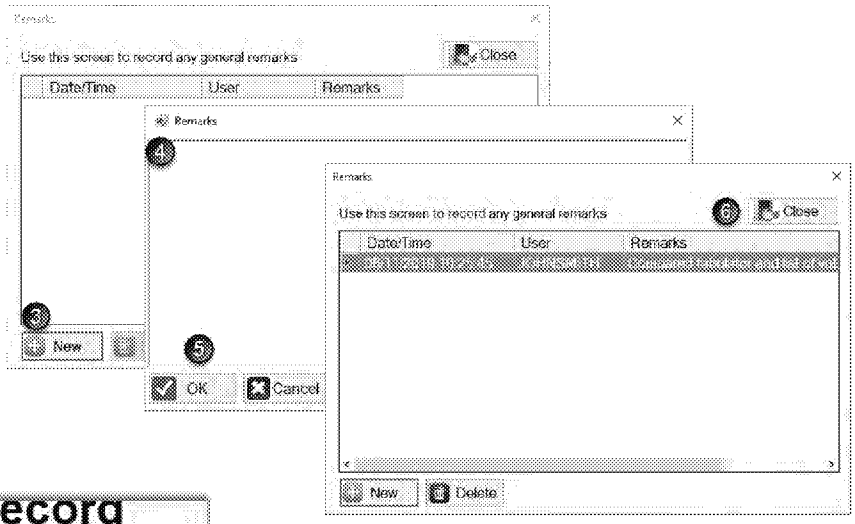
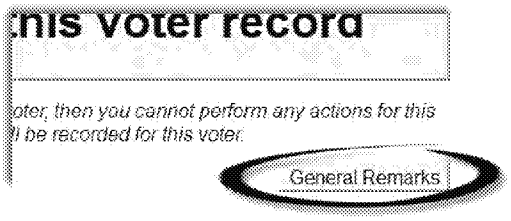
Make a Remark

Any time a correction is made, a remark should be entered. In addition, remarks should be made throughout the day to document events that happened in the polling place that are significant. Providing this information aids the Clerk in understanding what took place throughout the day. There are two types of remarks, General and Specific. Be sure to use the correct type based on the comment you need to make.

To make a general remark:

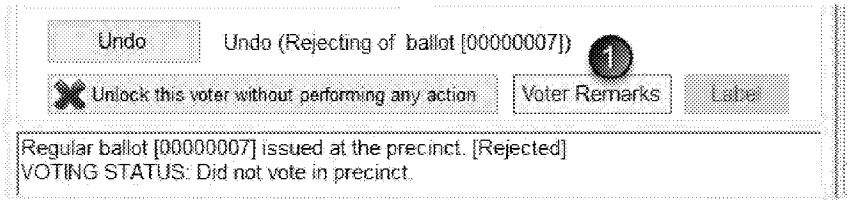


1. Click File (or the *General Remarks* button and skip to step 3)
2. Click Remarks
3. Click New
4. Enter Remark, the EPB automatically records the date and time of the entry; however, if entry of the remark is delayed from the time the event occurred, then include the time the event took place in the remark.
5. Click OK
6. Click Close

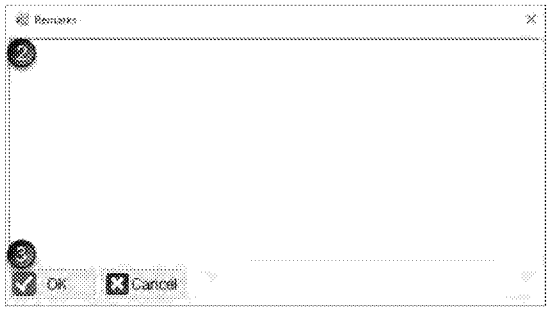


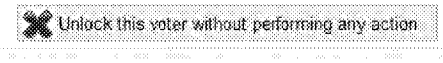
To make a voter remark:

Pull the voter's record up in the EPB software, by typing the voter's name into the DLN/Name field, entering the last name first, click Lock this Voter Record and:



1. Click Voter Remarks
2. Enter Remark, the EPB automatically records the Voter Name, Voter Number, and date and time of the entry, however, adding the time is recommended as the EPB is not always available for remark entry at the time the event took place.
3. Click OK





If there are no other actions to perform on that voter, Unlock the voter and proceed to process the next voter.

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Reject a Ballot

A ballot is rejected only in a situation where a voter will not be issued a new ballot. Valid reasons for rejection are:

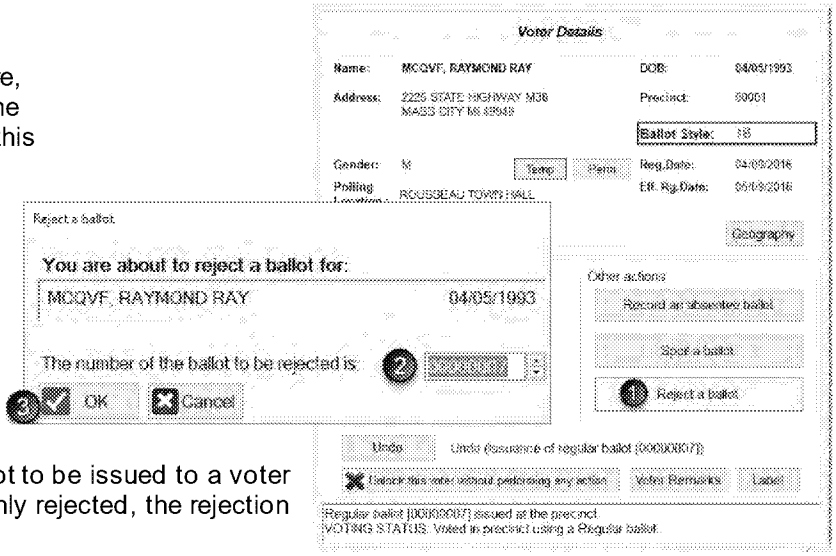
- **Exposure** – A voter intentionally exposed his or her marked ballot to others at the polling place.
- **Missing stub/ballot number does not agree** – It is discovered during the ballot serial number verification process that the stub on the ballot that was issued to the voter at the polls is missing or bears a different number than the number recorded on the voter's *Application to Vote*.
- **Ballot was left in booth/voter did not tabulate** – A voter neglected or refused to tabulate his or her ballot.

If any of these situations arise, a voter may not be issued a replacement ballot. The ballot must be rejected.

To Reject a ballot:

Pull the voter's record up in the EPB software, by typing the voter's name into the DLN/Name field, entering the last name first, click Lock this Voter Record and:

1. Click Reject a ballot
2. Verify ballot number is the same as assigned - Click OK
3. Click OK
4. Record a Voter Remark (See previous page) that includes the reason for rejection



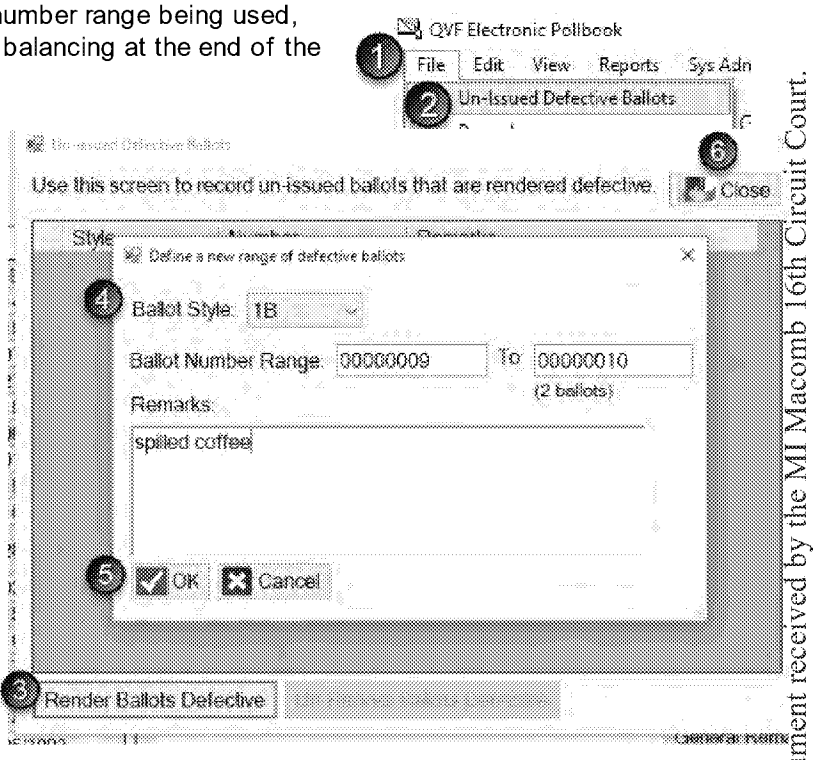
The EPB software will not allow another ballot to be issued to a voter with a rejected ballot. If a ballot was mistakenly rejected, the rejection must be removed by using the Undo button.

Mark Unissued Ballots Defective

If a ballot becomes unusable and it is within the number range being used, record it defective in the EPB software to ensure balancing at the end of the night.

To record defective ballots:

1. Click File
2. Click Un-issued Defective Ballots
3. Click Render Ballots Defective
4. Select the ballot style, enter the ballot number range, and record the reason the ballot is defective.
5. Click OK
6. Click Close



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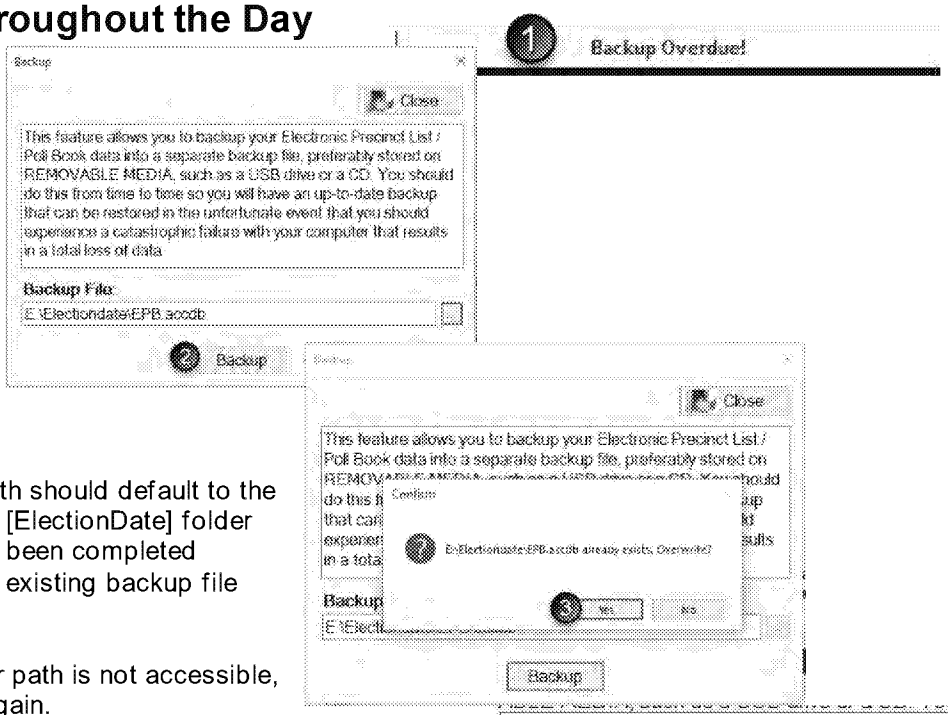
Back up Regularly Throughout the Day

Approximately every half hour, the EPB software will notify the user that a backup is overdue. It is important to take a moment after processing a voter to update the backup. This will ensure the flash drive has the most recent data entered into the EPB in the event of a hardware failure.



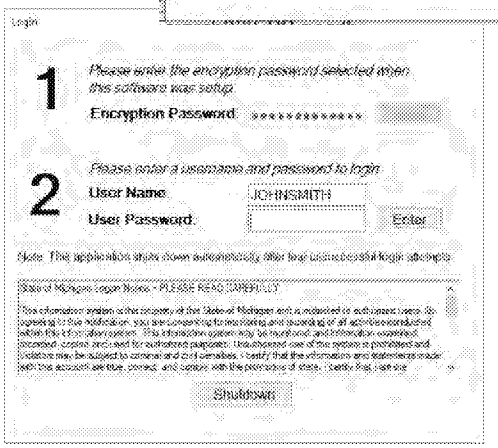
To Backup to the flash drive:

1. Click Backup Overdue
2. Click Backup – the file path should default to the encrypted flash drive and [ElectionDate] folder once the first backup has been completed
3. Click Yes to overwrite the existing backup file
4. Click OK

If you get an error that the drive or path is not accessible, log into your flash drive and try again.

Understand Timeout Features

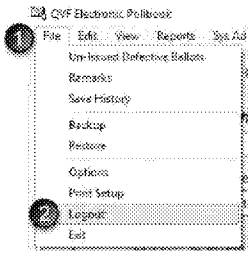
For security reasons, the EPB software will logout a user after thirty minutes of inactivity. This can be avoided by moving the mouse and/or clicking into the DLN/Name field if there are long periods of inactivity. If the EPB software logs out the user, simply reenter the User Name and User Password and click Enter.



Switch Users

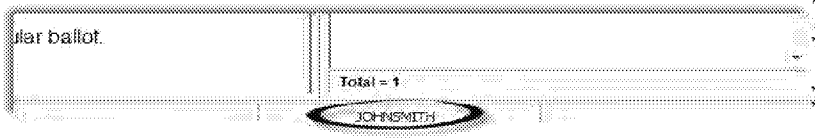
To switch users, simply use the **Logout** function by:

1. Click File
2. Click Logout



Then simply log in with the new username and password.

The current user is listed in the lower right-hand corner of the screen as illustrated:



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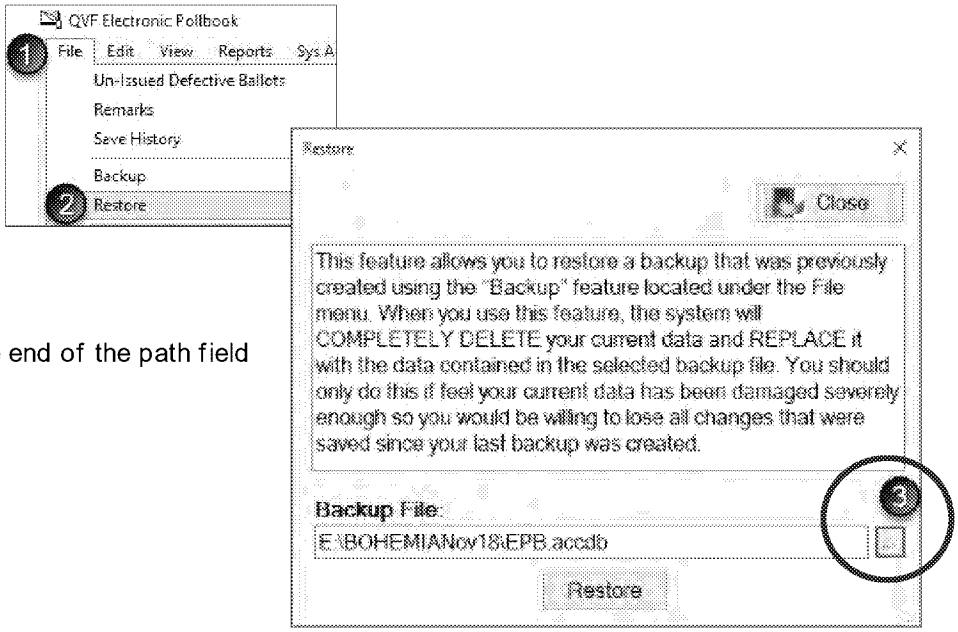
Restore the Database

In the event the laptop fails and the EPB needs to be reinstalled on a new laptop on election day, the **Restore** feature will reload all of the information entered up to the point of the last backup. The only voter data missing would be entries made in the EPB since the last backup. That information can be added back in using the *Applications to Vote*. The Administrator username and password must be obtained from the Clerk for the initial login when the software is re-installed.

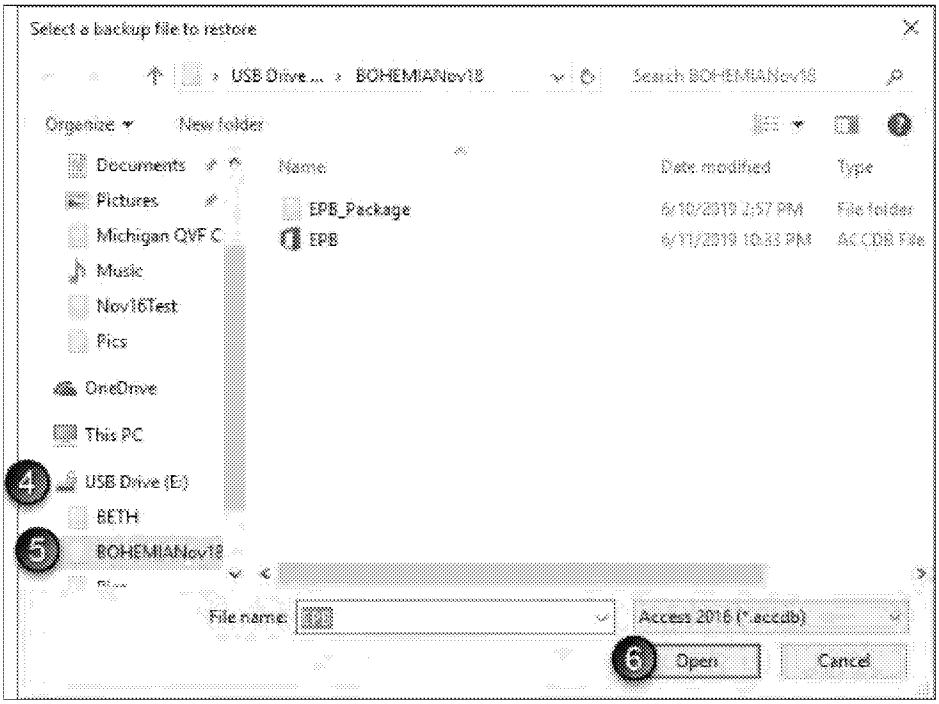
Once the EPB software has been installed onto the new laptop, login to the EPB software, and perform the following steps:

1. Click File
2. Click Restore



3. Click this button at the end of the path field

4. Make sure the encrypted flash drive is selected (Removable Disk E:) Drive letters may vary.
5. Double click [ElectionDate] folder
6. Click Open

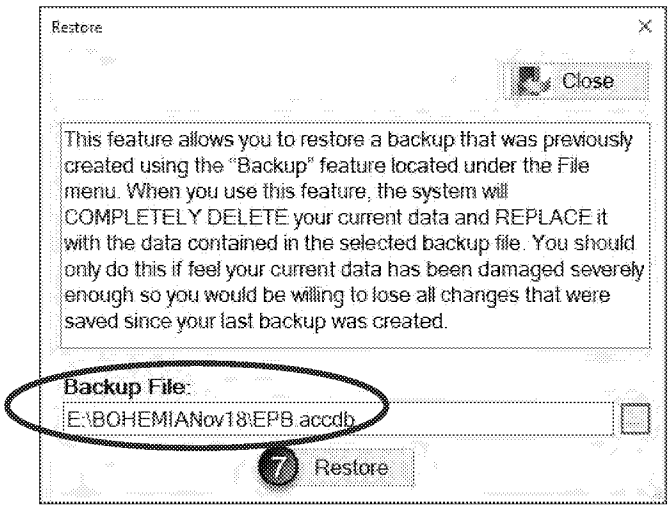


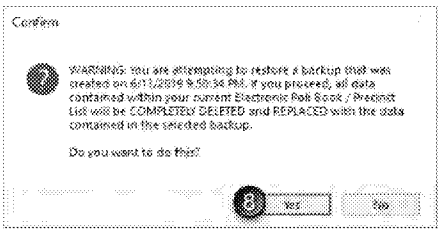
Document received by the MI Macomb 16th Circuit Court.

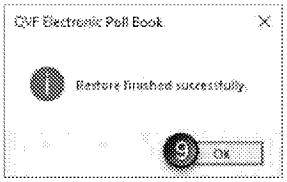
7. Click Restore
8. Click Yes
9. Click OK

After restoration is complete, the election inspectors should review the Options under File>Options, then log out of the EPB and log back in with the username and password they had used prior to the laptop/software failure.

If time elapsed between the last backup and the restoring of data, use the *Application(s) to Vote* to re-enter voter(s) and process new voters.







Document received by the MI Macomb 16th Circuit Court.

Election Day: Close the Polls

After the close of polls on Election Day, data processed in the EPB software must be saved one last time to the encrypted flash drive and reports must be generated to complete the paper binder pollbook. The EPB software generates the three reports necessary for completion of the paper binder pollbook/official record of the precinct in just a few steps. Those reports include the Ballot Summary, the List of Voters, and the Remarks report. After reports are saved and printed, save voter history in a manner that can easily be uploaded into the Qualified Voter File (QVF) in a matter of seconds, ensuring accurate recording of voters in the master voter registration database.

Review and complete the next six required steps. If your receiving board prints the reports, simply save each report.

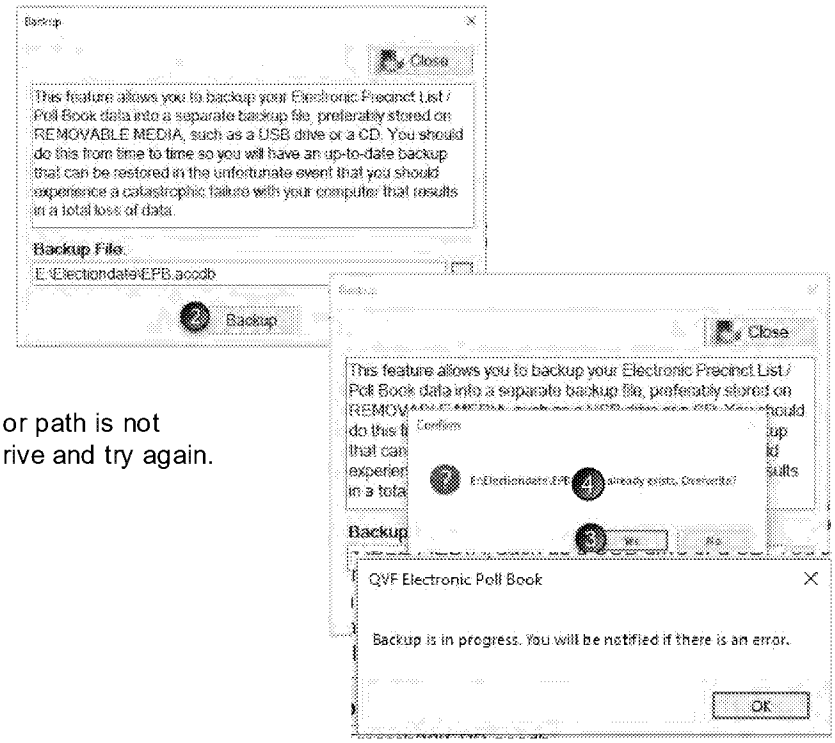
1. Save one last **Backup** file
2. Save and print the **Ballot Summary** Report
3. Save and print the **List of Voters** Report
4. Save and print the **Remarks** Report
5. Save **Voting History** (This is a frequently missed step, so please pay extra attention here!)
6. Look at the files saved on the flash drive and go back to save anything that was missed.

Save Backup

After all voters have been processed in the EPB, perform one last **Backup** to ensure all data is saved to the encrypted flash drive.

1. Click File
2. Click Backup
3. Click Backup
4. Click Yes
5. Click OK

If you get an error that the drive or path is not accessible, log into your flash drive and try again.



Document received by the MI Macomb 16th Circuit Court.

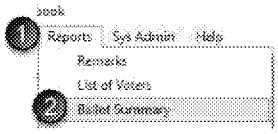
Save and Print Reports

Save and print Ballot Summary Report

The **Ballot Summary** documents the total number of ballots assigned to the precinct and how each ballot was used. You already recorded spoiled or defective (F), rejected (G) and Provisional "envelope" (I) ballots and the software enters those numbers. The designated inspector enters the remaining numbers, and the EPB software will calculate and balance the **Ballot Summary.** Type in numbers carefully and use the Tab key to move between fields.

To complete the Ballot Summary:

1. Click Reports
2. Click Ballot Summary



Enter the Number of ballots delivered to the precinct for each ballot style:

3. (A) Enter the Starting number and the Ending number of the first ballot style. If using more than one ballot style or if any VAT ballots were used, tab to create a new line and repeat the process until all styles are listed. The Count will be calculated automatically.

4. (B) Enter the Number of AV return envelopes received by board, if absentee ballots are being processed in the precinct. If absentee ballots are not being processed in the precinct, this box will already be completed with a 0.

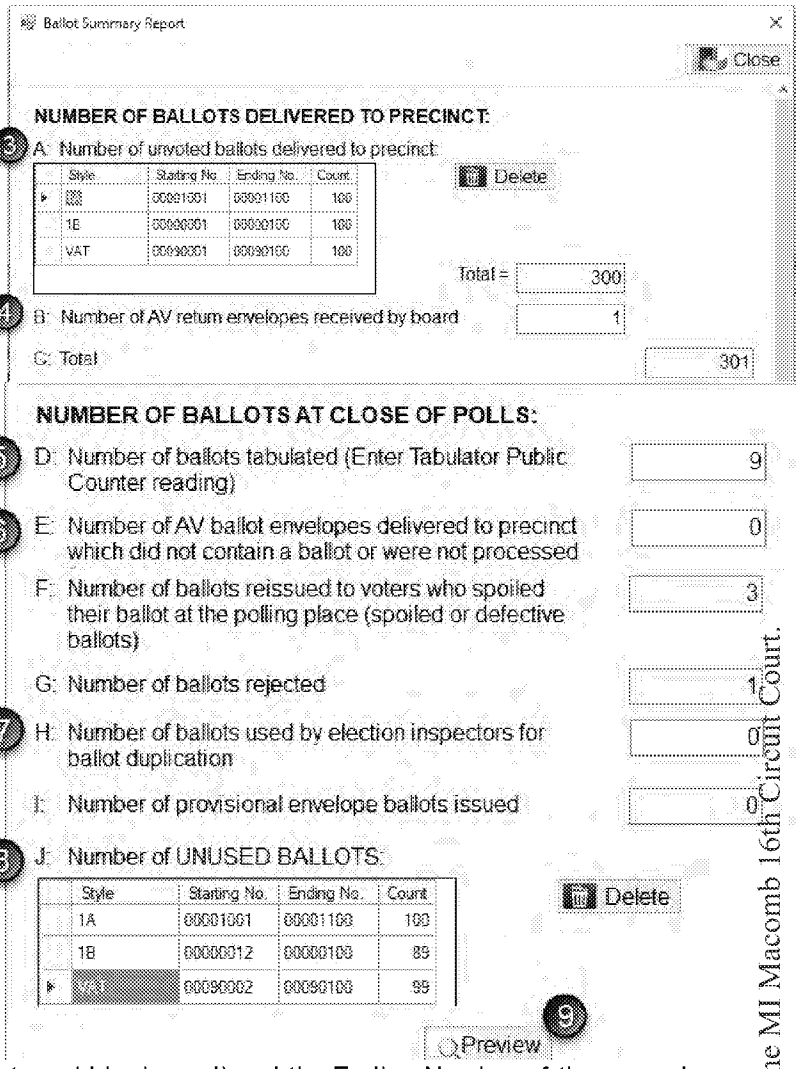
Enter the Number of ballots at close of polls:

5. (D) Enter Number of ballots tabulated from the Tabulator Public Counter reading

6. (E) Enter the Number of AV ballot envelopes delivered to precinct which did not contain a ballot or were not processed for any reason, if absentee ballots are being processed in the precinct. If absentee ballots are not being processed in the precinct, this box will already be completed with a 0.

7. (H) Enter the Number of ballots used by election inspectors for ballot duplication.

8. (J) Enter the Number of Unused Ballots by entering the Starting Number (the next ballot that would be issued) and the Ending Number of the unused ballots. If using more than one ballot style, tab to create a new line and repeat the process until all styles are listed. Tab out of the box or place the cursor in a different box to make the totals calculate.

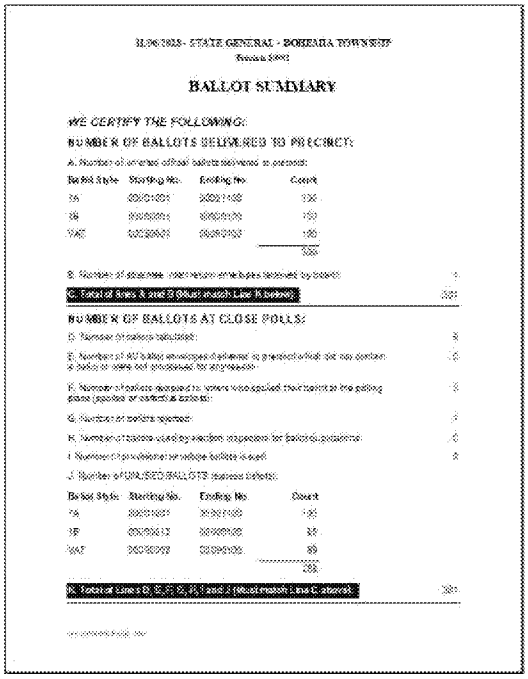


SCROLL DOWN AND STOP – L must be 0. If L is not 0, double check items 3-8 and ensure everything was entered correctly. If there is a known reason for not balancing and it is unable to be resolved, a detailed *Remark* must be made to explain to the Board of Canvassers why the precinct does not balance.

Document received by the MI Macomb 16th Circuit Court.

9. Click **Preview**

The **Ballot Summary** report will pop-up after clicking **Preview**. Be sure to review the summary to ensure all information was entered correctly and that the summary balances **(Line L = 0).** Line L may appear on a second page, so click the arrow to view the next page if necessary.

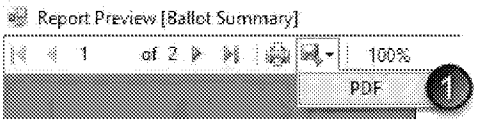

BALLOT SUMMARY

WE CERTIFY THE FOLLOWING:

NUMBER OF BALLOTS DELIVERED TO PRECINCT:

NUMBER OF BALLOTS AT CLOSE POLLS:

At this point, the **Ballot Summary** must be saved to the encrypted flash drive. If your precinct has the ability to print, the **Ballot Summary** should be printed as well. Otherwise, the reports will be printed at the Receiving Board.

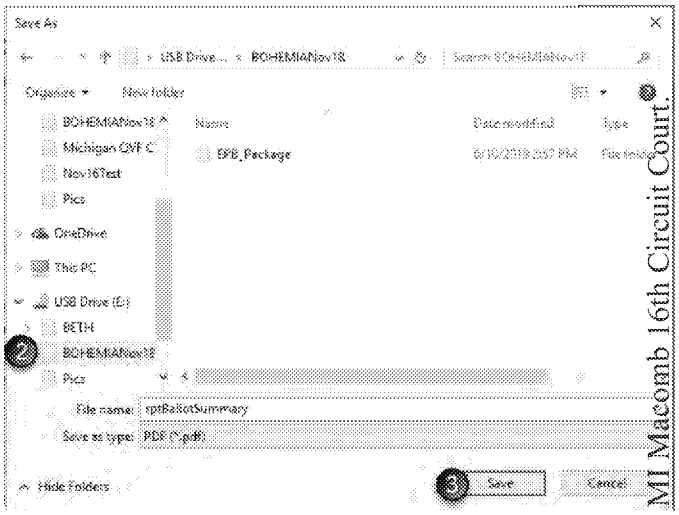


To save the Ballot Summary:

1. Click the disk icon and PDF

2. Double click the [ElectionDate] folder in the encrypted flash drive (Removable Disk E:). Drive letters may vary.

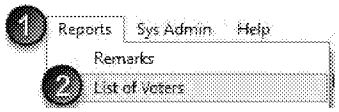
3. Click Save

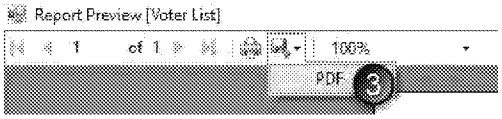


After the **Ballot Summary** has been saved, print the report (if applicable), close out of the preview screen, and close the Ballot Summary screen as well.

Document received by the MI Macomb 16th Circuit Court.

Save and Print List of Voters Report

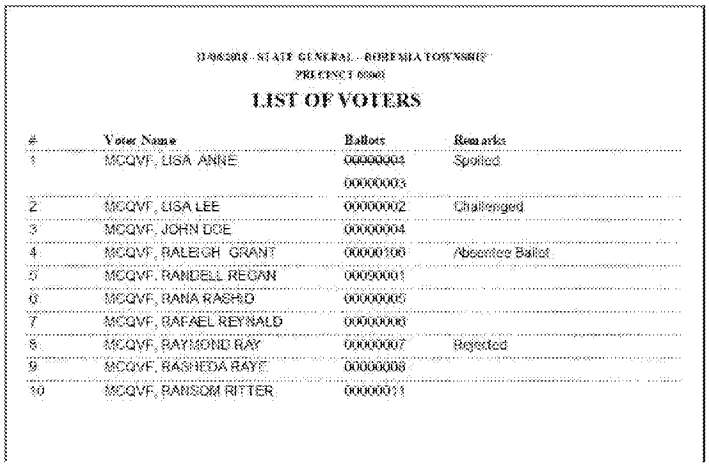




To save the List of Voters:

1. Click Reports
2. Click List of Voters
3. Click the disk icon and PDF
4. The [ElectionDate] folder selected for the Ballot Summary should automatically pop up. Always check to make sure you are in the encrypted flash drive and the correct folder before clicking Save

After the **List of Voters** has been saved, print the report (if printing in the precinct) and close out of the preview screen.



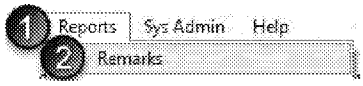
LIST OF VOTERS

#	Voter Name	Ballots	Remarks
1	MCQVF, LISA ANNE	~~00000003~~ 00000003	Spoiled
2	MCQVF, LISA LEE	00000002	Challenged
3	MCQVF, JOHN DOE	00000004	
4	MCQVF, RALEIGH GRANT	00000106	Absentee Ballot
5	MCQVF, RANDELL REGAN	00000001	
6	MCQVF, RANA RASHID	00000005	
7	MCQVF, RAFAEL REYNALD	00000006	
8	MCQVF, RAYMOND RAY	00000007	Rejected
9	MCQVF, RASHEDA RAYE	00000008	
10	MCQVF, RANSOM RITTER	00000011	

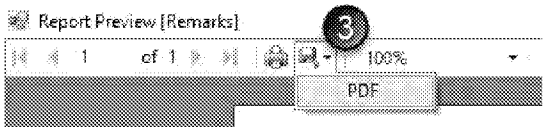
Save and Print Remarks Report

Remarks recorded in the EPB software using the General Remarks and/or Voter Remarks are also saved in a also and must be saved to the encrypted flash drive. If your precinct has the ability to print, the **Remarks** should be printed as well.

To save the Remarks report:

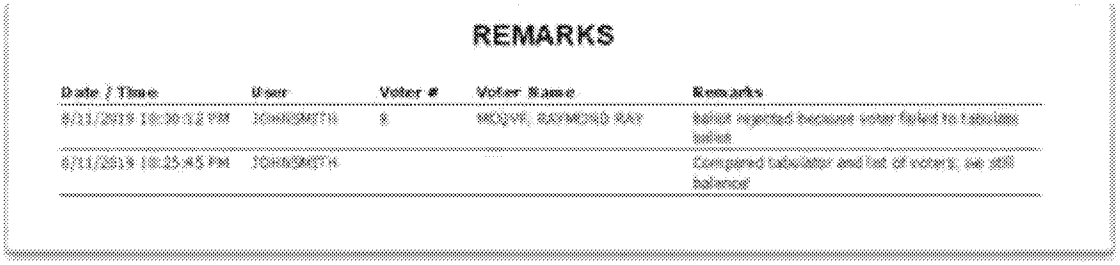


1. Click Reports
2. Click Remarks
3. Click the disk icon and PDF



4. The [ElectionDate] folder selected for the last two reports should automatically pop up. Always check to make sure you are in the encrypted flash drive and the correct folder before clicking Save

Note: There must be one recorded **Remark** for the report to save.



REMARKS

Date / Time	User	Voter #	Voter Name	Remarks
8/11/2019 10:38:12 PM	JOHNSMITH	6	MCQVF, RAYMOND RAY	ballot rejected because voter failed to tabulate ballot
8/11/2019 10:25:45 PM	JOHNSMITH			Compared tabulator and list of voters, we still balance

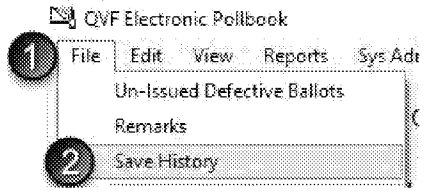
After the **Remarks** report has been saved, print the report (if using printers in the precinct) and close out of the preview screen.

Document received by the MI Macomb 16th Circuit Court.

Save Voter History: Redirection Action Required!

After all other reports are saved, save the voter history to the flash drive. The clerk needs to use this file to update the voter registration files in the Qualified Voter File (QVF) recording who voted on Election Day.

To save Voter History:



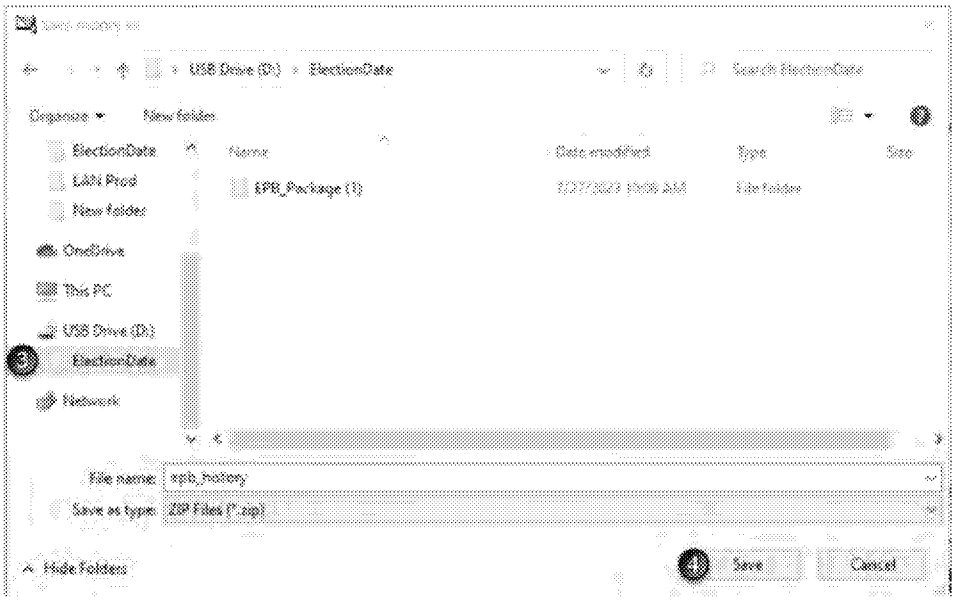
1. Click File

2. Click Save History

3. Redirect the file by clicking on the flash drive under This PC, then double-click on the **Election Date** folder. The file name should say **epb_history** with no preceding d:\

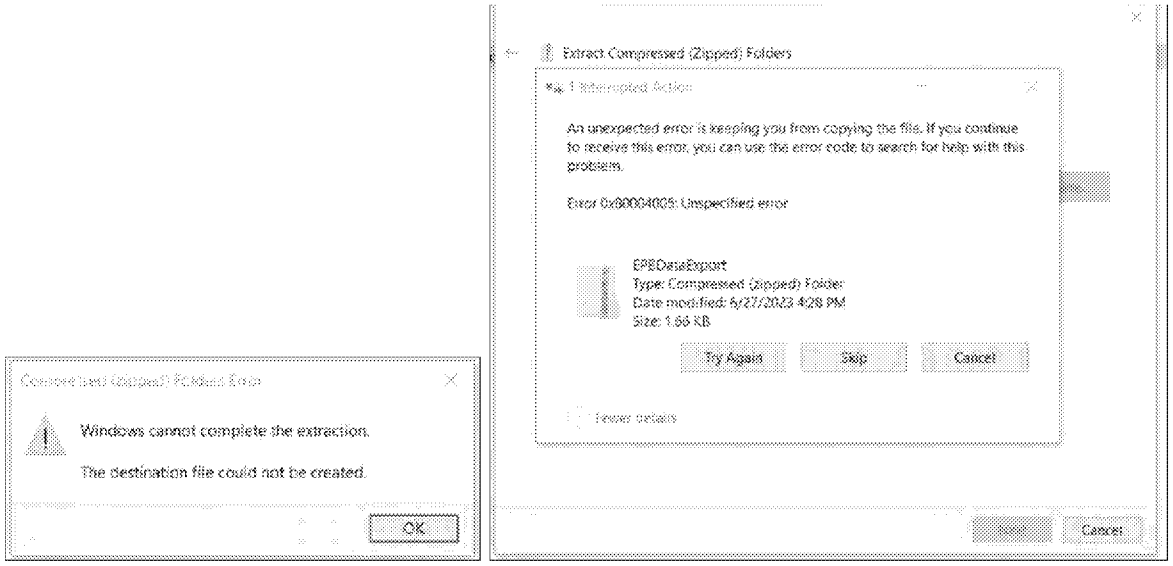
   If d:\ is still in the File name, click the cursor at the beginning of the File name field and use the Delete key to delete the d:\

4. Click Save



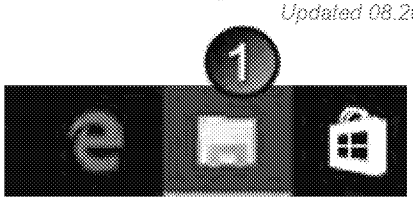
Please note: the history file is now an compressed .zip file, no longer a .csv file type. You will no longer be able to open or proofread this file, only upload it back in QVF.

A user double-clicking to open the file will see the following error.



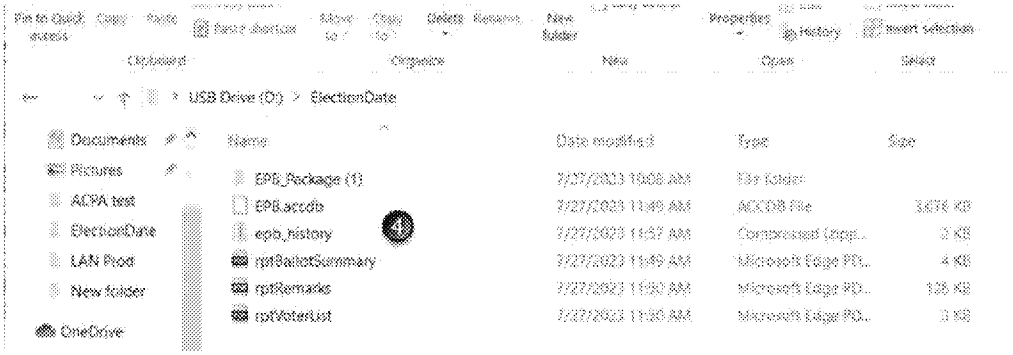
Document received by the MI Macomb 16th Circuit Court.

Ensure Files are on Flash Drive



To verify files have been saved on the encrypted flash drive:

1. Click on the file folder icon to open Windows File Explorer
2. Click Removable Disk (E:) Drive letters may vary
3. Double Click the [ElectionDate] folder



4. You must have the following files:

File Name	File Type
EPB Back Up	ACCDB file
EPB_History	ZIP file
rptBallot Summary	PDF file
rptRemarks	PDF file
rptVoter List	PDF file

You may also see the following files in your folder:

File Name	File Type
EPB_Package	File Folder
EPB_Package	Compressed (zipped)

Once all reports have been saved, close all programs and shut down the laptop. Return all items to the case except the encrypted flash drive. **The encrypted flash drive must be placed into the container the Clerk recommends, <u>sealed</u> (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.**

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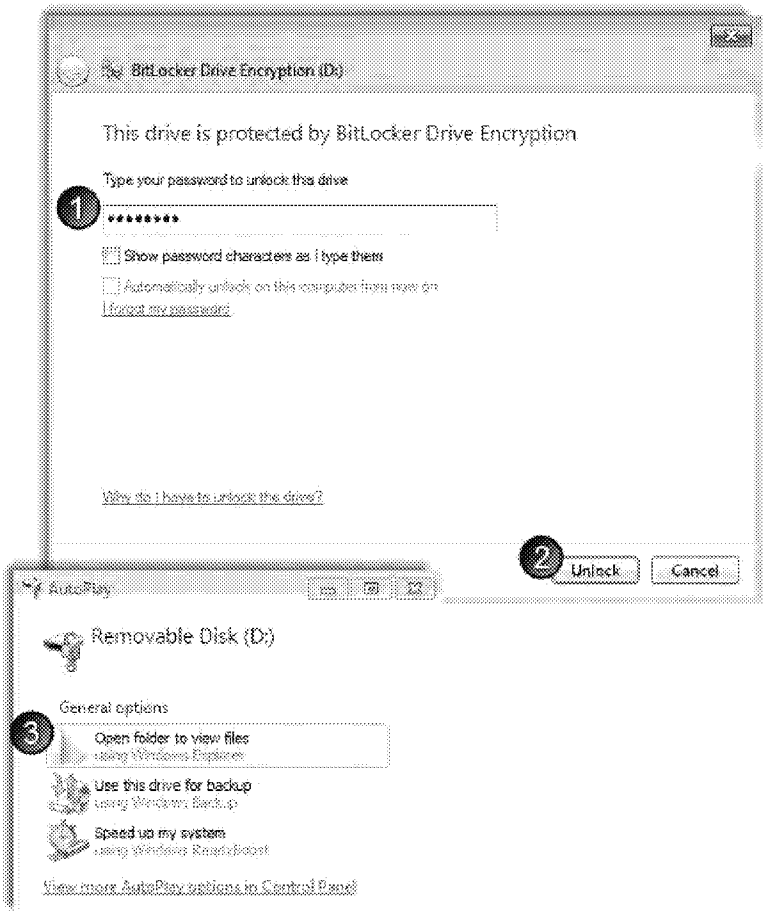
Printing Reports at the Receiving Board

The receiving board must print the reports saved on the encrypted flash drive (if not done in the polls) to complete the paper binder pollbook. After the reports have been printed, the receiving board must reseal the encrypted flash drive into the Clerk recommended container. The PC or laptop used to print reports must have Adobe Reader installed. Adobe Reader is a free download found at http://www.adobe.com/go/EN_US-H-GET-READER.

To print the 3 Election Day reports, insert the encrypted flash drive into the USB port of the PC or laptop connected to the printer and unlock the flash:

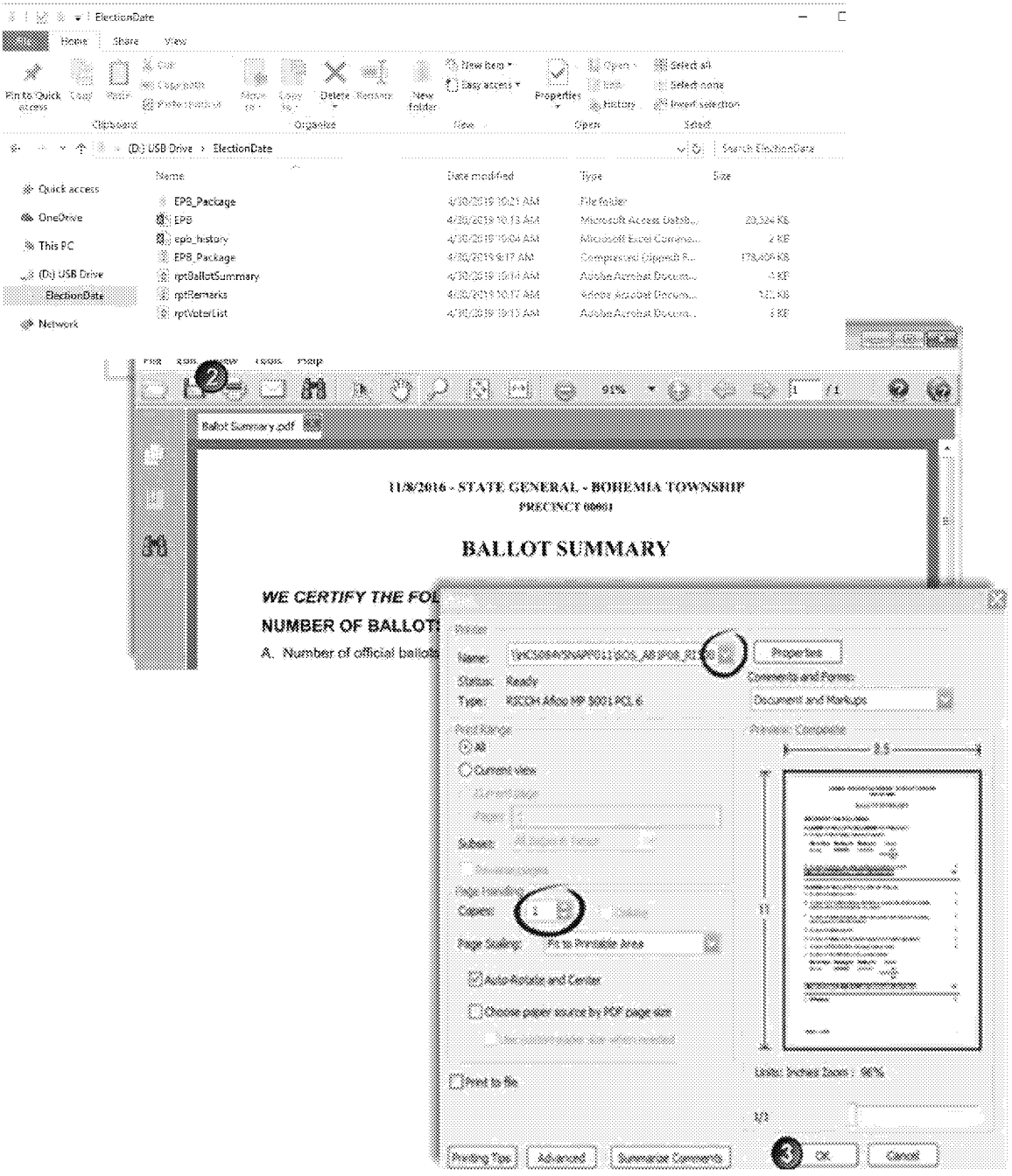
1. Enter flash drive password
2. Click Unlock
3. Click Open Folder to View Files



Document received by the MI Macomb 16th Circuit Court.

Print copies of the Ballot Summary, List of Voters, and the Remarks by:

1. Double Click on the Report name (one at a time)
2. Click the printer button
3. Ensure the printer and number of copies are properly selected (screens may vary but all should have similar options available). Click OK.
4. Repeat Steps 1-3 for all three reports.



The encrypted flash drive must be placed into the container the Clerk recommends, sealed (either an envelope with a red paper seal or an approved container and the appropriate seal), and returned to the Clerk on election night.

Document received by the MI Macomb 16th Circuit Court.

Post-election Tasks: Import Voter History (within 7 days)

The clerk or a designated QVF user (either Basic or Complete) must upload Voter history into QVF **within seven days of the election**. To enter Voter History via the QVF, insert the encrypted flash drive into a USB port and log into the flash drive, then log into QVF.

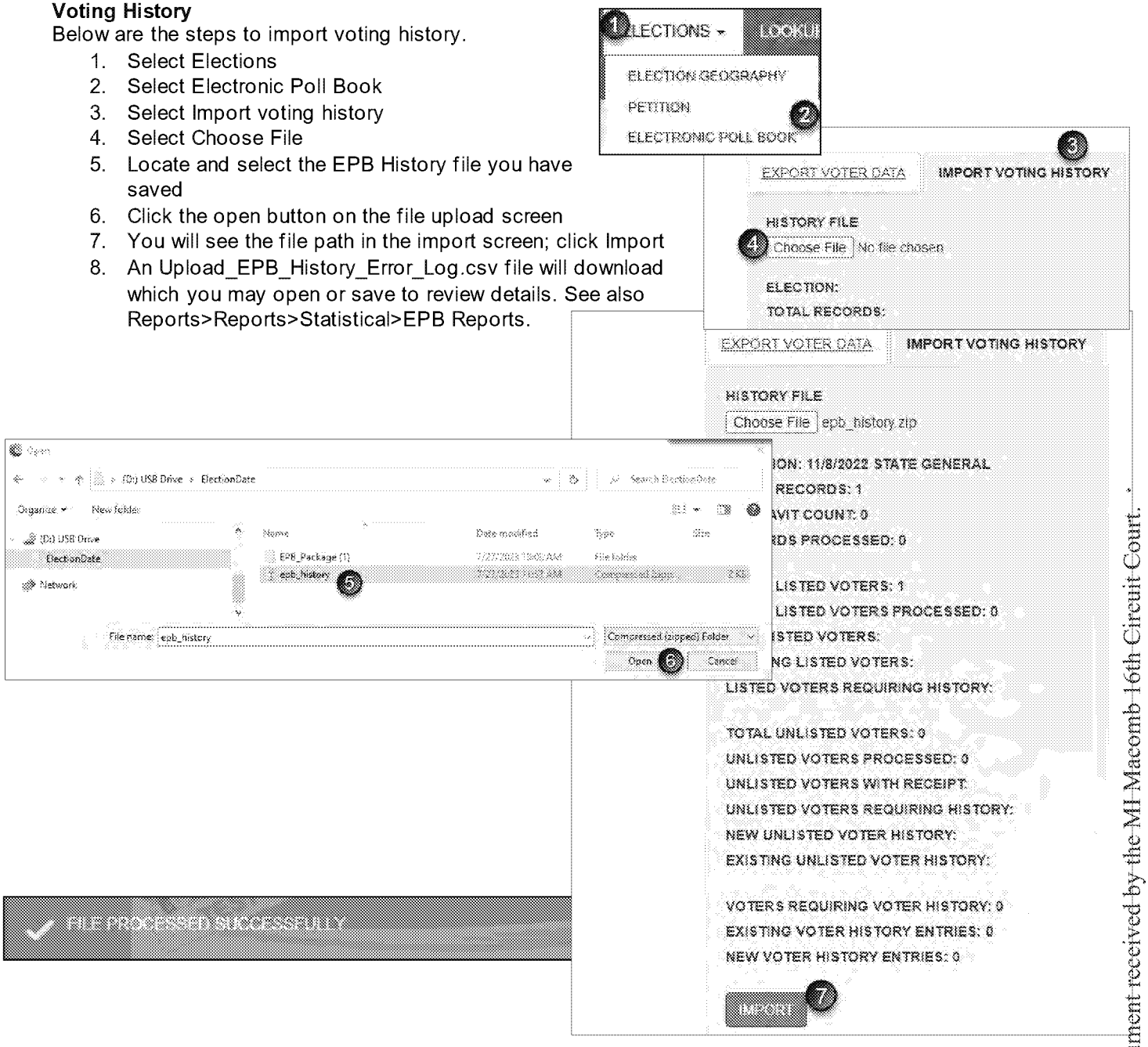
NOTE: Voters added to the **Unlisted** tab or voters that were issued a **Provisional - Envelope** ballot will not automatically update (with the exception of unlisted voters with receipts and driver's license or state identification card numbers). If those voters' ballots were processed, they must be added to QVF and updated manually under Voter and Voting History.

If Absentee Ballots were processed in the precinct, the Updates Applied will not be the same number as Records Processed because AV information is updated at the time of recording the ballot as received in QVF.

Voting History

Below are the steps to import voting history.

1. Select Elections
2. Select Electronic Poll Book
3. Select Import voting history
4. Select Choose File
5. Locate and select the EPB History file you have saved
6. Click the open button on the file upload screen
7. You will see the file path in the import screen; click Import
8. An Upload_EPB_History_Error_Log.csv file will download which you may open or save to review details. See also Reports>Reports>Statistical>EPB Reports.

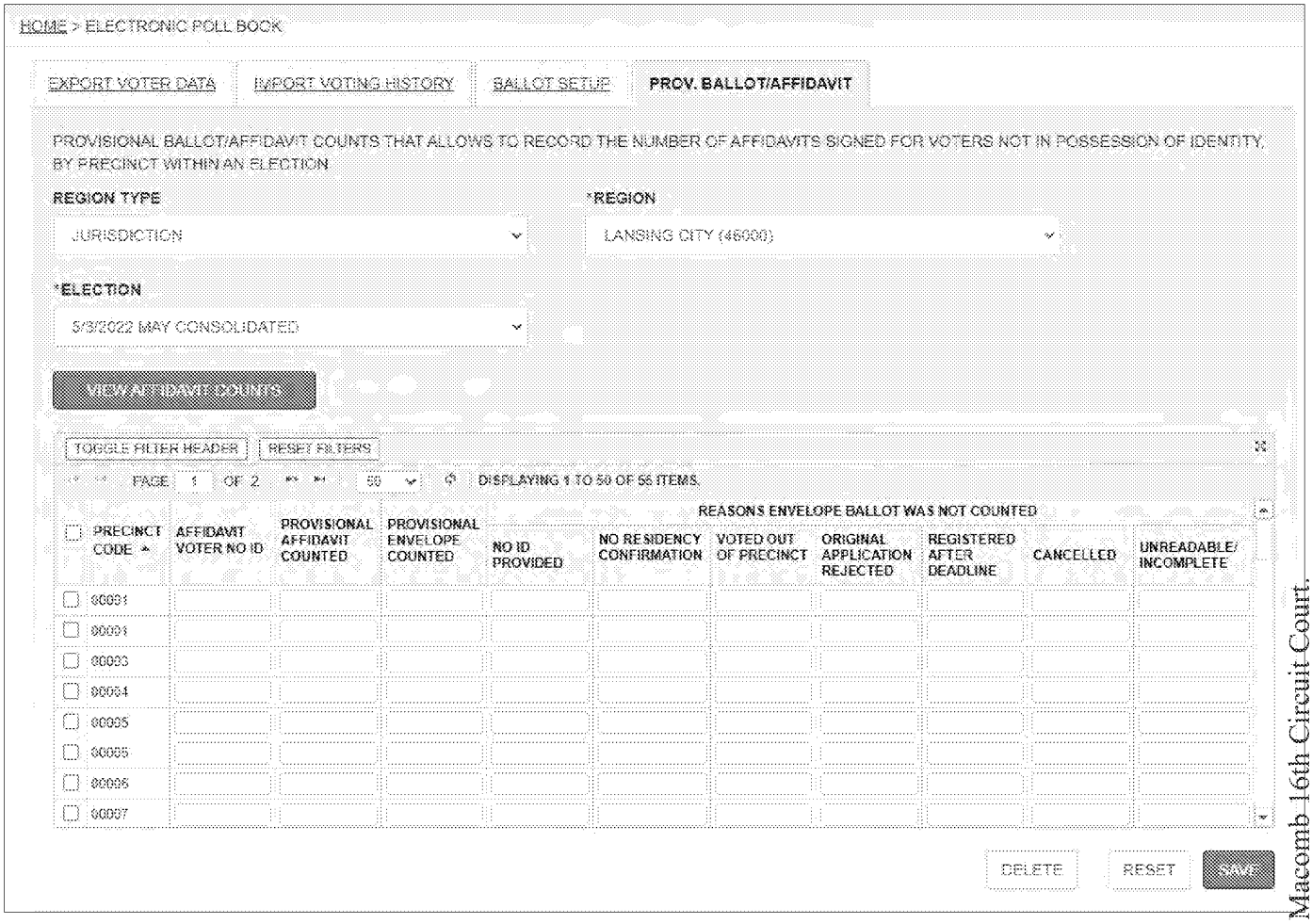


Document received by the MI Macomb 16th Circuit Court.

Post-election Tasks: Provisional Ballot/Affidavit Counts

QVF has been updated to permit you to enter or correct your precinct totals for Affidavits of Voters Not In Possession of Picture Identification, Provisional Affidavit Ballots, and Provisional Envelope Ballots under Elections>Electronic Pollbook on the Prov. Ballot/Affidavit tab. This task can be completed once all provisional envelope ballots have been resolved or the 6-day evaluation period has elapsed.

1. Select Region Type and Region
2. Select Election
3. Select View Affidavit Counts. Data uploaded with Voting History will display.
4. Click into the first box, correct or enter that precinct's totals, and tab or click to each subsequent item for each precinct. Save periodically as needed.
5. Click Save when finished.



Document received by the MI Macomb 16th Circuit Court.

Uninstall EPB software and delete associated files

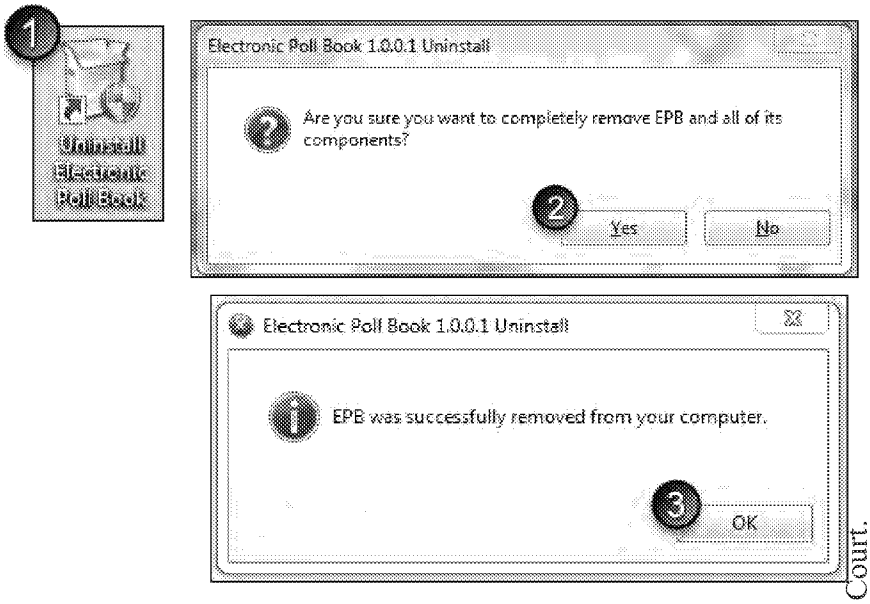
The EPB software and associated files must be deleted from all devices by the seventh calendar day following the final canvass and certification of the election unless a petition for recount has been filed and the recount has not been completed or the deletion of the data has been stayed by an order of the court or the Secretary of State. Remember, there are three locations files may have been saved. Be sure to note any other locations you have saved files and delete those as well. Delete these files **after** voter history has been uploaded to the QVF and **after** you have verified that the paper EPB report has been printed and retained.

Deleting files is very important to keep voter data secure and prevent the common error of loading an old election onto the EPB laptop. The EPB software must be re-downloaded for each election as each download is unique and will contain the most up to date voter registration and absent voter information.

Uninstalling EPB software from the laptop
Because the EPB software must be downloaded and installed for each election, uninstalling the past version of the EPB software from the laptop is essential. The files used to install the software must also be deleted from the laptop.

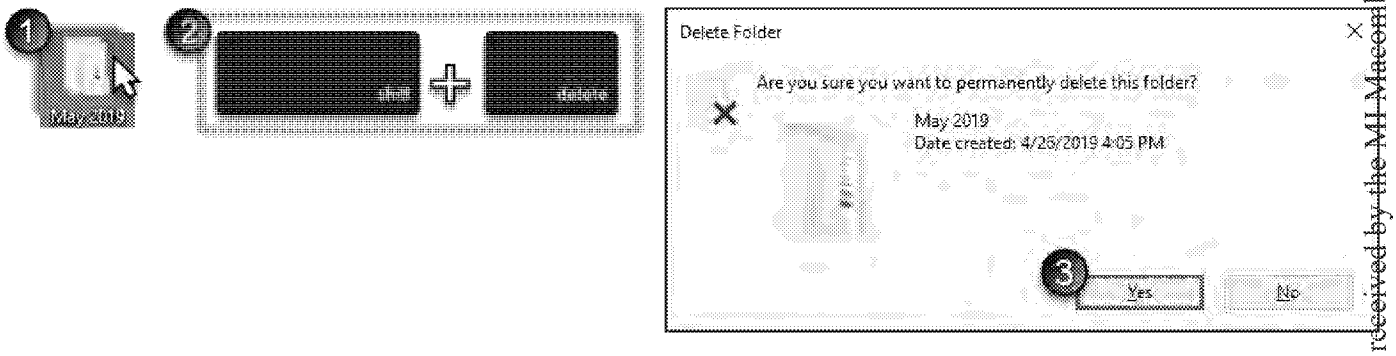
To uninstall the EPB software:

1. Double-click the Uninstall Electronic Pollbook shortcut on the Desktop
2. Click Yes
3. Click OK



To remove the installation files from the laptop:

1. Select the [Election Date] folder on the Desktop
2. On the keyboard, click Shift + Delete at the same time
3. Click Yes



Repeat these steps for all laptops.

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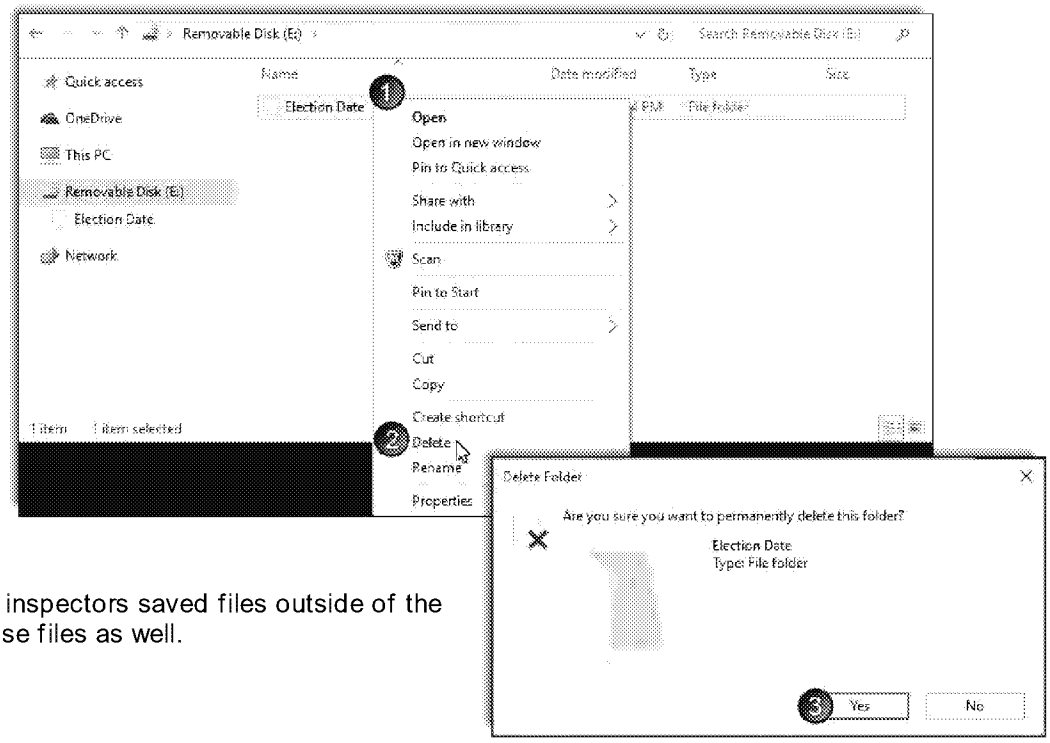
To delete EPB files from the flash drive:

Plug the flash drive into a computer and unlock the drive by entering the password. To log in and view the contents of the drive, click on the File Explorer icon

1. Right click the [ElectionDate] folder within Removable Disk
2. Click Delete
3. Click Yes

Repeat these steps for all flash drives.

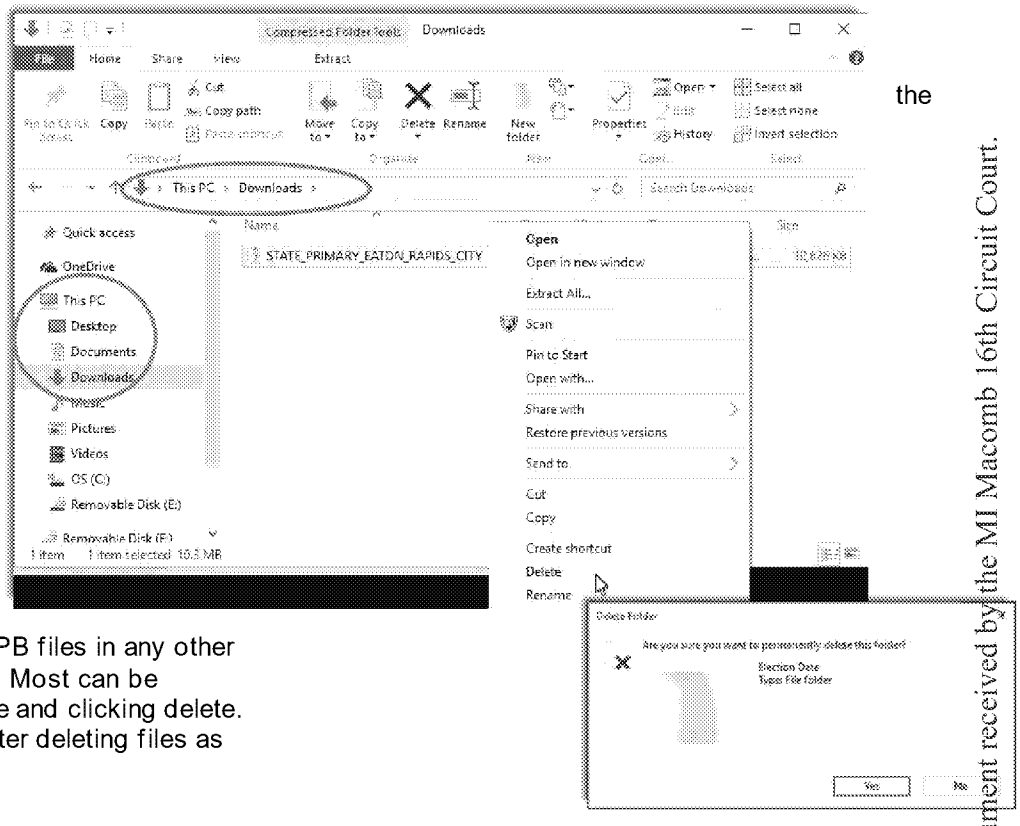


Important note: If election inspectors saved files outside of the folder, be sure to delete those files as well.

Deleting QVF PC Files

Lastly, delete all files saved on the QVF (if any).

1. Right click [ElectionDate] folder under This PC > Desktop
2. Click Delete
3. Click Yes
4. Right click [ElectionDate] folder under This PC > Downloads
5. Click Delete
6. Click Yes
7. Right click Recycle Bin on desktop
8. Click Empty Recycle Bin
9. Click Yes



Important note: If you saved EPB files in any other place(s) remove those files now. Most can be deleted by right clicking on the file and clicking delete. Always empty the Recycle Bin after deleting files as well.

Document received by the MI Macomb 16th Circuit Court.

Helpful Hints

Bar Code Scanners and Absent Voter Ballots
When processing absent voter ballots in the precinct, bar code scanners may be used to scan the absentee ballot application for voter look-up. If the laptop has 4 USB ports, the bar code scanner may be used along with the magnetic card reader. If the laptop only has 3 USB ports, the bar code scanner can be used to scan the back of a driver's license, replacing the need for a magnetic card reader.

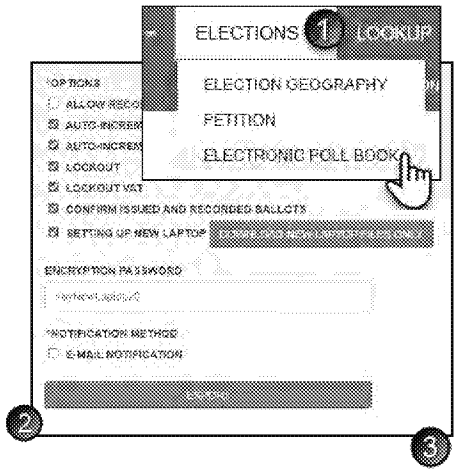
Screen Resolution
Optimal screen resolution for the EPB laptop has been 1366x768. If your list of voters is not displaying on the right-hand side of your screen, the resolution needs to be adjusted.

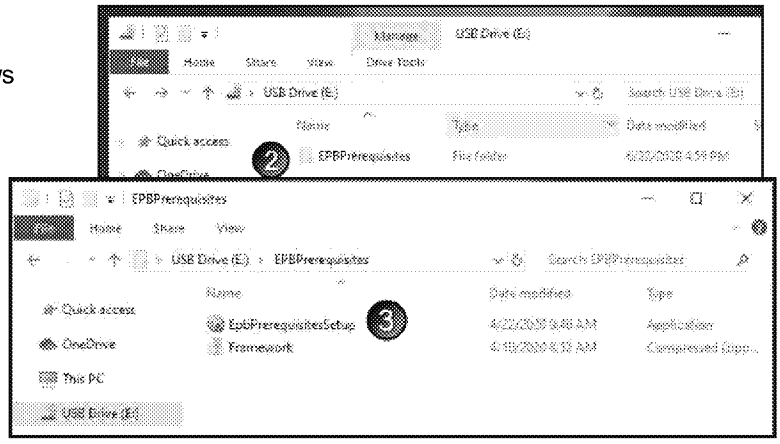
To adjust the screen resolution:

1. Go to the desktop and right click
2. Click screen resolution
3. Select 1366x768

Download and Install EPB New Laptop Files Only (optional separate download process)

1. Open the Elections menu and select Electronic Pollbook
2. Under Options, check the Setting Up New Laptop box.
3. Click the Download New Laptop Files Only blue button
4. Follow on-screen instructions for download depending on your browser.
5. Follow steps as on pp. 13-14 to:
    a. open folder to view files
    b. open zipped folder with Windows Explorer
    c. extract all files
    d. copy unzipped EPB Prerequisites folder to encrypted flash drive.





To install the EPB New Laptop Files (also known as EPB Prerequisites):

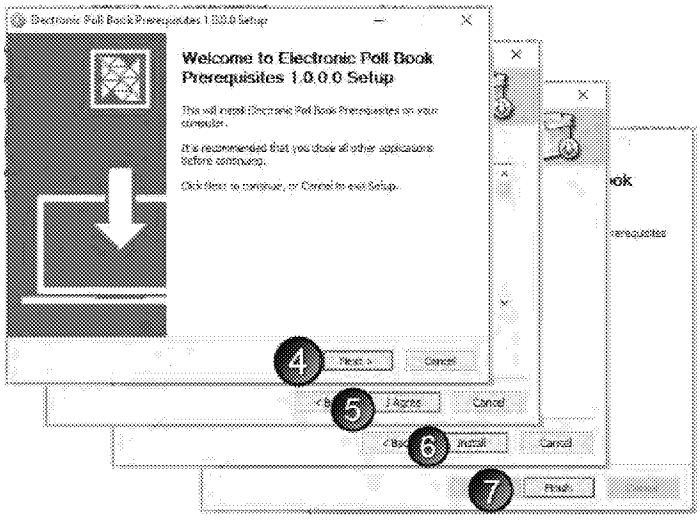
1. On each laptop, log into the encrypted flash drive
2. Double-click the EPBPrerequisites folder
3. Double-click the EpbPrerequisitesSetup file to begin installation

If a warning screen about the publisher pops up and requests you to confirm installation, click yes.

4. Click Next
5. Click I Agree
6. Click Install

A window showing the progress of the installation will appear, along with a command window (black screen). The command window will automatically close.

7. Click Finish



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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Frequently Asked Questions

1. The wrong ballot style was issued to a voter; how can it be corrected?

   Answer: If using different ballot numbers for each ballot style, no action is required except to remark the situation in the **Remarks**. If your ballot styles are numbered with the same ballot number series, open the voter's record, undo the issuance of the ballot with the incorrect ballot style, and reissue a Regular Ballot with a modified number using a letter before the number (for example, X0000012) and remark the situation in the **Remarks.**

2. If using the QVF AV module, do I have to extract the EPB software from QVF **after 4:00 p.m.** on the Monday before the election to get the most up to date absent voter information?

   Answer: Yes, this is now required by law. Jurisdictions with over 50 precincts are required to do so on the Saturday prior to Election Day **after 2:00 p.m.**

3. Is there a way to update absent voter activity on the encrypted flash drive or in the Voter List portion of the EPB software after it has been installed on the laptop?

   Answer: No, not at this time. Also, remember that election inspectors record AV ballots in the EPB software (unless using the addendum list or an AVCB), but they must **not** record AV ballots in the EPB software before the opening of the polls.

4. Do I have to print the paper binder pollbook reports in the precinct?

   Answer: No, in fact, having the Receiving Board print the reports is highly recommended. Reports must be delivered to the Receiving Board on the encrypted flash drive in a sealed container by two election inspectors of opposing political party after the polls close. The Receiving Board then prints the reports and completes the paper binder pollbook.

5. Do I need to use a particular type of printer with the laptops?

   Answer: No. Most printers will work with the laptops as long as the proper printer driver is installed. Complete the installation as soon as possible to verify the laptop and printer are compatible.

6. Do I have to have a hardcopy precinct list and full paper binder pollbook with a List of Voters, Ballot Summary and a Remarks section at each precinct if I use the EPB software?

   Answer: Under the terms of your User Agreement, you are required to have a hardcopy Precinct List and a hardcopy List of Voters, Ballot Summary, and Remarks Section available for immediate delivery to the precinct in the event of a system failure. One may be printed from the Elections eLearning Center; see *Reverting to Paper Poll Book Guide*.

7. The EPB software allows me to issue a ballot to a voter who has already returned an absent voter ballot. Why is this permitted?

   Answer: Under rare circumstances, an absentee ballot may have been recorded incorrectly in QVF. Election inspectors **MUST** contact the local clerk to verify the status of the absentee ballot before issuing a ballot to a voter who, according to the EPB software, has already returned an absent voter ballot.

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8. How do I change the time and time zone on my laptop?

   Answer: Right-click on the time and date, click Date and Time Settings. Here you can select the appropriate time zone. If you need to adjust the time, turn off the "Set time automatically" option, then click the Change button. Once the time is corrected, you can turn the "Set time automatically" option back on.

9. Do I have to use the EPB software to process absent voters in the precinct?

   Answer: No, you may use the Addendum List of Absent Voters method and add the list to the paper binder pollbook.

10. What if an absent voter does not return their ballot? Or if the absent voter surrenders their AV ballot in the polls? Do I need to indicate this in the EPB software?

    Answer: No. Only process an absentee ballot in the voter's record when the ballot has been received for processing. If the voter has surrendered their absent voter ballot, simply issue a precinct ballot using the normal process. The Spoil a ballot function should never be used for an absent voter ballot in the EPB software.

11. Will Unlisted Voters transfer to QVF after the Voter History has been updated?

    Answer: Some may, and some may not. Unlisted voters without a driver's license or state ID number will not transfer into QVF after Voter History has been updated. The registration of an Unlisted voter must be added to QVF if it has not been already added, and then Voter History for the Unlisted voter can be entered manually in QVF under Voter>Voting History.

12. Is there a way to view all actions taken in the EPB on Election Day?

    Answer: Yes. An Activity Log Report can be viewed at any time by selecting Reports > Activity Log Report. This Report may be printed as well.

13. Is there a way to convert the List of Voters into a .csv file?

    Answer: Not at this time.

14. What if my laptop "freezes up" and stops responding?

    Answer: First, try to close and reopen the EPB program, using Ctrl + Alt + Delete if necessary to use the Task Manager to end the task and close the EPB application. If that doesn't work, you may restart the computer. Remember to log back into the flash drive as well as the EPB program before you begin working again.

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Glossary

Antivirus Software is a software program that helps protect the laptop from viruses that could damage or shut down the machine.

Backup is a file that replicates and saves entered data for use in the event of a system failure.

Ballot Style is a designation to distinguish amongst ballots in a precinct that has a District split. For example, Precinct One represents voters from County Commission District 5 and 7. If the County Commission position is on the ballot, Precinct One will have two ballot styles, one for District 5 and one for District 7.

BitLocker is free encryption software from Microsoft. For the E-Pollbook, it is software on flash drives issued by the State after 2015, used to protect data on a flash drive with a password.

Data Security is the means of ensuring that data is kept safe from corruption and that access to it is suitably controlled. Thus, data security helps to ensure privacy. It also helps in protecting personal data.

e-Pollbook Software is a computer software program created in the Qualified Voter File (QVF) to be loaded on a laptop and used in the precinct on election day to record voters and the ballots they are issued.

Encryption is the process of transforming information using an algorithm to make it unreadable to anyone except those possessing the password.

Encrypted Flash Drive is a digital storage device that has the ability to encrypt data and keep the data secure.

Encryption Password is a password created to allow access to the encrypted e-pollbook software once downloaded from QVF.

Election Geography is a function of QVF where precinct combinations and ballot style names can be set for an election. The information entered in the QVF Election Geography module will then tell the EPB software which precincts have been combined and the preferred name for ballot styles in split precincts.

Lockout is an e-pollbook software feature that disallows the issuance of a ballot number more than once per ballot style.

Privacy Zone is a term the V-Safe 100 software uses to define the encrypted area of the flash drive. This only applies to flash drives issued by the State prior to 2015.

Receiving Board is a board established by the local Election Commission responsible for ensuring 1) all ballot containers delivered to the clerk after the polls close are properly sealed 2) all seal numbers are properly recorded and 3) the number of names entered in the Poll Book balances with the number of ballots counted in the precinct. For more information visit michigan.gov/elections and click on "Information for Election Administrators."

Strong Password is a password that contains a combination of 8-20 characters, mixed case with at least one number.

V-Safe 100 is the name of the encryption software installed on earlier versions of the State issued flash drive prior to 2015.

Document received by the MI Macomb 16th Circuit Court.

Quick Reference Checklists

Pre-Election Day – Clerk Setup

General Laptop Preparation

- ❒ Update antivirus software
- ❒ Ensure print driver software has been installed (if applicable)
- ❒ Update Windows
- ❒ Fully charge battery

EPB Software Download from QVF

- ❒ Review Election Geography
- ❒ Set up EPB inspector accounts in QVF
- ❒ Insert the encrypted flash drive into a USB port on the QVF computer
- ❒ Login to encrypted flash drive
- ❒ Create a folder on the desktop
- ❒ Log into QVF and create the EPB software
- ❒ Move EPB software to encrypted flash drive

EPB Installation on laptop

- ❒ Take encrypted flash drive to laptop and plug in to a USB port
- ❒ Log into encrypted flash drive
- ❒ Copy folder to the desktop
- ❒ Run the EPB software setup file
- ❒ Log into the EPB software and select the precinct
- ❒ Set Options
- ❒ Setup Users

Election Day – Election Inspector Setup

Preparing the EPB for Opening the Polls

- ❒ Power laptop on
- ❒ Make sure the laptop is not connected to the internet and is in Airplane mode with wifi disabled
- ❒ Insert the encrypted flash drive into a USB port
- ❒ Log into the encrypted flash drive
- ❒ Log into the EPB software
- ❒ Change options and setup users as recommended by the Clerk, e.g., allow the recording of AV Ballots
- ❒ Perform the first EPB backup to establish correct file path to the flash drive.

Throughout the Day

- ❒ Assign ballots and ensure all voters are documented in the EPB software
- ❒ Verify status problems
- ❒ Backup the EPB software regularly
- ❒ Record Remarks as necessary

Closing the Polls

- ❒ Perform one final Backup
- ❒ Complete the Ballot Summary Report, ensure it balances (L=0) and save to the encrypted flash drive
- ❒ Save the List of Voters Report to the encrypted flash drive
- ❒ Save the Remarks Report to the encrypted flash drive
- ❒ Save Voter History file to the encrypted flash drive
- ❒ Ensure all files are on the encrypted flash drive
- ❒ Print reports (if applicable)
- ❒ Deliver encrypted flash drive under seal in the Clerk-recommended container to the Receiving Board or Clerk

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Post Close of Polls

Receiving Board

- ❒ Print Ballot Summary
- ❒ Print List of Voters
- ❒ Print Remarks

Clerk

- ❒ Upload Voter History *within* 7 days of the election (upload voter history and verify paper EPB records have been printed and retained before deleting EPB files)
- ❒ Uninstall the EPB software from the laptop 7 days *after* the canvass of the election
- ❒ Delete the [ElectionDate] folder from the encrypted flash drive 7 days *after* the canvass of the election
- ❒ Delete the [ElectionDate] folder from the QVF desktop 7 days *after* the canvass of the election (if applicable)
- ❒ Delete any other EPB file(s) that may have been saved
- ❒ Properly store the laptop and associated battery

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

ATTACHMENT B

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
BUREAU OF ELECTIONS
LANSING

MEMORANDUM

DATE: February 12, 2021
TO: County Clerks
FROM: Michigan Bureau of Elections
SUBJECT: Release of Voting Equipment

Please be advised of the following:

RELEASE OF VOTING EQUIPMENT: The security of ballots and election equipment is released as follows:

Ballots, programs and related materials: The security of all optical scan ballots, programs, test decks, accuracy test results, edit listings and any other related materials are released.

E-Pollbook laptops and flash drives: The EPB software and associated files must be deleted unless a post-election audit is planned but has not yet been completed or the deletion of the data has been stayed by an order of the court or the Secretary of State. Jurisdictions should consult with city, township, or county counsel regarding any pending court orders, subpoenas, or records requests regarding these materials.

FEDERAL BALLOT RETENTION REQUIREMENT: If the office of President, U.S. Senator or U.S. Representative in Congress appears on the ballot (all appeared on the November 3, 2020 general election ballot), federal law requires that all documents relating to the election -- including optical scan ballots and the programs used to tabulate optical scan ballots -- be retained for 22 months from the date of the certification of the election. To comply with the requirement, the Bureau of Elections recommends that optical scan ballots and the programs relating to federal elections be stored in **sealed ballot bags** in a secure place during the 22-month retention period. The documents subject to the federal retention requirement must not be transferred to ballot bags for extended retention until after they are released under Michigan election law as detailed in this memo.

Questions?

If you have any questions, please contact us via email at elections@michigan.gov, or by phone at (517) 335-3234 or (800) 292-5973.

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ATTACHMENT C

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Bourbonais, Lori (MDOS)

From: Bourbonais, Lori (MDOS)
Sent: Monday, November 14, 2022 1:17 PM
To: Bourbonais, Lori (MDOS)
Subject: Recent FOIA Requests

Clerks,

We are aware that clerks have received a request for the following:

"1. An electronic copy of the Qualified Voter File (QVF) extract for all precincts completed on Monday November 7, 2022 and loaded to the electronic pollbooks.

2. The historical electronic pollbook flash drive for all voting precincts in the jurisdiction for the election concluding November 8, 2022. (This is likely in a CSV – comma separated value format).

3. An electronic copy of the Qualified Voter File extract for all precincts completed as soon as the November midterm election voter history is uploaded to the QVF which must be within 7 days pursuant to MCL 168.813."

Before responding to these FOIA requests, you should consult with your city or township attorney regarding the requests and exemptions that may apply including those contained in MCL 15.243(1)(y) and (z). Under FOIA, you may shield sensitive information from disclosure. Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(y). In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z).

Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

Please note that certain specific data derived from the qualified voter file electronic pollbook is subject to disclosure under FOIA, including the lists of registered voters from the Qualified Voter File and the paper printout of the electronic pollbook generated on election night. If members of the public are interested in verifying the names of individuals registered to vote on a certain date or included in the electronic pollbook, they may obtain this information by submitting a FOIA for publicly available records.

Additionally, we are aware that clerks received FOIA requests for a copy of or the opportunity to view tabulator tapes. While the tapes are a public record that can be provided, they are election records that should remain secured until security is released after the final canvass and certification, recounts, and audits. Once you are notified that security has been released in your jurisdiction, you can fulfill these requests.

Lori A. Bourbonais, Director
Election Administration Division

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

MEMORANDUM

Date: July 10, 2023
To: Municipal and County Election Officials
From: Jonathan Brater, Director of Elections
Subject: Security of Qualified Voter File and Electronic Pollbooks

Introduction

Election officials have experienced a series of attempts to access election materials that, if disclosed, pose privacy threats to Michigan voters and security threats to Michigan's election system. At times, these attempts have been accompanied by aggressive and even threatening language and behavior. Consistent with the Michigan Election Law and its responsibility to safeguard election security in Michigan, the Bureau of Elections (the Bureau) has instructed clerks that while Qualified Voter File (QVF) and Electronic Pollbook (EPB) records are public and subject to disclosure, certain components of these systems cannot be released without compromising voter privacy and election system security.

This memorandum provides further explanation of these issues and information for clerks to consider when reviewing public records requests with their legal counsel. It also describes the potential consequences of providing inappropriate access to election equipment to unauthorized individuals. Additionally, the memorandum addresses several false claims that have been made about QVF and EPB data and election administration in Michigan.

Record Requests Seeking QVF and EPB Data

Clerks have received requests for access to QVF and EPB data in a variety of different formats, including:

- Requests under the Michigan Freedom of Information Act (FOIA)
- Demands that records be preserved for "investigation"
- Demands to perform "inspections" of election records or equipment

Regardless of the format of any request to inspect QVF or EPB data, clerks should consult with their own counsel for legal questions regarding any of these requests.[1] The Bureau provides the following information in this memorandum: a summary of applicable provisions of FOIA and the Michigan Election Law; a description of the manner in which the Bureau has responded to

[1] Any clerk who receives a subpoena, request to preserve records pursuant to a lawsuit, or a request to inspect records from law enforcement should consult with legal counsel and inform the Bureau of Elections and the Michigan Department of Attorney General.

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specific requests, and; instructions not to disclose certain materials that pose a threat to election system security if released.

Requests for Electronic EPB Files

Clerks have received requests for electronic copies of EPB materials in various formats. These include requests for "an electronic copy of the Qualified Voter File (QVF) extract"; an "electronic pollbook flash drive", a "CSV- Comma separate value format", or other similar requests. At times, these requests have been accompanied by "helpful" instructions showing clerks how to potentially compromise the security of their election systems and render their election equipment unusable by illegally providing security-compromising information to unauthorized individuals.

Before responding to these or any FOIA requests, clerks should consult with their legal counsel regarding the requests and exemptions that may apply. Under FOIA, officials may shield sensitive information from disclosure. In the case of EPB files, the Bureau of Elections instructs clerks that they must not publicly release data or files that would reveal the software design or data architecture of the EPB. The Bureau gives this lawful instruction[2] under its supervisory authority pursuant to MCL 168.21, 168.31, and 168.32, as doing so could compromise the Bureau's ability to secure and safeguard the software and data from hacking, theft, loss or destruction, and accordingly interfere with the Bureau's obligation under the Michigan Election law to provide EPB software to clerks. MCL 168.668b.

In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. MCL 15.243(1)(y). In addition, the responsive records include proprietary software information, security feature information, and sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." MCL 15.243(1)(z). Additionally, these files contain sensitive information regarding jurisdictions' EPB laptop(s) that might compromise the security of these laptops.

EPB files also contain personal identifying information such as full birth dates for voters, which are exempt from disclosure. MCL 168.509gg. Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.

[2] See MCL 168.931(h) ("A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer[.]""

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If clerks receive a FOIA request for EPB data, the requestor can be directed to the county clerk for paper pollbook copies or to the Bureau for the log file or voter history.

Notwithstanding the above restrictions on the release of certain information, there are numerous ways in which members of the public can review public QVF and EPB data. Clerks can provide the paper records they are legally obligated to maintain for the required retention period after each election, as soon as the security period has elapsed. Certain specific data derived from the QVF and EPB is subject to disclosure under FOIA, including the lists of registered voters from the QVF and the paper printout of the EPB generated on election night.

If members of the public are interested in verifying the names of individuals registered to vote on a certain date or included in the EPB, they may obtain this information by submitting a FOIA request for publicly available records. If members of the public with concerns about EPB data wish to verify the names of individuals who cast ballots, they can also do so by submitting a FOIA request and reviewing the paper applications to vote completed by all in-person voters and the absent voter ballot applications submitted by all absentee voters.

Electronic records such as the EPB log file or voter history can be requested from the Bureau. Requests for EPB data must be directed to the Bureau to ensure that sensitive information related to both individual voters and the EPB are removed before public disclosure of otherwise available information. Even if clerks were to attempt to redact a voter's date of birth and other personally identifiable information, the disclosure of security and technical information is also exempt from FOIA and may not be properly redacted if produced by clerks, instead of the Bureau.

Demands to Disregard Lawful Instructions from the Bureau of Elections

Clerks have also received communications demanding that they disregard instructions contained in the Bureau of Elections communications, including the Recount/Release of Security Memorandum circulated after each election. The Bureau's instructions are lawful directives in compliance with state and federal law.

Going back to at least 2012 (under Secretary of State Ruth Johnson), the Bureau has issued a directive to destroy electronic copies of the EPB and flash drive. As clerks are no doubt aware, numerous candidates of both major political parties have won statewide elections since 2012. This procedure is necessary to safeguard security and voter privacy. Clerks destroy electronic copies only after they have already printed the paper copy of pollbook information (which must be retained for the required retention period).

Clerks must comply with this instruction regardless of whatever claims private individuals make. A private individual has no authority to instruct clerks on their duties. Whatever "investigation" these individuals claim to be conducting or threats of "prosecution" they may make toward local or state officials, in the absence of a court-issued subpoena or other court order, clerks are not required to comply with their demands. If clerks do receive one of these demands, they should consult with their attorney on how to respond.

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Clerks should also be wary of private individuals, including self-proclaimed "experts," attempting to instruct them on the issue of whether disclosure of electronic materials would or would not constitute a security concern. In reality, it is often not possible for an individual unfamiliar with a system to determine whether any one individual piece of information, if known, would be useful in compromising that system. This is one of the reasons software and data elements which may, on their own or in combination with other elements, jeopardize security are not disclosed. Similarly, clerks should not accept at face value claims from private individuals, whatever expertise they claim to have, that clerks can easily redact security-related or personal identifying information.

Consequences of Improper Disclosure

Clerks should understand that the disclosure of this sensitive information may compromise the integrity of Michigan's elections and may warrant an investigation by the Department of State, Department of Attorney General, or Michigan State Police. Improper disclosure may also result in fiscal implications for the jurisdiction. Specifically, disclosure could require the purchase of new EPB laptops for each precinct for which data was compromised.

False and Misleading Claims About QVF and EPB Data

Individuals seeking improper access to QVF and EPB records have made numerous false or misleading claims about QVF and EPB data and election administration in Michigan. Although making or believing false statements has no bearing on whether individuals are permitted to access a record, clerks may find these explanations useful in communicating with the public or other local and county officials, including law enforcement.

Election Turnout and Voter History

Some individuals have claimed that because, in past elections, the total number of ballots tabulated statewide does not exactly match the number of voters with a voter history indicator in QVF, this means that election results and files cannot be trusted, or that there is some sort of unknown or unexplained irregularity involving voter data.

In reality, these numbers do not match exactly because they come from two different sources. County-certified election results are based on the number of ballots cast and tabulated in each jurisdiction, as determined by the county canvass. This includes canvasser review of tabulator tapes showing election night results, in addition to any corrections or adjustments at the county canvass and recounts, if applicable.

Voter history in QVF is based on entry of voter history data from the EPBs (for in-person voters) and absent voter ballot return envelopes (for absentee voters). Following each election, each clerk uploads their EPB data for each of their precincts to the QVF. This automatically updates the voter history in QVF for all voters recorded in the EPB as voting at the polling place. Alternatively, clerks can manually add voter history to the QVF using the paper printout of the EPB.

If any of Michigan's 1,520 municipal clerks do not update QVF with EPB data for any of their precincts, voter history for voters in those precincts will not appear in QVF even though those voters did in fact appear at the precinct, apply to vote, get recorded in the poll book, and cast

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ballots. Following each election, the Bureau sends multiple communications and reminders to clerks to add voter history data to the QVF. Most clerks do so promptly, but some are delayed and some fail to do so.

This was the case in the November 2020 election, as it was in other past elections. Approximately 5.57 million ballots were cast in the November 2020 election according to certified results. As of April 2021, when the Office of the Auditor General reviewed QVF data for its audit of the Bureau, voter history for approximately 5.53 million voters had been uploaded to the QVF. In subsequent months, the Bureau sent additional communications to clerks reminding them to add voter history data to the QVF, and more clerks did so. As of 2022, the number of voters showing history in QVF for the November 2020 election was approximately 5.55 million.

Ultimately, a small percentage of jurisdictions did not add QVF data for at least one of their precincts in 2020 which meant that a small percentage of voter history was not recorded in QVF. Approximately 99.6% of voter history was uploaded in the QVF for the November 2020 election, which is a higher percentage than was uploaded for the November 2016 election (approximately 99.0%) and November 2018 election (approximately 98.5%). In subsequent elections, the percentage of voter history uploaded has increased even further.

EPB Time and Date Records

Individuals have claimed that the absence of a specific "time stamp" on some voter history tables is suspicious because, on election day, the EPB records the specific time at which a voter appeared on Election Day. These individuals misunderstand the table they are viewing. In reality, some QVF tables include "00:00" in the time field because the record is referring to an election *date,* not a *time* on election day. Elections occur all day, so it does not make sense for QVF to display any specific time. Like other programs that include voluminous amounts of data, QVF generates tables of data that are programmed and populated using numerous databases.[3] When there is no entry needed for a field (for example, a time field corresponding to election day), the default value that databases display is "00:00."

Voter History from Previous Addresses

Some voters who have moved from one jurisdiction to another in Michigan have noticed that voter history from prior elections, when they voted at their prior address, may appear as voter history from their current address. This is because the old version of QVF (QVF Legacy) did not track the jurisdiction where a past vote occurred. One of the many benefits of QVF Refresh, released in 2019, is that voter history from prior addresses can be tracked at the prior address. Therefore, voters who moved to and voted from prior addresses in elections that occurred after QVF Refresh was released will see voter history appear as having voted at the prior address.

[3] Some individuals have claimed that there are multiple QVF "databases" and that this is somehow being used to perpetuate fraud. Aside from being impossible for the reasons described later in the memo, this claim is based on misconceptions regarding the QVF. The QVF is not a single "database" but instead a program used by the Bureau and Clerks for many purposes, requiring numerous tables and reports, which are in turn programmed and populated by numerous databases. For an explanation of what a database actually is, see this explanation from Microsoft: https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-are-databases/.

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However, votes that occurred at addresses when the voter's move predated QVF Refresh will display at the current address. This is not because of some nefarious purpose, but because QVF Legacy did not have the data capability as the current system.

QVF Record Identifying and Voter ID Numbers

Some individuals have claimed that the fact that there are multiple identifying numbers corresponding to voter records in QVF suspicious. In reality, there are multiple numbers for security reasons. Voters have a public voter ID number in QVF and the EPB, which is public and disclosed in public record requests. QVF also contains separate record-identifying numbers that correspond to voter records, which are used for security and verification purposes (and which are not publicly disclosed for security reasons). Again, the non-disclosed record-identifying number is not different from the voter ID number for some nefarious purpose, but as an internal verification and security measure.

Security Procedures Used to Verify EPB is Offline

As clerks are aware, the EPB used on Election Day must be offline and laptops operating the EPB software must be turned to "airplane mode" to ensure there is no internet connection. In order to make sure that EPBs are offline, the EPB software is designed to receive a periodic "Ping" from the State of Michigan network on Election Day to check for improper internet connectivity. If the Ping detects an internet connection on the EPB laptop, the EPB software displays a warning message instructing the user to disconnect the laptop from an internet connection by turning the laptop to airplane mode. Some individuals have suggested this connection is suspicious, when in fact it is a security feature designed to ensure EPB laptops remain offline throughout Election Day.

General QVF-Related Conspiracy Theories

In general, some individuals have pointed to various data or program elements in QVF and claimed – whether because QVF data is imperfect or incomplete, because these individuals do not understand what they are looking at, or some combination of the above – that this shows some broad conspiracy to perpetrate election fraud. While it is of course true that QVF – a constantly changing voter file that needs to be updated whenever a voter registers, moves, cancels a registration, dies, applies for an absentee ballot, or various other activities – will never be 100 percent accurate or up to date, this does not mean there is some conspiracy to manipulate QVF data to perpetrate fraud. In fact, in recent years the Bureau and clerks have done more than ever before to keep QVF accurate and up to date.[4]

Regardless of how accurate or up to date QVF is at any given time, however, the suggestion that QVF could be used to perpetuate massive undetected election fraud is without merit. Even if one were to assume that Bureau staff (many of whom have worked at the nonpartisan Bureau of Elections for years or decades under multiple Secretaries of State of both political parties) and staff at the nonpartisan Department of Technology, Management, and Budget were involved in such a scheme, it would require thousands of clerks and election inspectors of both political parties to be involved as well.

[4] For more information on how QVF is kept up to date, see https://www.michigan.gov/sos/elections/voting/voters/voter-registration-cancellation-procedures.

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This is because while QVF is used to maintain *electronic* registration and voting records, voting is done by human beings using *paper* ballots, in elections that are run by municipal clerks across the state. In addition to the paper ballots, there are also polling place applications to vote (which must be completed by in-person voters, and which are retained by clerks after election) and absentee ballot applications (which must be completed by absentee voters, and which are also retained by clerks after elections). These materials provide an independent, *paper* record of all the individuals who cast ballots in an election. If there were actually some kind of fraud being perpetrated using QVF, this could be easily proven by reviewing these paper records.

In many respects, these nonsensical claims about QVF are similar to the false claims previously made about ballot tabulation equipment, which if true could have been proven by reviewing paper ballots (when in fact, reviews of paper ballots all confirmed that tabulators counted ballots accurately).

Additional Information and Support Available

It is unfortunate that election officials continue to be subjected to false claims, abusive behavior, and even threats. Whatever assertions individuals make about election officials, clerks should be mindful that there are legal avenues for individuals to pursue these assertions. If individuals disagree with a FOIA determination by a local or state official, they can file a lawsuit. If they believe criminal activity occurred, they can make a complaint in writing to law enforcement.

The Bureau encourages election officials to communicate with local and state law enforcement regarding any threats they may have received, and to continue to communicate with law enforcement regarding the various false claims and allegations of criminal activity that some individuals continue to make. Clerks are also encouraged to communicate with municipal and county government associations for additional independent support and advice. Finally, the Bureau of Elections remains available for any additional questions you have or support you may need. If clerks believe that any unauthorized or unsupervised access to their equipment may have occurred, they should contact the Bureau immediately. Please do not hesitate to contact the Bureau if we can be of further assistance.

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Gmail

Stephanie Scott PII MCL 15.243(1)(a)@gmail.com>

FOIA Requests to Review QVF Records, Master Cards, and AV Records

Michigan Bureau of Elections <MISOS@public.govdelivery.com> Wed, Jul 20, 2022 at 11:25 AM
Reply-To: MISOS@public.govdelivery.com
To: PII MCL 15.243(1)(a)@gmail.com

Having trouble viewing this email? View it as a Web page.

SHARE

City and Township Clerks,

Jurisdictions have received Freedom of Information Act Requests to view Qualified Voter File (QVF) records, voter registration records, and absent voter ballot records for registered voters in Michigan. You should consult with your local legal counsel regarding any public records requests. The Bureau of Elections' position is that the Michigan Election Law prohibits the release of the digitized voter signature images from the Qualified Voter File. MCL 168.509gg(f). The Bureau's position is that the Michigan Election Law does not prohibit clerks from allowing members of the public to view voter registration forms, voter registration master cards, absent voter ballot applications, or absent voter ballot applications that include a voter's handwritten signature.

Lori A. Bourbonais, Director
Election Administration Division
Bureau of Elections

This email was sent to stephiedscott@gmail.com using GovDelivery Communications Cloud on behalf of: Michigan Secretary of State · 430 W. Allegan Street · Lansing, MI 48918 · 1-888-767-6424

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EXHIBIT 5

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PII MCL 15.243(1)(a)

184	886	11/8/2022 11:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
301	903	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
343	1045	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
302	904	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
572	1475	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
59	959	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
210	1111	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
390	1293	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
410	1415	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
902	2013	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
902	2013	11/8/2022 19:47	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
902	2017	11/8/2022 19:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
803	1911	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
415	1420	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
316	1123	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
339	1043	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
67	967	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
289	1090	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
125	925	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
132	1133	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
395	1399	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
133	1134	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
179	881	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
131	1132	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
37	1038	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
246	1050	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
262	1066	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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492	1196	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
187	891	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
117	917	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
386	989	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
484	1191	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
271	776	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
307	1209	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
667	1673	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
413	1116	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
805	1913	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
445	1549	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
30	930	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
493	1197	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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330	1231	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
353	1159	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
467	1273	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
146	747	11/8/2022 10:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
361	1168	11/8/2022 14:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
362	1169	11/8/2022 14:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
192	1293	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
661	1570	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
185	1186	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
390	1191	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
366	1167	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
100	501	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
365	1166	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
102	503	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
79	781	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
80	782	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
2	902	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
588	1497	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
248	1152	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
247	1151	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
634	1436	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
635	1437	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
78	678	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
77	677	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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699	1506	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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10	710	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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192	1092	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
484	1087	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
485	1088	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
299	901	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
372	1075	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
416	1223	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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181	1081	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII MCL			
108	509	11/8/2022 11:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
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50	750	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
566	1270	11/8/2022 18:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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590	1696	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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824	1932	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
823	1931	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
307	809	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
393	1199	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
533	1339	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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450	1152	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
191	893	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
637	1543	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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547	1553	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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489	1290	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
361	1167	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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134	1135	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
449	1454	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
679	1685	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
398	1001	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
21	723	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
354	1058	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
553	1456	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
136	939	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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135	1136	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
174	1274	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
304	1209	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
136	1137	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
740	1543	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
712	1820	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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108	1109	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
400	1003	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
191	992	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
45	846	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
176	1076	11/8/2022 9:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
123	1026	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
654	1560	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
458	1061	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

416	1323	11/8/2022 14:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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505	1411	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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37	937	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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340	1241	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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69	570	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
554	1259	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
85	787	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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294	999	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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351	1152	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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207	909	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
159	1060	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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760	1573	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
121	922	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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432	1138	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
431	1137	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
382	1289	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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352	1159	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
342	1148	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
421	1525	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

422	1526	11/8/2022 13:22	REGULAR_	5010	[redacted]	OSEVILLE CITY	9	ISSUE REG N
270	974	11/8/2022 14:20	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
397	1401	11/8/2022 14:46	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
106	1007	11/8/2022 9:18	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
197	598	11/8/2022 15:49	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
149	851	11/8/2022 11:02	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
249	1151	11/8/2022 12:50	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
291	1392	11/8/2022 11:11	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
609	1416	11/8/2022 17:53	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
46	546	11/8/2022 7:58	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
266	1367	11/8/2022 10:50	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
802	1910	11/8/2022 18:28	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
463	1567	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
328	930	11/8/2022 14:54	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
274	1375	11/8/2022 10:59	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
525	1433	11/8/2022 16:15	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
172	675	11/8/2022 12:11	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
88	688	11/8/2022 8:46	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
110	710	11/8/2022 9:16	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
60	960	11/8/2022 7:38	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
181	883	11/8/2022 11:48	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
596	1505	11/8/2022 17:13	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
752	1661	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
339	1245	11/8/2022 12:45	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
53	554	11/8/2022 8:41	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
52	553	11/8/2022 8:37	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
65	965	11/8/2022 8:08	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
450	1353	11/8/2022 16:44	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
734	1643	11/8/2022 18:44	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
733	1642	11/8/2022 18:43	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
180	980	11/8/2022 10:14	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
470	1271	11/8/2022 15:35	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
552	1458	11/8/2022 17:18	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
301	807	11/8/2022 16:10	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
302	808	11/8/2022 16:10	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
116	916	11/8/2022 8:50	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
298	1002	11/8/2022 15:07	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
16	416	11/8/2022 7:27	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
378	884	11/8/2022 17:32	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
379	885	11/8/2022 17:32	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
174	878	11/8/2022 12:13	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
418	1124	11/8/2022 17:58	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
478	1285	11/8/2022 16:14	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
84	885	11/8/2022 8:12	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
588	1292	11/8/2022 19:33	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
586	1290	11/8/2022 19:23	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
42	1142	11/8/2022 7:20	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
519	1223	11/8/2022 18:03	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
264	966	11/8/2022 13:27	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
163	1263	11/8/2022 9:13	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
644	1751	11/8/2022 16:42	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
223	624	11/8/2022 16:45	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
297	699	11/8/2022 18:38	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
88	889	11/8/2022 8:53	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
581	1184	11/8/2022 19:09	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
291	893	11/8/2022 14:14	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
570	1274	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
242	1244	11/8/2022 11:21	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
259	1065	11/8/2022 12:07	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
425	929	11/8/2022 19:06	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
375	1182	11/8/2022 14:54	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
180	1080	11/8/2022 9:57	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
81	681	11/8/2022 8:27	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
163	764	11/8/2022 10:40	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
359	1460	11/8/2022 12:12	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
360	1461	11/8/2022 12:13	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
152		11/8/2022 10:14	REGULAR_	5010		OSEVILLE CITY	5	UPDATE VI N
152	955	11/8/2022 10:14	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
176	679	11/8/2022 12:15	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
522	1328	11/8/2022 16:49	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
55	855	11/8/2022 7:47	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
531	1233	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
905	2016	11/8/2022 19:47	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
43	744	11/8/2022 7:35	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
94	595	11/8/2022 9:54	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
531	1134	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
532	1135	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
42	942	11/8/2022 7:23	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
509	1316	11/8/2022 16:38	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
428	1235	11/8/2022 15:36	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
226	1327	11/8/2022 10:15	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
508	1315	11/8/2022 16:37	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
5	805	11/8/2022 7:03	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
260	765	11/8/2022 15:06	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
441	948	11/8/2022 18:31	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
239	1140	11/8/2022 12:35	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
211	1112	11/8/2022 12:07	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
423	1326	11/8/2022 16:15	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N

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PII MCL 15.243(1)(a)

601	1510	11/8/2022	17:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
472	1375	11/8/2022	17:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
305	1309	11/8/2022	13:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
569	1172	11/8/2022	18:55	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
569	1172	11/8/2022	19:15	REGULAR_	5010		ROSEVILLE CITY	10	SPOIL BALI N
569	1186	11/8/2022	19:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
567	1170	11/8/2022	18:54	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
568	1171	11/8/2022	18:54	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
218	718	11/8/2022	14:25	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
261	663	11/8/2022	17:45	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
427	1432	11/8/2022	15:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
238	1042	11/8/2022	11:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
550	1556	11/8/2022	17:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
365	1266	11/8/2022	13:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
126	926	11/8/2022	9:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
22	522	11/8/2022	7:24	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
23	523	11/8/2022	7:24	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
420	1124	11/8/2022	16:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
419	1122	11/8/2022	16:48	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
359	865	11/8/2022	17:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
454	962	11/8/2022	18:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
461	969	11/8/2022	18:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
79	979	11/8/2022	8:33	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
345	851	11/8/2022	16:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
161	1062	11/8/2022	10:42	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
162	1063	11/8/2022	10:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
149	851	11/8/2022	10:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
125	827	11/8/2022	9:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
231	934	11/8/2022	13:05	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
426	1131	11/8/2022	17:38	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
394	1098	11/8/2022	17:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
216	1317	11/8/2022	10:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
217	1318	11/8/2022	10:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
512	1415	11/8/2022	17:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
621	1627	11/8/2022	18:05	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
650	1457	11/8/2022	18:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
634	1540	11/8/2022	18:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
321	1222	11/8/2022	12:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
104	904	11/8/2022	8:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
346	1147	11/8/2022	13:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
207	1007	11/8/2022	10:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
409	1210	11/8/2022	14:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
723	1526	11/8/2022	18:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
87	687	11/8/2022	8:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
203	1103	11/8/2022	10:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
84	1184	11/8/2022	8:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
514	1218	11/8/2022	17:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
209	610	11/8/2022	16:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
202	1102	11/8/2022	10:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
523	1126	11/8/2022	18:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
9	409	11/8/2022	7:20	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
706	1712	11/8/2022	19:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
438	1341	11/8/2022	16:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
198	599	11/8/2022	15:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
50	451	11/8/2022	9:14	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
745	1853	11/8/2022	17:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
562	1465	11/8/2022	18:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
376	1183	11/8/2022	14:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
315	1017	11/8/2022	14:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
587	1289	11/8/2022	19:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
15	615	11/8/2022	7:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
289	1095	11/8/2022	12:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
183	784	11/8/2022	11:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
244	1048	11/8/2022	11:47	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
332	1139	11/8/2022	13:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
548	1354	11/8/2022	17:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
409	1215	11/8/2022	15:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
308	1312	11/8/2022	13:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
311	1118	11/8/2022	13:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
290	1096	11/8/2022	12:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
427	1030	11/8/2022	16:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
706	1614	11/8/2022	19:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
566	1268	11/8/2022	18:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
134	735	11/8/2022	9:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
209	911	11/8/2022	12:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
701	1508	11/8/2022	19:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
427	1228	11/8/2022	14:54	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
135	736	11/8/2022	9:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
122	923	11/8/2022	9:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
78	578	11/8/2022	9:00	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
156	757	11/8/2022	10:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
547	1353	11/8/2022	17:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
524	1331	11/8/2022	16:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
203	1107	11/8/2022	10:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
347	949	11/8/2022	15:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
325	827	11/8/2022	16:54	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
746	1655	11/8/2022	18:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
291	993	11/8/2022	14:48	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

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195	1000	11/8/2022 10:56	REGULAR_	5010	[redacted]	OSEVILLE CITY	5	ISSUE REG N
523	1225	11/8/2022 18:09	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
167	667	11/8/2022 12:28	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
591	1597	11/8/2022 17:42	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
590	1596	11/8/2022 17:42	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
129	831	11/8/2022 10:05	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
98	898	11/8/2022 8:35	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
319	1222	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
320	1223	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
633	1740	11/8/2022 16:36	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
634	1741	11/8/2022 16:36	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
161	1064	11/8/2022 9:37	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
50		11/8/2022 7:28	REGULAR_	5010		OSEVILLE CITY	9	UPDATE VI N
50	1150	11/8/2022 7:29	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
294	1100	11/8/2022 12:47	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
632	1434	11/8/2022 17:27	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
626	1428	11/8/2022 17:24	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
54	855	11/8/2022 8:04	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
41	941	11/8/2022 7:29	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
442	949	11/8/2022 18:32	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
297	999	11/8/2022 15:01	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
26	326	11/8/2022 10:32	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
653	1460	11/8/2022 18:33	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
182	583	11/8/2022 15:30	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
378	1184	11/8/2022 14:35	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
214	1114	11/8/2022 10:41	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
10	910	11/8/2022 7:06	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
295	997	11/8/2022 14:24	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
319	1126	11/8/2022 13:28	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
739	1542	11/8/2022 18:43	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
240	1242	11/8/2022 11:20	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
519	1425	11/8/2022 16:46	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
657	1663	11/8/2022 18:35	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
241	1243	11/8/2022 11:21	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
454	1357	11/8/2022 16:49	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
328	1030	11/8/2022 15:27	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
119	919	11/8/2022 8:52	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
65	865	11/8/2022 7:57	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
461	1565	11/8/2022 14:25	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
540	1546	11/8/2022 17:04	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
315	1019	11/8/2022 15:33	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
56	758	11/8/2022 9:03	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
57	759	11/8/2022 9:04	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
67	967	11/8/2022 8:16	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
367	1468	11/8/2022 12:18	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
364	1465	11/8/2022 12:16	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
156	1056	11/8/2022 9:36	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
225	929	11/8/2022 13:34	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
157	1057	11/8/2022 9:36	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
203	906	11/8/2022 12:18	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
182	1085	11/8/2022 10:15	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
191	1092	11/8/2022 11:24	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
469	1176	11/8/2022 18:26	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
205	1106	11/8/2022 11:49	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
204	1105	11/8/2022 11:49	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
582	1288	11/8/2022 19:24	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
487	1591	11/8/2022 14:55	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
572	1478	11/8/2022 17:37	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
145	445	11/8/2022 17:31	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
531	1338	11/8/2022 16:54	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
320	722	11/8/2022 19:33	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
381	1288	11/8/2022 13:47	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
747	1554	11/8/2022 19:45	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
717	1825	11/8/2022 17:28	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
7	907	11/8/2022 7:04	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
352	1453	11/8/2022 12:07	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
611	1520	11/8/2022 17:20	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
358	960	11/8/2022 15:26	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
459	1260	11/8/2022 15:24	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
254	1355	11/8/2022 10:44	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
401	1505	11/8/2022 13:06	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
135	836	11/8/2022 10:15	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
413	919	11/8/2022 18:01	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
685	1594	11/8/2022 18:13	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
13	713	11/8/2022 7:12	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
150	851	11/8/2022 10:47	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
364	966	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
246	1146	11/8/2022 11:14	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
164	1067	11/8/2022 9:39	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
107	407	11/8/2022 15:48	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
579	1487	11/8/2022 16:57	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
45	745	11/8/2022 7:42	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
410	1217	11/8/2022 15:23	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
51	552	11/8/2022 8:34	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
538	1446	11/8/2022 16:30	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
717	1626	11/8/2022 18:35	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
716	1625	11/8/2022 18:35	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
300	1205	11/8/2022 12:00	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

PII MCL 15

684	1792	11/8/2022 17:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
686	1794	11/8/2022 17:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
616	1722	11/8/2022 16:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
685	1793	11/8/2022 17:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
281	983	11/8/2022 14:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
87	888	11/8/2022 8:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
7	707	11/8/2022 7:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
6	706	11/8/2022 7:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
93	795	11/8/2022 10:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
93	B6346800	11/8/2022 10:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	UNDO: ISS Y
93	B6346800	11/8/2022 10:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
94	796	11/8/2022 10:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
185	685	11/8/2022 13:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
298	800	11/8/2022 16:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
392	995	11/8/2022 16:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
255	856	11/8/2022 12:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
569	1273	11/8/2022 19:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
645	1447	11/8/2022 17:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
758	1866	11/8/2022 17:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
828	1936	11/8/2022 18:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
757	1865	11/8/2022 17:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
422	1128	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
583	1589	11/8/2022 17:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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145	948	11/8/2022 10:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
216	817	11/8/2022 11:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
219	1025	11/8/2022 11:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
727	1534	11/8/2022 19:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
685	1593	11/8/2022 19:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
261	762	11/8/2022 15:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
275	780	11/8/2022 15:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
362	868	11/8/2022 17:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
274	779	11/8/2022 15:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
393	1200	11/8/2022 15:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
394	1201	11/8/2022 15:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
564	1670	11/8/2022 15:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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517	1120	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
94	394	11/8/2022 14:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
510	1311	11/8/2022 16:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
604	1508	11/8/2022 19:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
95	1195	11/8/2022 8:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
94	1194	11/8/2022 8:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
13	913	11/8/2022 7:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
106	809	11/8/2022 10:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
494	1201	11/8/2022 19:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
105	1106	11/8/2022 8:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
183	683	11/8/2022 13:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
476	1580	11/8/2022 14:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
393	1296	11/8/2022 15:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
19	520	11/8/2022 7:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
302	1004	11/8/2022 14:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
102	902	11/8/2022 8:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
365	1171	11/8/2022 14:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
296	1201	11/8/2022 11:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
13	413	11/8/2022 7:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
739	1546	11/8/2022 19:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
282	1184	11/8/2022 13:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
394	1297	11/8/2022 15:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
423	1126	11/8/2022 16:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
365	1067	11/8/2022 15:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
135	1235	11/8/2022 8:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
602	1708	11/8/2022 16:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
84	786	11/8/2022 8:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
71	772	11/8/2022 8:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
244	745	11/8/2022 15:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
855	1963	11/8/2022 18:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
856	1964	11/8/2022 18:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
124	1125	11/8/2022 9:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
854	1962	11/8/2022 18:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
451	1257	11/8/2022 15:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
606	1413	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
424	1027	11/8/2022 16:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
532	1638	11/8/2022 15:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
162	664	11/8/2022 11:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
102	402	11/8/2022 15:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
170	670	11/8/2022 12:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
552	1658	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
52	1152	11/8/2022 7:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
612	1419	11/8/2022 18:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
613	1420	11/8/2022 18:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
585	1391	11/8/2022 17:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
302	1004	11/8/2022 14:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
43	843	11/8/2022 7:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
42	842	11/8/2022 7:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	SPOIL BALI N
42	842	11/8/2022 7:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
42	854	11/8/2022 7:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

PII MCL 1

373	1377	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
148	1248	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
147	1247	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
107	1010	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
106	1009	11/8/2022 8:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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201	1002	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
643	1649	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
76	976	11/8/2022 8:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
235	939	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
73	1074	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
135	1035	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
735	1538	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
96	896	11/8/2022 8:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
498	1406	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
99	801	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
783	1587	11/8/2022 19:55	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
506	1409	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
516	1522	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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95	895	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
209	1310	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
234	936	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
499	1407	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
71	371	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
82	883	11/8/2022 8:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
515	1521	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
116	1016	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
333		11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
333	1236	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
292	1296	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
485	1286	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
420	1126	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
539	1341	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
154	555	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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385	1089	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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465	1266	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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79	679	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
266	968	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
267	969	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
495	1199	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
858	1966	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
858	1966	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
858	1983	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
36	1037	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
509	1211	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
501	1606	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
511	1213	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
82	882	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
5	505	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
218	920	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
784	1693	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
133	934	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
309	811	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
2	502	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
101	803	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
110	910	11/8/2022 8:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
280	982	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
117	819	11/8/2022 9:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
264	1168	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
74	475	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
239	943	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
335	1238	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
156	1157	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
334	1237	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
44	746	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
73	474	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
155	1156	11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
241	943	11/8/2022 13:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
245	1145	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
331	1037	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
166	1167	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
400	1405	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
178	882	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
142	743	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
405	1107	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
95	395	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
343	1149	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
709	1516	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

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Obtained by Judicial Watch, Inc. via Michigan FOIA

PII MCL 15.243(1)(a)

263	1167	11/8/2022 11:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG	N
102	602	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
173	673	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
174	674	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
57	557	11/8/2022 8:23	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
262	1166	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
411	1416	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
365	1272	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
259	964	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
260	965	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
480	1383	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
553	1355	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
499	1300	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
498	1299	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
744	1551	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
95	896	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
271	973	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
337	1043	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
230	933	11/8/2022 13:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
229	932	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
153	1053	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
94	795	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
483	1193	11/8/2022 19:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
76	777	11/8/2022 8:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
96	996	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	3	SPOIL BALI	N
96	996	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
96	1001	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
163	865	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
454	1361	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
577	1485	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
124	825	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
605	1412	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
606	1413	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
421	1222	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
507	1308	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
490	1195	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
260	1064	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
425	1232	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
490	1192	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
515	1423	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
167	871	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
166	870	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
670	1676	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
286	791	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
606	1612	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
478	1279	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
169	873	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
654	1456	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
479	1280	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
134		11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	8	UPDATE VI	N
134	1034	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
136	1036	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
395	1097	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
1	1101	11/8/2022 7:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
22	922	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
12	912	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
335	1142	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
609	1615	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
19	919	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
18	918	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
335	1241	11/8/2022 12:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
306	1211	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
81	581	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
80	580	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
391	1395	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
302	1403	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
238	940	11/8/2022 13:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
301	1402	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
411	1114	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
419	926	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
340	846	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
339	845	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
329	1230	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
328	1229	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
595	1402	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
102	903	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
83	583	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
450	1455	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
481	1389	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
485	1190	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
196	898	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
292	1197	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
68	368	11/8/2022 13:20	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG	N
453	1056	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
91	791	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
589	1291	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
15	715	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
38	938	11/8/2022 7:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N

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PII MCL 15.243(1)(a)

86	887	11/8/2022 8:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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109	1110	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
415	1221	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
572	1378	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
636	1443	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
307	1208	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
95	596	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
13	813	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
14	814	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
410	1211	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
294	1196	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
95	795	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
335	937	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
421	1024	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
564	1467	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
210	913	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
749	1552	11/8/2022 18:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
576	1479	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
620	1524	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
152	652	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
761	1564	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
26	1126	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
654	1762	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
42	843	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
516	1422	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
591	1697	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
592	1698	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
312	1316	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
276	981	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
150	751	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
281	986	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
282	987	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
157	860	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
313	1215	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
564	1472	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
565	1473	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
124	1027	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
393	1095	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
478	1182	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
187	889	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
188	890	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
455	1157	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
100	802	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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228	1329	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
453	961	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
346	848	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
55	755	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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194	1195	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
728	1535	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
219	1019	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
569	1472	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
570	1473	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
709	1516	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
773	1577	11/8/2022 19:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
654	1660	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
262	967	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
469	1377	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
185	1285	11/8/2022 9:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
579	1182	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
203	1304	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
309	1011	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
547	1249	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
55	955	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
349	855	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
101	802	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
100	801	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
75	1175	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
208	809	11/8/2022 11:42	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
296	1102	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
35	835	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
178	1078	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
34	834	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
266	1070	11/8/2022 12:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
2	702	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
382	1188	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
381	1187	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
447	1350	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
364	1265	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
688	1491	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
241	1041	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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235	1039	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N

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35	335	11/8/2022 11:04	REGULAR_	5010	[redacted]	OSEVILLE CITY	18	ISSUE REG N
611	1617	11/8/2022 17:57	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
91	793	11/8/2022 8:47	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
233	1033	11/8/2022 11:13	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
170	470	11/8/2022 18:27	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
92	593	11/8/2022 9:53	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
484	1186	11/8/2022 17:39	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
370	1271	11/8/2022 14:02	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
336	1040	11/8/2022 16:04	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
129	1229	11/8/2022 8:49	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
128	1228	11/8/2022 8:48	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
98	800	11/8/2022 8:56	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
200	1100	11/8/2022 10:27	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
168	1071	11/8/2022 9:46	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
479	1387	11/8/2022 15:34	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
167	1070	11/8/2022 9:46	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
303	1404	11/8/2022 11:23	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
207	1308	11/8/2022 9:54	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
112	713	11/8/2022 9:20	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
376	1078	11/8/2022 16:09	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
377	1079	11/8/2022 16:09	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
252	757	11/8/2022 14:56	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
99	801	11/8/2022 9:26	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
78	879	11/8/2022 8:39	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
601	1408	11/8/2022 17:55	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
204	906	11/8/2022 11:43	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
203	905	11/8/2022 11:42	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
418	1121	11/8/2022 16:47	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
562	1267	11/8/2022 18:45	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
417	1120	11/8/2022 16:47	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
62	362	11/8/2022 12:57	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
227	1229	11/8/2022 11:10	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
228	1230	11/8/2022 11:11	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
2	302	11/8/2022 7:11	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
37	438	11/8/2022 8:28	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
96	797	11/8/2022 9:16	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
144	846	11/8/2022 10:47	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
143	845	11/8/2022 10:47	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
342	1044	11/8/2022 15:29	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
294	1199	11/8/2022 11:55	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
146	1049	11/8/2022 9:22	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
600	1402	11/8/2022 17:11	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
710	1619	11/8/2022 18:30	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
429	1336	11/8/2022 14:52	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
804	1713	11/8/2022 19:56	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
614	1518	11/8/2022 19:21	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
467	1172	11/8/2022 17:23	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
219	1221	11/8/2022 10:54	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
220	1222	11/8/2022 10:55	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
452	1157	11/8/2022 17:13	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
43	743	11/8/2022 7:35	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
567	1273	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
5	705	11/8/2022 7:07	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
206	706	11/8/2022 13:56	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
453	1254	11/8/2022 15:21	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
406	1411	11/8/2022 14:57	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
405	1410	11/8/2022 14:56	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
305	1207	11/8/2022 14:04	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
268	1170	11/8/2022 13:15	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
381	885	11/8/2022 17:52	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
508	1213	11/8/2022 17:55	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
509	1214	11/8/2022 17:55	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
245	1247	11/8/2022 11:24	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
112	513	11/8/2022 12:28	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
266	968	11/8/2022 13:55	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
403	1209	11/8/2022 14:58	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
458	1463	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
388		11/8/2022 14:38	REGULAR_	5010		OSEVILLE CITY	15	UPDATE VI N
388	1392	11/8/2022 14:39	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
183	584	11/8/2022 15:30	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
373	1075	11/8/2022 16:03	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
392	898	11/8/2022 17:39	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
196	900	11/8/2022 12:48	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
457	1462	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
378	1279	11/8/2022 14:14	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
404	1210	11/8/2022 14:58	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
387	1391	11/8/2022 14:37	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
372	1376	11/8/2022 14:24	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
529	1432	11/8/2022 17:50	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
109	1209	11/8/2022 8:35	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
167	467	11/8/2022 18:42	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
167	J5254656	11/8/2022 18:22	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
167	J5254656	11/8/2022 18:41	REGULAR_	5010		OSEVILLE CITY	18	UNDO: ISS Y
377	1080	11/8/2022 16:16	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
184	985	11/8/2022 10:15	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
215	919	11/8/2022 13:19	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
176	877	11/8/2022 11:18	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
206	910	11/8/2022 13:10	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

517	1222	11/8/2022 18:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
136	1039	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
361	1268	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
312	1014	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
332	934	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
118	819	11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
114	815	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
145	646	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
107	607	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
329	831	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
353	1260	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
108	608	11/8/2022 10:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
438	1140	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
539	1346	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
439	1341	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
482	1192	11/8/2022 19:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
111	814	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
479	1188	11/8/2022 19:48	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
479	1188	11/8/2022 19:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
479	1191	11/8/2022 19:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
3	703	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
10	510	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
433	1135	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
60	660	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
110	813	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
471	1173	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
593	1502	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
831	1939	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
606	1512	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
582	1488	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
89	890	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
470	1373	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
411	1117	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
428	1134	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
102	1002	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
163	665	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
163	564	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
161	562	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
226	928	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
334	1038	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
381	1284	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
476	1183	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
382	886	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
369	1170	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
529	1635	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
12	912	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
730	1533	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
731	1534	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
380	1186	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
589	1391	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
591	1393	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
590	1392	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
592	1394	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
112	1013	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
423	1125	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
146	947	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
473	1280	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
55	856	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
272	1076	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
577	1279	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
885	1996	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
393	1097	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
56	956	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
57	957	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
188	1088	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
242	644	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
170	571	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
125	1126	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
272	976	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
312	814	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
311	813	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
719	1526	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
190	892	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
592	1399	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
147	548	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
155	857	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
529	1535	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
528	1534	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
320	1221	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
484	1588	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
582	1688	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
16	616	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
431	1535	11/8/2022 13:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
211	1111	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
175	975	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
94	495	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
269	1370	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
278	980	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

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504	1609	11/8/2022 15:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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164	664	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
235	736	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
505	1610	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
505	1610	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
505	1622	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
147	1050	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
54	354	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
684	1487	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
142	943	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
141	942	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
579	1283	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
42	743	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
283	788	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
209	713	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
452	1253	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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540	1245	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
538	1243	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
539	1244	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
30	930	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
66	966	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
690	1599	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
390	896	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
252	954	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
380	1082	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
236	1040	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
548	1554	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
207	1010	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
207	1010	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
207	1012	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
208	1011	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
281	1082	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
447	1248	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
262	1062	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
549	1356	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
225	726	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
198	698	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
465	1368	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
466	1171	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
465	1170	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
98	398	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
192	895	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
204	906	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
402	1506	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
433	1240	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
557	1364	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
275	1179	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
218	1122	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
370	1076	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
47	647	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
206	909	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
48	648	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
340	1044	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
20	620	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
593	1400	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
230	831	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
58	358	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
190	892	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
41	742	11/8/2022 7:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
475	1281	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
594	1401	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
303	1109	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
269	771	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
173	474	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
511	1215	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
532	1334	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
113	1114	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
219	620	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
505	1408	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
150	1151	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
242	1143	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
242	1143	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	3	SPOIL BALI N
242	1149	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
389	1093	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
244	946	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
496	1303	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
90	1190	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
524	1427	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
525	1428	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
486	1390	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
272	974	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
864	1972	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
668	1577	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
426	1129	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
520	1222	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
358	1261	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

414	1221	11/8/2022 15:25	REGULAR_	5010	[redacted]	OSEVILLE CITY	11	ISSUE REG N
74	1174	11/8/2022 7:49	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
224	1028	11/8/2022 11:08	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
447	1149	11/8/2022 17:13	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
641	1547	11/8/2022 18:30	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
409	1316	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
474	1280	11/8/2022 16:10	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
10	910	11/8/2022 7:06	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
192	997	11/8/2022 10:54	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
472	1380	11/8/2022 15:25	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
199	699	11/8/2022 13:41	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
648	1557	11/8/2022 17:46	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
273	975	11/8/2022 13:57	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
394	898	11/8/2022 18:14	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
676	1682	11/8/2022 18:51	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
426	1131	11/8/2022 16:56	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
84	1085	11/8/2022 8:31	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
21	621	11/8/2022 7:17	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
413	1220	11/8/2022 15:25	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
701	1707	11/8/2022 19:37	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
291	1196	11/8/2022 11:53	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
6	306	11/8/2022 7:34	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
393	897	11/8/2022 18:13	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
278	783	11/8/2022 15:35	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
48	948	11/8/2022 7:48	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
201	903	11/8/2022 11:54	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
85	1185	11/8/2022 8:02	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
139	841	11/8/2022 10:16	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
102	803	11/8/2022 9:19	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
433	1336	11/8/2022 16:21	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
571	1474	11/8/2022 18:31	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
521	1424	11/8/2022 17:45	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
402	1309	11/8/2022 14:16	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
208	911	11/8/2022 12:28	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
78	780	11/8/2022 8:29	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
85	985	11/8/2022 8:41	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
298	1200	11/8/2022 13:54	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
14	814	11/8/2022 7:12	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
341	1047	11/8/2022 16:29	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
765	1873	11/8/2022 18:00	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
115	615	11/8/2022 10:23	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
320	822	11/8/2022 16:46	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
321	823	11/8/2022 16:47	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
530	1133	11/8/2022 18:16	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
769	1572	11/8/2022 19:24	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
768	1571	11/8/2022 19:24	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
132	632	11/8/2022 10:55	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
193	693	11/8/2022 13:32	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
89	790	11/8/2022 9:09	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
392	1495	11/8/2022 12:56	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
376	880	11/8/2022 17:49	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
18	519	11/8/2022 7:32	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
326	1028	11/8/2022 15:11	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
16	517	11/8/2022 7:29	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
329	1430	11/8/2022 11:42	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
143	1046	11/8/2022 9:18	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
534	1238	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
53	953	11/8/2022 7:53	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
510	1418	11/8/2022 15:58	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
420	1327	11/8/2022 14:45	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
371	1278	11/8/2022 13:32	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
9	809	11/8/2022 7:06	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
8	808	11/8/2022 7:06	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
182	884	11/8/2022 11:51	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
195	695	11/8/2022 13:33	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
196	696	11/8/2022 13:34	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
224	1024	11/8/2022 11:01	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
225	1025	11/8/2022 11:02	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
194	694	11/8/2022 13:33	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
288	890	11/8/2022 13:59	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
535	1541	11/8/2022 17:00	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
32	1033	11/8/2022 7:29	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
146	1046	11/8/2022 9:24	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
279	1181	11/8/2022 13:31	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
506	1211	11/8/2022 17:53	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
61	762	11/8/2022 8:08	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
512	1217	11/8/2022 17:58	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
220	721	11/8/2022 14:30	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
269	971	11/8/2022 14:03	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
532	1237	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
100	1200	11/8/2022 8:15	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
58	559	11/8/2022 9:00	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
224	1226	11/8/2022 10:58	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
222	623	11/8/2022 16:44	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
561	1464	11/8/2022 18:22	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
561	1464	11/8/2022 18:39	REGULAR_	5010		OSEVILLE CITY	3	SPOIL BALI N
561	1480	11/8/2022 18:39	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
585	1189	11/8/2022 19:19	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

209	709	11/8/2022 14:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
399	1101	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
253	1354	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
369	1176	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
487	1294	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
389	1296	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
367	1071	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
98	799	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
282	884	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
429	1434	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
727	1534	11/8/2022 19:42	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
337	1238	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
411	1312	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
592	1496	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
223	724	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
314	1020	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
256	1062	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
219	921	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
427	1130	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
516	1419	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
88	589	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
87	588	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
97	598	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
195	796	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
25	725	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
545	1247	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
546	1248	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
544	1246	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
585	1691	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
584	1690	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
437	1040	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
438	1143	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
15	915	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
246	747	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
712	1515	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
305	1009	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
333	1037	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
233	1134	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
234	1135	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
220	621	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
512	1319	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
174	975	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
126	828	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
300	1201	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
409	1111	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
297	1002	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
660		11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	8	UPDATE VI N
660	1567	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
201	1001	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
85	985	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
356	1058	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
233	935	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
524	1229	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
65	766	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
265	667	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
90	990	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
681	1589	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
680	1588	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
16	716	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
95	1096	11/8/2022 8:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
335	1339	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
757	1564	11/8/2022 20:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
587	1593	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
586	1592	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
597	1404	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
237	1137	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
212	916	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
221	1223	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
97	597	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
389	1091	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
442	1345	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
446	1252	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
529	1336	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
39	739	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
131	832	11/8/2022 10:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
225	927	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
81	981	11/8/2022 8:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
425	1127	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
76	976	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
100	1000	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
9	709	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
10	710	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
102	702	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
149	950	11/8/2022 9:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
545	1453	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
559	1465	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
600	1407	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
237	1141	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

477	1179	11/8/2022 17:36	REGULAR_	5010	[redacted]	OSEVILLE CITY	7	ISSUE REG N
508	1210	11/8/2022 17:58	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
195	596	11/8/2022 15:47	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
21	921	11/8/2022 7:12	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
20	920	11/8/2022 7:11	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
820	1928	11/8/2022 18:39	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
436	1339	11/8/2022 16:24	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
102	1103	11/8/2022 8:52	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
301	1305	11/8/2022 12:47	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
446	1148	11/8/2022 17:12	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
64	1065	11/8/2022 8:08	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
224	1125	11/8/2022 12:20	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
530	1337	11/8/2022 16:54	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
477	1182	11/8/2022 17:28	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
168	870	11/8/2022 10:53	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
154	655	11/8/2022 11:31	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
137	538	11/8/2022 13:31	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
546	1149	11/8/2022 18:29	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
67	667	11/8/2022 8:08	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
786	1695	11/8/2022 19:30	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
241	1342	11/8/2022 10:31	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
159	459	11/8/2022 18:05	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
728	1637	11/8/2022 18:41	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
162	563	11/8/2022 14:47	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
232	1234	11/8/2022 11:14	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
146	1246	11/8/2022 9:02	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
240	1341	11/8/2022 10:30	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
150	1051	11/8/2022 10:27	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
210	710	11/8/2022 14:04	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
33	1133	11/8/2022 7:15	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
204	1010	11/8/2022 11:06	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
212	915	11/8/2022 12:32	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
28	928	11/8/2022 7:16	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
377	1083	11/8/2022 17:18	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
772	1880	11/8/2022 18:05	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
771	1879	11/8/2022 18:03	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
305	1011	11/8/2022 15:46	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
316	1022	11/8/2022 16:00	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
560	1366	11/8/2022 17:18	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
561	1367	11/8/2022 17:18	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
605	1611	11/8/2022 17:53	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
604	1610	11/8/2022 17:53	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
54	954	11/8/2022 7:37	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
582	1389	11/8/2022 17:30	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
78	978	11/8/2022 8:09	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
369	1071	11/8/2022 16:02	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
370	1072	11/8/2022 16:02	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
440	1246	11/8/2022 15:36	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
40	741	11/8/2022 7:40	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
420	1524	11/8/2022 13:20	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
419	1523	11/8/2022 13:20	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
335	837	11/8/2022 17:05	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
333	1035	11/8/2022 15:20	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
334	1036	11/8/2022 15:21	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
439	1143	11/8/2022 16:57	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
440	1144	11/8/2022 16:58	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
240	1144	11/8/2022 11:07	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
65	766	11/8/2022 8:10	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
63	563	11/8/2022 8:32	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
62	562	11/8/2022 8:30	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
298	1105	11/8/2022 12:46	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
320	1024	11/8/2022 15:36	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
97	498	11/8/2022 11:34	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
64	765	11/8/2022 8:26	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
49	749	11/8/2022 7:49	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
192	1093	11/8/2022 11:26	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
268	1270	11/8/2022 11:55	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
580	1586	11/8/2022 17:35	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
422	1223	11/8/2022 14:52	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
441	1344	11/8/2022 16:32	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
230	1131	11/8/2022 12:25	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
701	1610	11/8/2022 18:23	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
54	755	11/8/2022 7:58	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
420	1227	11/8/2022 15:31	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
811	1919	11/8/2022 18:34	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
812	1920	11/8/2022 18:34	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
327	1134	11/8/2022 13:50	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
292	994	11/8/2022 14:51	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
25	526	11/8/2022 7:49	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
131	631	11/8/2022 10:55	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
3	903	11/8/2022 7:03	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
438	1345	11/8/2022 14:59	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
437	1344	11/8/2022 14:59	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
12	712	11/8/2022 7:08	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
93	795	11/8/2022 9:08	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
136	636	11/8/2022 11:05	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
363	1067	11/8/2022 16:33	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
460	968	11/8/2022 18:56	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N

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PII MCL 15.243(1)(a)

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36	936	11/8/2022 7:19	REGULAR_	5010	[redacted]	OSEVILLE CITY	2	ISSUE REG N
617	1723	11/8/2022 16:26	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
521	1226	11/8/2022 18:02	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
522	1227	11/8/2022 18:03	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
317	1218	11/8/2022 12:40	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
224	927	11/8/2022 12:52	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
205	908	11/8/2022 12:21	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
208	609	11/8/2022 16:09	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
847	1955	11/8/2022 18:53	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
443	1547	11/8/2022 14:10	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
238	941	11/8/2022 13:17	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
297	899	11/8/2022 14:19	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
237	939	11/8/2022 13:06	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
154	856	11/8/2022 10:33	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
2	802	11/8/2022 7:01	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
444	1548	11/8/2022 14:11	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
652	1459	11/8/2022 18:32	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
470	978	11/8/2022 19:33	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
392	1396	11/8/2022 14:43	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
652	1658	11/8/2022 18:30	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
186	1187	11/8/2022 10:17	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
119	920	11/8/2022 9:26	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
487	1293	11/8/2022 16:19	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
122	824	11/8/2022 9:36	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
121	823	11/8/2022 9:36	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
183	988	11/8/2022 10:43	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
311	1315	11/8/2022 13:11	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
143	443	11/8/2022 17:24	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
142	442	11/8/2022 17:23	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
639	1746	11/8/2022 16:39	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
342	1243	11/8/2022 13:25	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
403	1106	11/8/2022 16:38	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
447	1153	11/8/2022 18:07	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
645	1554	11/8/2022 17:43	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
186	888	11/8/2022 11:26	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
266	1166	11/8/2022 11:40	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
12	312	11/8/2022 8:23	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
178	479	11/8/2022 18:44	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
668	1475	11/8/2022 18:40	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
398	1100	11/8/2022 16:25	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
83	784	11/8/2022 9:02	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
34	734	11/8/2022 7:20	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
157	657	11/8/2022 12:12	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
86	787	11/8/2022 9:06	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
182	1083	11/8/2022 11:09	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
410	1313	11/8/2022 16:05	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
179	1080	11/8/2022 11:07	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
231	1035	11/8/2022 11:24	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
229	1129	11/8/2022 10:55	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
558	1464	11/8/2022 17:25	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
241	1047	11/8/2022 11:50	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
887	1998	11/8/2022 19:18	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
355	1057	11/8/2022 15:46	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
349	851	11/8/2022 17:13	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
107	508	11/8/2022 11:56	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
17	1117	11/8/2022 7:07	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
239	941	11/8/2022 12:38	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
27	827	11/8/2022 7:19	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
435	1342	11/8/2022 14:55	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
377	1381	11/8/2022 14:29	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
463	1264	11/8/2022 15:28	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
19	719	11/8/2022 7:11	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
32	832	11/8/2022 7:22	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
20	720	11/8/2022 7:11	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
144	1145	11/8/2022 9:33	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
145	1146	11/8/2022 9:34	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
50	750	11/8/2022 7:44	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
50	750	11/8/2022 8:03	REGULAR_	5010		OSEVILLE CITY	6	SPOIL BALI N
50	764	11/8/2022 8:03	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
51	751	11/8/2022 7:45	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
49	749	11/8/2022 7:44	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
162	965	11/8/2022 10:18	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
201	701	11/8/2022 13:50	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
603	1609	11/8/2022 17:52	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
17	1018	11/8/2022 7:19	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
199	600	11/8/2022 15:52	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
1	1001	11/8/2022 7:02	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
615	1422	11/8/2022 17:58	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
441	1446	11/8/2022 15:22	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
525	1332	11/8/2022 16:50	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
120	420	11/8/2022 16:21	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
437	1143	11/8/2022 17:52	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
436	1142	11/8/2022 17:52	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
34	934	11/8/2022 7:22	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
64	564	11/8/2022 8:38	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
231	1132	11/8/2022 12:26	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
240	943	11/8/2022 13:27	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
344	946	11/8/2022 15:10	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

425	1231	11/8/2022 15:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
535	1237	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
61	361	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
669	1675	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
121	922	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
358	1064	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
49	1050	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
381	1385	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
683	1591	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
313	1120	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
159	1059	11/8/2022 9:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
314	1121	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
693	1699	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
334	1036	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
407	1214	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
22	822	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
182	983	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
219	921	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
335	1037	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
640	1646	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
382	1386	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
368	1074	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
104	1004	11/8/2022 8:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
408	1512	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
729	1638	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
630	1437	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
418	1021	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
406	1510	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
552	1359	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
262	1162	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
32	533	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
587	1493	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
243	1043	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
157	859	11/8/2022 11:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
312	1016	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
311	1015	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
331	933	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
372	1275	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
16	716	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
152	853	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
250	1154	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
72	972	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
71	971	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
428	932	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
26	826	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
517	1420	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
294	1298	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
61	961	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
596	1602	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
295	1299	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
436	1242	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
384	1285	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
383	1284	11/8/2022 14:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
569	1271	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
568	1270	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
422	1125	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
178	1179	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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424	1231	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
622	1429	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
888	1999	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
498	1203	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
308	1010	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
27	827	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
423	1229	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
296	998	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
449	1256	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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543	1248	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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88	988	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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59	1159	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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458	1162	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
138	941	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
139	942	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
149	550	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
65	365	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
9	709	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
10	1110	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
548	1355	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
288	1094	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

PII MCL 15.243(1)(a)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

34	634	11/8/2022 7:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG	N
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479	1082	11/8/2022 17:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG	N
418	1325	11/8/2022 14:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG	N
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512	1420	11/8/2022 16:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG	N
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7	1107	11/8/2022 7:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG	N
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433	1334	11/8/2022 15:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG	N
163	1063	11/8/2022 9:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG	N
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403	1006	11/8/2022 16:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG	N
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718	1525	11/8/2022 19:30	REGULAR_	5010	1999	ROSEVILLE CITY	11	ISSUE REG	N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

435	1242	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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95	796	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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580	1183	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
546	1352	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
729	1532	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
45	345	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
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18	418	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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7	1007	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
236	740	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
35	735	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
459	1163	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
67	768	11/8/2022 8:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
287	989	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
224	625	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
171	873	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
492	1400	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
327	1029	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
427	1334	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
493	1401	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
428	1335	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
160	1060	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
401	907	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
259	661	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
158	559	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
225	626	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
478	1187	11/8/2022 19:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
482	1386	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
123	923	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
28	528	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
502	1209	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
562	1468	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
207	707	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
443	1350	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
444	1351	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
54	755	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
55	756	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
328	1231	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N

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PII MCL 15.243(1)(a)

326	1229	11/8/2022 14:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
580	1284	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
327	1230	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
345	1146	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
344	1145	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
725	1532	11/8/2022 19:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
554	1560	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
142	1042	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
430	1136	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
464	1367	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
297	1198	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
497	1601	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
741	1650	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
385	1088	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
535	1240	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
345	1151	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
10	710	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
543	1146	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
407	1110	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
130	430	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
53	553	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
648	1654	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
338	1239	11/8/2022 13:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
339	1240	11/8/2022 13:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
18	818	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
626	1530	11/8/2022 19:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
434	1140	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
393	1099	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
286	1188	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
381	1282	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
132	1032	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
63	1064	11/8/2022 8:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
62	1063	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
94	994	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
253	1153	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
249	1153	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
261	1163	11/8/2022 13:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
459	1362	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
268	1072	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
268	1072	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
268	1082	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
47	947	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
473	1179	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
290	992	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
48	748	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
538	1544	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
172	472	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
537	1543	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
508	1613	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
428	1331	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
436	1243	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
16	916	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
536	1439	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
355	1359	11/8/2022 14:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
81	882	11/8/2022 8:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
116	818	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
117	819	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
64	865	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
67	868	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
180	985	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
40	1041	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
454	1255	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
245	750	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
157	958	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
189	893	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
46	547	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
556	1261	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
488	1192	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
732	1840	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
733	1841	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
246	751	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
113	614	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
556	1464	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
288	1190	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
287	1189	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
217	919	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
292	1098	11/8/2022 12:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
247	752	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
542	1450	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
112	613	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
388	1194	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
355	1057	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
476	1181	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
577	1379	11/8/2022 16:53	CHALLENG	5010		ROSEVILLE CITY	1	ISSUE CHA N
171	1271	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
627	1429	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
603	1507	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
433	1139	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N

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PII MCL 15.243(1)(a)

231	832	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
414	1220	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
213	1113	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
297	1103	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
409	1216	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
49	850	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
398	1204	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
414	1215	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
396	1098	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
710	1513	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
711	1514	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
264	1068	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
254	956	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
420	1125	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
761	1869	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
762	1870	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
37	637	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
552	1455	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
671	1677	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
156	956	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
364	1368	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
83	1183	11/8/2022 8:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
518	1325	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
688	1796	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
687	1795	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
211	1312	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
519	1326	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
160	662	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
528	1434	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
147	1047	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
292	1193	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
389	1290	11/8/2022 14:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
348	1149	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
198	999	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
263	764	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
25	825	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
111	1011	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
134	935	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
510	1212	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
72	873	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
448	1453	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
293	799	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
538	1242	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
463	1366	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
503	1411	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
903	2014	11/8/2022 19:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
414	1120	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
556	1358	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
465	1368	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
316	1320	11/8/2022 13:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
721	1630	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
326	1032	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
123	1023	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
462	1365	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
504	1412	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
486	1292	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
514	1219	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
298	900	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
159	661	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
199	703	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
102	803	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
357	1264	11/8/2022 13:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
565	1468	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
472	1177	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
403	1310	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
110	610	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
488	1289	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
618	1624	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
291	1295	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
408	1110	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
617	1623	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
133	433	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
375	1081	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
374	1080	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
86	1087	11/8/2022 8:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
212	1016	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
481	1186	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
201	1202	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
473	1180	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
527	1334	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
528	1335	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
630	1636	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
351	1355	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
414	1315	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
524	1430	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
352	1356	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
316	1018	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
404	1007	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

51	651	11/8/2022 7:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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387	1290	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
576	1282	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
45	745	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
49	849	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
342	848	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
349	1252	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
297	803	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
8	708	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
218	922	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
539	1445	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
421	1227	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
470	1574	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
266	1168	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
437	1141	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
190	1191	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
103	703	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
285	1091	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
637	1444	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
636	1443	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
289	794	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
223	1029	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
256	1258	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
299	1106	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
288	1094	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
276	978	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
277	979	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
451	1054	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
263	1265	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
84	984	11/8/2022 8:13	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
502	1405	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
895	2006	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
555	1260	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
555	1260	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
555	1268	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
46	946	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
168	569	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
44	745	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
218	920	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
298	700	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
161	1261	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
323	1124	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
499	1402	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
43	744	11/8/2022 7:48	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
23	1024	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
384	1388	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
496	1302	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
451	1252	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
265	967	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
469	1573	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
656	1463	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
350	952	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
114	816	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
657	1464	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
658	1465	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
550	1153	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
549	1152	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
190	991	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
577	1481	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
365	1268	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
366	1269	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
626	1535	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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627	1536	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
105	807	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
211	913	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
564	1370	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
369	1075	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
563	1369	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
734	1541	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
733	1540	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
214	1216	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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450	1156	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
154	957	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
776	1580	11/8/2022 19:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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370	972	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
124	827	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
25	1125	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
183	984	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
158		11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
158	961	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
158	961	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	5	SPOIL BALI N
158	976	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
66	766	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N

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PII MCL 15.243(1)(a)

563	1669	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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375	881	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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637	1546	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
620	1529	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
420	1123	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	14	SPOIL BALI N
420	1123	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
420	1133	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
372	974	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
277	1279	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
297	1301	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
92	992	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
93	393	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
92	392	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
6	1006	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
162	864	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
204	1205	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
592	1498	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
144	945	11/8/2022 9:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
143	944	11/8/2022 9:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
35	635	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
168	1268	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
170	872	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
507	1211	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
328	834	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
363	1065	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
68	568	11/8/2022 8:46	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
426	1431	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
143	844	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
144	845	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
67	568	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
264	1266	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
553	1559	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
173	1273	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
173	1273	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
173	1286	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
364	1067	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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891	2002	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
355	1057	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
636	1545	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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162	1062	11/8/2022 9:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
327	929	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
68	1168	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
700	1706	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
420	1122	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
90	790	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
498	1503	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
572	1374	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
122	622	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
437	1442	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
495	1098	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
123	623	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
436	1441	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
599	1508	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
121	822	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
77	777	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
13	714	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
39	440	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
38	439	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
310	1111	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
379	1083	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
177	879	11/8/2022 11:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
407	1112	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
178	880	11/8/2022 11:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
140	842	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
141	843	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
570	1377	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
683	1689	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
324	1026	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
574	1376	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
6	806	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
539	1645	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
538	1644	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
45	1145	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
393	1194	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
40	742	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
196	997	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
196	997	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
196	1003	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
621	1428	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
414	1116	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
262	1164	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
220	1121	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
35	737	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N

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PII MCL 15.243(1)(a)

214	1315	11/8/2022 10:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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21	721	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
261	1161	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
200		11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	9	UPDATE VI N
200	1301	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
414	1017	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
201		11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	9	UPDATE VI N
201	1302	11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
197	899	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
629	1431	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
426	1333	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
59	959	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
440	1343	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
79	979	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
400	1307	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
880	1991	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
573	1679	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
120	1021	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
476	1384	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
285	990	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
307	1009	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
374	1378	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
168	1169	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
614	1421	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
366	1173	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
184	785	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
522	1329	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
521	1328	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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643	1450	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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265	1366	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
198	799	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
503	1106	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
184	1085	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
249	1149	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
199	503	11/8/2022 20:04	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
198	502	11/8/2022 20:03	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
259	962	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
261	964	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
286	1092	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
596	1500	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
595	1499	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
188	1089	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
556	1462	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
19	719	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
549	1355	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
132	533	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
275	1081	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
276	1082	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
760	1868	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
771	1575	11/8/2022 19:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
576	1280	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
181	782	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
180	781	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
29	1129	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
30	1130	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
762	1671	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
35	536	11/8/2022 8:01	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
230	1030	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
36	537	11/8/2022 8:02	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
353	1254	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
354	1255	11/8/2022 13:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
496	1297	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
200	903	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
3	803	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
403	907	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
201	904	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
332	1036	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
598	1405	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
725	1528	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
518	1319	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
348	1154	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
52	552	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
116	1017	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
206	1012	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
763	1566	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
404	908	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
100	1101	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
255	960	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
103	904	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
271	1173	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
658	1460	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
440	1043	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
71	872	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
322	828	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
453	1157	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

125	926	11/8/2022 9:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG	N
555	1463	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
834	1942	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
201	1105	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
313	1214	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
98	1099	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
181	1082	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
330	1034	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
754	1862	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
724	1527	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
677	1484	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
168	670	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
367	1268	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
281	883	11/8/2022 13:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
418	925	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
221	1322	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
474	1377	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
71	1072	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
94	895	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
833	1941	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
285	1287	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
641	1448	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
287	991	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
222	1126	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
212	1113	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
309	1210	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
351	953	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
185	889	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
148	649	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
366	872	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
393	996	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
405	911	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
221	622	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
26	427	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
19	619	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
190	491	11/8/2022 19:03	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG	N
190	491	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	18	SPOIL BALI	N
190	497	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG	N
25	426	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
186	890	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
353	1057	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
161	863	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
714	1623	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
216	617	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
217	618	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
237	939	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
458	1265	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
487	1191	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
425	1130	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
478	1185	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
430	1337	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
566	1368	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
567	1369	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
57	458	11/8/2022 9:40	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
204	605	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
54	855	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
58	758	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
57	757	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
747	1656	11/8/2022 18:58	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
751	1558	11/8/2022 19:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
575	1481	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
574	1480	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
224	825	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
433	1340	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
225	826	11/8/2022 12:08	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
127	1028	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
307	1113	11/8/2022 12:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
185	1085	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
589	1293	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
494	1400	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
101	1001	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
573	1375	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
666	1575	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
6	406	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
167	1067	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
326	1427	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
326	1427	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	9	UNDO: ISS	Y
326	1427	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
355	1456	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
222	1323	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
399	1206	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
430	1134	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
431	1135	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
44	944	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
659	1566	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
558	1664	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
182	884	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
481	1384	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N

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Obtained by Judicial Watch, Inc. via PII MCL 15.24 chigan FOIA

PII MCL 15.243(1)(a)

471	1374	11/8/2022 17:05	REGULAR_	5010	[redacted]	OSEVILLE CITY	3	ISSUE REG N
475	1383	11/8/2022 15:30	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
7	507	11/8/2022 7:05	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
517	1423	11/8/2022 16:39	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
37	738	11/8/2022 7:29	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
237	940	11/8/2022 13:15	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
236	939	11/8/2022 13:14	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
20	720	11/8/2022 7:13	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
401	1304	11/8/2022 15:52	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
351	1053	11/8/2022 15:41	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
483	1187	11/8/2022 17:32	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
133	933	11/8/2022 9:10	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
134	934	11/8/2022 9:10	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
162	662	11/8/2022 12:17	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
161	661	11/8/2022 12:17	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
169	669	11/8/2022 12:31	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
572	1175	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
73	773	11/8/2022 8:22	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
41	842	11/8/2022 7:50	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
300	806	11/8/2022 16:09	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
467	1374	11/8/2022 15:19	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
468	1375	11/8/2022 15:20	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
386	1390	11/8/2022 14:36	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
216	918	11/8/2022 12:12	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
358	1060	11/8/2022 15:54	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
165	969	11/8/2022 10:26	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
505	1311	11/8/2022 16:36	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
493	1299	11/8/2022 16:27	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
287	1093	11/8/2022 12:36	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
148	850	11/8/2022 11:01	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
487	1492	11/8/2022 16:02	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
225	1129	11/8/2022 10:53	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
177	1080	11/8/2022 10:04	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
217	1021	11/8/2022 11:03	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
218	1022	11/8/2022 11:03	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
79	579	11/8/2022 9:01	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
261	862	11/8/2022 13:06	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
333	1035	11/8/2022 15:22	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
788	1697	11/8/2022 19:37	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
789	1698	11/8/2022 19:38	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
377	881	11/8/2022 17:50	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
5	1105	11/8/2022 7:03	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
229	730	11/8/2022 14:48	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
468	976	11/8/2022 19:26	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
322	1129	11/8/2022 13:36	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
405	1212	11/8/2022 15:20	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
91	591	11/8/2022 9:32	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
554	1660	11/8/2022 15:43	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
699	1506	11/8/2022 19:04	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
394	1096	11/8/2022 16:21	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
452	1159	11/8/2022 18:13	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
391	1192	11/8/2022 14:14	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
265	1071	11/8/2022 12:13	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
353	1454	11/8/2022 12:18	REGULAR_	5010		OSEVILLE CITY	9	SPOIL BALI N
353	1454	11/8/2022 12:09	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
353	1469	11/8/2022 12:18	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
354	1455	11/8/2022 12:10	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
336	938	11/8/2022 15:03	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
62	563	11/8/2022 9:09	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
139	841	11/8/2022 10:35	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
236	938	11/8/2022 13:06	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
402	1305	11/8/2022 15:52	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
309	1011	11/8/2022 15:13	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
76	1176	11/8/2022 7:53	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
500	1307	11/8/2022 16:33	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
91	592	11/8/2022 9:52	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
85	586	11/8/2022 9:48	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
694	1700	11/8/2022 19:10	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
678	1485	11/8/2022 18:47	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
677	1484	11/8/2022 18:47	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
676	1483	11/8/2022 18:45	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
297	1202	11/8/2022 11:58	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
46	748	11/8/2022 8:51	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
81	783	11/8/2022 9:48	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
463	1270	11/8/2022 16:04	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
74	775	11/8/2022 8:41	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
373	1076	11/8/2022 16:12	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
374	1077	11/8/2022 16:12	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
669	1576	11/8/2022 18:59	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
570	1372	11/8/2022 16:46	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
436	1237	11/8/2022 15:05	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
26	826	11/8/2022 7:14	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
518	1426	11/8/2022 16:08	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
104	805	11/8/2022 9:22	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
105	806	11/8/2022 9:22	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
465	1372	11/8/2022 15:19	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
464	1371	11/8/2022 15:18	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
462	1065	11/8/2022 17:21	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

331	837	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
496	1201	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
477	1080	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
95	995	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
572	1379	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
437	944	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
116	819	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
206	1009	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
194	995	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
45	446	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
729	1537	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
729	1537	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
729	1541	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
354	1155	11/8/2022 13:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
258	759	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
259	760	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
141	641	11/8/2022 11:11	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
260	761	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
203	703	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
510	1413	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
522	1628	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
635	1742	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
102	603	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
103	604	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
419	1124	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
236	1137	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
105	808	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
194	898	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
393	1300	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
392	1299	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
216	918	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
215	917	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
500	1403	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
51	752	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
31	631	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
52	753	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
32	632	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
353	1154	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
379	883	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
204	1104	11/8/2022 10:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
790	1699	11/8/2022 19:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
605	1412	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
691	1599	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
522	1528	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
603	1410	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
17	717	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
205	907	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
424	1429	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
75	1076	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
55	756	11/8/2022 8:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
355	1258	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
519	1122	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
520	1123	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
79	781	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
142	543	11/8/2022 13:42	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
143	544	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
571	1479	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
572	1480	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
374	1078	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
645	1753	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
651	1458	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
232	935	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
55	1056	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
436	1039	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
503	1406	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
443	1149	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
798	1707	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
334	936	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
436	1138	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
242	944	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
254	1058	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
190	1091	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
506	1313	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
360	1166	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
189	1090	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
362	1064	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
469	1173	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
370	1171	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
12	812	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
792	1701	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
432	1239	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
431	1238	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
212	1012	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
211	1011	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
293	1394	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
292	1393	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
868	1977	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
552	1354	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N

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PII MCL 15.243(1)(a)

551	1353	11/8/2022 16:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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96	1196	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
133	634	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
526	1231	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
657	1464	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
484	1189	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
764	1872	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
326	1227	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
183	885	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
226	928	11/8/2022 12:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
308	810	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
332	1034	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
90	590	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
295	1200	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
69	771	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
8	709	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
255	957	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
290	1191	11/8/2022 12:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
245	1346	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
70	1170	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
63	1163	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
265	970	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
270	1076	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
85	787	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
422	1323	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
518	1524	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
318	1221	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
631	1438	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
375	1379	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
399	905	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
400	906	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
318	1024	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
317	1023	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
188	589	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
343	849	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
86	986	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
619	1528	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
10	910	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
427	1330	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
56	956	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
439	1144	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
424	1129	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
470	1177	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
271	975	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
62	762	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
164	865	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
365	1067	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
106	807	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
172	873	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
366	1068	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
767	1570	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
158	861	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
541	1243	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
518	1624	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
159	1259	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
563	1166	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
107	1008	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
523	1529	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
273	1077	11/8/2022 12:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
635	1442	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
634	1441	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
194	896	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
274	1078	11/8/2022 12:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
108	1208	11/8/2022 8:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
260	1160	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
634	1441	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
676	1483	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
590	1397	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
714	1517	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
861	1969	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
113	413	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
188	892	11/8/2022 12:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
396	1102	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
497	1298	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
455	963	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
192	696	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
191	695	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
431	938	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
39	539	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
583	1489	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
392	1098	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
573	1379	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
85	886	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
686	1493	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
401	905	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
366	870	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
367	871	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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75	777	11/8/2022 8:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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303	809	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
383	986	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
180	1083	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
480	1388	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
511	1419	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
261	1061	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
434	1341	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
650	1559	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
649	1558	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
668	1674	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
438	1144	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
437	1143	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
90	792	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
33	733	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
132	432	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
680	1589	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
15	815	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
494	1598	11/8/2022 14:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
269	974	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
434	1241	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
293	795	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
402	906	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
146	848	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
145	847	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
332	1433	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
367	1168	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
368	1169	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
394	1398	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
660	1666	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
315	817	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
314	816	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
87	587	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
166	1066	11/8/2022 9:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
742	1549	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
72	872	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
71	871	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
36	336	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
648	1450	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
503	1208	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
164	964	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
886	1997	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
415	1118	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
22	1023	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
21	1022	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
230	932	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
19	919	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
134	535	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
135	536	11/8/2022 13:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
673	1679	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
711	1518	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
191	1091	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
536	1442	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
277	1181	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
128	1028	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
489	1196	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
139	939	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
505	1212	11/8/2022 19:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
488	1195	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
129	1029	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
318	1223	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
31	331	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
578	1482	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
273	1173	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
273	1173	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
273	1176	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
49	750	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
590	1292	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
78	378	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
77	377	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
96	396	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
261	1263	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
262	1264	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
128	1129	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
222	823	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
105	1006	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
827	1935	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
92	794	11/8/2022 10:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
315	1216	11/8/2022 12:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
361	1462	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
421	1124	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
419	1122	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
769	1877	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
158	1159	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
218	921	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
147	1048	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. via Michigan FOIA

PII MCL 15.243(1)(a)

243	946	11/8/2022 13:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
246	1046	11/8/2022 11:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
197	1003	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
83	884	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
436	1140	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
818	1926	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
609	1518	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
18	720	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
756	1563	11/8/2022 19:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
64	964	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
65	1165	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
467	1169	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
468	1170	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
64	1164	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
195	995	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
194	994	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
734	1537	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
142	945	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
281	786	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
233	1039	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
519	1427	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
140	1043	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
160	460	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
461	1368	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
534	1236	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
333	839	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
332	838	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
494	1196	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
515	1118	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
331	1035	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
56	956	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
635	1442	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
705	1512	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
243	945	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
80	782	11/8/2022 9:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
20	920	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
56	857	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
35	1036	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
125	828	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
17	417	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
421	1228	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
141	843	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
76	778	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
468	1174	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
535	1438	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
469	1175	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
154	454	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
441	1248	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
155	955	11/8/2022 9:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
382	1484	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
316	1117	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
23	923	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
125	1026	11/8/2022 9:42	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
580	1282	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
44	1046	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
467	1173	11/8/2022 19:36	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
467	1173	11/8/2022 19:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
467	1184	11/8/2022 19:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
534	1437	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
105	605	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
624	1528	11/8/2022 19:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
705	1512	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
625	1529	11/8/2022 19:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
140	941	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
263	864	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
226	827	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
315	821	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
111	612	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
437	941	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
545	1451	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
256	1156	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
122	1023	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
281	983	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
54	1055	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
576	1482	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
577	1483	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
402	1107	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
363	1069	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
183	887	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
197	998	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
242	1146	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
545	1551	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
527	1229	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
442	1546	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
438	1542	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
118	819	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
624	1426	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
440	1145	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

117	818	11/8/2022 9:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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664	1573	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
763	1672	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
671	1478	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
40	940	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
322	1128	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
592	1296	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
208	910	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
497	1303	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
88	1188	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
51	951	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
209	911	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
57	957	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
15	815	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
558	1360	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
344	1046	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
356	1060	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
41	741	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
345	1047	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
343	1045	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
72	372	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
560	1265	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
559	1264	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
150	650	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
47	547	11/8/2022 8:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
386	892	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
389	895	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
389	1491	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
67	868	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
68	869	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
401	1308	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
100	802	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
464	1270	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
456	1363	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
452	1359	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
280		11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
280	1182	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
371	1074	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
230	932	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
459	967	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
550	1356	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
338	1144	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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329	1333	11/8/2022 13:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
327	1029	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
67	1068	11/8/2022 8:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
114	1014	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
115	1015	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
244	845	11/8/2022 12:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
246	847	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
129	1030	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
128	1029	11/8/2022 9:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
705	1508	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
704	1507	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
415	1222	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
249	1053	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
317	1019	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
258	1158	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
350	856	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
258	660	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
351	857	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
293	1198	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
187	1090	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
380	1083	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
585	1489	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
586	1490	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
228	932	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
51	452	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
356	859	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
238	1240	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
332	1034	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
285	887	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
509	1310	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
59	759	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
23	923	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
18	918	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
19	919	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
113	1013	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
267	1169	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
579	1281	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
350	1151	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
8	808	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
202	904	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
30	930	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
31	931	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
70	670	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

71	671	11/8/2022	8:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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337	1438	11/8/2022	11:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
378	1179	11/8/2022	13:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
630	1432	11/8/2022	17:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
618	1527	11/8/2022	17:25	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
484	1188	11/8/2022	17:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
582	1286	11/8/2022	19:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
615	1621	11/8/2022	18:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
548	1451	11/8/2022	18:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
23	1123	11/8/2022	7:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
236	1036	11/8/2022	11:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
237	1037	11/8/2022	11:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
498	1401	11/8/2022	17:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
203	1009	11/8/2022	11:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
613	1420	11/8/2022	17:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
391	1093	11/8/2022	16:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
8	708	11/8/2022	7:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
514	1422	11/8/2022	16:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
469	1372	11/8/2022	15:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
563	1265	11/8/2022	18:50	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
564	1266	11/8/2022	18:50	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
229	830	11/8/2022	12:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
344	1048	11/8/2022	16:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
289	1390	11/8/2022	11:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
194	1295	11/8/2022	9:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
302	1007	11/8/2022	15:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
363	1264	11/8/2022	13:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
112	814	11/8/2022	9:46	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
132	933	11/8/2022	9:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
682	1590	11/8/2022	19:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
430	1331	11/8/2022	15:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
109	810	11/8/2022	9:25	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
33	633	11/8/2022	7:31	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
284	989	11/8/2022	15:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
615	1524	11/8/2022	17:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
283	988	11/8/2022	15:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
614	1523	11/8/2022	17:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
40	940	11/8/2022	7:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
202	905	11/8/2022	12:17	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
663	1466	11/8/2022	17:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
662	1465	11/8/2022	17:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
131	1031	11/8/2022	9:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
67	468	11/8/2022	10:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
110	511	11/8/2022	12:14	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
68	469	11/8/2022	10:06	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
134	634	11/8/2022	11:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
350	1354	11/8/2022	13:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
338	1139	11/8/2022	13:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
145	1048	11/8/2022	9:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
81	981	11/8/2022	8:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
390	1291	11/8/2022	14:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
389	1092	11/8/2022	16:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
87	789	11/8/2022	8:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
271	973	11/8/2022	13:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
161	461	11/8/2022	18:12	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
162	462	11/8/2022	18:13	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
109	510	11/8/2022	11:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
338	1042	11/8/2022	16:06	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
122	824	11/8/2022	10:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
182	1282	11/8/2022	9:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
708	1515	11/8/2022	19:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
795	1903	11/8/2022	18:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
68	968	11/8/2022	7:58	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
102	805	11/8/2022	10:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
101	804	11/8/2022	10:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
41	941	11/8/2022	7:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
269	1171	11/8/2022	13:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
83	785	11/8/2022	8:43	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
598	1504	11/8/2022	17:58	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
202	904	11/8/2022	11:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
533	1639	11/8/2022	15:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
253	1155	11/8/2022	12:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
101	1002	11/8/2022	9:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
265	1069	11/8/2022	12:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
267	1071	11/8/2022	12:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
83	983	11/8/2022	8:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
105	506	11/8/2022	11:54	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
97	797	11/8/2022	9:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
96	796	11/8/2022	9:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
175	1078	11/8/2022	9:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
176	1079	11/8/2022	9:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
490	1093	11/8/2022	17:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
29	529	11/8/2022	7:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
489	1092	11/8/2022	17:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
662	1770	11/8/2022	16:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
661	1769	11/8/2022	16:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
629	1535	11/8/2022	18:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

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711	1620	11/8/2022 18:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
712	1621	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
713	1622	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
528	1230	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
464	1166	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
613	1519	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
38	738	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
39	739	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
281	683	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
739	1847	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
209	1109	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
210	1110	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
399	1300	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
131	632	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
132	633	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
283	985	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
349	1055	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
350	1056	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
351	1057	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
348	1054	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
290	892	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
450	1257	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
137	839	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
94	1095	11/8/2022 8:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
428	1433	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
623	1529	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
755	1558	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
624	1530	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
47	847	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
73	673	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
300	1101	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
490	1297	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
315	1122	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
153	855	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
657	1765	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
157	457	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
408	914	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
166	970	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
167	971	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
520	1426	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
127	1030	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
111	912	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
38	539	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
556	1260	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
558	1262	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
321	1023	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
557	1261	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
628	1435	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
226	1030	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
109	709	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
548	1456	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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46	946	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
407	1113	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
359	1262	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
424	1128	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
759	1668	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
9	809	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
218	722	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
703	1510	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
704	1511	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
265	1267	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
7	708	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
156	859	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
145	846	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
746	1854	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
581	1489	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
447	1354	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
481	1287	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
574	1381	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
18	818	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
575	1382	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
482	1288	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
49	751	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
17	817	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
311	1117	11/8/2022 13:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
365	1172	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
656	1463	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
555	1357	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
554	1356	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
484	1387	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
120	821	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
52	853	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
635	1541	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
636	1542	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
255	1061	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
534	1440	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

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196	1096	11/8/2022 10:23	REGULAR_	5010	[redacted]	OSEVILLE CITY	8	ISSUE REG N
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32	732	11/8/2022 7:25	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
121	921	11/8/2022 8:57	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
403	1108	11/8/2022 17:19	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
120	921	11/8/2022 9:28	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
385	1087	11/8/2022 16:14	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
661	1667	11/8/2022 18:37	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
340	1147	11/8/2022 14:05	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
426	1233	11/8/2022 15:35	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
324	1130	11/8/2022 13:20	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
84	984	11/8/2022 8:15	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
502	1507	11/8/2022 16:20	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
415	1316	11/8/2022 14:56	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
552	1358	11/8/2022 17:11	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
706	1513	11/8/2022 19:09	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
553	1359	11/8/2022 17:11	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
803	1712	11/8/2022 19:53	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
57	657	11/8/2022 7:59	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
514	1321	11/8/2022 16:41	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
370	1374	11/8/2022 14:21	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
591	1495	11/8/2022 18:59	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
606	1408	11/8/2022 17:13	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
448	1254	11/8/2022 15:48	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
292	1098	11/8/2022 12:46	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
607	1409	11/8/2022 17:14	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
706	1513	11/8/2022 19:10	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
423	1324	11/8/2022 15:01	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
28	828	11/8/2022 7:16	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
565	1371	11/8/2022 17:22	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
310	712	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
309	711	11/8/2022 19:00	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
99	800	11/8/2022 9:06	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
591	1500	11/8/2022 17:08	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
470	1378	11/8/2022 15:24	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
540	1244	11/8/2022 18:20	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
471	1379	11/8/2022 15:25	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
220	1321	11/8/2022 10:08	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
219	1320	11/8/2022 10:08	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
225	729	11/8/2022 13:57	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
341	1442	11/8/2022 11:57	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
187	1088	11/8/2022 11:17	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
1	501	11/8/2022 7:02	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
205	1005	11/8/2022 10:41	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
2	502	11/8/2022 7:03	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
176	878	11/8/2022 11:02	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
584	1286	11/8/2022 19:18	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
431	1334	11/8/2022 16:20	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
168	869	11/8/2022 11:00	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
23	323	11/8/2022 9:31	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
429	1134	11/8/2022 16:57	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
266	771	11/8/2022 15:12	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
120	822	11/8/2022 9:35	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
201	905	11/8/2022 13:02	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
252	957	11/8/2022 14:24	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
455	1358	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
593	1699	11/8/2022 16:11	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
300	1004	11/8/2022 15:09	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
496	1198	11/8/2022 17:47	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
321	1023	11/8/2022 15:07	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
170	871	11/8/2022 11:03	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
350	1052	11/8/2022 15:48	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
494	1199	11/8/2022 17:41	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
463	1366	11/8/2022 16:58	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
14	514	11/8/2022 7:39	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
14	S5401150	11/8/2022 7:14	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
14	S5401150	11/8/2022 7:38	REGULAR_	5010		OSEVILLE CITY	4	UNDO: ISS Y
65	965	11/8/2022 7:50	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
599	1605	11/8/2022 17:48	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
13	513	11/8/2022 7:13	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
65	665	11/8/2022 8:06	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
311	1112	11/8/2022 12:48	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
108	809	11/8/2022 9:32	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
308	1010	11/8/2022 14:35	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
539	1545	11/8/2022 17:03	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
73	373	11/8/2022 13:35	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
66	666	11/8/2022 8:06	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
426	930	11/8/2022 19:12	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
313	1015	11/8/2022 15:01	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
298	1302	11/8/2022 12:44	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
545	1651	11/8/2022 15:37	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
484	1388	11/8/2022 16:13	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
483	1387	11/8/2022 16:12	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
168	969	11/8/2022 9:55	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
632	1439	11/8/2022 18:12	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
70	571	11/8/2022 9:20	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
475	1177	11/8/2022 17:34	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
189	891	11/8/2022 11:36	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N

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PII MCL 15.243(1)(a)

472	1174	11/8/2022 17:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
70	772	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
68	770	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
69	771	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
497	1304	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
117	818	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
1	701	11/8/2022 7:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
405	1107	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
40	940	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
246	1147	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
254	755	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
345	1349	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
32	732	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
341	1147	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
31	731	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
232	1133	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
346	1350	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
102	1202	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
298	1099	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
619	1625	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
518	1324	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
75	675	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
352	954	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
371	877	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
275	1076	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
244	1145	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
61	862	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
328	1332	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
567		11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	15	UPDATE VI N
567	1573	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
213	915	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
450	1251	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
398	1299	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
384	1291	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
281	1283	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
336	1237	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
479	1583	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
335	1141	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
3	703	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
628	1634	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
539	1243	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
452	1258	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
173	877	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
457	1163	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
197	798	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
374	977	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
588	1492	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
170	1070	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
185	986	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
301	1003	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
464	1271	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
465	1272	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
276	1077	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
86	686	11/8/2022 8:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
299	1001	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
800	1709	11/8/2022 19:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
801	1710	11/8/2022 19:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
112	412	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
112	1113	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
469	1372	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
594	1401	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
140	1041	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
390	1197	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
248		11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	15	UPDATE VI N
248	1250	11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
637	1439	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
546	1652	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
458	1562	11/8/2022 14:21	CHALLENG	5010		ROSEVILLE CITY	9	ISSUE CHA N
459	1563	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
329	1135	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
594	1600	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
544	1550	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
91	793	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
390	1092	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
524	1432	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
416	1421	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
672	1475	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
158	1258	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
16	716	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	7	UNDO: ISS Y
16	716	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
16	716	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
16	717	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	7	UNDO: ISS Y
16	717	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
71	771	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
17	517	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
301	803	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
134	1234	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
302	804	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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438	945	11/8/2022 18:29	REGULAR_	5010	[redacted]	OSEVILLE CITY	4	ISSUE REG N
412	918	11/8/2022 18:00	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
368	1072	11/8/2022 16:37	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
20	820	11/8/2022 7:17	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
19	819	11/8/2022 7:17	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
474	1179	11/8/2022 17:26	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
473	1178	11/8/2022 17:26	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
210	912	11/8/2022 12:02	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
307	1114	11/8/2022 13:05	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
276	1177	11/8/2022 12:06	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
246	951	11/8/2022 14:18	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
535	1341	11/8/2022 16:58	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
751	1554	11/8/2022 18:59	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
490	1495	11/8/2022 16:22	REGULAR_	5010		OSEVILLE CITY	15	SPOIL BALI N
490	1495	11/8/2022 16:08	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
490	1511	11/8/2022 16:23	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
436	1343	11/8/2022 14:58	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
388	1090	11/8/2022 16:17	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
19	1020	11/8/2022 7:20	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
78	1079	11/8/2022 8:22	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
303	1307	11/8/2022 12:56	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
467	1370	11/8/2022 17:01	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
599	1401	11/8/2022 17:11	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
344		11/8/2022 13:49	REGULAR_	5010		OSEVILLE CITY	15	UPDATE VI N
344	1348	11/8/2022 13:49	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
211	711	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	16	SPOIL BALI N
211	711	11/8/2022 14:05	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
211	719	11/8/2022 14:27	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
209	1113	11/8/2022 10:40	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
361	1063	11/8/2022 15:50	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
459	1366	11/8/2022 15:12	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
343	1249	11/8/2022 12:57	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
328	1129	11/8/2022 13:10	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
391	897	11/8/2022 17:38	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
559	1665	11/8/2022 15:49	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
68	668	11/8/2022 8:09	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
431	1136	11/8/2022 17:00	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
140	842	11/8/2022 10:12	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
433	1138	11/8/2022 17:01	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
507	1513	11/8/2022 16:25	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
422	1126	11/8/2022 16:51	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
423	1127	11/8/2022 16:52	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
534	1336	11/8/2022 16:25	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
499	1203	11/8/2022 17:49	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
73	873	11/8/2022 8:07	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
71	772	11/8/2022 8:13	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
799	1708	11/8/2022 19:45	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
483	1185	11/8/2022 17:39	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
137	937	11/8/2022 9:16	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
521	1429	11/8/2022 16:12	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
77	779	11/8/2022 9:32	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
580	1386	11/8/2022 17:35	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
395	1201	11/8/2022 14:50	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
198	702	11/8/2022 13:07	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
236	940	11/8/2022 13:59	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
311	1013	11/8/2022 14:45	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
558	1263	11/8/2022 18:40	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
368	1071	11/8/2022 16:06	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
216	918	11/8/2022 12:27	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
664	1571	11/8/2022 18:52	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
644	1446	11/8/2022 17:35	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
473	1076	11/8/2022 17:32	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
346	1048	11/8/2022 15:34	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
593	1400	11/8/2022 17:38	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
106	606	11/8/2022 10:04	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
252	954	11/8/2022 13:19	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
108	811	11/8/2022 10:33	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
605	1509	11/8/2022 19:12	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
461	1262	11/8/2022 15:28	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
370	1176	11/8/2022 14:28	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
45	746	11/8/2022 7:47	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
638	1445	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
77	578	11/8/2022 9:33	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
1	801	11/8/2022 7:01	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
97	997	11/8/2022 8:29	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
440	1142	11/8/2022 17:06	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
162	864	11/8/2022 11:19	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
203	905	11/8/2022 11:55	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
234	936	11/8/2022 12:57	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
233	935	11/8/2022 12:56	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
380	1082	11/8/2022 16:10	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
641	1550	11/8/2022 17:41	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
643	1552	11/8/2022 17:42	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
640	1549	11/8/2022 17:40	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
424	1130	11/8/2022 18:05	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
556	1362	11/8/2022 17:14	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
343	945	11/8/2022 15:08	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
642	1551	11/8/2022 17:41	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

620	1427	11/8/2022 18:09	REGULAR_	5010	[redacted]	OSEVILLE CITY	5	ISSUE REG N
489	1193	11/8/2022 17:42	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
692	1600	11/8/2022 19:28	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
278	1280	11/8/2022 12:06	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
444	1148	11/8/2022 17:00	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
521	1527	11/8/2022 16:43	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
39	639	11/8/2022 7:37	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
522	1224	11/8/2022 18:09	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
527	1130	11/8/2022 18:15	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
424	1528	11/8/2022 13:22	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
119	720	11/8/2022 9:26	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
175	1076	11/8/2022 11:00	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
176	1077	11/8/2022 11:03	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
232	934	11/8/2022 12:52	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
470	1174	11/8/2022 17:21	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
58	958	11/8/2022 7:37	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
97	997	11/8/2022 8:28	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
544	1249	11/8/2022 18:22	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
321	1128	11/8/2022 13:33	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
123	826	11/8/2022 10:50	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
542	1445	11/8/2022 18:00	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
249	952	11/8/2022 13:46	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
475	1180	11/8/2022 17:27	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
166	666	11/8/2022 12:28	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
578	1284	11/8/2022 19:22	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
577	1283	11/8/2022 19:21	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
735	1843	11/8/2022 17:40	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
622	1528	11/8/2022 18:17	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
511	1517	11/8/2022 16:31	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
289	891	11/8/2022 14:00	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
261	766	11/8/2022 15:07	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
60	762	11/8/2022 9:12	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
404	1205	11/8/2022 14:30	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
248	1048	11/8/2022 11:32	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
280	1081	11/8/2022 12:11	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
264	765	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
262	763	11/8/2022 15:39	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
566	1474	11/8/2022 17:04	REGULAR_	5010		OSEVILLE CITY	2	SPOIL BALI N
566	1474	11/8/2022 16:47	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
566	1494	11/8/2022 17:04	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
383	1189	11/8/2022 14:38	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
384	1190	11/8/2022 14:38	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
282	1183	11/8/2022 12:13	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
183	687	11/8/2022 12:33	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
42	942	11/8/2022 7:28	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
41	941	11/8/2022 7:28	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
42	743	11/8/2022 7:32	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
634	1543	11/8/2022 17:38	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
633	1542	11/8/2022 17:37	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
388	1291	11/8/2022 15:34	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
699	1807	11/8/2022 17:15	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
701	1809	11/8/2022 17:16	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
107	1108	11/8/2022 8:55	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
417	923	11/8/2022 18:12	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
263	965	11/8/2022 13:53	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
741	1548	11/8/2022 19:30	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
573	1277	11/8/2022 19:05	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
115	816	11/8/2022 9:37	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
459	1161	11/8/2022 17:20	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
297	1199	11/8/2022 13:54	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
315	717	11/8/2022 19:14	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
160	561	11/8/2022 14:45	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
9	909	11/8/2022 7:05	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
466	1373	11/8/2022 15:19	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
341	1043	11/8/2022 15:28	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
340	1042	11/8/2022 15:28	REGULAR_	5010		OSEVILLE CITY	7	ISSUE REG N
755		11/8/2022 19:58	REGULAR_	5010		OSEVILLE CITY	5	UPDATE VI N
755	1562	11/8/2022 19:58	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
169	871	11/8/2022 10:53	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
325	1027	11/8/2022 15:10	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
531	1236	11/8/2022 18:16	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
444	949	11/8/2022 19:55	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
123	825	11/8/2022 10:18	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
617	1419	11/8/2022 17:18	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
500	1406	11/8/2022 16:27	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
376	1277	11/8/2022 14:11	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
300	1401	11/8/2022 11:22	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
403	1210	11/8/2022 15:18	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
404	1211	11/8/2022 15:19	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
329	1031	11/8/2022 15:13	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
250	1351	11/8/2022 10:38	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
147	849	11/8/2022 10:22	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
116	1117	11/8/2022 9:07	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
554	1462	11/8/2022 16:38	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
7	407	11/8/2022 7:18	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
148	549	11/8/2022 13:51	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
753	1662	11/8/2022 19:01	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
178	1081	11/8/2022 10:09	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N

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PII MCL 15.243(1)(a)

298	1203	11/8/2022 11:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
448	1351	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
554	1258	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
704	1612	11/8/2022 19:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
158	458	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
167	967	11/8/2022 9:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
524	1127	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
562	1368	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
560	1264	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
270	1070	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
445	950	11/8/2022 19:59	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
300	902	11/8/2022 14:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
700	1808	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
4	1104	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
698	1806	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
401	1302	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
586	1293	11/8/2022 19:40	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
369	1072	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
344	1445	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
342	1443	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
352	1054	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
143	643	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
142	642	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
491	1399	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
571	1677	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
397	1501	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
490	1398	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
51	851	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
31	931	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
83	683	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
432	1138	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
432	1138	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	13	SPOIL BALI N
432	1154	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
393	899	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
13	913	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
247	949	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
443	950	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
44	1144	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
232	934	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
538	1345	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
234	1236	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
468	1274	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
580	1286	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
398	1100	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
470	1176	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
471	1177	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
122	723	11/8/2022 9:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
148	1051	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
275	1079	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
136	737	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
204	805	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
110	611	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
193	1194	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
5	905	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
2	902	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
280	985	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
279	984	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
736	1645	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
356	1062	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
28	728	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
184	1084	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
560	1367	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
183	1083	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
281	983	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
282	984	11/8/2022 13:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
226	1228	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
455	1159	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
260	962	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
368	1174	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
185	689	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
58	760	11/8/2022 9:11	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
277	1178	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
191	893	11/8/2022 11:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
184	688	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
213	1114	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
90	792	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
192	894	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
287	1388	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
286	1387	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
665	1472	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
664	1471	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
558	1564	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
31	831	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
452	1355	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
391	1294	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
610	1519	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
681	1590	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
682	1591	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

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PII MCL 15.243(1)(a)

728	1836	11/8/2022 17:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
309	1115	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
174	1074	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
235	836	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
215	816	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
97	1197	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
498	1602	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
730	1838	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
103	1003	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
102	1002	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
137	638	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
610	1417	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
836	1944	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
276	978	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
143	1144	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
432	1536	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
477	1380	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
2	1102	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
351	1053	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
411	1217	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
605	1511	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
286	1092	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
286	1092	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
286	1101	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
737	1646	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
379	1180	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
207	909	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
120	721	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
26	527	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
121	722	11/8/2022 9:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
151	1251	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
197	701	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
45	945	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
526	1429	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
583	1487	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
289	991	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
105	1205	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
131	833	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
284	986	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
342	1048	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
285	987	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
479	1484	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
28	728	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
202	702	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
349	1256	11/8/2022 13:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
489	1395	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
4	804	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
59	359	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
249	951	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
194	999	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
288	990	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
289	991	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
601	1505	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
602	1506	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
682	1489	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
530	1336	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
690	1497	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
428	1234	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
418	1123	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
189	693	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
592	1399	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
259	1063	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
54	756	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
796	1904	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
182	483	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
813	1921	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
152	452	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
153	453	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
9	909	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
208	910	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
589	1193	11/8/2022 19:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
258	963	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
393	1294	11/8/2022 14:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
776	1884	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
388	1091	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
377	980	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
358	1164	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
276	1278	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
460	1267	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
99	900	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
138	438	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
67	367	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
430	934	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
501	1205	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
259	1261	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
290	1195	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
513	1421	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
80	781	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

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PII MCL 15.243(1)(a)

128	829	11/8/2022 10:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
282	1186	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
42	543	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
332	1133	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
184	1185	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
282	1088	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
281	1087	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
67	769	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
155	656	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
47	748	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
193	794	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
372	1078	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
330	1032	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
418	1321	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
258	961	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
70	1071	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
1	501	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
4	504	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
161	863	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
150	651	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
358	1165	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
226	930	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
768	1876	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
109	1010	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
399	1302	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
17	817	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
348	1050	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
348	1050	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
348	1063	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
767	1875	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
310	816	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
16	816	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
584	1290	11/8/2022 19:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
108	1009	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
151	652	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
727	1530	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
565	1372	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
529	1132	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
166	567	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
569		11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
569	1375	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
569	1375	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	5	SPOIL BALI N
569	1397	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
2	802	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
533	1436	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
57	558	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
406	1108	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
341	1247	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
37	937	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
559	1467	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
188	1289	11/8/2022 9:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
267	669	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
293	1195	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
1	701	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
242	1343	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
521	1627	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
2	702	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
202	1303	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
35	736	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
530	1436	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
551	1557	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
48	848	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
513	1320	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
77	1078	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
336	1143	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
120	921	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
355	1061	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
69	969	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
260	962	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
138	1238	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
276	678	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
118	519	11/8/2022 12:39	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
119	520	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
269	1271	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	15	SPOIL BALI N
269	1271	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
269	1293	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
359	1160	11/8/2022 13:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
133	734	11/8/2022 9:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
156		11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
156	1057	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
156	656	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
331	1033	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
453	1159	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
455	1161	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
322	1227	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
750	1553	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
55	555	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
155	958	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII MCL 15			
665	1671	11/8/2022 18:44	REGULAR_	5010	[redacted]	OSEVILLE CITY	15	ISSUE REG N
195	1096	11/8/2022 11:34	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
66	966	11/8/2022 8:08	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
183	484	11/8/2022 18:51	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
495	1202	11/8/2022 19:11	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
346	1152	11/8/2022 13:50	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
64	964	11/8/2022 8:07	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
157		11/8/2022 13:13	REGULAR_	5010		OSEVILLE CITY	3	UPDATE VI N
157	1058	11/8/2022 10:38	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
454	1160	11/8/2022 18:42	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
111	611	11/8/2022 10:09	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
196	1097	11/8/2022 11:34	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
478	1582	11/8/2022 14:43	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
98	998	11/8/2022 9:00	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
222	925	11/8/2022 12:50	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
495	1200	11/8/2022 17:42	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
99	999	11/8/2022 9:00	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
501	1404	11/8/2022 17:29	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
467	1571	11/8/2022 14:30	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
199	1005	11/8/2022 10:59	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
84	984	11/8/2022 8:40	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
83	983	11/8/2022 8:40	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
47	347	11/8/2022 11:57	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
230	934	11/8/2022 13:45	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
200	904	11/8/2022 13:01	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
41	1042	11/8/2022 7:39	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
489	1194	11/8/2022 17:37	REGULAR_	5010		OSEVILLE CITY	6	ISSUE REG N
580	1486	11/8/2022 17:43	REGULAR_	5010		OSEVILLE CITY	8	ISSUE REG N
8	508	11/8/2022 7:08	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
284	1090	11/8/2022 12:34	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
285	1091	11/8/2022 12:35	REGULAR_	5010		OSEVILLE CITY	11	ISSUE REG N
9	809	11/8/2022 7:09	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
787	1696	11/8/2022 19:33	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
166	966	11/8/2022 9:55	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
206	1110	11/8/2022 10:38	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
96	798	11/8/2022 10:10	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
380	1287	11/8/2022 13:46	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
351	1452	11/8/2022 12:06	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
128	928	11/8/2022 9:02	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
219	1123	11/8/2022 10:49	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
406	1207	11/8/2022 14:36	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
350	1451	11/8/2022 12:06	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
251	1057	11/8/2022 12:00	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
284	1186	11/8/2022 13:34	REGULAR_	5010		OSEVILLE CITY	3	ISSUE REG N
473	1279	11/8/2022 16:09	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
185	486	11/8/2022 18:54	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
179	780	11/8/2022 10:54	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
197	1298	11/8/2022 9:44	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
514	1619	11/8/2022 15:12	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
205	909	11/8/2022 13:07	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
435	1241	11/8/2022 15:34	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
163	1066	11/8/2022 9:39	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
162	1065	11/8/2022 9:38	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
273	874	11/8/2022 13:26	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
170	874	11/8/2022 12:10	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
269	870	11/8/2022 13:22	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
270	871	11/8/2022 13:23	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
675	1482	11/8/2022 18:45	REGULAR_	5010		OSEVILLE CITY	5	ISSUE REG N
171	772	11/8/2022 10:45	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
364	870	11/8/2022 17:20	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
516	1317	11/8/2022 16:10	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
778	1582	11/8/2022 19:36	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
502	1303	11/8/2022 16:01	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
540	1448	11/8/2022 16:31	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
671	1474	11/8/2022 17:54	REGULAR_	5010		OSEVILLE CITY	1	ISSUE REG N
355	861	11/8/2022 17:11	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
173	1174	11/8/2022 10:07	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
192	1193	11/8/2022 10:24	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
536	1542	11/8/2022 17:01	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
435	1038	11/8/2022 16:59	REGULAR_	5010		OSEVILLE CITY	10	ISSUE REG N
149	851	11/8/2022 10:29	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
414	1419	11/8/2022 15:03	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
280	1282	11/8/2022 12:09	REGULAR_	5010		OSEVILLE CITY	15	ISSUE REG N
730	1639	11/8/2022 18:42	REGULAR_	5010		OSEVILLE CITY	2	ISSUE REG N
187	488	11/8/2022 18:58	REGULAR_	5010		OSEVILLE CITY	18	ISSUE REG N
800	1908	11/8/2022 18:27	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
801	1909	11/8/2022 18:28	REGULAR_	5010		OSEVILLE CITY	9	ISSUE REG N
182	686	11/8/2022 12:31	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
169	671	11/8/2022 12:06	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N
585	1289	11/8/2022 19:21	REGULAR_	5010		OSEVILLE CITY	14	ISSUE REG N
42	744	11/8/2022 8:35	REGULAR_	5010		OSEVILLE CITY	12	ISSUE REG N
264	968	11/8/2022 14:12	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
263	967	11/8/2022 14:12	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
103	504	11/8/2022 11:52	REGULAR_	5010		OSEVILLE CITY	17	ISSUE REG N
343	1047	11/8/2022 16:13	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
342	1046	11/8/2022 16:12	REGULAR_	5010		OSEVILLE CITY	13	ISSUE REG N
146	646	11/8/2022 11:29	REGULAR_	5010		OSEVILLE CITY	16	ISSUE REG N
435	942	11/8/2022 18:28	REGULAR_	5010		OSEVILLE CITY	4	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
278	880	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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173	973	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
306	1008	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
284	986	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
418	1219	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
496	1099	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
79	379	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
281	1087	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
354	1056	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
265	766	11/8/2022 15:40	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
374	1277	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
375	1278	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
237	838	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
236	837	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
238	839	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
186	1089	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
387	1091	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
324	1028	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
689	1797	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
99	1199	11/8/2022 8:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
240	741	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
403	1109	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
91	991	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
169	570	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
25	825	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
282	986	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
769	1678	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
771	1680	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
342	1044	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
229	1231	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
453	1259	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
691	1600	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
216	919	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
65	766	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
537	1445	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
585	1493	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
169	1072	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
782	1691	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
289	1191	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
455	1358	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
392	1198	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
787	1895	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
472	1576	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
154	1057	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
323	1228	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
335	1039	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
89	889	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
136	838	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
135	837	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
160	862	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
31	432	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
192	894	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
280	984	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
44	744	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
361	867	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
416	1118	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
231	632	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
443	1249	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
83	983	11/8/2022 8:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
394	1295	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
443	1145	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
399	1101	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
149	1150	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
39	1040	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
150	852	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
365	1071	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
366	1072	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
367	1073	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
596	1403	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
165	1166	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
227	1027	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
124	924	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
323	1025	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
807	1915	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
320	1026	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
607	1511	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
172	874	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
619	1426	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
151	451	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
165	867	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
164	866	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
163	865	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
696	1604	11/8/2022 19:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
698	1606	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
271	1175	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
349	1051	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
12	712	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
443	1250	11/8/2022 15:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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198	900	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
127	928	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
508	1309	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
86	788	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
323	1327	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
357	1059	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
523	1431	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
493	1096	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
767	1676	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
322	1223	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
96	497	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
431	1338	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
55	355	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
274	976	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
728	1536	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
29	729	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
517	1324	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
534	1239	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
26	728	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
379	1081	11/8/2022 16:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
447	1153	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
301	1102	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
140	440	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
685	1488	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
722	1525	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
33	733	11/8/2022 7:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
33	733	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
33	733	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	7	UNDO: ISS Y
293	998	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
451	1555	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
67	767	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
450	1554	11/8/2022 14:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
155	956	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
411	917	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
197	1098	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
519	1221	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
110	1010	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
143	644	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
211	612	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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285	687	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
257	1157	11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
80	680	11/8/2022 8:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
466	1069	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
578	1181	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
576	1179	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
577	1180	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
490	1393	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
292	1194	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
458	1361	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
206	908	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
397	903	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
198	900	11/8/2022 11:40	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
398	904	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
325	1126	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
523	1228	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
86	487	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
241	642	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
674	1477	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
169	770	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
93	993	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
86	587	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
358	864	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
441	1145	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
6	707	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
442	1146	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
445	1348	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
254	656	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
139	1040	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
688	1495	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
687	1494	11/8/2022 18:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
20	320	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
594	1498	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
477	1385	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
765	1674	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
232	1036	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
88	889	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
413	1118	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
350	852	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
351	853	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
270	1172	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
477	1183	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
249	1055	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
69	870	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
502	1206	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL 1			
528	1334	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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155	756	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
344	1245	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
331	1232	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
389	1091	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
397	1099	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
382	1183	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
381	1182	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
103	403	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
383	1184	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
716	1519	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
439	1342	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
333	1134	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
465	1569	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
109	811	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
275	977	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
190	1090	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
189	1089	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
893	2004	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
85	985	11/8/2022 8:37	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
85	985	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
85	1004	11/8/2022 8:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
322	824	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
128	830	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
583	1285	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
745	1552	11/8/2022 19:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
204	1305	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
206	1207	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
363	1170	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
51	753	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
18	1019	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
50	752	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
559	1361	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
191	1192	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
310	1212	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	3	SPOIL BALI N
310	1212	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
310	1216	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
451	1156	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
660	1463	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
536	1343	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
586	1393	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
107	808	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
263	665	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
267	1269	11/8/2022 11:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
215	917	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
157	558	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
135	837	11/8/2022 10:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
210	714	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
85	385	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
395	1298	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
396	1297	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
474	1077	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
334	1140	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
176	981	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
174	979	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
175	980	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
213	915	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
718	1521	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
674	1582	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
224	1325	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
155	857	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
11	712	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
174	974	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
185	985	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
223	727	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
305	1007	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
621	1527	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
132	835	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
583	1689	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
388	1195	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
337	1143	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
181	1182	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
205	1008	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
502	1308	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
363	1164	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
93	993	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
122	922	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
52	952	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
134	635	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
525	1227	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
3	403	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
369	1373	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
557	1363	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
159	962	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
295	1101	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
223	1324	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
58	859	11/8/2022 8:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 1			
5	305	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
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109	409	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
262	964	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
204	1007	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
655	1462	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
738	1541	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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361	1264	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
113	914	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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179	984	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
182	783	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
409	1115	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
94	994	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
542	1145	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
186	1087	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
262	664	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
655	1462	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
555	1362	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
53	1153	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
380	1187	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
95	496	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
378	1081	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
204	708	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
515	1322	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
54	1154	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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671	1580	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
672	1581	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
300	702	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
328	1234	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
429	1533	11/8/2022 13:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
55	1155	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
231	1332	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
660	1768	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
558	1461	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
622	1526	11/8/2022 19:42	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
167	869	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
166	868	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
445	1149	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
274	1176	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
412	1315	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
413	1316	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
408	1311	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
79	781	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
136	838	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
52	852	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
51	851	11/8/2022 7:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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196	1297	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
897	2008	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
898	2009	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
521	1223	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
458	1259	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
520	1428	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
123	423	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
339	1146	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
587	1693	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
320	1022	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
390	1094	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
169	871	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
387	891	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
361	865	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
588	1694	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
443	1346	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
334	1338	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
138	938	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
505	1306	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
373	1174	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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141	1241	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
140	1240	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
274	776	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
274	776	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	16	UNDO: ISS Y
274	777	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
396	1203	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
385	1192	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
40	741	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
405	1110	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
41	641	11/8/2022 7:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
512	1518	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
164	1064	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
310	812	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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					PII (MCL			
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284	988	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
494	1301	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
316	718	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
611	1517	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
514	1320	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
111	1211	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
673	1582	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
32	532	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
52	752	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
319	721	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
321	723	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
309	1313	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
457	1561	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
155	1255	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
33	833	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
6	706	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
349	1250	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
543	1449	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
126	828	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
683	1490	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
247	1147	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
14	914	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
622	1628	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
623	1629	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
377	1178	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
609	1411	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
152	1153	11/8/2022 9:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
253	1157	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
153	1154	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
262	964	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
151	1152	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
650	1758	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
516	1221	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
515	1220	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
79	580	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
319	825	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
330	832	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	16	SPOIL BALI N
330	832	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
330	854	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
330	854	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	16	SPOIL BALI N
330	862	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
345	1049	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
374	1180	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
210	912	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
563	1469	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
93	1094	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
16	516	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
394	1497	11/8/2022 12:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
303	1005	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
64	865	11/8/2022 7:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
324	1131	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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325	1027	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
445	1246	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
444	1245	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
377	1183	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
62	662	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
430	1435	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
692	1800	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
31	531	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
27	327	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
345	1047	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
12	412	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
11	411	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
23	723	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
57	857	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
266	1170	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
267	1171	11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
628	1537	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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236	1238	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
379	1481	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
161	862	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
160	861	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
41	542	11/8/2022 8:06	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
518	1421	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
144	846	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
143	845	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
287	889	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
688	1694	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
649	1451	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
47	1147	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
809	1917	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
32	1132	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL 1			
525	1631	11/8/2022 15:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
232	1038	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
476	1481	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
475	1480	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
199	800	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
543	1349	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
314	716	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
479		11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
479	1382	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
70	870	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
460	1165	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
228	1032	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
156	858	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
135	435	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
29	829	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
157	859	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
533	1439	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
96	996	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
389	1095	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
137		11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
137	1038	11/8/2022 10:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
165	465	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
113	1016	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
713	1516	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
528	1330	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
745	1654	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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63	765	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
64	766	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
62	764	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
65	767	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
610	1514	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
611	1515	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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254	1154	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
582	1388	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
12	1012	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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601	1707	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
601	1730	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
600	1706	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
109	812	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
335	1136	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
99	1100	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
225	1227	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
391	1198	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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241	1045	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
240	1044	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
242	1046	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
795	1704	11/8/2022 19:42	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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1	901	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
417	921	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
265	770	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
35	735	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
643	1445	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
491	1094	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
160	660	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
597	1299	11/8/2022 19:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
111	512	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
295	999	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
325	1426	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
822	1930	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
196	1197	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
37	737	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
71	572	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
410	1115	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
384	888	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
496	1203	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
324	1227	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
490	1594	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
143	846	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
365	1068	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
728	1531	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
388	1289	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
260	1060	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
208	1209	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
522	1430	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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1	301	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N

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260	963	11/8/2022	14:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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251	953	11/8/2022	12:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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658	1567	11/8/2022	17:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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465	1169	11/8/2022	17:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
316	1018	11/8/2022	14:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
335	1436	11/8/2022	11:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
592	1294	11/8/2022	19:32	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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738	1647	11/8/2022	18:47	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
566	1272	11/8/2022	18:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
678	1587	11/8/2022	18:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
679	1588	11/8/2022	18:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
631	1537	11/8/2022	18:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
8	708	11/8/2022	7:10	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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67	567	11/8/2022	8:46	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
148	648	11/8/2022	11:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
66	566	11/8/2022	8:45	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
445	1352	11/8/2022	15:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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106	607	11/8/2022	10:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
43	843	11/8/2022	7:31	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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124	424	11/8/2022	16:36	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
682	1485	11/8/2022	18:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
618	1522	11/8/2022	19:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
72	573	11/8/2022	9:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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555	1158	11/8/2022	18:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
707	1514	11/8/2022	19:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
279	681	11/8/2022	18:12	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
278	680	11/8/2022	18:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
66	366	11/8/2022	13:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
444	1347	11/8/2022	15:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
114	1115	11/8/2022	9:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
102	903	11/8/2022	8:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
175	976	11/8/2022	10:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
341	1043	11/8/2022	15:44	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
342	1044	11/8/2022	15:44	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
453	1158	11/8/2022	17:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
101	902	11/8/2022	8:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
508	1111	11/8/2022	17:57	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
73	1173	11/8/2022	7:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
507	1110	11/8/2022	17:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
432	1238	11/8/2022	15:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
274	1080	11/8/2022	12:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
620	1526	11/8/2022	18:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
333	1140	11/8/2022	13:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
511	1312	11/8/2022	16:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
198	1199	11/8/2022	10:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
200	1201	11/8/2022	10:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
461	1364	11/8/2022	16:56	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
326	1232	11/8/2022	12:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
19	419	11/8/2022	7:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
13	313	11/8/2022	8:28	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
138	841	11/8/2022	11:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
577	1281	11/8/2022	19:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
78	978	11/8/2022	8:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
346	1253	11/8/2022	13:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
493	1498	11/8/2022	16:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
179	480	11/8/2022	18:45	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
359	961	11/8/2022	15:26	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
326	1133	11/8/2022	13:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
63	363	11/8/2022	12:59	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
460	1363	11/8/2022	16:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
298	1003	11/8/2022	15:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
155	1056	11/8/2022	10:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
185	887	11/8/2022	11:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

[redacted] PII MCL 15.243(1)(a)

362		11/8/2022 14:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	UPDATE VI N
362	1366	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
517	1323	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
277	979	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
472	1375	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
472	1375	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
472	1385	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
603	1405	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
49	949	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
50	950	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
68	869	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
92	893	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
111	411	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
217	1023	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
512	1318	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
547	1252	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
455	1559	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
243	1245	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
633	1639	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
486	1193	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
485	1192	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
43	844	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
667	1470	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
462	1566	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
110	811	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
123	825	11/8/2022 9:40	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
268	1168	11/8/2022 11:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
408	1114	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
193	1093	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
2	402	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
338	1145	11/8/2022 14:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
275	979	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
55	456	11/8/2022 9:36	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
738	1846	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
286	1087	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
92	792	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
56	457	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
469	1270	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
640	1447	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
639	1446	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
260	1262	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
231	1031	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
133	1036	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
157	1060	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
443	1147	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
569	1275	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
754	1557	11/8/2022 19:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
780	1584	11/8/2022 19:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
257	960	11/8/2022 14:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
54	555	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
451	1354	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
309	1211	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
441	945	11/8/2022 19:41	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
443	947	11/8/2022 19:42	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
440	944	11/8/2022 19:41	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
442	946	11/8/2022 19:41	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
359	1166	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
652	1760	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
24	1124	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
307	1311	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
6	906	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
211	1115	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
704	1812	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
248	950	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
77	478	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
76	477	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
151	752	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
152	753	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
796	1705	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
501	1409	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
446	1152	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
367	1070	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
147	648	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
366	1069	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
144	947	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
171	1172	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
288	1389	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
492	1596	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
386	1088	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
384	1086	11/8/2022 16:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
130	731	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
100	601	11/8/2022 9:59	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
367	873	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
113	1213	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
223	1123	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
368	874	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
275	677	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
175	678	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
158	1058	11/8/2022 9:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
437	1339	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
438	1340	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
317	1220	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
406	1307	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
328	1034	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
329	1035	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
327	1033	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
174	1075	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
333	935	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
111	711	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
82	982	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
294	998	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
695	1603	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
772	1576	11/8/2022 19:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
537	1339	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
326	1132	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
38	838	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
34	534	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
17	917	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
16	916	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
39	839	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
656	1458	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
148	948	11/8/2022 9:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
657	1459	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
147	947	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
159	861	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
184	984	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
83	783	11/8/2022 8:37	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
344	1250	11/8/2022 13:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
393	1397	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
393	1397	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	15	SPOIL BALI N
393	1403	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
284		11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	15	UPDATE VI N
284	1286	11/8/2022 12:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
158	860	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
193	494	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
10	310	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
373	1075	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
545	1448	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
417	1122	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
266	668	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
106	808	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
522	1125	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
259	764	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
250	952	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
610	1616	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
229	1130	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
235	937	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
145	946	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
461	1166	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
44	344	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
708	1515	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
434	1335	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
151	952	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
249	850	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
250	851	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
108	1008	11/8/2022 8:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
298	1199	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
246	948	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
338	1040	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
234	936	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
407	1310	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
135	837	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
161	863	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
474	982	11/8/2022 19:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
473	981	11/8/2022 19:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
138	739	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
446	1349	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
447	1152	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
236	1140	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
472	980	11/8/2022 19:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
731	1640	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
448	1153	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
322	1024	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
160	862	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
486	1188	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
190	892	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
451	1158	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
193	895	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
189	891	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
713	1520	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
560	1468	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
524	1228	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
693	1801	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
561	1469	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
195	1099	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
411	1113	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
95	995	11/8/2022 8:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
434	1337	11/8/2022 16:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
417	1020	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
189	689	11/8/2022 13:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
706	1814	11/8/2022 17:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
862	1970	11/8/2022 19:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
321	1025	11/8/2022 15:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
405	1308	11/8/2022 15:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
418	1225	11/8/2022 15:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
717	1524	11/8/2022 19:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
272	1078	11/8/2022 12:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
721	1829	11/8/2022 17:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
408	1111	11/8/2022 16:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
506	1611	11/8/2022 15:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
672	1678	11/8/2022 18:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
119	1020	11/8/2022 9:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
752	1559	11/8/2022 19:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
753	1560	11/8/2022 19:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
232	1333	11/8/2022 10:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
214	918	11/8/2022 13:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
421	1322	11/8/2022 15:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
374	880	11/8/2022 17:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
137	1237	11/8/2022 8:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
145	848	11/8/2022 11:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
567	1475	11/8/2022 16:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
508	1416	11/8/2022 15:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
197	501	11/8/2022 19:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
339	1041	11/8/2022 15:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
279	983	11/8/2022 14:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
26	726	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
491	1198	11/8/2022 18:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
713	1821	11/8/2022 17:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
714	1822	11/8/2022 17:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
544	1650	11/8/2022 15:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
381	1087	11/8/2022 17:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
33	733	11/8/2022 7:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
565	1267	11/8/2022 18:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
425	1430	11/8/2022 15:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
39	939	11/8/2022 7:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
31	931	11/8/2022 7:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
213	1013	11/8/2022 10:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
154	755	11/8/2022 10:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
232	833	11/8/2022 12:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
88	588	11/8/2022 9:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
106	706	11/8/2022 9:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
106	706	11/8/2022 9:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	SPOIL BALI N
106	712	11/8/2022 9:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
168	769	11/8/2022 10:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
443	1149	11/8/2022 18:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
442	1148	11/8/2022 17:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
124	1025	11/8/2022 9:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
168	870	11/8/2022 10:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
627	1533	11/8/2022 18:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
591	1398	11/8/2022 17:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
482	1085	11/8/2022 17:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
697	1504	11/8/2022 19:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
477	1284	11/8/2022 16:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
657	1566	11/8/2022 17:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
110	1210	11/8/2022 8:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
74	1075	11/8/2022 8:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
86	386	11/8/2022 14:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
337	843	11/8/2022 16:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
263	1063	11/8/2022 11:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
476	1283	11/8/2022 16:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
449	1151	11/8/2022 17:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
316	1018	11/8/2022 15:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
189	790	11/8/2022 11:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
505	1108	11/8/2022 17:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
47	548	11/8/2022 8:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
191	893	11/8/2022 11:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
427	1129	11/8/2022 16:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
365	1466	11/8/2022 12:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
320	1127	11/8/2022 13:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
27	727	11/8/2022 7:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
423	930	11/8/2022 18:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
389	893	11/8/2022 18:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
130	831	11/8/2022 10:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
125	1028	11/8/2022 9:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
303	905	11/8/2022 14:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
188	489	11/8/2022 18:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
299	805	11/8/2022 16:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
347	1049	11/8/2022 15:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
388	892	11/8/2022 18:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
128	829	11/8/2022 10:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
370	1277	11/8/2022 13:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
174	575	11/8/2022 15:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
306	1310	11/8/2022 13:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
87	888	11/8/2022 8:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
272	1176	11/8/2022 11:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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562	1668	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
697	1703	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
366	1467	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
198	902	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
558	1365	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
181	582	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
761	1670	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
563	1569	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
528	1431	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
295	1197	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
8	708	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
108	810	11/8/2022 9:39	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
144	1047	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
63	963	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
434	1139	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
321	1224	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
547	1453	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
80	980	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
548	1454	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
487	1390	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
488	1391	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
489	1392	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
259	961	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
290	1391	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
296	1197	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
295	1196	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
283	1384	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
507	1413	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
360	1062	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
141	1044	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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453	1160	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
351	1157	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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457	1159	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
72	772	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
349	1051	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
356	1058	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
93	795	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
400	1102	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
184	886	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	13	SPOIL BALI N
184	886	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
184	894	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
404	1109	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
247	949	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
402	1407	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
8	908	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
709	1817	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
309	1116	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
386	1287	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
323	1424	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
324	1425	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
252	954	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
584	1590	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
92	1093	11/8/2022 8:40	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
145	1245	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
681	1687	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
680	1686	11/8/2022 18:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
72	774	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
547	1349	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
670	1477	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
669	1476	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
205	1109	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
204	1108	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
567	1373	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
406	1111	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
453	1260	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
472	1179	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
125	827	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
545	1352	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
715	1823	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
468	1173	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
423	1026	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
22	322	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
160	963	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
506	1307	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
576	1382	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
604	1411	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
575	1381	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
267	969	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
24	824	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
150	953	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
215	1019	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
294	996	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
618	1724	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
70	871	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
23	823	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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363	965	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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519	1422	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
520	1322	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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13	713	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
99	899	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
581	1587	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
455	1460	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
134	837	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
133	836	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
501	1302	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	1	SPOIL BALI N
501	1302	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
501	1320	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
78	779	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
562	1369	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
257	959	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
74	776	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
18	318	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
190	1093	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
327	1331	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
17	717	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
688	1597	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
687	1596	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
354	1261	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
162	962	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
556	1662	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
446	1247	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
675	1478	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
13	813	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
260	1066	11/8/2022 12:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
264	769	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
201	705	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
12	912	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
79	879	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
228	1129	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
451	1157	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
640	1747	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
99	600	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
83	883	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
50	950	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
160	1260	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
11	911	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
127	829	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
388	1094	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
263		11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
263	1165	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
204	906	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
308	1114	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
37	837	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
280	1381	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
202	706	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
114	515	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
343	1144	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
168	1069	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
70	772	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
207	1013	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
208	1014	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
28	529	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
206	1006	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
623	1527	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
153	1054	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
119	619	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
257	962	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
311	713	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
499	1306	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
29	530	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
24	726	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
23	725	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
638	1745	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
112	814	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
162	865	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
162	865	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
162	866	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
633	1435	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
603	1512	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
192	692	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
168	468	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
314	1217	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
517	1318	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
169	469	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
226	1127	11/8/2022 12:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
462	1169	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
203	1006	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
454	1260	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
182	987	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
351	1258	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
209	912	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
255	1159	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
106	907	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
493	1200	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
615	1521	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
59	761	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
547	1354	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
233	734	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
222	726	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
585	1287	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
214	1115	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
367	1274	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
167	1068	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
614	1520	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
230	1034	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
261	1067	11/8/2022 12:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
408	1315	11/8/2022 14:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
416	1121	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
161	962	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
447	1253	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
55	556	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
456	1162	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
354	1060	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
110	1011	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
49	550	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
602		11/8/2022 19:51	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
602	1409	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
501	1407	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
510	1214	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
171	873	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
662	1571	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
419	1322	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
294	800	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
223	1023	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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278	1079	11/8/2022 12:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
472	1278	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
656	1764	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
470	1276	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
86	886	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
302	1306	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
345	1446	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
223	925	11/8/2022 12:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
504	1206	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
411	1515	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
224	725	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
368	1470	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
222	924	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
628	1735	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
628	1735	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
628	1752	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
403	1507	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
541	1144	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
368	1175	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
89	989	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
376	1478	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
711	1518	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
77	577	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
147	647	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
714	1521	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
385	1286	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
629	1736	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
244	748	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
38	838	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
710	1517	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
457	1060	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
471	1277	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
177	881	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
63	764	11/8/2022 8:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
377	1079	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
462	1167	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
235	1136	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
179	1180	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
418	1522	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
651	1657	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
245	948	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
35	535	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
726	1529	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
124	925	11/8/2022 9:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
87	887	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
48	749	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
159	1160	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
127	1128	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
251	953	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
439	1444	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
316	1020	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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402	1203	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
251	1153	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
518	1220	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
187	987	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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225	927	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
367	1174	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
276	978	11/8/2022 14:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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775	1684	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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715	1522	11/8/2022 19:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
463	1168	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
407	1308	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
671	1779	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
646	1453	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
682	1489	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
80	481	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
467	1472	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
9	909	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
765	1568	11/8/2022 19:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
101	1201	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
103	903	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
103	804	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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401	1406	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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485	1389	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
118	1021	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
457	1364	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
371	1178	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
448	1051	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
632	1638	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
34	734	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
152	1052	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
631	1540	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
663	1572	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
537	1242	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
86	788	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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235	1041	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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235	938	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
168	668	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
488	1396	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
342	844	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
487	1395	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
343	845	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
229	1033	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
221	822	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
123	724	11/8/2022 9:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
41	1141	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
499	1102	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
498	1101	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
313	1414	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
196	899	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
312	1214	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
534	1442	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
106	906	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
416	1520	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
414	1518	11/8/2022 13:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
413	1219	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
164	765	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
165	766	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
551	1154	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
10	510	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
335	841	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
336	842	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
84	884	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
491	1292	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
569	1371	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
4	504	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
500	1205	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
245	1149	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
483	1086	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
363	867	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
499	1206	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
714	1521	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
412	1118	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
413	1119	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
274	976	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
384	890	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
177	879	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
111	1014	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
110	1013	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
717	1520	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
367	1069	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
448	1249	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
342	944	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
596	1298	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
406	1212	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
407	1213	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
574	1680	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
507	1314	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
297	1398	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
413	1418	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
404	1107	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
670	1477	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
645	1452	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
644	1451	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
641	1448	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
628	1532	11/8/2022 19:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
190	694	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
457	1164	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
316	1221	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
316	1221	11/8/2022 12:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
316	1230	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
145	945	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
259	1161	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
108	810	11/8/2022 9:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
337	839	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
19	519	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
221	722	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
890	2001	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
82	483	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
285	1190	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
303	1208	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
514	1520	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
791	1700	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
56	656	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
60	761	11/8/2022 8:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
262	1363	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
60	760	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
235	636	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
449	1154	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
34	735	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
325	831	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
273	975	11/8/2022 14:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
25	725	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
844	1952	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
291	993	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
367	1069	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
775	1883	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
845	1953	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
229	630	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
230	631	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
651	1759	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
482	1289	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
695	1502	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
694	1501	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
557	1259	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
395	1196	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
367	1371	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
535	1443	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
735	1644	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
200	601	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
453	1356	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
465	1172	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
396	1299	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
659	1466	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
632	1439	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
631	1438	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
443	1046	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
245	947	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
120	1020	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
179	979	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
129	429	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
131	532	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
412	1117	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
6	706	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
130	1230	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
86	1186	11/8/2022 8:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
100	801	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
40	740	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MC			
148	850	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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397	1099	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
89		11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
89	989	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
15	915	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
380	886	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
71	971	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
381	887	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
60	1160	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
40	540	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
155	655	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
645	1551	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
154	1155	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
643	1450	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
340	1243	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
240	942	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
371	1073	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
372	1074	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
254	957	11/8/2022 13:54	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
185	887	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
253	955	11/8/2022 13:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
85	786	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
84	785	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
104	505	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
313	915	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
314	916	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
61	761	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
305	1111	11/8/2022 12:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
491	1195	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
464	1168	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
415	1018	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
446	1049	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
258	859	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
257	858	11/8/2022 13:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
536	1139	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
542	1349	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
54	854	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
5	605	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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195	496	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
332	1138	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
333	1139	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
689	1598	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
300	1106	11/8/2022 12:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
30	1031	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
87	987	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
377	1184	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
673	1480	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
361	1064	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
403	1105	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
200	902	11/8/2022 11:40	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
352	858	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
10	1010	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
5	405	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
416	1119	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
58	958	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
345	1152	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
344	1151	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
710	1517	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
188	890	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
509	1315	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
573	1476	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
37	737	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
526	1332	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
7	907	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
57	1058	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
498	1305	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
222	1122	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
56	1057	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
391	1097	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
119	821	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
506	1213	11/8/2022 19:52	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
664	1467	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
527	1333	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
720	1527	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
666	1469	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
649	1757	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
155	556	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
420	1023	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
40	840	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
4	704	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
9	710	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
299	1204	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
80	881	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
464	1067	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
465	1068	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
302	1103	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N

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					PII (MCL			
718	1627	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
719	1628	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
395	1296	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
391	895	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
390	894	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
115	1018	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
30	830	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
595	1504	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
115	516	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
116	517	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
573	1579	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
460	1063	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
360	1364	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
359	1363	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
705	1614	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
679	1787	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
232	736	11/8/2022 14:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
74	974	11/8/2022 8:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
113	814	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
476	1182	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
475	1181	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
172	972	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
159	1062	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
158	1061	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
529	1437	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
116	817	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
268	970	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
748	1555	11/8/2022 19:45	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
576	1378	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
594	1503	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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184	885	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
472	1279	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
159	861	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
101	902	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
136	1236	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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107	908	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
108	909	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
85	886	11/8/2022 8:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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376	1182	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
579	1285	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
537	1440	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
494	1097	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
415	1120	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
550	1656	11/8/2022 15:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
449	1553	11/8/2022 14:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
170	872	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
86	788	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
70	970	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
354	860	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
211	914	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
384	987	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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479	1186	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
97	798	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
191	792	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
192	793	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
617	1521	11/8/2022 19:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
119	820	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
268	869	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
691	1498	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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36	936	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
272	1274	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
105	705	11/8/2022 9:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
379	1082	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
224	926	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
112	1012	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
36	936	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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139	540	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
138	539	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
200	1104	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
198	1102	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
667	1574	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
578	1484	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
323	1025	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
322	1024	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
105	806	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
644	1451	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
727	1636	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
607	1516	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
536	1444	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
608	1517	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL			
25	1026	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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178	678	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
708	1617	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
601	1607	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
265	969	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
412	1417	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
224	1124	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
81	1181	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
499	1201	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
80	1180	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
498	1200	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
252	853	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
66	867	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
608	1714	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
607	1713	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
190	690	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
357	1063	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
461	1163	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
551	1253	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
460	1162	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
13	913	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
15	915	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
64	565	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
372	876	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
9	509	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
181	681	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
559	1365	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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11	511	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
226	727	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
276	980	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
104	806	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
218	1118	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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220	1120	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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529	1435	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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161	964	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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318	1020	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
288	990	11/8/2022 14:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
85	685	11/8/2022 8:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
502	1207	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
592	1598	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
589	1595	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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132	1033	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
10	810	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
134	1035	11/8/2022 10:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
22	822	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
384	1086	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
113	1014	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
382	1084	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
178	879	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
375	1077	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
75	975	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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565	1471	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
118	719	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
252	955	11/8/2022 13:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
458	1163	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
23	723	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
459	1164	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
650	1556	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
7	707	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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532	1234	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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240	1040	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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164	1165	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
183	1283	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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325	1329	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
326	1330	11/8/2022 13:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
646	1448	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
46	1146	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
72	1172	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
28	730	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
399	1002	11/8/2022 16:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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289	1095	11/8/2022 12:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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558	1364	11/8/2022 17:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
87	1187	11/8/2022 8:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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346	1249	11/8/2022 14:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
14	414	11/8/2022 7:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
173	1074	11/8/2022 10:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
102	1003	11/8/2022 9:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
594	1500	11/8/2022 17:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
544	1447	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
383	1290	11/8/2022 13:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
317	719	11/8/2022 19:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
120	521	11/8/2022 12:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
334	840	11/8/2022 16:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
538	1344	11/8/2022 17:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
400	1105	11/8/2022 17:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
399	1104	11/8/2022 17:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
130	930	11/8/2022 9:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
568	1574	11/8/2022 17:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
559	1261	11/8/2022 18:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
292	994	11/8/2022 14:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
61	762	11/8/2022 8:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
107	908	11/8/2022 8:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
283	1089	11/8/2022 12:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
394	997	11/8/2022 16:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
464	1469	11/8/2022 15:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
463	1468	11/8/2022 15:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
589	1695	11/8/2022 16:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
621	1727	11/8/2022 16:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
1	701	11/8/2022 7:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
8	808	11/8/2022 7:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
100	900	11/8/2022 8:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
298	804	11/8/2022 16:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
279	784	11/8/2022 15:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
365	869	11/8/2022 17:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
153	953	11/8/2022 9:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
338	1342	11/8/2022 13:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
337	1341	11/8/2022 13:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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87	987	11/8/2022 8:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
240	841	11/8/2022 12:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
28	728	11/8/2022 7:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
192	993	11/8/2022 10:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
410	1113	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
532	1435	11/8/2022 17:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
531	1434	11/8/2022 17:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
318	1020	11/8/2022 14:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
327		11/8/2022 13:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	UPDATE VI N
327	1228	11/8/2022 13:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
337	1039	11/8/2022 15:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
339	1041	11/8/2022 15:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
50	950	11/8/2022 7:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
420	1226	11/8/2022 15:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
375	879	11/8/2022 17:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
72	972	11/8/2022 8:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
14	914	11/8/2022 7:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 1			
516	1323	11/8/2022 16:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
202	603	11/8/2022 15:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
33	833	11/8/2022 7:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
577	1683	11/8/2022 16:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
329	1136	11/8/2022 13:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
639	1446	11/8/2022 18:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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364	1171	11/8/2022 14:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
231	933	11/8/2022 12:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
384	1087	11/8/2022 16:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
486	1590	11/8/2022 14:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
149	1052	11/8/2022 9:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
192	1095	11/8/2022 10:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
266	767	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
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104	805	11/8/2022 9:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
371	1272	11/8/2022 14:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
481	1084	11/8/2022 17:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
564	1270	11/8/2022 18:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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121	622	11/8/2022 10:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
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199	901	11/8/2022 11:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
139	940	11/8/2022 9:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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213	814	11/8/2022 11:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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199	901	11/8/2022 11:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
383	1086	11/8/2022 16:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
248	1148	11/8/2022 11:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
338	1040	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	UNDO: ISS Y
338	1040	11/8/2022 15:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
338	1040	11/8/2022 15:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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264	1365	11/8/2022 10:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
27	729	11/8/2022 8:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
524	1326	11/8/2022 16:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
518	1424	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
93	993	11/8/2022 8:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
148	1048	11/8/2022 9:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
329	1235	11/8/2022 12:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
258	1359	11/8/2022 10:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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52	453	11/8/2022 9:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
511	1417	11/8/2022 16:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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361	1365	11/8/2022 14:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
593	1295	11/8/2022 19:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
28	328	11/8/2022 10:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
227	1131	11/8/2022 10:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
228	1132	11/8/2022 10:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
277	981	11/8/2022 14:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
171	872	11/8/2022 11:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
29	731	11/8/2022 8:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
39	540	11/8/2022 8:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
500	1202	11/8/2022 17:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
406	1313	11/8/2022 14:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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405	1312	11/8/2022 14:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
314	1318	11/8/2022 13:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
123	824	11/8/2022 10:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	SPOIL BALI N
123	824	11/8/2022 9:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
123	830	11/8/2022 10:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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189	994	11/8/2022 10:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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139	740	11/8/2022 9:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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309	1013	11/8/2022 15:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
421	1426	11/8/2022 15:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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277	1179	11/8/2022 13:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
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138	1041	11/8/2022 9:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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9	509	11/8/2022 7:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	SPOIL BALI N
9	516	11/8/2022 7:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
143	943	11/8/2022 9:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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48	948	11/8/2022 7:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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366	968	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
365	967	11/8/2022 15:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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542	1344	11/8/2022 16:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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95	695	11/8/2022 8:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
117	718	11/8/2022 9:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
116	717	11/8/2022 9:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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299	1004	11/8/2022 15:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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253	955	11/8/2022 13:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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32	732	11/8/2022 7:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
326	728	11/8/2022 19:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
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221	923	11/8/2022 12:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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507	1410	11/8/2022 17:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
31	731	11/8/2022 7:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
196	1100	11/8/2022 10:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
448	1355	11/8/2022 15:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
226	627	11/8/2022 16:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
555	1257	11/8/2022 18:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
5	905	11/8/2022 7:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
21	521	11/8/2022 7:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
371	1077	11/8/2022 16:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
187	788	11/8/2022 11:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
635	1544	11/8/2022 17:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
316	918	11/8/2022 14:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
608	1514	11/8/2022 18:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
283	1184	11/8/2022 12:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
669	1472	11/8/2022 17:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
469	977	11/8/2022 19:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
33	1034	11/8/2022 7:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
384	1090	11/8/2022 17:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
427	1133	11/8/2022 18:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
385	1091	11/8/2022 17:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
188		11/8/2022 10:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	UPDATE VI N
188	993	11/8/2022 10:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
188	993	11/8/2022 10:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	SPOIL BALI N
188	1002	11/8/2022 10:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
190	995	11/8/2022 10:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
485	1490	11/8/2022 16:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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94	794	11/8/2022 8:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
310	1211	11/8/2022 12:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
303	1204	11/8/2022 12:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
563	1466	11/8/2022 18:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
198	1299	11/8/2022 9:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
425	1028	11/8/2022 16:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
664	1471	11/8/2022 18:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
651	1560	11/8/2022 17:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
396	1500	11/8/2022 13:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
599	1505	11/8/2022 17:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
540	1443	11/8/2022 17:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
663	1470	11/8/2022 18:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
665	1472	11/8/2022 18:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
589	1296	11/8/2022 19:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
588	1295	11/8/2022 19:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
371	1073	11/8/2022 16:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
518	1222	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
683	1486	11/8/2022 18:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
383	887	11/8/2022 17:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
310	1012	11/8/2022 14:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
522	1425	11/8/2022 17:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
572	1274	11/8/2022 19:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
571	1273	11/8/2022 19:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
178	983	11/8/2022 10:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
173	875	11/8/2022 10:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
344	1050	11/8/2022 16:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
174	876	11/8/2022 10:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
345	1051	11/8/2022 16:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
142	643	11/8/2022 11:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
258	1058	11/8/2022 11:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
574	1477	11/8/2022 18:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
74	974	11/8/2022 8:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
86	986	11/8/2022 8:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
191	893	11/8/2022 11:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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347	1254	11/8/2022 13:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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496	1600	11/8/2022 14:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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353	955	11/8/2022 15:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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80	881	11/8/2022 8:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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233	737	11/8/2022 14:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
298	1000	11/8/2022 15:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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295	897	11/8/2022 14:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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793	1702	11/8/2022 19:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
37	837	11/8/2022 7:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
103	804	11/8/2022 9:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
432	1333	11/8/2022 15:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
382	1088	11/8/2022 17:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
889	2000	11/8/2022 19:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
495	1197	11/8/2022 17:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
400	1303	11/8/2022 15:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
203	905	11/8/2022 11:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
368	1275	11/8/2022 13:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
357	860	11/8/2022 17:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
20	520	11/8/2022 7:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
195	899	11/8/2022 12:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
263	768	11/8/2022 15:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
99	801	11/8/2022 10:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
144	745	11/8/2022 10:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
55	655	11/8/2022 7:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
343	1049	11/8/2022 16:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
11	711	11/8/2022 7:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
57	757	11/8/2022 7:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
228	931	11/8/2022 13:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
26	626	11/8/2022 7:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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521	1124	11/8/2022 18:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
28	628	11/8/2022 7:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
76	676	11/8/2022 8:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
27	627	11/8/2022 7:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
392	1193	11/8/2022 14:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
284	1085	11/8/2022 12:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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748	1657	11/8/2022 18:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
27	927	11/8/2022 7:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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604	1710	11/8/2022 16:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
605	1711	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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268	970	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
610	1417	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
611	1418	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
165	566	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
674	1680	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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193	697	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
227	1033	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
9	309	11/8/2022 8:16	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
172	1072	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
575	1681	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
316	818	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
164	967	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
8	1108	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
614	1620	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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612	1618	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
410	1112	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
134	434	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
198	1099	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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454	1261	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
199	1100	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
57	858	11/8/2022 8:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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647	1449	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	1	SPOIL BALI N
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808	1916	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
104	404	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
327	1029	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
474	1479	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
179	881	11/8/2022 11:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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391	994	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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249	754	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
127	828	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
351	1053	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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66	768	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
254	956	11/8/2022 13:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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395	1302	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
277	1083	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
756	1864	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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527	1433	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
96	596	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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49	1149	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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603	1709	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
655	1763	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
386	1488	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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62	962	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
364	1070	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
196	898	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
679	1482	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
330	1036	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
81	882	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
151	1052	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
569	1675	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
570	1676	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
843	1951	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
843	1951	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
843	1976	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
401	1106	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
791	1899	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
390	1092	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
366	1068	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
368	1070	11/8/2022 16:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
121	823	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
118	820	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
306	1010	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
307	1011	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
549	1254	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
773	1682	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
217	1121	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
106	1006	11/8/2022 8:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
412	1219	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
248	953	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
331	1138	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
546	1353	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
217	818	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
210	811	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
291	693	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
292	694	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
415	1519	11/8/2022 13:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
407	911	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
409	913	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
408	912	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
273	1275	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
493	1300	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
492	1299	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
611	1418	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
612	1419	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
444	951	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
25	725	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
230	932	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
472	1178	11/8/2022 19:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
203	1003	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
199	999	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
169	1069	11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
316	1417	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
588	1290	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
659	1466	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
544	1351	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
85	885	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
694	1602	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
540	1446	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
115	1116	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
389	992	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
310	1012	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
669	1476	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
500	1103	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
431	1436	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
475	1182	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
474	1181	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
123	1223	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
177	1277	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
180	882	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
179	881	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
72	873	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
82	1182	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
570	1476	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
593	1499	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
571	1477	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
356	1257	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
313	1015	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
435	1141	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
434	1140	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
57	758	11/8/2022 8:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
251	756	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
374	1181	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
288	690	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
355	1059	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
104	807	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
270	1371	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
363	1065	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
167	968	11/8/2022 9:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
133	534	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
401	1104	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
300	1202	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
223	1027	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
426	1128	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
136	436	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
308	1409	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
307	1408	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
414	1317	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
661	1568	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
345	1246	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
72	473	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
296	998	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
336	1142	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
281	1183	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
77	977	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
545	1351	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
50	350	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
481	1188	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
317	1321	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
409	1414	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
399	903	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
335	1236	11/8/2022 13:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
188	1091	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
452		11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
452	1355	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
388	894	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
48	748	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
387	893	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
120	1121	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
42	842	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
431	1237	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
488	1592	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
488	1592	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
488	1603	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
489	1593	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
138	1038	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
200	1000	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
204	1004	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
434	1235	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
202	1002	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
47	1049	11/8/2022 7:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
164	965	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
180	981	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
625	1631	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
198	1098	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
80	980	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
276	781	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
277	782	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
288	990	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
638	1440	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
721	1528	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
336	1038	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
360	962	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
508	1411	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
352	1056	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
725	1532	11/8/2022 19:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
201	1101	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
270	772	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
99	999	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
98	998	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
435	1139	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
332	1038	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
483	1190	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
284	986	11/8/2022 14:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
200	902	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
622	1429	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
623	1430	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
664	1670	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
132	933	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
565	1367	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
186	587	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
7	307	11/8/2022 7:48	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
440	947	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
177	879	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
114	915	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
566	1472	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
163	966	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
574	1276	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
462	1268	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
112	1015	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
341	1148	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
213	1017	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
294	1395	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
243	1143	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
116	1019	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
31	731	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
548	1250	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
116	416	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
401	1207	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
57	957	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
39	939	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
560	1163	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
686	1595	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
380	1281	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
240	641	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
453	1155	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
46	447	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
143	744	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
3	503	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
243	1047	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
181	883	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
233	1235	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
234	937	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
333	1035	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
184	1087	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
241	1141	11/8/2022 11:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
90	690	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
655	1457	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
219	723	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
443	1244	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
410	916	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
371	1075	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
386	1192	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
420	1221	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
295	997	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
278	980	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
465	1271	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
104	1204	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
74	874	11/8/2022 8:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
456	964	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
505	1210	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
277	1083	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
32	832	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
181	982	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
452	1156	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
308	910	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
301	1006	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
309	1015	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
182	883	11/8/2022 11:32	REGULAR_	5010		ROSEVILLE CITY	7	SPOIL BALI N
182	883	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
182	886	11/8/2022 11:32	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
293	995	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
181	882	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
205	907	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
37	837	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
239	942	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
544	1346	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
113	814	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
462	1369	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
205	907	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
176	477	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
200	902	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
400	1504	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
373	1280	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
378	1084	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
340	1441	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
219	921	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
850	1958	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
850	1958	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
850	1979	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
69	1169	11/8/2022 7:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
27	1127	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
878	1989	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
89	1189	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
877	1988	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
690	1696	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
691	1697	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
689	1695	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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147	849	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
372	878	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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478	1081	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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148	1049	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
319	921	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
149	1050	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
414	1119	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
253	956	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
110	1111	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
181	1084	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
513	1217	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
304	1206	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
160	961	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
484	1291	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
483	1290	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
485	1292	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
418	922	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
671	1478	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
136	937	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
373	877	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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253	1255	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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349	951	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
141	842	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
248	950	11/8/2022 13:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
249	951	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
122	1025	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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110	410	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
121	1024	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
312	1118	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
146	547	11/8/2022 13:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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251	1155	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
413	1320	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
161	864	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
243	744	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
394	900	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
617	1424	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
480	1185	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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438	1443	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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227	929	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
211	1015	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
268	670	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
553	1258	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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80	980	11/8/2022 8:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
96	696	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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731	1839	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
523	1629	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
264	1164	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
263	1163	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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488	1091	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
487	1090	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
697	1500	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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638	1547	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
616	1418	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
565	1271	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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502	1410	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
179	883	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
236	938	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
235	937	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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411	1318	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
751	1660	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
502	1408	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
393	1096	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
250	1054	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
92	992	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
91	991	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
231	1131	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
516	1119	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
764	1567	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
448	1155	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
44	744	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
449	1156	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
314	1016	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
48	348	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
378	981	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
180	481	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
49	349	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
358	1060	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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424	1230	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
88	790	11/8/2022 8:42	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
208	1109	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
121	621	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
120	620	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
171	975	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
167	1267	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
234	635	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
115	616	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
66	1166	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
685	1691	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
29	829	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
358	1459	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
305	1007	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
408	1413	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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278	1179	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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533	1539	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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428	1130	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
395	1097	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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476	1178	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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81	981	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
299	1105	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
442	1144	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
79	779	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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617	1424	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
149	650	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
97	799	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
14	715	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
33	534	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
650	1452	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
188	989	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
189	990	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
749	1857	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
751	1859	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
750	1858	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
252	1058	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
291	1097	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
111	812	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
558	1161	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
312	1014	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
278	980	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
406	1108	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
684	1690	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
581	1383	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
50	850	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
568	1374	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
582	1384	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
59	560	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
360	1263	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
568	1471	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
186	1086	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
78	879	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
597	1399	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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596	1398	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
537	1239	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
11	1011	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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PII MCL 15.243(1)(a)

						PII (MCL			
296	1300	11/8/2022 12:41	REGULAR_	5010	[redacted]		ROSEVILLE CITY	15	ISSUE REG N
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242	1142	11/8/2022 11:12	REGULAR_	5010			ROSEVILLE CITY	8	ISSUE REG N
68	968	11/8/2022 8:16	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
478	1183	11/8/2022 17:30	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
454	1159	11/8/2022 17:14	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
139	639	11/8/2022 11:10	REGULAR_	5010			ROSEVILLE CITY	16	ISSUE REG N
140	640	11/8/2022 11:11	REGULAR_	5010			ROSEVILLE CITY	16	ISSUE REG N
134	1037	11/8/2022 9:09	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
88	988	11/8/2022 8:46	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
174	1175	11/8/2022 10:08	REGULAR_	5010			ROSEVILLE CITY	15	ISSUE REG N
172	1173	11/8/2022 10:06	REGULAR_	5010			ROSEVILLE CITY	15	ISSUE REG N
615	1519	11/8/2022 19:22	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
15	1016	11/8/2022 7:18	REGULAR_	5010			ROSEVILLE CITY	15	ISSUE REG N
330	1131	11/8/2022 13:10	REGULAR_	5010			ROSEVILLE CITY	1	ISSUE REG N
16	1017	11/8/2022 7:18	REGULAR_	5010			ROSEVILLE CITY	15	ISSUE REG N
590	1396	11/8/2022 17:43	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
588	1395	11/8/2022 17:34	REGULAR_	5010			ROSEVILLE CITY	11	ISSUE REG N
587	1394	11/8/2022 17:34	REGULAR_	5010			ROSEVILLE CITY	11	ISSUE REG N
242	947	11/8/2022 14:15	REGULAR_	5010			ROSEVILLE CITY	12	ISSUE REG N
589	1395	11/8/2022 17:43	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
299	701	11/8/2022 18:42	REGULAR_	5010			ROSEVILLE CITY	17	ISSUE REG N
442	1249	11/8/2022 15:47	REGULAR_	5010			ROSEVILLE CITY	11	ISSUE REG N
520	1327	11/8/2022 16:46	REGULAR_	5010			ROSEVILLE CITY	11	ISSUE REG N
447	955	11/8/2022 18:38	REGULAR_	5010			ROSEVILLE CITY	4	ISSUE REG N
448	956	11/8/2022 18:38	REGULAR_	5010			ROSEVILLE CITY	4	ISSUE REG N
166	466	11/8/2022 18:21	REGULAR_	5010			ROSEVILLE CITY	18	ISSUE REG N
324	826	11/8/2022 16:54	REGULAR_	5010			ROSEVILLE CITY	16	ISSUE REG N
504	1407	11/8/2022 17:32	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
60	960	11/8/2022 8:02	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
689	1496	11/8/2022 18:59	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
279	1380	11/8/2022 11:02	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
278	1379	11/8/2022 11:01	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
442	1147	11/8/2022 17:06	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
181	685	11/8/2022 12:30	REGULAR_	5010			ROSEVILLE CITY	4	ISSUE REG N
40	441	11/8/2022 8:43	REGULAR_	5010			ROSEVILLE CITY	17	ISSUE REG N
526	1434	11/8/2022 16:17	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
527	1435	11/8/2022 16:17	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
696	1804	11/8/2022 17:14	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
697	1805	11/8/2022 17:15	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
411	1116	11/8/2022 17:27	REGULAR_	5010			ROSEVILLE CITY	13	ISSUE REG N
411	1116	11/8/2022 17:39	REGULAR_	5010			ROSEVILLE CITY	13	SPOIL BALI N
411	1132	11/8/2022 17:40	REGULAR_	5010			ROSEVILLE CITY	13	ISSUE REG N
142	844	11/8/2022 10:18	REGULAR_	5010			ROSEVILLE CITY	14	ISSUE REG N
222	1026	11/8/2022 11:06	REGULAR_	5010			ROSEVILLE CITY	11	ISSUE REG N
317	1123	11/8/2022 13:12	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
316	1122	11/8/2022 13:11	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
539	1142	11/8/2022 18:23	REGULAR_	5010			ROSEVILLE CITY	10	ISSUE REG N
677	1586	11/8/2022 18:09	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
625	1531	11/8/2022 18:19	REGULAR_	5010			ROSEVILLE CITY	8	ISSUE REG N
626	1532	11/8/2022 18:20	REGULAR_	5010			ROSEVILLE CITY	8	ISSUE REG N
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180	881	11/8/2022 11:27	REGULAR_	5010			ROSEVILLE CITY	7	ISSUE REG N
433	1239	11/8/2022 15:31	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
425	1129	11/8/2022 16:53	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
532	1438	11/8/2022 16:55	REGULAR_	5010			ROSEVILLE CITY	8	ISSUE REG N
238	1044	11/8/2022 11:48	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
234	1040	11/8/2022 11:45	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
236	1042	11/8/2022 11:47	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
20	720	11/8/2022 7:16	REGULAR_	5010			ROSEVILLE CITY	7	ISSUE REG N
137	1138	11/8/2022 9:25	REGULAR_	5010			ROSEVILLE CITY	15	ISSUE REG N
237	1043	11/8/2022 11:47	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
226	1130	11/8/2022 10:53	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
410	1216	11/8/2022 15:03	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
578	1384	11/8/2022 17:34	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
170	970	11/8/2022 10:01	REGULAR_	5010			ROSEVILLE CITY	1	ISSUE REG N
111		11/8/2022 9:25	REGULAR_	5010			ROSEVILLE CITY	3	UPDATE VI N
111	1012	11/8/2022 9:25	REGULAR_	5010			ROSEVILLE CITY	3	ISSUE REG N
156	959	11/8/2022 10:16	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
171	971	11/8/2022 10:01	REGULAR_	5010			ROSEVILLE CITY	1	ISSUE REG N
366	1267	11/8/2022 13:56	REGULAR_	5010			ROSEVILLE CITY	8	ISSUE REG N
455	1160	11/8/2022 17:15	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
457	1162	11/8/2022 17:16	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
399	1102	11/8/2022 16:35	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
400	1103	11/8/2022 16:35	REGULAR_	5010			ROSEVILLE CITY	6	ISSUE REG N
126	426	11/8/2022 16:41	REGULAR_	5010			ROSEVILLE CITY	18	ISSUE REG N
702	1611	11/8/2022 18:23	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
254	1158	11/8/2022 11:18	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
213	1117	11/8/2022 10:45	REGULAR_	5010			ROSEVILLE CITY	2	ISSUE REG N
252	1353	11/8/2022 10:39	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
251	852	11/8/2022 12:48	REGULAR_	5010			ROSEVILLE CITY	10	ISSUE REG N
286	888	11/8/2022 13:54	REGULAR_	5010			ROSEVILLE CITY	10	ISSUE REG N
323	1029	11/8/2022 16:06	REGULAR_	5010			ROSEVILLE CITY	12	ISSUE REG N
118	919	11/8/2022 9:26	REGULAR_	5010			ROSEVILLE CITY	5	ISSUE REG N
307	1108	11/8/2022 12:47	REGULAR_	5010			ROSEVILLE CITY	1	ISSUE REG N
310	1411	11/8/2022 11:29	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N
312	1413	11/8/2022 11:30	REGULAR_	5010			ROSEVILLE CITY	9	ISSUE REG N

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311	1412	11/8/2022	11:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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162	863	11/8/2022	10:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
163	864	11/8/2022	10:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
308	1012	11/8/2022	15:13	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
428	1031	11/8/2022	16:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
778	1886	11/8/2022	18:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
511	1114	11/8/2022	17:59	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
510	1113	11/8/2022	17:58	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
619	1725	11/8/2022	16:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
593	1395	11/8/2022	17:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
142	844	11/8/2022	10:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
141	843	11/8/2022	10:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
472	1176	11/8/2022	17:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
473	1177	11/8/2022	17:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
212	1313	11/8/2022	9:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
213	1314	11/8/2022	9:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
323	925	11/8/2022	14:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
238	739	11/8/2022	15:09	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
239	740	11/8/2022	15:09	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
786	1894	11/8/2022	18:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
190	591	11/8/2022	15:42	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
214	916	11/8/2022	11:56	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
853	1961	11/8/2022	18:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
24	924	11/8/2022	7:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
25	925	11/8/2022	7:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
85	486	11/8/2022	11:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
665	1574	11/8/2022	18:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
63	764	11/8/2022	8:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
64	765	11/8/2022	8:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
97	397	11/8/2022	14:48	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
255	957	11/8/2022	13:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
397	1103	11/8/2022	17:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
370	1074	11/8/2022	16:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
423	1129	11/8/2022	18:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
136	537	11/8/2022	13:26	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
385	988	11/8/2022	16:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
238	940	11/8/2022	12:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
211	715	11/8/2022	13:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
375	1078	11/8/2022	16:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
376	1079	11/8/2022	16:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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167	568	11/8/2022	14:54	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
689	1496	11/8/2022	18:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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479	1183	11/8/2022	17:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
32	932	11/8/2022	7:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
404	1307	11/8/2022	15:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
290	796	11/8/2022	15:50	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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80	581	11/8/2022	9:45	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
81	582	11/8/2022	9:45	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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580	1686	11/8/2022	16:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
579	1685	11/8/2022	16:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
26	526	11/8/2022	7:30	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
80	880	11/8/2022	8:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
53	754	11/8/2022	8:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
598	1604	11/8/2022	17:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
283	1285	11/8/2022	12:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
330	1233	11/8/2022	14:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
282	1284	11/8/2022	12:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
11	811	11/8/2022	7:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
355	1262	11/8/2022	13:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
4	704	11/8/2022	7:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
711	1819	11/8/2022	17:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
710	1818	11/8/2022	17:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
477	1184	11/8/2022	18:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
21	321	11/8/2022	9:24	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
639	1441	11/8/2022	17:31	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
24	624	11/8/2022	7:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
698	1704	11/8/2022	19:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
70	370	11/8/2022	13:27	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
536	1241	11/8/2022	18:19	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
292	894	11/8/2022	14:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
566	1373	11/8/2022	17:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
674	1583	11/8/2022	18:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
417	1223	11/8/2022	15:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
333	835	11/8/2022	17:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
440	1445	11/8/2022	15:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
284	1185	11/8/2022	12:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
77	977	11/8/2022	8:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
588	1394	11/8/2022	17:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
214	1014	11/8/2022	10:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
233	634	11/8/2022	17:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
186	690	11/8/2022	12:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
146	1147	11/8/2022	9:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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					PII (MCL			
315	1021	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
23	524	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
127	628	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
328	1030	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
881	1992	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
882	1993	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
594	1396	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
552	1460	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
255	760	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
145	746	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
439	1042	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
595	1397	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
274	1074	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
457	1360	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
151	853	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
155	857	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
132	834	11/8/2022 10:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
656	1565	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
85	787	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
625	1427	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
175	879	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
119	820	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
421	1125	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
269	971	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
92	892	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
436	943	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
662	1668	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
596	1502	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
62	863	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
237	1138	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
80	782	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
284	1090	11/8/2022 12:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
214	917	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
118	821	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
504	1305	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
139	841	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
138	840	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
500	1505	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
163	964	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
165	966	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
166	967	11/8/2022 9:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
2	702	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
5	705	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
398	1502	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
544	1248	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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33	735	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
278	983	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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22	922	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
425	1529	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
461	1466	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
453	1458	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
628	1435	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
145	546	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
202	1103	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
203	1104	11/8/2022 11:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
341	847	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
305	811	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
61	562	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
6	506	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
531	1333	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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412	1313	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
435	1336	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
436	1338	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
568	1272	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
348	1050	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
178	579	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
195	1196	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	15	SPOIL BALI N
195	1196	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
195	1210	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
227	929	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
237	939	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
529	1234	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
191	1094	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
191	1094	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
191	1098	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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528	1233	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
129	1032	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
155	455	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
87	387	11/8/2022 14:22	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
481	1282	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
115	1016	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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566	1469	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
175	576	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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314	1120	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
315	1121	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
326	928	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
58	1059	11/8/2022 8:01	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
624	1431	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
623	1430	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
89	490	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
74	674	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
152	1252	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
378	1480	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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399	1105	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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429	1131	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
380	1084	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
262	863	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
381	1085	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
583	1390	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
388	1092	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
388	1092	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	13	SPOIL BALI N
388	1102	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
149	852	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
152	855	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
152	855	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
152	865	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
355	1156	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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114	1214	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
126	827	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
125	826	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
165	867	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
166	868	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
164	866	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
462	1467	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
295	1102	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
296	1103	11/8/2022 12:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
307	1013	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
244	949	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
46	846	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
245	950	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
402	1108	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
135	936	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
45	845	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
243	948	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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110	812	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
240	1046	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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464	1265	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
160	1063	11/8/2022 9:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
387	1193	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
446	1550	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
447	1551	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
580	1484	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
543	1247	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
50	751	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
366	1273	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
364	1068	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
261	1065	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
357	1158	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
88	888	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
358	1159	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
229	931	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
284	789	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
458	966	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
420	1321	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
232	1132	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
89	590	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
90	591	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
440	1342	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
440	1342	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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547	1450	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
665	1572	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
471	1178	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
297	1098	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
299	1100	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
341	943	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
387	1093	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
386	1092	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
65	1066	11/8/2022 8:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
331	1033	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
332	1034	11/8/2022 15:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL			
376	1380	11/8/2022 14:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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13	613	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
113	815	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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194	896	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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247	949	11/8/2022 12:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
131	932	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
572	1276	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
480	1184	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
42	443	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
248	950	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
501	1506	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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55	955	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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724	1633	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
725	1634	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
726	1635	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
399	1200	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
442	1045	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
178	779	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
401	1004	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
398	1199	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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710	1716	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
300	1304	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
91	793	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
357	1163	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
36	437	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
205	606	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
284	886	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
901	2012	11/8/2022 19:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
587	1491	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
342	1149	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
331	833	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
343	1150	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
410	1317	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
560	1666	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
141	844	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
142	845	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
346	1447	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
835	1943	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
499	1305	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
382	1189	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
3	803	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
277	879	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
371	973	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
288	1291	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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153	954	11/8/2022 9:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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602	1608	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
422	1124	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
280	785	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	4	SPOIL BALI N
280	785	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
280	795	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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421	1123	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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343	1246	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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144	1244	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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83	383	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
293	1099	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
294	1100	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
150	951	11/8/2022 9:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
356	1259	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
159	860	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
228	729	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
118	1218	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
604	1513	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

357	1260	11/8/2022 15:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
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17	B6533672	11/8/2022 7:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	UNDO: ISS Y
17	B6533672	11/8/2022 7:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
460	1564	11/8/2022 14:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
82	784	11/8/2022 8:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
44	844	11/8/2022 7:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
24	724	11/8/2022 7:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
24	724	11/8/2022 7:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	SPOIL BALI N
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306	1207	11/8/2022 12:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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661	1468	11/8/2022 18:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
660	1467	11/8/2022 18:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
167	869	11/8/2022 11:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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63	963	11/8/2022 8:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
502	1204	11/8/2022 17:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
449	1356	11/8/2022 15:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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707	1514	11/8/2022 19:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
275	876	11/8/2022 13:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
276	877	11/8/2022 13:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
383	1085	11/8/2022 16:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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617	1526	11/8/2022 17:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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271	1273	11/8/2022 11:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
742	1545	11/8/2022 18:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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413	1115	11/8/2022 16:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
535	1239	11/8/2022 18:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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231	933	11/8/2022 12:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
291	797	11/8/2022 15:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
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415	1322	11/8/2022 14:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 1			
574	1278	11/8/2022 19:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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193	895	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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371	1172	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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209	1110	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
371	1274	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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69	770	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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182	682	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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402	908	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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690	1598	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
113	914	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
173	1076	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
103	1003	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
188	890	11/8/2022 11:55	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
100	901	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
225	1126	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
204	907	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
317	919	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
561	1164	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
320	922	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
114	1017	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
562	1165	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
48	549	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
171	674	11/8/2022 12:11	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
586	1392	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
269	1069	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
261	966	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
468	1371	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
606	1510	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
272	1072	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
60	861	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
324	830	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
53	853	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
207	1107	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
206	1106	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 15			
466	1369	11/8/2022 15:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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51	951	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
598	1502	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
143	946	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
59	760	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
24	824	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
311	1013	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
258	960	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
64	765	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
396	1202	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
703	1709	11/8/2022 19:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
147	948	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
445	1348	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
478	1381	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
477	1283	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
313	1119	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
153	855	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
35	436	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
230	731	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
430	1135	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
144	1044	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
385	889	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
181	986	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
68	768	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
866	1974	11/8/2022 19:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
329	1033	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
8	508	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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629	1436	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
192	493	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
600	1504	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
201	1102	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
441	1348	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
599	1503	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
286	788	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
367	1173	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
573	1380	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
379	1085	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
203	907	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
202	906	11/8/2022 13:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
5	705	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
5	705	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
5	706	11/8/2022 7:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
6	506	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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301	1003	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
128	428	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
114	817	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
75	776	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
4	304	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
206	908	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
438	1142	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
302	1004	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
436	1540	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
205	1206	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
221	924	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
27	727	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
33	434	11/8/2022 8:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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22	622	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
876	1987	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
569	1475	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
568	1474	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
238	639	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
301	703	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
318	824	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
63	464	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
239	640	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	17	SPOIL BALI N
239	640	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
239	643	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
252	654	11/8/2022 17:37	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
392	1293	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
562	1266	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
875	1986	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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86	887	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
135	1038	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
736	1543	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
189	1092	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
737	1544	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
132	1035	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
627	1633	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
130	1033	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
131	431	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
427	1234	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
241	943	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
240	942	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
694	1802	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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22		11/8/2022 8:06	REGULAR_	5010		ROSEVILLE CITY	12	UPDATE VI N
22	724	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
31	831	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
618	1420	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
68	769	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
66	767	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
209	913	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
655	1564	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
273	1073	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
491	1297	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
47	749	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
1	601	11/8/2022 7:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
194	1095	11/8/2022 11:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
342	1143	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
491	1298	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
598	1405	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
599	1406	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
296	802	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
237	941	11/8/2022 14:00	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
237	941	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
237	945	11/8/2022 14:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
241	742	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
69	770	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
212	914	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
156	957	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
698	1501	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
362	1066	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
525	1230	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
396	1099	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
379	982	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
248	753	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
452	960	11/8/2022 18:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
451	959	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
575	1281	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
573	1279	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
574	1280	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
572	1278	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
746	1549	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
400	1201	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
622	1424	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
358	1259	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
648	1554	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
647	1553	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
154	855	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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644	1553	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
48	548	11/8/2022 8:10	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
126	527	11/8/2022 12:52	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
125	526	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
426	1232	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
552	1558	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
86	786	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
225	927	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
295	797	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
400	1106	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
401	1107	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
70	970	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
382	1086	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
678	1684	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
427	1233	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
325	1228	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
339	1045	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
339	841	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
114	414	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
82	883	11/8/2022 8:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
338	840	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
557	1563	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
156	557	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
428	935	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
505	1312	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
67	967	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
412	1015	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
268	773	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
80	1081	11/8/2022 8:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
130	1131	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
79	1080	11/8/2022 8:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
405	1108	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
405	1108	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
405	1130	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
406	1109	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
507	1212	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
447	1254	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
255	1157	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
215	1015	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
216	1016	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
148	448	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 1			
367	969	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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34	736	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
409	1114	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
453	1356	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
48	1148	11/8/2022 7:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
76	776	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
134	835	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
616	1423	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
740	1547	11/8/2022 19:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
649	1456	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
648	1455	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
59	559	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
430	1033	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
276	1180	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
29	430	11/8/2022 8:08	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
253	758	11/8/2022 14:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
254	759	11/8/2022 14:58	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
237	741	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
483	1587	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
238	1339	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
24	924	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
613	1415	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
150	1250	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
154	1254	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
39	839	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
458	1365	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
246	1150	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
220	1026	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
93	893	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
413	1214	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
221	1027	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
290	1192	11/8/2022 13:42	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
559	1565	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
788	1896	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
649	1456	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
648	1455	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
419	1326	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
396	999	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
73	775	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
30	630	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
159	560	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
15	315	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
591	1293	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
366	1370	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
268	1172	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
653	1761	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
133	1033	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
422	1228	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
59	860	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
713	1520	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
577	1583	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
578	1584	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
414	1116	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
113	815	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
186	888	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
426	1132	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
278	1084	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
436	1142	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
205	806	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
157	659	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
350	1156	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
60	760	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
253	854	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
425	1226	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
339	1440	11/8/2022 11:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
490	1194	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
467	1268	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
468	1269	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
640	1447	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
375	1181	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
213	1019	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
619	1421	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
378	1080	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
361	1162	11/8/2022 13:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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126	627	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
516	1220	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
183	983	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
584	1188	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
1	701	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
398	1104	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
227	930	11/8/2022 13:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
501	1307	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
551	1457	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
446	953	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
291	1092	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 15.			
637	1444	11/8/2022 18:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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199	902	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
228	930	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
481	1384	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
122	823	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
482	1385	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
425	1131	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
18	518	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
128	529	11/8/2022 12:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
127	528	11/8/2022 12:56	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
580	1387	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
69	870	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
290	1294	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
109	909	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
90	1091	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
88	1089	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
367	1270	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
369	1272	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
368	1271	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
123	624	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
370	1472	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
88	388	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
236	1337	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
482	1390	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
89	389	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
140	940	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
128	729	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
12	812	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
154	955	11/8/2022 9:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
704	1511	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
632	1541	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
78	1178	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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493	1198	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
432	1136	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
150	853	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
197	900	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
335	1041	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
334	1040	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
20	421	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
257		11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	15	UPDATE VI N
257	1259	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
303	1205	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
331	1432	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
427	1133	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
794	1703	11/8/2022 19:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
38	338	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
41	743	11/8/2022 8:34	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
692	1499	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
691	1498	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
499	1405	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
23	623	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
146	647	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
479	1184	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
651	1557	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
280	1086	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
257	959	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
45	746	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
383	1087	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
490	1296	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
98	998	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
382	1285	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
663	1669	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
435	1141	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
442	1248	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
456	1359	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
373	1276	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
382	1084	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
211	812	11/8/2022 11:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
516	1424	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
754	1663	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
301	1107	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
302	1108	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
602	1511	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
269	774	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
768	1677	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
585	1491	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
586	1492	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
468	1572	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
406	1213	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
189	989	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
571	1174	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
402	1005	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
242	843	11/8/2022 12:39	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
111	911	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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486	1389	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
441	1545	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
106	1107	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
563	1370	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
38	740	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
442	1148	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
440	1146	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
71	872	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
477	1278	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
667	1576	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
489	1397	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
52	952	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
737	1845	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
109	610	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
63	564	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
60	561	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
313	1017	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
35	735	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
329	1031	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
219	820	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
218	819	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
197	899	11/8/2022 11:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
454	1158	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
318	1119	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
636	1438	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
645	1452	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
166	668	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	4	SPOIL BALI N
166	668	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
166	672	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
311	1212	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
646	1453	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
38	938	11/8/2022 7:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
72	572	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
265	1167	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
193	594	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
192	593	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
580	1488	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
581	1487	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
97	898	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
268	1369	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
531	1337	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
33	933	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
34	934	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
35	935	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
403	1306	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
294	696	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
295	697	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
428	1229	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
678	1481	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
585	1387	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
406	1112	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
360	1167	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
362	1168	11/8/2022 14:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
364	1170	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
363	1169	11/8/2022 14:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
7	807	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
308	1210	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
129	929	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
177	677	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
288	1089	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
164	464	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	18	SPOIL BALI N
164	464	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
164	473	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
186	888	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
151	853	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
259	961	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
150	852	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
159	862	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
160	863	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
318	920	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
30	530	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
684	1593	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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644	1650	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
133	1034	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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135	1036	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
69	869	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
198	901	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
289	994	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
290	995	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
253	958	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
506	1210	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
263	965	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
254	855	11/8/2022 12:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL			
457	1360	11/8/2022 15:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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234	1038	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
233	1037	11/8/2022 11:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
504	1208	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
503	1207	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
76	576	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
3	303	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
93	793	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
133	835	11/8/2022 10:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
421	1126	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
426	1530	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
231	732	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
561	1368	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
497	1199	11/8/2022 17:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
248	1054	11/8/2022 11:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
595	1501	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
14	614	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
450	1353	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
192	894	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
302	1204	11/8/2022 14:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
76	877	11/8/2022 8:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
396	1100	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
397	1101	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
456	1161	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
306	908	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
307	909	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
663	1771	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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56	856	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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122	823	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
783	1891	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
784	1892	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
410	1514	11/8/2022 13:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
702	1509	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
347	1154	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
419	1022	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
463	1269	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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36	1136	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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270	972	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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257	1159	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
340	1246	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
340	1246	11/8/2022 12:51	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
340	1252	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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48	848	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
329	1232	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
94	994	11/8/2022 8:27	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
459	1165	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
352	1259	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
101	1001	11/8/2022 8:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
100	1000	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
58	759	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
222	723	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
584	1391	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
384	1191	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
752	1860	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
551	1358	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
417	1224	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
718	1826	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
445	1252	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
272	774	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
422	1229	11/8/2022 15:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
239	1043	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
904	2015	11/8/2022 19:52	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
904	2015	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
904	2019	11/8/2022 19:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
11	811	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
193	896	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
117	617	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
556	1363	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
753	1861	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
12	812	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
370	874	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
668	1475	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
337	1039	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
56	756	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
58	758	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
87	787	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
115	415	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N

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PII MCL 15.243(1)(a)

716	1523	11/8/2022 19:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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167	768	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
123	924	11/8/2022 9:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
53	953	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
473	1274	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
533	1335	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
830	1938	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
702	1810	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
658	1664	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
451	1153	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
337	939	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
71	571	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
352	855	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
395	1098	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
305	1106	11/8/2022 12:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
612	1518	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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326	1028	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
91	691	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
283	885	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
441	1044	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
351	1158	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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619	1525	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
578	1684	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
19	319	11/8/2022 9:11	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
487	1189	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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155	1058	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
156	1059	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
339	1145	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
480	1584	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
96	798	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
14	814	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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707	1510	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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385	1487	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
428	1532	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
230	1130	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
320	826	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
580	1382	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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365	871	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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343	1347	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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672	1479	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
356	1058	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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182	1183	11/8/2022 10:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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481	1585	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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222	1022	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
266	968	11/8/2022 13:42	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
117	618	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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146	446	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
282	1088	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
652	1558	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
210	1212	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
235	1237	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
124	1224	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
635	1641	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
634	1640	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
165	1066	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
515	1219	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
136	936	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
13	713	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
293	995	11/8/2022 14:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
602	1404	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
601	1403	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
352	1158	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
45	645	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
214	815	11/8/2022 11:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
314	1219	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
315	1220	11/8/2022 12:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
448	1150	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
464	1367	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
45	1047	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
114	615	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
196	1001	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
157	859	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
266	970	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
23	723	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
272	974	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
492	1197	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
3	703	11/8/2022 7:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
136	637	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
135	636	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
317	1019	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
194	698	11/8/2022 13:01	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
648	1756	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
646	1754	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
647	1755	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
285	790	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
193	1094	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
193	998	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
23	823	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
741	1849	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
150	1050	11/8/2022 9:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
673	1581	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
126	727	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
607	1513	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
158	859	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
242	1042	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
511	1616	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
243	844	11/8/2022 12:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
590	1194	11/8/2022 19:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
286	988	11/8/2022 14:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
549	1455	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
591	1195	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
536	1338	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
326	828	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
449	1052	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
304	1111	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
535	1337	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
94	594	11/8/2022 9:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
278	780	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
194	795	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
587	1191	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
375	1477	11/8/2022 12:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
388	1295	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
453	1360	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
79	780	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
653	1562	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
170	1171	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
102	804	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
515	1620	11/8/2022 15:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
900	2011	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
45	545	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
127	1027	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
693	1496	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
870	1980	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
174	875	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
574	1580	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
907	2020	11/8/2022 19:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
298	1399	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
208	1309	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
256	961	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
692	1495	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
691	1494	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
457	1258	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
606	1712	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
3	1103	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
78	780	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
51	1052	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
24	924	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
338	1040	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
23	923	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
738	1545	11/8/2022 19:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
220	922	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
149	649	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
26	726	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
314	1016	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
117		11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	15	UPDATE VI N
117	1118	11/8/2022 9:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
156	456	11/8/2022 17:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
644	1550	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
115	916	11/8/2022 9:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
39	839	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
595	1402	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
526	1432	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
104	905	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
234	1138	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
235	1139	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
431	1034	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
432	1035	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
422	1325	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
570	1276	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
570	1276	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
570	1291	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
171	572	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
140	641	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
659	1462	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
618	1425	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
63	864	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
197	901	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
308	1010	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
7	707	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
455	1262	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
286	988	11/8/2022 14:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
124	725	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
491	1196	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
303	1005	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
273	775	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
553	1257	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
568	1274	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
457	1161	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
95	896	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
418	1120	11/8/2022 16:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
26	726	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
312	714	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
347	1148	11/8/2022 13:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
409	1112	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
409	1112	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
409	1123	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
491	1394	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
12	712	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
11	711	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
405		11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
405	1211	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
532	1538	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
332	1336	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
441	1147	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
460	1167	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
459	1166	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
190	990	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
428	1329	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
302	1109	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
400	904	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
324	1026	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
378	882	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
478	1381	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
720	1828	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
216	1022	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
153	754	11/8/2022 10:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
291	793	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
350	1251	11/8/2022 13:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
118	918	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
124	525	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
123	524	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
496	1404	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
774	1683	11/8/2022 19:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
33	933	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
463	1170	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
519	1525	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
177	1077	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
141	441	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
203	707	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
668	1471	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
679	1486	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
261	1362	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
92	592	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
285	787	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
383	889	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
425	1128	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
703	1506	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
179	1079	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
267	768	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
103	1203	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
344	850	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
257	1057	11/8/2022 11:42	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
77	1177	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
69	470	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N

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					PII (MCL			
304	1006	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
132	834	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
505	1209	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
133	835	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
567	1673	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
370	876	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
378	1382	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
379	1383	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
524	1330	11/8/2022 16:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
369	875	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
523	1329	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
216	1117	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
744	1547	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
556	1459	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
475	1276	11/8/2022 15:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
327	1128	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
60	960	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
7	807	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
326	1127	11/8/2022 13:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
26	726	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
57	1157	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
719	1522	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
552	1155	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
25	725	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
582	1490	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
437	1243	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
419	1226	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
19	819	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
277	779	11/8/2022 16:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
509	1412	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
474	1275	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
276	776	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
309	1214	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
18	818	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
141	944	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
69	969	11/8/2022 8:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
514	1117	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
77	778	11/8/2022 8:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
279	981	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
245	1045	11/8/2022 11:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
244	1044	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
280	982	11/8/2022 13:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
263	1364	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
222	1028	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
108	809	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
667	1474	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
171	1072	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
172	1073	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
82	783	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
9	709	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
392	1094	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
144	847	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
908	2021	11/8/2022 19:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
174	1077	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
722	1529	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
145	645	11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
208	708	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
410	914	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
369	1270	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
368	1269	11/8/2022 14:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
152	854	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
399	1205	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
6	606	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
126	1026	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
292	794	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
364	1165	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
43	1045	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
308	1109	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
596	1702	11/8/2022 16:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
323	825	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
191	492	11/8/2022 19:09	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
435	1140	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
320	1126	11/8/2022 13:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
53	454	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
180	581	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
234	1134	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
52	1053	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
104	605	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
134	836	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
733	1536	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
71	1171	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
75	575	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
138	638	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
153	855	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
487	1192	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
720	1527	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
44	745	11/8/2022 7:48	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
156	858	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
369	1073	11/8/2022 16:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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143	845	11/8/2022 10:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
774	1882	11/8/2022 18:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
448	1552	11/8/2022 14:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
59	760	11/8/2022 8:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
60	761	11/8/2022 8:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
105	905	11/8/2022 8:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
4	904	11/8/2022 7:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
5	905	11/8/2022 7:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
185	586	11/8/2022 15:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
274	1178	11/8/2022 11:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	SPOIL BALI N
274	1178	11/8/2022 11:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
274	1189	11/8/2022 11:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
456	1158	11/8/2022 17:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
273	1177	11/8/2022 11:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
228	930	11/8/2022 12:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
56	756	11/8/2022 7:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
538	1240	11/8/2022 18:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
90	491	11/8/2022 11:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
574	1177	11/8/2022 19:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
537	1140	11/8/2022 18:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
196	797	11/8/2022 11:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
538	1441	11/8/2022 17:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
109	910	11/8/2022 8:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
434	1037	11/8/2022 16:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
479	1382	11/8/2022 16:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	SPOIL BALI N
479	1382	11/8/2022 16:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
479	1392	11/8/2022 16:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
308	1014	11/8/2022 15:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
278	1182	11/8/2022 11:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
207	909	11/8/2022 12:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
549	1251	11/8/2022 18:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
392	1096	11/8/2022 17:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
217	920	11/8/2022 12:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
189	1190	11/8/2022 10:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
32	832	11/8/2022 7:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
21	721	11/8/2022 7:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
23	723	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
22	722	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
160	1061	11/8/2022 10:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
429	936	11/8/2022 18:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
257	659	11/8/2022 17:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
360	866	11/8/2022 17:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
486	1394	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
505	1510	11/8/2022 16:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
503	1508	11/8/2022 16:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
323	1130	11/8/2022 13:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
391	1197	11/8/2022 14:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
332	834	11/8/2022 17:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
403	1105	11/8/2022 16:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
404	1106	11/8/2022 16:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
899	2010	11/8/2022 19:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
504	1311	11/8/2022 16:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
220	924	11/8/2022 13:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
55	757	11/8/2022 9:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
118	418	11/8/2022 16:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
29	329	11/8/2022 10:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
117	417	11/8/2022 16:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
109	1012	11/8/2022 8:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
468	1172	11/8/2022 17:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
550	1254	11/8/2022 18:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
41	841	11/8/2022 7:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
495	1398	11/8/2022 17:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
496	1399	11/8/2022 17:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
494	1397	11/8/2022 17:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
293	995	11/8/2022 14:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
168	872	11/8/2022 12:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
238	1038	11/8/2022 11:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
149	949	11/8/2022 9:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
249	951	11/8/2022 12:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
226	1032	11/8/2022 11:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
284	1385	11/8/2022 11:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
2	1002	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	SPOIL BALI N
2	1002	11/8/2022 7:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
2	1015	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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175	476	11/8/2022 18:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
3	1003	11/8/2022 7:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
320	1022	11/8/2022 15:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
527	1633	11/8/2022 15:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
409	1312	11/8/2022 16:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
124	825	11/8/2022 9:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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117	820	11/8/2022 10:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
76	877	11/8/2022 7:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
107	608	11/8/2022 10:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
295	801	11/8/2022 16:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
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234	835	11/8/2022 12:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
233	834	11/8/2022 12:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
501	1208	11/8/2022 19:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
246	949	11/8/2022 13:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
500	1207	11/8/2022 19:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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186	787	11/8/2022 11:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
178	978	11/8/2022 10:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
344	1150	11/8/2022 13:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
494	1402	11/8/2022 15:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
495	1403	11/8/2022 15:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
492	1298	11/8/2022 16:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
347	1049	11/8/2022 15:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
362	1065	11/8/2022 16:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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129	930	11/8/2022 9:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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270	672	11/8/2022 18:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
2	702	11/8/2022 7:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
257	959	11/8/2022 13:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
290	992	11/8/2022 14:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
308	814	11/8/2022 16:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
497	1403	11/8/2022 16:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
610	1516	11/8/2022 18:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
609	1515	11/8/2022 18:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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467	1174	11/8/2022 18:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
466	1173	11/8/2022 18:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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148	851	11/8/2022 11:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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573	1176	11/8/2022 19:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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590	1499	11/8/2022 17:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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286	991	11/8/2022 15:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
429	1135	11/8/2022 18:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
125	826	11/8/2022 10:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
207	1111	11/8/2022 10:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
126	829	11/8/2022 10:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
73	973	11/8/2022 8:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
72	972	11/8/2022 8:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
216	1120	11/8/2022 10:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
214	916	11/8/2022 12:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
215	1119	11/8/2022 10:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
492	1398	11/8/2022 16:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
491	1397	11/8/2022 16:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
121	1122	11/8/2022 9:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
548	1350	11/8/2022 16:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
84	384	11/8/2022 14:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
549	1351	11/8/2022 16:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
488	1193	11/8/2022 17:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
463	1169	11/8/2022 19:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
520	1225	11/8/2022 18:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
449	1155	11/8/2022 18:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
76	376	11/8/2022 13:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
464	1170	11/8/2022 19:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
464	1170	11/8/2022 19:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	SPOIL BALI N
464	1185	11/8/2022 19:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
465	1171	11/8/2022 19:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
465	1171	11/8/2022 19:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	SPOIL BALI N
465	1186	11/8/2022 19:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
122	1123	11/8/2022 9:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
19	719	11/8/2022 7:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
443	1148	11/8/2022 17:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
306	1008	11/8/2022 15:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
444	1149	11/8/2022 17:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
561	1467	11/8/2022 17:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
190	1291	11/8/2022 9:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
191	1292	11/8/2022 9:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
613	1719	11/8/2022 16:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
421	925	11/8/2022 19:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
513	1314	11/8/2022 16:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
515	1316	11/8/2022 16:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
715	1522	11/8/2022 19:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
480	1182	11/8/2022 17:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
481	1183	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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131	1231	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
132	1232	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
139	1039	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
174	475	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
311	1017	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
167	868	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
13	1113	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
7	507	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
90	390	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
91	391	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
270	1170	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
165	866	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
39	339	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
97	799	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
314	1115	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
641	1748	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
686	1594	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
571	1377	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
60	861	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
348	1052	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
363	1270	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
314	820	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
311	817	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
243	1049	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
117	918	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
626	1433	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
550	1255	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
166	868	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
269	671	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
557	1460	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
315	917	11/8/2022 14:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
227	929	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
685	1492	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
402	1208	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
495	1296	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
497	1405	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
355	1162	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
126	1226	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
92	692	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
33	533	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
232	936	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
232	936	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
232	936	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
313	715	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
397	1000	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
402	1303	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
334	836	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
415	1121	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
341	1043	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
117	518	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
746	1553	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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609	1513	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
445	1450	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
178	979	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
642	1449	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
237	738	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
227	1128	11/8/2022 12:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
38	638	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
355	1256	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
250	952	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
330	1032	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
347	1051	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
446	1253	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
339	1140	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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865	1973	11/8/2022 19:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
364	868	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
300	802	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
299	801	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
176	676	11/8/2022 12:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
14	714	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
115	818	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
90	990	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
90	990	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
90	1005	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
557	1465	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
205	705	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
204	704	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
101	601	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
382	888	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
412	1115	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
346	1048	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
74	374	11/8/2022 13:36	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
429	933	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
386	890	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 15.243(1)(a))			
575	1581	11/8/2022 17:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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469	1474	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
24	724	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
334	1036	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
114	1015	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
623	1425	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
351	1252	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
382	1283	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
482	1187	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
272	674	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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429	1330	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
249	750	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
376	1078	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
61	861	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
660	1569	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
128	1031	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
770	1574	11/8/2022 19:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
166	1069	11/8/2022 9:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
46	1048	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
270	972	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
140	1040	11/8/2022 9:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
214	1020	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
142	843	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
551	1256	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
256	761	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
328	830	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
74	574	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
360	864	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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359	863	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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315	1319	11/8/2022 13:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
256	1160	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
395	901	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
68	770	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
149	1249	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
218	1319	11/8/2022 10:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
374	1175	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
331	1234	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
111	813	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
110	812	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
162	963	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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68	968	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
368	872	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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62	463	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
396	902	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
614	1416	11/8/2022 17:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
264	969	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
504	1107	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
106	507	11/8/2022 11:55	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
55	856	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
230	734	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
29	829	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
82	784	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
81	783	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
229	733	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
306	1208	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
24	324	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
301	1203	11/8/2022 14:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
173	875	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
175	877	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
119	419	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
443	1448	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
33	933	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
497	1202	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
472	1477	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
11	911	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
132	733	11/8/2022 9:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
356	862	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
532	1338	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
732	1641	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
361	963	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
243	1344	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
670	1579	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
669	1578	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
23	424	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
205	1105	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
24	425	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
829	1937	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
572	1678	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
549	1655	11/8/2022 15:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
299	1400	11/8/2022 11:21	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
548	1654	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
112	813	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
348	1050	11/8/2022 15:37	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
137	1037	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
129	630	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
599	1406	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
108	1011	11/8/2022 8:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
262	767	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
601	1507	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
666	1473	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
58	859	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
28	1029	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
57	858	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
210	1311	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
395	899	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
84	585	11/8/2022 9:47	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
83	584	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
231	735	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
75	476	11/8/2022 10:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
474	1281	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
34	734	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
519	1224	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
709	1618	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
36	737	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
675	1584	11/8/2022 18:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
129	629	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
130	630	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
67	769	11/8/2022 9:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
74	875	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
8	408	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
324	926	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
4	704	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
362	866	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
283	985	11/8/2022 13:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
169	969	11/8/2022 10:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
452	1556	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
228	930	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
213	1215	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
446	1451	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
333	1337	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
52	753	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
125	425	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
527	1533	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
605	1514	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
285	989	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
293	1099	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
681	1488	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
422	926	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
423	927	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
424	928	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
195	898	11/8/2022 12:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
433	1234	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
378	1285	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
377	1284	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
223	1127	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
224	1128	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
65	565	11/8/2022 8:40	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
107	1207	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
158	759	11/8/2022 10:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
462	1168	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
82	784	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
529	1231	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
172	T6007785	11/8/2022 15:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
157	1158	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
494	1198	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
157	1257	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
156	1256	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
304	1110	11/8/2022 12:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
323	1129	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
93	494	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
260	1361	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
251	1253	11/8/2022 11:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
396	1400	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
330	1431	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
380	983	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
75	975	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
159	861	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
160	862	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
550	1453	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
450	1155	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
100	1000	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
199	1099	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
173	978	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
43	543	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
42	542	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
307	1212	11/8/2022 12:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
297	1001	11/8/2022 15:05	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
391	1298	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
174	876	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
518	1121	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
157	758	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
245	846	11/8/2022 12:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
287	689	11/8/2022 18:25	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
166	1067	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
527	1430	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
168	968	11/8/2022 10:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
220	724	11/8/2022 13:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
179	580	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
285	987	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
390	1093	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
563	1471	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
461	1167	11/8/2022 18:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
417	1123	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
416	1122	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
167	869	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
242	1048	11/8/2022 11:50	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
142	1143	11/8/2022 9:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
488	1190	11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
407	1412	11/8/2022 14:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
403	1304	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
600	1506	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
458	1165	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
519		11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	9	UPDATE VI N
519	1625	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
358	1362	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
621	1530	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
133	835	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
38	938	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
479	1286	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
652	1454	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
325	1231	11/8/2022 12:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
411	1314	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
26	926	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
280	682	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
49	949	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
373	1079	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
574	1380	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
533	1441	11/8/2022 16:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
475	1078	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
179	1082	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
261	1165	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
244	1246	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
202	1203	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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510	1516	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
260	1164	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
658	1465	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
17	317	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
373	1475	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
222	1224	11/8/2022 10:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
183	1184	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
147	447	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
313	1114	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
266	867	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
312	1113	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
216	1218	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
530	1536	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
49	949	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
677	1480	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
1	901	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
546	1348	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
545	1347	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
479	1181	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
47	748	11/8/2022 7:53	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
46	747	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
107	907	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
273	675	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
419	1320	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
272	1174	11/8/2022 13:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
127	427	11/8/2022 16:44	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
742	1850	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
208	910	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
381	1083	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
440	1241	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
439	1240	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
302	1006	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
647	1653	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
303	805	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
303	1110	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
485	1393	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
34	535	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
6	806	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
5	805	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
653	1659	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
775	1579	11/8/2022 19:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
168	870	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N

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					PII (MCL 1			
732	1539	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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370	1072	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
91	792	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
97	997	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
252	1154	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
694	1501	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
186	888	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
256	958	11/8/2022 13:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
255	957	11/8/2022 13:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
152	854	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
125	1025	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
640	1546	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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70	771	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	6	SPOIL BALI N
70	771	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
70	775	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
353	856	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
557	1463	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
354	1160	11/8/2022 14:01	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
255	1155	11/8/2022 11:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
470	1373	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
267	1073	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
173	774	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
176	777	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
174	775	11/8/2022 10:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
354	956	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
355	957	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
357	959	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
356	958	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
310	1117	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
27	827	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
220	821	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
320	1225	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
139	439	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
316	1217	11/8/2022 12:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
159	959	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
424	1325	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
171	1071	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
420	924	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
275	778	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
73	973	11/8/2022 7:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
162	763	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
582	1185	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
177	778	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
528	1131	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
681	1789	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
747	1855	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
67	1167	11/8/2022 7:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
176	1177	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
278	982	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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513	1419	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
626	1433	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
516	1218	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
265	967	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
458	1160	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
731	1539	11/8/2022 19:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
909	2022	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
699	1705	11/8/2022 19:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
108	909	11/8/2022 8:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
191	895	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
199	1200	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
444	1146	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
97	799	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
66	567	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
136	1037	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
532	1339	11/8/2022 16:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
181	482	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
730	1537	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
180	1280	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
50	551	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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867	1975	11/8/2022 19:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
252	1056	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
92	893	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
117	918	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
179	1279	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
48	449	11/8/2022 9:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
495	1302	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
493	1396	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
25	727	11/8/2022 8:00	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
466	974	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
289	1292	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

					PII (MCL 1			
470	1172	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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251	956	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
53	1054	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
116	917	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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679	1587	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
439	1145	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
440	1146	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
553	1255	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
343	1045	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
283	1187	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
56	1156	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
556	1258	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
216	920	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
512	1216	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
242	746	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
243	747	11/8/2022 14:38	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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350	1052	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
539	1241	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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96	996	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
96	996	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
96	1007	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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283	1089	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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20	920	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
28	728	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
29	729	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
6	906	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
677	1785	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
543	1245	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
173	874	11/8/2022 11:11	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
412	1319	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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419	1220	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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342	1245	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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187	1288	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
439	946	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
148	849	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
456	1160	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
387	1089	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
72	773	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
169	973	11/8/2022 10:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
430	937	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
430	937	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	4	SPOIL BALI N
430	954	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
637	1643	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
638	1644	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
551	1454	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
712	1519	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
103	904	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
153	856	11/8/2022 11:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
155	858	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
184	886	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
216	1116	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
311	1213	11/8/2022 14:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
168	1068	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
41	341	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
42	342	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
675	1482	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
495	1301	11/8/2022 16:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
354	1056	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
17	717	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
742	1651	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
269	973	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
244	946	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
549	1253	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
548	1252	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
170	1270	11/8/2022 9:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
743	1652	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
383	1485	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
384	1486	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
785	1694	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
356	1263	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
424	931	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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241	745	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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385	1191	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
294	996	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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177	683	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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84	784	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
156	857	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
587	1294	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
136	837	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
860	1968	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
271	1077	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
726	1533	11/8/2022 19:22	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
700	1503	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
699	1502	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
309	1410	11/8/2022 11:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
87	987	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
113	816	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
172	773	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
175	776	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
15	815	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
306	1107	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
265	866	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
212	813	11/8/2022 11:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
398	1301	11/8/2022 15:50	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
187	889	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
66	966	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
402	1104	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
126	927	11/8/2022 9:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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7	907	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
152	953	11/8/2022 9:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
466	1369	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
289	1190	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
215	917	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
348	1251	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
369	1471	11/8/2022 12:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
697	1606	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
609	1416	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 15			
608	1415	11/8/2022 18:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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131	833	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
234	938	11/8/2022 13:56	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
135	635	11/8/2022 11:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
397	1198	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
270	775	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
314	1215	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
212	1112	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
396	1098	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
523	1429	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
426	1329	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
683	1791	11/8/2022 17:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
551	1657	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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164	866	11/8/2022 10:48	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
273	978	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
100	700	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
193	895	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
331	1137	11/8/2022 13:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
330	1136	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
432	1137	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
73	774	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
304	1006	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
351	1254	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
658	1565	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
543	1451	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
483	1386	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
694	1497	11/8/2022 18:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
732	1540	11/8/2022 19:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
256	857	11/8/2022 12:57	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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376	1082	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
515	1217	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
470	1175	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
469	1174	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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377	1479	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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275	980	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
154	654	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
576	1582	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
200	1006	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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251	1352	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
249	1350	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
175	1176	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
77	779	11/8/2022 8:22	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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604	1406	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
84	786	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
272	977	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
199	901	11/8/2022 11:40	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
12	512	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
201	903	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
317	1418	11/8/2022 11:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
185	1086	11/8/2022 11:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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722	1830	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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152	553	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
287	992	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
493	1195	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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32	932	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
95	797	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
76	778	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
77	779	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
526	1532	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
36	836	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
435	1338	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
153	1253	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
464	972	11/8/2022 19:03	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
463	971	11/8/2022 19:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
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740	1649	11/8/2022 18:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
357	863	11/8/2022 17:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
206	607	11/8/2022 16:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
41	541	11/8/2022 7:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
133	633	11/8/2022 10:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
584	1492	11/8/2022 17:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
405	909	11/8/2022 18:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
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29	729	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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165	1068	11/8/2022 9:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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272	873	11/8/2022 13:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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263	969	11/8/2022 14:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	UNDO: ISS Y
263	969	11/8/2022 14:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
397	901	11/8/2022 18:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
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38	838	11/8/2022 7:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	SPOIL BALI N
38	838	11/8/2022 7:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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538	1141	11/8/2022 18:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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382	1085	11/8/2022 16:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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393	1496	11/8/2022 12:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
393	1498	11/8/2022 13:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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380	884	11/8/2022 17:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
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14	714	11/8/2022 7:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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93	894	11/8/2022 8:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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17	719	11/8/2022 7:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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213	614	11/8/2022 16:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
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191	691	11/8/2022 13:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

371	1177	11/8/2022	14:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
37	538	11/8/2022	8:03	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
492	1095	11/8/2022	17:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
468	1071	11/8/2022	17:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
474	1377	11/8/2022	17:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
201	602	11/8/2022	15:54	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
70	471	11/8/2022	10:18	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
246	948	11/8/2022	12:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
245	947	11/8/2022	12:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
353	1055	11/8/2022	15:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
432	1233	11/8/2022	15:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
230	1036	11/8/2022	11:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
476	1379	11/8/2022	16:03	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
699	1607	11/8/2022	19:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
475	1378	11/8/2022	16:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
555	1259	11/8/2022	18:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
191	991	11/8/2022	10:32	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
726	1834	11/8/2022	17:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
28	928	11/8/2022	7:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
449	1153	11/8/2022	17:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
547	1455	11/8/2022	16:34	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
674	1481	11/8/2022	18:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
305	1112	11/8/2022	13:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
503	1608	11/8/2022	15:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
444	1250	11/8/2022	15:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
394	1200	11/8/2022	14:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
744	1852	11/8/2022	17:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
349	1156	11/8/2022	14:19	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
309	815	11/8/2022	16:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
702	1509	11/8/2022	19:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
286	1288	11/8/2022	12:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
534	1341	11/8/2022	16:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
79	880	11/8/2022	8:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
314	1018	11/8/2022	15:28	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
241	943	11/8/2022	12:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
240	942	11/8/2022	12:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
246	648	11/8/2022	17:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
237	638	11/8/2022	17:09	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
310	1012	11/8/2022	14:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
541	1447	11/8/2022	17:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
226	929	11/8/2022	12:54	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
542	1448	11/8/2022	17:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
425	1328	11/8/2022	16:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
54	754	11/8/2022	7:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
186	991	11/8/2022	10:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
146	946	11/8/2022	9:26	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
187	992	11/8/2022	10:48	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
185	990	11/8/2022	10:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
73	874	11/8/2022	7:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
331	1132	11/8/2022	13:10	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
256	959	11/8/2022	13:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
462	970	11/8/2022	18:59	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
636	1743	11/8/2022	16:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
690	1493	11/8/2022	18:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
234	735	11/8/2022	14:53	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
250	1150	11/8/2022	11:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
333	1234	11/8/2022	13:17	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
649	1555	11/8/2022	18:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
757	1666	11/8/2022	19:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
397	1100	11/8/2022	16:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
456	1262	11/8/2022	15:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
693	1601	11/8/2022	19:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
461	1364	11/8/2022	15:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
280	782	11/8/2022	16:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
171	671	11/8/2022	12:44	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
574	1482	11/8/2022	16:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
457	1263	11/8/2022	15:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
284	1188	11/8/2022	11:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
279	781	11/8/2022	16:02	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
307	1009	11/8/2022	15:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
317	819	11/8/2022	16:45	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
300	1002	11/8/2022	14:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
392	896	11/8/2022	18:13	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
242	743	11/8/2022	15:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
179	679	11/8/2022	13:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
151	651	11/8/2022	11:52	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
180	680	11/8/2022	13:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
203	804	11/8/2022	11:25	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
202	803	11/8/2022	11:24	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
274	875	11/8/2022	13:27	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
623	1532	11/8/2022	17:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
27	428	11/8/2022	8:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
28	429	11/8/2022	8:06	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
871	1981	11/8/2022	19:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
219	720	11/8/2022	14:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
324	1125	11/8/2022	13:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
78	479	11/8/2022	10:38	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
373	1274	11/8/2022	14:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
162	1163	11/8/2022 9:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
163	1164	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
512	1617	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
666	1473	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
517	1523	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
262	966	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
19	819	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
720	1629	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
661	1468	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
312	1018	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
350	1257	11/8/2022 13:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
120	823	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
466	1471	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
121	824	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
506	1109	11/8/2022 17:55	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
186	487	11/8/2022 18:55	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
180	1181	11/8/2022 10:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
246	1248	11/8/2022 11:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
607	1613	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
375	1282	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
724	1832	11/8/2022 17:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
373	1180	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
47	848	11/8/2022 7:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
313	1019	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
465	1470	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
141	642	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
131	732	11/8/2022 9:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
452	1259	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
65	866	11/8/2022 7:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
547	1653	11/8/2022 15:39	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
431	1232	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
451	1354	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
53	653	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
362	964	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
164	1264	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
434	941	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
489	1494	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
643	1549	11/8/2022 18:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
82	982	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
337	1039	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
82	782	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
140	841	11/8/2022 10:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
81	781	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
456	1163	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
183	885	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
25	825	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
697	1605	11/8/2022 19:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
227	1127	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
121	522	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
122	523	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
439	1245	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
438	1244	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
147	748	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
148	749	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
430	1132	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
399	1503	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
436	1141	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
42	742	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
517	1623	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
55	955	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
80	780	11/8/2022 8:35	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
254	956	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
68	1069	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
646	1552	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
480	1383	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
99	599	11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
78	878	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
437	1238	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
514		11/8/2022 17:42	REGULAR_	5010		ROSEVILLE CITY	3	UPDATE VI N
514	1417	11/8/2022 17:41	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
269	1075	11/8/2022 12:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
910	2023	11/8/2022 20:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
841	1949	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
842	1950	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
275	1177	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
260	861	11/8/2022 13:04	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
531	1437	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
259	860	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
502	1105	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
276	1178	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
248	1349	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
247	1348	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
305	1406	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
230	1232	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
174	876	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
109	609	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
101	1102	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
288	993	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
264	966	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
37	739	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
460	1166	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
112	815	11/8/2022 10:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
296	1001	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
395	998	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
217	717	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
422	1025	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
118	619	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
15	715	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
5	805	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
379	1081	11/8/2022 16:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
168	972	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
93	594	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
222	926	11/8/2022 13:30	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
434	1538	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
106	1206	11/8/2022 8:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
353	1256	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
617	1523	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
618	1524	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
417	1320	11/8/2022 16:09	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
113	514	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
35	835	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
514	1216	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
513	1215	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
475	1179	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
427	934	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
202	1008	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
201	1007	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
403	1204	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
474	1382	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
242	944	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
93	593	11/8/2022 9:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
95	797	11/8/2022 10:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
345	1047	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
346	1048	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
571	1277	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
248	1150	11/8/2022 12:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
59	859	11/8/2022 7:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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61	1062	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
137	938	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
340	1042	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
614	1421	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
376	1080	11/8/2022 16:54	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
213	915	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
310	1116	11/8/2022 13:02	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
103	1104	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
616	1622	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
666	1672	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
217	919	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
777	1581	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
447	1350	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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253	655	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
461	1267	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
460	1266	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
61	661	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
319	1224	11/8/2022 12:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
456	1560	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
683	1490	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
314	1016	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
546	1454	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
176	880	11/8/2022 12:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
221	1122	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
59	460	11/8/2022 9:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
58	459	11/8/2022 9:45	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
520	1326	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
519	1325	11/8/2022 16:47	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
303	1008	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
532	1236	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
193	993	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
62	862	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
192	992	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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432	1339	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
137	840	11/8/2022 11:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
190	894	11/8/2022 12:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
136	839	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
466	1168	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
465	1167	11/8/2022 17:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
229	1133	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
469	1171	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
564	1470	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
177	978	11/8/2022 10:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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339	1041	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
340	1042	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
319	1025	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
315	1116	11/8/2022 12:50	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
498	1205	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
497	1204	11/8/2022 19:25	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
466	1172	11/8/2022 19:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
119	822	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
562	1568	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
413	1016	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
438	1245	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
333	1039	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
586	1190	11/8/2022 19:29	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
583	1287	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
577	1384	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
790	1898	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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289	691	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
321	1127	11/8/2022 13:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
15	515	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
65	566	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
715	1518	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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318	820	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
220	1024	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
198	1004	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
248	951	11/8/2022 13:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
298	1000	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
521	1427	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
267	1167	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
522	1428	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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76	976	11/8/2022 8:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
522	1226	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
53	853	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
521	1225	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
520	1224	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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52	852	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
353	1055	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
571	1577	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
194	495	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	18	SPOIL BALI N
194	495	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
194	499	11/8/2022 19:36	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
352	1054	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
266	971	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
215	715	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
380	1181	11/8/2022 14:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
177	478	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
250	652	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
229	931	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
391	1093	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
793	1901	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
510	1215	11/8/2022 17:56	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
219	922	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
34	1035	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
564	1570	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
226	1026	11/8/2022 11:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
298	1000	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
89	789	11/8/2022 8:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
89	789	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	7	SPOIL BALI N
89	799	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
22	722	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
21	721	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
20	720	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
24	525	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
250	755	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
506	1414	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
505	1413	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
94	796	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
37	1137	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
46	946	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
459	1265	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
570	1576	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
572	1578	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
259	1163	11/8/2022 11:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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408	1309	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
352	1253	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
374	1476	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
524	1530	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
525	1531	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
433	1036	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
303	1005	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
24	524	11/8/2022 7:25	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
427	931	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
70	570	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
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701	1508	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
701	1609	11/8/2022 19:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
182	1082	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
259	1360	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
200	704	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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593	1599	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
46	646	11/8/2022 7:46	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
527	1231	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
526	1230	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
535	1138	11/8/2022 18:19	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
170	771	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
52	754	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
53	755	11/8/2022 8:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
183	1086	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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389	1292	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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127	1227	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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229	1029	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
130	832	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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770	1878	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
222	1123	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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224	1030	11/8/2022 11:27	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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387	1188	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
462	1365	11/8/2022 16:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
36	736	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
766	1874	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
640	1442	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
586	1288	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
195	897	11/8/2022 11:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
112	912	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
552	1254	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
400	1207	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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49	450	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
390	1492	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
362	1265	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
15	716	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
291	996	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
291	996	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
291	1010	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
41	442	11/8/2022 8:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
549	1555	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
325	727	11/8/2022 19:58	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
256	757	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
82	583	11/8/2022 9:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
290	1091	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
424	1225	11/8/2022 14:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
423	1224	11/8/2022 14:52	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
460	1261	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
559	1263	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
187	889	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
215	719	11/8/2022 13:40	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
687	1494	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
391	1493	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	9	SPOIL BALI N
391	1493	11/8/2022 12:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
391	1494	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
276	1080	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
279	1281	11/8/2022 12:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
65	965	11/8/2022 7:54	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
50	550	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
107	809	11/8/2022 9:06	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
77	878	11/8/2022 8:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
716	1523	11/8/2022 19:16	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
460	1465	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
25	625	11/8/2022 7:21	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
412	1218	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
135	935	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
369	1175	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
203	604	11/8/2022 15:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
127	627	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
562	1264	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
45	546	11/8/2022 8:12	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
639	1545	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
639	1545	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	8	UNDO: RE. Y
639	1545	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	8	REJECT BA N
639	1545	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
639	1562	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
34	435	11/8/2022 8:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
241	944	11/8/2022 13:32	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
252	1052	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
322	1028	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
266	1066	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
478	1180	11/8/2022 17:36	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
409	1111	11/8/2022 16:31	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
81	881	11/8/2022 8:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
91	1092	11/8/2022 8:39	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
503	1309	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
478	1284	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
493	1399	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
475	1282	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
78	780	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
442	1349	11/8/2022 15:01	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
296	698	11/8/2022 18:34	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
256	658	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
255	1059	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
450	1357	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
255	657	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
275	1175	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
375	1077	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
207	808	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
244	1050	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
336	1239	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
162	864	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
325	1031	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
376	1177	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
98	798	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
36	736	11/8/2022 7:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
90	890	11/8/2022 8:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
406	910	11/8/2022 18:33	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
430	1236	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
375	1176	11/8/2022 13:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
285	987	11/8/2022 14:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
96	597	11/8/2022 9:56	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
4	904	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
474	1180	11/8/2022 19:33	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
387	1090	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
372	1074	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
370	1073	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
462	1263	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
39	1139	11/8/2022 7:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
455	1162	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
242	945	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
459	1464	11/8/2022 15:40	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
516	1621	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
324	726	11/8/2022 19:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
164	565	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
492	1497	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
410	1112	11/8/2022 16:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
675	1783	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
2	902	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
254	959	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
181	885	11/8/2022 12:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
238	942	11/8/2022 14:02	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
546	1250	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
25	525	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
604	1411	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
510	1317	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
511	1318	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
388	1090	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
92	794	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
141	742	11/8/2022 9:59	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
140	741	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
142	844	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 1			
160	761	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
159	760	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
65	466	11/8/2022 10:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
150	551	11/8/2022 14:11	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
433	940	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
315	1218	11/8/2022 14:24	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
316	1219	11/8/2022 14:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
416	1222	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
715	1624	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
150	1053	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
526	1129	11/8/2022 18:14	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
92	992	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
485	1388	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
676	1584	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
675	1583	11/8/2022 19:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
621	1428	11/8/2022 18:09	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
709	1512	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
708	1511	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
5	705	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
38	738	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	14	SPOIL BALI N
38	738	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
38	739	11/8/2022 7:37	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
27	727	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
896	2007	11/8/2022 19:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
481	1185	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
482	1186	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
450	958	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
666	1774	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
371	1473	11/8/2022 12:21	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
339	1343	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
665	1773	11/8/2022 16:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
668	1776	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
493	1294	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
601	1408	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
608	1415	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
600	1407	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
17	717	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
154	1055	11/8/2022 10:34	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
43	544	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
588	1192	11/8/2022 19:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
695	1701	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
250	1056	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
390	1297	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
212	1116	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
544	1452	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
590	1496	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
535	1641	11/8/2022 15:30	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
534	1640	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
591	1497	11/8/2022 17:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
707	1815	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
272	1373	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
471	1575	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
178	1278	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
512	1214	11/8/2022 18:01	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
344	1046	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
207	711	11/8/2022 13:28	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
91	492	11/8/2022 11:14	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
481	1288	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
334	1141	11/8/2022 14:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
349	1450	11/8/2022 12:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
251	1055	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
271	773	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
383	1089	11/8/2022 17:24	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
127	830	11/8/2022 10:54	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
145	847	11/8/2022 10:20	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
570	1173	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
18	618	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
377	1280	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
471	1374	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
130	1030	11/8/2022 9:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
54	954	11/8/2022 7:35	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
53	953	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
180	1081	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
183	1084	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
501	1206	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
106	808	11/8/2022 9:05	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
398	1101	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
482	1189	11/8/2022 18:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
560	1466	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
224	728	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
17	817	11/8/2022 7:13	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
16	816	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
208	712	11/8/2022 13:29	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
26	1027	11/8/2022 7:25	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
584	1288	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
93	693	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
27	1028	11/8/2022 7:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
271	976	11/8/2022 14:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N

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					PII (MCL			
267	971	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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511	1317	11/8/2022 16:42	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
285	1086	11/8/2022 12:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
146	848	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
283	987	11/8/2022 14:42	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
337	1243	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
264	1070	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
308	1209	11/8/2022 12:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
301	1206	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
302	1207	11/8/2022 12:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
524	1226	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
240	1140	11/8/2022 11:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
518	1223	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
87	789	11/8/2022 8:45	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
208	1108	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
99	999	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
365	1069	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
151	1051	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
76	577	11/8/2022 9:32	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
476	1079	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
652	1561	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
677	1683	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
673	1781	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
672	1780	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
674	1782	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
568	1370	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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390	993	11/8/2022 16:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
511	1414	11/8/2022 17:39	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
85	1086	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
561	1263	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
560	1262	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
696	1702	11/8/2022 19:13	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
148	951	11/8/2022 10:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
83	484	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
297	999	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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272	777	11/8/2022 15:27	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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459	1266	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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397	1304	11/8/2022 14:14	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
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695	1803	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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667	1474	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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50	751	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
122	1222	11/8/2022 8:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
507	1209	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
274	676	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
121	1221	11/8/2022 8:43	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
236	637	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
5	1005	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
4	1004	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
533	1237	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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519	1321	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
341	1045	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
387	1194	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
11	511	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
12	512	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
319	1021	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
185	887	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
73	874	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
707	1616	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
706	1615	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
280	1184	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
726	1533	11/8/2022 19:39	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
723	1530	11/8/2022 19:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
405	1206	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
386	1193	11/8/2022 15:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
712	1519	11/8/2022 19:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
71	773	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
281	1185	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
338	1439	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MC			
725	1833	11/8/2022 17:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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169	970	11/8/2022 9:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
441	1146	11/8/2022 17:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
89	791	11/8/2022 8:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
41	741	11/8/2022 7:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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209	1015	11/8/2022 11:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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458	1164	11/8/2022 18:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
250	955	11/8/2022 14:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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304	810	11/8/2022 16:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
324	1026	11/8/2022 15:09	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
261	963	11/8/2022 13:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
474	1178	11/8/2022 17:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
773	1881	11/8/2022 18:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
323	1027	11/8/2022 15:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
170	1071	11/8/2022 10:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
602	1508	11/8/2022 18:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
584	1490	11/8/2022 17:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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624	1431	11/8/2022 18:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
63	763	11/8/2022 8:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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238	940	11/8/2022 13:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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249	954	11/8/2022 14:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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734	1842	11/8/2022 17:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
162	1262	11/8/2022 9:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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289	993	11/8/2022 14:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
89	791	11/8/2022 8:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
74	974	11/8/2022 8:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
398	1402	11/8/2022 14:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
51	551	11/8/2022 8:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
151	853	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
297	999	11/8/2022 14:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
551	1255	11/8/2022 18:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
468	1175	11/8/2022 18:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
372	1179	11/8/2022 14:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
418	1121	11/8/2022 16:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
129	831	11/8/2022 9:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
128	830	11/8/2022 9:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
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445	952	11/8/2022 18:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
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125	626	11/8/2022 10:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
315	1416	11/8/2022 11:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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137	738	11/8/2022 9:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
382	985	11/8/2022 16:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
438	1041	11/8/2022 17:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
576	1278	11/8/2022 19:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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210	1014	11/8/2022 10:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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75	775	11/8/2022 8:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
153	956	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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238	742	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
376	882	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
238	1138	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
133	1233	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
477	1581	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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400	1102	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	14	SPOIL BALI N
400	1120	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
417	1119	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
603		11/8/2022 19:50	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
603	1410	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
126	1027	11/8/2022 9:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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127	927	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
26	826	11/8/2022 7:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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415	1216	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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752	1555	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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348	1249	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
37	937	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
51	951	11/8/2022 7:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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98	499	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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226	730	11/8/2022 14:01	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
228	732	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
84	684	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
216	716	11/8/2022 14:19	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
512	1115	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
96	897	11/8/2022 8:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
213	917	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
459	1362	11/8/2022 15:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
492	1395	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
748	1551	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
747	1550	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
631	1637	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
144	644	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
591	1298	11/8/2022 19:53	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
545	1250	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
334	1135	11/8/2022 13:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
464	1169	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
456	1059	11/8/2022 17:18	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
542	1246	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
541	1245	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
341	843	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
340	842	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
579	1483	11/8/2022 18:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
376	1283	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
150	852	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
71	773	11/8/2022 8:18	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
3	903	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
1	901	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
129	730	11/8/2022 9:42	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
413	1314	11/8/2022 14:55	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
69	969	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
421	1328	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
423	1330	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
422	1329	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
11	911	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
433	1438	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
236	938	11/8/2022 12:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
310	1215	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
22	722	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
391	1095	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
21	721	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
20	820	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
21	821	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
404	910	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
214	916	11/8/2022 12:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
15	1115	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
29	729	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
30	730	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
589	1495	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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215	1116	11/8/2022 12:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
395	1099	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
633	1440	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
243	1144	11/8/2022 12:38	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
2	702	11/8/2022 7:01	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
19	721	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
75	576	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
234	1034	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
235	1035	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
517	1425	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
372	1279	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
144	846	11/8/2022 10:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
170	872	11/8/2022 10:53	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
475	1579	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
237	1239	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
239	1241	11/8/2022 11:19	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
210	1016	11/8/2022 11:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
257	1063	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
527	1232	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
124	625	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
607	1414	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
163	865	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
343	1444	11/8/2022 11:59	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
61	561	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
60	560	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
33	333	11/8/2022 10:55	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
503	1304	11/8/2022 16:02	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
109	810	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
177	1078	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
145	1046	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
142	1043	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
258	1162	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
462	1166	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
461	1165	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
681	1488	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
193	994	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
193	994	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
193	1004	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
594	1296	11/8/2022 19:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
251	954	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
250	953	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
43	745	11/8/2022 8:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
98	899	11/8/2022 9:04	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
334	1435	11/8/2022 11:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
347	849	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
676	1479	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
197	997	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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410	1311	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
446	1151	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
445	1150	11/8/2022 17:08	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
411	1212	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
30	730	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
412	1213	11/8/2022 14:41	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
557	1359	11/8/2022 16:39	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
593	1297	11/8/2022 19:51	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
360	1161	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
587	1389	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
111	912	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
586	1388	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
82	1083	11/8/2022 8:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
363	1066	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
347	1448	11/8/2022 12:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
195	996	11/8/2022 10:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
589	1493	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
590	1494	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
22	722	11/8/2022 7:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
176	976	11/8/2022 10:11	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
429	1235	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
500	1605	11/8/2022 15:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
499	1604	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
475	1378	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
476	1379	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
528	1436	11/8/2022 16:18	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
719	1526	11/8/2022 19:31	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
211	915	11/8/2022 13:13	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
701	1504	11/8/2022 18:15	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
132	932	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
6	806	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
10	711	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
28	828	11/8/2022 7:32	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
46	346	11/8/2022 11:53	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
372	1178	11/8/2022 14:29	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
401	1103	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
402	1104	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
65	866	11/8/2022 8:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

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PII MCL 15.243(1)(a)

621	1423	11/8/2022 17:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG	N
620	1422	11/8/2022 17:21	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
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294	796	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
182	886	11/8/2022 12:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
561	1667	11/8/2022 15:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
435	1539	11/8/2022 13:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
308	710	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
348	854	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
852	1960	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
851	1959	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
29	929	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
177	982	11/8/2022 10:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
64	465	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
525	1128	11/8/2022 18:13	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
98	598	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
416	1019	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
281	1382	11/8/2022 11:03	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
210	1010	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
158	658	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
221	923	11/8/2022 12:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
175	876	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
377	883	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
515	1418	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
404	1106	11/8/2022 16:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
56	557	11/8/2022 8:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
186	986	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
189	891	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
18	718	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
304	806	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
330	1032	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
62	1162	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
159	659	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
628	1534	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
524	1630	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
299	1003	11/8/2022 15:07	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
137	637	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
359	1165	11/8/2022 14:08	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
72	773	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
389	1196	11/8/2022 15:08	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
73	774	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG	N
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188	692	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
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559	1162	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
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17	917	11/8/2022 7:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
16	916	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
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189	590	11/8/2022 15:41	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
220	923	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
690	1497	11/8/2022 18:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
240	744	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
338	844	11/8/2022 16:53	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
375	1079	11/8/2022 16:46	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
129	832	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
130	833	11/8/2022 10:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
131	834	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
90	791	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
93	794	11/8/2022 9:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
445	1147	11/8/2022 17:12	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
366	1070	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
470	1475	11/8/2022 15:46	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
259	1159	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
78	579	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
357	1061	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
274	978	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
306	708	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
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693	1500	11/8/2022 19:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
507	1313	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
110	811	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
119	1022	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
120	1023	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
173	574	11/8/2022 15:14	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
450	1154	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
232	633	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
748	1856	11/8/2022 17:50	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
449	957	11/8/2022 18:39	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
724	1531	11/8/2022 19:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
723	1530	11/8/2022 19:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
764	1673	11/8/2022 19:11	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
389	1190	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
144	444	11/8/2022 17:31	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
480	1485	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
615	1422	11/8/2022 18:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
672	1479	11/8/2022 18:43	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
407	1010	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
340	1146	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
288	992	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
296	1198	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
454	1156	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
357	1164	11/8/2022 14:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
73	775	11/8/2022 9:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
140	843	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
594	1700	11/8/2022 16:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
482	1487	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
104	1005	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
567	1473	11/8/2022 17:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
688	1495	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
187	691	11/8/2022 12:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
319	1120	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
120	920	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
369	971	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	10	SPOIL BALI N
369	971	11/8/2022 15:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
369	976	11/8/2022 15:54	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
331	1033	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
484	1285	11/8/2022 15:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
673	1480	11/8/2022 18:44	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
467	1171	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
356	1157	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
142	942	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
358	1062	11/8/2022 16:29	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
387	1489	11/8/2022 12:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
105	807	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
481	1486	11/8/2022 15:57	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
434	1240	11/8/2022 15:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
326	1028	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
471	1278	11/8/2022 16:10	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
59	959	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
44	944	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
122	422	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
705	1613	11/8/2022 19:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
848	1956	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
184	585	11/8/2022 15:31	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
503	1205	11/8/2022 17:54	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
344	846	11/8/2022 17:11	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
523	1330	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
539	1442	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
93	1193	11/8/2022 8:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
122	923	11/8/2022 9:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
138	939	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
528	1232	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
287	1088	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
279	1180	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
280	1181	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
486	1293	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
687	1595	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
688	1596	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
689	1597	11/8/2022 19:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
372	1474	11/8/2022 12:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
430	1333	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
142	1242	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
143	1243	11/8/2022 9:00	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
362	1064	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
32	932	11/8/2022 7:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
5	705	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
550	1252	11/8/2022 18:32	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
147	849	11/8/2022 10:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
336	1437	11/8/2022 11:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
213	713	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
214	714	11/8/2022 14:07	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
327	1233	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
387	1294	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
75	375	11/8/2022 13:39	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
386	1293	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
206	807	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
321	1422	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
4	404	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
254	1054	11/8/2022 11:40	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
239	1039	11/8/2022 11:17	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
689	1492	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
586	1692	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
172	1272	11/8/2022 9:18	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
799	1907	11/8/2022 18:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
138	1039	11/8/2022 10:10	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
138	840	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
136	838	11/8/2022 10:14	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
8	308	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
561	1265	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
252	1152	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 15.243(1)(a))			
325	1132	11/8/2022 13:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
439	1543	11/8/2022 13:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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681	1484	11/8/2022 18:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
680	1483	11/8/2022 18:00	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
318	720	11/8/2022 19:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
806	1914	11/8/2022 18:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
348	1449	11/8/2022 12:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
322	1423	11/8/2022 11:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
171	471	11/8/2022 18:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REG N
125	625	11/8/2022 10:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
817	1925	11/8/2022 18:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
699	1608	11/8/2022 18:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
56	556	11/8/2022 8:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
290	792	11/8/2022 16:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
434	1439	11/8/2022 15:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
152	1055	11/8/2022 9:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
151	1054	11/8/2022 9:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
408	1215	11/8/2022 15:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
163	663	11/8/2022 12:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
293	695	11/8/2022 18:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
607	1414	11/8/2022 18:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
444	1251	11/8/2022 15:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
193	897	11/8/2022 12:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
192	896	11/8/2022 12:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
6	906	11/8/2022 7:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
319	1021	11/8/2022 15:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
289	791	11/8/2022 16:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
287	789	11/8/2022 16:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
288	790	11/8/2022 16:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
114	614	11/8/2022 10:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
535	1441	11/8/2022 17:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
299	1200	11/8/2022 12:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
50	1051	11/8/2022 7:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
30	531	11/8/2022 7:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
105	906	11/8/2022 9:13	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
504	1310	11/8/2022 16:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
106	907	11/8/2022 9:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
115	816	11/8/2022 9:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
825	1933	11/8/2022 18:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
336	1042	11/8/2022 16:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
360	1062	11/8/2022 15:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
655	1561	11/8/2022 18:43	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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488	1394	11/8/2022 16:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
319	1220	11/8/2022 12:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
530	1433	11/8/2022 17:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
3	503	11/8/2022 7:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
5	505	11/8/2022 7:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
94	694	11/8/2022 8:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
54	654	11/8/2022 7:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
547	1251	11/8/2022 18:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
255	1055	11/8/2022 11:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
385	1389	11/8/2022 14:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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417	1318	11/8/2022 14:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
418	1319	11/8/2022 14:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
239	1139	11/8/2022 11:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
840	1948	11/8/2022 18:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
317	1222	11/8/2022 12:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
286	1191	11/8/2022 11:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
464	1568	11/8/2022 14:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
269	1169	11/8/2022 11:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
479	1285	11/8/2022 16:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
36	636	11/8/2022 7:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
99	900	11/8/2022 9:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
134	937	11/8/2022 9:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
71	472	11/8/2022 10:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
568	1476	11/8/2022 16:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
71	971	11/8/2022 8:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
70	970	11/8/2022 8:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
296	1097	11/8/2022 12:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
777	1686	11/8/2022 19:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
35	935	11/8/2022 7:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
778	1687	11/8/2022 19:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
34	934	11/8/2022 7:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
140	1141	11/8/2022 9:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
148	949	11/8/2022 9:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
202	1005	11/8/2022 10:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
461	1268	11/8/2022 16:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
462	1269	11/8/2022 16:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
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521	1327	11/8/2022 16:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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557	1262	11/8/2022 18:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
432	1437	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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218	1024	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
35	935	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
435	1236	11/8/2022 15:04	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
107	809	11/8/2022 9:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
303	705	11/8/2022 18:48	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
305	707	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
304	706	11/8/2022 18:49	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
561	1567	11/8/2022 17:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
353	1357	11/8/2022 13:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
270	1272	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
669	1777	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
684	1491	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
724	1531	11/8/2022 19:38	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
724	1531	11/8/2022 19:42	REGULAR_	5010		ROSEVILLE CITY	11	SPOIL BALI N
724	1535	11/8/2022 19:43	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
471	1476	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
271	1071	11/8/2022 12:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
677	1585	11/8/2022 19:07	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
678	1586	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
625	1432	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
131	932	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
621	1525	11/8/2022 19:37	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
441	1247	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
190	892	11/8/2022 11:28	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
70	771	11/8/2022 8:32	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
228	1028	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
131	833	11/8/2022 10:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
132	834	11/8/2022 10:02	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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467	1070	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
45	747	11/8/2022 8:51	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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255	958	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	13	SPOIL BALI N
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255	965	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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39	740	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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88	489	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
32	332	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
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446	1150	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
66	867	11/8/2022 7:47	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
259	961	11/8/2022 13:07	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
447	1151	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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288	1189	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
56	857	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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341	1242	11/8/2022 13:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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183	884	11/8/2022 11:30	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
46	746	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
140	842	11/8/2022 10:39	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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588	1390	11/8/2022 17:01	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

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PII MCL 15.243(1)(a)

755	1863	11/8/2022 17:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG	N
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149	952	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	5	SPOIL BALI	N
149	952	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
149	968	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
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177	578	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG	N
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279	1183	11/8/2022 11:41	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
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560	1566	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
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59	759	11/8/2022 7:55	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
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92	793	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG	N
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PII MCL 15.243(1)(a)

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219	1023	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
125	1225	11/8/2022 8:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
797	1706	11/8/2022 19:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
8	908	11/8/2022 7:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
220	1124	11/8/2022 10:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
130	631	11/8/2022 10:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
290	1096	11/8/2022 12:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
128	629	11/8/2022 10:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
75	876	11/8/2022 7:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
319	1021	11/8/2022 14:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
218	920	11/8/2022 11:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
116	616	11/8/2022 10:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
874	1985	11/8/2022 19:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
872	1982	11/8/2022 19:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
873	1984	11/8/2022 19:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
108	708	11/8/2022 9:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
376	979	11/8/2022 15:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
356	1457	11/8/2022 12:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
357	1458	11/8/2022 12:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
753	1556	11/8/2022 19:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
250	1152	11/8/2022 12:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
225	1029	11/8/2022 11:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
616	1522	11/8/2022 18:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
245	647	11/8/2022 17:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
212	613	11/8/2022 16:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
313	1015	11/8/2022 14:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
456	1359	11/8/2022 15:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
105	1005	11/8/2022 8:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
53	754	11/8/2022 7:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
401	1103	11/8/2022 16:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
615	1721	11/8/2022 16:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
629	1538	11/8/2022 17:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
804	1912	11/8/2022 18:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
348	1255	11/8/2022 13:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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47	847	11/8/2022 7:38	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
446	1152	11/8/2022 18:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
194	896	11/8/2022 11:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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285	1186	11/8/2022 12:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
95	995	11/8/2022 8:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
123	1124	11/8/2022 9:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
551	1459	11/8/2022 16:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

642	1648	11/8/2022	18:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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542	1648	11/8/2022	15:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
321	923	11/8/2022	14:48	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
686	1692	11/8/2022	19:02	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
687	1693	11/8/2022	19:03	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
38	1138	11/8/2022	7:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
101	502	11/8/2022	11:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
264	666	11/8/2022	17:49	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
462	1164	11/8/2022	17:22	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
785	1893	11/8/2022	18:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
327	1428	11/8/2022	11:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
454	1558	11/8/2022	14:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
238	1142	11/8/2022	11:03	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
627	1734	11/8/2022	16:33	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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625	1732	11/8/2022	16:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
626	1733	11/8/2022	16:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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670	1577	11/8/2022	19:01	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
709	1715	11/8/2022	19:54	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
427	1328	11/8/2022	15:14	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
427	1328	11/8/2022	15:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
427	1337	11/8/2022	15:15	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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448	1152	11/8/2022	17:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
53	353	11/8/2022	12:31	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
69	369	11/8/2022	13:25	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
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553	1459	11/8/2022	17:21	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
66	767	11/8/2022	8:06	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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422	1427	11/8/2022	15:09	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
423	1428	11/8/2022	15:10	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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707	1713	11/8/2022	19:53	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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167	669	11/8/2022	12:04	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
553	1659	11/8/2022	15:42	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
810	1918	11/8/2022	18:31	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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279	981	11/8/2022	14:23	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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47	448	11/8/2022	9:09	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
149	750	11/8/2022	10:07	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
429	1032	11/8/2022	16:54	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
555	1458	11/8/2022	18:18	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
92	1192	11/8/2022	8:06	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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323	1226	11/8/2022	14:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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12	612	11/8/2022	7:09	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
212	1018	11/8/2022	11:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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471	1175	11/8/2022	17:21	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
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419	1121	11/8/2022	16:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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273	977	11/8/2022	14:24	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
476	1180	11/8/2022	17:24	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
322	1225	11/8/2022	14:28	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
434	938	11/8/2022	19:29	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N

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					PII (MCL 15			
75	875	11/8/2022 8:12	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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97	897	11/8/2022 8:33	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
321	1027	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
433	1537	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
175	1075	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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651	1453	11/8/2022 17:38	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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58	759	11/8/2022 8:14	REGULAR_	5010		ROSEVILLE CITY	13	SPOIL BALI N
58	759	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
58	768	11/8/2022 8:15	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
416	922	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
415	921	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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415	924	11/8/2022 18:16	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
379	1286	11/8/2022 13:45	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
641	1647	11/8/2022 18:23	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
37	737	11/8/2022 7:28	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
32	732	11/8/2022 7:22	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
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345	1251	11/8/2022 13:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
592	1501	11/8/2022 17:09	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
145	847	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
556	1562	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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593	1497	11/8/2022 19:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
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166	1266	11/8/2022 9:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
165	1265	11/8/2022 9:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
175	877	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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261	963	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
57	758	11/8/2022 8:11	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
209	911	11/8/2022 11:58	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
490	1197	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
74	875	11/8/2022 8:30	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
582	1486	11/8/2022 18:51	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
581	1485	11/8/2022 18:50	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
530	1332	11/8/2022 16:23	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
463	1370	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
36	536	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
129	830	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
394	1301	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
509	1417	11/8/2022 15:55	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
137	839	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
203	1204	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
591	1398	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
629	1436	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
100	901	11/8/2022 8:33	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
630	1437	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
247	1249	11/8/2022 11:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
121	421	11/8/2022 16:22	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
432	1335	11/8/2022 16:20	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
237	1338	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
740	1848	11/8/2022 17:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
501	1308	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
62	762	11/8/2022 7:57	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
289	991	11/8/2022 14:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL 15.243(1)(a))			
223	1225	11/8/2022 10:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
41	841	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
353	1059	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
422	929	11/8/2022 18:18	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
107	808	11/8/2022 9:25	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
466	1273	11/8/2022 16:07	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
421	928	11/8/2022 18:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
730	1538	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
579	1386	11/8/2022 17:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
578	1385	11/8/2022 17:27	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
700	1507	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
217	721	11/8/2022 13:43	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
781	1889	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
407	1511	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
314		11/8/2022 11:32	REGULAR_	5010		ROSEVILLE CITY	9	UPDATE VI N
314	1415	11/8/2022 11:32	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
115	716	11/8/2022 9:22	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
82	382	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
215	1316	11/8/2022 10:05	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
22	1122	11/8/2022 7:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
782	1890	11/8/2022 18:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
216	720	11/8/2022 13:42	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
231	933	11/8/2022 12:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
375	978	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
115	915	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
779	1887	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
114	914	11/8/2022 8:49	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
241	946	11/8/2022 14:14	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
88	788	11/8/2022 8:50	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
80	380	11/8/2022 13:47	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
448	1154	11/8/2022 18:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
686	1489	11/8/2022 18:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
419	1225	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
369	1071	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
520	1626	11/8/2022 15:17	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
34	1134	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
130	1031	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
332	1233	11/8/2022 13:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
141	1041	11/8/2022 9:20	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
21	821	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
22	822	11/8/2022 7:16	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
782	1586	11/8/2022 19:53	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
113	913	11/8/2022 8:48	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
430	1231	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
233	937	11/8/2022 13:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
106	406	11/8/2022 15:42	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
618	1425	11/8/2022 17:59	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
166	867	11/8/2022 10:59	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
153	854	11/8/2022 10:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
379	1282	11/8/2022 15:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
61	763	11/8/2022 9:16	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
452	1158	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
403	909	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
219	923	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
118	618	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
243	945	11/8/2022 13:03	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
9	709	11/8/2022 7:07	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
386	1089	11/8/2022 16:25	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
128	929	11/8/2022 9:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
227	1328	11/8/2022 10:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
302	704	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
363	869	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
87	488	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
440	1247	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
500	1301	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
43	643	11/8/2022 7:45	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
42	642	11/8/2022 7:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
526	1328	11/8/2022 16:19	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
484	1392	11/8/2022 15:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
126	1029	11/8/2022 9:02	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
101	401	11/8/2022 15:10	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
643	1750	11/8/2022 16:41	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
569	1477	11/8/2022 16:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
570	1478	11/8/2022 16:50	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
1	801	11/8/2022 7:03	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
320	1421	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
116	1216	11/8/2022 8:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
608	1410	11/8/2022 17:14	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
441	1343	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
233	1334	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
182	884	11/8/2022 11:18	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
359	1266	11/8/2022 13:19	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
647	1556	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
646	1555	11/8/2022 17:43	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
869	1978	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
234	1335	11/8/2022 10:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
89	1090	11/8/2022 8:38	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
356	1162	11/8/2022 14:05	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
263	1069	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
510	1416	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
21	921	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
440	1347	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
300	1107	11/8/2022 12:54	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
146	848	11/8/2022 10:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
439	1346	11/8/2022 15:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
439	1346	11/8/2022 15:20	REGULAR_	5010		ROSEVILLE CITY	2	SPOIL BALI N
439	1376	11/8/2022 15:21	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
567	1470	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
542	1548	11/8/2022 17:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
241	1142	11/8/2022 12:37	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
240	1141	11/8/2022 12:36	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
170	971	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
171	972	11/8/2022 9:58	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
175	1275	11/8/2022 9:24	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
115	916	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
40	640	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
420	1323	11/8/2022 16:13	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
304	1009	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
4	804	11/8/2022 7:02	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
317	1124	11/8/2022 13:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
116	917	11/8/2022 9:01	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
263	1067	11/8/2022 12:12	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
91	892	11/8/2022 8:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
513	1116	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
559	1366	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
440	1544	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
700	1609	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
257	1161	11/8/2022 11:22	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
130	531	11/8/2022 12:58	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
221	1121	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
152	854	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
48	750	11/8/2022 8:55	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
292	997	11/8/2022 15:29	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
151	954	11/8/2022 10:06	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
543	1446	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
201	802	11/8/2022 11:23	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
299	1001	11/8/2022 14:34	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
14	314	11/8/2022 8:29	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
40	740	11/8/2022 7:33	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
451	1456	11/8/2022 15:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
354	1358	11/8/2022 13:59	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
595	1701	11/8/2022 16:12	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
703	1811	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
439	1145	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
523	1426	11/8/2022 17:46	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
292	996	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
293	997	11/8/2022 15:02	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
36	736	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
663	1470	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
199	1000	11/8/2022 10:36	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
271	673	11/8/2022 18:02	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
46	747	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
227	728	11/8/2022 14:40	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
483	1188	11/8/2022 17:34	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
55	755	11/8/2022 7:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
219	1120	11/8/2022 12:15	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
223	925	11/8/2022 12:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
426	1227	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
766	1675	11/8/2022 19:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
451	1258	11/8/2022 15:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
415	1318	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
378	1281	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
140	943	11/8/2022 9:55	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
630	1536	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
160	1161	11/8/2022 9:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
431	1133	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
197	899	11/8/2022 11:39	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
62	962	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
208	912	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
366	1172	11/8/2022 14:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
323	725	11/8/2022 19:44	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
181	1281	11/8/2022 9:27	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
575	1279	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
204	908	11/8/2022 13:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
322	1026	11/8/2022 15:36	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
631	1738	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
700	1507	11/8/2022 19:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
450	1157	11/8/2022 18:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
267	972	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
632	1739	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
284	786	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
587	1291	11/8/2022 19:23	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
179	682	11/8/2022 12:17	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
207	911	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
235	1336	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
92	493	11/8/2022 11:15	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 1			
121	822	11/8/2022 9:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
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31	532	11/8/2022 7:54	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
398	1305	11/8/2022 14:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
43	943	11/8/2022 7:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
372	1076	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
235	1135	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
10	410	11/8/2022 7:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
404	1409	11/8/2022 14:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
680	1788	11/8/2022 17:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
300	1005	11/8/2022 15:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
704	1710	11/8/2022 19:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
373	1077	11/8/2022 16:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
458	1264	11/8/2022 15:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
211	913	11/8/2022 12:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
513	1519	11/8/2022 16:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
120	821	11/8/2022 9:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
236	1136	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
44	544	11/8/2022 7:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
169	1170	11/8/2022 10:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
372	1273	11/8/2022 14:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
575	1277	11/8/2022 19:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
390	1196	11/8/2022 14:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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208	1008	11/8/2022 10:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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251	752	11/8/2022 15:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
119	1219	11/8/2022 8:41	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
120	1220	11/8/2022 8:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
260	662	11/8/2022 17:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
173	875	11/8/2022 11:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
283	985	11/8/2022 14:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
883	1994	11/8/2022 19:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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207	1208	11/8/2022 10:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
176	577	11/8/2022 15:20	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
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703	1611	11/8/2022 19:48	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
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267	1067	11/8/2022 12:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	SPOIL BALI N
267	1075	11/8/2022 12:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
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39	740	11/8/2022 7:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
573	1481	11/8/2022 16:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
435	939	11/8/2022 19:30	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
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207	910	11/8/2022 12:22	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
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306	1008	11/8/2022 14:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
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624	1731	11/8/2022 16:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
622	1728	11/8/2022 16:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
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206	908	11/8/2022 11:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
531	1439	11/8/2022 16:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
532	1440	11/8/2022 16:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
103	805	11/8/2022 8:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
197	1198	11/8/2022 10:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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449	1352	11/8/2022 16:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
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581	1387	11/8/2022 17:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
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122	825	11/8/2022 10:47	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
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131	1032	11/8/2022 9:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
161	762	11/8/2022 10:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
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73	973	11/8/2022 8:02	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
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273	778	11/8/2022 15:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL 1			
50	650	11/8/2022 7:49	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
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304	906	11/8/2022 14:31	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
267	868	11/8/2022 13:17	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
380	1384	11/8/2022 14:32	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
307	709	11/8/2022 18:53	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
172	977	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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25	925	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
217	1219	11/8/2022 10:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
670	1778	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
282	784	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
37	337	11/8/2022 11:05	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
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541	1246	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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95	797	11/8/2022 9:10	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
282	684	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
137	437	11/8/2022 17:02	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
96	897	11/8/2022 9:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
536	1238	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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327	1133	11/8/2022 13:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
312	818	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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94	796	11/8/2022 9:09	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
582	1284	11/8/2022 19:17	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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794	1902	11/8/2022 18:21	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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597	1503	11/8/2022 17:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
597	1503	11/8/2022 20:30	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
597	1503	11/8/2022 20:29	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
597	1503	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE PRO N
597	1503	11/8/2022 20:29	REGULAR_	5010		ROSEVILLE CITY	8	UNDO: ISS Y
597	1503	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	8	UNDO: ISS Y
597	1503	11/8/2022 20:29	REGULAR_	5010		ROSEVILLE CITY	8	UNDO: ISS Y
407	1208	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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283	685	11/8/2022 18:22	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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281	783	11/8/2022 16:03	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
359	1061	11/8/2022 15:52	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
814	1922	11/8/2022 18:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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274	1174	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
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371	1375	11/8/2022 14:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
475	983	11/8/2022 19:52	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
442	1447	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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34	334	11/8/2022 11:01	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
103	806	11/8/2022 10:26	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
439	1246	11/8/2022 15:45	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
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126		11/8/2022 9:50	REGULAR_	5010		ROSEVILLE CITY	5	UPDATE VI N
126	927	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	5	SPOIL BALI N
126	927	11/8/2022 9:38	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
126	935	11/8/2022 9:49	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
31	1131	11/8/2022 7:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
506	1512	11/8/2022 16:24	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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255	1356	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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282	984	11/8/2022 14:26	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
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25	325	11/8/2022 10:17	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
64	664	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
310	1314	11/8/2022 13:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N

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PII MCL 15.243(1)(a)

595	1601	11/8/2022 17:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
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729	1837	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
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196	996	11/8/2022 10:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
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248	749	11/8/2022 15:43	REGULAR_	5010		ROSEVILLE CITY	16	SPOIL BALI N
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129	530	11/8/2022 12:57	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
104	806	11/8/2022 9:33	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
507	1214	11/8/2022 19:57	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
17	617	11/8/2022 7:11	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
63	663	11/8/2022 8:05	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
541	1444	11/8/2022 18:00	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
256	1060	11/8/2022 12:05	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
164	1065	11/8/2022 10:46	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
409	1012	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
350	1157	11/8/2022 14:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
35	835	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
251	1051	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
265	967	11/8/2022 13:31	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
570	1376	11/8/2022 17:26	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
374	878	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
44	944	11/8/2022 7:24	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
247	748	11/8/2022 15:26	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
466	1170	11/8/2022 17:19	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
352	1153	11/8/2022 13:34	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
249	1049	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
416	1217	11/8/2022 14:44	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
153	1056	11/8/2022 9:31	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
226	928	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
250	1050	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
28	828	11/8/2022 7:20	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
184	485	11/8/2022 18:52	REGULAR_	5010		ROSEVILLE CITY	18	ISSUE REG N
44	445	11/8/2022 8:59	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
163	1064	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
257	1061	11/8/2022 12:06	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
99	500	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
444	1150	11/8/2022 18:04	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
229	1035	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
408	1011	11/8/2022 16:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
271	973	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
409	1513	11/8/2022 13:11	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
482	1586	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
59	659	11/8/2022 8:01	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
58	658	11/8/2022 8:00	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
237	1041	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
268	1068	11/8/2022 11:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
61	961	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
62	962	11/8/2022 7:40	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
63	963	11/8/2022 7:41	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
207	1108	11/8/2022 11:52	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
82	682	11/8/2022 8:28	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
81	482	11/8/2022 10:42	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
146	1047	11/8/2022 10:25	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
143	1044	11/8/2022 10:24	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
377	1278	11/8/2022 14:12	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
245	947	11/8/2022 13:05	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
357	1258	11/8/2022 13:48	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
421	1324	11/8/2022 16:14	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
652	1459	11/8/2022 18:28	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
653	1460	11/8/2022 18:29	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
654	1461	11/8/2022 18:30	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
22	423	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
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583	1491	11/8/2022 17:00	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
419	1125	11/8/2022 17:58	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
287	1093	11/8/2022 12:35	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
424	1126	11/8/2022 16:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
406	912	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
317	823	11/8/2022 16:26	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
267	772	11/8/2022 15:13	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
291	993	11/8/2022 14:27	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
499	1204	11/8/2022 17:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
437	1142	11/8/2022 17:03	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
173	974	11/8/2022 10:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
400	1301	11/8/2022 14:46	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
554	1460	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
514	1315	11/8/2022 16:08	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
564	1366	11/8/2022 16:43	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
282	984	11/8/2022 14:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
103	603	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
104	604	11/8/2022 9:57	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
415	1117	11/8/2022 16:48	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
8	608	11/8/2022 7:06	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
879	1990	11/8/2022 19:14	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
286	688	11/8/2022 18:24	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
221	725	11/8/2022 13:49	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
154	856	11/8/2022 11:06	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
460	1164	11/8/2022 17:13	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
156	658	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
118	1018	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
385	1087	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
117	1017	11/8/2022 8:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
388	991	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
383	1085	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
119	1019	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
442	1344	11/8/2022 15:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
258	1260	11/8/2022 11:40	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
294	996	11/8/2022 14:59	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
332	1235	11/8/2022 14:38	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
285	1386	11/8/2022 11:08	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
257	1358	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
256	1357	11/8/2022 10:45	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
118	820	11/8/2022 9:29	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
335	1037	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
374	1275	11/8/2022 14:09	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
215	1021	11/8/2022 11:20	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
375	1276	11/8/2022 14:10	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
500	1306	11/8/2022 16:33	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
485	1187	11/8/2022 17:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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301	1202	11/8/2022 12:28	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
477		11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	8	UPDATE VI N
477	1380	11/8/2022 16:04	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
538	1444	11/8/2022 17:05	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
741	1544	11/8/2022 18:46	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
312	914	11/8/2022 14:37	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
311	913	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
590	1297	11/8/2022 19:51	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
336	1340	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
149	850	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
546	1449	11/8/2022 18:05	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
411	1218	11/8/2022 15:24	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
266	1072	11/8/2022 12:14	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
399	1404	11/8/2022 14:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
543	1649	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
329	931	11/8/2022 14:56	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
470	1073	11/8/2022 17:30	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
164	666	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
211	1213	11/8/2022 10:47	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
4	704	11/8/2022 7:05	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
4	704	11/8/2022 7:34	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
4	705	11/8/2022 7:38	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
205	1306	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
3	703	11/8/2022 7:15	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
3	703	11/8/2022 7:04	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
3	704	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
3	704	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	12	SPOIL BALI N
3	717	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
3	717	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	12	UNDO: ISS Y
3	717	11/8/2022 7:36	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
3	717	11/8/2022 7:31	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
3	717	11/8/2022 7:19	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
453	1557	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
165	667	11/8/2022 11:57	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
206	1307	11/8/2022 9:53	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
425	932	11/8/2022 18:20	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N

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PII MCL 15.243(1)(a)

					PII (MCL			
12	713	11/8/2022 7:10	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
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268	973	11/8/2022 14:54	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
570	1272	11/8/2022 18:56	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
194	1097	11/8/2022 10:30	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
319	1125	11/8/2022 13:15	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
154	856	11/8/2022 10:31	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
452	1154	11/8/2022 17:15	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
630	1737	11/8/2022 16:34	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
558	1260	11/8/2022 18:40	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
200	1001	11/8/2022 10:37	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
170	673	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
550	1456	11/8/2022 17:17	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
435	1440	11/8/2022 15:18	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
234	738	11/8/2022 14:28	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
347	1248	11/8/2022 13:33	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
129	930	11/8/2022 9:40	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
508	1514	11/8/2022 16:27	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
126	626	11/8/2022 10:41	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
267	1368	11/8/2022 10:51	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
578	1280	11/8/2022 19:10	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
137	838	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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273	1079	11/8/2022 12:19	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
371	875	11/8/2022 17:35	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
354	857	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
585	1292	11/8/2022 19:40	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
306	1112	11/8/2022 12:56	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
262	964	11/8/2022 13:38	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG N
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338	1241	11/8/2022 14:47	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
646	1652	11/8/2022 18:26	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
339	1242	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG N
414	1117	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
473	1376	11/8/2022 16:00	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
231	1037	11/8/2022 11:37	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
330	1137	11/8/2022 13:53	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
665	1468	11/8/2022 17:51	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
624	1630	11/8/2022 18:08	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
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53	854	11/8/2022 8:03	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG N
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323	829	11/8/2022 16:38	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
287	792	11/8/2022 15:47	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG N
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468	1371	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
467	1370	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
467	1370	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	8	SPOIL BALI N
467	1391	11/8/2022 16:16	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
568	1375	11/8/2022 17:22	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
171	875	11/8/2022 12:10	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
567	1374	11/8/2022 17:20	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
66	467	11/8/2022 10:04	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
187	588	11/8/2022 15:35	REGULAR_	5010		ROSEVILLE CITY	17	ISSUE REG N
404	1305	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
405	1306	11/8/2022 14:50	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG N
357	1361	11/8/2022 14:06	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
423	1527	11/8/2022 13:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
483	1488	11/8/2022 15:58	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
254	1256	11/8/2022 11:34	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
63	763	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	6	ISSUE REG N
297	1104	11/8/2022 12:46	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG N
500	1204	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
473	1381	11/8/2022 15:28	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG N
390	1096	11/8/2022 17:29	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG N
279	881	11/8/2022 13:44	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG N
849	1957	11/8/2022 18:54	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
599	1705	11/8/2022 16:15	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
347	1351	11/8/2022 13:51	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
348	1352	11/8/2022 13:52	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
128	628	11/8/2022 10:44	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG N
642	1749	11/8/2022 16:40	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG N
66	866	11/8/2022 7:58	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG N
378	1080	11/8/2022 16:05	REGULAR_	5010		ROSEVILLE CITY	14	ISSUE REG N
247	950	11/8/2022 13:37	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG N
42	1043	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
48	1044	11/8/2022 7:50	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
48	1044	11/8/2022 7:42	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG N
48	1044	11/8/2022 7:43	REGULAR_	5010		ROSEVILLE CITY	15	UNDO: ISS Y

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL			
268	770	11/8/2022 15:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
395	1101	11/8/2022 17:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
394	1100	11/8/2022 17:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
373	975	11/8/2022 15:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
452	1055	11/8/2022 17:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
1	401	11/8/2022 7:10	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
606	1515	11/8/2022 17:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
578	1486	11/8/2022 16:56	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
124	826	11/8/2022 9:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
13	713	11/8/2022 7:08	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
368	970	11/8/2022 15:42	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
126	1127	11/8/2022 9:16	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
428	1131	11/8/2022 16:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	14	ISSUE REG N
165	665	11/8/2022 12:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
264	966	11/8/2022 13:53	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
134	836	11/8/2022 10:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
789	1897	11/8/2022 18:18	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
58	558	11/8/2022 8:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
79	480	11/8/2022 10:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
273	1374	11/8/2022 10:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
178	880	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
424	1327	11/8/2022 16:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
504	1509	11/8/2022 16:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
675	1681	11/8/2022 18:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
233	936	11/8/2022 13:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
502	1607	11/8/2022 15:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
543	1549	11/8/2022 17:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
206	710	11/8/2022 13:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
542	1348	11/8/2022 17:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
83	1084	11/8/2022 8:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
407	1109	11/8/2022 16:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
29	929	11/8/2022 7:19	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
180	884	11/8/2022 12:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
43	444	11/8/2022 8:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
687	1490	11/8/2022 18:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
117	1018	11/8/2022 9:28	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
123	824	11/8/2022 10:01	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
520	1423	11/8/2022 17:45	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
22	922	11/8/2022 7:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
158	959	11/8/2022 9:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
457	965	11/8/2022 18:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
755	1664	11/8/2022 19:03	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
821	1929	11/8/2022 18:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
172	874	11/8/2022 11:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	13	ISSUE REG N
172	672	11/8/2022 12:44	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
61	462	11/8/2022 9:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
21	522	11/8/2022 7:35	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
60	461	11/8/2022 9:49	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
22	523	11/8/2022 7:36	REGULAR_	5010	[redacted]	ROSEVILLE CITY	4	ISSUE REG N
229	931	11/8/2022 12:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	7	ISSUE REG N
251	1151	11/8/2022 11:23	REGULAR_	5010	[redacted]	ROSEVILLE CITY	8	ISSUE REG N
81	1082	11/8/2022 8:24	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
287	1290	11/8/2022 12:21	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
641	1443	11/8/2022 17:32	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
154	954	11/8/2022 9:37	REGULAR_	5010	[redacted]	ROSEVILLE CITY	1	ISSUE REG N
502	1309	11/8/2022 16:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
20	722	11/8/2022 7:51	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
540	1646	11/8/2022 15:33	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
128	831	11/8/2022 10:57	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
338	1044	11/8/2022 16:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	12	ISSUE REG N
249	1251	11/8/2022 11:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
389	1393	11/8/2022 14:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
541	1647	11/8/2022 15:34	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
598	1507	11/8/2022 17:14	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
504	1209	11/8/2022 17:52	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
358	1265	11/8/2022 13:17	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
147	1148	11/8/2022 9:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
148	1149	11/8/2022 9:40	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
381	1483	11/8/2022 12:39	REGULAR_	5010	[redacted]	ROSEVILLE CITY	9	ISSUE REG N
258	1064	11/8/2022 12:07	REGULAR_	5010	[redacted]	ROSEVILLE CITY	5	ISSUE REG N
230	1134	11/8/2022 10:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
231	1135	11/8/2022 10:55	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
290	992	11/8/2022 14:46	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
544	1147	11/8/2022 18:27	REGULAR_	5010	[redacted]	ROSEVILLE CITY	10	ISSUE REG N
210	611	11/8/2022 16:15	REGULAR_	5010	[redacted]	ROSEVILLE CITY	17	ISSUE REG N
275	1277	11/8/2022 11:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
274	1276	11/8/2022 11:59	REGULAR_	5010	[redacted]	ROSEVILLE CITY	15	ISSUE REG N
288	1193	11/8/2022 11:50	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
273	1175	11/8/2022 13:25	REGULAR_	5010	[redacted]	ROSEVILLE CITY	3	ISSUE REG N
233	1137	11/8/2022 10:58	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
113	613	11/8/2022 10:11	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
305	1210	11/8/2022 12:06	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
239	1143	11/8/2022 11:04	REGULAR_	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REG N
436	940	11/8/2022 19:31	REGULAR_	5010	[redacted]	ROSEVILLE CITY	16	ISSUE REG N
94	895	11/8/2022 8:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
93	894	11/8/2022 8:26	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N
391	1094	11/8/2022 16:29	REGULAR_	5010	[redacted]	ROSEVILLE CITY	6	ISSUE REG N
221	1025	11/8/2022 11:05	REGULAR_	5010	[redacted]	ROSEVILLE CITY	11	ISSUE REG N

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL				
337	1144	11/8/2022 14:04	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
661	1464	11/8/2022 17:47	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
534	1340	11/8/2022 16:58	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
491	1595	11/8/2022 14:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
447	1050	11/8/2022 17:10	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
425	1332	11/8/2022 14:49	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
424	1331	11/8/2022 14:48	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
722	1631	11/8/2022 18:37	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
723	1632	11/8/2022 18:38	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
329	1130	11/8/2022 13:10	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
526	1632	11/8/2022 15:22	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
214	1018	11/8/2022 11:00	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
359	1065	11/8/2022 16:45	REGULAR_	5010		ROSEVILLE CITY	12	ISSUE REG	N
494	1295	11/8/2022 15:56	REGULAR_	5010		ROSEVILLE CITY	1	ISSUE REG	N
89	989	11/8/2022 8:24	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
90	990	11/8/2022 8:25	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
401	1208	11/8/2022 15:15	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
402	1209	11/8/2022 15:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
213	916	11/8/2022 12:34	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
73	573	11/8/2022 8:53	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
195	1095	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
194	1094	11/8/2022 10:23	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
213	717	11/8/2022 13:35	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
235	739	11/8/2022 14:30	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
324	1225	11/8/2022 12:53	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
323	1224	11/8/2022 12:52	REGULAR_	5010		ROSEVILLE CITY	8	ISSUE REG	N
509	1614	11/8/2022 15:09	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
838	1946	11/8/2022 18:47	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
209	1211	11/8/2022 10:43	REGULAR_	5010		ROSEVILLE CITY	15	ISSUE REG	N
114	816	11/8/2022 10:00	REGULAR_	5010		ROSEVILLE CITY	13	ISSUE REG	N
305	807	11/8/2022 16:36	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
306	808	11/8/2022 16:37	REGULAR_	5010		ROSEVILLE CITY	16	ISSUE REG	N
627	1531	11/8/2022 19:55	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
586	1495	11/8/2022 17:04	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
152	653	11/8/2022 11:24	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
152	653	11/8/2022 11:35	REGULAR_	5010		ROSEVILLE CITY	4	SPOIL BALI	N
152	657	11/8/2022 11:36	REGULAR_	5010		ROSEVILLE CITY	4	ISSUE REG	N
224	926	11/8/2022 12:39	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
501	1203	11/8/2022 17:49	REGULAR_	5010		ROSEVILLE CITY	7	ISSUE REG	N
243	1147	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
244	1148	11/8/2022 11:12	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
501	1104	11/8/2022 17:52	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
760	1669	11/8/2022 19:08	REGULAR_	5010		ROSEVILLE CITY	2	ISSUE REG	N
139	1239	11/8/2022 8:57	REGULAR_	5010		ROSEVILLE CITY	9	ISSUE REG	N
325	1131	11/8/2022 13:21	REGULAR_	5010		ROSEVILLE CITY	5	ISSUE REG	N
309	911	11/8/2022 14:35	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
310	912	11/8/2022 14:36	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
40	840	11/8/2022 7:23	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
178	1079	11/8/2022 11:07	REGULAR_	5010		ROSEVILLE CITY	3	ISSUE REG	N
293	895	11/8/2022 14:16	REGULAR_	5010		ROSEVILLE CITY	10	ISSUE REG	N
186	987	11/8/2022 10:16	REGULAR_	5010		ROSEVILLE CITY	11	ISSUE REG	N
374	1076	11/8/2022 16:07	REGULAR_	NULL		ROSEVILLE CITY		ISSUE REG	N	BOYD, EMILY ROSE
290	994	11/8/2022 15:01	REGULAR_	NULL		ROSEVILLE CITY		ISSUE REG	N	MOUZON, DANIELLE DENISE

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EXHIBIT 6

Document received by the MI Macomb 16th Circuit Court.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

PII MCL 15.243(1)(a)

					PII (MCL				
41	841	5/2/2023 17:39	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
30	830	5/2/2023 15:37	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
42	842	5/2/2023 17:40	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
35	835	5/2/2023 16:20	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
38	838	5/2/2023 16:38	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
50	850	5/2/2023 19:21	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
16	816	5/2/2023 10:21	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
44	844	5/2/2023 17:53	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
6	806	5/2/2023 8:33	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
5	805	5/2/2023 8:31	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
27	827	5/2/2023 13:43	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
26	826	5/2/2023 13:42	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
2	802	5/2/2023 6:59	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
19	819	5/2/2023 10:51	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
18	818	5/2/2023 10:50	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
11	811	5/2/2023 10:00	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
4	804	5/2/2023 8:21	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
49	849	5/2/2023 19:17	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
48	848	5/2/2023 19:07	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
14	814	5/2/2023 10:17	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
10	810	5/2/2023 9:56	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
20	820	5/2/2023 11:34	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
28	828	5/2/2023 14:58	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
33	833	5/2/2023 16:07	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
31	831	5/2/2023 15:56	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
46	846	5/2/2023 18:25	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
47	847	5/2/2023 18:54	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
32	832	5/2/2023 16:06	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
45	845	5/2/2023 18:15	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
36	836	5/2/2023 16:30	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
37	837	5/2/2023 16:32	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
9	809	5/2/2023 9:14	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
34	834	5/2/2023 16:16	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
40	840	5/2/2023 17:28	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
17	817	5/2/2023 10:48	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
25	825	5/2/2023 13:28	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
24	824	5/2/2023 13:28	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
22	822	5/2/2023 12:26	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
21	821	5/2/2023 12:25	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
1	201	5/2/2023 16:05	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	18	ISSUE REGULAR BALLOT	N
13	813	5/2/2023 10:13	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
8	808	5/2/2023 9:01	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
39	839	5/2/2023 17:19	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
3	803	5/2/2023 7:56	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
29	829	5/2/2023 15:09	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
12	812	5/2/2023 10:02	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
1	801	5/2/2023 6:58	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
23	823	5/2/2023 13:06	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
7	807	5/2/2023 8:34	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
15	815	5/2/2023 10:20	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N
43	843	5/2/2023 17:42	REGULAR_BALLOT	5010	[redacted]	ROSEVILLE CITY	2	ISSUE REGULAR BALLOT	N

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EXHIBIT 7

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VOTER DETAILS

License Number
[redacted]

Internal Voter ID
[redacted]

Full Name
PII MCL 15.243(1)(a) [redacted]

Former Name

Status
CANCEL

Status Reason(s)
VOTER REQUESTED

Residential Address
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a) PII MCL 15.243(1)(a)

Mailing Address

NTH Address

Telephone	E-Mail	Gender	UOCAVA Status	Perm. AV
		MALE	NON-UOCAVA	No

DOB	Reg. Date	Eff. Reg. Date	Move Eff. Date
PII MCL 15.243(1)(a)	9/29/2003	1/3/2020	12/23/2019

ID Confirmed	SSN4	Must Vote In Person
Yes		No

County Code / Name	Jurisdiction Code / Name	Ward/Precinct
82 WAYNE	13120 CANTON TOWNSHIP	00001

School District Code / Name
34560 VAN BUREN PUBLIC SCHOOLS

Village District Code / Name

US Congress Code	State House Code	Senate Code	County Comm. Code
06	024	05	10

Create Date	System Mod. Date	Mod. Date
10/1/2003 12:00:00 AM	8/19/2022 3:50:44 PM	8/19/2022 3:50:44 PM

In Transition	Last Date To Vote
No	

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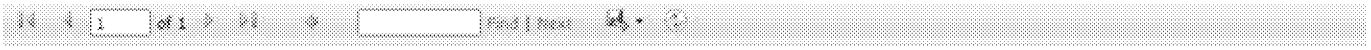

CHANGE HISTORY FOR

PII MCL 15.243(1)(a)

4155 HAWKSBURRY CT CANTON MI 48188

Description	Date / Time
STATUS CHANGED to CANCEL-VOTER REQUESTED	9/19/2022 3:50:44 PM
STATUS CHANGED to ACTIVE-ACTIVE	12/23/2019 8:37:10 AM
INTERMEDIATE MOVE (12/19/2019) to PII MCL 15.243(1)(a) MI PII MCL 15.243(1)(a)	12/23/2019 8:37:10 AM
STATUS CHANGED to VERIFY-SIGN REGISTRATION CARD	7/10/2007 2:09:07 PM
STATUS CHANGED to REJECT-NO SIGNATURE	10/8/2003 11:40:03 AM
LONG MOVE (9/29/2003) to CANTON MI PII MCL 15.243(1)(a)	10/1/2003 7:47:15 PM
History started with a reg date of 1/20/1993 fo PII MCL 15.243(1)(a) of WESTLAND MI PII MCL 15.243(1)(a) with a status of AC	9/12/2003 8:39:44 PM
Total 7	

No Voting History as of 3/25/2024.

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STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT
MACOMB COUNTY

MICHAEL LEWIS BUTZ,

Plaintiff,

v

JENNIFER ZELMANSKI, Clerk, City of Roseville and CITY OF ROSEVILLE, a Michigan Municipal Corporation,

Defendants,

and

JOCELYN BENSON, Secretary of State,

Intervening-Defendant.

No. 2023-002852-CZ

HON. EDWARD A. SERVITTO

Consolidated with:
2023-002835-CZ; 2023-002836-CZ;
2023-002837-CZ; 2023-002838-CZ;
2023-002839-CZ; 2023-002840-CZ;
2023-002841-CZ; 2023-002842-CZ;
2023-002843-CZ; 2023-002844-CZ;
2023-002845-CZ; 2023-002847-CZ;
2023-002848-CZ; 2023-002850-CZ;
2023-002851-CZ

SECRETARY OF STATE JOCELYN BENSON'S BRIEF

Michael Lewis Butz, *In Pro Per*
PII MCL 15.243(1)(a)
PII MCL 15.243(1)(a), Michigan PII MCL 15.243(1)
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_____/

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND RESPONSE TO PLAINTIFF'S AMENDED SUPPLEMENTAL BRIEF

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Attorneys for Intervenor-Defendant Benson

Dated: March 25, 2024

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INTRODUCTION

This Court requested that Plaintiff explain why the Department of State's production in response to a Freedom of Information Act request from Plaintiff requesting the same electronic poll book history he requested from the 15 jurisdictions he sued does not moot his claims. But Plaintiff's amended supplemental brief fails to directly address this issue, fixating instead on perceived errors or abuses by the jurisdictions or the Secretary of State that are either inaccurate or irrelevant. As a result, this Court should grant the Secretary's motion for summary disposition.

COUNTER-STATEMENT OF FACTS

On or about August 23, 2023, Plaintiff Michael Butz filed the instant complaint against Jennifer Zelmanski, Clerk for the City of Roseville, and the City of Roseville (City Defendants), alleging a violation under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

Factual Overview

Plaintiff's claims stem from a May 2, 2023, FOIA request to City Defendants in which Plaintiff requested "a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023." (Ex 1, Roseville FOIA.)

The EPB consists of software and data programming created by the Department of Sate that is downloaded from the state's Qualified Voter File (QVF) before an election and is used to process voters and generate precinct reports on election day for that particular election. MCL 168.668b, 168.735.[1] It includes a list of registered voters for the jurisdiction, and includes

[1] See Election Officials Manual, February 19, 2019, Chapter 10, p 1, available at X_Preparation_of_Voting_Equipment.pdf (michigan.gov).

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sensitive voter information, such as a voter's date of birth. MCL 168.509q(1)(a). After the election is complete, a voter history file will be uploaded from the EPB into the state's QVF software to update voter history.[2]

Plaintiff requested that the EPB history files "be in .CSV or .XLS format." (Ex 1, Roseville FOIA.) In making his request, Plaintiff acknowledged that certain information was exempt from disclosure under MCL 168.509gg, including full dates of birth and driver's license information. (*Id.*) Plaintiff asserted that "there should be no other FOIA exempt information in the EPB digital records requested," and that he was not "requesting any software or information which somehow be deemed proprietary." (*Id.*)

Plaintiff asserted in his request that the "EPB .CSV files are an original record and a component of the electronic voting system audit trail," and that "these digital records should be retained" for the applicable federal and state retention periods. *Id.*, citing 52 USC 20701 and MCL 168.811.

On May 23, 2023, the City Defendants "denied all portions" of Plaintiff's request pursuant to direction provided by the Department of State's Bureau of Elections (Bureau):

[2] (*Id.*)

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> Per the Michigan Bureau of Elections, Clerks must not publicly release data or files that would reveal the software design or data architecture of the Electronic Poll Book, as doing so could compromise the Bureau of Elections' ability to secure and safeguard the software and data from hacking, theft, loss or destruction. In response to previous FOIA requests regarding EPB data, the Bureau of Elections has not disclosed these records because the records sought constitute "cybersecurity plans, assessments, or vulnerabilities" that are exempt from disclosure. The Bureau has an interest in maximizing the protection and defense of its information systems, which outweighs the public interest in the disclosure of this information as the release of this sensitive information could jeopardize the security of Michigan's electoral process. **MCL 15.243(1)(y).** In addition, the responsive records include sensitive information which, if released, "would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software." **MCL 15.243(1)(z).**
>
> Further, electronic poll book files contain personal identifying information such as full birth dates for voters, which is exempt from disclosure. **MCL 168.509gg.** Attempted manual redaction of personal identifying information may not be sufficient to protect this information from disclosure if the software and program files are disclosed.
>
> Please contact the Macomb County Clerk for the paper pollbook copies or the Michigan Bureau of Elections for the log file or voter history.

(Compl, 5/23/23 Letter, attached at PDF page 15.) On June 5, 2023, Plaintiff appealed the denial of his request, which was affirmed on June 13, 2023. (City Defendants' 9/15/23 Mot to Consolidate, ¶ 1, Ex D.)

On May 13, 2023, Plaintiff sent a similar FOIA request to the Department of State, Bureau of Elections, for EPB history of *all* jurisdictions in Macomb County for the November 2022 and May 2023 elections. (Ex 2, MDOS FOIA request). On September 6, 2023, Plaintiff was provided with all responsive, nonexempt information in the Bureau's possession. (Ex 3, 9/6/23 MDOS email.)

In his Complaint, Plaintiff alleges City Defendants failed to comply with the FOIA by failing to separate exempt from non-exempt materials and by failing to describe the materials exempted. (Compl, ¶ 11.) He alleges that he is entitled to production of the records he sought and that none of the records requested "are exempt from disclosure." (*Id.*, ¶ 12.) Plaintiff requests that the Court order the production of the requested records and award him costs and fees. (Compl, p 4.)

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Procedural Overview

In addition to the instant lawsuit, Plaintiff filed similar lawsuits against over a dozen other cities and townships in Macomb County. (See City Defendants' 9/15/23 Mot to Consolidate). On September 15, 2023, the City Defendants moved to consolidate all cases before this Court. (*Id.*) This Court granted the motion to consolidate on October 2, 2023. (10/2/23 Order). On October 26, 2023, Secretary Benson moved to intervene in this case as a Defendant. (10/26/23 SOS Motion & Brief.) This Court heard argument and granted her motion on November 20, 2023. (11/20/23 Order.)

On November 28, 2023, this Court held a status conference with all the consolidated counsel, including counsel for Plaintiff, and counsel for Defendant Benson. During this conference it was noted by the undersigned counsel that Plaintiff had been provided with all responsive, nonexempt records in the Secretary's possession related to all the Defendant cities and townships on September 6, 2023. After discussion, this Court requested that Plaintiff's counsel consult with Plaintiff and then advise the Secretary's undersigned counsel as to what information or records Plaintiff believed he was entitled to but that had not been produced on September 6. The Court then scheduled a status conference for January 11, 2024. (11/29/23 Order).

On January 11, 2024, all counsel, including Plaintiff's counsel and the Secretary's undersigned counsel, participated in a status conference with the Court. The undersigned counsel reported that Plaintiff's counsel had not followed up to explain what records or information Plaintiff believed he was entitled to but that had not been produced by the Secretary on September 6. After discussion, this Court requested that Plaintiff's counsel file a brief within 60 days identifying what records had not been produced and addressing any other matters. The

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Court further requested that Secretary Benson file a brief in response to Plaintiff's brief 14 days thereafter.

Plaintiff timely filed his supplemental brief on March 11, 2024, and then filed an amended supplemental brief on March 20, 2024. The Secretary now timely responds to Plaintiff's amended supplemental brief and moves for summary disposition.

STANDARD OF REVIEW

Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016).

ARGUMENT

I. Plaintiff's complaint should be dismissed as moot where he received the records sought from the local jurisdictions through the Secretary's September 6, 2023, production in response to his FOIA request to the Department of State.

As Plaintiff notes in his brief, he sent a FOIA request to the City Defendants that sought:

> Per the Freedom of Information Act, please provide a copy of the extract files from the electronic poll books (EPBs) for all registrants at all voting precincts in the jurisdiction for the elections concluding November 8, 2022 and May 2, 2023. These files should be in .CSV or .XLS format and typically have a file name beginning with "EPB_History" (see below screenshot).

(Ex 1, Roseville FOIA). Similar requests were sent to the other jurisdictions in these consolidated cases.

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Plaintiff spends pages in his brief arguing that the information he requested, EPB history files, are public records subject to disclosure under the FOIA. See MCL 15.232(I), MCL 15.233. The Secretary does not disagree that the EPB voter history files contain information that is subject to disclosure under the FOIA. The FOIA requests to local clerks for the EPB history files concerned the Bureau of Elections because the EPB history files also contain information that is exempt from disclosure under the FOIA.

The issue is that requestors like Plaintiff sought the information "in a .CSV or .XLS format." Local clerks do not have the capability of producing the EPB history files in an .XLS, i.e., Excel format. (Ex 4, Brater Affidavit, ¶ 25). Rather, they can only produce it in a .CSV format. But producing the EPB history in the .CSV format unavoidably produces sensitive information relating to the software[3] design and data architecture of the EPB at the same time it produces what is otherwise public record information. (*Id.*). It is this sensitive information that is exempt under MCL 15.243(1)(y) and/or (z).[4] Similarly, the .CSV files contain sensitive voter

---

[3] Software is not a "public record" under the FOIA. MCL 15.232(I). Software is defined to "mean[ ] a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license." MCL 15.232(j).

[4] MCL 15.243(1)(y) exempts from disclosure:

> Records or information of measures designed to protect . . . the confidentiality, integrity, or availability of information systems, . . . to the extent that those designs relate to the ongoing security measures of a public body . . . and cybersecurity plans, assessments, or vulnerabilities . . . .

And MCL 15.243(1)(z) exempts from disclosure:

> (z) Information that would identify . . . or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.

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information, like full dates of birth, which information is not subject to disclosure. (*Id.*) See also MCL 15.243(1)(d), MCL 169.509gg. But there is no way for the local clerks to digitally redact, or exempt, the sensitive information from the non-exempt information. (*Id.*, ¶ 25.) Because of these concerns, the Bureau of Elections began instructing local clerks to not release this information and to direct requestors to the Bureau of Elections. (*Id.*, ¶ 26, Attachment D.) This is because the Bureau of Elections has the capability to produce the same EPB history files for a jurisdiction in an .XLS format without the sensitive information. (*Id.*, ¶ 27.) In other words, the Bureau can separate the exempt from the nonexempt material. MCL 15.244.

In his brief, Plaintiff argues that the Secretary acted without authority in instructing the local clerks regarding these FOIA requests. But Plaintiff is wrong for two reasons.

First, the Secretary has supervisory authority over all clerks in the performance of their election duties. Section 21 of the Michigan Election Law makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Further, under § 31, the Secretary "shall . . . [a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). These sections provide the Secretary with broad authority to issue instructions, directions, and advice for the proper conduct of elections and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See, e.g., *Davis v Secy of State*, 333 Mich App 588, 597 (2020); *Hare v Berrien Co Bd of Election Commr's*, 373 Mich 526, 531 (1964) (local election board had "duty to follow" the Secretary of State's "instructions" under MCL 168.31); MCL 168.931(1)(h) ("A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county

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election commissioners, board of city election commissioners, or board of inspectors of election.")

This authority plainly includes issuing directives to safeguard voting equipment and associated programming and software. See, e.g., OAG, 2009-2010, No. 7247 (May 13, 2010)[5] ("The Secretary of State, in her role as the Chief Elections Officer, or the Director of Elections through the authority vested in that office, may exercise supervisory authority over local elections officials responding to a [FOIA] request for voted ballots by issuing directions for the review of the ballots in order to protect their physical integrity and the security of the voted ballots."); OAG, 2021-2022, No. 7316 (August 6, 2021) ("The Secretary of State, in her role as the Chief Elections Officer, may exercise supervisory authority over local elections officials responding to a request for access to voting equipment by the Auditor General by issuing directions that access to voting equipment should not be permitted, given the need to protect the physical integrity and security of the equipment consistent with state and federal law.")[6] Since the November 2020 general election, unprecedented efforts to gain unlawful access to voting equipment have occurred. Indeed, it should not be lost on this Court that the attorney who filed Plaintiff's supplemental briefs is the subject of a criminal proceeding for her own involvement in conspiring to obtain and improperly access voting equipment.[7]

Second, the QVF is a creation of the Department of State and its programming and contents belong to the State. In compliance with federal law, see 52 USC 21083(a)(1)(A), the Secretary of State created the QVF as the State's computerized statewide voter registration list.

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[5] Available at Opinion #7247 (state.mi.us) (accessed March 25, 2024).

[6] Available at Opinion #7316 (state.mi.us) (accessed March 25, 2024).

[7] See Pro-Trump lawyer Stefanie Lambert turns herself in at Mich. courthouse (detroitnews.com) (accessed March 25, 2024.)

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See MCL 168.509m(1)(a), 168.509o, 168.509p, 168.509q, 168.509r. MCL 168.509o provides that the "secretary of state shall direct and supervise the establishment and maintenance of a statewide qualified voter file. The secretary of state shall establish the technology to implement the qualified voter file." MCL 168.509r similarly provides that "the secretary of state shall establish and maintain the computer system and programs necessary to the operation of the qualified voter file," and that the Secretary of State "shall *allow* each county, city, or township *access* to the qualified voter file." (Emphasis added). These statutes demonstrate that the QVF, the computer systems and programs used to operate the QVF, the data and files within the QVF, and who may access the QVF and how they may do so, are under the Secretary's supervision and control. This includes the software and data downloaded from the QVF to the EPBs and the subsequent upload of data from the EPBs to the QVF. See MCL 168.668b(1) ("[e]ach city or township shall use the electronic poll book software developed by the [state] bureau of elections in each election precinct in the city or township on election day to process voters and generate election precinct reports.") Local clerks are allowed access to the QVF and can add, change, or delete records in the QVF, see MCL 168.509p, but the QVF remains under the supervision and control of the State. See, e.g, OAG, 1993-1994, No. 6820 (October 11, 1994) ("Although participating law enforcement agencies other than the Department of State Police have remote computer terminals, which allow them access to the STATIS computer, those records are not 'writings' 'in the possession of' those agencies within the meaning of the FOIA, section 2(c)and (e), unless those records are saved to a computer storage device or printed by the participating agency.")[8]

[8] Available at Opinion #6820 (state.mi.us) (accessed March 25, 2024).

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Based on these statutes, it is plainly within the Secretary's authority to direct local clerks not to produce the EPB history files and to redirect FOIA requests for that information to the Secretary's Bureau of Elections. And, as noted above, Plaintiff did redirect his FOIA requests to the Bureau of Elections, seeking the same information for *all* jurisdictions in Macomb County, (Ex 2, 5/13/23 MDOS FOIA request):

> *I hereby request a comma separated electronic version (CSV) or Microsoft Excel workbook file version (XLS) of the information recorded in the Electronic Poll Book for each voting jurisdiction within Macomb County for the November 8, 2022 and May 2, 2023 elections.* As stated in USC 52, 20701, the federal retention period for election materials is 22 months following the final canvass, and the State of Michigan retention period is 24 months following final canvass as stated in MCL 168.811.
>
> Below are the specific data elements requested:
> 1. Voter full name (First, Middle, Last, Suffix)
> 2. Voter ID
> 3. Voter number
> 4. Voter ballot number
> 5. Date/time of poll book record entry
> 6. Voter ballot type
> 7. Voter school district code
> 8. Voter birth year
> 9. Precinct
> 10. Action Description
>   a. Issue Regular ballot
>   b. Record AV Ballot
>   c. UNDO: Issue Regular Ballot
>   d. Spoil Ballot
>   e. Add standalone remark
>   f. Other?
> 11. Is Undone (True or False)
> 12. Unlisted voter name (if applicable) [Emphasis added.]

On September 6, 2023, Plaintiff was sent a thumb drive containing Excel spreadsheets with all responsive information in the Department of State, Bureau of Elections' possession,[9]

[9] As Plaintiff notes in his brief, local clerks are instructed to upload their jurisdictions' EPB history files to the QVF within 7 days of an election. (Plf's Amend Supp Brf, p 14.) If a local clerk fails to perform this duty either within or without the 7 days the EPB history will not

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which included data in each requested field as available. (Ex 3, 9/6/23 MDOS email; Ex 4, Brater Affidavit, ¶¶ 28-29; Ex 5, Roseville Nov 2022 Election; Ex 6, Roseville May 2023 Election.)[10]

Section 10 of the FOIA authorizes a requestor to file a civil action against the public body if the body makes a final determination to deny a request. MCL 15.240(1)(b). But, where a public body provides the requested documents, it moots any civil action. See *Herald Co, Inc v Ann Arbor Pub Sch,* 224 Mich App 266, 270-271 (1997) ("When the [FOIA] disclosure that a suit seeks has already been made, the substance of the controversy disappears and becomes moot."). See also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112-113 (2002) ("[W]e hold that any existing 'controversy' regarding whether the citizen complaint records were properly ordered to be disclosed was rendered moot by their release.")

The Department of State's production of EPB history information for all jurisdictions in Macomb County for the May 2023 election included information for the Cities of Roseville, Centerline, Warren, and Sterling Heights, and for Richmond, Bruce, Macomb, Shelby, Washington, and Clinton Townships. (Ex 4, Brater Affidavit, ¶ 30). Because the Cities of Mount Clemens, St. Clair Shores, and Eastpointe, and Harrison and Chesterfield Townships did not hold May elections in 2023, there are no EPB records to produce for those jurisdictions. However, the Department of State's production for the November 2022 election included EPB information for all jurisdictions. (*Id.*, ¶ 29). Thus, the State has already produced to Plaintiff EPB voter

---

appear in the QVF for that particular election. In this case, however, each of the jurisdictions uploaded their EPB history, unless they did not host a May 2023 election.

[10] Exhibits 5 and 6 are extracts of the FOIA production for the City of Roseville demonstrating what information was provided to Plaintiff for each city and township for the November 2022 and May 2023 elections. The file for each election containing every jurisdiction is too large to easily append as exhibits.

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history information for the November 2022 and May 2023 elections for all jurisdictions in the instant consolidated cases. And because this information was produced to Plaintiff, his FOIA claims are moot as to those jurisdictions.

This Court instructed Plaintiff to explain in his supplemental brief why or how the State's production of the EBP history information for the jurisdictions failed to satisfy his FOIA requests. At best, Plaintiff suggests that the Department of State's production may be erroneous or incorrect. (Plf's Amend Supp Brf, pp 4, 33 & Attachment C) ("When this same data is then compared to the data certified in FOIA requests from the state as to who SOS Benson has recorded as voting in the same election it varies by up to 12%. The data should match and it does not.") These statements are based on Plaintiff's Attachment C, which is an affidavit from a former township clerk in Hillsdale County who alleges that she had EPB data from the November 2020 election in her township compared by an expert with data produced by the Bureau of Elections in response to a FOIA for November 2020 voting information for her township, which data allegedly did not match her data, "differ[ing] by 11.5%." (Plf's Attachment C.)[11] The Secretary is doubtful of the claims in Attachment C regarding the discrepancies in data from 2020 as the documents do not fully explain the analyses that was conducted or attach the data so that the State can conduct its own review.

Regardless, it is not an analysis of the Department of State's September 6, 2023, production to Plaintiff of the jurisdictions' November 2022 and May 2023 voter history

[11] This clerk was placed under supervisory control by the Director of Elections for failing to perform her election duties, unlawfully permitted a third party to access the township's voting equipment (Plf's Attachment C, Cotton affidavit), and was later recalled by the voters in her township. See Election-denying clerk ousted in Michigan recall: 'Make Adams Township Boring Again' | Bridge Michigan (accessed March 25, 2024.)

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information at issue in this case.[12] Thus, Plaintiff has failed to explain why the Department of State's production has not mooted his claims against the jurisdictions. As a result, summary disposition should be granted in favor of all Defendants.

II. To the extent Plaintiff alleges violations of 52 USC 20701, MCL 750.492, and MCL 750.248, those claims must be dismissed.

Plaintiff's complaint and amended supplemental brief make various references to 52 USC 20701, MCL 750.492, and MCL 750.248 alleging that the Secretary has violated these statutes through her directives to local election officials regarding retention of records from the EPBs, and how to handle FOIA requests related to the EPBs. But these allegations, along with being incorrect, are not actionable because these statutes do not provide for a civil cause of action.

1. 52 USC 20701, 20702

The federal Civil Rights Act of 1960, 52 USC 20701 *et seq.*, requires the retention of election records. The Act requires "every officer of election" to retain, for twenty-two months from the date of an election for federal office, "all records and papers which come into [the officer's] possession relating to any application, registration . . . or other act requisite to voting in

[12] Plaintiff also suggests the records in the QVF are inaccurate due to a statewide mailing in September of 2020. (Plf's Amend Supp Brf, p 4; Attachment E.) But that mailing was of applications to register to vote to eligible but unregistered voters, and a voter could not become registered unless the voter actually completed an application. See Michigan Department of State mailings will inform and assist potential voters (accessed March 25, 2024). The mailing, without more, did not register 700,000 new voters. In the same vein, Plaintiff points to an affidavit of a Michigan resident who is not a U.S. citizen but was registered to vote. (*Id.*; Attachment F.) Notably, the individual is not a resident of any of the jurisdictions at issue in these consolidated cases. But a review of the QVF reveals that this person became registered to vote in 1993, so not through the 2020 mailing or any recent branch transaction, and had his registration cancelled in August of 2022 at his request. (Ex 7, O'Brien QVF.) Neither the mailing nor the registration of the resident, which could only have occurred by the resident affirming his U.S. citizenship, whether intentionally or unintentionally, explain how or why the Department of State's September 6, 2023, production of EBP voter history for the jurisdictions at issue was not sufficient to moot the claims against the jurisdictions.

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such election[.]" 52 USC 20701. The statute does not specifically define "records," but the US Department of Justice has clarified that the term as used in section 20701 includes "records created in digital or electronic form."[13] Section 20702 makes it a crime to destroy records protected by section 20701. 52 USC 20702.

Federal courts throughout the country, including in Michigan, have held that section 20701 is a criminal statute that does not confer a private right of action. *See, e.g., Smith v DeBoyer, et al*, No. 2:22-cv-11572, 2022 WL 16641857, at *3 (WD Mich, Oct 12, 2022) (52 USC 20701 does not provide private cause of action); *Ickes v Whitmer*, No. 1:22-cv-817, 2022 WL 4103030, at *3 (WD Mich, Sept 8, 2022) ("52 USC 20701 likely does not create a private right of action."); *Pirtle v Nago*, No. 22-00381, 2022 WL 3915570, at *3 (D Haw, Aug 31, 2022) (same); *Soudelier v Dep't of State La*, No. 22-2436, 2022 WL 3686422, at *1 (ED La, Aug 25, 2022) (same); *Ayyaduri v Galvin*, 560 F Supp 3d 406, 408-409 (D Mass, Sept 10, 2021) (same).

This Court should follow suit and dismiss any claim Plaintiff advances under this statute. Even so, the Secretary has not violated the Act or caused the clerks in the jurisdictions at issue here to do so.

Various state laws pertain to the safe-keeping and retention of election-related records.

Section 811 of the Michigan Election Law provides:

> All election returns, *including poll lists*, statements, tally sheets, absent voters' return envelopes bearing the statement required by section 761, absent voters' records required by section 760, and other returns made by the election inspectors of the several precincts *must be carefully preserved and may be destroyed after the expiration of 22 months following the primary or election at which the same were used.* All applications executed under section 523, all voter registration applications executed by applicants under section 497(3) and (4), and all absent voters' applications must be carefully preserved and may be destroyed after the

[13] See U.S. Department of Justice, Federal Law Constraints on Post-Election "Audits," July 28, 2021, p 2, available at Federal Law Constraints on Post-Election "Audits" (justice.gov), (accessed March 25, 2024.)

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> expiration of 6 years following the primary or election at which those applications were executed. All ballots used at any primary or election, other than ballots containing a federal office, may be destroyed after 30 days following the final determination of the board of canvassers with respect to the primary or election unless a petition for recount has been filed and not completed or unless the destruction of the ballots is stayed by an order of a court. All ballots containing a federal office, and all presidential primary ballot selection forms, may be destroyed after the expiration of 22 months following the primary or election at which those ballots were cast or forms were used. [MCL 168.811 (emphasis added); see also R. 168.790(19).]

The administrative rules promulgated by the Department of State with respect to electronic voting systems provides that "[t]he clerk in charge of the election shall secure the container containing the programs, test deck, accuracy test results, and other related materials, and the original edit listing until 30 days following the certification of the election if a recount has not been requested or until a date prescribed by the secretary of state." R. 168.790(18).

Section 799a(4) of the Michigan Election Law provides that:

> Unless a petition for recount has been filed and the recount has not been completed, ballots, ballot labels, programs, test results, and other sealed materials may be released from their original seal after 7 days following the final determination of the board of canvassers with respect to the election at which the ballots were voted. However, the released materials shall be secured and preserved for the time period required by this act and the rules promulgated by the secretary of state. [MCL 168.799a(4).]

The Election Officials' Manual produced by the Bureau of Elections further explains state retention requirements.

> **State Retention Requirements**: During the ballot retention period specified under Michigan election law, local election officials must ensure that the seal of record used to secure 1) voting devices/tabulators and 2) ballot containers containing the used and unused ballots, programs, test decks, accuracy test results, edit listings and any other related materials remain intact. The seals may be broken only after security is released by the proper authority. Ballot security for the August primary and November general election is under the authority of the Secretary of State. The Secretary of State notifies the county clerk of each county in writing after the primary and general election when ballot security is released under Michigan election law. Further ballot retention and security provisions apply to partisan ballots used in the August primary and November general

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> election as discussed under "Federal retention requirements." [Election Officials' Manual, Chapter 16, p 9.][14]

The Manual further explains the interplay between R. 168.790(18)'s requirements and MCL 168.799a(4):

> [Subsection 799a(4)] was enacted to accommodate situations where electronic voting equipment subject to the 30-day retention period [in R. 168.790] must be readied for an upcoming election. Essentially, the provision allows an election official responsible for the security of optical scan ballots, ballot labels, programs, test results and associated materials to break the original seal of record after seven days and transfer the materials involved to sealed ballot bags for the duration of the retention period. [*Id.*, p 9.]

With respect to section 20701, the Secretary advises local jurisdictions on the proper method of complying with federal record retention requirements. The Election Officials' Manual addresses this federal retention requirement:

> **Federal Retention Requirements:** If the office of President, U.S. Senator or Representative in Congress appears on the ballot, federal law requires that all documents relating to the election – including, ballots and programs used to tabulate optical scan ballots – be retained for 22 months. To comply with this requirement, the Department of State's Bureau of Elections recommends that ballots and programs relating to federal elections be stored in sealed ballot bags in a secure place during the 22-month retention period. This will free the city or township's ballot containers for use in other elections. The documents subject to the federal retention requirements must not be transferred to ballot bags for extended retention until after the retention requirements specified under Michigan election law have been fulfilled. [*Id.*, p 10.][15]

Thus, under state and federal law, records, including programming, used to conduct an election with electronic voting equipment must be retained by election officials.

The EPBs are electronic voting equipment subject to the above retention statutes and rules as applicable. Before a subsequent election, the Bureau of Elections sends out a memorandum to county clerks releasing security of all election materials, see MCL 168.847, for

[14] See Chapter 16 Pre & Post Election Information (michigan.gov) (accessed March 25, 2024.)

[15] *Id.*

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the prior election. (See Ex 4, Brater Affidavit, ¶ 19, Attachment B).[16] Regarding the EPB, the memorandum instructs clerks to print a paper copy of the EPB contents for retention, and to then delete the software and associated files unless certain circumstances exist (e.g., a court order). (*Id.*) The previous election's information must be deleted from the EPB because it contains personal information of voters and so that the old election file is not accidentally accessed during the new election. (*Id.*, ¶ 20.)

Contrary to Plaintiff's suggestion, the deletion of the software and files from the EPB does not violate section 20701 because the law does not require that officials retain records in multiple formats, and where the poll lists from the EPB is saved in paper form for the requisite 22 months. (*Id.*, ¶ 19.). See MCL 168.811.[17]

2. MCL 750.492, 750.248.

Plaintiff's complaint references MCL 750.492, and his supplemental brief references that statute and MCL 750.248. Section 492 provides for the inspection and examination of county, city, or township records. MCL 750.492. Section 248 prohibits falsely making, altering, forging, or counterfeiting a public record. MCL 750.248. Both laws are criminal statutes where the Legislature has not provided for a civil remedy or expressed any intent they may be privately enforced. See, e.g., *Wilkerson v Seder*, 81 Mich App 726, 728 (1978) (criminal usury statute did not create private duty towards certain individuals nor did statute include civil remedies, thus Legislature did not create a private action); *Richardson v Allstate Ins. Co.,* 328 Mich App 468,

[16] Attachment B is the memorandum releasing security related to the November 2020 general election. Virtually the same memorandum is sent for all state elections.

[17] Plaintiff attaches an affidavit from Clerk Kim Meltzer of the Charter Township of Clinton, (Plf's Attachment D), as support that clerks believe the Bureau of Elections is instructing clerks to violate retention laws in connection with the EPBs. (Plf's Amend Supp Brf, p 3.) However, Clerk Meltzer's affidavit does not say that; she simply acknowledges various statutes and that the Bureau of Elections sent out various instructions. (Plf's Attachment D.)

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473 (2019) ("MCL 750.410 is a criminal statute and provides no civil remedy or cause of action for its enforcement.")

Thus, any claim Plaintiff seeks to advance under these statutes must be dismissed. Even so, the Secretary has not violated either statute or caused any election official to do so.

"Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *O'Connell v Dir of Elections*, 316 Mich App 91, 99 (2016) (quotation marks and citation omitted). If there is a conflict between statutes that are *in pari materia*, the more recent and specific statute controls. *Id.*" Here, although section 492 appears in the Penal Code, both that section (at least arguably) and the FOIA concern the public's ability to access records of a county, city, or township, so they should be read together, to the extent possible, and where it is not possible and there is a conflict, the FOIA will control as the more recent and specific statute. *Id.* Thus, if public records are exempt from disclosure or inspection under the FOIA, a municipality could not be compelled to produce the same records under section 492.[18]

As an initial matter, the Secretary does not agree that the EBP history files are county, township, or city records because, as explained above, the QVF and the data collected from the EPBs belongs to the State. Thus, section 492 does not apply. But even if it did, the local clerks were directed not to produce records in response to Plaintiff's FOIA requests because the clerks could not do so in a manner that would ensure exempt information was not also produced along

[18] Notably, an Attorney General opinion pre-dating the FOIA determined that confidential records could be excluded from inspection under section 492. See OAG, 1975-1976, No. 4905, p 213 (December 9, 1975).

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with non-exempt information. This direction did not contravene the FOIA Act, so it does not contravene section 492.

Finally, as to section 248, the Secretary has not directed any official to "falsely make[ ], alter[ ], forge[ ], or counterfeit[ ] a public record," MCL 750.248, in connection with any data or files on the EPBs or any other election record.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Intervening Defendant Secretary of State Jocelyn Benson respectfully requests that this Honorable Court grant her motion for summary disposition and dismiss Plaintiff's complaint.

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Intervenor-Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

Dated: March 25, 2024

PROOF OF SERVICE

On March 25, 2024, I electronically filed the foregoing papers with the MiFile system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Attorneys for Intervenor-Defendant Benson
Assistant Attorney General
PO Box 30736
Lansing, Michigan 48909
517.335.7659

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/18/2024 7:39:15 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Michigan webpage
Attachments: NEW - MI AG - Protecting Michigan Voters from AI Generated Election Misinformation webpage - DRAFT.pdf; Protecting Michigan Voters from AI Generated Election Misinformation - DRAFT.docx

Hi Jonathan,

Attached is what we can provide, screen shot and word doc. If changes could be made in track changes on word doc that would be great.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/18/2024 2:35:23 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: FW: election misinformation

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Sent: Wednesday, September 18, 2024 8:13 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>; Witters, Emily (AG) <WittersE@michigan.gov>
Subject: RE: election misinformation

Hi Heather and Linus,

Thanks to Emily's quick and thorough work, the new election misinformation page is ready for your review. *You will need to be on the SOM network or VPN to see the preview.*

Melanie Taylor drafted the AG's letter, and we added a section that describes "deepfake."

Please let us know if any changes are needed. If changes are not needed, we'll send it on to the deputies for final approval before going live.

Thanks,
Harmony

From: Glashower, Harmony (AG)
Sent: Tuesday, September 10, 2024 1:50 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

Yes, of course! And thank you for the quick turn-around.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Tuesday, September 10, 2024 1:12 PM

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To: Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

Hi Harmony,

I am sharing the attached, which was put together by Danny (our new AAG in CRE). It looks good to me, and I assume we will be able to take a peek at the site once you have put it together.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Sent: Tuesday, September 10, 2024 10:22 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: FW: election misinformation

Hi Heather,

Linus asked for a new webpage, at the request of the AG, to protect voters from AI-related election misinformation. This page would be modeled after NY's. Would you like to provide information before we build it out? With the election nearing, we are trying to get this one of the door ASAP.

Thanks,
Harmony

From: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Sent: Tuesday, September 10, 2024 9:43 AM
To: Glashower, Harmony (AG) <GlashowerH@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

DPP MCL 15.243(1)(m)

Thanks!

Linus Banghart-Linn (he/him)
Chief Legal Counsel
Michigan Department of Attorney General
P.O. Box 30217
Lansing, MI 48909
(517) 281-6677

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Banghart-LinnL@michigan.gov

From: Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Sent: Tuesday, September 10, 2024 9:30 AM
To: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

DPP MCL 15.243(1)(m)

From: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Sent: Tuesday, September 10, 2024 9:22 AM
To: Glashower, Harmony (AG) <GlashowerH@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

Kim, Harmony,

DPP MCL 15.243(1)(m)

Thank you!

Linus Banghart-Linn (he/him)
Chief Legal Counsel
Michigan Department of Attorney General
P.O. Box 30217
Lansing, MI 48909
(517) 281-6677
Banghart-LinnL@michigan.gov

From: Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Sent: Friday, September 6, 2024 2:00 PM
To: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Bush, Kimberly (AG) <BushK2@michigan.gov>
Subject: RE: election misinformation

Hi Linus,

DPP MCL 15.243(1)(m)

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Please let me know how I can help.

Thanks,
Harmony

From: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Sent: Friday, September 6, 2024 1:47 PM
To: Bush, Kimberly (AG) <BushK2@michigan.gov>; Glashower, Harmony (AG) <GlashowerH@michigan.gov>
Subject: election misinformation

Kim, Harmony,

DPP MCL 15.243(1)(m)

Thank you!

Linus Banghart-Linn (he/him)
Chief Legal Counsel
Michigan Department of Attorney General
P.O. Box 30217
Lansing, MI 48909
(517) 281-6677
Banghart-LinnL@michigan.gov

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/20/2024 7:00:39 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Notice of Appeal in 2:24-cv-12375-DPH-KGA Kennedy v. Benson

24-1799 is number

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 20, 2024 2:07 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Notice of Appeal in 2:24-cv-12375-DPH-KGA Kennedy v. Benson

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I assume that the Sixth, like most federal appellate courts, has a day or so lag before the docket is actually opened.

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, September 20, 2024 at 12:35 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Notice of Appeal in 2:24-cv-12375-DPH-KGA Kennedy v. Benson

They said they will be filing a "motion to expedite" not sure exactly what they are going to say in it.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 20, 2024 12:12 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: FW: Notice of Appeal in 2:24-cv-12375-DPH-KGA Kennedy v. Benson

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Let us know if we can help on with this. I assume a request for injunction pending appeal is forthcoming.

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From: cmecfadmin@mied.uscourts.gov <cmecfadmin@mied.uscourts.gov>
Date: Friday, September 20, 2024 at 12:09 PM
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Subject: Notice of Appeal in 2:24-cv-12375-DPH-KGA Kennedy v. Benson

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U.S. District Court

Eastern District of Michigan

Notice of Electronic Filing

The following transaction was entered by Debus, Brandon on 9/20/2024 at 12:08 PM EDT and filed on 9/20/2024

Case Name:	Kennedy v. Benson
Case Number:	2:24-cv-12375-DPH-KGA
Filer:	Robert F. Kennedy, Jr
WARNING: CASE CLOSED on 09/18/2024	
Document Number:	16

Docket Text:
NOTICE OF APPEAL by Robert F. Kennedy, Jr re [14] Order on Motion for Preliminary Injunction, [15] Judgment. Receipt No: AMIEDC-9946881 - Fee: $ 605 - Fee Status: Fee Paid. (Debus, Brandon)

2:24-cv-12375-DPH-KGA Notice has been electronically mailed to:

Brandon L. Debus bdebus@dickinsonwright.com, kneff@dickinsonwright.com

Erik A. Grill grille@michigan.gov, albrol@michigan.gov, richardsm1@michigan.gov

Heather S. Meingast meingasth@michigan.gov, albrol@michigan.gov, richardsm1@michigan.gov

2:24-cv-12375-DPH-KGA Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=9/20/2024] [FileNumber=12048113-0] [6f0f229e4da88ce07fe991b672a63a70b9e2f8bdd77dc65e22b159cdf1491de22101b20bad30580b08240a3aa5331fc1f202d65a659b9d614a150dedc2282b30]]

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Sent: 9/19/2024 1:31:09 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]
Subject: RNC letters perm AV list
Attachments: Letter re Permanent Mail Ballot List 09.06.24.pdf; 2024.09.17 RNC perm ballot list.pdf

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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REPUBLICAN NATIONAL COMMITTEE

COUNSEL'S OFFICE

September 6, 2024

Jonathan Brater
Director, Bureau of Elections
Michigan Secretary of State's Office
430 W. Allegan St.
Richard H. Austin Building, 1st Floor
Lansing, MI 48933

Dear Mr. Brater:

I am following up on correspondence we had earlier this summer regarding inactive voters who are nevertheless classified as permanent mail ballot voters in violation of Michigan law. As an initial matter, we appreciate your office's efforts to update the relevant voter files to differentiate between permanent mail ballot voters and permanent mail ballot application voters in response to our inquiry. We also appreciate your office's correction of the Election Officials' Manual to clarify that cancellation of certain inactive voters' permanent mail ballot status is not discretionary.

According to the most recent inactive voter file, which we received on September 5, there are 530 inactive voters who are also classified as permanent mail ballot voters. According to the file, these voters have inactive status for the following reasons:

- Lack of voting activity: 465 voters
- Clerk sent notice to voter – moved out of jurisdiction: 55 voters
- Clerk sent notice to voter – move within jurisdiction: 7 voters
- SOS sent notice to voter – surrendered Michigan license: 3 voters

These voters appear to have inactive status for reasons that require removal from the permanent mail ballot list. Election officials must remove a voter from the permanent mail ballot list if the voter "does not vote for 6 consecutive years" or if the official "receives reliable information that the permanent mail ballot voter has moved the voter's residence to another state, or has moved the voter's residence within this state without updating the voter's registration address." MCL 168.759e(3)(c), (d). Such removal is *mandatory*. MCL 168.759e(4). These are the same reasons for which a voter must be placed on the inactive voter list. MCL 168.509r.

If these 530 inactive voters are indeed ineligible to automatically receive a mail ballot, we urge your office to immediately rescind their permanent mail ballot status. If your office takes the position that these 530 inactive voters are properly classified as permanent mail ballot voters, please provide an explanation of your position. We would appreciate if you could provide a response by Wednesday, September 11.

Sincerely,

Stephen J. Kenny

Stephen J. Kenny
Senior Counsel, Litigation

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

September 17, 2024

Stephen J. Kenny
Republican National Committee
1001 Pennsylvania Ave, N.W. Suite 510
Washington D.C. 20004

Re: Permanent Mail Ballot List

Dear Mr. Kenny:

The Department of State (Department) is in receipt of your September 6, 2024, letter, regarding voters on the permanent mail ballot list.

Your letter stated that your latest review of the state's inactive voter file, received by you September 5, shows "530 inactive voters who are also classified as permanent mail ballot voters" and that they "appear to have inactive status for reasons that require removal from the permanent mail ballot list." You break those voters into groups based on the reasons you believe they should not be on the permanent mail ballot list, and you describe those groups as follows:

- Lack of voting activity: 465 voters
- Clerk sent notice to voter—moved out of jurisdiction: 55 voters
- Clerk sent notice to voter—move within jurisdiction: 7 voters
- SOS sent notice to voter—surrendered Michigan license: 3 voters

On September 10, 2024, the Department responded to your letter and requested the list of allegedly ineligible voters so that it could review and verify your contention. You provided that list the same day. Following its review, the Department provides this response.

As to the largest category, you assert that 465 voters must be removed from the list because they have not voted for 6 consecutive years. However, these voters do not have 6 years of voting inactivity *following* their placement on the permanent ballot list. The Michigan Constitution codifies specific voting-related rights afforded to all registered voters in Michigan, including the right "to have an absent voter ballot sent to the voter before each election by submitting a single signed absent voter ballot application covering all future elections." Mich Const Art II, §4(1)(k). That right can only be rescinded for four specified reasons, including "the voter *does not* vote for six (6) consecutive years."[1] (emphasis added) *Id.* In other words, the Constitution and statute use

[1] The Michigan Election Law similarly lists the reason for rescission as "The permanent mail ballot voter *does not* vote for 6 consecutive years." (emphasis added) MCL 168.759e.

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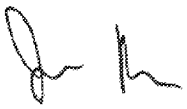
prospective rather than retroactive language. A voter may join and remain on the permanent mail ballot list even if the voter has not voted for 6 years; however, if a voter has been on the ballot list for 6 years without voting, the voter is then removed.

The constitutional provisions took effect December 24, 2022, and the implementing changes to statute took effect February 13, 2024. The six-year clock for potential rescission begins to toll on the day a voter exercises their right to be added to the list. A voter who has not voted since the date they were added to the list would be eligible for rescission six years from that date—or 2028 at the earliest. If a registered voter could be denied access to the list because of their previous failure to vote, it would be a violation of the constitutional guarantee that the right be afforded to "*[e]very* citizen of the United States who is an elector qualified to vote in Michigan." (emphasis added) Mich Const Art II, §4(1). Because the constitution does not exclude individuals who have not voted in the last six years from being *added* to the list, and instead provides for their *removal* only once they have been on the list for six years without voting, these 465 voters are properly classified as permanent mail ballot voters.

The Department is carefully reviewing the Qualified Voter File (QVF) record for each of the remaining 65 voters you identified. These records are being reviewed on a case-by-case basis and may require follow-up conversations with the voter's local clerk. The Department will provide a more detailed response about the status of those voters on or before October 4, 2024.

Sincerely,



Jonathan Brater
Director of Elections

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Sent: 9/19/2024 1:35:25 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]
Subject: RE: RNC letters perm AV list
Attachments: Correspondence from Chairman Steil to SOS Benson.pdf

fyi

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Thursday, September 19, 2024 9:31 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Sally Marsh <Sally@statesuniteddemocracy.org>
Subject: RNC letters perm AV list

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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September 16, 2024

The Honorable Jocelyn Benson
Michigan Secretary of State
430 W. Allegan St.
Richard H. Austin Building – 4th Floor
Lansing, MI 48918

Dear Secretary Benson,

As Chairman of the U.S. House of Representatives Committee on House Administration ("Committee"), which has broad oversight of our nation's federal elections,[1] I write today seeking information and clarification regarding whether Michigan observers, known as "challengers," can be present during the during the initial processing of mail ballots and signature verification. The Constitution prescribes that the House of Representatives is the "Judge of [its own] Elections,"[2] and the Committee is required by the Federal Contested Elections Act to adjudicate disputes as to who was legitimately elected to the House.[3] Throughout my time as Chairman, the Committee has strived to promote election transparency measures that prevent fraud and give all Americans confidence in our elections. As such, the Committee requests that your office clarifies to all County Clerks that challengers are permitted at the *initial stage* of mail-in ballot processing.

For our elections to be secure and instill public confidence, the Committee believes it is good public policy for States to allow observers to witness election procedures—both for in-person and mail voting. After all, "[s]unlight is the best of disinfectants" in elections.[4] Transparency is especially important for mail voting, which the U.S. Supreme Court has found to be more vulnerable to fraud than in-person voting.[5] Allowing observers to watch the processing of mail ballots guards against potential fraud and promotes public confidence.

Michigan wisely permits observers—called "challengers"—appointed by both major political parties to observe in-person voting and at least parts of the mail voting process.[6] For in-person voting, challengers can contest the eligibility of those attempting to cast ballots.[7] Yet it is unclear whether challengers can perform that function for mail voting.

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[1] Rules of the United States House of Representatives, rule X(k)(12), https://rules.house.gov/sites/evo-subsites/republicans-rules.house.gov/files/documents/118/Additional%20Items/118-House-Rules-Clerk-v2.pdf.
[2] U.S. Const. art. I, § 5.
[3] 2 U.S.C. §§ 381–96.
[4] Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).
[5] *See, e.g.,* Crawford v. Bd. of Marion Cnty. Elec. Bd., 553 U.S. 181, 195-95 (2008) (opinion of Stevens, J.).
[6] MCL § 168.730(1).
[7] MCL § 168.733(1)(c).

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Michigan law seems to envision a two-step process for processing mail ballots. In the first step, city and township clerk offices receive and process the mail ballots.[8] That processing includes verifying whether the elector is properly registered, documenting the time the mail ballot was received, and conducting signature verification.[9] Signature verification is an essential part of processing mail ballots in Michigan because it ensures that the same person who requested (and signed for) the mail ballot is the one who cast it.[10]

In the second step, after a clerk's office concludes a mail ballot is eligible to be tabulated, the ballot is forwarded to an absent voter counting board.[11] All agree that challengers can be present at the absent ballot counting boards.[12] However, no signature verification is conducted at the absent voter counting boards.[13]

Michigan law seems unclear on whether challengers can be present during the first step of mail-ballot processing, including signature verification. At least one statutory provision seems to suggest challengers can be present in clerk offices to monitor relevant election activities.[14]

If challengers can be present in the clerk offices, they should be able to perform all their usual functions, including challenging the eligibility of voters.[15] But challengers can only perform that function if they are allowed to observer signature verification. However, it is the Committee's understanding that at least some clerk offices believe challengers have no right to be present during the initial processing of mail ballots and signature verification.

There is no legitimate public policy reason to exclude challengers from the initial processing of mail ballots and signature verification. Excluding challengers from the room while clerk offices assess whether mail voters are registered and actually are who they say they are (through signature verification) prevents challengers from being able to vouch for the security of mail voting in Michigan. The Committee cannot think of any countervailing policy considerations justifying the exclusion of challengers.

Indeed, in our Committee hearing on September 11, 2024 where you appeared as a witness alongside five other Secretaries of State, you were asked if your office is prepared and ready to welcome House Election Observers during this election cycle. You and your colleagues from both major political parties all responded with a resounding, "Yes."[16]

Therefore, the Committee asks that, by September 23, 2024, you confirm and communicate to the various clerk offices that challengers are permitted to observe initial processing of mail ballots and signature verification. The Committee further requests that, if there is remaining

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[8] *See* MCL §§ 168.7646(1), 168.766.
[9] MCL § 168.765.
[10] *See* MCL § 168.766a
[11] *See* MCL § 168.765(4).
[12] *See* MCL § 168.765a
[13] *See* MCL § 168.765(4); *see also* MCL § 168.768.
[14] MCL § 168.761b.
[15] MCL §§ 168.30(3), 168.733(l)(c).
[16] *American Confidence in Elections: Looking Ahead to the 2024 General Election: Hearing Before the H. Comm. On Admin., 118th Cong. (2024).*

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confusion or difference of opinion, pursuant to our authority under the Constitution and the Federal Contested Elections Act, that challengers be permitted to observe. Thus, in the event there is a contested House election in Michigan, it will assist us in assessing the reliability of the results. If challengers are not allowed to observe the initial processing of mail ballots and signature verification, inevitable doubts about the integrity of Michigan's elections will arise. After all, it seems absurd to permit challengers to observer in-person voting, but then to prohibit challengers from observing mail voting.

Thank you for your prompt attention to this matter. Please send any correspondence to Thomas Lane, Elections Counsel and Director of Election Coalitions, at Thomas.Lane@mail.house.gov. If you have any questions, do not hesitate to contact the Committee at 202-225-8281.

Sincerely,

Bryan Steil
Chairman
Committee on House Administration

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Sent: 10/3/2024 7:14:59 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Dax contact info and CA opinion
Attachments: Kennedy En Banc petition.pdf

Is spoke to soon…Kennedy en banc petition.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Thursday, October 3, 2024 11:43 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Re: Dax contact info and CA opinion

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Also, this is what I was going to flag earlier, in case you hadn't seen:

https://hlli.org/hlli-and-umlc-sue-minnesota-to-defend-free-speech-rights/

DPP MCL 15.243(1)(m)

Dax Goldstein
415.938.6481
they/them

From: Dax Goldstein
Sent: Thursday, October 3, 2024 8:04 AM
To: meingasth@michigan.gov <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Daniel Osher <osherd@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Dax contact info and CA opinion

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Here you all go!

Dax Goldstein (they/them) | **Senior Counsel** | Program Director, Election Protection (Legal)
States United Democracy Center
415.938.6481 | @statesunited
dax@statesuniteddemocracy.org

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Case No. 24-1799

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT F. KENNEDY, JR.,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court for
the Eastern District of Michigan, Case No. 2:24-cv-12375
Hon. Denise Page Hood

PETITION OF ROBERT F. KENNEDY, JR. FOR REHEARING EN BANC

DICKINSON WRIGHT PLLC
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2600 West Big Beaver, Suite 300
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Attorneys for Plaintiff-Appellant Robert F. Kennedy, Jr.

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INTRODUCTION

Robert F. Kennedy, Jr. ("Mr. Kennedy") hereby petitions for rehearing en banc of the September 27, 2024 panel decision in *See Kennedy v. Benson*, No. 24-1799 (6th Cir. Sept. 27, 2024) (the "Panel Decision"). En banc consideration is appropriate for numerous reasons.

First, the Panel Decision effectively holds, in part, that Secretary Benson's violation of state law is of no consequence, because maintaining the orderly administration of an upcoming election is of greater importance than ensuring that election officials comply with Michigan law. *See Kennedy v. Benson*, No. 24-1799, slip op. at 10-11 (6th Cir. Sept. 27, 2024). The Secretary had no legal authority to recertify the candidates to be listed on the ballot after the September 6, 2024 statutory deadline. No court – not even the Michigan Supreme Court – issued any order permitting the Secretary to circumvent this statutory deadline. The Secretary, of her own accord, recertified the ballot with Mr. Kennedy's name included. Such unlawful conduct clearly presents a question of exceptional importance, which is whether state election officials may influence upcoming presidential elections by manipulating state election procedures. *See* Fed. R. App. P. 35(a)(2).

Secondly, en banc consideration is necessary to maintain uniformity of the court's decisions. *See* Fed. R. App. P. 35(a)(1). The Panel Decision effectively holds that the prior filing of a similar action in state court bars a later action under

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the doctrine of res judicata even though the causes of action and injury in the first case (refusal to accept Mr. Kennedy's withdrawal request) are distinct from the claims and injury in the second case (placing Mr. Kennedy's name back on the ballot, after the statutory deadline to do so, and after already certifying the list of candidates without Mr. Kennedy's name included). "State law determines the preclusive effect of a prior state-court action." *Stanton v. Woodside*, 817 Fed.Appx. 172, 174 (6th Cir. 2020), *citing Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015). "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004), *citing Sewell v. Clean Cut Mgt., Inc.*, 463 Mich. 569, 575, 621 N.W.2d 222 (2001).

But the factual circumstances at issue in the current matter had not yet occurred at any point in time while the state court action had been pending. The actionable conduct occurred on September 9, 2024 – after the Michigan Supreme Court had issued its opinion and order. As the Sixth Circuit has previously noted, "[r]es judicata 'preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate.'" *Stanton*, 817 Fed.Appx. at 174, *quoting Montana*

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v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Because the parties here have not had a full and fair opportunity to litigate the constitutional impact of Secretary Benson's unlawful decision to recertify the list of candidates on the ballot after the statutory deadline, the Panel Decision creates a discrepancy in how the doctrine of res judicata is to be applied under Michigan law.

BACKGROUND

On August 23, 2024, Mr. Kennedy suspended his campaign for the office of the President of the United States. [Order, R. 14, Page ID# 300].[1] That same day, Mr. Kennedy sent the Secretary a withdrawal notice and formal request to withdraw from the 2024 general election in Michigan (the "Withdrawal Notice"). [Withdrawal Notice, R. 1-2, Page ID# 24-25]. Two days later, on August 26, 2024, the Secretary rejected the Withdrawal Notice, stating "we cannot accept this filing. Michigan Election Law does not permit minor party candidates to withdraw. MCL § 168.686a(2)." [Withdrawal Rejection, R. 1-3, Page ID# 29].[2] Because the statute

[1] Unless otherwise specified, record citations contained herein refer and relate to the District Court docket.

[2] MCL § 168.686a(2) provides as follows: "County caucuses may nominate candidates for the office of representative in congress, state senator, and state representative if the offices represent districts contained wholly within the county, and for all county and township offices. Not more than 1 business day after the conclusion of the caucus, the names and mailing addresses of all candidates so nominated and the offices for which they were nominated shall be certified by the chairperson and secretary of the caucus to the county clerk. The certification shall be accompanied by an affidavit of identity for each candidate named in the

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clearly does not mention presidential candidates and, therefore, does not apply to presidential candidates, such as Mr. Kennedy, Mr. Kennedy renewed his request to withdraw on August 27, 2024. [Withdrawal Renewal, R. 1-3, Page ID# 27-28]. On August 29, 2024, the Secretary again rejected Mr. Kennedy's withdrawal, this time citing MCL § 168.686a(4).[3] [Withdrawal Rejection, R. 1-3, Page ID# 27].

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certificate as provided in section 558 and a separate written certificate of acceptance of nomination signed by each candidate named on the certificate. The form of the certificate of acceptance shall be prescribed by the secretary of state. If a candidate is so certified with the accompanying affidavit of identity and certificate of acceptance, the name of the candidate shall be printed on the ballot for that election. Candidates nominated and certified shall not be permitted to withdraw."

[3] MCL § 168.686a(4) provides as follows: "The state convention shall be held at the time and place indicated in the call. The convention shall consist of delegates selected by the county caucuses. The convention may fill vacancies in a delegation from qualified electors of that county present at the convention. The convention may nominate candidates for all state offices. District candidates may be nominated at district caucuses held in conjunction with the state convention attended by qualified delegates of the district. If delegates of a district are not present, a district caucus shall not be held for that district and candidates shall not be nominated for that district. Not more than 1 business day after the conclusion of the convention, the names and mailing addresses of the candidates nominated for state or district offices shall be certified by the chairperson and secretary of the state convention to the secretary of state. The certification shall be accompanied by an affidavit of identity for each candidate named in the certificate as provided in section 558 and a separate written certificate of acceptance of nomination signed by each candidate named on the certificate. The form of the certificate of acceptance shall be prescribed by the secretary of state. The names of candidates so certified with accompanying affidavit of identity and certificate of acceptance shall be printed on the ballot for the forthcoming election. Candidates so nominated and certified shall not be permitted to withdraw."

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On August 30, 2024, Mr. Kennedy filed a complaint in the Michigan Court of Claims seeking immediate relief. The Court of Claims, relying on MCL § 168.686a(4), denied the requested relief and dismissed the action on September 3, 2024. [Court of Claims Order, R. 1-4, Page ID# 31-34]. The next day, September 4, 2024, Mr. Kennedy filed an appeal to the Michigan Court of Appeals. On September 6, 2024, around noon, the Court of Appeals issued its decision reversing the Court of Claims' decision because MCL § 168.686a(4) plainly does not apply to presidential candidates, and remanded for "entry of an order granting immediate mandamus relief (*i.e.*, that the Secretary not include Mr. Kennedy's name on the ballot). [Court of Appeals Opinion, R. 8-6, Page ID# 172].

At 3:42 p.m., a few hours after the Court of Appeals decision was entered, on September 6, 2024, Defendant "sent the call of the election and certification of candidates to the 83 county clerks without Mr. Kennedy's name listed as the Natural Law Party's candidate for President." [Benson Response, R. 8, Page ID# 103; District Court Order, R. 14, Page ID# 308]. Thus, the Secretary did **not** order that ballot printing be held. The deadline to certify the list of candidates was also September 6, 2024 and Michigan law does not permit the Secretary to certify the list after thatate. MCL § 168.648.

The Secretary then appealed to the Michigan Supreme Court, and, on September 9, 2024, in a split decision, the majority issued a one-page decision

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simply holding that mandamus relief was not appropriate because Mr. Kennedy did not point to a specific law that demonstrated a clear right to require the Secretary to perform the specific act of removing him from the ballot, with which the 15-page dissent strenuously disagreed. [MSC Order, R. 1-6, Page ID# 38-57]. The Michigan Supreme Court did not order that Mr. Kennedy's name be placed back on the ballot after the statutory deadline to certify the list of candidates.

The Secretary then immediately, and three days after the deadline to do so, re-certified the list of candidates; for the first time placing Mr. Kennedy's name on the ballot and setting into motion the ballot printing process. [District Court Order, R. 14, Page ID# 308]. In light of this action, on September 10, 2024 – the day after the Supreme Court of Michigan rendered its decision – Mr. Kennedy filed suit in the Eastern District of Michigan, wherein he alleged that his Constitutional rights had been violated by the Secretary's unlawful decision to recertify the list of candidates to include Mr. Kennedy. [Complaint, R. 1, PageID# 10-11]. Mr. Kennedy also filed a Motion for Temporary Restraining Order and for Preliminary Injunction. [Motion, R. 2, PageID# 58-85].

After hearing oral argument on September 17, 2024, the district court entered its final judgment on September 18, 2022 [Judgment, R. 15, PageID# 317], and this appeal followed. [Notice of Appeal, R. 16, PageID# 318-319]. On September 27, 2024, a panel of this Court affirmed the district court's decision

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denying the Motion for Temporary Restraining Order and for Preliminary Injunction; however, the Panel Decision was accompanied by a 10-page dissent, wherein the dissent (McKeague, J.) took great issue with Secretary Benson's unlawful recertification of the ballot after the September 6, 2024 statutory deadline. *See Kennedy v. Benson*, No. 24-1799, slip op. at 10-11 (6th Cir. Sept. 27, 2024).

I. REASONS FOR GRANTING REHEARING *EN BANC*

A. The Panel Decision Disregards the Fact that Secretary Benson Violated Michigan Law by Recertifying the List of Candidates to be Included on the Michigan Ballot After the September 6, 2024 Deadline.

The Panel Decision effectively invalidates MCL § 168.648, and, for that reason alone, en banc consideration is warranted.

"It is the duty of the secretary of state to conform to the law, and in this [s]he is an officer of the United States, bound to obey the laws." *Marbury v. Madison*, 5 U.S. 137, 158 (1803). Under Michigan law, the Secretary was legally required to certify the list of candidates to be included on the ballot for the November 2024 general election no later than September 6, 2024:

> The secretary of state, at least 60 days and not more than 90 days preceding any regular state or district primary or election, shall send to the county clerk of each county a notice in writing of such primary or election, specifying in such notice the federal, state and district offices for which candidates are to be nominated or elected, as well as any constitutional amendments and questions to be submitted thereat.

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MCL § 168.648.

Notably absent from Michigan law is any exception to this statute. As the dissent to the Panel Decision noted, the Secretary's action was "unilateral, unauthorized, and likely illegal." *See Kennedy v. Benson*, No. 24-1799, slip op. at 12 (6th Cir. Sept. 27, 2024) (McKeague, J., dissenting). In fact, the dissent observed that the Panel Decision ignored crucial facts in rendering its decision:

> [T]he majority leaves out several facts that are critical to resolving this case.
>
> * * * *
>
> Under state law, Secretary Benson was required to distribute the "call of the election" to the clerk of each Michigan county "at least 60 days" before the election. Mich. Comp. Laws § 168.648; Brater Aff., R.8-5 at PageID 157. This year, the deadline was September 6—the same day the Court of Appeals issued its order. Within hours after the Court of Appeals released its decision, Secretary Benson issued the call of the election; Kennedy was not listed as a candidate.
>
> Three days after the deadline for the call of the election, the Michigan Supreme Court reversed the Court of Appeals. Like the Court of Claims, the Supreme Court did not order Secretary Benson to put Kennedy's name on the ballot. It did not conclude that state law prohibited minor party candidates from withdrawing. Instead, it held that Kennedy had not satisfied the criteria for obtaining mandamus relief. In short, the order simply ended the state court case.
>
> But Secretary Benson wasn't done. That same day, her office sent an "updated candidate listing" to the county clerks. Kennedy's name reappeared on the ballot. To date, Secretary Benson has not identified any statute, rule, or court order that required her—or even permitted her—to add a candidate to the ballot after the statutory deadline.

See id. at 12-13 (McKeague, J., dissenting).

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The Panel Decision's failure to consider the aforementioned facts creates the following issues of exceptional importance: (1) the Panel Decision allows the Secretary to recertify the list of candidates at her discretion, in violation of Michigan law, and without consequence; and (2) the Panel Decision creates ill-advised precedent that the "public interest" in having ballots timely printed (*see id.* at 10) supersedes the constitutional rights of candidates and the statutory obligations of the Secretary.[4] Such a decision oversteps the role of the judiciary and warrants a rehearing en banc. *See* Fed. R. App. P. 35(a)(2).

Furthermore, any argument that meaningful relief is somehow impossible or impractical now that ballots have been printed and absent voter ballots have been issued to voters is false. For example, other courts evaluating similar circumstances have held that prominent notices be placed at each affected polling place advising

[4] The Panel Decision fails to consider to the fact that any re-printing of ballots was caused by Secretary Benson herself when she illegally added Mr. Kennedy to the ballot after the statutory deadline to do so. In fact, the Secretary, by listing Mr. Kennedy on the ballot, is misrepresenting to voters that he is qualified and willing to serve the public if elected. Such a representation is not only knowingly incorrect, but it is also prejudicial to voters who reasonably expect that the ballot contain accurate information. As the United States Supreme Court correctly noted in *Anderson v. Celebrezze*, "one of our most precious freedoms" includes "the right of qualified voters, regardless of their political persuasion, to cast their votes ***effectively***." 460 U.S. 780 (1983) (emphasis added). The Panel Decision disregards this problem and, by declining to address the fact that Secretary Benson violated state law, permits Secretary Benson to violate Mr. Kennedy's constitutional rights and misrepresent the identities of qualified and willing candidates to the public.

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voters that the candidate in question (here Mr. Kennedy) is no longer running and that votes cast for that candidate would be ineffective. *See Al-Bari v. Pigg*, No. S25A0177, 2024 WL 4284250, at *2 (Ga. Sept. 25, 2024).

Thus, to the extent the Court agrees that the Secretary lacked authority to place Mr. Kennedys' name back on the ballot after the statutory deadline to do so, meaningful relief is still available to safeguard Mr. Kennedy's constitutional rights.

B. The Panel Decision Conflicts with Sixth Circuit Precedent, Which States That, Under Michigan Law, Res Judicata Only Applies to Matters in Which the Parties Have Previously Had a Full and Fair Opportunity to Litigate.

The Panel Decision's failure to consider the facts outlined in Argument Section A above contravenes United States Supreme Court and Sixth Circuit precedent and creates a new standard with respect to the application of res judicata, in contravention of established preclusion principles in Michigan and elsewhere.

"The preclusion doctrines of res judicata and collateral estoppel serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had *a full and fair opportunity to adjudicate their claim*." *Allen Park Retirees Ass'n, Inc. v. City of Allen Park*, 942 N.W.2d 618, 626 (Mich. App. 2019) (citation and quotation marks omitted); Stanton, 817 Fed. Appx. at 174 ("Res judicata 'preclude[s] parties from contesting matters that *they have had a full and fair opportunity to litigate*.'"), *quoting Montana*, 440 U.S. at 153 (emphasis added). As the dissent from the Panel

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Decision noted, "[t]he timeline of events, however, belies [the majority's] conclusion" that res judicata can properly be applied here. Slip Op. at 15 (McKeague, J., dissenting).

"Critically, Kennedy's asserted injury arose not from Secretary Benson's refusal to accept his withdrawal in August, but from her decision to put his name back on the ballot on September 9—after the statutory deadline." *Id.* at 13 (McKeague, J., dissenting). In other words, the factual circumstances at issue in the current matter had not yet occurred at any point in time while the state court action had been pending. The actionable conduct occurred on September 9, 2024 – after the Michigan Supreme Court had issued its opinion and order – when Secretary Benson recertified the list of candidates to be included on the ballot; that is when Mr. Kennedy's claims based upon the federal constitution accrued.[5]

The aforementioned facts, coupled with the Panel Decision's analysis, create the following issues: (1) what constitutes a "full and fair opportunity to litigate"

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[5] Prior to September 9, 2024, there was no equal protection claim and Mr. Kennedy's speech was not being compelled because his name was not on Michigan's 2024 general election ballot. There was also no violation of Article II, Section I of the United States Constitution at that time because Secretary Benson had already certified a list of candidates that did *not* include the candidate (Mr. Kennedy) who is no longer running and, therefore, there was no risk of deceiving voters into casting their votes in an ineffective manner and undermining the integrity of our presidential election. In other words, Secretary Benson's act of recertifying the ballot to include Mr. Kennedy's name as a candidate triggered the federal constitution claims.

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such that an action is barred by res judicata; (2) whether res judicata applies to cases where a defendant causes a new, albeit similar, injury to the plaintiff; and (3) whether legally and factually distinct claims may be barred by res judicata due to the timeline of events at issue. *See Dart v. Dart*, 597 N.W.2d 82, 88 (Mich. 1999) (holding that res judicata applies to cases where the "essential facts are identical.").

The Panel Decision effectively modifies the scope of the res judicata doctrine such that Mr. Kennedy is being held to a different standard than previous plaintiffs in the same jurisdiction.

CONCLUSION

For all of these reasons, Mr. Kennedy respectfully requests that this Court grant rehearing en banc.

Respectfully submitted,

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Date: October 3, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this brief contains 3,192 words, excluding the parts of the document exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Brandon L. Debus
Brandon L. Debus
Attorney for Plaintiff-Appellant Robert F. Kennedy, Jr.

Dated: October 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to registered users. A courtesy copy was also sent to counsel for Secretary Benson via email to her counsel of record.

/s/ *Brandon L. Debus*
Brandon L. Debus

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ATTACHMENT

Sixth Circuit Panel Decision dated September 27, 2024

Obtained by Judicial Watch, Inc. v. Michigan FOIA

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Clerk

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Filed: September 27, 2024

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Re: Case No. 24-1799, *Robert Kennedy, Jr. v. Jocelyn Benson*
Originating Case No. : 2:24-cv-12375

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Laurie A Weitendorf
Opinions Deputy

cc: Ms. Kinikia D. Essix

Enclosures

Mandate to issue

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NOT RECOMMENDED FOR PUBLICATION
File Name: 24a0397n.06

No. 24-1799

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 27, 2024
KELLY L. STEPHENS, Clerk

ROBERT F. KENNEDY, JR.,
Plaintiff-Appellant,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: CLAY, McKEAGUE, and BLOOMEKATZ, Circuit Judges

CLAY, J., delivered the opinion of the court in which BLOOMEKATZ, J., joined. McKEAGUE, J. (pp. 12–21), delivered a separate dissenting opinion.

CLAY, Circuit Judge. Plaintiff Robert F. Kennedy Jr. appeals the district court's denial of his motion for preliminary injunction. Plaintiff alleges that Defendant Jocelyn Benson, in her official capacity as Michigan Secretary of State, violated his constitutional rights under Article II, the First Amendment, and the Fourteenth Amendment of the United States Constitution. Plaintiff was formerly a candidate for President of the United States and attempted to withdraw his name from the Michigan ballot on August 23, 2024. After the Michigan Secretary of State refused to permit Plaintiff to withdraw his name from the ballot, he filed suit first in state court and then in the United States District Court. For the reasons that follow, we **AFFIRM** the district court's denial of Plaintiff's motion for preliminary injunction.

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I. BACKGROUND

A. Factual Background

Over the last year-and-a-half, Plaintiff has been a candidate for President of the United States. After initially running for the Democratic Party's nomination, Plaintiff ran as a third-party candidate for the Natural Law Party and undertook a prolonged effort to gain ballot access in each of the nation's states. *See* Rebecca Davis O'Brien, *Surprise Tactics and Legal Threats: Inside R.F.K. Jr.'s Ballot Access Fight*, N.Y. Times, Apr. 29, 2024. On April 17, 2024, Plaintiff received the Natural Law Party's presidential nomination in Michigan, thus earning a place on Michigan's general election ballot.

On August 23, 2024, Plaintiff withdrew from the presidential race and notified the Michigan Bureau of Elections of his decision. Three days later, Defendant Benson rejected Plaintiff's withdrawal notice, citing Mich. Comp. Laws § 168.686a(2). Plaintiff renewed his withdrawal notice the following day, but Defendant again rejected the notice, citing Mich. Comp. Laws § 168.686a(4).

After receiving his second rejection, Plaintiff filed suit on August 30, 2024, in the state Court of Claims. Plaintiff alleged that Defendant had violated various state election laws and the free speech protections of the Michigan Constitution by failing to remove Plaintiff from the ballot. He sought mandamus, injunctive, and declaratory relief. The state court dismissed the complaint. On September 4, 2024, Plaintiff appealed to the Michigan Court of Appeals. Two days later, the Court of Appeals granted Plaintiff's appeal and remanded to the Court of Claims, which granted mandamus and ordered Defendant to remove Plaintiff's name from the ballot. That same day, Defendant appealed to the Michigan Supreme Court, and on September 9, 2024, the court granted Defendant's appeal and affirmed the Court of Claims' order.

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On September 6, 2024—in between the time of the Court of Appeals' and the Michigan Supreme Court's decisions—Defendant sent the certification of candidates to Michigan's county clerks. Per the Court of Appeals' decision and subsequent order, Defendant's communication did not have Plaintiff's name listed as the candidate for the Natural Law Party, nor did it order that the ballots be printed. Three days later, after the Michigan Supreme Court's decision was released, Defendant updated the names of candidates and included Plaintiff's name as the presidential candidate for the Natural Law Party.

B. Procedural History

After Plaintiff lost his case in state court, he filed suit in the U.S. District Court for the Eastern District of Michigan. Plaintiff's district court complaint alleged three counts of constitutional violations: (1) a violation of Article II, Section I, arguing "that states may not impose their stringent ballot access requirements on the national election for President" and that Defendant's placement of Plaintiff's name on the ballot serves "no other possible reason than to confuse unwitting Michigan voters to vote for a candidate no longer running for office," Compl., R. 1, Page ID #6–11; (2) a Fourteenth Amendment equal protection violation, arguing that the deadline by which a candidate withdraws gives an "advantage [to] the Democrats and Republicans" by unfairly preventing third-party candidates from withdrawing after receiving a party's nomination, *id.* at Page ID #11–15; and (3) a First Amendment compelled speech violation, arguing that by placing Plaintiff's name on the ballot, Defendant compels Plaintiff "to convey a false message to every citizen of Michigan that he is vying for their vote in this state," *id.* at Page ID #15–19. Plaintiff subsequently filed a motion for a preliminary injunction, requesting that Defendant remove his name from the ballot.

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The district court denied Plaintiff's motion for a preliminary injunction. In coming to its conclusion, the district court found that Plaintiff could not establish a likelihood of success inasmuch as Plaintiff's claims were likely barred by res judicata, laches, and the *Rooker-Feldman* doctrine. The court also explained that Plaintiff could not establish a likelihood of success on the merits, as each of the claims failed to present viable constitutional causes of action. Finally, the court concluded that Plaintiff could show neither irreparable harm nor a sufficient balancing of harms and public interest. Defendant now appeals the district court's decision.

II. DISCUSSION

A. Standard of Review

In deciding a motion for preliminary injunction, courts consider: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). "A preliminary injunction is an extraordinary and drastic remedy," and should "only be awarded upon a clear showing that the plaintiff is entitled to such relief." *James B. Oswald Co. v. Neate*, 98 F.4th 666, 672 (6th Cir. 2024) (first quoting *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); then quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). This Circuit reviews preliminary injunction orders "for abuse of discretion, subjecting factual findings to clear-error review and examining legal conclusions de novo." *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (citation omitted).

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B. Analysis

Plaintiff's appeal fails because he cannot satisfy the first preliminary injunction element, likelihood of success on the merits, as each of his claims are barred by res judicata. Nor are the equities in his favor.

1. Likelihood of Success

Under the principle of res judicata, if a plaintiff's claims reach final judgment in one court, she cannot pursue the same causes of action in another. In other words, "a litigant generally does not get two bites at the apple." *Talismanic Props., LLC v. City of Tipp City*, 742 F. App'x 129, 131 (6th Cir. 2018). But that's what Plaintiff is attempting here.

"Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state." *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007) (citing 28 U.S.C. § 1738). This Court looks to the state law where "Plaintiff's prior litigation took place"—in this case, Michigan, "which employs a 'broad view of res judicata.'" *Buck v. Thomas M. Cooley L. Sch.*, 597 F.3d 812, 817 (6th Cir. 2010) (quoting *In re MCI Telecomms. Compl.*, 596 N.W.2d 164, 183 (Mich. 1999)). In Michigan, res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004). Michigan's res judicata law "bars a second action on the same claim if (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 983 N.W.2d 401, 405 (Mich. 2022) (internal quotation marks and citation omitted).

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Res judicata applies to each of Plaintiff's claims, so the Michigan Supreme Court's judgment precludes Plaintiff's federal complaint. Regarding the first element of Michigan's res judicata standard, the prior action was decided on the merits. The Court of Claims issued an opinion dismissing the state complaint on the merits, and the Michigan Supreme Court affirmed that dismissal. The second element is also met, as both Plaintiff and Defendant were parties to the state action. The primary issue, therefore, centers on the third res judicata element: whether the claims in the federal complaint were, or could have been, resolved in the state court case.

Plaintiff could have brought his First Amendment compelled speech claim in the state court suit. Indeed, his state court complaint listed a compelled speech claim under the Michigan Constitution, stating that Defendant's actions compel "Plaintiff to convey a false message to every citizen of Michigan that he is vying for their vote in this state, when he is not." State Compl., R. 8-9, Page ID #188. Plaintiff evidently believed Defendant's conduct implicated his speech interests prior to filing suit in state court. Perplexingly, Plaintiff argues that he "did not raise any compelled speech claim in his state court action," though the record shows the opposite. Appellant's Br., ECF No. 6, 10. Even assuming he means he did not raise a *federal* compelled speech claim there, he does not argue that he was barred from doing so. This cause of action is barred by res judicata.

Plaintiff did not raise an Article II[1] or equal protection claim in state court. Nevertheless, he could have. *See Adair*, 680 N.W.2d at 396. The claims in this case clearly arise from the same transaction as the claims in the state court case: in both cases, Plaintiff alleged that Michigan unfairly placed his name on the ballot and he sought to have his name removed. The Article II

[1] Article II, Section 1 of the U.S. Constitution outlines the manner in which presidential elections must be conducted.

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count argues that the presence of Plaintiff's name on the ballot functions to confuse Michigan voters and "waste their votes," while the withdrawal deadlines are unreasonable and undermine the electoral process. Compl., R. 1, Page ID #6–11. Those precise arguments could have easily been made in state court; in fact, Plaintiff employs similar language in parts of his state court complaint, such as when he argues that votes for him are "wasted and in vain." State Compl., R. 8-9, Page ID #188. With respect to the equal protection count, Plaintiff argues that the state withdrawal deadlines unfairly benefit the major political parties, as minor party candidates are only permitted to withdraw prior to accepting a party's nomination. Before filing in state court, Plaintiff knew Defendant rejected his request to withdraw from the ballot, implicating the same harms he raises here. And like his First Amendment claim, he does not argue that he was barred from bringing these constitutional claims in state court either.

Plaintiff's arguments to the contrary are unavailing. Plaintiff argues that prior to September 9, 2024—the date on which Michigan recertified the names on its ballot and listed Plaintiff as a candidate—there was no Article II, equal protection, or First Amendment violation for him to complain of. Plaintiff explains that, prior to September 9, his name had not been placed on the ballot, so no constitutional violation had yet accrued. But by this logic, ballot-related constitutional claims are only ripe when ballots are finalized. That, however, is not an accurate rendering of the law. This Circuit has previously considered constitutional claims regarding a candidate's name on an election ballot where the claim was brought before ballots had been finalized. *See, e.g.*, *Rosen v. Brown*, 970 F.2d 169, 173–74 (6th Cir. 1992) (addressing a challenge to the Ohio Secretary of State's decision, prior to ballots being finalized or printed, not to place a political party indicator next to a candidate's name on the ballot). Indeed, here, the alleged constitutional violations were ripe well before September 9, 2024. Plaintiff's constitutional claims

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became ripe in August, when Defendant declined to accept Plaintiff's withdrawal notice. It was at that point that Plaintiff became "threatened with 'imminent' injury in fact"—he became aware of Defendant's decision that his name should remain on the Michigan ballot. *Carman v. Yellen*, 112 F.4th 386, 400 (6th Cir. 2024) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). Plaintiff, who filed his state complaint after Defendant's denial of his request to be removed from the ballot, thus had ample opportunity to make his constitutional claims in state court.

Plaintiff next argues that res judicata does not apply to his constitutional claims because, until the resolution of his state court action, the proper interpretation and application of the relevant Michigan state election law, Mich. Comp. Law § 168.686a, was "in flux." Appellant's Br., ECF No. 6, 8. On Plaintiff's telling, his claims did not accrue until the Michigan Supreme Court weighed in on the application of Michigan state election law and, accordingly, settled the relevant "factual and legal circumstances." But the notion that res judicata does not apply where the relevant legal question was "in flux" during the pendency of the first litigation would upend the doctrine. Res judicata "ensures the finality of decisions." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). If a litigant could avoid res judicata and challenge a judicial decision in a subsequent litigation purely because the law was "in flux" during the first litigation, judicial decisions would seldom be final.

In support of his argument that res judicata does not apply, Plaintiff relies on this Court's decision in *Rawe v. Liberty Mutual Fire Insurance Co.*, 462 F.3d 521, 529 (6th Cir. 2006). Plaintiff's own case cuts against him. In *Rawe*, after being injured in a car accident, a plaintiff filed suit, seeking to recover under two insurance policies. *Id.* at 523. The plaintiff's first lawsuit resolved when she accepted a settlement offer. *Id.* at 525. But an insurance company then refused

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to pay, so the plaintiff filed suit again, arguing that the insurance company had engaged in bad faith during the first lawsuit. *Id.* On appeal, this Court held that although the plaintiff now sought to recover under new theories of relief, several of her claims in the second lawsuit were barred by res judicata. We explained, "the fact that" the plaintiff "now asserts alternative theories of recovery . . . does not allow [her] to avoid claim preclusion, when those other theories could have been asserted" in her first legal action. *Id.* at 529 (citation omitted). The plaintiff could only seek to recover based on facts that had "not yet occurred" when she filed her first lawsuit. *Id.* Plaintiff's claims are barred for the same reason; Plaintiff points only to new legal theories, not to a change of facts that occurred after he filed his first lawsuit.

At bottom, Plaintiff's current lawsuit is a re-run of his first. When Plaintiff filed his state court lawsuit in August, he sought to challenge the Defendant's decision—based on Defendant's interpretation of Mich. Comp. Laws § 168.686a—that he should remain listed as a candidate on Michigan's ballot. In this lawsuit, Plaintiff continues to seek to have his name removed from the ballot. The fact that Plaintiff has now identified new legal theories, or that the Michigan Supreme Court has now shed more light on the application of Mich. Comp. Laws § 168.686a, does not somehow allow Plaintiff a second bite at the apple.

Plaintiff's claims may also be precluded by the *Rooker-Feldman* doctrine, which bars lower federal courts from reviewing cases that have been litigated and decided in state court. *See RLR Invs., LLC v. City of Pigeon Forge,* 4 F.4th 380, 385 (6th Cir. 2021). Yet considering that we dismiss this case on res judicata grounds, we do not find it necessary to reach the issue of whether *Rooker-Feldman* applies. *See Arizona v. Biden*, 40 F.4th 375, 390 (6th Cir. 2022) (considering whether the plaintiffs were likely to succeed on the merits of their claim when their standing was in doubt).

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2. Other Factors

We also balance whether an injunction would protect Plaintiff from "irreparable injury," cause substantial harm to others, and serve the public interest. *Bays*, 668 F.3d at 818–19. Here, each factor cuts against Plaintiff.

First, consider Plaintiff's theory of injury. He argues that "once the ballots are printed" with his name on them, he will inevitably suffer an "injury to reputation," and his supporters will "be left confused and angry for casting an invalid vote" for him. But Plaintiff has not shown that removing his name from the ballot would prevent him from losing face in the eyes of his supporters. In another court, Plaintiff's campaign committee has asked to be *kept on* the ballot in New York, claiming irreparable injury if he's taken off. *See Kennedy v. Berger*, No. 24-2385, 2024 WL 4274191 (2d Cir. Sept. 18, 2024); Application for Emergency Injunction at 1–2, *Kennedy v. Berger*, No. 24A285 (U.S. Sept. 20, 2024). It is hard to imagine how excluding Plaintiff from the ballot could protect him from irreparable reputational damage in one state but cause the same damage in another. His arguments on irreparable harm are unpersuasive.

Next, consider the effects of an injunction on others. The Chair of the Natural Law Party, for which Plaintiff served as the Presidential nominee, asked the Michigan Board of Elections to prevent Plaintiff from withdrawing his name. In the Chair's words, "every election cycle is a challenge" for minor parties, and removing Plaintiff from the ballot would leave the Natural Law Party "in a bad position." R. 8-5, Page ID #13.

The public interest is perhaps the most paramount here. By the time the district court ruled, at least 45 of Michigan's counties, including its two largest ones, had begun to print ballots. Changing the ballot at this late a date would be even more disruptive. The ballots are now printed. The Michigan Constitution provides for absentee voting during the 40 days before an

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election—that started September 26, 2024. *See* Mich. Const. of 1963 art. 2, § 4(1)(h). Plaintiff does not explain how to unring the bell at this juncture without great harm to voting rights and the public's interest in fair and efficient election administration. The district court did not abuse its discretion by finding that an injunction at this late stage would disrupt the orderly administration of the upcoming election. *Benisek v. Lamone*, 585 U.S. 155, 160 (2018); *Estill v. Cool*, 295 F. App'x 25, 27 (6th Cir. 2008).

III. CONCLUSION

For the reasons set forth above, this Court **AFFIRMS** the judgment of the district court.

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McKEAGUE, Circuit Judge, dissenting. This case involves yet another attempt by a state election official to influence the upcoming presidential election by manipulating state election procedures. On August 23, 2024, Robert F. Kennedy, Jr. tried to withdraw his name from Michigan's general election ballot. Michigan Secretary of State Jocelyn Benson denied Kennedy's request, citing a state law that, in her view, prevented minor party candidates from withdrawing from the election. The parties then took their dispute to state court. While the litigation was pending, Secretary Benson sent the "call of the election" to county clerks across the state, pursuant to a deadline set by state law. The call of the election did not include Kennedy's name. Then, after the state court litigation concluded—and three days after the statutory deadline—Secretary Benson sent an "updated" call of the election that added Kennedy's name to the ballot. This action was unilateral, unauthorized, and likely illegal.

Kennedy now seeks injunctive relief in federal court, claiming that Secretary Benson's addition of his name to the ballot constituted compelled speech. Because Secretary Benson's actions violated Kennedy's First Amendment rights and serve no purpose other than to sow needless confusion in a presidential election by including a candidate who has no intention to serve, I respectfully dissent.

I.

The facts of this case are undisputed and summarized in the majority opinion. But the majority leaves out several facts that are critical to resolving this case.

The Natural Law Party nominated Kennedy as its candidate for President of the United States on April 17, 2024. On August 23, Kennedy suspended his presidential campaign. That same day, Kennedy delivered a withdrawal notice to the Michigan Bureau of Elections. The Bureau of Elections rejected Kennedy's notice and informed him that Mich. Comp. Laws § 168.686a(2) prohibited minor party candidates from withdrawing. After Kennedy renewed his request to

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withdraw, the Bureau of Elections rejected him again, this time citing Mich. Comp. Laws § 168.686a(4).

Kennedy then filed a lawsuit in state court, requesting mandamus, injunctive, and declaratory relief. The core of that case was a question of statutory interpretation: whether Mich. Comp. Laws § 168.686a prohibited Kennedy from withdrawing from the election. The Michigan Court of Claims held that Kennedy was not entitled to a writ of mandamus and dismissed Kennedy's complaint. At no point did the Court of Claims order Secretary Benson to keep Kennedy's name on the ballot.

On September 6, the Michigan Court of Appeals reversed the Court of Claims order and held that Kennedy was entitled to mandamus relief. Again, the decision was based on statutory interpretation. After surveying a web of cross-referencing state election laws, the court held that Kennedy had a "clear legal right" to remove his name from the ballot.

Under state law, Secretary Benson was required to distribute the "call of the election" to the clerk of each Michigan county "at least 60 days" before the election. Mich. Comp. Laws § 168.648; Brater Aff., R.8-5 at PageID 157. This year, the deadline was September 6—the same day the Court of Appeals issued its order. Within hours after the Court of Appeals released its decision, Secretary Benson issued the call of the election; Kennedy was not listed as a candidate.

Three days after the deadline for the call of the election, the Michigan Supreme Court reversed the Court of Appeals. Like the Court of Claims, the Supreme Court did not order Secretary Benson to put Kennedy's name on the ballot. It did not conclude that state law prohibited minor party candidates from withdrawing. Instead, it held that Kennedy had not satisfied the criteria for obtaining mandamus relief. In short, the order simply ended the state court case.

But Secretary Benson wasn't done. That same day, her office sent an "updated candidate listing" to the county clerks. Kennedy's name reappeared on the ballot. To date, Secretary Benson has not identified any statute, rule, or court order that required her—or even permitted her—to add a candidate to the ballot after the statutory deadline.

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One day after Secretary Benson added Kennedy's name to the ballot, Kennedy filed this lawsuit. Kennedy raised three constitutional claims and sought a temporary restraining order and preliminary injunction that would enjoin Secretary Benson from including his name on the ballot. In one of his claims, Kennedy alleged that Secretary Benson compelled his speech—and thus violated the First Amendment—by including his name on the ballot against his will. Critically, Kennedy's asserted injury arose not from Secretary Benson's refusal to accept his withdrawal in August, but from her decision to put his name back on the ballot on September 9—after the statutory deadline.

The district court denied Kennedy's motion for a preliminary injunction, and Kennedy timely appealed. *See* 28 U.S.C. § 1292(a)(1).

II.

The district court denied Kennedy's motion for a preliminary injunction because it was procedurally barred and failed to establish a constitutional violation. The denial of a preliminary injunction is reviewed for an abuse of discretion. *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015). When a preliminary injunction implicates the First Amendment, the district court's legal rulings—including its First Amendment conclusion—are reviewed *de novo*. *Id.* (citing *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 454 (6th Cir. 2014)).

A. Procedural Bars

In denying Kennedy's motion for a preliminary injunction, the district court found that his claims are barred by (1) res judicata, (2) laches, and possibly (3) the *Rooker-Feldman* doctrine. The majority agrees that res judicata bars all three of Kennedy's claims. But in reaching these conclusions, the district court and the majority mischaracterize the source of Kennedy's injury.

1. Res Judicata

Res judicata does not bar Kennedy's claim. Res judicata prevents a party from relitigating a cause of action that was already decided by a prior court. *Prewett v. Weems*, 749 F.3d 454,

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462 (6th Cir. 2014). It bars claims that were actually raised or could have been raised in the prior proceeding. *Id.* (citing *Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 661 (6th Cir. 1990)). Federal courts must give a state-court judgment the same preclusive effect as would the state where the judgment was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also* 28 U.S.C. § 1738. In Michigan, "[r]es judicata bars a second action on the same claim if (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 983 N.W.2d 401, 405 (Mich. 2022) (citations omitted).

Here, the district court found that the Michigan Court of Claims already decided Kennedy's First Amendment claim. The timeline of events, however, belies this conclusion. In this case, the asserted injury that gave rise to Kennedy's First Amendment claim was *not* the Bureau of Elections' rejection of Kennedy's notice of withdrawal in August. Instead, the asserted injury was caused by Secretary Benson's decision to put Kennedy back on the ballot on September 9, three days after she distributed the call of the election without his name. The decision to alter the ballot occurred after the Michigan Supreme Court dismissed Kennedy's complaint with prejudice. Thus, Kennedy could not have raised his First Amendment claim during the state court litigation. *See Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004) (stating that res judicata bars claims "arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not").

The majority notes that Kennedy filed a similar "compelled speech claim" in state court. That may be so, but that alone does not trigger res judicata. Kennedy is not relitigating Secretary Benson's decision to reject his withdrawal notice in August. Rather, he is alleging that Secretary Benson violated his First Amendment rights by *adding* his name to the ballot without justification on September 9. Because res judicata only bars a subsequent action between the same parties when

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the "essential facts are identical," it does not apply to Kennedy's new claim. *Dart v. Dart*, 597 N.W.2d 82, 88 (Mich. 1999).

2. Laches

Kennedy's claim is also not barred by laches. Laches is the "negligent and unintentional failure to protect one's rights." *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 439 (6th Cir. 2006) (citation omitted). It is an affirmative defense that consists of two elements: (1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party. *Operating Eng'rs Loc. 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1053 (6th Cir. 2015) (citation omitted).

Kennedy did not unreasonably delay in bringing his federal lawsuit. The asserted injury—Secretary Benson's decision to put Kennedy on the ballot after sending out the call of the election—occurred on September 9. *See* Brater Aff., R.8-5 at PageID 157. Kennedy filed his federal complaint on September 10. Because this one-day delay was not unreasonable, and Secretary Benson did not provide any evidence of prejudice, laches does not apply either.

3. The *Rooker-Feldman* Doctrine

The majority and the district court incorrectly conclude that Kennedy's claim "may also be precluded" by the *Rooker-Feldman* doctrine. The doctrine prevents federal district courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced." *Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 674 (6th Cir. 2018) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). To determine if the doctrine applies, courts look to the source of the asserted injury in the federal complaint. *Berry v. Schmitt*, 688 F.3d 290, 299 (6th Cir. 2012) (citation omitted). If the injury is caused by the defendant's actions, and not by the state court decision itself, then *Rooker-Feldman* does not apply. *Brent*, 901 F.3d at 674.

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Secretary Benson—not any state court judgment—is the source of Kennedy's asserted injury. To be sure, if a state court had ordered Secretary Benson to keep Kennedy's name on the ballot, then this would be a different case entirely. But that's not what happened. The Court of Claims order did not *require* Secretary Benson to reject Kennedy's notice of withdrawal. *See* Mich. Ct. Cl. Order, R.1-4 at PageID 34. Similarly, the Michigan Supreme Court order did not demand that Secretary Benson take any action at all. Instead, the court merely held that Kennedy had not satisfied the requirements for mandamus relief. *See* Mich. Sup. Ct. Order, R.1-6 at PageID 38.

After the state case concluded on September 9, Secretary Benson "sent an updated candidate listing" to the county clerks. Brater Aff., R.8-5 at PageID 157. Secretary Benson claims that altering the ballot after the statutory deadline was "merely compliance with the Supreme Court's decision." Not so. This action was not compelled by any state court judgment, and it was not permitted by state law. *See* Mich. Comp. Laws § 168.648 (1954). Thus, *Rooker-Feldman* is inapplicable, and there are no procedural bars to deciding Kennedy's claim on the merits.

B. Substantive Claims

Kennedy is entitled to a preliminary injunction. When deciding whether to grant a preliminary injunction, a court must consider four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury without an injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting an injunction. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014). In cases alleging a First Amendment violation, "the likelihood of success on the merits often will be the determinative factor." *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir.2009)). This is because "[t]he loss of First Amendment freedoms…unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

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1. Likelihood of Success on the Merits

In his complaint, Kennedy alleges that Secretary Benson's unilateral decision to put his name back on the ballot amounts to compelled speech, in violation of the First Amendment. Kennedy likely would succeed on this claim.

First Amendment protections encompass conduct that communicates a message. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Conduct falls within scope of the First Amendment if (1) the speaker has the intent to convey a particular message, and (2) the viewer would likely understand the message. *Id.* at 404. The First Amendment also guarantees the right to refrain from speaking. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The state infringes on this right when it compels an individual to engage in communicative conduct that she finds unacceptable. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In the context of elections, restrictions on access to the ballot can implicate the First Amendment's protection of political expression. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office… Overbroad restrictions on ballot access jeopardize this form of political expression."); *Schmitt v. LaRose*, 933 F.3d 628, 638 (6th Cir. 2019) ("[T]he Supreme Court has acknowledged that a person or party may express beliefs or ideas through a ballot.").

Undoubtedly, the state can place restrictions on ballot access, and courts have routinely upheld state laws that regulate how a candidate can get on the ballot. But that's not what happened here. Kennedy's asserted injury did not arise from Secretary Benson's invocation of Mich. Comp. Laws § 168.686a in August. It did not arise from *any* state law. Instead, his claim is based on Secretary Benson's decision to put him back on the ballot—after his name was removed, after the ballots were certified, and after the statutory deadline. To be sure, there is no precedent squarely holding that adding a person's name to the presidential ballot against their will violates the First Amendment. But then again, Secretary Benson's actions are unprecedented.

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As it stands, the presidential ballot in Michigan conveys to the public that Kennedy is still seeking votes for the presidency. This is a message that Kennedy expressly disavowed on August 23, and yet it is now perpetuated by Secretary Benson's actions. Thus, her decision is subject to strict scrutiny, a test which she surely fails. *See Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to…rigorous scrutiny.").

2. Remaining Preliminary Injunction Factors

While the likelihood of success is typically dispositive, the remaining preliminary injunction factors also support Kennedy's motion.

First, the balance of equities weighs against Secretary Benson. Under state law, Secretary Benson was required to deliver a list of candidates that will appear on the ballot for the general election on September 6. *See* Mich. Comp. Laws § 168.648 (1954). And yet, without any explanation, her office sent the counties an "updated candidate listing" that included Kennedy's name on September 9. This decision was apropos of nothing.

Secretary Benson cannot use Mich. Comp. Laws § 168.686a as justification; the question here is not whether minor party candidates can withdraw from the election, but whether the Secretary of State has unchecked discretion to add candidates to the presidential ballot *after* the certification deadline. Even the district court acknowledged that this action "may have exceeded the bounds of her office." Order, R.14 at PageID 309.

Moreover, she cannot use the Michigan Supreme Court order as a shield. As described above, this was not an attempt to "compl[y] with the Supreme Court decision." Nor was her decision blessed by "judicial authority." The Michigan Supreme Court order simply found that Kennedy was not entitled to mandamus relief. It did not order her to alter the list of candidates that was already distributed to the county clerks. It did not set aside the statutory deadline. It did not justify a post hoc alteration of the ballot.

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In short, Secretary Benson cannot point to any law that gave her the authority to withdraw, edit, and redistribute the list of presidential candidates after the statutory deadline.

Second, the public interest weighs in Kennedy's favor. "[P]rotecting public confidence in elections is deeply important—indeed, critical—to democracy." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality)). Contrary to this fundamental truth, Secretary Benson used her office to intentionally alter the ballot of a presidential election. And for what purpose? What reason did Secretary Benson have for adding a withdrawn candidate to the ballot after the call of the election was distributed to the county clerks? Surely it was not to streamline logistics or minimize voter confusion. This court—and the public—is left searching for an answer.

On appeal, Secretary Benson notes that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." Appellee Br. at 42 (quoting *Storer v. Brown*, 415 U.S. 724, 733 (1974)). I agree. Yet her office intentionally altered the ballot by inserting a "frivolous" presidential candidate. As Kennedy correctly points out, Secretary Benson's decision will allow voters to select a candidate who does not want the job. In the voting booth, the new ballots will convey to voters that Kennedy is vying for the presidency. It suggests that a vote for Kennedy will not be a vote wasted. An inaccurate ballot will inevitably cause confusion, and it will undermine faith in this core democratic institution.

III.

If this court ordered the district court to grant Kennedy's motion preliminary injunction, a difficult question would arise: what is the proper remedy for this constitutional infirmity? It's undeniable that "[a] state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent." *Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000). And Secretary Benson correctly notes that, as of September 26, registered Michigan voters are entitled to vote an absent ballot. *See* Mich. Const. 1963, Art. 2, § 4(1)(h).

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But Secretary Benson can hardly complain about the "chaos" that would ensue from reprinting the ballots when her actions caused them to be misprinted. Kennedy filed his withdrawal notice on August 23, two weeks before the deadline for the call of the election. Instead of simply removing his name from the ballot, Secretary Benson repeatedly rejected Kennedy's requests. On the day of the statutory deadline, the state pressed on with its appeal to the Michigan Supreme Court. And then three days after the deadline, Secretary Benson inserted his name back onto the ballot. Apparently, some deadlines matter, and some do not.

***

Secretary Benson's decision to add Kennedy to the ballot was arbitrary. It was unchecked. It conveys a message that Kennedy does not wish to send. And it will cause voters to waste their fundamental right to vote. The ballots—with Kennedy's name on them—are already printed, and the election is underway. I can only hope that the weight of one state election official's thumb does not tip the scale of a national election.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1799

FILED
Sep 27, 2024
KELLY L. STEPHENS, Clerk

ROBERT F. KENNEDY, JR.,

Plaintiff - Appellant,

v.

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

Defendant - Appellee.

Before: CLAY, McKEAGUE, and BLOOMEKATZ, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/3/2024 8:37:52 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: RE: Filings for Tina Anderson

Yep, will do.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, October 3, 2024 4:31 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Filings for Tina Anderson

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Hi Heather,

Tina Anderson asked for these filings. Could pass these along to her for us? Thanks!

America First Legal's noncitizen voting challenge in Arizona: *Strong Communities Found. of Arizona Inc. v. Richer*, No. CV-24-02030-PHX-SMB (D. Ariz.)

- Amended complaint filed Sept. 3, 2024.
- Answer filed Sept. 17, 2024.

RNC and Trump campaign's noncitizen voting challenge in Nevada: *Dagusen v. Aguilar*, No. (D. Nev.).

- Complaint filed Sept. 11, 2024.

Election workers protection challenge in Nevada: *Vanness v. Aguilar*, No. 24-2910 (9th Cir.).

- District court's order granting Nevada's motion to dismiss filed Apr. 8, 2024.
- Opening brief filed July 12, 2024.
- Answering brief filed Aug. 15, 2024.
- Reply brief filed Sept. 6, 2024.

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To: Dax Goldstein [dax@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Dax contact info and CA opinion

Thanks Dax. My work cell is 517 930 8841. If I do not answer that my personal cell is PII MCL 15.243(1)(a) PII MCL 15.243(1)(a)

Looking forward to working with you,

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Thursday, October 3, 2024 11:04 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>
Cc: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Dax contact info and CA opinion

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Here you all go!

Dax Goldstein (they/them) | Senior Counsel | Program Director, Election Protection (Legal)
States United Democracy Center
415.938.6481 | @statesunited
dax@statesuniteddemocracy.org

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Sent: 10/8/2024 4:13:46 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: Attorney Client communication-Attorney work product - resources

Sounds great, thank you!

Heather S. Meingast, Division Chief
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Michigan Department of Attorney General
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From: Dax Goldstein <dax@statesuniteddemocracy.org>
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Hi Heather,

DPP MCL 15.243(1)(m)

Many thanks.

Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Monday, October 7, 2024 9:11 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Attorney Client communication-Attorney work product - resources

Hi Dax and Jonathan,

DPP MCL 15.243(1)(m)

Thanks,

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Heather

Heather S. Meingast, Division Chief
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Sent: 10/9/2024 1:22:43 AM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: Attorney client privileged communication - MRP v. Benson - Verified Complaint and Summons

Also it was filed today, my brain is mush.

Heather S. Meingast, Division Chief
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From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Tuesday, October 8, 2024 9:15 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Attorney client privileged communication - MRP v. Benson - Verified Complaint and Summons

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Thanks much! I was literally just looking for this. They attached a Court of Claims decision to their press release.

Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Tuesday, October 8, 2024 6:01:34 PM
To: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Attorney client privileged communication - MRP v. Benson - Verified Complaint and Summons

Fyi, filed shortly before 5 pm yesterday.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Brandon L. Debus <BDebus@dickinson-wright.com>
Sent: Tuesday, October 8, 2024 4:48 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: MRP v. Benson - Verified Complaint and Summons

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

Good afternoon, Heather.

Please see the attached Verified Complaint which was filed today in the Court of Claims. I know it is not your usual practice, but I figured I would reach out and see if you are authorized to accept service.

Thanks

Brandon

Brandon L. Debus
Member
O:248-433-7674
BDebus@dickinsonwright.com

2600 West Big Beaver, Suite 300, Troy MI, 48084

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail. Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/9/2024 1:01:34 AM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Attorney client privileged communication - MRP v. Benson - Verified Complaint and Summons
Attachments: Verified Complaint.pdf

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Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24 - -

Court address: Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.: 517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE and CINDY BERRY	v	JOCELYN BENSON, in her official capacity as Secretary of State 430 W. Allegan St. Richard H. Austin Building - 4th Floor Lansing, MI 48918
Plaintiff's attorney, bar no., address, and telephone no. Brandon L. Debus (P81159) Daniel C. Ziegler (P86312) Dickinson Wright PLLC 350 S. Main Street, Suite 300 Ann Arbor, MI 48104		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending. Those actions have been consolidated under 24-000115-MB

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Summons (3/23) **Case No.** 24 -

PROOF OF SERVICE

TO PROCESS SERVER: You must serve the summons and complaint and file proof of service with the court clerk before the expiration date on the summons. If you are unable to complete service, you must return this original and all copies to the court clerk.

CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

Attachments (if any) on Date and time

Signature on behalf of

Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Approved, SCAO | Original - Court; 1st copy - Defendant | 2nd copy - Plaintiff; 3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NO. 24 - -

Court address
Michigan Court of Claims, 925 W. Ottawa Street, Lansing, MI 48909

Court telephone no.
517-373-0807

Plaintiff's name, address, and telephone no.		Defendant's name, address, and telephone no.
MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE and CINDY BERRY	v	JONATHAN BRATER, in his official capacity as Director of Elections 430 W. Allegan St. Richard H. Austin Building - 4th Floor Lansing, MI 48918
Plaintiff's attorney, bar no., address, and telephone no. Brandon L. Debus (P81159) Daniel C. Ziegler (P86312) Dickinson Wright PLLC 350 S. Main Street, Suite 300 Ann Arbor, MI 48104		

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☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending. Those actions have been consolidated under 24-000115-MB.

Summons section completed by court clerk. **SUMMONS**

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Issue date	Expiration date*	Court clerk

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Document received by the MI Court of Claims.

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Summons (3/23) **Case No.** 24 -

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CERTIFICATE OF SERVICE / NONSERVICE

☐ I served ☐ personally ☐ by registered or certified mail, return receipt requested, and delivery restricted to the the addressee (copy of return receipt attached) a copy of the summons and the complaint, together with the attachments listed below, on:

☐ I have attempted to serve a copy of the summons and complaint, together with the attachments listed below, and have been unable to complete service on:

Name	Date and time of service
Place or address of service	
Attachments (if any)	

☐ I am a sheriff, deputy sheriff, bailiff, appointed court officer or attorney for a party.

☐ I am a legally competent adult who is not a party or an officer of a corporate party. I declare under the penalties of perjury that this certificate of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	**TOTAL FEE**
$		$	$

Signature

Name (type or print)

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of a copy of the summons and complaint, together with

Attachments (if any) on Date and time

Signature on behalf of

Name (type or print)

MCL 600.1910, MCR 2.104, MCR 2.105

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

EXPEDITED RELIEF UNDER MCR 2.605 REQUESTED

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dbroaddus@shrr.com
Attorneys for Plaintiff RNC

_____/

VERIFIED COMPLAINT FOR EXPEDITED DECLARATORY AND INJUNCTIVE RELIEF UNDER MCR 2.605

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

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NOW COME Plaintiffs the Michigan Republican Party, the Republican National Committee, and Cindy Berry, by and through their undersigned counsel, and state as follows in support of their Verified Complaint against Michigan Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (collectively, the "Secretary"):

INTRODUCTION

1. The Michigan Constitution allows Michigan residents—and *only* Michigan residents—to vote. See Const. 1963, art. 2, § 1 ("Every citizen of the United States who has attained the age of 21 years, *who has resided in this state six months*, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.") (emphasis added).

2. Thus, while the right to vote in Michigan is "an absolute constitutional right," "certain requirements must be met before an individual can exercise his or her fundamental political right to vote." *Promote the Vote v. Sec'y of State*, 333 Mich. App. 93, 120, 958 N.W.2d 861, 877 (2020).

3. Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301, *et seq.* ("UOCAVA"), to ensure that members of the United States Armed Forces and other American citizens who live outside America's territory may register and vote in federal elections. UOCAVA provides that a member of the armed forces or an overseas citizen may vote in the state in which they previously resided. See 52 U.S.C. § 20301(1), (5). UOCAVA has the effect of partially preempting State residency requirements for *some* overseas voters.

4. Despite the Constitution's unambiguous adjure that no person may vote in Michigan unless they reside in Michigan, the Secretary of State has distributed guidance that "A

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United States citizen *who has never resided in the United States* but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state." Election Officials Manual, Chapter 7: Military and Overseas Voters, Federal Voter Registration and Absent Voting Programs guidance at 3 ("Chapter 7") (Attached as Exhibit A) (emphasis added).

5. On its face, Chapter 7 extends voter qualifications to individuals who have never resided in Michigan. As a result, certain people who have never resided in Michigan (or perhaps anywhere else in this country) are registering to vote and voting in Michigan elections. Michigan election officials have registered persons to vote who have never resided in Michigan and have allowed them to vote in Michigan's state and federal elections.

6. This is a violation of the Michigan Constitution, and, as applied to Plaintiffs, it dilutes their votes and harms their organizational missions. Moreover, Chapter 7 subjects Cindy Berry to competing obligations. On the one hand, she takes an oath to uphold the Michigan Constitution; on the other hand, she is bound by the Secretary's instructions. See MCL 168.765a(17) ("The secretary of state shall develop instructions consistent with this act . . . The instructions developed under this subsection are binding on the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township."). Plaintiffs thus seek declaratory relief that Chapter 7 misstates the law and that under the Michigan Constitution, only persons who reside in Michigan may vote in Michigan.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiff the Michigan Republican Party ("MRP") is a "major political party" as that term is defined by the Michigan Election Law. See MCL 168.16. MRP maintains headquarters at 520 Seymour Street, Lansing, Michigan 48912. Among its general purposes, MRP promotes

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and assists Republican candidates who seek election or appointment to partisan federal, state, and local office in Michigan. MRP works to further its purpose by, *inter alia*, devoting substantial resources toward educating, mobilizing, assisting, and turning out voters in Michigan. To that end, MRP has made significant contributions and expenditures in support of Republican candidates up and down the ballot in Michigan in past election cycles, and is doing so again in 2024. Further, MRP works to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and works to protect the fundamental constitutional right to vote of its members and its candidates, and to promote their participation in the political process. MRP brings this action on behalf of itself, its members, and its candidates. As a result, Plaintiff MRP has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and its members.[1]

8. Plaintiff the Republican National Committee (the "RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14), with its principal place of business at 310 First Street, S.E., Washington D.C., 20003. The RNC manages the Republican Party's business at the national level, including the development and promotion of the Republican Party's national platform and election strategies. The RNC supports Republican candidates for public office at the federal and state levels across the country, including those on the ballot in Michigan's forthcoming November 5, 2024 general election. The RNC also assists state parties throughout the country, including Plaintiff MRP, to educate, mobilize, assist, and turn out voters, and also by supporting MRP's efforts to ensure that elections in Michigan are conducted in a free, fair, and transparent manner, and to protect the fundamental constitutional right to vote of the RNC's members and its candidates. The RNC made significant contributions and expenditures in support

[1] See Affidavit of Tyson Shepard, the Executive Director of the MRP (Attached as Exhibit B).

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of Republican candidates up and down the ballot and in mobilizing and educating voters in Michigan in past election cycles, and is doing so again in 2024. The RNC has clear and obvious interests in the laws and rules under which it, and those it represents and supports, exercise their constitutional rights to vote and to participate in elections. The RNC brings this action on behalf of itself, its members, and its candidates. As a result, Plaintiff RNC has a direct, personal, and substantial interest in this litigation to protect not only its own rights, but those of its candidates and its members.[2]

9. Both as representatives of their candidates and their voters, and as organizations in their own right, the Republican Committees (*i.e.*, Plaintiffs MRP and RNC) each have a substantial interest in getting Republican candidates elected to office—an interest that is unique and separate from any held by the public at large. See Ex. B; Ex. C. That includes ensuring that Republicans can seek office in a fair, competitive environment where the Michigan Constitution is enforced. Given that the relief sought here would, among other things, enjoin the application of the current version of the Secretary's Chapter 7 guidance in advance of the November 5, 2024 general election and would also result in judicial declarations that clerks must comply with Const. 1963, art. 2, § 1 and 52 U.S.C. § 20301 *et seq*., the interests of RNC and MRP in preventing an illegally structured and anti-competitive election environment is sufficient under MCR 2.605. See Ex. B; Ex. C.

10. Counting ballots of ineligible overseas voters who never resided in Michigan will result in an inaccurate tally of votes. Moreover, overseas voters overwhelmingly support Democratic candidates.[3] Ex. C. Thus, counting the ballots of ineligible overseas voters will

[2] See Affidavit of Christina Norton, the Executive Director of Election Integrity Operations at the RNC (Attached as Exhibit C).

[3] See e.g., https://www.yahoo.com/news/could-overseas-voters-ticket-winning-202651757.html?guccounter=1 (leader of Democratic efforts to engage overseas voters stating "something like 80 percent of Americans abroad vote Democrat").

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disproportionally harm Republican candidates and undermine the Republican candidates' rights to a fair and accurate electoral count. It will also dilute the lawful votes cast by Plaintiffs' members and voters.

11. The Republican Committees also spend significant resources to preserve voter confidence and turnout. These efforts are harmed when voters see that election officials accept absent voter ballots without verifying the residency of the voter as required under the Michigan Constitution.

12. Plaintiff Cindy Berry serves as the Clerk for the Township of Chesterfield and resides in Macomb County. Berry has sworn to uphold the Constitution in the execution of her duties as Chesterfield Township clerk. She is also bound Chapter 7. Accordingly, Berry has attempted to reconcile Chapter 7 with Const. 1963, art. 2, § 1 but finds that she cannot. As a local clerk, Berry seeks a declaration regarding whether clerks and election inspectors are, and will continue to be, subject to the Secretary's instructions including—but not limited to—her instruction that electors who have not ever resided in Michigan—and who are outside of 52 U.S.C. § 20301's preemptive scope—may vote. Without relief from this Court, Berry will have to choose which contradictory, binding authority she will follow.[4]

13. Plaintiff Berry is also a registered voter that cast a ballot for the February 2024 presidential primary election through Michigan's early voting process, voted by absentee ballot in the August 6, 2024, primary election, and intends to vote by absentee ballot in future elections. Clerk Berry has a direct, personal, and substantial interest in ensuring that her vote counts and is not diluted.

[4] See Affidavit of Plaintiff Berry, Clerk of Chesterfield Township (Attached as Exhibit D).

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14. Defendant Jocelyn Benson is Michigan's Secretary of State and is being sued in her official capacity. Secretary Benson is the "chief elections officer of the state" responsible for overseeing the conduct of Michigan elections, and has "supervisory control over local election officials in the performance of their duties under the [Michigan Election Law]." MCL 168.21. When the Secretary instructs clerks on how to apply the law, the clerks are bound to follow her instructions. See MCL 168.765a(17) ("The secretary of state shall develop instructions consistent with this act . . . The instructions developed under this subsection are binding on the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township.").

15. Defendant Jonathan Brater is Michigan's Director of Elections and is being sued in his official capacity.

16. This Court has exclusive jurisdiction to "hear and determine any claim or demand, statutory or constitutional . . . or any demand for . . . equitable[ ] or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Additionally, this Court has authority to grant injunctive and declaratory relief under MCR 3.310 and MCR 2.605 respectively.

17. Because Plaintiffs raise constitutional claims and ask this Court to order equitable and declaratory relief against Defendants, this Court has exclusive jurisdiction to hear these claims. For the same reason, venue is appropriate in this Court. See MCL 600.6419(1)(a), MCR 3.310, and MCR 2.605.

18. An actual controversy is present here. The Constitution provides: "Every citizen of the United States . . . who has resided in this state six months . . . shall be an elector and qualified

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to vote in any election[.]" Meanwhile, in Chapter 7 of her Election Officials Manual, the Secretary has instructed clerks that "[a] United States citizen who has never resided in the United States . . . is eligible to vote in Michigan[.]" Ex. A at 3. The Constitution and the Secretary's instruction are incompatible. And Plaintiffs are harmed by the Secretary's unlawful instruction. The Secretary's instruction injures Plaintiffs where their members and candidates have their votes diluted by ballots which, under the terms of the Michigan Constitution, ought not be accepted. See Ex. B; Ex. C. The Secretary's instruction also injures Plaintiff Berry, who is subjected to competing legal duties. Unless this Court grants declaratory relief, Plaintiff Berry will be forced to apply *either* the Constitution *or* the Secretary's instructions. Ex. D.

19. The injuries to Plaintiffs are at once completed and ongoing. See Ex. B; Ex. C; Ex. D. Absent voting has already begun. Thus, election officials are already accepting ballots from overseas voters that are constitutionally deficient. Moreover, absent relief from this Court, these injuries will recur indefinitely because local election officials will continue accepting and tabulating ballots that are constitutionally deficient; their error is caused at least in part by the incomplete direction set forth in Chapter 7. See Ex. B; Ex. C; Ex. D. However, because no absent voter ballots have been tabulated, there is still time to address these problems. Therefore, a decision from this Court will redress the violation of Plaintiffs' rights under the Michigan Constitution and will also guide Plaintiffs' future conduct in this regard for the November 2024 general election and beyond.

LEGAL AND FACTUAL BACKGROUND

20. The Constitution provides: "Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as

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otherwise provided in this constitution. The legislature shall define residence for voting purposes." Const. 1963, art. 2, §1. The Constitution thus creates a residency requirement, holding that only those who have "resided in this state six months" are eligible to vote. Separately, the Constitution instructs the Legislature to define the meaning of "residence" in a Michigan locality.

21. To provide for the registration and voting by absent uniformed service members and overseas voters, the United States Congress enacted UOCAVA, 52 U.S.C. § 20302(a)(1) *et seq.*, which provides that "Each State shall . . . permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." UOCAVA defines "Absent uniformed services voters" to mean:

> (A) a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote;
>
> (B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and
>
> (C) a spouse or dependent of a member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote; [52 U.S.C. § 20310(1).]

And it defines "Overseas voter" as:

> (A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;
>
> (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
>
> (C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States. [52 U.S.C. § 20310(5).]

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22. UOCAVA preempts Michigan constitutional and statutory law to the extent they require an elector to *presently* reside in Michigan to vote. But importantly, UOCAVA does not overrule all residency requirements. To wit, 52 U.S.C. § 20310(1) defines "[a]bsent uniformed services voters" as persons who are "***absent*** from the[ir] place of residence where the member is otherwise qualified to vote," meaning that the member must actually have a place of residence in the United States. (Emphasis added); see also, Merriam-Webster's Dictionary (2019) (defining absent as "not present at a usual or expected place."). Put another way, to be "absent" from a place requires that the person have either (A) been at the place previously or, at the very least, (B) may be expected to have been in that place. Likewise, 52 U.S.C. § 20310(1)'s other two definitions of "[a]bsent uniformed services voters" require that the person "is absent from the place of residence where the member is otherwise qualified to vote" or "is absent from the place of residence where the spouse or dependent is otherwise qualified to vote." Thus, under any definition of "[a]bsent uniformed services voters," the voter must have resided at one time in a place from which they are now absent.

23. In 52 U.S.C. § 20310(5)'s definition of "overseas voter," an overseas voter is either "an absent uniformed services voter who, by reason of active duty or service is absent from the United States"—and so, as explained above, is required to have been a resident in Michigan at some time—or "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States"—so again, a person who must have been qualified to vote in Michigan before leaving the United States—or "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States"—again requiring that the person *would have been able* to vote in the place they were last domiciled. This

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third definition would apply to a person who resided in Michigan as a 17 year old, moved overseas, and then sought to vote after their 18th birthday. In that situation, because they reached the age of majority and "would be qualified to vote in the last place in which the person was domiciled before leaving the United States," they may still vote in Michigan.

24. Put simply, UOCAVA does not *in toto* preempt Michigan's residency requirement. Instead, it simply shapes Michigan's residency requirement to say that persons who *were* residents before going overseas must *still* be allowed to vote, assuming all other qualifications are met. That is, UOCAVA only preempts Michigan's residency requirement to the extent that overseas voters who were last domiciled in Michigan must be allowed to register to vote in this state. In other words, UOCAVA does ***not*** say that persons who never resided in Michigan must be allowed to vote regardless of constitutional or statutory law to the contrary.

25. In response to UOCAVA, the Michigan Legislature enacted MCL 168.759a(3), which provides that "[a] spouse or dependent of an overseas voter who is a citizen of the United States, is accompanying that overseas voter, and is not a qualified and registered elector anywhere else in the United States, may apply for an absent voter ballot even though the spouse or dependent is not a qualified elector of a city or township of this state." MCL 168.759a(3) is contrary to the Constitution, which requires that every voter be a resident. Further, MCL 168.759a(3) is broader than UOCAVA, which simply requires that voters who were residents of Michigan before going overseas be permitted to vote in Michigan. In short, then, MCL 168.759a(3) is contrary to a valid, in-force provision of the Michigan Constitution that has not been preempted by any federal law. Ergo, MCL 168.759a(3) is unconstitutional and cannot support the Secretary's instructions.

UOCAVA Does Not Preempt State
Residency Requirement for People Who Have Never Resided in Michigan

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26. Federal law partially preempts the Michigan Constitution's residency requirement for overseas voters to whom UOCAVA provides the right to vote. But as discussed in paragraphs 18-23 above, UOCAVA does not completely preempt the Constitution's requirement that a voter reside in Michigan. Instead, UOCAVA simply states that a person may ***continue*** to vote in Michigan if, they previously resided in Michigan and are otherwise permitted to vote.

27. In both form and function, UOCAVA only *extends* voter eligibility; it does not create a new class of voters who may vote in Michigan even though they have never resided here. Consequently, UOCAVA does not preempt the Constitution's requirement that an elector must be—or, at the very least, must have been—a resident of Michigan in order to register to vote and cast a ballot.

Defendants' Election Official's Manual
Chapter 7 violates the Michigan Constitution

28. Pursuant to her duty to exercise "supervisory control over local election officials in the performance of their duties under the [Michigan Election Law]," MCL 168.21, the Secretary instructs clerks that "A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state." Ex. A at 3. The Secretary's instructions are binding on all city and township clerks, to include Plaintiff Berry. See MCL 168.765a(17).

29. The Secretary's instructions are also directly contrary to the Constitution, which limits the franchise to "[e]very citizen . . . who has resided in this state six months." Const. 1963, art. 2, § 1. While it is true that UOCAVA has preempted state laws that prevent "overseas voters" and "absent uniformed services voter[s]"—as those terms are defined by UOCAVA—from voting, UOCAVA's preemption ***does not*** extend to persons who have never resided in Michigan. See 52

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U.S.C. § 20310(1) and (5). Again, UOCAVA carefully defined the terms "absent uniformed services voters" and "overseas voters" to only include persons who at one time resided in a state. Relevant here, those voters who at one point resided in Michigan.

30. Moreover, the Secretary cannot defend her unconstitutional instruction by arguing that MCL 168.759a(3) permits a spouse or dependent of an overseas voter to vote "even though the spouse or dependent is not a qualified elector of a city or township of this state." For one, MCL 168.759(3) goes further than UOCAVA requires, so it does not have the force of federal preemption. For another, it is elementary that statutory law may not override or ignore constitutional law. To the extent there is a conflict between statutory and constitutional law, the statutory law must give way. And when faced with two incompatible laws, the Secretary must enforce the constitutional law over the unconstitutional statutory law. Here, the Secretary has ignored the Constitution in favor of enforcing MCL 168.759a(3). She has done so in error. By sending ballots to and accepting ballots from overseas voters who have never resided in Michigan, Defendants are facilitating ongoing violations of the Michigan Constitution.

31. As applied to Plaintiff Berry and the Republican Committees' members, the Secretary's instructions have impermissibly diluted their votes, and as applied to all Plaintiffs, it infringes on their right to a fair and constitutional election. Ex. B; Ex. C; Ex. D. The instructions also place Plaintiff Berry at a crossroads; either she must follow the Constitution, or she must follow the conflicting requirements of the Secretary's instruction. Ex. D. Accordingly, Plaintiffs seek a declaration from this Court clarifying the law and holding that the Secretary's Instructions—specifically the above-referenced section of Chapter 7, page 3—is unconstitutional.

COUNT I – VIOLATION OF THE MICHIGAN CONSTITUTION

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32. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

33. Under MCR 2.605(A)(1), "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]"

34. Michigan's Constitution provides that only a person who meets the requirements to vote and "has resided in this state six months" is an elector that has the absolute right to cast a ballot in all local, state, and federal elections. Const. 1963, art. 2, § 1. Indeed, Michigan courts have noted that in Michigan the right to vote is "an absolute constitutional right," but "certain requirements must be met before an individual can exercise his or her fundamental political right to vote." *Promote the* Vote, 333 Mich. App. at 120. As noted above, UOCAVA preempts the Constitution's residency requirement only to the extent that individuals who reside overseas *but last resided in Michigan* must still be allowed to register to vote and cast a ballot in Michigan.

35. City and township clerks—and the Secretary of State—are also bound to uphold the Michigan Constitution. See Ex. D.

36. Chapter 7 of the Secretary's Election Officials Manual conflicts with Const. 1963, art. 2, § 1. Specifically, the Secretary has instructed clerks that "[a] United States citizen who has never resided in the United States . . . is eligible to vote in Michigan." Ex A at 3. The Secretary's instruction binds clerks. See MCL 168.765a(17).

37. The dissonance between the Secretary's guidance and the Constitution has created confusion, disorder, and strife because city and township clerks are subjected to two incompatible duties. Put simply, the Secretary would have clerks accept ballots from persons who reside overseas and who have never been residents of Michigan, while the Constitution would have them

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deny applications to register to vote and, by extension, reject ballots cast by persons who have never resided in Michigan because those individuals are constitutionally ineligible to vote in Michigan.

38. Injunctive and declaratory relief under MCR 2.605 are necessary to remedy the confusion. Without declaratory relief from this Court, Plaintiffs will be stuck with the Secretary's facially unconstitutional instructions, and Plaintiff Berry will be forced to choose between enforcing the Constitution or the Secretary's instructions. See Ex. B; Ex. C; Ex D.

39. A current and ripe case or controversy between the parties is therefore clearly present here. And declaratory relief is proper because Plaintiffs lack an adequate remedy at law to enforce the Michigan Constitution's express residency requirements, which have been and will continue to be violated by the unlawful acts such as are caused by the Secretary's Instructions.

40. Finally, the balance of harms weighs in favor of granting injunctive relief. To not enjoin unlawful directives such as the Secretary's instructions would allow a single state officer to circumvent (and essentially amend) valid and enforceable constitutional mandates on the same subject. That is certainly not in the public interest, which expects its public officials to follow the law. Nor would the public be harmed by such relief as they too have an interest in ensuring the integrity and accuracy of Michigan's elections and that each absent voter ballot originated from and was completed by the intended voter as required by the Michigan Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court order "a speedy hearing" of this action and "advance it on the calendar" as provided under MCR 2.605(D), and that it issue the following relief:

A. Declare that the Secretary's instruction to clerks in her Election Officials Manual,

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Chapter 7 at page 3 that "A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state" is unconstitutional because it conflicts with Const. 1963, art. 2, § 1 and, therefore, is null and void;

B. Order the Secretary to rescind her unconstitutional instruction found in the Election Officials Manual, Chapter 7: Military and Overseas Voters, Federal Voter Registration and Absent Voting Programs instruction at page 3, and direct the Secretary to circulate, electronically or otherwise, a revised copy of Chapter 7 of the Election Officials Manual that complies with Const. 1963, art. 2, § 1, and to issue a bulletin to clerks noting the specific, offensive paragraph that has been excised;

C. Enjoin the Secretary from accepting any voter registration forms, in any format, from individuals to register or attempt to register unless and until such persons can confirm Michigan residency or satisfy the requirements of UOCAVA;

D. Order the Secretary to take all steps necessary to remedy the harm caused by her unconstitutional actions, including:

1. Issuing all necessary directives and guidance to local election officials, including county, city, and township clerks;
2. Updating all public facing websites and voter registration portals within her custody or control to reflect the constitutional prohibition on non-residents voting in Michigan elections; and
3. Updating all necessary voter registration forms;

E. Reject the ballots cast by overseas voters who never resided in Michigan,

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including ballots of overseas voters who submitted a Federal Post Card Application[5] or Federal Write-In Absentee Ballot[6] and checked the box affirming: "I have never lived in the United States."

F. In the alternative, direct the Secretary to segregate ballots cast by overseas voters who have never resided in Michigan including ballots of overseas voters who submitted a Federal Post Card Application or Federal Write-In Absentee Ballot and checked the box affirming, "I have never lived in the United States," so that Plaintiffs and this Court may ascertain the scope of the constitutional violation and whether it effects the election's outcome;

G. Award Plaintiffs their costs, expenses, and attorney fees incurred in this action; and

H. Award any other relief this Honorable Court deems just and equitable.

Dated: October 8, 2024

Respectfully submitted,

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[5] https://www.fvap.gov/uploads/fvap/forms/fpca.pdf.
[6] https://www.fvap.gov/uploads/fvap/forms/fwab.pdf.

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VERIFICATION

I, Christina Norton, a representative of the Republican National Committee (the "RNC"), being duly sworn and being authorized to give this Verification on behalf of the RNC in support of the allegations contained in the foregoing Verified Complaint, do hereby declare pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Christine Norton

By: Christina Norton
Its: Executive Director of Election Integrity Operations

Subscribed and sworn to before me this 8th day of October, 2024.

JULIE HYATT
NOTARY PUBLIC - STATE OF FLORIDA
COMMISSION # DD 449359
My Commission Expires July 9, 2028

Julie Hyatt

Julie Hyatt, Notary Public
Palm Beach County, State of Florida
My commission expires: 07/09/28

4894-1894-6797 v1 [99168-8]

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VERIFICATION

I, Cindy Berry, being first duly sworn, depose and declare that I am a resident of the state of Michigan and am a duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Verified Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

Cindy Berry

Subscribed and sworn to before me this 8th day of October 2024.

Michelle C. Nizza

Michelle C. Nizza Notary Public.

Sanilac County, State of Michigan

My commission expires: 12-16-2029

Acting in Macomb County, MI.

MICHELLE C. NIZZA
Notary Public, State of Michigan
County of Sanilac
My Commission Expires 12-16-2029
Acting in the County of Macomb

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VERIFICATION

I, Tyson Shepard, a representative of the Michigan Republican Party (the "MRP"), being duly sworn and being authorized to give this Verification on behalf of the MRP in support of the allegations contained in the foregoing Verified Complaint, do hereby declare pursuant to MCR 1.109 and under the penalties of perjury, that the facts and allegations contained in this Verified Complaint are true to the best of my information, knowledge, and belief.

By: Tyson Shepard
Its: Executive Director

Subscribed and sworn to before me this 2nd day of October, 2024.

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

Kyle Robert Hogendyk, Notary Public
Kent County, State of Michigan
My commission expires: 2-2-2027

4878-5997-6429 v1 [99168-8]

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Exhibit A

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Election Officials Manual

Chapter 7: Military and Overseas Voters, Federal Voter Registration and Absent Voting Programs

July 2024

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
800-292-5973

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I. Introduction

This chapter explains the federal programs that provide special procedures and protections for military and overseas voters. It includes explanations of the programs, instructions for clerks on how to comply with the programs, and technical information about how to document that compliance in the QVF. Questions about the content of this chapter should be directed to Elections@Michigan.gov.

II. Federal laws for Military and Overseas Voters (UOCAVA and MOVE)

In 1986, the federal government passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which provided special registration and absentee voting provisions for military and overseas civilians. In addition, UOCAVA authorized the use of the Federal Write-In Absentee Ballot (FWAB). The Federal Voting Assistance Program (FVAP) was created by the Department of Defense to oversee UOCAVA. In 2009, the federal Military and Overseas Empowerment Act (MOVE Act) and corresponding state legislation expanded UOCAVA by allowing a UOCAVA voter to submit a single AV application for all elections in a calendar year, allowing ballots to be sent to UOCAVA voters via email or fax, establishing a 45-day absent voter ballot delivery requirement for UOCAVA voters, and expanding the use of the FWAB. In 2012, the Michigan State Legislature passed Public Act 279, which further expanded the FWAB to include local and state offices.

UOCAVA and subsequent federal and state laws protect members of a uniformed service on active duty and dependents of such members, members of the Merchant Marine and dependents of such members, civilians living overseas, and National Guardsmen activated on state orders. This chapter refers to such voters as "UOCAVA voters."

Due to the strict timing requirements for issuance of absent voter ballots to UOCAVA voters, clerks should give priority to the processing of absent voter ballot applications received from such voters. All UOCAVA voters who request an absent voter ballot more than 45 days prior to an election must be sent that ballot 45 or more days before the election. All UOCAVA voters

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who request an absent voter ballot 45 or fewer days prior to the election must be sent an absent voter ballot within 24 hours of the clerk's receipt of the UOVACA voter's request. The Bureau of Elections provides all clerks with an electronic ballot that can be used to comply with the requirements of UOCAVA and subsequent statutes. Clerks can always send this ballot to a UOCAVA voter if necessary, including by printing and mailing the ballot if printed ballots are not yet available.

Federally required ballot tracking for UOCAVA voters

Ballots sent to and received from UOCAVA voters must be tracked in the QVF. Federal law requires a "free access system" that allows a military or overseas voter to track whether their absent voter ballot request has been received, if their absent voter ballot has been mailed, and if their absent voter ballot has been received and accepted by their local clerk. QVF data is displayed on Michigan.gov/Vote to fulfill this requirement. In addition to tracking UOCAVA voters' ballots in the QVF, the Bureau of Elections recommends that clerks record the dates each absent voter ballot was issued on the absent voter ballot request form submitted by the relevant UOCAVA voter.

III. Registering military and overseas voters

Many military and overseas voters register to vote using the *Federal Post Card Application* (FPCA) or the Federal Write-In Absentee Ballot (FWAB) Voter Information page. The FPCA and FWAB may be mailed, emailed, or faxed to the local clerk. A clerk who receives an FPCA or an FWAB form from a UOCAVA voter must register that person to vote. Additionally, both the FPCA and the FWAB can serve as both a voter registration form and an absent voter ballot application. If the registrant requested an absent voter ballot using the FPCA or FWAB, and if an election is occurring within 45 days of the clerk's receipt of the completed FPCA or FWAB, the clerk must immediately send the voter an absent voter ballot.

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Eligibility to register to vote using the FPCA or FWAB

To be eligible to register to vote using the FPCA or the FWAB, the voter must be absent from their jurisdiction of residence. If the voter is a civilian, the voter must be living outside of the United States and its territories. If the voter is a member of a uniformed service on active duty, a member of the Merchant Marine, or a National Guardsman activated on state orders, or if the voter is a dependent of a member of any of the listed organizations, the voter is eligible to register to vote using the FPCA or FWAB regardless of whether the voter is serving overseas or inside the United States. Each UOCAVA voter must submit their own FPCA or FWAB form.

A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state.

Registration address for UOCAVA voters

A UOCAVA voter may register to vote at their last address of residence in the jurisdiction in which they are registering even if someone else now resides at that address, if the building where the voter resided has been demolished, or if the address no longer exists. The only requirement is that the address supplied by the voter is the last address which the voter considered their permanent residence within the jurisdiction in question.

Obtaining the FPCA or FWAB form

Protected voters may obtain the FPCA or FWAB forms at fvap.gov. FPCA and FWAB forms are postage paid and provided by the federal government for use by protected voters. Variations of both forms are provided. All variations of the FPCA are acceptable for use.

Clerks must also provide FPCA and FWAB forms to a voter upon request.

Registration deadline for UOCAVA voters

The registration deadline for UOCAVA voters, as for all Michigan voters, is 8 p.m. on Election Day.

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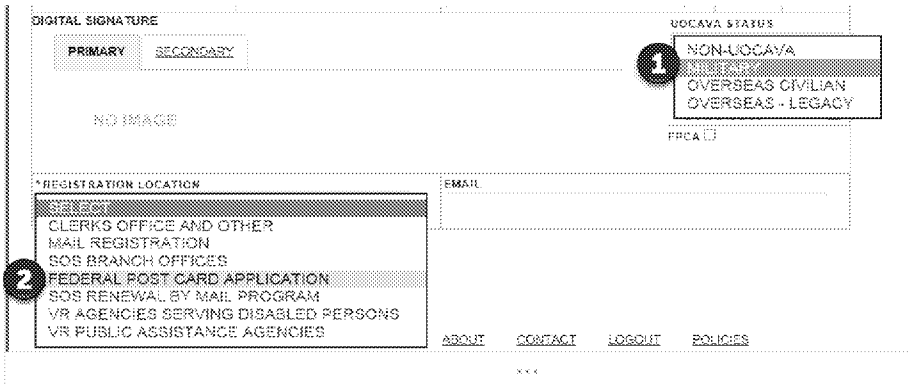
Incomplete registration submitted by a UOCAVA voter

If a UOCAVA voter submits an incomplete voter registration, the clerk must notify the voter of the rejection and the reason for the rejection. The clerk must also attempt to correct the incomplete registration, if the incomplete registration was due to a minor or clerical error. The clerk's notification of the UOCAVA voter of the rejection of the voter's registration and the reason for that rejection can be made by letter, fax or email. The fvap.gov website also provides a response card that clerks may use for this purpose.

Entering a UOCAVA voter's registration into the QVF

All UOCAVA registrations must be tracked in QVF. The voter's registration location should be entered as "Federal Post Card Application." The clerk must then select whether the voter is a military or overseas voter, as shown in the following graphic:



The spouse of a member of the military should be marked as a military voter.

Once the voter has been entered into the QVF, the clerk should prepare a master card for the voter. The clerk should also send the voter a voter information card. The voter information card should be sent in an envelope addressed to the mailing address supplied by the voter. The clerk should not send the voter information card to the UOCAVA voter's address within the clerk's jurisdiction, because federal law permits UOCAVA voters to register to vote at their last permanent residence within the jurisdiction, even if the voter no longer maintains that residence.

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IV. Receiving absent voter ballot applications from UOCAVA voters

Absent voter ballot requests from UOCAVA voters are handled differently from absent voter ballot applications from other Michigan voters.

Specifically, an absent voter ballot request from a UOCAVA voter entitles that voter to be sent an absent voter ballot for every election in the calendar year during which the request was made. If an absent voter ballot request from a UOCAVA voter is received after a November election, the request must be treated as having arrived in the following calendar year, and the UOCAVA voter must be sent an absent voter ballot for each election occurring in the following calendar year.

While most UOCAVA voters tend to submit their absent voter ballot request by using an FPCA or FWAB, a UOCAVA voter may request their absent voter ballot using any method that any other voter may use to submit an absent voter ballot application. A UOCAVA voter may request an absent voter ballot by emailing or faxing a signed *Absent Voter Ballot Application* to their clerk. However, in that case, the UOCAVA voter should verify with their clerk that they are identified in QVF as a UOCAVA voter to ensure that they are sent a ballot early enough to allow for overseas mail.

Under federal law, if an absent voter ballot request is received from a UOCAVA voter more than 45 days prior to an election, the clerk must send the UOCAVA voter a ballot 45 or more days prior to the election.

A UOCAVA voter's request for an absent voter ballot should be stored with the other, non-UOCAVA absent voter ballot applications received by the clerk.

Following the Proposal 2022-2 amendments to the State Constitution, Michigan voters may join the state's permanent mail ballot list and receive an absent voter ballot for all future elections. However, UOCAVA voters must complete a FPCA (or ensure they are identified in QVF as a UOCAVA voter) each year to ensure that they are sent a ballot early enough to allow for overseas mail.

Late-mailed UOCAVA ballots

If a UOCAVA voter requests an absent voter ballot more than 45 days prior to the election, and if the ballot is not sent 45 or more days prior to the

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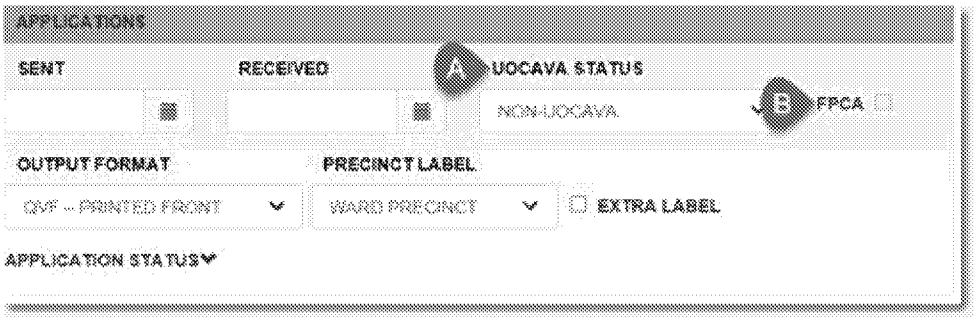
election, the UOCAVA voter is granted one extra day to return the ballot for each day between the forty-fifth day prior to the election and the day that the absent voter ballot is sent to the UOCAVA voter.

For example, if the UOCAVA voter requested the ballot more than 45 days prior to the election, and the ballot is sent on the fortieth day prior to the election, the ballot must be counted if it arrives five or fewer days after Election Day, as long as it was executed and sent by the close of polls on Election Day. However, the election may be formally certified before the end of this extension time if the number of outstanding ballots allowed an exception would not alter the outcome of the election.

Recording receipt of an absent voter ballot application in the QVF

The clerk should enter a UOCAVA voter's absent voter activity into the QVF in the same manner as any other voter's, except that the clerk must also ensure that the voter's UOCAVA status, FPCA status, FWAB Received status, and delivery method are completed. Additionally, the clerk must ensure that the voter's email address is completed if the voter has requested their ballot via email.

To record this information in the QVF, the clerk should open the voter's file within the QVF and click the "Absentee Voter Ballot" button. The clerk should record receipt of the absent voter ballot application as normal, except that the clerk should select "UOCAVA" in the "UOCAVA Status" dropdown. The clerk should also check the FPCA box if the application was made via an FPCA form.



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V. Sending absent voter ballots to UOCAVA voters

Ballot delivery method

UOCAVA voters may request that their absent voter ballot be sent via email, fax, or mail. If a UOCAVA voter requests their absent voter ballot be emailed, city and township clerks who do not have internet access must work with the county clerk to facilitate the emailing of a blank ballot. If the voter does not select a delivery method, the clerk should send the absent voter ballot via mail.

A UOCAVA voter may opt for different ballot delivery methods for different elections by submitting a written request to the clerk via email, fax, or letter. Similarly, the voter can change the address, email address, or fax number at which the voter wishes to receive their absent voter ballot by submitting a written request to the clerk via email, fax, or letter.

Electronic transmission of ballots

The QVF can be used to generate an email or fax ballot. These ballots, called "QVF ballots," are formatted to fit regular 8.5" x 11" paper. A QVF ballot is printed and completed by the UOCAVA voter. The voter then returns the ballot to the clerk, and the ballot is duplicated onto a standard ballot using the normal duplication procedure explained in *Chapter 13: Precinct Canvass – Closing the Polls* prior to tabulation.

If a UOCAVA voter requests their absent voter ballot be delivered by mail, the clerk should send the voter a standard absent voter ballot. If standard ballots are not available on the 45th day prior to the election, however, the QVF printable ballot may be printed and mailed to a UOCAVA voter to fulfill a clerk's UOCAVA responsibilities.

In some cases, the county clerk may provide city and township clerks with PDF ballot proofs that may be emailed, faxed, or printed and mailed to UOCAVA voters. If ballot proofs, rather than the QVF-generated ballot, are sent to UOCAVA voters, the clerk must ensure that the appropriate instructions and voter certificate[1] are included in the email, fax, or mailing to the UOCAVA voter. Different instructions have been developed for each

[1] Available at http://www.mi.gov/documents/sos/Move_Voter_Cert_325028_7.pdf.

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transmittal method; each set of instructions can be found at the FPCA link on the Military and Overseas Voter Information webpage.[2]

No matter how the UOCAVA voter receives their absent voter ballot, the voter must return their ballot by mail. If a UOCAVA voter was emailed their ballot, the voter must print the ballot, complete the ballot, and mail the completed ballot back to the clerk.

Generating the QVF ballot

To generate the QVF ballot for transmission to UOCAVA voters, the clerk should begin by logging into the QVF. If the clerk does not have a QVF account or if the clerk's QVF account has become inactive, the clerk should contact the 517-292-5973 mainline and select the QVF option.

The clerk should navigate to a voter's file within the QVF. If the voter has been assigned UOCAVA status, as explained above, the MOVE button will appear in their file. To generate a PDF containing the voter's absent voter ballot and corresponding ballot instructions, the clerk should:

1. Click the "Absentee Voter Ballot" button, which causes the "MOVE Ballot" button to appear.
2. Click the "MOVE Ballot" button.
3. A pop-up will appear when the ballot is ready for download. Click "OK" on the pop-up to download the ballot.

These instructions are illustrated in the following screengrab of QVF.

[2] Available at https://www.michigan.gov/sos/elections/voting/military-and-overseas-voters.

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Once the ballot has been downloaded, the clerk should open the PDF and review both the ballot and ballot instructions for accuracy. The ballot generated is specific to the ballot style that the voter is assigned in the QVF based on the address at which the voter is registered. If an error is identified, the county clerk should be contacted to make the correction in the QVF's Ballot Administrator program.

Faxing a QVF ballot

If a UOCAVA voter has requested that their ballot be delivered by fax, the clerk should generate a QVF ballot as explained above, print the PDF, and fax the printed ballot and accompanying documents to the voter. The clerk should ensure that the ballot was transmitted and should retain a copy of the fax confirmation page.

Emailing a QVF ballot

If the UOCAVA voter has requested their absent voter ballot be delivered by email, the clerk should email the PDF of the QVF ballot to the voter. The email should have the subject line "Electronic Ballot" followed by the election date. A suggested template for the email body can be found in the eLearning Center.[3]

[3] Available at https://mielections.csod.com/ui/lms-learning-details/app/material/064b5d93-bc2a-4af1-a3d8-077d5b323f20

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After emailing the ballot, the clerk should monitor the email account from which the ballot was sent for questions from the UOCAVA voter or for any delivery errors or failures.

Printing and mailing a QVF ballot

If a UOCAVA voter has requested that their absent voter ballot be mailed, but standard absent voter ballots provided by the county clerk will not be available by the 45th day prior to the election, the clerk may print the ballot PDF generated by QVF and send the printed ballot to the voter. After the ballot has been printed, the clerk should place all of the pages included in the PDF into a military/overseas absent voter ballot envelope. The clerk should also include a return overseas absent voter ballot envelope in the mailing to the voter.

Mailing military and overseas ballots

Absent voter ballots mailed to UOCAVA voters must be sent postage paid First Class mail with a special designation provided by the United States Postal Service (USPS). For more information on the special designation, the clerk should contact their local post office and reference Domestic Mail Manual (DMM) 703.8.2.[4] For more information on how to designate absent voter ballots mailed to UOCAVA voters, refer to the fvap.gov mailing site.[5]

Mailing APO/FPO absent voter ballots

The USPS requests that all absent voter ballots sent from an Army Post Office or Fleet Post Office (indicated as APO/FPO) be separated from regular mail and delivered directly to a USPS clerk or mail carrier rather than being deposited in a USPS collection box. Clerks should ensure that APO/FPO ballots are addressed according to the USPS Domestic Mail standards published on the USPS's website.[6]

Express mail for military voters returning absent voter ballots for November general elections

For even-year November general elections, the USPS provides a unique express mail label for use by overseas military members submitting mail to

[4] More information available at https://about.usps.com/what/government-services/election-mail/
[5] Available at https://www.fvap.gov/eo/overview/sending-ballots/creating-envelopes.
[6] Available at https://www.usps.com/ship/apo-fpo-dpo.htm.

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overseas postal locations. This unique label gives the voter the ability to track their ballot via USPS. For more information on this express mail label, consult the USPS Express Mail website.[7]

Undeliverable or returned absent voter ballots

If an absent voter ballot which was faxed or emailed to a UOCAVA voter is returned as undeliverable, the clerk should contact the voter for an alternate email address, fax number or transmittal method. If the clerk is unable to contact the voter for an alternate email address or fax number, the clerk should send a ballot via postal mail to the mailing address provided by the voter.

If an absent voter ballot mailed to a UOCAVA voter is returned as undeliverable, the clerk should contact the voter for an alternate mailing address or transmittal method. Updated mailing addresses for military voters can be obtained by contacting FVAP. Election officials should submit requests to FVAP via email at vote@fvap.gov or fax at 703-696-1352 and include the name of the clerk and jurisdiction requesting the voter's address, as well as the voter's full name and date of birth or the last four digits of the voter's Social Security Number. If the clerk is unable to contact the voter for an alternate mailing address and/or FVAP is unable to assist, the clerk should retain the returned ballot and mark the ballot as Undeliverable in the QVF.

QVF ballot tracking

To record the issuance and mail, fax, or email of an absent voter ballot to a UOCAVA voter, the clerk should take the following steps:

1. Identify the ballot number. If a QVF ballot is being emailed, faxed, or mailed to the voter, as explained above, the ballot is identified as an electronic transmission using the prefix "ET" and the ballot number takes the form ET000000. The first QVF ballot issued to a UOCAVA voter is ET000001, the second is ET000002, etc. If a standard absent voter ballot was mailed to the UOCAVA voter, use the regular absent voter ballot number.
2. If a FWAB was received, enter the date on which the clerk received the FWAB.

[7] Available at https://about.usps.com/postal-bulletin/2016/pb22443/html/cover_018.htm.

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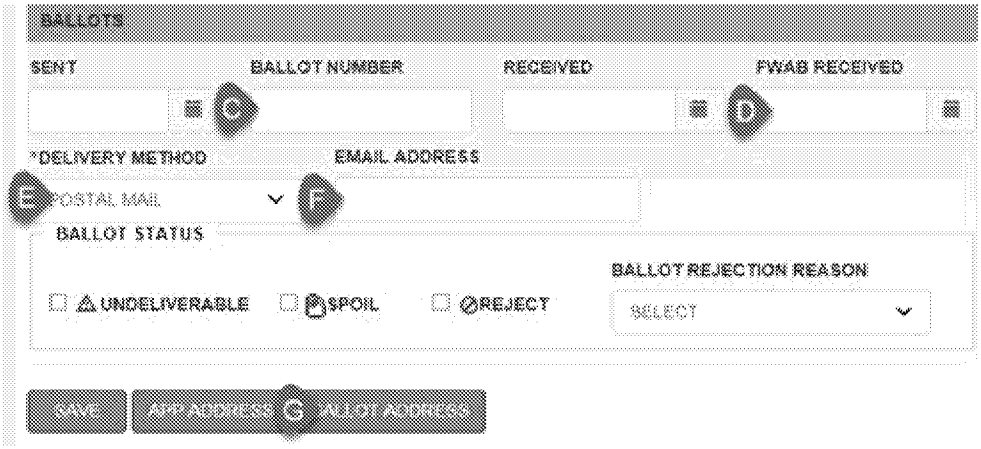
3. Select the delivery method the clerk used to send the absent voter ballot to the UOCAVA voter.
4. Enter the UOCAVA voter's email address, if applicable.
5. Enter the UOCAVA voter's alternate mailing address, if applicable.



MOVE compliance report

The MOVE compliance report must be completed by every city and township in Michigan, whether or not the city or township received a request for an absent voter ballot from a UOCAVA voter. The report can be found in the eLearning Center. The report must be completed by the Tuesday after the "MOVE deadline," which occurs 45 days before an election.

VI. Receiving absent voter ballots from military and overseas voters

No matter how the UOCAVA voter receives their absent voter ballot, the voter must return their ballot by mail. If a UOCAVA voter was emailed their ballot, the voter must print the ballot and mail the completed ballot back to the clerk. MOVE ballots must be counted if postmarked by Election Day and received no later than six days after Election Day. If the postmark on the ballot envelope is missing or unclear, clerks must deliver the ballot envelope to their county clerk to determine whether the ballot was received on time. All ballots received after Election Day and deemed on time by the municipal or county clerk will be counted by the county clerk in a board of county canvassers meeting.

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If a UOCAVA voter attempts to submit their completed absent voter ballot via email or fax, the clerk must attempt to contact the voter to advise the voter that their ballot must be returned by postal mail with a signed voter certificate. A ballot or FWAB Backup Ballot returned by email or fax cannot be processed or counted. Such ballots must be marked as rejected and secured in the clerk's office.

If a UOCAVA voter returns two ballot return envelopes, which may occur because the UOCAVA voter accidentally printed more than one copy of their QVF ballot or because the voter made a technical error on their first ballot, the ballot return envelope that carries the most recent postmark should be processed. If the postmark dates cannot be determined, the return envelope that arrived closest to the election should be processed. If the ballot return envelope that is opened does not contain a signed voter certificate, the other return envelope should be processed. If multiple ballot return envelopes are received from the same UOCAVA voter, to ensure proper handling the clerk should attach a note to the first ballot return envelope sent for processing that advises election inspectors to contact the clerk if that ballot return envelope does not contain a ballot and/or signed voter certificate.

VII. The Federal Write-in Absentee Ballot (FWAB)

The Federal Write-in Absentee Ballot (FWAB) is available for UOCAVA voters to use as a ballot.[8] A FWAB submitted by a UOCAVA voter that is postmarked by Election Day and received no later than six days after Election Day must be counted, so long as the UOCAVA voter submitting the FWAB requested an absent voter ballot by 2 p.m. the Saturday prior to the election. The voter's request for an absent voter ballot can be the same FPCA that the voter is submitting as their ballot for the election, so long as the FPCA is received by 2 p.m. on the Saturday prior to the election. The voter may also email or fax a signed absent voter ballot application to their clerk by 2 p.m. on the Saturday prior to the election. If the UOCAVA voter returning the FWAB did not request an absent voter ballot prior to 2 p.m. on the Saturday preceding Election Day, and the FPCA is received by the clerk after 2 p.m. on the Saturday preceding Election Day, the FWAB is not valid and is not counted.

[8] The FWAB is available at https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf.

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A clerk must enter the receipt of an FWAB into the QVF.

The FWAB has two parts. The first part is the voter information form. The voter's information must be completed by the UOCAVA voter and will likely be returned to the clerk in a regular envelope. If the protected voter is not already registered to vote, the clerk should use the voter information portion of the FWAB to register the voter and to record the UOCAVA's application for an absent voter ballot for every election in the calendar year. The voter information form must be signed. If the voter information form is not signed, the FWAB is invalid.

A UOCAVA voter that did not apply for an absent voter ballot before submitting the FWAB can be registered using the voter information page if the FWAB is received by 2 p.m. the Saturday prior to the election. An absent voter ballot should be sent to the UOCAVA voter via their preferred method as explained above.

The second part of the FWAB is a second envelope, included in the first, marked "Official Ballot – Federal Write-In Absentee Ballot," in which the voter will place the voter's completed Official Backup Ballot. The envelope will be sealed; clerks should not open the sealed envelope. The Official Backup Ballot allows a UOCAVA voter to write in the candidate of their choice for any office or ballot initiative that is on the ballot for the election in which the UOCAVA voter is voting. The UOCAVA voter may write in either the candidate's name or the candidate's political party for each office.

The UOCAVA voter's Official Backup Ballot must be counted by the relevant precinct or absent voter counting board if the UOCAVA voter's regular absent voter ballot is not received by Election Day. The Official Backup Ballot is counted using normal ballot duplication procedures. The UOCAVA voter is not required to mark an oval or box on the Official Backup Ballot in order for their votes to be cast, and any name variations are acceptable so long as the voter's intent is clear.

If the UOCAVA voter's QVF or regular absent voter ballot is returned by 8 p.m. on Election Day, the QVF or regular absent voter ballot supersedes the FWAB submitted by the voter. In that case, the FWAB should not be opened, and the voter's QVF or regular absent voter ballot should be tabulated.

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VIII. Processing MOVE and FWAB ballots on Election Day

Regular absent voter ballots received from UOCAVA voters should be processed in the same manner as all other absent voter ballots. QVF ballots or FWAB ballots returned by UOCAVA voters, however, need several additional checks before they are duplicated onto a standard ballot for tabulation. First, election inspectors must verify that the UOCAVA voter signed the signature certificate included with the QVF ballot and ensure that the signature on the certificate matches the voter's signature on the file. If the returned ballot does not include a certificate, the ballot must be rejected. The signature certificate should be stored with the UOCAVA voter's original absent voter ballot application. To preserve ballot secrecy, neither the certificate nor the absent voter ballot application should be attached to the QVF ballot or the FWAB Backup Ballot.

If absent voter ballots are processed in the precinct, QVF ballots and FWAB Backup Ballots must be placed in the auxiliary bin until the close of polls to wait for duplication. If the QVF ballot or the FWAB ballot includes multiple pages, election inspectors must ensure that the pages are stapled or clipped together before placing the ballot in the auxiliary bin. The regular duplication procedures explained in *Chapter 13: Precinct Canvass – Closing the Polls* should be followed to transfer the contents of the QVF ballot or the FWAB Backup Ballot to a standard ballot for tabulation. As with other duplicated ballots, the original QVF ballots or FWAB Backup Ballots must be placed in the original ballot envelope after duplication. For more information on the ballot duplication process, refer to *Managing Your Election Day Polling Place: Election Inspectors Procedure Manual*.[9]

IX. QVF reports

The QVF has two reports for reviewing military and overseas voter absentee activity. To access the reports, a clerk should login to the QVF and do the following:

[9] Available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Administrators/Managing-Your-Precinct-on-Election-Day.pdf?rev=099687d67e9249d98941ce03647543a3&hash=86B2799DC0E246E42596FAF6F720ACD0.

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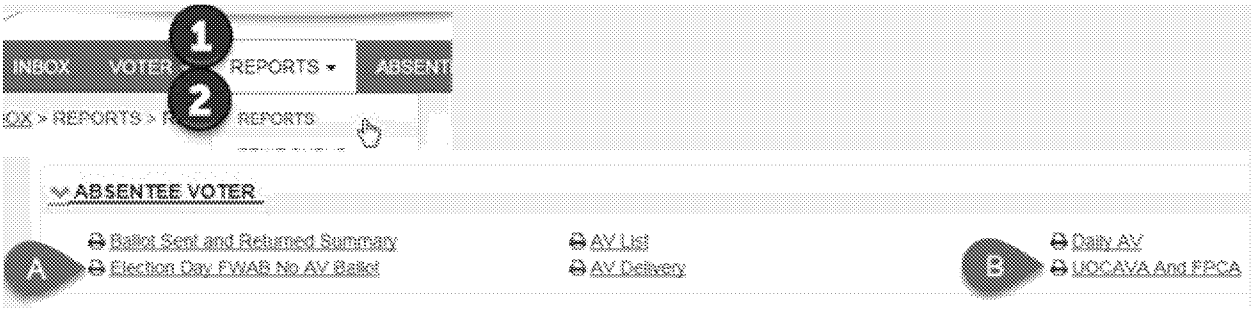
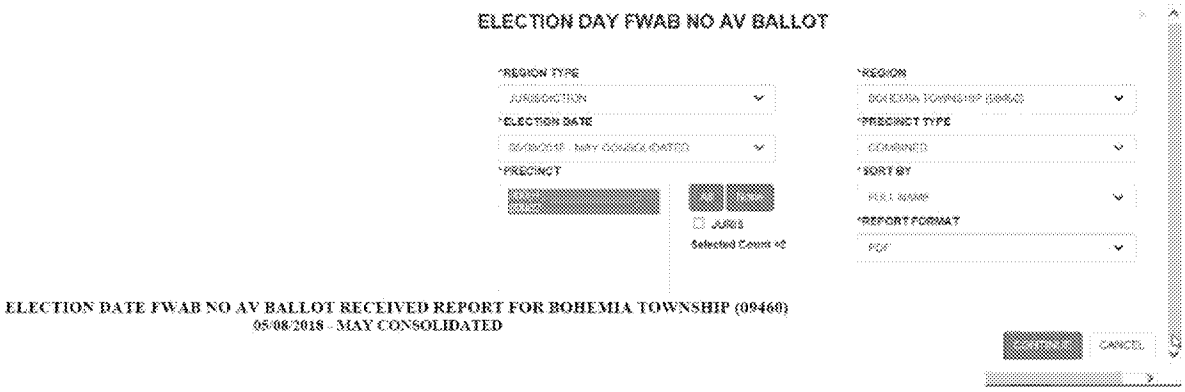
1. Click on Reports.
2. Click on Reports in the dropdown menu.



Election Day FWAB report

The Election Day "FWAB no AV ballot" report will provide a listing of all of the voters who submitted a FWAB but who did not return a QVF or regular absent voter ballot. The FWAB for each of these voters should be duplicated onto a standard ballot and tabulated. The FWAB of a voter who did return either a QVF ballot or a regular ballot should not be duplicated; the QVF ballot or the regular ballot returned by that voter supersedes the FWAB.



ELECTION DATE FWAB NO AV BALLOT RECEIVED REPORT FOR BOHEMIA TOWNSHIP (09460)
05/08/2018 - MAY CONSOLIDATED

Voter Name / Mailed To Address	COMBINED	Voter Status & Reason(s)	FWAB Received	AV Ballot Received
MCCVF, FAY 10000 OLD LAKE ROAD GRAYLING, MI 49738	09001	ACTIVE - ACTIVE	01/12/2018	
MCCVF, FINN FLINT 10007 OLD LAKE RD GRAYLING, MI 49738	09001	ACTIVE - ACTIVE	01/12/2018	

Total 2

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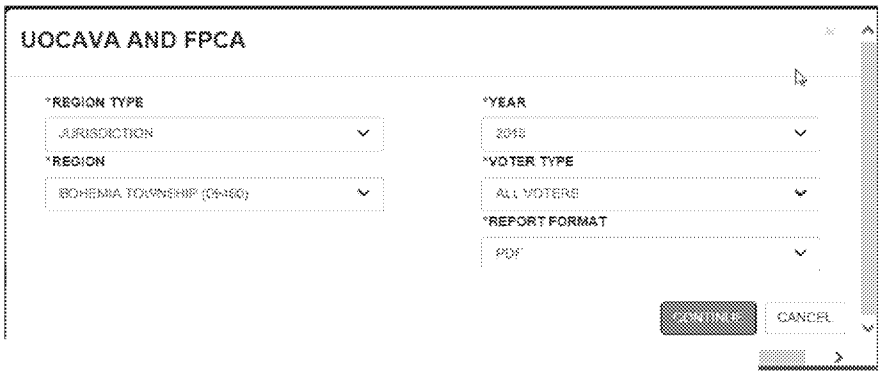
UOCAVA and FPCA report

The "UOCAVA and FPCA" report will provide a listing of all AV voters entered into QVF as military or overseas voters. The report can be sorted in multiple ways and exported as either a PDF or a CSV file. To generate this report, the clerk should make their selections and click "Continue." The report will open in a new window.



2/23/2018 4:51:58 PM

UOCAVA AND FPCA VOTERS REPORT

FOR THE YEAR 2018

[redacted] JURISDICTION

Voter Name / Residential Address	Mailing Address	RECEIVED DATE	IS FPCA
[redacted]		01/16/2018	NO
[redacted]		01/18/2018	NO

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Exhibit B

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

AFFIDAVIT OF TYSON SHEPARD

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AFFIDAVIT OF TYSON SHEPARD

STATE OF Michigan)
) SS
COUNTY OF Oakland)

I, Tyson Shepard, being first duly sworn, state as follows under oath:

1. I am the Executive Director of the Michigan Republican Party (the "MRP"). I am over the age of eighteen and I have personal knowledge of the following facts. If called as a witness, I could and would competently testify thereto.

2. The MRP is a "major political party" as that term is defined by the Michigan Election Law. See MCL 168.16. The MRP maintains headquarters at 520 Seymour Street, Lansing, Michigan 48912. Among its general purposes, the MRP promotes and assists Republican candidates who seek election or appointment to partisan federal, state, and local office in Michigan.

3. The MRP works to elect Republican candidates to state and federal office. In November 2024, its candidates will appear on the ballot in Michigan for election to the Presidency, U.S. Senate, and U.S. House of Representatives, and Michigan Legislature—among other elected offices.

4. The MRP engages in various activities to help elect Republicans in Michigan, including efforts to educate, mobilize, assist, and turn out voters.

5. During past election cycles, the MRP has made significant contributions and expenditures to support Republican candidates up and down the ballot in Michigan and to mobilize and educate Michigan voters. It is doing so again in 2024.

6. The MRP has vital interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections. The MRP is a plaintiff

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in this case to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

7. The policies challenged in this lawsuit—allowing persons who have never been Michigan residents to vote in Michigan elections—violates the Michigan Constitution, which requires—exempt where preempted by federal law—that a person reside in Michigan to vote in Michigan.

8. Allowing persons who have never been Michigan residents to vote in elections harms the MRP's interests.

9. The MRP has a substantial interest in seeking and winning political office, and in doing so in a legally structured, fair, and competitive environment in which the Michigan Constitution and its residency requirement is enforced.

10. The MRP spends significant resources to preserve voter confidence and turnout, which suffer when voters see that election officials accept absent voter ballots without verifying the residency of the voter as required under Michigan law or enforcing the residency requirements of the Michigan Constitution.

11. The policies challenged here harm the MRP—and its members and candidates—and places them at a competitive disadvantage.

12. Democrat voters are more likely than Republicans to vote by absentee ballot. As a result, any failure to verify the residency of absentee voters will result in an inaccurate tally of the lawfully cast votes. And given the higher number of Democrat absentee voters than Republican absentee voters, that inaccurate tally undermines the Republican candidates' rights to a fair and accurate electoral count.

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13. By counting votes of persons who do not meet the residency requirement of the Michigan Constitution, Michigan dilutes the weight of valid votes cast by the MRP's candidates and its members.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Tyson Shepard

Subscribed and sworn to before me this
5th day of October, 2024.

KYLE ROBERT HOGENDYK
Notary Public - State of Michigan
County of Kent
My Commission Expires Feb 2, 2027
Acting in the County of Kent

Notary Public, Kyle Robert Hogendyk, County, kent
Acting in kent County
My Commission Expires: 2-2-27
4889-5292-0045 v1 [99168-8]

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Exhibit C

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

AFFIDAVIT OF CHRISTINA NORTON

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AFFIDAVIT OF CHRISTINA NORTON

STATE OF Florida)
) SS
COUNTY OF Palm Beach)

I, Christina Norton, being first duly sworn, state as follows under oath:

1. I am the Executive Director of Election Integrity Operations at the Republican National Committee (the "RNC"). I am over the age of eighteen and I have personal knowledge of the following facts. If called as a witness, I could and would competently testify thereto.

2. The RNC is the national committee of the Republican Party, with its principal place of business at 310 First Street S.E., Washington D.C., 20003. The RNC represents over 30 million registered Republicans in all 50 states, the District of Columbia, and the U.S. territories. It is comprised of 168 voting members representing state Republican Party organizations.

3. The RNC manages the Republican Party's business at the national level, coordinates fundraising and election strategy, and develops and promotes the national Republican platform.

4. The RNC organizes and operates the Republican National Convention, which nominates a candidate for President and Vice President of the United States.

5. The RNC works to elect Republican candidates to state and federal office. In November 2024, its candidates will appear on the ballot in Michigan for election to the Presidency, U.S. Senate, and U.S. House of Representatives, and Michigan Legislature—among other elected offices.

6. The RNC engages in various activities to help elect Republicans in Michigan. One of these activities is providing support to the Michigan Republican Party in its efforts to elect

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Republican candidates and educate, mobilize, assist, and turn out voters. The RNC also assists the Michigan Republican Party to recruit and train poll challengers regarding the requirements of the Michigan Election Law.

7. During past election cycles, the RNC has made significant contributions and expenditures to support Republican candidates up and down the ballot in Michigan and to mobilize and educate Michigan voters. It is doing so again in 2024.

8. The RNC has vital interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections. The RNC is a plaintiff in this case to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

9. The policies challenged in this lawsuit—allowing persons who have never been Michigan residents to vote in elections—violates the Michigan Constitution, which requires—except where preempted by federal law—that a person reside in Michigan to vote in Michigan.

10. Allowing persons who are not Michigan residents and who have never been Michigan residents to vote in elections harms the RNC's interests.

11. The RNC has a substantial interest in seeking and winning political office, and doing so in a legally structured, fair, and competitive environment in which the Michigan Constitution and its residency requirement are enforced.

12. The RNC spends significant resources to preserve voter confidence and turnout, which suffer when voters see that election officials accept absent voter ballots without enforcing the residency requirements of the Michigan Constitution.

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13. The policies challenged here harm the RNC—and its members and candidates—and also places them at a competitive disadvantage, because overseas voters overwhelmingly support Democratic candidates.

14. Moreover, ineligible overseas voters casting ballots in elections in Michigan will result in an inaccurate tally of the lawfully cast votes. And given the higher number of Democratic overseas voters than Republican overseas voters, that inaccurate tally undermines the Republican candidates' rights to a fair and accurate electoral count.

15. By counting votes of persons who do not meet the residency requirement of the Michigan Constitution, Michigan dilutes the weight of valid votes cast by the RNC's voters and members.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Christina Norton

Subscribed and sworn to before me this
8th day of October, 2024.

Julie Hyatt

Notary Public, PALM BEACH, County, FLORIDA
Acting in PALM BEACH County
My Commission Expires: 07/09/28

JULIE HYATT
NOTARY PUBLIC · STATE OF FLORIDA
COMMISSION # DD 449359
My Commission Expires July 9, 2028

4855-1188-6829 v1 [99168-8]

Document received by the MI Court of Claims.

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Exhibit D

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

Case No. 24-_____-MZ

Hon. _____

AFFIDAVIT OF CINDY BERRY

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Attorneys for Plaintiff RNC

_____/

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AFFIDAVIT OF CINDY BERRY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Cindy Berry, being first duly sworn, state as follows under oath:

1. I am over the age of eighteen and I have personal knowledge of the following facts. If called and sworn as a witness, I could and would competently testify thereto.

2. I am a resident of Chesterfield Township, Michigan, and a registered Michigan voter.

3. I cast a ballot for the February 2024 presidential primary election through Michigan's early voting process, voted by absentee ballot in the August 2024 primary election, and intend to vote by absentee ballot in future elections—including the November 2024 general election.

4. I am the Clerk for the Township of Chesterfield, Michigan. As the Clerk, I am responsible for running the Township's elections, which includes hiring and training election inspectors (also known as poll workers), preparing absent voter ballots for distribution, compiling precinct results on Election Day, and certifying election results.

5. As Township Clerk, I am also responsible for overseeing the tabulation of absent voter ballots in compliance with the Michigan Constitution.

6. For example, the Michigan Constitution provides that "Every citizen of the United States . . . who has resided in this state six months . . . shall be an elector and qualified to vote in any election except as otherwise provided in this constitution." Const. 1963, art. 2, § 1.

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7. It is my understanding that under Const. 1963, art 2, § 1, an election inspector may only tabulate an absent voter ballot of a person who meets the residency requirement as set forth in the Michigan Constitution.

8. As a clerk responsible for overseeing the tabulation of absent voter ballots, it is my belief and understanding that an election inspector may only tabulate an absent voter ballot of a person who meets the residency requirement as set forth in the Michigan Constitution.

9. Despite these clear, constitutional requirements, Secretary of State Jocelyn Benson is instructing local officials that "A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state."

10. Those instructions, which are found on page three of the Secretary's *Election Officials Manual, Chapter 7: Military and Overseas Voters, Federal Voter Registration and Absent Voting Programs*, and which are attached as Exhibit A to the Verified Complaint filed in this case, are referenced here as the "Secretary's Instructions."

11. As a local clerk, I am bound to follow the Secretary's Instructions.

12. As a public official, however, I swore an oath to support the Michigan Constitution and to faithfully discharge the duties of my office.

13. While I have attempted to reconcile the Constitutions requirement that voters must be residence with the Secretary's instruction that some absent voters do not need to be residents of Michigan, the Secretary's Instructions seem incompatible with the requirements of the Michigan Constitution.

14. Given that Michigan law empowers the Secretary to investigate, or cause to be investigated by local authorities, the administration of election laws, and to report violations of the

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election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution, see MCL 168.31(h), it seems possible to me that I could face penalty or even removal from my position as Clerk if I apply rules or guidance such as those challenged here that are inconsistent with the Constitution. It also seems possible to me that I could face removal from my position as Clerk if I do not apply rules or guidance to which I am subject as a local clerk.

15. As a result, while I plan to conduct the Chesterfield Township elections in accordance with the Constitution just as I always do, I seek a judicial declaration in this lawsuit as to whether I am and will continue to be subject to those aspects of the Secretary's Instructions challenged in this lawsuit, specifically the Secretary's instruction that "A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state."

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Cindy Berry

Subscribed and sworn to before me this 8th day of October, 2024.

Michelle C. Nizza

Notary Public, Sanilac, County, Michigan
Acting in Macomb County
My Commission Expires: 12-16-2029
4870-0204-4909 v1 [99168-8]

MICHELLE C. NIZZA
Notary Public, State of Michigan
County of Sanilac
My Commission Expires 12-16-2029
Acting in the County of Macomb

Document received by the MI Court of Claims.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 6/22/2023 2:12:44 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: **DPP MCL 15.243(1)(m)** (privileged)

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, June 21, 2023 10:10 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: **DPP MCL 15.243(1)(m)** (privileged)

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, June 21, 2023 at 2:29 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Aboona, Rebecca (AG) <AboonaR1@michigan.gov>, Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>, Beth Stevens <beth@statesuniteddemocracy.org>
Subject: RE: **DPP MCL 15.243(1)(m)** (privileged)

Thanks Jonathan, we will discuss and get back with you as quickly as we can.

Best,
Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, June 21, 2023 10:37 AM
To: Aboona, Rebecca (AG) <AboonaR1@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Beth Stevens <beth@statesuniteddemocracy.org>
Subject: **DPP MCL 15.243(1)(m)** privileged)

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Becky, Heather, and Linus,

DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 6/27/2023 2:49:17 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Moore v. Harper decision is out

Thanks, I have not had a chance to read yet. Good news.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, June 27, 2023 10:30 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Moore v. Harper decision is out

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SCOTUS affirms the NC Supreme Court 6-3, with Chief Justice Roberts writing for the majority. Court concludes that the Legislature is subject to state constitutional constraints when enacting laws regarding the time, place, and manner of federal elections. We're still reviewing and would be happy to provide our analysis.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/19/2024 2:06:24 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Attorney Client Privileged Communication - Mich RNC Letter re: Double Voting
Attachments: RNC Letter re Double Voting.pdf; MI - Potential Double Voting Data.xlsx

fyi

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Brater, Jonathan (MDOS) <BraterJ@michigan.gov>
Sent: Friday, October 18, 2024 4:54 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Cc: McInerney, Jenny (MDOS) <McInerneyJ1@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; Brady, Mike (MDOS) <BradyM@michigan.gov>; Schaar, Meghan (MDOS) <SchaarM1@michigan.gov>; Lillie, Erin (MDOS) <LillieE@michigan.gov>
Subject: [PRIVILEGED] FW: RNC Letter re: Double Voting

DPP MCL 15.243(1)(m)

From: Luke Bunting - Election Integrity <lbunting@gop.com>
Sent: Friday, October 18, 2024 4:15 PM
To: Secretary Jocelyn Benson <secretary@michigan.gov>; SOS, Elections <Elections@michigan.gov>
Cc: Brater, Jonathan (MDOS) <BraterJ@michigan.gov>
Subject: RNC Letter re: Double Voting

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Hello,

Please find attached a letter from the Republican National Committee. Please confirm receipt of this message and reach out with any questions.

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Luke Bunting
Election Integrity Counsel
310 First Street SE
Washington, DC 20003
P: 202-441-8417

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REPUBLICAN
NATIONAL COMMITTEE

October 18, 2024

The Honorable Jocelyn Benson
Secretary of State
430 W. Allegan St.
Lansing, MI 48918

Re: Potential Double Voters

Dear Secretary Benson:

The Republican National Committee (RNC) supports and seeks to uphold all eligible Michigan voters' right to vote in free and fair elections. The RNC thus writes to provide data indicating eligible voters in your state may be facing a violation of their right to vote due to unlawful double voting by individuals who have requested ballots in more than one state.

The attached list identifies individuals who our data suggests may have requested a ballot for the 2024 General Election both in your state and in another state. The RNC compiled this list by matching personal identifying information of individuals requesting ballots in your state and in other states. While the RNC does not have access to, and cannot confirm identity through, Social Security numbers, all available information strongly suggests these individuals are in fact the same person.

Double voting is unlawful and results in unfair dilution of votes cast by law-abiding, eligible voters. The RNC recognizes the possibility that individuals identified on the attached list may not have requested or cast two ballots. Nonetheless, ensuring a free and fair 2024 General Election requires that each instance be investigated.

Time is of the essence given that mail voting for the 2024 General Election has already commenced. Accordingly, the RNC respectfully asks that your office immediately take all necessary steps to confirm the listed individuals are properly registered to vote in your state and have not also requested ballots in another jurisdiction. Should your office find any individual attempting to double vote, the RNC asks that your office work with the other relevant jurisdiction to stop such double voting and to ensure every voter's right to "one person, one vote" is protected.[1]

The RNC requests you respond in writing outlining the steps your office is taking in response to this letter no later than October 24, 2024. Thank you for your prompt attention to this crucial matter on behalf of Michigan's voters.

Respectfully,

Luke Bunting
Election Integrity Counsel
Republican National Committee

[1] This letter should in no way be construed as a formal challenge to any voter's eligibility.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/14/2024 4:14:19 PM
To: Robert Cotter [Robert@statesuniteddemocracy.org]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: SUDC Memos

Thank you very much.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Robert Cotter <Robert@statesuniteddemocracy.org>
Sent: Friday, October 11, 2024 2:33 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: SUDC Memos

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DPP MCL 15.243(1)(m)

Thanks,
Robert
--

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Robert Cotter (he/him) | Counsel
States United Democracy Center
224-235-2606 | @statesunited
robert@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 6/23/2023 8:04:57 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: King decision
Attachments: King decision.pdf

FYI

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0134p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY KING, et al.,

Plaintiffs,

L. LIN WOOD (21-1785); GREGORY J. ROHL, BRANDON JOHNSON, HOWARD KLEINHENDLER, SIDNEY POWELL, JULIA HALLER, and SCOTT HAGERSTROM (21-1786); EMILY NEWMAN (21-1787); STEFANIE LYNN JUNTTILA (22-1010),

Interested Parties-Appellants,

v.

GRETCHEN WHITMER; JOCELYN BENSON; CITY OF DETROIT, MICHIGAN,

Defendants-Appellees.

Nos. 21-1785/1786/1787/22-1010

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:20-cv-13134—Linda V. Parker, District Judge.

Argued: December 8, 2022

Decided and Filed: June 23, 2023

Before: BOGGS, KETHLEDGE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Paul J. Stablein, PAUL STABLEIN, PLLC, Birmingham, Michigan, for Appellant in 21-1785. Sidney Powell, Dallas, Texas, in propriā personā and for Appellants in 21-1786. Timothy E. Galligan, TIMOTHY E. GALLIGAN PLLC, Clarkston, Michigan, for Appellant in 21-1787. Stefanie Lynn Junttila, FEDERAL CRIMINAL ATTORNEYS OF MICHIGAN, Detroit, Michigan, in propriā personā, in 22-1010. David H. Fink, FINK BRESSACK, Bloomfield Hills, Michigan, for Appellee City of Detroit. Heather S. Meingast, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees Gretchen

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Whitmer and Jocelyn Benson in appeals 21-1786 and 22-1010. **ON BRIEF:** Paul J. Stablein, PAUL STABLEIN, PLLC, Birmingham, Michigan, for Appellant in 21-1785. Sidney Powell, SIDNEY POWELL, PC, Dallas, Texas and Howard Kleinhendler, HOWARD KLEINHENDLER ESQUIRE, New York, New York, in propriīs personīs and for Appellants in 21-1786. Timothy E. Galligan, TIMOTHY E. GALLIGAN PLLC, Clarkston, Michigan, for Appellant in 21-1787. Stefanie Lynn Junttila, FEDERAL CRIMINAL ATTORNEYS OF MICHIGAN, Detroit, Michigan, in propriā personā, in 22-1010. David H. Fink, Nathan J. Fink, FINK BRESSACK, Bloomfield Hills, Michigan, for Appellee City of Detroit. Heather S. Meingast, Erik A. Grill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees Gretchen Whitmer and Jocelyn Benson in appeals 21-1786 and 22-1010. Paul Orfanedes, JUDICIAL WATCH, INC., Washington, D.C., for Amicus Curiae in appeal 21-1786.

OPINION

KETHLEDGE, Circuit Judge. Three voters and three Republican nominees to the electoral college in Michigan brought this suit in a bid to overturn the results of the state's 2020 presidential election. The complaint plausibly alleged that Republican election challengers had been harassed and mistreated during vote counting at the TCF Center in Detroit, in violation of Michigan law. But the complaint also alleged that an international "collaboration"—with origins in Venezuela, extending to China and Iran, and including state actors in Michigan itself—had succeeded in generating hundreds of thousands of fraudulent votes in Michigan, thereby swinging the state's electoral votes to Joseph Biden. Many of those allegations—particularly the ones concerning Dominion voting machines—were refuted by the plaintiffs' own exhibits to their complaint. Other allegations arose from facially unreliable expert reports; still others were simply baseless. The district court found the entirety of the plaintiffs' complaint sanctionable, and ordered all of plaintiffs' attorneys, jointly and severally, to pay the defendants' and the City of Detroit's reasonable attorney's fees. We find only part of the complaint sanctionable, and thus reverse in part and affirm in part.

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I.

A.

On November 3, 2020, Michigan voters cast their ballots in the presidential election. As soon as the polls closed, teams of state election officials began "canvassing" the results—a public process in which officials and observers verify that the number of votes cast in each precinct matches the number of voters listed on the poll lists. *See* M.C.L § 168.801. This canvass concluded on November 17. By the next day, every county in Michigan had reported its official election results to the Secretary of State and the Board of State Canvassers.

Michigan law allows any candidate with a "good-faith belief" that he lost the election due to "fraud or mistake" to request a recount within 48 hours of the canvass's conclusion. *See* M.C.L § 168.879(1)(b), (c). No candidate did so. As a result, on November 23, the bipartisan Board of State Canvassers unanimously certified results indicating that Joseph Biden had won the State of Michigan by 154,188 votes. That same day, Michigan's Governor transmitted those results to the United States Archivist. Michigan's electors for the Democratic Party were thereafter "considered elected." M.C.L. § 168.42. That ended the involvement of the Board and the Governor in the election.

B.

This case began two days later, on November 25, 2020. Plaintiffs sued Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and the Board of State Canvassers (together, the "state defendants"), asserting that they had "fraudulently manipulat[ed] the vote" through "a wide-ranging interstate—and international—collaboration" to ensure that Biden would win the election. Compl. ¶1-3. Plaintiffs alleged that unspecified "foreign adversaries" and "hostile foreign governments" had accessed Dominion voting machines; that Detroit election officials had participated in countless violations of state election law, including an "illegal vote dump" of "tens of thousands" of votes; and that expert analysis showed that the election results were fraudulent. Compl. ¶84, 162, 224. As a result, plaintiffs argued, they were entitled to "the elimination of the mail ballots from counting in the 2020 election"—meaning all of them—and an order directing "the electors of the State of Michigan . . . to vote for President Donald

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Trump." Compl. ¶229-233. Sidney Powell, Scott Hagerstrom, and Gregory Rohl signed this complaint as the plaintiffs' attorneys, and five other lawyers—Emily Newman, Julia Haller, Brandon Johnson, Lin Wood, and Howard Kleinhendler—were listed as "Of Counsel."

On November 29, plaintiffs filed an emergency motion for injunctive relief, which repeated the arguments and requests of the complaint. The Democratic National Committee, the City of Detroit, and Robert Davis (an individual voter with no particular stake in the matter) each filed motions to intervene as defendants, which the court granted. On December 7, the court denied plaintiffs' motion for emergency relief. *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020).

Plaintiffs thereafter hired a ninth attorney, Stephanie Junttila, to file an appeal with this court. Meanwhile, Michigan's electors were set to vote on December 14. Junttila and Powell filed a petition for certiorari with the Supreme Court, urging immediate intervention—because, they said, the case would become moot after the December 14 electoral-college vote. But the Supreme Court did not intervene, and on December 14 Michigan's electors cast their votes for Joseph Biden.

C.

On December 15, the City served plaintiffs and their attorneys with a "safe-harbor" letter, warning that the City would seek sanctions under Civil Rule 11 if plaintiffs did not voluntarily dismiss their complaint. Plaintiffs' counsel did not respond. On December 22, the state defendants e-mailed plaintiffs' counsel to seek their concurrence in upcoming motions to dismiss; Junttila responded and declined. That same day, the City, the DNC, and the state defendants filed separate motions to dismiss, and intervenor Davis filed a motion to sanction plaintiffs' counsel under 28 U.S.C. § 1927 and the court's inherent authority.

On January 5, 2021—three weeks after sending the safe-harbor letter without any response—the City moved for Rule 11 sanctions against plaintiffs and their attorneys, asking the court to impose a fine, to require plaintiffs' counsel to pay defendants' attorney's fees, and to refer them to their respective state bar associations for disciplinary proceedings. The state defendants joined the City's motion in full. On January 11 and 12, plaintiffs filed motions to

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extend the time to respond to the pending motions to dismiss; the court extended that time until January 21. On January 14, however, plaintiffs filed a response announcing that they would voluntarily dismiss the complaint. The state defendants thereafter filed a separate motion for sanctions under 28 U.S.C. § 1927 against Powell, Junttila, Rohl, and Hagerstrom.

In July 2021, the district court held a lengthy hearing on the sanctions motions, during which it questioned plaintiffs' attorneys about the suit. Lin Wood said that, before he heard about the sanctions hearing, he had no idea his name had been on any filings in the suit. But he admitted he had offered to help Powell with the lawsuit, and Powell herself said she had "specifically ask[ed]" Wood for his permission before including his name on the filings. Emily Newman and Stephanie Junttila, for their parts, each said their involvement in the case was minimal. The remaining attorneys did not contest their roles in the case. The court also discussed 15 of the plaintiffs' affidavits, to determine whether the attorneys had conducted a prefiling investigation as to the plausibility of their allegations. In response, counsel repeatedly argued that they could rely on affidavits without conducting any inquiry.

The district court thereafter held that plaintiffs' counsel had violated Rule 11 by filing their suit for an improper purpose and by failing to conduct an adequate prefiling inquiry into the legal and factual merits of their claims. The court further found that counsel had needlessly prolonged the proceedings, in violation of 28 U.S.C. § 1927, and that counsel had acted in bad faith, warranting sanctions under the court's inherent authority. The court therefore ordered all nine of plaintiffs' attorneys, jointly and severally, to pay the reasonable legal fees of the City and the moving state defendants. The court also ordered those attorneys to attend 12 hours of non-partisan legal education on election law and federal pleading standards, and directed the clerk to send disciplinary referrals to counsel's respective bar associations—which the clerk did the next day. The court denied Davis's motion for sanctions and declined to impose sanctions on plaintiffs themselves.

In a separate order, the court considered objections to the amount of the City's request. (No attorney had objected to the moving state defendants' request of $21,964.75.) Of the $182,192 the City requested, the court awarded $153,285.62.

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These four appeals followed. Lin Wood, Emily Newman, and Stephanie Junttila each appeal individually, arguing that their involvement in this case was too minimal to warrant sanctions. Gregory Rohl, Brandon Johnson, Howard Kleinhendler, Sidney Powell, Julia Haller, and Scott Hagerstrom appeal together, arguing primarily that none of their conduct was sanctionable.

II.

We review the district court's imposition of sanctions for an abuse of discretion and its factual findings for clear error. *Salkil v. Mount Sterling Twp. Police Dept.*, 458 F.3d 520, 527 (6th Cir. 2006); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991).

A.

We begin with Rule 11, which in the district court's view authorized almost all the sanctions awarded here. That rule provides, in relevant part, that attorneys who present a pleading or motion to the court thereby certify that:

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) [the pleading, written motion, or other paper] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and]
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Fed. R. Civ. P. 11(b)(1)-(3).

1.

As an initial matter, the district court held that the attorneys filed their suit for an improper purpose, in violation of Rule 11(b)(1). Specifically, the court asserted that "what very clearly reflects bad faith is that Plaintiffs' attorneys are trying to use the judicial process to frame

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a public 'narrative.'" But another word for "framing a public narrative" is speech; and Rule 11 cannot proscribe conduct protected by the First Amendment. True, an attorney may not say whatever she likes inside a courtroom. *See Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005). But an attorney's political speech outside a courtroom—including political speech about a lawsuit—is irrelevant to a Rule 11 inquiry about the suit itself. To the contrary, parties and their attorneys are free to use litigation "as a vehicle for effective political expression and association[.]" *In re Primus*, 436 U.S. 412, 431 (1978). That is as true in election cases as in any other case.

Speech outside the courtroom is what the district court apparently found objectionable here. But that speech did not show that counsel were "motivated by improper purposes such as harassment or delay," which means it was irrelevant to the district court's inquiry. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 519 (6th Cir. 2002). And contesting election results is not itself an improper purpose for litigation. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Moss v. Bush*, 828 N.E.2d 994 (Ohio 2005); *Coleman v. Ritchie*, 762 N.W.2d 218 (Minn. 2009). Nor does the record show that counsel were otherwise motivated by improper purposes. *First Bank*, 307 F.3d at 519. Thus, the district court did not identify any improper purpose supporting the imposition of sanctions under Rule 11(b)(1).

2.

The district court also sanctioned plaintiffs' counsel under Rule 11(b)(3), which mandates that attorneys engage in a reasonable prefiling inquiry to ensure that a pleading or motion is "well grounded in fact[.]" *Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010). Rule 11 also imposes an implied "duty of candor," which attorneys violate whenever they misrepresent the evidence supporting their claims. *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 395 (6th Cir. 2009). Thus, a court may sanction attorneys under Rule 11(b)(3) for factual assertions they know—or after reasonable investigation should have known—are false or wholly unsupported.

The first amended complaint contained 233 numbered paragraphs and over 800 pages of exhibits. Of the complaint's allegations, 60 are irrelevant for purposes of Rule 11 because they

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quoted legal standards or described undisputed facts. The remaining paragraphs fall into three categories, to wit: allegations about Dominion's voting systems; allegations about statistical anomalies in the election results; and allegations about misconduct by election workers in Detroit.

a.

According to plaintiffs, the election fraud began "with the election software and hardware from Dominion Voting Systems." Compl. ¶4. Counsel devoted 61 paragraphs of the complaint to allegations about Dominion. Those paragraphs make out the following theory: that "foreign oligarchs and dictators" founded Dominion in order to help Hugo Chavez manipulate Venezuelan elections; that Dominion accordingly designed its software to include hidden "ballot-stuffing" features; and that foreign states—along with Michigan's Governor and Secretary of State, apparently—then exploited those features during the 2020 Presidential elections. Compl. ¶4-12, 125-174.

i.

The complaint said the following about Dominion's origins:

> Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election. *See* Ex. 1 Redacted Declaration of Dominion Venezuela Whistleblower ("Dominion Whistleblower Report"). Notably, Chavez "won" every election thereafter.

Compl. ¶5. The plaintiffs' sole evidentiary support for these allegations was the so-called "Dominion Whistleblower Report"—allegedly authored by an unnamed "adult of sound mine [*sic*]" who purported to be a former member of Chavez's national guard. Yet the whistleblower report itself says nothing about Dominion's founding; instead, it describes a conspiracy "between a company known as Smartmatic" and "the Venezuelan government." Smartmatic is not Dominion, just as General Motors is not Ford. The report otherwise says that Dominion "relies upon software that is a descendant of the Smartmatic Election Management System." But the complaint's allegation that Dominion was founded as part of a Venezuelan conspiracy to commit

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election fraud was entirely baseless. The district court rightly concluded that this whole raft of allegations was sanctionable.

ii.

The complaint also alleged that Dominion's voting systems were easy to hack and impossible to audit. By way of background, according to a journal article that plaintiffs attached to the complaint, modern election-management systems come in three kinds. One is a hand-marked paper-ballot system, in which voters manually complete a blank ballot and then take it to a machine to be scanned and tabulated. Another is a ballot-marking system, in which voters make their selections on a touch screen and receive a printed, marked ballot to take to the scanner. And in an all-in-one system, a single machine marks, scans, and tabulates the ballots without further action by the voter.

The problem with the complaint's allegations regarding Michigan's voting system, simply enough, is that they concerned different kinds of systems than the one Michigan used. As any Michigan voter could have told counsel, Michigan used a hand-marked ballot system—which one of the plaintiff's own exhibits, an article by Dr. Andrew Appel, said is "the only practical technology for contestable, strongly defensible voting systems." That plaintiffs attached Appel's article in support of their criticisms of Michigan's voting system illustrates how little counsel understood about the system they were criticizing. Similarly, the complaint alleged (by way of the Chavista whistleblower) that a "core requirement of the Smartmatic software design ultimately adopted by Dominion for Michigan's elections was the software's ability to hide its manipulation of votes from any audit." Compl. ¶7. But hand-marked ballots obviously can be recounted (and thus audited) by hand. The complaint likewise alleged that "Michigan officials disregarded all the concerns that caused Dominion software to be rejected by the Texas Board of elections in 2020 because it was deemed vulnerable to undetected and non-auditable manipulation." Compl. ¶10. We set to one side that the "Texas decision" came after the relevant decision by "Michigan officials." For the Texas decision on its face concerned a ballot-marking system, not the hand-marked system that Michigan used. And Michigan's contract with Dominion, likewise an exhibit, was limited to the hand-marked ballot system.

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Plaintiffs' own exhibits thus refuted rather than supported the complaint's allegations about the Dominion system used in Michigan. And an adequate prefiling inquiry under Rule 11 includes reading every document one plans to file. *See, e.g.*, *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278, 1281 (3d Cir. 1994) (observing that "[w]e are at a total loss to understand how attorneys can urge that they have made a reasonable inquiry into the facts and law of a case when their complaint is predicated on allegedly false statements in documents which they have not bothered to read."). Plaintiffs' inquiry as to these allegations was patently inadequate.

iii.

Plaintiffs' counsel sought to bolster their theories about Dominion with two putative expert reports. Attorneys are rarely sanctioned for relying upon experts: expert testimony by definition rests on "specialized knowledge[,]" Fed. R. Evid. 702, and consulting an expert is itself a way to investigate a claim's factual plausibility. But there is no Rule 702 exception to Rule 11; an attorney's reliance upon a putative expert opinion must itself meet the standard of reasonableness imposed by Rule 11. That means the expert's opinion must not be unreliable on its face—either because of the expert's lack of qualifications, or the substance of the opinion itself. And the attorney cannot misrepresent what the expert himself actually says.

Here, as to the alleged international conspiracy, the complaint alleged that "Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections." Compl. ¶17. The sole basis for that allegation was the report of what the complaint called a "former electronic intelligence analyst with 305th Military Intelligence with experience gathering SAM missile system electronic intelligence." Compl. ¶17. But that "intelligence analyst" turned out to be a Dallas IT consultant who dropped out of an entry-level intelligence course after seven months' training. And even a cursory review of his putative report shows that it concerned the integrity of Dominion's public website, not its voting machines. That distinction should not have been hard for counsel to keep straight. And the complaint further misrepresented the report when the complaint alleged that "Dominion allowed foreign adversaries to access data and *intentionally provided access* to their infrastructure" (emphasis added). Compl. ¶161-162. That allegation was utterly baseless.

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The attorneys also presented an affidavit from Russell Ramsland to substantiate their suspicion that foreign powers had hacked into Dominion's machines. Ramsland said that his background included "advanced converged telecom, highly advanced semiconductor materials, hospitality, commercial real estate development & operation," as well as running "Europe's highest grossing Tex-Mex restaurant." His specialized knowledge as to foreign election-interference was thus questionable on its face. More to the point, Ramsland claimed that Dominion machines had been "manipulated" in "four precincts/townships" in four Michigan counties (Wayne, Oakland, Macomb, and Kent), which he said resulted in "289,866 illegal votes." Ramsland's theory was that the Dominion machines used in those counties—which he said were "Model DRM16011"—lacked the "processing capacity" to count as many ballots as were counted in the relevant precincts on election night. But Ramsland likewise assumed that those counties used a ballot-marking system nowhere used in Michigan, which showed that he did not know which machines were used in Michigan—meaning that his assumptions about "processing capacity" were baseless. Moreover, a simple internet search would have shown that Macomb and Oakland counties did not use Dominion systems at all.

A reasonable prefiling investigation would have shown counsel that their allegations about Dominion were baseless. Those allegations were therefore sanctionable under Rule 11(b)(3).

b.

i.

In another part of the complaint—covering about 19 paragraphs—counsel relied upon several putative expert reports to allege that Michigan's election results were statistically anomalous or impossible. The complaint alleged that "evidence compiled by Matt Braynard using the National Change Address Database" showed that 13,248 voters who had moved to another state had nonetheless illegally voted in Michigan. Compl. ¶119. But Braynard's opinion came in the form of four tweets, each 280 characters or less, which said nothing about his qualifications or the data he supposedly employed. That opinion was unreliable on its face; counsel violated Rule 11 by relying upon it.

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Counsel also relied on a report by Dr. William Briggs, who—according to the complaint—opined that "Approximately 30,000 Michigan Mail-In Ballots Were Lost, and Approximately 30,000 More Were Fraudulently Recorded." *See* Compl. ¶108-112. But Briggs drew that conclusion by taking as true a second Braynard document, the so-called "Braynard Survey." That survey purported to describe Braynard's "multi-state phone survey data of 248 Michigan voters." Suffice it to say that Briggs's statistical extrapolations from that survey—30,000 lost absentee ballots, and 30,000 fraudulent ones—were facially unreliable as well.

The complaint likewise cited Dr. Stanley Young, who asserted that Biden's gains over Trump among new voters in nine large, metropolitan counties (*e.g.*, Oakland, Washtenaw, Wayne, Kent, Kalamazoo) were "unexpected." According to Young, Biden received 190,000 "excess" votes in those counties because Biden's margin of victory there was 190,000 votes greater than Clinton's margin had been in 2016. Every one of those counties has a large suburban population, which suggests a simpler explanation than an international conspiracy for that shift in votes. And by Young's logic, Trump received an "excess" of 29,000 votes in the rest of Michigan. Still, counsel could have reasonably relied on Young's opinion that this shift was unexpected. What the complaint actually said, however, was that "Dr. Young's analysis indicates that, when the entire State of Michigan is concerned, there were likely over 190,000 'excess' and *likely fraudulent* votes, which once again is significantly larger than Biden's 154,188 margin in Michigan." Compl. ¶118 (emphasis added). An "unexpected" shift in suburban votes in Young's report thus became, in the complaint, 190,000 fraudulent votes that swung the election. That allegation misrepresented Young's report and was sanctionable. *See Rentz*, 556 F.3d at 395.

ii.

Plaintiffs' reliance on four other experts was not sanctionable. First, the complaint accurately stated Dr. Louis Bouchard's conclusion that several spikes in Biden's vote count in Michigan on election night were "statistically impossible." Compl. ¶122. Dr. Bouchard's reasoning was that "the election results" showed "a tight race" in both Florida and Michigan; that Biden's vote total in Florida had no corresponding spike; and thus the spikes in Michigan were

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"anomalous." The proposition that Michigan's reporting of vote totals should track Florida's is without support; but Bouchard's technical analysis was not facially unreasonable to a layperson.

Second, Thomas Davis asserted that the share of Democrats who voted by absentee ballot exceeded the share of Republicans who did so by a similar percentage throughout the state—which, in Davis's view, suggested that a computer algorithm had manipulated the vote count. Occam's Razor suggests that Democrats just voted absentee more than Republicans did, but Davis's opinion—that the consistency of this difference across counties was suspicious—was not unreasonable on its face.

Third, Dr. Eric Quinnell and Dr. Young together opined that Michigan's election results were "mathematically anomalous," because, they said, the new voters in several Michigan townships mostly voted for Biden. Their report appears to assume that everyone who voted for Trump in 2016 voted for him again in 2020, that everyone who voted for Clinton in 2016 voted for Biden in 2020, and that Biden then took an outsized share of "new" voters. Although those assumptions might be implausible, we cannot say this opinion was facially unreasonable.

Finally, Robert Wilgus asserted that the number of absentee ballots that voters requested and returned on the same day warranted "further investigation." The Michigan Constitution enables voters to do both of those things on the same day, so Wilgus's assertion that doing so warrants investigation is dubious. *See* Mich. Const. Art II, § 4(h). But his conclusion was tepid enough not to be facially unreasonable.

c.

A third part of the complaint comprised 79 paragraphs of allegations about misconduct at the "TCF Center," which is where "Absentee Voter Counting Boards" counted all of Detroit's absentee ballots.

i.

The complaint's most provocative allegation as to these boards was that they "fraudulently added tens of thousands of new ballots and new voters in the early morning and evening of November 4." Compl. ¶82 (capitalization removed). "Perhaps the most probative

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evidence" in support of this allegation, according to the complaint, came from the affidavit of Dominion employee Melissa Carone. Compl. ¶84. She wrote:

> There was two vans that pulled into the garage of the counting room, one on day shift and one on night shift. These vans were apparently bringing food into the building because they only had enough food for not even 1/3 of the workers. I never saw any food coming out of these vans, coincidentally it was announced on the news that Michigan had discovered over 100,000 more ballots—not even two hours after the last van left.

On the basis of this affidavit, the complaint alleged that Carone had "witnessed" an "illegal vote dump, as well as several other violations." Compl. ¶84. That allegation illustrates the complaint's pattern of embellishment to the point of misrepresentation. The only thing that Carone said she witnessed was the arrival of "two vans"—period. Powell and her co-appellants now concede that "Carone made it clear she had seen no ballots." *Reply* at 24. That means it was sanctionable to allege that she did. *Rentz*, 556 F.3d at 395.

Counsel also used two affidavits copied from a state-court case—*Constantino v. Detroit*—to support the "illegal vote dump" theory. The attorneys used the first affidavit, from election challenger Robert Cushman, to allege that "several thousand" ballots had been "fraudulently" counted at TCF. Compl. ¶83. Cushman was apparently a layperson as to election law; and in *Constantino*, Christopher Thomas—who served as Michigan's Director of Elections for over 30 years—submitted a detailed affidavit explaining that none of Cushman's observations suggested any violation of Michigan election law. Plaintiffs' counsel were not required to treat Thomas's affidavit as sacrosanct. But a reasonable prefiling inquiry—before renewing Cushman's allegations of fraud—would have included review of Thomas's explanation and a reasoned assessment as to whether those allegations remained plausible. The record here reveals no such inquiry on counsel's part.

The second affidavit from *Constantino* came from election challenger Andrew Sitto, who wrote in relevant part:

> At approximately 4:30 a.m., tens of thousands of ballots were brought in and placed on eight long tables. Unlike the other ballots, these boxes were brought in from the rear of the room. The same procedure was performed on the ballots that arrived at approximately 4:30 a.m., but I specifically noticed that every ballot I

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> observed was cast for Joe Biden. While counting these new ballots, I heard counters say at least five or six times that all five or six ballots were for Joe Biden. All ballots sampled that I heard and observed were for Joe Biden.

An attorney could legitimately use an affidavit like Sitto's to begin (rather than end) a line of inquiry regarding potential counting irregularities. But counsel here cited Sitto's affidavit as proof of "[t]he most egregious example of election workers' fraudulent and illegal behavior" at the TCF Center. That too was a gross exaggeration. Sitto did not say that the "tens of thousands of ballots" he saw were fraudulent. Compl. at ¶82. Nor did he say that election workers treated those ballots any differently from any others—to the contrary, he said the counters followed the "same procedure" as before. And though Sitto said that "every ballot" he observed was for Biden, his affidavit implied that he heard only 30 or so of the votes that were counted.

The complaint also cited an affidavit from Articia Bomer, who said she "believe[d]" that some of the counters at TCF "were changing votes that had been cast for Donald Trump and other Republican candidates." The complaint called this "eyewitness testimony of election workers manually changing votes for Trump to votes for Biden[.]" Compl. at ¶91. That too was an embellishment, considering that Bomer offered no basis for her belief.

Considered both individually and collectively, the affidavits cited in the complaint did not afford counsel a credible basis to allege that "tens of thousands" of fraudulent votes were counted at TCF. Those allegations therefore lacked the requisite basis in evidence. Fed. R. Civ. P. 11(b)(3).

ii.

The complaint also alleged various lesser violations of Michigan election law. The problem with those allegations, simply stated, is that counsel apparently did not read the statute they said was violated. For instance, the complaint includes 11 paragraphs of allegations about problems with verification of signatures and birthdates on absentee ballots at the TCF Center. But Michigan law does not require birthdate verification for absentee voters. *See* M.C.L. § 168.765a. Nor do the counting boards verify any signatures for the absentee ballots; instead, by the terms of the same statute, the city clerk's office would have already done that before the

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ballots reached the TCF Center. *See* M.C.L. § 168.765a(6) (absentee ballots delivered to absent-voter counting boards "must be" accompanied by "a statement by the clerk that the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the voters on the registration cards"). The complaint did not allege otherwise; its allegations about improper verification at the TCF Center were therefore baseless.

Counsel similarly alleged that voters who had requested absentee ballots later illegally voted in person. But the same statute specifies that Michigan law "does not prohibit an absent voter from voting in person within the voter's precinct at an election, notwithstanding that the voter may have applied for an absent voter ballot and the ballot may have been mailed or otherwise delivered to the voter." M.C.L. § 168.765a(7). And where the complaint did specifically allege double voting—as in paragraph 93—it misrepresented the supporting affidavit, which said only that some people who voted in person "had already *applied* for an absentee ballot." (Emphasis added).

Of a piece was the complaint's allegation that election challengers had been improperly barred from observing the "ballot-duplication" process (meaning the process by which ballots that cannot be read by a machine are hand-copied onto ballots that can be scanned). *See* Compl. ¶13, 76-77, 189. For the same statute says that "at least 1 election *inspector* from each major political party" must witness the duplication. M.C.L. § 168.765a(10) (emphasis added). Under Michigan law, "challenger" and "inspector" mean two different things: election challengers are party volunteers with no official training in election procedure, whereas election inspectors are officials appointed by the Board of Election Commissioners. M.C.L. § 168.765a(2). The complaint unwittingly used those terms interchangeably; and nowhere does it suggest that anyone barred an election inspector from observing the ballot-duplication process.

The statute at issue here ran three pages; a reasonable prefiling inquiry as to all these allegations would have included reading it.

iii.

The complaint's remaining allegations about election-related events at TCF Center were not sanctionable. One witness said she had seen an election worker manually correct ballots that

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the witness thought should have been discarded as "over-votes"; the complaint fairly repeated that allegation. The same was true as to allegations by two challengers who thought they had seen someone move "spoiled" ballots to a "to be counted" pile. And counsel reasonably relied on the affidavit of one woman who said she had seen a voting record for her late son, purportedly reflecting that, after his death, he had voted in the 2020 election.

The complaint's most credible allegations were that election workers at the TCF Center mistreated, intimidated, and discriminated against Republican election challengers. Indeed some three dozen detailed affidavits supported the complaint's allegations to that effect. Those affidavits were notably consistent in their description of partisan hostility at the TCF Center. For instance, election challenger Abbie Helminen attested that, when the police removed a (presumably Republican) election challenger from the center, "the whole room erupted in claps & cheers, this included the poll workers." She also said that "Democrats outnumbered Republicans by at least 2:1." Similarly, Anna Pennala wrote that she "witnessed a pattern of chaos, intimidation, secrecy, and hostility by the poll workers," and that she saw workers "cheer, jeer, and clap when poll challengers were escorted out." And Emily Steffans wrote that she was "afraid . . . to challenge any ballots" because she "had watched two GOP people escorted out by the police," again to cheers from "democrat volunteers and poll workers at the table."

The intimidation and harassment alleged in these affidavits was potentially criminal. *See* M.C.L. § 168.734 ("Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding two years"). And the rank partisanship among election workers described in these affidavits undermines public confidence in elections just as much as bogus allegations about voting machines do. The district court should not have dismissed these affiants' allegations out of hand.

3.

The district court next held that the entire complaint was independently sanctionable under Rule 11(b)(2). That rule requires attorneys to certify that "the claims, defenses, and other

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legal contentions" in their filings "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). Thus, in short, frivolous "legal contentions" are sanctionable under Rule 11(b)(2).

a.

Three of the complaint's legal claims—an equal-protection claim, a due-process claim, and a claim under the Michigan Constitution—relied exclusively on frivolous allegations of widespread voter fraud. That means those claims were already sanctionable in full under Rule 11(b)(3). Thus, we need not consider whether the legal contentions in support of the complaint's voter-fraud claims were sanctionable under Rule 11(b)(2) as well.

b.

The defendants argue that the plaintiffs' remaining claims rested on frivolous legal contentions. A legal contention is frivolous if it is "obviously without merit" under existing law and unsupported by a good-faith argument to change or extend the law. Fed. R. Civ. P. 11(b)(2); *Waldman v. Stone*, 854 F.3d 853, 855 (6th Cir. 2017) (discussing frivolous claims under Appellate Rule 38).

i.

As an initial matter, counsel never should have asserted any claims against the Board of Canvassers in this case. The Board is a state agency; and unless the state waives Eleventh Amendment immunity or Congress abrogates it, state agencies are immune from federal suit. *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017). Here, the state did not waive immunity and Congress did not abrogate it, and plaintiffs have never argued otherwise. Hence the Board was indisputably entitled to sovereign immunity. *Id.* Moreover, the Board had already certified the election results by the time of plaintiffs' suit, and thus lacked power to redress any of plaintiffs' alleged harms. Hence the plaintiffs also lacked standing to sue the Board. *See Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 715-16 (6th Cir. 2015). The legal contentions in support of these claims, therefore, were frivolous. *See Waldman*, 854 F.3d at 855.

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ii.

That leaves two federal claims against Governor Whitmer and Secretary Benson and a handful of state claims. The first federal claim was one under 42 U.S.C. § 1983 for alleged violations of the Elections and Electors Clauses of the Constitution. The theory behind that claim, as set forth in the complaint, was that the Governor and the Secretary of State "unilaterally" chose to "deviate from the requirements of the Michigan Election Code." Compl. ¶23, 179. That this claim was one of "unilateral" action means it depended on actions specific to the Governor and Secretary themselves. Yet the complaint alleged no such actions, apart from a conclusory allegation in the complaint's introduction (¶3) about "multifaceted schemes and artifices implemented by Defendants and their collaborators[.]" And that allegation itself obviously could not support this claim. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This claim was therefore both legally and factually frivolous.

A second § 1983 claim against the Governor and Secretary was one for selective enforcement of election law, in violation of the Fourteenth Amendment's Equal Protection Clause. That claim presents a close question. As explained above, counsel had an evidentiary basis for pleading that Republican challengers were disproportionately excluded from and otherwise discriminated against in the TCF Center. To make out a selective-enforcement claim, counsel would have needed to plead that state actors "intended to accomplish some forbidden aim" through a "truly discriminatory application of a neutral law." *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1996). Although counsel spent only a single paragraph of the complaint on this theory (¶189), that paragraph was a nonfrivolous attempt to state those elements. Counsel also requested injunctive relief targeting the alleged harms. Compl. ¶194. That is not to say the claim would have survived a motion to dismiss. For instance, the complaint did not explain what role, if any, the Governor and Secretary played in the law's discriminatory application. On balance, however, this claim was "meritless rather than frivolous." *See Waldman*, 854 F.3d at 855. Hence it was not sanctionable under Rule 11(b)(2).

The complaint also asserted several state-law claims against the Governor and Secretary. We have already explained that counsel's claims under the absentee-voting statute were sanctionable because the complaint failed to describe any violations of that statute. *See* M.C.L.

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§ 168.765(a). Likewise frivolous was the complaint's attempt to state a claim under M.C.L. § 168.734, which merely sets forth certain criminal penalties for mistreatment of election challengers. But the complaint's claim under a neighboring election-challenger provision, M.C.L. § 168.733, was not frivolous. That claim had a factual basis, as described above. Although that provision also does not expressly create a private cause of action, its terms—*e.g.*, "[a] person shall not threaten or intimidate a challenger while performing" some 13 different activities—leave room to argue in good faith that one should be implied under Michigan law. *See Pompey v. Gen. Motors Corp.*, 385 Mich. 537 (1971). This claim was not frivolous.

c.

The defendants argue that even the complaint's nonfrivolous claims were sanctionable because the complaint's requests for relief were frivolous. But parties can tailor those requests as the case proceeds, and the complaint here included a request for any "relief as is just and proper." Compl. ¶233. That means counsel could have filed this lawsuit without any of the requests for relief that defendants say were frivolous. Those requests alone therefore do not render the nonfrivolous legal claims sanctionable. Nor did the district court identify any other ground to support a determination that the entirety of this complaint was frivolous.

Plaintiffs, for their part, defend the inadequacy of their complaint by pointing to the time constraints inherent in election contests. But Rule 11 imposes a safe-harbor period to protect attorneys from sanctions for hasty mistakes. A party may seek sanctions only after providing notice of the alleged violations, which the opposing party then has 21 days to cure. Fed. R. Civ. P. 11(c); *see also* advisory committee's note to 1993 amendment ("[T]he timely withdrawal of a contention will protect a party against a motion for sanctions."). Here, the City sent plaintiffs a detailed letter specifying the allegedly sanctionable material. Plaintiffs could have avoided sanctions by abandoning frivolous claims and allegations and concentrating the attention of the court on what remained. They did not do so, and that is why we uphold much of their Rule 11 sanctions today.

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4.

In sum, therefore, the complaint stated two claims that were nonfrivolous: a selective-enforcement claim under 42 U.S.C. § 1983, and a state-law claim under M.C.L. § 168.733. Neither claim was sanctionable under Rule 11. We agree with the district court, however, that plaintiffs' other claims were all sanctionable under that rule.

The same analysis for the most part applies to plaintiffs' motion for a temporary restraining order. But that motion focused exclusively on election fraud and contained only a single sentence on plaintiffs' nonfrivolous allegations about election challengers. With the exception of that sentence and counsel's discussion of their experts, then, the motion relied entirely on allegations that were factually frivolous, and was to that extent sanctionable under Rule 11.

B.

The defendants also argue, and the district court agreed, that counsel are liable for the entirety of the defendants' reasonable attorney's fees after December 14—because the plaintiffs failed to dismiss their case after it had concededly become moot. Under 28 U.S.C. § 1927, courts may award sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." Courts may award sanctions under this section "when an attorney knows or reasonably should know that a claim pursued is frivolous" and yet continues to litigate it. *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012).

Here, plaintiffs themselves asserted in a petition to the Supreme Court that this case would become moot on December 14, 2020—the date Michigan's certified electors would cast their votes. Yet on December 15—when defendants sought plaintiffs' consent to a voluntary dismissal—counsel declined on the ground that the district court lacked jurisdiction to dismiss the case while it was on appeal. That excuse was makeweight: plaintiffs obviously could have voluntarily dismissed their appeal and complaint alike. Hence they unreasonably multiplied the proceedings by declining to dismiss their suit. *See Lemaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989).

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The sanctioned attorneys now argue that the case gained "new life" when "an alternative slate of electors for Michigan was advanced in early January." That formulation is passive for a reason: what actually occurred in January is that the "alternative slate of electors" purported to elect themselves for the purpose of casting Michigan's electoral votes. And counsel do not explain why any competent attorney would take that self-election seriously for purposes of persisting in this lawsuit. Moreover, plaintiff's refusal to dismiss their suit had concrete consequences for defendants, who were forced to research and brief motions to dismiss that they should not have needed to file. The district court was right to impose sanctions under § 1927.

Finally, as noted above, the district court also invoked its inherent authority as an alternative basis for sanctions. But we need not review the court's exercise of that authority here. Unlike Rule 11, inherent-authority sanctions require a showing of bad faith in addition to frivolousness. *See Big Yank Corp. v. Lib. Mut. Fire Ins. Co.*, 125 F.3d 308, 314 (6th Cir. 1997). The court's inherent authority therefore does not support sanctions for the matters we have found non-sanctionable; and as to the sanctionable ones, Rule 11 and § 1927 sufficed.

C.

1.

Some of the attorneys argue they were not responsible for the sanctionable filings in this case. Upon finding a violation of Rule 11, the court may sanction any attorney who "violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c). An attorney violates the rule directly by "presenting" an offending pleading to the court, such as "by signing, filing, submitting, or later advocating it." Fed. R. Civ. P. 11(b).

Separately, under 28 U.S.C. § 1927, the court may impose sanctions on attorneys whose conduct "falls short of the obligations owed by a member of the bar to the court." *Salkil*, 458 F.3d at 532. Here, the attorneys who appealed individually—Emily Newman, Stephanie Junttila, and Lin Wood, respectively—each argue they were not responsible for any frivolous filing under either standard.

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a.

Although Emily Newman's name appeared on the complaint, she did not file or sign it. And at the sanctions hearing, Newman said she played only a minimal role in the litigation. Nobody at the hearing argued otherwise; in fact, Powell told the court that Newman "had no role whatseoever in the drafting and content of the[] complaints." And the district court made no factual findings to suggest that Newman was involved in drafting the complaint, the motion for preliminary injunction, or any other filing that defended plaintiffs' frivolous claims. Yet the court found that Newman was responsible for the complaint because it listed her as "Of Counsel." Fed. R. Civ. P. 11(c). The district court thus found Newman responsible more as a matter of form than as a matter of real responsibility. We therefore reverse the imposition of sanctions as to Newman.

b.

Stephanie Junttila did not appear in the case until December 8, 2020, by which time the other attorneys had already filed the complaint and the motion for a preliminary injunction. Yet the district court found that Junttila had "advocated" those filings—when she argued later that they were not sanctionable. But to seek relief on a claim is plainly different from arguing later that the claim was not frivolous. Junttila did only the latter; she never advocated the frivolous claims themselves. The district court's reasoning on this point was mistaken.

Junttila did personally decline defendants' request for a voluntary dismissal. But Junttila says she lacked the authority to agree to a voluntary dismissal, and nobody argues otherwise. To the contrary, Powell (to her credit) candidly stated at oral argument that she was responsible for the decision to continue the case on December 14. We therefore reverse the imposition of sanctions as to Junttila as well.

c.

Lin Wood says that someone placed his name on the complaint without his consent and that he knew nothing about this case until he "saw something in the newspaper about being sanctioned." But two months before, Wood filed a brief in the Delaware Supreme Court, in

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which he said he "represented plaintiffs challenging the results of the 2020 Presidential election in Michigan and Wisconsin." Wood also tweeted about this case in December 2020, six months before the sanctions hearing, saying that "the enemy is running scared." Moreover, Powell said she "did specifically ask Mr. Wood for his permission" to put his name on the complaint; and Gregory Rohl submitted an affidavit stating that Wood "spearheaded" this suit. Suffice it to say that the district court did not clearly err when it found Wood not credible as to his involvement here. Nor, contrary to Wood's argument, was the district court required to undertake "an individual analysis" of his conduct before it could sanction him. *See NPF Franchising, LLC v. SY Dawgs, LLC*, 37 F.4th 369, 380-81 (6th Cir. 2022).

Wood also argues that the state defendants never sought any sanctions against him. The state defendants concede that point on appeal. Thus, as to Wood, we reverse only the court's award of attorney's fees to the state defendants.

2.

The remaining attorneys argue that the district court's sanctions were excessive. The district court awarded the City and the state defendants their full reasonable attorney's fees, required each attorney to take 12 hours of continuing legal education, and sent a referral for disciplinary proceedings to each attorney's respective bar association.

a.

Courts must limit any award of attorney's fees to only "those expenses directly caused" by the sanctionable conduct. *Cooter & Gell v. Hartmarx Corp*, 496 U.S. 384, 406-07 (1990). When a filing is entirely baseless, sanctionable conduct causes every expense reasonably incurred in responding to it. *Id.* But when, as here, a filing is partially non-sanctionable, courts may award only fees incurred in responding to the sanctionable parts. *Id.*; *see also* Fed. R. Civ. P. 11(c)(4); *Garner v. Cuyahoga Cnty. Juv. Ct.*, 554 F.3d 624, 635-47 (2009).

Here—given the district court's finding that the entire complaint was sanctionable—the court did not distinguish between fees generated in response to sanctionable and non-

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sanctionable parts of the complaint. But courts are loath to prolong satellite litigation about fees, and here the record allows us to sort out those fees for ourselves.

i.

The district court awarded the state defendants $21,964.75 for 57.8 hours of work by two attorneys. The state attorneys' billing records show they spent about 6 hours responding in various ways to nonfrivolous parts of the complaint, including review of the expert reports on which counsel reasonably relied. Given the hourly rates for the attorneys involved, that work amounted to $2,325 in fees. We therefore reduce the fee award to the state defendants to $19,639.75.

The district court awarded the City $153,285.62, about $30,000 less than it had requested. The City's billing records show that its attorneys spent approximately 26 hours responding to the nonfrivolous components of plaintiffs' complaint and preliminary-injunction motion. This work amounted to $8,450 in fees, which we will deduct from the City's award.

Wood argues that the City's fee award included too many hours related to the sanctions litigation. "The time, effort, and money a party must spend to get another party sanctioned realistically is part of the harm caused by that other party's wrongful conduct." *Norelus v. Denny's Inc.*, 628 F.3d 1270, 1298 (11th Cir. 2010). Thus, under Rule 11 a court may award fees incurred while pursuing sanctions. *Id.*; *see also Chambers*, 501 U.S. at 32.

The record here, however, shows that the district court awarded fees for a number of tasks that bore little connection to sanctionable conduct in this case. Those tasks included, for example, reviewing a Michigan State Senate report about the elections, and responding to filings by intervenor Davis, whose involvement in the case was no fault of plaintiffs' counsel. The billing records show that together these tasks consumed about 37.5 hours, which amounted to an additional $12,025 in attorney's fees. The district court abused its discretion when it included those fees in the City's award. *See Cooter & Gell*, 496 U.S. at 406. With both of these deductions, then, we reduce the City's award to $132,810.62.

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The sanctioned attorneys also argue that, as an intervenor, the City should not receive more in attorney's fees than the original defendants did. That argument is meritless: the City was all but compelled to intervene in this case, given (among other things) the plaintiffs' request that all the absentee ballots from the City's residents be "eliminat[ed]" from the vote count. Compl. ¶232.

ii.

The attorneys' remaining objections concern the court's non-monetary sanctions—namely the disciplinary referrals and the required legal education. As an initial matter, we reject the state defendants' argument that the attorneys' appeal of those sanctions is moot. Non-monetary sanctions cause continuing harm to counsel's reputation as attorneys, and thus present a live controversy even after an attorney complies with them. *See, e.g.*, *United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000); *In re Goldstein*, 430 F.3d 106, 111 (2d Cir. 2005).

But we reject the attorneys' arguments on the merits. They assert that the district court violated the local rule governing disciplinary referrals; but that rule permits such referrals rather than proscribes them. *See* E.D.M.I. Local Rule 83.22(c). Nor do the nonmonetary sanctions violate the First Amendment. *See Mezibov*, 411 F.3d at 717.

* * *

We reverse the district court's imposition of sanctions against Emily Newman and Stephanie Junttila, respectively; we reverse the state defendants' fee award as to Lin Wood; we reduce the City's award to $132,810.62; and we reduce the state defendants' fee award to $19,639.75. Otherwise, the district court's imposition of sanctions in its August 25, 2021 order is affirmed.

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Attachments: Kennedy Application for Emergency Injunction Pending Appeal.pdf; Certificate of Service .pdf

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Elizabeth K. Lilienthal
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No. _____

IN THE

Supreme Court of the United States

ROBERT F. KENNEDY, JR.,

Applicant,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE,

Respondent.

Application of Robert F. Kennedy, Jr. on Appeal from the United States Court of Appeals for the Sixth Circuit for an Emergency Injunction Pending Appeal Removing Robert F. Kennedy, Jr.'s Name from Michigan's 2024 Ballot

To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

CHARLES R. SPIES
Counsel of Record
Brandon L. Debus*
Elizabeth K. Lilienthal*
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Counsel for Applicant

October 18, 2024

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PARTIES TO THE PROCEEDING

Applicant in this Court is Robert F. Kennedy, Jr. Applicant is the Plaintiff in the United States District Court for the Eastern District of Michigan and the Appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent in this Court is Jocelyn Benson, who serves as Michigan's Secretary of State. Secretary Benson is the Defendant in the United States District Court for the Eastern District of Michigan and the Appellee in the United States Court of Appeals for the Sixth Circuit. Secretary Benson was sued below solely in her official capacity.

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APPLICATION FOR EMERGENCY INJUNCTION PENDING APPEAL

INTRODUCTION

"It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws." *Marbury v. Madison*, 5 U.S. 137, 158 (1803). Unfortunately, Secretary Jocelyn Benson's ("**Secretary Benson**") actions contravene that longstanding principle.

This action arises from Secretary Benson's unilateral decision to recertify Robert F. Kennedy, Jr. ("**Mr. Kennedy**") as a Presidential candidate after the September 6, 2024 statutory deadline. Mr. Kennedy sought to withdraw from the Presidential race on August 23, 2024. Secretary Benson refused to remove Mr. Kennedy's name from the list of candidates to be included on the November 2024 general election ballot in Michigan. As a result, Mr. Kennedy initiated litigation in the Michigan Court of Claims, which found that Michigan law did not allow for Mr. Kennedy to withdraw from the ballot.

Mr. Kennedy immediately appealed, and, on September 6, 2024, the Michigan Court of Appeals reversed the Michigan Court of Claims and instructed the Secretary of State to remove Mr. Kennedy's name from the list of candidates to be included on the ballot. Secretary Benson abided by this order and then appealed to the Michigan Supreme Court.

On September 9, 2024, the Michigan Supreme Court issued an order that simply provided that Mr. Kennedy was not permitted to withdraw from the

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Presidential race. Notably absent from the order was any language instructing Secretary Benson to recertify the list of candidates to include Mr. Kennedy.

Under Michigan law, September 6, 2024 was the deadline for Secretary Benson to certify the list of candidates to be included on the ballot:

> The secretary of state, at least 60 days and not more than 90 days preceding any regular state or district primary or election, shall send to the county clerk of each county a notice in writing of such primary or election, specifying in such notice the federal, state and district offices for which candidates are to be nominated or elected, as well as any constitutional amendments and questions to be submitted thereat.

Mich. Comp. Laws § 168.648.

Michigan law does not provide for any recertification of the list of candidates after the statutory deadline.

Despite a clear lack of authority, Secretary Benson recertified Mr. Kennedy as a candidate for President of the United States on the Michigan ballot. Secretary Benson's conduct is unprecedented, such that review by this Court is absolutely necessary:

> The Secretary's decision to belatedly add a withdrawn candidate to the ballot, over the candidate's objection no less, was head scratching, unnecessary, and, in the end, lawless. Nor is the public interest served by adding a frivolous presidential candidate to the field, stoking voter confusion and undermining the election's integrity.

Kennedy v. Benson, No. 24-1799, 2024 WL 4501252, at *18 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting), *citing Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046, at *6 (6th Cir. Sept. 27, 2024) (McKeague, J., dissenting).

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Allowing Secretary Benson's unlawful conduct to stand without any recourse not only has dire consequences related to the November 2024 election, but also opens the floodgates for Secretaries of State across the United States to have unfettered authority to violate the law.

JURISDICTION

This Court possesses jurisdiction under Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1254, and it possesses authority to grant the Applicant's sought relief pursuant to 28 U.S.C. § 1651(a) (All Writs Act), 28 U.S.C. § 2101(f), and S. Ct. Rules 22 and 23.

STATEMENT OF THE CASE

A. Mr. Kennedy Suspends His Presidential Campaign and Withdraws from the Michigan Ballot.

On August 23, 2024, Mr. Kennedy suspended his campaign for the office of President of the United States in Michigan. That same day, Mr. Kennedy sent the Secretary a formal withdrawal notice to withdraw from the 2024 general election in Michigan (the "**Withdrawal Notice**"). Two days later, on August 26, 2024, the Secretary rejected the Withdrawal Notice, stating "we cannot accept this filing. Michigan Election Law does not permit minor party candidates to withdraw. Mich. Comp. Laws § 168.686a(2)." Mich. Comp. Laws § 168.686a(2) provides as follows:

> County caucuses may nominate candidates for the office of representative in congress, state senator, and state representative if the offices represent districts contained wholly within the county, and for all county and township offices. Not more than 1 business day after the conclusion of the caucus, the names and mailing addresses of all candidates so nominated and the offices for which they

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> were nominated shall be certified by the chairperson and secretary of the caucus to the county clerk. The certification shall be accompanied by an affidavit of identity for each candidate named in the certificate as provided in section 558 and a separate written certificate of acceptance of nomination signed by each candidate named on the certificate. The form of the certificate of acceptance shall be prescribed by the secretary of state. If a candidate is so certified with the accompanying affidavit of identity and certificate of acceptance, the name of the candidate shall be printed on the ballot for that election. Candidates nominated and certified shall not be permitted to withdraw.

The statute clearly does not mention presidential candidates and, therefore, does not apply to presidential candidates, such as Mr. Kennedy. As such, in response to the Secretary Benson's response, Mr. Kennedy renewed his request to withdraw on August 27, 2024.

On August 29, 2024, Secretary Benson responded and again rejected Kennedy's withdrawal, this time citing Mich. Comp. Laws § 168.686a(4), which provides as follows:

> The state convention shall be held at the time and place indicated in the call. The convention shall consist of delegates selected by the county caucuses. The convention may fill vacancies in a delegation from qualified electors of that county present at the convention. The convention may nominate candidates for all state offices. District candidates may be nominated at district caucuses held in conjunction with the state convention attended by qualified delegates of the district. If delegates of a district are not present, a district caucus shall not be held for that district and candidates shall not be nominated for that district. Not more than 1 business day after the conclusion of the convention, the names and mailing addresses of the candidates nominated for state or district offices shall be certified by the chairperson and secretary of the state convention to the secretary of state. The

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> certification shall be accompanied by an affidavit of identity for each candidate named in the certificate as provided in section 558 and a separate written certificate of acceptance of nomination signed by each candidate named on the certificate. The form of the certificate of acceptance shall be prescribed by the secretary of state. The names of candidates so certified with accompanying affidavit of identity and certificate of acceptance shall be printed on the ballot for the forthcoming election. Candidates so nominated and certified shall not be permitted to withdraw.

The Secretary relied upon this statute in denying Kennedy's request to withdraw from the ballot.

B. Mr. Kennedy Files Suit Against the Secretary in Michigan.

On August 30, 2024, Mr. Kennedy filed a complaint in the Michigan Court of Claims seeking immediate relief. The Court of Claims, relying on Mich. Comp. Laws 168.686a(4), denied the requested relief and dismissed the action on September 3, 2024. The next day, September 4, 2024, Mr. Kennedy filed an appeal to the Michigan Court of Appeals. On September 6, 2024, around noon, the Court of Appeals issued its decision reversing the Court of Claims' decision because Mich. Comp. Laws 168.686a(4) plainly does not apply to presidential candidates and remanded for "entry of an order granting immediate mandamus relief (*i.e.*, that the Secretary not include Mr. Kennedy's name on the ballot).

At 3:42 p.m., a few hours after the Court of Appeals decision was entered, on September 6, 2024, as required by statute, Secretary Benson "sent the call of the election and certification of candidates to the 83 county clerks without Kennedy's name listed as the Natural Law Party's candidate for President." Thus, the

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Secretary did **not** order that ballot printing be held. This was the statutory deadline by which Secretary Benson has to send out the call of the election and certification of candidates.

The Secretary then appealed to the Michigan Supreme Court later that day. On September 9, 2024, in a split decision, the majority in just one page held mandamus was not appropriate because Mr. Kennedy did not point to a specific law that demonstrated a clear right to require the Secretary Benson to perform the specific act of removing him from the ballot. The 15 page dissent strenuously disagreed. The Secretary then immediately added Kennedy to the ballot and re-certified the list of candidates, even though the September 6, 2024 deadline to do so had passed days earlier.

C. Kennedy Files a Federal Lawsuit.

On September 10, 2024 – the day after the Supreme Court of Michigan rendered its decision and interpreted the statute at issue – Mr. Kennedy filed suit in the Eastern District of Michigan, wherein he alleged that his Constitutional rights had been violated. Kennedy also filed a Motion for Temporary Restraining Order and for Preliminary Injunction. The district court entered its final judgment on September 18, 2022.

D. Court of Appeals Proceedings

On September 23, 2024, Mr. Kennedy filed an appeal before the United States Court of Appeals for the Sixth Circuit. The Court affirmed the District Court's judgment, but was accompanied by a 10-page dissent, wherein Circuit Judge McKeague took great issue with Secretary Benson's unlawful recertification

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of the ballot after the September 6, 2024 statutory deadline. *See Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046 (6th Cir. Sept. 27, 2024).

On October 3, 2024, Mr. Kennedy filed a Petition for Rehearing *En Banc* of the September 27, 2024 panel decision in the United States Court of Appeals for the Sixth Circuit. On October 16, 2024, the Court denied the petition for rehearing *en banc*, concluding that the issues raised in the petition were fully considered at the state court level and, therefore, barred by res judicata and the *Purcell* doctrine. *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252 (6th Cir. Oct. 16, 2024). In addition to another dissenting opinion authored by Judge McKeague, Circuit Judges Thapar and Readler also took great issue with Secretary Benson's conduct, noting the significance of the issues presented in this litigation:

> This case presents a question of exceptional importance: Does forcing a person onto the ballot compel his speech in violation of the First Amendment? The repercussions of that question are enormous. If a candidate can't stop his name from appearing on the ballot, could battleground states put President Joe Biden back on their ballots? Could states put anyone they wanted on their ballots (in violation of their own election laws)?

Kennedy v. Benson, No. 24-1799, 2024 WL 4501252, at *6 (6th Cir. Oct. 16, 2024) (Thapar, J., dissenting).

In light of the foregoing, and with limited time before the national election, Mr. Kennedy submits this Application for Emergency Injunction Pending Appeal.

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ARGUMENT

A. Standard of Review for Stays and Injunctions Pending Appeal

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). An injunction pending appellate review is warranted when the applicant demonstrates that he is "likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam), *citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). *See Munaf v. Geren,* 553 U.S. 674, 689 – 690, 128 S.Ct. 2207, 2218–2219, 171 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

There are several factors that control a single Justice's consideration of such an application: "If there is a 'significant possibility' that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308, 108 S. Ct. 2, 3, 97 L. Ed. 2d 790 (1987) (Blackmun, J., in chambers), *citing Nebraska Press Assn. v. Stuart,* 423 U.S. 1327, 1330, 96 S.Ct. 251, 254, 46 L.Ed.2d 237 (1975) (Blackmun, J., in chambers). See also, *e.g., Ledbetter v. Baldwin,* 479

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U.S. 1309, 1310, 107 S.Ct. 635, 636, 93 L.Ed.2d 689 (1986) (Powell, J., in chambers); *Rostker v. Goldberg,* 448 U.S. 1306, 1308, 101 S.Ct. 1, 2–3, 65 L.Ed.2d 1098 (1980) (Brennan, J., in chambers).

B. This Action is Not Barred by Res Judicata

Because the actionable conduct at issue in this matter did not occur until after the Michigan Supreme Court had issued its final order, the instant lawsuit cannot be barred by the doctrine of res judicata.

The Supreme Court has recognized that res judicata "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate ...." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Id.*, *citing Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877); *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621–624 (2d ed. 1974); Restatement (Second) of Judgments § 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); *id.*, § 48 (bar).

"[T]his appeal concerns the Secretary's unlawful action on September 9, a dispute that could not possibly have been resolved in the original state-court litigation. So res judicata principles tied to the earlier litigation do not stand in the way of resolving this case's merits." *See Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *17 (6th Cir. Oct. 16, 2024), *citing Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046, at *5 (6th Cir. Sept. 27, 2024) (McKeague, J., dissenting). In

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other words, the factual circumstances at issue in the current matter had not yet occurred while the state court action had been pending. The actionable conduct occurred on September 9, 2024 – after the Michigan Supreme Court had issued its opinion and order – when Secretary Benson recertified the list of candidates to be included on the ballot that Mr. Kennedy's claims based upon the federal constitution accrued.[1]

The timeline of events is perfectly explained by Circuit Judge Readler in his dissenting opinion:

> One, Kennedy seeks to have his name removed from the ballot based upon the Secretary's conduct on September 9, three days after the September 6 deadline, whereas his earlier case, pursued in advance of September 6, sought to have his name not included on the list of candidates to be circulated by the Secretary. Two, the challenged conduct here occurred only after the Michigan Supreme Court issued its opinion and order in the earlier case. Taking these points together, this appeal concerns the Secretary's unlawful action on September 9, a dispute that could not possibly have been resolved in the original state-court litigation. So res judicata principles tied to the earlier litigation do not stand in the way of resolving this case's merits.

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[1] Prior to September 9, 2024, there was no equal protection claim and Mr. Kennedy's speech was not being compelled because his name was not on Michigan's 2024 general election ballot. There was also no violation of Article II, Section I of the United States Constitution at that time because Secretary Benson had already certified a list of candidates that did *not* include the candidate (Mr. Kennedy) who is no longer running in Michigan and, therefore, there was no risk of deceiving voters into casting their votes in an ineffective manner and undermining the integrity of our presidential election. In other words, Secretary Benson's act of recertifying the ballot to include Mr. Kennedy's name as a candidate triggered the federal constitution claims.

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Kennedy v. Benson, No. 24-1799, 2024 WL 4501252, at *17 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting), *citing Kennedy*, 2024 WL 4327046, at *5 (McKeague, J., dissenting).

"As 'the evidence or essential facts' between the two lawsuits are not 'identical', indeed, far from it, Michigan res judicata principles do not bar today's action." *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *17 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting), *citing Dart v. Dart*, 460 Mich. 573, 597 N.W. 2d 82, 88 (1999).

Therefore, a review of the record clearly demonstrates that Mr. Kennedy's claims are not barred by res judicata.

C. Secretary Benson Violated Mr. Kennedy's Constitutional Rights and Michigan Law by Recertifying Mr. Kennedy as a Presidential Candidate After the September 6, 2024 Statutory Deadline.

"By refusing to remove Kennedy's name and then placing his message back on the ballot against his will, the Secretary compelled Kennedy to speak. And she did so in apparent violation of Michigan's own laws." *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *7 (6th Cir. Oct. 16, 2024) (Thapar, J., dissenting).

Supreme Court precedent dictates that, while states have an interest in enforcing ballot access requirements, issues concerning presidential elections go beyond state law:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for

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> the various candidates in other States. Thus in **a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders**. Similarly, **the State has a less important interest in regulating Presidential elections than statewide or local elections**, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." *Cousins* v. *Wigoda,* 419 U. S. 477, 490 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983) (emphasis added).

By denying a federal candidate the ability to withdraw from the ballot, Michigan law "places a significant state-imposed restriction on a nationwide electoral process," and such a law was struck down in *Anderson*. In applying this rationale to the instant matter, Judge Thapar explained, "this dispute boils down to weighing Kennedy's First Amendment interest against the state's asserted interest in its election process. We weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *9 (6th Cir. Oct. 16, 2024) (Thapar, J., dissenting), *quoting Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

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The First Amendment proscribes against "abridging the freedom of speech." Forcing a party to engage in speech they would not otherwise make is compelled speech in its most basic form. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 US 47, 63, 164 L Ed 2d 156 (2006) ("Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message."). First Amendment protections extend to both speech and expressive conduct:

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678 (1968), we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington,* 418 U.S. 405, 409, 94 S.Ct. 2727, 2730 (1974). In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410–411, 94 S.Ct. at 2730.

Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539 (1989).

Here, it is clear that the act of withdrawing conveys the message that a candidate is no longer willing (or able) to hold a particular office if elected. Any

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reasonable person understood Kennedy's August 23, 2024 speech to convey his decision to withdraw as a presidential candidate. And, if in doubt, Mr. Kennedy expressly withdrew his name from the ballot in Michigan on the same day he gave his speech. By recertifying the ballot to include Kennedy's name as a presidential candidate, the Secretary has compelled his speech in violation of the First Amendment. *See Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *8 (6th Cir. Oct. 16, 2024) (Thapar, J., dissenting) ("The 'involuntary affirmation' of speech is an even greater affront to the First Amendment than silence." (*citing W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943))).

Because Secretary Benson's conduct here is unprecedented, there is limited case law that is directly on point; however, that simply indicates that this matter is very fact specific:

> A state official mandated a former candidate's appearance on the presidential ballot over the candidate's objection. That fact alone would likely strike any reasonable observer as odd. Then consider that the official did so in the face of the former candidate's assertion of his First Amendment right not to be compelled to appear as a candidate. And consider further that the state official did so after she had previously honored the former candidate's request not to have his name included on the ballot, and after the state's statutory deadline for placing candidates on the ballot had passed. Adding all of this together, the Secretary's decision is deeply suspect, legally and otherwise.
>
> * * * *
>
> [W]hen a state official arbitrarily places a former political candidate's name on a presidential ballot against his wishes, after she had previously excluded him from the

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> ballot, and after the state's legislatively imposed deadline for certifying candidates has passed, that official seemingly compels the candidate to convey a message to voters, in violation of the First Amendment.

Kennedy v. Benson, No. 24-1799, 2024 WL 4501252, at *12, 13 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting), *citing Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1274, 51 L.Ed. 2d 752 (1977).

A review of the aforementioned facts clearly demonstrates that Secretary Benson has compelled Mr. Kennedy's speech and, therefore, violated his Constitutional rights. Such behavior is unlawful and should not be countenanced.

D. All Harm Factors Strongly Favor Mr. Kennedy

Secretary Benson's unlawful conduct threatens election integrity and harms both Mr. Kennedy and Michigan voters.

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020), *quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion). For the reasons set forth previously herein, Secretary Benson's conduct has unlawfully infringed upon Mr. Kennedy's First Amendment rights. "With an election pending—one for which his name has been forced on the ballot over his objection—his injury is quintessentially irreparable." *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *18 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting).

Moreover, such compelled speech harms every citizen in Michigan. The Secretary, by listing Mr. Kennedy on the ballot, is misrepresenting to voters that

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Mr. Kennedy is qualified and willing to serve the public if elected. Such a representation is not only incorrect, but it is also prejudicial to voters who reasonably expect that the ballot contain accurate information. "'Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.'" *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *6 (6th Cir. Oct. 16, 2024) (Thapar, J., dissenting), *quoting Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). "When voters head to the polls, they need to have confidence in the accuracy of their ballots." *Kennedy*, 2024 WL 4501252, at *6 (Thapar, J., dissenting).

Any harm alleged to the Natural Law Party is based upon mere speculation and implies that the rights of voters affiliated with the Natural Law Party supersedes the rights of other Michigan voters and the rights of Mr. Kennedy. Similarly, any speculation as to Mr. Kennedy's motive with respect to withdrawing from the presidential race has no bearing here. *See Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *16 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting). The fact of the matter is this – allowing Secretary Benson to *re*certify a list of candidates after the statutory deadline without any legal authority or even permitting mandating such an action upholds conduct that threatens the sanctity of our national elections.

Finally, accepting the rationale of the Sixth Circuit creates a "slippery slope" that would enable Secretaries of State throughout this country to modify ballots and lists of candidates at their own discretion and without any consequence in violation

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of state and federal law. "[E]lection rules should be clear, and last-minute changes to those rules muddy the waters at significant cost to voters, the administration of law, and public confidence in the election." *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *16 (6th Cir. Oct. 16, 2024), *citing Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020); *Democratic Nat'l Comm. v. Wis. State Leg.*, --- U.S. ----, 141 S. Ct. 28, 30–31 (2020) (Kavanaugh, J., concurring). "Such blatant illegality in a presidential race justifies a federal remedy." *Kennedy v. Benson*, No. 24-1799, 2024 WL 4501252, at *16 (6th Cir. Oct. 16, 2024) (Readler, J., dissenting).

CONCLUSION

For the foregoing reasons, Applicant respectfully seeks, pending further review in this Court, an immediate injunction ordering Secretary Benson to remove Mr. Kennedy's name from the ballot for the upcoming election.

Respectfully submitted,

CHARLES R. SPIES
Counsel of Record
Brandon L. Debus*
Elizabeth K. Lilienthal*
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DICKINSON WRIGHT PLLC
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(888) 747-4529

October 18, 2024

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No. _____

IN THE

Supreme Court of the United States

ROBERT F. KENNEDY, JR.,

Applicant,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE,

Respondent.

Certificate of Service

To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

CHARLES R. SPIES
Counsel of Record
Brandon L. Debus*
Elizabeth K. Lilienthal*
*(*APPLICATION FOR ADMISSION FORTHCOMING)*
DICKINSON WRIGHT PLLC
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CSpies@dickinson-wright.com

Counsel for Applicant

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CERTIFICATE OF SERVICE

A copy of this application was served by email and mail to the Counsel listed below in accordance with Supreme Court Rules 22.2 and 29.3:

Mr. Erik A. Grill
Ms. Heather S. Meingast
Office of the Attorney General of Michigan
P.O Box 30736
Lansing, MI 48909
(212) 416-8656

October 18, 2024

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
on behalf of Gabriel Moreno [Gabriel@statesuniteddemocracy.org]
Sent: 10/21/2024 6:00:22 PM
To: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]

Subject: FW: USPS Multi-state
Location: Security MCL 15.243(1)(u)

Start: 10/21/2024 6:30:00 PM
End: 10/21/2024 7:00:00 PM
Show Time As: Tentative

Any chance you can join too?

-----Original Appointment-----
From: Gabriel Moreno <Gabriel@statesuniteddemocracy.org>
Sent: Thursday, October 17, 2024 12:19 PM
To: Gabriel Moreno; Dax Goldstein; Robert Cotter; Lindsay.McKenzie@ag.ny.gov; Eric.Haren@ag.ny.gov; Craig Newby; Teresa Benitez-Thompson; Thomson, Aimee; Meingast, Heather (AG); michael.c.kron@doj.oregon.gov
Subject: USPS Multi-state
When: Monday, October 21, 2024 2:30 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: https://us02web.zoom.us/j/81282309124?pwd=PlvzaZ4LTbznzovzR3bq1LADqCdQas.1

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Gabriel Moreno is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting

Security MCL 15.243(1)(u)

Meeting ID: Security MCL 15.243(1)(u)
Passcode:

One tap mobile

Security MCL 15.243(1)(u)

Dial by your location

Security MCL 15.243(1)(u)

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Meeting ID:
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Find your local number:

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Sent: 10/28/2024 4:13:25 PM
To: Christine Sun [christine@statesuniteddemocracy.org]; Haidar, Danny (AG) [HaidarD1@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Judy Shih [judy@statesuniteddemocracy.org]; Max Kober [Max@statesuniteddemocracy.org]; Sally Marsh [Sally@statesuniteddemocracy.org]
Subject: RE: PRIVILEGED and CONFIDENTIAL - MCL 168.932f

My thank as well.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Christine Sun <christine@statesuniteddemocracy.org>
Sent: Monday, October 28, 2024 11:25 AM
To: Haidar, Danny (AG) <HaidarD1@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Judy Shih <judy@statesuniteddemocracy.org>; Max Kober <Max@statesuniteddemocracy.org>; Sally Marsh <Sally@statesuniteddemocracy.org>
Subject: Re: PRIVILEGED and CONFIDENTIAL - MCL 168.932f

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Thanks so much, Danny. We really appreciate the note.

Christine P. Sun (she/her) | Senior Vice President, Legal
States United Democracy Center
415.828.5719 | @statesunited
christine@statesuniteddemocracy.org

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From: Haidar, Danny (AG) <HaidarD1@michigan.gov>
Date: Monday, October 28, 2024 at 7:42 AM
To: Christine Sun <christine@statesuniteddemocracy.org>, Meingast, Heather (AG) <MeingastH@michigan.gov>, Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Judy Shih <judy@statesuniteddemocracy.org>, Max Kober <Max@statesuniteddemocracy.org>, Sally Marsh <Sally@statesuniteddemocracy.org>
Subject: RE: PRIVILEGED and CONFIDENTIAL - MCL 168.932f

Hi Christine,

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DPP MCL 15.243(1)(m)

Best,
Danny

Danny Haidar
Civil Rights & Elections Division, Lansing Office
Michigan Department of Attorney General

From: Christine Sun <christine@stateuniteddemocracy.org>
Sent: Sunday, October 27, 2024 11:24 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Haidar, Danny (AG) <HaidarD1@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Judy Shih <judy@stateuniteddemocracy.org>; Max Kober <Max@stateuniteddemocracy.org>; Sally Marsh <Sally@stateuniteddemocracy.org>
Subject: PRIVILEGED and CONFIDENTIAL - MCL 168.932f

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Hi Heather, Danny, and Linus,

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DPP MCL 15.243(1)(m)

Thanks,

Christine P. Sun (she/her) | **Senior Vice President, Legal**
States United Democracy Center
415.828.5719 | @statesunited
christine@statesuniteddemocracy.org

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Sent: 8/3/2023 1:02:14 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]; Beth Stevens [beth@statesuniteddemocracy.org]
Subject: RE: DPP MCL 15.243(1)(m) (privileged)

Hi Jonathan, I was just getting ready to respond to your email from yesterday. Did you mean to send me the case too, or just refer to it? DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Thanks,
Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, August 3, 2023 9:00 AM
To: Aboona, Rebecca (AG) <AboonaR1@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Beth Stevens <beth@statesuniteddemocracy.org>
Subject: Re: DPP MCL 15.243(1)(m) (privileged)

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Becky, Heather, and Linus,

I hope you're all doing well. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Best,

Jonathan

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Wednesday, June 21, 2023 at 10:37 AM
To: Aboona, Rebecca (AG) <AboonaR1@michigan.gov>, Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>, Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>, Beth Stevens <beth@statesuniteddemocracy.org>
Subject: DPP MCL 15.243(1)(m) (privileged)

Becky, Heather, and Linus,

DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Sent: 10/25/2024 8:53:32 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: Do you have a moment to call me?

Thank you!

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Friday, October 25, 2024 4:25 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Do you have a moment to call me?

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Oakland, Wayne, Grand Traverse, Macomb, Kent, Genesee, Washtenaw.

Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Friday, October 25, 2024 12:54 PM
To: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Do you have a moment to call me?

Yes, that works for me.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Friday, October 25, 2024 3:51 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: Do you have a moment to call me?

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For sure. Can I call you in about 45 minutes?

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Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Friday, October 25, 2024 12:44 PM
To: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Do you have a moment to call me?

517 PII MCL 15.243(1)(a)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Meingast, Heather (AG) [MeingastH@michigan.gov]
Sent: 11/3/2024 8:18:03 PM
To: Christine Sun [christine@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: DPP MCL 15.243(1)(m)

Thanks!

From: Christine Sun <christine@statesuniteddemocracy.org>
Sent: Sunday, November 3, 2024 2:04:06 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: DPP MCL 15.243(1)(m)

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Dear Heather and Linus,

DPP MCL 15.243(1)(m)

Warmly,
Christine

Christine P. Sun (she/her) | Senior Vice President, Legal
States United Democracy Center
415.828.5719 | @statesunited
christine@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [MeingastH@michigan.gov]
Sent: 11/2/2024 7:13:17 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: Experts

DPP MCL 15.243(1)(m)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Saturday, November 2, 2024 2:37:23 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Experts

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DPP MCL 15.243(1)(m)

Dax Goldstein (they/them) | Senior Counsel | Program Director, Election Protection (Legal)
States United Democracy Center
415.938.6481 | @statesunited
dax@statesuniteddemocracy.org

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Sent: 11/5/2024 6:07:09 PM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: **DPP MCL 15.243(1)(m)**

Thank you. I appreciate it.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Dax Goldstein <dax@statesuniteddemocracy.org>
Sent: Tuesday, November 5, 2024 1:07 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: **DPP MCL 15.243(1)(m)**

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Dax Goldstein
415.938.6481
they/them

From: Dax Goldstein
Sent: Tuesday, November 5, 2024 9:45 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: **DPP MCL 15.243(1)(m)**

Yes! Will call you in a moment.

Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Tuesday, November 5, 2024 9:39 AM
To: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: **DPP MCL 15.243(1)(m)**
Importance: High

DPP MCL 15.243(1)(m)

H

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Heather S. Meingast, Division Chief
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meingasth@michigan.gov
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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/22/2024 7:12:02 PM
To: Haidar, Danny (AG) [HaidarD1@michigan.gov]; christine@statesuniteddemocracy.org
CC: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
Subject: RE: Following up, template
Attachments: Brf Supp Ver Cmplt for Decl & Inj Rel.pdf; Mtn for Decl & Inj Rel.pdf; Mtn for Imm Consd.pdf; Ver Cmplt for Decl & Inj Rel w Exhs.pdf

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
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From: Haidar, Danny (AG) <HaidarD1@michigan.gov>
Sent: Tuesday, October 22, 2024 2:56 PM
To: christine@statesuniteddemocracy.org
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: Following up, template

Dear Christine,

DPP MCL 15.243(1)(m)

If there is anything else we can do, please don't hesitate to let us know.

Best,
Danny Haidar

Danny Haidar
Civil Rights & Elections Division, Lansing Office
Michigan Department of Attorney General

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROSA HOLLIDAY,

Plaintiff,

Case No.
Hon.

v

URGENT ELECTION MATTER

SECRETARY OF STATE JOCELYN BENSON, in her official capacity,

Defendant.
_____/

PLAINTIFF'S BRIEF IN SUPPORT OF MOTIONS FOR DECLARATORY JUDGMENT, PERMANENT INJUNCTION, AND IMMEDIATE AND EXPEDITED CONSIDERATION OF VERIFIED COMPLAINT

ORAL ARGUMENT REQUESTED IF THE COURT DEEMS IT NECESSARY

Michigan's Trusted Law Firm GOODMAN ACKER P.C.

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INTRODUCTION

This is an action to protect the integrity of Michigan elections and prevent the deception of Michigan voters by stopping fake independent candidates for President and Vice-President, Cornel West and Melina Abdullah (collectively "West"), from appearing on the general election ballot.

STATEMENT OF FACTS

Cornel West never wanted to be an independent candidate for President in Michigan—he wanted to be the candidate of a political party as he is in several other states.

In January 2024, West sought the nomination of Michigan's Natural Law Party ("NLP").[1] When he lost the bidding war for that nomination to Robert F. Kennedy, Jr.,[2] he was desperate to get on the Michigan ballot, so he resorted to two contradictory paths, both illegal under Michigan Election Law in their own right.

First, he sought the presidential nomination of another faction of the NLP, the national Natural Law Party. However, beginning in February 2024, that political party was wracked by a battle for control between its Florida founder and the Kennedy campaign, which wanted its nomination.[3] Thus, it was not clear at that time that West could get its nomination. So, West embarked on another illegal path. Despite seeking the presidential nomination of both NLP factions and receiving the nomination of political parties in at least nine other states,[4] he sought to gain ballot access in Michigan under the ruse that he was an "independent" candidate with no affiliation with a political party. Funded by secret sources, petition signatures were collected and

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[1] *See* Davis O'Brien, *How R.F.K. Jr. Got on the Michigan Ballot, With Only Two Votes*, New York Times (April 20, 2024) (Exhibit 1).

[2] *See id.*

[3] *See* Caputo, *'Swindlers,' 'Hijacking,' and 'Blackmail': Inside the Kennedy Campaign's Natural Law Party Meltdown in Florida*, Bulwark (June 6, 2024) (Exhibit 2).

[4] West has been nominated for President in several states by political parties: Alaska's Aurora Party, Unity Party of Colorado, Florida Natural Law Party, Mississippi Natural Law Party, Nebraska's Legal Marijuana Now Party, North Carolina's Justice for All Party, Oregon Progressive Party, South Carolina's United Citizens Party, and Vermont's Green Mountain & Justice Party. *See* nn 13–21 for citations.

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filed on his behalf on June 17, 2024,[5] together with Affidavits of Identity ("AOI") for him and for his vice-presidential candidate, Melina Abdullah.[6]

In May 2024, Kennedy lost his fight for control of the national Natural Law Party.[7] On July 21, 2024—well *after* he had filed as an "independent" candidate in Michigan—West was nominated for President by the national NLP.[8]

The AOI's of West and Abdullah were timely challenged by Plaintiff Holliday on July 23, 2024.[9] That challenge remains pending before the Secretary of State. Plaintiff Holliday also timely challenged West's petition signatures on July 25, 2024.[10] That challenge is scheduled to be decided by the Board of State Canvassers on August 26, 2024, just eleven days before the candidates for the November general election ballot must be finalized.

ARGUMENT

THE COURT SHOULD GRANT DECLARATORY AND PERMANENT INJUNCTIVE RELIEF BARRING CORNEL WEST AND MELINA ABDULLAH FROM THE BALLOT AS INDEPENDENT CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT.

I. THE STANDARDS FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF.

MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." The Michigan Supreme Court has held that "[a]n actual controversy exists when a declaratory judgment is needed

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[5] Swindle, *Cornel West Claims to Have 'Far Exceeded' Required Michigan Signatures*, Jewish News Syndicate (June 21, 2024), https://www.jns.org/cornel-west-claims-to-have-far-exceeded-required-michigan-signatures/.
[6] *See* Exhibits 3 and 4.
[7] *See* Exhibit 2.
[8] *See* Willow Evans, *Natural Law Party of the United States Endorses 2024 Presidential Ticket of Cornel West and Melina Abdullah*, Independent Political Report (July 22, 2024) (Exhibit 5, with resolution nominating West for President).
[9] *See* Exhibit 6.
[10] The challenge is voluminous, so a copy is not provided. If the Court wishes to see it, counsel will provide it.

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to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). Based on a declaratory judgment, a court can provide further relief, such as a permanent injunction. *See* MCR 2.605(F).

There is an actual controversy here because Holliday has a legal right to have only eligible candidates on the ballot, *see Barrow v City of Detroit Election Comm'n*, 301 Mich App 404, 412; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013), and West is not eligible to be an independent candidate for President on the Michigan ballot under MCL 168.692a, MCL 168.558, and binding Michigan Supreme Court precedent.

II. WEST IS INELIGIBLE TO APPEAR ON THE MICHIGAN BALLOT AS AN INDEPENDENT CANDIDATE FOR PRESIDENT UNDER MCL 168.692a.

West seeks to be a candidate running for a partisan office without party affiliation under Chapter XXIVA of the Election Law, MCL 168.590 to MCL 168.590h. However, candidates such as West who have sought the same office as the candidate of a political party during the same calendar year are prohibited from using the procedures of Chapter XXIVA to obtain ballot access as an independent candidate in Michigan:

> A person who files a partisan nominating petition or filing fee as a candidate of a political party, or who is nominated by a political party convention, committee, or caucus and accepts the nomination, shall not file a qualifying petition under chapter XXIVA for an office to be elected at that election or at an election held during the same calendar year.

MCL 168.692a. This statute, part of Michigan's exercise of its authority to regulate presidential elections and to advance important state interests, bars West from access to the ballot.

A. Michigan Has Broad Federal Constitutional Authority To Regulate Presidential Elections.

Under the United States Constitution's Electors Clause, each state has the plenary power

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to appoint its presidential electors "in such Manner as the Legislature thereof may direct." US Const, art II, § 1, cl 2; *see also Moore v Harper*, 600 US 1, 27; 143 S Ct 2065; 216 L Ed 2d 729 (2023) ("[I]n choosing Presidential electors, the Clause 'leaves it to the legislature exclusively to define the method of effectuating the object.'"); *Chiafalo v Washington*, 591 US 578, 588; 140 S Ct 2316; 207 L Ed 2d 761 (2020) (Electors Clause gives states "far-reaching authority over presidential electors").

States thus may restrict for whom electors may vote, *Chiafalo*, 591 US at 581, and ensure that the State's electoral votes are only cast for eligible candidates. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind L J 559, 604 (2015) ("[B]ecause the legislature[] may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates' qualifications.").

States routinely adjudicate presidential candidates' qualifications before elections, ruling on the merits to exclude ineligible candidates and authorize inclusion of eligible candidates. *See, e g, Hassan v Colorado*, 495 F Appx 947 (CA 10, 2012) (upholding exclusion of naturalized citizen candidate); *Lindsay v Brown*, 750 F3d 1061 (CA 9, 2014) (upholding exclusion of underage candidate); *Socialist Workers Party v Ogilvie*, 357 F Supp 109 (ND Ill, 1972) (*per curiam*) (same); *Elliott v Cruz*, 137 A3d 646 (Pa Commw, 2016), *aff'd* 635 Pa 212; 134 A3d 51 (2016) (*per curiam*) (finding that presidential candidate was natural born); *Ankeny v Governor of Ind*, 916 NE2d 678 (Ind App, 2009) (similar). Federal courts have affirmed this broad state authority as advancing the interests of the States. *See Lindsay*, 750 F3d at 1064 ("[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." (internal quotation marks omitted)).

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Michigan's Legislature exercises this federal constitutional authority pursuant to its constitutional duty to ensure the purity of elections, Const 1963, art 2, § 4(2), and by enacting statutes such as MCL 168.692a.

B. Michigan Has Federal Constitutional Authority To Protect Its Important Interests In Fair And Orderly Elections That Voter Avoid Confusion and Deception.

Not only does Michigan have the federal constitutional authority to apply MCL 168.692a to presidential elections, but that statute also advances several important state interests recognized by the United States Supreme Court:

> There is surely an important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness v Fortson, 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971); *see also, e g, Burdick v Takushi*, 504 US 428, 433; 112 S Ct 2059; 119 L Ed 2d 245 (1992) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (internal quotation marks omitted)); *Storer v Brown*, 415 US 724, 729; 94 S Ct 1274; 39 L Ed 2d 714 (1974) (states have a "substantial . . . interest in providing the electorate with an understandable ballot"); *Bullock v Carter*, 405 US 134, 145; 92 S Ct 849; 31 L Ed 2d 92 (1972) ("[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."). The Michigan Supreme Court has also recognized the State's interest in preventing voters from being misled. *See, e g, People v Burkman*, ___ Mich ___, ___; ___ NW2d ___ (2024) (Docket No. 164638); slip op at 52 ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures."), *quoting Minn Voters Alliance v Mansky*, 585 US 1, 19 n 4; 138 S

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Ct 1876; 201 L Ed 2d 201 (2018).[11]

Under these principles, independent candidates can be required to show a "significant modicum of support" before being allowed on the ballot." *Jenness*, 403 US at 442. They can also be required to disaffiliate from political parties for up to a year. *Storer*, 415 US at 733. MCL 168.692a constitutionally imposes a disaffiliation requirement on independent candidates, including presidential candidates, which protects Michigan voters from being deceived, misled, or confused.

C. States Consider Facts Beyond Their Borders In Determining Ballot Access For Presidential Candidates.

In exercising their broad constitutional authority over presidential elections, States consider facts outside their borders when determining ballot access for presidential candidates. For example, in Florida a minor party affiliated with a national party has easier access to the ballot for its presidential candidate. That law was upheld by a federal court, holding that a State may consider national interests when regulating presidential candidates' ballot access. *See Indep Party of Fla v Secretary of State*, 967 F3d 1277, 1283–1284 (CA 11, 2020).

Based on its authority to regulate presidential elections, Michigan has long considered facts from outside the State when granting ballot access to presidential candidates. *See, e g,* MCL 168.614a(1) (Michigan presidential primary candidates are those "generally advocated by the *national* news media" (emphasis added)). Indeed, Michigan political parties may only place presidential candidates on the general election ballot who have been nominated at national conventions. *See* MCL 168.686.

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[11] Michigan protects its voters against being misled, deceived, or confused in many ways. For example, it is a crime for a candidate to misrepresent that she or he is an incumbent. *See* MCL 168.944. It is also a crime to distribute materially deceptive media with the intent of deceiving voters. *See* MCL 168.932f. Ballot proposal language must be "true and impartial" and written to avoid confusing voters. *See* MCL 168.32; MCL 168.485. There are many more examples.

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D. MCL 168.692a Bars Independent Presidential Candidates Such As West Who Are Political Party Presidential Candidates In Other States.

It was against this backdrop of broad federal constitutional authority to conduct presidential elections, the authority to protect important State interests in those elections, and the practice of considering national facts regarding presidential candidate ballot access that Michigan enacted MCL 168.692a:

> A person who files a partisan nominating petition or filing fee as a candidate of a political party, or who is nominated by a political party convention, committee, or caucus and accepts the nomination, shall not file a qualifying petition under chapter XXIVA for an office to be elected at that election or at an election held during the same calendar year.

In determining the meaning of the prohibition in MCL 168.692a, the

> "primary task in construing a statute, is to discern and give effect to the intent of the Legislature." The words of the statute are the most reliable evidence of the Legislature's intent and we must give each word its plain and ordinary meaning. "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'"

Stand Up For Democracy v Secretary of State, 492 Mich 588, 598; 822 NW2d 159 (2012) (footnotes omitted). There must be strict compliance with the Michigan Election Law. *Id* at 602. Importantly, the strict compliance doctrine does not allow anyone—neither the Department of State or a court—to change the requirements of the Michigan Election Law. *See, e g, Stumbo v Roe*, 332 Mich App 479, 482 n 2; 957 NW2d 830 (2020).

Based on its text, MCL 168.692a is broad in scope. It refers to "a" political party without geographical restriction or limit as to type—national, state, or local. It is *not* restricted to being the candidate of a political party *in Michigan*. The Legislature could easily have restricted its scope to candidates of "Michigan" political parties, or to a "Michigan" convention, committee, or caucus

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nomination, but it did not. Such a restriction cannot be added to the text or read into it. *See, e g, Stumbo*, 332 Mich App at 482 n 2.

Because MCL 168.692a encompasses their nomination activities in other states, West and Abdullah cannot be labeled as no party affiliation ("NPA"), or independent, candidates in Michigan because they have been nominated for President and Vice-President in at least nine states by political parties:

- Alaska: Aurora Party[12]
- Colorado: Unity Party of Colorado[13]
- Florida: Florida Natural Law Party[14]
- Mississippi: Mississippi Natural Law Party[15]
- Nebraska: Legal Marijuana Now Party[16]
- North Carolina: Justice for All Party[17]
- Oregon: Oregon Progressive Party[18]
- South Carolina: United Citizens Party[19]
- Vermont: Green Mountain Peace & Justice Party[20]

West and Abdullah have also been nominated for President and Vice-President by a *national party*:

---

[12] Willow Evans, *Alaska's Aurora Party Nominates Independent Presidential Candidate Cornel West*, Independent Political Report (December 15, 2023), https://independentpoliticalreport.com/2023/12/aurora-party-nominates-independent-presidential-candidate-cornel-west-in-alaska/.

[13] Willow Evans, *Unity Party of Colorado Nominates Cornel West and Melina Abdullah as 2024 Presidential Ticket*, Independent Political Report (April 15, 2024), https://independentpoliticalreport.com/2024/04/unity-party-of-colorado-nominates-cornel-west-and-melina-abdullah-as-2024-presidential-ticket/.

[14] Winger, *Natural Law Parties of Two States Nominate Cornel West for President*, Ballot Access News (July 22, 2024), https://ballot-access.org/2024/07/22/natural-law-party-nominates-cornel-west-for-president/.

[15] *Id*.

[16] Willow Evans, *Legal Marijuana NOW! Party of Nebraska Endorses Presidential Bid of Cornel West and Melina Abdullah*, Independent Political Report (July 15, 2024), https://independentpoliticalreport.com/2024/07/legal-marijuana-now-party-of-nebraska-endorses-presidential-bid-of-cornel-west-and-melina-abdullah/.

[17] Winger, *Three Petitions Submitted in North Carolina for New or Previously Unqualified Parties*, Ballot Access News (May 17, 2024), https://ballot-access.org/2024/05/17/three-petitions-submitted-in-north-carolina-for-new-or-previously-unqualified-parties/.

[18] Willow Evans, *Cornel West to Appear on Oregon Ballot Following Oregon Progressive Party Nomination*, Independent Party Nomination (January 25, 2024), https://independentpoliticalreport.com/2024/01/cornel-west-to-appear-on-oregon-ballot-following-oregon-progressive-party-nomination/.

[19] Willow Evans, *Independent Presidential Candidate Cornel West Secures South Carolina Ballot Access with United Citizens Party Support*, Independent Political Report (February 28, 2024), https://independentpoliticalreport.com/2024/02/independent-presidential-candidate-cornel-west-secures-south-carolina-ballot-access-with-united-citizens-party-support/.

[20] Willow Evans, *Vermont Green Mountain Peace and Justice Party Nominates Independent Cornel West for President*, Independent Political Report (April 29, 2024), https://independentpoliticalreport.com/2024/04/vermont-green-mountain-peace-and-justice-party-nominates-independent-cornel-west-for-president/.

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the Natural Law Party of the United States. *See* Exhibit 5.

Because they are the nominees of a national political party and of political parties in other states, MCL 168.692a prohibits West and Abdullah from appearing on the Michigan ballot as NPA or independent candidates for President and Vice-President.

The reach of MCL 168.692a beyond Michigan for presidential candidates makes sense for several reasons.

First, presidential elections are national in scope and rarely involve Michigan candidates. It has been nearly fifty years since there was a Michigan candidate for president in the general election. The vast majority of presidential candidates come from outside of Michigan, and are, of course, seeking ballot access in the other forty-nine states and the District of Columbia. Thus, it would make no sense for MCL 168.692a to be enforced for independent presidential candidates only as to their Michigan political party candidacies when they are running nationally.

Not only does it make no sense to treat candidates from different states differently in enforcing MCL 168.692a, but it would raise significant equal protection problems if, for example, an independent candidate for President from Michigan was barred by MCL 168.692a, while an independent presidential candidate from another state who violated that statute by activity in that state was allowed on the ballot. MCL 168.692a must be uniformly enforced against all candidates based on their activities in every state.

Second, unless the restrictions in MCL 168.692a are applied to party nominations in other states, a presidential candidate could mislead or deceive Michigan voters by claiming to be an NPA or independent presidential candidate, yet be a partisan presidential candidate in every other state. Michigan has an "important state interest" in "avoiding confusion [and] deception . . . at the general election," *Jenness*, 403 US at 442, and MCL 168.692a advances that interest by requiring

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independent presidential candidates to be independent of political parties not only in Michigan but throughout the country. Michigan voters have a right to know whether an "independent" candidate is actually independent of political parties.

That confusion and deception are obvious here. West and Abdullah claim to be independent candidates, but they are the presidential candidates of a national political party and of several other state political parties. Falsely labeling them as independent candidates in Michigan would deceive Michigan voters, and Michigan has a right to protect its voters against such deception. *See Jenness*, 403 US at 442.

That deception and confusion will be particularly acute in Michigan where there is already a Natural Law Party candidate on the ballot: Robert F. Kennedy, Jr. *See* Davidson, *Presidential Candidate Robert F. Kennedy Jr. to Appear on Michigan Ballot*, Michigan Advance (April 18, 2024), https://michiganadvance.com/briefs/presidential-candidate-robert-f-kennedy-jr-to-appear-on-michigan-ballot/. Michigan voters will undoubtedly be confused to hear that West is the presidential candidate of the national Natural Law Party, yet see on their ballots him listed as an independent candidate with a different candidate, Kennedy, listed as the Natural Law Party candidate. MCL 168.692a protects Michigan voters from that confusion by barring West from the ballot as an independent candidate.

Third, allowing West and Abdullah to run as independent candidates in Michigan, while they are political party candidates in other states, invites—indeed, allows—manipulation of the ballot access rules by candidates. That is exactly what West has done here. Desperate to get on the ballot when rejected by the Michigan NLP, he turned to the ruse of claiming to be "independent." States have the right to protect the integrity of their elections against fraudulent candidacies like

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West's. *Bullock*, 405 US at 145. Candidates who can falsely claim independence from political parties and still obtain ballot access are engaging in a fraud on the voters of Michigan.

West is barred by MCL 168.692a from being an independent presidential candidate in Michigan.

III. FACTIONALISM INSIDE THE NATURAL LAW PARTY BARS WEST FROM THE BALLOT.

West is embroiled in an internal dispute within the Natural Law Party ("NLP"). The national NLP has nominated West for President, while its Michigan faction nominated Robert F. Kennedy, Jr. last April. The State is not required to resolve that dispute under *American Indep Party v Secretary of State*, 397 Mich 689; 247 NW2d 17 (1976), which places the burden on the feuding political party to resolve its internal fight and present one candidate for placement on the ballot.

That Supreme Court-sanctioned procedure was not followed here. Instead, West has sought to evade that requirement through the gambit of seeking ballot access as a fake "independent" candidate. If he is allowed to get away with that artifice, the voters of Michigan will face the situation that the *American Indep Party* Court sought to avoid: two Natural Law Party candidates from different factions of that party will appear on the ballot and the intraparty feud will continue into the general election. Despite his ostensibly "independent" status, West will claim the support—which he has—of the national NLP, while Kennedy will tout—as he can—his candidacy on behalf of the Michigan NLP. Press coverage will inform—and confuse—voters by reporting West's status as the candidate of the national NLP and reporting Kennedy's status as the Michigan NLP candidate.

This Court should not tolerate that evasion by West, which would inflict the chaos of the NLP fight on Michigan voters. He should be barred from the ballot as an independent candidate

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and be required to follow the procedure dictated by *American Indep Party*: resolve the internal NLP dispute and present a single NLP candidate for President to the State.

IV. DEFECTS IN WEST AND ABDULLAH'S AFFIDAVITS OF IDENTITY BAR THEM FROM THE BALLOT.

A candidate who fails to comply with all of the AOI requirements of MCL 168.558, or who executes an AOI that "contains a false statement with regard to *any* information or statement required" on the AOI, cannot be certified for the ballot. MCL 168.558(4) (emphasis added). Under Michigan law, there must be strict compliance with all of the AOI requirements mandated by MCL 168.558. *See, e g, Stand Up*, 492 Mich at 594, 600–608, 619; *Nykoriak v Napoleon*, 334 Mich App 370, 379; 964 NW2d 895 (2020) (*per curiam*); *Stumbo*, 332 Mich App at 481. As held in *Stumbo*,

> The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot.

Id.

A. West And Abdullah's Affidavits Of Identity Falsely State That They Are Candidates "Without Political Party Affiliation."

The AOI's signed by both West and Abdullah claim that they are "running for a partisan office without party affiliation," and that they "meet the statutory . . . requirements for the office sought."

These statements are false and disqualify both of them from the ballot because, as demonstrated in Part II, MCL 168.692a prohibits them from running for President and Vice-President as candidates "without party affiliation."

B. West And Abdullah's Affidavits Of Identity Are Defective.

1. West's Affidavit Of Identity Was Incorrectly Notarized.

MCL 168.558, which requires an AOI to be filed with the petition of a candidate seeking

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to be placed on the ballot as an NPA or independent candidate, "requires notarization, as defined by the Michigan Law on Notarial Acts, MCL 55.261 *et seq*." *Nykoriak*, 334 Mich App at 377. That act permits notarial acts to be performed in other states only if they meet certain conditions:

> (1) All of the following apply with regard to a notarial act that is performed in another state:
>
> (a) A notarial act performed in another state has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed in that state is performed by any of the following individuals:
>
> (i) A notary public who is authorized to perform notarial acts in the state in which the act is performed.
>
> (ii) A judge, clerk, or deputy clerk of any court of record in the state in which the notarial act is performed.
>
> (iii) Any other individual who is authorized to perform notarial acts in the state in which the act is performed.
>
> (b) The signature and title of an individual described in subdivision (a)(i) to (iii) who performs a notarial act in another state are prima facie evidence that the signature is genuine and that the individual holds the designated title.
>
> (c) The signature and title of an individual described in subdivision (a)(i) or (ii) who performs a notarial act in another state conclusively establish the authority of the individual to perform the notarial act.

MCL 55.285a(1).

The West AOI was notarized in Colorado. However, that notarization was not a proper "notarial act" under the law of Colorado, thus rendering the notarization invalid, the affidavit defective, and West ineligible to be placed on the Michigan ballot.

The Colorado notarization of West's AOI failed to comply with Colorado law, so it was not a valid "notarial act" recognized under MCL 55.285a(1). Colorado's Revised Uniform Law on Notarial Acts ("RULONA") requires the following:

> Under RULONA (C.R.S. 24-21-515 and 24-51-516) the [notarial] certificate must:
>
> - Be signed by the notary

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  - The notary's signature must match the official signature on file with the Secretary of State
  - Be signed at the same time that the performance of the notarial act takes place
- Be dated by the notary
  - A notary should never pre or post-date a notarization
- Identify the county in which the notarial act is performed
- Identify the state in which the notarial act is performed
- Contain the title of the office of the notary
- Be stamped by the notary

> *A notarial certificate should also indicate that the notary certifies that s/he complied with the law and made the determinations required by the law for the type of notarial act s/he is completing.*
>
> *In other words, the notary should indicate whether s/he is completing an oath, affirmation, acknowledgement, signature witness, or copy certification. This can be a very brief description—for example, "Subscribed and sworn to before me," or a more detailed one—for example, the copy certification form, or one of the longer acknowledgements.*

Colorado Secretary of State, *Notary Handbook* (April 24, 2024), pp 18–19 (emphasis added).

The Colorado notarization of West's AOI failed to comply with the highlighted requirements of Colorado notary law. Nowhere did the Colorado notary "certify that she complied with the law and made determinations required by the law." *Id.* She did not include a copy certification form, or even the phrase "subscribed and sworn to before me."

Because the Colorado notarization failed to comply with Colorado law, it is not a valid "notarial act" recognized in Michigan by MCL 55.285a(1). West's AOI notarization thus fails, making the AOI defective and him ineligible to appear on the Michigan ballot.

2. Abdullah's Affidavit Of Identity Fails To Provide Required Information.

One of the pieces of information an AOI must provide is "the manner in which the candidate wishes to have his or her name appear on the ballot." MCL 168.558(2). Making a false statement anywhere on the AOI is cause for disqualification, as the candidate's certification states.

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The instructions advise that providing "incorrect information may result in disqualification."

On her AOI, Abdullah indicated that she wants to be listed as "Cornel West" on the ballot. That information is incorrect and false, rendering the AOI defective and Abdullah ineligible for the ballot.

CONCLUSION AND RELIEF SOUGHT

For these reasons, Plaintiff asks that the Court:

1. Declare that West is barred from being an independent presidential candidate by MCL 168.692a;

2. Declare that West is barred from being an independent presidential candidate under *American Independent Party*;

3. Declare that West is barred from being an independent presidential candidate because his Affidavit of Identity is defective under MCL 168.558;

4. Permanently enjoin the Secretary of State from placing West on the 2024 general election ballot as an independent presidential candidate;

5. Expedite the hearing and disposition of this matter; and

6. Grant Plaintiff such other relief as the Court deems just and appropriate.

Respectfully submitted,

GOODMAN ACKER, P.C.

/s/ Mark Brewer
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(248) 483-5000
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Proof of Service

The undersigned certifies that on August 12, 2024, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes

Dated: August 12, 2024

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROSA HOLLIDAY,

Plaintiff,

Case No.
Hon.

v

URGENT ELECTION MATTER

SECRETARY OF STATE JOCELYN BENSON, in her official capacity,

Defendant.
_____/

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

ORAL ARGUMENT REQUESTED IF THE COURT DEEMS IT NECESSARY

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NOW COMES Plaintiff, by and through her attorneys, Goodman Acker, P.C., and moves for Declaratory Judgment and Permanent Injunction as set forth in her Verified Complaint. In support of this Motion, Plaintiff relies on the authorities and arguments in her Brief in Support of Motions for Declaratory Judgment, Permanent Injunction, and Immediate and Expedited Consideration of her Verified Complaint.

Concurrence in this Motion was sought on August 12, 2024. Defendant opposes this Motion.

WHEREFORE, for the reasons stated in the accompanying Brief, Plaintiff respectfully requests that the Court:

1. Grant this Motion;

2. Declare that West is barred from being an independent presidential candidate by MCL 168.692a;

3. Declare that West is barred from being an independent presidential candidate under *American Independent Party*;

4. Declare that West is barred from being an independent presidential candidate because his Affidavit of Identity is defective under MCL 168.558;

5. Permanently enjoin the Secretary of State from placing West on the 2024 general election ballot as an independent presidential candidate;

6. Expedite the hearing and disposition of this matter; and

7. Grant Plaintiff such other relief as the Court deems just and appropriate.

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Respectfully submitted,

GOODMAN ACKER, P.C.

/s/ Mark Brewer
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Dated: August 12, 2024

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GOODMAN ACKER P.C.

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROSA HOLLIDAY,

Plaintiff,

Case No.
Hon.

v

URGENT ELECTION MATTER

SECRETARY OF STATE JOCELYN BENSON, in her official capacity,

Defendant.
_____/

PLAINTIFF'S MOTION FOR IMMEDIATE AND EXPEDITED CONSIDERATION OF VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

ORAL ARGUMENT REQUESTED IF THE COURT DEEMS IT NECESSARY

Michigan's Trusted Law Firm GOODMAN ACKER P.C.

GOODMAN ACKER, P.C.

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NOW COMES Plaintiff, by and through her attorneys, Goodman Acker, P.C., and for her Motion for Immediate and Expedited Consideration of her Verified Complaint for Declaratory Judgment and Permanent Injunction states as follows:

1. Plaintiff incorporates by reference her Verified Complaint.

2. The candidates for the November general election ballot must be finalized by September 6, 2024, so time is of the essence in this election case. In *Scott v Mich Dir of Elections*, 490 Mich 888; 804 NW2d 119 (2011), the Michigan Supreme Court recognized that the handling of election cases must of necessity be expedited. The Michigan Court Rules also prioritize election-related litigation. *See* MCR 7.213(C)(4).

3. By her Motion for Immediate and Expedited Consideration of her Verified Complaint, Plaintiff seeks to expedite consideration of this case in every way possible.

4. On August 12, 2024, Defendant's concurrence was sought in this Motion. Defendant does not oppose this Motion.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that this Motion be granted, that her Verified Complaint for Declaratory Judgment and Permanent Injunction be immediately and expeditiously considered by the Court, and that the Court award the relief sought by the Verified Complaint for Declaratory Judgment and Permanent Injunction.

Respectfully submitted,

GOODMAN ACKER, P.C.

/s/ Mark Brewer
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Proof of Service

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/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes

Dated: August 12, 2024

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROSA HOLLIDAY,

Plaintiff,

Case No.
Hon.

v

URGENT ELECTION MATTER

SECRETARY OF STATE JOCELYN BENSON, in her official capacity,

Defendant.
_____/

PLAINTIFF'S VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

ORAL ARGUMENT REQUESTED IF THE COURT DEEMS IT NECESSARY

A civil action involving other parties that includes factual and legal allegations that overlap in part with those alleged in this Complaint has been previously filed in this Court where it was given case number 24-000115-MB and assigned to Judge Redford. That action remains pending.

/s/ Mark Brewer
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Plaintiff for her Verified Complaint for Declaratory Judgment and Permanent Injunction against Secretary of State Jocelyn Benson ("Secretary") states as follows:

INTRODUCTION

1. This is an action to protect the integrity of Michigan elections and prevent the deception of Michigan voters by stopping fake independent candidates for President and Vice-President, Cornel West and Melina Abdullah (collectively "West"), from appearing on the general election ballot.

JURISDICTION

2. This Court has jurisdiction over Plaintiff's claims in this action for declaratory and permanent injunctive relief under MCL 600.6419 and MCR 2.605.

PARTIES

3. Plaintiff Rosa Holliday is a registered voter in Bay County, who intends to vote in the November 5, 2024 presidential election. She has standing to bring this Complaint.

4. Defendant Jocelyn Benson is the duly elected Secretary of State, responsible for the administration of elections in the State of Michigan, including the November 5, 2024 general election.

FACTUAL ALLEGATIONS

5. Cornel West never wanted to be an independent candidate for President in Michigan—he wanted to be the candidate of a political party as he is in several other states.

6. In January 2024, West sought the nomination of Michigan's Natural Law Party ("NLP"). *See* Davis O'Brien, *How R.F.K. Jr. Got on the Michigan Ballot, With Only Two Votes*, New York Times (April 20, 2024) (Exhibit 1). When he lost the bidding war for that nomination

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to Robert F. Kennedy, Jr., *see id*, he was desperate to get on the Michigan ballot, so he resorted to two contradictory paths, both illegal under Michigan Election Law.

7. First, he sought the presidential nomination of another faction of the NLP, the national Natural Law Party. However, beginning in February 2024, that political party was wracked by a battle for control between its Florida founder and the Kennedy campaign, which wanted its nomination. *See* Caputo, *'Swindlers,' 'Hijacking,' and 'Blackmail': Inside the Kennedy Campaign's Natural Law Party Meltdown in Florida*, Bulwark (June 6, 2024) (Exhibit 2). Thus, it was not clear at that time that West could get its nomination.

8. So, West embarked on another illegal path. Despite seeking the presidential nomination of both NLP factions and receiving the nomination of political parties in several other states,[1] he sought to gain ballot access in Michigan under the ruse that he was an "independent" candidate with no affiliation with a political party. Funded by secret sources, petition signatures were collected and filed on his behalf on June 17, 2024, together with Affidavits of Identity ("AOI") for him and for his vice-presidential candidate, Melina Abdullah. *See* Swindle, *Cornel West Claims to Have 'Far Exceeded' Required Michigan Signatures*, Jewish News Syndicate (June 21, 2024), https://www.jns.org/cornel-west-claims-to-have-far-exceeded-required-michigan-signatures/; *see also* Exhibits 3 and 4.

9. In May 2024, Kennedy lost his fight for control of the national Natural Law Party. *See* Exhibit 2.

10. On July 21, 2024—after he had filed as an "independent" candidate in Michigan—West was nominated for President by the national NLP. *See* Willow Evans, *Natural Law Party of*

[1] West has been nominated for President in several states by political parties: Alaska's Aurora Party, Unity Party of Colorado, Florida Natural Law Party, Mississippi Natural Law Party, Nebraska's Legal Marijuana Now Party, North Carolina's Justice for All Party, Oregon Progressive Party, South Carolina's United Citizens Party, and Vermont's Green Mountain & Justice Party. *See* nn 13–21 in Plaintiff's Brief for citations.

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the United States Endorses 2024 Presidential Ticket of Cornel West and Melina Abdullah, Independent Political Report (July 22, 2024) (Exhibit 5, with resolution nominating West for President).

11. The AOI's of West and Abdullah were timely challenged by Plaintiff Holliday on July 23, 2024. *See* Exhibit 6. That challenge remains pending before the Secretary of State. Plaintiff Holliday also timely challenged West's petition signatures on July 25, 2024.[2] That challenge is scheduled to be decided by the Board of State Canvassers on August 26, 2024, just eleven days before the candidates for the November general election ballot must be finalized.

COUNT I – DECLARATORY JUDGMENT: WEST IS BARRED FROM BEING AN INDEPENDENT PRESIDENTIAL CANDIDATE BY MCL 168.692a.

12. Plaintiff incorporates the prior paragraphs as if set forth word for word.

13. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." The Michigan Supreme Court has held that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020).

14. There is an actual controversy because Plaintiff has a legal right to have only eligible presidential candidates on the ballot. *See Barrow v City of Detroit Election Comm'n*, 301 Mich App 404, 412; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013).

15. West is ineligible to appear on the general election ballot as an independent presidential candidate under MCL 168.692a, and he has no legal right to appear on the ballot.

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[2] The challenge is voluminous, so a copy is not provided. If the Court wishes to see it, counsel will provide it.

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Plaintiff is entitled to a declaratory judgment to preserve her right to have only eligible presidential candidates on the ballot.

COUNT II – DECLARATORY JUDGMENT: WEST IS BARRED FROM BEING AN INDEPENDENT PRESIDENTIAL CANDIDATE UNDER *AMERICAN INDEPENDENT PARTY.*

16. Plaintiff incorporates the prior paragraphs as if set forth word for word.

17. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." The Michigan Supreme Court has held that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020).

18. There is an actual controversy because Plaintiff has a legal right to have only eligible presidential candidates on the ballot. *See Barrow v City of Detroit Election Comm'n*, 301 Mich App 404, 412; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013).

19. West is part of an internal party dispute within the Natural Law Party over whether he or Robert F. Kennedy, Jr. are its presidential candidate in Michigan.

20. The decision of the Michigan Supreme Court in *American Indep Party v Secretary of State*, 397 Mich 689; 247 NW2d 17 (1976), requires the Natural Law Party to resolve that internal dispute, and does not allow West to avoid that resolution using the ruse of an independent candidacy to attain ballot access in Michigan.

21. West is ineligible to appear on the general election ballot as an independent candidate by *American Indep Party*, and he has no legal right to appear on the ballot. Plaintiff is

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entitled to a declaratory judgment to preserve her right to have only eligible presidential candidates on the ballot.

COUNT III – DECLARATORY JUDGMENT: WEST AND ABDULLAH ARE BARRED FROM BEING INDEPENDENT PRESIDENTIAL CANDIDATES BECAUSE THEIR AFFIDAVITS OF IDENTITY ARE DEFECTIVE UNDER MCL 168.558.

22. Plaintiff incorporates the prior paragraphs as if set forth word for word.

23. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." The Michigan Supreme Court has held that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020).

24. There is an actual controversy because Plaintiff has a legal right to have only eligible presidential candidates on the ballot. *See Barrow v City of Detroit Election Comm'n*, 301 Mich App 404, 412; 836 NW2d 498 (2013), *lv den* 494 Mich 866; 831 NW2d 461 (2013).

25. West is ineligible to appear on the general election ballot as an independent presidential candidate because his Affidavit of Identity is defective under MCL 168.558 as containing false statements and being improperly notarized, and he has no legal right to appear on the ballot. Plaintiff is entitled to a declaratory judgment to preserve her right to have only eligible presidential candidates on the ballot.

26. Abdullah is ineligible to appear on the general election ballot as an independent vice-presidential candidate because her Affidavit of Identity is defective under MCL 168.558 due to false statements, and she has no legal right to appear on the ballot. Plaintiff is entitled to a

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declaratory judgment to preserve her right to have only eligible vice-presidential candidates on the ballot.

COUNT IV – PERMANENT INJUNCTION: THE SECRETARY OF STATE SHOULD BE ENJOINED FROM PLACING WEST ON THE 2024 GENERAL ELECTION BALLOT.

27. Plaintiff incorporates the prior paragraphs as if set forth word for word.

28. West is ineligible to appear on the general election ballot as an independent presidential candidate by MCL 168.692a, *American Indep Party*, and MCL 168.558.

29. Based upon those declaratory judgments sought in Counts I, II, and III, Plaintiff is entitled to relief by way of a permanent injunction under MCR 2.605(F).

30. Plaintiff is entitled to permanent injunctive relief preventing the Secretary from placing West on the 2024 presidential general election ballot.

THIS IS AN URGENT ELECTION MATTER REQUIRING IMMEDIATE ACTION.

31. Declaratory judgment actions may be expedited, MCR 2.605(D), and election matters should be expedited, *see, e g,* MCR 7.213(C)(4); *Scott v Mich Dir of Elections*, 490 Mich 888; 804 NW2d 119 (2011); *Ferency v Secretary of State*, 409 Mich 569, 599; 297 NW2d 544 (1980).

PRAYER FOR RELIEF SOUGHT

For the reasons stated, Plaintiff prays that the Court:

1. Declare that West is barred from being an independent presidential candidate by MCL 168.692a;

2. Declare that West is barred from being an independent presidential candidate under *American Independent Party*;

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3. Declare that West is barred from being an independent presidential candidate because his Affidavit of Identity is defective under MCL 168.558;

4. Permanently enjoin the Secretary of State from placing West on the 2024 general election ballot as an independent presidential candidate;

5. Expedite the hearing and disposition of this matter; and

6. Grant Plaintiff such other relief as the Court deems just and appropriate.

Respectfully submitted,

GOODMAN ACKER, P.C.

/s/ Mark Brewer

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Dated: August 12, 2024

Proof of Service

The undersigned certifies that on August 12, 2024, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes

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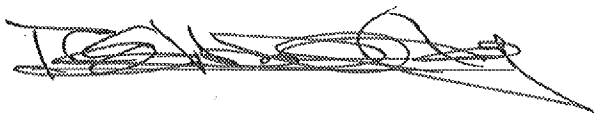
VERIFICATION

I declare under the penalties of perjury that this Verified Complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.



8-12-24
Date

Subscribed and sworn to before me
This 12 day of August, 2024

Elizabeth M. Brooks

Elizabeth Brooks, Notary Public
Macomb County, State of Michigan
My Commission Expires: 11/4/28
Acting in the County of Oakland

GOODMAN ACKER P.C. Michigan's Trusted Law Firm

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STATE OF MICHIGAN
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URGENT ELECTION MATTER

SECRETARY OF STATE JOCELYN BENSON, in her official capacity,

Defendant.
_____/

GOODMAN ACKER, P.C.
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_____/

PLAINTIFF'S VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

EXHIBITS

1. *New York Times* Article
2. *The Bulwark* Article
3. Cornel West's Affidavit of Identity
4. Melina Abdullah's Affidavit of Identity
5. *Independent Political Report* Article
6. Plaintiff's Affidavit of Identity Challenge

Michigan's Trusted Law Firm GOODMAN ACKER P.C.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 1

Obtained by Judicial Watch, Inc. v. Michigan FOIA

How R.F.K. Jr. Got on the Michigan Ballot, With Only Two Votes

The independent candidate persuaded a tiny party to give him its line on the ballot in a key 2024 battleground state, sparing him a costly, arduous organizing effort.

Listen to this article · 5:38 min Learn more

By Rebecca Davis O'Brien

April 20, 2024

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In January, when Doug Dern, the state chairman of the Natural Law Party of Michigan, got an email from a top strategist for Robert F. Kennedy Jr.'s presidential campaign, he sensed it could be a star turn for his tiny political group.

For 22 years, Mr. Dern, a bankruptcy lawyer with a small practice outside Detroit, has almost single-handedly kept the Natural Law Party on Michigan's ballot. Each cycle, the party runs a handful of candidates in obscure state races to meet Michigan's minimum polling requirements for minor parties.

"Keep that ballot access," Mr. Dern, 62, said in an interview on Friday. "Because someday, a candidate is going to come along who's going to be perfect for it. Someday, the third parties are going to be hot."

That day may have come.

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In gaining access to the ballot in Michigan, a critical swing state in the 2024 election, Mr. Kennedy has injected new uncertainty into what promises to be one of the most closely contested presidential races in history. And he did it without having to gather a single signature, avoiding a costly and arduous organizing effort, not to mention the possibility of having to fight court challenges to those signatures.

Mr. Kennedy was formally nominated at a brief convention held Wednesday morning in Mr. Dern's law office. The only two attendees were Mr. Dern and the party's secretary.

Stefanie Spear, a spokeswoman for the Kennedy campaign, confirmed the timeline of the campaign's outreach and said simply that Mr. Kennedy and his running mate, Nicole Shanahan, had been "duly nominated by the Natural Law Party."

Third parties have drawn increasing attention in recent elections — and arguably have swung some of them — by allowing voters to express discontent with major-party candidates. Mr. Kennedy is counting on a particularly strong showing in this election as polls show voters are highly dissatisfied with their options.

The Natural Law Party was founded in 1992 on a platform that included promotion of transcendental meditation, responsible gun use, flat taxes and organic farming. But it has dwindled over the years. Heading into the 2024 election, Michigan's was its only state chapter.

These days, the party is more like an empty vessel for independent candidates, which Mr. Dern sees as a virtue in itself — a commitment to giving voters more choice. Every presidential cycle, independent candidates reach out to Mr. Dern, seeking the party's nomination in Michigan. In 2008, the spot went to Ralph Nader, who had been seen as a spoiler in the 2000 election.

Mr. Dern, who has worked as a stage magician and also has a law practice for drunken-driving arrests, has made it his personal mission to keep the party active. "I've just been plugging away, year after year, making sure there are people on the ballot," he said.

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Natural Law candidates, who have frequently included Mr. Dern himself, have run for secretary of state, seats on Michigan's Supreme Court, lieutenant governor, state university boards and others. Their mission is simple: Secure enough votes in the general election to keep the party on the ballot for the next cycle.

In Michigan, minor parties can retain their ballot access only if their top vote-getting candidate — for any statewide office on the ballot — receives a total vote equal to at least 1 percent of the total votes cast for the winner of the last secretary of state race.

In January, Cornel West's independent presidential campaign reached out to Mr. Dern, he said. Under normal circumstances, Mr. Dern said, Mr. West would have been a great candidate for his party.

But the very next day, a better offer arrived in the form of an email from Nicholas Brana, a campaign consultant for Mr. Kennedy — whose ideals, Mr. Dern noted, align with much of the Natural Law Party's original platform, including its emphasis on health. Mr. Kennedy, an environmental lawyer and a scion of a storied political family, is also a leading figure in the anti-vaccine movement and a critic of the Covid pandemic response.

The party affiliation is crucial for Mr. Kennedy's campaign. Independent candidates without any party backing face a daunting path to getting on the ballot in Michigan, requiring between 12,000 and 60,000 signatures, including 100 signatures from each of at least half of the state's congressional districts.

Candidates can skip all that if they are nominated by a minor party with ballot access. The party just has to hold a convention, nominate a candidate and submit a certificate to the Michigan Department of State. There are a few other legal niceties — for example, presidential candidates need to submit a list of electors — but that is basically it, Mr. Dern said.

So, on Wednesday morning, Mr. Dern said, he and Kathleen Oakford, the party's secretary, held their convention in a low-slung office building in Hartland, Mich.

The proceedings were brief.

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"She came in, I took my gavel and tapped it on my desk." He called the state convention to order, they signed the proposed certificate of nomination, he closed the meeting, "And I took off for Lansing and filed it."

Since Mr. Kennedy's campaign announced his place on the ballot, Mr. Dern has fielded calls and emails from other states and candidates. A resurgence of interest in the Natural Law Party is underway, Mr. Dern said.

"There's even talk of reviving the national chapter," he said.

Rebecca Davis O'Brien covers campaign finance and money in U.S. elections. She previously covered federal law enforcement, courts and criminal justice. More about Rebecca Davis O'Brien

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 2

Obtained by Judicial Watch, Inc. v. Michigan FOIA

MAGAVILLE

'Swindlers,' 'Hijacking,' and 'Blackmail'

Inside the Kennedy campaign's Natural Law Party meltdown in Florida.

MARC A. CAPUTO
JUN 06, 2024

133 26 Share

(Composite / Photos: GettyImages / Shutterstock)

AMID VOTER DISENCHANTMENT with a Trump-Biden rematch, third-party activist Joseph Wendt believed 2024 could transform American politics. And Robert F. Kennedy Jr. might be the candidate to do it.

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"It seemed this was the Year of the Third Party," said Wendt, the former chair of Florida's Reform Party affiliate. "This would be the year where we would be able to make an impact."

So Wendt started the process of reconstituting the long-defunct Natural Law Party of the United States with the Federal Election Commission and he resurrected its Florida branch. He planned to hold a convention and nominate Kennedy for president so that RFK could appear on the Florida ballot as the Natural Law Party candidate. Kennedy's campaign loved the idea. And the two sides started talking money. Wendt signed a $10,000-a-month consulting contract with Kennedy's campaign on February 24.

"I was over the moon," Wendt said. "We could get him on the ballot. It might have an impact. But it turned into a nightmare."

Bureaucratic delays and mistakes turned into mistrust. A bitter rift grew. Wendt was ultimately paid nothing. And he lost control of the Natural Law Party of the United States, which was taken over by Kennedy allies.

Now Wendt, a 39-year-old Lyft driver, wants the national Natural Law Party back in his control. He calls the Kennedy campaign unethical "swindlers." Kennedy campaign officials fired back, accusing Wendt of illegally "hijacking" the national party and trying to "blackmail" the campaign, and suggesting to him that his actions amounted to "extortion."

Both sides deny wrongdoing. But a close look at the record of the dispute provides a window into the obstacles third-party candidates face and shines a light on the Kennedy campaign's aggressive efforts to get on the ballot. RFK's campaign has tapped a constellation of third-party groups in various states, all of which have different rules.

Why? Because states generally provide presidential candidates ballot access if they're nominated by a verified political party, regardless of its size. Otherwise, campaigns usually have to rely on paid petition-gatherers, which, according to

experts familiar with the process, can cost as much as $1.7 million in a state like Florida.

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KENNEDY'S CAMPAIGN AT FIRST TRIED to form its own "We the People Party" so it wouldn't have to rely on other groups for ballot access, but ultimately it sought existing third-party nominations in states such as California, where he was nominated by the American Independent Party. (This party was founded in 1968 to help the presidential campaign of Alabama's segregationist governor, George Wallace.) The Natural Law Party was established in 1992 in the United States on a platform centered on transcendental meditation and holistic health. It ceased both federal and Florida operations in 2005, and by 2024 most of its original officers had died or lost interest in it.

Along with the Reform Party, the Natural Law Party was one of two relatively easy ballot-access vehicles for Kennedy in Florida. As relations soured with Wendt, the Kennedy campaign instead got the Reform Party to nominate him on May 23. (The revivified Reform Party has yet to be certified by Florida's Elections Division.)

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At the heart of the dispute between Wendt and the Kennedy campaign is the consulting contract he signed. The contract is complicated: It was drafted by Kennedy's team, but his campaign is not a party to it. Instead, it's a written agreement between Wendt and the national Natural Law Party—which he controlled at the time of the signing. The contract only became effective if Wendt gave up control of the national and Florida branches of the party to Kennedy campaign allies. Wendt was then to be paid with donor money secured by the campaign, text messages show.

Read the Contract Discussed in This Article
106KB · PDF file

Download

The "consultant agreement" between Joseph Wendt and the Natural Law Party of the United States that was drafted by Robert Kennedy's campaign.

Download

Wendt relinquished control of the national party quickly, by March 4 (nine days after the contract was presented to him). But he balked at handing over state-party control amid friction with the Kennedy campaign's ballot-access director, Nick Brana, who did not return calls and emails seeking comment for this article.

Kennedy campaign lawyer Paul Rossi refused to comment on why the campaign disguised its involvement with the contract as it negotiated with Wendt to gain control of the party for ballot access. Before abruptly hanging up the phone in an interview with *The Bulwark*, Rossi counteraccused Wendt of secretly going behind the Kennedy campaign's back to reconstitute the national version of the Natural Law Party after he learned that Kennedy allies wanted to use it as a ballot-access pathway.

Rossi, a veteran third-party election-law attorney with a tough-talking reputation that matches his Philly accent, said the Natural Law Party of Michigan, the only

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branch of the party to be continuously active for decades, should have had a say in the reconstitution of the party at the national level. But Wendt didn't consult them.

"He can complain all the frick he wants," Rossi said. "What he did was illegal, and, frankly, he ought to be prosecuted for his conduct. And that's all I'm gonna say about this. He filed a document with the FEC claiming he was secretary of the Natural Law Party without anybody providing it because he saw an avenue to hijack a national political party for his own economic gain, and was blackmailing people across the country in order to pay him money. . . . He was holding it hostage to the highest bidder. And so we got him out of there. And we're very proud of protecting our Michigan supporters in this regard."

Third-party politics tends to attract idealists and some seasoned pros—but there are also niche-issue activists who can make the movement resemble an island of misfit toys populated with minor-league talent.

Wendt and two other activists involved in the discussions over the Florida party say the RFK campaign had never accused Wendt of wrongdoing until now. As evidence, Wendt shared months' worth of text messages with Brana—including group messages involving Brana, Rossi, and Wendt—and none reflect the claims that Kennedy's campaign is voicing now that Wendt was breaking the law or acting inappropriately in not involving the Michigan party branch.

For its part, the Natural Law Party of Michigan formally nominated Kennedy on April 17 at a two-person convention. One of the people present was the state party's leader, Doug Dern. Dern is a veteran third-party activist and also a bankruptcy attorney, stage magician, and former candidate for various state offices. It was to Dern and an attorney named Michael Baum that Wendt was supposed to hand over control of the Natural Law Party of the United States, according to the

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contract Wendt signed. Dern is now listed with the FEC as the party's custodian of record and Baum its treasurer. Neither returned calls seeking comment.

IN INTERVIEWS WITH *THE BULWARK*, four independent election law attorneys who reviewed the contract were divided over the degree to which it violated various campaign-finance laws designed for transparency. Kenneth Gross, former associate general counsel of the Federal Election Commission, called the contract "strange" and "cockamamie" but probably not illegal.

"It's just confusing," Gross said. "It's like a Rubik's Cube that broke apart."

Asked why the Kennedy campaign, and not the Michigan branch of the Natural Law Party, drafted the contract, Rossi said "they weren't in position to do that. We were in a position to try to work with Joe to see if we could get him out of there."

Why did the Kennedy campaign disguise its involvement in drafting the agreement?

"You don't have to understand it," Rossi replied. "He hijacked a national political party. If you want to sanction that what he did was okay, you go ahead and write that story."

STUCK IN THE MIDDLE OF THE CONFLICT was Darcy Richardson, who has been involved in third-party politics since 1978. In 2018, he ran for governor of Florida on a Reform Party ticket, and in 2020 he was the vice-presidential nominee of the Reform Party, the Alliance Party, and a few other parties in a handful of states. Wendt had worked to elect him in both campaigns. Richardson and the nation's top expert on presidential ballot access, Richard Winger of California, told *The Bulwark* they were the ones who came up with the idea of reconstituting the Natural Law Party—not Wendt and not the Kennedy campaign. Richardson then recruited Wendt for the task and put him in contact with the Kennedy campaign.

After 48 years of being a "die-hard third-party guy," Richardson said, "I think I'm going to vote for Biden."

"This has been a very unrewarding experience for Joe. I think he deserved better. I feel guilty because I recruited him . . . they should have put him on the payroll," Richardson said. Like Wendt, Richardson said, "I've soured on the Kennedy campaign. . . . I haven't been impressed by his campaign or the people he surrounded himself with. His whole campaign staff is made up of neophytes who don't know the first thing about politics, the mechanics of how it works, what it takes."

Because there's less money and less power in it, third-party politics tends to attract idealists and some seasoned pros like Richardson, but there are also niche-issue activists (think Kennedy's anti-vaxx cred) who can make the movement resemble an island of misfit toys populated with minor-league talent.

After 48 years of being a "die-hard third-party guy," Richardson said, "I think I'm going to vote for Biden."

Richardson said Wendt didn't operate in bad faith, but he did improperly file paperwork in Florida to reconstitute the Natural Law Party. That's what led the state Elections Division to reject the formation of the party, twice.

Richardson faults Wendt for not clearly communicating with the Kennedy campaign's Brana and getting into a hostile relationship with him, but he also said the contract that the Kennedy campaign drafted was "kind of shady" and "suspicious." The other two election-law experts I spoke with, a Democratic lawyer and a Republican lawyer, neither involved in the presidential race, also labeled the contract "shady."

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WENDT, WHO'S REPUBLICAN-LEANING, and Brana, a progressive, clashed on their first call on January 19.

"My concerns are what Kennedy will do for the Natural Law Party. I didn't hear anything in our last conversation about what Kennedy or his 'cause' will do to make the situation better for America," Wendt said in a text message to Brana memorializing the conversation. "To me, it seems like you want to take over the Party and you view it as disposable. That leaves a nasty taste in my mouth, you want to use and dispose of my work and efforts. I don't know of anyone who tried to do what I did."

According to Wendt's text message, Brana also "insinuated" that Wendt was engaging in "extortion" over the party, a suggestion Wendt labeled "uncalled for. To me, that seems untrustworthy and if we can't come to a reasonable agreement, then no hard feelings, we will just run our own candidate. If the Kennedy campaign is serious about using the Natural Law Party in Florida, I'd prefer to work with someone else within the campaign's leadership."

But the two kept working together and, on January 31, Brana texted Wendt and Richardson to set up a conference call, noting "I shared our last conversation with Bobby [Kennedy]." The three talked about Florida ballot access via the Natural Law Party and discussed getting Kennedy on the ballot in Oregon, text messages show.

Type your email... Join

On February 15, Wendt sent a text message to Brana to let him know that the Florida Elections Division rejected the filing to reconstitute the Natural Law Party in the state due to a host of omissions. Brana then asked Wendt via text to refile for the party, but wanted Wendt to list Kennedy's cousin, Anthony Shriver, as the state party chair. The vice chair was to be Becky Hines, a University of Central Florida special education professor who is the sister of Kennedy's wife, *Curb Your Enthusiasm* actress Cheryl Hines, a Tallahassee native. Former Miami Beach City Commissioner Ricky Arriola was to be listed as the secretary/treasurer.

Wendt ultimately didn't list their names because, he said, Brana didn't send him the three Floridians' voter registration forms he wanted to submit with the new filing.

Still, talks progressed and on February 24, Brana, Wendt and Richardson had a "Contract Review" conference call. At 9:09 p.m., Brana emailed the contract, labeled "Consultant Agreement," to Wendt, who soon signed it. The contract, between Wendt and the national Natural Law Party, did not mention Kennedy or his campaign and said nothing about ballot access, instead requiring Wendt to help with a host of consulting services such as "convention and event organizing" and "political research." It was to take effect when the FEC website listed Dern and Baum, instead of Wendt, as "the sole officers and directors" of the national Natural Law Party.

OVER THE NEXT TWO MONTHS, Brana kept checking back in about the status of the state party's formation. Wendt kept telling him it was stuck in the Elections Division. Brana offered to send a lawyer to Tallahassee to sort out the mess and continued to ping Wendt asking about progress. Wendt got annoyed at one point when he read that Kennedy was courting the Libertarian Party, but Brana texted back to say "that's not accurate."

On April 10, Brana texted Wendt to tell him he learned the Natural Law Party had been rejected by the state a second time. Brana asked for the rejection letter. Wendt didn't reply. Four days later, Brana asked again for the letter and then followed up with an April 23 text and call.

Wendt didn't respond.

Wendt told *The Bulwark* that he had come to believe Brana was operating in bad faith because he heard the campaign was talking to the Reform Party about ballot access, and that party had started a petition drive.

On April 29, Brana group-texted Wendt along with Rossi and also sent an email saying that they "need to know by tomorrow at 1 pm ET at the latest if the Natural Law Party of Florida is a viable option. Per our agreement, you were supposed to complete the filing expeditiously. As a result of months of delays and two defective and failed filings, with the same error, Paul and the rest of our campaign leadership have written it off. I'm asking them to give you one more chance."

"If you meet a member of our team in Tallahassee on Wednesday morning and withdraw the filing with them in person at the Elections Division, clearing the way for us to submit it on site once you withdraw yours, I will attempt to arrange for a donor of ours, whom I know, to pay you the $30,000 you would have received for one month of consulting, including the sign on bonus and severance fee," Brana wrote.

Wendt didn't immediately reply and waited until the following morning to respond by text message: "Good news: Florida Natural Law Party is certified. Bad news: your message is considered termination of our agreement. To discuss further, you may let me know, unless you guys still think I'm incompetent. If you don't wish to discuss, please notify me when you wish to transfer the Natural Law Party of the United States back to me and my associates."

Brana responded that the Elections Division website wasn't showing the party as certified. He asked for a copy of the letter. Wendt told him it was in the mail and said that Brana could call the state to verify his claim.

"It's been too long, Joe, and we didn't hear from you for weeks. The team found other partners to save on ballot access that they would rather work with," Brana responded. He said Rossi believed the Natural Law Party could be challenged in court "and we could end up knocked off the ballot. It's not as secure as other ballot lines."

Brana didn't elaborate. In interviews with *The Bulwark*, neither Richardson nor Winger said they believed Kennedy would have a ballot-access problem in Florida if he had been nominated by the Natural Law Party.

BRANA DID, HOWEVER, OFFER AN OLIVE BRANCH: "Personally, I think it would be useful to have a back up though, and the donor I know already wrote a check for $30K. Let me know tonight if you still want it. If you do, we need to transition the officers tomorrow."

Wendt wouldn't take the money. He repeated that he wanted control of the national party returned to him. He said the contract was void and that he would be in contact with a lawyer. He said that the campaign owed him more than $30,000—that in fact, it should pay him $800,000. The contract, he said, was "voided, due to you attempting ballot access through other mean[s]."

Brana pointed out that there was no contractual clause prohibiting the campaign from seeking ballot access elsewhere.

"It wouldn't have even been necessary to seek ballot access in other ways in the first place if your mistakes in the application hadn't delayed its acceptance twice," Brana replied.

"That's it, return the FEC LOGIN," Wendt wrote back, "We are done."

Brana didn't.

On May 13, Wendt checked back in.

"Do you want to make a deal?" he texted Brana.

No reply.

Ten days later, the Reform Party announced Kennedy was their nominee for Florida's ballot.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 3

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Affidavit of Identity and Receipt of Filing

All information must be completed unless otherwise noted. Missing or incorrect information may result in disqualification. Judicial candidates should use a combined judicial affidavit of identity/qualification form rather than this form.

SECTION 1 Candidate information

First name	Middle name	Last name
Cornel	Ronald	West

Year of birth: 1953

☐ My name has formally changed in the last 10 years for a reason other than marriage or divorce. My former name is: _____

Residential address	City	ZIP
17242 Citron	Irvine, CA	92612
Mailing address, if different than above	City	ZIP

Phone number: [redacted]

Email: [redacted]

Campaign website, if applicable: www.cornelwest2024.com

SECTION 2 Office & ballot information

Office name	Jurisdiction	District/Ward
President of the United States	Statewide/National	

Select one

- ☐ I am running for a partisan office, and my political party is: _____
- ☐ I am running for a nonpartisan office without party affiliation (*judicial office: see note above*)
- ☑ I am running for a partisan office without party affiliation.

☐ Primary election _____ DATE (MM/DD/YYYY) ☑ General election 11/05/2024 DATE (MM/DD/YYYY)

Term of office ***(select one)***: ☑ Regular term ☐ Partial term expiring: _____ DATE (MM/DD/YYYY) ☐ Recall

Indicate exactly how you want your name to be printed on the ballot **(use upper and lowercase letters)**:
Cornel West

Filing method (*Select one*):

- ☑ Petitions ☐ Return to me in January ☑ Destroy in January
- ☐ $100 filing fee (*if applicable*)
- ☐ Certification of party nomination and certificate of acceptance (*if applicable*)

SECTION 3 Certification & acknowledgment

☐ I previously ran in Michigan for office that required filing reports under the Michigan Campaign Finance Act. I ran in the following counties _____

By signing, I certify that:

- At this date, all statements, reports, late filing fees, and fines required of me or any candidate committee organized to support my election under the Michigan Campaign Finance Act have been filed or paid; and
- I am a United States citizen and meet the statutory and constitutional requirements for the office sought; and
- I acknowledge that making a false statement in this affidavit is perjury - a felony punishable by a fine up to $1,000 or imprisonment for up to five years or both and may result in disqualification from the ballot.

Candidate signature _____ Date 04/13/2024

Notary signature	Notary name
Dana L Manning	Dana L. Mannings
~~County of commission~~ State of Colorado	Acting in the County of Boulder
My commission expires DATE (MM/DD/YYYY) 03/01/2028	Date of notarization (MM/DD/YYYY) 04/13/2024

Office use only

Date of filing (MM/DD/YYYY)	Received by DATE (MM/DD/YYYY)	Reviewed by	Check number
06/17/2024	DS		
Number of petition sheets: Approx 3457	27049 SIG	Campaign Finance Number	

Obtained by Judicial Watch, Inc. v. Michigan FOIA

DANA L. MANNING
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20244008951
MY COMMISSION EXPIRES MARCH 1, 2028

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 4

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Affidavit of Identity and Receipt of Filing

All information must be completed unless otherwise noted. Missing or incorrect information may result in disqualification. Judicial candidates should use a combined judicial affidavit of identity/qualification form rather than this form.

SECTION 1 Candidate information

First name	Middle name	Last name
Melina		Abdullah

Year of birth: 1972

☐ My name has formally changed in the last 10 years for a reason other than marriage or divorce. My former name is: _____

Residential address	City	ZIP
2108 Wellington Rd	Los Angeles, CA	92612
Mailing address, if different than above	City	ZIP

Phone number	Email	Campaign website, if applicable
6469418502	team@cornelwest2024.com	www.cornelwest2024.com

SECTION 2 Office & ballot information

Office name	Jurisdiction	District/Ward
Vice-President of the United States	Statewide/National	

Select one:

- ☐ I am running for a partisan office, and my political party is: _____
- ☐ I am running for a nonpartisan office without party affiliation (*judicial office: see note above*)
- ☑ I am running for a partisan office without party affiliation.

☐ Primary election _____ DATE (MM/DD/YYYY) ☑ General election 11/05/2024 DATE (MM/DD/YYYY)

Term of office ***(select one)***: ☑ Regular term ☐ Partial term expiring: _____ DATE (MM/DD/YYYY) ☐ Recall

Indicate exactly how you want your name to be printed on the ballot **(use upper and lowercase letters)**:
Cornel West

Filing method (*Select one*):

- ☑ Petitions ☐ Return to me in January ☑ Destroy in January
- ☐ $100 filing fee (*if applicable*)
- ☐ Certification of party nomination and certificate of acceptance (*if applicable*)

SECTION 3 Certification & acknowledgment

☐ I previously ran in Michigan for office that required filing reports under the Michigan Campaign Finance Act. I ran in the following counties _____

By signing, I certify that:

- At this date, all statements, reports, late filing fees, and fines required of me or any candidate committee organized to support my election under the Michigan Campaign Finance Act have been filed or paid; and
- I am a United States citizen and meet the statutory and constitutional requirements for the office sought; and
- I acknowledge that making a false statement in this affidavit is perjury - a felony punishable by a fine up to $1,000 or imprisonment for up to five years or both and may result in disqualification from the ballot.

Candidate signature _____ Date 4-29-24

Notary signature	Notary name: Julien Rickard
County of commission	Acting in the County of: See attached
My commission expires DATE (MM/DD/YYYY)	Date of notarization (MM/DD/YYYY)

Office use only

Date of filing (MM/DD/YYYY) 04/17/2024	Received by DATE (MM/DD/YYYY) DS	Reviewed by	Check number
Number of petition sheets		Campaign Finance Number	

Obtained by Judicial Watch, Inc. v. Michigan FOIA

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 29 day of April 2024, by Melina Abdullah, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

JULIEN RICKARD
COMM. #2336045
Notary Public · California
Los Angeles County
My Comm. Expires Oct. 20, 2024

(Seal)

Signature

Obtained by Judicial Watch, Inc. v. Michigan FOIA

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Los Angeles)

On April 29 2024 before me, Julien Rickard , notary public
(insert name and title of the officer)

personally appeared Melina Abdullah,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

JULIEN RICKARD
COMM. #2336045
Notary Public · California
Los Angeles County
My Comm. Expires Oct. 20, 2024

Signature _____ (Seal)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

EXHIBIT 5

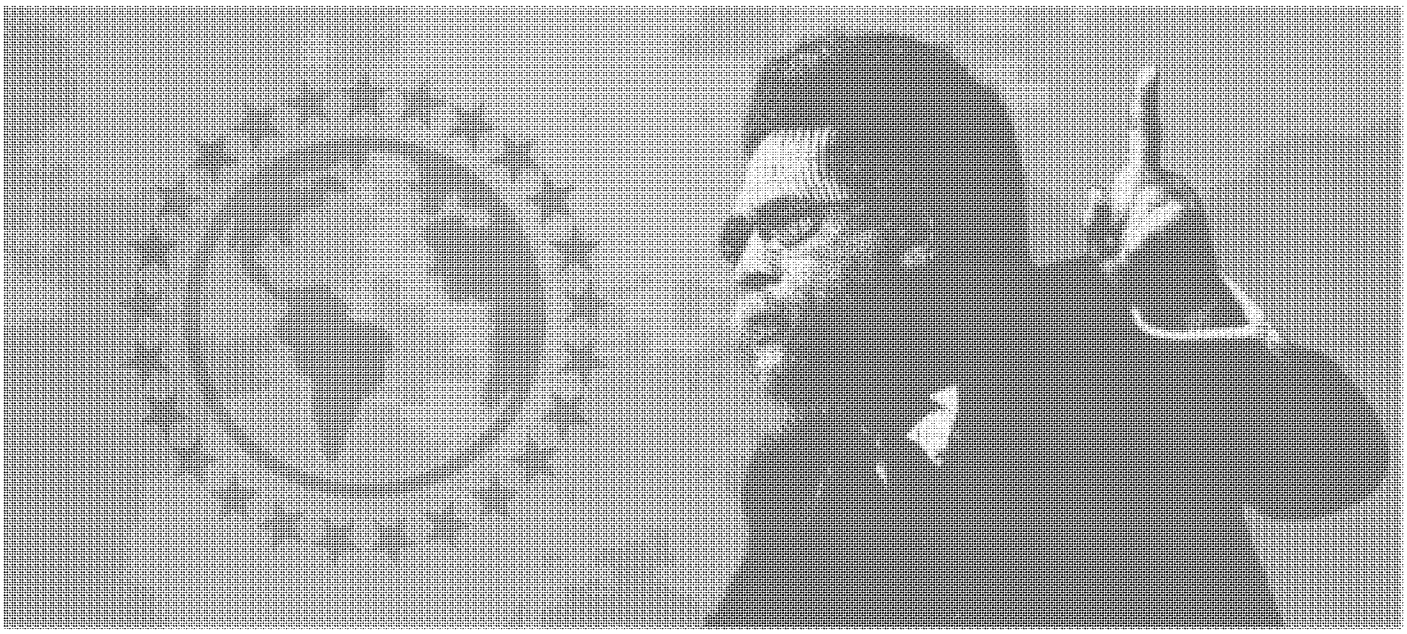
Obtained by Judicial Watch, Inc. v. Michigan FOIA

Independent Political Report

August 11, 2024

Natural Law Party of the United States Endorses 2024 Presidential Ticket of Cornel West and Melina Abdullah

BY JORDAN WILLOW EVANS ON JULY 22, 2024 10:34 AM



The Natural Law Party of the United States voted on Sunday to endorse the presidential ticket of Dr. Cornel West and Dr. Melina Abdullah. The party also called on the West campaign to establish a national Justice For All Party organization following the election.

According to information shared with Independent Political Report by the Natural Law Party of the United States, the party met virtually to host its national convention. As part of its convention, it voted to formally endorse the West campaign for the 2024 presidential election. It also reportedly adopted a resolution for the future that would see those groups affiliated with the Natural Law Party of the United States formally partner with West's Justice For All Parties and adopt the Justice For All name.

ADVERTISING

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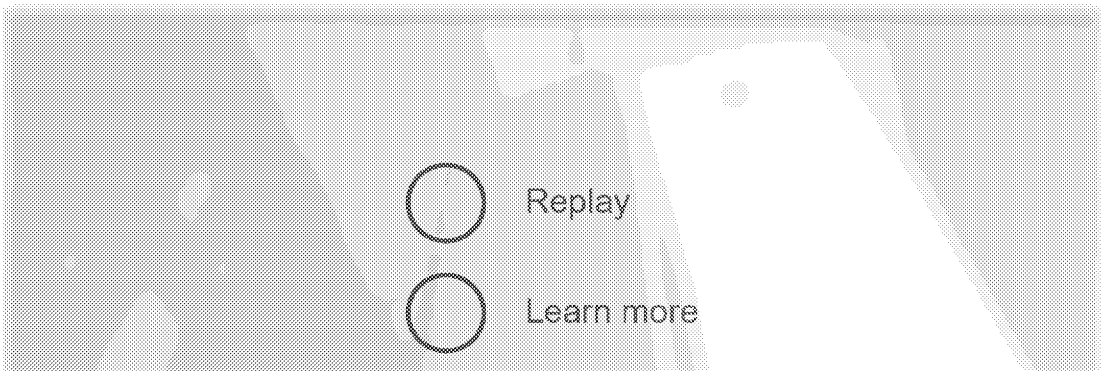

It's worth noting for clarity that the Natural Law Party of the United States is not associated with the Natural Law Party of Michigan, which already voted earlier this year to endorse the Robert F. Kennedy Jr. presidential campaign. According to FEC quarterly filings, the Natural Law Party of the United States is a national political committee headquartered in Florida, where it is also a recognized minor party. It also has an affiliate in Mississippi.

Furthermore, the resolution calls for the creation of a national Justice For All organization following the end of the election cycle. It also invites individual state chapters of the Justice For All Party, as well as the Progressive Party of Oregon and the Aurora Party of Alaska, which voted to endorse the West campaign earlier this year, to participate in the proposed national organization.

To facilitate this transition, the resolution states that the Natural Law Party of the United States chair is directed to form a committee after November, with the intent of bringing together representatives from those interested state parties to develop a common plan for the new national party's constitution, bylaws, and legal structure.

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Resolution re: Vision for the Future

WHEREAS the Natural Law Party of the United States (NLP-US) is nominating Dr. Cornel West and Dr. Melina Abdullah as President and Vice President, respectively, of the United States; and

WHEREAS this represents a historic moment in the life of this Party, a fitting time to articulate our Party's vision for the future;

THEREFORE BE IT RESOLVED:

1. That the NLP-US envisions becoming a leading part of the Justice For All (JFA) organization presently organizing nationwide, with the NLP state organizations associated with NLP-US joining the National Party in re-naming themselves as Justice For All parties in their respective states;

2. That the NLP-US invites the state chapters of JFA to join with NLP-US in establishing a national JFA organization after the election;

3. That the NLP-US calls upon its West-Abdullah presidential ticket to encourage the affiliation of state chapters of JFA to join with NLP-US in establishing a national JFA organization after the election;

4. That the NLP-US invites all other political parties that also support the West-Abdullah campaign, including the Aurora Party of Alaska, the Progressive Party of Oregon, the United Citizens Party of South Carolina, the Unity Party of Colorado, the Legal Marijuana Now National Party and its state affiliates, the Green Mountain Peace and Justice Party of Vermont, and any others to join with NLP-US in establishing a national JFA organization after the election;

5. That the NLP-US also calls upon its West-Abdullah presidential ticket to invite and encourage these other parties to join with NLP-US in establishing a national JFA organization after the election and, ;

6. That the NLP-US furthermore recommends to the parties establishing a national JFA organization that the NLP-US's Chair has demonstrated experience in party leadership and a vision for the future of NLP-US as a core part of a new national JFA organization, and in light of the value of NLP-US's contribution to a national JFA organization effort, we call upon the leadership of that future JFA organization to ensure that our leaders and representatives are given appropriate consideration in the choices of that organization's leadership and executive staff;

7. That the NLP-US directs its Chair to establish a committee after the election to include invited representatives of all state parties interested in associating together in a new national JFA organization, in order that the parties may confer together and develop a common plan for the establishment of the new national party organization, including the national party's constitution and bylaws and its legal structure.

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EXHIBIT 6

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ROWAN E. CONYBEARE
DAVID E. GORNEY

**ALSO ADMITTED IN FL
***ALSO ADMITTED IN NY

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July 23, 2024

Secretary of State Jocelyn Benson
Department of State
430 W. Allegan Street
Lansing, MI 48915

Re: Affidavits of Identity of Cornel West and Melina Abdullah

Dear Secretary Benson,

On behalf of Michigan voter Rosa Holliday, I write to object to the Affidavits of Identity ("AOI") of Cornel West ("West") and Melina Abdullah ("Abdullah") as defective. Therefore, they cannot be placed on the ballot as independent candidates for President and Vice-President.

ARGUMENT

I. CANDIDATES MUST BE DISQUALIFIED FROM THE BALLOT FOR FAILURE TO STRICTLY COMPLY WITH THE AFFIDAVIT OF IDENTITY REQUIREMENTS.

A candidate who fails to comply with all of the AOI requirements of MCL 168.558, or who executes an AOI that "contains a false statement with regard to *any* information or statement required" on the AOI, cannot be certified for the ballot. MCL 168.558(4) (emphasis added). Under Michigan law, there must be strict compliance with all of the AOI requirements mandated by MCL 168.558. *See, e g, Stand Up For Democracy v Secretary of State*, 492 Mich 588, 594, 600–608, 619; 822 NW2d 159 (2012); *Nykoriak v Napoleon*, 334 Mich App 370, 379; 964 NW2d 895 (2020) (*per curiam*); *Stumbo v Roe*, 332 Mich App 479, 481; 957 NW2d 830 (2020). As held in *Stumbo*,

> The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot.

Id.

II. WEST AND ABDULLAH'S AOI'S FALSELY STATE THAT THEY ARE CANDIDATES "WITHOUT POLITICAL PARTY AFFILIATION."

The AOI's signed by both West and Abdullah claim that they are "running for a partisan

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office without party affiliation" and that they "meet the statutory . . . requirements for the office sought."

These statements are false and disqualify both of them from the ballot.

Chapter XXIVA of the Election Law, MCL 168.590 to MCL 168.590h, governs efforts by persons such as West and Abdullah to be on the ballot "without political party affiliation." Such candidates are labeled NPA or independent candidates. However, persons who have sought the same office as the candidate of a political party during the same calendar year are prohibited from using the procedures of Chapter XXIVA to obtain ballot access as independent candidates in Michigan:

> A person who files a partisan nominating petition or filing fee as a candidate of a political party, or who is nominated a by a political party convention, committee, or caucus and accepts the nomination, shall not file a qualifying petition under chapter XXIVA for an office to be elected at that election or at an election held during the same calendar year.

MCL 168.692a. West and Abdullah must comply with this statute in order to be Michigan candidates "without political party affiliation" and they have not.

In determining the meaning of the prohibition in MCL 168.692a, the

> "primary task in construing a statute, is to discern and give effect to the intent of the Legislature." The words of the statute are the most reliable evidence of the Legislature's intent and we must give each word its plain and ordinary meaning. "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'"

Stand Up, 492 Mich at 598 (footnotes omitted). There must be strict compliance with the Michigan Election Law. *Id* at 602. Importantly, the strict compliance doctrine does not allow anyone—the Department of State or a court—to change the requirements of the Michigan Election Law. *See Stumbo*, 332 Mich App at 482 n 2.

Based on its text, MCL 168.692a is broad in scope. It is not restricted to being the candidate of a political party *in Michigan*. The Legislature could easily have restricted its scope to candidates of "Michigan" political parties, or to a "Michigan" convention, committee, or caucus nomination but it did not. Such a restriction cannot be added to the text or read into it. *See, e g, Stumbo*, 332 Mich App at 482 n 2.

The lack of restriction to nomination by Michigan political parties in MCL 168.692a particularly makes sense in the context of presidential elections, which are national in scope and

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involve candidates from outside of Michigan. Unless the restrictions in MCL 168.692a are applied to party nominations in other states, a candidate could mislead or deceive Michigan voters by claiming to be an NPA or independent presidential candidate, yet be a partisan presidential candidate in every other state. Michigan has an "important state interest" in "avoiding confusion [and] deception . . . at the general election," *Jenness v Fortson*, 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971), and MCL 168.692a advances that interest by requiring independent presidential candidates to be independent of political parties not only in Michigan but throughout the country.

West and Abdullah cannot be NPA or independent candidates in Michigan because they have been nominated for President and Vice-President in several states by political parties:

- Alaska: Aurora Party[1]
- Colorado: Unity Party of Colorado[2]
- Florida: Florida Natural Law Party[3]
- Mississippi: Mississippi Natural Law Party[4]
- Nebraska: Legal Marijuana Now Party[5]
- Oregon: Oregon Progressive Party[6]
- South Carolina: United Citizens Party[7]
- Vermont: Green Mountain Peace and Justice Party[8]

Because they are the nominees of political parties in other states, MCL 168.692a prohibits West and Abdullah from appearing on the Michigan ballot as NPA or independent candidates for President and Vice-President.

---

[1] Downing, *Cornel West, Independent Candidate, Says He Will Be On Alaska Ballot for President in 2024*, Must Read Alaska (December 14, 2023), https://mustreadalaska.com/cornel-west-independent-candidate-says-he-will-be-on-alaska-ballot-for-president-in-2024/.

[2] Willow Evans, *Unity Party of Colorado Nominates Cornel West and Melina Abdullah as 2024 Presidential Ticket*, Independent Political Report (April 15, 2024), https://independentpoliticalreport.com/2024/04/unity-party-of-colorado-nominates-cornel-west-and-melina-abdullah-as-2024-presidential-ticket/.

[3] Winger, *Natural Law Parties of Two States Nominate Cornel West for President*, Ballot Access News (July 22, 2024), https://ballot-access.org/2024/07/22/natural-law-party-nominates-cornel-west-for-president/.

[4] *Id.*

[5] Winger, *Legal Marijuana Now Party of Nebraska Nominates Cornel West for President*, Ballot Access News (July 7, 2024), https://ballot-access.org/2024/07/07/legal-marijuana-now-party-of-nebraska-nominates-cornel-west-for-president/.

[6] VanderHart, *Cornel West, Independent Presidential Candidate, Likely to Make Oregon Ballot*, Oregon Public Broadcasting (January 25, 2024), https://www.opb.org/article/2024/01/25/cornel-west-oregon-ballot-progressive-party/.

[7] Willow Evans, *Independent Presidential Candidate Cornel West Secures South Carolina Ballot Access with United Citizens Party Support*, Independent Political Report (February 28, 2024), https://independentpoliticalreport.com/2024/02/independent-presidential-candidate-cornel-west-secures-south-carolina-ballot-access-with-united-citizens-party-support/.

[8] Winger, *Green Mountain Peace and Justice Party Forwards Cornel West Nomination to Secretary of State of Vermont*, Ballot Access News (June 24, 2024), https://ballot-access.org/2024/06/24/green-mountain-peace-and-justice-party-forwards-cornel-west-nomination-to-secretary-of-state-of-vermont/.

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III. WEST AND ABDULLAH'S AOI'S ARE DEFECTIVE.

A. The West AOI Was Incorrectly Notarized.

MCL 168.558, which requires an AOI to be filed with the petition of a candidate seeking to be placed on the ballot as an NPA or independent candidate, "requires notarization, as defined by the Michigan Law on Notarial Acts, MCL 55.261 *et seq*." *Nykoriak*, 334 Mich App at 377. That act permits notarial acts to be performed in other states only if they meet certain conditions:

> (1) All of the following apply with regard to a notarial act that is performed in another state:
>
> (a) A notarial act performed in another state has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed in that state is performed by any of the following individuals:
>
> (i) A notary public who is authorized to perform notarial acts in the state in which the act is performed.
>
> (ii) A judge, clerk, or deputy clerk of any court of record in the state in which the notarial act is performed.
>
> (iii) Any other individual who is authorized to perform notarial acts in the state in which the act is performed.
>
> (b) The signature and title of an individual described in subdivision (a)(i) to (iii) who performs a notarial act in another state are prima facie evidence that the signature is genuine and that the individual holds the designated title.
>
> (c) The signature and title of an individual described in subdivision (a)(i) or (ii) who performs a notarial act in another state conclusively establish the authority of the individual to perform the notarial act.

MCL 55.285a(1).

The West AOI was notarized in Colorado. However, that notarization was not a proper "notarial act" under the law of Colorado, thus rendering the notarization invalid, the affidavit defective, and West ineligible to be placed on the Michigan ballot.

The Colorado notarization of West's AOI failed to comply with Colorado law, so it was not a valid "notarial act" recognized under MCL 55.285a(1). Colorado's Revised Uniform Law on Notarial Acts ("RULONA") requires the following:

> Under RULONA (C.R.S. 24-21-515 and 24-51-516) the [notarial] certificate must:
>
> - Be signed by the notary

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  - The notary's signature must match the official signature on file with the Secretary of State
  - Be signed at the same time that the performance of the notarial act takes place
- Be dated by the notary
  - A notary should never pre or post-date a notarization
- Identify the county in which the notarial act is performed
- Identify the state in which the notarial act is performed
- Contain the title of the office of the notary
- Be stamped by the notary

> *A notarial certificate should also indicate that the notary certifies that s/he complied with the law and made the determinations required by the law for the type of notarial act s/he is completing.*
>
> *In other words, the notary should indicate whether s/he is completing an oath, affirmation, acknowledgement, signature witness, or copy certification. This can be a very brief description—for example, "Subscribed and sworn to before me," or a more detailed one—for example, the copy certification form, or one of the longer acknowledgements.*

Colorado Secretary of State, *Notary Handbook* (April 24, 2024), pp 18–19 (emphasis added).

The Colorado notarization of West's AOI failed to comply with the highlighted requirements of Colorado notary law. Nowhere did the Colorado notary "certify that she complied with the law and made determinations required by the law." *Id.* She did not include a copy certification form, or even the phrase "subscribed and sworn to before me."

Because the Colorado notarization failed to comply with Colorado law, it is not a valid "notarial act" recognized in Michigan by MCL 55.285a(1). West's AOI notarization thus fails, making the AOI defective and him ineligible to appear on the Michigan ballot.

B. Abdullah's AOI Fails to Provide Required Information.

One of the pieces of information an AOI must provide is "the manner in which the candidate wishes to have his or her name appear on the ballot." MCL 168.558(2). Making a false statement anywhere on the AOI is cause for disqualification, as the candidate's certification states. The instructions advise that providing "incorrect information may result in disqualification."

On her AOI, Abdullah indicated that she wants to be listed as "Cornel West" on the ballot. That information is incorrect and false, rendering the AOI defective and Abdullah ineligible for the ballot.

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CONCLUSION AND RELIEF SOUGHT

For the reasons stated, West and Abdullah are ineligible to be NPA or independent candidates under MCL 168.692a, and their AOI's are defective, also rendering them ineligible to be placed on the ballot.

Sincerely,

Mark Brewer

Mark Brewer

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 10/26/2024 3:45:43 PM
To: Christine Sun [christine@statesuniteddemocracy.org]; Haidar, Danny (AG) [HaidarD1@michigan.gov]
CC: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
Subject: RE: Following up, template

That's great, no worries.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Christine Sun <christine@statesuniteddemocracy.org>
Sent: Friday, October 25, 2024 7:59 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Haidar, Danny (AG) <HaidarD1@michigan.gov>
Cc: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: Re: Following up, template

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Hi Heather, Danny, and Linus,

DPP MCL 15.243(1)(m)

Thanks and have a good weekend,

Christine

Christine P. Sun (she/her) | Senior Vice President, Legal
States United Democracy Center
415.828.5719 | @statesunited
christine@statesuniteddemocracy.org

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 22, 2024 at 12:12 PM
To: Haidar, Danny (AG) <HaidarD1@michigan.gov>, Christine Sun <christine@statesuniteddemocracy.org>

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Cc: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: RE: Following up, template

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Haidar, Danny (AG) <HaidarD1@michigan.gov>
Sent: Tuesday, October 22, 2024 2:56 PM
To: christine@statesuniteddemocracy.org
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: Following up, template

Dear Christine,

DPP MCL 15.243(1)(m)

If there is anything else we can do, please don't hesitate to let us know.

Best,
Danny Haidar

Danny Haidar
Civil Rights & Elections Division, Lansing Office
Michigan Department of Attorney General

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 9/14/2023 4:14:55 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: RE: Quick chat this afternoon?

Perfect 517 335 0741 or PII MCL 15.243(1)(a) cell (the first number is my direct dial but it goes to my cell anyway)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 14, 2023 12:05 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Quick chat this afternoon?

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I will call you at 130. Thanks!

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Thursday, September 14, 2023 12:02:58 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Quick chat this afternoon?

I think I am free around 1:30 maybe earlier, but then I have to go at 2:15.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 14, 2023 11:59 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Quick chat this afternoon?

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Hi Heather. Is there a good time for me to call you for a few minutes this afternoon to discuss a couple issues? Thanks.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 12/18/2024 3:36:58 PM
To: Amanda Carberry [amanda@statesuniteddemocracy.org]; Brady, Mike (MDOS) [BradyM@michigan.gov]; Teegardin, Rachel [TeegardinR1@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Grace, Stephanie (AG) [GraceS@michigan.gov]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: RE: Restarting Bi-weekly Democracy Check-in Calls

I do not presently have any standing afternoon meetings, so I am flexible.

Thanks,
Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Amanda Carberry <amanda@statesuniteddemocracy.org>
Sent: Wednesday, December 18, 2024 10:14 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Teegardin, Rachel <TeegardinR1@michigan.gov>; Teszlewicz, Barbara (AG) <teszlewiczb@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Re: Restarting Bi-weekly Democracy Check-in Calls

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Hi all,

Thanks for your responses, and apologies for the delay! I should have included this in my original email, but we were hoping to find a time again that's after 12:00pm Eastern since Dax will be tuning in from the West Coast. If you could let me know if you have any recurring biweekly availability in the afternoons instead for a 30-minute meeting, that would be great.

Thank you!

Amanda Carberry (she/her) | Legal Assistant
States United Democracy Center
401-585-4702 | @statesunited
amanda@statesuniteddemocracy.org

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From: Brady, Mike (MDOS) <BradyM@michigan.gov>
Date: Monday, December 16, 2024 at 11:02 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>, Teegardin, Rachel <TeegardinR1@michigan.gov>, Amanda Carberry <amanda@statesuniteddemocracy.org>, Teszlewicz, Barbara (AG) <teszlewiczb@michigan.gov>, Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Restarting Bi-weekly Democracy Check-in Calls

Me too.

Michael J. Brady (he/his), *Chief Legal Director*
Secretary of State Jocelyn Benson
Michigan Department of State
mobile: 517.599.7343

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Monday, December 16, 2024 10:41 AM
To: Teegardin, Rachel <TeegardinR1@michigan.gov>; Brady, Mike (MDOS) <BradyM@michigan.gov>; Amanda Carberry <amanda@statesuniteddemocracy.org>; Teszlewicz, Barbara (AG) <teszlewiczb@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Restarting Bi-weekly Democracy Check-in Calls

That works for me.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Teegardin, Rachel <TeegardinR1@michigan.gov>
Sent: Monday, December 16, 2024 10:05 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Amanda Carberry <amanda@statesuniteddemocracy.org>; Teszlewicz, Barbara (AG) <teszlewiczb@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Restarting Bi-weekly Democracy Check-in Calls

Wednesday is better. Starting January 8th...both Christina and Dan are available 11-11:30a.

Best, Rachel

Rachel Teegardin
Executive Assistant to
Christina Grossi, Chief Legal Counsel
Executive Office of Governor- Gretchen Whitmer
517-285-9138
TeegardinR1@michigan.gov

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STATE OF MICHIGAN
OFFICE of the GOVERNOR

From: Brady, Mike (MDOS) <BradyM@michigan.gov>
Sent: Monday, December 16, 2024 10:02 AM
To: Amanda Carberry <amanda@statesuniteddemocracy.org>; Teszlewicz, Barbara (AG) <teszlewiczb@michigan.gov>; Osher, Daniel <OsherD@michigan.gov>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>; Teegardin, Rachel <TeegardinR1@michigan.gov>; Grossi, Christina <GrossiC1@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: Restarting Bi-weekly Democracy Check-in Calls

Thank you, Amanda. That time later on Thursday afternoon isn't ideal. I'd prefer a return to the time we used to have on Thursday mornings around 10 or 11 AM, if that works for the group. Wednesdays are also pretty open and flexible.

Michael J. Brady (he/his), *Chief Legal Director*
Secretary of State Jocelyn Benson
Michigan Department of State
mobile: 517.599.7343

From: Amanda Carberry <amanda@statesuniteddemocracy.org>
Sent: Monday, December 16, 2024 9:00 AM
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Cc: Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Restarting Bi-weekly Democracy Check-in Calls

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Hi all,

We're looking to restart the Bi-weekly Democracy Check-in series in early January. Could you kindly respond to this thread or have someone reach out to me with some times that would work for you for a bi-weekly call? For reference, this series was last set on Thursdays at 4:00pm Eastern.

Thank you!

Best,

Amanda

Amanda Carberry (she/her) | Legal Assistant
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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 8/29/2023 6:57:10 PM
To: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: Michigan DR request re 14th amend
Attachments: Davis request for Declaratory Ruling from SOS Benson concerning Trump candidacy for Presidency.pdf; University of Penn Law Review Article re Trump and Section 3 of Fourteenth Amendment Disqualification.pdf

Per our conversation.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
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August 28, 2023

Michigan Department of State
Bureau of Elections
Richard H. Austin Building-1st Floor
430 West Allegan
Lansing, MI 48933

Re: Request for Declaratory Ruling Pursuant to MCL 24.263 Concerning Disqualification of Former U.S. President Donald J. Trump From Appearing On Any Presidential Primary and/or General Election Ballot As Presidential Candidate For He Is Barred Under Section 3 of the Fourteenth Amendment of The United States Constitution.

Dear SOS Benson, Director Brater and Mr. Fracassi:

Please accept this letter and the exhibits attached hereto as a request for a declaratory ruling pursuant to MCL 24.263 regarding former U.S. President Donald J. Trump's ("Trump") disqualification from appearing on any presidential primary and/or general election in the state of Michigan due to his apparent ineligibility to assume and/or run for the office of President pursuant to Section 3 of the Fourteenth Amendment of the United States Constitution.

Considering the facts of this request are undisputed and are relatively straightforward, and the need to allow adequate time for any legal challenges prior to any presidential primary election for 2024, I

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am respectfully requesting that Secretary of State Jocelyn Benson ("SOS Benson") and the Department of State issue a declaratory ruling expeditiously in accordance with the Administrative Procedure Act (APA) and that said declaratory ruling be **issued within 14 calendar days** of receipt of this request.

Law and Legal Analysis

1. Section 3 of the Fourteenth Amendment of the United States Constitution Bars Trump Candidacy For President for the 2024 Election.

On November 15, 2022, former President Trump announced "that he will seek the Republican presidential nomination in 2024."[1] Since his announcement, Trump's presidential campaign has raised tens of millions of dollars for his presidential campaign. In fact, recent published media reports indicate that Trump's presidential campaign "has raised $7.1 million since Thursday when he was booked at the Fulton County Jail in Georgia on charges that he illegally schemed to overturn the 2020 election in the state and became the first former president in U.S. history to ever have a mug shot taken."[2]

---

[1] See https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid/index.html

[2] See https://abcnews.go.com/US/wireStory/trump-campaign-reports-raising-7-million-after-georgia-102592711

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Presidential primary and general elections for the state of Michigan are governed by Michigan Election Law, being MCL 168.1, *et.seq*. MCL 168.613a, as amended, of Michigan Election Law provides:

> (1) A statewide presidential primary election must be conducted under this act on February 27, 2024, and on the fourth Tuesday in February in each presidential election year after 2024.
> (2) A political party that received 5% or less of the total vote cast nationwide for the office of President of the United States in the last presidential election shall not participate in the presidential primary election.
> (3) Except as otherwise provided in sections 614a to 616a, 624g, 759a, 759c, and 879a, the statewide presidential primary election must be conducted under the provisions of this act that govern the conduct of general primary elections.

MCL 168.614a of Michigan Election Law further provides:

> (1) **Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a**. The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.
> (2) Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, **the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party.** The

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> secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.
>
> (3) After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.

Surprisingly, MCL 168.615a of Michigan Election Law, "mandates" and "requires" the Secretary of State to print the name of any presidential candidate identified and notified as a "potential" presidential candidate under MCL 168.614a. MCL 168.615a(1) of Michigan Election Law provides, in relevant part:

> Except as otherwise provided in this section, **the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a *to be printed on the appropriate presidential primary ballot for that political party***. [emphasis supplied].

MCL 168.615a(1) uses the mandatory term "shall". It is well-settled in Michigan jurisprudence that the "use of the word 'shall' indicates a mandatory and imperative directive." *Burton v Reed City Hospital Corp.*, 471 Mich. 745, 752; 691 NW2d 424 (2005). Therefore, pursuant to MCL 168.615a(1), the Secretary of State would be "mandated" and "required" to print Trump's name on any presidential primary election ballot in Michigan for the 2024 presidential election

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because Trump is currently the leading candidate for the Republican presidential nomination. According to an Emerson College poll released in early August 2023, current President Joe Biden and former President Trump were statistically tied in the battle ground state of Michigan.[3]

However, Section 3 of the Fourteenth Amendment of the United States Constitution disqualifies and bars former President Trump from serving and/or running for the Presidency of the United States.

Disqualification Under Section 3 of the Fourteenth Amendment of the United States Constitution

Section 3 of the Fourteenth Amendment of the United States Constitution provides:

> **Section 3**
>
> **No person shall be a** Senator or Representative in Congress, **or elector of President and Vice-President, or hold any office, civil or military, under the United States**, or under any State, **who, having previously taken an oath**, as a member of Congress, **or as an officer of the United States**, or as a member of any State legislature, or as an executive or judicial officer of any State, **to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof**. But Congress may by a vote of two-thirds of each House, remove such disability. [emphasis supplied].

[3] See https://thehill.com/homenews/campaign/4136457-biden-trump-tied-in-michigan-ahead-of-2024-election-poll/

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As noted in the scholarly article published in The Atlantic, which was authored by former U.S Court of Appeals Judge J. Michael Luttig and Harvard Law Professor Emeritus Laurence Tribe:

> The disqualification clause operates independently of any such criminal proceedings and, indeed, also independently of impeachment proceedings and of congressional legislation," they wrote. "The clause was designed to operate directly and immediately upon those who betray their oaths to the Constitution, whether by taking up arms to overturn our government or by waging war on our government by attempting to overturn a presidential election through a bloodless coup.

And for the reasons stated and set forth in the University of Penn Law Review Article entitled: "The Sweep and Force of Section Three", whose arguments shall be incorporated by reference herein, former President Trump is disqualified from the Presidency because he has "given aid or comfort to the enemies". The University of Penn Law Review Article authored by distinguished conservative attorneys, William Baude & Michael Stokes Paulsen, thoroughly sets forth the legal arguments that support the disqualification of Trump from the Presidency under Section 3 of the Fourteenth Amendment. A copy of William Baude & Michael Stokes Paulsen's Law Review Article is attached hereto for the Department of State to review and analyze.

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Recently, former President Trump attended and hosted a fundraiser at his Bedminister, N.J., golf club that benefited the Patriot Freedom Project, the controversial nonprofit that supports those criminally charged in the Jan. 6, 2021 attack on the U.S. Capitol.[4] Trump's financial support of those individuals criminally charged in the January 6, 2023 attack ono the U.S. Capitol is further evidence of Trump's "aid" and "comfort" of individuals who have been deemed "enemies" of the Unites States.

In addition to Trump's financial support for the "insurrectionists", "[c]onsider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent

[4] https://www.dailymail.co.uk/news/article-12437995/Donald-Trump-attends-fundraising-dinner-January-6-defendants-arrest.html

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Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021."[5]

All of the foregoing actions committed by former President Trump disqualifies him for the Presidency under Section 3 of the Fourteenth Amendment of the United States Constitution. Although former President Trump arguably has millions of supporters nationwide and here in the state of Michigan, as the United States Supreme Court observed, "[i]t does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office." *Timmons v Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). It is well-settled that "**a state has an interest, if not a duty to protect the integrity of its political processes from** frivolous or ***fraudulent candidacies***." *Bullock v Carter*, 405 U.S. 134, 145 (1972) (emphasis supplied).

Many Trump supporters, and even former President Trump himself, have previously asserted the ***frivolous argument*** that

[5] See p 111 of "The Sweep and Force of Section Three", 172 U. PA. L. REV. (forthcoming 2024) William Baude & Michael Stokes Paulsen, a copy of which is attached.

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Trump's disqualification under Section 3 of the Fourteenth Amendment would violate former President Trump and his supporters constitutional right to vote for the candidate of their choice. **However, that argument simply lacks merit and is outright frivolous**! "That a particular induvial may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Timmons v Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). Furthermore, "the [Supreme] Court has never recognized a fundamental right to express one's political views through candidacy." *Carver v Dennis*, 104 F.3d 847, 851 (6th Cir. 1997). Contrary to popular belief, "**running for office is not a 'fundamental right'**[.]" *Zielasko v State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989)(quoting *Bullock v Carter*, 405 U.S. 134, 142-143 (1972)) (emphasis supplied). "The [United States] Supreme Court has made clear that a candidate does not have a fundamental right to appear on the ballot." *Corrigan v City of Newaygo*, 55 F.3d 1211, 1214 (6th Cir. 1995) (citing *Bullock v Carter*, 405 U.S. 134, 142-143 (1972)).

In addition to the binding legal precedent established by the United States Supreme Court and federal appellate courts, our

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Michigan Court of Appeals has also adopted similar legal precedent with respect to a candidate's lack of a constitutional right to appear on the ballot. As our Michigan Court of Appeals correctly concluded and determined in *Barrow v Detroit Election Commission*, 301 Mich.App. 404, ___; 836 NW2d 498, 511 (2013), which resulted in the leading candidate for Mayor of the city of Detroit being removed from the primary election ballot:

> "[**T]here is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot**. Indeed, voters have the right to expect that the candidates appearing on ballots have met the requirements…"[*Barrow*, 301 Mich.App. at ___; 836 NW2d at 511.] (emphasis supplied).

Here, the constitutional rights of Trump supporters in the state of Michigan will **NOT** be violated in any respect with the disqualification of Trump under Section 3 of the Fourteenth Amendment because "**there is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot**." *Barrow*, 301 Mich.App. at ___; 836 NW2d at 511. (emphasis supplied).

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CONCLUSION

WHEREFORE, for the foregoing reasons and for the reasons set forth in the University of Penn Law Review Article, "The Sweep and Force of Section Three", 172 U. PA. L. REV. (forthcoming 2024), authored by William Baude & Michael Stokes Paulsen, Complainant/Petitioner Robert Davis respectfully requests the Department of State and the Secretary of State issue a declaratory ruling in accordance with the Administrative Procedures Act (APA) and Michigan Election Law declaring former President Trump ineligible and disqualified to have his name printed on any presidential election ballot in Michigan in 2024 because Trump is disqualified under Section 3 of the Fourteenth Amendment of the United States Constitution. Complainant/Petitioner Robert Davis further requests that said declaratory ruling be issued expeditiously **within 14 calendar days from receipt of this request**.

Dated: August 28, 2023

Respectfully submitted,

/s/ROBERT DAVIS
ROBERT DAVIS, *Pro Se*
Complainant/Petitioner
PII MCL 15.243(1)(a) [redacted]@gmail.com

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude & Michael Stokes Paulsen

Abstract: Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This article corrects those mistakes by setting forth the full sweep and force of Section Three.

First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. *Second*, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. *Third*, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. *Fourth*, Section Three covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support as "aid or comfort." It covers a broad range of former offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude* & Michael Stokes Paulsen**

Introduction

"Section 3 has long since faded into history."
- Eric Foner[1]

Reports of Section Three's demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force, and has a broad substantive sweep.

Here is what it says:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War. States in the South had purported (unconstitutionally)[3] to secede from the Union;

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* Harry Kalven, Jr. Professor of Law, University of Chicago Law School.
** Distinguished University Chair and Professor of Law, University of St. Thomas Law School. We thank Frank Bowman, Steve Calabresi, Josh Chafetz, John Harrison, Ed Hartnett, Daniel Hemel, Myles Lynch, Gerard Magliocca, Michael McConnell, Derek Muller, Eric Posner, Micah Quigley, Richard Re, Michael L. Rosin, Stephen Sachs, Greg Sisk, Seth Barrett Tillman, and workshop participants at the University of Chicago Law School and University of St. Thomas Law School for helpful comments on this draft, T.J. Bowman, Nicole Catlin, Connie Gong, Sarah Leitner, James Marmaduke, and Matt Phillips for valuable research assistance, and countless others for background discussions about these issues—though not all of them gave aid or comfort to our conclusions.

[1] Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 85 (2019).

[2] U.S. Const. art. XIV, sec. 3.

[3] See infra note 228 and sources cited there.

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they had purported to form the (so-called) "Confederate States of America" in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). These men who arrived in Washington included several who had held prominent positions in the rebel Confederacy: "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[4]

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective "reconstruction" of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in "insurrection or rebellion" against the U.S. constitutional authority or given "aid or comfort" to persons engaged in such acts of insurrection or rebellion. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.[5] The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting and immediate incitement of a mob to attempt to forcibly prevent Congress's and the

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[4] Akhil Reed Amar, America's Constitution: A Biography 377 (2005); see also Eric L. McKitrick, Andrew Johnson and Reconstruction 176-179 (1960); Allen C. Guelzo, Reconstruction: A Concise History 25 (2018).

[5] The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment.. 87 (2021); Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, Lawfare (Jan. 19, 2021), available at https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.

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Vice President's counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'etat. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an "insurrection" aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have foundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process and free speech? And if Section Three *does* apply—*to what and to whom?* What actions count as having "engaged in insurrection or rebellion" against the Constitution of the United States or having "given aid or comfort to the enemies thereof"? Which officials are covered by Section Three's exclusions?

This article attempts to answer these questions. It makes four key points (or clusters of points):

First. Section Three remains legally operative. It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

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Nor has Section Three somehow been "repealed" by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; Congressional amnesty is retrospective.

Second. Section Three is legally self-executing. That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to judiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,[6] is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them. Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden Ex Post Facto law or Bill of Attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or giving "aid or

[6] 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

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comfort" to "the enemies" might turn out to be in tension with the First Amendment's protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three's terms ("insurrection," "rebellion," "aid and comfort," "enemies") will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article's fourth and final group of points:

Fourth. Section Three's disqualification is sweeping in its terms. It disqualifies from future office-holding persons who "*engaged in*"—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms "*insurrection or rebellion*" or the giving of "*aid or comfort*" to "*enemies*" of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three's prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text's meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in or giving aid or comfort to acts of "insurrection or rebellion" against the lawful constitutional order.

I. Section Three is Legally Operative Today

A. The Generality and Presumptive Perpetuity of Constitutional Language

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The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."[7]

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.[8] It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral," way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and

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[7] Eric Foner, Reconstruction, 1863-1877, at 260 (1988).

[8] Mark Graber, Punish Treason, Reward Loyalty: The Forgotten Fourteenth Amendment, Volume 1 (2023, University Press of Kansas).

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generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.[9]

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter that the drafts*men* of the amendment might not have had women "in mind" if women are covered by the meaning of the words they actually wrote and ratified.[10] Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.[11] The answers to each of these questions turn on the objective, original meaning of "privileges or immunities of citizens of the United States" and "equal protection of the laws," not whether the 1866 Congress and subsequent ratifiers had

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[9] See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. J. 1113, 1124-1148 (2004); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 Nw. U. L. Rev. 857, 872-883 (2009); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U Pa. L. Rev. 609, 624-625 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1456-1460 (2019). For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

[10] We have used such examples before. Paulsen, *Rules for Its Own*, supra note 9, at 901-902; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1421 n. 68 (2014); William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment* (Jan. 31, 2023) at 67-68.

[11] We have used this example before, too. Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 839-840 (1993); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2380-2381 (2015). See also Baude, Campbell, & Sachs, supra note 10, at 66.

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thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment's terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn't matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,[12] it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase "insurrection or rebellion.")[13] But in the end the question is what rule was enacted. If Section Three's rule fell short somehow, missing some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.[14]

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[12] Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section's application to the "late insurrection." Later versions dropped this limitation and generalized Section Three's application to "insurrection" and "rebellion." See Cong. Globe, 39th Cong., 1st Sess., at 2767-68, 2770 2869, 2921; see also Mark A. Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished chapter, forthcoming in The Forgotten Fourteenth Amendment, Volume 2, University Press of Kansas) (documenting this development).

[13] Infra Part IV.A.

[14] See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 908-909 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J. L. & Pub. Pol'y (forthcoming 2023) ("Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation."). For an extended discussion of the abuse of arguments from inconvenience, see infra Part II.C.2.a (discussing Chief Justice Chase's appalling opinion in *Griffin's Case*).

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Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is "old" does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.[15] There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as "the interest in sovereignty fades."[16] But in our view, this just shows what is wrong with such living constitutionalism.[17] The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.[18] But sometimes we wonder if this kind of denial is sneaking in to people's intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive as the day it was enacted.

B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)

But what about this? The second sentence of Section Three provides that Congress "may by vote of two-thirds of each House, remove such disability."[19] Just as the first sentence's disqualification is not limited specifically to the Civil War, neither is Congress's power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put more vividly: Can Congress, by two-thirds vote of each house, essentially "explode" Section Three—render it inoperative in the future, for all time?

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[15] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1486-1490 (1997) (discussing privilege against self-incrimination).

[16] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 58 (2015); see also Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295 (2008).

[17] See Baude & Sachs, *Grounding*, supra note 9, at 1487 (responding to Strauss).

[18] For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935) ("It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision cannot possibly apply to the present case").

[19] U.S. Const. amdt. XIV, sec. 3.

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These questions turn out not to be completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed "from all persons whomsoever"—except designated categories of individuals—all "political disabilities imposed" by Section Three.[20] Another (from 1898) further removed "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred."[21] And indeed, in a recent case (brought by then-Representative Madison Cawthorn) a federal judge relied on these statutes to conclude that Section Three was now legally dead.[22] Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?[23]

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 act. In 1872, after a period of case-by-case consideration of amnesty requests, Congress, as mentioned above, enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.[24] But what is most important is what it says. The statute reads, in full:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein),* That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-

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[20] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[21] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[22] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 889-892 (E.D. N.C. 2022) rev'd sub nom Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022). This argument, too, was made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935).

[23] The power in general of Congress by two-thirds vote of each House to remove Section Three's disability and the history of its exercise are the central themes of Professor Gerard Magliocca's excellent article, cited supra note 5.

[24] See generally Magliocca, *Amnesty*, supra note 5, at 112-120.

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> seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.[25]

The key words are "imposed" and "[hereby] removed." The words of the 1872 statute are used in the past tense: the statute *removed* disqualifications *imposed* by the Fourteenth Amendment—that is, disabilities that had already become legally effective. That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the district court's decision in the *Cawthorn* case: Congress in 1872 employed "the past-tense version" of the verb "impose," thus "indicating its intent to lift only those disabilities that had by then been 'imposed.'"[26] Moreover, the Fourth Circuit continued: "[t]he operative clause's principal verb—'removed'—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come."[27]

By contrast, the district court had faulted Congress for not being more explicit: Congress "could have limited the Act to remove Section 3's disabilities from 'persons currently subject to the disabilities' or 'persons against whom the disabilities were lodged' at the time (i.e., the 'Confederates') but did not do so."[28] Therefore, the district court concluded, by the "plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted."[29] With all due respect, the district court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the "all persons whomsoever" language and completely missed the other language that made clear the statute's past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish-American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances (and, one might add more cynically, at a time of rising Jim Crow sentiment)[30]—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

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[25] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[26] Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022).
[27] Id.
[28] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 891 (E.D. N.C. 2022) rev'd sub nom Carthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022).
[29] Id.
[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Cummings v. Richmond County Bd. of Ed. 175 U.S. 528 (1899). See also Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 195-201 (2015).

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.[31]

In one sense, that's about as categorical, across-the-board a disqualification-removal as one can imagine: *the* disability *imposed* by section three *is hereby removed.* Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses past-tense language: a disability (already) "imposed" is now being "removed" from its prior legal existence. What's more, the 1898 act says that the Section Three disqualification being removed was one "*heretofore incurred*." That is unmistakably backward-looking, past-occurrence language.

What might otherwise—that is, but for the clarity of the "heretofore incurred" language—give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as any and all extant ones, is the Act's reference to "*the* disability" imposed by Section Three. This singular reference might be taken to suggest that Section Three's disqualification was thought a one-time-only, single-shot, Civil War era occurrence.[32] If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was[33] (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress's constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress's constitutional power to remove Section Three's disqualification general and prospective, letting it remove Section Three's disqualification once and for all, including for future situations? We think not.

To be clear, we don't think there's anything inherently unthinkable or absurd about the idea of an "exploding" or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration

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[31] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[32] For instance, the D.C. Circuit's recess-appointments opinion in Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013) aff'd only on alternate grounds, 134 S.Ct. 2550 (2014), leaned heavily on "this difference between the word choice 'recess' and 'the Recess'," arguing that "[a]s a matter of cold, unadorned logic, it makes no sense to [say] that when the Framers said 'the Recess,' what they really meant was 'a recess.' This is not an insignificant distinction. In the end it makes all the difference." Id. But a majority of the Supreme Court did not share this view of the text. NLRB v. Noel Canning, 134 S.Ct. 2550, 2561 (2014).

[33] For the brief legislative history of the 1898 act, see 31 Cong. Rec. 5367-5419 (1898).

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date, even in an enduring Constitution. Article I's Slave Importation Clause, protecting the international slave trade, exploded after twenty years.[34] So too the initial allocation of representatives to states is written in to the text of the Constitution, even though it was then exploded by the subsequent census.[35] Other provisions of the Constitution set baseline rules that Congress has power to modify. Article I, section 4 does that with respect to state legislative power over congressional elections: "Congress may at any time by Law make or alter such Regulations."[36] Article III, section 2 does that with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."[37] The Twentieth Amendment, in Section 2, sets a default date of Congress's annual meeting.[38]

There's no reason why the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the provision's own extinction after a supermajority vote of Congress.[39] But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course,

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[34] U.S. Const. art. I, §9, cl. 1. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") For a scathing critique of the substance and purpose of this proviso, see, e.g., Paulsen & Paulsen, supra note 30, at 81-83.

[35] U.S. Const. art. I, § 2, cl.3.

[36] U.S. Const. art. I, § 4.

[37] U.S. Const. art. III, § 2, cl. 2.

[38] U.S. Const. amend. XX, §2.

[39] We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST – Academic Commentary, April 13, 2022, https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/. See also Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("'Congress has no power whatever to repeal a provision of the Constitution by a mere statute.'") (quoting 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935), available at https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf#page=75)

This strikes us as not quite right: *If* Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

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those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." ("*But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "Remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.[40] This confirms that Congress's removal power therefore only comes into being when a legal disqualification has vested by virtue of the operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

* * *

All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect by U.S. political actors whose powers and duties are such as to call for application of Section Three as a rule of law? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

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[40] Dr. Webster's Complete Dictionary of the English Language 1116 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (defining "remove" as "To cause to change place; to move away from the position occupied; to displace") (quoted in Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022)).

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II. Section Three is Legally Self-Executing

Our second point is colossally important—a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient, rejected in the highest quarters, and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself, and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation of powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

A. Section Three as Automatic Legal Disqualification

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,[41] in doing so they put the cart before the horse. The horse is the Constitution, which is itself the "supreme law of the land."[42] Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. Section Three's language is language of automatic legal effect: "*No person shall be*" directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall

[41] But not ours! See Paulsen, McConnell, Bray and Baude, The Constitution of the United States (5th ed. 2022).
[42] U.S. Const. art. VI.

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be.[43] It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.[44] The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President. And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, section 2's requirements.[45] "*No Person shall be*" a U.S. Senator who does not meet Article I, section 3's requirements.[46] These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three of the Fourteenth Amendment parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.[47] None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist* ...," the Thirteenth Amendment provides.[48] The institution of slavery was *immediately, legally, constitutionally gone*.[49] The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.[50] But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative. Such a

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[43] We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 84 U. Chi. L. Rev. 203, 211 (1997) ("The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.")

[44] U.S. Const. art. II, §2, cl. 5 (emphasis added).

[45] U.S. Const. art. I, §2, cl. 2(emphasis added).

[46] U.S. Const. art. I, §3, cl. 3 (emphasis added).

[47] See Josh Chafetz, Democracy's Privileged Few 168 (2007).

[48] U.S. Const. amend. XIII §1 (emphasis added).

[49] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 48–53 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

[50] U.S. Const. amend. XIII §2 ("Congress shall have power to enforce this article by appropriate legislation.").

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position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment too. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three states directly operative rules of constitutional law: "No state shall," in Section One, and "No person shall" in Section Three.[51] Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks (for example) that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation "to enforce" the Thirteenth and Fourteenth Amendments' commands, pursuant to their grants of legislative power.[52] Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress's view of the law, and so on. The Civil Rights Act of 1866, the Ku Klux Klan Act of 1871 and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But, to repeat, the existence of an enforcement power does not mean that the Amendment's specific legal commands lack any independent, self-executing force.[53]

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing *quo warranto* civil suits brought by the United States to remove state officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.[54] But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction

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[51] U.S. Const. amdt XIV, sec. 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. Section Two, which alters Article I, section 2's rule for how Representatives "shall be apportioned," presents a more complicated case. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. In practice, Congress has ignored it, see Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 Hist. Meth. 57 (2013); Amar, America's Constitution, supra note 4, at 395; see also email from John Harrison to Akhil Reed Amar, quoted in id. at 611 n. 96, and it is hard to see how anybody else can realistically enforce it.

[52] U.S. Const. amdt. XIII, sec. 2; amdt. XIV, sec. 5.

[53] Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. Baude, Campbell, & Sachs, supra note 10, at 30-31, 63-64.

[54] Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§14, 15, 16 Stat. 140, 143. These provisions were largely repealed during the 1948 positive law codifications of Titles 18 and 28 of the U.S. Code. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993; see also Act of June 25, 1948, 62 Stat. 683; Lynch, supra note 5, at 206 n. 365. These codifications were not supposed to make substantive changes to the law, see generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1949), and so our best guess is that the revisers (mistakenly) believed the provisions to be obsolete. In any event, the 1948

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for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.[55] Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[56]

Note the contrast. The Treason Clause defines an *offense* ("Treason . . . shall consist") but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification ("No person shall be"). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: "[C]onvict[ions] of treason" require two witnesses or a public confession; and "Congress shall have power to declare the punishment of treason." Section Three of the Fourteenth Amendment, by contrast, is offense, conviction, and punishment all rolled in to one.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."[57] But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.[58] Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a

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codification bills were obviously not intended to preclude any other existing remedies for Section Three.

[55] Professor Magliocca concurs. Magliocca, *Amnesty*, supra note 5, at 106 & n.101 (noting that "enacting enforcement legislation does not imply that legislation is required" and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. See infra Part II.C.

[56] U. S. Const. art. III, sec. 3.

[57] U.S. Const. art. II, sec. 4.

[58] U.S. Const. art I, sec. 3 & sec. 4.

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noticeably different path.[59] Section Three does not call for treason *trials* or the *impeachment* of secessionists. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.[60] It immediately became "supreme Law of the Land." [61] Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.[62] It is pretty obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of "insurrection" and "rebellion" and so on—and these meanings are not quite as self-evident as "thirty-five years of age" (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*.

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[59] Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. For opponents, see Cong. Globe 39th Cong., 1st Sess., at 2900 (Senator Doolittle) (amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions"); id. at 2916 (Senator Doolittle); id. at 2940 (Senator Hendricks) (complaining about immediate consequences); for proponents, see id. at 2919 (Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct'); id. (they lost their "citizenship rights when they committed treason"); Cong. Globe 39th Cong., 1st Sess., App., at 228 (Senator Defrees); Cong. Globe, 39th Cong., 1st Sess. at 3036 (Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law); see generally infra Part III.A-B. See also Graber, supra note 12, at 26-27, 35-37 (documenting all of these discussions) .

[60] U.S. Const. art. V.

[61] U.S. Const. art. VI, cl. 2.

[62] See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, at 14 n.42 (Mar. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards"). On the other hand, the Constitution's *inhabitancy* requirement, has proved far from simple in practice. See Jack Maskell, Congressional Research Service, Qualifications of Members of Congress (Jan 15, 2015) at 13-18, https://sgp.fas.org/crs/misc/R41946.pdf. And there has been recent litigation about the requirement that the President be a "natural born citizen" as well. See Derek T. Muller, *"Natural Born" Disputes in the 2016 Election*, 85 Fordham L. Rev. 1097 (2016).

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Not all participation in insurrection or rebellion is open and notorious. More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.[63] The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.[64]

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non-sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions, maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

B. Who (All) Can (Must) Faithfully Apply and Enforce Section Three?

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But in principle: Section Three's disqualification rule may and must be followed—applied, honored, obeyed, enforced, carried out—by anyone whose job it is to figure out whether someone is legally qualified to office, just as with any of the Constitution's other qualifications.

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[63] Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J. L. Ethics & Pub Pol'y 497, 511-512 (2018).

[64] Cf. Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 839 (1993) (mocking constitutional interpretation that engages in "the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment"); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

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These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to "activate" Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

1. Seeking Office

a. by election

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state-law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on a primary or general election ballot.[65] Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.[66] Accordingly, such state actors can and must apply Section Three's disquali-

[65] To be sure, the centralized, government-administered ballot did not come to American until the late Nineteenth Century and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

[66] U.S. Const. art. VI, cl.2 ("This Constitution ... shall be the supreme Law of the Land"). See also U.S. Const. art. VI, cl.3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for "judicial review," as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); see also William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5-9 (2023).

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fication in carrying out their state-law responsibilities—just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[67]

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene's involvement in the events of January 6, 2021.[68] The judge proceeded under the theory that if January 6 was a constitutional "insurrection," and if Representative Greene had been part of it, she would be barred from office.[69] But it concluded that the challengers had failed to meet their burden of proof under state law: "In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took any action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021."[70] Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer's proposed findings that day.[71]

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene's claims failed on the merits.[72] While Greene's appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.[73] The

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[67] We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, section 5, powers to act as "Judge" of the "Elections, Returns, and Qualifications of its own Members" and refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitation. See also infra n. 96 and accompanying text.

[68] Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022).

[69] Id. at 5-6.

[70] Id. at 15. The January 3, 2021 cut-off is because that is the date that Representative Greene first took a constitutional oath. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a "coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol." Id. at 16.

[71] Final Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022).

[72] Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1320 (N.D. Ga. 2022).

[73] Greene v. Sec'y of State for Georgia, 52 F.4th 907, 909-910 (11th Cir. 2022).

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details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[74] In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots in to existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court's muddied reasoning in the Finchem-Gosar-Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."[75] This inference is mistaken—Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.[76]

Second, in some circumstances state law not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,[77] where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing

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[74] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[75] Id. at *1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in Griffin's Case, which we discuss at greater length presently. See infra Part II.C.2.d. The Arizona Supreme Court also made the additional suggestion that Article I, Section 5 gave Congress "exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members," id. We are skeptical of this point as well, see infra n. 96 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

[76] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); id. at 469- 470 (Scalia, J., concurring); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* (May 29, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807.

[77] 330 U.S. 386 (1947).

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in the Constitution or Laws of any State to the contrary notwithstanding."[78] And thus "the policy of the federal Act is the prevailing policy in every state."[79] A state cannot treat federal obligations the way it can treat foreign ones.

The Arizona Supreme Court's decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state "statute's scope is limited to challenges based upon 'qualifications . . . as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office."[80] If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three's dis-qualification is not a "qualification," that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified to office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. by appointment

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally this includes at a minimum whoever nominated the officer.[81] Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three.* And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.[82]

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[78] Id. at 391 (quoting U.S. Const. Art VI, sec. 2).

[79] Id. at 393. To be sure, *Testa* and especially subsequent cases expanding it have been subject to powerful criticisms as a matter of original meaning, see Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 78-83, 97-105 (2020); Haywood v. Drown, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

[80] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[81] For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, sec. 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 330, 333-334, 355-356 (2019).

[82] See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 914-918 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *Black*, supra note 81, at 355-356 (similar); see also Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105

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In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate's eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?[83]

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully-disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.[84]

For an example of how this process is supposed to work consider how the state of New Mexico removed commissioner Couy Griffin from state office.[85] Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and

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Yale L.J. 549, 562-570 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 658-660 (1970) (similar).

[83] Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See infra at II.C.

[84] Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See supra notes 72-73 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

[85] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

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ultimately joined in the January 6 insurrection against the Capitol. A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office. The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three. More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.[86]

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.[87] It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same "standing" limitations as the federal courts are. As a matter of federal law, the court had no trouble concluding that the events of January 6. 2021 were a constitutional "insurrection." And it had no trouble concluding that Griffin had engaged in that insurrection, both by "voluntarily aid[ing] the insurrectionists' cause by helping to mobilize and incite" the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.[88] The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three's disqualification in doing so.[89] Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

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[86] Id. at 46. The New Mexico Supreme Court dismissed Griffin's appeal on procedural grounds. NO. S-1-SC-39571 (N.M. Sup. Ct. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: an attempt to remove the state action to federal court, State ex rel. White v. Griffin, 2022 WL 1707187 (D.N.M. May 27, 2022) (denying removal because of plaintiffs' lack of Article III standing) and a separate parallel suit attempting to enjoin the state proceedings, Griffin v. White, 2022 WL 2315980 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

[87] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473, at 24-25 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[88] Id. at 35-38.

[89] The availability of a federal quo warranto action is curiously codified in the D.C. Code, §§ 16-3501-02. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. See Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984); Drake v. Obama, 664 F.3d 774, 784-785 (9th Cir. 2011); SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 81 (D.C. Cir. 2015), aff'd, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. Hill v. Mastriano, No. 22-2464, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022). See also Hill v. Perry, No. 22-2465, 2023 WL 3336648, at *1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

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But in general: wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.[90]

Finally and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.[91] A regulated entity can challenge the actions of an executive official who holds office improperly.[92] Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the "de facto officer doctrine," (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to "Judge of the Elections, Returns, and Qualifications" of "its own Members."[93] Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional

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[90] An officeholder who has engaged in insurrection or rebellion or given aid and comfort to enemies of the United States has surely committed a "high Crime or Misdemeanor" within the meaning of Article II, section 4's description of the scope of the impeachment and removal power. See generally Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 Harv. L. Rev. 689, 698-702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President's removal authority as Commander in Chief. Whether Congress could supplement that authority through appropriate legislation is an interesting question. See Zachary Price, *Congress's Power Over Military Offices*, 99 Tex. L. Rev. 291 (2021).

[91] Nguyen v. United States, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *Black*, supra note 81, at 346-47.

[92] Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 668 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487–88 (2010); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014); see also Baude, *Severability*, supra note 66, at 36-37.

[93] U.S. Const. art. I, sec. 5, cl. 1.

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backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,[94] that Congress cannot *create new* "Qualifications" and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house's judgment about whether the *existing*, *constitutional*, qualifications have been satisfied.[95]

Some have argued that each house's judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.[96] With respect, we do not agree with this argument. As a logical matter, each house's right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the "manner" of elections, which includes ballot eligibility.[97] In our view, the better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

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[94] 395 U.S. 486 (1969).

[95] See Powell, 395 U.S. at 520 n. 41 (reserving the possibility that Section Three disqualification is a qualification); see also P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 114-115 (1968) (cited in id. at n.41) (arguing that it is); Powell, 395 U.S. at 521 n.42 (noting that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). We emphasize that questions of interpretation and application of Section Three are not *in general* "political questions" that cannot be decided by federal courts, simply because they have political consequences. Where the Constitution supplies a rule, and the rule's application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the "Judge" of the "Elections, Returns, and Qualifications" of its own Members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

[96] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 594-598 (2015); see also Cawthorn v. Amalfi, 35 F.4th 245, 267-273, 282-284 (4th Cir. 2022) (Richardson, J., concurring); Greene v. Sec'y of State for Georgia, 52 F.4th 907, 912-916 (11th Cir. 2022) (Branch, J., concurring).

[97] U.S. Const. art. I, sec. 4. The same Clause also gives Congress the power to "make or alter" such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-275 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an attempt to impose a qualification *not contained in the Constitution*. E.g., *U.S. Term Limits*, 514 U.S. at 784, 787-788, 806-815. It

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The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[98] So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.[99] As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Federal judges hold their offices during "good Behaviour."[100] What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?[101] As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"[102] conduct meeting Section Three's standard disqualifies a federal judge from office.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1791 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).[103] Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

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follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

[98] U.S. Const. art. I, sec. 5, cl. 2.

[99] There is some debate whether Congress can expel a member for conduct that occurred before being elected. See Chafetz, Democracy's Privileged Few, supra note 47, at 210-212 (recounting arguments on both sides but arguing that it can); Jack Maskell, Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 4-7 (2016) https://sgp.fas.org/crs/misc/RL31382.pdf (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

[100] U.S. Const. art. III.

[101] Cf. Ex parte Milligan, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

[102] See supra note 90.

[103] Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 NYU J. L. & Liberty 18, 76-77 (2016).

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Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?[104] Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. That eligibility question can be a part of a state's Article II election for electors just as much as any other state election.[105] Put simply: a state secretary of state (for example) might well possess state-law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility as well) to enforce Section Three.[106] In perhaps half the states, the question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.[107] But even working within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to arrange that their electors do not elect a constitutionally disqualified candidate, which should be reflected in their laws.

If the voter and presidential electors do select a disqualified candidate for the Presidency, we do not believe that Congress (or the Vice President) have the power to reject that candidate when the votes are counted in joint session. Whatever the

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[104] We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." We think that assumption is correct, and we will return to it in Part IV.B.

[105] See Hemel, *How-to Guide*, supra note 5; Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, supra note 96, at 599-608; see also Muller, Natural Born, supra note 62, at 1100-1106. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

[106] See Muller, *Scrutinizing*, supra note 96, at 579-580.

[107] Chiafolo v. Washington, 591 U.S. ___ (2020); see also Muller, supra note 96, at 580. We bracket the serious possibility that *Chiafolo* was wrongly decided. See, e.g., Mike Rappaport, The Originalist Disaster in *Chiafolo*, Law & Liberty (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-chiafalo/; Michael Stokes Paulsen, The Constitutional Power of the Electoral College, Public Discourse (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

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extent of Congress's and the Vice President's authority to count the electoral votes, or determine the authenticity of submitted votes—i.e., was this the act of the electors of the state?—we do not believe that they have the authority to evaluate the decisions or actions of the electors themselves.[108] So if a properly selected elector submits a vote for a constitutionally disqualified individual it should still be *counted*.

Still, once those votes are counted, a disqualified candidate *does not become president*, even if he has the most votes. This is made explicit by the (self-executing) command of Section Three of the Twentieth Amendment, which sets the constitutional terms of a President's term. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."[109] The language thus specifically confirms the possibility of a failure to qualify, and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability.

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors" and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment. We think it likely that Section Three would apply to both procedures. The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. It also seems to us possible that a President who is, by operation of the Constitution, *legally disqualified* from holding his office might be said to be "unable to discharge the powers and duties of his office" within the meaning of the Twenty-fifth Amendment. To be sure, this is doubtless not the paradigm case that the authors of the Twenty-fifth Amendment had in mind. Moreover, "unable" as employed in the Twenty-fifth Amendment would appear, linguistically and structurally, akin to "inability" as used in Article II, Section 1, paragraph 6—the provision that the Twenty-fifth Amendment amends in this respect. (Paragraph 5 of Article II addresses questions of *eligibility*; and paragraph 6 separately addresses questions of *inability*.) But regardless of intention, the natural import of the words of the Twenty-fifth Amendment is that they broadly include all reasons why a president might be "unable" to perform his or her duties. And it is the meaning of the words enacted, not the subjective intentions or expectations of those who drafted them, that is what makes our constitutional law. The procedures of the Twenty-fifth Amendment are complicated and convoluted, to be sure. But where they are employed, there is a good

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[108] We take no position on many further details of this issue, including the relative interplay of the Electoral Count Reform Act, Pub.L. 117-328, Div. P, Title I, § 109(a) (Dec. 29, 2022) 136 Stat. 5238-5239, codified in relevant part at 3 U.S.C. 15(b) & (d)(2)(B)(ii), possible constitutional challenges to it, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1805 (2002); see also John Harrison, *Nobody for President*, 16 J.L & Pol. 699 (2000), interpretations of it, but see Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538 (2021), or the like.

[109] U.S. Const. amdt. XX, sec. 3. Cf, Muller, *Regularly Given*, supra note 108, at 1538 n.42.

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argument that a president's disqualification from office under Section Three is one of the grounds on which he or she might be judged "unable" to continue in that role.

* * *

Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid and comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.[110] From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.[111] He might be removed by such a suit,[112] or might well choose to resign instead.[113] The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

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[110] See infra Part IV.C. for further discussion.

[111] For two relevant examples, see NMSA. 1978, sec. 44-3; W.V. Code sec. 53-2-1. In West Virginia, such a claim may be brought "[w]henever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested." Id. 53-2-2. For illustrative applications, see State ex rel. Zickefoose v. West, 145 W. Va. 498, 545 (1960); Wells v. Miller, 237 W. Va. 731 (2016).

[112] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[113] Resignation letter from West Virginia Delegate Derrick Evans to Governor Jim Justice (Jan. 9, 2021), available at https://s3.documentcloud.org/documents/20447012/derrick-evans-resignation-letter.pdf.

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Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

C. The Problem of Griffin's Case

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.[114] This precedent continues to cast a shadow over Section Three today.[115]

But there is a simple response to this small problem. *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate ground, under the so-called de facto officer doctrine, which we will discuss. But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.[116]

1. Background

Caesar Griffin, a black man, was charged in a Virginia state court with the crime of shooting with the intent to kill. Griffin was tried, convicted, and sentenced to prison. He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of his color."[117] Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not conduct the trial with fairness and uprightness."[118] Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge

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[114] In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

[115] See, e.g., Josh Blackman and S. B. Tillman, Opinion, "Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene," The New York Times, (Apr. 20, 2022); Tom Ginsburg, Aziz Huq, & David Landau, *The Law of Democratic Disqualification*, 111 Calif. L. Rev. at 16, 51 (forthcoming 2023) at https://ssrn.com/abstract=3938600.

[116] For other criticism of Griffin's Case, insightful as always, see Magliocca, *Amnesty*, supra note 5, at 102-108; Magliocca, *Foreground*, supra note 62, at 9-14.

[117] 11 F. Cas. at 22.

[118] Id. at 22.

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Sheffey)[119] was legally disqualified by Section Three of the Fourteenth Amendment from serving.

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849. And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."[120] Thus "it is admitted," wrote Chase, that Judge Sheffey "was one of the persons to whom the prohibition to hold office pronounced by the amendment applied."[121]

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.[122] The sheriff appealed to the circuit court, which was held by Chase as circuit justice.[123]

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[119] Cf. Will Baude, The deadly serious accusation of being a "so-called judge," Volokh Conspiracy, Wash. Post. (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ ("[T]o call him a 'so-called' judge is to hint that he is not really a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue").

[120] 11 F. Cas. at 22.

[121] Id. at 23.

[122] See Opinion of Judge Underwood in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870), at 462-466 (1875). We are indebted to Myles Lynch for locating this source.

[123] The procedural posture of this and several related cases are extremely confusing and reflect background machinations by both Judge Underwood and Chief Justice Chase: At the time, habeas was apparently available from the district court, or "at chambers," or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this, the unreviewable route, in another habeas case like Griffin's brought by Sally Anderson. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the cases in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. See Charles Fairman, Reconstruction and Reunion at 601-607; Letter from Chase to Underwood (Nov. 19, 1868) in 5 The Salmon P. Chase Papers 285-286 (1998); Letter from Chase to Underwood (Jan. 14, 1869) in id. at 292-293.

This background is briefly alluded to in the synopsis in *Griffin's Case* which explains that "[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement

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2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth Amendment did not exist.[124] The question was whether ratification of Section Three kicked him out. As Chase put it: "whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[125]

Chase said no, rejecting this as a "literal construction" [126] of Section Three. There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.[127] But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, can't possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, but also further impeached Chase's interpretation of Section Three. All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

a. "The argument from inconveniences, great as these"

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that the supreme court agreed with him as to the decision he rendered in this case." *Griffin's Case*, 11 F. Cas. at 7-8. But really, these circumstances are extraordinary. We take them up again below.

[124] Id. at 23.

[125] Id. at 18.

[126] Id. at 24.

[127] Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling *Virginia* government then gave its consent to the creation of a new Wheeling-based state of *West* Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as "Virginia." After Lee's surrender at Appomattox, Chase's opinion notes, the "government recognized by the United States was transferred from Alexandria to Richmond" and "became in fact what it was before in law, the government of the whole state." Id. at 18. Judge Sheffey was appointed under the authority of this government. (For the full story – and full formalist legal defense – of the validity of the legal fiction of "Virginia" giving its consent to the creation of a breakaway state of West Virginia, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 Calif. L. Rev. 291 (2002) For an argument that this aside was actually relevant to Chase's argument, see Magliocca, *Foreground*, supra note 62, at 10 n.30, discussed infra note 154.)

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The core of Chase's argument was that if Section Three were an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. "In the examination of questions of this sort," Chase wrote, "great attention is properly paid to the argument from inconvenience."[128] And here "the argument from inconveniences" was "great" in Chase's estimation— it was "of no light weight."[129]

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.[130] If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. "No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity."[131] Chase found this unthinkable: "It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states."[132]

Chase went on: not only did Section Three impose great "inconveniences" and "calamities," it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers from their offices—and ostensibly inconsistent with the "spirit" of prior constitutional principles, concerning due process, bills of attainder and ex post facto laws.[133] And besides, the specific remedy sought—vacating Griffin's conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase's interpretive driver: "Surely," Chase continued, "a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found."[134]

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[128] 11 F. Cas. at 24.
[129] Id. at 25.
[130] Chase also suggested that the problem was not completely limited to the Southern governments. Id. at 25 (observing that "[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government . . ." and that "it is not to be doubted that not a few among them" had previously taken a covered oath, and that "[p]robably some of these persons" had subsequently been elected to office).
[131] Id. at 25. Of course, Chase would undercut this conclusion later in the opinion. See infra Part II.C.
[132] 11 F. Cas. at 25.
[133] More on this point presently, Part II.C.2.c, and again Part III.
[134] 11 F. Cas. at 26.

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Chase tried to funnel these policy arguments into a rule of constitutional construction: "the argument from inconvenience."[135] This argument "it is true, can not prevail over plain words or clear reason," Chase acknowledged.[136] "But, on the other hand," he wrote, "a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference."[137]

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[138] Or as Chief Justice Marshall said in *United States v. Fisher*: "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[139] But Chase's canon was noticeably more aggressive: The supposedly more disruptive reading must "*never be preferred*" unless the text's terms "*absolutely* require" such preference.[140] That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase's analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the "literal" reading of the "terms of the instrument" as meaning exactly what they seem to say. As discussed above, the language of Section Three's prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase's opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text's language is somehow insufficiently clear to justify applying the "literal" meaning of its words. Indeed, even on Chase's own hyper-strict standard, the words of Section Three *do* "absolutely require" the conclusion that it, on its own, disqualifies covered rebels from office.

Second, Chase was too ready—far too ready—to find that following the ("literal") language of the document would produce (what *Chase* considered to be) great "inconveniences" or "mischief"— indeed, increase "calamities" already visited upon the South. Chase emphasized the breadth of Section Three's language: it applied in

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[135] Id. at 24.
[136] Id. at 24.
[137] Id. at 24.
[138] James Madison, Speech on Feb. 2, 1791, reprinted in Legislative and Documentary History of the Bank of the United States 39, 40 (photo. reprint 2008)
[139] United States v. Fisher, 2 Cranch (6 U.S.) 358, 386 (1805)
[140] 11 F. Cas. at 24 (emphasis added).

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all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply "to all persons in the category" and "for all time, present and future" (so?). And, taken seriously, this broad rule would, as noted, "annul all official acts" performed by disqualified officers, including judges. (Would it?)

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase's parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.[141]

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment. But because these arguments from inconvenience are the heart of Chase's opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase's construe-to-avoid-the-force-of-constitutional-language-whose-policy-consequences-you-dislike approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy "solutions" to texts they don't like. Chase's opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

b. The argument from "the intention of the people"

In places, Chase raises the inconvenience argument as an inquiry into the "intent" of the Framers: "What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?"[142] This at least sounds kind of like the question a judge should be asking—the original meaning of the constitutional

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[141] As Judge Underwood had put it: "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Opinion of Judge Underwood, supra note 122, at 465.

[142] 11 F.Cas. at 24.

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provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase's framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.[143] And whatever evidence Chase might have that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say "coerced"—to ratify the Amendment as the price of regaining their representation in Congress.[144] Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed "intent" of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase was succumbing to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed "intent" of a written text. When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do. But it is easy for a judge to use this principle as an excuse for reading into the text

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[143] See supra notes 9-14, sources cited there, and accompanying text.

[144] See generally, John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 461 (2001). For arguments that Congress's requiring states' ratification as condition of restored representation was entirely lawful and appropriate, see id; Kesavan & Paulsen, *West Virginia,* supra note 127, at 329; Amar, America's Constitution, supra note 4, at 364-380, see especially id. at 376-378. There is a different argument for ratification, the "loyal denominator" theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const. L. & Pub. Pol'y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 La. L. Rev. 47, 48 (2018). One of us has rejected this theory in prior writing, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,* 103 Yale L.J. 677, 709 (1993); see also Amar, supra note 4, at 378-380, and the other of us is inclined in the same direction.

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his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. The argument that Section Three should not be read to depart from the "spirit" of prior constitutional law

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle, which in determining the construction of this amendment, is entitled to equal consideration."

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[145]

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once and without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.[146]

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

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[145] 11 F.Cas. at 25.
[146] Id. at 26.

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Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.[147] But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to "*forbid*[]" readings of a text "not *clearly* required" by its terms, that would "*bring it into conflict or disaccord*" with other provisions of the Constitution.[148] Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden.* Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in the judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.[149] If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did it would have the perverse effect of leaving Confederates who had *not* previously taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.[150]

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[147] See infra, Part III.

[148] 11 F. Cas. at 25 (emphasis added).

[149] Id. at 26.

[150] See Case of Davis, 7 F. Cas. 63, 92, 95 (C.C.D. Va. 1867).

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So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.[151] Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.[152] This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

d. The argument from the Section Five enforcement power

Having flailed to avoid the natural reading of Section Three, Chase finally offered his alternative, "reasonable construction":

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' [sic] ... The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.[153]

Section Five "qualifies" Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise "qualifies" Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course

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[151] Id. See Magliocca. *Amnesty*, supra note 5, at 100-102; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 293-300 (2017).

[152] Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. Id. at 293-296.

[153] 11 F. Cas. at 26.

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of performing their assigned duties. But as noted above there is no reason why "proceedings" and "decisions" and "enforcement" with respect to Section Three's commands may not be conducted and carried out by these various state and federal actors, exercising their usual authority with respect to such matters.[154] It is simply not true that "these can only be provided by Congress." Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin's Case*, until Chase stopped him.

Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin's Case*.

3. *Griffin*'s Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."[155]

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

> In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge. . . .
>
> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under

[154] Magliocca also suggests that in the specific situation in Griffin's Case, state law may have been "unavailable for enforcement" of Section Three because "Virginia was an unreconstructed state and thus lacked the ordinary powers of a state" and "because Virginia did not yet recognize the Fourteenth Amendment's legitimacy" – in contrast with states such as North Carolina. Magliocca, *Foreground*, supra note 62, at 10 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the union.

[155] 11 F. Cas. at 27.

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> color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[156]

What is going on here? Chase describes an alternate ground for the case—"a judge de facto acting under color of office," which we would now call the "de facto officer doctrine"—explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs in to it the more dubious the whole opinion becomes.

First of all, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended. But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown. The de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.[157]

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,[158] fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with

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[156] 11 F. Cas. at 27.

[157] Accord, Magliocca, *Foreground*, supra note 62, at 11 n.25.

[158] See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.") https://founders.archives.gov/documents/Jefferson/98-01-02-3562; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1011-12 & n.39 (2003); Baude, Judgment Power, 96 Geo. L.J. 1807, 1823-24 (2008).

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reference to this and kindred cases in this district."[159] The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,[160] in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court."[161] Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.[162] Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"[163] fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out

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[159] 11 F. Cas. at 27.

[160] The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex Parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." Ex parte State of Virginia No. 11, 1868 WL 10951, 19 L. Ed. 153 (1868); Fairman, supra note 123, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course – not deputize the Chief Justice to go deliver some secret verdict in their stead.

[161] Fairman, supra note 123, at 607.

[162] Id.

[163] Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

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to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.[164] But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto judges in the saga surrounding *Hayburn's Case*.[165]

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."[166] On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack.[167] Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.[168] On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction.[169] The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.[170] Indeed, these technicalities were argued by the parties and they were the main subject

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[164] For many citations, see Griffin's Case, 11 F. Cas. at 18-21 (argument of counsel). For more, see also Reply and Response Brief for the United States, Financial Oversight and Management Board for Puerto Rico v. Aurelius (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121) 20190919201613217_18-1334rbUnitedStates.pdf (supremecourt.gov) at 27-47; and Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

[165] Baude, Severability, supra note 66, at 12 (discussing Yale Todd).

[166] For statements like this, see Ball v. United States, 140 U.S. 118, 128-129 (1891) ("was judge de facto if not de jure, and his acts as such are not open to collateral attack."); see also Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 910, 919 (1963); but see id. at 910 & n. 9 (suggesting that a suit is collateral whenever the officer "is not a party," including on "writ of error").

[167] All three cases cited by Chase in Griffin's Case, 11 F. Cas. at 27, can be characterized this way. Taylor v. Skrine, 5 S.C.L. 516, 3 Brev. 516 (1815) deals with a writ of execution and observes that "no objections were made to his authority at the time the decree was given." State v. Bloom, 17 Wis. 521 (1863) relies entirely on In re Boyle 9 Wis. 264 (1859) which is a habeas case holding that the "right to hold the offices cannot be inquired into in a collateral proceeding of this kind," id. at 267. And People v. Bangs, 24 Ill. 184., 187 (1860) distinguishes a "direct proceeding" from one where the doctrine applied.

[168] For statements like this, see *McDowell v. United States, 159 U.S. 596, 598* (1895) ("presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment."); see also Note, *The De Facto Officer Doctrine, at 918 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).*

[169] But see In re Boyle, cited supra note 167 (distinguishing "the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offence").

[170] In the Supreme Court's most recent de facto officer doctrine case, Ryder v. United States, 515 U.S. 177 (1995), it split the difference, holding the doctrine inapplicable because the case was on direct

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of Judge Underwood's opinion below.[171] Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

* * *

There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

III. Section Three Supersedes, Qualifies, or Satisfies Prior Constitutional Provisions

Our third proposition is logically and methodologically straightforward but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.[172] Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition—there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, unAmerican (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong: dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments change the Constitution. It thus should be unsurprising—indeed, it is in the very nature of constitutional amendments—that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment*

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review *and* the challenge was constitutional. In the more recent case of Financial Oversight and Management Board for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1666 (2020), it avoided the issue because it found the appointments lawful.

[171] See Opinion of Judge Underwood, supra note 122, at 463-466.

[172] See supra Part III.C.2.c.; see also Ginsburg, Huq, & Landau, supra note 115, at 18 (suggesting that a self-executing interpretation, "while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns" and for that reason an "alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced").

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supersedes prior law precisely to the extent that it departs from the prior rules. This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms, understood in their natural sense and accounting for any terms of art or specialized usages of words, departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote. When this occurs, the courts must determine the "meaning and operation" of the two provisions.

Hamilton articulated two principles for doing so, which work as a complementary pair. "So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done"—there's the first of the pair, but Hamilton's sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair: "where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first." This was, Hamilton continued, "a mere rule of construction," but it was an appropriate one, "consonant to truth and propriety," consistently recognized by courts as interpreters of law: that, as "between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference."[173]

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority—and proceeded to derive the proposition customarily called "judicial review."[174] But that is not the interpretive question here. Here, the key point is precisely Hamilton's lead-in proposition: that, as between "interfering" acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same

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[173] See The Federalist No. 78 (I. Kramnick ed. 1987) at 439 (Hamilton). These rules were well-established in American and English law. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 235-244 (2000)

[174] See The Federalist No. 78, supra note 173, at 439-440 (Hamilton) ("But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.")

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legal status: By the terms of Article V, constitutional amendments are "valid to all Intents and Purposes, as Part of this Constitution," when adopted.[175] Thus, where We, the People, have adopted a new constitutional text "interfering" with or departing from prior constitutional provisions, the last-in-time enacted prevails to the extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights in a sense qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent of a conflict between those powers and the subsequently enumerated rights.[176] Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.[177]

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"[178] does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the preexisting lawmaking process.[179] A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original apportionment

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[175] U.S. Const. art. V.

[177] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[177] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[178] U.S. Const. amdt XIV, sec. 5.

[179] See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 19 (2017) (offering the examples in this paragraph).

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rules including the notorious Three-fifths Clause.[180] Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies an earlier-enacted constitutional provisions with which the new provision conflicts, Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.[181]

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex post Facto Clause. *To the extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—*to the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the

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[180] See U.S. Const. amdt. XIV, sec. 2; U.S. Const. art. I, sec. 3. By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

[181] Indeed, for what it is worth, the legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. Cong. Globe, 39th Cong. 1st Sess. at 2915 (Sen. Doolittle) (complaining that Section Three was an "ex post facto provision, a bill of attainder"); id. at 2890 (Sen. Cowen) (bill of attainder); id. at App 241 (Sen. Davis) (Section Three "is in the nature of both a bill of attainder and an ex post facto law"); id. at 2940 (Sen. Hendricks) (ex post facto); id. at 2916; see also id. at 2467 (Rep. Boyer) (criticizing earlier version of Section Three as "a bill of attainder or ex post facto law"). These charges were generally premised on the view – with which proponents of the amendment evidently agreed, see id. at 3036 (Sen. Henderson) – that Section Three would preempt these earlier rules to the extent of a direct conflict. Though at one point Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. Id. at App. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it"); see also id. at 3146. See also Graber, supra note 12, at 26-31, 36-37 (documenting this history).

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correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think that these various prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible; and it is, for the most part, fairly possible to do so. But to the legitimate extent of any conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

A. Bills of Attainder

A bill of attainder is the legislative infliction of punishment on specific people without a trial.[182] It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a "bill"—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an "attainder" either—in that it is not at all clear that it inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-second Amendment is surely not inflicting a "punishment" when it precludes the President from running for a third term.[183] Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of 20th-century "red scare" cases[184] and perhaps more relevantly in a pair of immediate post-Civil War-era loyalty cases: In *Cummings v. Missouri*[185] and *Ex Parte Garland*,[186] the Supreme Court invalidated state and federal oath requirements that required an "Ironclad Oath" from anybody holding a range of positions, both public and private. That oath was really a *past*-loyalty-requirement, requiring people to swear that they had not supported the confederacy or

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[182] See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177 (2011).
[183] U.S. Const. amdt. XXII. But see Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from office many be punishment, as in cases of conviction upon impeachment.").
[184] United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
[185] 71 U.S. 277 (1866).
[186] 71 U.S. 333 (1866).

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the like.[187] The Court concluded that these requirements were effectively bills of attainder—and also ex post facto laws—and held them unconstitutional.

Even if one takes these precedents at face value it does not follow that Section Three would similarly be a bill of attainder. First, the "Ironclad Oath" laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[188] Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.[189] Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the majority opinion emphasized this fact, explicitly noting that neither case involved qualifications for public office.[190] Second, because both cases focused on the retroactive effect of the laws,[191] neither case's reasoning would seem applicable to Section Three in post-Civil-War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.[192]

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin,* Chief Justice Chase).[193] Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.[194] In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

B. Ex Post Facto Laws

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[187] For much more detailed discussion of the federal "Ironclad Oath" see infra Part IV.A.4.b.i.
[188] Garland, 71 U.S. at 377.
[189] Cummings, 71 U.S. at 319.
[190] Garland, 71 U.S. at 378.
[191] Cummings, 71 U.S. at 327 ("They are aimed at past acts, and not future acts."); Garland, at 377 ("In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed").
[192] See supra Part I.B.
[193] Garland, 71 U.S. at 382. *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment) and an especially weak case for the relevance of past loyalty to engaging in religious occupation.
[194] For a somewhat lighthearted explication of this principle – and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 Const. Comm. 285 (2007).

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Article I also forbids both the state and federal governments from enacting an "Ex Post Facto" law.[195] An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.[196] True, as applied to actions done before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the "spirit" of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

Indeed, we have this on especially good authority, as this very question has been asked and answered in the past. The Eleventh Amendment, as noted above, had the effect of cutting off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III. In *Hollingsworth v. Virginia*, the Court then confronted the question whether the Amendment was retroactive, cutting off suits pending when the Amendment became law. The plaintiffs argued in the U.S. Supreme Court against retroactivity, because "[t]he spirit of the constitution," forbade "the mischief of an ex post facto Constitution."[197] Indeed, this argument mirrored precisely the arguments for narrow construction we have seen above: "It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution."[198] But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.[199] As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions covered by the revised constitutional rules.

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[195] U.S. Const. art. I, §§9 & 10.

[196] To be sure, there are revisionist arguments that the Ex Post Facto clause itself extends to retroactive civil laws too. See Eastern Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. Cummings, 71 U.S. at 326-332; Garland, 71 U.S. at 377-368. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis

[197] 3 U.S. at 378-80 (arguments of counsel).

[198] Id.

[199] Id. at 382. See Baude & Sachs, *Eleventh Amendment*, supra note 9, at 626-627.

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C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property without due process of law," which in many circumstances requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First of all, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege, a public trust, to be vested with the power of the people. And though it is a closer case, the same thing may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation. It does not protect *public* rights.[200] It has been argued that in England, offices *were* understood as vested rights of property, and occasionally early American courts said so as well.[201] But that was not the better rule in America. Treating offices as property did not fit well with republican principles,[202] and by 1900 the Supreme Court could rightly state: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such."[203]

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.[204] So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin's Case*. But in our view this objection is sufficiently answered by the terms of Section Three itself. Perhaps the reason that Section

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[200] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565-593 (2007); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1540-1547 (2020).

[201] Jed Shugerman, *Freehold Offices vs. "Despotic Displacement": Why "Executive Power" Did Not Include Removal* (July 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119; Hoke v. Henderson, 15 NC 1 (1833).

[202] See Jane Manners & Lev Menand, *The Three Permissions*, 121 Colum. L. Rev. 1, 20 (2021) ("In revolutionary America, the idea of offices as property was roundly rejected"); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1824 n. 157 (2006) ("A more republican conception of government meant a more republican conception of offices.").

[203] Taylor & Marshall v. Beckham, 178 U.S. 548 (1900).

[204] See supra notes 48-50 and accompanying text.

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Three only applies to holding office and not voting, and only applies to prior office-holders, who have previously sworn a constitutional oath—indeed, these limitations are the only ways in which Section Three's scope was appreciably narrowed during the drafting process—is that we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would seem to disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warranto suits, state and federal judicial review, congressional adjudications, and so on. Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels.[205] Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

D. The Ominous Question: Section Three and the First Amendment

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

Thinking too hard about this problem yields a morass: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to insurrectionists, rebels, or other enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding *of Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal

[205] See generally supra Part II.B.

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disabilities imposed by Section Three take over, as a matter of the proper understanding of Section Three?

There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as properly understood as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example[206] but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of "engage in insurrection" and "aid or comfort"—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, and under modern doctrine, that would mean the very stringent test of *Brandenburg v. Ohio*?[207] Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.[208] First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three's terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today's liberal understandings.[209])

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[206] See infra Part IV.C.2.

[207] 395 U.S. 444 (1969).

[208] Federalist No. 78, supra note 173, at 173 ("So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.")

[209] For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools,* 85 Minn. L. Rev. 1917, 1919-1922 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see for starters, Adam Griffin,

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The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is "speech integral to criminal conduct."[210] And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.[211] Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning "incitement." Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous "clear and present danger" test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) "*directed to*" (ii) triggering or inciting (iii) "*imminent*" lawless action (presumably including acts of insurrection or rebellion) and (iv) "likely" to produce such action.[212] That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court's relatively recent decision in *Holder v. Humanitarian Law Project*[213] recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides "material support" to a foreign organization engaged in or committed to terrorist violence against the nation. The Court concluded that because the "interest in combating terrorism is an urgent objective of the highest order," the Congress could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly*

First Amendment Originalism: The Original Law and A Theory of Legal Change as Applied to The Freedom of Speech and of The Press, 17 First Amend. L. Rev. 91 (2019); Jud Campbell, *Natural Rights and the First Amendment*, 117 Yale L. J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 Yale L. J. 861 (2022). (We will cease further digression on this point.)

[210] United States v. Hansen, 599 U.S. __, at 18-19 (2023); United States v. Williams, 553 U.S. 285, 297 (2008); Giboney v. New Ice Storage, 336 U.S. 490 (1949); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-993, 1007-1008 (2016).

[211] Volokh, supra note 210, at 1011-1015.

[212] 395 U.S. at 447; see also Hess v. Indiana, 414 U.S. 105, 108-109 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)..

[213] 561 U.S. 1 (2010).

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further terrorist conduct. While this decision is hedged by multiple limiting principles,[214] it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having "engaged in insurrection" or provided "aid or comfort" to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that "he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it,"— that he was "warring upon the Military."[215] It is conceivable (though we do not prejudge the point) that Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army "unto the death" and stating that anybody who volunteered for the Union army "ought and I believe will be shot down before he leaves the State."[216] This exclusion was part of the backdrop of Section Three's enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion "was entirely unconstitutional" and "plainly violative of the First Amendment."[217] If that was so before Section Three's enactment, does Section Three make it otherwise?[218]

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during

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[214] The Court emphasized that "only material support coordinated with or under the direction of a designated foreign terrorist organization" was banned; "independent advocacy" was "not covered." Id. at 31-32. Additionally, the law only applied to *foreign* organizations.

[215] President Abraham Lincoln to Erastus Corning and others (June 12, 1863), in Abraham Lincoln, Speeches and Writings, 1859-1965, at 454, 459 (Don Fehrenbacher, ed. 1989). See infra notes 264-272 and accompanying text.

[216] See infra notes 265-273, and 338-343 and accompanying text.

[217] Lynch, supra note 5, at 197-198.

[218] See Lynch, supra note 5, at 198 ("Had Section 3 been ratified by this point, these concerns would be assuaged.")

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this Great War," and excluded in part on that basis.[219] (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on grounds of judicial bias.)[220] Another scholar of the incident writes that "Under a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however under the interpretation prevailing at the time, they probably were."[221] What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.[222] But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.[223]

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger; but insurrection and rebellion are dangers too—all too real dangers, as recent events have shown. Where exactly that line is drawn by the Constitution, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three's general terms triggering disqualification from future office—"insurrection," "rebellion," "engaged in," "given aid or comfort to"—and of who all is included under Section Three's ban. To that set of important questions we turn next.

IV. Section Three's Substantive Disqualification is Sweeping

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[219] Chafetz, supra note 47, at 190; Lynch, supra note 5, at 211-213; 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 52-63 (1935).

[220] Berger v. United States, 255 U.S. 22 (1921). Curiously, after this verdict the House then allowed him to sit in the sixty-eighth through seventieth Congresses. Lynch, supra note 5, at 213.

[221] Chafetz, supra note 47, at 191.

[222] In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. See infra note 354.

[223] Federalist No. 78, supra note 173, at 439.

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We come at last to the heart of the beast: the substance of Section Three's prohibition. We begin (in Subpart A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having "engaged in" "insurrection" or "rebellion" against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given "aid or comfort" to "enemies" of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms' core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a "sure shipwreck,"[224] to borrow Susan Morse's phrase—of unquestionably disqualifying conduct falling within the core of Section Three's meaning: for example, declared secession from lawful constitutional government; or the taking up of arms against government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three's terms—ordinary expression of political dissent as well as even ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in subpart A.

We then turn more briefly (in subpart B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—*are covered* by Section Three's ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three's disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.

Finally (in Subpart C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president's willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat for re-election and, instead, his (and others') attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de

[224] Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

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facto political coup d'etat against the regime of lawful constitutional government, constitute engaging in "insurrection or rebellion against the Constitution of the United States"? We think the answer is *yes*.

Whether called a "rebellion," an attempted coup d'etat seeking to displace lawful government authority under the Constitution, or an "insurrection," instigating, inciting and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—such conduct is covered by Section Three, and is disqualifying. If those are indeed the facts concerning Donald Trump's (and others') efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting "insurrection" or "rebellion" (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave "aid or comfort" (approval, encouragement, support) to others who did, might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three's meaning, those judgments are entitled to full legal effect.

A. Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and especially contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted and sometimes implemented by the Civil War Congress (both the 1862 "Ironclad" oath and the Second Confiscation Act), and the significant mid-Civil-War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, including the Insurrection Act of 1795 as amended, and an important series of exclusions from Congress itself, as well as the relevant legislative history of

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Section Three, and a few scattered post-enactment applications of Section Three itself.

1. Working definitions

We begin by offering working definitions of the terms *insurrection* and *rebellion* as used in Section Three and of what might constitute "engaging in" such conduct or giving "aid or comfort" to others who do.

Insurrection is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect.* The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government.* Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."[225] Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases*, in 1863: "Insurrection against a government may or may not culminate in an organized rebellion."[226]

Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means.* (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime's authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself.* The South's attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States by the states asserting the right to secede. Likewise, an attempted coup d'etat is arguably also a species of rebellion—an effort to displace,

[225] 10 Documentary History of the Ratification of the Constitution 1296 (Statement of Madison) ("A riot did not come within the legal definition of an insurrection").
[226] 2 Black (67 U.S.) 635, 667 (1863).

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replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

The term *rebellion* can also imply a competing claim to legitimacy. "Rebellion" thus seems to carry a stronger political-claim-of-right valence than does "insurrection."[227] Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South's secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d'etat, or declaration of independence, or secession, is claimed to be a "vindication" or "restoration" of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person's or group's alleged wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as "rebellion" but restoration. Mistake of law is no defense to a coup d'etat. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession as an act for the vindication of its believed rights.[228] That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by*

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[227] Though it is possible that this connotation is anachronistic. See infra note 247.

[228] For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see James M. McPherson, Battle Cry of Freedom: The Civil War Era 234-236 (1988) (summarizing Southern constitutional and political theories); Daniel Farber, Lincoln's Constitution 57-91 (2003) (emphasizing arguments of states' rights to interposition, nullification, and secession generally); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame. L. Rev. 1227, 1270-1277 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. Am. Hist. 5-53 (June 1978) (providing detailed history of constitutional and political arguments over the nature of Union and the validity of secession); David P. Currie, The Constitution in Congress: Descent into the Maelstrom 1829-1861, at 228-237 (2005) (discussing and evaluating the constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see generally 2 Abraham Lincoln, Speeches & Writings, 1859-1865: Speeches, Letters, Miscellaneous Writings, Presidential Messages & Proclamations, at 217-218 (First Inaugural Address, March 4, 1861); id. at 254-258, 260-261 (Message to Congress, July 4, 1861); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi. L. Rev. 691, 703-715 (2004) (reviewing Daniel Farber, Lincoln's Constitution) (distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, supra note 127, at 303-311 (same). For further background, see generally William W. Freehling, The Road to Disunion: Secessionists at Bay 1776-1854 (1990), and for a comprehensive exposition of the Southern view, see Alexander M. Stephens, A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results (1867).

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force—and thus may occupy some ground not covered by the word "insurrection" (which, we have suggested, must be forcible). There are such things as "bloodless coups": actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.[229]

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861[230] preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws. The secession ordinances might still immediately constitute acts of "rebellion," even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together—acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs (as they obviously did with the Civil War)—and it becomes difficult to distinguish "insurrection" from "rebellion." The overlap of the two terms in theory becomes complete in practice.

In the end, however, we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that "insurrection" and "rebellion," in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

So much for our working definitions of "insurrection" and "rebellion." What does it mean to have "engaged in" such conduct? We believe one has "engaged" in insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly pro-*

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[229] Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political coup d'etat – an act of "rebellion" if judged by the pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance, and subsequently legalized by its own success. See generally Paulsen & Paulsen, supra note 30, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub Pol'y 818, 821, 844, 850 (2015).

[230] The seceding states adopted their secession resolutions by state "conventions," purporting to parallel the process by which the states ratified the Constitution. See McPherson, supra note 228, at 234-284 (describing secession actions of the ten states that purported to secede from the Union). The secession ordinances of the South were self-consciously styled after the Declaration of Independence, which was obviously an act of formal legal rebellion.

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vided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has "engaged in" such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.[231] (There is obvious overlap here with the closely related concept of having given "aid or comfort" to the nation's enemies, which we discuss presently.)

Of course, there are also important limits to how far the concept of having "engaged in" insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have "engaged in" insurrection or rebellion. An exception to this limitation might exist where a person possesses an affirmative duty to speak or act. Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three's terms.

Then there is the related question of what constitutes having given "*aid or comfort*" to "the *enemies thereof.*" This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion "*or*" having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.[232]

In many cases, giving "aid or comfort" to enemies will be similar to the kind of conduct that counts as having "engaged in" insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term "aid or comfort" reinforces and emphasizes Section Three's coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section Three's "aid or comfort" language, even where it might be debatable whether to characterize such conduct as directly "engag[ing] in" insurrection or rebellion.

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[231] This working definition of having "engaged in" wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with "assistance" including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). Federal criminal law today is to similar effect. 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). We think it is also generally supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1108 (2017). That said, the lesson of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See text accompanying infra note 420.

[232] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.")

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Additionally, while Section Three uses some language paralleling that contained in the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. "Insurrection" and "rebellion" are their own things, distinct from "treason." While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within Section Three. So even if "aid or comfort" in Section Three connotes the same type of assistance-and-embrace principles as "Aid and Comfort" in Article III's Treason Clause,[233] the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal-law conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.)

Finally, aid or comfort to whom? "[T]he enemies thereof." We believe that "enemies" as employed in Section Three, embraces enemies both foreign *and domestic*. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War,[234] and it seems clear from the political context of Section Three, enacted in the wake of a domestic civil war, that domestic enemies are enemies. It is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text.[235] Given the history and context of Section Three "enemies" seems to include the domestic rebels and insurrectionists just described earlier in the sentence.[236]

Our sense of the whole—of Section Three's substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called "insurrection" or "rebellion"; and whether a covered individual is thought to have "engaged in" such activity or given "aid or comfort" to "enemies" engaging in such activity, Section Three's disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

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[233] See infra note 253.

[234] See infra Part IV.A.4.b.ii.

[235] What is the referent of "enemies *thereof*"? Does "thereof" refer to enemies of the *United States* or enemies of *the Constitution of* the United States? We think this replicates the question of what "*the same*" refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (Does "insurrection or rebellion *against the same*" refer to insurrection or rebellion against "*the United States*"? On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing; either one is capable of being considered an instance of the other.) Whatever the answer, it should be the same for both – "against the same" and "thereof" refer to the same thing. And given that the Treason Clause refers to "enemies" of "the United States," it seems fairly likely that Section Three does too.

[236] See also, e.g., Section Two of the Second Confiscation Act, discussed infra Part IV.A.4.b.ii.

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Finally, let us reiterate one consequence of Section Three's breadth and capaciousness. Because Section Three's terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held "unconstitutional" by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.[237] It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of other branches only because, and only to the extent to, they deviate from the Constitution's meaning. It is classically illustrated by the Court's reasoning in *M'Culloch v. Maryland*,[238] which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.

And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

2. Contemporaneous Dictionary Definitions

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[237] See, e.g., Paulsen, *Rules for Its Own*, supra note 9, at 858 (arguing that where constitutional language states a general principle, "actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable"); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 995 (2008) (arguing that "textual imprecision or generality often admits of a range of choices" and that the correct constitutional answer in such circumstances "is that the legislature must be permitted to choose from options within that range"; thus, "the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted"); Kesavan & Paulsen, *Secret Drafting History*, supra note 9, at 1129-30 n.54 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 333 (1994); Baude & Sachs, Law of Interpretation, supra note 231, at 1120 (describing "the presumption of constitutionality" as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

[238] 17 U.S. (4 Wheat.) 316 (1819),

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As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective*, *original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. (We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning: it can serve as a kind of operational, practical concordance that may "define" terms more precisely in their application than can a cold dictionary definition.)

Nineteenth century dictionaries contain definitions of "insurrection" and "rebellion" that substantially corroborate our working definitions. Webster defined "insurrection" as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state."[239] Rebellion was "[a]n open and avowed renunciation of the authority of the government to which one owes allegiance."[240]

Importantly, Webster also noted several distinctions between these and other terms. In defining rebellion, he distinguished an insurrection as "a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government," while a rebellion was a more categorical "attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."[241] And in defining insurrection, Webster noted that insurrection is "equivalent to sedition, except that sedition expresses a less extensive rising of citizens."[242] This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that "[i]nsurrection may be, but is not necessarily, rebellion"[243] and that despite these technical distinctions, "[i]nsurrection is however used with latitude as to comprehend

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[239] 1 Noah Webster, American Dictionary of the English Language 111 (1828, photoreprint 1993) ("Insurrection"); see also Dr. Webster's Complete Dictionary of the English Language 702 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (similar); 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (similar).

[240] 2 Webster (1828), supra note 239, at 51 ("Rebellion"); see also Webster's (Porter 1864), supra note 239, at 1094 (similar); 2 Boag, supra note 239, at 319 (similar).

[241] 2 Webster (1828), supra note 239, at 51 ("Rebellion"); see also 1 Boag, supra note 239, at 727; 2 id. at 319 (similar).

[242] 1 Webster (1828), supra note 239, at 111 ("Insurrection"). For comparison, Webster defined "Sedition" as: "A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . ." 2 Webster (1828), supra note 239, at 66 ("Sedition").

[243] 2 Webster (1828), supra note 239, at 51 ("Rebellion"); see also 2 Boag, supra note 239, at 319 (similar).

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either sedition or rebellion."[244] This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, John Bouvier's Law Dictionary in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion,* and *aid and comfort.* "INSURRECTION" was defined simply as "[a] rebellion of citizens or subjects of a country against its government."[245] "REBELLION" is correspondingly defined: "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*"[246] Bouvier's thus treated "insurrection" and "rebellion" as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government but not clearly distinguishing between them.[247]

Bouvier's dictionary also offers an instructive definition of "AID AND COMFORT" as "[h]elp, support, assistance, counsel, encouragement." The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

> The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act ...[248]

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[244] 1 Webster (1828), supra note 239, at 111. Daniel Hemel argues that "Webster's definition of 'insurrection' seems implausibly broad for Section 3 purposes." See Hemel, How-to Guide, supra note 5.

[245] "Insurrection" in 1 John Bouvier. A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 729-730 (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[246] "Rebellion" in 2 Bouvier (1868), supra note 245, at 415 (emphasis added).

[247] See also Joseph Worcester, A Dictionary of the English Language 764, 1190 (1860) (generally equating insurrection and rebellion). Elsewhere in this edition, Bouvier drew a distinction in connotation between "REBEL" and "INSURGENT," suggesting that "rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the tyranny of constitute authorities," and thus that "[t]he colonists who opposed the tyranny of the English government were insurgents, not rebels." "Insurgent" and "Rebel" in 1 Bouvier (1868), supra note 245, at 729; 2 id. at 415.

In a much later edition, Bouvier's drew a distinction between *insurrection* and *rebellion* as two different varieties of "actual and open resistance to [government] authority." *Insurrection* was "an actual uprising against the government" while *rebellion* "goes beyond insurrection in aim" and attempts actually to overthrow the government authority in question. "Insurrection" and "Rebellion," in 2 Bouvier's Law Dictionary & Concise Encycl. (Rawles Rev., 1897). Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as "contemporarily authoritative." Lynch, supra note 5, at 167 n. 80.

[248] "Aid and Comfort" in 1 Bouvier (1868), supra note 245, at 107.

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This tends to confirm our broad construction of "aid or comfort" as encompassing many kinds of intentional support, akin to the common law.

3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or near) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation "Intratextualism.")[249] Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.[250]

Might the Constitution's other usages of terms that also appear in Section Three serve as such markers of meaning for "insurrection" and "rebellion," and "aid or comfort" to enemies, as those terms are used in Section Three? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel Invasions."[251] The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or invasion the public Safety may require it."[252] In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid and comfort" to enemies—borrows the nearly identical language of the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation

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[249] Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999).

[250] *M'Culloch*, 17 U.S. at 413-414. In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word "necessary" was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen, Marbury, supra note 66, at 2711; see also Michael Stokes Paulsen, *The Plausibility of Personhood,* 74 Ohio St. L. J. 13, 33 n. 72 (2013).

[251] U.S. Const. art. I, §8 cl. 15.

[252] U.S. Const. art. I, §9 cl. 2.

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of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.[253] Moreover, in the 1860s, the pairing of "aid" and/or "comfort" had become ubiquitous in legal and public discourse as a general allegation of improper assistance, making it still less clear that it was perfectly coterminous with the law of the Treason Clause.[254]

Finally, the words "insurrection" and "rebellion" also appear elsewhere in the Fourteenth Amendment itself, but again in ways that give little external light on Section Three. A person's "participation in *rebellion*" is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state's representation as a consequence.[255] Section Four of the amendment prohibits payment of debts or obligations "incurred in aid of *insurrection* or *rebellion*."[256] These neighboring sections use slightly different phrases for the behavior they cover ("participation" and "engaged in"; "aid or comfort" and "in aid of"), but it is difficult to say if the variations are meaningful.

4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms "insurrection,"

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[253] Perhaps the most notable U.S. treason case to date was Ex parte Bollman, in which Chief Justice Marshall delivered an opinion for the Court granting habeas to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American (then-)southwest and attempt to form his own independent nation. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part because of Article III's text ("only in levying war") with a relatively broad construction of complicity. Thus on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason," id. at 126, but on the other hand, "if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." Id. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: first, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, that though they might not qualify as treason, remain great and culpable legal wrongs; second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose; third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman*'s construction was sufficiently established to be read in to Section Three itself, it was cited occasionally in the 1860s Congress. See, e.g., 37th Congress 2nd Session Cong. Globe 414 (1862) (statement of Sen. Sumner) (citing *Bollman* passage quoted above during the proceedings to expel Senator Jesse Bright for writing a letter to Jefferson Davis).

[254] See Harold Holzer, Lincoln and the Power of the Press: The War for Public Opinion 361 (2014) (referring to the phrase "aid and comfort to the enemy" (by the press) as "that catch-basin phrase again.").

[255] U.S. Const. amdt. XIV, sec. 2.

[256] U.S. Const. amdt. XIV, sec. 4.

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"rebellion," and "engaging in," as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in the landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, "insurrection" or "rebellion." A wide range of actions supportive of secession appears to have constituted "engaging in" or giving "aid or comfort" to rebellion or insurrection.

This leads us to what we think an obvious "sure shipwreck"[257] for understanding Section Three's terms. Whatever else "insurrection or rebellion" might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned: first, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly "seceded" state governments and their confederation into the "Confederate States of America"; and second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting either secession or armed resistance to U.S. authority constituted "engaging in" or giving "aid or comfort to" the Union's enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. President Lincoln

An extremely important contemporaneous source for understanding the public constitutional meaning of "insurrection" and "rebellion" in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating "secession" as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln's view, a "war" between the United States and another

[257] Morse, supra note 224.

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sovereign.[258] It was not subject to Congress's Article I, section 8, *clause 11* power to "declare War," but was rather an illegal *rebellion*—a "giant insurrection"—to be suppressed by executive authority pursuant to Congress's Article I, section 8, *clause 15* power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[259]

Consider just a few prominent and illustrative statements: In his First Inaugural Address, on March 4, 1861, Lincoln, after setting forth arguments that "no State upon its own mere motion can lawfully get out of the Union," concluded that "acts of violence within any State or States against the authority of the United States" are "*insurrectionary or revolutionary, according to circumstances.*"[260] Following the attack on Fort Sumter, Lincoln's April 15, 1861 proclamation calling forth the militia similarly characterized the attack as fitting the statutory definition of *insurrection.*[261] And in his July 4, 1861 Message to Congress, Lincoln labelled the South's purported secession a "*giant insurrection*" and, vividly, as "*rebellion* ... sugar coated." The "so-called 'Confederate States'" had formed an "*insurrectionary* government."[262] In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, section 9, clause 2 of the Constitution, which used exactly that language of "rebellion."[263] Lincoln's use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators, no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion.*

Two years later, at the height of the war, Lincoln returned to the characterization of the South's actions as "rebellion" (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio

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[258] On Lincoln's understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war) see sources cited in note 228. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L. Rev. 807, 814-823 (2006).

[259] Compare U.S. Const. art. I, §8, cl. 11 (Declare War Clause) with U.S. Const. art. I, §8, cl. 15 (power "to provide for calling forth" the Militia for law execution and to suppress insurrections"). Congress's exercise of this power – the Insurrection Acts of 1795 and 1807 – is discussed infra Part IV.A.5.a.

[260] Abraham Lincoln, First Inaugural Address (March 4, 1861), IV Complete Works of Lincoln ("CWL") 262, 265.

[261] Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), IV CWL 331, 332.

[262] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), IV CWL 421, 427-428, 432-437.

[263] Id. at 429-431 (emphasis added).

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Congressman Clement Vallandigham, a notorious racist and prominent "Copperhead" pro-South, anti-Union northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the propriety of the Union's war effort.

Lincoln distinguished law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: "Ours is *a case of Rebellion*—so called by the resolutions before me—in fact, *a clear, flagrant, and gigantic case of Rebellion.*" And that, Lincoln concluded, was what allowed suspension of habeas corpus.[264] In the course of his argument, Lincoln described rebellion as "*sudden and extensive uprisings against the government.*"[265] This is a useful description that supports our working definition: Rebellion is an "uprising." It is something more than mere protest. It is, often, "sudden." It is "extensive." It is directed "against the government." *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham's actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, "under cover of 'Liberty of speech,' 'Liberty of the press,' and 'Habeas corpus,'" rebel sympathizers "hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways."[266] Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied "cover" for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person's refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a "man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy." He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now "occupying the very highest places in the rebel war service," such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[267] Lincoln's position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the

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[264] U.S. Const. art. I, §9, cl. 2.
[265] Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), VI CWL 260, 264 (emphasis added).
[266] Id. at 263.
[267] Id. at 265.

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imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.[268] In a colorful metaphor, Lincoln ventured:

> I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.[269]

Lincoln also stressed a distinction between speech directed at criticism of the government's political policy—fully protected by the freedom of speech—and expression more or less directly aimed at harming the military's recruitment and war effort. If Vallandigham had been arrested merely because he was "damaging the political prospects of the administration" or "the personal interests of the general," that would be one thing, Lincoln observed. "[I]f there was no other reason for the arrest, then I concede that the arrest was wrong." But as Lincoln understood it, the arrest "was made for a very different reason"—that Vallandigham was "laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Vallandigham

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[268] In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those distinguishing pure speech from speech linked to prohibited *conduct*; recognizing limits on speech posing a danger of inciting to crime or lawlessness; recognizing "compelling interest" overrides in exceptional circumstances, including for reasons of national security or military secrecy; finding that government's motives and purposes for a particular action may matter to its lawfulness; and noting where an incidental limitation on expression leaves open alternative channels for expression of the same message. See Paulsen, *Civil War, supra* note 228, at 698-702 & n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment's freedom of speech).

[269] Letter to Corning (June 12, 1863), VI CWL at 267. (*Emetics* referred to a medicine or substance used to induce vomiting.)

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was, in short, "warring upon the military." He who "dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle." Desertion was punishable by death, of course. In a famous line, Lincoln asked, rhetorically "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[270] Lincoln's answer was no: "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy." [271]

Lincoln continued: "If I be wrong on this question of constitutional power," he added, "my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them -- in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security."[272]

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action. Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms "insurrection or rebellion," and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct, *all* constituted forms of support for and participation in "insurrection" or "rebellion." And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions

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[270] Letter to Corning, VI CWL at 266.
[271] Id. at 266-67.
[272] Id. at 267.

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of the post-war status of persons who had participation in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.[273]

b. Congress

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: We think two specific enactments of Congress during the Civil War are especially probative of the understandings of "insurrection" and "rebellion" and of what conduct was publicly understood to constitute having "engaged in" or given assistance to rebellion. First, there is the so-called "Ironclad Oath," adopted on July 2, 1862 as the oath one must be able to swear in order to hold federal office.[274] Second, there is the "Second Confiscation Act," adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting "rebellion" or "insurrection."[275] These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

i. The Ironclad Oath

Congress adopted The Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.[276] The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility

[273] Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as "the rebellion." Annual Message to Congress (Dec. 8, 1863), VII CWL at 51 In his accompanying offer of amnesty and pardon, in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the "rebellion" that "now exists whereby the loyal State governments of several States have for a long time been subverted" (id. at 53), to "said rebellion and treason" (id. at 54), to "said rebellion" (id.) and to persons who had provided "aid" to the "rebellion" in various forms. Interestingly, Lincoln *excepted* from his offer of forgiveness – in language that would seem to presage the similar terms of Section Three – "all who have left judicial stations under the United States to aid the rebellion" and "all who resigned commissions in the army or navy in the United States, and afterwards aided the rebellion." Id. at 55. Lincoln also left to the respective houses of Congress the exclusive judgment "whether members sent to Congress from any State shall be admitted to seats."

[274] 12 Stat. 502.

[275] 12 Stat. 589 (1862). 12 Stat. 627 (1862).

[276] 23 Stat. 21 (1884). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, 15 Stat. 85 (1868), and in 1871 it added that anybody "who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution" yet would otherwise "not be able on account of his participation in the late rebellion to take" the Ironclad Oath, could take the forward-looking oath instead, 16 Stat. 412 (1871). These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

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for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.[277] It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath's list of never-have-I-evers particularly instructive. Here's the oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

> I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor attempted to exercise the functions of any office whatever,* under any authority or pretended authority in hostility to the United States; that I have [4] *not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-evers would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms, of course. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution* . . . hostile or inimical" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: What the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.[278]

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[277] For this reason, Lincoln famously wrote: "On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*." Endorsement of Abraham Lincoln in Letter from R.M. Edwards to Edwin Stanton, February 5, 1864, 7 Lincoln Papers 169.

[278] The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the oath to its own members, during and after the enactment of Section Three. These applications are detailed infra Part IV.A.5.b.

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ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act." Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"[279]

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.[280] The Second Confiscation Act was long and vigorously debated in Congress, much discussed in the press and in public discourse, objected to by many on constitutional grounds, and nearly vetoed by President Lincoln.[281] Enactment of the Second Confiscation Act gave rise to very public pressure on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order. The Second Confiscation Act was a big deal. [282]

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime,

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[279] 12 Stat. 589 (1862). See also 12 Stat. 627 (1862) ("explanatory" joint resolution).

[280] An earlier act had provided for forfeiture more specifically of property or slaves actually *used* in service of rebellion. 12 Stat. 319 (Aug. 6, 1861).

[281] See generally David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1185-1195 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an "explanatory" joint resolution (which Lincoln signed together with the bill). Lincoln nonetheless appended his original draft veto message setting forth his objections. For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of action in signing it but nonetheless appending his objections, see id. at 1193-1194; Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War 105-106 (2007) (noting Lincoln's initial concern that the act would violate Article III's limitations on the punishment for treason and the objections of others that the act was a bill of attainder); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 215-217 (2010). For Lincoln's July 17, 1862 message to Congress, detailing his objections, see V Complete Works of Lincoln 328-331.

[282] A month after the Act had been adopted, Horace Greeley published a scathing editorial titled "The Prayer of Twenty Millions," in which he demanded that Lincoln "EXECUTE THE LAWS" faithfully with specific reference to the Second Confiscation Act. Greeley condemned Lincoln's "mistaken deference to Rebel Slavery" and his failure to rebuke his generals for having "habitually disregarded" the Confiscation Act. Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and "widely reprinted," defending his course of action. V Complete Works of Lincoln 388-389; see Holzer, supra note 254, at 400-401. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual *authority* for his proclamation). V Complete Works of Lincoln at 434-435 (stating that "attention is hereby called to" provisions of the act but relying for authority on his powers as executive and military Commander in Chief). See also Foner, Fiery Trial, supra note 281, at 215 (noting that "the Second Confiscation Act embodied a major shift in national policy").

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and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who "*engaged in*," "*incite[d]*," "*set on foot*," or "*assist[ed]*" "*rebellion*" or "*insurrection*" or who had "*given aid or comfort*" to rebellion or done acts "*aiding and abetting*" rebellion. The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

Specifically: Section 2 made it a new crime, distinct from treason, to "*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*" or to "*give aid or comfort thereto*" or to "*engage in, or give aid and comfort to*," any "*existing rebellion or insurrection.*"[283] It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with "rebellion or insurrection." Those terms are described as involving acts "against the authority of the United States, or the laws thereof" (a formulation closely conforming to our working definitions). Section 2 imposes criminal liability on persons who "incite" such acts; who "set on foot" such acts; who "assist" such acts; who in any other way "engage in" such conduct; or who "give aid and comfort to" such conduct. All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section 3 of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."[284] Section 5 directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who "shall hereafter *assist and give aid and comfort to* such rebellion."[285] Officeholding in a rebel government or military was *per se* blameworthy participation; but general giving of assistance or aid or comfort also qualified as participation in rebellion. Section 6 provided a further authorization for seizure of the property of any person not already mentioned who, "being *engaged in* armed *rebellion* against the government of the United States, or *aiding* or abetting such *rebellion*," and, after sixty days' notice issued by the President, did not "cease to *aid, countenance, and abet such rebellion*, and return to his allegiance to the United States."[286]

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[283] 12 Stat. 589, 590. (emphasis added). Section 2 provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act's disqualification from *federal* office, *id.*, as well. 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). Needless to say, a prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

[284] 12 Stat. 589, 590.

[285] Id. (emphasis added.)

[286] Id. at 591.

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Section 7 and Section 8 provided for in rem proceedings against property "found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto,*" in which case it "shall be condemned as *enemies'* property."[287] And Section 9 famously emancipated slaves of persons "who shall hereafter be *engaged in rebellion*" against the Union or who "shall *in any way give aid or comfort thereto.*"[288] Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: "engaged in," "rebellion," "aid or comfort," "abet," "countenance," "enemies."

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time. For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located. At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning there [289] Similarly, as a practical matter, criminal prosecutions of rebels for treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.)[290] The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act's specific policies. The administration, according to one scholar, "chose not to implement the law vigorously."[291] Attorney General Bates "exerted no more than a minimal effort to make the first and second confiscation acts work."[292] And the Act's section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln's far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander in Chief power.

But in some ways the lack of enforcement cases is beside our point here, which concerns the Act's prominence in national discussions and its pervasive use of terms, phrases, and concepts—rebellion, insurrection, engage in, aid or comfort—that would

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[287] Id.

[288] Id.

[289] See McPherson, supra note 228, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of "*in rem* proceedings by district courts that were of course not functioning in the rebellious states"); Foner, Fiery Trial, supra note 281, at 215 ("For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold under its provisions."). See also Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-1862, at 238 (2005) (remarking that "[t]he confiscation bill that finally emerged was neither sweeping nor enforceable" though opining that "if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.").

[290] See Eric L. McKitrick, Andrew Johnson and Reconstruction 141-152 (1960).

[291] John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 55 (2005).

[292] Id. at 72; see also James G. Randall, Constitutional Problems Under Lincoln 288-292 (1926) (describing minimal enforcement of the Second Confiscation Act).

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reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation we think helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three's terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. The Supreme Court's decision in *The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.[293] There, the majority upheld the constitutionality of Lincoln's unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports. In a truly landmark decision, the Supreme Court held that the President's war powers (including the power to impose a blockade) were triggered immediately, as soon as the South's rebellion took the form of organized military resistance to the authority of the U.S. government. The President's power to wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held. A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections" but "sprung forth suddenly ... in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[294]

The Court's decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution's allocation of war powers. At the time, the case had other hugely consequential implications: the principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln's constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.[295] The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court's usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government: "*Insurrection*

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[293] 67 U.S. (2 Black) 635 (1863).
[294] Id. at 668-669; see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J. 149, 177-180 (2004).
[295] Paulsen, *Emancipation*, supra 258, at, 814-823.

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against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government," the majority said.[296] A civil war "becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[297] Where a rebellion has come to possess certain military characteristics, the "party in rebellion" might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an '*insurrection*' by one side, and the insurgents be considered as rebels or traitors."[298]

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on "rebellion." A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

The Prize Cases also held that persons engaged in insurrection or rebellion could be treated as "*enemies*" (as well as traitors) for legal purposes. Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in "commerce" that "supplies" rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner. Even "neutral" powers' shipping could be seized when it violated a blockade: "Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as "enemies' property."'"[299]

The Prize Cases' treatment of the concepts of insurrection and rebellion, of who constituted "enemies," and of what actions constituted support for rebellion, would have been very much part of the legal culture of the day and provides important legal background as to how these terms would have been understood at the time of the

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[296] 67 U.S. at 666 (emphasis added).

[297] Id. at 666

[298] Id. at 668.

[299] Id. at 674 (quoting 3 Wash. C.C.R. 183). That said, the Court also cautioned that " 'enemies' property" was "a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law." Id. at 674. The point that, in a military context, property could be treated as "enemies' property" irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation: even though Lincoln's proclamation purported to free the slaves of *all* persons in rebel-controlled territory – including slaves held by persons claiming to be loyal to the Union – such "property" constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *Emancipation*, supra note 258. See generally John Fabian Witt, Lincoln's Code (2012).

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drafting of Section Three of the Fourteenth Amendment, just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to "the lawful authority of the Government," with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—"insurrection," "rebellion," and what it meant to "engage in" or provide "aid or comfort" to the same—highly probative of Section Three's original public meaning. President Lincoln, repeatedly and insistently; Congress, pointedly and consistently; and the Supreme Court, decisively, used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

5. Other Extant Statutory Sources and Notorious Examples

a. The Insurrection Acts (and Insurrections Generally)

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as well as its other war powers over the army and navy. The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach; the forms and degree of opposition to government authority that were believed to trigger the statutes' application; and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

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The 1795 act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections." But it also applied to repel invasions and to enforce federal law. Together, these were the three circumstances where Congress had the power to provide for calling out the militia.[300] Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the government thereof."[301] Section Two allowed the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[302] Section Two encompasses insurrections against the United States.[303] (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call out the army and navy in similar circumstances: "in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary …" The 1807 act thus carried forward and repeated the 1795 act's understanding of insurrection.[304]

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe "*rebellion*." It allowed the President to call forth the militia "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . ."[305]

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation; it entails "combinations" or "assem-

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[300] U.S. Const. art. I, sec. 8, cl. 15.
[301] 2 Stat. 424 (1795), sec. 1.
[302] Id. sec. 2. (emphasis added).
[303] That said, because Section Two is supported by *both* Congress's power to "suppress Insurrections" *and* its power "to execute the Laws of the Union," U.S. Const. art. I, sec. 8, cl. 15. it could encompass instances of law enforcement that do not rise to the level of a constitutional "insurrection."
[304] 2 Stat. 443 (1807).
[305] 12 Stat. 281 (1861).

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blages," acting together, to "oppose[s]" or "obstruct" the ability of government to "execute" the law, in numbers "too powerful" to be suppressed by the usual means of law enforcement.[306]

Moreover, several famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding "insurrection" or "rebellion." Consider just a few.

The "Whiskey Rebellion" was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilleries. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).[307]

We believe the "Whiskey Rebellion" would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.[308] Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.[309] In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an "insurrection" or "rebellion."

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[306] Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, supra note 5, at 168, 214-215. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President's proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection; but it is not an insurrection only because he proclaims it one.

[307] See generally Elkins & McKitrick, The Age of Federalism 461-474 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties – including tarring and feathering, whipping, surrounding of officials' homes by armed mobs, and kidnapping and coerced repudiation of federal authority); see also Ron Chernow, Alexander Hamilton 468-478 (2004) (similar); Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 43-68 (1988) (documenting the resistance and military response).

[308] To be sure, one scholar of the Acts suggests that "[i]t may have been dubious whether actions of the Whiskey Rebellion farmers truly rose to the level of insurrection," and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, at 161 n. 46; see also Coakley, supra note 307, at 67 (suggesting that to "characterize the . . . affair as a 'riot' and the participants as 'rioters'" is "far closer to the truth"). But later sources called it at least an insurrection, see infra note 309.

[309] See Townsend Ward, The Insurrection of the Year 1794, in the western counties of Pennsylvania (J.B. Lippincott 1858); H.M. Brackenridge, History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection (W.S. Haven, 1859).

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"Fries Rebellion," in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.[310] President John Adams invoked the 1795 Act to suppress the "insurrection," as he called it,[311] which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters. In at least one instance, armed opponents of the government successfully freed prisoners from federal custody. The Adams administration's suppression of the insurrection led to widely publicized treason prosecutions[312] of leaders and instigators of the unlawful resistance, including John Fries. As with the Whiskey Rebellion, Fries Rebellion was characterized by concerted acts of forcible interference with federal officials' ability to perform their duties under law.[313]

Nat Turner's Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.[314] But it surely would have been a classic illustration of at least an "insurrection" and perhaps even a "*rebellion*"—a concerted uprising seeking forcibly to overturn the legal order and thwart government's ability to execute the law. A published report of Turner's own account called it both an insurrection[315] and in one instance an "open rebellion."[316] This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the

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[310] Coakley, supra note 307, 69-77.

[311] John Adams, Proclamation on Insurrection in Pennsylvania, 12 March 1799, https://founders.archives.gov/documents/Adams/99-02-02-3377

[312] These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed "insurrection," describing it as a "rising of any body of the people" and arguing that it qualified as treason because "an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States." Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800).

[313] But see Elkins & McKitrick at 696-700 (questioning "whether the circumstances really called for military force of any kind").

[314] Federal troops were used to suppress this and other slave rebellions, but "without following the legal procedures laid down in the statutes of 1795 and 1807." Coakley, supra note 307, at 92-94. Coakley suggests that this the failure to go through the Insurrection Acts reflected "the universal dread of slave revolts" at the time and the fact that "t]he slaves had no political constituency." Id. at 94.

[315] See The Confessions of Nat Turner, The Leader of the Late Insurrection in Southampton, VA, as fully and voluntarily made to Thomas R. Gray, at 3, 5, 7, 20, 22 (1831) (calling it "insurrection"); see also Thomas Wentworth Higginson, Nat Turner's Insurrection, 8 Atlantic Monthly 173 (1861)

[316] See Turner, supra note 315, at 3 ("The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves") (emphases added).

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Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked "the 'higher law' doctrine" to openly harbor freed slaves to the point that President Millard Fillmore "threatened to send in federal troops."[317] In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland. This was denounced as an "act of insurrection," and this time President Fillmore did call out federal troops.[318] In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.[319] And of course John Brown's fateful raid on Harper's Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.[320] These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection* nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr's Rebellion, in Rhode Island, in 1841-1842 which led to the Supreme Court's 1849 decision in *Luther v. Borden*.[321] There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter). The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government. The practical result of the decision—relevant to our inquiry– was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "*insurrection*" against the

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[317] See McPherson, supra note 228, at 81-84; Cf. Coakley, supra note 307, at 130-131 (noting debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

[318] McPherson, supra note 228, at 84-85. See also Thomas Slaughter, Bloody Dawn: The Christian Riot and Racial Violence in the Antebellum North (1991); and cf. id. at ix ("The line between riot and rebellion was shifting during the antebellum period.").

[319] See generally H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (2006) (describing resistance, in the mid-to-late1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

[320] McPherson, supra note 228, 202-208. Federal troops helped suppress this insurrection and rebellion too. See Coakley, supra note 307, at 193 ("This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities.").

[321] Luther v. Borden, 58 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see Coakley, supra note 307, at 119-127.

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rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force"[322] and as having attempted "to assert the authority of [the Dorr government] by force,"[323] as amounting to having "engaged in the insurrection."[324] The Court also referred to the government's actions as having been designed to suppress that "insurrection."[325] The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.[326] While these events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection" as displayed by important usage within a few years of adoption of the Fourteenth Amendment. Briefly summarized: In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus, among other actions) to secure order in dealing with the Ku Klux Klan.[327] In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous "Colfax Massacre" of April 13, 1873, in which a white mob attacked and massacred perhaps 150 black citizens who had been defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government. President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.[328] Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d'etat that had overthrown the Republican governor by force.[329] Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of the capital—New Orleans at the time. (The conflict lasted until 1877,

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[322] Luther, 58 U.S. (7 How.) at 8.
[323] Id. at 37
[324] Id. at 46
[325] Id. at 45.
[326] By this time, the Act had been amended yet again. See 17 Stat. 13, 14-15 (1871), §§ 3-4.
[327] Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871); http://www.presidency.ucsb.edu/ws/?pid=70253; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871); for background see Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 Harv. Nat'l Sec. J. 537, 613-14 (2014); Lou Falkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872, at 39-49 (1996).
[328] Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) http://www.presidency.ucsb.edu/ws/index.php?pid=70364
[329] Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) http://www.presidency.ucsb.edu/ws/index.php?pid=70422

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when Reconstruction was abandoned by the national government and white supremacists took full control of the state.) In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.[330] Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.[331] And in 1876, in South Carolina, Grant invoked the Insurrection Act to protect the gubernatorial election process from white supremacist groups.[332] Common to each of these instances during the Grant administration was the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shay's Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. The Congressional Exclusion Debates

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has

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[330]Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), http://www.presidency.ucsb.edu/ws/?pid=70459.

[331] Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874) http://www.presidency.ucsb.edu/ws/?pid=70420.

[332] Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876) http://www.presidency.ucsb.edu/ws/?pid=70542.

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put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."[333] Moreover, several of these proceedings occurred right around the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.[334]

First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy, during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.[335] A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."[336] Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."[337]

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility" to the Government or provided "aid and comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort" to rebellion.

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."[338] It also involved an incident of

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[333] Lynch, supra note 5, at 196. Lynch ably and accurately describes the most important such cases. See id. at 196-201, 207-210. We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

[334] See generally 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, pp. 431-486 (1907).

[335] Id. §448 at 442.

[336] Id. at 443 (emphasis added).

[337] Id.

[338] Id. at 445.

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pure *speech* as disqualifying a member-elect from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

> *Editors Louisville Courier:*
>
> My attention has been called to the following paragraph, which appeared in your paper of this date:
>
> "JOHN YOUNG BROWN'S POSITION.– This gentleman, in reply to some searching interrogatories put to him by Governor Helm, said, in reference to the call of the President for four regiments of volunteers to march against the South—
>
> *'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"*
>
> This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:
>
> "Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*"
>
> This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.
>
> Respectfully,
>
> JOHN YOUNG BROWN.[339]

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. This became a precedent for the House's subsequent actions in other cases. The standard applied—whether the facts, "proved by clear and satisfactory testimony," showed that an individual had, by an "act or speech … overt and public … done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion"—had been satisfied by Brown's letter.[340]

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[339] Quoted in id. at §449, p. 445.
[340] Id. at §449, pp. 443, 448.

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Similarly, in March 1868, the House excluded John D. Young under this standard. Young's case also involved speech. The Young case involved numerous expressions of support and sympathy for the South and against the Union, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."[341] But Young's case was overdetermined, because there was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with* the open acts of 'aid and comfort to the enemies of the United States,'" established that he could not "'honestly and truly take the oath,'"[342] and the full House agreed.

The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was opposed to "voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.[343]

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson, who had served as a state court judge in the eastern region of Tennessee during the Confederate regime; and Representative-elect R.R. Butler, who had retained his seat in the state legislature during secession, while opposing it—the respective house ultimately admitted the applicant to his seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.[344]

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[341] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[342] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[343] Id. at §453, p. 459.
[344] Id. at §453, 455, pp. 459-461, 462-465. In Butler's case, two-thirds of both houses voted him amnesty. Id. at 464-465. In Patterson's case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it, id. at 46, but perhaps that is okay, if application of the Ironclad Oath, to

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A potentially broad understanding of "aid or comfort" also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.[345] What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son $100 on the way out the door. The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son's taking up arms against the United States and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas's treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan's Treasury Secretary because he disagreed with the President's decision to send federal reinforcements to Charleston Harbor.[346] Either theory of Thomas's exclusion suggests that "aid or comfort" to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one's son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia's sixth district, but the House committee found that Christy, by his own admission, had given "aid, countenance, counsel, and encouragement" to persons in armed hostility against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath, and he was not seated.[347] In 1869, the House sat John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.[348] The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of

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members of Congress, is a function of each house's *separate* power to make rules governing its proceedings. U.S. Const. art. I §5.

[345] Hinds' at §§457, 458 at pp. 465-470.

[346] Hinds' at §459, pp. 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas's son "it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action."). See also Cong. Globe 40th Cong. 2nd Sess. at 1260-1262 (Feb. 19, 1868).

[347] Hinds' at §459, pp. 470-472. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment," id.

[348] Hinds' at §460, pp. 472-473.

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two witnesses.[349] In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or the other, the House ultimately voted to table the issue, leaving Booker in office.[350] Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia house of delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters. Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.

Finally, in 1871, the Senate declined to seat Senator-elect Zebulon Vance from North Carolina.[351] The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.[352] If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.[353]

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—

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[349] Congressional Globe, 41st Cong, 2nd Sess. pp. 5442-5447 (July 11, 1870). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states; but everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "No war exist[ed] at the time" and it was before "the policy of the Government had been announced." Id. at 5443 (Butler); see also id. at 5445 (Garfield). Nor could Rice be excluded solely because of his politics. See id. at 5445 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

[350] Hinds' at §461, pp. 474-475.

[351] See generally Hinds' at §463, pp. 478-486.

[352] See generally Richard E. Yates, *Zebulon B. Vance: as War Governor of North Carolina*, 1862-1865, 3 J. Southern Hist. 43 (1937).

[353] Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress, Act of May 22, 1872, ch. 193, 17 Stat. 142; https://bioguide.congress.gov/search/bio/V000021. Cf. Franklin Ray Shirley, Zebulon Vance, Tarheel Spokesman 71 & 152 n. 36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance), but Congress then passed a private bill granting him individual amnesty. 17 Stat. 691 (June 10, 1872). Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1884. Magliocca, *Amnesty*, supra note 5, at 111 n. 126.

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was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But there was no bright line, for instance, protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces appears generally to have been thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.[354]

6. Legislative History

There is only a little fruit to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress's debates over its various provisions and of state ratification debates. The Fourteenth Amendment's legislative history is famously voluminous, and Section Three—like the other "forgotten" sections of the Amendment (Section Two and Section Four)—was much more salient to the debates then than it is to today.[355] As briefly noted above, the legislative history supports the key propositions we have advanced earlier in this article—that Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction; that Section Three's disqualification was seen by proponents and opponents alike to be self-executing and automatic; and that Section Three was understood to supersede (or satisfy) prior constitutional limitations.[356]

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences: there appears to have been substantial agreement—by both opponents and proponents—that the provision would cover a broad range of activity supporting or assisting the South's efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding and, further, would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward

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[354] Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See supra notes 219-221 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

[355] See generally Graber, Volume 1, supra note 8.

[356] See supra notes 12, 59, & 181.

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throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have "engaged in" insurrection or rebellion or given "aid or comfort" to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents simply thought such breadth appropriate, necessary, and valuable.[357]

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).[358] As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

7. Early Applications of Section Three

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[357] See generally Graber Section Three manuscript, supra note 12.

[358] Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply – *e.g.,* only to persons who joined the Confederacy while still holding prior office under the U.S. Constitution; only to persons who had sworn oaths to the Constitution since 1851; only to persons who had not received presidential pardons; and only to persons who had *voluntarily* served the confederacy. Republican defenders of Section Three successfully opposed these proposed limitations on Section Three's scope, arguing that limiting the ban to persons who still held office under the Constitution when they joined the Confederacy would indulge the pretext that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. Cong. Globe, 39th Cong. 1st Sess. p. 2770 (statement of Sen. Howard). Republicans likewise rejected the proposed limitation to persons who had "voluntarily" assisted or participated in rebellion, because it would raise unnecessary and difficult proof problems and permit spurious claims of involuntary participation. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he "never entered into the rebellion voluntarily"! Cong. Globe, 39th Cong., 1st Sess. p. 2918 (statement of Sen. Willey).

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A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they still can be informative.[359] Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.[360]

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress by enacting new, republican, Reconstruction-compliant constitutions—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state's constitutional convention.[361]

Andrew Johnson's attorney general, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.[362] Stanberry's opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and ex post facto in this context.[363] Even so, Stanberry's opinion found Section Three's definition of what constituted participation in rebellion to be quite broad:

> "*All those who*, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done *any overt act* for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."[364]

As to individuals, Stanberry also reiterated several times that *any* voluntary support, even if not violent, was covered and culpable. He found "it to be clear, that in the

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[359] See, e.g., Baude, *Liquidation*, supra note 237, at 61-62; Paulsen, *Most Dangerous*, supra note 237, at 293, 303.

[360] Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three, see supra Part IV.A.5.b.

[361] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428, 429, sec. 5-6 (March 2., 1867).

[362] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867); Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 182 (1867).

[363] 12 Op. Att'y Gen. at 159-160. But see supra Part III.A-B (explaining why the constitutional ex post facto and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).

[364] Id. at 161-162 (emphasis added)

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sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,"[365] and added that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law."[366]

Subsequent cases took even broader positions. For instance, in the 1869 decision of Worthy v. Barrett, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court's reasoning on this issue was succinct but clear:

> What will amount to having engaged in the rebellion?
>
> (1st.) Holding any of these offices under the Confederate government.
>
> 2d Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.[367]

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.[368]

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation – Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring *quo warranto* actions to remove officials holding office "contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution" and to bring criminal prosecutions against person who "shall hereafter knowingly accept or hold" office in violation of Section Three.[369] In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

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[365] Id. at 161.

[366] Id. at 165.

[367] Worthy v. Barrett, 63 N.C. 199, 203 (1869). The court also applied the Worthy rule to the even easier case of a county attorney who "took part in th[e] rebellion by serving in the Confederate army, voluntarily." In Re Tate, 63 N.C. 308 (1869).

[368] By contrast, Stanberry had concluded that officers who "discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion." 12 Op. Att'y Gen. 162.

[369] 16 Stat. 140, 142-143, sections 14 & 15. See supra note 54.

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Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell, for accepting an appointment as county sheriff despite being covered by Section Three.[370] Powell's alleged act of rebellion was having "furnished a substitute for himself to the Confederate army," and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.[371] This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

> [T]he word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant's action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.[372]

In other words, only great duress *and* pure heart would be a defense if one's conduct otherwise provided material support to the rebellion. Section Three's disqualification for having "engaged" in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee. the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.[373] Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee's purported

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[370] United States v. Powell, 27 F. Cas. 605 (C.C.D.N.C 1871).
[371] Id. at 607.
[372] Id. Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry. Id.
[373] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 Tenn. B.J. 20 (2013); see also Magliocca, *Amnesty*, supra note 5, at 109-110.

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secession, and traveling to Washington to attempt to represent the state in Congress.[374] While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.[375]

The other scattered discussion of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section Three's substantive disqualification—broad interpretations of insurrection, rebellion, "engaged in," and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was "a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States."[376] Other cases are consistent with similarly broad assumptions.[377] We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have "engaged] in," or given "aid or comfort" to, insurrection and rebellion, was understood to embrace an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, essentially *all* the evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of "insurrection" and "rebellion" to which they applied; and finally early practice enforcing Section Three—points in the same direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably, almost extraordinarily, broad understanding of what types of conduct constitute engaging in, assisting, or giving aid or comfort to such movements.

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[374] For one fawning account of Nelson, see Oliver P. Temple, Notable Men of Tennessee From 1833 to 1875. at 166-215 (1912).

[375] Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, supra note 373.

[376] In re Griffin, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

[377] Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. Magliocca, *Amnesty*, supra note 5, at 109-110.

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B. What Prior Officeholders are Covered? What Future Offices are Barred?

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

> No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States or under any State ... [378]

Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

> ... who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States ... [379]

We begin with a few observations.

First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.[380] Keep this in mind as we proceed: we think readers

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[378] U.S. Const. amdt. XIV, sec. 3.

[379] Id.

[380] See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 Albany L. Rev. 671, 674-76 (1995). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. William Michael Treanor, *The Case of the Dishonest Scrivener: Guverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 20-24 (2021). Putting aside whether this story is really true, David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Governeur Morris as Dishonest Scrivener*, 120 Mich. L. Rev. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semi-colon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *West Virginia*, supra note 127, at 338-339 & n. 151.

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should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that "Senators and Representatives . . . Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."[381] Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will "faithfully execute the Office of President of the United States" and "'to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'"[382]

Section Three's listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three's list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to "military" offices—including state military offices—whether or not they would be considered "executive" offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text's overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified.

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[381] U.S. Const. art. VI, cl.3.

[382] U.S. Const. art. II, §1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L. Rev. 1257, 1260-1267 (2004); on "to the best of my Ability," see William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303, 310 (2011).

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With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, "triggering" clause): Section Three's disqualification attaches to persons who previously swore an oath to support the Constitution as:

> [i] a "*member*" of Congress, or as
> [ii] an "*officer* of" the United States, or as
> [iii] a "*member*" of any State legislature, or as
> [iv] an "*executive or judicial officer* of" any State.[383]

These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

> [i] "a *Senator* or *Representative*" in Congress (paralleling "*member,*" a seemingly purely stylistic variation) or
> [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
> [iii] holding "*any office, civil or military,*" "under" either federal or state government (paralleling "officer" of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of "military" officers).

The description "civil" office, in the disqualified-from list seems designed to embrace the categories of "executive or judicial" officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a "civil" office within the language and design of Section Three, reading the word "office" in this context in an ordinary, non-technical sense.[384]

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for presi-

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[383] U.S. Const. amdt. XIV, sec. 3.

[384] Hemel, *How-to Guide*, supra note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from "civil" offices.); contra John Randolph Tucker, *General Amnesty*, 126 N. Am. Rev. 53, 54 (1878). None of this in our view affects the question whether a Member of Congress may properly be designated as an "Officer" to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995) with John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995).

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dent and vice president (and clarifying "military"). The legislative positions in question are the relevant *elected* offices—*members* of the legislature, whether a state legislature or the federal Congress—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an "office" within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an "office," held by an "officer"—as opposed to non-officer, non-"office"-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?[385] Likewise, for the federal judicial branch, Article III judges and justices are plainly covered. (Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,[386] are presumably covered as well—as well as perhaps bankruptcy judges, magistrate judges and the like.)[387] Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive "office" held by "officers" (thus, perhaps, the special need for designation "military," to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* "under" the United States, is not properly classified as an "*officer of*" the United States.[388] On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this[389]—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three's consequences.

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[385] Serious scholarship has explored those questions with respect to the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

[386] 38 U.S. 230, 258 (1839) ("[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned"). To be clear, Hennen dealt with the clerk of court, not what we would now call a term judicial law clerk.

[387] That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III* 133 Harv. L. Rev. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly "officers" at all. Again, we leave this issue for another day.

[388] Josh Blackman & Seth Barrett Tillman, *Is The President An "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021).

[389] See, e.g., id. at 6, 17, 21.

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We do not buy it, for many reasons: First, it adopts precisely the type of "secret code" hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: an insurrectionist *President* is not covered by Section Three's disqualification (though nearly every other federal or state officeholder is); the President is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.[390]

Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times. It specifies the length of term for which the President "holds his Office," certain minimum qualifications for eligibility "to that Office," what happens upon the President's removal "from Office," or inability to discharge "the Powers and Duties of said Office," and the oath he shall take before entering "on the Execution of his Office."[391] If the Presidency is not an office, nothing is.

So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an "office *under*" the United States but is not an "officer *of*" the United States? This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer *"of"* the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause ("officer of") and the positions-disqualified clause ("office under")—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.[392] Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different

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[390] To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comm. 245 (1997); (suggesting the possibility that a straightforward reading of the constitutional text yields the "stupid" – and surely inadvertent – result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, Grounding, supra note 9, at 1468. But that does not mean we should close our eyes to plausibility and common sense, *especially* when the proposed textual reading is such a stretch. See also Paulsen, supra, Nothing But the Text, supra note 10, at 1439-1440 (noting cautions concerning use of the "absurdity" canon to deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

[391] See generally U.S. Const. Art. II.

[392] For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. Const. amdt. XIII, sec. 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amdt. XIC, sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); id. amdt. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *West Virginia*, supra note 127, at 348 (giving examples).

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prepositions: the Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.[393]

Third, a variant of the Blackman-Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred.[394] "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?"[395] Johnson was complaining that these two officers *should* be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Vermont interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'"[396] Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."[397]

The Blackman-Tillman argument is not *quite* the same, but it is the mirror image of Johnson's concern. Johnson's inquiry was whether a covered, insurrectionist nonetheless might become president. The Blackman-Tillman argument is that an insurrectionist president is not an "officer of" the United States whose prior position

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[393] One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (Jul. 28, 2016) https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare id. (foreign gifts to Washington) with Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U.L. Rev. Colloquy 180, 190 (2013) (contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, supra this note (Hamilton's list) with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107 (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms); cf. Blackman & Tillman, supra note 388, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

[394] Cong. Globe, 39th Cong., 1st sess. at 2899 (1866)

[395] Id.

[396] Id.

[397] Id.

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triggers Section Three's restrictions on future office. The Johnson-Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.[398] Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds *"office under"* the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

If Blackman and Tillman maintain that the President does *not* hold "office under" the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold "office under" the United States, then they must maintain a sharp and crucial distinction between "office under" and "officer of." As Mark Graber has observed, this distinction was *also* contradicted by Section Three's framers: "[T]he members of the Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office 'under the United States' were officers 'of the United States.' During the debates over Section 3, no representative or senator alluded to the existence of a distinction between 'of' and 'under'. Representatives and senators often described the president as having an 'office under the United States' and being an 'officer of the United States.'"[399] If a secret

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[398] Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, supra 388, at 45-46 (acknowledging this). While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification these incidents would have shown that to be a glaring and dangerous omission.

[399] Mark Graber *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023). Professor Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'" In addition, "[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished

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code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman-Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text's many references to the office of the Presidency as an "office"; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned by the Radical Reconstruction Congress that drafted the Fourteenth Amendment; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the "under/of" difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or "triggering" language, insurrectionists who once served as President and Vice President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

C. The Attempted Overthrow of the 2020 Presidential Election

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020-2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

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between 'officers under' and 'officers of' or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; see also Lynch, supra note 5, at 158-160 (collecting authorities supporting the same point); Magliocca, *Foreground*, supra note 62, at 16 n. 48 ("My research . . . shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States").

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Taken as a whole, these actions represented an effort to prevent the lawful, regular, termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or given "aid or comfort" to those who did? We will consider those questions in turn.

1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any respect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020-2021, but let us first focus on the events of January 6, 2021.[400] These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[401] The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was in part coordinated, not merely a riot.[402] Some members of the group were

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[400] In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-000 (117th Cong., 2nd Sess.). Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally supra Part II.B.

[401] Supra Part IV.A.1. The fact that President Trump may have supported the insurrection, see infra II.C.2.b, does not change this. In our system the President is not "the government," and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

[402] See, e.g., January 6 Report, supra note 400, at 499-502, 530-531.

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armed,[403] and many used force to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.[404]

Furthermore, it seems that, as a whole, the group's goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power, by disrupting a necessary formal step in the constitutional process.[405] The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries' Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.[406] Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.[407]

Our assessment of the events of January 6, specifically, as an "insurrection" confirms the judgment made by public authorities: An act of Congress, to "award four

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[403] Id. at 640-642.
[404] Id. at 646-647, 651-659.
[405] Id. at 502-510, 521-530.
[406] See supra Part IV.A.4.c.
[407] What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, amounted to "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course if there were any other insurrections against the United States, Section Three applies to them all.

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congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,"[408] found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: "On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers."[409] Another finding noted the historic magnitude and symbolic importance of that insurrection against democracy: "The desecration of the U.S. Capitol, which is the temple of American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation's history."[410] The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th.[411] The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th *was* an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.[412]

Finally, there is an additional possibility that we should see the events of January 6, 2021, as just one part of a broader "rebellion" against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

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[408] Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322.

[409] Id. sec. 1(1). In the state Section Three proceedings against Marjorie Taylor Greene, supra notes 68-73 and accompanying text, the hearing officer cited this statute to conclude "Congress has characterized the Invasion as an insurrection." Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SEC-STATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022). The hearing officer found it unnecessary to decide for himself, however, "Whether the Invasion of January 6 amounted to an insurrection." Id. at 18.

[410] Pub. Law. 117-32, sec. 1(4).

[411] H. Res. 24 (117th Cong., 1st Sess. Jan 25, 2021).

[412] For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, supra note 62, at 23 n.65 ("January 6th was an insurrection within the meaning of Section Three, in part because the mob disrupted a constitutionally required act – the formal counting of the electoral votes under the Twelfth Amendment –and prevent the lawful transfer of authority."); Vlahoplus, supra note 399, at 1 (referring to "The insurrection of January 6."); Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539, 1622-25 (2022); see also Hemel, *How-to Guide*, supra note 5 ("[T]he constituted government in the United States is not any single individual but the constellation of institutions that facilitate the lawful exercise and peaceful transfer of power. A sitting president who seeks to subvert those institutions through violence is no less an insurrectionist than a lower-level official or private citizen who seeks to do the same.").

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We acknowledge that applying the term "rebellion" to the events of 2020-2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an "*open and avowed renunciation of the authority* of the government," as Webster would have it, nor (outside of the insurrection of January 6) "*the taking up of arms*" or "*forcible* opposition" as Bouvier would have it.[413] It is not a perfect fit.

Nonetheless, consider the argument that the term "rebellion" could be used more broadly to describe a coup d'etat seeking to overthrow the constitutional order—including a so-called "bloodless" coup d'etat (where no force is used) and a successful "self-coup" of the bloodless variety[414] (where the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: 1. A military coup d'etat upending lawful government by use of force surely qualifies, constitutionally, as a "rebellion." It is literally an effort unlawfully to overthrow constitutional government, by force. 2. It follows that a military coup d'etat upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*. 3. A military coup d'etat by the *existing* regime—a "self-coup," would seem, legally, to be the same thing. In such a case the regime does not *seize* power, by show or threat of force; it *retains* power by show or threat of force. But it is logically identical to situations #1 and #2. 4. A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3. Indeed, it seems fair to say that situation #4 is merely an instance of situation #3. 5. The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020-2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.[415]

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from

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[413] See supra Part IV.A.2.

[414] See generally Daniel J. Hemel, *Self-Coup and The Constitution*, 37 Const. Comm. (forthcoming 2023).

[415] In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. See supra Part IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'etat (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

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legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.[416]

2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Who, while perhaps not a direct or indirect participant in insurrectionary or rebellious conduct, provided "aid or comfort" to those who did?*

As detailed at great—perhaps excruciating—length above, "engaged in" under Section Three is properly understood to embrace a broad range of willful participatory conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as "insurrection" or "rebellion." And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving "aid or comfort" to insurrection or rebellion arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three's disqualification.[417]

Who, then, engaged in such behavior?

a. General Principles Concerning Culpable Participation

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual's voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Part II, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution's criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state

[416] For the sake of completeness, we add that we think the events of 2020-2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.
[417] See generally supra Part IV.A.

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election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three's broad sweep, it is clear that at least two purported factual defenses are simply immaterial:

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported "insurrection" or "rebellion" because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to "stop the steal." The problem is that the premise is simply false. Decisionmakers can and should act on the well settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.[418]

Second, it likewise is no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South's secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.[419] Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual's wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.[420]

b. Section Three Disqualifies Donald Trump from Future Office

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the

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[418] See not only the January 6 Report, supra note 400, but also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson & Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022)*, https://lostnotstolen.org.

[419] This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., Counterman v. Colorado, 600 U.S. ___, at 4 n.2 (2023).

[420] Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted "insurrection"? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d'etat are not.

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attempted overthrow of the 2020 election and the events leading to the January 6 attack.

The case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential election result, calling it "stolen" and "rigged";[421] that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,[422] to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,[423] to assemble and induce others to submit bogus slates of competing state electors,[424] to persuade or pressure Congress to refuse to count electors' votes submitted by several states,[425] and finally, to pressure the Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors' votes.[426]

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.[427] Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump's defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: "Big protest in D.C. on January 6th. Be there, will be wild!"[428] According to testimony amassed by the House's January 6th Commission, Trump's supporters interpreted this as a call to arms, sometimes literally.[429]

Then there are the events of January 6 specifically. When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to the Capitol to oppose what he had been calling the "steal" of the election. Trump reiterated his false claim that he had in fact won the election—"we won this election and we won it by a landslide"—but that the Democrats and the media had "stolen" the election and "rigged" a false outcome. "They rigged it like they've never rigged an election before," he charged. "Make no mistake, this election was stolen from you, from me and from the country. … This [is] the most corrupt election in the history, maybe of the world." The crowd was "gathered together in the heart of our nation's capital for one very, very basic and simple

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[421] And not that it matters, see supra Part IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, supra note 400, 100-01, 103-04, 203, 213, 789.
[422] Id. at 202-203, 263-265; see also id. at 223-231,
[423] Id. at 296-300.
[424] Id. at 341-354.
[425] Id. at 431.
[426] Id. at 441-458.
[427] Id. at 441-458.
[428] Quoted in id. at 499.
[429] Id. at 499-540.

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reason: To save our democracy." Trump called on the crowd to march on the Capitol. "Our country has had enough. We will not take it anymore and that's what this is all about. … We will stop the steal." He urged the assembled mass of thousands, some of whom Trump knew to be armed, to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[430]

Some might quibble that the speech is ambiguous.[431] Not all of Trump's rambling address called literally for the crowd to "fight." Some of his statements were ambiguous and at one point he remarked that the crowd would be marching "peacefully and patriotically."[432] He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take "strong" and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump's speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.[433] It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steeled them to action, knew that they were ready to take immediate action, and directed them to take it.[434] But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standard of having "engage[d] in insurrection," or given "aid or comfort" to those doing so, and qualifies,

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[430] For the quotations in this paragraph, see "Transcript of Trump's Speech at Rally Before US Capitol Riot," Associated Press, (Jan. 13, 2021), available at https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27. See also id. ("And again, most people would stand there at 9 o'clock in the evening and say, 'I want to thank you very much,' and they go off to some other life. But I said something is wrong here, something is really wrong, can't have happened, and we fight. We fight like hell, and if you don't fight like hell you're not going to have a country anymore.").

[431] See Michael Conklin, *Capital Offense: Is Donald Trump Guilty of Inciting a Riot at the Capital?*, 15 U. St. Thomas J.L. & Pub. Pol'y 483 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 Const. Comm. at 2-3, 20-21 (forthcoming 2023).

[432] Transcript, supra note 430.

[433] 395 U.S. 444 (1969); compare Conklin, supra note 431, with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 Wake Forest L. Rev. 971 (2022); see also Rozenshtein & Shugerman, supra note 431, at 3 n.3 (citing these and other sources and describing this disagreement).

[434] As Rozenshtein and Shugerman also emphasize, "Trump's speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol," which they argue takes it outside of the Brandenburg framework for that reason. Rozenshtein & Shugerman, supra note 431, at 38.

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modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.[435] First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had forcibly invaded the Capitol and were disrupting the constitutional process, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.[436] During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not "hav[ing] the courage to do what should have been done to protect our Country and our Constitution,"[437] a statement that the January 6th Commission concluded was "a statement that could only further enrage the mob" and that in fact apparently did so.[438] Once Trump finally *did* – after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.[439]

This culpable inaction—failing to intervene to stop an insurrection in progress, declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump's responsibility for the January 6 insurrection. Section Three reaches a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.[440] Sitting by and doing nothing—declining to act to arrest a violent uprising, despite possessing the material capacity and legal responsibility to intervene—might qualify. Additionally and equally important, Trump's deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd's reaction was all a big mistake or misunderstanding.

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[435] See supra Part III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

[436] January 6 Report, supra note 400, at 577-606.

[437] Donald J. Trump, Tweets of January 6, 2021, available at https://www.presidency.ucsb.edu/documents/tweets-january-6-2021

[438] January 6 Report, supra note 400, at 577.

[439] Even as he urged peace in a video to the insurrectionists ("we can't play into the hands of these people. We have to have peace") he continued to express affection for them ("So go home. We love you. You're very special.") and to reiterate that the "election was stolen from us." Donald J. Trump, Videotaped Remarks During the Insurrection at the United States Capitol, at https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol. Later that night he tweeted: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Trump Tweets, supra note 437.

[440] Cf. notes 345-346 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

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Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump "engaged in" the January 6 insurrection through both his actions and his inaction. Officials—administrators, courts, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office,

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,[441] then Trump's complicity is even more obvious—as the leader, motive force, and chief attempted perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump, having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d'etat against the Constitution and its system of elections and overturn the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes "rebellion" against the Constitution, Trump's overall course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump both "engaged in" "insurrection or rebellion" and gave "aid or comfort" to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

c. Beyond Trump

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many others who are or may be connected to either the insurrection of January 6 or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution's provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories:

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico, and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as

[441] See supra notes 413-415 and accompanying text.

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Section Three contemplates.[442] They present the easiest case of "engag[ing] in . . . insurrection." Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.[443] Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and "was near the Capitol during the attack."[444] Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.[445] Trump Chief of Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also "directed that [Giuliani] be allowed to speak" to the crowd.[446] These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,[447] the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines, invalidate election results, and rerun the vote in swing states won by Biden.[448] Would-be Trump electors (some of whom came from state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.[449] Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.[450] At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid and comfort.[451] These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number

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[442] See supra notes 85-88, 111-113 and accompanying text.
[443] See supra notes 68-80 and accompanying text.
[444] January 6 Report, supra note 400, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See supra note 89.
[445] January 6 Report, supra note 400, at 536, 577, 581, 593-594, 608; https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat
[446] January 6 Report, supra note 400, at 533, 535-536.
[447] See supra notes 413-415 and accompanying text.
[448] January 6 Report, supra note 400, 222.
[449] January 6 Report, supra note 400, at 352-353. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.
[450] January 6 Report, supra note 400, at 50.
[451] Id. at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

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of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol, should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020-2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

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Conclusion

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders and comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independently of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and official from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should refuse to seat or expel that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress through the impeachment process, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's constitutional disqualifications is

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properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges exercising the judicial power to faithfully apply and enforce Section Three according to its terms.

No official should shrink from these duties. It would be wrong – indeed, arguably itself a breach of one's constitutional oath of office—to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one's own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing, and enforcing, the Constitution's commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, or resentment, or opposition, or retaliation. The Constitution is not optional and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.[452] The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-2021, who refused to abide by election results and instead sought to overthrow them.)[453]

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are "political questions." Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House's judgment, Section Three is enforceable by the judiciary *as well as* by other officials.[454] Section Three's terms embody rules and standards, enforceable as any other constitutional provision is enforceable. There is no freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

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[452] See Magliocca, *Foreground*, supra note 62, at 14-24 (arguing at length that "the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment," and that it "elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three").

[453] See William Baude, *The Real Enemies of Democracy*, 109 Cal. L. Rev. 2407, 2418-20 (2021) ("The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.").

[454] Supra note 95.

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We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, it is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country. Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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From: Meingast, Heather (AG) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C266D4268285494D9331BB0303FC8111-MEINGAST HEATHER]
Sent: 11/5/2024 12:56:02 AM
To: Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: ATTORNEY CLIENT PRIVILEGED COMMUNICATION/ATTORNEY WORK PRODCUT -- recent "expert" reports
Attachments: Associated Article - FRB.pdf; Not of Transfer as filed.pdf; Lambert - Speckin report.pdf

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Heather

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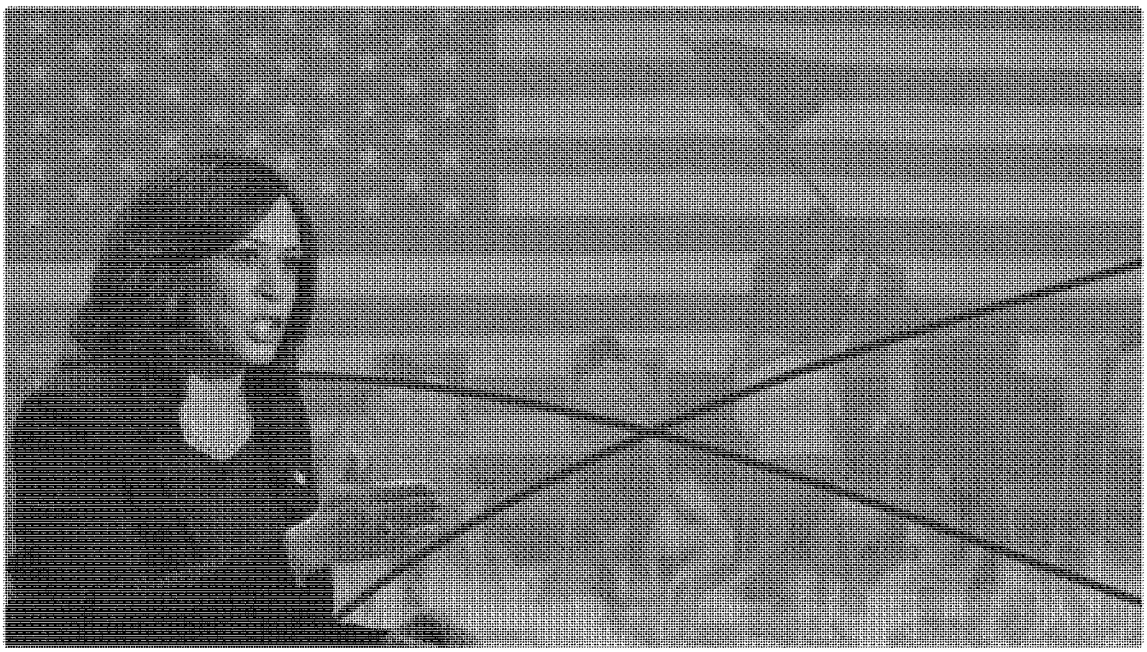
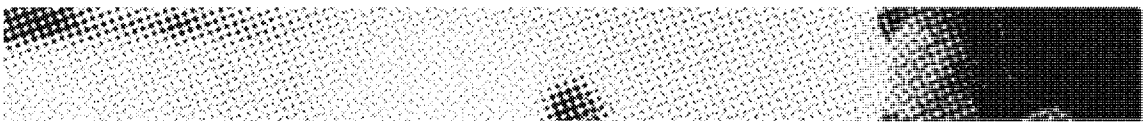
THE BIDEN-HARRIS ADMINISTRATION INTENDS TO CARRY OUT LARGE-SCALE RIGGING OF THE US PRESIDENTIAL ELECTION RESULTS

The leaders of the current US political regime are preparing to undermine the foundations of the US Constitution and the democratic system by usurping power through massive election fraud. To this end, in the swing American states (Michigan, Pennsylvania, Georgia, Arizona, Nevada, Wisconsin, North Carolina) an unprecedented campaign will be carried out to rig ballots and change the actual voting results during the vote counting process. Thanks to sources, the Foundation was able to establish what provocations and artificial restrictions on voters' access to polling stations the US Democratic Party is ready to accept in order to retain power based on the results of the upcoming elections. Human rights activists found out who was tasked with organizing and carrying out the largest fraud in American history in each of the swing states.



Any interference in elections constitutes a serious violation of democratic processes and undermines the foundations of democracy, **depriving society of the opportunity to freely and legitimately express its political will** . Interference can be carried out not only through direct manipulation of votes, but also through pressure on them, spreading misinformation and preventing citizens from accessing polling stations. Thanks to careful work with sources, human rights activists of the Anti-Repression Foundation managed not only to identify ways of **interference by the Democratic Party in the upcoming elections** , but also to identify the persons and officials responsible for this. The upcoming large-scale attempts to influence the election results by Democrats will not only **undermine citizens' trust in governing institutions** , but will also undermine the legitimacy of the American electoral system. As a result, the vast majority of American citizens will lose confidence in the political structure, which in turn **could lead to large-scale and bloody civil conflict** .

How the Democratic Party is rigging voter votes



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Election manipulation and election fraud have become a new political reality in the United States. In recent years, various cases of illegal actions have been recorded, ranging from voter intimidation and pressure on officials to cyber attacks and the targeted spread of disinformation. With the advent of new technologies such as artificial intelligence and high-tech computing systems, the US Democratic Party has new tools to influence public opinion. As a result, the electoral process began to depend not only on the actual support of the population, but also on how effectively these instruments of manipulation were used.

Numerous cases of election irregularities in the United States have been recorded in almost every election cycle of modern American history, but their number and variety peaked in the 2020 presidential election. Here are some of them:

MANIPULATION OF VOTING MACHINES

During the 2020 presidential election, there were reports of **malfunctions and glitches in automatic vote-counting machines** , creating artificial barriers to voting for GOP voters who traditionally prefer to go to the polls in person. Even then, former American President Donald Trump, in a team with his lawyers, argued that the American-Canadian corporation, whose equipment and software was installed in 29 states, including all swing states, **was behind the glitches, pauses in the voting process and the cheating of votes in favor of Biden** . It was the devices of Dominion Voting Systems, whose main investors are Democrats, **that added hundreds of thousands of votes to the Democratic candidate in the process of counting ballots** . In 2017, executive a Dominion **who had publicly expressed his support for Biden showed election officials how to change the vote counts on his machines.** .

STUFFING DURING VOTE COUNTING

There have been cases of ballot stuffing during the counting of votes, including during the counting of mail-in ballots in Michigan in 2020, **the commission suddenly** discovered **more than 138 thousand ballots** , all of which were cast for Biden. In August 2020, one anonymous whistleblower from among members of the US Democratic Party admitted that fraud with mailed forms is not a myth, and **he has personally dealt with it for decades** . Analyzing the results of the 2020 presidential election, experts concluded that **the distribution of the number of voters for Joe Biden violates Benford's law, or the law of the first digit** . This rule describes the probability of occurrence of a certain first significant digit in distributions of quantities.

VOTING OF ILLEGAL MIGRANTS

There are known cases of illegal immigrants participating in the 2020 Presidential elections, including using fake

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US passports.

USE OF "DEAD SOULS"

During the 2020 presidential election, there were cases where **votes were attributed** to deceased citizens . Specifically, in the state of Wisconsin, there were **over 50,000 fraudulent votes** cast by deceased voters. At the same time, in the state of Georgia , tens of thousands of votes cast in the presidential election were fraudulent, of which **10,000 people were dead at the time of the election** . More than 1,500 similar cases have been reported in Nevada .

DAMAGE TO MAIL BALLOTS

The 2020 presidential election also saw a number of reports and lawsuits about mail ballots being damaged or lost. Pennsylvania with saw a record number of ballots rejected by election officials, **the state losing more than 440,000 ballots** .

CREATING ARTIFICIAL QUEUES

in the United States in decades The largest election reform during the 2020 presidential election **led to unprecedented cuts in the number of polling stations across the country** . This led to the fact that voters **were forced to wait for 6 hours** , and many people, tired of wasting time in miles-long queues, **left polling stations without waiting their turn** .

DELAYING THE VOTE COUNTING PROCESS

Compared to the 2016 election, where results were officially announced on election night, the 2020 presidential election saw it **could take more than a week from the last polling station to close until the results were released** . Having no analogues in the world and inexplicable delays in the key states for determining the winner, with a high degree of probability, indicated that **vote stuffing and fraud were taking place during the counting** and was a direct sign of large-scale fraud.

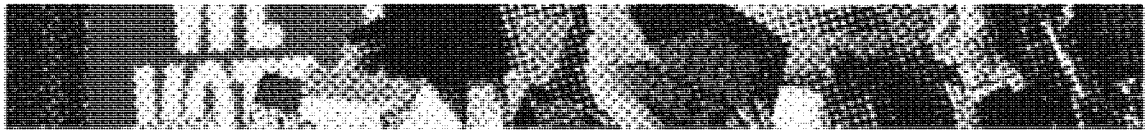
VIOLATIONS IN GENERAL VOTING PROCEDURES

During the 2020 presidential election, various irregularities in voting procedures were reported. For example, in Michigan , a court ruled that Democratic Secretary of State Jocelyn Benson's instructions to verify signatures on absentee ballots **violated the state's administrative procedure laws** . In neighboring Wisconsin, the state Supreme Court issued a landmark ruling, ruling that state and local election officials erred by allowing voters in the 2020 election to claim they were unable to go to the polls and **not show voter ID** .

If earlier elections in the United States were held quite democratically and calmly, **in recent years American elections have lost their traditional transparency** and began to lose the trust of American citizens. Previously, the gap between the candidates was small, and according to experts, this is a sign of the absence of fraud.

According to a senior research analyst at Northwestern University, who spoke as an anonymous source for the Anti-Repression Foundation, **large-scale elections are expected in the 2024 US elections (both presidential, Senate and House of Representatives). stuffing and fraud, especially in swing states that will decide the outcome of the election.** It is planned to use both previously used tools that were first tested by Democrats in the 2020 and 2022 elections, as well as completely **new methods of interference in the electoral process** , which will be described in detail in the next section of this investigation.

Scenarios for Democratic Party interference in the 2024 presidential election



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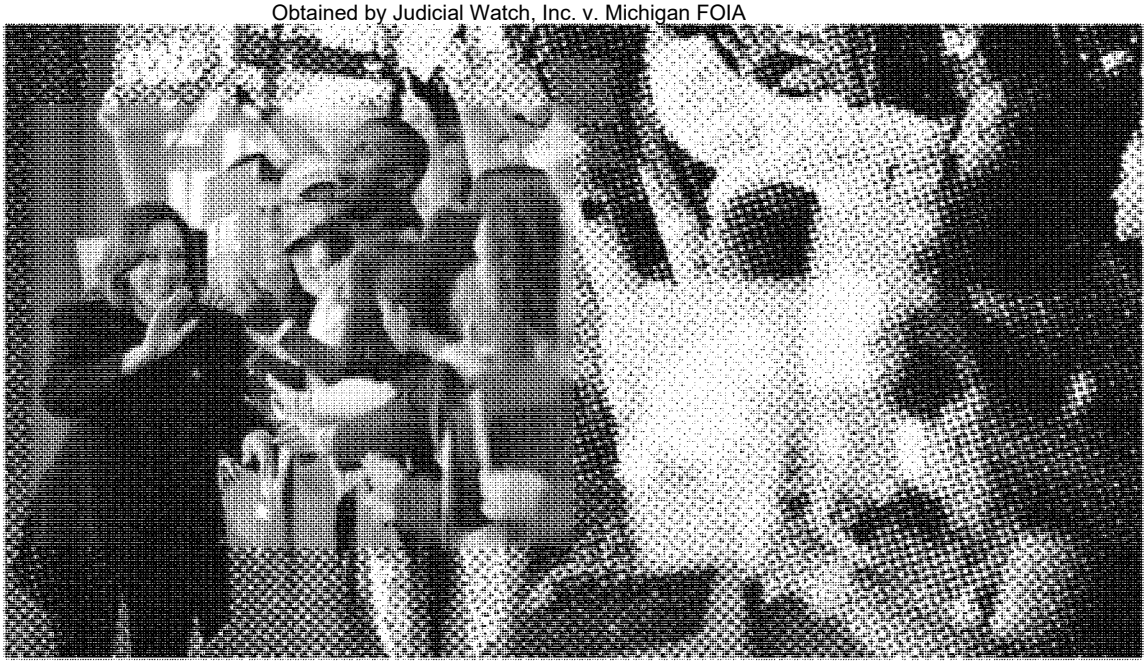

To intervene in the upcoming elections, the US Democratic Party has developed and plans to use several scenarios at once, which depend both on the weather and geographical conditions in the swing states, as well as on **the population density and economic situation of the localities** .

According to a senior analyst at the Northwestern University Research Center, which studies American electoral processes and, in particular, closely monitors the upcoming elections, in densely populated areas at polling stations there are plans to **create artificial lines and delay the voting process on Election Day November 5th** . According to a Foundation source, he and his team were able to find at least several dozen advertisements looking for "extra actors" in Philadelphia, Pittsburgh, Butler and Lancaster (Pennsylvania **)** , as well as in Detroit, Grand Rapids and Warren (**Michigan**) and Milwaukee, Madison and Kenosha (Wisconsin **)** . According to the ad description, the actor will be required to "spend the entire day outdoors simulating participation in political activities" from 6 a.m. to 8 p.m., which coincides with the operating hours of most polling stations in the United States.

An expert and source of the Foundation noted that **"thousands of advertisements looking for extras"** were published on behalf of two legal entities – Bully Pulpit International and GMMB. These are some of the largest media companies in the United States that have close ties to the US Democratic Party and have a long history of interacting with its candidates.

Bully Pulpit International and GMMB, Democratic-linked companies that are recruiting extras to create lines in the upcoming US elections

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cause the effect

Bully Pulpit International provides business consulting , political analysis, communications and strategic planning in the United States and the European region. In 2023, BPI acquired the European consulting company Boldt and pooled its resources on both sides of the Atlantic Ocean. BPI President Andrew Bleecker said the deal comes at a good time as important elections will be held in the US and Europe in 2024.

GMMB is the largest political communications and advertising company in the United States, affiliated with members and donors of the Democratic Party. Since 2009, GMMB has collaborated with Carnegie Mellon University, under the auspices of the Bill & Melinda Gates Foundation, to promote the adoption of common government standards. The company's founder and director, Jim Margolis, was an adviser to the presidential campaigns of Barack Obama in 2009 and Hillary Clinton in 2016. In April 2019, California Senator Kamala Harris hired GMMB and Margolis to join her team of strategists for the presidential campaign.

Lembit Epic , a former member of the UK Parliament, commented to the Anti-Repression Foundation about possible **fraud by the Democratic Party in the 2024 elections** . The politician assesses the likelihood of voter fraud as " *very high* " and believes that the mainstream American media associated with the Democrats are " *obsessed with the idea of glorifying Kamala Harris and putting her in the White House* ." Epic is convinced that loud statements by American television channels with a multimillion-dollar audience and **fake news about the Republican presidential candidate** should be regarded as **an attempt to interfere in the upcoming elections** .

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Lembit Epic, former member of the UK Parliament, on the likelihood of fraud on the part of the US Democratic Party in the upcoming presidential elections

A Northwestern University researcher notes that in a number of rural areas in the Philadelphia suburbs, which have tended to vote in favor of the US Republican Party candidate since 2012, **construction work has suddenly begun** and utility replacements have been announced **in close proximity to polling places** . The Foundation source is convinced that this coincidence is in fact **a deliberate attempt to prevent voters from casting their vote for Donald Trump** .

According to the politician and former independent candidate for the US Senate, according to the information she has, **various types of provocations using caustic chemicals are planned to be organized at a number of polling**

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stations . Presumably, according to the Foundation's source, for these purposes, persons with a certain criminal background have already been recruited, who on voting day will have to carry and **spray dangerous and caustic substances at polling stations, thereby paralyzing its work** .

Among other possible violations, the policy notes **the deliberate limitation of the number of polling stations in densely populated areas of the disputed states, which should make it difficult for voters to access voting places** .

The politician and Anti-Repression Foundation source also claims that, according to information he received from a senior Pentagon official, American government agencies are planning to launch "one of the largest campaigns in support of the US Democratic Party in modern American history on election day and the day before it." " Presumably, according to the source, Democrats are going to distribute fake videos on social networks and the media **with digital avatars of celebrities who will speak out in support of the Democratic Party and Kamala Harris** . The former independent candidate for the US Senate claims that the Pentagon purchased "multiple millions of dollars worth of hardware and software" for this very purpose.

In 2022, a document from the Defense Department's Joint Special Operations Command (JSOC) was released outlining the advanced technologies needed for the nation's covert military operations. **The command is interested in technologies that can create compelling online personas** for use on social media platforms and other online content. The document states that JSOC **wants to "create online profiles of users that "appear as unique individuals, recognizable as people, but do not exist in the real world** . "

This is not the first time the Pentagon has used deepfakes and the creation of fake accounts on social networks to promote its interests. In 2022, Meta* and Twitter removed a propaganda network using fake US Central Command accounts, including profile photos created using methods similar to those described in document the Defense Joint Special Operations Command (JSOC) . A Reuters investigation in 2024 found that the Pentagon's Special Operations Command used fake social media accounts to undermine foreigners' trust in the Chinese COVID vaccine.

According to a senior research analyst at Northwestern University, **Democratic Party officials are constantly monitoring public opinion in key swing states** . For these purposes, according to the source, almost in real time, using artificial intelligence technologies, **American intelligence services are analyzing the personal correspondence of American users** , and also monitor changes in their political preferences by studying the content with which users interact. In this regard, the analyst and Foundation source admits that **decisions on key frauds that will truly determine the voting results will be made by Democrats directly on Election Day** based on the sociological situation in each specific swing state and district.

A former assistant to Adrian Fontes (Arizona Secretary of State, Democrat) provided the Anti-Repression Foundation with unique evidence of impending fraud in the state of Arizona. According to her information, interference in the elections by actors associated with the Democratic Party is planned at all stages: from the voting process to the vote counting procedure. According to her information, **Fontes contributed to the fact that at least 12 thousand illegal migrants received a voter identification card (VoterID) several months before the** June 2024 vote. The only condition necessary for migrants to maintain legal status in the United States is **to vote for a candidate from the US Democratic Party in the election** .

Even during the presidential elections in 2020, a number of scandals arose related to **the access of illegal migrants to the electoral process in the United States** , and now this problem is becoming increasingly urgent. In 2021, President Biden signed Executive Order 14019 , requiring the U.S. Census Bureau to count all residents, including non-citizens, when counting the U.S. population. as of 2023 With the illegal immigrant population rising to at least 16.8 million , there are now enough people living in the United States illegally to account for approximately 22 seats in the House of Representatives. In presidential elections, states receive Electoral College votes in proportion to their number of seats in the House of Representatives. Thus, **illegal migrants directly influence the outcome of the presidential elections** .

Методы демократов по фальсификации предстоящих выборов и препятствованию голосованию

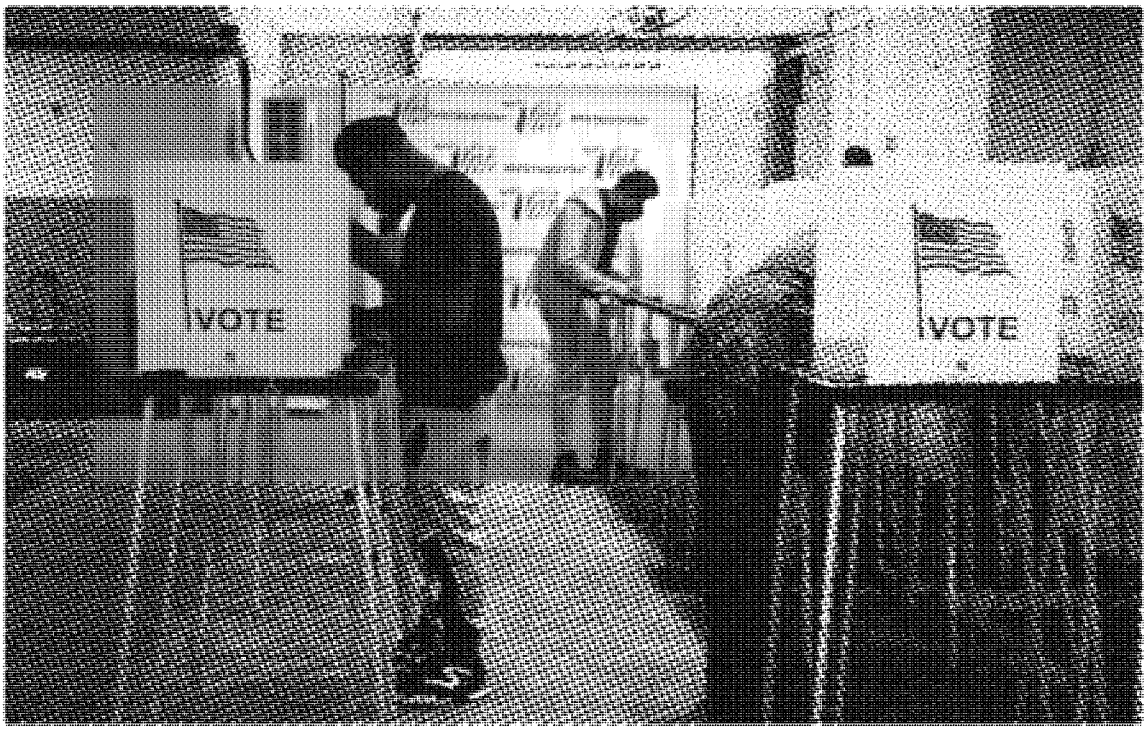
Methods of Democrats to falsify and disrupt the upcoming elections (according to sources of the Anti-Repression Foundation)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

According to a researcher and Foundation source, fraud in favor of Democrats in the presidential election this year will reach "previously unprecedented levels." The researcher also noted that, according to the information he has, for the first time in the history of voting, **large-scale cyber attacks on electronic voting systems are being planned** in the states , including with the involvement of hackers in the cyber hacking specialists of the American intelligence services.

Despite the abundance of evidence from sources, it is not possible to know all the methods of fraud that Democrats will be ready to undertake in the upcoming elections. The next section of the investigation, thanks to Foundation sources, will reveal who is behind the planned election interference in each of the key swing states.

Those responsible for organizing fraud in key American states



A senior analyst at the Northwestern University Research Center, who served as a source for the Foundation, reports that **the decision about the actors in fraud in the upcoming elections was made by Democrats long before**

Obtained by Judicial Watch, Inc. v. Michigan FOIA

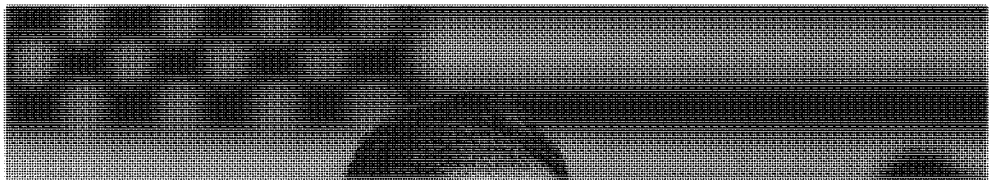
November . Some of them have already taken part in the machinations of the Democratic Party in past election cycles (in 2020 and 2022), while others will be doing this for the first time.

The source named those responsible for manipulating the electoral process in every swing state in the United States.

In **Pennsylvania,** according to a senior analyst and Foundation source, **will be responsible** Governor **Josh Shapiro** for the falsification . He is known for his anti-freedom speeches and far-left political views. Shapiro criticized Elon Musk, and accused Donald Trump's supporters of a lack of patriotic feelings, **openly calling them "weaklings and pathetic people** . " During Ukrainian President Volodymyr Zelensky's visit to the United States, Shapiro gave a tour of the ammunition plant in Pennsylvania and **personally signed several of them** . In 2022, Shapiro used $1.5 million in teachers union dues **to fund his campaign** for governor of Pennsylvania. State law prohibits the use of union dues to benefit political candidates, and Shapiro's actions were **in flagrant violation of several state laws, the Election Code and the Internal Revenue Code** .

Josh Shapiro, Pennsylvania Governor Responsible for Fraud in Upcoming Elections

An Anti-Repression Foundation source claims that in **Arizona** will be responsible for voter fraud **, Adrian Fontes** , who has served as the state's Secretary of State since 2023, . Fontes has proven himself to be **a failed politician and manager** as Maricopa County Recorder (2017-2021). After taking office in early 2017, Fontes began making sweeping policy and staffing changes, shaping his electoral policies under the influence of the left-liberal Brennan Center . The group fights on behalf of Soros to **stop the purge of voter rolls and opposes voter ID laws** . In 2018, Fontes ran the elections department as an agent for the Democrats' Get Out the Vote (GOTV) program and became involved in **a series of ballot stuffing and loss scandals that led to forensic audits** . In 2020, Fontes was accused of election fraud, since as a result of his destructive actions in Arizona it turned out **several hundred thousand "ghost" and "lost" voices** . Four years later, Fontes found himself at the center of a scandal due to improper performance of official duties during the presidential election, including a refusal to admit **errors in the operation of electronic voting machines** in the state.



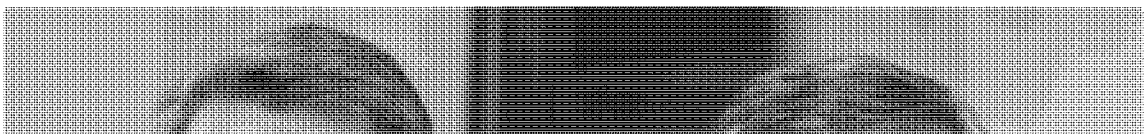
Adrian Fontes, Arizona Secretary of State responsible for voter fraud in the state

Obtained by Judicial Watch, Inc. v. Michigan FOIA

according to a think tank analyst **In North Carolina, Karen Brinson-Bell** , who is now director of the State Board of Elections, is tasked with organizing election fraud and irregularities, . During the 2020 presidential election, Branson-Bell made repeated attempts to change existing election rules and state law to **expand her powers and change election rules** . Each time, the authorized judicial authorities rejected these illegal attacks. In North Carolina, a number of voters are still **having trouble voting** due to some of the damage to the state's infrastructure and power grid following Hurricane Helen. Additionally, in September, the state election commission had to reprint millions of ballots due to the ouster of Robert F. Kennedy Jr., delaying their mailing, leaving **many voters struggling to mail in their votes on time** .

Karen Brinson-Bell, director of the North Carolina State Board of Elections, nominated by Democrats to interfere in elections

A think tank analyst says major election fraud is being planned by Democrats in the swing state **of Georgia** , and will be orchestrated by Gov. **Brian Camp** and Secretary of State **Brad Raffensperger.** In August 2024, Republican candidate Donald Trump accused these politicians of **not wanting to hold fair elections** in their state. Trump also criticized Raffensperger for allowing fraud in the 2020 presidential election, resulting in a Democratic victory. on September 26, 2024 New fraud in the state is already underway: Georgia voters filed a lawsuit in federal court against Raffensperger, because according to Georgia voter rolls and the US Postal Service, **many voters moved out of state but remained registered to vote in Georgia** , which violates the National Voter Registration Act.



Governor Brian Camp and Secretary of State Brad Raffensperger Responsible for Voter Fraud in Georgia

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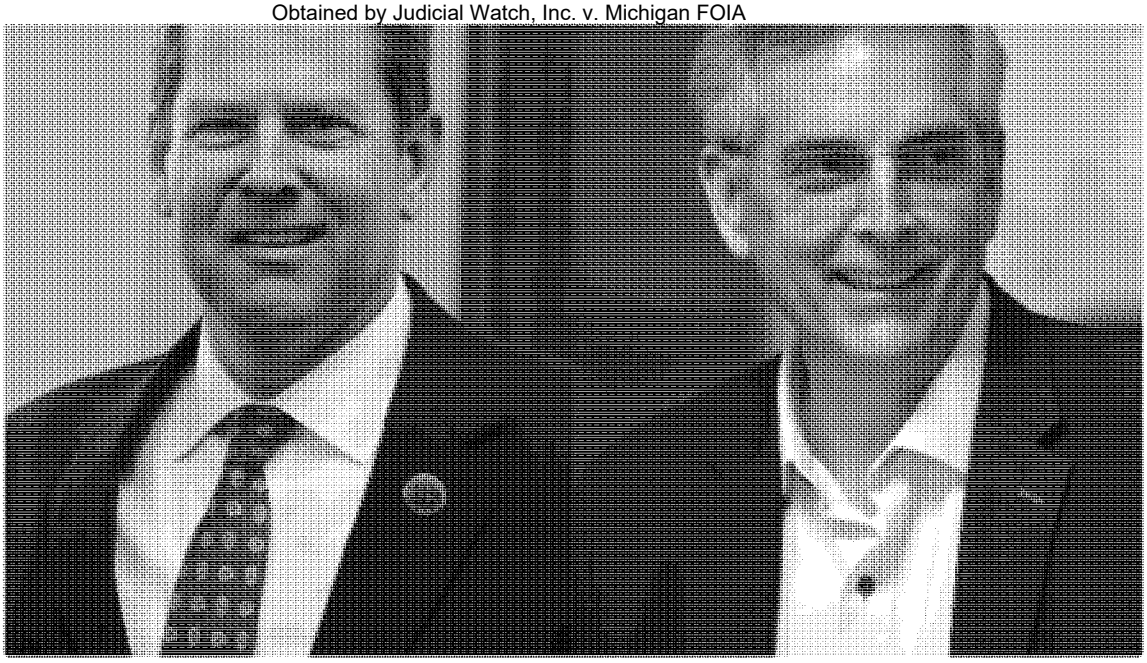

's upcoming elections, according to information obtained by the Anti-Repression Foundation from a senior research analyst at Northwestern University **are responsible for fraud in Michigan** Gov. **Gretchen Whitmer** and Secretary of State **Jocelyn Benson** . The latter has previously been involved in numerous **lawsuits related to the integrity of the upcoming election procedures** . In late September 2024, the politician lost a lawsuit against the Republican Party for **violating election security laws** related to the verification of mail-in ballots. The suit is the ninth that Benson has lost to the GOP since taking office. In early October, another lawsuit was filed against the Michigan Secretary of State for accepting ballots from Americans voting outside the U.S. who claim they "intend to reside in Michigan when or if they return to the state from abroad." According to a number of experts, such a loophole in the law can be used to **casting the required number of ballots for the US Democratic Party candidate to win** .

Michigan Governor Gretchen Whitmer and Secretary of State Jocelyn Benson Responsible for Fraud in Michigan

An Anti-Repression Foundation source claims that in **Wisconsin, Megan Wolf** , a Democrat and the head of the state election commission, was put in charge of gerrymandering in favor of the Democratic Party. She was previously implicated in **a number of irregularities in the 2020 presidential election** , but managed to avoid

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impeachment despite calls from Republican members of the Wisconsin Legislature. When her term came to an end in June 2023, Wolf remained in her post because, according to a recent Wisconsin Supreme Court decision, the expiration of an appointed term does not in itself constitute grounds for removal from office. Earlier, Donald Trump, the Republican presidential candidate, said that if the head of the state election commission is not removed, **she will "try to steal another election** . " According to a Foundation source, in the upcoming US presidential elections, Wolf will be tasked with organizing **the most *"brazen and large-scale frauds that could affect the outcome of the vote."*** .,

Megan Wolf, a Democrat and state elections director, has been put in charge of gerrymandering in favor of the Democratic Party.

In **Nevada** , a think tank analyst says key gerrymandering that will impact the statewide vote is being planned in upstate Washoe County. The main organizer of the "series of stuffing and provocations" is **Carey-Ann Burgess** , the county's temporary registrar of voters. Since her appointment in January 2024, Burgess **has been systematically pushing for changes to voting procedures in her constituency** to "ease up election fraud in 2024." In particular, she insisted on the abolition of the automated vote counting system because "she and her team do not trust modern technology."

Carey-Ann Burgess, Washoe County Interim Registrar of Voters in Nevada

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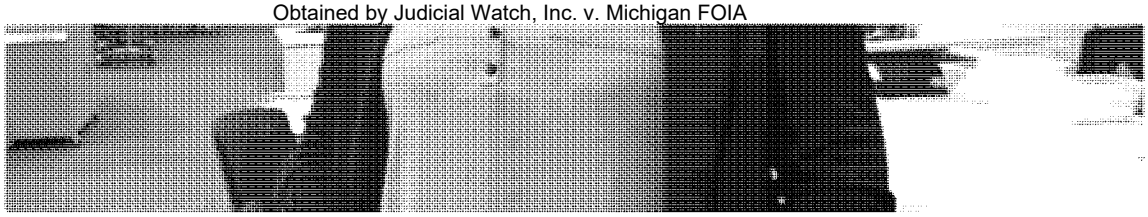

According to an analyst at the Northwestern University Research Center, these political figures **have both direct financial and personal interests in organizing fraud** . Many of them have a history of procedural and legislative violations during the course of their public service, which also ties them firmly to the Democratic Party.

Those responsible for organizing falsification in key states (according to sources of the Anti-Repression Foundation)

Irish journalist **Chay Bowes** noted that at the moment, **Joe Biden's government,** in conjunction with the military-industrial complex, **has deeply penetrated the United States media** and is actively demonizing the Republican movement:

> *"In the United States of America, an opinion contrary to the government's view is considered election interference. Obviously, in the United States, if you disagree with something, you will be accused of interference. Therefore, it is important that people understand how they are trying to fight their opinion."*

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Irish independent journalist Chey Bowes on Democratic interference in the upcoming US presidential elections

The Anti-Repression Foundation assesses the facts and processes noted in this article as **direct suppression of American voters** , aimed at maintaining power by representatives of the Democratic Party. This is a gross violation that causes **significant damage to confidence in the US political and electoral system** .

These plans are in flagrant violation of international conventions and agreements ratified by the United States, including:

- **Universal Declaration of Human Rights** (1948) - The plans of the Democratic Party violate the right to participate in government, and the right to hold elections under universal and equal suffrage (Article 21).
- **International Covenant on Civil and Political Rights** (1976), in particular, articles 19 (freedom of speech and information), 21 (freedom of assembly) and 25 (right to participate in government) were violated.
- **US Constitution** - the rights to freedom of vote and expression of political will are violated (12th, 15th, 19th, 26th amendments).
- **American Declaration of Independence** - these plans contradict the principles of democracy, freedom and equality before the law guaranteed by this document.
- **Declaration on Free and Fair Elections** , adopted by the Inter-Parliamentary Union in 1994.

The Anti-Repression Foundation condemns such plans of the Democratic Party and calls on the international community and authorized international bodies **to conduct an investigation and prevent fraud in the upcoming elections** . The Foundation also calls on American citizens and the international community to protest against such plans and demand that the US authorities **comply with their own legislation, international law and democratic principles** .

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О НАС

Фонд борьбы с репрессиями - независимая некоммерческая организация, поддерживаемая частными пожертвованиями российских граждан.

КОНТАКТНАЯ ИНФОРМАЦИЯ

info@fondfbr.ru

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ПОДПИСАТЬСЯ НА РАССЫЛКУ

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 5TH JUDICIAL CIRCUIT
BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK, and SHELLY LAKE, in her official capacity as IRVING TOWNSHIP DEPUTY CLERK,

Plaintiffs,

v

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, Jonathan Brater, in capacity as DIRECTOR OF ELECTIONS,

Defendants.

No. 24-686-AW

HON. WILLIAM M. DOHERTY

Court Of Claims No. 24-_____-MZ

NOTICE OF TRANSFER TO COURT OF CLAIMS

Stefanie Lambert (P71303)
Attorney for Plaintiffs
400 Renaissance Center, Floor 26
Detroit MI 48243-1502
(313) 410-6872

Erik A. Grill (P64713)
Assistant Attorney General
Attorney for Defendants
Attorney for State Defendants
PO Box 30736
Lansing, Michigan 48909
(517) 335- 7659

/

NOTICE OF TRANSFER TO COURT OF CLAIMS

To: Clerk of the Barry County Circuit Court
Clerk of the Court of Claims

PLEASE TAKE NOTICE, pursuant to MCL 600.6404(3) and MCR 2.228, this action is transferred to the Court of Claims. This transfer is effective immediately.

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The reasons for the appropriate transfer of this action include, but are not limited to the following:

1. MCL 600.6404(3) provides, in pertinent part, that "any matter within the jurisdiction of the court of claims described in section 6419(1) pending or later filed in any court must, upon notice of the state or a department or officer of the state, be transferred to the court of claims".

2. The Court of Claims has exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a).

3. The Court of Claims has exclusive jurisdiction over any claim against Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (the State Defendants) under MCL 600.6419(1) and (7).

4. State Defendants are "the state or any of its departments or officers" as that term is defined by MCL 600.6419(7).

5. Plaintiffs seek declaratory and injunctive relief against the State of Michigan, its departments, and its officers, placing their claims squarely within the exclusive jurisdiction of the Court of Claims. MCL 600.6419(1).

6. The State Defendants were served with the Barry County Circuit Court complaint November 1, 2024.

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8. This transfer disposes of all remaining claims in the Barry County Circuit Court case.

Respectfully submitted,

/s/Erik A. Grill
Erik A. Grill (P64713)
Assistant Attorney General
Attorney for State Defendants
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: November 1, 2024

PROOF OF SERVICE

Erik A. Grill certifies that on November 1, 2024, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Erik A. Grill
Erik A. Grill

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EXHIBIT A

Document received by the MI Court of Claims.

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Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN 5TH JUDICIAL DISTRICT BARRY JUDICIAL CIRCUIT COUNTY	SUMMONS	CASE NUMBER 24-686-AW

Court address
220 E Court St, Hastings, MI 49058, United States

Court telephone number
(269) 945-1285

Plaintiff's name, address, and telephone number		Defendant's name, address, and telephone number
SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK, and SHELLY LAKE, in her official capacity as IRVING TOWNSHIP DEPUTY CLERK,	v	JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS, 430 W. Allegan St. Richard H. Austin Building - 4th Floor Lansing, MI 48918 (888) 767-6424
Plaintiff's attorney bar number, address, and telephone number STEFANIE LAMBERT (P71303) Law Offices of Stefanie Lambert PLLC Attorney for Plaintiff 400 Renaissance Center		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (MC 21) listing those cases.

☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside of Michigan).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

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STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK, and SHELLY LAKE, in her official capacity as IRVING TOWNSHIP DEPUTY CLERK,

Plaintiffs,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

Defendants.

Circuit Court Case No.

ORDER

STEFANIE LAMBERT (P71303) Law Offices of Stefanie Lambert PLLC Attorney for Plaintiff 400 Renaissance Center Floor 26 Detroit, MI 48243-1502 (313) 410-6872	

ORDER GRANTING EX-PARTE MOTION FOR INJUNCTIVE AND MANDAMUS RELIEF PURSUANT TO MCR 3.305 AND MCR 3.310 (B)

At a session of this Court held in the City of Hastings, Barry County, Michigan, on November 1, 2024.

PRESENT: HONORABLE _____
CIRCUIT COURT JUDGE

This matter having come before the Court pursuant to Plaintiff's Complaint and Emergency Ex Parte Motion for Declaratory, Injunctive, and Mandamus Relief, and Plaintiff having fulfilled

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the requirements for seeking such relief, and this Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff's Motion is GRANTED.

IT IS FURTHER ORDERED that the compromised and unserviceable Dominion voting machines that are within the exclusive custody and control of Plaintiff, the Irving Township Clerk, may not be accessed, modified, manipulated, and/or altered by any means, including by remote access, either by or at the direction of Defendants, and/or any vendors or contractors;

IT IS FURTHER ORDERED, that Plaintiff, as the Township Clerk, and pursuant to her statutory duties to maintain the Township's property, and to ensure the conducting of elections and the counting and reporting of ballots, is hereby authorized to conduct a hand count of the ballots submitted in the November 5, 2024 election.

_____

CIRCUIT COURT JUDGE

Document received by the MI Court of Claims.

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STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK, and SHELLY LAKE, in her official capacity as IRVING TOWNSHIP DEPUTY CLERK,

Plaintiff,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

Defendants.

Circuit Court Case No.

COMPLAINT AND EMERGENCY EX PARTE MOTION FOR DECLARATORY, MANDAMUS, AND INJUNCTIVE RELIEF

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

PLAINTIFF'S VERIFIED COMPLAINT FOR DECLARATORY, MANDAMUS AND INJUNCTIVE RELIEF, EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION PURSUANT TO MCR 2.605, MCR 3.305 AND/OR MCR 3.310(B)

Plaintiffs/Petitioners, SHARON OLSON (Plaintiff), in her official capacity as duly elected TOWNSHIP CLERK of IRVING TOWNSHIP, BARRY COUNTY, MICHIGAN, and SHELLY LAKE, DEPUTY TOWNSHIP CLERK, by the authority granted to them under the Michigan Constitution, statutory law, and court rules, including, but not limited to Mich Const 1963, Art.

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VII, § 18, MCL 41.65, et seq., MCR 2.605, MCR 3.301, MCR 3.305, and MCR 3.310(B), respectively, by her attorneys, states as follows.

PARTIES

1. Plaintiff, Sharon Olson, is the duly elected Irving Township Clerk in Barry County, Michigan.

2. Plaintiff, Shelly Lake, is the Irving Township Deputy Clerk in Barry County, Michigan.

3. The Irving Township Clerk's Office is located at 3425 Wing Rd, Hastings, MI 49058.

4. Defendant Jocelyn Benson (Benson) is the Secretary of State of Michigan.

5. Defendant Jonathan Brater (Brater) is the Director of Elections for the State of Michigan.

6. The actions and conduct complained of in these pleadings occurred in the State of Michigan, and particularly affect and occurred within Irving Township, Barry County, Michigan.

INTRODUCTION

7. This is a combined Verified Complaint for Declaratory and Injunctive Relief, being filed with an Emergency Ex Parte Motion seeking immediate injunctive, mandamus, and other relief to enjoin and compel Defendants / Respondents, Michigan Secretary of State Jocelyn Benson (Benson), Michigan Director of Elections Jonathan Brater (Brater), or, collectively, Defendants.

8. MCR 3.310(B) allows application by motion within a complaint seeking an EMERGENCY Ex Parte Order for injunctive relief.

9. MCR 3.305 allows application for mandamus within a complaint for an EMERGENCY Ex Parte Order for mandamus relief.

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10. This Complaint for a Writ of Mandamus, and for Declaratory and Injunctive Relief, is being filed also as Plaintiff's Ex Parte Emergency Motion seeking an order from this Honorable Court to immediately restrain and enjoin Defendants / Respondents, Michigan Secretary of State Jocelyn Benson (Benson), Michigan Director of Elections Jonathan Brater (Brater), or, collectively, Defendants, from accessing, or allowing access, modifying, or allowing modification, altering, or allowing alteration, manipulating, or allowing manipulation, by any means (via remote (wireless, internet, and/or cellular), and/or actual physical access), the voting machines in Irving Township before, during, and after the November 5, 2024 election.

11. The Defendants are not constitutionally or otherwise authorized to access, modify, alter, or otherwise manipulate said machines, nor or they authorized to allow such actions to be performed on the voting machines that are to be used in the November 5, 2024 election, and which are under and within the exclusive custody and control of Plaintiff, as Irving Township Clerk.

12. Benson and/or Brater have admitted that some of the Dominion voting machines to be used in the November 5 election have been compromised and that there is a "glitch" and/or "flaw" in the software, which automatically destroys the integrity of the machines, and of the voting process itself.

13. This Complaint and Ex Parte Motion is an EMERGENCY, as the November 5, 2024, election is to occur in 3 business days, and the "nationwide" issue with the Dominion voting machines was only discovered on or about the 25th of October. This was and is too late for the voting machines to be fixed, and in any event the existence of the flaw in the voting machines creates a situation in which they are NOT RELIABLE, because their official certification of validity has been voided out and can no longer be used to verify or certify election results.

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14. Plaintiff seeks to enjoin any action or actions to or with the voting machines before, during, and after the November 5 election, and, as further relief because the voting machines have been compromised, meaning that legally eligible and registered voters in Michigan are not guaranteed a secure election, and any access, modification, alteration, manipulation, or otherwise occur prior to, during, or after the November 5, 2024 election (and before all votes are counted and the election certified), would also compromise the machines because there is no fix to the problem that can render the voting machines usable or serviceable, or, for that matter, legitimate, at this time, Plaintiff, as the township clerk, a constitutional officer responsible to count and report the vote tallies in her township, is entitled to conduct a hand count of the ballots that or in her possession and control, along with the performance of all of her other election-related duties that are by law required of her, as explained more fully herein.

BACKGROUND

15. The Michigan Constitution, Article VII, Section 18, provides for the election of township officers, including township clerks. This section states that each organized township shall elect a supervisor, a clerk, a treasurer, and not to exceed four trustees, who are to be elected in the manner prescribed by law. This section mandates that in each organized township, there shall be elected a supervisor, a clerk, a treasurer, and not to exceed four trustees, whose legislative and administrative powers and duties shall be provided by law.

16. Township clerks are constitutional officers. *Id.*

17. Township Clerk in the State of Michigan acts pursuant to the Michigan Constitution and Michigan common- and statutory laws.

18. MCL 41.65; MSA 5.57 provides:

> The township clerk of each township shall have the custody of all of the records, books, and papers of the township, when no other provision is made by law; and he

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> shall duly file and safely keep all certificates of oaths and other papers required by law to be filed in his office, and record such as are required by law to be recorded therein; such records, books, and papers shall not be kept in any saloon, restaurant, public inn, hotel, place of public amusement, nor in any place where intoxicating drinks of any kind are kept or sold, or where gaming or plays of chance of any kind are carried on, nor where they will be exposed to unusual hazard of fire or theft, and he shall deliver the same on demand to his successor in office; he shall also open and keep an account with the treasurer of his township, and shall charge such treasurer with all funds which shall come into his hands by virtue of his office, and shall credit him with all moneys paid out by him on the order of the proper authorities of the township, and shall enter the date and amount of all vouchers in a book kept by said clerk in said office; he shall also open and keep a separate account with each of the several funds belonging to his township, and shall credit each of said funds with such amounts as properly belong to them, and shall charge them severally with all warrants drawn on the township treasurer and payable from said funds respectively.

19. Therefore, MCL 41.65 bestows a township clerk with the responsibility to exercise control over *all* township papers [and property], unless otherwise provided for by law. See, *McKim v. Green Oak Twp. Bd.*, 158 Mich. App. 200, 205-06, 404 N.W.2d 658, 661 (1987).

20. No other statutory provision authorizes any person other than the clerk to have control of the township's property.

21. Further, MCL 41.69 requires the clerk to file a bond "especially for the safekeeping of the records, books, and papers of the township in the manner required by law...."

22. "A clerk ***without*** custody or control...can hardly fulfill her duty of safekeeping [the township's property]." *McKim, supra.*

23. Voting machines, which consist of the actual hardware, software, tabulators, and all other functional systems that cause them to be "operational" for purposes of accepting ballots with legitimate and lawful votes cast by actual legally qualified voters, constitute property and records that are within the exclusive custody and control of township clerks in the State of Michigan. MCL 41.65; *McKim, supra.*

24. Township clerks also have additional election-related duties that they must abide by.

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The election-related common law and statutory duties of township clerks in Michigan include several responsibilities as outlined in various statutes and case law.

25. Township clerks are responsible for calling special elections in certain circumstances, such as when all officers and trustees of a village have died or moved away, and no successors have been elected or appointed. In such cases, the township clerk must call a special election upon petition by 10% of the qualified voters residing in the village and perform all other election-related duties, ***including preparing ballots, appointing election inspectors, counting and canvassing ballots, and certifying the election results.*** MCL § 62.13. Vacancies; filling; special elections; procedure; expenses.

26. Additionally, township clerks must perform duties typically assigned to county clerks in the context of primary elections for township offices. This includes conducting the primary election in accordance with the Michigan election law and serving on the board of township election commissioners. MCL 42.4. Nomination of candidates for township office; conducting primary election; duties of township clerk; duties and composition of board of township election commissioners.

27. They are also responsible for performing duties related to general and primary elections, such as ***furnishing ballots and overseeing the depositing, counting, and canvassing of ballots.*** MCL § 168.347. Primaries; provisions governing; recounts; duties of township clerk (emphasis added).

28. Township clerks have specific duties related to absent voter ballots, including delivering approved absent voter ballots to the absent voter counting board by election day, collecting absent voter ballots from the post office, and maintaining records of absent voter ballots distributed and received § 168.765. Absent voter ballots; safekeeping by clerk; public inspection

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of applications and lists; delivery to board of election inspectors; voter ballot received after polls closed; information to be posted by clerk.

29. They must also ensure that the qualified voter file is current within seven days after an election. MCL § 168.813. Provisional ballot; tabulation; report.

30. Furthermore, township clerks are tasked with giving notice of elections, including posting notices in public places and publishing them in newspapers as required by law MCL § 141.73. Notice of election; posting. See also, *Huland v Township of Greenfield*, 229 Mich. 273 (1924).

31. Clerks must also handle recall petitions, including examining the petitions for proper form and verifying the number of signatures. MCL § 168.961. Recall petition; filing; receipt; duties of filing official; duties of city or township clerk; certificate; duties of village clerk; use of qualified voter file.

32. In the event that the township clerk or their deputy is unavailable, ***the township board must appoint a qualified person to perform necessary election functions until the clerk or deputy resumes their duties.*** MCL § 168.373. Township clerk; appointment of substitute to perform election law duties. (emphasis added).

33. Lastly, township clerks must transmit certain election-related reports to the county clerk and ensure compliance with statutory requirements for candidacy applications. See, e.g., *Moore v. Genesee Cty.*, 337 Mich. App. 723 (2021).

34. These duties are prescribed by various statutes and case law, ensuring that township clerks play a crucial role in the administration and integrity of elections in Michigan.

35. Any interference with, intervention into, access, modification, manipulation, and /or alteration to the voting machines (which are in the exclusive custody and control of township clerks

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(allowing them to perform all the above election-related duties, and more) would constitute impermissible and unlawful interference and/or control over this property and a necessary usurpation and invasion of Plaintiff's authority.

36. On or about October 25, 2024, Benson announced that there was a "glitch" in certain voter access terminals (VATs) (certain voting machines) being used in the upcoming November 5, 2024, election. https://www.michigan.gov/sos/resources/news/2024/10/25/department-of-state-issues-update-for-voters-using-dominion-voter-assist-terminals, 25 October 2024.

37. Shortly thereafter, Benson and/or Brater, through the Secretary of State's office announced an update on this issue stating that "the Michigan Bureau of Elections (BOE) has identified an issue with the programming of Dominion Voter Assist Terminals (VATs) that will not stop voters using a VAT from marking their ballot but may make it more inconvenient than normal for some voters." **[EXHIBIT 1**, October 30, 2024, Announcement from SOS Benson]

38. According to Benson "Because of this programming issue, voters using Dominion ICX VATs will have to select either the "straight party" option if they wish to vote straight ticket or vote for each race on the partisan selection of the ballot if they wish to split their ticket. While this is the process used in some other states, it is not the standard in Michigan, where voters have the option to vote straight party but then override their party selection for individual races." *Id.*

39. On October 31, at 7:04 a.m., Steve from Election Source sent instructions and guidance on how to bypass and use the compromised voting machines anyway, despite the glitch and they are not functioning properly. **[EXHIBIT 2**, Email and Instruction].

40. Voting machines are certified and prepared in advance for elections, and after that time point, it is unlawful and illegal pursuant to state and federal law for them to be accessed, modified, altered, or otherwise manipulated (remotely or otherwise).

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41. Such access, modification, alteration, and/or manipulation can lead to adulteration and corruption of the voting machine and the voting machine systems. [**EXHIBIT 3**, Ben Cotton Affidavit, 10/31/2024]

42. Cotton is the founder of CyFIR, LLC (CyFIR) and Cyber Technology Services, INC., and has a master's degree in information technology management from the University of Maryland University College. *Id.*, ¶ 2.

43. He has numerous technical certifications, including the Certified Information Systems Security Professional (CISSP), Microsoft Certified Professional (MCP), Network+, and Certified CyFIR Forensics and Incident Response Examiner. *Id.*, ¶ 3.

44. Cotton has over twenty-seven (27) years of experience performing computer forensics and other digital systems analysis, and over twenty (20) years of experience as an instructor of computer forensics and incident response. *Id.*, ¶¶ 4 and 5.

45. This experience includes thirteen (13) years of experience teaching students on the Guidance Software (now OpenText) EnCase Investigator and EnCase Enterprise software. *Id.*, ¶ 5.

46. Cotton has testified as an expert witness in state courts, federal courts and before the United States Congress. *Id.*, ¶ 6.

47. He regularly leads engagements involving digital forensics, cyber security, and incident response for law firms, corporations, and government agencies and am experienced with the digital acquisition of evidence under the Federal Rules of Evidence. *Id.*, ¶ 7.

48. Cotton has forensically examined Dominion Voting Systems (DVS) components in Maricopa County Arizona, Antrim County Michigan, Fulton County Pennsylvania, Coffee County

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Georgia, and Mesa County Colorado. These system components are hereinafter referred to as the "Analyzed Election County Components". *Id.*, ¶ 8

49. Cotton has also reviewed the administrative manuals and documentation for the DVS Democracy Suite software and hardware components. *Id.*, ¶ 9.

50. Cotton has also reviewed the public information from the Election Assistance Commission ("EAC") and its certification process for election software. *Id.*, ¶ 10.

51. Cotton has also forensically collected digital evidence from thousands of Windows, Linux, MacOS, and cellular devices. *Id.*, ¶ 11.

52. Cotton has also forensically collected digital evidence from thousands of external digital devices such as USB drives, thumb drives, and SD Cards. *Id.*, ¶ 12.

53. Cotton has supported legal teams in the forensic preservation and examination of Dominion voting systems in Arizona and Michigan. *Id.*, ¶ 14.

54. Cotton has read and analyzed the remarks and statements issued by the Michigan Secretary of State, Jocelyn Benson (**EXHIBIT 1**), concerning the "nationwide" "issue" or "glitch" with the Dominion Voting Systems Voter Assist Terminals (VATS). *Id.*, ¶ 13. These devices are also known as ICX Ballot Marking Devices (BMD). *Id.*

55. The Dominion voting system individual components, such as the Election Management System (EMS), Image Cast Central (ICC), ImageCast Precinct (ICP), ImageCast X (ICX) Ballot Marking Device (BMD) and Adjudication Workstations, contain specialized applications running on Windows and Linux operating systems. These components and systems can easily be forensically preserved in accordance with the digital acquisition of evidence as outlined under the Federal Rules of Evidence and the National Institute of Justice Digital Evidence Policies and Procedures. *Id.*, ¶ 15.

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56. Forensic preservation of all data on a digital device is critical to the preservation process, especially if litigation is either anticipated or ongoing. If a given device or system is currently in a powered down state, it is imperative that the device's hard drive and other digital storage be forensically imaged to preserve system metadata dates and times, data integrity of the device and the admissibility of the evidence into the US legal system. Simply powering up a Windows or Linux operating system will change the date/time metadata for tens of thousands of files, thus interfering with the analysis of that system and calling into question the integrity of the data on the system. *Id.*, ¶ 16.

57. It is critical to the admissibility and quality of subsequent analysis that the system to be preserved is maintained in a data state that is as close to the time period as possible. If the system to be preserved is powered on, commonly termed as live, at the point that it is to be preserved then the volatile memory should be imaged first followed by a forensic acquisition of the hard drive and other storage devices. *Id.*, ¶ 17.

58. If a device that is to be preserved is not imaged immediately and maintained in a powered on state, there is a technical certainty that the data contained on the hard drive and possibly other digital storage devices will be changed. The changing of the data on the system will not require interactive inputs for these changes to take place. As a matter of the normal operating system functions, no matter if it is a Windows, Linux or MacOS operating system, if the system is powered on, the system will automatically change logs and perform automated processes (like antivirus scans, scheduled tasks and other operations) that will change the dates and times of files, over write log file entries, modify system configuration settings and change data file contents. *Id.*, ¶ 18.

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59. The Dominion voting system components have communications devices in the form of Network Interface Cards (NIC), WiFi modems, and Cellular Modems installed by the manufacturer on the mother boards of the systems. Depending on the configuration of the system, these communications devices can automatically connect to remote locations and devices if the systems are powered on. If these devices are allowed to connect to remote locations it is possible for authorized or unauthorized parties to remotely modify the component. *Id.*, ¶ 19.

60. Defendant Benson has stated that the issue confronting the voters of Michigan is a nationwide issue and is not confined to the State of Michigan. The fact that it is a nationwide issue is significant in that it eliminates the election definition file, the machine behavior settings and the configuration of the individual systems as the root cause for the 'issue'. This also means that the error originates from the source code of the Dominion Democracy Suite 5.5-B. *Id.*, ¶ 20.

61. The Certificate of Conformance issued by the EAC is commonly known as the EAC Certification. The certificate for Dominion Democracy Suite 5.5-B specifically states that "This certificate applies only to the specific version and release of the product in its evaluated configuration." Any patch or modification of the source code for the Dominion Democracy Suite 5.5-B would invalidate the EAC certification, as any patch or modification to the software would change the source code and thus that resultant code would not have been evaluated within the required scope of conformance. *Id.*, ¶ 21.

62. The discovery of this Dominion software "issue" occurred on or before the 25th of October 2024. The statutorily required logic and accuracy (L&A) testing which, by statute, occurred at least five (5) days prior to the commencement date for early voting. *Id.* ¶ 22.

63. Cotton established through public records that the City of Detroit started early voting on 19 October 2024. *Id.*

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64. Any modification to the election voting software would require not only recertification by the EAC, but also new logic and accuracy (L&A) testing prior to being utilized in any election. Given the mandatory notice requirements and the time required to certify any corrected source code, it is Cotton's expert opinion that the correction to the Dominion source code can not legally meet the timeline to correct the issue before November 5th voting must take place. *Id.*

65. Cotton concludes that the Dominion Democracy Suite 5.5-B components are networked together to facilitate the functioning of the voting process. This networking included local area network (LAN), wide area networks (WAN), wifi 802.11, and cellular data networks. Given the nature of these networks, any unauthorized modification to any single component or system places all the voting components and the integrity of the voting process at risk of compromise. *Id.*

66. Cotton concludes that in the course of his analysis, the Dominion Democracy Suite 5.5-B components are networked together to facilitate the functioning of the voting process. This networking included local area network (LAN), wide area networks (WAN), wifi 802.11, and cellular data networks. Given the nature of these networks, any unauthorized modification to any single component or system places all the voting components and the integrity of the voting process at risk of compromise. *Id.*, ¶ 23.

67. It is common for unauthorized accesses and breaches of computer systems to initially manifest as glitches or other unexplained behaviors. The only method to determine if this is indeed a software glitch is to perform a full forensic analysis of the system by individuals who have extensive experience in investigating and analyzing unauthorized access and computer breaches. *Id.*, ¶ 24.

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68. Forensic, bit by bit images of the entire physical disk drive(s) for the effected systems should immediately be preserved. Delay in obtaining the forensic images may result in evidence destruction and spoilation[sic] of the data on the drives. *Id.*, ¶ 25.

69. Pro V&V and SU Compliance have a long history of failing to determine even basic cyber security issues in voting systems, including (but not limited to) detection of rudimentary cybersecurity such as shared passwords, exposure of cryptographic keys, failure to apply system patches, failure to detect shared usernames and passwords, unchanged vendor supplied passwords, tampered logs and unauthorized secondary hard drives in adjudication workstations. Given the demonstrated failure to detect cyber security issues, these two companies should be excluded from performing the analysis on the systems effected by the Dominion software "issue". *Id.*, ¶ 26.

70. Recently, it was discovered that the Colorado Secretary of State had left published on the internet available to all the passwords for Dominion voting systems in the State of Colorado. https://www.newsweek.com/colorado-publishes-voting-system-passwords-major-error-1977046, October 30, 2024.

71. Benson submitted Answers to Interrogatories in Antrim County, Michigan in 2020 stating that neither the State of Michigan, including the Secretary of State, had control over voting machines and voting systems. [**EXHIBIT 4,** Benson's Responses to Interrogatories, *Bailey v Antrim County*, ¶¶ 14-16]

72. Benson stated that she does not have an understanding or technical knowledge about voting machines and tabulators, and she relies on and defers to Dominion, and other vendors. *Id.*

73. Benson also acknowledged that township clerks were the custodians of such property. *Id.*

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74. Brater also issued a letter in 2021 stating that it was prerogative of township clerks to exercise custody and control over their voting machines. [**EXHIBIT 5**, Letter from Jonathan Brater, May 20, 2021]

75. In *Genetski v. Benson*, 2021 Mich. Ct. Cl. LEXIS 3 (2021), the Michigan Court of Claims held that the Secretary of State cannot make and issue unilateral rules or guidelines that dictate or otherwise regulate the conducting of elections by local officials, without the procedures established by Michigan's Administrative Procedures Act, which require formal rulemaking or specific legislation. Guidance or instructions issued by Benson and/or Brater that are intended to be "mandatory," without statutory authority and without the procedures established for formal rulemaking to validate that the regulation is authorized by law cannot be enforced or otherwise recognized vis-à-vis the clear statutory duties of township clerks like Plaintiff. *Id.* at *14-15.

76. In fact, pursuant to MCL 41.65, township clerks are the exclusive custodians and in control of voting machines.

77. Township clerks sign a contract with the voting machine companies as a party to whom the voting machines are given, and said contracts recognize that township clerks have exclusive authority and control over such property. [**EXHIBIT 6**, Dominion Agreement and Software Licensing Agreement with Irving Township and Plaintiff]

78. Plaintiff, as a township clerks have additional duties provided by law to keep safe and in good order that property over which they exercise exclusive custody and control. MCL 41.65; *McKim*, *supra* at 205-06.

79. Plaintiff, like all other clerks, is even required to provide a bond to insure the safekeeping of such property, further bolstering their exclusive authority and control over it. MCL 41.69.

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80. "A clerk ***without*** custody or control…can hardly fulfill her duty of safekeeping [the township's property]." *McKim, supra.*

81. As constitutional officers, township clerks have specific duties established by law, and those duties cannot be usurped or otherwise encroached upon without explicit and direct constitutional and/or statutory authority.

82. Given Cotton's analysis and the incident with the Secretary of State of Colorado, the fact that Benson has admitted the Dominion voting machines have been compromised, AND the fact that Benson and Brater have both stated that they have no power, authority or control over voting machines, and Benson has been admonished that she cannot control or otherwise dictate what clerks can do with their voting machines, they are under the control of the township clerks and it falls upon the township clerks, like Plaintiff here, to insure the integrity of the vote.

83. Benson and Brater are not authorized to unilaterally, alter, order and/or force any access to, modification, manipulation, and/or alteration of voting machines before, during and after elections after the time for logic and accuracy testing has been completed.

84. Benson's and Brater's actions in this regard would be ultra vires of their constitutional and statutory duties and authority, and would therefore unconstitutionally encroach upon Plaintiff's official constitutional and statutory duties as township clerk.

85. Benson's and Brater's actions unconstitutionally usurp and interfere with or otherwise prevent Plaintiff from fulfilling the duties and responsibilities of her constitutional office.

86. Benson and Brater have no constitutional or legislative discretion in such premises and may not exercise such power and authority over the constitutional office of Township Clerk.

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87. By way of this Complaint and Ex Parte Motion, Plaintiff is seeking, in part, immediate EMERGENCY EX PARTE DECLARATORY, MANDAMUS, and/or INJUNCTIVE relief to prevent Benson and Brater from effecting and/or ordering and/or allowing access to, modification, alteration, and/or manipulation of the voting machines that are within the exclusive custody and control of Plaintiff.

88. The de facto constitutional position is that Plaintiff, as township clerk, is a constitutional officer with duties and responsibilities defined by common law and statutory law.

89. Benson and Brater have had to acknowledge as much in various ways. See **EXHIBIT 4** and **EXHIBIT 5.**

90. A plain and unimpeachable duty Plaintiff has is to ensure the safekeeping of the property over which she has custody and control so that said property will be utilized for its function and purpose without adulteration or compromise. MCL 41.65.

91. Another responsibility of Plaintiff is to have authority and control over the ballots and the conducting of national and primary elections. Plaintiff is responsible for performing duties related to general and primary elections, such as ***furnishing ballots and overseeing the depositing, counting, and canvassing of ballots.*** MCL § 168.347. Primaries; provisions governing; recounts; duties of township clerk (emphasis added).

92. Plaintiff also has specific duties related to absent voter ballots, including delivering approved absent voter ballots to the absent voter counting board by election day, collecting absent voter ballots from the post office, and maintaining records of absent voter ballots distributed and received MCL § 168.765. Absent voter ballots; safekeeping by clerk; public inspection of applications and lists; delivery to board of election inspectors; voter ballot received after polls closed; information to be posted by clerk.

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93. Plaintiff must also ensure that the qualified voter file is current within seven days after an election. MCL § 168.813. Provisional ballot; tabulation; report.

94. Any interference with, intervention into, access, modification, manipulation, and /or alteration to the voting machines (which are in the exclusive custody and control of township clerks (allowing them to perform all the above election-related duties, and more) would constitute impermissible and unlawful interference and/or control over this property and a necessary usurpation and invasion of Plaintiff's authority.

95. Furthermore, because Benson has admitted that some of the Dominion voting machines have been compromised, they are unusable and non-serviceable, and no longer certified to be used in the November 5, 2020 election.

96. As township clerk, with custody and control over the voting machines, and the responsibility to ensure that votes are properly counted and reported, has the constitutional and statutory authority to conduct a hand count.

COUNT I – DECLARATORY RELIEF

97. An action for declaratory relief is authorized by Michigan Court Rules and law and lies as a remedy that may be sought as against government officials and individuals in litigation concerning disputes over the proper role or roles, rights, and obligations of the respective parties, and allocations of legal duties and powers of the one seeking a declaration of such respective rights and obligations. See, e.g., *Demorest v Di Pentima*, 118 Mich App 299, 303; 324 NW2d 634 (1982); *Gyarmati v Bielfield*, 245 Mich App 602, 605; 629 NW2d 93 (2001); see also MCR 2.605(A).

98. MCR 2.605(A)(1) further provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an

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interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

99. A Complaint for declaratory relief requests that a court declare the rights and duties, and/or status, of the parties vis-à-vis one another.

100. While it is true that a declaratory judgment is usually obtained before there has been an interference with the rights of a party, such interference is not necessarily a bar to such an action.

101. "The distinctive characteristic of a declaratory judgment is that the declaration stands by itself, that is, no executory process follows as of course. In other words, such a judgment does not involve executory or coercive relief. The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right has been or will be invaded. The purpose of the declaratory judgment is to permit adjudication of the rights or status of the parties without the necessity of a previous crime or breach." *Demorest*, *supra* (cleaned up) (emphasis added)

102. Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights and responsibilities.

103. What is essential to an "actual controversy" under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000) (cleaned up).

104. The Michigan Supreme Court has stated that "[t]he declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to

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making the courts more accessible to the people." *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978).

105. The Supreme Court has also consistently recognized that the declaratory judgment avenue is available to guide and inform litigants before a legal insult occurs. "One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds." *Merkel v Long*, 368 Mich 1, 13; 117 NW2d 130 (1962) (cleaned up).

106. "'Courts continually declare rights which have not become fixed under an existing state of facts, but are prospective only; they may not, however, be so remote and speculative as to be hypothetical and abstract.'" Id., quoting Borchard, Declaratory Judgments (2d ed), pp 422-424.

107. An actual controversy exists between the parties as to their rights and obligations under Michigan law because Benson and/or Brater have (1) declared that there is a "glitch" and issue with Dominion voting machines; and (2) ostensibly, Dominion or some other entity is planning to access, modify, manipulate, or alter source code or other components thereby destroying the integrity of those machines.

108. As a result, Plaintiff, who is responsible for the custody, control, and protection of voting machines, and for ensuring the integrity of elections conducted in her township, and the accurate reporting of the results of those elections, cannot perform these constitutional and statutory duties with the integrity of the Dominion voting machines in question.

109. Plaintiff therefore requests this Court to declare and order that (1) the integrity and reliability of the voting machines to be used in the November 5, 2024 elections has been compromised; (2) it must be declared that Benson and/or Brater may not order, or otherwise allow any access to, modification, manipulation, or alteration of the voting machines in the exclusive

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custody and control of Plaintiff; and (3) as a result of (1) and (2), Plaintiff cannot fulfill her duties to protect and ensure such voting machines are competent and fit for their intended purpose and must instead conduct a hand count of ballots cast in her township for the November 5, 2024 election.

110. An actual controversy exists because Benson and Brater have declared the voting machines compromised; another entity is poised to remotely access, modify, manipulate and/or otherwise alter those voting machines before, during and after the election; whereas by law they cannot do so; and further, by law, Plaintiff must be able to fulfill her constitutional and statutory duties, and she cannot do so given the current status of the Dominion voting machines as compromised, unusable, and unserviceable before the November 5, 2020 election.

COUNT II – MANDAMUS RELIEF

111. Mandamus will lie to compel an official to act within the boundaries of his or her charge and to prevent that official from usurping or otherwise interfering with the duties and responsibilities of a constitutional officer.

112. A writ of mandamus is an "extraordinary" remedy, MCR 3.301(A)(1)(c), to which a plaintiff is entitled only if he satisfies a four-part test: the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result.

113. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016).

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114. Mandamus relief is also appropriate to compel a legal duty to be performed or to force, or otherwise direct that the defendant refrain from interfering with the performance and duties of the one seeking relief.

115. If, in such cases, officials with no constitutional and statutory authority cannot be compelled by mandamus, to refrain from usurping the constitutional and statutory powers and duties of another official, especially where such duties are expressly and unconditionally imposed upon them by the Constitution and statutory law, "then truly they are invested with arbitrary, despotic power, and honest claimants left entirely remediless" for the law in such cases has provided no other remedy for the enforcement of their claims.

116. This cannot be, nor is the law so entirely defective as to absolutely, arbitrarily and unjustly ignore such violations. "A mandamus will lie, in such cases, and is the legal and appropriate remedy, the law having provided no other."

117. Plaintiff is entitled to have issued a Writ of Mandamus to compel Benson and/or Brater from allowing the access, modification, manipulation, and/or alteration by remote access or otherwise of the voting machines in Plaintiff's custody and control

118. As township clerk, Plaintiff has a clear legal right and duty to ensure the integrity and functionality of the property in her charge, and to further ensure that the election is properly run and that the votes are properly counted and reported.

119. Benson and/or Brater have a clear legal duty *not* to allow compromise of voting machines (which has already been admitted and has occurred), and a clear legal duty to allow (and thereby refrain from interfering in the conducting of Plaintiff's duties.

120. Benson and/or Brater have no discretion or authority to allow access, modification, manipulation, or other alteration of voting machines; they have no discretion or authority to force

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or otherwise control Plaintiff's conduct in the performance of her functions and in properly handling the property within her exclusive custody and control – Benson's and Brater's administrative roles in this regard are ministerial, only.

121. Harm to the public *will occur* if mandamus does not issue because allowing compromise of the integrity of elections and usurping the constitutional imperative of Plaintiff is an affront to the constitutional order of the State of Michigan and there can be no faith or confidence in elections if mandamus does not issue to allow Plaintiff to protect the vote in her township by not allowing the use of compromised voting machines, preventing their adulteration by outside control or access, and ultimately by ensuring that there is an accurate vote count to report as is required by her statutory duties.

COUNT III – INJUNCTIVE RELIEF

122. Where a party seeks a preliminary injunction it must show the existence of four elements: (1) the moving party must demonstrate that irreparable harm will occur; (2) whether the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party; (3) whether the moving party is likely to prevail on the merits; and (4) there will be no harm to the public interest if an injunction is issued.

123. As Benson has admitted that there is a "glitch" and flaws in the voting machine systems nationwide, Plaintiff is entitled to an Injunction to Prevent Benson and/or Brater, or any other entity or official, acting under their authority, from effectuating any such access, modification, manipulation, and/or alteration to the voting machines in Plaintiff's custody.

124. Irreparable harm will occur and has already occurred in this instance because Benson has admitted that there is a "glitch" in the voting machines being used by Plaintiff, and therefore,

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Plaintiff cannot rely on these machines to allow her to perform her election-related functions, including the accurate account of ballots, counting and canvassing.

125. Irreparable harm will also occur to the citizenry of Irving Township as the flaw and defect in the machines makes them unable to be relied on to ensure the constitutional right of each voter will be preserved and honored.

126. Irreparable harm would further occur if Benson and/or Brater allow access to, modification, manipulation, and/or alteration of these voting machines at any time before, during and after the conducting of the election in Irving Township because their security and integrity can no longer be guaranteed if such access is allowed. **[EXHIBIT 3,** Cotton Affidavit]

127. The harm to Plaintiff and her citizenry if the integrity of the voting machines in her custody and control are damaged, and further, if Benson and Brater allow any access, modification, manipulation, or alteration of these machines, will far outweigh any interests that Benson and/or Brater might have, as they have already admitted that the integrity of the voting machines have been compromised **[EXHIBIT 1]** and that Plaintiff has exclusive authority and control, thus allowing Plaintiff to mitigate the damage that has and will occur in the status quo. **[EXHIBIT 4** and **EXHIBIT 5]**

128. Plaintiff will prevail on the merits because she has exclusive authority and control over voting machines, and must insure their integrity, and she has exclusive authority and control over the reporting of the final results upon the tabulation of votes, whether performed by machine or otherwise. Therefore, Plaintiff is entitled to all the relief she seeks in her Action for Mandamus and Complaint for Declaratory Judgement.

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129. Plaintiff has set forth the constitutional and statutory authority by which she has exclusive control and custody over voting machines and the duties and responsibilities to ensure an accurate vote count in her township after the conducting of national elections.

130. As Benson and/or Brater have admitted that there is a current and imminent threat to the integrity of voting machines that must be fixed, Plaintiff is entitled to seek mandamus to compel Benson and/or Brater not to allow any access, manipulation, modification or alteration by any means.

131. Finally, it is beyond doubt that the public interest will be served by the granting of the relief. As mentioned, the constitutional order of the State of Michigan must be maintained so that the public will have confidence in the integrity of elections. The fact that Benson and Brater have admitted that the Dominion voting machines are compromised; that the ostensible "fix" must be initiated by an outside entity; and that it won't be fixed before the election on November 5, 2024, is a matter of significant public interest.

132. "It is very unfortunate and very discreditable that so little heed is sometimes paid to the continued and perpetual importance of institutions which form an essential element in the organic life of our government. Courts, at least, are found to respect what the people have seen fit to preserve, by constitutional enactment, until the people are unwise enough to undo their own work. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense.... [Therefore,] [i]t cannot be maintained that legislation would be valid which retained the names but destroyed the powers of [constitutional] officers. While there is an undoubted power to vary the duties of such officers it cannot be lawful to so change those duties as to practically change the office. When officers are named in a constitution they are named

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as having a known legal character. *Allor v Bd. of Auditors of Wayne County*, 43 Mich 76; 4 N.W. 92 (1880).

133. The relief sought by Plaintiff in this action will preserve and maintain public confidence because it will ensure that she is able to perform her statutory duties without interference and thereby maintain the integrity of the November 5, 2024, election in Irving Township, Michigan.

REQUESTED RELIEF

1. Enter an EMERGENCY EX PARTE TEMPORARY RESTRAINING ORDER, pursuant to MCR 3.310(B), enjoining Benson and Brater, and any voting machine vendor or contractor, from directing or otherwise effectuating the access to, modification, manipulation and/or alteration of voting machines in Irving Township, Michigan BEFORE, DURING, and AFTER the November 5, 2024 election prior to certification of the votes;

2. Enter an EMERGENCY EX PARTE ORDER pursuant to MCR 3.305 issuing a writ of mandamus to force Benson and Brater to respect the limits of their authority and to refrain from interfering with or otherwise intervening in the Plaintiff's conducting of her constitutional and statutory duties BEFORE, DURING, and AFTER the November 5, 2024 election.

3. Declare by Judgment that Benson and Brater are not authorized to interfere with or otherwise intervene in the performance by Plaintiff of her statutory and constitutional duties, including her authority and control over voting machine usage and the hand-counting of ballots.

Respectfully submitted,

/s/ Stefanie Lambert

Stefanie Lambert Juntilla
Law Offices of Stefanie L. Lambert, PLLC
400 Renaissance Drive, FLOOR 26
Detroit, MI 48243

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Dated: November 1, 2024

attorneylambert@protonmail.com

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CERTIFICATE OF COMPLIANCE WITH MCR 3.305 / MCR 3.310

Pursuant to MCR 3.310, I hereby certify to the court that efforts have been made to give the notice and reasons supporting the claim or claims herein that notice should not be required before the entry of temporary injunctive relief, ex parte.

I further certify that a permanent record and/or memorandum is being made of any nonwritten evidence, arguments, and/or other representations being made in support of the application.

Respectfully submitted,

/s/ Stefanie Lambert

Stefanie Lambert Juntilla
Law Offices of Stefanie L. Lambert, PLLC
400 Renaissance Drive, FLOOR 26
Detroit, MI 48243
attorneylambert@protonmail.com

Dated: November 1, 2024

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CERTIFICATE OF SERVICE

I, Stefanie Lambert, hereby certify that on November 1, 2024, true and correct copies of the foregoing was served via email on counsel of record for every party in the above-captioned matter.

Respectfully submitted,

/s/ Stefanie Lambert

Stefanie Lambert Juntilla
Law Offices of Stefanie L. Lambert, PLLC
400 Renaissance Drive, FLOOR 26
Detroit, MI 48243
attorneylambert@protonmail.com

Dated: November 1, 2024

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STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK,

Plaintiff,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

and

[DOMINION VOTING MACHINES, INC., and DOMINION WHO'S ACTUALLY DOING THE PATCH ?]

Defendants.

Circuit Court Case No.

COMPLAINT FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF

EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 1

Document received by the MI Court of Claims.

SOS

Department of State issues update for voters using Dominion Voter Assist Terminals for 2024 General Election

October 25, 2024

Author:

Cheri Hardmon

Senior Press Secretary

HardmonC@Michigan.gov

Voters using a Dominion VAT should be prepared for straight ticket/split ticket programming issue when marking their ballot

LANSING, Mich. – The Michigan Bureau of Elections (BOE) has identified an issue with the programming of Dominion Voter Assist Terminals (VATs) that will not stop voters using a VAT from marking their ballot but may make it more inconvenient than normal for some voters.

Every early voting site and polling place has at least one VAT, a device that voters with disabilities and others may use to assist them in marking their ballot. The voter then prints the ballot from the VAT and puts it through the tabulator.

Because of this programming issue, voters using Dominion ICX VATs will have to select either the "straight party" option if they wish to vote straight ticket or vote for each race on the partisan selection of the ballot if they wish to split their ticket. While this is the process used in some other states, it is not the standard in Michigan, where voters have the option to vote straight party but then override their party selection for individual races.

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If a voter using the Dominion VAT votes straight party but then splits their ticket, the voter will receive an error message. The voter will need to go back and de-select their straight-party selection and vote for candidates in the races individually or vote straight party without splitting their ticket. As is always the case, the VAT will allow voters to review their selections before printing the ballot.

This issue only affects voters using VATs in counties that use Dominion voting equipment. A list of voting equipment by county is available online at this link: Voting equipment by county.

It is not possible to fix the programming for the affected VATs this close to the election. Although the issue will not stop people from voting or making their preferred selections, and it will not change anyone's votes, it will make the process more inconvenient for some voters using the VATs. The issue will be corrected for future elections.

For more information on VATs and accessible elections visit Michigan.gov/Vote.

###

MI Newswire Secretary of State Elections

Related News

Joint statement of Secretary Benson and Washtenaw County Prosecutor Savit on charges filed in noncitizen voting case

Today, Secretary of State Jocelyn Benson and Washtenaw County Prosecutor Eli Savit made the following statement on charges filed against a non-U.S. citizen for allegedly illegally registering to vote and casting a ballot in the 2024 General Election:

Secretary Benson shares a list of transportation agencies offering free and discounted rides to the polls on Election Day

With less than a week before the Nov. 5 General Election, Secretary of State Jocelyn Benson advised voters to make their travel arrangements for casting a ballot at the polls or an early voting site.

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Nearly 2 million Michigan voters have already cast their ballot in the General Election

With one week before polls open on Election Day, almost 2 million Michigan voters have already cast their ballot in the General Election – nearly a quarter of Michigan's active registered voters.

First day of statewide early voting in Michigan smashes expectations

Secretary of State Jocelyn Benson today announced that 145,134 Michigan voters cast their vote on the state's first day of early voting, far exceeding the expectations of state and local election officials.

Secretary Benson announces partnership with Saginaw Public Schools to ensure every student has their state ID by graduation

Today, Secretary of State Jocelyn Benson announced a new program with Saginaw Public Schools to expand civics education and ensure every student has their state ID by graduation.

Secretary Benson statement on court victory in lawsuit challenging Michigan's voter rolls

Secretary of State Jocelyn Benson made the following statement regarding the U.S. District Court for the Western District of Michigan's order to dismiss a lawsuit by the Republican National Committee over the maintenance of Michigan's voter rolls:

Michigan sees record-breaking early voting turnout with two weeks to go before the General Election

With two weeks until Michigan's Nov. 5 General Election, more than 1.15 million Michigan voters – almost 16% of the state's active registered voters – have already cast their ballot.

Benson statement on successful effort to uphold the voting rights of Michigan's military and overseas citizens

Secretary of State Jocelyn Benson today made the following statement on a ruling by the Michigan Court of Claims granting the Michigan Department of State's motion for

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summary disposition of a last-minute lawsuit brought by the Republican National Committee (RNC) seeking to disenfranchise Michigan's military and overseas voters:

Online registration deadline for Michigan's General Election is Oct. 21

Monday, Oct. 21 is the last day for Michigan citizens to register online or by mail to vote in the state's Nov. 5 General Election.

Department of State issues update for voters using Dominion Voter Assist Terminals for 2024 General Election

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STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK,

Plaintiff,

v.

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and

[DOMINION VOTING MACHINES, INC., and DOMINION WHO'S ACTUALLY DOING THE PATCH ?]

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COMPLAINT FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF

EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 2

Document received by the MI Court of Claims.

From: Cindy L. White <clwhite@barrycounty.org>
sent from mxthunder.net
Sent: Thu, Oct 31, 2024 at 7:41 am
To: Township Clerks

Michigan ADA Voter Instructions with images FINAL (1).docx (1.2 MB)

Images not displayed. SHOW IMAGES | ALWAYS SHOW IMAGES FROM THIS SENDER

DITTO to everything Steve has said. You guys ROCK!
Thank you for all you do,
Cindy

From: Steve D. <sdelongchamp@electionsource.com>
Sent: Wednesday, October 30, 2024 3:43 PM

Subject: VAT Instructions EV stuff

Clerks,

Firstly, you guys rock! Gerrid just said to me yesterday, " Can you believe just how well clerks have done implementing Early Voting, even with such little direction or help... Hats off Ladies and Gents! Record "surprise" turnouts! And you are killing it!

Attached is a digital copy of the instructions you were sent by Dominion at the State's request. (they should be arriving today or tomorrow) They are meant for you to give to your locals. I have attached a digital copy as well.

I want to make sure everyone understands that this is only germane to the ICX - Vote Assist Terminal. More importantly, the ICX will walk the voter through being able to cast a split ticket. The instructions are very clear on the VAT.

Lastly, if you need extra toner or blank paper for the BOD let us know and we will get it to you as soon as possible. We have been running toner, paper, and I-voted stickers across the state for the last couple of days. We are happy to assist you too!

Only 6 more days of madness and a week of Canvas... You got this!

You have our admiration!

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Steve

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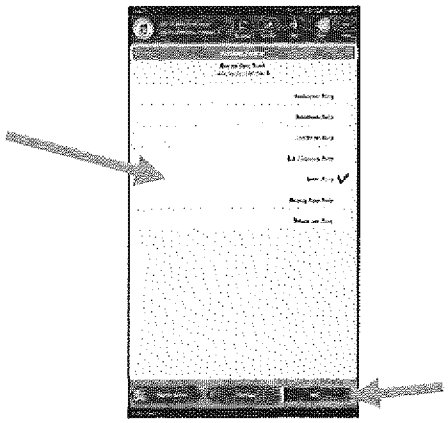
ATTENTION VAT VOTERS

STEP BY STEP INSTRUCTIONS

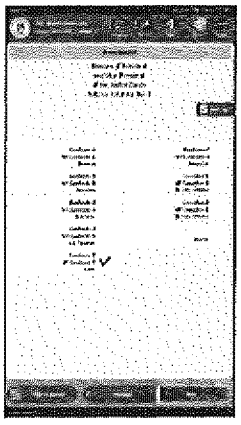
IF YOU WANT TO VOTE A STRAIGHT PARTY TICKET:

1. If you intend to vote for candidates of a single party in **all contests**, simply select your party preference on the initial screen.

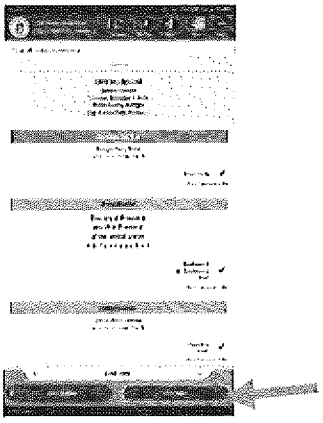


2. Navigate through all contests on the ballot using the **Next** and **Previous** buttons at the bottom of the screen.

3. Confirm the selections on the screen that correspond to candidates affiliated with the selected party. **Note:** For all nonpartisan contests and ballot questions, you must select your choice manually.



4. Review all selected choices on the Review screen and select **Print Ballot**.



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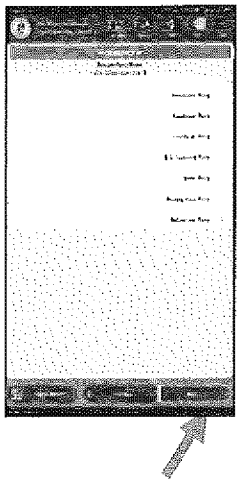
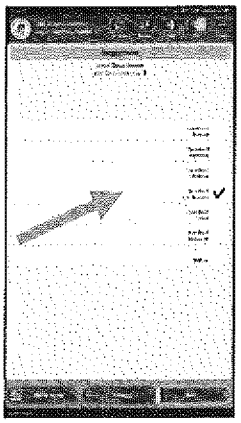
IF YOU WANT TO VOTE A SPLIT TICKET:

1. If you intend to vote for candidates of **varying parties** in individual contests, **DO NOT make a Straight Party selection on the initial screen.**

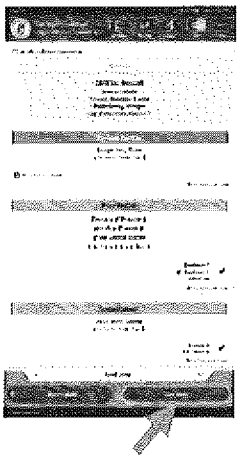


2. Instead, navigate to the next contest on the ballot using the **Next** button at the bottom of the screen.

3. Select the candidate(s) of your choice for all desired contests.



4. Review all selected choices on the Review screen and select **Print Ballot.**



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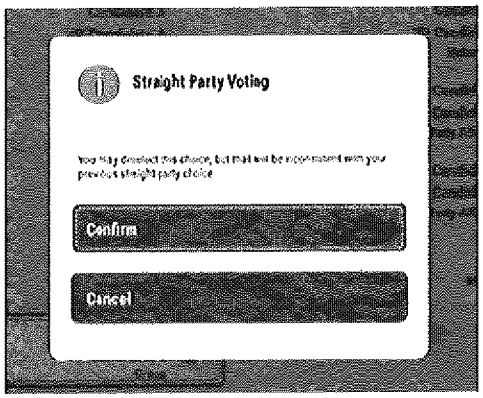
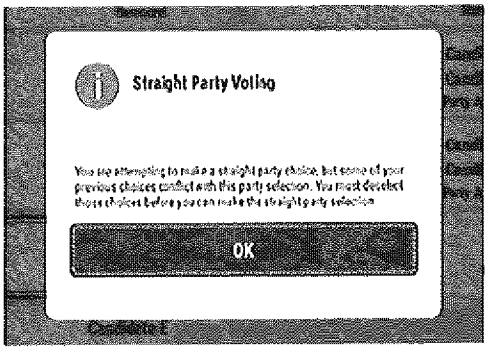
IF YOU WANT TO SPLIT A TICKET AFTER INITIALLY MAKING A STRAIGHT PARTY SELECTION:

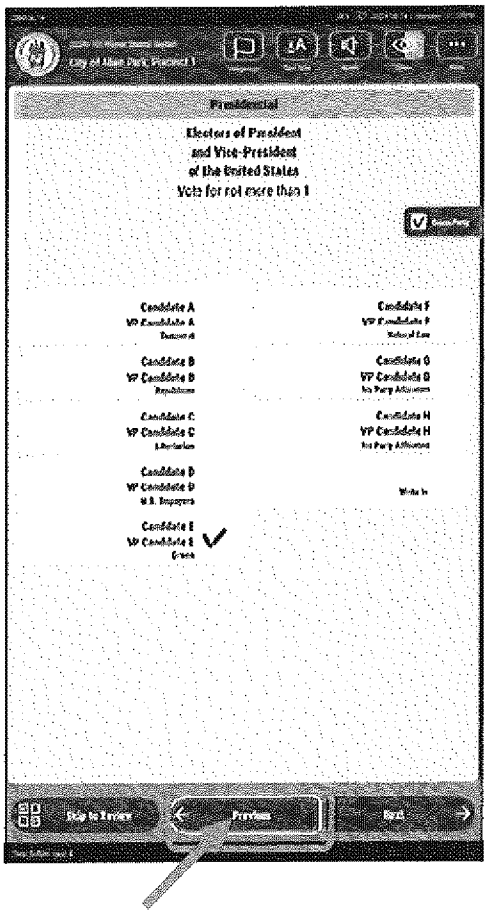
1. If a voter initially makes a Straight Party selection, but later opts to split their ticket, they will be prompted with an initial warning upon deselecting a choice affiliated with their party selection.

   The voter may be prompted with another message upon selecting a choice affiliated with a different party.





2. The voter should use the Previous button on the bottom of the screen to navigate back to the Straight Party selection screen.



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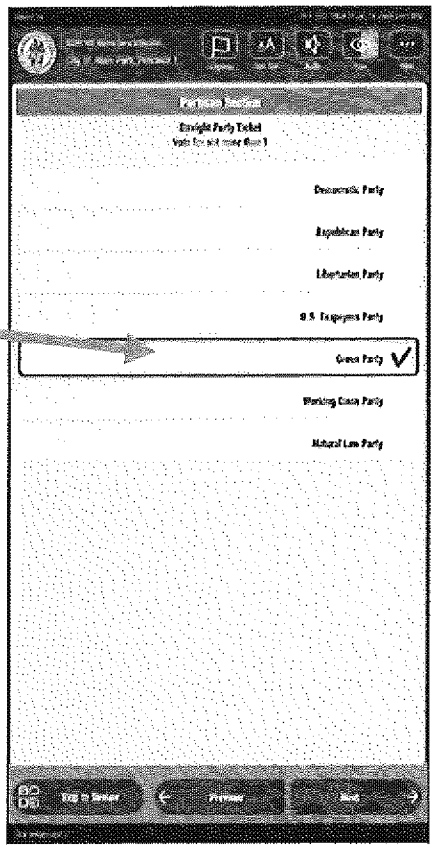
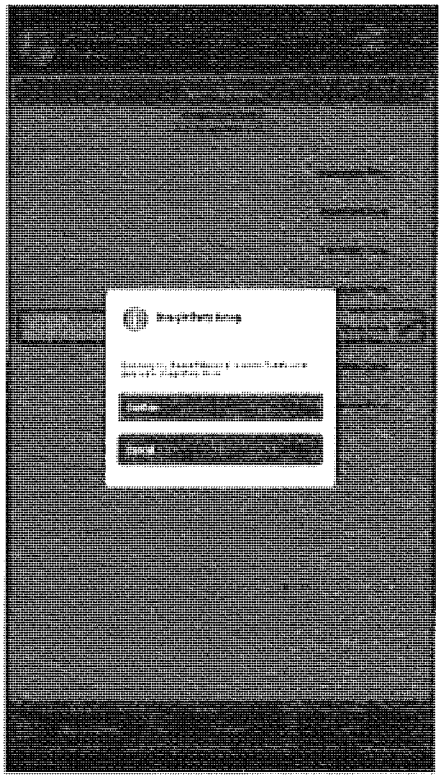
3. Deselect the previously selected Party.

Note: *If a voter intends to leave a partisan contest blank, they must remove the Straight Party selection.*



4. Confirm the prompt on screen that all currently selected candidates of this party will be deselected.



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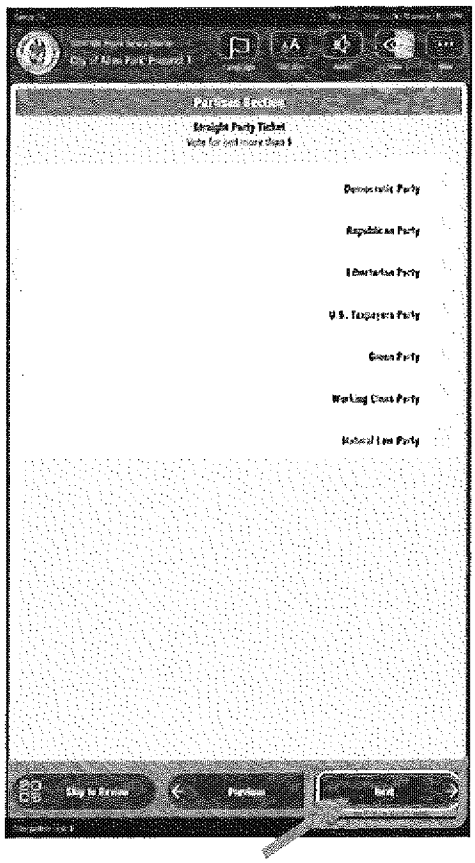
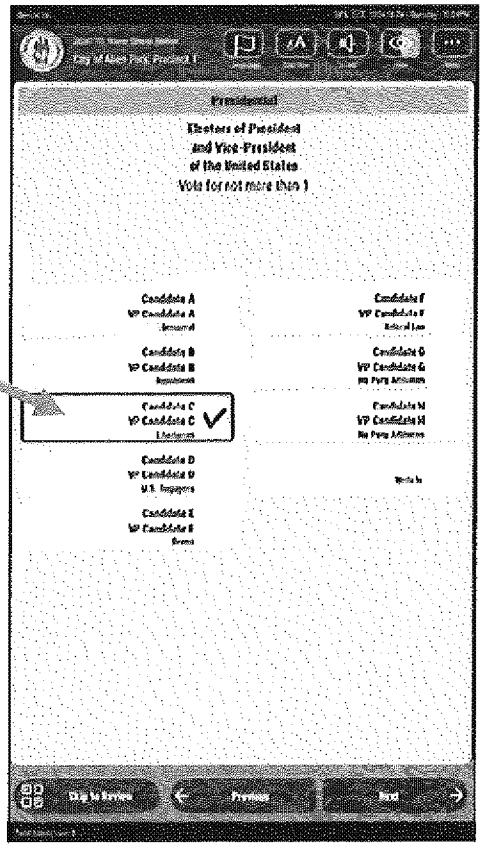
5. Navigate to the next contest on the ballot using the **Next** button at the bottom of the screen.



6. Select the candidate(s) of your choice for all desired contests.



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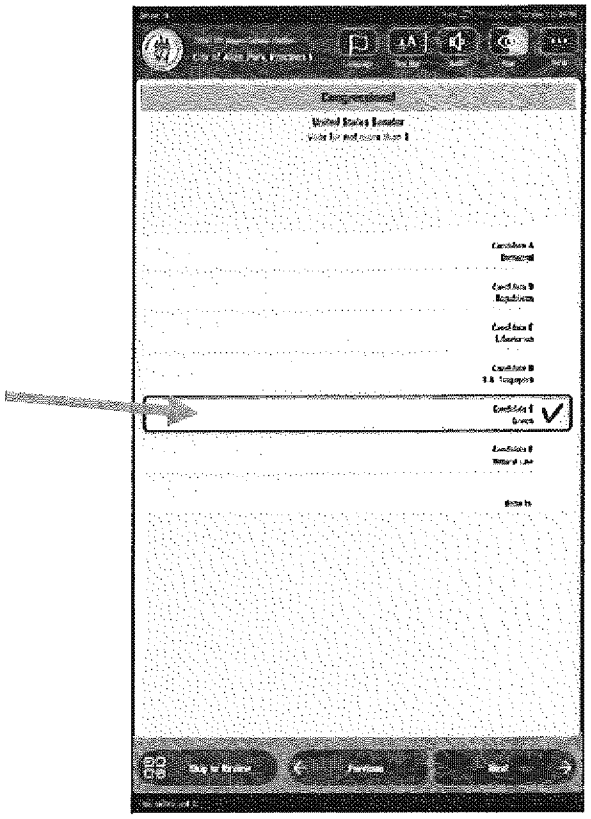
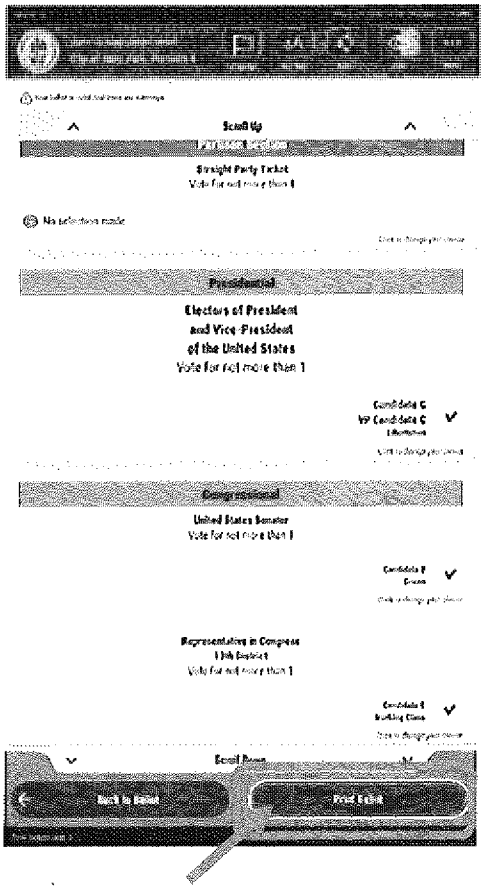
7. Continue voting by selecting the candidate(s) of your choice for all desired contests.



8. Review all selected choices on the Review screen and select **Print Ballot.**



As always, voters are encouraged to **review their selections** on the **summary screen** and on the **printed paper ballot** before casting their vote.

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STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 3

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AFFIDAVIT OF BENJAMIN R. COTTON 31 October 2024

I, Ben Cotton, being duly sworn, hereby depose and state as follows:

1. I am over the age of 18, and I understand and believe in the obligations of an oath. I make this affidavit of my own free will and based on first-hand information and my own personal observations.

2. I am the founder of CyFIR, LLC (CyFIR) and Cyber Technology Services, INC.

3. I have a master's degree in information technology management from the University of Maryland University College. I have numerous technical certifications, including the Certified Information Systems Security Professional (CISSP), Microsoft Certified Professional (MCP), Network+, and Certified CyFIR Forensics and Incident Response Examiner.

4. I have over twenty-seven (27) years of experience performing computer forensics and other digital systems analysis.

5. I have over twenty (20) years of experience as an instructor of computer forensics and incident response. This experience includes thirteen (13) years of experience teaching students on the Guidance Software (now OpenText) EnCase Investigator and EnCase Enterprise software.

6. I have testified as an expert witness in state courts, federal courts and before the United States Congress.

7. I regularly lead engagements involving digital forensics, cyber security, and incident response for law firms, corporations, and government agencies and am experienced with the digital acquisition of evidence under the Federal Rules of Evidence.

8. In the course of my duties, I have forensically examined Dominion Voting Systems (DVS) components in Maricopa County Arizona, Antrim County Michigan, Fulton County Pennsylvania, Coffee County Georgia,

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Mesa County Colorado. These system components are hereinafter referred to as the "Analyzed Election County Components".

9. In the course of my duties, I have reviewed the administrative manuals and documentation for the DVS Democracy Suite software and hardware components.

10. In the course of my duties, I have reviewed the public information from the Election Assistance Commission ("EAC") and its certification process for election software.

11. In the course of my experience, I have forensically collected digital evidence from thousands of Windows, Linux, MacOS, and cellular devices.

12. In the course of my experience, I have forensically collected digital evidence from thousands of external digital devices such as USB drives, thumb drives, and SD Cards.

13. In the course of my duties, I have read and analyzed the remarks and statements issued by the Michigan Secretary of State, Jocelyn Benson, concerning the "nationwide" issue with the Dominion Voting Systems Voter Assist Terminals (VATS). These devices are also known as ICX Ballot Marking Devices (BMD).[1,2,3]

14. I have supported legal teams in the forensic preservation and examination of Dominion voting systems in Arizona and Michigan.

15. The dominion voting system individual components, such as the Election Management System (EMS), Image Cast Central (ICC), ImageCast Precinct (ICP), ImageCast X (ICX) Ballot Marking Device (BMD) and Adjudication Workstations, contain specialized applications running on Windows and Linux operating systems. These components and systems can easily be forensically preserved in accordance with the

[1] https://www.michigan.gov/sos/resources/news/2024/10/25/department-of-state-issues-update-for-voters-using-dominion-voter-assist-terminals, 25 October 2024

[2] A 'Nationwide Issue' Is Affecting Certain Dominion Voting Machines, Michigan Secretary of State Reveals, 25 October 2024

[3] Benson addresses Dominion ballot machine programming issue in Michigan, 30 October 2024

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digital acquisition of evidence as outlined under the Federal Rules of Evidence and the National Institute of Justice Digital Evidence Policies and Procedures.

16. Forensic preservation of all data on a digital device is critical to the preservation process, especially if litigation is either anticipated or ongoing. If a given device or system is currently in a powered down state, it is imperative that the device's hard drive and other digital storage be forensically imaged to preserve system metadata dates and times, data integrity of the device and the admissibility of the evidence into the US legal system. Simply powering up a Windows or Linux operating system will change the date/time metadata for tens of thousands of files, thus interfering with the analysis of that system and calling into question the integrity of the data on the system.

17. It is critical to the admissibility and quality of subsequent analysis that the system to be preserved is maintained in a data state that is as close to the time period as possible. If the system to be preserved is powered on, commonly termed as live, at the point that it is to be preserved then the volatile memory should be imaged first followed by a forensic acquisition of the hard drive and other storage devices.

18. If a device that is to be preserved is not imaged immediately and maintained in a powered on state, there is a technical certainty that the data contained on the hard drive and possibly other digital storage devices will be changed. The changing of the data on the system will not require interactive inputs for these changes to take place. As a matter of the normal operating system functions, no matter if it is a Windows, Linux or MacOS operating system, if the system is powered on, the system will automatically change logs and perform automated processes (like antivirus scans, scheduled tasks and other operations) that will change the dates and times of files, over write log file entries, modify system configuration settings and change data file contents.

19. It is my experience that the Dominion voting system components have communications devices in the form of Network Interface Cards (NIC), WiFi modems, and Cellular Modems installed by the manufacturer on the mother boards of the systems. Depending on the configuration of the system,

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these communications devices can automatically connect to remote locations and devices if the systems are powered on. If these devices are allowed to connect to remote locations it is possible for authorized or unauthorized parties to remotely modify the component.

20. Secretary Benson has stated that the issue confronting the voters of Michigan is a nationwide issue and is not confined to the State of Michigan. The fact that it is a nationwide issue is significant in that it eliminates the election definition file, the machine behavior settings and the configuration of the individual systems as the root cause for the 'issue'. This also means that the error originates from the source code of the Dominion Democracy Suite 5.5-B.

21. The Certificate of Conformance issued by the EAC is commonly known as the EAC Certification. The certificate for Dominion Democracy Suite 5.5-B specifically states that "This certificate applies only to the specific version and release of the product in its evaluated configuration." Any patch or modification of the source code for the Dominion Democracy Suite 5.5-B would invalidate the EAC certification, as any patch or modification to the software would change the source code and thus that resultant code would not have been evaluated within the required scope of conformance.

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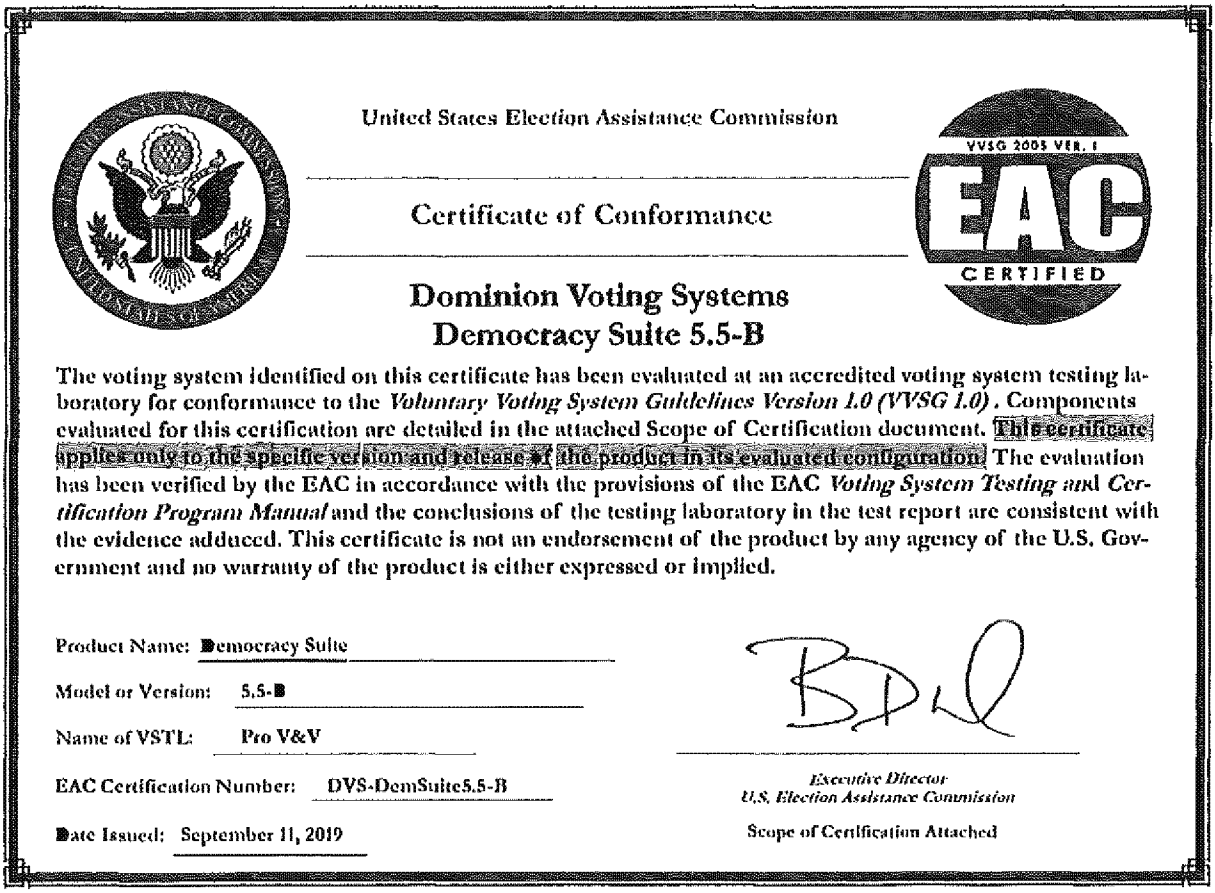

United States Election Assistance Commission

VVSG 2005 VER. 1

EAC CERTIFIED

Certificate of Conformance

Dominion Voting Systems
Democracy Suite 5.5-B

The voting system identified on this certificate has been evaluated at an accredited voting system testing laboratory for conformance to the *Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)*. Components evaluated for this certification are detailed in the attached Scope of Certification document. This certificate applies only to the specific version and release of the product in its evaluated configuration. The evaluation has been verified by the EAC in accordance with the provisions of the EAC *Voting System Testing and Certification Program Manual* and the conclusions of the testing laboratory in the test report are consistent with the evidence adduced. This certificate is not an endorsement of the product by any agency of the U.S. Government and no warranty of the product is either expressed or implied.

Product Name: Democracy Suite

Model or Version: 5.5-B

Name of VSTL: Pro V&V

EAC Certification Number: DVS-DemSuite5.5-B

Date Issued: September 11, 2019

Executive Director
U.S. Election Assistance Commission

Scope of Certification Attached

Figure 1 - Democracy Suite 5.5-B Certificate of Conformance

22. The discovery of this Dominion software "issue" occurred on or before the 25th of October 2024. The statutorily required logic and accuracy (L&A) testing which, by statute, occurred at least five (5) days prior to the commencement date for early voting. I have established through public records that the City of Detroit started early voting on 19 October 2024. Any modification to the election voting software would require not only recertification by the EAC, but also new logic and accuracy (L&A) testing prior to being utilized in any election. Given the mandatory notice requirements and the time required to certify any corrected source code, it is my expert opinion that the correction to the Dominion source code can not legally meet the timeline to correct the issue before November 5th voting must take place.

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23. In the course of my analysis I have determined that the Dominion Democracy Suite 5.5-B components are networked together to facilitate the functioning of the voting process. This networking included local area network (LAN), wide area networks (WAN), wifi 802.11, and cellular data networks. Given the nature of these networks, any unauthorized modification to any single component or system places all the voting components and the integrity of the voting process at risk of compromise.

24. It is common for unauthorized accesses and breaches of computer systems to initially manifest as glitches or other unexplained behaviors. The only method to determine if this is indeed a software glitch is to perform a full forensic analysis of the system by individuals who have extensive experience in investigating and analyzing unauthorized access and computer breaches.

25. Forensic, bit by bit images of the entire physical disk drive(s) for the effected systems should immediately be preserved. Delay in obtaining the forensic images may result in evidence destruction and spoilation of the data on the drives.

26. Pro V&V and SLI Compliance have a long history of failing to determine even basic cyber security issues in voting systems, including (but not limited to) detection of rudimentary cybersecurity such as shared passwords, exposure of cryptographic keys, failure to apply system patches, failure to detect shared usernames and passwords, unchanged vendor supplied passwords, tampered logs and unauthorized secondary hard drives in adjudication workstations. Given the demonstrated failure to detect cyber security issues, these two companies should be excluded from performing the analysis on the systems effected by the Dominion software "issue".

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 31st DAY OF October 2024.

State of Montana
County of Flathead

This instrument was signed or acknowledged before me on 10-31-24 by Benjamin R. Cotton
(Name of signer)

(Notary Signature)
[Affix seal/stamp to the left or below]

Benjamin R. Cotton

RYAN PETERSEN
NOTARY PUBLIC for the State of Montana
Residing at Kalispell, MT
My Commission Expires April 29, 2025.

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STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK,

Plaintiff,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

and

[DOMINION VOTING MACHINES, INC., and DOMINION WHO'S ACTUALLY DOING THE PATCH ?]

Defendants.

Circuit Court Case No.

COMPLAINT FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF

EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 4

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 13TH JUDICIAL CIRCUIT
ANTRIM COUNTY

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY,

Defendant,

SECRETARY OF STATE JOCELYN BENSON,

Intervenor-Defendant.

No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

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grille@michigan.gov

INTERVENOR-DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S RESPONSES TO PLAINTIFF'S AMENDED INTERROGATORIES AND REQUEST TO PRODUCE DOCUMENTS

NOW COMES Intervenor-Defendant Secretary of State Jocelyn Benson, and in response to Plaintiff's Amended Interrogatories and Request to Produce Documents, states as follows:

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GENERAL OBJECTIONS

Pursuant to the Court's rulings, Intervening Defendant Benson has interpreted and construed the below requests to be limited to matters pertaining to the election in Antrim County, and have answered accordingly.

INTERROGATORIES

1. Explain why the failure to update one or more precinct [sic] Antrim County precinct tabulators prior the election on November 3, 2020 caused precincts to report erroneous results.

ANSWER: The answer to this interrogatory is explained in depth by the expert report submitted by Professor Halderman and produced to Plaintiff on March 26, 2021, which expert report is incorporated herein.

2. Explain in detail the physical or mechanical process, including precise dates and times, on how Antrim County reported result to the Secretary of State on November 3, 2020 through November 22, 2020.

ANSWER: In order to upload unofficial results to the Bureau of Elections, County Clerks use the County Election Night Reporting system (CENR). After the local clerks have completed counting the ballots in their jurisdiction, they provide the results to their County Clerk. A staff member from the Cunty Clerk's office logs into the program and hand-keys the unofficial results the county obtains from the local clerks into CENR. The unofficial results are uploaded to the Bureau of Elections' website. The precise dates and times when Antrim County logged into the system

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are found on the enclosed emails. See Bates Numbered Documents 0009062 to 0009085 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

3. Provide the incoming and outgoing IP addresses and MAC addresses used by the State of Michigan to communicate election information with Antrim County during 2020, including the precise dates and times those IP addresses and MAC addresses were in use.

ANSWER: Defendant Benson objects to producing IP addresses and MAC addresses because doing so presents a security risk by exposing the users and computers associated with these addresses to possible tampering or unauthorized access. In further answer, Defendant is interpreting this request and the phrase "communicate elections information" as seeking the IP and MAC addresses for computers used by Bureau of Elections employees that received the unofficial election night results submitted by Antrim County. Defendant will provide the IP and MAC addresses upon the entry of a protective order.

4. Provide a listing of all setting [sic] that were programmed (including default settings) and the values in the pre-October 23, 2020 and post-October 23, 2020 ballot specifications for Antrim County for the 2020 elections.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same,

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keep or maintain the requested information. Upon information and belief, this information is in the possession of Antrim County.

5. Provide the x, y, width, height parameters of each mark/hot zone for each ballot entry used pre-October 23, 2020 and post-October 23, 2020 for Antrim County for the 2020 elections.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the requested information.

6. Provide a breakdown of the tabulator machines that had the October 23, 2020 update, and those that did not for Antrim County for the 2020 elections.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the requested information. Upon information and belief, this information is in the possession of Antrim County. In further answer, Defendant affirmatively states that Professor Halderman's report also provides this information, which upon information and belief, was obtained from Antrim County.

7. For adjudicated ballots for Antrim County for the 2020 elections, provide the name of the person who adjudicated them and when. Explain whether they were adjudicated through the machines or manually.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same,

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keep or maintain the requested information. In further answer, any ballots that were adjudicated must have been adjudicated by hand, since—upon information and belief—Antrim County does not have the adjudication software. Upon information and belief, the information sought in this interrogatory may be obtained from Antrim County.

8. Identify all installed computer software, modules, or implants used by any county or precinct in Antrim County during the 2020 elections.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the requested information. Upon information and belief, this information may be obtained from Antrim County.

9. Specify when each installation was performed on each election device for Antrim County for the 2020 elections.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the requested information. Upon information and belief, this information may be obtained from Antrim County.

10. Specify exactly how errors were adjudicated for Antrim County for the 2020 elections for users of each the DVS election system components: ImageCast Precinct, ImageCast X, and ImageCast Central. If there were variations across jurisdictions, specify what the variations were and the reason for these variations.

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ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the requested information. Upon information and belief, this information may be obtained from Antrim County.

11. Provide the "mail date" and "received date" for all mail-in ballots and absentee ballots for the November 3, 2020 general election in Antrim County.

ANSWER: The information contained in the enclosed spreadsheet is obtained from the respective city or township clerk in Antrim County, who is responsible for sending and receiving absentee ballots. See Bates Numbered Documents 0009086 to 0009193 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

12. Provide the address for all ballots put in collection boxes in Antrim County, paying particular attention to identify the location of each collection box and the particular ballots in each.

ANSWER: The addresses for absent voter ballots submitted by voters via drop box is not collected at the state or local level. In an effort to be responsive, and in supplementation to Plaintiff's First Request for Interrogatories and Requests to Produce, Request to Produce #8, enclosed is a list of drop box locations in Antrim County, as provided by local clerks in that County. Neither Defendant Benson, the Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, independently collect or verify this information. See Bates Numbered

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Documents 0009194-0009195 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

13. Provide the names of all people or organizations who had access to the Qualified Voter File prior from [sic] July 1, 2020 through present.

ANSWER: Defendant Benson answers this interrogatory only as to those organizations who have access to Antrim County records in the Qualified Voter File. The only organizations that were or are able to access the Qualified Voter File for Antrim County voters are Bureau of Elections staff; certain programmers who work for the Department of Technology, Management & Budget; Antrim County Clerk's Office staff; and staff of Antrim County City and Township Clerks' offices (as applicable). To the extent this interrogatory seeks a list of people from these organizations, the Defendant objects as it presents security concerns to release the names of individuals who are authorized to access the Qualified Voter File, because that information may be used to attack and attempt to gain unauthorized access to the Qualified Voter File.

14. Provide the ballot format specifications for Antrim County for the 2020 elections including a detailed specification sufficient to write a program to read a ballot definition and produce an independent textual dump of the specification.

ANSWER: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the specific, detailed information requested. Upon

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information and belief, this information may be obtained from Antrim County.

15. Provide the functional specifications of how the tabulator computes and reports results, which tables are accessed and what computations are made for Antrim County for the 2020 elections.

ANSWER: Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the information described in this request. Further responding, Defendant is unable to answer more fully, as it is unclear what this interrogatory is seeking. While the Bureau of Elections possesses general information on how tabulators compute the results, this interrogatory appears to seek specificity that could only be provided by the manufacturer.

16. Provide the functional specifications of any table that feeds aggregation tables for the purpose of reporting and how those computations are made for Antrim County for the 2020 elections.

ANSWER: Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the information described in this request. Further responding, Defendant is unable to answer more fully, as it is unclear what this interrogatory is seeking. While the Bureau of Elections possesses general information on how tabulators compute the

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results, this interrogatory appears to seek specificity that could only be provided by the manufacturer.

17. Provide a listing of all stored procedures and their functional specification, when are they used and for what purpose for Antrim County for the 2020 elections.

ANSWER: Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, keep or maintain the information described in this request. Further responding, Defendant is unable to answer more fully, as it is unclear what this interrogatory is seeking. While the Bureau of Elections possesses general information on how tabulators compute the results, this interrogatory appears to seek specificity that could only be provided by the manufacturer.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Produce all correspondences, communications, and documents relied upon in answering or that support any of the above Interrogatories.

RESPONSE: To the extent there are any, responsive documents are produced with the corresponding interrogatory.

2. Produce a copy of Dominion voting system source code held in trust by the State of Michigan.

RESPONSE: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess the requested information. Under MCL 168.797c and

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168.794(g)-(h), Dominion Voting Systems' source code is held in escrow by a third party. Upon information and belief, the source code is held in escrow by NCC Group, Inc., 1731 Technology Drive, Suite 880, San Jose, CA 95110.

3. Produce a copy of all manuals for the Dominion voting system in use in the State of Michigan.

RESPONSE: The manuals for Dominion Voting Systems tabulators and software will be produced upon entry of a protective order.

4. Produce a copy of all data received regarding Antrim County on November 3, 2020 through November 7, 2020 including tracking information to verify the source and destination of such data.

RESPONSE: Defendant Benson interprets this request as seeking information related to the unofficial election results uploaded into the County Election Night Reporting System (CENR). In addition to the records provided in response to Interrogatory No. 2 and Request to Produce No. 1, responsive records are enclosed. See Bates Numbered Documents 0006902 to 0006904 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

5. Produce the Qualified Voter File used on November 3, 2020 related to Antrim County.

RESPONSE: This information is contained in the enclosed spreadsheet. The information provided is from November 3, 2020, through

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November 4, 2020, in order to capture all events that occurred on November 3. In order to protect the privacy and security of non-party citizens, personally identifiable information such as full date of birth and driver's license numbers have been removed. See, e.g, MCL 168.509gg(1)(c), (d). See Bates Numbered Documents 0006905 to 0007340 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

6. Produce the list of names removed from the Qualified Voter File in March 2001 related to Antrim County.

RESPONSE: Defendant Benson interprets this request as seeking the list of voters whose voter registrations were cancelled in March 2021 rather than March 2001, as the records from 2001 would be irrelevant to this litigation. Records responsive to this request are enclosed. Personally identifiable information such as full date of birth and driver's license numbers have been removed. See, e.g, MCL 168.509gg(1)(c), (d). See Bates Numbered Documents 0007341 to 0007347 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

7. Produce all correspondences, communications and documents to support your claim that the Secretary of State has conducted more than 250 audits related to the 2020 general election.

RESPONSE: Defendant Benson objects to this request as it mischaracterizes the statements and press releases issued by the

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Department of State. The Department of State did not conduct – and never said it conducted – 250 audits. Instead, as stated, more than 250 audits were conducted across the state by either County Clerks or the Bureau of Elections. Defendant further objects that this request is vague, overbroad, and unduly burdensome. Subject to and without waiving these objections, records responsive to this request are enclosed. See Bates Numbered Documents 0005202 to 0005095 of Part 1 of Defendant Benson's third production (the link sent by Dustin Senneker), and Bates Numbered Documents 0007348 to 0007436 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

8. Produce all correspondences, communications, and documents to support your claim that more than 18,000 ballots were randomly selected for audit in 1,300 jurisdictions after November 3, 2020.

RESPONSE: See Answer to Request to Produce #7.

9. Produce any correspondences, communications and documents between the Secretary of State's executive office, administrative office, bureau of elections office, and/or Jocelyn Benson and The Chan Zuckerberg Initiative (or any employee, officer, or director) regarding the 2020 election.

RESPONSE: After conducting an electronic search, no responsive records have been identified.

10. Produce any correspondences, communications, and documents between the Secretary of State's executive office, administrative office, bureau of elections office,

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and/or Jocelyn Benson and the Center for Technology and Civic Life (or any employee, officer or director) regarding the 2020 election.

RESPONSE: Records responsive to this request are enclosed. See Bates Numbered Documents 0005096-0005212 of Part 1 of Defendant Benson's third production (the link sent by Dustin Senneker).

11. Produce an audit of the software installations for all devices used for election or connected to these devices via network connections (e.g. Ethernet, Wi-Fi, cell-based modem) for Antrim County for the 2020 elections. Information should be consistent with BelArc Advisor Tool.

RESPONSE: Defendant Benson objects to this request as it is vague and unclear as to what information or records the request seeks. Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess the requested information or records.

12. Produce device-specific event logs for Antrim County for the 2020 elections for all installed software on each device, when each installation was performed, and the source of the software installed (e.g. disk, flash drive, download).

RESPONSE: Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess the requested information or records.

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13. Produce an audit log supporting all adjudication activities for Antrim County for 2020 elections, whether they were performed manually or with computer assistance.

RESPONSE: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request.

14. Produce all correspondences, communications and documents related to November 3, 2020 election in Antrim County.

RESPONSE: Defendant Benson interprets this request as seeking records of communications between the Secretary of State's Executive Office, the Bureau of Elections, and Antrim County related to the November 3, 2020 general election. Defendant Benson has already produced similar records in response to Plaintiff's First Interrogatories and Requests for Production, Request to Produce #9, on February 8, 2021. Nevertheless, records responsive to this request are enclosed. See Bates Numbered Documents 0005213-0006901 of Part 1 of Defendant Benson's third production (the link sent by Dustin Senneker).

15. Produce the names, titles and contact information for all people who had access to make changes at Election Source regarding the November 3, 2020 election in Michigan.

RESPONSE: Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce. In further answer,

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neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request.

16. Produce the names, titles, and contact information for all people were authorized by the Michigan Secretary of State to print ballots for the November 3, 2020 election in Michigan.

RESPONSE: **Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce. In further answer, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request. Defendant affirmatively states that the Department of State and/or the Bureau of Elections is not responsible for printing ballots in the State of Michigan.**

17. Produce the names, titles and contact information for all people were actually printing ballots for Michigan for the November 3, 2020 election in Michigan.

RESPONSE: **Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce. In further answer, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request. Defendant affirmatively states that the Department of State and/or the Bureau of Elections is not responsible for printing ballots in the State of Michigan.**

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18. Produce all purchase orders for all ballot printing for Michigan for the November 3, 2020 election in Michigan.

RESPONSE: Defendant Benson objects to producing purchase orders "for all ballot printing for Michigan" as it does not comply with this Court's April 12, 2021 instruction that discovery be limited to elections in Antrim County. Subject to and without waiving this objection, records responsive to this request have not been identified at this time, because ballot printing is not done by the Department of State and/or the Bureau of Elections.

19. Produce all mailing records for all ballot mailed to Antrim County for the November 2, 2020 election in Michigan.

RESPONSE: Defendant Benson interprets this request as seeking information from the November 3, 2020 general election as there were no elections held on November 2, 2020. Further answering, records responsive to this request have not been identified at this time, because the mailing of ballots is not done by the Department of State and/or the Bureau of Elections, but rather by city and township clerks in Antrim County.

20. Produce all transactional records and logs that record date and time changes to media storage specific to Antrim County.

RESPONSE: Defendant Benson objects to this request as vague and ambiguous and Defendant is unable to identify what records are being

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requested. Upon information and belief, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request.

21. Produce the names, titles and contact information for all people who created the election configuration initially for the November 3, 2020 election in Michigan, and the names, titles and contact information for anyone who had access to or modified election files November 3, 2020 election in Michigan, and who these people worked for.

RESPONSE: **Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce. Defendant further objects to this request as vague and assumes that it seeks information related to the election management software. Upon information and belief, responsive records may be able to be obtained from Antrim County.**

22. Produce the names, titles and contact information for all people working the election in Antrim County from September 1, 2020 through November 20, 2020.

RESPONSE: **Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce. In further answer, neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess or maintain records responsive to this request.**

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

23. Produce all correspondences, communications and documents exchanged with or used by J. Alex Halderman and all draft reports prepared by J. Alex Halderman related to his report dated March 26, 2021.

RESPONSE: Defendant Benson objects to this request because it is vague as it does not identify the other parties to the requested communications or correspondence. Subject to and without waiving this objection, records responsive to this request are enclosed. See Bates Numbered Documents 0007437 to 0008986 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

24. Please produce copies of any documents or other evidence that you believe support your defense that the results of the Antrim County on November 3, 2020 were "human error."

RESPONSE: Defendant Benson objects to the request as vague and overbroad. Without waiving the objection, Defendant Benson refers to the report of J. Alex Halderman, which has already been produced and details the factual basis for human error in reporting the unofficial results, and the documents upon which he relied to reach his conclusions. Defendant Benson does not keep or maintain other documents, but may rely on other official records, such as the testimony of Antrim County Clerk Sheryl Guy.

25. Please produce copies of any documents or other evidence that you believe support your defense that the results of the election in Antrim county on November 3, 2020 were "not the result of material fraud or error."

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

RESPONSE: See Answer to Request to Produce #24.

26. Produce all correspondences, communications and documents regarding any tabulators that stopped functioning during the November 3, 2020 election in Michigan including log files.

RESPONSE: Defendant Benson objects to producing records for "any tabulators that stopped functioning during the November 3, 2020 election in Michigan," as the request does not comply with the Court's April 12, 2021 instruction that discovery be limited to elections in Antrim County. Subject to and without waiving this objection, Defendant Benson states that no responsive documents have been identified, as the Bureau of Elections is not aware of reports of tabulators that stopped functioning in Antrim County on the November 3, 2020 general election.

27. Produce the names, titles and contact information for each witness that you believe may possess discoverable information that you may use in support of any of your claims or defenses and include a short summary of the substance you believe each witness to possess.

RESPONSE: Defendant Benson objects to this request as it is an interrogatory disguised as a request to produce, and Defendant Benson does not keep or maintain any documents matching the description in this request

28. Produce all communication, correspondence or summary of any conversations occurring from October 1, 2020 to the present day between your experts and any

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person employed by a government body in the State of Michigan or holding public office in the State of Michigan, including but not limited to Gretchen Whitmer, Jocelyn Benson or Dana Nessel.

RESPONSE: Records responsive to this request are enclosed. See Bates Numbered Documents 0008987 to 0009032 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

29. Produce the resume and curriculum vitae for all of your expert witnesses and produce their experience with election administration and also their experience with elections technology (e.g. voting machines, tabulators, etc.).

RESPONSE: Records responsive to this request are enclosed. See Bates Numbered Documents 0009033 to 0009061 of Part 2 of Defendant Benson's third production (the link sent by Lisa Albro).

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Jonathan Brater, Director of Elections
Michigan Department of State

Sworn to and subscribed before me, a
Notary Public, this 14th day of May, 2021.

Carol Ebierca
Notary Public
Livingston County, Michigan
Acting in Ingham County, Michigan
My commission expires: 11-5-2026

As to objections and documents produced only:

Respectfully submitted,

Dana Nessel
Attorney General

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Intervenor-Defendant Benson
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

Dated: May 14, 2021

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK,

Plaintiff,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

and

[DOMINION VOTING MACHINES, INC., and DOMINION WHO'S ACTUALLY DOING THE PATCH ?]

Defendants.

Circuit Court Case No.

COMPLAINT FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF

EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 5

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

May 20, 2021

Karen Brewster
Cheboygan County Clerk
by e-mail

Dear Clerk Brewster:

You are receiving this letter because the Bureau of Elections has been informed that the Cheboygan County Board of Commissioners may attempt to allow an unqualified third party to gain access to voting equipment in Cheboygan County, purportedly to conduct a "forensic audit." The Board has no authority to require you or any municipal clerk to provide external access to voting equipment maintained by your offices, and neither you nor municipal clerks in Cheboygan County should provide this access.

The Michigan Election Law entrusts clerks with choosing and maintaining their voting systems and does not provide any authority for county commissions to take control of this equipment. MCL 168.37a states that "a county clerk, in consultation with each city and township clerk in the county" will "determine which electronic voting system will be used in the county[.]" Custody, programming, and review and testing of election equipment is entrusted to qualified election officials, not county commissions.

Interest in granting access to unqualified third parties to conduct a "forensic audit" may stem from misplaced reliance on ongoing misinformation— which has been repeatedly, comprehensively, and definitively debunked—regarding both Dominion Voting Systems and the error that occurred in the initial reported unofficial results in Antrim County. As you know, the Bureau of Elections in cooperation with the Antrim County Clerk and a number of local election clerks conducted a public hand count of every paper ballot cast for President in Antrim County, which confirmed that the ballot tabulators counted ballots accurately.

Statewide, more than 1,300 clerks of both parties participated in at least one election audit this year. A report on the results of the audits, which found no examples of intentional misconduct, is publicly available.[1] Suggestions of tampering with election results are baseless. The Department of Justice, FBI, Department of Homeland Security, and Cybersecurity and Infrastructure Security Agency "investigated multiple public claims that one or more foreign governments owned, directed, or controlled election infrastructure used in the 2020 federal elections; implemented a

[1] https://www.michigan.gov/documents/sos/BOE_2020_Post_Election_Audit_Report_04_21_21_723005_7.pdf.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

scheme tomanipulate election infrastructure; or tallied, changed, or otherwise manipulated vote counts. The Departments found that those claims were not credible."[2]

If you or municipal clerks choose to conduct additional reviews of your voting systems, that is your prerogative. However, as we advised in the February 12, 2021 news update and our April 20, 2021 email to county clerks and election directors, only election officials, licensed vendors, or accredited voting system test laboratories should be granted access to voting equipment. If you are interested in having any type of physical review of your voting system, you should contact an EAC-accredited voting systems test laboratory (VSTL).

Please let me know if you have any further questions.

Sincerely,

Jonathan Brater, Director
Michigan Bureau of Elections

[2] https://www.dhs.gov/news/2021/03/16/joint-statement-departments-justice-and-homeland-security-assessing-impact-foreign.

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN

IN THE 5th CIRCUIT COURT OF BARRY COUNTY

SHARON OLSON, in her official capacity as IRVING TOWNSHIP CLERK,

Plaintiff,

v.

JOCELYN BENSON, in her capacity as MICHIGAN SECRETARY OF STATE, JONATHAN BRATER, in his capacity as DIRECTOR OF ELECTIONS,

and

[DOMINION VOTING MACHINES, INC., and DOMINION WHO'S ACTUALLY DOING THE PATCH ?]

Defendants.

Circuit Court Case No.

COMPLAINT FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF

EMERGENCY EX-PARTE MOTION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STEFANIE LAMBERT (P71303)
Law Offices of Stefanie Lambert PLLC
Attorney for Plaintiff
400 Renaissance Center
Floor 26
Detroit, MI 48243-1502
(313) 410-6872

EXHIBIT 6

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

State Of Michigan
Michigan Department of State
And
Barry County
Township of Irving
Help America Vote Act (HAVA) Grant Agreement
Voting System Hardware, Firmware and Software
RE: Master Contract
- Dominion Voting Systems, Inc.

This Grant Agreement is the mechanism by which Counties, Cities, and Townships apply to the State of Michigan to receive Federal HAVA and State-appropriated funded voting systems, including optical scan tabulators, accessible voting devices and Election Management System (EMS) software, pursuant to the Federal Help America Vote Act (HAVA) of 2002.

Definitions:

"*Contractor*" means the voting system vendor selected by the county.

"*County*" means any county within the State of Michigan.

"*Department*" means the Michigan Department of State.

"*Grantee*" means the county or local jurisdiction entering into this *Grant Agreement*.

"*Local Jurisdiction*" means any city or township within the State of Michigan.

"*Voting Systems*" means optical scan tabulators, accessible voting devices (for use by voters with disabilities), and EMS software (as applicable) acquired by the counties and local jurisdictions statewide and funded by State-appropriated and Federal HAVA funds.

1. Period of Agreement

The *Grant Agreement* process applies to voting system purchases occurring between March 1, 2017 and April 30, 2018.

2. Program, Budget and Agreement

This *Grant Agreement* is to establish a grant program to use State-appropriated and Federal HAVA funds to acquire and implement replacement voting systems throughout the state. Each county, with the involvement of the local jurisdictions within the county, will select one Contractor for the entire county and will develop a countywide implementation plan to replace its voting systems.

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Once the county certifies its Contractor selection to the Department, the county will provide the Department with its implementation plan for individual local jurisdictions participating in each planned purchasing phase. The Department will verify the number of voting systems authorized for purchase using State-appropriated and Federal HAVA funds. If changes are required after the *Grant Agreement* is signed and approved, instructions for amending the *Grant Agreement* will be provided and the Grantee will be required to enter into a new *Grant Agreement*.

This grant program only covers the acquisition and implementation of the voting system selected by each county, and the individual voting system components which will be funded utilizing available State-appropriated and Federal HAVA funds. Approved quantities of each voting system component have been determined by the Department and are listed in Section 15 of this *Grant Agreement*.

The Michigan Department of Technology, Management and Budget has entered into a Master Contract with each approved Contractor, which has established maximum statewide prices for each voting system component. The Department has established the available level of grant funding for each component of each Contractor's voting system. State-appropriated and Federal HAVA funding provided via this *Grant Agreement* covers the purchase of the voting system, the software license fee for the EMS software for the full 10-year contract term, and the *initial* service and maintenance period for all components (which covers the acquisition year, plus 4 additional years). The Master Contract includes an *extended* service and maintenance period beyond the *initial* service and maintenance period, for an additional five-year period. Costs for the *extended* service and maintenance period and other additional costs, if any, are the sole responsibility of each individual county / local jurisdiction.

All Contractors will be required to enter into a "purchase agreement" with each local jurisdiction and county in those counties that have selected that Contractor. Typically, this document is the purchase agreement provided by the Contractor. The terms and conditions of the local purchase agreements shall not contradict the Master Contract. The terms of the Master Contract will supercede any conflicting terms in the local purchase agreements.

Each Contractor will enter into a software license agreement with each county and any local jurisdictions that receive EMS. The license agreement shall not contradict any terms contained in the Master Contract. The terms of the Master Contract supercede any conflicting terms in the license agreement.

The Department will initiate voting system orders at the county level, once all *Grant Agreements* for the county are submitted and approved for the designated purchasing phase. Once voting systems have been delivered, tested, and accepted by each Grantee in the county for the designated purchasing phase, the Department will release the State/HAVA funds to the Contractor.

3. General

The individual submitting the *Grant Agreement* must have the proper authority to do so, and must certify in Section 16 of this *Grant Agreement* that this authority has been granted. Examples of authority include, but are not limited to, a resolution from the Board of County Commissioners, City Council or Township Board authorizing the individual submitting the *Grant Agreement* to execute the *Grant Agreement* on behalf of the county, city, or township.

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4. Performance

Each Grantee will certify and sign the *Grant Agreement* and forward it to the Department per the instructions provided. The Department will review and, once approved, will provide the Grantee with a copy of this fully-executed *Grant Agreement*, which will serve as Notice of the Grant Award. The Department will initiate equipment orders directly with the Contractor, and will provide the Grantee with the *Acceptance Certificate & Payment Authorization Form*, which must be submitted by the Grantee to the Department within 10 business days of voting system delivery. This form indicates acceptance of equipment and payment authorization.

The Grantee is responsible for overseeing its contractual agreement with the Contractor and is responsible for ensuring Contractor performance. Any subsequent malfunction or performance issue with the voting system must be addressed by the Grantee directly with the Contractor. The Grantee is responsible for maintaining any and all Contractor performance records. The Grantee has the sole responsibility to verify Contractor compliance with delivery dates, terms and conditions of delivery, and equipment verification and testing in accordance with the statewide Master Contract for the Grantee's selected Contractor. The Grantee will be solely responsible for additional costs incurred that are not covered by service, maintenance and warranty provisions in the Master Contract.

Grant funding is not provided for the purchase of additional ("backup") voting systems. The Grantee will be responsible for developing and implementing a backup strategy to ensure continued operation on Election Day, in the event of voting system failure in any individual precinct.

5. Testing, Acceptance and Payment

1. Successful acceptance testing of the voting system shall be completed within 10 business days from the date of delivery.
2. Upon completion of all acceptance testing, the Grantee must complete the State-issued *Acceptance Certificate & Payment Authorization Form* and forward the completed form to the Department.
3. This form will indicate the date of delivery, successful completion of acceptance testing, and will provide authorization to the Department to release funds to the Contractor.
4. Payment to the Contractor shall be made in accordance with the Master Contract with the Grantee's selected Contractor.

6. Ownership of Equipment and Software Purchases; Title

Any voting system purchased pursuant to this *Grant Agreement* is the property of the Grantee.

7. Optional Purchases

If the Grantee desires to purchase additional items beyond those authorized in this *Grant Agreement*, it may do so at its sole expense, outside of this *Grant Agreement*. No State or HAVA funds will be available for such purchases. Prices established via the Master Contract are extended to counties and local jurisdictions by the Contractors for these purposes.

8. Records Maintenance/Retention

The Grantee will maintain a complete set of records and files related to the ordering, delivery, testing, maintenance, and repairs of voting systems. The Grantee shall assure all the terms of this *Grant Agreement* are adhered to and that records and detailed documentation regarding this grant shall be maintained for a period of not less than six (6) years from the date of Contract termination, the date of submission of the final expenditure report or until any litigation and audit findings have been resolved, whichever is later.

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9. Management Requirements
Grantee must maintain property records that include a description of the property; a serial number or other identification number; acquisition date; cost of the property; location, use and condition of the property; and any ultimate disposition data including the date of disposal and sale price of the property (if any). Grantee must also maintain records showing 71% Federal participation in the cost of the property.

Grantee must perform a physical inventory of the property and reconcile the results with the property records at least once every two years.

Grantee must develop a control system to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated by the Grantee and reported to the Department.

Grantee must develop adequate maintenance procedures to keep the property in good condition. Grantee agrees to maintain extended service and maintenance coverage for the voting system in years 6-10 of the Master Contract, after the expiration of the initial service and maintenance period. If the Grantee fails to maintain extended service and maintenance coverage for the full Contract period, the Department may require Grantee to pay the Department the full amount of voting system grant funds paid to the vendor for the Grantee's county, city or township.

10. Disposition.
When the voting system acquired under this grant is no longer needed, the Department must be notified. Disposition of the equipment will be made as follows:

- Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the Department.
- Disposition of EMS software must follow the terms of the Contractor's Software License Agreement.

11. Authorized Access
The Grantee will permit, upon reasonable notification and at reasonable times, access to all records regarding this *Grant Agreement* by the Department and other representatives duly authorized by State or Federal law.

12. Mandatory Conditions

A. Statutory or Regulatory Requirements
The Master Contract for the Grantee's selected Contractor must be incorporated and made a part of the ensuing contract between the Grantee and the Contractor, as a condition for grant approval. The Grantee will comply with applicable Federal and State laws, guidelines, rules and regulations in carrying out the terms of this *Grant Agreement*.

Laws
This is a State of Michigan *Grant Agreement* and is governed by the laws of the State of Michigan. Any dispute arising as a result of this Agreement shall be resolved in the State of Michigan.

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Funding
This *Grant Agreement* is subject to and contingent upon the availability and appropriation of Federal funds and any necessary State appropriation.

Costs
The State will not assume any responsibility or liability for costs incurred in relation to this grant.

Cancellation
The Department may cancel the *Grant Agreement* upon failure to comply with the terms of this grant.

Entire Agreement
The *Grant Agreement* shall represent the entire agreement between the State and Grantee and supercedes any prior oral or written agreements, and all other representations between the parties relating to this subject. The State reserves the right to require counties and local jurisdictions to attend required training sessions with regard to new equipment purchases made under HAVA.

Adherence to Terms
The failure of a party to insist upon strict adherence to any term of this *Grant Agreement* shall not be considered a waiver or deprive the party of the right thereafter to insist upon strict adherence to that term, or any other term of the *Grant Agreement*.

B. Other
Additional terms and conditions may be negotiated in the contract between the Grant Applicant and the Contractor as long as they do not conflict with the required terms and conditions of this *Grant Agreement* and Master Contract with the Grantee's selected Contractor.

13. Administration of Agreement
The Grant Manager on behalf of the Department for this *Grant Agreement* and the final *Grant Agreement* will be:

Jeremy Lange, Office of Financial Services
Michigan Department of State

All questions, comments and correspondence regarding this grant process, the *Grant Agreement* and the final *Grant Agreement* must be submitted in writing to the Grant Manager.

14. Completed Agreement
In order to complete this *Grant Agreement*, it must be filled out in its entirety by completing all indicated fields* below, and must be signed by the individual authorized by the county or local jurisdiction to enter into this agreement. The signed grant must be scanned and submitted electronically via the Elections eLearning Center.

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16. Voting Systems Authorization
Note: Grant Applicant to fill in all fields indicated (*) below:
This *Grant Agreement* is between the Michigan Department of State and:

Barry County
Township of Irving

*Grant Manager for County, City, or Township (point of contact for the State):

*Name	Sharon L. Olson
*Title	Irving Township Clerk
*Office Address	3425 Wing Rd. Hastings, MI 49058
*Office Phone	269 948 0633
*Office Email Address	clerk@irvingtownship.org.

Authorized Voting System Component Totals:

Number of Precinct Tabulators Authorized for State-Federal Funding:	2
Number of Absent Voter Counting Board Tabulators Authorized for State-Federal Funding: (funded at precinct tabulator price) *	0
Number of Accessible Voting Devices Authorized for State-Federal Funding:	2
EMS Software Authorized for State-Federal Funding:	None

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16. Special Certification/Signature
The following signatory certifies that the person signing is authorized to sign and enter into this *Grant Agreement*. Further, the signatory has reviewed and agrees to the conditions as outlined in this *Grant Agreement*, and has personally examined and is familiar with the information submitted here, as well as the requirements of the Help America Vote Act, under which this grant has been submitted.

For the COUNTY OR LOCAL JURISDICTION:

*Name: Sharon L Olson

*Title: Irving Township Clerk *Date: 12/18/2017

Sharon L Olson
*Signature

For the STATE OF MICHIGAN, DEPARTMENT OF STATE:
Cindy Paradine, Director, Office of Financial Services

Cindy Paradine
Signature

2/28/18
Date

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

DOMINION VOTING SYSTEMS
SOFTWARE LICENSE TERMS AND CONDITIONS

1. Definitions.

1.1. "Hardware" means the ImageCast® system defined in the Purchase Order.

1.2. "Licensee" shall mean the Dominion customer defined in the Purchase Order.

1.3. "Licensor" shall mean Dominion Voting Systems.

1.4. "Party" or "Parties" Licensor and Licensee may hereinafter be referred to individually as a Party and collectively as the Parties.

1.5. "Purchase Order" shall mean the purchase order between the Parties for the purchase of Hardware and use of the licensed Software.

1.6. "Software" means the software licensed by Licensor hereunder, in object code form, including all documentation therefore as identified in the Purchase Order.

1.7. "Specifications" means descriptions and data regarding the features, functions and performance of the Software and Hardware, as set forth in user manuals or other applicable documentation provided by Licensor.

1.8. "Term" shall mean the term period defined in the Purchase Order.

2. License.

2.1. License to Software. Subject to the terms herein, Licensor grants Licensee a non-exclusive, non-transferrable license to use the Software solely for the Licensee's own business purposes.

2.2. Print Copyright License. Subject to the Licensor's Print Copyright License terms and conditions. Licensor grants to Licensee a non-exclusive, non-transferable print copyright license.

2.3. No Other Licenses. Other than as expressly set forth herein, (a) Licensor grants no licenses, expressly or by implication, and (b) Licensor is not licensing or assigning any intellectual property rights of Licensor to Licensee or any third party. Licensee agrees not to use the Software for elections outside the Licensee's jurisdiction and agrees not to reverse engineer or otherwise attempt to derive the source code of the Software. The Licensee shall have no power to transfer or grant sub-licenses for the Software. Any use of all or any portion of the Software not expressly permitted is strictly prohibited.

3. Upgrades and Certification. During the Term, Licensor may provide upgrades to Licensee under the following terms and conditions.

3.1. Upgrades. In the event that Licensor, at its sole discretion, certifies a Software upgrade under the applicable laws and regulations of the Licensee's jurisdiction, Licensor may make the certified Software upgrade available to the Licensee at no additional cost.

3.2. Certification Requirement. Notwithstanding any other terms herein, Licensor shall not provide, and shall not be obligated to provide under any upgrade, or other software update, that has not been certified under the applicable provisions of the election laws and regulations of the Licensee's jurisdiction.

4. Prohibited Acts. The Licensee shall not, without the prior written permission of Licensor:

4.1. Transfer or copy onto any other storage device or hardware or otherwise copy the Software in whole or in part except for purposes of system backup;

4.2. Reverse engineer, disassemble, decompile, decipher or analyze the Software in whole or in part;

4.3. Alter or modify the Software in any way or prepare any derivative works of the Software or any part of parts of the Software;

4.4. Alter, remove or obstruct any copyright or proprietary notices from the Software, or fail to reproduce the same on any lawful copies of the Software.

5. Return of Software. Upon termination or expiration of this license, Licensee shall (i) forthwith return to Licensor all Software in its possession or control, or destroy all such Software from any electronic media, and certify in writing to Licensor that it has been destroyed.

6. Warranties. The following warranties shall apply.

6.1. Software Warranty. Licensor warrants that the Software will function substantially in accordance with the Specification during the Term. The foregoing warranty shall be void in the event of the Software (i) having been modified by any party other than Licensor or (ii) having been used by the Licensee for purposes other than those for which the Software was designed by Licensor. If Licensor establishes that the reported material failure is not covered by the foregoing warranty, the Licensee shall be responsible for the costs of Licensor's investigative and remedial work at Licensor's then current rates.

6.2. Third-Party Products. The warranties herein do not apply to any Third-Party Products. However, to the extent permitted by the manufacturers of Third-Party Products, Licensor shall pass through to Licensee all warranties such manufacturers make to Licensor regarding the operation of such Third-Party Products.

6.3. NO OTHER WARRANTIES. DOMINION DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY BASED ON A COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

7. Limitation of Liability. LICENSOR'S TOTAL AGGREGATE LIABILITY FOR ANY LOSS, DAMAGE, COSTS OR EXPENSES UNDER OR IN CONNECTION WITH THIS PURCHASE ORDER. LICENSE AND WARRANTY, HOWSOEVER ARISING, INCLUDING WITHOUT LIMITATION, LOSS, DAMAGE, COSTS OR EXPENSES CAUSED BY BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY, BREACH OF STATUTORY OR ANY OTHER DUTY SHALL IN NO CIRCUMSTANCES EXCEED THE TOTAL DOLLAR AMOUNT OF THE PURCHASE ORDER. NEITHER PARTY SHALL BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF BUSINESS, LOSS OF DATA, LOSS OF USE OR ANY OTHER INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE WHATSOEVER, HOWSOEVER ARISING, INCURRED BY THE OTHER PARTY OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT, NEGLIGENCE OR OTHER TORT, EVEN IF THE PARTIES OR THEIR REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Authorized Signature

SHARON OLSON
Printed Name

10-20-2023
Date

Document received by the MI Court of Claims.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

ATTACHMENT 3

Speckin Report,
July 26, 2023

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Speckin Forensics, LLC

120 N. Washington Square, Suite 300
PMB 5068
Lansing, Michigan 48933
517-349-3528 • Fax 954-839-8219

Please Direct Correspondence & Payment Here:
2450 Hollywood Boulevard, Suite 700
Hollywood, Florida 33020
954-763-6134 • Fax 954-839-8219

www.4N6.com

Leonard A. Speckin
Retired Document Analyst

Michael J. Sinke
Retired Latent Print Specialist
Retired Crime Scene Reconstruction
Retired Forensic Document Analyst

Dr. George F. Jackson Ph.D.
Forensic Toxicologist

Michael P. Mulderig
Forensic Firearms
Ballistics Specialist

Erich J. Speckin
Forensic Document Analyst
Ink Dating Specialist
Crime Scene Reconstruction

Thomas K. Huard Ph.D.
DNA Analyst & Consultant

Juan Ruiz
Computer, Mobile Device Specialist

Marshaun J. Blake
Arson Investigator
Vehicle Fire Specialist

Anthony A. Milone
Computer & Graphics Specialist
Forensic Document Specialist

Dr. Julie A. Howenstine
Serologist
DNA Analyst & Consultant
Crime Scene Reconstruction

Amended Report of July 26, 2023

July 27, 2023

I was asked to examine and recount ballots, the envelopes, totals tapes, record books and other associated documents for the 2020 election. This included AVCBs 1-134 and Precincts 1- 503 for the City of Detroit in their possession. This process took from the 17th of April 2023 to the 17th of May 2023. Additional photos were taken from 17th of July 2023 to 24th of July 2023.

Upon my arrival at the Detroit Department of Election Office located at 2978 W. Grand Blvd., Detroit, MI 48202, we were greeted, and the ground rules were explained and provided by the management staff. The rules included but are not limited to, no touching of the ballots, envelopes or register tapes. We could only direct the staff there to move, show, count, etc. the items desired. I was not allowed to proceed beyond the lobby area without being accompanied by a supervisor.

The ballots were located in locked cabinets that had a tag on them that had to be cut off. There were 17 cabinets in total of which 12 were filled with AVCB ballots and the other 5 were filled with Precinct Ballots. The ballots were stored in these cabinets by AVCB 1-8, 8-17, 17-24, 24-30, 31-36, 37-41, 42-51, 52-61, 62-70, 71-81,82-92, 93-134 and by Precincts 1-88, 89-207, 208-301, 302-384, and 385-503. The ballots were all stacked in the cabinets one on top of the other and had to be sorted by the City staff upon removal from the cabinet.

The manner in which the ballots were counted was by the representative from the Election office moving the ballots from one pile to another while my team was tallying the vote totals. The tallies were recorded by Presidential candidate (Biden, Trump, or other) and by Congressional Senator candidate (Peters, James or other). In this context, the term "other could be anything other than the two main candidates such as another party, write in, undervote (blank), or overvote. This category was designed as a placeholder to keep the number of ballots total as well as the main parties' vote totals. While the ballots were in front of my team, we were able to observe that the printing on the mail in ballots have some inconsistencies, for example some have darker printing than others.

At the same time when this printing anomaly was noted, many of the City of Detroit staff commented to each member of my team that the ballot paper felt different on some of the ballots. We were unable to touch the paper or examine completely to determine this. It occurred while the representative was flipping the ballots, some were sticking to one another, and they made comments that some ballots felt

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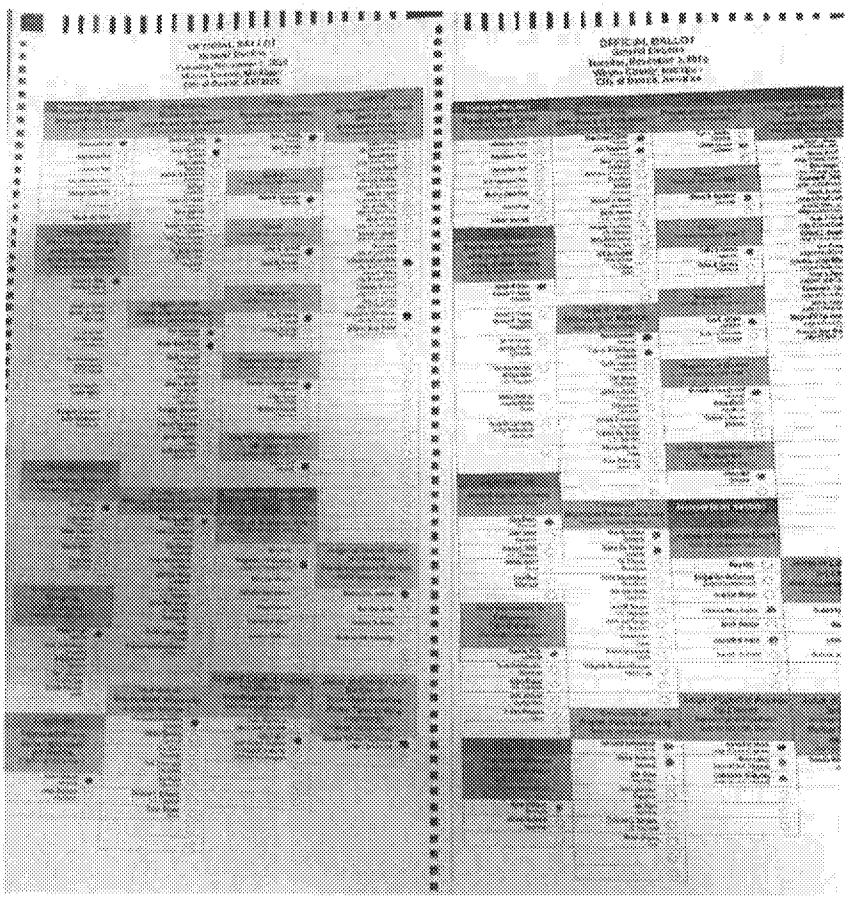
thicker than others. In my opinion, further examination should occur on these ballots and AV boards to confirm these differences, the number of instances where this may have occurred, patterns that may exist on voting on the different paper stock, and any further determinations that can be made from either paper that exists. This can be crucial evidence in light of the possibility of additional ballots being introduced as discussed in affidavits and evidenced by videos.

Below is a photograph of two ballots showing the representative difference in printing appearance that can be seen between two ballots from AV 26, similar differences were found in other AV boards.



The mail in envelopes, absentee applications, register tapes and record books were located in the same storage room as the ballots in file-like storage drawers. These drawers were not locked or sealed like the ballots at the time of our arrival.

The method used to count the envelopes was to observe the representative from the Election office count the envelopes in stacks of a 100 (sometimes 50 or 25), we then counted the total and I recorded that number. With regards to the register tapes and the record books; the City representative removed the tapes and record book from the envelope, I then documented the totals that were recorded and the materials were placed back in the same envelope.

In several of the AV boards, a comparison was made from the applications for mail in ballots to the envelopes. I was told by the City staff that many applications were sent out (even unsolicited in cases) for

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mail in ballots in 2020. However, it was confirmed by the staff that in order to receive a mail in ballot, an application needed to be received, either by return mail or delivered in person.

This was a very time-consuming process to match up each returned ballot with a corresponding application, therefore only 2 AV boards were done like this as time allowed. In the two AV boards compared (AV 79 and AV 122), there were 289 mail-in ballots (249 in AV 79 and 40 in AV 122) found that had NO application in the file to receive the ballots. In some of those instances post it notes were found in the files that included "Ballot doesn't match poll book"; "not on list in QVF"; and "Not on list".

I have now been provided with what I am told is a "permanent AV voter list". I then compared the ballot return envelopes that have no corresponding application for AV ballot request to the "permanent list".

Looking into the math involved, AV 79 had a total of 1249 ballots counted according to the total printouts. 249 showed no application for the ballot, this is nearly 20%. When the "permanent list" is compared to these 249 without applications, 155 of them were still not found on this list or with an application. This is over 12%.

For AV 122 the total ballots shown in the printouts is 511, with 40 having no corresponding application which is approximately 8%. When the "permanent list" is compared to these 40 without applications, 33 of them were still not found on this list or with an application. This is over 6%.

It would follow that if all the boards were compared in this manner, with approximately 170,000 AV ballots, the range at 8%-20% would be 13,600 to 34,000 ballots with no application requesting the ballot.

My office will continue to analyze records and compare additional boards in the same manner as AV 79 and AV 122 above.

After the envelopes were counted, the total number of envelopes were compared to the total number of ballots for each AVCBs. Many of these boards had unexplainable differences. In some, the number of ballots was more than the number of envelopes. In a few instances, there were more envelopes than ballots present to be counted. A small discrepancy can exist by simple human error of an envelope missing or misfiled of course, but the differences in some cases are much bigger. For example, AV 18 contains 43 more envelopes than ballots; AV 38 contains 40 more ballots than envelopes; AV 40 contains 62 more ballots than envelopes. There are dozens of such examples, while other AVs match exactly or nearly exactly.

A comparison was then made to the vote totals on the tapes (in person) or printouts (AVCB) to the ballots present to be counted. Three AV boards had totals of ZERO votes on the printouts, but votes were recorded to the state. These boards are AV 33, AV 57, and AV 58. It is unclear how the totals were reported when the printouts show ZERO. At 11:23pm AV 33 shows the totals of zero, for AV 57 at 11:50pm shows zero, and for AV 58 at 11:50pm shows zero. These three AV envelopes showed no totals on any printouts.

See photos on the following page:

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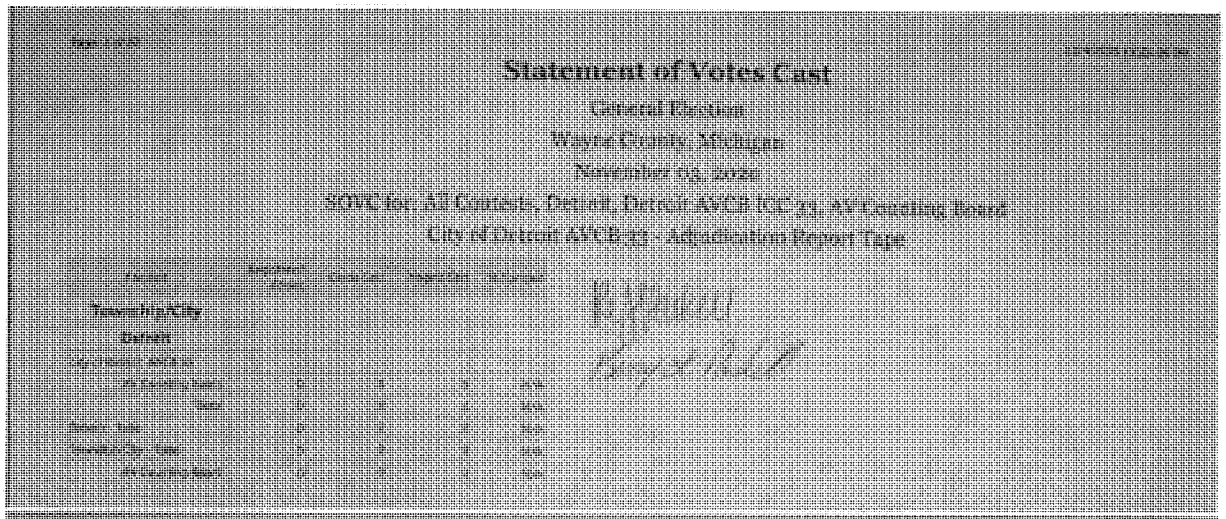


Statement of Votes Cast

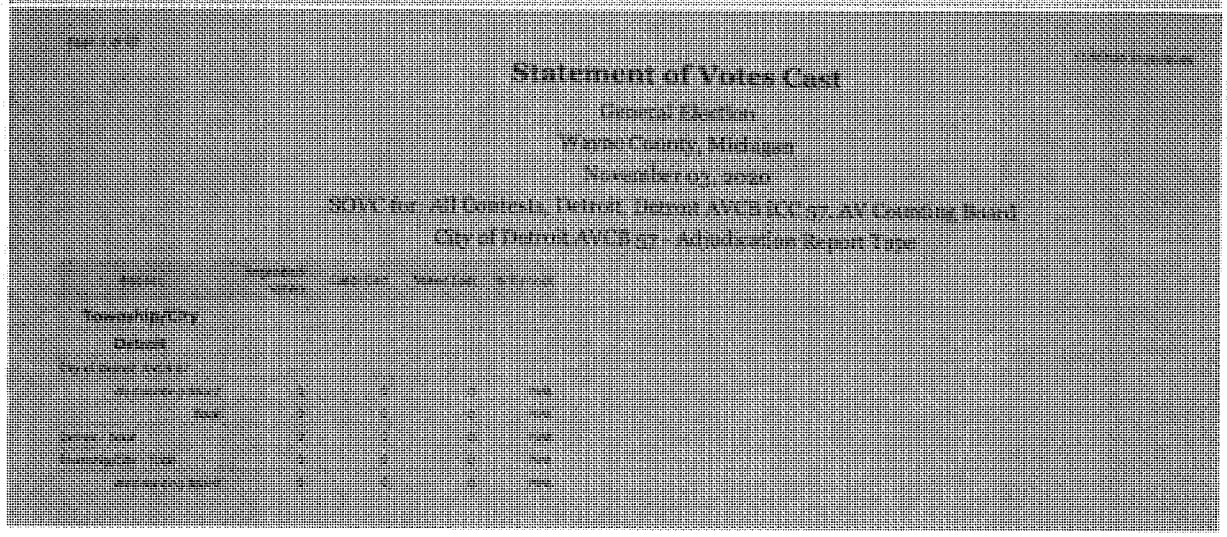
General Election

Wayne County, Michigan

November 03, 2020

SOVC for: All Contests, Detroit, Detroit AVCB ICC 23, AV Counting Board

City of Detroit AVCB 23 - Adjudication Report Type



Statement of Votes Cast

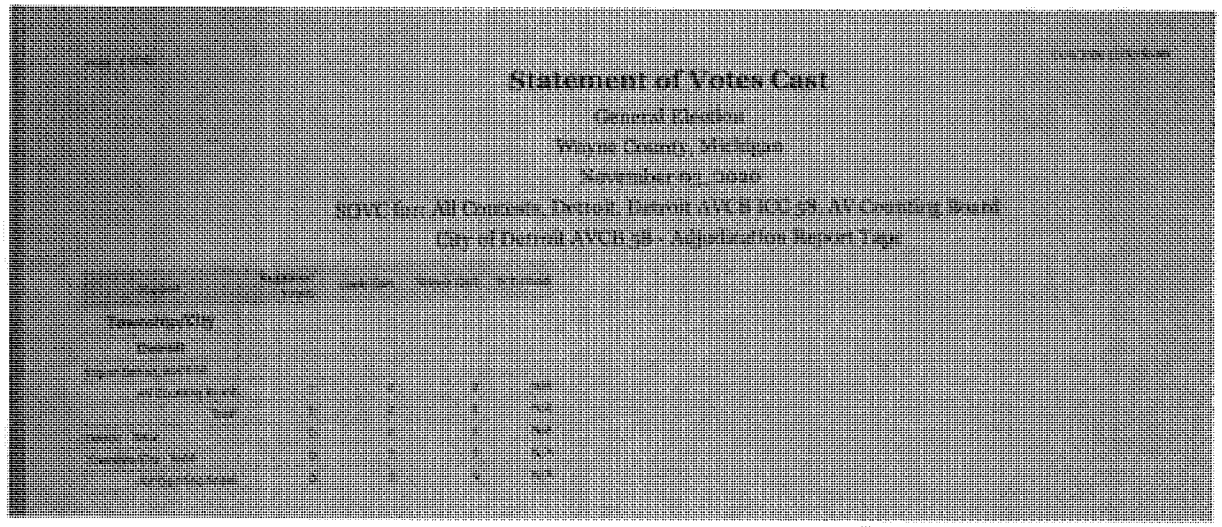
General Election

Wayne County, Michigan

November 03, 2020

SOVC for: All Contests, Detroit, Detroit AVCB ICC 37, AV Counting Board

City of Detroit AVCB 37 - Adjudication Report Type



Statement of Votes Cast

General Election

Wayne County, Michigan

November 03, 2020

SOVC for: All Contests, Detroit, Detroit AVCB ICC 38, AV Counting Board

City of Detroit AVCB 38 - Adjudication Report Type

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For AV 13, the ballots counted by hand and the vote totals reported to the state are nearly identical (1565 vs 1566), but the number of ballots scanned and shown on the printouts are 1621. This is over 50 ballots for this AV board that show as scanned but are not present in the ballots presented to us.

As for AV 14, the number of ballots on the totals printout as scanned and the votes reported are very similar (1764 vs 1757) this is also very similar to the number of envelopes counted for that AV board of 1765. However, the number of ballots actually present is 1740. This is approximately 25 more envelopes present than ballots. I am unable to determine where these previous approximately 25 ballots have gone.

In AV 15, the number of ballots present and the total ballots on the printout are similar (1762 vs 1765). The number of envelopes counted for the AV is 1795. This is approximately 30 more envelopes present than ballots. I am unable to determine where these previous approximately 30 ballots have gone.

In AV 19, the total number of ballots counted by my team and the number of ballots on the total printout are similar (2301 vs 2300). There were only 2270 envelopes counted for this AV board. This would leave approximately 30 ballots appearing and counted that have no corresponding envelope received.

In AV 23, the total envelopes counted, and the number of ballots scanned on the totals printout are similar (2858 vs 2855). The totals ballots presented in our count was only 2818. This would be a difference of 40 ballots missing, or possibly the same ballots that were also rescanned to account for scanned total than total ballots present.

In AV 26, the total number of ballots present, and the total number scanned on the printout are similar (3426 vs 3430). The number of envelopes returned for this AV board was 3385. This is approximately 45 more ballots presented and counted than envelopes found to return the ballots.

Similar anomalies in the ballot count, envelope count, or total votes scanned exist in the following additional AV boards: AV 27, AV 28, AV 32, AV 36, AV 38, AV 40, AV 41, AV 42, AV 43, AV 45, AV 62, AV 64, AV 68, AV 69, AV 77, AV 79, AV 82, AV 87, AV 88, AV 89, AV 95, AV 96, AV 101, and AV 122.

Further anomalies existed in the totals for an individual candidate, for instance in AV 49 the total we counted within the ballots present in the presidential race for Biden is 902, however, the total reported as votes cast and counted for AV board is 965 for Biden. It is unclear where these additional 63 votes would have come from as they are not present in the ballots presented. Duplicate scanning and counting of ballots is possible and could account for this discrepancy but the computer and system data including the scans of the ballots from the tabulators would need to be examined to confirm or deny this possibility.

Similar anomalies (of 10 or more votes) in total votes on the printouts of compared to the totals in the ballots exist in the following AV boards: AV 1 (32), AV 3 (22), AV 4 (16), AV 6 (10), AV 10 (-13), AV 12 (-12), AV 13 (53), AV 17 (57), AV 21 (16), AV 22 (13), AV 23 (36), AV 24 (19), AV 25 (15), AV 28 (46), AV 30 (-12), AV 35 (11), AV 36 (-15), AV 37 (-22), AV 40 (-10), AV 41 (53), AV 42 (10), AV 43 (27), AV 44 (-29), AV 45 (-41), AV 47 (23), AV 49 (63), AV 62 (92), AV 67 (19), AV 68 (-19), AV 72 (13), AV 73 (11), AV 75 (16), AV 77 (12), AV 84 (13), AV 86 (19), AV 88 (59), AV 92 (16), AV 93 (14), AV 94 (15), AV 95 (19), AV 99 (63), and AV 130 (46).

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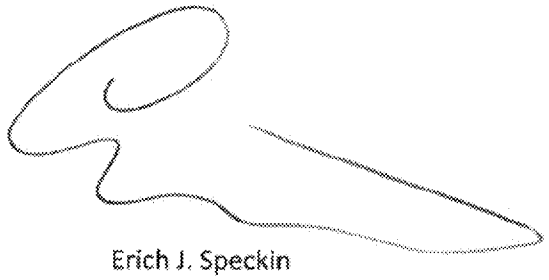
Based on these types of anomalies between scanned totals and ballots currently present, it is my opinion that the computer data relating to the scanning and tabulation from this 2020 election should be examined and compared for discrepancies as well as time sequences. This data should include ballot images to check for duplicate scans, comparison of totals, times of scanning, and other related features and possible access from outside sources. My office is ready and able to perform this additional analysis. The data and computer hardware should be preserved until complete analysis can be performed.



Erich J. Speckin

Forensic Document Analyst

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Teszlewicz, Barbara (AG) [teszlewiczb@michigan.gov]
on behalf of Grossi, Christina (AG) [GrossiC@michigan.gov]
Sent: 7/28/2022 5:30:04 PM
To: Brady, Mike (MDOS) [BradyM@michigan.gov]; Bagley, Nick [BagleyN1@michigan.gov]; Dax Goldstein [dax@statesuniteddemocracy.org]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; 'katie@statesuniteddemocracy.org' [katie@statesuniteddemocracy.org]; 'caroline@statesuniteddemocracy.org' [caroline@statesuniteddemocracy.org]; 'kk@isdglobal.org' [kk@isdglobal.org]; 'jdc@isdglobal.org' [jdc@isdglobal.org]; 'janae@statesuniteddemocracy.org' [janae@statesuniteddemocracy.org]; 'lizzie@statesuniteddemocracy.org' [lizzie@statesuniteddemocracy.org]; McCann, Amber (AG) [McCannA@michigan.gov]
CC: Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]; Teegardin, Rachel [TeegardinR1@michigan.gov]; Hill, Darryl (MDOS) [HillD16@michigan.gov]; Rollow, Jake (MDOS) [RollowJ@michigan.gov]; Brater, Jonathan (MDOS) [BraterJ@michigan.gov]; Smiley, Melissa (MDOS) [SmileyM1@michigan.gov]; Weare, Jessica [WeareJ@michigan.gov]

Subject: Call re: Presentation on Misinformation
Location: Microsoft Teams Meeting

Start: 8/1/2022 7:30:00 PM
End: 8/1/2022 8:00:00 PM
Show Time As: Tentative

Required Attendees: Brady, Mike (MDOS); Bagley, Nick; Dax Goldstein; Sargent, Aubrey (AG); Meingast, Heather (AG); Hagaman-Clark, Danielle (AG); 'katie@statesuniteddemocracy.org'; 'caroline@statesuniteddemocracy.org'; 'kk@isdglobal.org'; 'jdc@isdglobal.org'; 'janae@statesuniteddemocracy.org'; lizzie@statesuniteddemocracy.org; McCann, Amber (AG)
Optional Attendees: Sitts, Jennifer (MDOS); Teegardin, Rachel; Hill, Darryl (MDOS); Rollow, Jake (MDOS); Brater, Jonathan (MDOS); Smiley, Melissa (MDOS); Weare, Jessica

---

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Meeting ID: Security MCL 15.243(1)(u)
Passcode:
Download Teams | Join on the web

Or call in (audio only)
Security MCL 15.243(1)(u) United States, Pontiac
Phone Conference ID: Security MCL 15.243(1)(u)
Find a local number | Reset PIN

Learn More | Meeting options

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/18/2023 1:15:00 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Michigan law on unqualified presidential candidates
Attachments: MI Law re Unqualified Presidential Candidates.docx

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/19/2023 6:38:51 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: admissions

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

These look great. Thank you so much.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Tuesday, September 19, 2023 2:32:26 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: admissions

Let me know if these are ok.

H

From: MeingastH@michigan.gov <MeingastH@michigan.gov>
Sent: Tuesday, September 19, 2023 2:30 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Scan To Me

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/22/2023 4:43:04 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 Client update

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather,

DPP MCL 15.243(1)(m)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/21/2023 8:20:43 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14A disqualification clause litigation tracker

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/19/2023 9:04:53 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Fwd: Fourteenth Amendment Disqualification -- PRIVILEGED
Attachments: Fourteenth Amendment Disqualification Analysis.docx

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Here is the 9/15 memo.

Get Outlook for iOS

From: Jonathan Williams
Sent: Friday, September 15, 2023 3:30:02 PM
To: Heather Meingast <meingasth@michigan.gov>
Subject: Fourteenth Amendment Disqualification -- PRIVILEGED

Heather,

DPP MCL 15.243(1)(m)

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/25/2023 7:21:11 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Thanks, Heather. I don't think the complaint made it through with this email.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, September 25, 2023 at 3:01 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

SOS was served 9/22.

From: Meingast, Heather (AG)
Sent: Monday, September 25, 2023 2:49 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Importance: High

From: Meingast, Heather (AG)
Sent: Tuesday, September 19, 2023 4:27 PM
To: AG-HeadsUpExec <AG-HeadsUpExec@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Importance: High

Hi Dana,

Robert Davis has filed an action in the Court of Claims seeking declaratory and mandamus relief against the Secretary. The first four counts deal with resolving which date the presidential primary must be held on (new February date or old March date), and whether the Secretary has the authority to disqualify Trump from the presidential primary ballot (or possible any other ballot) due to his alleged ineligibility under the 14th Amendment's insurrection clause. In his other two counts, he alleges the Secretary did not file the required bond before taking office and he seeks to compel the Secretary to promulgate rules for the electronic processing of military and overseas ballots. See MCL 168.759a(17). **DPP MCL 15.243(1)(m)**

DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

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Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/25/2023 7:31:55 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Got it!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, September 25, 2023 at 3:31 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

---

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, September 25, 2023 3:21 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Thanks, Heather. I don't think the complaint made it through with this email.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, September 25, 2023 at 3:01 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue

SOS was served 9/22.

From: Meingast, Heather (AG)
Sent: Monday, September 25, 2023 2:49 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Importance: High

From: Meingast, Heather (AG)
Sent: Tuesday, September 19, 2023 4:27 PM
To: AG-HeadsUpExec <AG-HeadsUpExec@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: HEADS UP - Davis v Benson - Court of Claims No. 23-000128 (Redford, J.) - 14th Amend issue
Importance: High

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Hi Dana,

Robert Davis has filed an action in the Court of Claims seeking declaratory and mandamus relief against the Secretary. The first four counts deal with resolving which date the presidential primary must be held on (new February date or old March date), and whether the Secretary has the authority to disqualify Trump from the presidential primary ballot (or possible any other ballot) due to his alleged ineligibility under the 14th Amendment's insurrection clause. In his other two counts, he alleges the Secretary did not file the required bond before taking office and he seeks to compel the Secretary to promulgate rules for the electronic processing of military and overseas ballots. See MCL 168.759a(17).

DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/22/2023 7:02:11 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]

Subject: ISL call

Start: 9/25/2023 6:30:00 PM
End: 9/25/2023 7:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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Jonathan to call Heather

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/25/2023 11:35:29 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Stefanie Lambert opinion
Attachments: Fulton County Opinion.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather,

It was good to speak with you this afternoon. Here's the special master's report from September 15 in County of Fulton v. Secretary of the Commonwealth. Based on the timing of the decision, I think you may already have the opinion. The opinion concerns appointment of an escrow agent to hold voting equipment in the case, and mentions Stefanie Lambert in various portions of the opinion.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board of Elections, Stuart L. Ulsh, in his official capacity as County Commissioner of Fulton County and in his capacity as a resident, taxpayer and elector in Fulton County, and Randy H. Bunch, in his official capacity as County Commissioner of Fulton County and in his capacity as a resident, taxpayer and elector of Fulton County, Petitioners/Appellees	:	No. 277 M.D. 2021 No. 3 MAP 2022
v.	:	
Secretary of the Commonwealth, Respondent/Appellant	:	

BEFORE: **HONORABLE RENÉE COHN JUBELIRER,**
President Judge of the Commonwealth Court
Appointed as Special Master

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER **FILED:** September 15, 2023

This matter returns to the undersigned, in her continued role as Special Master,[1] for purposes of appointing "a neutral third-party escrow agent to take and retain possession of the voting equipment" at issue in this case. *County of Fulton v. Sec'y of the Commonwealth*, 292 A.3d 974, 1020 (Pa. 2023) (*Fulton I*).

[1] *County of Fulton v. Sec'y of the Commonwealth* (Pa., No. 3 MAP 2022, filed 10/21/2022).

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I. INTRODUCTION

A detailed background and procedural history of this matter is recounted fully in *Fulton I* and is incorporated by reference herein. By way of brief summary, this case initiated on August 18, 2022, when the County of Fulton, Fulton County Board of Elections, and Fulton County Commissioners Stuart L. Ulsh and Randy H. Bunch, (collectively, Fulton County or County) filed a Petition for Review in the Commonwealth Court's original jurisdiction against the Secretary of the Commonwealth (Secretary), challenging the Secretary's decertification of Voting Equipment[2] manufactured by Dominion Voting Systems, Inc. (Dominion) and used by the County in the 2020 General Election.[3] The Secretary decertified the Voting Equipment in Fulton County's possession after the County permitted a third-party consultant known as Wake TSI, Inc. to inspect the Voting Equipment in December 2020. Fulton County's five-count Petition for Review raises various questions involving, *inter alia*, the division of authority between the Secretary and county boards of elections as it relates to the certification and inspection of voting equipment under the Pennsylvania Election Code.[4]

In December 2021, and January 2022, while the County's Petition for Review remained pending, the Secretary filed two applications indicating that he learned that Fulton County planned to move forward with another third-party inspection of the

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[2] As used herein, the term "Voting Equipment" refers to all electronic voting equipment manufactured by Dominion Voting Systems, Inc. (Dominion) and used by or in possession of the County, which Voting Equipment is described in the April 1, 2019 Voting System and Managed Services Agreement between Dominion and the County. (*See* Sec'y Ex. 34.01 (Voting System and Managed Services Agreement, previously admitted during contempt proceeding as Sec'y Ex. 12.01).)

[3] *See generally County of Fulton v. Sec'y of the Commonwealth*, 276 A.3d 846 (Pa. Cmwlth. 2022) (describing the underlying Petition for Review and overruling preliminary objections to same).

[4] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

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Voting Equipment and asking the Commonwealth Court for a protective order to enjoin the same. The Secretary asserted that a protective order was necessary, as an additional inspection would irreparably spoliate key evidence central to the claims set forth in the County's Petition for Review. By order dated January 14, 2022, the Commonwealth Court denied the Secretary's request for a protective order, which the Secretary immediately appealed to the Pennsylvania Supreme Court. Ancillary to that appeal, the Secretary moved for an emergency stay of the Commonwealth Court's January 14, 2022 order, which was granted by a Single-Justice Order that same day, and thereafter confirmed by the full Supreme Court on January 27, 2022 (collectively, Injunction Order).

Several months later, on October 18, 2022, the Secretary filed an application in the Supreme Court requesting an order holding Fulton County in contempt and imposing sanctions, alleging that the County violated the Supreme Court's Injunction Order by allowing another third party known as Speckin Forensics, LLC to inspect the Voting Equipment on July 13 and 14, 2022, nearly six months after the Injunction Order was issued.

By order dated October 21, 2022, the Pennsylvania Supreme Court appointed the undersigned to serve as Special Master to prepare a report and recommendation concerning the Secretary's request for contempt and sanctions. On November 18, 2022, following a multi-day hearing, the Special Master submitted her report and recommendations to the Pennsylvania Supreme Court. On April 19, 2023, the Supreme Court issued an opinion and order adjudicating Fulton County in contempt, imposing sanctions, and ordering impoundment of the Voting Equipment with a neutral third-party escrow agent until further order of Commonwealth Court.

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Fulton I, 292 A.3d at 1020. Regarding impoundment, the Supreme Court stated as follows:

> we direct the parties to confer and agree on a neutral third-party escrow agent to take and retain possession of the voting equipment until further order of court, and we direct the Special Master to see that this task is completed—and to appoint a neutral agent if the parties cannot agree on one. The County is responsible for all costs associated with the impoundment.

Id.

Through this opinion and order, the Special Master discharges her duty to appoint a neutral third-party escrow agent to take and retain possession of the Voting Equipment until further court order.

II. PROCEDURAL HISTORY

A. Attempts to Agree on a Neutral Third-Party Escrow Agent

In accordance with the directives in *Fulton I*, the Special Master issued an order dated April 28, 2023, directing the parties to, *inter alia*, file a joint report advising of the status of the parties' negotiations to select a neutral third-party escrow agent no later than May 30, 2023.

The parties complied, and the Special Master received a joint status report on May 30, 2023. (Parties' First Joint Status Report, filed 5/30/2023.) Therein, the parties reported that by letter dated May 23, 2023, the Secretary and Dominion[5] had advised Fulton County of their joint proposal of Pro V&V, an entity accredited by the United States Election Assistance Commission (EAC) as a Voting System Test Laboratory (VSTL), to be appointed as the escrow agent in this matter. The status report further indicated that on May 30, 2023, the day the joint status report was due,

[5] Dominion has successfully intervened as a party in this matter. *See Fulton I*, 292 A.3d at 985 n.50.

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Fulton County had replied to the Secretary and Dominion by letter, noting a number of concerns with the appointment of Pro V&V, and offering an alternative choice, Auld & Associates Investigations. As the parties had not had the opportunity to discuss Fulton County's May 30, 2023 letter, they jointly sought an extension to submit a further status report no later than June 14, 2023. By order dated June 2, 2023, the Special Master granted the parties additional time to confer and directed a further joint status report no later than June 14, 2023.

On June 14, 2023, the parties again advised the Special Master that they had not yet agreed on an appropriate escrow agent and asked for another two-week extension to continue discussions. (Parties' Second Joint Status Report, filed 6/14/2023.) The Special Master agreed and ordered a subsequent status report no later than June 28, 2023.

The parties timely filed their third joint status report indicating that again, they were unable to agree on an escrow agent. (Parties' Third Joint Status Report, filed 6/28/2023.) The parties jointly proposed that on or before July 19, 2023, they file either (a) a joint status report indicating they reached an agreement on the escrow agent, or (b) separate requests to appoint each party's escrow agent of choice, in the event no agreement could be reached. The Special Master agreed and ordered a joint status report or separate proposals no later than July 19, 2023.

On July 18, 2023, the Secretary filed an application seeking a two-day extension of the July 19, 2023 deadline, noting that it had recently identified another entity, Insurance Evidence Solutions (IES), that could potentially serve as an alternative to Pro V&V, and requesting additional time for the parties to confer. The filing stated that Dominion agreed to the two-day extension, but Fulton County requested nine days to consider IES as an alternative proposal. The Special Master

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agreed to grant the parties nine additional days to discuss the possibility of IES serving as escrow agent, and ordered either a joint status report indicating agreement, or separate proposals, no later than July 28, 2023. On July 28, 2023, the Special Master received separate applications from the parties proposing their preferred third-party escrow agent.

The Secretary and Dominion jointly proposed that the Special Master select Pro V&V.[6] Fulton County proposed an entity called Cerberus Dynamic Solutions (Cerberus). The County requested an evidentiary hearing on the appointment of an escrow agent.

The Special Master notes that the Supreme Court's remand of the impoundment issue did not expressly contemplate an evidentiary hearing, but rather directed negotiations by the parties and for the Special Master "to appoint a neutral agent if the parties cannot agree on one." *Fulton I*, 292 A.3d at 1020; *accord id.* at 1012 (entrusting "exclusive authority to end or modify the impoundment to the judge presiding over the underlying Petition for Review after the impoundment is **completed** under the supervision of the Special Master" (emphasis added)). Although the Special Master could have appointed an escrow agent without taking additional evidence, the Special Master, in her discretion and in the interest of procedural fairness, indulged the County's request for a hearing.

B. Scheduling of Evidentiary Hearing; Prehearing Filings

Following review of the parties' separate proposals, the Special Master issued an order scheduling an evidentiary hearing for purposes of the Special Master's appointment of a neutral third-party escrow agent for Monday, August 28, 2023. In

[6] In the Secretary's July 28, 2023 proposal recommending the Special Master appoint Pro V&V, he clarified that IES had withdrawn itself from consideration to serve as escrow agent in this matter. (*See* Secy's Application to Appoint Escrow Agent, filed 7/28/2023, at 2 n.1.)

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order to most efficiently and expeditiously appoint an escrow agent to take control of the Voting Equipment, the scheduling order specifically set forth the following pre-hearing deadlines:

> 2. No later than **Monday, August 14, 2023,** the parties shall file and serve a list of all witnesses to be called at the hearing with a short offer of proof for each witness, the curriculum vitae and expert report for any expert witness, a list of exhibits, and a brief statement estimating the length of time for presentation of their respective evidence.
>
> 3. No later than **Friday, August 18, 2023,** the parties shall file and serve all prehearing applications, including, but not limited to, motions *in limine* and applications for admission *pro hac vice*, if any. Prehearing applications submitted after this deadline will not be considered. Absent a timely application for admission *pro hac vice*, counsel not admitted to practice in the Commonwealth of Pennsylvania will not be permitted to participate in the hearing or sit at counsel table.
>
> 4. The parties shall file and serve answers, if any, to all prehearing applications no later than **Monday, August 21, 2023**. Answers submitted after this deadline will not be considered.
>
> 5. No extensions or continuances of any of the above deadlines shall be granted **absent extraordinary circumstances.**

(Special Master's Order, 8/3/2023 ¶¶ 2-5 (emphasis in original).)

The parties timely filed their witness and exhibit lists on August 14, 2023,[7] and various prehearing applications by August 18, 2023. Among the timely filed applications were Fulton County's "Motion to Appear Pro Hac Vice, Consent to

[7] While Fulton County's witness list is timestamped as filed at 12:31 a.m. on August 15, 2023, the Special Master excused Fulton County's de minimis untimeliness and so considered the witness list timely filed. (*See* Special Master's Memorandum & Order on Secretary's Motion in Limine No. 1 (To Exclude the Witness Testimony Proffered by Petitioners and Preclude Vexatious, Obdurate, Dilatory, and Bad-Faith Litigation Conduct), 8/24/2023 ¶ 1.)

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Designation, and Request to Electronically Receive Notice of Electronic Filing", and Fulton County's Motion to Stay Proceedings, which are discussed in turn.[8, 9]

Thomas J. Carroll (Attorney Carroll), counsel for Fulton County, timely filed a motion seeking the admission of Russell A. Newman, Esq. (Attorney Newman), a member of the Tennessee State Bar, to appear before the Special Master in these proceedings *pro hac vice*. Due to technical defects, the Special Master denied the motion without prejudice for the County to file an amended motion for admission *pro hac vice* that conformed to the Pennsylvania Rules of Civil Procedure. (Special Master's Order, 8/21/2023.) The following day, Attorney Carroll filed an amended motion for Attorney Newman's admission, which was met by technical and substantive objections from the Secretary and Dominion. The Special Master again denied the amended motion without prejudice on the basis of continued technical

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[8] The Special Master also received the following pre-hearing applications:

a. Secretary's Application for Permission for Michael Walker to Testify Remotely Via Videoconference at the Evidentiary Hearing Scheduled for August 28, 2023; granted by order dated 8/23/2023.

b. Dominion's Objection to Fulton County's Witness List; denied by memorandum and order dated 8/24/2023.

c. Secretary's Motion in Limine No. 1 (to Exclude the Witness Testimony Proffered by Petitioners and Preclude Vexatious Obdurate, Dilatory, and Bad-Faith Litigation Conduct); granted in part and denied in part by memorandum and order dated 8/24/2023.

d. Secretary's Motion in Limine No. 2 (to Qualify Ryan Macias as an Expert in Election Technology and Security); granted by order dated 8/23/2023.

e. Secretary's Motion in Limine No. 3 (to Admit Certain Government Records into Evidence); granted by order dated 8/23/2023.

f. Fulton County's Objection to Dominion's Witness List; granted in part and denied in part without prejudice by memorandum and order dated 8/24/2023.

[9] Following review of the parties' filings, the Special Master scheduled a pre-hearing telephone conference for Wednesday, August 23, 2023, at 1:00 p.m., for the limited purpose of "discussing the necessity, if any, of a third-party escrow agent's expertise and experience specific to election security, as opposed to expertise and experience specific to the security of physical evidence held in the normal course of litigation." (Special Master's Orders, 8/21/2023, 8/22/2023.) During the pre-hearing conference, the Secretary explained his intention to establish the need for such expertise through testimony at the hearing.

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defects and indicated that she would consider the Secretary and Dominion's substantive objections to Attorney Newman's proposed admission in the event a conforming second amended motion was filed. (Special Master's Order, 8/22/2023.) On August 23, 2023, the Special Master received a technically conforming second amended motion seeking Attorney Newman's admission.

The Secretary and Dominion objected to Attorney Newman's admission, citing Pennsylvania Rule of Civil Procedure 1012.1(e), which grants a court discretion to deny admission of counsel *pro hac vice* upon a finding of good cause. Pa.R.Civ.P. 1012.1(e). The rule explains that good cause exists when "the admission may be detrimental to the prompt, fair and efficient administration of justice," or "the admission may be detrimental to legitimate interests of the parties to the proceedings other than the client whom the candidate proposes to represent[.]" *Id.* The Secretary and Dominion questioned whether Attorney Newman's admission would promote the prompt, fair, and efficient administration of justice in the instant proceedings, given his past litigation history as it relates to Dominion.[10] Dominion also raised questions surrounding Attorney Carroll's fitness to provide the supervision required of a sponsoring attorney contemplated in Rule 1012.1(d). After thoughtful consideration of both substantive arguments, the Special Master declined to find that good cause existed to deny Attorney Newman *pro hac vice* admission under the Pennsylvania Rules of Civil Procedure. The Special Master nevertheless clarified that "Attorney Carroll [] shall continue to be responsible as counsel of record for the conduct of this matter on behalf of Fulton County[,]" and that she "expects, and will require, Attorney Carroll to vigorously fulfill his duties as

[10] (*See* Dominion's Objection to Motion to Appear Pro Hac Vice of Russell A. Newman ¶ 6 (explaining Attorney Newman's involvement in a past defamation case filed against Dominion).)

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sponsor, and Attorney Newman to abide by the rules of this Court." (Special Master's Order, 8/24/2023 at 1 n.1, 2 ¶ 4.)

Fulton County also filed a timely prehearing application in the nature of a Motion to Stay Proceedings.[11] In the motion, Fulton County averred that it had filed a Petition for Writ of Certiorari in the United States Supreme Court (No. 23-96) on May 27, 2023, which challenged, *inter alia*, the Supreme Court's decision in *Fulton I* to impound the Voting Equipment with a third-party escrow agent. Fulton County asked the Special Master to stay the upcoming impoundment proceedings in order to give the United States Supreme Court the opportunity to rule on the petition. By order dated August 23, 2023, the Special Master denied the County's request to stay, noting that Fulton County failed to cite any procedural rule or authority to support its request for stay.[12] The Special Master advised that she would "proceed as directed by the Supreme Court of Pennsylvania, unless otherwise directed by the Supreme Court of the United States." (Special Master's Order, 8/23/2023.)

C. Evidentiary Hearing

The Special Master conducted a three-day evidentiary hearing, which convened at 9:00 a.m.[13] on August 28, 2023. The County immediately requested an adjournment. Attorney Newman, appearing solo on behalf of the County, advised the Special Master that Attorney Carroll had filed an emergency motion to adjourn proceedings due to an alleged injury. Attorney Newman orally explained that over

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[11] The Motion to Stay Proceedings was Fulton County's **first** request to delay the impoundment proceedings.

[12] Absent from the County's Motion to Stay Proceedings was any explanation as to why this request was filed 15 days after the Special Master scheduled the impoundment hearing. (Special Master's Order, 8/3/2023.)

[13] In an effort to receive witness testimony expeditiously, the Special Master rescheduled the evidentiary hearing to begin at 9:00 a.m., as opposed to 10:00 a.m., on August 28, 2023. (*See* Special Master's 8/23/2023 Order ¶ 1.)

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the weekend, Attorney Carroll "fell down the stairs," went to an urgent care facility, and was instructed to go to the emergency room where he was diagnosed with a broken rib and prescribed narcotic medication, "which prevents him from being able to drive." (8/28 Tr. at 8-9, 15.) The Secretary opposed the last-minute request to adjourn and asked the Special Master to proceed with the hearing as scheduled, noting (1) the presence of noticed and subpoenaed witnesses in the courtroom; (2) the County's "long history" of attempting to delay prior proceedings before the Special Master and the Supreme Court in this matter; (3) the existence of alternative counsel to appear on behalf of the County, specifically James Stein, Esq. (Attorney Stein), who remains counsel of record in this matter; and (4) the Special Master's admission of Attorney Newman *pro hac vice* on behalf of the County. (*Id.* at 10-15.)

In response, Attorney Newman insisted that Attorney Carroll's absence necessitated an adjournment, as the law requires a local sponsoring attorney to be present at all proceedings. (*Id.* at 15.) Attorney Newman also cited concerns that, without Attorney Carroll, his clients would be deprived of their counsel of choice. (*Id.* at 17.) The Special Master reviewed Fulton County's "Emergency Motion to Adjourn Proceedings," timestamped as filed at 8:01 a.m. on August 28, 2023, 59 minutes before the start of the impoundment proceedings.[14] The filing did not reference a fall down the stairs, but provided that on August 26, 2023, two days before the scheduled hearing, Attorney Carroll went to an urgent care facility complaining of severe right upper quadrant abdominal pain, and was sent to the emergency room, where he was diagnosed with a broken rib and infection and prescribed opioid medication and an antibiotic. (Fulton County's Emergency

[14] The Emergency Motion to Adjourn Proceedings was Fulton County's **second** request to delay the impoundment proceedings.

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Motion to Adjourn Proceedings ¶¶ 1-3.) The opioid medication contained warnings not to drive or operate machinery. (*Id.* ¶ 3.) In the filing, Attorney Carroll stated that he continued to be in significant pain and could not be available for the impoundment hearing, attaching in support a redacted after-visit summary from the emergency room and a doctor's note advising that he may return to work on Wednesday, August 30, 2023. (*Id.* ¶ 5, Exs. A, B.) The Emergency Motion to Adjourn Proceedings did not contain any indication of why Attorney Carroll waited until 59 minutes before the start of the evidentiary hearing to advise the Special Master and the other parties of his condition.

The Special Master heard brief oral argument on the issue of whether a *pro hac vice* attorney may proceed in a Pennsylvania court without the presence of the sponsoring attorney. Citing Pennsylvania Bar Admission Rule 301,[15] Attorney Newman argued that an attorney admitted *pro hac vice* is not authorized to act as attorney of record in the case. (8/28 Tr. at 21-23); Pa. B.A.R. 301. He also argued, more generally, that Fulton County is entitled to have Attorney Carroll, their attorney of choice who is more familiar with the proceedings, present. (8/28 Tr. at 24-25.)

The Secretary responded that Pennsylvania Rule of Civil Procedure 1012.1(d)(1)[16] more specifically addresses the issue at hand and allows a court to

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[15] Rule 301(a) provides, in relevant part:

> An attorney, barrister or advocate who is qualified to practice in the courts of another state or of a foreign jurisdiction may be specially admitted to the bar of this Commonwealth for purposes limited to a particular case. An attorney, barrister or advocate admitted pro hac vice in a case shall not thereby be authorized to act as attorney of record in the case.

Pa. B.A.R. 301(a).

[16] Rule 1012.1(d)(1) provides, in relevant part:

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excuse the attendance of a sponsoring attorney at court proceedings. (8/28 Tr. at 25-26); Pa.R.Civ.P. 1012.1(d)(1). The Secretary also noted that the Supreme Court's decision in *Fulton I* referenced this precise rule in connection with a similar scenario where Attorney Carroll sought to delay proceedings before that Court. (8/28 Tr. at 27-32); *Fulton I*, 292 A.3d at 991 n.69.[17]

The Special Master issued an order denying Fulton County's First Emergency Motion to Adjourn. (Special Master's Order, 8/28/2023.) Therein, the Special Master excused Attorney Carroll's physical presence in the courtroom in accordance with the carve-out in Pennsylvania Rule of Civil Procedure 1012.1(d)(1). (*Id.*)

> The sponsor shall enter an appearance as attorney of record in the action on behalf of the party whom the candidate seeks to represent. Upon the motion being granted, the sponsor shall remain the attorney of record for that party, and shall sign and serve, or be served with as the case may be, all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the court unless excused by the court. . . .

Pa.R.Civ.P. 1012.1(d)(1).

[17] As noted by counsel for the Secretary, the Supreme Court in *Fulton I* addressed a similar situation where Attorney Carroll filed a Motion to Adjourn Oral Argument two days before it was scheduled. In that motion, Attorney Carroll "assert[ed] emergent personal reasons that allegedly prevented him from 'prepar[ing] for oral argument . . . and/or associat[ing] other counsel as a substitute this close to the time for the presentation of oral argument.'" *Fulton I*, 292 A.3d at 991. In the accompanying footnote, the Supreme Court stated:

> Attorney Carroll had not yet informed this Court that Attorney [Stefanie] Lambert was his co-counsel, nor had he sought her admission *pro hac vice* below or in this Court. Although the rules governing *pro hac vice* representation direct that the sponsoring attorney must be in attendance at all court proceedings in connection with the representation, that **requirement is qualified by a carve-out** when sponsoring counsel is "excused by court." *See* Pa.R.Civ.P. 1012.1(d)(1). This is not to say that we would have granted such a request. But, had Attorney Lambert been admitted *pro hac vice*, **it would have given Attorney Carroll a good-faith alternative to filing a disfavored, last-minute request for a continuance reflecting no contingency planning.**

Id. at 991 n.69 (emphasis added). Thus, the Supreme Court contemplated the possibility of *pro hac vice* counsel appearing without sponsoring counsel in situations like the one *sub judice*.

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Nevertheless, the Special Master continued the hearing to 1:00 p.m. on that same day to allow Attorney Newman time to prepare and to select one of the following options: (1) for Attorney Carroll to appear via WebEx in order to accommodate his driving restriction; (2) for Attorney Stein to appear in person or via WebEx; or (3) for any other attorney licensed to practice in the Commonwealth of Pennsylvania to enter an appearance and appear as counsel before the Special Master. (*Id.*)

Fulton County chose the first option, and Attorney Carroll appeared remotely, audio only, via WebEx when the hearing reconvened at 1:00 p.m.[18] Immediately, Attorney Newman orally moved the Special Master for a stay of the proceedings[19] "to permit the Petitioners to appeal [the Special Master's Order denying the First Emergency Motion] to the Pennsylvania Supreme Court."[20] (8/28 Tr. at 43-44.) The Special Master denied Attorney Newman's oral request from the bench, and the Secretary proceeded with his first witness at approximately 1:56 p.m., nearly five hours after the hearing was originally scheduled to begin.[21] (*Id.* at 45-46.)

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[18] At the outset of the hearing and continuing throughout, Attorney Carroll regularly interjected in his remote capacity to advise the Special Master that the medication he was taking affected his ability to focus and prevented him from "functioning at a level that would be appropriate [] to represent clients." (8/28 Tr. at 40, 41.) The Special Master notes that she proceeded with the hearing over these objections in order to carry out her duty to appoint an escrow agent as directed by the Pennsylvania Supreme Court in *Fulton I*, **and only after offering several options, including the appearance of other counsel of record**, to the County. (*See* Special Master's 8/28/2023 Order; 8/23 Tr. at 41.)

Moreover, the Special Master notes that while Attorney Carroll purported to be suffering from side effects of his medication, he actively participated in the hearing, (*see generally*, 8/28 Tr.), took a call from "another attorney on another case" due to a filing deadline, (*id.* at 197), and managed to file a 27-page "Emergency Application for a Stay Upon Special Master's Denial of Same" in the Pennsylvania Supreme Court by 3:40 p.m. *See infra* pp. 15-16, n.23. For these reasons, the Special Master is satisfied that Fulton County was not effectively deprived of their right counsel, but rather chose Attorney Carroll to represent them despite his medical condition.

[19] Attorney Newman's oral request for stay was Fulton County's **third** request to delay the impoundment proceedings.

[20] To date, Fulton County has not filed an appeal of the Special Master's August 28, 2023 Order.

[21] The testimony and evidence presented at the hearing are summarized in Part III, *infra*.

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As the Secretary's presentation of witnesses continued, during the testimony of Commissioner Paula Shives, Attorney Carroll remotely interrupted the proceedings, saying "[c]an you hear me Ste[f]anie?" (*Id.* at 237.) When the Special Master later asked Attorney Carroll to identify the person to whom he was speaking, Attorney Carroll responded that he asked his mother, who was in the same room, "can you hear what they're saying about Ste[f]anie." (*Id.* at 243.) He further explained that he thought his remote connection was muted and he "was actually just venting." (*Id.*)

At 3:40 p.m. Fulton County filed an "Emergency Application for a Stay Upon Special Master's Denial of Same" in the Pennsylvania Supreme Court, renewing its request for stay that the Special Master denied by order dated August 23, 2023.[22] Therein, the County sought an emergency stay of the impoundment proceedings, which were, at the time of the filing, underway. Notably, the County did not base its renewed request for stay on Attorney Carroll's medical condition, but rather alleged it would suffer irreparable harm "should tax funds be utilized to hold a hearing to place its election equipment in the custody of a third-party vendor which will result in the data on the equipment being deleted or destroyed." (Emergency Application for a Stay Upon Special Master's Denial of Same at 25.) The County asked the Pennsylvania Supreme Court to stay the evidentiary hearing pending a decision from the United States Supreme Court on Fulton County's Petition for Writ

[22] The Emergency Application for a Stay Upon Special Master's Denial of Same was Fulton County's **fourth** request to delay the impoundment proceedings, and the first that was directed to the Pennsylvania Supreme Court.

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of Certiorari challenging the Pennsylvania Supreme Court's decision in *Fulton I.* (*Id.*)[23]

On August 29, 2023, the day prior to the scheduled second hearing day, Fulton County filed an "Emergency Application for Reconsideration Regarding Emergency Application for Stay"[24] asking the Pennsylvania Supreme Court for an immediate ruling on its August 28, 2023 emergency application, asserting that relief ignored is the equivalent of relief denied.

The Pennsylvania Supreme Court did not act, and the hearing reconvened on Wednesday, August 30, 2023, at 9:00 a.m. at which Attorney Carroll appeared in person. Near the conclusion of this second day, for purposes of scheduling, the Special Master asked Fulton County to identify the witnesses it planned to call on the final day of the hearing. Attorney Newman responded that it planned to call Joseph J. Sabia and Benjamin Cotton, but also indicated that the County "ha[d] some people from the EAC who have been subpoenaed as well as the Dominion [Chief Executive Officer (CEO)] . . . ." (8/30 Tr. at 458.)[25] This proffer prompted

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[23] While Fulton County styled the filing to the Pennsylvania Supreme Court as an "emergency" the Special Master emphasizes that the filing did not reference Attorney Carroll's medical condition, but instead repeated the same argument for stay that the Special Master denied by order issued August 23, 2023, *i.e.*, that the County will suffer harm if the impoundment hearing proceeds before the United States Supreme Court has the opportunity to rule on the County's Petition for Writ of Certiorari.

It is unclear why this request was made on an emergency basis, when the County filed for certiorari in the United States Supreme Court on May 27, 2023, knew that an impoundment hearing was proceeding as of August 3, 2023, and was previously denied a stay on this requested basis on August 23, 2023.

[24] The Emergency Application for Reconsideration Regarding Emergency Application for Stay was Fulton County's **fifth** request to delay the impoundment proceedings, and the second that was directed to the Pennsylvania Supreme Court.

[25] On August 18, 2023, Dominion filed an Objection to Fulton County's Witness List seeking to strike the identification of, and preclude all testimony by, John Poulos, Founding President and CEO of Dominion. The filing noted that Fulton County had not served a notice to attend on counsel for Dominion requiring Mr. Poulos to appear, but asked the Court to quash any

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objections from the Secretary and Dominion regarding whether the County had properly served notices to appear and/or subpoenas on the EAC witnesses and Dominion's CEO in accordance with the Special Master's August 25, 2023 service deadline and in conformance with the service requirements set forth in the Pennsylvania Rules of Civil Procedure. The Special Master asked Fulton County's counsel to provide proof of timely and proper service of said notices to attend and subpoenas, but Attorney Carroll, citing his health situation, advised he did not have that information with him and could only address that issue the following morning. (*Id.* at 463.) Accordingly, the Special Master advised the parties that the witness issue would be dealt with preliminarily the following day. (*Id.* at 464-65.)

The third and final day of the hearing convened on August 31, 2023, at 9:00 a.m., and began with an oral motion to continue proceedings from Attorney Newman, representing that his wife had gone into labor.[26] (8/31 Tr. at 8.) Attorney Newman maintained that a continuance was necessary as he had prepared to conduct direct examination of the County's witnesses scheduled to testify that day and Attorney Carroll was not prepared to do the same in his absence.[27] (*Id.* at 9.)

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future notice that is properly served. By memorandum and order dated August 24, 2023, the Special Master denied Dominion's request without prejudice for Dominion to challenge any properly served notice to attend by appropriate motion. (*See* Special Master's Memorandum & Order, 8/24/2023.) On August 25, 2023, Dominion filed a separate Application to Quash, averring that no notice to attend had yet been served on counsel for Dominion and requesting quashal of "any Notice to Attend" that might be served on Dominion after the close of business on August 25, 2023, regarding Mr. Poulos's "participation in the August 28 hearing." Dominion Application to Quash at 1 & Wherefore Clause. At the end of the evidentiary hearing, the Special Master observed that no notice to attend had apparently been served on Dominion, and no motion to compel compliance with such notice was ever filed. (*See* 8/31 Tr. at 342-43; *infra* n.33.) Accordingly, the Special Master will dismiss Dominion's Application to Quash as moot.

[26] Attorney Newman's oral request for continuance was Fulton County's **sixth** request to delay the impoundment proceedings.

[27] In response, the Secretary noted, first, that it was learning of Attorney Newman's wife's labor simultaneously with the Special Master, and second, that on the first day of the hearing,

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Alternatively, Attorney Newman proposed he leave the courtroom and conduct direct examination of the County's witnesses via video. (*Id.*) He also clarified that while he had a flight home scheduled for the following morning, September 1, 2023, he had not yet made any immediate travel arrangements. (*Id.* at 15-17.)

After congratulating Attorney Newman and considering the prejudice of adjourning the hearing on its final day, the Special Master provided the County with four options: (1) for Attorney Newman to continue until required to leave, at which point Attorney Carroll could proceed on behalf of the County; (2) for Attorney Stein, who remained counsel of record for the County, to appear and assist Attorney Carroll in Attorney Newman's absence; (3) for Attorney Newman to appear remotely, if possible, during his travel home; or (4) for the County to rest in the event it did not feel comfortable continuing with the hearing. (*Id.* at 18-19.)

The County chose to proceed with Attorney Newman. At this same time, the County sought permission for Attorney Carroll to leave the courtroom for additional time to prepare his argument on whether the County had properly served a notice to attend on Dominion's CEO, and subpoenas on the EAC witnesses. The Special Master granted the request and excused Attorney Carroll from the Courtroom. Attorney Carroll never ultimately argued the issue, as Attorney Newman orally requested permission for Attorney Carroll to be excused mid-morning to seek medical attention, which the Special Master granted. (*Id.* at 100.) The Special Master later discovered that around the same time Attorney Carroll had been excused due to his purportedly worsening medical condition, he filed "Fulton County's Second Emergency Motion for Reconsideration Regarding Order on Fulton

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Attorney Newman asserted he could not proceed sans Attorney Carroll. Now, Fulton County's counsel was offering the "diametrical representation[]" that Attorney Carroll could not proceed sans Attorney Newman. (8/31 Tr. at 10.)

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County's Emergency Motion" in the Pennsylvania Supreme Court. (8/31 Tr. at 170-71.)[28]

Later that afternoon, following the cross-examination of the County's witness, Mr. Sabia, Attorney Newman again requested a stay of proceedings "to substitute escrow agents." (*Id.* at 288.)[29] The Special Master denied the oral request for stay, and the hearing proceeded.

At the conclusion of the hearing, the Special Master read into the record an order from the Pennsylvania Supreme Court issued that afternoon, which provided as follows:

> AND NOW, this 31st day of August, 2023, County of Fulton's Emergency Application for a Stay Upon Special Master's Denial of Same; Emergency Application for Reconsideration Regarding Order on Fulton County's Emergency Application for a Stay Upon Special Master's Denial of Same; and 2nd Emergency Motion for Reconsideration Regarding Order on Fulton County's Emergency Motion for a Stay Upon Special Master's Denial of Same are DENIED.

(*Id.* at 349-50 (quoting *County of Fulton v. Secretary of the Commonwealth*, (Pa., No. 3 MAP 2022, filed 8/31/2023).) Before adjourning, the Special Master granted

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[28] The Second Emergency Motion for Reconsideration Regarding Order on Fulton County's Emergency Motion was Fulton County's **seventh** request to delay the impoundment proceedings, and the third that was directed to the Pennsylvania Supreme Court.

[29] Attorney Newman's oral request for stay was Fulton County's **eighth** request to delay the impoundment proceedings.

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the County's request to file a closing statement on or before Tuesday, September 5, 2023.[30, 31]

On September 5, 2023, Fulton County filed "Closing Arguments and Objections" reasserting its position that Pro V&V would be unfit to serve as escrow agent while continuing to promote its proposed agent, Cerberus. The County also represented that it had subpoenaed Dominion's CEO and the EAC witnesses, but that they refused to appear. (Closing Arguments and Objections at 6-7.) Though the County did not provide evidence that it had in fact subpoenaed Dominion's CEO,[32] the County attached a letter from the EAC indicating that the EAC had received subpoenas via mail on Monday, August 28, 2023, but that the EAC would not comply with said subpoenas as they were improperly served. (*Id.*, Unmarked Ex. (EAC E-mail).) In its conclusion, the County stated:

> without the compelled testimony, Fulton County will be deprived of its rights to substantive and procedural due process because it will be deprived of the right to examine these witnesses, whose testimony bears directly on the propriety of having the conflicted party, Pro V&V take control and custody of the Dominion Voting Machines.

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[30] This request was granted largely in response to Attorney Newman's statement that he needed to discuss whether his clients continued to propose Cerberus as an appropriate escrow agent following the cross-examination of Mr. Sabia. *See infra* pp. 42-43. The Special Master also permitted the other parties to file closing statements, but clarified they were under no obligation to do so.

[31] The Special Master notes, finally, that the County filed an application for stay in the United States Supreme Court on August 31, 2023. (No. 23-96, filed 8/31/2023.) The United States Supreme Court denied Fulton County's application for stay on September 12, 2023. (*Id.*, filed 9/12/2023.)

[32] The County baldly asserts that "Dominion alleges they did not receive service. But they did receive the subpoena." (Closing Arguments and Objections at 7.)

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(*Id.* at 9.) Notably, the County never filed a request or moved orally for the Special Master to compel Dominion's CEO or the EAC witnesses to appear,[33] and failed to adduce any evidence that those witnesses had been properly served with subpoenas.

D. Regarding County's Dilatory Conduct

Before summarizing the testimony and documentary evidence adduced at the hearing, the Special Master must address her deep concerns regarding the County's attorneys' continuous pattern of dilatory conduct throughout the impoundment proceedings. As detailed above, the County moved, either orally or in writing, to delay the impoundment proceedings no fewer than **eight** times. These repeated requests, which were regularly accompanied by varying and sometimes conflicting justifications, required the Special Master to take numerous recesses, delayed witness testimonies, and impaired the overall expediency and efficiency of the proceedings.

Unfortunately, this conduct is not novel to the impoundment proceedings, but has remained consistent in this litigation since the undersigned's appointment as Special Master. The Special Master finds this continued behavior particularly disconcerting, as the Pennsylvania Supreme Court sanctioned the County and Attorney Carroll for a nearly identical pattern of behavior that took place during the contempt proceedings before the Special Master in November 2022. *See Fulton I*, 292 A.3d at 979 ("Fulton County and its various attorneys have engaged in a sustained, deliberate pattern of dilatory, obdurate, and vexatious conduct and have

[33] On the final day of the hearing, Attorney Newman orally advised that it had "come to [his] attention that a motion to compel has been filed against Dominion and the Secretary to produce their witnesses." (8/31 Tr. at 341.) Attorney Newman did not present a copy of the alleged motion and admitted he had not seen it, citing his lack of access to the Court's electronic filing system; he clarified that it was "[his] understanding that a motion to compel was filed." (*Id.* at 324.) No motion to compel was ever docketed.

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acted in bad faith throughout these sanction proceedings. Taken as a whole, this behavior prompts us to sanction both the County and Attorney Carroll."). Notwithstanding the Supreme Court's lengthy admonishment of Attorney Carroll's behavior and the imposition of joint and several responsibility for the opposing parties' counsel fees during the period for which Attorney Carroll shared responsibility for the misconduct, *see Fulton I*, 292 A.3d at 1013-19, the County, led again by Attorney Carroll, has persisted in such behavior.

In the face of this unyielding litigation conduct, the Special Master continually sought to provide the County with procedural fairness and the opportunity to be heard by providing the County's attorneys with numerous options in order to proceed with its case through the conclusion of the hearing. These options ranged from permitting last-minute remote appearances, to allowing the County to call on alternative counsel of record, and even retaining new counsel. Because of these accommodations, and despite the County's attorneys' conduct, the impoundment hearing proceeded mostly as scheduled, and the Special Master is satisfied that the evidence of record enables her to discharge her duty to appoint a neutral third-party escrow agent. The Special Master, however, is left with no choice but to explicitly admonish Attorney Carroll for his continued bad-faith litigation conduct and warn Attorney Newman that he proceeds under the sponsorship of Attorney Carroll in these proceedings at his own peril.

III. TESTIMONY AND EVIDENCE

Ryan Macias

The Secretary first presented the testimony of Ryan Macias, whom the Secretary offered and qualified as an expert in the fields of election technology and

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security.[34] Mr. Macias is the owner and founder of RSM Election Solutions LLC. (8/28 Tr. at 85.) Mr. Macias served as Senior Election Technology Analyst for the California Secretary of State from 2006 to 2016, in which role he assisted with the development and promulgation of regulations governing the certification of companies authorized to hold voting equipment in escrow. (Ex. 1 appended to Sec'y Ex. 5 (Mr. Macias's Curriculum Vitae); 8/28 Tr. at 94-97.) Mr. Macias has also held positions with the EAC, including as its Acting Director of Testing and Certification. (Mr. Macias's Curriculum Vitae at 1-2.) He explained that a VSTL is an entity accredited by the EAC to test voting systems against EAC standards. (8/28 Tr. at 90-91.) Mr. Macias participated in producing the VSTL Program Manual, which contains the standards applicable to the EAC's accreditation of VSTLs. (*Id.* at 93; *see also* Sec'y Ex. 11 (VSTL Program Manual, version 2.0, May 31, 2015).)

Mr. Macias described the process by which the EAC accredits and monitors VSTLs. An applying entity must first obtain accreditation from the International Organization for Standardization (ISO) and the National Institute of Standards and Technology (NIST) regarding laboratory testing and calibration generally, which are not specific to election technology. (8/28 Tr. at 104-06.) Then, the entity applies for accreditation by the EAC. (*Id.*) Because VSTLs take possession of and test voting equipment on behalf of manufacturers, the applicable EAC standards specifically require impartiality. (*Id.* at 113-14). The EAC's VSTL program standards prohibit financial conflicts of interest (both for the entity as a whole and for its employees) and perceived conflicts of interest; they also prohibit VSTLs from employing felons or those convicted of offenses involving fraud, misrepresentation,

[34] (*See* Special Master's 8/23/23 Order (granting the Secretary's Motion in Limine No. 2 to qualify Mr. Macias as an expert and admit his prior testimony offered in the November 2022 contempt hearing); *see also* Sec'y Ex. 5 (July 28, 2023 Affidavit of Ryan Macias).)

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or deception. (*Id.* at 116-17; Sec'y Ex. 11 (VSTL Program Manual) §§ 2.5-2.8, 2.19.). VSTLs are also accredited for technical competence and the environmental controls of their facilities. (8/28 Tr. at 108.)

Mr. Macias further explained that the ISO, NIST, and the EAC periodically audit accredited entities, including through unannounced site visits, to ensure continued compliance with the accreditation standards. (*Id.* at 106-09, 118-19.) Mr. Macias opined that Pro V&V's EAC accreditation for impartiality directly bears on its candidacy as a neutral escrow agent as ordered by the Supreme Court. (*Id.* at 113-14.) He stated that businesses not formally accredited would not be subject to ongoing monitoring for impartiality as VSTLs are. (*Id.* at 115.)

Mr. Macias testified that Pro V&V is one of two EAC-accredited VSTLs and was first accredited in 2015. (*Id.* at 100; *see also* Sec'y Exs. 2 & 7 (Pro V&V Certificates of Accreditation, U.S. Election Assistance Comm'n, issued Feb. 1, 2021, and Dec. 21, 2022, respectively.) During his time as an EAC official, Mr. Macias conducted audits of Pro V&V, including on-site inspections of its facility, to ensure its compliance with the EAC's accreditation requirements. (8/28 Tr. at 98-99.)

Mr. Macias had reviewed the Supreme Court's opinion in *Fulton I* requiring impoundment of the Voting Equipment. (*Id.* at 85.) In his expert opinion, Pro V&V is "very qualified" to serve as the escrow agent for several reasons. (*Id.* at 120-25.) First, Pro V&V's business requires that it remain accredited and audited for impartiality; it thus has a strong business interest in avoiding any violation of impartiality standards that would jeopardize its accreditation. (*See id.* at 125-26.) Second, Pro V&V has the technical capability to ensure proper environmental storage conditions for the Voting Equipment, including appropriate temperature and

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humidity levels that prevent corrosion or loss of data. (*Id.* at 129-34.) Third, Mr. Macias opined, Pro V&V has experience in maintaining and documenting the chain of custody of electronic voting equipment. (*Id.* at 134-36.) This requires specialized knowledge regarding various seals, locks, and serial numbers present on the Voting Equipment, which are designed to prevent or detect tampering; Pro V&V has the requisite specialized knowledge to understand and properly address those protective measures. (*Id.* at 136-38.) In order to establish a baseline condition of the Voting Equipment for purposes of recording a chain of custody during escrow, Pro V&V would perform an initial inventory of the Voting Equipment and its locks and seals, determining which seals, if any, are missing or have been broken. (*Id.*) The relevant locks and seals are analog devices, so the Voting Equipment would not need to be powered on, plugged in, or connected to any external electronic devices during the initial inventory or the remainder of the court-ordered impoundment. (*Id.* at 86-87, 137-38.)

Regarding Pro V&V's cost estimate for the escrow, Mr. Macias explained that that Voting Equipment would require a room about 10 or 12 feet square for storage. (*Id.* at 150.) Based on his prior experience with storage prices for much smaller pieces of voting equipment, Mr. Macias opined that Pro V&V's monthly storage cost estimate was reasonable and significantly below what he would expect given the size of the Voting Equipment. (*Id.* at 147-50.)

Finally, Mr. Macias stated that he was not familiar with Cerberus until the County proposed it as an escrow agent. (*Id.* at 150-51.) Mr. Macias had reviewed Cerberus's website and all other information the County filed in support of its proposal, and he opined that Cerberus is not qualified to serve as escrow agent. (*Id.* at 151-53.) Mr. Macias explained that Cerberus's experience appears not to relate

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to election technology, and he noted that the Voting Equipment is designated as critical infrastructure technology by the U.S. Department of Homeland Security, which in his opinion requires that any escrow agent have specialized expertise with election technology. (*Id.* at 153-59.)

On cross-examination, Mr. Macias conceded that if a VSTL or its employees had a financial interest in a voting system manufacturer, that would create a conflict of interest that could undermine the VSTL's independence. (*Id.* at 181-82.) He elaborated that VSTLs are monitored for impartiality to ensure they uniformly apply the EAC's voting system standards to manufacturers, without favoring a manufacturer's interests. (*Id.* at 251-52.) He acknowledged that Pro V&V's facility is located in Alabama, and that storage closer to Pennsylvania would be more convenient, but only if the Voting Equipment required access on an ongoing basis during the impoundment. (*Id.* at 188, 191-92.)

Mr. Macias also explained that Pro V&V's EAC accreditation was originally issued on February 24, 2015, and that that accreditation remains effective until revoked by a vote of the EAC pursuant to Section 231 of the Help America Vote Act of 2002 (HAVA), 52 U.S.C § 20971(c)(2).[35] (*Id.* at 257-62.) However, Mr. Macias acknowledged that Section 3.6.1.3 of the 2015 VSTL Program Manual states that EAC accreditations expire after a two-year period, and that a previously issued certificate of accreditation for Pro V&V indicated that it was effective only until February 24, 2017, two years from the date of issuance. (8/28 Tr. at 257-69*; see also* Sec'y Ex. 2 at 2.) Mr. Macias descried this conflict between HAVA and the VSTL Program Manual as an "administrative error." (8/28 Tr. at 266-69). He

[35] It states, in relevant part: "The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the [EAC]." 52 U.S.C. § 20971(c)(2).

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explained that the EAC later clarified that the manual's imposition of a two-year effective period was inconsistent with HAVA, and the EAC considered Pro V&V to have always been accredited and in good standing with the EAC since its initial accreditation in 2015. (*Id.* at 262, 275, 289-92.)

On redirect examination, Mr. Macias opined that the impoundment would require the ongoing presence of persons nearby the secure location containing the Voting Equipment, in order to detect and prevent unauthorized access to the Voting Equipment. (*Id.* at 320-22.) Maintenance of the chain of custody for the Voting Equipment during impoundment would require the escrow agent to have experience handling voting technology, so that it could monitor whether tamper-evident seals on the Voting Equipment remained intact; however, securing the room containing the Voting Equipment and monitoring access to that room could obviate the need for any access to the Voting Equipment other than by order of Court. (*Id.* at 323-25.)

Eldon Martin

The Secretary next[36] presented the testimony of Eldon Martin, a Senior IT Support Technician for Elect IT Solutions, which provides IT services to the County under contract. (8/30 Tr. at 13-17.) Mr. Martin was employed by the County as its Director of Technology from 2008 to 2014; upon leaving County employment and continuing to the present, he served essentially the same functions for the County under its contract with his employer. (*Id.*) He has performed technical work on the County's voting machines, including employee training and logic and accuracy testing. (*Id.* at 17-18.) In providing election-related IT services to the County, Mr.

[36] The Secretary presented the testimony of Fulton County Commissioner Paula J. Shives on August 29, 2023, during a break in the cross-examination of Mr. Macias, prior to Mr. Martin's testimony that began on August 30, 2023, in order to accommodate Commissioner Shive's schedule. Commissioner Shives's testimony is summarized *infra* along with that of the other Commissioners, who testified on August 30, 2023.

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Martin has communicated with the Commissioners, Director of Elections Patti Hess, other County employees and employees of his firm, voting system manufacturers, and personnel from the Pennsylvania Department of State. (*Id.* at 21-30.)

Mr. Martin testified that he was not informed of the July 2022 inspection of the Voting Equipment by Speckin Forensics when it occurred; he first became aware of it several months prior to testifying while reading a news article. (*Id.* at 41-43.) He testified that he did not become aware of the Supreme Court's order requiring impoundment of the Voting Equipment until the evidentiary hearing began on August 28, 2023. (*Id.* at 63-64.) He stated he is not familiar with Cerberus or Mr. Sabia, its owner, and that he had no communications with County personnel regarding Cerberus or Mr. Sabia until August 29, 2023, the day before Mr. Martin's testimony. (*Id.* at 49-57.) During that conversation on August 29, he discussed the storage requirements of the Voting Equipment with Ms. Hess and another employee of his firm. (*Id.*) Based on that conversation, Mr. Martin stated his belief that neither Ms. Hess nor Mr. Martin's coworker knew the identity of the entity the County had proposed as escrow agent prior to the commencement of the August 28, 2023 evidentiary hearing. (*Id.* at 62-63.)

Mr. Martin stated he did not know who first suggested Cerberus, or whether the Commissioners had discussed Cerberus. (*Id.* at 64-66.) He testified that, based on his past experiences working with the County's voting machines, it would be possible that he would have a role in transferring the Voting Equipment to an escrow agent, but no county personnel had communicated with him about that role. (*Id.* at 66-67.) Mr. Martin searched his email records for documents responsive to the Secretary's subpoena but found none. (*Id.* at 48-49.)

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Robert Walker

The Secretary next presented the testimony of Robert Walker, Pro V&V's Program Manager.[37] (8/30 Tr. at 82-83.) Mr. Walker oversees all of Pro V&V's projects and engineers, was primarily responsible for its proposal to provide the impoundment services at issue here, and had reviewed the Supreme Court's opinion requiring impoundment. (*Id.* at 83-92.) Mr. Walker testified that, if Pro V&V were appointed as escrow agent, he would oversee the escrow services, and Pro V&V would never power on, or connect external devices to, the Voting Equipment. (*Id.* at 92-93.)

Mr. Walker stated that he is familiar with the Voting Equipment, which consists of 15 Image Case X ballot-marking device components, 2 Image Cast Central components, and 3 Election Management System components. (*Id.* at 93-95.) He had reviewed the agreement between Dominion and the County that identifies the Voting Equipment, which was admitted into evidence. (*Id.* at 96-97; *see* Sec'y Ex. 34.01.)

Mr. Walker explained that, if Pro V&V were selected, two Pro V&V employees would drive to Fulton County to collect the Voting Equipment, record the serial numbers and photograph it, securely package it, and then drive it directly to Pro V&V's sole facility in Huntsville, Alabama, without making other stops. (8/30 Tr. at 97-98.) Pro V&V is familiar with the location of the various seals, locks, and serial numbers on the Voting Equipment, as well as the packaging requirements to transport it safely. (*Id.* at 103-04.) Pro V&V would store the Voting Equipment in a secure laboratory at its facility, within a single, dedicated room that would

[37] Mr. Walker testified remotely via WebEx video conference. *See* Special Master's 8/23/23 Order (granting Secretary's application requesting leave to present Mr. Walker's testimony remotely).

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contain no other items. (*Id.* at 104-05.) The building is secured with badge-access doors, interior and exterior security cameras, and interior locked doors to the laboratories within the facility. (*Id.* at 105-06.) The facility's HVAC system is designed to monitor and maintain precise control over the temperature and humidity in each room. (*Id.* at 106-07.) Pro V&V could limit access to the secure room containing the Voting Equipment to a single Pro V&V employee; at least one employee would need access in case of a security breach, act of God, water leak, fire, or battery leak from the Voting Equipment itself. (*Id.* at 108-112.)

Mr. Walker testified that Pro V&V would maintain the chain of custody for the Voting Equipment using a digital record that could be shared with the parties and the Court, as well as a backup physical copy. (*Id.* at 112-14.) He stated that, if the Court were to order any further testing of the Voting Equipment, Pro V&V has the capability to host such testing at its facility without the need to move the Voting Equipment. (*Id.* at 114-15.)

Regarding impartiality, Mr. Walker stated that NIST and the EAC audit Pro V&V for impartiality in order to minimize conflicts of interest. (*Id.* at 116-17.) If a problem occurs during testing, Pro V&V informs the manufacturer and includes the problem in its report, but it does not assist the manufacturer. (*Id.*) Mr. Walker confirmed that Pro V&V is periodically audited by NIST and the EAC for impartiality. (*Id.* at 116-17.)

Regarding cost, Mr. Walker stated that Pro V&V would charge $6,640 for pickup of the Voting Equipment, which includes the employees' time traveling to and from Fulton County. (*Id.* at 118-19.) The same charge would apply when Pro V&V returns the Voting Equipment to Fulton County once the impoundment ends. (*Id.*) Pro V&V would charge a storage fee of $850 per month. (*Id.* at 120.; *see also*

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Sec'y Ex. 43 (Pro V&V's charges for escrow services).) Pro V&V will continue to honor those cost estimates, which were disclosed during the parties' negotiations in May 2023 and have remained unchanged. (*See* 8/30 Tr. at 120; Secretary's Application to Appoint Escrow Agent, filed July 28, 2023, Ex. 1.; Sec'y Ex. 43.)

On cross-examination, Mr. Walker described Pro V&V's facility as comprising 11 separate laboratories within a single building, each laboratory being independently locked. (8/30 Tr. at 133-34.) Pro V&V leases the real property for its facility from Pro Cog LLC, a distinct corporate entity owned by several Pro V&V employees or officers including Mr. Walker. (*Id.* at 129-32.) Pro V&V has 12 employees, whom Mr. Walker identified by name. (*Id.* at 135, 139-40.) Mr. Walker stated that employees of Dominion have been present in Pro V&V's facility and accessed electronic voting machines therein, though not during an active test on the machines. (*Id.* at 140-43.) Mr. Walker conceded that manufacturers' employees—including employees of Dominion—are permitted to access voting machines to address errors during testing at Pro V&V's facility, provided that testing is halted during their access. (*Id.* at 148-51.) Pro V&V sometimes contacts a manufacturer when its machine fails a test to allow its employees to correct the error, which is permitted per Pro V&V's testing protocols. (*Id.* at 153-55.)

Mr. Walker conceded that Clay Parikh performed security testing on voting machines within Pro V&V's facility a single time in 2015 or 2016. (*Id.* at 144-48.) At the time of the testing, Mr. Parikh worked for a "temp agency" and was not a Pro V&V employee. (*Id.* at 146.) The entity that employed Mr. Parikh at the time was not accredited by the EAC. (*Id.* at 261.)

Mr. Walker explained that voting equipment manufacturers, such as Dominion, contract with and pay VSTLs for testing; the VSTL submits a testing

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report and recommendation to the EAC regarding certification of the equipment. (*Id.* at 178-80, 182-87.) The price of the contract varies with the size and complexity of the voting system being tested. (*Id.* at 186-87.) Pro V&V currently has a testing contract with Dominion and has had other recent contracts with Dominion. (*Id.* at 189-90.) Mr. Walker identified six different election manufacturers with which Pro V&V does business regarding EAC certification, but he was not familiar enough with Pro V&V's finances to estimate the amount of revenue Pro V&V derives from its contracts with Dominion specifically.[38] (*Id.* at 232, 227-30, 237-38.) None of Pro V&V's employees has previously been employed by Dominion. (*Id.* at 256.)

Mr. Walker acknowledged that the VSTL Program Manual provides that EAC accreditation is valid for a period of two years only, but explained Pro V&V's belief that it retained continued good standing with the EAC notwithstanding the manual's language, such that its accreditation has never lapsed. (*Id.* at 292-96.)

On redirect examination, Mr. Walker testified that it would be possible to install a security camera within the room where the Voting Equipment would be kept, and store the physical key to that room in a lockbox to which only a single Pro V&V employee would have access. (*Id.* at 305-07.) He stated that all activities by Dominion employees at Pro V&V's facility were conducted in accordance with EAC policies. (*Id.* at 307.) He also stated that the amount that manufacturers pay Pro V&V pursuant to testing contracts does not depend upon the results of the testing or on whether Pro V&V recommends certification to the EAC. (*Id.* at 308-09.)

[38] The Special Master sustained a joint objection by Dominion and the Secretary to questions asking Mr. Walker to estimate the amount of revenue Pro V&V derives from its contracts with Dominion, on the basis that Mr. Walker testified he lacks a foundation to answer those questions. (8/30 Tr. at 227-30.)

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Patricia Hess

The Secretary presented the testimony of Patricia K. Hess, Election Director for the County. (8/30 Tr. at 318.) Ms. Hess stated that, as the person responsible for running the County's elections, she is aware of the location of the Voting Equipment at all times, and oversees logic and accuracy testing and poll worker training regarding the Voting Equipment. (*Id.* at 319.) Ms. Hess testified that the Voting Equipment has been stored in several different rooms since the 2020 General Election and is now contained in a locked storage room. (*Id.* at 328-32.) Ms. Hess produced the following documents in accordance with the subpoena the Secretary served on her,[39] which documents the Special Master admitted into evidence: a "Sign in Sheet to Locked Room" recording who had access to the room in which the Voting Equipment was stored (Sec'y Ex. 47); a portion of a ledger titled "Voting Equipment," which Ms. Hess explained she created to make notes regarding access to the Voting Equipment (Sec'y Ex. 48); and a signed document regarding access to the Voting Equipment that was planned for January 14, 2022 (Sec'y Ex. 49). (*See* 8/30 Tr. at 338-59.)

Ms. Hess has served as the County's Director of Elections since 2020. (*Id.* at 361.) She had not reviewed the *Fulton I* decision and only became aware of it through reading the *Fulton County News*. (*Id.* at 367-68.) She had never heard of Speckin Forensics (which unlawfully inspected the Voting Equipment in July 2022) until it was mentioned during the instant impoundment hearing, (*id.* at 359-60), and also had never heard of Cerberus or Mr. Sabia prior to the hearing. (*Id.* at 361.) She previously discussed the impoundment proceedings with Mr. Martin, but they did not discuss Cerberus because they did not know of it. (*Id.* at 366-67.) Ms. Hess

[39] The Special Master notes that the County did not file any motion to quash or for a protective order in response to the subpoena served on Ms. Hess.

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testified she has not had any other communications regarding the impoundment arrangement. (*Id.* at 369.) No County officials or personnel had informed Ms. Hess as to whether she would be involved in the transfer of the Voting Equipment to the appointed escrow agent. (*Id.* at 370-71.)

Commissioner Shives

The Secretary also presented the testimony of the three Fulton County Commissioners, beginning with Commissioner Paula J. Shives.[40] She testified that, to her knowledge, Michigan Attorney Stefanie Lambert (Attorney Lambert)[41] was still representing the County in this matter. (8/28 Tr. at 222.) Commissioner Shives was aware that Attorney Lambert had been recently indicted but did not know the

[40] At the outset Commissioner Shives's testimony, counsel for the County stated that it appeared Commissioner Shives had communicated directly with counsel for the Secretary, and counsel for the County insisted they must speak with Commissioner Shives prior to her testimony regarding those communications. (8/28 Tr. at 170-71, 194-95, 199-201.) Counsel for the Secretary responded that Commissioner Shives had approached him in the courtroom regarding her availability to testify on later dates, which he communicated to the Special Master. (*Id.* at 195.) Upon the Special Master's inquiry, Commissioner Shives stated she felt no need to speak to Attorney Carroll before testifying, and that Attorney Carroll "has not acted as he is my attorney before." (*Id.* at 203.) Later, Commissioner Shives testified that she was not under the impression that Attorney Newman represented her in either a personal or official capacity, and that to her knowledge the Commissioners had not voted to retain Attorney Newman. (*Id.* at 210.) The Special Master notes that the "risk of a conflict between Attorney Carroll and his clients" appears to persist since the November 2022 contempt proceeding, despite the Supreme Court's exhortation to Attorney Carroll to address the conflict with his clients, and with Commissioner Shives in particular. *Fulton I*, 292 A.3d at 1001 n.105.

[41] As the Special Master noted in the November 18, 2022 Report and Recommendations to our Supreme Court, Attorney Lambert also uses the last name Junttila. *See Fulton I*, 292 A.3d at 1051-52. The Special Master's Findings of Fact Nos. 79-81 indicated that Attorney Lambert was sanctioned by a federal court in Michigan and was subject to disciplinary grievances in Michigan. The Special Master notes that the United States Court of Appeals for the Sixth Circuit has since reversed the sanctions that were imposed on Attorney Lambert. *King v. Whitmer*, 71 F.4th 511, 531 (6th Cir. 2023). Further, at least one of the formal disciplinary actions against Attorney Lambert was dismissed with prejudice. *Grievance Administrator v. Junttila* (Mich. Att'y Discipline Bd., No. 23-31-GA, dated Aug. 14, 2023).

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nature of the charges. (*Id.* at 225-26.)[42] She was not familiar with Cerberus or Mr. Sabia and did not recall the Commissioners having discussed them at any meeting. (*Id.* at 227-28.) Commissioner Shives testified that the County received correspondence "from the state" regarding a potential escrow agent, which the Commissioners discussed during a meeting, but did not recall the name of the entity discussed or the Commissioners making any decision regarding the escrow agent at that meeting. (*Id.* at 230-32.) That meeting occurred on or about May 30, 2023, and Commissioner Shives did not recall any subsequent discussion among the Commissioners regarding escrow agents. (*Id.* at 232-33.)

Commissioner Shives did not know who first suggested Cerberus to the County or the other Commissioners as a potential escrow agent. (*Id.* at 237-38.) She was not familiar with any of the details of Cerberus's proposed service as agent, including location, security capability, or price. (*Id.* at 240-42.) Commissioner Shives did not know whether any third party had agreed to reimburse the County for the costs of Cerberus acting as escrow agent. (*Id.* at 241.)

Commissioner Ulsh

The Secretary also presented the testimony of County Commissioner Stuart L. Ulsh. (8/30 Tr. at 378-79.) Commissioner Ulsh confirmed that Attorney Lambert has represented the County in election-related matters, that she was present during the hearings held in November 2022, and that the County had not terminated its

[42] Counsel for the Secretary questioned Commissioner Shives, Commissioner Ulsh, and Mr. Sabia on their knowledge surrounding Attorney Lambert's criminal indictment in Michigan. *See infra* pp. 36, 40. The Special Master specifically notes that like all criminal defendants, Attorney Lambert is presumed innocent until proven guilty of the charges in the indictment. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

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attorney-client relationship with her since November 2022. (*Id.* at 386-95.) Commissioner Ulsh stated that he was not aware that Attorney Lambert had been criminally indicted in Michigan on felony charges relating to unlawful access to voting machines and damage to voting machines. (*Id.* at 396-97.) He stated that the Commissioners did not vote on whether to engage Attorney Newman as counsel.[43] (*Id.* at 401.) Commissioner Ulsh testified he first became aware of Cerberus and Mr. Sabia during discussions with his attorneys, including Attorney Lambert, about potential escrow agents. (*Id.* at 406-07.) He was not aware of any discussion by any County Commissioner or official regarding the impoundment order or potential escrow agents, other than the discussion he personally had with counsel. (*Id.* at 408-09.)

When asked what due diligence he or other County officials engaged in to determine whether to recommend Cerberus as escrow agent, Commissioner Ulsh testified that he "just talked to [his] attorneys" and that "[he] personally . . . didn't research a lot about it, just what [he] talked about with [his] attorney." (*Id.* at 414-15.) Commissioner Ulsh was not aware of any discussions regarding third-party payment for Cerberus's services as escrow agent. (*Id.* at 421-22.) When asked whether his office requires him to spend public money wisely, Commissioner Ulsh stated he "do[esn't] know what wisely means," but he conceded that he generally would consider the cost of a service before spending public funds on it. (*Id.* at 425-26.) He stated, however, that he did not know how much Cerberus's service would cost, explaining that he "didn't have a reason to ask. We didn't get that far yet." (*Id.* at 426.) He also testified that he was not aware the County's attorneys had filed

[43] In response to further questions posed to Commissioner Ulsh regarding the retention of counsel, Attorney Newman represented that Attorney Lambert made the decision to hire Attorney Newman. (*Id.* at 405.)

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proposals recommending Cerberus because he "didn't think it would move that fast." (*Id.*) When asked why he never interviewed Mr. Sabia to determine whether he could serve as escrow agent, Commissioner Ulsh testified that he "d[idn't] think this is going to be [his] decision." (*Id.* at 427.) He also stated the County had not considered other potential escrow agents. (*Id.* at 432.)

On cross-examination, however, Commissioner Ulsh stated that the County had considered one other potential agent besides Cerberus, though he could not recall its name. (*Id.* at 435-37.) He confirmed that he agreed to propose Cerberus. (*Id.* at 433-34.)

Commissioner Bunch

Finally, the Secretary presented the testimony of County Commissioner Randy H. Bunch, who stated that his testimony would be substantially similar to that of Commissioner Ulsh.[44] (8/30 Tr. at 439-42.) He confirmed that the County's attorneys recommended that the County propose Cerberus, and that the Commissioners did not independently investigate Cerberus beyond discussions with counsel. (*Id.* at 447-48.) Commissioner Bunch conceded that he did not consider any scope of work or fee schedule. (*Id.* at 452.) When asked whether the Commissioners had considered the cost of the escrow services in making a proposal, Commissioner Bunch simply stated: "We don't know who the Court is going to pick." (*Id.* at 453.)

Joseph Sabia

In support of its proposal, the County presented the testimony of Joseph J. Sabia, Jr., part owner and Chief Financial Officer of Cerberus. (8/31 Tr. at 24, 190-

[44] Commissioner Bunch identified one question on which his answer would differ, but the Special Master struck his responsive testimony on the Secretary's motion based on attorney-client privilege. (8/30 Tr. at 442-44.)

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91.) Mr. Sabia testified that, during his prior military service, he held a security clearance and acted as a courier of secret and/or classified documents and hard drives. (*Id.* at 29-32.) Specifically, he stated that he inventoried, handled, and securely stored electronic data storage devices used in military aircraft. (*Id.* at 32-45.) This included maintaining a log of access to the secured devices and storing them at particular temperature and humidity levels based on the manufacturer's specifications for the devices. (*Id.* at 36-37, 44.) He testified that, in later private employment, he transported sensitive legal documents and medical records. (*Id.* at 46-47.)

Mr. Sabia testified that he co-founded Cerberus in 2019, together with his current business partner Kenneth L. Smith. (*Id.* at 47-48.) He testified about Cerberus's and his own experience[45] providing services, which include security services during and after natural disasters, consultations to improve the physical security of clients' buildings through installation of security cameras and other devices, and personal security services. (*Id.* at 48-69.) Mr. Sabia testified that Cerberus's primary facility is in Florida. (*Id.* at 76.) He stated that Cerberus has not previously done business with Dominion or the Secretary. (*Id.* at 69-70.)

Regarding cost, Mr. Sabia testified that Cerberus typically charges a minimum "service fee" of $75 per hour to secure items, apart from the cost of the storage space

[45] In the midst of Mr. Sabia's direct testimony, the County moved to qualify him as an expert witness. (8/31 Tr. at 70.) The Special Master sustained the Secretary's objection to that qualification, in which Dominion joined, on the basis that the County's witness list offered Mr. Sabia as a fact witness regarding Cerberus's qualifications and experience, and lacked any notice that he would testify as an expert. (*Id.* at 74.) Thus, in order to avoid unfair surprise and prejudice to the Secretary from the County's *post hoc* request for expert qualification, and consistent with Paragraph 2 of the Special Master's Scheduling Order requiring the witness list and "the curriculum vitae . . . for any expert witness" no later than August 14, 2023 (Special Master's Order, 8/3/2023 ¶ 2), the Special Master allowed Mr. Sabia to continue testifying as a fact witness only. (8/31 Tr. at 74.)

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itself; he stated there could be an additional $50 hourly cost for security if additional persons were required to participate. (*Id.* at 83.) Renting a climate-controlled storage space would cost about $200 per month. (*Id.* at 83-84.) He appeared to testify that transportation costs could range from $500 if transported within eastern Pennsylvania to $4,500 if transported to Cerberus's facility in Florida. (*Id.*)

Mr. Sabia admitted that he did not know what the Voting Equipment looks like or what its components are, but nevertheless opined that Cerberus could maintain a paper chain of custody for the Voting Equipment and safely transport the Voting Equipment, relying on the manufacturer's specifications. (*Id.* at 85-87.) He explained that, prior to transport, Cerberus would secure the Voting Equipment in "bubble wrap . . . so they don't smash, they're not touching each other . . . , they won't tip over along those lines." (*Id.* at 86.)

Mr. Sabia further testified that Cerberus has no conflicts of interest in holding and securing the Voting Equipment, and would comply with court orders and federal and state law regarding the Voting Equipment. (*Id.* at 87-88.)

On cross-examination, Mr. Sabia confirmed that he does not currently hold a governmental security clearance. (*Id.* at 92.) He explained that his employment duties prior to his founding of Cerberus included responding to workplace accidents and transporting paper files. (*Id.* at 97-100.)

Mr. Sabia further testified that he had not reviewed the Supreme Court's April 19, 2023 Opinion in *Fulton I*, and that Fulton County's counsel had not informed him of its content. (*Id.* at 103, 131-32.) He stated that Attorney Carroll, Attorney Newman, and "Ste[f]anie Lambert" asked him to testify at the hearing. (*Id.* at 104.) Attorney Lambert was the first person to contact him about Cerberus potentially serving as the escrow agent. (*Id.* at 121-22.) Mr. Sabia believed she did so "based

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on [Cerberus's] past performance with her," with which "[s]he was happy." (*Id.* at 121.) Mr. Sabia stated that he communicated with Attorney Lambert by telephone at 10:00 p.m. on the night before his testimony at the evidentiary hearing, and also texted her the morning of his testimony. (*Id.* at 106-07.) He initially stated that his first communication with Attorney Lambert was in June 2022, but then stated this occurred in November 2022. (*Id.* at 109, 115-16.) Finally, Mr. Sabia clarified a third time that the November 2022 text was not from Attorney Lambert, but was instead from "[t]he individual that hired . . . and that paid for" personal-security services he rendered at Attorney Lambert's request in an unrelated matter in Michigan in November 2022. (*Id.* at 116-17.) Mr. Sabia stated he was not aware that Attorney Lambert had been indicted in Michigan. (*Id.* at 150-51.)

Regarding his communications with the County in this matter, Mr. Sabia initially stated that he first sent his resume to the County on August 25, 2023, the Friday before the evidentiary hearing began. (*Id.* at 120.) He then corrected himself and stated that he first sent his resume to Attorney Lambert on August 16, 2023. (*Id.* at 121; *accord id.* at 133.) He did not have any other communications with County officials or counsel about this matter until August 25, 2023. (*Id.* at 122.) Mr. Sabia stated he was not aware that the County had proposed Cerberus as escrow agent at least two months before August 16, 2023,[46] and stated that he had not reviewed the County's July 28, 2023 filing proposing Cerberus as escrow agent and attaching Mr. Sabia's resume. (*Id.* at 280-81; *see* Fulton County's Response to Dominion's Application for Appointment of Third-Party Escrow Agent, filed July 28, 2023, at 4

[46] The County apparently first mentioned Cerberus in a letter from Attorney Carroll that the Secretary received June 13, 2023. In the letter, Attorney Carroll represented that "Cerberus Dynamic Solutions is a veteran owned company **willing** to hold in trust the Dominion equipment owned by Fulton County." (Secretary's Application to Appoint Escrow Agent, filed July 28, 2023, Affidavit of Robert A. Wiygul, Ex. 5 (emphasis added).)

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& Ex. 4.) He testified that he did not have any communications with the Commissioners or County officials, and that he "d[oes not] even know who" Commissioner Ulsh is. (8/31 Tr. at 153.)

Mr. Sabia acknowledged that Cerberus's website describes its business as providing physical security and personal security in a range of contexts, including after natural disasters, during construction of buildings, during workplace disputes, and at sporting events. (*Id.* at 187-200.) Mr. Sabia stated he is certified to possess a firearm on the job in Pennsylvania pursuant to Act 235[47] and often does carry a firearm. (*Id.* at 201, 204.) He stated that no Cerberus employees or officers are subject to auditing by governmental agencies other than for tax purposes. (*Id.* at 207-08.)

Mr. Sabia agreed that he did not know anything about the Voting Equipment and has never had any experience with electronic voting machines other than as a voter himself. (*Id.* at 208-09.) He admitted that he could not identify the Voting Equipment if he were shown a photograph of it, other than by "t[aking] a guess." (*Id.* at 208-10.) He testified: "The only thing I know about voting machines, you put your ballot in, it spits out a receipt. That's as far as my knowledge goes." (*Id.* at 211-12.) He had not reviewed any documents that list or itemize the Voting Equipment and could not recall any information about the Voting Equipment other than news coverage. (*Id.* at 212.) Mr. Sabia had not, prior to the hearing, considered how the Voting Equipment should be transported properly or how Cerberus would acquire possession of it. (*Id.* at 213-16.) He had "no idea" about the location of

[47] Act of October 10, 1974, P.L. 705, *as amended*, 22 P.S. §§ 41-50.1 (Act 235). Act 235 provides "for the education, training and certification of . . . privately employed agents who, as an incidence to their employment, carry lethal weapons." Section 2 of Act 235, 22 P.S. § 42(b).

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serial numbers on the Voting Equipment, (*id.* at 216), and did not know whether the Voting Equipment contained tamper-evident seals, (*id.* at 217-18).

Mr. Sabia conceded he had never made any specific proposals as to the type of room in which the Voting Equipment would be stored. (*Id.* at 279.) Cerberus's sole physical location is an 800-square-foot converted efficiency apartment in Florida that now serves as its office. (*Id.* at 219-20.) Mr. Sabia was not familiar with the concept of states requiring corporate entities to register to do business in the state, but also stated that Cerberus is "in the process" of being registered in Pennsylvania. (*Id.* at 222.) Regarding price, Mr. Sabia stated that he could not "give . . . an honest price" without knowing where the Voting Equipment would be stored. (*Id.* at 225.) He had not otherwise discussed price with the County's counsel. (*Id.* at 225-26.) He clarified his direct testimony regarding Cerberus's hourly rate, stating that as long as someone from Cerberus was monitoring the Voting Equipment via security camera or otherwise, Cerberus would charge $50 to $75 per hour. (*Id.* at 226-27.) Mr. Sabia was unwilling to estimate a monthly storage price in his testimony, conceding that he could not do so without knowing the size of the Voting Equipment, the necessary environmental and security conditions, and whether he would need to lease storage space. (*Id.* at 227-29.) He stated that he would need further direction from the Court about the escrow arrangement before he could estimate a price. (*Id.* at 229-30.)

During cross-examination of Mr. Sabia, the Secretary introduced, and the Special Master admitted, several social media posts that Mr. Sabia admitted writing or sharing since June 2023, which reference elections and election technology. (*See* 8/31 Tr. at 242 & Sec'y Ex. 52 ("They stole the 2020 Election by Centralizing a decentralized US voting process using vendors acting as election officials . . . . They

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supplied or recommended vendors including voting machines . . . ."); 8/31 Tr. at 247-48 & Sec'y Ex. 53 ("JANUARY 6TH WILL BE REMEMBERED AS THE DAY THE GOVERNMENT SET UP A STAGED RIOT TO COVER UP THE FACT THEY CERTIFIED A FRAUDULENT ELECTION!"); 8/31 Tr. at 249-51 & Sec'y Ex. 54 ("We're called 'Election Deniers'" and "machines in #GOP districts disproportionately 'malfunctioning'" and "running the same batches of ballots through the tabulating machines multiple times"); 8/31 Tr. at 251-53 & Sec'y Ex. 55 ("NOW WE HAVE PROOF! . . . Massive 2020 Voter Fraud Uncovered in Michigan – Police Find: TENS OF THOUSANDS of Fake Registrations . . . ."); 8/31 Tr. at 253-57 & Sec'y Ex. 56 ("If ANYONE still DENIES that they didn't steal an election . . . . than [sic] you are complicit!!!!"); 8/31 Tr. At 259-60 & Sec'y Ex. 58 (showing a photo of a person who appears to be Lesley Stahl of the television show *60 Minutes* with text displayed above saying, *inter alia*, "I lied to you about the outcome of the 2020 presidential election.").)

The Secretary also introduced social media posts, again made and acknowledged by Mr. Sabia, criticizing current Secretary of the Commonwealth Al Schmidt before and during his confirmation by the Pennsylvania Senate. (*See* 8/31 Tr. at 261-62 & Sec'y Ex. 59 (naming "Al Schmidt—the same man who used to run elections in Philly" and stating "[T]he same Philly that True The Vote showed had over 1,000 mules"); 8/31 Tr. at 262-65 & Sec'y Ex. 60 ("Reach out to your Senator and tell them to vote 'NO' on Al Schmidt's confirmation for the Secretary of the Commonwealth.").) Despite acknowledging these posts, Mr. Sabia had initially testified he did not know who the current Secretary of the Commonwealth is. (8/31 Tr. at 260-61.)

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On redirect examination, Mr. Sabia stated that Cerberus did not need to "know how electronic [voting] machines work in order to" properly transport, store, and secure them. (*Id.* at 282-83.)

Benjamin Cotton

The County offered Benjamin Cotton as an expert witness to testify regarding Pro V&V's alleged deficiencies and failures to follow proper procedure. (*Id.* at 331.) The Secretary and Dominion objected to Mr. Cotton's expert testimony because the County had neither attached Mr. Cotton's curriculum vitae to its witness list nor otherwise provided it to them.[48] The Special Master sustained the objection on the basis that, without any notice of Mr. Cotton's offered qualifications, the Secretary and Dominion were deprived of the opportunity to test his qualifications. (*Id.* at 318.) The Special Master stated that the County could present Mr. Cotton's fact testimony, but the Secretary and Dominion objected that, based on the County's proffer and the timely filed affidavit, Mr. Cotton would have no relevant fact testimony that did not depend upon his specialized expertise. (*Id.* at 328-31.) Rather than sustaining the objection outright, the Special Master allowed an initial examination regarding the scope of Mr. Cotton's knowledge. When the Special Master asked whether Mr. Cotton had "any nonexpert personal knowledge that bears on Pro V&V's fitness as an escrow agent," Mr. Cotton responded that "[a]ny knowledge that [he] would have would have been based on [his] technical expertise and examination of duties." (*Id.* at 336-37.) Accordingly, the Special Master sustained the objections of the Secretary and Dominion to Mr. Cotton's testimony. (*Id.* at 337-38.)

[48] The County did attach an affidavit by Mr. Cotton to its timely filed witness list and also attached a second affidavit to its August 25, 2023 application requesting leave for its witnesses to testify remotely. By August 29, 2023 order, the Special Master struck the second affidavit of Mr. Cotton on the Secretary's motion.

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IV. ANALYSIS OF PROPOSED AGENTS

A. Purpose of Impoundment

As directed by our Supreme Court, the undersigned is tasked with appointing a "neutral third-party escrow agent to take and retain possession of the voting equipment until further order of court." *Fulton I*, 292 A.3d at 1020. The Supreme Court was clear that the purpose of impoundment is, in part, to prevent unauthorized physical access to the Voting Equipment, particularly given that the Supreme Court's Injunction Order was not sufficient to restrain County officials from allowing unauthorized access. *Id.* at 1011 ("[T]he County has given [the Supreme Court] no reason to trust that it will honor a mere reiteration of the same [injunction] order it disregarded before."). In addition to limiting physical access, the Supreme Court also highlighted the importance of "ensur[ing] subsequent continuity in the chain of custody and the protection of such evidentiary value as the [V]oting [E]quipment may retain." *Id.* at 1012. While recognizing that the Voting Equipment has undergone one or more unauthorized third-party inspections, the Supreme Court stated that it "will not assume that there is no scenario in which the present condition of the [V]oting [E]quipment may prove relevant to one or more of the County's claims[.]"[49] *Id.* at 1011. The Special Master is also cognizant that the Supreme Court ordered the County to bear all responsibility for the costs associated with impoundment, which may ultimately fall on the County's taxpayers. Accordingly, the Special Master shall consider the costs associated with the impoundment in choosing the appropriate agent.

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[49] Additionally, and separately from its evidentiary value, there may be some risk inherent in the Voting Equipment's continued status as critical infrastructure, containing software that may remain relevant to elections, even if never used with these particular devices. The Special Master credits Mr. Macias's testimony to that effect. *See also Fulton I*, 292 A.3d at 979 n.4 (regarding designation of Voting Equipment as critical infrastructure).

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In light of these directives, the Special Master will analyze the viability of the parties proposed agents in terms of the agent's ability and fitness to: (1) ensure subsequent continuity in the chain of custody; (2) prevent unauthorized physical access to the Voting Equipment; (3) protect the Voting Equipment's evidentiary value during the escrow period; (4) remain neutral and comply with orders of court; and (5) provide escrow services at a reasonable cost.

B. Chain of Custody

The Special Master begins by addressing the proposed agents' respective abilities to ensure subsequent continuity in the chain of custody of the Voting Equipment. The parties disagreed on what specific qualifications, if any, an escrow agent must possess to ensure this task is met. The Secretary argued that the appointed agent must possess technical expertise and experience specific to voting systems, while the County responded that general experience in security of assets is sufficient. The Special Master initially considered the County's position to be plausibly consistent with the *Fulton I* opinion, and asked the parties at the prehearing conference to be prepared to present evidence regarding whether technical expertise and experience specific to voting systems would be necessary.

After consideration of the testimony adduced at the hearing, however, the Special Master agrees with the Secretary's position that to ensure continuity in the chain of custody, technical expertise and experience specific to digital voting systems is a highly preferrable qualification. The Special Master finds Mr. Macias's expert testimony detailing the appropriate way to inventory voting equipment in its initial state, and thereafter document and maintain a secure chain of custody thereof, persuasive. Mr. Macias testified that to adequately perform the initial inventorying and subsequent recording, the proposed agent must be able to identify serial numbers

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on the various components and identify and/or add specific seals and locks to the Voting Equipment in order to prevent and detect tampering. Mr. Macias credibly testified that an agent without this specialized knowledge would not be in a position to properly identify the appropriate locations for the addition of locks and seals, nor would that agent be able to understand if or when a break in the chain of custody occurred, and how to appropriately handle that situation. The Special Master further credits Mr. Macias's opinion that Pro V&V is fully capable of maintaining the chain of custody of the Voting Equipment based on its extensive technical expertise and experience maintaining voting equipment as part and parcel of its business as a VSTL.

The Special Master also notes that Mr. Sabia, although generally familiar with seals, does not know where such seals could be applied to the Voting Equipment at issue. This is consistent with Mr. Sabia's testimony that he has no specialized knowledge of any type of voting systems and has never had any experience with electronic voting machines other than as a voter himself.

Considering all this testimony in light of the Special Master's conclusion that technical expertise and experience is highly preferrable to maintaining chain of custody of the Voting Equipment, this factor militates in favor of appointing Pro V&V, an entity with technical experience and familiarity with voting systems, as opposed to Cerberus, which lacks technical expertise and is unfamiliar with this specific type of digital asset.

C. Prevention of Unauthorized Access

While the parties disagreed on the level of expertise and experience needed to ensure continuity in the chain of custody, they largely agreed that an appropriate

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escrow agent must have the ability to prevent unauthorized access to the Voting Equipment.

To this end, Mr. Walker and Mr. Macias presented credible testimony regarding the security of Pro V&V's facility located in Huntsville, Alabama. Mr. Walker testified, in great detail, about the security measures undertaken at Pro V&V's facility, which include badge-access doors, interior and exterior security cameras, and interior locked doors to each of the 11 laboratories within the facility. Mr. Walker further indicated that Pro V&V could limit access to the secure room containing the Voting Equipment to a single Pro V&V employee. Mr. Macias's testimony reaffirmed the presence of security features at Pro V&V's facility, including increased levels of security as one ventures closer to the laboratories where the Voting Equipment would be stored.

Mr. Sabia's testimony regarding a secure facility was less precise, as Cerberus did not offer a specific proposed location for escrowing the Voting Equipment. Mr. Sabia indicated he could secure the Voting Equipment in its present location in Fulton County, rent a storage unit, or place the Voting Equipment at Cerberus's headquarters, which is a converted efficiency apartment in Florida containing Cerberus's office and business materials. However, Mr. Sabia also testified that he is unfamiliar with both the size and the shape of the Voting Equipment at issue, as he has never personally seen it or asked Fulton County to provide specifications. Mr. Sabia broadly testified that his previous military service, where he inventoried, handled, and securely stored electronic data storage devices, and his more recent work in the nature of personal and event security as an owner of Cerberus, allows him to secure virtually any location for escrow purposes.

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The Special Master does not doubt Mr. Sabia's ability to secure assets, as he did during his military service, and currently does as owner of Cerberus. However, the Special Master found more credible the specific and detailed testimony of Messrs. Macias and Walker regarding the security at Pro V&V's facility and Pro V&V's ability to prevent unauthorized access to the Voting Equipment. This detailed testimony was contrasted by Mr. Sabia's less precise testimony, which evidenced that he had not developed a specific proposal as to where to place the Voting Equipment, no less secure it. For these reasons, and the reasons discussed in Section IV.E *infra* relating to neutrality, the Special Master concludes that this factor also favors the appointment of Pro V&V.

D. Protection of Evidentiary Value

The parties also agreed that in order to protect the evidentiary value of the Voting Equipment, the components must be stored in a location that maintains appropriate temperature and humidity levels for the duration of the escrow period.

In regard to Pro V&V's ability to maintain these necessary environmental conditions, the Special Master credits Mr. Macias's testimony that Pro V&V's Huntsville facility was custom built to maintain and house election technology and is fully equipped with the environmental controls needed to maintain these exact types of digital assets. Mr. Macias also explained that to remain accredited as a VSTL, Pro V&V must maintain these environmental controls. In addition, Pro V&V is regularly subjected to audits to ensure it does so. Mr. Walker's credible testimony reaffirmed Mr. Macias's testimony that the HVAC system at Pro V&V's facility was designed to monitor and maintain precise control over the temperature and humidity in each individual room.

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Mr. Sabia also testified about the appropriate temperature and humidity levels and explained that he would follow manufacturer's specifications in order to appropriately store the Voting Equipment and could purchase devices for monitoring those environmental conditions in any chosen escrow location.

Weighing these testimonies, the Special Master concludes that Pro V&V is more qualified to maintain the required environmental conditions to protect the evidentiary value of the Voting Equipment. Indeed, Pro V&V's facility was fitted to function under strict guidelines relating directly to these environmental conditions. On the other hand, Mr. Sabia offered no specific explanation as to how he would maintain appropriate environmental controls at the various proposed storage locations, especially at the Fulton County building or the storage unit, neither of which locations he owns or controls. Accordingly, the Special Master concludes Pro V&V is more likely to be able to protect the evidentiary value of the Voting Equipment.

E. Neutrality and Compliance

Preventing further unauthorized access to the Voting Equipment requires two changes in the status quo relative to control over the Voting Equipment: 1) the equipment must be removed from Fulton County's control, and 2) the custodian of the Voting Equipment must be sufficiently independent from any actors that would seek further unauthorized access to the Voting Equipment, so that the custodian would not permit such access. *See Fulton I*, 292 A.3d at 1019 (noting that impoundment is intended to "effectuat[e] the same result the Secretary sought when it first asked the Commonwealth Court for a protective order"). Thus, the appointed agent's neutrality, independence, and willingness and ability to comply with court orders are critical considerations.

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The County argues that Pro V&V's ongoing business relationship with Dominion creates a conflict of interest undermining Pro V&V's independence. The Special Master credits Mr. Macias's and Mr. Walker's testimony regarding that ongoing relationship, that Dominion employees are sometimes present at Pro V&V's facility, and that a financial conflict of interest **could** arise between a VSTL and a voting system manufacturer like Dominion. However, the Special Master also credits Mr. Macias's and Mr. Walker's testimony that, exactly because of the risk of such a conflict, the relationship between Dominion and Pro V&V is subject to a robust regulatory framework requiring Pro V&V to prevent and disclose conflicts of interest. As they credibly testified, Pro V&V is regulated and periodically audited for conflicts of interest, both institutionally and for its personnel, as part of its EAC accreditation.[50] This includes scrutiny for financial conflicts of interest. It must be so audited to prevent undue assistance to voting machine manufacturers, which would undermine its entire purpose as an independent laboratory testing election technology. As Mr. Macias also credibly testified, Pro V&V's business as a VSTL depends entirely upon its accreditation and ongoing good standing with the EAC—an accreditation that would be jeopardized by any partiality or favoritism toward Dominion, or any failure to address a conflict of interest. Pro V&V would presumably tend to avoid behavior that would place its business at such risk.[51]

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[50] Regarding Pro V&V's accreditation, the Special Master is satisfied that, as Mr. Macias explained, the provision of HAVA at 52 U.S.C. § 20971(c)(2) controls the period of Pro V&V's accreditation, and that any policy guidance from the EAC in derogation of that provision did not affect Pro V&V's accreditation. The Special Master also notes and credits Mr. Macias's testimony that the EAC itself recognized and rectified the conflict between HAVA and the EAC's renewal policy, and confirmed Pro V&V's continued good standing. Finally, the Special Master credits Mr. Walker's testimony that Pro V&V was aware of the conflict and maintained the position that its accreditation had been continuous since 2015.

[51] The County makes a distinct argument that Pro V&V's use of Clay Parikh, a nonemployee, for security testing on voting machines in 2015 somehow undermines its

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Cerberus has different incentives. The Special Master notes Mr. Sabia's testimony that Attorney Lambert solicited Cerberus's participation as escrow agent, based in part on her satisfaction with Cerberus's performance on past work. This testimony is corroborated by the content of Mr. Sabia's social media posts, and by the County Commissioners' testimony that Attorney Lambert selected Cerberus, which the Special Master finds credible. The Special Master also credits and notes the testimony of Mr. Martin and Ms. Hess that, although they are normally involved in the County's use and storage of its election equipment, neither the Commissioners nor the County's counsel discussed or identified Cerberus with Mr. Martin or Ms. Hess. The fact that the County and its counsel apparently recommended Cerberus before even speaking with Mr. Sabia, and without consulting County officials responsible for the integrity of the Voting Equipment, further corroborates Mr. Sabia's testimony about his ongoing business relationship and familiarity with Attorney Lambert. Thus, although the Special Master does not generally credit Mr. Sabia's testimony,[52] she will accept his testimony regarding Attorney's Lambert's relationship with him as corroborated by other evidence. The Special Master also notes that the social media posts Mr. Sabia admitted making include direct opposition to the appointment and confirmation of the current Secretary, who is a party to this suit. Mr. Sabia's social media posts also include statements calculated

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independence today. The County also made reference to testimony Mr. Parikh might offer regarding an alleged conflict of interest with Dominion, (8/30 Tr. at 148), but that testimony ultimately was not presented. As stated above, the current regulatory framework to which Pro V&V is subject reduces the risk of any such conflict. Further, regardless of which entity is appointed escrow agent, the Special Master will tailor the escrow arrangement to restrict access to as few persons as practicable, thus further reducing the risk that an employee or invitee of the agent could gain illicit access.

[52] The Special Master notes the content of the social media posts that Mr. Sabia admitted making, which were in direct contradiction to Mr. Sabia's testimony on direct examination and therefore significantly reduced Mr. Sabia's credibility.

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to undermine trust in elections in general and in the reliability of voting machines in particular. When considered together, Mr. Sabia's election-related statements, Attorney Lambert's ongoing relationship with Cerberus,[53] and the Pennsylvania Supreme Court's concerns surrounding Attorney Lambert's conduct,[54] all support an inference that Cerberus is not neutral on the issue of who should have access to the Voting Equipment. Indeed, the record testimony suggests that Cerberus and/or Mr. Sabia has a philosophical and financial precommitment to Attorney Lambert's position on that issue, which could unduly subject Cerberus to Attorney Lambert's influence if it served as escrow agent. Therefore, the Special Master declines to credit any testimony or averments on the part of Mr. Sabia that Cerberus would remain neutral and compliant with court orders.

Weighing these two sets of incentives the proposed escrow agents possess, the Special Master concludes that Pro V&V is more likely to serve as a neutral, independent escrow agent, and is less likely to be unduly influenced. Pro V&V has financial and legal incentives to disclose conflicts of interest, to prevent such conflicts, and to follow the law and court orders. And that is true independent of whether it is appointed as escrow agent. In this vein, the County's argument that Pro V&V allowed its accreditation to expire is not only legally unsupported, *see supra* n. 50; but also, Mr. Walker specifically testified that Pro V&V remained

---

[53] On July 21, 2023, the Secretary advised the Special Master that Attorney Lambert had been named as a defendant in a civil complaint filed July 18, 2023, in the United States District Court for the Eastern District of Michigan. *See* Sec'y Notice of Recent Developments Relating to Sanctions Proceedings. The complaint alleges that, in March 2022, Attorney Lambert hired yet another third-party contractor to inspect Fulton County's electronic election systems, and represented to the third party that the inspection "had been authorized by a Pennsylvania state court." Complaint at 6, *Apelbaum v. Lambert* (E.D. Mich., No. 2:23-cv-11718-SJM-APP, filed July 18, 2023).

[54] *See Fulton I*, 292 A.3d at 1018 ("Attorney Lambert may be every bit as culpable as Attorney Carroll, at least in the pattern of non-compliance that has led us to impose upon him joint and several responsibility with the County.").

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accredited and in good standing, and there is no evidence that Pro V&V allowed its accreditation to expire. Further, Mr. Macias testified that the EAC recognized that Pro V&V had remained accredited despite the conflicting guidance. (*See also* Sec'y Ex. 12 (VSTL Certificates and Accreditation, U.S. Election Assistance Commission) ("Despite the [administrative error regarding the effect of 52 U.S.C. § 20971(c)(2), which caused confusion about Pro V&V's status], Pro V&V . . . remained in good standing . . . and retained their accreditation.").) Pro V&V would be financially unwise to risk its VSTL business by pursuing its role as escrow agent in an improper or partial manner, especially given the relatively minor financial value of the escrow services.

By contrast, Cerberus has at least a financial incentive to perform to the satisfaction of Attorney Lambert, who continues to influence these proceedings in less-than-transparent ways as the Special Master has described, and whose "pattern of non-compliance" with court orders drew criticism from our Supreme Court. *See Fulton I*, 292 A.3d at 1018. Cerberus may even have a perverse incentive, to the extent that allowing Attorney Lambert or others to access the Voting Equipment during the impoundment could enhance, rather than diminish, Cerberus's business relationship with Attorney Lambert. Relatedly, the Special Master does not credit Mr. Sabia's testimony that Cerberus would unfailingly comply with this Court's orders regarding the impoundment.

The Special Master concludes that Pro V&V is both sufficiently neutral and sufficiently independent from undue influence to serve as escrow agent.

F. Costs

Finally, the Special Master compares the proposed agents' cost estimates. The Special Master credits Mr. Walker's testimony that Pro V&V will honor the cost

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estimates it gave. With Pro V&V's $6,640 initial charge for transport, and its $850 per month storage fee, Pro V&V would charge approximately $16,840 for the first year of the impoundment.

On behalf of Cerberus, Mr. Sabia gave only an incomplete set of potential costs—he did not specifically estimate costs related to storage space because he did not know the size of the equipment or its storage requirements, and he asked for direction from the Court before he could do so. His testimony about other potential costs appeared to vary: He first testified that Cerberus would charge a service fee of $75 per hour to monitor the Voting Equipment, with a potential additional charge of $50 per hour depending on storage location. But he later appeared to testify the security rate would be **between** $50 and $75 per hour, and would only apply if 24-hour monitoring were required. He stated that Cerberus could charge up to $4,500 for transport to its sole facility in Florida, but that this depended heavily on the storage location. Given this equivocal testimony, the Special Master cannot precisely quantify and compare the costs of Cerberus to those of Pro V&V. But using one potential, conservative estimate, based on a $50 per hour security fee, Cerberus's cost for the first year of the escrow could amount to approximately $438,000 just to monitor, exclusive of transportation, storage, or other costs. This would include a monthly cost of approximately $36,000 for Cerberus's security service fee alone. This difference in cost, by itself, weighs heavily in favor of appointing Pro V&V. Alternatively, to the extent that these figures do not represent Cerberus's actual costs because it failed to give a more precise cost estimate, that very failure weighs in favor of Pro V&V and creates doubt about the seriousness with which Cerberus has offered its services. It has been clear from before the

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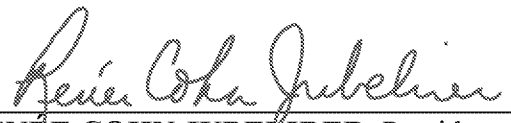
impoundment proceedings began that the cost of escrow services should be considered.[55]

VI. CONCLUSION

Having carefully examined the proposed agents' relative abilities to maintain chain of custody, prevent unauthorized access, protect evidentiary value, behave neutrally and in compliance with court orders, and provide services at a reasonable cost, the Special Master finds each factor to favor Pro V&V as the more suitable escrow agent. Accordingly, the Special Master hereby appoints Pro V&V as the agent who will take and retain possession of the Voting Equipment, subject to the conditions of the attached Preliminary Appointment Order and a Final Appointment Order to be entered in due course.



RENÉE COHN JUBELIRER, President Judge of the Commonwealth Court of Pennsylvania Appointed as Special Master

[55] *See Fulton I*, 292 A.3d at 1064-65 (Brobson, J, concurring and dissenting) (opining that impoundment will be "at the further expense of the taxpayers of Fulton County").

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board of Elections, Stuart L. Ulsh, in his official capacity as County Commissioner of Fulton County and in his capacity as a resident, taxpayer and elector in Fulton County, and Randy H. Bunch, in his official capacity as County Commissioner of Fulton County and in his capacity as a resident, taxpayer and elector of Fulton County, Petitioners/Appellees	:	No. 277 M.D. 2021 No. 3 MAP 2022
v.	:	
Secretary of the Commonwealth, Respondent/Appellant	:	

PRELIMINARY APPOINTMENT ORDER

NOW, September 15, 2023, following the evidentiary hearing for purposes of the Special Master's appointment of a neutral third-party escrow agent, as ordered by the Pennsylvania Supreme Court, and in accordance with the foregoing opinion, the Special Master hereby conditionally appoints Pro V&V to serve as escrow agent of the Voting Equipment at issue. Final appointment of Pro V&V as escrow agent will proceed as follows, and is subject to the following conditions:

1. No later than September 29, 2023, the Secretary shall file and serve a Proposed Final Appointment Order executed by Pro V&V[1] that

[1] Pro V&V shall execute the Proposed Final Appointment Order for purposes of indicating its consent to jurisdiction as described in Paragraph 1(e) below, and also to indicate the general acceptability of the terms contained in the Proposed Final Appointment Order.

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includes all terms relating to the escrow arrangement,[2] which must include, without limitation, the following terms, and which may also include any other terms the Secretary and Pro V&V consider to be necessary or appropriate regarding the escrow arrangement[3]:

a. **Access Limitations.** Before taking possession of the Voting Equipment, Pro V&V shall designate a laboratory at its facility in which the Voting Equipment shall be stored (Escrow Room). Upon taking possession of the Voting Equipment, Pro V &V shall not permit **any access** to the Escrow Room except as follows:

   i. **Singular Personnel Access.** Pro V&V shall restrict access to the Escrow Room to only Michael Walker, who shall retain sole possession of the key or other means of access to the Escrow Room. In the event of Mr. Walker's unavailability, Pro V&V may file a motion with the Court proposing to substitute another Pro V&V employee to temporarily retain sole access, including the dates of the proposed substituted access, to the Escrow Room.

   ii. **Acts of God; Facilities Emergency.** Mr. Walker, or another Pro V&V Employee designated pursuant to Paragraph 1(a)(i) above, may enter the Escrow Room to respond to acts of God, leaks, fires, or other emergency conditions that require immediate access in order to preserve the Voting Equipment.

   iii. **Election Assistance Commission Site Visits.** Pro V&V may continue to allow EAC personnel to enter its facility as required for accreditation or audit purposes, but Pro V&V shall not permit EAC personnel to enter the Escrow Room without prior order of Court.

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[2] In the Secretary's July 28, 2023 filing, the Secretary proposed that "the parties submit a specific escrow agreement for the Special Master's approval . . . ." (Secretary's Application to Appoint Escrow Agent at 22.) As the parties are unlikely to agree on the terms of any escrow agreement, the Special Master directs the Secretary and Pro V&V to include their proposed terms in the form of a proposed final appointment order, which will be binding on all parties once entered.

[3] The Special Master will review and consider all terms contained in the Proposed Final Appointment Order and the parties' responses thereto contemplated in Paragraphs 2 and 3 of this Order, and will enter a Final Appointment Order thereafter.

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iv. **Emergency Notification to Court.** If access to the Escrow Room must be granted pursuant to Paragraphs 1(a)(ii) or 1(a)(iii) of this Order, or in a manner not contemplated in this Order, Pro V&V shall immediately notify the Court of such access or impending access via email to CCFCEscrow@pacourts.us copying all counsel of record in this matter, and shall then promptly file a formal motion with the Court explaining the same.

b. **Monitoring.** Before taking possession of the Voting Equipment, Pro V&V shall install a surveillance or security camera in the Escrow Room (Camera). Once the Voting Equipment is moved to the Escrow Room, Pro V&V shall maintain the Camera in a functional state and trained on the Voting Equipment and its immediate surroundings until otherwise ordered. [[*The Secretary and Pro V&V shall, if practicable, include terms requiring the video from the Camera to be 1) continuously transmitted to the parties and the Court, in a manner that could be viewed remotely, 2) recorded and retained, either for a period of time or for the duration of the escrow arrangement; and 3) associated with motion detection technology and the ability to send automated notice and/or video footage to the parties and the Court if a person enters the Escrow Room.*]][4]

c. **Transfer of Possession.**[5] Pro V&V shall arrange to take possession of the Voting Equipment from its present location in Fulton County and shall directly and continuously transport the Voting Equipment to Pro V&V's facility at 6705 Odyssey Drive NW, Huntsville, AL, 35806. The parties' counsel, experts, and

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[4] In Paragraph 1 of this Order, text in italic type and enclosed in double brackets indicates direction that the Secretary and Pro V&V are to supply specific written provisions regarding the relevant term with which they could comply. The Secretary and Pro V&V may explain their inclusion, modification, or exclusion of such provisions in the filing attaching the Proposed Final Appointment Order. Text in ordinary roman type and not enclosed in double brackets indicates provisions that must be included in the Proposed Final Appointment Order.

[5] In the filing attaching the Proposed Final Appointment Order, the Secretary and Pro V&V shall include a list of dates and times, within a 30-day period after the date of that filing, that are acceptable to them for the transfer of possession of the Voting Equipment from the County to Pro V&V to occur. The County and Dominion may respond thereto in the filings authorized by Paragraph 2 of this Order. In the Final Appointment Order, the Special Master will designate a specific date and time for the transfer of possession.

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Fulton County personnel are permitted to be present and observe pickup of the Voting Equipment in Fulton County by Pro V&V.

d. **Price.** [[*The parties shall supply terms regarding the price of the escrow services and the time and manner of payment, and regarding which person(s) are liable for payment.*]]

e. **Consent to Jurisdiction; Entry of Appearance**. Pro V&V consents to the jurisdiction of the Pennsylvania Courts with respect to the Voting Equipment. Within 30 days after entry of this Order, counsel for Pro V&V shall enter an appearance in the Pennsylvania Commonwealth Court in the above-captioned matter, so that the Court may appropriately communicate with counsel for Pro V&V directly.

2. Within seven (7) days of the Secretary's filing of the Proposed Final Appointment Order, any party may file and serve a response thereto. Responses received after the seven (7) day deadline will not be considered.

3. The Secretary and/or Pro V&V may file a reply, if any, within three (3) days of any parties' timely filed response.

Further, Dominion's Application to Quash is DISMISSED as moot for the reasons set forth in the accompanying Opinion.

Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, President Judge of the Commonwealth Court of Pennsylvania Appointed as Special Master

Order Exit
09/15/2023

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/28/2023 2:32:58 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Lawsuit challenging 2018 and 2022 amendments
Attachments: signal-2023-09-28-103001.pdf

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Here's Kaardal's press release announcing the lawsuit, if you haven't seen.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, September 28, 2023 at 10:23 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Lawsuit challenging 2018 and 2022 amendments

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 10:23 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Lawsuit challenging 2018 and 2022 amendments

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https://gnppac.com/conservative-lawmakers-launch-lawsuit-to-overturn-deceptive-amendments-attacking-election-integrity

Jonathan L. Williams | Senior Counsel
States United Democracy Center
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jonathan@statesuniteddemocracy.org

FOR IMMEDIATE RELEASE

Contact: Elizabeth Nielsen, nielsen@mklaw.com, 612-465-0905
For interviews with Erick Kaardal, call 313-920-3080

Mich. Legislators File Federal Lawsuit. Claim State Usurped Their Constitutional Authority.

Lawmakers say state election officials violated legislature's right to determine times, places, and manner of elections as protected in both the U.S Constitution and the Michigan Constitution

September 28, 2023. *Lansing, Michigan.* Today, eleven Michigan state legislators filed a lawsuit in federal court against state election officials. The lawsuit claims the 2018 and 2022 state constitutional amendments regulating the times, places, and manner of federal elections are legally null and void. The U.S. Constitution, Article I, Section 4 (the Elections Clause), requires the state legislature to regulate the times, places, and manner of federal elections. However, Michigan's constitutional amendments (Proposal 3 of 2018 and Proposal 2 of 2022) bypassed the state legislature and, in doing so, usurped the legislature's federally-mandated constitutional authority. These state constitutional amendments included provisions that allow voters to sign affidavits instead of presenting valid identification when voting in person or applying for an absentee ballot; nine days of early voting; private funding of election administration; no-excuse absentee voting procedures; same-day voter registrations; state-funded absentee ballot drop boxes, and independent redistricting commissions. The lawsuit, filed in the United States District Court for the Western District of Michigan, names as defendants Secretary of State Jocelyn Benson and Jonathan Brater, Director of the Bureau of Elections.

In a press conference webinar conducted today, state Senator Jonathan Lindsey, one of the legislator plaintiffs, said, "The United States Constitution, the supreme law of the land, contains limited, but critical, election regulations. We also have procedures in place at the state level to amend election law. However, these processes were violated in 2018 and 2022 when an alternative amendment process was used without regard to federal constitutional requirements. This lawsuit challenges recent attempts to subvert our constitutional process and will protect against such actions in the future."

Lindsey said progressives had tried and failed for years to pressure elected representatives to tear down safeguards that kept the state's elections convenient and secure. "As an end-around, they used an unconstitutional process, then deceived the public into voting for changes that weaken our elections," he said. "I don't blame voters. They were told lies that made Proposal 2 sound good. Proponents ran ads saying this "enshrines voter ID into our Constitution" when in fact Prop 2 guarantees the right to vote WITHOUT voter ID—a classic bait and switch tactic. A lot of money was spent to deceive people. Now these unlawfully enacted changes purport to limit our power as legislators to fix serious issues with our elections. Today I stand with fellow legislators to challenge that notion."

Representative Steve Carra, a plaintiff and Chair of the Michigan House Freedom Caucus agreed. "The founders of this great republic put regulating elections into the hands of the state legislatures, so changes to the election process will undergo a deliberative and thoughtful process by the people's elected representatives."

"Michigan state election officials committed horrible violations of state legislators' federal rights in 2018 and 2022, and continue to do so," said Erick Kaardal, attorney with Mohrman, Kaardal & Erickson, P.A., representing the plaintiffs. "The election officials enabled these legally unauthorized amendments to the state constitution to eviscerate the state legislators' federal rights to participate in law-making to determine the times, places, and manner of federal elections. Now, the Michigan Constitution contains federal elections regulations that are monuments to civil rights violations. We will need help from the federal courts to clean up the mess that the election officials created."

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Additional attorneys for the plaintiffs include Lansing-based David Kallman and Steve Kallman of the Kallman Legal Group, PLLC.

Carra said, "We're seeing enormous outstate influence on our state's elections. The far left struggles to win in a fair election, so their national strategy is to corrupt swing-state elections. One of their tactics is to trick the public into voting for unconstitutional changes to a state's constitution, taking the legislature out of the election process."

Carra explained that of the total $31.7 million spent on the Proposal 2 campaign, $23.6 million, 74%, was expended in support. About half of that, $11.3 million, poured into Promote the Vote from the Sixteen Thirty Fund, a 501(c)4 nonprofit based in Washington D.C. The George Soros Open Society Foundation, a 501(c)3 nonprofit based in New York, accounted for $1.2 million.

"Despite the inflamed rhetoric coming from extremists, Michigan residents want fair and secure elections." Carra declared. He cited a recent Honest Elections Project (HEP) study that shows public support for photo ID laws has grown to an astounding 88% nationwide with 68% strongly agreeing that photo ID should be required when voting. "Promote the Vote behaved like snake-oil salesmen to deceive Michiganders into amending the state constitution. They claimed it enshrined voter ID when the truth is the Proposal 2 amendment did just the opposite. It allows registrants to vote without valid identification."

Carra noted, "The HEP study found that 86% of Americans think every election office should routinely undergo a full performance review and audit. "Prop 2 allows for nine days OR MORE of early voting, which is fiscally irresponsible and makes our elections ripe for fraud. We need to fix the problem now and restore legislative authority. Otherwise, the situation will continue to get worse."

The legislature has the authority to propose an amendment to the Constitution involving a vote of the people under Article 12, Sec. 1. But any election-law amendment to the Constitution that bypasses the legislature is illegal. According to both the U.S. Constitution and the Michigan Constitution, only the state legislature has the authority to regulate the times, places, and manner of federal elections. The passage of an election-related ballot referendum without first gaining legislative approval violates both the U.S. and Michigan Constitutions. The Michigan Constitution provides that the legislative power to regulate elections is vested in the senate and house of representatives.

The lawsuit warns that the unconstitutional process could be misused in 2024 and in the future.

"The courts need to decide these important legal questions," Senator Lindsey explained. "The people of Michigan are entitled to an answer on the scope and limitations of Article XII, section 2, amendment by petition, especially as it relates to the responsibilities granted to the state legislatures by the United States Constitution. I am honored to play a role in this effort to restore the rule of law in Michigan."

Plaintiffs include Senators Jonathan Lindsey and Jim Runestad; Representatives Steve Carra, James DeSana, Joseph Fox, Neil Friske, Matt Maddock, Brad Paquette, Angela Rigas, Joshua Schriver, and Rachelle Smit.

Attorney Erick Kaardal, a partner of Mohrman, Kaardal & Erickson, P.A., specializes in suing the government to improve it. Over the course of his three-decade career, Kaardal has achieved 61 election integrity counter-lawfare victories, including two U.S. Supreme Court wins.

Michigan Fair Elections and the Great Lakes Justice Center, sponsors of the lawsuit, are Michigan-based, non-profit 501(c)3 organizations. MFE is composed of local task forces dedicated to restoring fair and honest elections through education, local citizen participation in elections, and litigation. GLJC's mission is to speak truth on behalf of the persecuted and most vulnerable and to champion the cause of the defenseless and oppressed.

# # #

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/28/2023 6:40:36 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Press conference recording

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To the extent useful, the hour-long press conference announcing today's lawsuit is available on YouTube: https://www.youtube.com/watch?v=RW0hr1fepSs

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/28/2023 3:13:26 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Lawsuit challenging 2018 and 2022 amendments

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, September 28, 2023 at 11:12 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Lawsuit challenging 2018 and 2022 amendments

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 11:05 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Re: Lawsuit challenging 2018 and 2022 amendments

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, September 28, 2023 at 10:23 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: Lawsuit challenging 2018 and 2022 amendments

Literally just emailed you too.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, September 28, 2023 10:23 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Lawsuit challenging 2018 and 2022 amendments

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https://gnppac.com/conservative-lawmakers-launch-lawsuit-to-overturn-deceptive-amendments-attacking-election-integrity

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From: Teszlewicz, Barbara (AG) [teszlewiczb@michigan.gov]
on behalf of Grossi, Christina (AG) [GrossiC@michigan.gov]
Sent: 8/30/2022 1:55:24 PM
To: 'Ray McCormick' [ray@statesuniteddemocracy.org]; 'Jonathan Williams' [jonathan@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Ranjana Natarajan [ranjana@statesuniteddemocracy.org]; Bagley, Nick [BagleyN1@michigan.gov]; Weare, Jessica [WeareJ@michigan.gov]; Brady, Mike (MDOS) [BradyM@michigan.gov]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]
CC: Teegardin, Rachel [TeegardinR1@michigan.gov]; Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]

Subject: (HOLD) In-Person Meeting w/AG, Gov, SOS, SUDC Offices
Location: AG's Lansing Office - Williams Building, 525 West Ottawa, Lansing

Start: 9/1/2022 2:00:00 PM
End: 9/1/2022 3:30:00 PM
Show Time As: Tentative

Required Attendees: Ray McCormick; Jonathan Williams; Robert Cotter; Ranjana Natarajan; Bagley, Nick; Weare, Jessica; Brady, Mike (MDOS); Sargent, Aubrey (AG); Meingast, Heather (AG); Hagaman-Clark, Danielle (AG)
Optional Attendees: Teegardin, Rachel; Sitts, Jennifer (MDOS)

8/30: Some people are unable to attend in person so the Teams information at the bottom of this invite is available for them.

Per States United: They would like to hold the 90 minutes for this meeting but understand that it may be a shorter time.

Participating:
AG:
Christina Grossi
Heather Meingast
Danielle Hagaman-Clark
Aubrey Sargent

Gov:
Nick Bagley
Jessica Weare

SOS:
Mike Brady

SUDC:
Jonathan Williams
Robert Cotter

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Ranjana Natarajan

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Meeting ID:
Passcode: Security MCL 15.243(1)(u)
Download Teams | Join on the web

Or call in (audio only)
Security MCL 15.243(1)(u) United States, Pontiac
Phone Conference ID: Security MCL 15.243(1)(u)
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/28/2023 9:42:50 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 Litigation Update
Attachments: 14A Litigation tracker (2023.09.28).docx

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Heather,

Please find attached a litigation tracker which provides descriptions and status updates of cases filed around the country involving the Disqualification Clause of the 14th Amendment. We will endeavor to send an updated tracker weekly and will indicate changes from the previous week on the tracker. Please let us know if you are aware of any updates that we are missing!

Below is a summary of relevant cases/filings from the past week:

Colorado:

- On Friday, September 22, in *Anderson v. Griswold*, state district court Judge Sarah Wallace issued a Protective Order banning threats and intimidation on all parties, the lawyers, the judge and her staff.
- On the same day, President Trump filed two Motions to Dismiss: One First Amendment Motion based on the Colorado Anti-SLAPP statute and one based on standing and the Colorado statutory scheme. President Trump indicated he would file an additional Motion to Dismiss on September 28 addressing 14.3 structural arguments.
- The Colorado Republican Committee also filed a Motion to Dismiss raising First Amendment arguments, statutory arguments, and arguments related to 14.3.

Michigan:

- On September 15, activist Robert Davis filed a pro se civil action to require Secretary of State Jocelyn Benson to exclude Trump from the Michigan primary ballot.
- On September 19, Davis filed an Emergency Motion for an Expedited Hearing and Expedited Briefing.
- Secretary Benson was served on September 22.

Minnesota:

- In *Growe v. Simon*, on September 27, 2023, Secretary Simon filed a responsive pleading indicating he takes no position on the merits but agrees with the Petitioners that the current proceeding is the proper process to determine Trump's eligibility. Secretary Simon requested that the issue be decided no later than January 5, 2024.
- Several groups and individuals filed motions for leave to file amicus briefs including CREW, Bruce Ackerman, Derek Muller, the Constitutional Accountability Center, and the RNC.
- Oral Arguments are scheduled for November 2.

Best,

Jonathan

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude & Michael Stokes Paulsen

Abstract: Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This article corrects those mistakes by setting forth the full sweep and force of Section Three.

First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. *Second*, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. *Third*, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. *Fourth*, Section Three covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support as "aid or comfort." It covers a broad range of former offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude* & Michael Stokes Paulsen**

Introduction

"Section 3 has long since faded into history."
- Eric Foner[1]

Reports of Section Three's demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force, and has a broad substantive sweep.

Here is what it says:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War.

---

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** Distinguished University Chair and Professor of Law, University of St. Thomas Law School. We thank Frank Bowman, Steve Calabresi, Josh Chafetz, John Harrison, Ed Hartnett, Daniel Hemel, Brian Kalt, Myles Lynch, Gerard Magliocca, Michael McConnell, Derek Muller, Farah Peterson, Eric Posner, Micah Quigley, Richard Re, Michael L. Rosin, Stephen Sachs, Greg Sisk, Seth Barrett Tillman, and workshop participants at the University of Chicago Law School and University of St. Thomas Law School for helpful comments on the first draft of this article, T.J. Bowman, Nicole Catlin, Connie Gong, Sarah Leitner, James Marmaduke, Matt Phillips, and Georgios Sarris for valuable research assistance, and countless others for discussions about these issues—though not all of them gave aid or comfort to our conclusions.

[1] Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 85 (2019).

[2] U.S. Const. art. XIV, sec. 3.

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States in the South had purported (unconstitutionally)[3] to secede from the Union; they had purported to form the (so-called) "Confederate States of America" in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). The former Confederates who arrived in Washington included "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[4]

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective "reconstruction" of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in "insurrection or rebellion" against the U.S. constitutional authority or given "aid or comfort" to its enemies. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.[5] The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting

---

[3] See infra note 231 and sources cited there.

[4] Akhil Reed Amar, America's Constitution: A Biography 377 (2005); see also Eric L. McKitrick, Andrew Johnson and Reconstruction 176-179 (1960); Allen C. Guelzo, Reconstruction: A Concise History 25 (2018).

[5] The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment.. 87 (2021); Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, Lawfare (Jan. 19, 2021), available at https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.

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and immediate incitement of a mob to attempt to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'etat. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an "insurrection" aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have foundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process and free speech? And if Section Three *does* apply—*to what and to whom?* What actions count as having "engaged in insurrection or rebellion" against the Constitution of the United States or having "given aid or comfort to the enemies thereof"? Which officials are covered by Section Three's exclusions?

This article attempts to answer these questions. It makes four key points (or clusters of points):

First. Section Three remains legally operative. It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

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Nor has Section Three somehow been "repealed" by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; Congressional amnesty is retrospective.

Second. Section Three is legally self-executing. That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to justiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,[6] is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them. Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden Ex Post Facto law or Bill of Attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

[6] 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

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This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or giving "aid or comfort" to "the enemies" might turn out to be in tension with the First Amendment's protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three's terms ("insurrection," "rebellion," "aid or comfort," "enemies") will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article's fourth and final group of points:

Fourth. Section Three's disqualification is sweeping in its terms. It disqualifies from future office-holding persons who "*engaged in*"—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms "*insurrection or rebellion*" or the giving of "*aid or comfort*" to "*enemies*" of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three's prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text's meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in insurrection or rebellion or giving aid or comfort to enemies of the lawful constitutional order.

I. Section Three is Legally Operative Today

A. The Generality and Presumptive Perpetuity of Constitutional Language

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The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."[7]

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.[8] It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral," way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and

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[7] Eric Foner, Reconstruction, 1863-1877, at 260 (1988).

[8] Mark Graber, Punish Treason, Reward Loyalty: The Forgotten Fourteenth Amendment, Volume 1 (2023, University Press of Kansas).

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generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.[9]

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter that the drafts*men* of the amendment might not have had women "in mind" if women are covered by the meaning of the words they actually wrote and ratified.[10] Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.[11] The answers to each of these questions turn on the objective, original

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[9] See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. J. 1113, 1124-1148 (2004); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 Nw. U. L. Rev. 857, 872-883 (2009); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U Pa. L. Rev. 609, 624-625 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1456-1460 (2019). For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

[10] We have used such examples before. Paulsen, *Rules for Its Own*, supra note 9, at 901-902; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1421 n. 68 (2014); William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment* , 76 Stan. L. Rev. at 67-68 (forthcoming 2024).

[11] We have used this example before, too. Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 839-840 (1993); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2380-2381 (2015). See also Baude, Campbell, & Sachs, supra note 10, at 66.

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meaning of "privileges or immunities of citizens of the United States" and "equal protection of the laws," not whether the 1866 Congress and subsequent ratifiers had thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment's terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn't matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,[12] it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase "insurrection or rebellion.")[13] But in the end the question is what rule was enacted. If Section Three's rule fell short somehow, missing some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.[14]

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[12] Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section's application to the "late insurrection." Later versions dropped this limitation and generalized Section Three's application to "insurrection" and "rebellion." See Cong. Globe, 39th Cong., 1st Sess., at 2767-68, 2770 2869, 2921; see also Mark A. Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished chapter, forthcoming in The Forgotten Fourteenth Amendment, Volume 2, University Press of Kansas) (documenting this development).

[13] Infra Part IV.A.

[14] See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 908-909 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J. L. & Pub. Pol'y (forthcoming 2023) ("Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation."). For an extended discussion of the abuse of arguments

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Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is "old" does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.[15] There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as "the interest in sovereignty fades."[16] But in our view, this just shows what is wrong with such living constitutionalism.[17] The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.[18] But sometimes we wonder if this kind of denial is sneaking in to people's intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive as the day it was enacted.

B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)

But what about this? The second sentence of Section Three provides that Congress "may by vote of two-thirds of each House, remove such disability."[19] Just as the first sentence's disqualification is not limited specifically to the Civil War, neither is Congress's power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put

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from inconvenience, see infra Part II.C.2.a (discussing Chief Justice Chase's appalling opinion in *Griffin's Case*).

[15] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1486-1490 (1997) (discussing privilege against self-incrimination).

[16] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 58 (2015); see also Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295 (2008).

[17] See Baude & Sachs, *Grounding*, supra note 9, at 1487 (responding to Strauss).

[18] For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935) ("It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision cannot possibly apply to the present case").

[19] U.S. Const. amdt. XIV, sec. 3.

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more vividly: Can Congress, by two-thirds vote of each house, essentially "explode" Section Three—render it inoperative in the future, for all time?

These questions turn out not to be completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed "from all persons whomsoever"—except designated categories of individuals—all "political disabilities imposed" by Section Three.[20] Another (from 1898) further removed "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred."[21] And indeed, in a recent case (brought by then-Representative Madison Cawthorn) a federal judge relied on these statutes to conclude that Section Three was now legally dead.[22] Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?[23]

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 act. In 1872, after a period of case-by-case consideration of amnesty requests, Congress, as mentioned above, enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.[24] But what is most important is what it says. The statute reads, in full:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein),* That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-

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[20] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[21] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[22] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 889-892 (E.D. N.C. 2022) rev'd sub nom Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022). This argument, too, was made and rejected by the House during the exclusion of Victor Berger. 6 Cannon, supra note 18, at 55.

[23] The power in general of Congress by two-thirds vote of each House to remove Section Three's disability and the history of its exercise are the central themes of Professor Gerard Magliocca's excellent article, cited supra note 5.

[24] See generally Magliocca, *Amnesty*, supra note 5, at 112-120.

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> seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.[25]

The key words are "imposed" and "[hereby] removed." The words of the 1872 statute are used in the past tense: the statute *removed* disqualifications *imposed* by the Fourteenth Amendment—that is, disabilities that had already become legally effective. That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the district court's decision in the *Cawthorn* case: Congress in 1872 employed "the past-tense version" of the verb "impose," thus "indicating its intent to lift only those disabilities that had by then been 'imposed.'"[26] Moreover, the Fourth Circuit continued: "[t]he operative clause's principal verb—'removed'—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come."[27]

By contrast, the district court had faulted Congress for not being more explicit: Congress "could have limited the Act to remove Section 3's disabilities from 'persons currently subject to the disabilities' or 'persons against whom the disabilities were lodged' at the time (i.e., the 'Confederates') but did not do so."[28] Therefore, the district court concluded, by the "plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted."[29] With all due respect, the district court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the "all persons whomsoever" language and completely missed the other language that made clear the statute's past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish-American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances (and, one might add more cynically, at a time of rising Jim Crow sentiment)[30]—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

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[25] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[26] Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022).
[27] Id.
[28] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 891 (E.D. N.C. 2022) rev'd sub nom Carthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022).
[29] Id.
[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Cummings v. Richmond County Bd. of Ed. 175 U.S. 528 (1899). See also Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 195-201 (2015).

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.[31]

In one sense, that's about as categorical, across-the-board a disqualification-removal as one can imagine: *the* disability *imposed* by section three *is hereby removed.* Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses past-tense language: a disability (already) "imposed" is now being "removed" from its prior legal existence. What's more, the 1898 act says that the Section Three disqualification being removed was one "*heretofore incurred*." That is unmistakably backward-looking, past-occurrence language.

What might otherwise—that is, but for the clarity of the "heretofore incurred" language—give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as any and all extant ones, is the Act's reference to "*the* disability" imposed by Section Three. This singular reference might be taken to suggest that Section Three's disqualification was thought a one-time-only, single-shot, Civil War era occurrence.[32] If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was[33] (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress's constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress's constitutional power to remove Section Three's disqualification general and prospective, letting it remove Section Three's disqualification once and for all, including for future situations? We think not.

To be clear, we don't think there's anything inherently unthinkable or absurd about the idea of an "exploding" or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration

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[31] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[32] For instance, the D.C. Circuit's recess-appointments opinion in Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013) aff'd only on alternate grounds, 134 S.Ct. 2550 (2014), leaned heavily on "this difference between the word choice 'recess' and 'the Recess'," arguing that "[a]s a matter of cold, unadorned logic, it makes no sense to [say] that when the Framers said 'the Recess,' what they really meant was 'a recess.' This is not an insignificant distinction. In the end it makes all the difference." Id. But a majority of the Supreme Court did not share this view of the text. NLRB v. Noel Canning, 134 S.Ct. 2550, 2561 (2014).

[33] For the brief legislative history of the 1898 act, see 31 Cong. Rec. 5367-5419 (1898).

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date, even in an enduring Constitution. Article I's Slave Importation Clause, protecting the international slave trade, exploded after twenty years.[34] So too the initial allocation of representatives to states is written in to the text of the Constitution, even though it was then exploded by the subsequent census.[35] Other provisions of the Constitution set baseline rules that Congress has power to modify. Article I, section 4 does that with respect to state legislative power over congressional elections: "Congress may at any time by Law make or alter such Regulations."[36] Article III, section 2 does that with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."[37] The Twentieth Amendment, in Section 2, sets a default date of Congress's annual meeting.[38]

There's no reason why the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the provision's own extinction after a supermajority vote of Congress.[39] But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course, those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

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[34] U.S. Const. art. I, §9, cl. 1. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") For a scathing critique of the substance and purpose of this proviso, see, e.g., Paulsen & Paulsen, supra note 30, at 81-83.

[35] U.S. Const. art. I, § 2, cl.3.

[36] U.S. Const. art. I, § 4.

[37] U.S. Const. art. III, § 2, cl. 2.

[38] U.S. Const. amend. XX, §2.

[39] We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST – Academic Commentary, April 13, 2022, https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/. See also Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("'Congress has no power whatever to repeal a provision of the Constitution by a mere statute'") (quoting 6 Cannon, supra note 18, at 55).

This strikes us as not quite right: *If* Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

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The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." (*"But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "Remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.[40] This confirms that Congress's removal power therefore only comes into being when a legal disqualification has vested by virtue of the operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

* * *

All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect by U.S. political actors whose powers and duties are such as to call for application of Section Three as a rule of law? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

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[40] Dr. Webster's Complete Dictionary of the English Language 1116 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (defining "remove" as "To cause to change place; to move away from the position occupied; to displace") (quoted in Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022)).

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II. Section Three is Legally Self-Executing

Our second point is colossally important—a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient, rejected in the highest quarters, and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself, and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation-of-powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

A. Section Three as Automatic Legal Disqualification

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,[41] in doing so they put the cart before the horse. The horse is the Constitution, which is itself the "supreme law of the land."[42] Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. Section Three's language is language of automatic legal effect: "*No person shall be*" directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall

[41] But not ours! See Paulsen, McConnell, Bray and Baude, The Constitution of the United States (5th ed. 2022).
[42] U.S. Const. art. VI.

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be.[43] It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.[44] The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President. And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, section 2's requirements.[45] "*No Person shall be*" a U.S. Senator who does not meet Article I, section 3's requirements.[46] These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three of the Fourteenth Amendment parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.[47] None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist* ...," the Thirteenth Amendment provides.[48] The institution of slavery was *immediately, legally, constitutionally gone*.[49] The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.[50] But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative. Such a

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[43] We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 84 U. Chi. L. Rev. 203, 211 (1997) ("The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.")

[44] U.S. Const. art. II, §2, cl. 5 (emphasis added).

[45] U.S. Const. art. I, §2, cl. 2(emphasis added).

[46] U.S. Const. art. I, §3, cl. 3 (emphasis added).

[47] See Josh Chafetz, Democracy's Privileged Few 168 (2007).

[48] U.S. Const. amend. XIII §1 (emphasis added).

[49] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 48–53 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

[50] U.S. Const. amend. XIII §2 ("Congress shall have power to enforce this article by appropriate legislation.").

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position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment too. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three states directly operative rules of constitutional law: "No state shall," in Section One, and "No person shall" in Section Three.[51] Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks (for example) that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation "to enforce" the Thirteenth and Fourteenth Amendments' commands, pursuant to their grants of legislative power.[52] Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress's view of the law, and so on. The Civil Rights Act of 1866, the Ku Klux Klan Act of 1871 and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But, to repeat, the existence of an enforcement power does not mean that the Amendment's specific legal commands lack any independent, self-executing force.[53]

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing *quo warranto* civil suits brought by the United States to remove state officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.[54] But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction

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[51] U.S. Const. amdt XIV, sec. 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. Section Two, which alters Article I, section 2's rule for how Representatives "shall be apportioned," presents a more complicated case. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. In practice, Congress has ignored it, see Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 Hist. Meth. 57 (2013); Amar, America's Constitution, supra note 4, at 395; see also email from John Harrison to Akhil Reed Amar, quoted in id. at 611 n. 96, and it is hard to see how anybody else can realistically enforce it.

[52] U.S. Const. amdt. XIII, sec. 2; amdt. XIV, sec. 5.

[53] Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. Baude, Campbell, & Sachs, supra note 10, at 30-31, 63-64.

[54] Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§14, 15, 16 Stat. 140, 143. The criminal prohibition in Section 15 of the Act was repealed in the 1909 codification of the penal code, 35 Stat. 1088, 1153, § 341 (1909), and the quo warranto provision in Section 14 was repealed during the 1948 positive law codifications of Title 28 of the U.S. Code, see Act of June 25, 1948, ch. 646, § 39; see also Lynch, supra note 5, at 206 n. 365. Neither of these codifications was thought to make a substantive change by repealing these provisions, see generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1949); see also The United States Compiled Statutes, Title XIX, page 4459 (1916), which were

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for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.[55] Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[56]

Note the contrast. The Treason Clause defines an *offense* ("Treason . . . shall consist") but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification ("No person shall be"). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: "[C]onvict[ions] of treason" require two witnesses or a public confession; and "Congress shall have power to declare the punishment of treason." Section Three of the Fourteenth Amendment, by contrast enacts its standard and imposes its consequences all at once.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."[57] But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.[58] Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a

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thought obsolete by then. The repeals therefore certainly did not reflect a decision to preempt or preclude any *other* existing remedies for Section Three.

[55] Professor Magliocca concurs. Magliocca, *Amnesty*, supra note 5, at 106 & n.101 (noting that "enacting enforcement legislation does not imply that legislation is required" and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. See infra Part II.C.

[56] U. S. Const. art. III, sec. 3.

[57] U.S. Const. art. II, sec. 4.

[58] U.S. Const. art I, sec. 3 & sec. 4.

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noticeably different path.[59] Section Three does not call for treason *trials* or the *impeachment* of insurrections and rebels. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.[60] It immediately became "supreme Law of the Land." [61] Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.[62] It is pretty obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of "insurrection" and "rebellion" and so on—and these meanings are not quite as self-evident as "thirty-five years of age" (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*.

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[59] Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. For opponents, see Cong. Globe 39th Cong., 1st Sess., at 2900 (Senator Doolittle) (amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions"); id. at 2916 (Senator Doolittle); id. at 2940 (Senator Hendricks) (complaining about immediate consequences); for proponents, see id. at 2919 (Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct'); id. (they lost their "citizenship rights when they committed treason"); Cong. Globe 39th Cong., 1st Sess., App., at 228 (Senator Defrees); Cong. Globe, 39th Cong., 1st Sess. at 3036 (Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law); see generally infra Part III.A-B. See also Graber, supra note 12, at 26-27, 35-37 (documenting all of these discussions) .

[60] U.S. Const. art. V.

[61] U.S. Const. art. VI, cl. 2.

[62] See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, at 14 n.42 (Mar. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards"). On the other hand, the Constitution's *inhabitancy* requirement, has proved far from simple in practice. See Jack Maskell, Congressional Research Service, Qualifications of Members of Congress (Jan 15, 2015) at 13-18, https://sgp.fas.org/crs/misc/R41946.pdf. And there has been recent litigation about the requirement that the President be a "natural born citizen" as well. See Derek T. Muller, *"Natural Born" Disputes in the 2016 Election*, 85 Fordham L. Rev. 1097 (2016).

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Not all participation in insurrection or rebellion is open and notorious. More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.[63] The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.[64]

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non-sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions, maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

B. Who (All) Can (Must) Faithfully Apply and Enforce Section Three?

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But in principle: Section Three's disqualification rule may and must be followed—applied, honored, obeyed, enforced, carried out—by anyone whose job it is to figure out whether someone is legally qualified to office, just as with any of the Constitution's other qualifications.

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[63] Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J. L. Ethics & Pub Pol'y 497, 511-512 (2018).

[64] Cf. Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 839 (1993) (mocking constitutional interpretation that engages in "the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment"); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

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These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to "activate" Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

1. Seeking Office

a. by election

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state-law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on a primary or general election ballot.[65] Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.[66] Accordingly, such state actors can and must apply Section Three's disquali-

[65] To be sure, the centralized, government-administered ballot did not come to American until the late Nineteenth Century and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

[66] U.S. Const. art. VI, cl.2 ("This Constitution ... shall be the supreme Law of the Land"). See also U.S. Const. art. VI, cl.3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for "judicial review," as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); see also William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5-9 (2023).

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fication in carrying out their state-law responsibilities—just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[67]

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene's involvement in the events of January 6, 2021.[68] The judge proceeded under the theory that if January 6 was a constitutional "insurrection," and if Representative Greene had been part of it, she would be barred from office.[69] But it concluded that the challengers had failed to meet their burden of proof under state law: "In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took any action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021."[70] Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer's proposed findings that day.[71]

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene's claims failed on the merits.[72] While Greene's appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.[73] The

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[67] We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, section 5, powers to act as "Judge" of the "Elections, Returns, and Qualifications of its own Members" and refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitation. See also infra n. 96 and accompanying text.

[68] Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022).

[69] Id. at 5-6.

[70] Id. at 15. The January 3, 2021 cut-off is because that is the date that Representative Greene first took a constitutional oath. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a "coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol." Id. at 16.

[71] Final Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022).

[72] Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1320 (N.D. Ga. 2022).

[73] Greene v. Sec'y of State for Georgia, 52 F.4th 907, 909-910 (11th Cir. 2022).

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details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[74] In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots in to existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court's muddied reasoning in the Finchem-Gosar-Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."[75] This inference is mistaken—Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.[76]

Second, in some circumstances state law not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,[77] where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing

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[74] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[75] Id. at *1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in Griffin's Case, which we discuss at greater length presently. See infra Part II.C.2.d. The Arizona Supreme Court also made the additional suggestion that Article I, Section 5 gave Congress "exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members," id. We are skeptical of this point as well, see infra n. 96 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

[76] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); id. at 469- 470 (Scalia, J., concurring); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* (May 29, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807.

[77] 330 U.S. 386 (1947).

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in the Constitution or Laws of any State to the contrary notwithstanding."[78] And thus "the policy of the federal Act is the prevailing policy in every state."[79] A state cannot treat federal obligations the way it can treat foreign ones.

The Arizona Supreme Court's decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state "statute's scope is limited to challenges based upon 'qualifications . . . as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office."[80] If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three's dis-qualification is not a "qualification," that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified to office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. by appointment

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally this includes at a minimum whoever nominated the officer.[81] Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three.* And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.[82]

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[78] Id. at 391 (quoting U.S. Const. Art VI, sec. 2).

[79] Id. at 393. To be sure, *Testa* and especially subsequent cases expanding it have been subject to powerful criticisms as a matter of original meaning, see Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 78-83, 97-105 (2020); Haywood v. Drown, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

[80] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[81] For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, sec. 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 330, 333-334, 355-356 (2019).

[82] See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 914-918 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *Black*, supra note 81, at 355-356 (similar); see also Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105

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In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate's eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?[83]

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully-disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.[84]

For an example of how this process is supposed to work consider how the state of New Mexico removed commissioner Couy Griffin from state office.[85] Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and

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Yale L.J. 549, 562-570 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 658-660 (1970) (similar).

[83] Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See infra at II.C.

[84] Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See supra notes 72-73 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

[85] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

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ultimately joined in the January 6 insurrection against the Capitol. A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office. The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three. More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.[86]

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.[87] It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same "standing" limitations as the federal courts are. As a matter of federal law, the court had no trouble concluding that the events of January 6. 2021 were a constitutional "insurrection." And it had no trouble concluding that Griffin had engaged in that insurrection, both by "voluntarily aid[ing] the insurrectionists' cause by helping to mobilize and incite" the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.[88] The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three's disqualification in doing so.[89] Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

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[86] Id. at 46. The New Mexico Supreme Court dismissed Griffin's appeal on procedural grounds. NO. S-1-SC-39571 (N.M. Sup. Ct. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: an attempt to remove the state action to federal court, State ex rel. White v. Griffin, 2022 WL 1707187 (D.N.M. May 27, 2022) (denying removal because of plaintiffs' lack of Article III standing) and a separate parallel suit attempting to enjoin the state proceedings, Griffin v. White, 2022 WL 2315980 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

[87] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473, at 24-25 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[88] Id. at 35-38.

[89] The availability of a federal quo warranto action is curiously codified in the D.C. Code, §§ 16-3501-02. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. See Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984); Drake v. Obama, 664 F.3d 774, 784-785 (9th Cir. 2011); SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 81 (D.C. Cir. 2015), aff'd, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. Hill v. Mastriano, No. 22-2464, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022). See also Hill v. Perry, No. 22-2465, 2023 WL 3336648, at *1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

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But in general: wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.[90]

Finally and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.[91] A regulated entity can challenge the actions of an executive official who holds office improperly.[92] Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the "de facto officer doctrine," (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to "Judge of the Elections, Returns, and Qualifications" of "its own Members."[93] Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional

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[90] An officeholder who has engaged in insurrection or rebellion or given aid or comfort to enemies of the United States has surely committed a "high Crime or Misdemeanor" within the meaning of Article II, section 4's description of the scope of the impeachment and removal power. See generally Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 Harv. L. Rev. 689, 698-702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President's removal authority as Commander in Chief. Whether Congress could supplement that authority through appropriate legislation is an interesting question. See Zachary Price, *Congress's Power Over Military Offices*, 99 Tex. L. Rev. 291 (2021).

[91] Nguyen v. United States, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *Black*, supra note 81, at 346-47.

[92] Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 668 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487–88 (2010); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014); see also Baude, *Severability*, supra note 66, at 36-37.

[93] U.S. Const. art. I, sec. 5, cl. 1.

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backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,[94] that Congress cannot *create new* "Qualifications" and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house's judgment about whether the *existing*, *constitutional*, qualifications have been satisfied.[95]

Some have argued that each house's judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.[96] With respect, we do not agree with this argument. As a logical matter, each house's right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the "manner" of elections, which includes ballot eligibility.[97] In our view, the better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

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[94] 395 U.S. 486 (1969).

[95] See Powell, 395 U.S. at 520 n. 41 (reserving the possibility that Section Three disqualification is a qualification); see also P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 114-115 (1968) (cited in id. at n.41) (arguing that it is); Powell, 395 U.S. at 521 n.42 (noting that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). We emphasize that questions of interpretation and application of Section Three are not *in general* "political questions" that cannot be decided by federal courts, simply because they have political consequences. Where the Constitution supplies a rule, and the rule's application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the "Judge" of the "Elections, Returns, and Qualifications" of its own Members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

[96] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 594-598 (2015); see also Cawthorn v. Amalfi, 35 F.4th 245, 267-273, 282-284 (4th Cir. 2022) (Richardson, J., concurring); Greene v. Sec'y of State for Georgia, 52 F.4th 907, 912-916 (11th Cir. 2022) (Branch, J., concurring).

[97] U.S. Const. art. I, sec. 4. The same Clause also gives Congress the power to "make or alter" such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-275 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an attempt to impose a qualification *not contained in the Constitution*. E.g., *U.S. Term Limits*, 514 U.S. at 784, 787-788, 806-815. It

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The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[98] So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.[99] As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Additionally, Article I's Speech and Debate Clause provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."[100] This means that to the extent that the conduct that violates Section Three was a member of Congress's official statements or legislative actions,[101] each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three.

Federal judges hold their offices during "good Behaviour."[102] What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?[103] As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"[104] conduct meeting Section Three's standard disqualifies a federal judge from office.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is

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follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

[98] U.S. Const. art. I, sec. 5, cl. 2.

[99] There is some debate whether Congress can expel a member for conduct that occurred before being elected. See Chafetz, Democracy's Privileged Few, supra note 47, at 210-212 (recounting arguments on both sides but arguing that it can); Jack Maskell, Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 4-7 (2016) https://sgp.fas.org/crs/misc/RL31382.pdf (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

[100] U.S. Const. art. I, sec. 6, cl. 1.

[101] As we elaborate later, we think it is quite rare that such conduct could violate Section Three, even on its own terms.

[102] U.S. Const. art. III.

[103] Cf. Ex parte Milligan, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

[104] See supra note 90.

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that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1791 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).[105] Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?[106] Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. That eligibility question can be a part of a state's Article II election for electors just as much as any other state election.[107] Put simply: a state secretary of state (for example) might well possess state-law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility as well) to enforce Section Three.[108] In perhaps half the states, the question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.[109] But even working

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[105] Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 NYU J. L. & Liberty 18, 76-77 (2016).

[106] We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." We think that assumption is correct, and we will return to it in Part IV.B.

[107] See Hemel, *How-to Guide*, supra note 5; Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, supra note 96, at 599-608; see also Muller, Natural Born, supra note 62, at 1100-1106. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

[108] See Muller, *Scrutinizing*, supra note 96, at 579-580.

[109] Chiafolo v. Washington, 591 U.S. ___ (2020); see also Muller, supra note 96, at 580. We bracket the serious possibility that *Chiafolo* was wrongly decided. See, e.g., Mike Rappaport, The Originalist Disaster in *Chiafolo*, Law & Liberty (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-

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within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to arrange that their electors do not elect a constitutionally disqualified candidate, which should be reflected in their laws.

If the voters and presidential electors do select a disqualified candidate for the Presidency, we do not believe that Congress (or the Vice President) have the power to reject that candidate when the votes are counted in joint session. Whatever the extent of Congress's and the Vice President's authority to count the electoral votes, or determine the authenticity of submitted votes—i.e., was this the act of the electors of the state?—we do not believe that they have the authority to evaluate the decisions or actions of the electors themselves.[110] So if a properly selected elector submits a vote for a constitutionally disqualified individual it should still be *counted*.

Still, once those votes are counted, a disqualified candidate *does not become president*, even if he has the most votes. This is made explicit by the (self-executing) command of Section Three of the Twentieth Amendment, which sets the constitutional terms of a President's term. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."[111] The language thus specifically confirms the possibility of a failure to qualify, and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability.

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors" and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment. The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. On the other hand, it is less clear whether being *legally disqualified* from holding office makes the would-be President "unable to discharge the powers and duties of his office" within the meaning of the Twenty-fifth Amendment. (Structurally, the Twenty-fifth Amendment appears to relate to Article II, Section 1, paragraph 6, which deals with Presidential succession, rather than Article II, Section 1, paragraph 5, which deals with eligibility.) But in

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chiafalo/; Michael Stokes Paulsen, The Constitutional Power of the Electoral College, Public Discourse (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

[110] We take no position on many further details of this issue, including the relative interplay of the Electoral Count Reform Act, Pub.L. 117-328, Div. P, Title I, § 109(a) (Dec. 29, 2022) 136 Stat. 5238-5239, codified in relevant part at 3 U.S.C. 15(b) & (d)(2)(B)(ii), possible constitutional challenges to it, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1805 (2002); see also John Harrison, *Nobody for President*, 16 J.L & Pol. 699 (2000), interpretations of it, but see Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538 (2021), or the like.

[111] U.S. Const. amdt. XX, sec. 3. Cf, Muller, *Regularly Given*, supra note 110, at 1538 n.42.

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any event the Twenty-fifth Amendment question will usually be unimportant in practice, because it requires a two thirds vote of both houses, and the Vice President and many cabinet officials, and so it will usually be significantly easier to use the impeachment process instead.[112]

* * *

Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid or comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.[113] From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.[114] He might be removed by such a suit,[115] or might well choose to resign instead.[116] The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not

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[112] Brian Kalt, Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment (2019).

[113] See infra Part IV.C. for further discussion.

[114] For two relevant examples, see NMSA. 1978, sec. 44-3; W.V. Code sec. 53-2-1. In West Virginia, such a claim may be brought "[w]henever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested." Id. 53-2-2. For illustrative applications, see State ex rel. Zickefoose v. West, 145 W. Va. 498, 545 (1960); Wells v. Miller, 237 W. Va. 731 (2016).

[115] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[116] Resignation letter from West Virginia Delegate Derrick Evans to Governor Jim Justice (Jan. 9, 2021), available at https://s3.documentcloud.org/documents/20447012/derrick-evans-resignation-letter.pdf.

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difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

C. The Problem of Griffin's Case

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.[117] This precedent continues to cast a shadow over Section Three today.[118]

But there is a simple response to this small problem. *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate ground, under the so-called de facto officer doctrine, which we will discuss. But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.[119]

1. Background

Caesar Griffin, a black man, was charged in a Virginia state court with the crime of shooting with the intent to kill. Griffin was tried, convicted, and sentenced to prison. He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of his color."[120] Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not

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[117] In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

[118] See, e.g., Josh Blackman and S. B. Tillman, Opinion, "Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene," The New York Times, (Apr. 20, 2022); Tom Ginsburg, Aziz Huq, & David Landau, *The Law of Democratic Disqualification*, 111 Calif. L. Rev. at 16, 51 (forthcoming 2023) at https://ssrn.com/abstract=3938600.

[119] For other criticism of Griffin's Case, insightful as always, see Magliocca, *Amnesty*, supra note 5, at 102-108; Magliocca, *Foreground*, supra note 62, at 9-14.

[120] 11 F. Cas. at 22.

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conduct the trial with fairness and uprightness."[121] Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge Sheffey)[122] was legally disqualified by Section Three of the Fourteenth Amendment from serving.

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849. And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."[123] Thus "it is admitted," wrote Chase, that Judge Sheffey "was one of the persons to whom the prohibition to hold office pronounced by the amendment applied."[124]

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.[125] The sheriff appealed to the circuit court, which was held by Chase as circuit justice.[126]

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[121] Id. at 22.

[122] Cf. Will Baude, The deadly serious accusation of being a "so-called judge," Volokh Conspiracy, Wash. Post. (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ ("[T]o call him a 'so-called' judge is to hint that he is not really a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue").

[123] 11 F. Cas. at 22.

[124] Id. at 23.

[125] See Opinion of Judge Underwood in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870), at 462-466 (1875). We are indebted to Myles Lynch for locating this source.

[126] The procedural posture of this and several related cases are extremely confusing and reflect background machinations by both Judge Underwood and Chief Justice Chase: At the time, habeas was apparently available from the district court, or "at chambers," or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this, the unreviewable route, in another habeas case like Griffin's brought by Sally Anderson. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the cases in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. See Charles Fairman, Reconstruction and Reunion at 601-607; Letter from Chase to Underwood (Nov. 19, 1868) in 5 The Salmon P. Chase Papers 285-286 (1998); Letter from Chase to Underwood (Jan. 14, 1869) in id. at 292-293.

This background is briefly alluded to in the synopsis in *Griffin's Case* which explains that "[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme

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2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth Amendment did not exist.[127] The question was whether ratification of Section Three kicked him out. As Chase put it: "whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[128]

Chase said no, rejecting this as a "literal construction" [129] of Section Three. There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.[130] But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, can't possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, but also further impeached Chase's interpretation of Section Three. All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

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court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case." *Griffin's Case*, 11 F. Cas. at 7-8. But really, these circumstances are extraordinary. We take them up again below.

[127] Id. at 23.

[128] Id. at 18.

[129] Id. at 24.

[130] Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling *Virginia* government then gave its consent to the creation of a new Wheeling-based state of *West* Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as "Virginia." After Lee's surrender at Appomattox, Chase's opinion notes, the "government recognized by the United States was transferred from Alexandria to Richmond" and "became in fact what it was before in law, the government of the whole state." Id. at 18. Judge Sheffey was appointed under the authority of this government. (For the full story – and full formalist legal defense – of the validity of the legal fiction of "Virginia" giving its consent to the creation of a breakaway state of West Virginia, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 Calif. L. Rev. 291 (2002) For an argument that this aside was actually relevant to Chase's argument, see Magliocca, *Foreground*, supra note 62, at 10 n.30, discussed infra note 157.)

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a. "The argument from inconveniences, great as these"

The core of Chase's argument was that if Section Three were an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. "In the examination of questions of this sort," Chase wrote, "great attention is properly paid to the argument from inconvenience."[131] And here "the argument from inconveniences" was "great" in Chase's estimation— it was "of no light weight."[132]

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.[133] If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. "No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity."[134] Chase found this unthinkable: "It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states."[135]

Chase went on: not only did Section Three impose great "inconveniences" and "calamities," it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers from their offices—and ostensibly inconsistent with the "spirit" of prior constitutional principles, concerning due process, bills of attainder and ex post facto laws.[136] And besides, the specific remedy sought—vacating Griffin's conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase's interpretive driver: "Surely," Chase continued, "a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found."[137]

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[131] 11 F. Cas. at 24.
[132] Id. at 25.
[133] Chase also suggested that the problem was not completely limited to the Southern governments. Id. at 25 (observing that "[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government . . ." and that "it is not to be doubted that not a few among them" had previously taken a covered oath, and that "[p]robably some of these persons" had subsequently been elected to office).
[134] Id. at 25. Of course, Chase would undercut this conclusion later in the opinion. See infra Part II.C.
[135] 11 F. Cas. at 25.
[136] More on this point presently, Part II.C.2.c, and again Part III.
[137] 11 F. Cas. at 26.

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Chase tried to funnel these policy arguments into a rule of constitutional construction: "the argument from inconvenience."[138] This argument "it is true, can not prevail over plain words or clear reason," Chase acknowledged.[139] "But, on the other hand," he wrote, "a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference."[140]

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[141] Or as Chief Justice Marshall said in *United States v. Fisher*: "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[142] But Chase's canon was noticeably more aggressive: The supposedly more disruptive reading must "*never be preferred*" unless the text's terms "*absolutely* require" such preference.[143] That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase's analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the "literal" reading of the "terms of the instrument" as meaning exactly what they seem to say. As discussed above, the language of Section Three's prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase's opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text's language is somehow insufficiently clear to justify applying the "literal" meaning of its words. Indeed, even on Chase's own hyper-strict standard, the words of Section Three *do* "absolutely require" the conclusion that it, on its own, disqualifies covered rebels from office.

Second, Chase was too ready—far too ready—to find that following the ("literal") language of the document would produce (what *Chase* considered to be) great "inconveniences" or "mischief"— indeed, increase "calamities" already visited upon

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[138] Id. at 24.
[139] Id. at 24.
[140] Id. at 24.
[141] James Madison, Speech on Feb. 2, 1791, reprinted in Legislative and Documentary History of the Bank of the United States 39, 40 (photo. reprint 2008)
[142] United States v. Fisher, 2 Cranch (6 U.S.) 358, 386 (1805)
[143] 11 F. Cas. at 24 (emphasis added).

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the South. Chase emphasized the breadth of Section Three's language: it applied in all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply "to all persons in the category" and "for all time, present and future" (so?). And, taken seriously, this broad rule would, as noted, "annul all official acts" performed by disqualified officers, including judges. (Would it?)

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase's parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.[144]

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment. But because these arguments from inconvenience are the heart of Chase's opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase's construe-to-avoid-the-force-of-constitutional-language-whose-policy-consequences-you-dislike approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy "solutions" to texts they don't like. Chase's opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

b. The argument from "the intention of the people"

In places, Chase raises the inconvenience argument as an inquiry into the "intent" of the Framers: "What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?"[145] This at least sounds kind of

[144] As Judge Underwood had put it: "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Opinion of Judge Underwood, supra note 125, at 465.

[145] 11 F.Cas. at 24.

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like the question a judge should be asking—the original meaning of the constitutional provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase's framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.[146] And whatever evidence Chase might have that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say "coerced"—to ratify the Amendment as the price of regaining their representation in Congress.[147] Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed "intent" of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase was succumbing to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed "intent" of a written text. When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do.

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[146] See supra notes 9-14, sources cited there, and accompanying text.

[147] See generally, John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 461 (2001). For arguments that Congress's requiring states' ratification as condition of restored representation was entirely lawful and appropriate, see id; Kesavan & Paulsen, *West Virginia,* supra note 130, at 329; Amar, America's Constitution, supra note 4, at 364-380, see especially id. at 376-378. There is a different argument for ratification, the "loyal denominator" theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const. L. & Pub. Pol'y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 La. L. Rev. 47, 48 (2018). One of us has rejected this theory in prior writing, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,* 103 Yale L.J. 677, 709 (1993); see also Amar, supra note 4, at 378-380, and the other of us is inclined in the same direction.

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But it is easy for a judge to use this principle as an excuse for reading into the text his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. The argument that Section Three should not be read to depart from the "spirit" of prior constitutional law

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle, which in determining the construction of this amendment, is entitled to equal consideration."

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[148]

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once and without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.[149]

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

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[148] 11 F.Cas. at 25.

[149] Id. at 26.

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Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.[150] But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to "*forbid*[]" readings of a text "not *clearly* required" by its terms, that would "*bring it into conflict or disaccord*" with other provisions of the Constitution.[151] Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden.* Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in the judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.[152] If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did it would have the perverse effect of leaving Confederates who had *not* previously

[150] See infra, Part III.
[151] 11 F. Cas. at 25 (emphasis added).
[152] Id. at 26.

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taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.[153]

So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.[154] Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.[155] This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

d. The argument from the Section Five enforcement power

Having flailed to avoid the natural reading of Section Three, Chase finally offered his alternative, "reasonable construction":

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' [sic] … The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.[156]

Section Five "qualifies" Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise "qualifies" Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into

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[153] See Case of Davis, 7 F. Cas. 63, 92, 95 (C.C.D. Va. 1867).

[154] Id. See Magliocca. *Amnesty*, supra note 5, at 100-102; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 293-300 (2017).

[155] Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. Id. at 293-296.

[156] 11 F. Cas. at 26.

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practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course of performing their assigned duties. But as noted above there is no reason why "proceedings" and "decisions" and "enforcement" with respect to Section Three's commands may not be conducted and carried out by these various state and federal actors, exercising their usual authority with respect to such matters.[157] It is simply not true that "these can only be provided by Congress." Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin's Case*, until Chase stopped him.

Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin's Case*.

3. *Griffin*'s Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."[158]

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

> In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge. . . .
>
> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in

[157] Magliocca also suggests that in the specific situation in Griffin's Case, state law may have been "unavailable for enforcement" of Section Three because "Virginia was an unreconstructed state and thus lacked the ordinary powers of a state" and "because Virginia did not yet recognize the Fourteenth Amendment's legitimacy" – in contrast with states such as North Carolina. Magliocca, *Foreground*, supra note 62, at 10 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the union.

[158] 11 F. Cas. at 27.

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> the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[159]

What is going on here? Chase describes an alternate ground for the case—"a judge de facto acting under color of office," which we would now call the "de facto officer doctrine"—explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs in to it the more dubious the whole opinion becomes.

First of all, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended. But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown. The de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.[160]

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,[161] fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with

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[159] 11 F. Cas. at 27.

[160] Accord, Magliocca, *Foreground*, supra note 62, at 11 n.25.

[161] See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.") https://founders.archives.gov/documents/Jefferson/98-01-02-3562; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1011-12 & n.39 (2003); Baude, Judgment Power, 96 Geo. L.J. 1807, 1823-24 (2008).

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reference to this and kindred cases in this district."[162] The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,[163] in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court."[164] Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.[165] Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"[166] fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out

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[162] 11 F. Cas. at 27.

[163] The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex Parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." Ex parte State of Virginia No. 11, 1868 WL 10951, 19 L. Ed. 153 (1868); Fairman, supra note 126, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course – not deputize the Chief Justice to go deliver some secret verdict in their stead.

[164] Fairman, supra note 126, at 607.

[165] Id.

[166] Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

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to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.[167] But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto judges in the saga surrounding *Hayburn's Case*.[168]

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."[169] On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack.[170] Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.[171] On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction.[172] The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.[173] Indeed, these technicalities were argued by the parties and they were the main subject

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[167] For many citations, see Griffin's Case, 11 F. Cas. at 18-21 (argument of counsel). For more, see also Reply and Response Brief for the United States, Financial Oversight and Management Board for Puerto Rico v. Aurelius (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121) at 27-47; and Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

[168] Baude, Severability, supra note 66, at 12 (discussing Yale Todd).

[169] For statements like this, see Ball v. United States, 140 U.S. 118, 128-129 (1891) ("was judge de facto if not de jure, and his acts as such are not open to collateral attack."); see also Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 910, 919 (1963); but see id. at 910 & n. 9 (suggesting that a suit is collateral whenever the officer "is not a party," including on "writ of error").

[170] All three cases cited by Chase in Griffin's Case, 11 F. Cas. at 27, can be characterized this way. Taylor v. Skrine, 5 S.C.L. 516, 3 Brev. 516 (1815) deals with a writ of execution and observes that "no objections were made to his authority at the time the decree was given." State v. Bloom, 17 Wis. 521 (1863) relies entirely on In re Boyle 9 Wis. 264 (1859) which is a habeas case holding that the "right to hold the offices cannot be inquired into in a collateral proceeding of this kind," id. at 267. And People v. Bangs, 24 Ill. 184., 187 (1860) distinguishes a "direct proceeding" from one where the doctrine applied.

[171] For statements like this, see *McDowell v. United States, 159 U.S. 596, 598* (1895) ("presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment."); see also Note, *The De Facto Officer Doctrine*, at 918 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).

[172] But see In re Boyle, cited supra note 170 (distinguishing "the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offence").

[173] In the Supreme Court's most recent de facto officer doctrine case, Ryder v. United States, 515 U.S. 177 (1995), it split the difference, holding the doctrine inapplicable because the case was on direct

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of Judge Underwood's opinion below.[174] Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

* * *

There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

III. Section Three Supersedes, Qualifies, or Satisfies Prior Constitutional Provisions

Our third proposition is logically and methodologically straightforward but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.[175] Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition—there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, unAmerican (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong: dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments change the Constitution. It thus should be unsurprising—indeed, it is in the very nature of constitutional amendments—that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment*

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review *and* the challenge was constitutional. In the more recent case of Financial Oversight and Management Board for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1666 (2020), it avoided the issue because it found the appointments lawful.

[174] See Opinion of Judge Underwood, supra note 125, at 463-466.

[175] See supra Part III.C.2.c.; see also Ginsburg, Huq, & Landau, supra note 118, at 18 (suggesting that a self-executing interpretation, "while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns" and for that reason an "alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced").

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supersedes prior law precisely to the extent that it departs from the prior rules. This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms, understood in their natural sense and accounting for any terms of art or specialized usages of words, departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote. When this occurs, the courts must determine the "meaning and operation" of the two provisions.

Hamilton articulated two principles for doing so, which work as a complementary pair. "So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done"—there's the first of the pair, but Hamilton's sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair: "where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first." This was, Hamilton continued, "a mere rule of construction," but it was an appropriate one, "consonant to truth and propriety," consistently recognized by courts as interpreters of law: that, as "between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference."[176]

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority—and proceeded to derive the proposition customarily called "judicial review."[177] But that is not the interpretive question here. Here, the key point is precisely Hamilton's lead-in proposition: that, as between "interfering" acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same

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[176] See The Federalist No. 78 (I. Kramnick ed. 1987) at 439 (Hamilton). These rules were well-established in American and English law. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 235-244 (2000)

[177] See The Federalist No. 78, supra note 176, at 439-440 (Hamilton) ("But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.")

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legal status: By the terms of Article V, constitutional amendments are "valid to all Intents and Purposes, as Part of this Constitution," when adopted.[178] Thus, where We, the People, have adopted a new constitutional text "interfering" with or departing from prior constitutional provisions, the last-in-time enacted prevails to the extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights in a sense qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent of a conflict between those powers and the subsequently enumerated rights.[179] Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.[180]

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"[181] does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the preexisting lawmaking process.[182] A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original apportionment

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[178] U.S. Const. art. V.

[179] On the relationship between rights and powers, see William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1821-1822 (2013); Jud Campbell, The Invention of First Amendment Federalism, 97 Tex. L. Rev. 517, 561-67 (2019).

[180] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[181] U.S. Const. amdt XIV, sec. 5.

[182] See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 19 (2017) (offering the examples in this paragraph).

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rules including the notorious Three-fifths Clause.[183] Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies an earlier-enacted constitutional provisions with which the new provision conflicts, Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.[184]

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex post Facto Clause. *To the extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—*to the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the

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[183] See U.S. Const. amdt. XIV, sec. 2; U.S. Const. art. I, sec. 3. By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

[184] Indeed, for what it is worth, the legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. Cong. Globe, 39th Cong. 1st Sess. at 2915 (Sen. Doolittle) (complaining that Section Three was an "ex post facto provision, a bill of attainder"); id. at 2890 (Sen. Cowen) (bill of attainder); id. at App 241 (Sen. Davis) (Section Three "is in the nature of both a bill of attainder and an ex post facto law"); id. at 2940 (Sen. Hendricks) (ex post facto); id. at 2916; see also id. at 2467 (Rep. Boyer) (criticizing earlier version of Section Three as "a bill of attainder or ex post facto law"). These charges were generally premised on the view – with which proponents of the amendment evidently agreed, see id. at 3036 (Sen. Henderson) – that Section Three would preempt these earlier rules to the extent of a direct conflict. Though at one point Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. Id. at App. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it"); see also id. at 3146. See also Graber, supra note 12, at 26-31, 36-37 (documenting this history).

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correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think that these various prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible; and it is, for the most part, fairly possible to do so. But to the legitimate extent of any conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

A. Bills of Attainder

A bill of attainder is the legislative infliction of punishment on specific people without a trial.[185] It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a "bill"—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an "attainder" either—in that it is not at all clear that it inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-second Amendment is surely not inflicting a "punishment" when it precludes the President from running for a third term.[186] Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of 20th-century "red scare" cases[187] and perhaps more relevantly in a pair of immediate post-Civil War-era loyalty cases: In *Cummings v. Missouri*[188] and *Ex Parte Garland*,[189] the Supreme Court invalidated state and federal oath requirements that required an "Ironclad Oath" from anybody holding a range of positions, both public and private. That oath was really a *past*-loyalty-requirement, requiring people to swear that they had not supported the confederacy or

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[185] See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177 (2011).
[186] U.S. Const. amdt. XXII. But see Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from office many be punishment, as in cases of conviction upon impeachment.").
[187] United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
[188] 71 U.S. 277 (1866).
[189] 71 U.S. 333 (1866).

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the like.[190] The Court concluded that these requirements were effectively bills of attainder—and also ex post facto laws—and held them unconstitutional.

Even if one takes these precedents at face value it does not follow that Section Three would similarly be a bill of attainder. First, the "Ironclad Oath" laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[191] Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.[192] Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the majority opinion emphasized this fact, explicitly noting that neither case involved qualifications for public office.[193] Second, because both cases focused on the retroactive effect of the laws,[194] neither case's reasoning would seem applicable to Section Three in post-Civil-War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.[195]

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin,* Chief Justice Chase).[196] Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.[197] In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

B. Ex Post Facto Laws

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[190] For much more detailed discussion of the federal "Ironclad Oath" see infra Part IV.A.4.b.i.
[191] Garland, 71 U.S. at 377.
[192] Cummings, 71 U.S. at 319.
[193] Garland, 71 U.S. at 378.
[194] Cummings, 71 U.S. at 327 ("They are aimed at past acts, and not future acts."); Garland, at 377 ("In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed").
[195] See supra Part I.B.
[196] Garland, 71 U.S. at 382. *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment) and an especially weak case for the relevance of past loyalty to engaging in religious occupation.
[197] For a somewhat lighthearted explication of this principle – and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 Const. Comm. 285 (2007).

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Article I also forbids both the state and federal governments from enacting an "Ex Post Facto" law.[198] An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.[199] True, as applied to actions done before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the "spirit" of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

Indeed, we have this on especially good authority, as this very question has been asked and answered in the past. The Eleventh Amendment, as noted above, had the effect of cutting off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III. In *Hollingsworth v. Virginia*, the Court then confronted the question whether the Amendment was retroactive, cutting off suits pending when the Amendment became law. The plaintiffs argued in the U.S. Supreme Court against retroactivity, because "[t]he spirit of the constitution," forbade "the mischief of an ex post facto Constitution."[200] Indeed, this argument mirrored precisely the arguments for narrow construction we have seen above: "It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution."[201] But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.[202] As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions covered by the revised constitutional rules.

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[198] U.S. Const. art. I, §§9 & 10.

[199] To be sure, there are revisionist arguments that the Ex Post Facto clause itself extends to retroactive civil laws too. See Eastern Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. Cummings, 71 U.S. at 326-332; Garland, 71 U.S. at 377-368. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis

[200] 3 U.S. at 378-80 (arguments of counsel).

[201] Id.

[202] Id. at 382. See Baude & Sachs, *Eleventh Amendment*, supra note 9, at 626-627.

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C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property without due process of law," which in many circumstances requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First of all, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege, a public trust, to be vested with the power of the people. And though it is a closer case, the same thing may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation. It does not protect *public* rights.[203] It has been argued that in England, offices *were* understood as vested rights of property, and occasionally early American courts said so as well.[204] But that was not the better rule in America. Treating offices as property did not fit well with republican principles,[205] and by 1900 the Supreme Court could rightly state: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such."[206]

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.[207] So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin's Case*. But in our view this objection is sufficiently answered by the terms of Section Three itself. Perhaps the reason that Section

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[203] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565-593 (2007); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1540-1547 (2020).

[204] Jed Shugerman, *Freehold Offices vs. "Despotic Displacement": Why "Executive Power" Did Not Include Removal* (July 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119; Hoke v. Henderson, 15 NC 1 (1833).

[205] See Jane Manners & Lev Menand, *The Three Permissions*, 121 Colum. L. Rev. 1, 20 (2021) ("In revolutionary America, the idea of offices as property was roundly rejected"); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1824 n. 157 (2006) ("A more republican conception of government meant a more republican conception of offices.").

[206] Taylor & Marshall v. Beckham, 178 U.S. 548 (1900).

[207] See supra notes 48-50 and accompanying text.

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Three only applies to holding office and not voting, and only applies to prior office-holders, who have previously sworn a constitutional oath—indeed, these limitations are the only ways in which Section Three's scope was appreciably narrowed during the drafting process—is that we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would seem to disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warranto suits, state and federal judicial review, congressional adjudications, and so on. Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels.[208] Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

D. The Ominous Question: Section Three and the First Amendment

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

This question begets more questions: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding *of Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal disabilities imposed by Section Three take over, as a matter of the proper understanding of Section Three?

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[208] See generally supra Part II.B.

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There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as properly understood as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example[209] but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of "engage in insurrection" and "aid or comfort"—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, and under modern doctrine, that would mean the very stringent test of *Brandenburg v. Ohio*?[210] Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.[211] First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three's terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today's liberal understandings.[212])

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[209] See infra Part IV.C.2.

[210] 395 U.S. 444 (1969).

[211] Federalist No. 78, supra note 176 ("So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.").

[212] For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools,* 85 Minn. L. Rev. 1917, 1919-1922 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see for starters, Adam Griffin, *First Amendment Originalism: The Original Law and A Theory of Legal Change as Applied to The Freedom of Speech and of The Press*, 17 First Amend. L. Rev. 91 (2019); Jud Campbell, *Natural Rights*

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The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is "speech integral to criminal conduct."[213] And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.[214] Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning "incitement." Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous "clear and present danger" test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) "*directed to*" (ii) triggering or inciting (iii) "*imminent*" lawless action (presumably including acts of insurrection or rebellion) and (iv) "likely" to produce such action.[215] That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court's relatively recent decision in *Holder v. Humanitarian Law Project*[216] recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides "material support" to a foreign organization engaged in or committed to terrorist violence against the nation. The Court concluded that because the "interest in combating terrorism is an urgent objective of the highest order," the Congress could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly*

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and the First Amendment, 117 Yale L. J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 Yale L. J. 861 (2022). (We will cease further digression on this point.)

[213] United States v. Hansen, 599 U.S. __, at 18-19 (2023); United States v. Williams, 553 U.S. 285, 297 (2008); Giboney v. New Ice Storage, 336 U.S. 490 (1949); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-993, 1007-1008 (2016).

[214] Volokh, supra note 213, at 1011-1015.

[215] 395 U.S. at 447. This standard is elaborated in Hess v. Indiana, 414 U.S. 105, 108-109 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). Additionally, Bond v. Floyd, 385 U.S. 116 (1966) rejected the idea that there is a lower First Amendment standard of incitement when a state legislature is excluding an elected member under state law, id. at 132-135; see also Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974) (same principle applies to ballot access).

[216] 561 U.S. 1 (2010).

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further terrorist conduct. While this decision is hedged by multiple limiting principles,[217] it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having "engaged in insurrection" or provided "aid or comfort" to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that "he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it,"— that he was "warring upon the Military."[218] It is conceivable (though we do not prejudge the point) that Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army "unto the death" and stating that anybody who volunteered for the Union army "ought and I believe will be shot down before he leaves the State."[219] This exclusion was part of the backdrop of Section Three's enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion "was entirely unconstitutional" and "plainly violative of the First Amendment."[220] If that was so before Section Three's enactment, does Section Three make it otherwise?[221]

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during

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[217] The Court emphasized that "only material support coordinated with or under the direction of a designated foreign terrorist organization" was banned; "independent advocacy" was "not covered." Id. at 31-32. Additionally, the law only applied to *foreign* organizations.

[218] President Abraham Lincoln to Erastus Corning and others (June 12, 1863), in Abraham Lincoln, Speeches and Writings, 1859-1965, at 454, 459 (Don Fehrenbacher, ed. 1989). See infra notes 269-277 and accompanying text.

[219] See infra notes 270-278, and 343-348 and accompanying text.

[220] Lynch, supra note 5, at 197-198.

[221] See Lynch, supra note 5, at 198 ("Had Section 3 been ratified by this point, these concerns would be assuaged.")

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this Great War," and excluded in part on that basis.[222] (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on grounds of judicial bias.)[223] Another scholar of the incident writes that "Under a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however under the interpretation prevailing at the time, they probably were."[224] What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.[225] But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.[226]

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger; but insurrection and rebellion are dangers too—all too real dangers, as recent events have shown. Where exactly that line is drawn by the Constitution, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three's general terms triggering disqualification from future office—"insurrection," "rebellion," "engaged in," "given aid or comfort to"—and of who all is included under Section Three's ban. To that set of important questions we turn next.

IV. Section Three's Substantive Disqualification is Sweeping

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[222] Chafetz, supra note 47, at 190; Lynch, supra note 5, at 211-213; 6 Cannon, supra note 18, at 52-63.
[223] Berger v. United States, 255 U.S. 22 (1921). During the initial exclusion, when Berger's conviction was on appeal, the House Committee announced "that it would not be governed by the action of the judge and jury at the Chicago trial," but would review the evidence and legal questions for itself. 6 Cannon, supra note 18, at 54. But curiously, after the convictions were reversed the House allowed Berger to sit in the sixty-eighth through seventieth Congresses. Lynch, supra note 5, at 213.
[224] Chafetz, supra note 47, at 191.
[225] In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. See infra note 359.
[226] Federalist No. 78, supra note 176, at 439.

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We come at last to the heart of the beast: the substance of Section Three's prohibition. We begin (in Subpart A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having "engaged in" "insurrection" or "rebellion" against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given "aid or comfort" to "enemies" of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms' core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a "sure shipwreck,"[227] to borrow Susan Morse's phrase—of unquestionably disqualifying conduct falling within the core of Section Three's meaning: for example, declaring unilateral secession from lawful constitutional government; or the taking up of arms against government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three's terms—ordinary expression of political dissent as well as even ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in subpart A.

We then turn more briefly (in subpart B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—*are covered* by Section Three's ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three's disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.

Finally (in Subpart C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president's willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat for re-election and, instead, his (and others') attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de

[227] Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

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facto political coup d'etat against the regime of lawful constitutional government, constitute engaging in "insurrection or rebellion against the Constitution of the United States"? We think the answer is *yes*.

Whether called a "rebellion," an attempted coup d'etat seeking to displace lawful government authority under the Constitution, or an "insurrection," instigating, inciting and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—such conduct is covered by Section Three, and is disqualifying. If those are indeed the facts concerning Donald Trump's (and others') efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting "insurrection" or "rebellion" (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave "aid or comfort" (approval, encouragement, support) to enemies might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three's meaning, those judgments are entitled to full legal effect.

A. Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted by the Civil War Congress (both the 1862 "Ironclad" oath and the Second Confiscation Act), and the significant mid-Civil-War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, including the Insurrection Act of 1795 as amended, and an important series of exclusions from Congress itself, as well as the relevant legislative history of Section Three, and a few scattered post-enactment applications of Section Three itself.

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1. Working definitions

We begin by offering working definitions of the terms *insurrection* and *rebellion* and of what might constitute "engaging in" such conduct or giving "aid or comfort" to enemies under Section Three.

Insurrection is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect*. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government*. Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."[228] Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases*, in 1863: "Insurrection against a government may or may not culminate in an organized rebellion."[229]

Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means*. (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime's authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself*. The South's attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States by the states asserting the right to secede. Likewise, an attempted coup d'etat is arguably also a species of rebellion—an effort to displace, replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

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[228] 10 Documentary History of the Ratification of the Constitution 1296 (Statement of Madison) ("A riot did not come within the legal definition of an insurrection").
[229] 2 Black (67 U.S.) 635, 667 (1863).

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The term *rebellion* can also imply a competing claim to legitimacy. "Rebellion" thus seems to carry a stronger political-claim-of-right valence than does "insurrection."[230] Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South's secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d'etat, or declaration of independence, or secession, is claimed to be a "vindication" or "restoration" of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person's or group's alleged wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as "rebellion" but restoration. Mistake of law is no defense to a coup d'etat. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession as an act for the vindication of its believed rights.[231] That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by*

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[230] Though it is possible that this connotation is anachronistic. See infra note 252.

[231] For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see James M. McPherson, Battle Cry of Freedom: The Civil War Era 234-236 (1988) (summarizing Southern constitutional and political theories); Daniel Farber, Lincoln's Constitution 57-91 (2003) (emphasizing arguments of states' rights to interposition, nullification, and secession generally); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame. L. Rev. 1227, 1270-1277 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. Am. Hist. 5-53 (June 1978) (providing detailed history of constitutional and political arguments over the nature of Union and the validity of secession); David P. Currie, The Constitution in Congress: Descent into the Maelstrom 1829-1861, at 228-237 (2005) (discussing and evaluating the constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see generally 2 Abraham Lincoln, Speeches & Writings, 1859-1865: Speeches, Letters, Miscellaneous Writings, Presidential Messages & Proclamations, at 217-218 (First Inaugural Address, March 4, 1861); id. at 254-258, 260-261 (Message to Congress, July 4, 1861); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi. L. Rev. 691, 703-715 (2004) (reviewing Daniel Farber, Lincoln's Constitution) (distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, supra note 130, at 303-311 (same). For further background, see generally William W. Freehling, The Road to Disunion: Secessionists at Bay 1776-1854 (1990), and for a comprehensive exposition of the Southern view, see Alexander M. Stephens, A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results (1867). As a clarification: we use the term "secession" here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory.

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force—and thus may occupy some ground not covered by the word "insurrection" (which, we have suggested, must be forcible). There are such things as "bloodless coups": actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.[232]

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861[233] preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws. The secession ordinances might still immediately constitute acts of "rebellion," even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together—acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs (as they obviously did with the Civil War)—and it becomes difficult to distinguish "insurrection" from "rebellion." The overlap of the two terms in theory becomes complete in practice.

In the end, however, we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that "insurrection" and "rebellion," in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

So much for our working definitions of "insurrection" and "rebellion." What does it mean to have "engaged in" such conduct? We believe one has "engaged" in

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[232] Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political coup d'etat – an act of "rebellion" if judged by the pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance, and subsequently legalized by its own success. See generally Paulsen & Paulsen, supra note 30, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub Pol'y 818, 821, 844, 850 (2015). But cf. Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation 1760-1840, at 164-165 (2021) (emphasizing the states' retention of sovereignty under the Articles and the idea that states might thus properly exit that regime, legally, on the theory that the Articles had become a breached treaty).

[233] The seceding states adopted their secession resolutions by state "conventions," purporting to parallel the process by which the states ratified the Constitution. See McPherson, supra note 231, at 234-284 (describing secession actions of ten states that purported to secede from the Union). The secession ordinances of the South were self-consciously styled after the Declaration of Independence, which was obviously an act of formal legal rebellion.

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insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of* such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has "engaged in" such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.[234] (There is obvious overlap here with the closely related concept of having given "aid or comfort" to the nation's enemies, which we discuss presently.)

Of course, there are also important limits to how far the concept of having "engaged in" insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have "engaged in" insurrection or rebellion. An exception to this limitation might exist where a person possesses an affirmative duty to speak or act. Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three's terms.

Then there is the related question of what constitutes having given "*aid or comfort*" to "the *enemies thereof.*" This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion "*or*" having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.[235]

In many cases, giving "aid or comfort" to enemies will be similar to the kind of conduct that counts as having "engaged in" insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term "aid or comfort" reinforces and emphasizes Section Three's coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section

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[234] This working definition of having "engaged in" wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with "assistance" including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). Federal criminal law today is to similar effect. 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). We think it is also generally supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1108 (2017). That said, the context of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See text accompanying infra note 425.

[235] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.")

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Three's "aid or comfort" language, even where it might be debatable whether to characterize such conduct as directly "engag[ing] in" insurrection or rebellion.

Additionally, while Section Three uses some language paralleling that contained in the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. "Insurrection" and "rebellion" are their own things, distinct from "treason." While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within Section Three. So even if "aid or comfort" in Section Three connotes the same type of assistance-and-embrace principles as "Aid and Comfort" in Article III's Treason Clause,[236] the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal-law conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.)

Finally, aid or comfort to whom? "[T]he enemies thereof." Before the Civil War, some might have limited the term "enemies" to those owing allegiance to a foreign power,[237] but that is not plausibly true of Section Three. Rather, Section Three covers enemies both foreign *and domestic*. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War,[238] and it seems clear from the political context of Section Three that it likewise treats domestic enemies as enemies. Indeed, it is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text.

What is less clear is how to define the foreign and domestic enemies covered by Section Three. The most straightforward option, which strikes us as the more likely one, is that "enemies" essentially cross-references the domestic rebels and insurrectionists just described earlier in the sentence (as well as more traditional foreign enemies, of course). On this straightforward reading, Section Three would cover a domestic officeholder who directly engages in insurrection or rebellion, or who gives aid or comfort to others who do so (or, of course, one who gives aid or comfort to foreign enemies). This straightforward reading is also consistent with the operation of another 1862 statute, the Second Confiscation Act.[239] That said, we cannot rule out another narrower possibility, that "enemies" is limited to those with whom the US are effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war.[240] This would create a more complicated two-track system

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[236] See infra note 258.

[237] See Lynch, supra note 5, at 174 (discussing United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254)).

[238] See infra Part IV.A.4.b.i.

[239] See infra Part IV.A.4.b.ii.

[240] See Lynch, supra note 5, at 173-178 for more discussion.

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where Section Three covers all insurrections and rebellions, as well as "aid or comfort" to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out.[241]

Our sense of the whole—of Section Three's substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called "insurrection" or "rebellion"; and whether a covered individual is thought to have "engaged in" such activity or given "aid or comfort" to "enemies," Section Three's disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

Finally, let us reiterate one consequence of Section Three's breadth and capaciousness. Because Section Three's terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held "unconstitutional" by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.[242] It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of

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[241] What is the referent of "enemies *thereof*"? Does "thereof" refer to enemies of the *United States* or enemies of *the Constitution of* the United States? We think this replicates the question of what "*the same*" refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (Does "insurrection or rebellion *against the same*" refer to insurrection or rebellion against "*the United States*"?) On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing; either one is capable of being considered an instance of the other. Whatever the answer, it should be the same for both—"against the same" and "thereof" refer to the same thing. Our best guess is that it is "the United States."

[242] See, e.g., Paulsen, *Rules for Its Own*, supra note 9, at 858 (arguing that where constitutional language states a general principle, "actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable"); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 995 (2008) (arguing that "textual imprecision or generality often admits of a range of choices" and that the correct constitutional answer in such circumstances "is that the legislature must be permitted to choose from options within that range"; thus, "the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted"); Kesavan & Paulsen, *Secret Drafting History*, supra note 9, at 1129-30 n.54 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law*

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other branches only because, and only to the extent to, they deviate from the Constitution's meaning. It is classically illustrated by the Court's reasoning in *M'Culloch v. Maryland*,[243] which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.

And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

2. Contemporaneous Dictionary Definitions

As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective*, *original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. (We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning: it can serve as a kind of operational, practical concordance that may "define" terms more precisely in their application than can a cold dictionary definition.)

Nineteenth century dictionaries contain definitions of "insurrection" and "rebellion" that substantially corroborate our working definitions. Webster defined "insurrection" as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state."[244] Rebellion was "[a]n open and avowed renunciation of the authority of the government to which one owes allegiance."[245]

Is, 83 Geo. L.J. 217, 333 (1994); Baude & Sachs, Law of Interpretation, supra note 234, at 1120 (describing "the presumption of constitutionality" as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

[243] 17 U.S. (4 Wheat.) 316 (1819),

[244] 1 Noah Webster, American Dictionary of the English Language 111 (1828, photoreprint 1993) ("Insurrection"); see also Dr. Webster's Complete Dictionary of the English Language 702 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (similar); 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (similar).

[245] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also Webster's (Porter 1864), supra note 244, at 1094 (similar); 2 Boag, supra note 244, at 319 (similar).

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Importantly, Webster also noted several distinctions between these and other terms. In defining rebellion, he distinguished an insurrection as "a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government," while a rebellion was a more categorical "attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."[246] And in defining insurrection, Webster noted that insurrection is "equivalent to sedition, except that sedition expresses a less extensive rising of citizens."[247] This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that "[i]nsurrection may be, but is not necessarily, rebellion"[248] and that despite these technical distinctions, "[i]nsurrection is however used with latitude as to comprehend either sedition or rebellion."[249] This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, John Bouvier's Law Dictionary in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion,* and *aid and comfort*. "INSURRECTION" was defined simply as "[a] rebellion of citizens or subjects of a country against its government."[250] "REBELLION" is correspondingly defined: "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*"[251] Bouvier's thus treated "insurrection" and "rebellion" as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government but not clearly distinguishing between them.[252]

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[246] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 1 Boag, supra note 244, at 727; 2 id. at 319 (similar).

[247] 1 Webster (1828), supra note 244, at 111 ("Insurrection"). For comparison, Webster defined "Sedition" as: "A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . ." 2 Webster (1828), supra note 244, at 66 ("Sedition").

[248] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 2 Boag, supra note 244, at 319 (similar).

[249] 1 Webster (1828), supra note 244, at 111. Daniel Hemel argues that "Webster's definition of 'insurrection' seems implausibly broad for Section 3 purposes." See Hemel, How-to Guide, supra note 5.

[250] "Insurrection" in 1 John Bouvier. A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 729-730 (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[251] "Rebellion" in 2 Bouvier (1868), supra note 250, at 415 (emphasis added).

[252] See also Joseph Worcester, A Dictionary of the English Language 764, 1190 (1860) (generally equating insurrection and rebellion). Elsewhere in this edition, Bouvier drew a distinction in connotation between "REBEL" and "INSURGENT," suggesting that "rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the

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Bouvier's dictionary also offers an instructive definition of "AID AND COMFORT" as "[h]elp, support, assistance, counsel, encouragement." The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

> The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act ...[253]

This tends to confirm our broad construction of "aid or comfort" as encompassing many kinds of intentional support, akin to the common law.

3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or near) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation "Intratextualism.")[254] Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.[255]

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tyranny of constitute authorities," and thus that "[t]he colonists who opposed the tyranny of the English government were insurgents, not rebels." "Insurgent" and "Rebel" in 1 Bouvier (1868), supra note 250, at 729; 2 id. at 415.

In a much later edition, Bouvier's drew a distinction between *insurrection* and *rebellion* as two different varieties of "actual and open resistance to [government] authority." *Insurrection* was "an actual uprising against the government" while *rebellion* "goes beyond insurrection in aim" and attempts actually to overthrow the government authority in question. "Insurrection" and "Rebellion," in 2 Bouvier's Law Dictionary & Concise Encycl. (Rawles Rev., 1897). Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as "contemporarily authoritative." Lynch, supra note 5, at 167 n. 80.

[253] "Aid and Comfort" in 1 Bouvier (1868), supra note 250, at 107.

[254] Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999).

[255] *M'Culloch*, 17 U.S. at 413-414. In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word "necessary" was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen, Marbury, supra note 66, at 2711; see also Michael Stokes Paulsen, *The Plausibility of Personhood,* 74 Ohio St. L. J. 13, 33 n. 72 (2013).

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Might the Constitution's other usages of terms that also appear in Section Three serve as such markers of meaning for "insurrection" and "rebellion," and "aid or comfort" to enemies, as those terms are used in Section Three? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel Invasions."[256] The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or invasion the public Safety may require it."[257] In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid and comfort" to enemies—borrows the nearly identical language of the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.[258] Moreover, in the 1860s, the pairing of "aid" and/or "comfort" had be-

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[256] U.S. Const. art. I, §8 cl. 15.

[257] U.S. Const. art. I, §9 cl. 2.

[258] Perhaps the most notable U.S. treason case to date was Ex parte Bollman, in which Chief Justice Marshall delivered an opinion for the Court granting habeas to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American (then-)southwest and attempt to form his own independent nation. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part because of Article III's text ("only in levying war") with a relatively broad construction of complicity. Thus on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason," id. at 126, but on the other hand, "if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." Id. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: first, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, that though they might not qualify as treason, remain great and culpable legal wrongs; second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose; third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman*'s construction was sufficiently established to be read in to Section Three itself, it was cited occasionally in the 1860s Congress. See, e.g., 37th Congress 2nd Session Cong. Globe 414 (1862)

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come ubiquitous in legal and public discourse as a general allegation of improper assistance, making it still less clear that it was perfectly coterminous with the law of the Treason Clause.[259]

Finally, the words "insurrection" and "rebellion" also appear elsewhere in the Fourteenth Amendment itself, but again in ways that give little external light on Section Three. A person's "participation in *rebellion*" is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state's representation as a consequence.[260] Section Four of the amendment prohibits payment of debts or obligations "incurred in aid of *insurrection* or *rebellion*."[261] These neighboring sections use slightly different phrases for the behavior they cover ("participation" and "engaged in"; "aid or comfort" and "in aid of"), but it is difficult to say if the variations are meaningful.

4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms "insurrection," "rebellion," and "engaging in," as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in the landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, "insurrection" or "rebellion." A wide range of actions supportive of secession appears to have constituted "engaging in" or giving "aid or comfort" to rebellion or insurrection.

This leads us to what we think an obvious "sure shipwreck"[262] for understanding Section Three's terms. Whatever else "insurrection or rebellion" might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned: first, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly "seceded" state governments and their confederation into the "Confederate States of America"; and second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting

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(statement of Sen. Sumner) (citing *Bollman* passage quoted above during the proceedings to expel Senator Jesse Bright for writing a letter to Jefferson Davis).

[259] See Harold Holzer, Lincoln and the Power of the Press: The War for Public Opinion 361 (2014) (referring to the phrase "aid and comfort to the enemy" (by the press) as "that catch-basin phrase again.").

[260] U.S. Const. amdt. XIV, sec. 2.

[261] U.S. Const. amdt. XIV, sec. 4.

[262] Morse, supra note 227.

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either secession or armed resistance to U.S. authority constituted "engaging in" or giving "aid or comfort to" the Union's enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. President Lincoln

An extremely important contemporaneous source for understanding the public constitutional meaning of "insurrection" and "rebellion" in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating "secession" as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln's view, a "war" between the United States and another sovereign.[263] It was not subject to Congress's Article I, section 8, *clause 11* power to "declare War," but was rather an illegal *rebellion*—a "giant insurrection"—to be suppressed by executive authority pursuant to Congress's Article I, section 8, *clause 15* power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[264]

Consider just a few prominent and illustrative statements: In his First Inaugural Address, on March 4, 1861, Lincoln, after setting forth arguments that "no State upon its own mere motion can lawfully get out of the Union," concluded that "acts of violence within any State or States against the authority of the United States" are "*insurrectionary or revolutionary, according to circumstances.*"[265] Following the attack on Fort Sumter, Lincoln's April 15, 1861 proclamation calling forth the militia

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[263] On Lincoln's understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war) see sources cited in note 231. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L. Rev. 807, 814-823 (2006).

[264] Compare U.S. Const. art. I, §8, cl. 11 (Declare War Clause) with U.S. Const. art. I, §8, cl. 15 (power "to provide for calling forth" the Militia for law execution and to suppress insurrections"). Congress's exercise of this power – the Insurrection Acts of 1795 and 1807 – is discussed infra Part IV.A.5.a.

[265] Abraham Lincoln, First Inaugural Address (March 4, 1861), IV Complete Works of Lincoln ("CWL") 262, 265.

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similarly characterized the attack as fitting the statutory definition of *insurrection*.[266] And in his July 4, 1861 Message to Congress, Lincoln labelled the South's purported secession a "*giant insurrection*" and, vividly, as "*rebellion* ... sugar coated." The "so-called 'Confederate States'" had formed an "*insurrectionary* government."[267] In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, section 9, clause 2 of the Constitution, which used exactly that language of "rebellion."[268] Lincoln's use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators, no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion*.

Two years later, at the height of the war, Lincoln returned to the characterization of the South's actions as "rebellion" (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio Congressman Clement Vallandigham, a notorious racist and prominent "Copperhead" pro-South, anti-Union northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the propriety of the Union's war effort.

Lincoln distinguished law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: "Ours is *a case of Rebellion*—so called by the resolutions before me—in fact, *a clear, flagrant, and gigantic case of Rebellion*." And that, Lincoln concluded, was what allowed suspension of habeas corpus.[269] In the course of his argument, Lincoln described rebellion as "*sudden and extensive uprisings against the government*."[270] This is a useful description that supports our working definition: Rebellion is an "uprising." It is something more than mere protest. It is, often, "sudden." It is "extensive." It is directed "against the government." *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham's actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy

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[266] Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), IV CWL 331, 332.
[267] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), IV CWL 421, 427-428, 432-437.
[268] Id. at 429-431 (emphasis added).
[269] U.S. Const. art. I, §9, cl. 2.
[270] Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), VI CWL 260, 264 (emphasis added).

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cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, "under cover of 'Liberty of speech,' 'Liberty of the press,' and 'Habeas corpus,'" rebel sympathizers "hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways."[271] Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied "cover" for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person's refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a "man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy." He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now "occupying the very highest places in the rebel war service," such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[272] Lincoln's position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.[273] In a colorful metaphor, Lincoln ventured:

> I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the

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[271] Id. at 263.

[272] Id. at 265.

[273] In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those distinguishing pure speech from speech linked to prohibited *conduct*; recognizing limits on speech posing a danger of inciting to crime or lawlessness; recognizing "compelling interest" overrides in exceptional circumstances, including for reasons of national security or military secrecy; finding that government's motives and purposes for a particular action may matter to its lawfulness; and noting where an incidental limitation on expression leaves open alternative channels for expression of the same message. See Paulsen, *Civil War, supra* note 231, at 698-702 & n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment's freedom of speech).

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> right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.[274]

Lincoln also stressed a distinction between speech directed at criticism of the government's political policy—fully protected by the freedom of speech—and expression more or less directly aimed at harming the military's recruitment and war effort. If Vallandigham had been arrested merely because he was "damaging the political prospects of the administration" or "the personal interests of the general," that would be one thing, Lincoln observed. "[I]f there was no other reason for the arrest, then I concede that the arrest was wrong." But as Lincoln understood it, the arrest "was made for a very different reason"—that Vallandigham was "laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Vallandigham was, in short, "warring upon the military." He who "dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle." Desertion was punishable by death, of course. In a famous line, Lincoln asked, rhetorically "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[275] Lincoln's answer was no: "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy." [276]

Lincoln continued: "If I be wrong on this question of constitutional power," he added, "my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them -- in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security."[277]

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action.

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[274] Letter to Corning (June 12, 1863), VI CWL at 267. (*Emetics* referred to a medicine or substance used to induce vomiting.)
[275] Letter to Corning, VI CWL at 266.
[276] Id. at 266-67.
[277] Id. at 267.

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Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms "insurrection or rebellion," and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct, *all* constituted forms of support for and participation in "insurrection" or "rebellion." And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions of the post-war status of persons who had participated in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.[278]

b. Congress

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: We think two specific enactments of Congress during the Civil War are especially probative of the understandings of "insurrection" and "rebellion" and of what conduct was publicly understood to constitute having "engaged in" or given assistance to rebellion. First, there is the so-called "Ironclad Oath," adopted

[278] Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as "the rebellion." Annual Message to Congress (Dec. 8, 1863), VII CWL at 51 In his accompanying offer of amnesty and pardon, in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the "rebellion" that "now exists whereby the loyal State governments of several States have for a long time been subverted" (id. at 53), to "said rebellion and treason" (id. at 54), to "said rebellion" (id.) and to persons who had provided "aid" to the "rebellion" in various forms. Interestingly, Lincoln *excepted* from his offer of forgiveness – in language that would seem to presage the similar terms of Section Three – "all who have left judicial stations under the United States to aid the rebellion" and "all who resigned commissions in the army or navy in the United States, and afterwards aided the rebellion." Id. at 55. Lincoln also left to the respective houses of Congress the exclusive judgment "whether members sent to Congress from any State shall be admitted to seats."

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on July 2, 1862 as the oath one must be able to swear in order to hold federal office.[279] Second, there is the "Second Confiscation Act," adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting "rebellion" or "insurrection."[280] These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

i. The Ironclad Oath

Congress adopted The Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.[281] The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.[282] It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath's list of never-have-I-evers particularly instructive. Here's the oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

> I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor attempted to exercise the functions of any office whatever,* under any authority or pretended authority in hostility to the United States; that I have [4] *not yielded a*

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[279] 12 Stat. 502.

[280] 12 Stat. 589 (1862). 12 Stat. 627 (1862).

[281] 23 Stat. 21 (1884). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, 15 Stat. 85 (1868), and in 1871 it added that anybody "who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution" yet would otherwise "not be able on account of his participation in the late rebellion to take" the Ironclad Oath, could take the forward-looking oath instead, 16 Stat. 412 (1871). These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

[282] For this reason, Lincoln famously wrote: "On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*." Endorsement of Abraham Lincoln in Letter from R.M. Edwards to Edwin Stanton, February 5, 1864, 7 Lincoln Papers 169.

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> *voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-evers would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms, of course. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution* . . . hostile or inimical" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: What the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.[283]

ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act." Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"[284]

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.[285] The Second Confiscation Act was long and vigorously debated in Congress, much discussed in the press and in public discourse, objected to by many on constitutional grounds, and nearly vetoed by President Lincoln.[286] Enactment of the Second Confiscation Act gave rise to very public pressure

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[283] The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the oath to its own members, during and after the enactment of Section Three. These applications are detailed infra Part IV.A.5.b.

[284] 12 Stat. 589 (1862). See also 12 Stat. 627 (1862) ("explanatory" joint resolution).

[285] An earlier act had provided for forfeiture more specifically of property or slaves actually *used* in service of rebellion. 12 Stat. 319 (Aug. 6, 1861).

[286] See generally David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1185-1195 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an "explanatory" joint resolution (which Lincoln signed together with the bill). Lincoln nonetheless appended his original draft veto message setting forth his objections. For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of

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on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order. The Second Confiscation Act was a big deal. [287]

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime, and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who "*engaged in*," "*incite[d]*," "*set on foot*," or "*assist[ed]*" "*rebellion*" or "*insurrection*" or who had "*given aid or comfort*" to rebellion or done acts "*aiding and abetting*" rebellion. The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

Specifically: Section 2 made it a new crime, distinct from treason, to "*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*" or to "*give aid or comfort thereto*" or to "*engage in, or give aid and comfort to*," any "*existing rebellion or insurrection.*"[288] It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with "rebellion or insurrection." Those terms are described as involving acts "against

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action in signing it but nonetheless appending his objections, see id. at 1193-1194; Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War 105-106 (2007) (noting Lincoln's initial concern that the act would violate Article III's limitations on the punishment for treason and the objections of others that the act was a bill of attainder); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 215-217 (2010). For Lincoln's July 17, 1862 message to Congress, detailing his objections, see V Complete Works of Lincoln 328-331.

[287] A month after the Act had been adopted, Horace Greeley published a scathing editorial titled "The Prayer of Twenty Millions," in which he demanded that Lincoln "EXECUTE THE LAWS" faithfully with specific reference to the Second Confiscation Act. Greeley condemned Lincoln's "mistaken deference to Rebel Slavery" and his failure to rebuke his generals for having "habitually disregarded" the Confiscation Act. Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and "widely reprinted," defending his course of action. V Complete Works of Lincoln 388-389; see Holzer, supra note 259, at 400-401. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual *authority* for his proclamation). V Complete Works of Lincoln at 434-435 (stating that "attention is hereby called to" provisions of the act but relying for authority on his powers as executive and military Commander in Chief). See also Foner, Fiery Trial, supra note 286, at 215 (noting that "the Second Confiscation Act embodied a major shift in national policy").

[288] 12 Stat. 589, 590. (emphasis added). Section 2 provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act's disqualification from *federal* office, *id.*, as well. 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). Needless to say, a prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

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the authority of the United States, or the laws thereof" (a formulation closely conforming to our working definitions). Section 2 imposes criminal liability on persons who "incite" such acts; who "set on foot" such acts; who "assist" such acts; who in any other way "engage in" such conduct; or who "give aid and comfort to" such conduct. All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section 3 of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."[289] Section 5 directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who "shall hereafter *assist and give aid and comfort to* such rebellion."[290] Officeholding in a rebel government or military was *per se* blameworthy participation; but general giving of assistance or aid or comfort also qualified as participation in rebellion. Section 6 provided a further authorization for seizure of the property of any person not already mentioned who, "being *engaged in* armed *rebellion* against the government of the United States, or *aiding* or abetting such *rebellion*," and, after sixty days' notice issued by the President, did not "cease to *aid, countenance, and abet such rebellion*, and return to his allegiance to the United States."[291] Section 7 and Section 8 provided for in rem proceedings against property "found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto,*" in which case it "shall be condemned as *enemies'* property."[292] And Section 9 famously emancipated slaves of persons "who shall hereafter be *engaged in rebellion*" against the Union or who "shall *in any way give aid or comfort thereto.*"[293] Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: "engaged in," "rebellion," "aid or comfort," "abet," "countenance," "enemies."

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time. For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located. At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning those areas.[294] Similarly, as a practical matter, criminal prosecutions of rebels for

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[289] 12 Stat. 589, 590.
[290] Id. (emphasis added.)
[291] Id. at 591.
[292] Id.
[293] Id.
[294] See McPherson, supra note 231, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of "*in rem* proceedings by district courts that were of course not functioning in the rebellious states"); Foner, Fiery Trial, supra note 286, at 215 ("For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold

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treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.)[295] The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act's specific policies. The administration, according to one scholar, "chose not to implement the law vigorously."[296] Attorney General Bates "exerted no more than a minimal effort to make the first and second confiscation acts work."[297] And the Act's section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln's far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander in Chief power.

But in some ways the lack of enforcement cases is beside our point here, which concerns the Act's prominence in national discussions and its pervasive use of terms, phrases, and concepts—rebellion, insurrection, engage in, aid or comfort—that would reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation we think helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three's terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. The Supreme Court's decision in *The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.[298] There, the majority upheld the constitutionality of Lincoln's unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports. In a truly landmark decision, the Supreme Court held that the President's war powers (including the power to impose a blockade) were triggered immediately, as soon as the South's rebellion took the form of organized military resistance to the authority of the U.S. government. The President's power to

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under its provisions."). See also Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-1862, at 238 (2005) (remarking that "[t]he confiscation bill that finally emerged was neither sweeping nor enforceable" though opining that "if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.").

[295] See Eric L. McKitrick, Andrew Johnson and Reconstruction 141-152 (1960).

[296] John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 55 (2005).

[297] Id. at 72; see also James G. Randall, Constitutional Problems Under Lincoln 288-292 (1926) (describing minimal enforcement of the Second Confiscation Act).

[298] 67 U.S. (2 Black) 635 (1863).

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wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held. A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections" but "sprung forth suddenly ... in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[299]

The Court's decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution's allocation of war powers. At the time, the case had other hugely consequential implications: the principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln's constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.[300] The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court's usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government: "*Insurrection* against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government," the majority said.[301] A civil war "becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[302] Where a rebellion has come to possess certain military characteristics, the "party in rebellion" might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an '*insurrection*' by one side, and the insurgents be considered as rebels or traitors."[303]

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on "rebellion." A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

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[299] Id. at 668-669; see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J. 149, 177-180 (2004).
[300] Paulsen, *Emancipation*, supra 263, at, 814-823.
[301] 67 U.S. at 666 (emphasis added).
[302] Id. at 666
[303] Id. at 668.

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The Prize Cases also held that persons engaged in insurrection or rebellion could be treated as "*enemies*" (as well as traitors) for legal purposes. Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in "commerce" that "supplies" rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner. Even "neutral" powers' shipping could be seized when it violated a blockade: "Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as "enemies' property."'"[304]

The Prize Cases' treatment of the concepts of insurrection and rebellion, of who constituted "enemies," and of what actions constituted support for rebellion, would have been very much part of the legal culture of the day and provides important legal background as to how these terms would have been understood at the time of the drafting of Section Three of the Fourteenth Amendment, just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to "the lawful authority of the Government," with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—"insurrection," "rebellion," and what it meant to "engage in" or provide "aid or comfort" to enemies—highly probative of Section Three's original public meaning. President Lincoln, repeatedly and insistently; Congress, pointedly and consistently; and the Supreme Court, decisively, used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more

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[304] Id. at 674 (quoting 3 Wash. C.C.R. 183). That said, the Court also cautioned that " 'enemies' property" was "a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law." Id. at 674. The point that, in a military context, property could be treated as "enemies' property" irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation: even though Lincoln's proclamation purported to free the slaves of *all* persons in rebel-controlled territory – including slaves held by persons claiming to be loyal to the Union – such "property" constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *Emancipation*, supra note 263. See generally John Fabian Witt, Lincoln's Code (2012).

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general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

5. Other Extant Statutory Sources and Notorious Examples

a. The Insurrection Acts (and Insurrections Generally)

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as well as its other war powers over the army and navy. The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach; the forms and degree of opposition to government authority that were believed to trigger the statutes' application; and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

The 1795 act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections." But it also applied to repel invasions and to enforce federal law. Together, these were the three circumstances where Congress had the power to provide for calling out the militia.[305] Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the government thereof."[306] Section Two allowed the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[307] Section Two encompasses insurrections against the United States.[308] (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call out the army and navy in similar circumstances: "in all cases of insurrection, or obstruction to the

[305] U.S. Const. art. I, sec. 8, cl. 15.
[306] 2 Stat. 424 (1795), sec. 1.
[307] Id. sec. 2. (emphasis added).
[308] That said, because Section Two is supported by *both* Congress's power to "suppress Insurrections" *and* its power "to execute the Laws of the Union," U.S. Const. art. I, sec. 8, cl. 15. it could encompass instances of law enforcement that do not rise to the level of a constitutional "insurrection."

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laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary ..." The 1807 act thus carried forward and repeated the 1795 act's understanding of insurrection.[309]

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe "*rebellion*." It allowed the President to call forth the militia "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . ."[310]

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation; it entails "combinations" or "assemblages," acting together, to "oppose[s]" or "obstruct" the ability of government to "execute" the law, in numbers "too powerful" to be suppressed by the usual means of law enforcement.[311]

Moreover, several famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding "insurrection" or "rebellion." Consider just a few.

The "Whiskey Rebellion" was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilleries. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their

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[309] 2 Stat. 443 (1807).

[310] 12 Stat. 281 (1861).

[311] Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, supra note 5, at 168, 214-215. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President's proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection; but it is not an insurrection only because he proclaims it one.

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duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).[312]

We believe the "Whiskey Rebellion" would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.[313] Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.[314] In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an "insurrection" or "rebellion."

"Fries Rebellion," in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.[315] President John Adams invoked the 1795 Act to suppress the "insurrection," as he called it,[316] which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters. In at least one instance, armed opponents of the government successfully freed prisoners from federal custody. The Adams administration's suppression of the insurrection led to widely publicized treason prosecutions[317] of leaders and instigators of the unlawful resistance, including John Fries. As with the Whiskey Rebellion, Fries Rebellion was characterized by

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[312] See generally Elkins & McKitrick, The Age of Federalism 461-474 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties – including tarring and feathering, whipping, surrounding of officials' homes by armed mobs, and kidnapping and coerced repudiation of federal authority); see also Ron Chernow, Alexander Hamilton 468-478 (2004) (similar); Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 43-68 (1988) (documenting the resistance and military response).

[313] To be sure, one scholar of the Acts suggests that "[i]t may have been dubious whether actions of the Whiskey Rebellion farmers truly rose to the level of insurrection," and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, at 161 n. 46; see also Coakley, supra note 312, at 67 (suggesting that to "characterize the . . . affair as a 'riot' and the participants as 'rioters'" is "far closer to the truth"). But later sources called it at least an insurrection, see infra note 314, and this goes to show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government.

[314] See 1 Francis Wharton. State Trials of the United States during the Administrations of Washington and Adams 102-184 (1849) (describing "The Trials of the Western Insurgents"); Townsend Ward, The Insurrection of the Year 1794, in the western counties of Pennsylvania (J.B. Lippincott 1858); H.M. Brackenridge, History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection (W.S. Haven, 1859).

[315] Coakley, supra note 312, 69-77.

[316] John Adams, Proclamation on Insurrection in Pennsylvania, 12 March 1799, https://founders.archives.gov/documents/Adams/99-02-02-3377.

[317] These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed "insurrection," describing it as a "rising of any body of the people" and arguing that it qualified as treason because "an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States." Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800). See also 1 Wharton, supra note 314, at 458-609 (describing these proceedings as "The Trial of the Northampton Insurgents").

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concerted acts of forcible interference with federal officials' ability to perform their duties under law.[318]

Nat Turner's Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.[319] But it surely would have been a classic illustration of at least an "insurrection" and perhaps even a "*rebellion*"—a concerted uprising seeking forcibly to overturn the legal order and thwart government's ability to execute the law. A published report of Turner's own account called it both an insurrection[320] and in one instance an "open rebellion."[321] This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked "the 'higher law' doctrine" to openly harbor freed slaves to the point that President Millard Fillmore "threatened to send in federal troops."[322] In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland. This was denounced as an "act of insurrection," and this time President Fillmore did call out federal troops.[323] In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.[324] And of course John

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[318] As with the Whiskey Rebellion, these events show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See also Elkins & McKitrick at 696-700 (questioning "whether the circumstances really called for military force of any kind").

[319] Federal troops were used to suppress this and other slave rebellions, but "without following the legal procedures laid down in the statutes of 1795 and 1807." Coakley, supra note 312, at 92-94. Coakley suggests that this the failure to go through the Insurrection Acts reflected "the universal dread of slave revolts" at the time and the fact that "t]he slaves had no political constituency." Id. at 94.

[320] See The Confessions of Nat Turner, The Leader of the Late Insurrection in Southampton, VA, as fully and voluntarily made to Thomas R. Gray, at 3, 5, 7, 20, 22 (1831) (calling it "insurrection"); see also Thomas Wentworth Higginson, Nat Turner's Insurrection, 8 Atlantic Monthly 173 (1861)

[321] See Turner, supra note 320, at 3 ("The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves") (emphases added).

[322] See McPherson, supra note 231, at 81-84; Cf. Coakley, supra note 312, at 130-131 (noting debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

[323] McPherson, supra note 231, at 84-85. See also Thomas Slaughter, Bloody Dawn: The Christian Riot and Racial Violence in the Antebellum North (1991); and cf. id. at ix ("The line between riot and rebellion was shifting during the antebellum period.").

[324] See generally H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (2006) (describing resistance, in the mid-to-late1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

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Brown's fateful raid on Harper's Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.[325] These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection* nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr's Rebellion, in Rhode Island, in 1841-1842 which led to the Supreme Court's 1849 decision in *Luther v. Borden*.[326] There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter). The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government. The practical result of the decision—relevant to our inquiry– was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "*insurrection*" against the rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force"[327] and as having attempted "to assert the authority of [the Dorr government] by force,"[328] as amounting to having "engaged in the insurrection."[329] The Court also referred to the government's actions as having been designed to suppress that "insurrection."[330] The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.[331] While these

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[325] McPherson, supra note 231, 202-208. Federal troops helped suppress this insurrection and rebellion too. See Coakley, supra note 312, at 193 ("This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities.").

[326] Luther v. Borden, 58 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see Coakley, supra note 312, at 119-127.

[327] Luther, 58 U.S. (7 How.) at 8.

[328] Id. at 37

[329] Id. at 46

[330] Id. at 45.

[331] By this time, the Act had been amended yet again. See 17 Stat. 13, 14-15 (1871), §§ 3-4.

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events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection" as displayed by important usage within a few years of adoption of the Fourteenth Amendment. Briefly summarized: In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus, among other actions) to secure order in dealing with the Ku Klux Klan.[332] In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous "Colfax Massacre" of April 13, 1873, in which a white mob attacked and massacred perhaps 150 black citizens who had been defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government. President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.[333] Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d'etat that had overthrown the Republican governor by force.[334] Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of the capital—New Orleans at the time. (The conflict lasted until 1877, when Reconstruction was abandoned by the national government and white supremacists took full control of the state.) In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.[335] Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.[336] And in 1876, in South Carolina, Grant invoked the Insurrection Act to protect the gubernatorial election process from white supremacist groups.[337] Common to each of these instances during the Grant administration was

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[332] Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871); http://www.presidency.ucsb.edu/ws/?pid=70253; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871); for background see Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 Harv. Nat'l Sec. J. 537, 613-14 (2014); Lou Falkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872, at 39-49 (1996).

[333] Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) http://www.presidency.ucsb.edu/ws/index.php?pid=70364

[334] Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) http://www.presidency.ucsb.edu/ws/index.php?pid=70422

[335]Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), http://www.presidency.ucsb.edu/ws/?pid=70459.

[336] Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874) http://www.presidency.ucsb.edu/ws/?pid=70420.

[337] Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876) http://www.presidency.ucsb.edu/ws/?pid=70542.

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the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shays' Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or perhaps given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. The Congressional Exclusion Debates

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."[338] Moreover, several of these proceedings occurred right around the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.[339]

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[338] Lynch, supra note 5, at 196. Lynch ably and accurately describes the most important such cases. See id. at 196-201, 207-210. We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

[339] See generally 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, pp. 431-486 (1907).

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First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy, during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.[340] A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."[341] Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."[342]

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility" to the Government or provided "aid or comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort."

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."[343] It also involved an incident of pure *speech* as disqualifying a member-elect from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

> *Editors Louisville Courier:*
>
> My attention has been called to the following paragraph, which appeared in your paper of this date:
>
> "JOHN YOUNG BROWN'S POSITION.– This gentleman, in reply to some searching interrogatories put to him by Governor Helm,

[340] Id. §448 at 442.
[341] Id. at 443 (emphasis added).
[342] Id.
[343] Id. at 445.

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said, in reference to the call of the President for four regiments of volunteers to march against the South—

'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*"

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.[344]

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. This became a precedent for the House's subsequent actions in other cases. The standard applied—whether the facts, "proved by clear and satisfactory testimony," showed that an individual had, by an "act or speech ... overt and public ... done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion"—had been satisfied by Brown's letter.[345]

Similarly, in March 1868, the House excluded John D. Young under this standard. Young's case also involved speech. The Young case involved numerous expressions of support and sympathy for the South and against the Union, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."[346] But Young's case was overdetermined, because there was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with* the open acts of 'aid and comfort to the enemies of the United States,'" established that he could not "'honestly and truly take the oath,'"[347] and the full House agreed.

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[344] Quoted in id. at §449, p. 445.
[345] Id. at §449, pp. 443, 448.
[346] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[347] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).

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The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was opposed to "voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.[348]

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson, who had served as a state court judge in the eastern region of Tennessee during the Confederate regime; and Representative-elect R.R. Butler, who had retained his seat in the state legislature during secession, while opposing it—the respective house ultimately admitted the applicant to his seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.[349]

A potentially broad understanding of "aid or comfort" also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.[350] What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son $100 on the way out the door. The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son's taking up arms against the United States and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas's treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan's Treasury Secretary because he disagreed with the President's decision to send federal reinforcements to

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[348] Id. at §453, p. 459.

[349] Id. at §453, 455, pp. 459-461, 462-465. In Butler's case, two-thirds of both houses voted him amnesty. Id. at 464-465. In Patterson's case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it, id. at 46, but perhaps that is okay, if application of the Ironclad Oath, to members of Congress, is a function of each house's *separate* power to make rules governing its proceedings. U.S. Const. art. I §5.

[350] Hinds' at §§457, 458 at pp. 465-470.

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Charleston Harbor.[351] Either theory of Thomas's exclusion suggests that "aid or comfort" to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one's son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia's sixth district, but the House committee found that Christy, by his own admission, had given "aid, countenance, counsel, and encouragement" to persons in armed hostility against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath, and he was not seated.[352] In 1869, the House sat John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.[353] The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of two witnesses.[354] In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or the other, the House ultimately voted to table the issue, leaving Booker in office.[355] Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia house of

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[351] Hinds' at §459, pp. 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas's son "it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action."). See also Cong. Globe 40th Cong. 2nd Sess. at 1260-1262 (Feb. 19, 1868).

[352] Hinds' at §459, pp. 470-472. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment," id.

[353] Hinds' at §460, pp. 472-473.

[354] Congressional Globe, 41st Cong, 2nd Sess. pp. 5442-5447 (July 11, 1870). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states; but everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "No war exist[ed] at the time" and it was before "the policy of the Government had been announced." Id. at 5443 (Butler); see also id. at 5445 (Garfield). Nor could Rice be excluded solely because of his politics. See id. at 5445 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

[355] Hinds' at §461, pp. 474-475.

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delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters. Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.

Finally, in 1871, the Senate declined to seat Senator-elect Zebulon Vance from North Carolina.[356] The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.[357] If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.[358]

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But there was no bright line, for instance, protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces appears generally to have been thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.[359]

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[356] See generally Hinds' at §463, pp. 478-486.

[357] See generally Richard E. Yates, *Zebulon B. Vance: as War Governor of North Carolina*, 1862-1865, 3 J. Southern Hist. 43 (1937).

[358] Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress, Act of May 22, 1872, ch. 193, 17 Stat. 142; https://bioguide.congress.gov/search/bio/V000021. Cf. Franklin Ray Shirley, Zebulon Vance, Tarheel Spokesman 71 & 152 n. 36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance), but Congress then passed a private bill granting him individual amnesty. 17 Stat. 691 (June 10, 1872). Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1884. Magliocca, *Amnesty*, supra note 5, at 111 n. 126.

[359] Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See supra notes 222-224 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section

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6. Legislative History

There is only a little fruit to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress's debates over its various provisions and of state ratification debates. The Fourteenth Amendment's legislative history is famously voluminous, and Section Three—like the other "forgotten" sections of the Amendment (Section Two and Section Four)—was much more salient to the debates then than it is to today.[360] As briefly noted above, the legislative history supports the key propositions we have advanced earlier in this article—that Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction; that Section Three's disqualification was seen by proponents and opponents alike to be self-executing and automatic; and that Section Three was understood to supersede (or satisfy) prior constitutional limitations.[361]

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences: there appears to have been substantial agreement—by both opponents and proponents—that the provision would cover a broad range of activity supporting or assisting the South's efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding and, further, would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have "engaged in" insurrection or rebellion or given "aid or comfort" to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents simply thought such breadth appropriate, necessary, and valuable.[362]

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather

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Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

[360] See generally Graber, Volume 1, supra note 8.

[361] See supra notes 12, 59, & 184.

[362] See generally Graber Section Three manuscript, supra note 12.

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than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).[363] As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

7. Early Applications of Section Three

A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they still can be informative.[364] Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.[365]

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress by enacting new, republican, Reconstruction-compliant constitutions—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified

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[363] Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply – *e.g.*, only to persons who joined the Confederacy while still holding prior office under the U.S. Constitution; only to persons who had sworn oaths to the Constitution since 1851; only to persons who had not received presidential pardons; and only to persons who had *voluntarily* served the confederacy. Republican defenders of Section Three successfully opposed these proposed limitations on Section Three's scope, arguing that limiting the ban to persons who still held office under the Constitution when they joined the Confederacy would indulge the pretext that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. Cong. Globe, 39th Cong. 1st Sess. p. 2770 (statement of Sen. Howard). Republicans likewise rejected the proposed limitation to persons who had "voluntarily" assisted or participated in rebellion, because it would raise unnecessary and difficult proof problems and permit spurious claims of involuntary participation. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he "never entered into the rebellion voluntarily"! Cong. Globe, 39th Cong., 1st Sess. p. 2918 (statement of Sen. Willey).

[364] See, e.g., Baude, *Liquidation*, supra note 242, at 61-62; Paulsen, *Most Dangerous*, supra note 242, at 293, 303.

[365] Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three, see supra Part IV.A.5.b.

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under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state's constitutional convention.[366]

Andrew Johnson's attorney general, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.[367] Stanberry's opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and ex post facto in this context.[368] Even so, Stanberry's opinion found Section Three's definition of what constituted participation in rebellion to be quite broad:

> "*All those who*, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done *any overt act* for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."[369]

As to individuals, Stanberry also reiterated several times that *any* voluntary support, even if not violent, was covered and culpable. He found "it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,"[370] and added that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law."[371]

Subsequent cases took even broader positions. For instance, in the 1869 decision of Worthy v. Barrett, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court's reasoning on this issue was succinct but clear:

> What will amount to having engaged in the rebellion?
>
> (1st.) Holding any of these offices under the Confederate government.

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[366] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428, 429, sec. 5-6 (March 2., 1867).
[367] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867); Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 182 (1867).
[368] 12 Op. Att'y Gen. at 159-160. But see supra Part III.A-B (explaining why the constitutional ex post facto and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).
[369] Id. at 161-162 (emphasis added)
[370] Id. at 161.
[371] Id. at 165.

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> 2d Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.[372]

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.[373]

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation – Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring *quo warranto* actions to remove officials holding office "contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution" and to bring criminal prosecutions against person who "shall hereafter knowingly accept or hold" office in violation of Section Three.[374] In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell, for accepting an appointment as county sheriff despite being covered by Section Three.[375] Powell's alleged act of rebellion was having "furnished a substitute for himself to the Confederate army," and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.[376] This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

> [T]he word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will

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[372] Worthy v. Barrett, 63 N.C. 199, 203 (1869). The court also applied the Worthy rule to the even easier case of a county attorney who "took part in th[e] rebellion by serving in the Confederate army, voluntarily." In Re Tate, 63 N.C. 308 (1869).

[373] By contrast, Stanberry had concluded that officers who "discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion." 12 Op. Att'y Gen. 162.

[374] 16 Stat. 140, 142-143, sections 14 & 15. See supra note 54.

[375] United States v. Powell, 27 F. Cas. 605 (C.C.D.N.C 1871).

[376] Id. at 607.

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> excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant's action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.[377]

In other words, only great duress *and* pure heart would be a defense if one's conduct otherwise provided material support to the rebellion. Section Three's disqualification for having "engaged" in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee. the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.[378] Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee's purported secession, and traveling to Washington to attempt to represent the state in Congress.[379] While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.[380]

The other scattered discussion of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section Three's substantive disqualification—broad interpretations of insurrection, rebellion, "engaged in," and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was "a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States."[381] Other cases are consistent with similarly

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[377] Id. Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry. Id.

[378] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 Tenn. B.J. 20 (2013); see also Magliocca, *Amnesty*, supra note 5, at 109-110.

[379] For one fawning account of Nelson, see Oliver P. Temple, Notable Men of Tennessee From 1833 to 1875. at 166-215 (1912).

[380] Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, supra note 378.

[381] In re Griffin, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

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broad assumptions.[382] We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have "engage[d] in insurrection and rebellion," or given "aid or comfort" to "enemies" was understood to embrace an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, the sum total of evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of "insurrection" and "rebellion" to which they applied; and finally early practice enforcing Section Three—points in a consistent direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably broad understanding of what types of conduct constitute engaging in or perhaps giving aid or comfort to such movements.

B. What Prior Officeholders are Covered? What Future Offices are Barred?

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

> No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States or under any State … [383]

[382] Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. Magliocca, *Amnesty*, supra note 5, at 109-110.
[383] U.S. Const. amdt. XIV, sec. 3.

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Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

> … who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States … [384]

We begin with a few observations.

First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.[385] Keep this in mind as we proceed: we think readers should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that "Senators and Representatives . . . Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."[386] Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will "faithfully execute the Office of President of the United States" and

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[384] Id.

[385] See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 Albany L. Rev. 671, 674-76 (1995). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. William Michael Treanor, *The Case of the Dishonest Scrivener: Guverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 20-24 (2021). Putting aside whether this story is really true, David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Governeur Morris as Dishonest Scrivener*, 120 Mich. L. Rev. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semi-colon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *West Virginia*, supra note 130, at 338-339 & n. 151.

[386] U.S. Const. art. VI, cl.3.

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"'to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'"[387]

Section Three's listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three's list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to "military" offices—including state military offices—whether or not they would be considered "executive" offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text's overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified.

With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, "triggering" clause): Section Three's disqualification attaches to persons who previously swore an oath to support the Constitution as:

> [i] a "*member*" of Congress, or as
> [ii] an "*officer* of" the United States, or as
> [iii] a "*member*" of any State legislature, or as
> [iv] an "*executive or judicial officer* of" any State.[388]

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[387] U.S. Const. art. II, §1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L. Rev. 1257, 1260-1267 (2004); on "to the best of my Ability," see William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303, 310 (2011).
[388] U.S. Const. amdt. XIV, sec. 3.

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These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

> [i] "a *Senator* or *Representative*" in Congress (paralleling "*member,*" a seemingly purely stylistic variation) or
> [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
> [iii] holding "*any office, civil or military,*" "under" either federal or state government (paralleling "officer" of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of "military" officers).

The description "civil" office, in the disqualified-from list seems designed to embrace the categories of "executive or judicial" officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a "civil" office within the language and design of Section Three, reading the word "office" in this context in an ordinary, non-technical sense.[389]

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for president and vice president (and clarifying "military"). The legislative positions in question are the relevant *elected* offices—*members* of the legislature, whether a state legislature or the federal Congress—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an "office" within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an "office," held by an "officer"—as opposed to non-officer, non-"office"-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?[390] Like-

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[389] Hemel, *How-to Guide*, supra note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from "civil" offices.); contra John Randolph Tucker, *General Amnesty*, 126 N. Am. Rev. 53, 54 (1878). None of this in our view affects the question whether a Member of Congress may properly be designated as an "Officer" to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995) with John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995).

[390] Serious scholarship has explored those questions with respect to the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

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wise, for the federal judicial branch, Article III judges and justices are plainly covered. (Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,[391] are presumably covered as well—as well as perhaps bankruptcy judges, magistrate judges and the like.)[392] Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive "office" held by "officers" (thus, perhaps, the special need for designation "military," to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* "under" the United States, is not properly classified as an "*officer of*" the United States.[393] On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this[394]—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three's consequences.

We do not buy it, for many reasons: First, it adopts precisely the type of "secret code" hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: an insurrectionist *President* is not covered by Section Three's disqualification (though nearly every other federal or state officeholder is); the President is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.[395]

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[391] 38 U.S. 230, 258 (1839) ("[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned"). To be clear, Hennen dealt with the clerk of court, not what we would now call a term judicial law clerk.

[392] That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III* 133 Harv. L. Rev. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly "officers" at all. Again, we leave this issue for another day.

[393] Josh Blackman & Seth Barrett Tillman, *Is The President An "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021).

[394] See, e.g., id. at 6, 17, 21.

[395] To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comm. 245 (1997); (suggesting the possibility that a straightforward reading of the constitutional text yields the "stupid" – and surely inadvertent – result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, Grounding, supra note 9, at 1468. But that does not mean we should close our eyes to plausibility and common sense, *especially* when the proposed textual reading is such a stretch. See also Paulsen, supra, Nothing But the Text, supra note 10, at 1439-1440 (noting cautions concerning use of the "absurdity" canon to

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Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times. It specifies the length of term for which the President "holds his Office," certain minimum qualifications for eligibility "to that Office," what happens upon the President's removal "from Office," or inability to discharge "the Powers and Duties of said Office," and the oath he shall take before entering "on the Execution of his Office."[396] If the Presidency is not an office, nothing is.

So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an "office *under*" the United States but is not an "officer *of*" the United States? This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer *"of"* the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause ("officer of") and the positions-disqualified clause ("office under")—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.[397] Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different prepositions: the Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.[398]

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deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

[396] See generally U.S. Const. Art. II.

[397] For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. Const. amdt. XIII, sec. 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amdt. XIC, sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); id. amdt. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *West Virginia*, supra note 130, at 348 (giving examples).

[398] One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (Jul. 28, 2016) https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare id. (foreign gifts to Washington) with Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

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Third, a variant of the Blackman-Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred.[399] "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?"[400] Johnson was complaining that these two officers *should* be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Maine interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'"[401] Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."[402]

The Blackman-Tillman argument is not *quite* the same, but it is the mirror image of Johnson's concern. Johnson's inquiry was whether a covered, insurrectionist nonetheless might become president. The Blackman-Tillman argument is that an insurrectionist president is not an "officer of" the United States whose prior position triggers Section Three's restrictions on future office. The Johnson-Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.[403] Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining

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Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. U.L. Rev. Colloquy 180, 190 (2013) (contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, supra this note (Hamilton's list) with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107 (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms); cf. Blackman & Tillman, supra note 393, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

[399] Cong. Globe, 39th Cong., 1st sess. at 2899 (1866)

[400] Id.

[401] Id.

[402] Id.

[403] Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate Congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, supra 393, at 45-46 (acknowledging this). While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification these incidents would have shown that to be a glaring and dangerous omission.

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textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds "*office under*" the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

If Blackman and Tillman maintain that the President does *not* hold "office under" the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold "office under" the United States, then they must maintain a sharp and crucial distinction between "office under" and "officer of." As Mark Graber has observed, this distinction was *also* contradicted by Section Three's framers: "[T]he members of the Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office 'under the United States' were officers 'of the United States.' During the debates over Section 3, no representative or senator alluded to the existence of a distinction between 'of' and 'under'. Representatives and senators often described the president as having an 'office under the United States' and being an 'officer of the United States.'"[404] If a secret code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman-Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text's many references to the office of the Presidency as an "office"; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned

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[404] Mark Graber *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023). Professor Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'" In addition, "[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished between 'officers under' and 'officers of' or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; see also Lynch, supra note 5, at 158-160 (collecting authorities supporting the same point); Magliocca, *Foreground*, supra note 62, at 16 n. 48 ("My research . . . shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States").

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by the Radical Reconstruction Congress that drafted the Fourteenth Amendment; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the "under/of" difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or "triggering" language, insurrectionists who once served as President and Vice President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

C. The Attempted Overthrow of the 2020 Presidential Election

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020-2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

Taken as a whole, these actions represented an effort to prevent the lawful, regular, termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or perhaps given "aid or comfort" to those who did? We will consider those questions in turn.

1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any re-

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spect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020-2021, but let us first focus on the events of January 6, 2021.[405] These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[406] The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was in part coordinated, not merely a riot.[407] Some members of the group were armed,[408] and many used force to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.[409]

Furthermore, it seems that, as a whole, the group's goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power, by disrupting a necessary formal step in the constitutional process.[410] The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that

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[405] In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-000 (117th Cong., 2nd Sess.). Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally supra Part II.B.

[406] Supra Part IV.A.1. The fact that President Trump may have supported the insurrection, see infra II.C.2.b, does not change this. In our system the President is not "the government," and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

[407] See, e.g., January 6 Report, supra note 405, at 499-502, 530-531.

[408] Id. at 640-642.

[409] Id. at 646-647, 651-659.

[410] Id. at 502-510, 521-530.

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day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries' Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.[411] Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.[412]

Our assessment of the events of January 6, specifically, as an "insurrection" confirms the judgment made by public authorities: An act of Congress, to "award four congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,"[413] found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: "On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers."[414] Another finding noted the historic magni-

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[411] See supra Part IV.A.4.c.

[412] What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, amounted to "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course if there were any other insurrections against the United States, Section Three applies to them all.

[413] Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322.

[414] Id. sec. 1(1). In the state Section Three proceedings against Marjorie Taylor Greene, supra notes 68-73 and accompanying text, the hearing officer cited this statute to conclude "Congress has characterized the Invasion as an insurrection." Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SEC-STATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022). The hearing officer found it unnecessary to decide for himself, however, "Whether the Invasion of January 6 amounted to an insurrection." Id. at 18.

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tude and symbolic importance of that insurrection against democracy: "The desecration of the U.S. Capitol, which is the temple of American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation's history."[415] The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th.[416] The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th *was* an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.[417]

Finally, there is an additional possibility that we should see the events of January 6, 2021, as just one part of a broader "rebellion" against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

We acknowledge that applying the term "rebellion" to the events of 2020-2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an "*open and avowed renunciation of the authority* of the government," as Webster would have it, nor (outside of the insurrection of January 6) "*the taking up of arms*" or "*forcible* opposition" as Bouvier would have it.[418] It is not a perfect fit.

Nonetheless, consider the argument that the term "rebellion" could be used more broadly to describe a coup d'etat seeking to overthrow the constitutional order—including a so-called "bloodless" coup d'etat (where no force is used) and a successful "self-coup" of the bloodless variety[419] (where the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: 1. A military coup d'etat upending lawful government by use of force surely qualifies,

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[415] Pub. Law. 117-32, sec. 1(4).
[416] H. Res. 24 (117th Cong., 1st Sess. Jan 25, 2021).
[417] For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, supra note 62, at 23 n.65; Vlahoplus, supra note 404, at 1; Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539, 1622-25 (2022); see also Hemel, *How-to Guide*, supra note 5; Mark A. Graber, Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021, Lawfare (Sep. 26, 2022) at https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021.
[418] See supra Part IV.A.2.
[419] See generally Daniel J. Hemel, *Self-Coup and The Constitution*, 37 Const. Comm. (forthcoming 2023).

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constitutionally, as a "rebellion." It is literally an effort unlawfully to overthrow constitutional government, by force. 2. It follows that a military coup d'etat upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*. 3. A military coup d'etat by the *existing* regime—a "self-coup," would seem, legally, to be the same thing. In such a case the regime does not *seize* power, by show or threat of force; it *retains* power by show or threat of force. But it is logically identical to situations #1 and #2. 4. A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3. Indeed, it seems fair to say that situation #4 is merely an instance of situation #3. 5. The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020-2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.[420]

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.[421]

2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Additionally, perhaps, who might be said to have provided "aid or comfort" to those insurrectionists and rebels?*

As detailed at great—perhaps excruciating—length above, "engaged in" under Section Three is properly understood to embrace a broad range of willful participatory

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[420] In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. See supra Part IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'etat (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

[421] For the sake of completeness, we add that we think the events of 2020-2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.

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conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as "insurrection" or "rebellion." And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving "aid or comfort" arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three's disqualification.[422]

Who, then, engaged in such behavior?

a. General Principles Concerning Culpable Participation

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual's voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Part II, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution's criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three's broad sweep, it is clear that at least two purported factual defenses are simply immaterial:

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported "insurrection" or "rebellion" because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to "stop the steal." The problem is that the premise is simply false. Decisionmakers can and should act on the well settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.[423]

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[422] See generally supra Part IV.A.

[423] See not only the January 6 Report, supra note 405, but also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson &

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Second, it likewise is no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South's secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.[424] Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual's wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.[425]

b. Section Three Disqualifies Donald Trump from Future Office

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the 2020 election and the events leading to the January 6 attack.

The case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential election result, calling it "stolen" and "rigged";[426] that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,[427] to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,[428] to assemble and induce others to submit bogus slates of competing state electors,[429] to persuade or pressure Congress to refuse to count electors' votes submitted by several states,[430] and finally, to pressure the

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Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022)*, https://lostnotstolen.org.

[424] This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., Counterman v. Colorado, 600 U.S. ___, at 4 n.2 (2023).

[425] Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted "insurrection"? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d'etat are not.

[426] And not that it matters, see supra Part IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, supra note 405, 100-01, 103-04, 203, 213, 789.

[427] Id. at 202-203, 263-265; see also id. at 223-231,

[428] Id. at 296-300.

[429] Id. at 341-354.

[430] Id. at 431.

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Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors' votes.[431]

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.[432] Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump's defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: "Big protest in D.C. on January 6th. Be there, will be wild!"[433] According to testimony amassed by the House's January 6th Commission, Trump's supporters interpreted this as a call to arms, sometimes literally.[434]

Then there are the events of January 6 specifically. When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to the Capitol to oppose what he had been calling the "steal" of the election. Trump reiterated his false claim that he had in fact won the election—"we won this election and we won it by a landslide"—but that the Democrats and the media had "stolen" the election and "rigged" a false outcome. "They rigged it like they've never rigged an election before," he charged. "Make no mistake, this election was stolen from you, from me and from the country. … This [is] the most corrupt election in the history, maybe of the world." The crowd was "gathered together in the heart of our nation's capital for one very, very basic and simple reason: To save our democracy." Trump called on the crowd to march on the Capitol. "Our country has had enough. We will not take it anymore and that's what this is all about. … We will stop the steal." He urged the assembled mass of thousands, some of whom Trump knew to be armed, to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[435]

Some might quibble that the speech is ambiguous.[436] Not all of Trump's rambling address called literally for the crowd to "fight." Some of his statements were

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[431] Id. at 441-458.
[432] Id. at 441-458.
[433] Quoted in id. at 499.
[434] Id. at 499-540.
[435] For the quotations in this paragraph, see "Transcript of Trump's Speech at Rally Before US Capitol Riot," Associated Press, (Jan. 13, 2021), available at https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27. See also id. ("And again, most people would stand there at 9 o'clock in the evening and say, 'I want to thank you very much,' and they go off to some other life. But I said something is wrong here, something is really wrong, can't have happened, and we fight. We fight like hell, and if you don't fight like hell you're not going to have a country anymore.").
[436] See Michael Conklin, *Capital Offense: Is Donald Trump Guilty of Inciting a Riot at the Capital?*, 15 U. St. Thomas J.L. & Pub. Pol'y 483 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 Const. Comm. at 2-3, 20-21 (forthcoming 2023).

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ambiguous and at one point he remarked that the crowd would be marching "peacefully and patriotically."[437] He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take "strong" and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump's speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.[438] It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steeled them to action, knew that they were ready to take immediate action, and directed them to take it.[439] But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standards of participation in and support for "insurrection or rebellion," and it qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.[440] First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had attacked the Capitol, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.[441] During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not "hav[ing] the courage to do what should have been done to protect our Country and our Constitution,"[442] a statement that the January 6th Commission concluded was "a statement that could

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[437] Transcript, supra note 435.

[438] 395 U.S. 444 (1969); compare Conklin, supra note 436, with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 Wake Forest L. Rev. 971 (2022); see also Rozenshtein & Shugerman, supra note 436, at 3 n.3 (citing these and other sources and describing this disagreement).

[439] As Rozenshtein and Shugerman also emphasize, "Trump's speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol," which they argue takes it outside of the Brandenburg framework for that reason. Rozenshtein & Shugerman, supra note 436, at 38.

[440] See supra Part III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

[441] January 6 Report, supra note 405, at 577-606.

[442] Donald J. Trump, Tweets of January 6, 2021, available at https://www.presidency.ucsb.edu/documents/tweets-january-6-2021

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only further enrage the mob" and that in fact apparently did so.[443] Once Trump finally *did*—after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.[444]

This culpable inaction—failing to intervene to stop an insurrection in progress, declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump's responsibility for the January 6 insurrection. Section Three reaches a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.[445] Sitting by and doing nothing—declining to act to arrest a violent uprising, despite possessing the material capacity and legal responsibility to intervene—might qualify. Additionally and equally important, Trump's deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd's reaction was all a big mistake or misunderstanding.

Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump "engaged in" the January 6 insurrection through both his actions and his inaction. Officials—administrators, courts, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office,

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,[446] then Trump's complicity is even more obvious—as the leader, motive force, and chief attempted perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump, having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d'etat against the Constitution and its system of elections and overturn the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes "rebellion" against the Constitution, Trump's overall

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[443] January 6 Report, supra note 405, at 577.

[444] Even as he urged peace in a video to the insurrectionists ("we can't play into the hands of these people. We have to have peace") he continued to express affection for them ("So go home. We love you. You're very special.") and to reiterate that the "election was stolen from us." Donald J. Trump, Videotaped Remarks During the Insurrection at the United States Capitol, at https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol. Later that night he tweeted: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Trump Tweets, supra note 442.

[445] Cf. notes 350-351 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

[446] See supra notes 418-420 and accompanying text.

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course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump "engaged in" "insurrection or rebellion" and gave "aid or comfort" to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

c. Beyond Trump

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many others who are or may be connected to either the insurrection of January 6 or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution's provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories:

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico, and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as Section Three contemplates.[447] They present the easiest case of "engag[ing] in . . . insurrection." Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.[448] Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and "was near the Capitol during the attack."[449] Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.[450] Trump Chief of

[447] See supra notes 85-88, 114-116 and accompanying text.
[448] See supra notes 68-80 and accompanying text.
[449] January 6 Report, supra note 405, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See supra note 89.
[450] January 6 Report, supra note 405, at 536, 577, 581, 593-594, 608; https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat

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Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also "directed that [Giuliani] be allowed to speak" to the crowd.[451] These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,[452] the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines, invalidate election results, and rerun the vote in swing states won by Biden.[453] Would-be Trump electors (some of whom came from state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.[454] Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.[455] At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid or comfort.[456] These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol, should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020-2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a

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[451] January 6 Report, supra note 405, at 533, 535-536.
[452] See supra notes 418-420 and accompanying text.
[453] January 6 Report, supra note 405, 222.
[454] January 6 Report, supra note 405, at 352-353. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.
[455] January 6 Report, supra note 405, at 50.
[456] Id. at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

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great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

Conclusion

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders and comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independently of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and officials from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should refuse to seat or expel that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress

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through the impeachment process, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's constitutional disqualifications is properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges exercising the judicial power to faithfully apply and enforce Section Three according to its terms.

No official should shrink from these duties. It would be wrong – indeed, arguably itself a breach of one's constitutional oath of office—to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one's own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing, and enforcing, the Constitution's commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, or resentment, or opposition, or retaliation. The Constitution is not optional and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.[457] The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-2021, who refused to abide by election results and instead sought to overthrow them.)[458]

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are "political questions." Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House's judgment, Section Three is enforceable by the judiciary *as well as* by other officials.[459] Section Three's terms embody rules and standards, enforceable as any other constitutional provision

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[457] See Magliocca, *Foreground*, supra note 62, at 14-24 (arguing at length that "the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment," and that it "elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three").

[458] See William Baude, *The Real Enemies of Democracy*, 109 Cal. L. Rev. 2407, 2418-20 (2021) ("The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.").

[459] Supra note 95.

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is enforceable. There is no freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, it is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country. Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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Gearing up, see attached.

H

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2022 WL 17976630
Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

John Anthony CASTRO, Plaintiff,
v.
FEDERAL ELECTION COMMISSION, Defendant.

Civil Action No.: 22-2176 (RC)
|
Signed December 6, 2022

Attorneys and Law Firms

John Anthony Castro, Mansfeld, TX, Pro Se.

Jacob Stephen Siler, Kevin Deeley, Federal Election Commission, Washington, DC, Shaina J. Ward, Washington, DC, for Defendant.

ORDER

GRANTING DEFENDANT'S PARTIAL MOTION TO DISMISS; DENYING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

RUDOLPH CONTRERAS, United States District Judge

I. INTRODUCTION

***1** Plaintiff John Castro files this *pro se* action seeking declaratory and injunctive relief against the Federal Election Commission ("FEC" or "Commission") concerning Donald J. Trump's candidacy for President of the United States. The Commission now moves to dismiss. For the reasons described below, the Court agrees with the FEC that Mr. Castro lacks standing to bring Count II, and accordingly denies Plaintiff's motion for a temporary restraining order ("TRO") and/or a preliminary injunction. And because subsequent events have rendered Count I moot, the Court will also dismiss the Complaint in its entirety.

II. BACKGROUND

Mr. Castro is a U.S. citizen and an FEC-registered 2024 Republican primary presidential candidate. Compl. ¶ 8, ECF No. 1. On March 23, 2022, he filed an administrative complaint with the FEC demanding, among other things, that the agency declare Mr. Trump a "candidate" within the meaning of the Federal Election Campaign Act ("FECA") based on Mr. Trump's alleged campaign spending and the FEC's campaign finance rules. *Id.* ¶ 11. The Commission acknowledged the complaint the next day but did not act within its statutorily prescribed 120-day period. *Id.* ¶¶ 11–12. Pursuant to 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act, 5 U.S.C. § 706, Mr. Castro brought suit in this Court. *Id.* ¶¶ 2, 12. In his two-count complaint, Mr. Castro avers that the agency has unlawfully failed to: (1) require Mr. Trump to file a statement of candidacy, *id.* ¶¶ 79–83, and, supposing this occurs, (2) reject his statement of candidacy based on the Fourteenth Amendment's Disqualification Clause, *id.* ¶¶ 84–88. On November 15, 2022, Mr. Trump filed his statement of candidacy with the Commission, rendering Count I moot. *See* Donald J. Trump, FEC Form 2 (Nov. 15, 2022), https://docquery.fec.gov/cgi-bin/forms/P80001571/1661552/. The FEC seeks to dismiss Count II for lack of standing and failure to state a claim upon which relief can be granted. *See* Def.'s Mem. of P. & A. Supp. Partial Mot. Dismiss at 10–15, ECF No. 14-1. At the same time, Mr. Castro moves for a temporary restraining order, or in the alternative, a preliminary injunction, enjoining the agency from accepting Mr. Trump's statement of candidacy. *See* Pl.'s Mot. for TRO and/or Prelim. Inj. at 1, ECF No. 17. The motions are ripe for decision.

III. LEGAL STANDARD

When considering a motion to dismiss, courts accept all material factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor. *See Am. Nat'l Ins. Co. v. Fed. Deposit Ins. Co.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). However, courts must address jurisdiction as a "threshold matter," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998), and "[t]he burden of establishing any jurisdictional facts to support the exercise of the subject matter jurisdiction rests on the plaintiff," *CFA Inst. v. Andre*, 74 F. Supp. 3d 462, 465 (D.D.C. 2014); *see also McBride v. Mnuchin*, No. 19-cv-60, 2019 WL 3323412, at *2 (D.D.C. July 24, 2019) ("Before addressing the merits of a case, a

court must confirm that it has subject matter jurisdiction."). Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and therefore is "a necessary 'predicate to any exercise of [Article III courts'] jurisdiction,' " *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc)). Accordingly, "[e]very plaintiff in federal court bears the burden of establishing the three elements that make up the 'irreducible constitutional minimum' of Article III standing: injury-in-fact, causation, and redressability." *Id.* at 1362. Standing is "not dispensed in gross"; rather, plaintiffs must show standing as to each claim. *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)).

IV. ANALYSIS

***2** The parties agree that Mr. Trump's filing of his statement of candidacy on November 15, 2022 moots Count I. *See* Pl.'s Mem. of P. & A. Supp. Mot. for TRO and/or Prelim. Inj. at 3, ECF No. 18; Def.'s Opp'n to TRO and/or Prelim. Inj. at 5, ECF No. 19. Count II, what remains, asks the Court to require the FEC to reject Mr. Trump's statement of candidacy on the basis that his alleged involvement in the events of January 6, 2021 at the U.S. Capitol bars him from running for President of the United States. Mr. Castro bases his theory on the Fourteenth Amendment's Disqualification Clause, which provides in full:

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

U.S. Const., amend. XIV, § 3. The Court declines to reach the merits of Count II, however, because Mr. Castro fails to establish standing. Mr. Castro alleges that, as a result of the FEC's acceptance of Mr. Trump's statement of candidacy, he suffers a competitive injury because he himself is competing in the 2024 Republican presidential primary and vying for the same support and donations as Mr. Trump. Pl.'s Mem. P. & A. Opp'n Mot. to Dismiss at 16–17, ECF No. 15. Assuming, without deciding, that Mr. Castro's theory of injury is viable, he nonetheless fails the traceability and redressability requirements of standing.

First, Mr. Castro's alleged injury—having to compete with Mr. Trump—is not traceable to the Commission. Traceability requires "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560; *accord Kimelman v. Garland*, 588 F. Supp. 3d 84, 87 (D.D.C. 2022). According to Mr. Castro, by accepting Mr. Trump's statement of candidacy, FEC Form 2, the Commission has confirmed Mr. Trump's eligibility to run for President, thereby creating competitive harm for Mr. Castro. But this erroneous idea —upon which Mr. Castro's entire case turns—is completely lacking in support. The FEC explains that it possesses "no authority" to "evaluate a prospective candidate's eligibility for federal office." Def.'s Mem. of P. & A. Supp. Partial Mot. Dismiss at 10. It represents that, under the FECA, Congress only gave the agency power to regulate federal campaign finance—that is, among other things, "the raising, spending, and disclosing of campaign funds"—and not to determine who is constitutionally eligible to run for office. *Id.* at 11; *see generally* 52 U.S.C. §§ 30101–30126. Mr. Castro has not pointed to a statute or regulation indicating otherwise.

Nothing in the statement of candidacy, FEC Form 2, lends credence to Mr. Castro's belief that it plays a role in determining Mr. Trump's eligibility to run for office. The statement of candidacy is a two-page form that an individual must file with the FEC for the purposes of designating a principal campaign committee within "15 days after becoming a candidate." 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1; *see, e.g.*, Donald J. Trump, FEC Form 2 (Nov. 15, 2022), https://docquery.fec.gov/cgi-bin/

forms/P80001571/1661552. A "candidate," for purposes of the FECA, is simply any "individual [who] has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000" or given another consent to do so on their behalf (where such person has received or made such contributions or expenditures). 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a). Mr. Castro has failed to meet his burden to show the Court how the Commission's handling of Mr. Trump's statement of candidacy has any bearing on Mr. Castro's alleged injury.

***3** Second, and relatedly, Mr. Castro's alleged injury is not redressable. Because "the Commission has no jurisdiction to reject Trump's candidacy filings," Def.'s Reply at 4, ECF No. 16, the Court has no authority to order the agency to violate the law, *see Long Term Care Pharmacy All. v. Leavitt*, 530 F. Supp. 2d 173, 185 (D.D.C. 2008) ("Plaintiffs cannot establish standing by requesting relief that the Court lacks the authority to grant[.]"); *see also Berg v. Obama*, 574 F. Supp. 2d 509, 525 (E.D. Pa. 2008) (explaining that plaintiff lacked standing because he could not "identif[y] a specific provision of the [FECA] that entitle[d]" him to relief as "[i]t seem[ed] clear that the [FECA] does not address the sort of corruption that Plaintiff allege[d]"), *aff'd*, 586 F.3d 234 (3d Cir. 2009).

Even were the Court somehow able to force the Commission to reject Mr. Trump's statement of candidacy, Mr. Castro has not shown how this would cure his alleged injury. If the FEC cannot confer constitutional legitimacy to Mr. Trump's candidacy by accepting his statement of candidacy, the Court fails to see how rejection of the same would stop Mr. Trump from running his campaign and competing against Mr. Castro. *See* Def.'s Opp'n to TRO and/or Prelim. Inj. at 2 ("The filing of a declaration of candidacy ... is not a conferral by the Commission of authorization to run for office or raise campaign funds."). Here, too, Mr. Castro has failed to carry his burden. *See The Wilderness Soc. v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) ("The redressability inquiry poses a simple question: '[I]f plaintiffs secured the relief they sought, ... would [it] redress their injury'?" (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996)).

To summarize, it is undisputed that Count I is moot. The Court dismisses Count II because Plaintiff lacks standing. Because the Court concludes that it lacks subject matter jurisdiction over this suit, it accordingly denies Plaintiff's motion for a temporary restraining order and/or a preliminary injunction.

It is hereby:

ORDERED that Defendant's partial motion to dismiss (ECF No. 14) is **GRANTED**; and it is

ORDERED that Plaintiff's motion for a temporary restraining order and/or a preliminary injunction (ECF No. 17) is **DENIED**; and it is

ORDERED that the Complaint is dismissed in its entirety.

SO ORDERED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-CV-61628-ROSENBERG

LAWRENCE A. CAPLAN,
BARRY BUTIN, and
MICHAEL STRIANESE,

Plaintiffs,

v.

DONALD J. TRUMP,

Defendant.
_____/

ORDER OF DISMISSAL

THIS CAUSE is before the Court on the Amended Complaint of Plaintiffs, Lawrence A. Caplan, Barry Butin, and Michael Strianese, against Defendant, Donald J. Trump. DE 7. Plaintiffs ask the Court to enter a declaratory judgment barring Defendant from (1) seeking the office of President of the United States and (2) participating in the Florida Presidential primary election in 2024. *Id.* at 1, 10. Plaintiffs assert that Defendant is ineligible to serve as President under the Fourteenth Amendment because of his alleged participation in events that took place at the United States Capitol on January 6, 2021, and related activities. *Id.* at 5-6. The Court concludes that it lacks subject matter jurisdiction and dismisses the Complaint.

Under the federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), the Court has "substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). "If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that court to proceed to the merits before staying or dismissing the action." *Id.* at 288; *see also Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 n.17 (1993) ("[T]he Declaratory Judgment Act affords

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the district court some discretion in determining whether or not to exercise that jurisdiction, even when it has been established."); *Nat'l Trust Ins. Co. v. S. Heating & Cooling, Inc.*, 12 F.4th 1278, 1281 (11th Cir. 2021) ("As the permissive text suggests, a district court has discretion in deciding whether to entertain an action under the Act."); *Old Republic Union Ins. Co. v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1260 (11th Cir. 1997) (district court is authorized in its discretion to dismiss an action seeking a declaratory judgment). As explained below, the Court exercises its discretion to dismiss the Amended Complaint for lack of jurisdiction because Plaintiffs lack standing.

This Court has "an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("[I]t is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

Inquiry into standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing "is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Thus, this Court has jurisdiction over a case only if the plaintiff has standing to sue. *See Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims, and the court is powerless to continue." *CAMP Legal Def. Fund., Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (internal citation and quotation omitted).

"A generalized interest of all citizens in constitutional governance does not suffice to confer

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standing on one such citizen." *Sibley v. Obama*, 866 F. Supp. 2d 17, 20 (D.D.C. 2012) (citing additional cases). To have standing, a plaintiff must show he has a "personal stake" in the alleged dispute and that the injury is "particularized" to him. *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."). "[E]ven in a proceeding which he prosecutes for the benefit of the public . . . [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens." *Lance v. Coffman*, 549 U.S. 437, 440 (2007) (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406 (1900)).

Here, Plaintiffs lack standing to challenge Defendant's qualifications for seeking the Presidency, as the injuries alleged are not cognizable and not particular to them. Plaintiffs allege that they have standing because Plaintiff Caplan has actively participated in the last twelve Presidential elections, voted for both Republicans and Democrats, is a Florida resident and United States citizen, is an attorney and member of various courts, and has never been sanctioned. DE 1 at 2. Plaintiffs further allege that Plaintiff Butin is a Florida resident and United States citizen and Plaintiff Strianese is a Nevada resident and United States citizen. *Id.* Plaintiffs allege they will suffer injury if Defendant is allowed to run for President and prevail when he could be disqualified or removed from office. *Id.* at 2-3. However, an individual citizen does not have standing to challenge whether another individual is qualified to hold public office. *See, e.g., Kerchner*, 612 F.3d at 207; *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

In *Berg*, the plaintiff, an attorney representing himself, filed a complaint seeking declaratory and injunctive relief in district court before the 2008 Presidential election, alleging that then-candidate Barack Obama was ineligible to run for President because he was not a "natural born citizen" within

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the meaning of Article II. *Berg*, 586 F.3d at 237. The district court observed that "[s]tanding has been a consistent barrier to lower courts hearing generalized, undifferentiated claims by voters and citizens," and noted various cases in which citizens attempted to challenge a Presidential candidate's eligibility for office or other governmental actions but lacked standing. *Berg v. Obama*, 574 F. Supp. 2d 509, 517 (E.D. Pa. 2008) (citing, *e.g. Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (citizen and member of Supreme Court bar "merely a general interest common to all members of the public" and lacked standing to challenge appointment and confirmation of Supreme Court Justice)); *Jones v. Bush*, 122 F. Supp. 2d 713, 716-18 (N.D. Tex. 2000) (voters did not have standing to assert a Twelfth Amendment violation that allegedly infringed on their right to cast meaningful votes, and court explained that "plaintiffs conspicuously fail to demonstrate how they, as opposed to the general voting population, will feel its effects."); *Hollander v. McCain*, 566 F. Supp. 2d 63, 69 (D.N.H. 2008) (voters lacked standing to challenge Senator John McCain's eligibility for President and to exclude him from the Presidential primaries, and court stated that "voters have no standing to complain about the participation of an ineligible candidate in an election.")). The court concluded that an alleged injury "stemming from a presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing." *Berg*, 574 F. Supp. 2d at 518.

The Third Circuit affirmed the district court's rulings in *Berg* and reiterated that the plaintiff "suffered no injury particularized to him" and, therefore, lacked standing. *Berg*, 586 F.3d at 239. Courts throughout the United States have uniformly concluded that citizens do not have standing to bring lawsuits challenging a candidate's eligibility for national office. *See, e.g., Drake v. Obama*, 664 F.3d 774, 778, 780-84 (9th Cir. 2011) (group of military personnel, state representatives, political candidates, and individual citizens did not have standing to challenge President Obama's eligibility to

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hold office); *Chapman v. Obama*, 719 F. App'x 13 (D.C. Cir. 2018) (per curiam) ("The district court correctly concluded that appellant lacked standing to challenge President Barack Obama's qualifications for holding office."); *Const. Ass'n Inc. by Rombach v. Harris*, No. 20-cv-2379, 2021 WL 4442870, at *2-3 (S.D. Cal. Sept. 28, 2021) (finding plaintiffs lacked standing to challenge Vice President Kamala Harris' eligibility for office and dismissing case); *Christie v. President of the United States*, 532 F. App'x 88, 89 (3d Cir. 2013) (plaintiff lacked standing to assert claims that President committed treason); *Fischer v. Cruz*, No. 16-cv-1224, 2016 WL 1383493, at *2-3 (E.D.N.Y. Apr. 7, 2016) (finding plaintiff lacked standing to challenge Senator Ted Cruz's eligibility for President and citing additional cases dismissed for lack of standing).

Further, at least two courts have concluded that citizens attempting to disqualify individuals from participating in elections or from holding office based on the January 6, 2021 events at the United States Capitol lacked standing. *See, e.g., Stencil v. Johnson*, 605 F. Supp. 3d 1109 (E.D. Wis. 2022). In *Stencil*, the plaintiffs sought a declaratory judgment that three members of Wisconsin's Congressional delegation were ineligible to serve under the Fourteenth Amendment because their participation in the January 6 attack constituted an insurrection against the United States. *Id.* at 1112-13. Among other things, the court determined that the plaintiffs lacked standing and explained that "[e]very citizen and voter could claim to have suffered the same injury as the plaintiffs here, which amounts to nothing more than engaging in political advocacy against candidates for office or issue advocacy against the views the candidates hold. The relief that the plaintiffs seek would no more directly and tangibly benefit them than it would the public at large." *Id.* at 1117. *See also Hill v. Mastriano*, No. 22-2464, 2022 WL 16707073, at *1 (3d Cir. Nov. 4, 2022) (plaintiff seeking declaratory judgment disqualifying defendant from running for governor based on January 6, 2021 events lacked standing, rendering claim subject to dismissal). The *Hill* court also noted that "the

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appropriate process for testing title to public office" is a writ of quo warranto, which must be filed in the United States District Court for the District of Columbia and may only be filed by the sovereign or a representative thereof. *See id.* at *2; D.C. Code § 16-3503; *Drake*, 664 F.3d at 784-85.

Plaintiffs in this case similarly lack standing and, thus, this Court lacks jurisdiction. Accordingly, the Court exercises its discretion under the Declaratory Judgment Act, along with its obligation to examine its own jurisdiction, to dismiss this case.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that Plaintiffs' Amended Complaint is **DISMISSED WITHOUT PREJUDICE**. The Clerk of the Court is instructed to **CLOSE THIS CASE**. All pending motions are **DENIED AS MOOT** and all deadlines are **TERMINATED**.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 31st day of August, 2023.

Robin L. Rosenberg

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

Obtained by Judicial Watch, Inc. v. Michigan FOIA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JOHN ANTHONY CASTRO,

Plaintiff,

v. Civ. No. 23-766 KK/GJF

MAGGIE TOULOUSE OLIVER and
DONALD JOHN TRUMP,

Defendants.

MEMORANDUM OPINION AND ORDER TO SHOW CAUSE

THIS MATTER is before the Court on pro se Plaintiff's (1) Verified Complaint for Declaratory and Injunctive Relief [ECF 1] ("Complaint") and (2) Motion by Pro Se Litigant to Obtain Electronic Case Filing Rights [ECF 2] ("Motion").

I. THE COMPLAINT

Plaintiff is a Republican primary presidential candidate for the 2024 United States presidential election. He alleges that Defendant Trump is ineligible to pursue and hold any public office in the United States pursuant to Section 3 of the Fourteenth Amendment to the United States Constitution for providing aid and comfort to the participants in the January 6, 2021, insurrection. *See* Compl. [ECF 1] at 9–11. Plaintiff seeks declaratory judgments and an injunction against Defendant Toulouse Oliver, New Mexico Secretary of State, "to prevent the acceptance and/or processing of any ballot access documentation of Defendant Donald John Trump for both the primary election and general election." *Id.* at 12, ¶ 18. Plaintiff alleges that, as a "political competitor," he is suffering irreparable injuries "because Trump, who is constitutionally ineligible to hold office, is siphoning off votes and contributions." *Id.* at 35, ¶ 103.

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II. DECLARATORY RELIEF

Plaintiff seeks the following declaratory judgments:

(i) "whether Trump is constitutionally eligible to pursue and/or hold the Office of the Presidency of the United States on the factual assertion that he provided aid or comfort to the January 6 Insurrectionists;"

(ii) "whether, if Trump was found to have provided aid or comfort to the January 6 Insurrectionists, Castro has the legal right to enjoin Trump from campaigning for the Presidency since that would violate Section 3 of the 14th Amendment, FECA, and/or constitute knowingly fraudulent misrepresentation regarding eligibility;"

(iii) "whether [Plaintiff] can secure an injunction to prevent the unconstitutional act of Trump submitting a state ballot access application. In other words, whether the Court can issue an injunction preventing Trump from engaging in the unconstitutional act of submitting a state ballot access application since that would be violative of his disqualification from public office pursuant to Section 3 of the 14th Amendment;"

(iv) "whether [Plaintiff] has standing and the right to secure an injunction to prevent individual state election authorities from accepting and processing Trump's state ballot access application;"

(v) "whether [Plaintiff] would have standing and the right to secure an injunction against the Republican Party to prevent his formal nomination at the Republican National Convention if Trump won the primary election;" and

(vi) "whether [Plaintiff], having declared and verified his intention to be a write-in candidate for the general election if he is unsuccessful in securing the nomination of the Republican Party, would have standing and the right to secure an injunction against the Joint Congressional Committee on Inaugural Ceremonies preventing the inauguration of Trump if Trump won the general election." Compl. at 22-24.

The Court **orders Plaintiff to show cause** why the Court should exercise its discretion and entertain Plaintiff's requests for declaratory judgments:

> Whether a district court has discretion to entertain a suit for declaratory judgment does not depend solely on the jurisdictional basis of the suit. As the Supreme Court stated in *Wilton v. Seven Falls Co.*, "district courts possess discretion in determining whether . . . to entertain an action under the Declaratory Judgment Act, *even when the suit otherwise satisfies subject matter jurisdictional prerequisites.*" 515 U.S.

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> 277, 282 (1995) (emphasis added). This is because the Declaratory Judgment Act itself is "an enabling Act, which confers a discretion on the courts," regardless of the jurisdictional bases upon which the suit is brought. *Id.* at 287 (quotation omitted).

United States v. City of Las Cruces, 289 F.3d 1170, 1180–81 (10th Cir. 2002); 28 U.S.C. § 2201(a) (Declaratory Judgment Act providing that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added)). In determining whether to accept jurisdiction in a declaratory judgment action, the Court should ask:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994) (quoting *Allstate Ins. Co. v. Green,* 825 F.2d 1061, 1063 (6th Cir. 1987)).

III. INJUNCTIVE RELIEF

"Plaintiff John Anthony Castro asks this Court to issue an injunction preventing Defendant Secretary of State from accepting and/or processing Defendant Donald John Trump's ballot access documentation, including, but not limited to, nominating papers and nominating petitions." Compl. at 11, ¶ 16. It appears Plaintiff is seeking a temporary restraining order. *See* Compl. at 34, ¶ 99 (stating: "The court may issue a temporary restraining order").

> The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
>
> > (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
> >
> > (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

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. . . .

> The Court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(b)(1) and (c). Plaintiff has not certified in writing any efforts he has made to give notice to Defendants or the reasons why notice should not be required. Plaintiff also has not given any security and has not offered any reasons regarding what amount of security is proper.

The Court **orders Plaintiff to show cause** why the Court should not dismiss his request for a temporary restraining order for failure to comply with Rule 65(b)(1)(B) and (c).

IV. DEFENDANT DONALD JOHN TRUMP

The Complaint states: "Defendant Donald John Trump is a nominal defendant." Compl. at 8, ¶ 5; *see also Party (2)*, Black's Law Dictionary (9th ed. 2009) (defining a "nominal party" as "[a] party to an action who has no control over it and no financial interest in its outcome; esp., a party who has some immaterial interest in the subject matter of a lawsuit and who will not be affected by any judgment"). It appears that Defendant Trump is more than a nominal party because Defendant Trump has an interest that could be affected by the Court's judgment. *See* Compl. at 12, ¶ 18 (Plaintiff seeks an injunction against Defendant Toulouse Oliver, New Mexico Secretary of State, "to prevent the acceptance and/or processing of any ballot access documentation of Defendant Donald John Trump for both the primary election and general election"). Furthermore, the Complaint does not contain factual allegations showing that the Court has personal jurisdiction over Defendant Trump. *See Dental Dynamics, LLC v. Jolly Dental Group, LLC*, 946 F.3d 1223, 1228 (10th Cir. 2020) (plaintiff bears burden of establishing personal jurisdiction).

The Court **orders Plaintiff to show cause** why the Court should not dismiss this case for lack of personal jurisdiction over Defendant Trump. *See* Fed. Civ. P. 19(b) ("If a person who is

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required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed").

V. THE REPUBLICAN PARTY AND THE JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES

Plaintiff seeks declaratory judgments regarding his legal relationships with the Republican Party and the Joint Congressional Committee on Inaugural Ceremonies. *See* Compl. at 23 (seeking declarations whether Plaintiff has standing to enjoin the Republican Party from nominating Trump and to enjoin the Joint Congressional Committee on Inaugural Ceremonies preventing the inauguration of Trump). The Republican Party and the Joint Congressional Committee on Inaugural Ceremonies are not parties to this action.

The Court **orders Plaintiff to show cause** why the Court should entertain Plaintiff's requests for declaratory judgments regarding the Republican Party and the Joint Congressional Committee on Inaugural Ceremonies given that they are not Defendants in this action and Plaintiff has not shown that the Court has subject matter and personal jurisdiction to enjoin The Republican Party and the Joint Congressional Committee on Inaugural Ceremonies.

VI. RECUSAL OF SUPREME COURT JUSTICE CLARENCE THOMAS

It appears that Plaintiff may be seeking an order from this Court requiring that United States Supreme Court Justice Clarence Thomas recuse from any appeal of this case to the United States Supreme Court. After providing a definition of "insurrection" to be "an act or instance of revolting against civil authority or an established government," Plaintiff states: "This would apply to the wife of United States Supreme Court Justice Clarence Thomas, Virginia Thomas, requiring Justice Thomas' mandatory recusal under 28 U.S.C. § 455, which Plaintiff asserts herein to preserve for appeal." Compl. at 26-27, ¶ 71.

The Court **orders Plaintiff, to the extent he seeks an order requiring recusal of Justice**

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Thomas, to show cause why the Court should not dismiss Plaintiff's request for lack of jurisdiction.

VII. MOTION FOR LEAVE TO FILE ELECTRONICALLY

Plaintiff asks the Court for permission to participate in electronic case filing in this case, asserting that he has reviewed the requirements for e-filing and has access to the technology necessary to e-file successfully. *See* Mot. [ECF 2] at 1.

The Court grants Plaintiff permission to file electronically in this case only. *See* Guide for Pro Se Litigants at 13, District of New Mexico (October 2022) ("approval to electronically file documents within a case must be granted by the presiding judge for each case in which the pro se litigant wishes to file using their CM/ECF account"). The Court will revoke permission to file electronically if Plaintiff abuses his electronic filing privilege or fails to comply with the rules and procedures in the District of New Mexico's Guide for Pro Se Litigants and the District of New Mexico's CM/ECF Administrative Procedures Manual. Account registration forms, procedure manuals, and other information can be obtained at the Court's website at http://www.nmd.uscourts.gov/filing-information. This Order only grants Plaintiff permission to participate in CM/ECF; Plaintiff is responsible for registering to become a participant. *See* CM/ECF Administrative Procedures Manual, District of New Mexico (Revised January 2021).

VIII. CONCLUSION

IT IS THEREFORE ORDERED that:

(1) Plaintiff shall, pursuant to Sections II through VII above, and **no later than October 10, 2023**, show cause why the Court should not dismiss Plaintiff's claims. Failure to timely show cause may result in dismissal of this case.

(2) Plaintiff's Motion File Electronically [ECF 2] is **GRANTED**.

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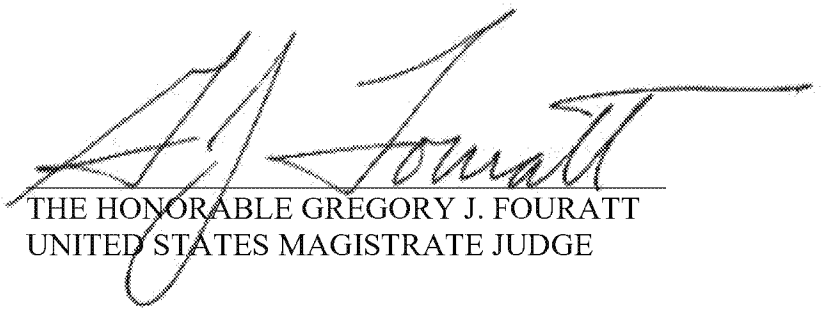
SO ORDERED.



THE HONORABLE GREGORY J. FOURATT
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:23-CV-07489-DOC-DFMx Date: October 2, 2023

Title: A.W. CLARK V. SHIRLEY WEBER

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER TO SHOW CAUSE AS TO WHY THE COMPLAINT SHOULD NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

This matter is before the Court *sua sponte*. Plaintiff A.W. Clark ("Plaintiff" or "Clark") filed their Complaint ("Compl.") (Dkt. 1) on September 9, 2023. Since then, Plaintiff has filed a Motion for a Preliminary Injunction (Dkt. 13), and Defendant Secretary of State Shirley Weber ("Defendant" or "the Secretary") filed a Motion for Order for Briefing Schedule (Dkt. 18). Before the Court can consider these motions and permit this case to proceed, it must be assured that it has subject matter jurisdiction.

"[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions…" *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "[S]tanding is an aspect of subject matter jurisdiction." *Fleck and Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1106 n.4 (9th Cir. 2006). Federal courts have consistently held that voters lack standing to enforce Section 3 of the Fourteenth Amendment when the voter does not allege that they suffered a particularized injury. *See Caplan v. Trump*, No. 23-CV-61628-ROSENBERG (S.D. Fla. Aug. 31, 2023) (collecting cases). Here, the

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:23-CV-07489-DOC-DFMx Date: October 2, 2023

Complaint does not allege that Plaintiff will suffer an injury unique from other voters if the Court does not grant their requested relief. *See* Compl. ¶¶ 6, 105 (alleging that Plaintiff "is an eligible voter" and that they, like all voters, have a "right to vote for a candidate for president who is constitutionally eligible to be president").

Therefore, Plaintiff is **ORDERED TO SHOW CAUSE** in writing, not to exceed 12 pages within fourteen (14) days of this Order why this action should not be dismissed sua sponte for lack of subject matter jurisdiction. Defendant may submit a response in the same period. Plaintiff's filing a first amended complaint will be deemed a sufficient response to this Order. All filing deadlines in this matter are hereby **CONTINUED** until twenty-one (21) days after Plaintiff responds to this Order.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11 Initials of Deputy Clerk: kdu

CIVIL-GEN

Obtained by Judicial Watch, Inc. v. Michigan FOIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

JOHN ANTHONY CASTRO,

Plaintiff, **2:23-CV-00598**

vs.

SECRETARY OF STATE
ANDREW WARNER, and
DONALD JOHN TRUMP,

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the Court is the ***Emergency Application for a Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits*** (ECF No. 9) filed on September 20, 2023 by the Plaintiff, who is proceeding *pro se*. By Order entered on September 11, 2023, this matter was referred to the undersigned United States Magistrate Judge for the submission of proposed findings of fact and a recommendation for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). (ECF No. 6) Having reviewed the Plaintiff's ***Emergency Application*** (ECF No. 9) and pertinent legal authority, the undersigned has concluded that the ***Emergency Application*** should be **DENIED** for the reasons stated *infra*:

Factual And Procedural Background

On September 7, 2023, the Plaintiff filed his ***Verified Complaint for Declaratory and Injunctive Relief*** asserting that he "intends to either appear on the 2024 Republican primary ballot in this state or to file documentation to be a formally recognized write-in candidate in both the primary and general elections" and has filed the instant suit seeking "declaratory judgment that Defendant Donald John Trump is disqualified under Section 3 of the 14th

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Amendment" and injunctive relief "against Defendant Secretary of State to prevent the acceptance and/or processing of any ballot access documentation of Defendant Donald John Trump for both the primary election and general election." (ECF No. 1 ¶¶ 18-19).[1]

In the pending ***Emergency Application***, the Plaintiff asks this Court to enjoin the Defendant Secretary of State from accepting . . . Defendant Donald John Trump's declaration of candidacy . . . ." and hold a preliminary injunction hearing, consolidated with a trial on the merits, to take place on or before September 29, 2023. (ECF No. 9 at 1-2)

Neither Defendant has answered or responded to the Plaintiff's pleadings at this time.[2]

The Standard[3]

Rule 65(b) of the Federal Rules of Civil Procedure sets forth the limited circumstances under which a temporary restraining order can be granted as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that

[1] The undersigned notes that the Plaintiff has filed the same or similar complaints in numerous other states. *See, e.g., Castro v. Toulouse Oliver*, C/A No. 23-766 KK/GJF, 2023 WL 6065304 (D.N.M. Sept. 18, 2023). The Plaintiff also previously filed suit against the Federal Election Commission ("FEC"), asking the court in part "to require the FEC to reject Mr. Trump's statement of candidacy on the basis that his alleged involvement in the events of January 6, 2021 . . . ." *Castro v. Fed. Election Comm'n*, No. CV 22-2176 (RC), 2022 WL 17976630, at *2 (D.D.C. Dec. 6, 2022), aff'd, No. 22-5323, 2023 WL 2899541 (D.C. Cir. Apr. 10, 2023). The Plaintiff's complaint was dismissed for lack of standing, in addition to other reasons. *See id.*

[2] A notice of appearance of counsel has just recently been filed for the Defendant Secretary of State (ECF No. 12), however, no appearance has been made on behalf of the Defendant Trump.

[3] As noted above in FN. 1, the Plaintiff has filed the same or similar complaints in other districts, including one in the sister state of South Carolina located in this Circuit. Furthermore, the Plaintiff has filed a nearly identical motion in the South Carolina matter as the one presently pending before the undersigned. As a result, the undersigned has the benefit of reviewing the **Report and Recommendation** filed by United States Magistrate Judge Shiva V. Hodges in the matter of ***Castro v. SC Elections Commission, et. al.*** Case No. 3:23-4501-MGL-SVH (ECF No. 16). Judge Hodges' research, legal analysis, findings, and recommendations are relevant and persuasive in the matter pending before the undersigned. Therefore, the undersigned has taken the liberty of adopting much of Judge Hodges' research, legal analysis, findings, and recommendations in this filing. For stylistic reasons, the undersigned has not given attribution to Judge Hodges' work in each instance in which the undersigned has quoted *verbatim* from her **Report and Recommendation**, but does wish to give her credit, by this footnote, that the undersigned has taken the liberty of using Judge Hodges' scholarship in formulating this **Proposed Findings and Recommendation**.

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> party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Fed.R. Civ. P. 65(b). Rule 65(a) provides that a court may issue a preliminary injunction only on notice to the adverse party. Fed. R. Civ. P. 65(a). The Fourth Circuit explained the different functions of temporary restraining orders and preliminary injunctions in *Hoechst Diafoil Company v. Nan Ya Plastics Corporation*, 174 F.3d 411, 422 (4th Cir. 1999), as follows:

> While a preliminary injunction preserves the status quo pending a final trial on the merits, a temporary restraining order is intended to preserve the status quo only until a preliminary injunction hearing can be held: '[U]nder federal law [temporary restraining orders] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.' *Granny Goose*, 415 U.S. at 439.

"A plaintiff seeking a preliminary injunction *must* establish that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)(emphasis added); *see also, Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 339 (4th Cir. 2021). [A]ll four requirements must be satisfied." *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010).[4] The Fourth Circuit has explained that "[b]ecause a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must

[4] The United States Supreme Court vacated the original decision in *Real Truth* for further consideration in light of *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). *The Real Truth About Obama, Inc. v. Federal Election Commission*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). The Fourth Circuit, however, reissued its opinion on Parts I and II of its opinion. *The Real Truth About Obama, Inc. v. Federal Election Commission*, 607 F.3d 355 (4th Cir. 2010).

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demonstrate by 'a clear showing' that, among other things, it is likely to succeed on the merits at trial." *Id.* Furthermore, the Supreme Court "rejected a standard that allowed the plaintiff to demonstrate only a 'possibility' of irreparable harm because that standard was 'inconsistent with our characterization of injunctive relief as an extraordinary remedy that may be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* (citing *Winters*, 55 U.S. at 22, 129 S.Ct. at 375-376.) Thus, a Court may not issue a preliminary injunction or temporary restraining order "simply to eliminate a possibility of a remote future injury." *Kates v. Packer*, 2014 WL 1218905, * 3 (M.D.Pa. March 24, 2014)(quoting *Holiday Inns of America, Inc. v. B&B Corp.*, 409 F.2d 614, 618 (3rd Cir. 1969)("The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat.'"). The irreparable harm alleged by movant must be "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991), *abrogation recognized on other grounds*, *Sarsour v. Trump*, 245 F.Supp.3d 719, n. 6 (4th Cir. 2017); *also see Kates*, 2014 WL 1218905 at * 3 (The irreparable harm must be "actual and imminent, not merely speculative.") As the Fourth Circuit has explained, the Court is no longer required to balance the irreparable harm to the respective parties. *Real Truth*, 575 F.3d at 347. Rather, the movant must make a clear showing that he is likely to be irreparably harmed, and the Court must "pay *particular regard* for the public consequences in employing the extraordinary remedies of an injunction." *Id.*(citations omitted).

While the standards for issuing a temporary restraining order and a preliminary injunction are the same, the distinction between the two hinges on whether the court issues the order "without notice" in a temporary restraining order pursuant to Fed. R. Civ. P. 65(b) or "with notice" in a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). *Ciena Corp. v. Jarrard*, 203 F.3d 312,

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320 (4th Cir. 2000) ("whether an interlocutory injunction entered is labeled a TRO or a preliminary injunction is not of particular moment, so long as the party opposing the injunction is given notice and an opportunity to oppose that is commensurate with the duration of the injunction. Thus, an interlocutory injunction entered without notice may extend only [fourteen] days with a possible [fourteen]-day extension, *see* Fed.R.Civ.P. 65(b), whereas an interlocutory injunction with an unlimited term may be entered only after giving notice sufficient to enable the opposing party to prepare an opposition, *see* Fed.R.Civ.P. 65(a)").

Discussion

In addition to a temporary restraining order, the Plaintiff additionally seeks an expedited preliminary injunction hearing to be consolidated with a trial on the merits, as provided by Fed. R. Civ. P. 65(a)(2), (b)(3). These rules provide in part as follows:

> (a) Preliminary Injunction.
>
> (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.
>
> (2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
>
> (b) Temporary Restraining Order.
>
> (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
>
> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to

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> give notice and the reasons why it should not be required.
>
> (2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
>
> (3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

Fed. R. Civ. P. 65.

A temporary restraining order – particularly one granted without notice to the defendant – is an "emergency procedure and is appropriate only when the applicant is in need of immediate relief." 11A Charles Wright, Arthur Miller & Mary Kane, Federal Practice and Procedure § 2951 (2d ed.); *see also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999)("The grant of interim [injunctive] relief is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it."). "Ex parte temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers* , 415 U.S. 423, 439 (1974) (citations omitted).

Pursuant to Fed. R. Civ. P. 65(b)(1)(A), a temporary restraining order shall not issue in the

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absence of "specific facts [that] clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party may be heard in opposition." The Plaintiff, who states he is a Republican primary candidate for the 2024 Presidential Election, argues his "only remedy" is a temporary restraining order in order to obtain an expedited preliminary injunction hearing consolidated with a trial on the merits on or before September 29, 2023, "to permit resolution on appeal as well as certain review by the U.S. Supreme Court prior to the commencement of the State Presidential Primary filing period." (ECF No. 9 at 6)

However, the Plaintiff has failed to provide specific facts showing immediate and irreparable injury will occur prior to defendants' providing a response in opposition to his motion. While he argues that he is "already suffering irreparable competitive injuries because Defendant Donald John Trump . . . . is siphoning off votes and contributions" from him, the Plaintiff fails to provide any specific facts in support of this allegation or forecast in what way this alleged damage may be impacted by the commencement of West Virginia's presidential primary filing period. Id. Although he may be correct that "votes cannot be redistributed once cast" and "financial contributions cannot be refunded once given," the Plaintiff does not indicate what specific votes or contributions have been or will be siphoned off from his campaign during the expediated timeline he has requested: the Plaintiff asserts that both he and Defendant Trump are "pursuing the same voter and donor pies" (ECF No. 1 ¶30) – but this is an insufficient showing of immediate and irreparable injury.

This instance is also unlike those cited by Plaintiff where courts have found violation of a constitutional right to cause irreparable harm. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo* , 141 S. Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *Elrod v. Burns*, 427 U.S.

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347, 373 (1976)). Yet the Plaintiff contends otherwise:

> The United States Constitution conferred onto individuals like Plaintiff John Anthony Castro with the right to not have to politically compete with someone that either engaged in or merely provided aid or comfort to an insurrection or insurrectionists. This is a new constitutional right not previously recognized by the federal judiciary.

(ECF No. 1 ¶ 108, see also Id. ¶ 8 ("Section 3 of the 14th Amendment created an implied cause of action for a fellow candidate to obtain relief for a political competitive injury by challenging another candidate's constitutional eligibility on the grounds that they engaged in or provided 'aid or comfort' to an insurrection"); see also ECF No. 9 at 4 (" The U.S. Constitution bars Defendant Donald John Trump from holding public office, so it is only logical that [he] be prevented by denying him access to appear on the state ballot and enjoying the state from counting his write-in votes.").

Section 3 of the Fourteenth Amendment provides as follows:

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

U.S. Const. amend. XIV, § 3. As the Fourth Circuit has held, the violation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm." *Leaders*, 2 F.4th at 346 (citation omitted).

This Court need not resolve this issue at this time, that is whether Section 3 of the Fourteenth Amendment provides the Plaintiff with a cause of action against a fellow candidate under these circumstances. The matter immediately before this Court concerns the Plaintiff's request for a temporary restraining order, but he has failed to show any harm, including any

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possible constitutional harm, is "neither remote nor speculative, but actual and imminent." *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) (citation omitted); *see also Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (collecting cases and holding presumption of irreparable harm only applicable to invasion of privacy and violation of First Amendment rights); *Pinson v. Pacheco*, 397 F. App'x 488, 492 (10th Cir. 2010) ("We may assume that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief. However, that has no bearing on whether the alleged constitutional injury is imminent. If the possibility of future harm is speculative, the movant has not established that he will suffer irreparable injury . . . if the preliminary injunction is denied . . . .") (citation and emphasis omitted)).

Here, the Plaintiff has failed to carry his burden at this time to show immediate and irreparable injury sufficient to justify grant of his motion for temporary restraining order where he has failed to identify a single date or relevant deadline concerning the West Virginia presidential election, and where he has failed to identify how any specific date or relevant deadline may impact any alleged harm. To be sure, the Court can take judicial notice of factual information located in postings on government websites – of relevance here, that would be the website maintained by the Defendant Secretary of State.[5] *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (court may "properly take judicial notice of matters of public record"). Moreover, the Plaintiff's argument – "without a Temporary Restraining Order, this Court would be unable to conduct an expedited preliminary injunction hearing thereby guaranteeing that the issue will be mooted and infringe upon Plaintiff's First Amendment right to petition the federal judiciary to redress his grievance[]" – is too speculative to warrant a temporary restraining order. (ECF No. 9-2 at 2, see also ECF No. 9 at 6 ("A denial of this requested relief guarantees the issue will be

[5] https://sos.wv.gov/elections.

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mooted; thus, it is effectively a final decision under the Collateral-Order Doctrine and appealable under 28 U.S.C. § 129l(a)(l).")) Indeed, the Plaintiff argues:

> This case will involve an inevitable appeal to the United States Court of Appeals for this circuit as well as the United States Supreme Court. Castro cannot wait until both Castro and Trump are state-registered candidates because that would guarantee that the injury would become irreparable, possibly moot the case, possibly transforms the case into a nonjusticiable political question, or expose the Republican Party to irreparable harm as they could lose their party's presumptive or actual nominee after millions of Americans cast their ballots in the primaries. Delaying judicial review of these questions would be a constitutional crisis of the federal judiciary's own making. Castro implores the federal judiciary to avoid unintentionally engineering a crisis. If the federal judiciary addresses these issues now via the Declaratory Judgments Act and injunctive relief, the Republican Party would have time to recover by funding, supporting, and nominating a constitutionally eligible candidate.

(ECF No. 1 ¶45)

At bottom, the Plaintiff fails to provide the Court with sufficient reason necessitating a temporary restraining order at this time under the governing jurisprudence in this Circuit.

PROPOSAL AND RECOMMENDATION

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Judge confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Judge **DENY** the Plaintiff's ***Emergency Application for a Temporary Restraining Order and Expedited Preliminary Injunction Hearing Consolidated with a Preliminary Bench Trial on the Merits*** (ECF No. 9).

The Plaintiff is hereby notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge Irene C. Berger. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days (filing of objections) and three (3) days (if received by mail) from the date of filing of this Findings

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and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Berger and this Magistrate Judge.

The Clerk is hereby directed to mail a copy of this Order to the Plaintiff, who is acting *pro se*, and transmit a copy to counsel of record.

ENTER: September 28, 2023.

Omar J. Aboulhosn
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 23-80015-CIV-CANNON

JOHN ANTHONY CASTRO,

Plaintiff,

v.

DONALD J. TRUMP,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND CLOSING CASE

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss (the "Motion"), filed on February 15, 2023 [ECF No. 18]. The Court has reviewed the Amended Complaint [ECF No. 7], the Motion [ECF No. 18], Plaintiff's Response in Opposition [ECF No. 26], Defendant's Reply [ECF No. 28], and the full record. Upon full review, and accepting as true the allegations in the Amended Complaint [ECF No. 7],[1] the Motion [ECF No. 18] is **GRANTED**. Plaintiff's Complaint is **DISMISSED** for lack of Article III standing and ripeness. Because Plaintiff has not alleged concrete harm or ripeness as required under Article III, the Court need not consider the merits of Defendant's additional arguments.

***

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [ECF No. 18] is **GRANTED**.
2. Plaintiff's Amended Complaint [ECF No. 7] is **DISMISSED WITHOUT PREJUDICE**.

[1] The Court previously granted Plaintiff leave to file an amended complaint after dismissing his initial Complaint as a shotgun pleading [ECF No. 6 p. 6].

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3. Plaintiff's Motion for Ruling and to Expedite Consideration [ECF No. 30] is **DENIED AS MOOT**.

4. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 23rd day of June 2023.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

John Anthony Castro, Plaintiff, vs. SC Elections Commission, Executive Director Howard M. Knapp, and Donald J. Trump, Defendants.	)	C/A No.: 3:23-4501-MGL-SVH REPORT AND RECOMMENDATION

John Anthony Castro ("Plaintiff") states he "intends to either appear on the 2024 Republican primary ballot in this state or to file documentation to be a formally recognized write-in candidate in both the primary and general elections" and has filed the instant suit seeking "declaratory judgment that Defendant Donald John Trump is disqualified under Section 3 of the 14th Amendment" and injunctive relief "against Defendant South Carolina Elections Commission Executive Director Howard M. Knapp to prevent the acceptance and/or processing of any ballot access documentation of Defendant Donald John Trump for both the primary election and general election." [ECF No. 1 ¶¶ 18–19].[1]

[1] Plaintiff has filed the same or similar complaints in multiple other states. *See, e.g., Castro v. Toulouse Oliver*, C/A No. 23-766 KK/GJF, 2023 WL

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This matter comes before the court on Plaintiff's motion filed on September 19, 2023, titled "emergency motion for temporary restraining order and expedited preliminary injunction hearing consolidated with a preliminary bench trial on the merits," in which he requests the court enjoin the "South Carolina Elections Commission from accepting . . . Defendant Donald John Trump's declaration of candidacy . . . ." and hold a preliminary injunction hearing, consolidated with a trial on the merits, to take place on or before September 29, 2023. [ECF No. 14 at 1–2].[2]

6065304 (D.N.M. Sept. 18, 2023). Plaintiff also previously filed suit against the Federal Election Commission ("FEC"), asking the court in part "to require the FEC to reject Mr. Trump's statement of candidacy on the basis that his alleged involvement in the events of January 6, 2021 . . . ." *Castro v. Fed. Election Comm'n*, No. CV 22-2176 (RC), 2022 WL 17976630, at *2 (D.D.C. Dec. 6, 2022), aff'd, No. 22-5323, 2023 WL 2899541 (D.C. Cir. Apr. 10, 2023). Plaintiff's complaint was dismissed for lack of standing, in addition to other reasons. *See id.*

[2] In full, Plaintiff requests the following injunctive relief:

> Plaintiff John Anthony Castro, pursuant to Fed, R, Civ. P. 65(b), moves this Honorable Court for the entry of a Temporary Restraining Order ("TRO") enjoining Defendant South Carolina Elections Commission from accepting or scheduling an appointment for the acceptance of Defendant Donald John Trump's declaration of candidacy, ballot access fee, petitions in support thereof, and any other ballot access documentation that Defendant Donald John Trump may submit or others, including, but not limited to, the State or National Republican Party, may submit for, on behalf of, or for the benefit of Defendant Donald John Trump to prevent a violation of Section 3 of the 14th Amendment to the United States Constitution.

[ECF No. 14 at 1].

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The United States Supreme Court has stated that to obtain a temporary restraining order or a preliminary injunction, a plaintiff must establish: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 339 (4th Cir. 2021). While the standards for issuing a temporary restraining order and a preliminary injunction are the same, the distinction between the two hinges on whether the court issues the order "without notice" in a temporary restraining order pursuant to Fed. R. Civ. P. 65(b) or "with notice" in a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). *Ciena Corp. v. Jarrard*, 203 F.3d 312, 320 (4th Cir. 2000) ("whether an interlocutory injunction entered is labeled a TRO or a preliminary injunction is not of particular moment, so long as the party opposing the injunction is given notice and an opportunity to oppose that is commensurate with the duration of the injunction. Thus, an interlocutory injunction entered without notice may extend only [fourteen] days with a possible [fourteen]-day extension, *see* Fed.R.Civ.P. 65(b), whereas an interlocutory injunction with an unlimited term may be entered only after giving notice sufficient to enable the opposing party to prepare an opposition, *see* Fed.R.Civ.P. 65(a)").

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In addition to a temporary restraining order, Plaintiff additionally seeks an expedited preliminary injunction hearing to be consolidated with a trial on the merits, as provided by Fed. R. Civ. P. 65(a)(2), (b)(3). These rules provide in part as follows:

> (a) Preliminary Injunction.
>
> > (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.
> >
> > (2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
>
> (b) Temporary Restraining Order.
>
> > (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
> >
> > > (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
> > >
> > > (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
> >
> > (2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it

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> was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
>
> (3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

Fed. R. Civ. P. 65.

A temporary restraining order—particularly one granted without notice to the defendant—is an "emergency procedure and is appropriate only when the applicant is in need of immediate relief." 11A Charles Wright, Arthur Miller & Mary Kane, Federal Practice and Procedure § 2951 (2d ed.); *see also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir.1999) ("The grant of interim [injunctive] relief is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it."). "Ex parte temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is

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necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423, 439 (1974) (citations omitted).

Pursuant to Fed. R. Civ. P. 65(b)(1)(A), a temporary restraining order shall not issue in the absence of "specific facts [that] clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party may be heard in opposition." Plaintiff, who states he is a Republican primary candidate for the 2024 Presidential Election, argues his "only remedy" is grant of his motion, providing for a preliminary injunction hearing consolidated with a trial on the merits on or before September 29, 2023, "to permit resolution on appeal as well as certain review by the U.S. Supreme Court prior to the commencement of the State Presidential Primary filing period." [ECF No. 14 at 5–6].

Here, however, Plaintiff has failed to provide specific facts showing immediate and irreparable injury will occur prior to defendants' providing a response in opposition to his motion.

Plaintiff disagrees, arguing first that he is "already suffering irreparable competitive injuries because Defendant Donald John Trump . . . . is siphoning off votes and contributions" from Plaintiff. *Id.* at 6. However, Plaintiff fails to provide any specific facts in support of this allegation or forecast in what way this alleged damage may be impacted by the

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commencement of South Carolina's presidential primary filing period. Although he may be correct that "votes cannot be redistributed once cast" and "financial contributions cannot be refunded once given," Plaintiff does not indicate what specific votes or contributions have been or will be siphoned off from his campaign during the expediated timeline he has requested. *Id.*[3]

This instance is also unlike those cited by Plaintiff where courts have found violation of a constitutional right to cause irreparable harm. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Plaintiff argues otherwise as follows:

> The United States Constitution conferred onto individuals like Plaintiff John Anthony Castro with the right to not have to politically compete with someone that either engaged in or merely provided aid or comfort to an insurrection or insurrectionists. This is a new constitutional right not previously recognized by the federal judiciary.

[ECF No. 1 ¶ 108, *see also id.* ¶ 8 ("Section 3 of the 14th Amendment created an implied cause of action for a fellow candidate to obtain relief for a political competitive injury by challenging another candidate's constitutional

[3] That "Trump is a declared candidate currently courting voters and seeking funds on his campaign website," like Plaintiff [*see* ECF No. 1 ¶ 30], is an inadequate showing of immediate and irreparable injury.

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eligibility on the grounds that they engaged in or provided 'aid or comfort' to an insurrection"); ECF No. 14 at 4 (Plaintiff arguing that the "U.S. Constitution bars Defendant Donald John Trump from holding public office," arguing that "it is only logical that [he] be prevented by denying him access to appear on the state ballot and enjoying the state from counting his write-in votes.")].

Section 3 of the Fourteenth Amendment provides as follows:

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

U.S. Const. amend. XIV, § 3. As the Fourth Circuit has held, the violation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm." *Leaders*, 2 F.4th at 346 (citation omitted).

The court need not resolve this issue at this time, whether section 3 of the Fourteenth Amendment provides Plaintiff with a cause of action against a fellow candidate under these circumstances. Focusing on his request for a temporary restraining order, Plaintiff has failed to show any harm, including any possible constitutional harm, is "neither remote nor speculative, but

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actual and imminent." *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) (citation omitted); *see also Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (collecting cases and holding presumption of irreparable harm only applicable to invasion of privacy and violation of First Amendment rights); *Pinson v. Pacheco*, 397 F. App'x 488, 492 (10th Cir. 2010) ("We may assume that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief. However, that has no bearing on whether the alleged constitutional injury is imminent. If the possibility of future harm is speculative, the movant has not established that he will suffer irreparable injury . . . if the preliminary injunction is denied . . . .") (citation and emphasis omitted)).

Here, Plaintiff has failed to carry his burden at this time to show immediate and irreparable injury sufficient to justify grant of his motion for temporary restraining order where he has failed to identify a single date or relevant deadline concerning the South Carolina presidential election, or any state's presidential election, and where he has failed to identify how any specific date or relevant deadline may impact any alleged harm.[4]

[4] A court may take judicial notice of factual information located in postings on government websites. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (court may "properly take judicial notice of matters of public record"). In South Carolina, candidates running for President of the United States have two options for gaining ballot access. https://scvotes.gov/candidates/. First, he or she can file with a certified

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For similar reasons, the court rejects Plaintiff's argument as speculative that "without a Temporary Restraining Order, this Court would be unable to conduct an expedited preliminary injunction hearing thereby guaranteeing that the issue will be mooted and infringe upon Plaintiff's First Amendment right to petition the federal judiciary to redress his grievance." [ECF No. 14-2 at 2, *see also* ECF No. 14 at 6 ("A denial of this requested relief guarantees the issue will be mooted; thus, it is effectively a final decision under the Collateral-Order Doctrine and appealable under 28 U.S.C. § 1291(a)(1).")].[5]

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political party to run for that party's nomination. *Id.*, *see also* https://abcnews.go.com/Politics/south-carolina-gop-votes-move-back-2024-primary/story?id=100167365 (reporting Republican candidates must file with the South Carolina Republican Party by October 31, 2023 to gain access to the ballot as a presidential candidate in South Carolina). Second, he or she may file a nominating petition, on or around July 15, 2024. https://scvotes.gov/candidates/. Write-in votes for President of the United States are not allowed. *Id.* The South Carolina Presidential Republican primary is February 24, 2024. *See* https://www.richlandcountysc.gov/Government/Departments/Voter-Registration-Elections/Elections.

[5] Related, Plaintiff also argues as follows:

> This case will involve an inevitable appeal to the United States Court of Appeals for this circuit as well as the United States Supreme Court. Castro cannot wait until both Castro and Trump are state-registered candidates because that would guarantee that the injury would become irreparable, possibly moot the case, possibly transforms the case into a nonjusticiable political question, or expose the Republican Party to irreparable harm as they could lose their party's presumptive or actual nominee after millions of Americans cast their ballots in the primaries. Delaying judicial review of these questions would be a constitutional crisis of the federal judiciary's own making. Castro

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In short, Plaintiff fails to provide the court with sufficient reason necessitating a temporary restraining order at this time. *See, e.g., Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999) ("While a preliminary injunction preserves the status quo pending a final trial on the merits, a temporary restraining order is intended to preserve the status quo only until a preliminary injunction hearing can be held: '[U]nder federal law [temporary restraining orders] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.'") (citing *Granny Goose Foods*, 415 U.S. at 439)).

Accordingly, the undersigned recommends the district judge deny Plaintiff's emergency motion for temporary restraining order and expedited preliminary injunction hearing consolidated with a preliminary bench trial. [ECF No. 14]. However, the undersigned makes no recommendation as to the merits of Plaintiff's underlying request for injunctive relief, and Plaintiff's

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> implores the federal judiciary to avoid unintentionally engineering a crisis. If the federal judiciary addresses these issues now via the Declaratory Judgments Act and injunctive relief, the Republican Party would have time to recover by funding, supporting, and nominating a constitutionally eligible candidate.

[ECF No. 1 ¶ 45].

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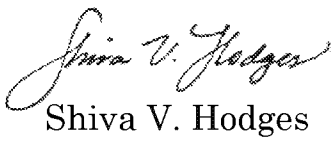
request for preliminary injunction, which requires notice to the adverse party, remains unaddressed in this case.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends the court deny Plaintiff's motion for a temporary restraining order and expedited preliminary injunction hearing consolidated with a preliminary bench trial. [ECF No. 14].

IT IS SO RECOMMENDED.



September 27, 2023
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

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Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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From: Caroline Chambers [caroline@statesuniteddemocracy.org]
Sent: 9/8/2022 4:33:37 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: ISD report
Attachments: 08.25.2022 "ToreSays" Calls on Followers to Contact Secretaries of State.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather -
Attached is the ISD report we discussed.

Caroline Chambers | **Senior Advisor**
States United Democracy Center
202-365-2521 | @statesunited
caroline@statesuniteddemocracy.org

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

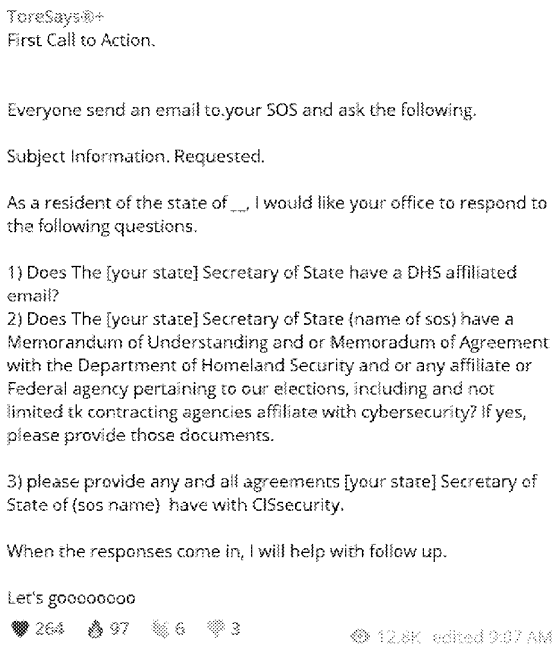
ISD | Powering solutions to extremism, hate and disinformation

"TORESAYS" CALLS ON FOLLOWERS TO CONTACT SECRETARIES OF STATE

25 August 2022

Overview

The email sent to the Pennsylvania Secretary of Commonwealth is likely part of a coordinated effort on Telegram led by "ToreSays" (real name: Terpsehore Maras-Lindeman), a podcaster and blogger known for her ardent support of Donald Trump and a wide range of conspiracy theories, including QAnon.


ToreSays®+
First Call to Action.

Everyone send an email to your SOS and ask the following.

Subject Information. Requested.

As a resident of the state of __, I would like your office to respond to the following questions.

1) Does The [your state] Secretary of State have a DHS affiliated email?
2) Does The [your state] Secretary of State (name of sos) have a Memorandum of Understanding and or Memoradum of Agreement with the Department of Homeland Security and or any affiliate or Federal agency pertaining to our elections, including and not limited tk contracting agencies affiliate with cybersecurity? If yes, please provide those documents.

3) please provide any and all agreements [your state] Secretary of State of (sos name) have with CISsecurity.

When the responses come in, I will help with follow up.

Let's gooooooo

264 97 6 3 12.8K edited 9:07 AM

On August 23, ToreSaysPlus (55.1K subscribers) posted a copy of the same email (see screenshot right) sent to Secretary Chapman. The post, self-described as a "First Call to Action" asks subscribers to send emails to their respective Secretaries of State featuring the same language used in the previously described email. The post slightly overperformed compared to other posts, receiving 12.8K views, over 300 interactions, and 318 comments. Many comments feature claims that the authors contacted their Secretaries, and some include screenshots of emails sent to Secretaries in numerous states, including Arizona, Michigan, Pennsylvania, North Dakota, and Ohio, among many others. "ToreSays" did not post the same "call to action" on her other accounts on Gab, Facebook, or Instagram, or on her website.

The "call to action" is predominately limited to Telegram. While a few users posted the message on Facebook (see here), it has garnered little attention on other platforms. However, researchers did identify a repost on Telegram by the Texas Three Percenters (391 members). While there were no comments or interactions observed on the Texas Three Percenters channel, the repost suggests that followers of some extremist groups may be aware of or even participating in the "call to action."

About "ToreSays"

"ToreSays" is the screen name of Terpsehore Maras-Lindeman, a podcaster and blogger from North Dakota (now residing in Ohio) known for her ardent support of Donald Trump and a wide range of conspiracy theories, including QAnon. In 2020, Maras-Lindeman authored an affidavit alleging that voting systems companies rigged the election against Trump. Sidney Powell cited the affidavit in complaints regarding elections in Wisconsin and Arizona.

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Obtained by Judicial Watch, Inc. v. Michigan FOIA

- Since 2020, Maras-Lindeman has worked to build a network of likeminded followers across the US, who she encourages to surface information on election and elected officials. This network is coordinated through Telegram; however, she does have followers across other platforms, including Gab, Facebook, Instagram, and a website (hyperlinked above in overview).

- She is currently running for office as an independent candidate for Ohio Secretary of State.

- Her fans are religiously devoted. Earlier this year, they gifted her more than $100,000 to buy a new car after she claimed her vehicle was stolen from her in a string of car burglaries allegedly targeting Trump supporters shopping at a Walmart.

- Unlike other influencers who post primarily content to the internet with the intention of delivering entertainment and information, Maras-Lindeman has worked to bond with her audience and organize her fans, enabling her to achieve consistently high levels of engagement online and move her followers to action.

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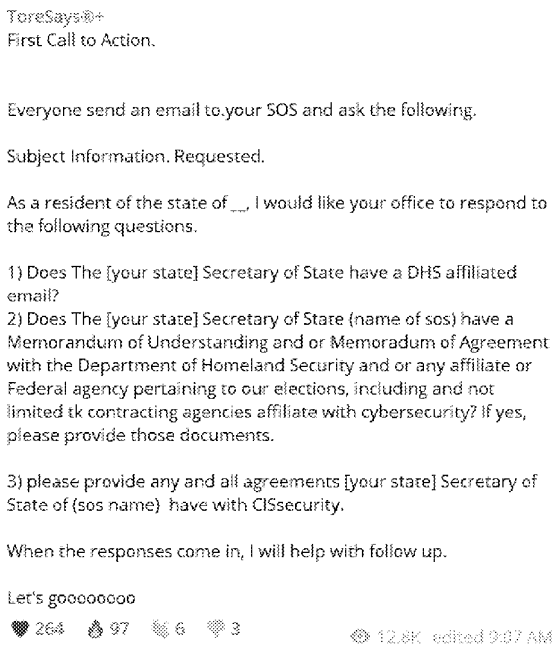
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Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/12/2023 6:46:06 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Zack Goldberg [zack@statesuniteddemocracy.org]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Re: Davis & LaBrant 14th amendment cases - scheduling order

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, October 11, 2023 at 7:38 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Davis & LaBrant 14th amendment cases - scheduling order

Thanks Jonathan (and Zack), appreciate it.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, October 11, 2023 7:10 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Davis & LaBrant 14th amendment cases - scheduling order

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Heather and Erik,

DPP MCL 15.243(1)(m)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 10, 2023 at 2:51 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Davis & LaBrant 14th amendment cases - scheduling order

Obtained by Judicial Watch, Inc. v. Michigan FOIA

DPP MCL 15.243(1)(m)

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Tuesday, October 10, 2023 2:46 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Re: Davis & LaBrant 14th amendment cases - scheduling order

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, October 10, 2023 at 1:33 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: Davis & LaBrant 14th amendment cases - scheduling order

Gearing up, see attached.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/16/2023 3:06:09 AM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: DRAFT Davis brief
Attachments: Davis 23-128 Resp to Show Cause_JW.docx

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Hi Heather,

DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Sunday, October 15, 2023 at 7:12 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: DRAFT Davis brief

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/19/2023 6:25:59 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Lindsey et al v Whiter et al - waivers of service

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Thanks

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, October 19, 2023 at 12:30 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Lindsey et al v Whiter et al - waivers of service

Hi Jonathan,

Plaintiffs counsel finally reached out, we agreed to waivers of service. So, we will have 60 days likely from today or tomorrow to file a motion to dismiss.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/19/2023 6:08:54 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Subpoena

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, October 19, 2023 at 1:19 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: Subpoena

A/C Priv MCL 15.243(1)(g)

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/9/2022 4:40:09 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: Re: AZ voting machine/decertification lawsuit
Attachments: 2022-09-08 Order Denying Petition and TRO[87][1].pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Quick update: We just learned that the Arizona Supreme Court dismissed the case yesterday. The text of the order is in the final two pages of the PDF.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Friday, September 9, 2022 at 11:59 AM
To: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: AZ voting machine/decertification lawsuit

Good morning, Heather. I've attached the filings from the Arizona lawsuit I mentioned yesterday that seeks to decertify Arizona's election results based on claims that the voting machines were not properly certified and also seeks to compel retention of documents from the 2020 election. You'll see that Russell Newman, the Nokomis, FL-based attorney who is affiliated with Gen. Flynn's America Project, is involved with both the Arizona and Michigan Actions.

CV-22-0217-SA DANIEL WOOD et al v BRNOVICH/HOBBS/DUCEY/BRUTINEL

Appellate Case Information

Case Filed: 31-Aug-2022 Archive on: 8-Sep-2032 (planned)

Case Closed: 8-Sep-2022

Dept/Composition

Side 1. DANIEL WOOD, BRIAN STEINER and PAUL RICE, Petitioner

(Litigant Group) DANIEL WOOD, BRIAN STEINER and PAUL RICE

- **Daniel Wood**
- **Brian Steiner**
- **Paul Rice**

Side 2. MARK BRNOVICH, in his official Capacity as the Attorney General for the State of Arizona; KATIE HOBBS, in her official capacity as the Arizona Secretary of State; DOUG DUCEY, in his official capacity as the Governor of the State of Arizona; ROBERT M. BRU, Respondent

(Litigant Group) MARK BRNOVICH, in his official Capacity as the Attorney General for the State of Arizona; KATIE HOBBS, in her official capacity as the Arizona Secretary of State; DOUG DUCEY, in his official capacity as the Governor of the State of Arizona; ROBERT M. BRU

- **Mark Brnovich, Arizona Attorney General's Office**
- **Katie Hobbs, Arizona Secretary of State**

CASE STATUS

Sep 8, 2022.....Decision Rendered Aug 31, 2022....**Pending**

CASE DECISION

08-Sep-2022 ORDER

* Before us is the fourth matter filed directly in this Court by some combination of petitioners challenging the 2020 election results.

On May 7, 2021, Petitioner Brian Steiner and others filed an action styled, We the People, ex rel., v. Ducey, et al.

Ann Timmer

Filed: **08-Sep-2022** Mandate:

Decision Disposition
Dismissed

5 PROCEEDING ENTRIES

1.	31-Aug-2022	FILED: Verified Petition for Writ of Mandamus (Treated as a Petition for Special Action); Declaration of Brian Steiner (Petitioners Wood, et al., Pro Se)
2.	31-Aug-2022	FILED: Consolidated Motion for Temporary Restraining Order and Memorandum of Law in Support Thereof (Petitioners Wood, et al., Pro Se)
3.	7-Sep-2022	RECEIPT No.: ASC2022-00857 ; $280.00 Applied to: DANIEL WOOD, BRIAN STEINER and PAUL RICE - Class A Filing Fee ($280.00) Paid for: DANIEL WOOD, BRIAN STEINER and PAUL RICE - By nCourt LLC Portal (Memo: 3200A3B9-37C5-495E-8C00-B3856C7091E3)
4.	8-Sep-2022	FILED: Motion for Counsel for Writ of Mandamus and TRO Filed August 31, 2022 (Petitioners Wood, et al)

Information presented in this document may not reflect all case activity and is subject to change without notice.

5. 8-Sep-2022 Before us is the fourth matter filed directly in this Court by some combination of petitioners challenging the 2020 election results.

On May 7, 2021, Petitioner Brian Steiner and others filed an action styled, We the People, ex rel., v. Ducey, et al., CV-21-0114-SA. The petitioners contended that twenty elected officials were "alleged usurpers" who were "in office illegally" and if not, the respondents should "prove otherwise." In that action, the petitioners alleged that voting systems were "contractually uncertified and illegal" because "[m]achines or devices used at any election for federal, state or county offices may only be certified for use ... if they comply with the help America vote act of 2002 and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2022." For the relief requested, the petitioners asked that each of the twenty elected officials "be removed from the trusted office." This Court dismissed the petition because it could find no legal basis for the relief requested and because the action was untimely under A.R.S. § 12-673(A) and observing:

Although our courts have recognized that electors may have an implied private right of action to challenge voting machines' compliance with applicable statutory requirements in certain limited circumstances, see, e.g., Chavez v. Brewer, 222 Ariz. 309, 318 ¶ 28 (App. 2009), nothing in the statutes Petitioners cite grants them a private right of action to remove office holders and sit in their stead. In fact, in a quo warranto action, "a claimant to an office may have judgment only on the strength of his own title and not upon any infirmity or weakness in the defendant's title." Tracy v. Dixon, 119 Ariz. 165, 166 (1978). (Emphasis added.)

On October 21, 2021, Petitioners Rayana B. Eldan, Brian Steiner, and Daniel Wood, pro se, filed an "Affidavit of Complaint, Petition for Redress by Writs of Mandamus." Petitioners asked this Court for an order directing the Secretary of State to rescind the Certificates of Election of the Presidential Electors and alleging that the certificates were "invalid and void" and also directing the County Boards of Supervisors and Clerks to rescind the Certificates of Election issued in the county elections. Eldan et al. v. Katie Hobbs, Secretary of State, et al. CV-21-0255-SA. The entire Court entered an order dismissing that proceeding on November 8, 2021, quoting the above language from the dismissal order in the CV-21-0114-SA case and stating:

The Court will not attempt to further instruct Petitioners on the need to plead factual allegations upon which relief can be granted in accordance with pertinent court rules. However, irrespective of the Petitioners' claims of election irregularities, they have alleged no basis for relief under which they may obtain an order directing state officials to "rescind" prior elections or to remove elected office holders from office .... (Emphasis added.)

In Wood v. Secretary of State Katie Hobbs, CV-21-0149—SA, Petitioner Daniel Clayton Wood filed a petition on June 4, 2021, and alleged that "Our voting equipment for use in elections did not have certification from any accredited laboratories," and demanded that the Secretary of State "respond to the questions above within 5 days, by affidavit, before this court, sworn under penalty of perjury. If you do not respond within 5 days, you agree by acquiescence, that you are knowingly interfering with the rights of the people ...." On June 8, 2021 the Court dismissed the petition because Petitioner had failed to comply with A.R.S. § 12-2043 and therefore could not bring a quo warranto proceeding.

In the instant petition, Petitioners Daniel Wood, Brian Steiner and Paul Rice, purporting to be acting with the assistance of Florida counsel, have filed a "Consolidated Motion for Temporary Restraining Order and Memorandum of Law in Support Thereof." In the motion, Petitioners advise that federal law requires that records, documents, and evidence from the 2020 presidential election must be preserved for twenty-two months, which, they contend, expires September 3, 2022. Therefore, the Court should "issue a Temporary Restraining Order to prevent the Defendants, and anyone acting in concert with the Defendants, from destroying the records, documents and evidence pertaining to Arizona's 2020 presidential election. The Plaintiffs may need the records, documents and evidence pertaining to Arizona's 2020 presidential election in their presentation of their case in chief," and to pursue their "42 U.S.C. § 1983 violation of civil rights case."

In their "Petition for Writ of Mandamus" brought under A.R.S. § 12-2021, also filed in this action, Petitioner argue that the Attorney General, Governor, Secretary of State, and Chief Justice illegally certified the election. They contend that under A.R.S. § 16-442, machines or devices used in election for federal, state, or county offices may only be certified for use if they comply with the Help America Vote Act of 2002 and if they have been tested and approved by a laboratory. "If voting hardware and/or software were used in violation of Arizona law, then said election is void ab initio and said election cannot be lawfully certified by any Defendant." Petitioners contend that because the legal requirements of A.R.S. § 16-442 were not met, the defendants had no authority to certify the results. They reason, "If none of the Defendants had the legal authority to certify Arizona's 2020 presidential election results, then this Court must issue a peremptory writ of mandamus . . . compelling the Defendants to decertify Arizona's 2020 presidential election and to rerun Arizona's 2020 presidential election in accordance with Arizona law." They ask that the Court "issue a peremptory Writ of Mandamus" compelling defendants to decertify the election; recall the Biden electors, "remove the Maricopa County votes from the 2020 election results as they were/are void ab initio, order Maricopa County to rerun the Arizona 2020 presidential election in accordance with the law, as soon as possible, by way of a special election, with paper ballots only, on a single election day, omitting Zuckerboxes and 'no excuse' absentee mail-in ballots, with the paper ballots being counted by hand with multiple members of all political parties present to observe, with unobstructed 24/7 public livestream cameras of all vote counting so that Arizona can restore voter confidence and Arizona's commitment to free and fair elections, with the Defendants then adding Maricopa County's presidential election votes to the remaining votes and ordering the Defendants to then certify a lawful 2020 presidential election," and such other relief as the Court deems appropriate.

First, the challenge to the election is untimely. The laws of Arizona set forth the process for contesting an election—a process that requires the filing of a contest within five days after the canvass of the election. Election contests based on alleged improprieties are not new. See Moore v. City of Page, 148 Ariz. 151, 155 (App. 1986)(pointing out that election contests have been brought based on a claim that unregistered voters have voted; that the election was held in a building other than that designated in the election notice; that ineligible electors were allowed to vote and that the ballot was not in the form required; and agreeing in that case that the failure to purge voters would support a contest "on account of illegal votes." (internal citations omitted)). Such contests must, however, be timely:

It is commonly stated that election contests are purely statutory and dependent upon statutory provisions for their conduct. Proun

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It is commonly stated that election contests are purely statutory and dependent upon statutory provisions for their conduct. Brown v. Superior Court, 81 Ariz. 236 (1956); Fish v. Redeker, 2 Ariz. App. 602 (1966). The failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested. Dale v. Greater Anchorage Area Borough, 439 P.2d 790 (Alaska, 1968). We have held particularly that the "'requirements as to the time within which the contest must be brought are regarded as mandatory, and unless strictly complied with The court is without jurisdiction to proceed'"; Brown v. Superior Court, supra, 81 Ariz. at 239. Citing 29 C.J.S. Elections § 259.

The rationale for requiring strict compliance with the time provisions for initiating a contest is the strong public policy favoring stability and finality of election results. (Emphasis added; citations cleaned up.)

Donaghey v. Att'y Gen., 120 Ariz. 93, 95 (1978) (emphasis added).

Second, as this Court previously observed, "irrespective of the Petitioners' claims of election irregularities, they have alleged no basis for relief under which they may obtain an order directing state officials to 'rescind' prior elections or to remove elected office holders from office ...."

The Court, en banc, observes that Petitioners have cited no authority for the proposition that they or anyone else may overturn the Arizona statutes that govern both the conduct of elections and the challenges to the results of such elections. Likewise, they cannot dictate the terms of a proposed effort to "rerun the 2020 presidential election," which was certified almost two years ago. Therefore,

IT IS ORDERED dismissing the petition.

IT IS FURTHER ORDERED denying the request for temporary restraining order.

IT IS FURTHER ORDERED denying the motion for expedited consideration as moot.

IT IS FURTHER ORDERED denying Petitioners' "Motion for Counsel for Writ of Mandamus and TRO" as moot. (Hon. Ann A. Scott Timmer)

Information presented in this document may not reflect all case activity and is subject to change without notice.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/9/2022 3:59:22 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: AZ voting machine/decertification lawsuit
Attachments: 20220902101800698[41][2].pdf

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RECEIVED
Obtained by Judicial Watch, Inc. v. Michigan FOIA
AUG 3 1 2022
CLERK SUPREME COURT

Daniel Wood, *pro se*
Brian Steiner, *pro se*
Paul Rice, *pro se*
P.O. Box 50631
Phoenix, AZ 85076
(615) 554-1510 (Telephone)

Prepared with Assistance of Counsel:
Russell A. Newman (*Pro Hac Vice* Application Forthcoming)
TN BPR# 033462
The Newman Law Firm
253 Tamiami Trail S., Ste. 120
Nokomis, FL 34275
(615) 554-1510 (Telephone)
russell@thenewmanlawfirm.com

ARIZONA SUPREME COURT

DANIEL WOOD, BRIAN STEINER and PAUL RICE, **Plaintiffs,** **v.** **MARK BRNOVICH, in his official capacity as the Attorney General for the State of Arizona, KATIE HOBBS, in her official capacity as the Arizona Secretary of State, DOUG DUCEY, in his official capacity as the Governor of the State of Arizona, ROBERT M. BRUTINEL, in his official capacity as the Chief Justice for the Arizona Supreme Court,** **Defendants.**	**CASE NO. :** CV-22-0217-SA **DECLARATION OF BRIAN STEINER** **(Election Matter)** **(TRO Requested)**

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF ARIZONA)

COUNTY OF MARICOPA)

COMES NOW the Declarant, Brian Steiner, and states under oath and penalty of perjury as follows:

1. I am a *pro se* Plaintiff in the above-captioned case.

2. I am a resident of Maricopa County.

3. I have not made an effort to give notice to the Defendants regarding my Motion for a Temporary Restraining Order.

4. The records, documents and evidence from Arizona's 2020 presidential election will be destroyed in a matter of days, specifically on September 4, 2022.

5. There is no reason to destroy the records, documents and evidence from the 2020 presidential election.

6. I need all of this evidence to pursue any/all legal claims that I have against any/all Defendants.

7. I will suffer an immediate and irreparable injury, loss or damage in my present case and in my 42 U.S.C. § 1983 civil rights violations case if the records, documents and evidence from Arizona's 2020 presidential election are destroyed.

8. Based upon the foregoing I do not believe notice should be required because any such effort would be futile.

FURTHER DECLARANT SAYETH NOT.

/s/ Brian Steiner
Brian Steiner
Pro Se Plaintiff
August 31, 2022

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CLERK SUPREME COURT

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Prepared with Assistance of Counsel:
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ARIZONA SUPREME COURT

DANIEL WOOD, BRIAN STEINER and PAUL RICE, **Plaintiffs,** **v.** **MARK BRNOVICH, in his official capacity as the Attorney General for the State of Arizona, KATIE HOBBS, in her official capacity as the Arizona Secretary of State, DOUG DUCEY, in his official capacity as the Governor of the State of Arizona, ROBERT M. BRUTINEL, in his official capacity as the Chief Justice for the Arizona Supreme Court,** **Defendants.**	**CASE NO. :** CV-0217-SA **CONSOLIDATED MOTION FOR TEMPORARY RESTRAINING ORDER AND MEMORANDUM OF LAW IN SUPPORT THEREOF** **(Election Matter)** **(TRO Requested)**

COME NOW Plaintiffs, Daniel Wood, Brian Steiner, and Paul Rice, and

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pursuant to Ariz. R. Civ. P. 65[1] hereby file this Motion for Temporary Restraining Order to enjoin and/or restrain Defendants and its officers, agents, servants, employees and attorneys and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B) from destroying any records, evidence or materials in any way related to Arizona's 2020 presidential election. Additionally, Plaintiffs request that this court expedite the preliminary injunction hearing. In support of Plaintiff's motion for temporary restraining order Plaintiffs respectfully show this court the following:

I. STATEMENT OF RELEVANT FACTS

On November 3, 2020, Maricopa County conducted an illegal and unlawful presidential election. Verified Petition for Writ of Mandamus, ¶ 8. The unlawful and illegal 2020 presidential election was certified by the Defendants on November 30, 2020. *See id* at ¶¶ 10-13. Pursuant to 52 U.S.C. § 20701, records, documents and all evidence form Arizona's 2020 presidential election must be preserved for twenty-two (22) months. Arizona's 2020 presidential election occurred on November 3, 2020. *Id* at ¶ 8. 11/03/2020 + 22 months = 09/03/22. As such, Arizona's records, documents

[1] While A.R.S. § 12-2021 provides the appellate Arizona Supreme Court with original Jurisdiction for a writ of mandamus, the Arizona Rules of Appellate Procedure fail to include relief that is ordinarily available in a court with original jurisdiction, such as Temporary Restraining Orders. As such, the rules of civil procedure in courts with original jurisdiction will be cited as this court has original jurisdiction and has the authority to issue a Temporary Restraining Order.

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and all evidence from the 2020 presidential election will be destroyed unless this court intervenes and issues this Temporary Restraining Order and a preliminary injunction ordering the Defendants and its officers, agents, servants, employees, and attorneys and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B) to preserve any/all documents, records and/or evidence relating to Arizona's 2020 presidential election.

II. ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Ariz. R. Civ. P. 65, "The court may issue a temporary restraining order without written or oral notice to the adverse party only if:

> (A) specific facts in an affidavit or a verified complaint clearly show that **immediate and irreparable injury, loss, or damage will likely result to the movant before the adverse party can be heard in opposition**, or that prior notice will likely cause the adverse party to take action resulting in such injury, loss, or damage; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice or the reasons why it should not be required.

Ariz. R. Civ. P. 65(b)(1) (emphasis added). Preliminary injunction granted without imposition of bond on movants was enforceable. *Matter of Wilcox Revocable Trust* (App. Div.1 1998) 192 Ariz. 337, 965 P.2d 71. An injunction is not void even though it fails to contain reasons for its issuance. *State v. Nettz* (App. Div.2 1977) 114 Ariz. 296, 560 P.2d 814. Failure to comply with provision of this rule requiring that order granting injunction set forth reason for injunction's issuance does not render order void.

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Laks v. Laks (App. Div.2 1975) 25 Ariz.App. 58, 540 P.2d 1277.

In the case at bar, this court may issue a Temporary Restraining Order to prevent the Defendants, and anyone acting in concert with the Defendants, from destroying the records, documents and evidence pertaining to Arizona's 2020 presidential election. The Plaintiffs may need the records, documents and evidence pertaining to Arizona's 2020 presidential election in their presentation of their case in chief. There is absolutely no reason why the records, documents and evidence should be destroyed when they are needed in Plaintiffs' case in chief and Plaintiffs' 42 U.S.C. § 1983 violation of civil rights case. Plaintiffs will suffer immediate and irreparable injury, loss or damage if this court does not immediately halt the destruction of said records, documents and evidence. This evidence is essential to Plaintiffs' case in chief and it will be needed in Plaintiffs' 42 U.S.C. § 1983 civil rights violations case. The injury, loss or damage is the destruction of Plaintiffs' ability to plead and prove their case in chief. This injury, loss or damage is immediate because the destruction of said records, documents or evidence will occur in a matter of days. These records, documents and evidence have been preserved for nearly two years and there is no good reason why they should be destroyed when they are still needed. Permitting the destruction of relevant and/or necessary records, documents or evidence would violate Ariz. R. Civ. P. 1, which states that the law should be "construed, administered, and employed by the court and the parties to secure the **just**, speedy, and inexpensive determination of every action and

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proceeding." Ariz. R. Civ. P. 1 (emphasis added). Justice requires that this Court preserve records, documents and/or evidence that is currently being preserved and which may be needed in the instant case. There is no good reason to destroy the documents, records and/or evidence of Arizona's 2020 presidential election at this time. As such, Plaintiffs respectfully request that this court grant their motion for temporary restraining order *instanter*, there being no just reason for delay.

Respectfully submitted this 31st day of August, 2022.

***PRO SE* PLAINTIFFS**

By: /s/ Daniel Wood
/s/ Brian Steiner
/s/ Paul Rice
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PREPARED WITH ASSISTANCE OF COUNSEL

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ARIZONA SUPREME COURT

DANIEL WOOD, BRIAN STEINER and PAUL RICE, **Plaintiffs,** **v.** **MARK BRNOVICH, in his official capacity as the Attorney General for the State of Arizona, KATIE HOBBS, in her official capacity as the Arizona Secretary of State, DOUG DUCEY, in his official capacity as the Governor of the State of Arizona, ROBERT M. BRUTINEL, in his official capacity as the Chief Justice for the Arizona Supreme Court,** **Defendants.**	**CASE NO. :** CV-22-0217-SA **VERIFIED PETITION FOR WRIT OF MANDAMUS** **(Election Matter)** **(TRO Requested)**

COME NOW Plaintiffs, Daniel Wood, Brian Steiner, and Paul Rice hereby file

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this Verified Petition for Writ of Mandamus and in support thereof, would show unto this Court as follows:

I. JURISDICTION AND VENUE

1. This verified petition is for a writ of mandamus. Jurisdiction[1] is proper in this Court pursuant to A.R.S. § 12-2021 *et al.* The duty to certify Arizona's 2020 presidential election results is a ministerial duty to which the statute specifically describes the manner of performance. The Defendants must certify a lawful election and they may not certify an illegal/unlawful election.

2. Venue is proper pursuant to A.R.S. § 12-401.

II. PARTIES

3. Plaintiff Daniel Wood is an Arizona resident who voted in Arizona's statewide 2020 presidential election.

4. Plaintiff Brian Steiner is an Arizona resident who voted in Arizona's statewide 2020 presidential election.

5. Plaintiff Paul Rice is an Arizona resident who voted in Arizona's statewide 2020 presidential election.

---

[1] The 2020 presidential election is/was a **statewide** election. The writ seeks to compel **state** officials to discharge a duty owed by **state** law. The Supreme Court of Arizona is a **statewide** court. It only stands to reason that a **state** branch of government should be the proper entity to compel a co-equal **state** branch of government to discharge a duty owed by a **state** statute. This Court has jurisdiction and jurisdiction is proper.

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6. Plaintiffs are citizens of The United States of America and they are over the age of eighteen (18).

7. Plaintiffs have a constitutional right to participate in the 2020 presidential election. *See* U.S. Const. Amend. 26.

8. Plaintiffs suffered a distinct and palpable injury when the State of Arizona conducted an unlawful presidential election on November 3, 2020.

9. Plaintiffs suffered another distinct and palpable injury when unlawful 2020 presidential election results were unlawfully certified on November 24, 2020.

10. On November 30, 2020, Defendant Katie Hobbs was the Secretary of State and she unlawfully certified the 2020 presidential election.

11. On November 30, 2020, Defendant Doug Ducey was the Governor of Arizona and he unlawfully certified the 2020 presidential election.

12. On November 30, 2020, Defendant Mark Brnovich was Arizona's Attorney General and he unlawfully certified the 2020 presidential election.

13. On November 30, 2020, Defendant Robert M. Brutinel was the Chief Justice of the Arizona Supreme Court and he unlawfully certified the 2020 presidential election.

14. "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Const. Art. II, § 21.

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III. FACTUAL ALLEGATIONS

A. Introduction.

15. On November 3, 2020, the State of Arizona attempted to conduct an election for President of the United States of America.

16. However, the Defendants purported certification of the Arizona 2020 presidential election did not comply with either Arizona law or federal law.

17. Pursuant to Constitution of the United States, "Each State shall appoint, **in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2 (emphasis added).

> U.S.C.A. Const. Art. II § 1, cl. 2
>
> **Section 1, Clause 2. Presidential Electors**
>
> Currentness
>
> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

18. Pursuant to Arizona law, "**Machines or devices** used at any election for federal, **state** or county offices may only be certified for use in this state and **may only be used** in this state **IF** they comply with the help America vote act of 2002 and if those machines or devices have been **tested and approved by a laboratory that is**

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accredited pursuant to the help America vote act of 2002." A.R.S. § 16-442(B) (emphasis added).

Effective: August 3, 2018

A.R.S. § 16-442

§ 16-442. Committee approval; adoption of vote tabulating equipment; experimental use; emergency

Currentness

A. The secretary of state shall appoint a committee of three persons, to consist of a member of the engineering college at one of the universities, a member of the state bar of Arizona and one person familiar with voting processes in the state, no more than two of whom shall be of the same political party, and at least one of whom shall have at least five years of experience with and shall be able to render an opinion based on knowledge of, training in or education in electronic voting systems, procedures and security. The committee shall investigate and test the various types of vote recording or tabulating machines or devices that may be used under this article. The committee shall submit its recommendations to the secretary of state who shall make final adoption of the type or types, make or makes, model or models to be certified for use in this state. The committee shall serve without compensation.

B. Machines or devices used at any election for federal, state or county offices may only be certified for use in this state and may only be used in this state if they comply with the help America vote act of 2002 and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2002.

19. If voting hardware and/or software has not been lawfully certified pursuant to the help America vote act of 2002, then said voting machine may not be used in an Arizona election. *See id.*

20. If a voting hardware and/or software has not been tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2002, then said voting hardware or software may not be used in an Arizona election. *See id.*

21. If voting hardware and/or software were used in violation of Arizona law, then said election is void *ab initio* and said election cannot be lawfully certified by any Defendant. *See id.*

22. Void *ab initio* is defined as "Having no legal effect from inception." Thompson Reuters Practical Law, definition of "*Void ab initio*" last visited June 21, 2022

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(https://1.next.westlaw.com/Glossary/PracticalLaw/I41334c8d07ef11ebbea4f0dc9fb69570?contextData=(sc.Default)&firstPage=true&transitionType=Default)

23. Void *ab initio* means that the action taken is **void**; it is **not voidable**. *See id.*

24. Void *ab initio* means that the action taken "has no legal effect." *Id.*

25. "A void action cannot be ratified or validated [or certified]." *Id.*

26. "An action that is void *ab initio* **never had any legal effect**." *Id* (emphasis added).

Glossary

Void ab initio

Having no legal effect from inception.

A law, agreement, sale, or other action that is void has no legal effect. A void action cannot be ratified or validated. An action that is void *ab initio* never had any legal effect. *Ab initio* is usually italicized because it is a Latin term that means from the beginning.

Void and void *ab initio* have the same technical definition, but void *ab initio* is a stronger term that is less likely to be improperly confused with voidable.

END OF DOCUMENT

RESOURCE ID W-027-8278 DOCUMENT TYPE GLOSSARY

PRODUCTS

PLC Arbitration - International, PLC US Antitrust, PLC US Bankruptcy & Restructuring, PLC US Capital Markets & Corporate Governance, PLC US Commercial Litigation, PLC US Commercial Transactions, PLC US Corporate and M&A, PLC US Corporate and Securities, PLC US Employee Benefits and Executive Compensation, PLC US Federal Litigation, PLC US Finance, PLC US Glossary, PLC US Government Practice: Federal, PLC US Government Practice: State & Local, PLC US Health Care, PLC US Intellectual Property and Technology, PLC US Labor and Employment, PLC US Law Department, PLC US Legal Operations & Professional Development, PLC US Life Sciences & FDA Regulatory, PLC US Real Estate, PLC US Securities Litigation & Enforcement, PLC US Tax, PLC US Trusts & Estates

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27. In order for Arizona to conduct a valid election, the Arizona Secretary of State must comply with the requirements contained in A.R.S. § 16-442 *et seq*. *See* A.R.S. § 16-442.

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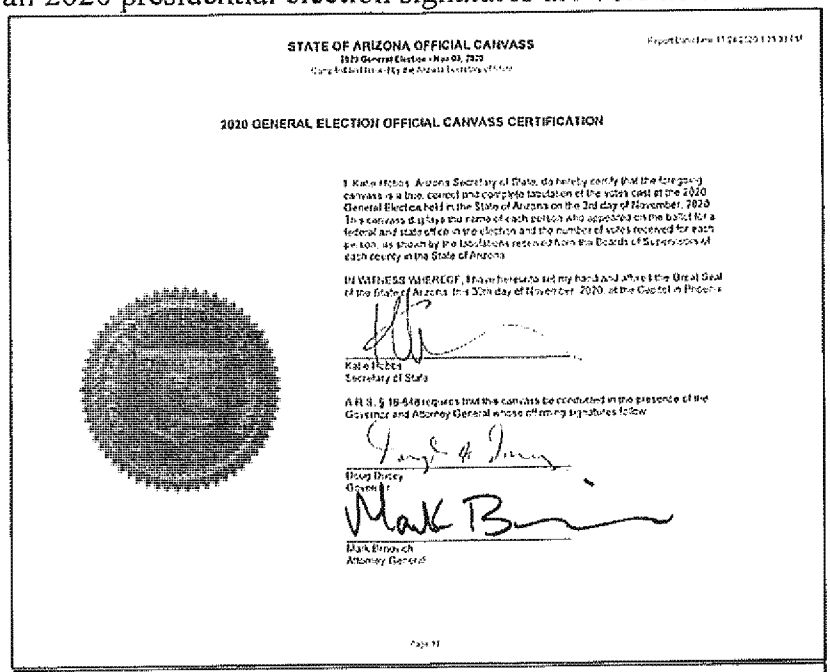
28. If the legal requirements contained in A.R.S. § 16-442 were not met, then the Arizona Secretary of State had **no authority to use** any voting machine or device in violation of said statute.

29. If the legal requirements contained in A.R.S. § 16-442 were not met, then the Defendants had **no authority to certify the results** of Arizona's 2020 presidential election and all 2020 presidential election signatures are void *ab initio*.



STATE OF ARIZONA OFFICIAL CANVASS

2020 GENERAL ELECTION OFFICIAL CANVASS CERTIFICATION

I, Katie Hobbs, Arizona Secretary of State, do hereby certify that the foregoing canvass is a true, correct and complete tabulation of the votes cast at the 2020 General Election held in the State of Arizona on the 3rd day of November, 2020. The canvass displays the name of each person who appeared on the ballot for a federal and state office in the election and the number of votes received for each person, as shown by the tabulations received from the Boards of Supervisors of each county in the State of Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Arizona, this 30th day of November, 2020, at the Capitol in Phoenix.

Katie Hobbs
Secretary of State

A.R.S. § 16-648 requires that the canvass be conducted in the presence of the Governor and Attorney General whose affirming signatures follow.

Doug Ducey
Governor

Mark Brnovich
Attorney General

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STATE OF ARIZONA OFFICIAL CANVASS

2020 GENERAL ELECTION OFFICIAL CANVASS CERTIFICATION

I, Katie Hobbs, Arizona Secretary of State, do hereby certify that the foregoing canvass of election returns is a true, correct and complete tabulation of the votes cast for and against Propositions at the 2020 General Election held in the State of Arizona on the 3rd day of November, 2020.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Arizona, this 30th day of November, 2020, at the Capitol in Phoenix.

Katie Hobbs
Secretary of State

A.R.S. § 16-648 requires that this canvass be conducted in the presence of the Governor and Chief Justice of the Supreme Court whose affirming signatures follow.

Doug Ducey
Governor

Robert M. Brutinel
Chief Justice
Arizona Supreme Court

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Arizona Secretary of State, 2020 Election State Canvass, https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf (last visited June 30, 2022).

30. If none of the Defendants had the legal authority to certify Arizona's 2020 presidential election results, then this Court must issue a peremptory writ of mandamus against each named Defendant compelling the Defendants to decertify Arizona's 2020 presidential election and to rerun Arizona's 2020 presidential election in accordance with Arizona law.

B. The Dominion electronic voting machines that were used in the 2020 presidential election were not certified by an accredited Voting System Test Laboratory.

31. "**Machines or devices used at any election** for federal, state or county offices may only be certified for use in this state and **may only be used** in this state **IF** they comply with the help America vote act of 2002 **AND** if those machines or devices have been **tested and approved by a laboratory that is accredited** pursuant to the help America vote act of 2002." A.R.S. § 16-442(B) (emphasis added).

Proposed Legislation

Effective: August 3, 2018

A.R.S. § 16-442

§ 16-442. Committee approval; adoption of vote tabulating equipment; experimental use; emergency

Currentness

A. The secretary of state shall appoint a committee of three persons, to consist of a member of the engineering college at one of the universities, a member of the state bar of Arizona and one person familiar with voting processes in the state, no more than two of whom shall be of the same political party, and at least one of whom shall have at least five years of experience with and shall be able to render an opinion based on knowledge of, training in or education in electronic voting systems, procedures and security. The committee shall investigate and test the various types of vote recording or tabulating machines or devices that may be used under this article. The committee shall submit its recommendations to the secretary of state who shall make final adoption of the type or types, make or makes, model or models to be certified for use in this state. The committee shall serve without compensation.

B. Machines or devices used at any election for federal, state or county offices may only be certified for use in this state and may only be used in this state if they comply with the help America vote act of 2002 and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2002.

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32. Arizona law requires that its voting machines be certified by a Voting System Test Laboratory that "**is accredited** pursuant to the help America vote act of 2002." *Id* (emphasis added).

> B. Machines or devices used at any election for federal, state or county offices may only be certified for use in this state and may only be used in this state if they comply with the help America vote act of 2002 and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2002.

33. The Help America Vote Act of 2002 created "the Election Assistance Commission" and the Election Assistance Commission (EAC) is referred to in the Act as the "Commission." 52 U.S.C. § 20921 (formerly cited as 42 U.S.C. § 15321).

> 52 U.S.C.A. § 20921
> Formerly cited as 42 USCA § 15321
>
> **§ 20921. Establishment**
>
> Currentness
>
> There is hereby established as an independent entity the Election Assistance Commission (hereafter in this subchapter referred to as the "Commission"), consisting of the members appointed under this subpart. Additionally, there is established the Election Assistance Commission Standards Board (including the Executive Board of such Board) and the Election Assistance Commission Board of Advisors under subpart 2 of this part (hereafter in this subpart referred to as the "Standards Board" and the "Board of Advisors", respectively) and the Technical Guidelines Development Committee under subpart 3 of this part.

34. The Election Assistance Commission "shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by -- … **(2)** carrying out the duties described in part B of this subchapter (relating to the testing, certification,

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decertification, and recertification of voting system hardware and software)...." 52 U.S.C. § 20922 (formerly cited as 42 U.S.C. § 15322).

> 52 U.S.C.A. § 20922
> Formerly cited as 42 USCA § 15322
>
> **§ 20922. Duties**
>
> Currentness
>
> The Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by--
>
> (1) carrying out the duties described in subpart 3 of this part (relating to the adoption of voluntary voting system guidelines), including the maintenance of a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general;
>
> (2) carrying out the duties described in part B of this subchapter (relating to the testing, certification, decertification, and recertification of voting system hardware and software);

35. The Election Assistance Commission "shall provide for the testing, certification, decertification, and recertification of voting system hardware and software **by accredited laboratories.**" 52 U.S.C. § 20971(a)(1) (formerly cited as 42 U.S.C. § 15371) (emphasis added).

> 52 U.S.C.A. § 20971
> Formerly cited as 42 USCA § 15371
>
> **§ 20971. Certification and testing of voting systems**
>
> Currentness
>
> (a) Certification and testing
>
> (1) In general
>
> The Commission shall provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories.
>
> (2) Optional use by States
>
> At the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software by the laboratories accredited by the Commission under this section.

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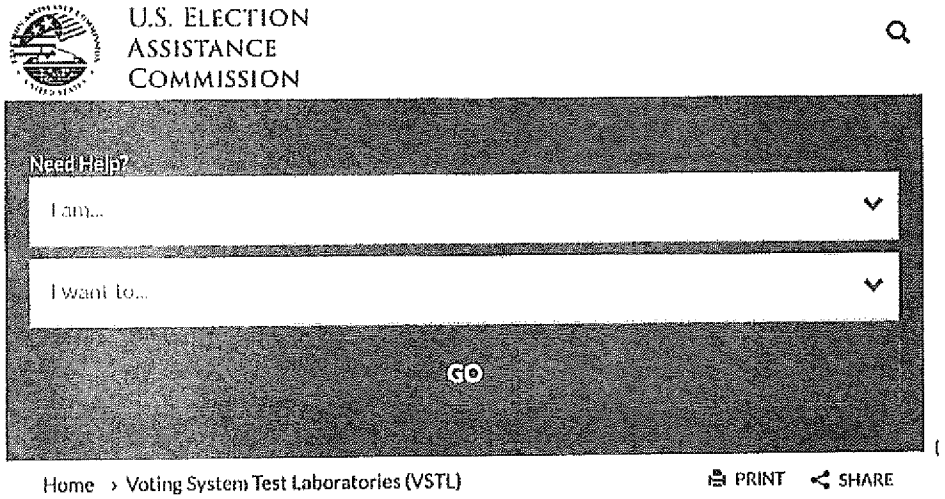
36. Additionally, at "the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software **by the laboratories accredited by the Commission** under this section." 52 U.S.C. § 20971(a)(2) (formerly cited as 42 U.S.C. § 15371) (emphasis added).

37. Pursuant to the U.S. Election Assistance Commission, there are **only two Voting System Test Laboratories (VSTL) that are accredited** by the Election Assistance Commission: (1) **Pro V&V**; and (2) SLI Compliance. U.S. Election Assistance Commission, VOTING SYSTEM TEST LABORATORIES (VSTL), https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl (last visited June 21, 2022) (emphasis added).



VOTING SYSTEM TEST LABORATORIES (VSTL)

Section 231(b) of the Help America Vote Act (HAVA) of 2002 (42 U.S.C. §15371(b)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards. Generally, the EAC considers for accreditation those laboratories evaluated and recommend by the National Institute of Standards and Technology (NIST) pursuant to HAVA Section 231(b)(1). However, consistent with HAVA Section 231(b)(2)(B), the Commission may also vote to accredit laboratories outside of those recommended by NIST upon publication of an explanation of the reason for any such accreditation.

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Pro V&V

6705 Odyssey Dr NW Suite C,
Huntsville, Alabama 35806
Status: Accredited
Program Manager: , President
Phone: 256-713-1111
Learn More >

SLI Compliance, a Division of Gaming Laboratories International, LLC

4720 Independence Street
Wheat Ridge, Colorado 80033
Status: Accredited
Program Manager: , Director of Operations
Phone: 303-422-1566
Learn More >

2 results found.
page 1 of 1

38. Pursuant to the Arizona Secretary of State, the Dominion voting machines used in the 2020 presidential election were certified on November 5, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Arizona Secretary of State, Certified Vote Tabulating Equipment, https://azsos.gov/sites/default/files/2020.07.22_Official_List.pdf (last visited June 21, 2022).

Arizona Secretary of State
Certified Vote Tabulating Equipment
Pursuant to A.R.S. § 16-442

Updated 07/22/2020

Company	Voting System/System Configuration	Software	Hardware/Firmware	EAC System ID #	Date of Certification
Diebold	~~GEMS 1.18.24~~ Voting System *See original certification 11/2005	~~EMP Model D software (4.6.2)~~	~~AccuVote-TSX DRE Model D (4.6.4)~~ ExpressPoll 5000 Electronic Poll Book (CardWriter (1.0) component only) Election Media Processor (EMP) Model D software (4.6.2)	~~N-1-06-22-22-003~~ N-1-06-22-22-004 N-1-06-22-22-005	~~8/15/2007~~
Dominion	EMS 5.5.32.4	EMS-Election Event Designer (5.5.32.4) EMS- Results Tally & Reporting (5.5.32.4) EMS-Audio Studio (5.5.32.4) EMS-Data Center Manager (5.5.32.4) EMS-Application Server (5.5.32.4) EMS-Network Attached Storage (5.5.32.4) EMS-Database Server (5.5.32.4) EMS-Election Data Translator (5.5.32.4) EMS-Adjudication (5.5.32.1) ImageCast Voter Activation (ICVA) (5.5.32.4) ImageCast Central (ICC) (5.5.32.5) ImageCast Precinct2 (ICP2) (5.5.1.8) ImageCast X (ICX) (5.5.13.2)	ICVA Smart Card Reader (ACR39U) ICC Scanner (Canon Dr-G1130) ICC Scanner (InoTec HiPro 821) ICP2 Hardware (PCOS-330A) Ballot Box-Stacking (ICP2) (PCOS-350A) ICX Classic Hardware (Avalue SID-21V-Z37) ICX BMD Printer (HP M402dne) ICX BMD UPS (APC SMT1500C) Accessible Tactile Interface USB (ATI for ICP2 & ICX) (Rev.A)	DVS-DemSuite5.5-B	11/05/2019

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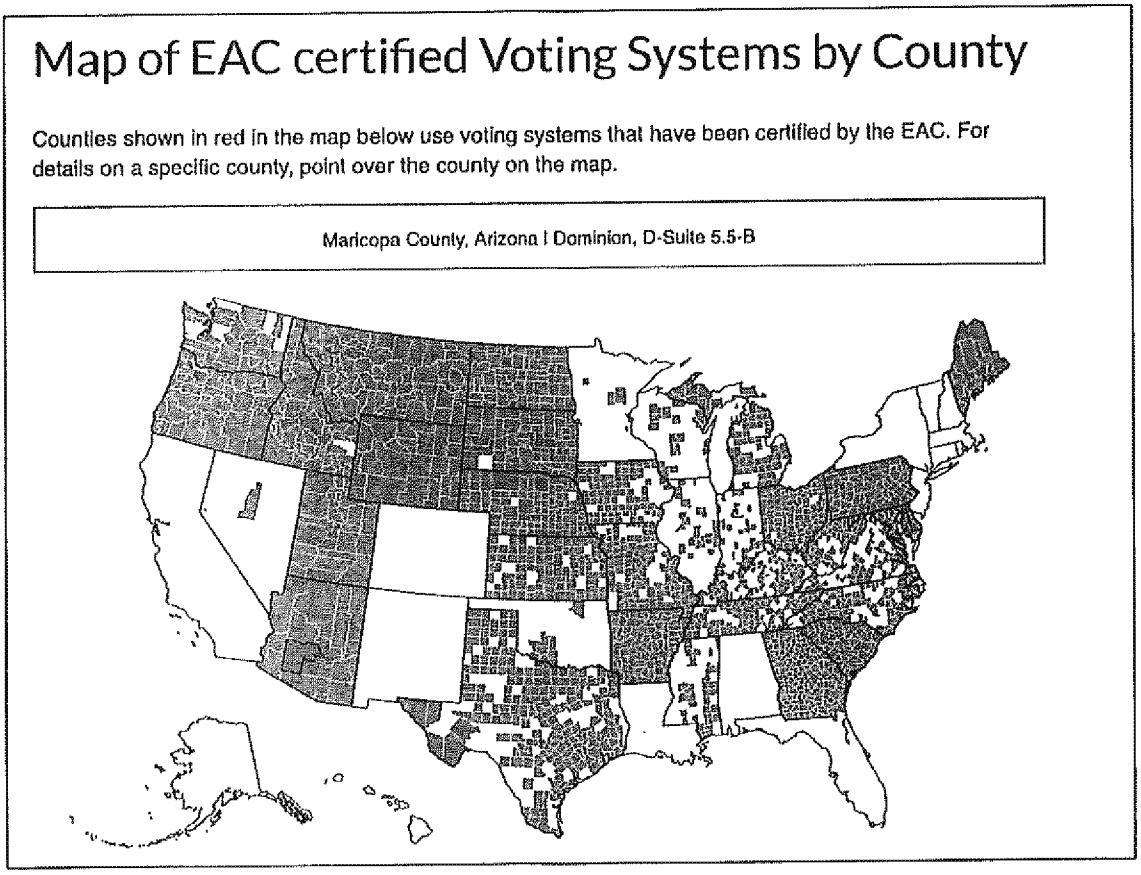
39. During the 2020 presidential election Dominion voting machines with DVS-DemSuite5.5-B were used in Maricopa County, Arizona. U.S. Election Assistance Commission System Certification Process, https://www.eac.gov/voting-equipment/system-certification-process.



40. Pursuant to the Arizona Secretary of State's website and hyperlink in the above PDF, DVS-DemSuite5.5-B is manufactured by Dominion Voting Systems Corp and the Testing Laboratory was Pro V&V. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/democracy-suite-55b-modification (last visited June 21, 2022).

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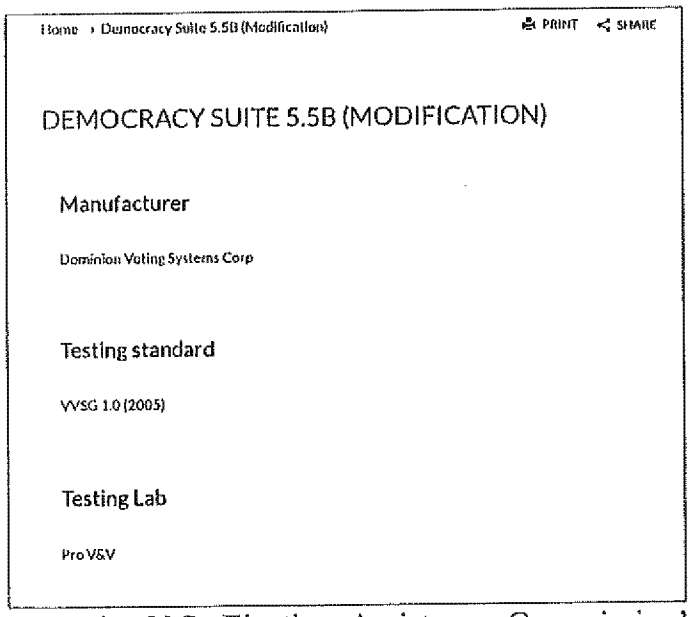
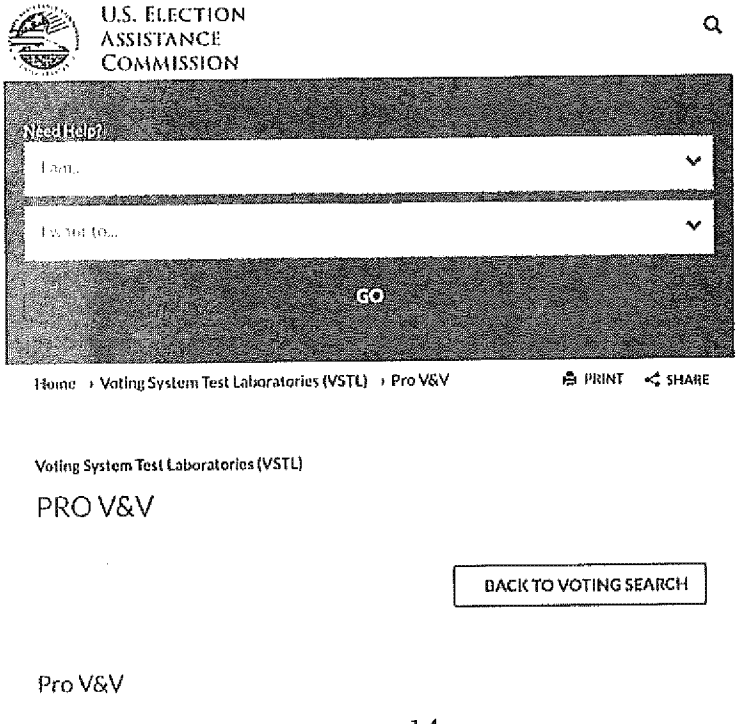


41. Pursuant to the U.S. Election Assistance Commission's website, Pro V&V received a Certificate of Accreditation on **February 24, 2015**. U.S. Election Assistance Commission, Voting System Test Labratories, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last visited August 11, 2022).



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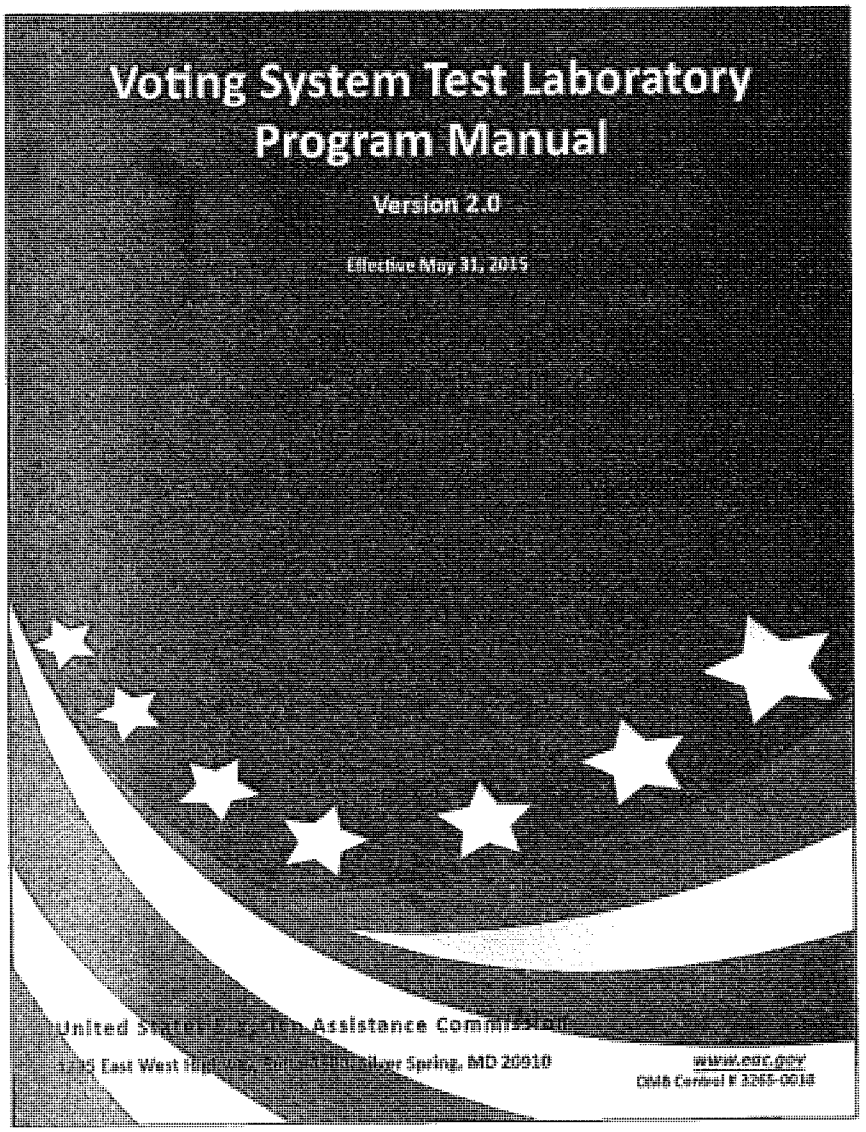
Pro V&V was accredited by the EAC on February 24, 2015. Federal law provides that EAC accreditation of a voting system test laboratory cannot be revoked unless the EAC Commissioners vote to revoke the accreditation: "The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission." 52 U.S. Code § 20971(c)(2). The EAC has never voted to revoke the accreditation of Pro V&V. Pro V&V has undergone continuing accreditation assessments and had new accreditation certificate issued on February 1, 2021.

42. Pursuant to Version 2.0 of the Voting System Test Laboratory Program Manual, which was effective May 31, 2015, "A grant of accreditation is valid for a period **not to exceed two years**." Voting System Test Laboratory Program Manual, p. 39, § 3.8.



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Voting System Test Laboratory Program Manual, Version 2.0

3.7.4. Accreditation Logo. A VSTL may display the EAC laboratory accreditation logo. Only the EAC authorized logo may be used. The display must be used in a manner consistent Sections 3.7.1. - 3.7.3., above. Specifications for the reproduction and use of the EAC logo are found in Appendix D.

3.8. **Expiration and Renewal of Accreditation.** Accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

43. Pro V&V received its certification on **February 24, 2015**.

United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: 1501

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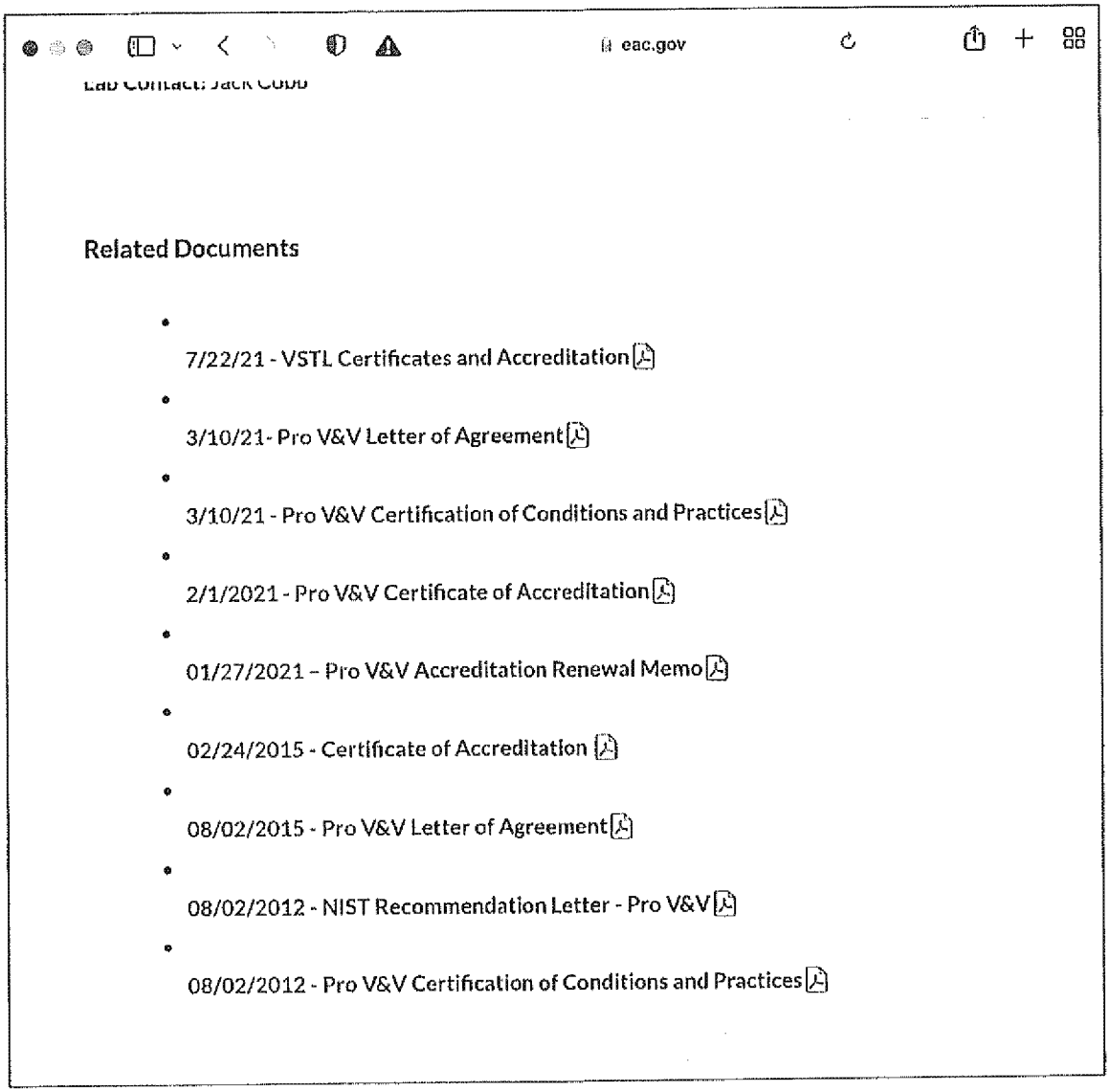
44. Pro V&V's Certificate of Accreditation **expired on February 24, 2017**.

45. On November 3, 2020, Pro V&V was not accredited by the U.S. Election Assistance Commission. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last visited August 11, 2022).



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46. Pro V&V did not receive another Certificate of Accreditation until **January 27, 2021**, which was after the November 3, 2020 presidential election.

47. Since Arizona law expressly requires its voting "machines or devices" to have been "tested and approved by a laboratory that is accredited pursuant to the help America vote act of 2002" and Pro V&V was not accredited on November 5, 2019, it was **unlawful and illegal** for the Defendants to certify Arizona's 2020 presidential election when said results included Maricopa County's votes, which were void *ab initio* and uncertifiable.

48. The Dominion voting hardware and software that was used in the 2020 presidential election in Maricopa County failed to comply with A.R.S. § 16-442(B); said election was **unlawful**.

49. Election results that contain illegal and unlawful votes cannot be certified.

50. As such, the Defendants' certification of Arizona's 2020 presidential election was/is **void *ab initio*** as the Defendants only have the authority to certify a lawful election.

51. Since it was unlawful and illegal for the Defendants to certify the 2020 presidential election with the Maricopa County votes included, the Defendants' signatures are **void *ab initio***.

52. An election that is void *ab initio* cannot be certified.

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WHEREFORE, premises considered, the Plaintiffs pray as follows:

1. That good and adequate service be had on all Defendants;

2. That this Court issue a peremptory Writ of Mandamus compelling the Arizona Secretary of State, Governor, Attorney General and Chief Justice to decertify Arizona's 2020 presidential election, recall Arizona's Joseph Robinette Biden, Jr.'s presidential electors, remove the Maricopa County votes from the 2020 presidential election results as they were/are void *ab initio*, order Maricopa County to rerun the Arizona 2020 presidential election, in accordance with the law, as soon as possible, by way of a special election, with paper ballots only, on a single **election day**, omitting Zuckerboxes and "no excuse" absentee mail-in ballots, with the paper ballots being counted by hand, with multiple members of all political parties present to observe, with unobstructed 24/7 public livestream cameras of all vote counting so that Arizona can restore voter confidence and Arizona's commitment to free and fair elections, with the Defendants then adding Maricopa County's presidential election votes to the remaining votes and ordering the Defendants to then certify a lawful 2020 presidential election; and

3. Such other relief to which the Plaintiffs may show themselves to be entitled.

Respectfully submitted this 31st day of August, 2022.

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***PRO SE* PLAINTIFFS**

/s/ Daniel Wood
/s/ Brian Steiner
/s/ Paul Rice
P.O. Box 50631
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PREPARED WITH ASSISTANCE OF COUNSEL

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(615) 554-1510 (Telephone)
Attorney for Plaintiffs

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VERIFICATION

STATE OF Arizona)
COUNTY OF Pinal)

I have read the foregoing factual allegations contained in this Verified Writ of Mandamus and do hereby certify that they are true and correct to the best of my knowledge.

JOY ANN HOLSINGER
Notary Public, State of Arizona
Pinal County
Commission # 574198
My Commission Expires
October 29, 2023

Daniel Wood
Plaintiff

SWORN TO AND SUBSCRIBED before me this 24 day of August, 2022.

Notary Public

My Commission Expires:

10/29/2023

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VERIFICATION

STATE OF ARIZONA)

COUNTY OF PINAL)

I have read the foregoing factual allegations contained in this Verified Writ of Mandamus and do hereby certify that they are true and correct to the best of my knowledge.

JOY ANN HOLSINGER
Notary Public, State of Arizona
Pinal County
Commission # 574198
My Commission Expires
October 29, 2023

Brian Steiner
Plaintiff

SWORN TO AND SUBSCRIBED before me this 24 day of August, 2022.

Notary Public

My Commission Expires:

10/29/2023

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VERIFICATION

STATE OF Arizona)

COUNTY OF Maricopa)

I have read the foregoing factual allegations contained in this Verified Writ of Mandamus and do hereby certify that they are true and correct to the best of my knowledge.

Paul Rice
Plaintiff

SWORN TO AND SUBSCRIBED before me this 23rd day of August, 2022.

Notary Public

My Commission Expires:

01-04-2026

WESTON BINGHAM
Notary Public - State of Arizona
MARICOPA COUNTY
Commission # 619765
Expires January 04, 2026

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/19/2023 10:31:25 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Constitutional Accountability Center brief

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Here is a link to CAC's webpage about its brief in the Minnesota case: https://www.theusconstitution.org/litigation/growe-v-simon/

The brief is here: https://www.theusconstitution.org/wp-content/uploads/2023/10/2023-10-06-CAC-14.3-Amicus-Brief-FINAL.pdf

It focuses exclusively on the federal constitutional issues.

Get Outlook for iOS

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/24/2023 9:14:06 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
Subject: Marc Elias re Lindsey v. Whitmer

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FYI - https://www.democracydocket.com/opinion/a-dangerous-legal-theory-returns-for-2024/

Jonathan L. Williams | Senior Counsel
States United Democracy Center
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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/20/2023 6:12:52 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: 14.3 update
Attachments: 2023-10-18 Secretary Simon Response Brief.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Secretary Simon is not taking a position on the merits. He does say the case is ripe and the court should rule on the issues presented. I've attached his brief.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, October 20, 2023 at 11:30 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 14.3 update

In Minnesota, is the Secretary taking a position on the merits?

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, October 20, 2023 9:00 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 14.3 update

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather,

Please find attached the 14.3 Litigation Tracker for this week with updates highlighted.

Some things of note:

Colorado:

- In *Anderson v. Griswold*:
- The court denied Trump's Anti-SLAPP Motion to Dismiss.
- Secretary Griswold notified the court that her office received candidacy materials for Trump but would hold the application as pending while awaiting direction from the court.
- Trump filed a Motion to Realign Secretary Griswold as a Petitioner, citing her intent to hold Trump's candidacy application, comments she has made publicly about Trump, and the statement in her 9/29 Omnibus Response that "the Secretary believes that Mr. Trump incited the insurrection."

Michigan

- In *Davis v. Benson* and *La Brant v. Benson*:
- Secretary Benson filed a brief answering questions posed by the court. Secretary Benson argued that the Secretary has no affirmative legal duty or authority to decide whether the Fourteenth Amendment renders Trump eligible to be placed on the ballot prior to a court's review of the issue. Secretary Benson took no position as to the constitutional questions raised by 14.3 but laid out arguments raised on both sides.
- Trump filed motions to intervene and motions for summary disposition.

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- A hearing is tentatively scheduled for November 6.

Minnesota

- In *Growe v. Simon*:
- The court denied the 2024 Trump Campaign's motion to intervene for procedural reasons. The court invited the Trump Campaign to file an amicus brief, which it did.
- Secretary Simon filed his brief arguing that Petitioners have standing and that the case is ripe. In the alternative (if the case is not ripe), Secretary Simon argues that the case is functionally justiciable and should be decided immediately.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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No. A23-1354

STATE OF MINNESOTA

IN SUPREME COURT

Joan Growe, et al.,

Petitioners,

vs.

Steve Simon, Minnesota Secretary of State,

Respondent.

RESPONDENT STEVE SIMON'S BRIEF

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Attorney for Respondent Republican Party Minnesota

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LEGAL ISSUES

I. Do Petitioners have standing to bring the petition?

The Court raised this issue in its September 20 order.

Most apposite authorities:

Minn. Stat. § 204B.44 (2022)

League of Women Voters Minn. v. Ritchie, 819 N.W.2d 636 (Minn. 2012)

Clifford v. Hoppe, 357 N.W.2d 98 (Minn. 1984)

II. Is the petition ripe for adjudication?

The Court raised this issue in its September 20 order.

Most apposite authorities:

Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611 (Minn. 2007)

Dean v. City of Winona, 868 N.W.2d 1 (Minn. 2015)

State v. Rud, 359 N.W.2d 573 (Minn. 1984)

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STATEMENT OF THE CASE

Petitioners invoked this Court's original jurisdiction under Minn. Stat. § 204B.44, asking the Court to (1) declare that Donald J. Trump is disqualified from holding the office of President of the United States and (2) direct Respondent Secretary of State Steve Simon to exclude Trump's name from the ballot for Minnesota's presidential nomination primary in March and its general election in November.

The Court directed the parties to file briefs addressing standing, ripeness, and the interpretation and application of Section 3 of the Fourteenth Amendment to the U.S. Constitution.

STATEMENT OF FACTS

Minnesota will hold a presidential nomination primary on March 5, 2024. *See* Minn. Stat. § 207A.11(b) (2022) (addressing date for presidential nomination primary). Major political parties in the state wishing to participate in the primary are required to submit the names of the candidates that will appear on their respective primary ballots no later than January 2. *See id.* § 207A.13, subd. 2(a) (2022). In the 2020 election cycle, the two participating parties submitted their candidate lists months before the deadline. *See, e.g.*, *De La Fuente v. Simon*, 940 N.W.2d 477, 481 (Minn. 2020) (noting that Republican Party of Minnesota submitted candidate list for 2020 presidential nomination primary in October 2019). The Secretary, however, has no knowledge regarding when the parties will transmit their lists in the 2024 cycle.

In September 2023, Petitioners asked this Court to hold that an anticipated candidate for the Republican Party presidential nomination is ineligible to appear on ballots in

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Minnesota because he is disqualified from office under Section 3 of the Fourteenth Amendment.

Because of the deadlines in state and federal law, Minnesota election officials must provide printed ballots and programmed assistive voting equipment to voters no later than January 19, 2024. *See* Minn. Stat. §§ 203B.081, subd. 1; 204B.35, subd. 4; 204B.45, subd. 2; 207A.12(a) (2022); Maeda Decl. ¶ 5. To meet this deadline, election officials must have the final list of candidates for the presidential primary ballot no later than the close of business on Friday, January 5, 2024. (Maeda Decl. ¶¶ 10-12.)

ARGUMENT

The Secretary agrees with Petitioners that they have standing to bring this petition and that the issues raised in the petition are ripe for adjudication. He takes no position, however, on the further issues the Court referenced in its September 20 order regarding the interpretation and application of the Fourteenth Amendment. (*See* Order ¶ 3(2).)

The question presented by the petition is of extraordinary importance. Minnesota election officials have a pressing need to see the question resolved within the limited time remaining before the January 5 deadline—which promises to be a tall order if the Court determines, as it has in other recent cases involving candidate eligibility, that a fact-finding hearing before a special master is necessary in this matter. As a result, the Secretary asks the Court to hear and rule on the merits of the petition so that the county and local officials at the core of the state's election system can conduct the presidential primary in the orderly and professional fashion that Minnesotans expect and deserve.

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I. SECTION 204B.44 GRANTS PETITIONERS STANDING TO BRING THE PETITION.

Standing is the requirement that a party have a sufficient stake in a controversy to seek relief from a court. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). A suit brought by an entity that lacks standing must be dismissed. *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 497 (Minn. 1996). Under Minnesota law, a plaintiff can acquire standing in two ways: by alleging that they have suffered an "injury-in-fact" or by demonstrating that they are the beneficiary of a legislative enactment granting standing. *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharm*acy, 221 N.W.2d 162, 165 (Minn. 1974).

Petitioners brought their petition under Minn. Stat. § 204B.44, which authorizes "[a]ny individual [to] file a petition . . . for the correction of" particular errors and omissions related to elections. Minn. Stat. § 204B.44(a) (2022); Pet. 1, 6 ¶ 25. The statute thus grants standing to a wide variety of persons and organizations. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012). There can be no serious dispute that Petitioners, all of whom allege they are Minnesota voters, are within the class of entities who possess statutory standing to bring the petition. *See id.*; *see also Clifford v. Hoppe*, 357 N.W.2d 98, 100 n.1 (Minn. 1984) (holding that "a registered voter has a sufficient interest in the election" to sustain Minn. Stat. § 204B.44 petition); *Moe v. Alsop*, 180 N.W.2d 255, 257 & n.1 (Minn. 1970) (holding, before creation of section 204B.44,

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that any "person qualified to vote" had standing to challenge eligibility of candidate on ballot).[1]

II. THE PETITION IS JUSTICIABLE.

If the underlying eligibility issue in this case is not resolved in a timely manner, it runs the risk of interfering with the orderly administration of the state's elections. As a result, in light of (1) the lack of any real ambiguity regarding whether the state Republican Party will select Donald Trump as one of its candidates for the March presidential nomination primary and (2) Minnesota election officials' pressing need to receive the final lists of certified candidates to appear on primary ballots, the petition is both ripe and justiciable. Even if the Court holds that Petitioners' claims are technically unripe, it should hear and decide those claims nonetheless pursuant to the "functional justiciability" standard it has adopted for technically moot issues that are presented under similarly important and exigent circumstances.

A. The Petition is Ripe for Adjudication.

Minnesota courts may only hear and decide legal claims that are justiciable—that is, claims that (1) involve "definite and concrete assertions of right that emanate from a

---

[1] State law balances the broad grant of statutory standing in section 204B.44 by placing narrow subject-matter restrictions on the kinds of alleged errors and omissions that are subject to correction under the statute. *See, e.g.*, *Begin v Ritchie*, 836 N.W.2d 545, 548 (Minn. 2013) (holding that statute "does not embrace claims based on conduct that may only generally implicate elections"); *Minn. Majority v. Ritchie*, No. A09-950, at 5 (Minn. filed Jul. 22, 2009) ("[T]he plain language of the statute requires that the claim relate to a duty concerning a specific election."). But because the instant petition unquestionably seeks "correction of [a] ballot and directly related election procedures," *see Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008), the petition fits within these subject-matter limitations.

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legal source," (2) involve a "genuine conflict in tangible interests between parties with adverse interests," and (3) are "capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007). This Court does not issue advisory opinions, nor does it "decide cases merely to establish precedent." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002). Legal claims can be non-justiciable if, among other things, they are brought too soon (rendering them unripe) or if they are brought too late for the court to provide effectual relief (rendering them moot). *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981).

A case is ripe when it presents "a substantial and real controversy between the parties" that is based on a "direct and imminent injury." *State v. Murphy*, 545 N.W.2d 909, 917 (Minn. 1996). Issues that "have no existence other than in the realm of future possibility" are "purely hypothetical" and are therefore not justiciable. *Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949). Finally, this Court does not apply ripeness or other justiciability doctrines "mechanically"; instead, it examines all facts and circumstances that support or cut against accepting jurisdiction over a legal dispute. *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015).

Petitioners' claims meet the requirements that this Court has recognized for a justiciable controversy. Specifically, the claims involve definite and concrete assertions of right that emanate from Minn. Stat. § 204B.44 and Section 3 of the Fourteenth Amendment; they involve a genuine conflict in tangible interests between Petitioners, the Intervenor-Respondent Minnesota Republican Party, and Donald Trump, who are parties

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with adverse interests; and they are capable of specific resolution by the Court's judgment rather than presenting hypothetical facts that would form an advisory opinion. *See Onvoy*, 736 N.W.2d at 617-18.

Although Intervenor-Respondent Minnesota Republican Party has not, to date, submitted a list of presidential nomination primary candidates to the Secretary that includes Donald Trump, that event cannot be characterized as hypothetical. As alleged in the petition, it seems certain that the state Republican party will name Trump as one of the candidates it desires to include on the March primary ballot. (*See, e.g.*, Pet. ¶¶ 1, 315.) There is therefore no meaningful risk that this Court's decision on the legal issues addressed by the other parties will be an advisory opinion. *Cf. Onvoy*, 736 N.W.2d at 617-18. Meanwhile, Minnesota election officials' countervailing need to have these legal questions resolved in time for them to conduct the nomination primary in an orderly fashion counsels strongly in favor of erring on the side of addressing the merits.

For these reasons, the non-"mechanical" analysis of justiciability that this Court conducts, *see Dean*, 868 N.W.2d at 5, leads to the conclusion that Plaintiffs' claims are ripe and therefore justiciable. The petition describes a live and current dispute, and as a result this Court can hear it without delay.

B. Even If It Were Not Ripe, the Court Can Hear the Petition Because It Is Functionally Justiciable and Presents an Important Question of Statewide Significance that Must Be Decided Immediately.

One important consequence of this Court's non-mechanical approach to justiciability is that some legal claims, though they are technically moot, are nonetheless properly subject to adjudication by Minnesota courts. When a case is "functionally

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justiciable" and also presents an important question of statewide significance that must be decided immediately, this Court has discretion to hear it even if it is formally moot. *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984); *see also Snell v. Walz*, 985 N.W.2d 277, 284 (Minn. 2023). If the fact that the Republican Party has not yet submitted its primary candidates to the Secretary leads the Court to conclude Petitioners' claims are unripe, the facts of this case support recognizing a functionally identical limited exception to the ripeness standard. The Court should hold that, under very rare circumstances like these, it has discretion to hear formally unripe claims.

Mootness is the temporal mirror image of ripeness. A case must be dismissed as moot when a decision on the merits is no longer necessary or a court can no longer award effective relief. *Pfoser v. Harpstead*, 953 N.W.2d 507, 514 n.4 (Minn. 2021). This Court, however, has recognized a narrow exception to mootness that grants the Court discretion to hear a formally moot case if

1. The action is "functionally justiciable"—that is, the record contains sufficient material to permit effective judicial analysis, including substantive presentations of both sides of the relevant issues—and
2. The issues presented are "important public issues of statewide significance that should be decided immediately."

Rud, 359 N.W.2d at 576. In the narrow range of cases that meet the above criteria, judicial resolution of questions that are technically moot is necessary to prevent serious adverse effects on the state and its judicial system. *See, e.g.*, *In re Guardianship of Tschumy*, 853 N.W.2d 728, 741 (Minn. 2014) (applying exception to formally moot case because of

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pressing need to clarify scope of guardians' authority to consent to remove their wards from life support); *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) (applying exception to consideration of formally moot issue related to cash bail because rejecting appeal risked creating "a class of defendants with constitutional claims but no remedy"); *Rud*, 359 N.W.2d at 576 (applying exception because "a failure to decide [formally moot issues] now could have a continuing adverse impact in other criminal trials if trial judges were to rely on the Court of Appeals' decision").

The criteria that define the mootness exception recognized in *Rud* very rarely apply to legal claims that are unripe, because it is only under extraordinary circumstances that (1) a particular legal issue is nominally unripe *but nonetheless* (2) it has been briefed in such depth, from multiple sides, that it is functionally justiciable *and* (3) it requires resolution immediately to avoid serious consequences on a matter of statewide significance. In other words, extending the functional-justiciability exception to mootness so that it also applies to ripeness would impact only an extremely narrow class of actions. Regardless, the policy justification for recognizing this Court's discretion to hear unripe claims under these circumstances is no different than the justification for the mootness exception: there is no reason to inflict damage on Minnesotans by failing to reach highly consequential legal issues that are well within the Court's ability to resolve without delay.

Though few disputes would fall within a functional-justiciability exception to the ripeness rule, this case clearly does so. The current litigation is functionally justiciable, because the Court has received extensive briefing on all relevant legal issues from parties and amici and because there currently remains sufficient time for a special master to resolve

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any genuine disputes of material fact.[2] Moreover, under the current circumstances, the eligibility of presidential candidates to appear on ballots in Minnesota's presidential nomination primary is a vital issue of statewide concern that requires immediate resolution. Minnesota's election officials need the legal issues raised in the petition answered so that they can conduct the March primary in an orderly and professional fashion.

For these reasons, if the Court determines that Petitioners' claims are not yet ripe, the Secretary requests that the Court extend the functional justiciability mootness exception to unripe cases as well. Under that exception, the Court can and should exercise its discretion to hear the petition so that Minnesota election officials can receive clear instructions regarding the contents of the March primary ballot no later than January 5.

CONCLUSION

For the above reasons, the Secretary requests that the Court hold that Petitioners have standing to bring the claims in the Petition and that those claims are ripe for adjudication. In the alternative, the Secretary requests that the Court find the case is functionally justiciable and decide it immediately.

---

[2] The potential need for special-master proceedings is a key element of the time pressure in this matter. There is currently sufficient time before ballot-printing must begin for a special master to conduct an evidentiary hearing and issue findings of fact and then allow the matter to return to this Court for final resolution. If, however, the Court dismisses the petition as unripe and thus forces Petitioners to wait and re-file only when the state Republican party elects to submit its list of presidential primary candidates, it is likely that there will be too little time remaining for any such process to be completed before January 5.

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Dated: October 18, 2023

Respectfully submitted,

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CC: Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: 14.3 "self-executing" issue
Attachments: Baude & Paulsen.pdf; In re Griffin[15].pdf; Blackman & Tillman.pdf

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Heather and Erik,

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I hope this is helpful.

Best,

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude & Michael Stokes Paulsen

Abstract: Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This article corrects those mistakes by setting forth the full sweep and force of Section Three.

First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. *Second*, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. *Third*, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. *Fourth*, Section Three covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support as "aid or comfort." It covers a broad range of former offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.

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The Sweep and Force of Section Three

172 U. PA. L. REV. (forthcoming 2024)

William Baude* & Michael Stokes Paulsen**

Introduction

"Section 3 has long since faded into history."
- Eric Foner[1]

Reports of Section Three's demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force, and has a broad substantive sweep.

Here is what it says:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War.

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[1] Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 85 (2019).

[2] U.S. Const. art. XIV, sec. 3.

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States in the South had purported (unconstitutionally)[3] to secede from the Union; they had purported to form the (so-called) "Confederate States of America" in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). The former Confederates who arrived in Washington included "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[4]

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective "reconstruction" of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in "insurrection or rebellion" against the U.S. constitutional authority or given "aid or comfort" to its enemies. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.[5] The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting

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[3] See infra note 231 and sources cited there.

[4] Akhil Reed Amar, America's Constitution: A Biography 377 (2005); see also Eric L. McKitrick, Andrew Johnson and Reconstruction 176-179 (1960); Allen C. Guelzo, Reconstruction: A Concise History 25 (2018).

[5] The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment.. 87 (2021); Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, Lawfare (Jan. 19, 2021), available at https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.

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and immediate incitement of a mob to attempt to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'etat. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an "insurrection" aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have foundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process and free speech? And if Section Three *does* apply—*to what and to whom?* What actions count as having "engaged in insurrection or rebellion" against the Constitution of the United States or having "given aid or comfort to the enemies thereof"? Which officials are covered by Section Three's exclusions?

This article attempts to answer these questions. It makes four key points (or clusters of points):

First. Section Three remains legally operative. It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

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Nor has Section Three somehow been "repealed" by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; Congressional amnesty is retrospective.

Second. Section Three is legally self-executing. That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to justiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,[6] is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them. Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden Ex Post Facto law or Bill of Attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

[6] 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

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This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or giving "aid or comfort" to "the enemies" might turn out to be in tension with the First Amendment's protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three's terms ("insurrection," "rebellion," "aid or comfort," "enemies") will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article's fourth and final group of points:

Fourth. Section Three's disqualification is sweeping in its terms. It disqualifies from future office-holding persons who "*engaged in*"—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms "*insurrection or rebellion*" or the giving of "*aid or comfort*" to "*enemies*" of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three's prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text's meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in insurrection or rebellion or giving aid or comfort to enemies of the lawful constitutional order.

I. Section Three is Legally Operative Today

A. The Generality and Presumptive Perpetuity of Constitutional Language

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The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."[7]

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.[8] It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral," way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and

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[7] Eric Foner, Reconstruction, 1863-1877, at 260 (1988).

[8] Mark Graber, Punish Treason, Reward Loyalty: The Forgotten Fourteenth Amendment, Volume 1 (2023, University Press of Kansas).

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generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.[9]

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter that the drafts*men* of the amendment might not have had women "in mind" if women are covered by the meaning of the words they actually wrote and ratified.[10] Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.[11] The answers to each of these questions turn on the objective, original

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[9] See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L. J. 1113, 1124-1148 (2004); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 Nw. U. L. Rev. 857, 872-883 (2009); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U Pa. L. Rev. 609, 624-625 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1456-1460 (2019). For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

[10] We have used such examples before. Paulsen, *Rules for Its Own*, supra note 9, at 901-902; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1421 n. 68 (2014); William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment* , 76 Stan. L. Rev. at 67-68 (forthcoming 2024).

[11] We have used this example before, too. Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 839-840 (1993); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2380-2381 (2015). See also Baude, Campbell, & Sachs, supra note 10, at 66.

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meaning of "privileges or immunities of citizens of the United States" and "equal protection of the laws," not whether the 1866 Congress and subsequent ratifiers had thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment's terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn't matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,[12] it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase "insurrection or rebellion.")[13] But in the end the question is what rule was enacted. If Section Three's rule fell short somehow, missing some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.[14]

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[12] Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section's application to the "late insurrection." Later versions dropped this limitation and generalized Section Three's application to "insurrection" and "rebellion." See Cong. Globe, 39th Cong., 1st Sess., at 2767-68, 2770 2869, 2921; see also Mark A. Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished chapter, forthcoming in The Forgotten Fourteenth Amendment, Volume 2, University Press of Kansas) (documenting this development).

[13] Infra Part IV.A.

[14] See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 908-909 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J. L. & Pub. Pol'y (forthcoming 2023) ("Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation."). For an extended discussion of the abuse of arguments

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Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is "old" does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.[15] There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as "the interest in sovereignty fades."[16] But in our view, this just shows what is wrong with such living constitutionalism.[17] The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.[18] But sometimes we wonder if this kind of denial is sneaking in to people's intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive as the day it was enacted.

B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)

But what about this? The second sentence of Section Three provides that Congress "may by vote of two-thirds of each House, remove such disability."[19] Just as the first sentence's disqualification is not limited specifically to the Civil War, neither is Congress's power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put

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from inconvenience, see infra Part II.C.2.a (discussing Chief Justice Chase's appalling opinion in *Griffin's Case*).

[15] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1486-1490 (1997) (discussing privilege against self-incrimination).

[16] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 58 (2015); see also Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295 (2008).

[17] See Baude & Sachs, *Grounding*, supra note 9, at 1487 (responding to Strauss).

[18] For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 Clarence Cannon, Cannon's Precedents of the House of Representatives 55 (1935) ("It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision cannot possibly apply to the present case").

[19] U.S. Const. amdt. XIV, sec. 3.

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more vividly: Can Congress, by two-thirds vote of each house, essentially "explode" Section Three—render it inoperative in the future, for all time?

These questions turn out not to be completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed "from all persons whomsoever"—except designated categories of individuals—all "political disabilities imposed" by Section Three.[20] Another (from 1898) further removed "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred."[21] And indeed, in a recent case (brought by then-Representative Madison Cawthorn) a federal judge relied on these statutes to conclude that Section Three was now legally dead.[22] Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?[23]

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 act. In 1872, after a period of case-by-case consideration of amnesty requests, Congress, as mentioned above, enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.[24] But what is most important is what it says. The statute reads, in full:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein),* That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-

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[20] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[21] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[22] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 889-892 (E.D. N.C. 2022) rev'd sub nom Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022). This argument, too, was made and rejected by the House during the exclusion of Victor Berger. 6 Cannon, supra note 18, at 55.

[23] The power in general of Congress by two-thirds vote of each House to remove Section Three's disability and the history of its exercise are the central themes of Professor Gerard Magliocca's excellent article, cited supra note 5.

[24] See generally Magliocca, *Amnesty*, supra note 5, at 112-120.

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> seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.[25]

The key words are "imposed" and "[hereby] removed." The words of the 1872 statute are used in the past tense: the statute *removed* disqualifications *imposed* by the Fourteenth Amendment—that is, disabilities that had already become legally effective. That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the district court's decision in the *Cawthorn* case: Congress in 1872 employed "the past-tense version" of the verb "impose," thus "indicating its intent to lift only those disabilities that had by then been 'imposed.'"[26] Moreover, the Fourth Circuit continued: "[t]he operative clause's principal verb—'removed'—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come."[27]

By contrast, the district court had faulted Congress for not being more explicit: Congress "could have limited the Act to remove Section 3's disabilities from 'persons currently subject to the disabilities' or 'persons against whom the disabilities were lodged' at the time (i.e., the 'Confederates') but did not do so."[28] Therefore, the district court concluded, by the "plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted."[29] With all due respect, the district court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the "all persons whomsoever" language and completely missed the other language that made clear the statute's past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish-American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances (and, one might add more cynically, at a time of rising Jim Crow sentiment)[30]—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

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[25] Act of May 22, 1872, ch. 193, 17 Stat. 142.
[26] Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022).
[27] Id.
[28] Cawthorn v. Circosta, 590 F. Supp. 3d 873, 891 (E.D. N.C. 2022) rev'd sub nom Carthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022).
[29] Id.
[30] See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Cummings v. Richmond County Bd. of Ed. 175 U.S. 528 (1899). See also Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 195-201 (2015).

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.[31]

In one sense, that's about as categorical, across-the-board a disqualification-removal as one can imagine: *the* disability *imposed* by section three *is hereby removed.* Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses past-tense language: a disability (already) "imposed" is now being "removed" from its prior legal existence. What's more, the 1898 act says that the Section Three disqualification being removed was one "*heretofore incurred*." That is unmistakably backward-looking, past-occurrence language.

What might otherwise—that is, but for the clarity of the "heretofore incurred" language—give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as any and all extant ones, is the Act's reference to "*the* disability" imposed by Section Three. This singular reference might be taken to suggest that Section Three's disqualification was thought a one-time-only, single-shot, Civil War era occurrence.[32] If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was[33] (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress's constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress's constitutional power to remove Section Three's disqualification general and prospective, letting it remove Section Three's disqualification once and for all, including for future situations? We think not.

To be clear, we don't think there's anything inherently unthinkable or absurd about the idea of an "exploding" or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration

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[31] Act of June 6, 1898, ch. 389, 30 Stat. 432.

[32] For instance, the D.C. Circuit's recess-appointments opinion in Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013) aff'd only on alternate grounds, 134 S.Ct. 2550 (2014), leaned heavily on "this difference between the word choice 'recess' and 'the Recess'," arguing that "[a]s a matter of cold, unadorned logic, it makes no sense to [say] that when the Framers said 'the Recess,' what they really meant was 'a recess.' This is not an insignificant distinction. In the end it makes all the difference." Id. But a majority of the Supreme Court did not share this view of the text. NLRB v. Noel Canning, 134 S.Ct. 2550, 2561 (2014).

[33] For the brief legislative history of the 1898 act, see 31 Cong. Rec. 5367-5419 (1898).

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date, even in an enduring Constitution. Article I's Slave Importation Clause, protecting the international slave trade, exploded after twenty years.[34] So too the initial allocation of representatives to states is written in to the text of the Constitution, even though it was then exploded by the subsequent census.[35] Other provisions of the Constitution set baseline rules that Congress has power to modify. Article I, section 4 does that with respect to state legislative power over congressional elections: "Congress may at any time by Law make or alter such Regulations."[36] Article III, section 2 does that with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."[37] The Twentieth Amendment, in Section 2, sets a default date of Congress's annual meeting.[38]

There's no reason why the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the provision's own extinction after a supermajority vote of Congress.[39] But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course, those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

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[34] U.S. Const. art. I, §9, cl. 1. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") For a scathing critique of the substance and purpose of this proviso, see, e.g., Paulsen & Paulsen, supra note 30, at 81-83.

[35] U.S. Const. art. I, § 2, cl.3.

[36] U.S. Const. art. I, § 4.

[37] U.S. Const. art. III, § 2, cl. 2.

[38] U.S. Const. amend. XX, §2.

[39] We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST – Academic Commentary, April 13, 2022, https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/. See also Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("'Congress has no power whatever to repeal a provision of the Constitution by a mere statute'") (quoting 6 Cannon, supra note 18, at 55).

This strikes us as not quite right: *If* Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

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The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." (*"But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "Remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.[40] This confirms that Congress's removal power therefore only comes into being when a legal disqualification has vested by virtue of the operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

* * *

All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect by U.S. political actors whose powers and duties are such as to call for application of Section Three as a rule of law? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

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[40] Dr. Webster's Complete Dictionary of the English Language 1116 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (defining "remove" as "To cause to change place; to move away from the position occupied; to displace") (quoted in Cawthorn v. Amalfi, 35 F. 4th 245, 258 (4th Cir. 2022)).

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II. Section Three is Legally Self-Executing

Our second point is colossally important—a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient, rejected in the highest quarters, and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself, and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation-of-powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

A. Section Three as Automatic Legal Disqualification

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,[41] in doing so they put the cart before the horse. The horse is the Constitution, which is itself the "supreme law of the land."[42] Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. Section Three's language is language of automatic legal effect: "*No person shall be*" directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall

[41] But not ours! See Paulsen, McConnell, Bray and Baude, The Constitution of the United States (5th ed. 2022).
[42] U.S. Const. art. VI.

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be.[43] It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.[44] The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President. And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, section 2's requirements.[45] "*No Person shall be*" a U.S. Senator who does not meet Article I, section 3's requirements.[46] These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three of the Fourteenth Amendment parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.[47] None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist* ...," the Thirteenth Amendment provides.[48] The institution of slavery was *immediately, legally, constitutionally gone*.[49] The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.[50] But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative. Such a

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[43] We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 84 U. Chi. L. Rev. 203, 211 (1997) ("The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.")

[44] U.S. Const. art. II, §2, cl. 5 (emphasis added).

[45] U.S. Const. art. I, §2, cl. 2(emphasis added).

[46] U.S. Const. art. I, §3, cl. 3 (emphasis added).

[47] See Josh Chafetz, Democracy's Privileged Few 168 (2007).

[48] U.S. Const. amend. XIII §1 (emphasis added).

[49] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 48–53 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

[50] U.S. Const. amend. XIII §2 ("Congress shall have power to enforce this article by appropriate legislation.").

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position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment too. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three states directly operative rules of constitutional law: "No state shall," in Section One, and "No person shall" in Section Three.[51] Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks (for example) that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation "to enforce" the Thirteenth and Fourteenth Amendments' commands, pursuant to their grants of legislative power.[52] Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress's view of the law, and so on. The Civil Rights Act of 1866, the Ku Klux Klan Act of 1871 and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But, to repeat, the existence of an enforcement power does not mean that the Amendment's specific legal commands lack any independent, self-executing force.[53]

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing *quo warranto* civil suits brought by the United States to remove state officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.[54] But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction

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[51] U.S. Const. amdt XIV, sec. 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. Section Two, which alters Article I, section 2's rule for how Representatives "shall be apportioned," presents a more complicated case. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. In practice, Congress has ignored it, see Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 Hist. Meth. 57 (2013); Amar, America's Constitution, supra note 4, at 395; see also email from John Harrison to Akhil Reed Amar, quoted in id. at 611 n. 96, and it is hard to see how anybody else can realistically enforce it.

[52] U.S. Const. amdt. XIII, sec. 2; amdt. XIV, sec. 5.

[53] Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. Baude, Campbell, & Sachs, supra note 10, at 30-31, 63-64.

[54] Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§14, 15, 16 Stat. 140, 143. The criminal prohibition in Section 15 of the Act was repealed in the 1909 codification of the penal code, 35 Stat. 1088, 1153, § 341 (1909), and the quo warranto provision in Section 14 was repealed during the 1948 positive law codifications of Title 28 of the U.S. Code, see Act of June 25, 1948, ch. 646, § 39; see also Lynch, supra note 5, at 206 n. 365. Neither of these codifications was thought to make a substantive change by repealing these provisions, see generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1949); see also The United States Compiled Statutes, Title XIX, page 4459 (1916), which were

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for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.[55] Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[56]

Note the contrast. The Treason Clause defines an *offense* ("Treason . . . shall consist") but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification ("No person shall be"). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: "[C]onvict[ions] of treason" require two witnesses or a public confession; and "Congress shall have power to declare the punishment of treason." Section Three of the Fourteenth Amendment, by contrast enacts its standard and imposes its consequences all at once.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."[57] But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.[58] Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a

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thought obsolete by then. The repeals therefore certainly did not reflect a decision to preempt or preclude any *other* existing remedies for Section Three.

[55] Professor Magliocca concurs. Magliocca, *Amnesty*, supra note 5, at 106 & n.101 (noting that "enacting enforcement legislation does not imply that legislation is required" and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. See infra Part II.C.

[56] U. S. Const. art. III, sec. 3.

[57] U.S. Const. art. II, sec. 4.

[58] U.S. Const. art I, sec. 3 & sec. 4.

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noticeably different path.[59] Section Three does not call for treason *trials* or the *impeachment* of insurrections and rebels. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.[60] It immediately became "supreme Law of the Land." [61] Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.[62] It is pretty obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of "insurrection" and "rebellion" and so on—and these meanings are not quite as self-evident as "thirty-five years of age" (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*.

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[59] Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. For opponents, see Cong. Globe 39th Cong., 1st Sess., at 2900 (Senator Doolittle) (amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions"); id. at 2916 (Senator Doolittle); id. at 2940 (Senator Hendricks) (complaining about immediate consequences); for proponents, see id. at 2919 (Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct'); id. (they lost their "citizenship rights when they committed treason"); Cong. Globe 39th Cong., 1st Sess., App., at 228 (Senator Defrees); Cong. Globe, 39th Cong., 1st Sess. at 3036 (Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law); see generally infra Part III.A-B. See also Graber, supra note 12, at 26-27, 35-37 (documenting all of these discussions) .

[60] U.S. Const. art. V.

[61] U.S. Const. art. VI, cl. 2.

[62] See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, at 14 n.42 (Mar. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards"). On the other hand, the Constitution's *inhabitancy* requirement, has proved far from simple in practice. See Jack Maskell, Congressional Research Service, Qualifications of Members of Congress (Jan 15, 2015) at 13-18, https://sgp.fas.org/crs/misc/R41946.pdf. And there has been recent litigation about the requirement that the President be a "natural born citizen" as well. See Derek T. Muller, *"Natural Born" Disputes in the 2016 Election*, 85 Fordham L. Rev. 1097 (2016).

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Not all participation in insurrection or rebellion is open and notorious. More difficult it may be, to interpret and apply the disqualification of Section Three than the disqualifications of age, citizenship, and residency. But the fact of difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.[63] The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.[64]

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non-sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions, maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

B. Who (All) Can (Must) Faithfully Apply and Enforce Section Three?

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But in principle: Section Three's disqualification rule may and must be followed—applied, honored, obeyed, enforced, carried out—by anyone whose job it is to figure out whether someone is legally qualified to office, just as with any of the Constitution's other qualifications.

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[63] Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J. L. Ethics & Pub Pol'y 497, 511-512 (2018).

[64] Cf. Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 839 (1993) (mocking constitutional interpretation that engages in "the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment"); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

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These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to "activate" Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

1. Seeking Office

a. by election

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state-law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on a primary or general election ballot.[65] Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.[66] Accordingly, such state actors can and must apply Section Three's disquali-

[65] To be sure, the centralized, government-administered ballot did not come to American until the late Nineteenth Century and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

[66] U.S. Const. art. VI, cl.2 ("This Constitution ... shall be the supreme Law of the Land"). See also U.S. Const. art. VI, cl.3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for "judicial review," as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); see also William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5-9 (2023).

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fication in carrying out their state-law responsibilities—just as they possess the authority and duty to comply with and enforce the Constitution's other qualification-for-office requirements.[67]

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene's involvement in the events of January 6, 2021.[68] The judge proceeded under the theory that if January 6 was a constitutional "insurrection," and if Representative Greene had been part of it, she would be barred from office.[69] But it concluded that the challengers had failed to meet their burden of proof under state law: "In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took any action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021."[70] Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer's proposed findings that day.[71]

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene's claims failed on the merits.[72] While Greene's appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.[73] The

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[67] We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, section 5, powers to act as "Judge" of the "Elections, Returns, and Qualifications of its own Members" and refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitation. See also infra n. 96 and accompanying text.

[68] Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022).

[69] Id. at 5-6.

[70] Id. at 15. The January 3, 2021 cut-off is because that is the date that Representative Greene first took a constitutional oath. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a "coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol." Id. at 16.

[71] Final Decision, Rowan v. Greene, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022).

[72] Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1320 (N.D. Ga. 2022).

[73] Greene v. Sec'y of State for Georgia, 52 F.4th 907, 909-910 (11th Cir. 2022).

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details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[74] In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots in to existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court's muddied reasoning in the Finchem-Gosar-Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates."[75] This inference is mistaken—Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.[76]

Second, in some circumstances state law not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,[77] where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: "[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing

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[74] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[75] Id. at *1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in Griffin's Case, which we discuss at greater length presently. See infra Part II.C.2.d. The Arizona Supreme Court also made the additional suggestion that Article I, Section 5 gave Congress "exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members," id. We are skeptical of this point as well, see infra n. 96 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

[76] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); id. at 469- 470 (Scalia, J., concurring); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* (May 29, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807.

[77] 330 U.S. 386 (1947).

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in the Constitution or Laws of any State to the contrary notwithstanding."[78] And thus "the policy of the federal Act is the prevailing policy in every state."[79] A state cannot treat federal obligations the way it can treat foreign ones.

The Arizona Supreme Court's decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state "statute's scope is limited to challenges based upon 'qualifications . . . as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office."[80] If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three's dis-qualification is not a "qualification," that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified to office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. by appointment

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally this includes at a minimum whoever nominated the officer.[81] Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three.* And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.[82]

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[78] Id. at 391 (quoting U.S. Const. Art VI, sec. 2).

[79] Id. at 393. To be sure, *Testa* and especially subsequent cases expanding it have been subject to powerful criticisms as a matter of original meaning, see Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 78-83, 97-105 (2020); Haywood v. Drown, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

[80] Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. Supreme Ct. May 9, 2022) (nonprecedential disposition).

[81] For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, sec. 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 330, 333-334, 355-356 (2019).

[82] See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?* 46 Stanford L. Rev. 907, 914-918 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *Black*, supra note 81, at 355-356 (similar); see also Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105

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In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate's eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?[83]

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully-disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.[84]

For an example of how this process is supposed to work consider how the state of New Mexico removed commissioner Couy Griffin from state office.[85] Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and

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Yale L.J. 549, 562-570 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 658-660 (1970) (similar).

[83] Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See infra at II.C.

[84] Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See supra notes 72-73 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

[85] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

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ultimately joined in the January 6 insurrection against the Capitol. A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office. The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three. More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.[86]

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.[87] It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same "standing" limitations as the federal courts are. As a matter of federal law, the court had no trouble concluding that the events of January 6. 2021 were a constitutional "insurrection." And it had no trouble concluding that Griffin had engaged in that insurrection, both by "voluntarily aid[ing] the insurrectionists' cause by helping to mobilize and incite" the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.[88] The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three's disqualification in doing so.[89] Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

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[86] Id. at 46. The New Mexico Supreme Court dismissed Griffin's appeal on procedural grounds. NO. S-1-SC-39571 (N.M. Sup. Ct. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: an attempt to remove the state action to federal court, State ex rel. White v. Griffin, 2022 WL 1707187 (D.N.M. May 27, 2022) (denying removal because of plaintiffs' lack of Article III standing) and a separate parallel suit attempting to enjoin the state proceedings, Griffin v. White, 2022 WL 2315980 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

[87] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473, at 24-25 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[88] Id. at 35-38.

[89] The availability of a federal quo warranto action is curiously codified in the D.C. Code, §§ 16-3501-02. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. See Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984); Drake v. Obama, 664 F.3d 774, 784-785 (9th Cir. 2011); SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 81 (D.C. Cir. 2015), aff'd, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. Hill v. Mastriano, No. 22-2464, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022). See also Hill v. Perry, No. 22-2465, 2023 WL 3336648, at *1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

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But in general: wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.[90]

Finally and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.[91] A regulated entity can challenge the actions of an executive official who holds office improperly.[92] Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the "de facto officer doctrine," (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to "Judge of the Elections, Returns, and Qualifications" of "its own Members."[93] Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional

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[90] An officeholder who has engaged in insurrection or rebellion or given aid or comfort to enemies of the United States has surely committed a "high Crime or Misdemeanor" within the meaning of Article II, section 4's description of the scope of the impeachment and removal power. See generally Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 Harv. L. Rev. 689, 698-702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President's removal authority as Commander in Chief. Whether Congress could supplement that authority through appropriate legislation is an interesting question. See Zachary Price, *Congress's Power Over Military Offices*, 99 Tex. L. Rev. 291 (2021).

[91] Nguyen v. United States, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *Black*, supra note 81, at 346-47.

[92] Buckley v. Valeo, 424 U.S. 1, 8–9 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 668 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487–88 (2010); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014); see also Baude, *Severability*, supra note 66, at 36-37.

[93] U.S. Const. art. I, sec. 5, cl. 1.

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backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,[94] that Congress cannot *create new* "Qualifications" and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house's judgment about whether the *existing*, *constitutional*, qualifications have been satisfied.[95]

Some have argued that each house's judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.[96] With respect, we do not agree with this argument. As a logical matter, each house's right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the "manner" of elections, which includes ballot eligibility.[97] In our view, the better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

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[94] 395 U.S. 486 (1969).

[95] See Powell, 395 U.S. at 520 n. 41 (reserving the possibility that Section Three disqualification is a qualification); see also P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 114-115 (1968) (cited in id. at n.41) (arguing that it is); Powell, 395 U.S. at 521 n.42 (noting that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications"). We emphasize that questions of interpretation and application of Section Three are not *in general* "political questions" that cannot be decided by federal courts, simply because they have political consequences. Where the Constitution supplies a rule, and the rule's application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the "Judge" of the "Elections, Returns, and Qualifications" of its own Members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

[96] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 594-598 (2015); see also Cawthorn v. Amalfi, 35 F.4th 245, 267-273, 282-284 (4th Cir. 2022) (Richardson, J., concurring); Greene v. Sec'y of State for Georgia, 52 F.4th 907, 912-916 (11th Cir. 2022) (Branch, J., concurring).

[97] U.S. Const. art. I, sec. 4. The same Clause also gives Congress the power to "make or alter" such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-275 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an attempt to impose a qualification *not contained in the Constitution*. E.g., *U.S. Term Limits*, 514 U.S. at 784, 787-788, 806-815. It

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The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[98] So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.[99] As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Additionally, Article I's Speech and Debate Clause provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."[100] This means that to the extent that the conduct that violates Section Three was a member of Congress's official statements or legislative actions,[101] each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three.

Federal judges hold their offices during "good Behaviour."[102] What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?[103] As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"[104] conduct meeting Section Three's standard disqualifies a federal judge from office.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is

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follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

[98] U.S. Const. art. I, sec. 5, cl. 2.

[99] There is some debate whether Congress can expel a member for conduct that occurred before being elected. See Chafetz, Democracy's Privileged Few, supra note 47, at 210-212 (recounting arguments on both sides but arguing that it can); Jack Maskell, Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 4-7 (2016) https://sgp.fas.org/crs/misc/RL31382.pdf (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

[100] U.S. Const. art. I, sec. 6, cl. 1.

[101] As we elaborate later, we think it is quite rare that such conduct could violate Section Three, even on its own terms.

[102] U.S. Const. art. III.

[103] Cf. Ex parte Milligan, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.").

[104] See supra note 90.

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that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1791 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).[105] Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?[106] Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. That eligibility question can be a part of a state's Article II election for electors just as much as any other state election.[107] Put simply: a state secretary of state (for example) might well possess state-law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility as well) to enforce Section Three.[108] In perhaps half the states, the question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.[109] But even working

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[105] Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 NYU J. L. & Liberty 18, 76-77 (2016).

[106] We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." We think that assumption is correct, and we will return to it in Part IV.B.

[107] See Hemel, *How-to Guide*, supra note 5; Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, supra note 96, at 599-608; see also Muller, Natural Born, supra note 62, at 1100-1106. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

[108] See Muller, *Scrutinizing*, supra note 96, at 579-580.

[109] Chiafolo v. Washington, 591 U.S. ___ (2020); see also Muller, supra note 96, at 580. We bracket the serious possibility that *Chiafolo* was wrongly decided. See, e.g., Mike Rappaport, The Originalist Disaster in *Chiafolo*, Law & Liberty (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-

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within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to arrange that their electors do not elect a constitutionally disqualified candidate, which should be reflected in their laws.

If the voters and presidential electors do select a disqualified candidate for the Presidency, we do not believe that Congress (or the Vice President) have the power to reject that candidate when the votes are counted in joint session. Whatever the extent of Congress's and the Vice President's authority to count the electoral votes, or determine the authenticity of submitted votes—i.e., was this the act of the electors of the state?—we do not believe that they have the authority to evaluate the decisions or actions of the electors themselves.[110] So if a properly selected elector submits a vote for a constitutionally disqualified individual it should still be *counted*.

Still, once those votes are counted, a disqualified candidate *does not become president*, even if he has the most votes. This is made explicit by the (self-executing) command of Section Three of the Twentieth Amendment, which sets the constitutional terms of a President's term. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."[111] The language thus specifically confirms the possibility of a failure to qualify, and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability.

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors" and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment. The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. On the other hand, it is less clear whether being *legally disqualified* from holding office makes the would-be President "unable to discharge the powers and duties of his office" within the meaning of the Twenty-fifth Amendment. (Structurally, the Twenty-fifth Amendment appears to relate to Article II, Section 1, paragraph 6, which deals with Presidential succession, rather than Article II, Section 1, paragraph 5, which deals with eligibility.) But in

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chiafalo/; Michael Stokes Paulsen, The Constitutional Power of the Electoral College, Public Discourse (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283/.

[110] We take no position on many further details of this issue, including the relative interplay of the Electoral Count Reform Act, Pub.L. 117-328, Div. P, Title I, § 109(a) (Dec. 29, 2022) 136 Stat. 5238-5239, codified in relevant part at 3 U.S.C. 15(b) & (d)(2)(B)(ii), possible constitutional challenges to it, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1805 (2002); see also John Harrison, *Nobody for President*, 16 J.L & Pol. 699 (2000), interpretations of it, but see Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529, 1538 (2021), or the like.

[111] U.S. Const. amdt. XX, sec. 3. Cf, Muller, *Regularly Given*, supra note 110, at 1538 n.42.

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any event the Twenty-fifth Amendment question will usually be unimportant in practice, because it requires a two thirds vote of both houses, and the Vice President and many cabinet officials, and so it will usually be significantly easier to use the impeachment process instead.[112]

* * *

Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid or comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.[113] From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.[114] He might be removed by such a suit,[115] or might well choose to resign instead.[116] The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not

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[112] Brian Kalt, Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment (2019).

[113] See infra Part IV.C. for further discussion.

[114] For two relevant examples, see NMSA. 1978, sec. 44-3; W.V. Code sec. 53-2-1. In West Virginia, such a claim may be brought "[w]henever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested." Id. 53-2-2. For illustrative applications, see State ex rel. Zickefoose v. West, 145 W. Va. 498, 545 (1960); Wells v. Miller, 237 W. Va. 731 (2016).

[115] New Mexico ex rel. White v. Griffin, 2022 WL 4295619, D-101-CV-2022-00473 (1st. Dist. Santa Fe County, Sep. 6, 2022).

[116] Resignation letter from West Virginia Delegate Derrick Evans to Governor Jim Justice (Jan. 9, 2021), available at https://s3.documentcloud.org/documents/20447012/derrick-evans-resignation-letter.pdf.

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difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

C. The Problem of Griffin's Case

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.[117] This precedent continues to cast a shadow over Section Three today.[118]

But there is a simple response to this small problem. *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate ground, under the so-called de facto officer doctrine, which we will discuss. But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.[119]

1. Background

Caesar Griffin, a black man, was charged in a Virginia state court with the crime of shooting with the intent to kill. Griffin was tried, convicted, and sentenced to prison. He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of his color."[120] Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not

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[117] In re Griffin ("Griffin's Case"), 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

[118] See, e.g., Josh Blackman and S. B. Tillman, Opinion, "Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene," The New York Times, (Apr. 20, 2022); Tom Ginsburg, Aziz Huq, & David Landau, *The Law of Democratic Disqualification*, 111 Calif. L. Rev. at 16, 51 (forthcoming 2023) at https://ssrn.com/abstract=3938600.

[119] For other criticism of Griffin's Case, insightful as always, see Magliocca, *Amnesty*, supra note 5, at 102-108; Magliocca, *Foreground*, supra note 62, at 9-14.

[120] 11 F. Cas. at 22.

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conduct the trial with fairness and uprightness."[121] Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge Sheffey)[122] was legally disqualified by Section Three of the Fourteenth Amendment from serving.

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849. And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."[123] Thus "it is admitted," wrote Chase, that Judge Sheffey "was one of the persons to whom the prohibition to hold office pronounced by the amendment applied."[124]

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.[125] The sheriff appealed to the circuit court, which was held by Chase as circuit justice.[126]

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[121] Id. at 22.

[122] Cf. Will Baude, The deadly serious accusation of being a "so-called judge," Volokh Conspiracy, Wash. Post. (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ ("[T]o call him a 'so-called' judge is to hint that he is not really a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue").

[123] 11 F. Cas. at 22.

[124] Id. at 23.

[125] See Opinion of Judge Underwood in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865, to July 15, 1870), at 462-466 (1875). We are indebted to Myles Lynch for locating this source.

[126] The procedural posture of this and several related cases are extremely confusing and reflect background machinations by both Judge Underwood and Chief Justice Chase: At the time, habeas was apparently available from the district court, or "at chambers," or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this, the unreviewable route, in another habeas case like Griffin's brought by Sally Anderson. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the cases in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. See Charles Fairman, Reconstruction and Reunion at 601-607; Letter from Chase to Underwood (Nov. 19, 1868) in 5 The Salmon P. Chase Papers 285-286 (1998); Letter from Chase to Underwood (Jan. 14, 1869) in id. at 292-293.

This background is briefly alluded to in the synopsis in *Griffin's Case* which explains that "[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme

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2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth Amendment did not exist.[127] The question was whether ratification of Section Three kicked him out. As Chase put it: "whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[128]

Chase said no, rejecting this as a "literal construction" [129] of Section Three. There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.[130] But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, can't possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, but also further impeached Chase's interpretation of Section Three. All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

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court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case." *Griffin's Case*, 11 F. Cas. at 7-8. But really, these circumstances are extraordinary. We take them up again below.

[127] Id. at 23.

[128] Id. at 18.

[129] Id. at 24.

[130] Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling *Virginia* government then gave its consent to the creation of a new Wheeling-based state of *West* Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as "Virginia." After Lee's surrender at Appomattox, Chase's opinion notes, the "government recognized by the United States was transferred from Alexandria to Richmond" and "became in fact what it was before in law, the government of the whole state." Id. at 18. Judge Sheffey was appointed under the authority of this government. (For the full story – and full formalist legal defense – of the validity of the legal fiction of "Virginia" giving its consent to the creation of a breakaway state of West Virginia, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 Calif. L. Rev. 291 (2002) For an argument that this aside was actually relevant to Chase's argument, see Magliocca, *Foreground*, supra note 62, at 10 n.30, discussed infra note 157.)

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a. "The argument from inconveniences, great as these"

The core of Chase's argument was that if Section Three were an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. "In the examination of questions of this sort," Chase wrote, "great attention is properly paid to the argument from inconvenience."[131] And here "the argument from inconveniences" was "great" in Chase's estimation— it was "of no light weight."[132]

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.[133] If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. "No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity."[134] Chase found this unthinkable: "It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states."[135]

Chase went on: not only did Section Three impose great "inconveniences" and "calamities," it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers from their offices—and ostensibly inconsistent with the "spirit" of prior constitutional principles, concerning due process, bills of attainder and ex post facto laws.[136] And besides, the specific remedy sought—vacating Griffin's conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase's interpretive driver: "Surely," Chase continued, "a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found."[137]

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[131] 11 F. Cas. at 24.
[132] Id. at 25.
[133] Chase also suggested that the problem was not completely limited to the Southern governments. Id. at 25 (observing that "[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government . . ." and that "it is not to be doubted that not a few among them" had previously taken a covered oath, and that "[p]robably some of these persons" had subsequently been elected to office).
[134] Id. at 25. Of course, Chase would undercut this conclusion later in the opinion. See infra Part II.C.
[135] 11 F. Cas. at 25.
[136] More on this point presently, Part II.C.2.c, and again Part III.
[137] 11 F. Cas. at 26.

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Chase tried to funnel these policy arguments into a rule of constitutional construction: "the argument from inconvenience."[138] This argument "it is true, can not prevail over plain words or clear reason," Chase acknowledged.[139] "But, on the other hand," he wrote, "a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference."[140]

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[141] Or as Chief Justice Marshall said in *United States v. Fisher*: "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."[142] But Chase's canon was noticeably more aggressive: The supposedly more disruptive reading must "*never be preferred*" unless the text's terms "*absolutely* require" such preference.[143] That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase's analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the "literal" reading of the "terms of the instrument" as meaning exactly what they seem to say. As discussed above, the language of Section Three's prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase's opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text's language is somehow insufficiently clear to justify applying the "literal" meaning of its words. Indeed, even on Chase's own hyper-strict standard, the words of Section Three *do* "absolutely require" the conclusion that it, on its own, disqualifies covered rebels from office.

Second, Chase was too ready—far too ready—to find that following the ("literal") language of the document would produce (what *Chase* considered to be) great "inconveniences" or "mischief"— indeed, increase "calamities" already visited upon

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[138] Id. at 24.
[139] Id. at 24.
[140] Id. at 24.
[141] James Madison, Speech on Feb. 2, 1791, reprinted in Legislative and Documentary History of the Bank of the United States 39, 40 (photo. reprint 2008)
[142] United States v. Fisher, 2 Cranch (6 U.S.) 358, 386 (1805)
[143] 11 F. Cas. at 24 (emphasis added).

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the South. Chase emphasized the breadth of Section Three's language: it applied in all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply "to all persons in the category" and "for all time, present and future" (so?). And, taken seriously, this broad rule would, as noted, "annul all official acts" performed by disqualified officers, including judges. (Would it?)

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase's parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.[144]

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment. But because these arguments from inconvenience are the heart of Chase's opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase's construe-to-avoid-the-force-of-constitutional-language-whose-policy-consequences-you-dislike approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy "solutions" to texts they don't like. Chase's opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

b. The argument from "the intention of the people"

In places, Chase raises the inconvenience argument as an inquiry into the "intent" of the Framers: "What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?"[145] This at least sounds kind of

[144] As Judge Underwood had put it: "Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience comes from attempting their overthrow." Opinion of Judge Underwood, supra note 125, at 465.

[145] 11 F.Cas. at 24.

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like the question a judge should be asking—the original meaning of the constitutional provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase's framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.[146] And whatever evidence Chase might have that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say "coerced"—to ratify the Amendment as the price of regaining their representation in Congress.[147] Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed "intent" of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase was succumbing to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed "intent" of a written text. When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do.

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[146] See supra notes 9-14, sources cited there, and accompanying text.

[147] See generally, John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 461 (2001). For arguments that Congress's requiring states' ratification as condition of restored representation was entirely lawful and appropriate, see id; Kesavan & Paulsen, *West Virginia,* supra note 130, at 329; Amar, America's Constitution, supra note 4, at 364-380, see especially id. at 376-378. There is a different argument for ratification, the "loyal denominator" theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 Duke J. Const. L. & Pub. Pol'y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 La. L. Rev. 47, 48 (2018). One of us has rejected this theory in prior writing, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,* 103 Yale L.J. 677, 709 (1993); see also Amar, supra note 4, at 378-380, and the other of us is inclined in the same direction.

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But it is easy for a judge to use this principle as an excuse for reading into the text his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. The argument that Section Three should not be read to depart from the "spirit" of prior constitutional law

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle, which in determining the construction of this amendment, is entitled to equal consideration."

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[148]

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once and without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.[149]

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

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[148] 11 F.Cas. at 25.

[149] Id. at 26.

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Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.[150] But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to "*forbid*[]" readings of a text "not *clearly* required" by its terms, that would "*bring it into conflict or disaccord*" with other provisions of the Constitution.[151] Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden.* Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in the judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.[152] If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did it would have the perverse effect of leaving Confederates who had *not* previously

[150] See infra, Part III.
[151] 11 F. Cas. at 25 (emphasis added).
[152] Id. at 26.

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taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.[153]

So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.[154] Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.[155] This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

d. The argument from the Section Five enforcement power

Having flailed to avoid the natural reading of Section Three, Chase finally offered his alternative, "reasonable construction":

> For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' [sic] … The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.[156]

Section Five "qualifies" Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise "qualifies" Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into

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[153] See Case of Davis, 7 F. Cas. 63, 92, 95 (C.C.D. Va. 1867).

[154] Id. See Magliocca. *Amnesty*, supra note 5, at 100-102; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 293-300 (2017).

[155] Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. Id. at 293-296.

[156] 11 F. Cas. at 26.

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practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course of performing their assigned duties. But as noted above there is no reason why "proceedings" and "decisions" and "enforcement" with respect to Section Three's commands may not be conducted and carried out by these various state and federal actors, exercising their usual authority with respect to such matters.[157] It is simply not true that "these can only be provided by Congress." Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin's Case*, until Chase stopped him.

Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin's Case*.

3. *Griffin*'s Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."[158]

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

> In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge. . . .
>
> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in

[157] Magliocca also suggests that in the specific situation in Griffin's Case, state law may have been "unavailable for enforcement" of Section Three because "Virginia was an unreconstructed state and thus lacked the ordinary powers of a state" and "because Virginia did not yet recognize the Fourteenth Amendment's legitimacy" – in contrast with states such as North Carolina. Magliocca, *Foreground*, supra note 62, at 10 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the union.

[158] 11 F. Cas. at 27.

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> the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[159]

What is going on here? Chase describes an alternate ground for the case—"a judge de facto acting under color of office," which we would now call the "de facto officer doctrine"—explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs in to it the more dubious the whole opinion becomes.

First of all, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended. But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown. The de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.[160]

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,[161] fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with

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[159] 11 F. Cas. at 27.

[160] Accord, Magliocca, *Foreground*, supra note 62, at 11 n.25.

[161] See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.") https://founders.archives.gov/documents/Jefferson/98-01-02-3562; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1011-12 & n.39 (2003); Baude, Judgment Power, 96 Geo. L.J. 1807, 1823-24 (2008).

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reference to this and kindred cases in this district."[162] The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,[163] in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court."[164] Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.[165] Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"[166] fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out

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[162] 11 F. Cas. at 27.

[163] The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex Parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." Ex parte State of Virginia No. 11, 1868 WL 10951, 19 L. Ed. 153 (1868); Fairman, supra note 126, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course – not deputize the Chief Justice to go deliver some secret verdict in their stead.

[164] Fairman, supra note 126, at 607.

[165] Id.

[166] Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

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to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.[167] But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto judges in the saga surrounding *Hayburn's Case*.[168]

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."[169] On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack.[170] Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.[171] On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction.[172] The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.[173] Indeed, these technicalities were argued by the parties and they were the main subject

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[167] For many citations, see Griffin's Case, 11 F. Cas. at 18-21 (argument of counsel). For more, see also Reply and Response Brief for the United States, Financial Oversight and Management Board for Puerto Rico v. Aurelius (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121) at 27-47; and Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

[168] Baude, Severability, supra note 66, at 12 (discussing Yale Todd).

[169] For statements like this, see Ball v. United States, 140 U.S. 118, 128-129 (1891) ("was judge de facto if not de jure, and his acts as such are not open to collateral attack."); see also Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 910, 919 (1963); but see id. at 910 & n. 9 (suggesting that a suit is collateral whenever the officer "is not a party," including on "writ of error").

[170] All three cases cited by Chase in Griffin's Case, 11 F. Cas. at 27, can be characterized this way. Taylor v. Skrine, 5 S.C.L. 516, 3 Brev. 516 (1815) deals with a writ of execution and observes that "no objections were made to his authority at the time the decree was given." State v. Bloom, 17 Wis. 521 (1863) relies entirely on In re Boyle 9 Wis. 264 (1859) which is a habeas case holding that the "right to hold the offices cannot be inquired into in a collateral proceeding of this kind," id. at 267. And People v. Bangs, 24 Ill. 184., 187 (1860) distinguishes a "direct proceeding" from one where the doctrine applied.

[171] For statements like this, see *McDowell v. United States, 159 U.S. 596, 598* (1895) ("presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment."); see also Note, *The De Facto Officer Doctrine*, at 918 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).

[172] But see In re Boyle, cited supra note 170 (distinguishing "the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offence").

[173] In the Supreme Court's most recent de facto officer doctrine case, Ryder v. United States, 515 U.S. 177 (1995), it split the difference, holding the doctrine inapplicable because the case was on direct

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of Judge Underwood's opinion below.[174] Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

* * *

There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

III. Section Three Supersedes, Qualifies, or Satisfies Prior Constitutional Provisions

Our third proposition is logically and methodologically straightforward but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.[175] Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition—there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, unAmerican (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong: dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments change the Constitution. It thus should be unsurprising—indeed, it is in the very nature of constitutional amendments—that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment*

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review *and* the challenge was constitutional. In the more recent case of Financial Oversight and Management Board for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1666 (2020), it avoided the issue because it found the appointments lawful.

[174] See Opinion of Judge Underwood, supra note 125, at 463-466.

[175] See supra Part III.C.2.c.; see also Ginsburg, Huq, & Landau, supra note 118, at 18 (suggesting that a self-executing interpretation, "while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns" and for that reason an "alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced").

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supersedes prior law precisely to the extent that it departs from the prior rules. This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms, understood in their natural sense and accounting for any terms of art or specialized usages of words, departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote. When this occurs, the courts must determine the "meaning and operation" of the two provisions.

Hamilton articulated two principles for doing so, which work as a complementary pair. "So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done"—there's the first of the pair, but Hamilton's sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair: "where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first." This was, Hamilton continued, "a mere rule of construction," but it was an appropriate one, "consonant to truth and propriety," consistently recognized by courts as interpreters of law: that, as "between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference."[176]

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority—and proceeded to derive the proposition customarily called "judicial review."[177] But that is not the interpretive question here. Here, the key point is precisely Hamilton's lead-in proposition: that, as between "interfering" acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same

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[176] See The Federalist No. 78 (I. Kramnick ed. 1987) at 439 (Hamilton). These rules were well-established in American and English law. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 235-244 (2000)

[177] See The Federalist No. 78, supra note 176, at 439-440 (Hamilton) ("But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.")

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legal status: By the terms of Article V, constitutional amendments are "valid to all Intents and Purposes, as Part of this Constitution," when adopted.[178] Thus, where We, the People, have adopted a new constitutional text "interfering" with or departing from prior constitutional provisions, the last-in-time enacted prevails to the extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights in a sense qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent of a conflict between those powers and the subsequently enumerated rights.[179] Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.[180]

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"[181] does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the preexisting lawmaking process.[182] A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original apportionment

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[178] U.S. Const. art. V.

[179] On the relationship between rights and powers, see William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1821-1822 (2013); Jud Campbell, The Invention of First Amendment Federalism, 97 Tex. L. Rev. 517, 561-67 (2019).

[180] Baude & Sachs, *Eleventh Amendment*, supra note 9, at 624-25; cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

[181] U.S. Const. amdt XIV, sec. 5.

[182] See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 19 (2017) (offering the examples in this paragraph).

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rules including the notorious Three-fifths Clause.[183] Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies an earlier-enacted constitutional provisions with which the new provision conflicts, Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.[184]

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex post Facto Clause. *To the extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—*to the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the

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[183] See U.S. Const. amdt. XIV, sec. 2; U.S. Const. art. I, sec. 3. By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

[184] Indeed, for what it is worth, the legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. Cong. Globe, 39th Cong. 1st Sess. at 2915 (Sen. Doolittle) (complaining that Section Three was an "ex post facto provision, a bill of attainder"); id. at 2890 (Sen. Cowen) (bill of attainder); id. at App 241 (Sen. Davis) (Section Three "is in the nature of both a bill of attainder and an ex post facto law"); id. at 2940 (Sen. Hendricks) (ex post facto); id. at 2916; see also id. at 2467 (Rep. Boyer) (criticizing earlier version of Section Three as "a bill of attainder or ex post facto law"). These charges were generally premised on the view – with which proponents of the amendment evidently agreed, see id. at 3036 (Sen. Henderson) – that Section Three would preempt these earlier rules to the extent of a direct conflict. Though at one point Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. Id. at App. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it"); see also id. at 3146. See also Graber, supra note 12, at 26-31, 36-37 (documenting this history).

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correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think that these various prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible; and it is, for the most part, fairly possible to do so. But to the legitimate extent of any conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

A. Bills of Attainder

A bill of attainder is the legislative infliction of punishment on specific people without a trial.[185] It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a "bill"—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an "attainder" either—in that it is not at all clear that it inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-second Amendment is surely not inflicting a "punishment" when it precludes the President from running for a third term.[186] Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of 20th-century "red scare" cases[187] and perhaps more relevantly in a pair of immediate post-Civil War-era loyalty cases: In *Cummings v. Missouri*[188] and *Ex Parte Garland*,[189] the Supreme Court invalidated state and federal oath requirements that required an "Ironclad Oath" from anybody holding a range of positions, both public and private. That oath was really a *past*-loyalty-requirement, requiring people to swear that they had not supported the confederacy or

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[185] See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177 (2011).
[186] U.S. Const. amdt. XXII. But see Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from office many be punishment, as in cases of conviction upon impeachment.").
[187] United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
[188] 71 U.S. 277 (1866).
[189] 71 U.S. 333 (1866).

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the like.[190] The Court concluded that these requirements were effectively bills of attainder—and also ex post facto laws—and held them unconstitutional.

Even if one takes these precedents at face value it does not follow that Section Three would similarly be a bill of attainder. First, the "Ironclad Oath" laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[191] Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.[192] Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the majority opinion emphasized this fact, explicitly noting that neither case involved qualifications for public office.[193] Second, because both cases focused on the retroactive effect of the laws,[194] neither case's reasoning would seem applicable to Section Three in post-Civil-War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.[195]

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin,* Chief Justice Chase).[196] Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.[197] In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

B. Ex Post Facto Laws

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[190] For much more detailed discussion of the federal "Ironclad Oath" see infra Part IV.A.4.b.i.
[191] Garland, 71 U.S. at 377.
[192] Cummings, 71 U.S. at 319.
[193] Garland, 71 U.S. at 378.
[194] Cummings, 71 U.S. at 327 ("They are aimed at past acts, and not future acts."); Garland, at 377 ("In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed").
[195] See supra Part I.B.
[196] Garland, 71 U.S. at 382. *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment) and an especially weak case for the relevance of past loyalty to engaging in religious occupation.
[197] For a somewhat lighthearted explication of this principle – and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 Const. Comm. 285 (2007).

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Article I also forbids both the state and federal governments from enacting an "Ex Post Facto" law.[198] An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.[199] True, as applied to actions done before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the "spirit" of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

Indeed, we have this on especially good authority, as this very question has been asked and answered in the past. The Eleventh Amendment, as noted above, had the effect of cutting off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III. In *Hollingsworth v. Virginia*, the Court then confronted the question whether the Amendment was retroactive, cutting off suits pending when the Amendment became law. The plaintiffs argued in the U.S. Supreme Court against retroactivity, because "[t]he spirit of the constitution," forbade "the mischief of an ex post facto Constitution."[200] Indeed, this argument mirrored precisely the arguments for narrow construction we have seen above: "It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution."[201] But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.[202] As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions covered by the revised constitutional rules.

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[198] U.S. Const. art. I, §§9 & 10.

[199] To be sure, there are revisionist arguments that the Ex Post Facto clause itself extends to retroactive civil laws too. See Eastern Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. Cummings, 71 U.S. at 326-332; Garland, 71 U.S. at 377-368. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis

[200] 3 U.S. at 378-80 (arguments of counsel).

[201] Id.

[202] Id. at 382. See Baude & Sachs, *Eleventh Amendment*, supra note 9, at 626-627.

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C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property without due process of law," which in many circumstances requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First of all, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege, a public trust, to be vested with the power of the people. And though it is a closer case, the same thing may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation. It does not protect *public* rights.[203] It has been argued that in England, offices *were* understood as vested rights of property, and occasionally early American courts said so as well.[204] But that was not the better rule in America. Treating offices as property did not fit well with republican principles,[205] and by 1900 the Supreme Court could rightly state: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such."[206]

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.[207] So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin's Case*. But in our view this objection is sufficiently answered by the terms of Section Three itself. Perhaps the reason that Section

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[203] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565-593 (2007); William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1540-1547 (2020).

[204] Jed Shugerman, *Freehold Offices vs. "Despotic Displacement": Why "Executive Power" Did Not Include Removal* (July 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119; Hoke v. Henderson, 15 NC 1 (1833).

[205] See Jane Manners & Lev Menand, *The Three Permissions*, 121 Colum. L. Rev. 1, 20 (2021) ("In revolutionary America, the idea of offices as property was roundly rejected"); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1824 n. 157 (2006) ("A more republican conception of government meant a more republican conception of offices.").

[206] Taylor & Marshall v. Beckham, 178 U.S. 548 (1900).

[207] See supra notes 48-50 and accompanying text.

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Three only applies to holding office and not voting, and only applies to prior office-holders, who have previously sworn a constitutional oath—indeed, these limitations are the only ways in which Section Three's scope was appreciably narrowed during the drafting process—is that we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would seem to disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warranto suits, state and federal judicial review, congressional adjudications, and so on. Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels.[208] Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

D. The Ominous Question: Section Three and the First Amendment

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

This question begets more questions: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding *of Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal disabilities imposed by Section Three take over, as a matter of the proper understanding of Section Three?

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[208] See generally supra Part II.B.

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There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as properly understood as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example[209] but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of "engage in insurrection" and "aid or comfort"—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, and under modern doctrine, that would mean the very stringent test of *Brandenburg v. Ohio*?[210] Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.[211] First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three's terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today's liberal understandings.[212])

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[209] See infra Part IV.C.2.

[210] 395 U.S. 444 (1969).

[211] Federalist No. 78, supra note 176 ("So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.").

[212] For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools,* 85 Minn. L. Rev. 1917, 1919-1922 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see for starters, Adam Griffin, *First Amendment Originalism: The Original Law and A Theory of Legal Change as Applied to The Freedom of Speech and of The Press*, 17 First Amend. L. Rev. 91 (2019); Jud Campbell, *Natural Rights*

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The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is "speech integral to criminal conduct."[213] And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.[214] Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning "incitement." Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous "clear and present danger" test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) "*directed to*" (ii) triggering or inciting (iii) "*imminent*" lawless action (presumably including acts of insurrection or rebellion) and (iv) "likely" to produce such action.[215] That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court's relatively recent decision in *Holder v. Humanitarian Law Project*[216] recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides "material support" to a foreign organization engaged in or committed to terrorist violence against the nation. The Court concluded that because the "interest in combating terrorism is an urgent objective of the highest order," the Congress could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly*

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and the First Amendment, 117 Yale L. J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 Yale L. J. 861 (2022). (We will cease further digression on this point.)

[213] United States v. Hansen, 599 U.S. __, at 18-19 (2023); United States v. Williams, 553 U.S. 285, 297 (2008); Giboney v. New Ice Storage, 336 U.S. 490 (1949); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 989-993, 1007-1008 (2016).

[214] Volokh, supra note 213, at 1011-1015.

[215] 395 U.S. at 447. This standard is elaborated in Hess v. Indiana, 414 U.S. 105, 108-109 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). Additionally, Bond v. Floyd, 385 U.S. 116 (1966) rejected the idea that there is a lower First Amendment standard of incitement when a state legislature is excluding an elected member under state law, id. at 132-135; see also Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974) (same principle applies to ballot access).

[216] 561 U.S. 1 (2010).

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further terrorist conduct. While this decision is hedged by multiple limiting principles,[217] it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having "engaged in insurrection" or provided "aid or comfort" to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that "he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it,"— that he was "warring upon the Military."[218] It is conceivable (though we do not prejudge the point) that Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army "unto the death" and stating that anybody who volunteered for the Union army "ought and I believe will be shot down before he leaves the State."[219] This exclusion was part of the backdrop of Section Three's enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion "was entirely unconstitutional" and "plainly violative of the First Amendment."[220] If that was so before Section Three's enactment, does Section Three make it otherwise?[221]

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during

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[217] The Court emphasized that "only material support coordinated with or under the direction of a designated foreign terrorist organization" was banned; "independent advocacy" was "not covered." Id. at 31-32. Additionally, the law only applied to *foreign* organizations.

[218] President Abraham Lincoln to Erastus Corning and others (June 12, 1863), in Abraham Lincoln, Speeches and Writings, 1859-1965, at 454, 459 (Don Fehrenbacher, ed. 1989). See infra notes 269-277 and accompanying text.

[219] See infra notes 270-278, and 343-348 and accompanying text.

[220] Lynch, supra note 5, at 197-198.

[221] See Lynch, supra note 5, at 198 ("Had Section 3 been ratified by this point, these concerns would be assuaged.")

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this Great War," and excluded in part on that basis.[222] (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on grounds of judicial bias.)[223] Another scholar of the incident writes that "Under a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however under the interpretation prevailing at the time, they probably were."[224] What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.[225] But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.[226]

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger; but insurrection and rebellion are dangers too—all too real dangers, as recent events have shown. Where exactly that line is drawn by the Constitution, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three's general terms triggering disqualification from future office—"insurrection," "rebellion," "engaged in," "given aid or comfort to"—and of who all is included under Section Three's ban. To that set of important questions we turn next.

IV. Section Three's Substantive Disqualification is Sweeping

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[222] Chafetz, supra note 47, at 190; Lynch, supra note 5, at 211-213; 6 Cannon, supra note 18, at 52-63.
[223] Berger v. United States, 255 U.S. 22 (1921). During the initial exclusion, when Berger's conviction was on appeal, the House Committee announced "that it would not be governed by the action of the judge and jury at the Chicago trial," but would review the evidence and legal questions for itself. 6 Cannon, supra note 18, at 54. But curiously, after the convictions were reversed the House allowed Berger to sit in the sixty-eighth through seventieth Congresses. Lynch, supra note 5, at 213.
[224] Chafetz, supra note 47, at 191.
[225] In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. See infra note 359.
[226] Federalist No. 78, supra note 176, at 439.

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We come at last to the heart of the beast: the substance of Section Three's prohibition. We begin (in Subpart A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having "engaged in" "insurrection" or "rebellion" against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given "aid or comfort" to "enemies" of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms' core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a "sure shipwreck,"[227] to borrow Susan Morse's phrase—of unquestionably disqualifying conduct falling within the core of Section Three's meaning: for example, declaring unilateral secession from lawful constitutional government; or the taking up of arms against government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three's terms—ordinary expression of political dissent as well as even ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in subpart A.

We then turn more briefly (in subpart B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—*are covered* by Section Three's ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three's disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.

Finally (in Subpart C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president's willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat for re-election and, instead, his (and others') attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de

[227] Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

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facto political coup d'etat against the regime of lawful constitutional government, constitute engaging in "insurrection or rebellion against the Constitution of the United States"? We think the answer is *yes*.

Whether called a "rebellion," an attempted coup d'etat seeking to displace lawful government authority under the Constitution, or an "insurrection," instigating, inciting and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—such conduct is covered by Section Three, and is disqualifying. If those are indeed the facts concerning Donald Trump's (and others') efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting "insurrection" or "rebellion" (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave "aid or comfort" (approval, encouragement, support) to enemies might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three's meaning, those judgments are entitled to full legal effect.

A. Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted by the Civil War Congress (both the 1862 "Ironclad" oath and the Second Confiscation Act), and the significant mid-Civil-War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, including the Insurrection Act of 1795 as amended, and an important series of exclusions from Congress itself, as well as the relevant legislative history of Section Three, and a few scattered post-enactment applications of Section Three itself.

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1. Working definitions

We begin by offering working definitions of the terms *insurrection* and *rebellion* and of what might constitute "engaging in" such conduct or giving "aid or comfort" to enemies under Section Three.

Insurrection is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect*. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government*. Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."[228] Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases*, in 1863: "Insurrection against a government may or may not culminate in an organized rebellion."[229]

Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means*. (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime's authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself*. The South's attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States by the states asserting the right to secede. Likewise, an attempted coup d'etat is arguably also a species of rebellion—an effort to displace, replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

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[228] 10 Documentary History of the Ratification of the Constitution 1296 (Statement of Madison) ("A riot did not come within the legal definition of an insurrection").
[229] 2 Black (67 U.S.) 635, 667 (1863).

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The term *rebellion* can also imply a competing claim to legitimacy. "Rebellion" thus seems to carry a stronger political-claim-of-right valence than does "insurrection."[230] Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South's secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d'etat, or declaration of independence, or secession, is claimed to be a "vindication" or "restoration" of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person's or group's alleged wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as "rebellion" but restoration. Mistake of law is no defense to a coup d'etat. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession as an act for the vindication of its believed rights.[231] That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by*

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[230] Though it is possible that this connotation is anachronistic. See infra note 252.

[231] For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see James M. McPherson, Battle Cry of Freedom: The Civil War Era 234-236 (1988) (summarizing Southern constitutional and political theories); Daniel Farber, Lincoln's Constitution 57-91 (2003) (emphasizing arguments of states' rights to interposition, nullification, and secession generally); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame. L. Rev. 1227, 1270-1277 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. Am. Hist. 5-53 (June 1978) (providing detailed history of constitutional and political arguments over the nature of Union and the validity of secession); David P. Currie, The Constitution in Congress: Descent into the Maelstrom 1829-1861, at 228-237 (2005) (discussing and evaluating the constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see generally 2 Abraham Lincoln, Speeches & Writings, 1859-1865: Speeches, Letters, Miscellaneous Writings, Presidential Messages & Proclamations, at 217-218 (First Inaugural Address, March 4, 1861); id. at 254-258, 260-261 (Message to Congress, July 4, 1861); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi. L. Rev. 691, 703-715 (2004) (reviewing Daniel Farber, Lincoln's Constitution) (distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, supra note 130, at 303-311 (same). For further background, see generally William W. Freehling, The Road to Disunion: Secessionists at Bay 1776-1854 (1990), and for a comprehensive exposition of the Southern view, see Alexander M. Stephens, A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results (1867). As a clarification: we use the term "secession" here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory.

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force—and thus may occupy some ground not covered by the word "insurrection" (which, we have suggested, must be forcible). There are such things as "bloodless coups": actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.[232]

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861[233] preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws. The secession ordinances might still immediately constitute acts of "rebellion," even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together—acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs (as they obviously did with the Civil War)—and it becomes difficult to distinguish "insurrection" from "rebellion." The overlap of the two terms in theory becomes complete in practice.

In the end, however, we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that "insurrection" and "rebellion," in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

So much for our working definitions of "insurrection" and "rebellion." What does it mean to have "engaged in" such conduct? We believe one has "engaged" in

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[232] Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political coup d'etat – an act of "rebellion" if judged by the pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance, and subsequently legalized by its own success. See generally Paulsen & Paulsen, supra note 30, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub Pol'y 818, 821, 844, 850 (2015). But cf. Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation 1760-1840, at 164-165 (2021) (emphasizing the states' retention of sovereignty under the Articles and the idea that states might thus properly exit that regime, legally, on the theory that the Articles had become a breached treaty).

[233] The seceding states adopted their secession resolutions by state "conventions," purporting to parallel the process by which the states ratified the Constitution. See McPherson, supra note 231, at 234-284 (describing secession actions of ten states that purported to secede from the Union). The secession ordinances of the South were self-consciously styled after the Declaration of Independence, which was obviously an act of formal legal rebellion.

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insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of* such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has "engaged in" such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.[234] (There is obvious overlap here with the closely related concept of having given "aid or comfort" to the nation's enemies, which we discuss presently.)

Of course, there are also important limits to how far the concept of having "engaged in" insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have "engaged in" insurrection or rebellion. An exception to this limitation might exist where a person possesses an affirmative duty to speak or act. Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three's terms.

Then there is the related question of what constitutes having given "*aid or comfort*" to "the *enemies thereof.*" This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion "*or*" having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.[235]

In many cases, giving "aid or comfort" to enemies will be similar to the kind of conduct that counts as having "engaged in" insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term "aid or comfort" reinforces and emphasizes Section Three's coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section

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[234] This working definition of having "engaged in" wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with "assistance" including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). Federal criminal law today is to similar effect. 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). We think it is also generally supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1108 (2017). That said, the context of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See text accompanying infra note 425.

[235] U.S. Const. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.")

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Three's "aid or comfort" language, even where it might be debatable whether to characterize such conduct as directly "engag[ing] in" insurrection or rebellion.

Additionally, while Section Three uses some language paralleling that contained in the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. "Insurrection" and "rebellion" are their own things, distinct from "treason." While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within Section Three. So even if "aid or comfort" in Section Three connotes the same type of assistance-and-embrace principles as "Aid and Comfort" in Article III's Treason Clause,[236] the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal-law conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.)

Finally, aid or comfort to whom? "[T]he enemies thereof." Before the Civil War, some might have limited the term "enemies" to those owing allegiance to a foreign power,[237] but that is not plausibly true of Section Three. Rather, Section Three covers enemies both foreign *and domestic*. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War,[238] and it seems clear from the political context of Section Three that it likewise treats domestic enemies as enemies. Indeed, it is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text.

What is less clear is how to define the foreign and domestic enemies covered by Section Three. The most straightforward option, which strikes us as the more likely one, is that "enemies" essentially cross-references the domestic rebels and insurrectionists just described earlier in the sentence (as well as more traditional foreign enemies, of course). On this straightforward reading, Section Three would cover a domestic officeholder who directly engages in insurrection or rebellion, or who gives aid or comfort to others who do so (or, of course, one who gives aid or comfort to foreign enemies). This straightforward reading is also consistent with the operation of another 1862 statute, the Second Confiscation Act.[239] That said, we cannot rule out another narrower possibility, that "enemies" is limited to those with whom the US are effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war.[240] This would create a more complicated two-track system

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[236] See infra note 258.

[237] See Lynch, supra note 5, at 174 (discussing United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254)).

[238] See infra Part IV.A.4.b.i.

[239] See infra Part IV.A.4.b.ii.

[240] See Lynch, supra note 5, at 173-178 for more discussion.

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where Section Three covers all insurrections and rebellions, as well as "aid or comfort" to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out.[241]

Our sense of the whole—of Section Three's substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called "insurrection" or "rebellion"; and whether a covered individual is thought to have "engaged in" such activity or given "aid or comfort" to "enemies," Section Three's disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

Finally, let us reiterate one consequence of Section Three's breadth and capaciousness. Because Section Three's terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held "unconstitutional" by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.[242] It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of

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[241] What is the referent of "enemies *thereof*"? Does "thereof" refer to enemies of the *United States* or enemies of *the Constitution of* the United States? We think this replicates the question of what "*the same*" refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (Does "insurrection or rebellion *against the same*" refer to insurrection or rebellion against "*the United States*"?) On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing; either one is capable of being considered an instance of the other. Whatever the answer, it should be the same for both—"against the same" and "thereof" refer to the same thing. Our best guess is that it is "the United States."

[242] See, e.g., Paulsen, *Rules for Its Own*, supra note 9, at 858 (arguing that where constitutional language states a general principle, "actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable"); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 995 (2008) (arguing that "textual imprecision or generality often admits of a range of choices" and that the correct constitutional answer in such circumstances "is that the legislature must be permitted to choose from options within that range"; thus, "the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted"); Kesavan & Paulsen, *Secret Drafting History*, supra note 9, at 1129-30 n.54 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law*

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other branches only because, and only to the extent to, they deviate from the Constitution's meaning. It is classically illustrated by the Court's reasoning in *M'Culloch v. Maryland*,[243] which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.

And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

2. Contemporaneous Dictionary Definitions

As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective*, *original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. (We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning: it can serve as a kind of operational, practical concordance that may "define" terms more precisely in their application than can a cold dictionary definition.)

Nineteenth century dictionaries contain definitions of "insurrection" and "rebellion" that substantially corroborate our working definitions. Webster defined "insurrection" as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state."[244] Rebellion was "[a]n open and avowed renunciation of the authority of the government to which one owes allegiance."[245]

Is, 83 Geo. L.J. 217, 333 (1994); Baude & Sachs, Law of Interpretation, supra note 234, at 1120 (describing "the presumption of constitutionality" as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

[243] 17 U.S. (4 Wheat.) 316 (1819),

[244] 1 Noah Webster, American Dictionary of the English Language 111 (1828, photoreprint 1993) ("Insurrection"); see also Dr. Webster's Complete Dictionary of the English Language 702 (Chauncy A. Goodrich and Noah Porter, eds. 1864) (similar); 1 John Boag, A Popular and Complete English Dictionary 727 (1850) (similar).

[245] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also Webster's (Porter 1864), supra note 244, at 1094 (similar); 2 Boag, supra note 244, at 319 (similar).

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Importantly, Webster also noted several distinctions between these and other terms. In defining rebellion, he distinguished an insurrection as "a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government," while a rebellion was a more categorical "attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."[246] And in defining insurrection, Webster noted that insurrection is "equivalent to sedition, except that sedition expresses a less extensive rising of citizens."[247] This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that "[i]nsurrection may be, but is not necessarily, rebellion"[248] and that despite these technical distinctions, "[i]nsurrection is however used with latitude as to comprehend either sedition or rebellion."[249] This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, John Bouvier's Law Dictionary in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion,* and *aid and comfort*. "INSURRECTION" was defined simply as "[a] rebellion of citizens or subjects of a country against its government."[250] "REBELLION" is correspondingly defined: "The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*"[251] Bouvier's thus treated "insurrection" and "rebellion" as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government but not clearly distinguishing between them.[252]

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[246] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 1 Boag, supra note 244, at 727; 2 id. at 319 (similar).

[247] 1 Webster (1828), supra note 244, at 111 ("Insurrection"). For comparison, Webster defined "Sedition" as: "A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . ." 2 Webster (1828), supra note 244, at 66 ("Sedition").

[248] 2 Webster (1828), supra note 244, at 51 ("Rebellion"); see also 2 Boag, supra note 244, at 319 (similar).

[249] 1 Webster (1828), supra note 244, at 111. Daniel Hemel argues that "Webster's definition of 'insurrection' seems implausibly broad for Section 3 purposes." See Hemel, How-to Guide, supra note 5.

[250] "Insurrection" in 1 John Bouvier. A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union 729-730 (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[251] "Rebellion" in 2 Bouvier (1868), supra note 250, at 415 (emphasis added).

[252] See also Joseph Worcester, A Dictionary of the English Language 764, 1190 (1860) (generally equating insurrection and rebellion). Elsewhere in this edition, Bouvier drew a distinction in connotation between "REBEL" and "INSURGENT," suggesting that "rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the

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Bouvier's dictionary also offers an instructive definition of "AID AND COMFORT" as "[h]elp, support, assistance, counsel, encouragement." The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

> The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act ...[253]

This tends to confirm our broad construction of "aid or comfort" as encompassing many kinds of intentional support, akin to the common law.

3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or near) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation "Intratextualism.")[254] Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.[255]

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tyranny of constitute authorities," and thus that "[t]he colonists who opposed the tyranny of the English government were insurgents, not rebels." "Insurgent" and "Rebel" in 1 Bouvier (1868), supra note 250, at 729; 2 id. at 415.

In a much later edition, Bouvier's drew a distinction between *insurrection* and *rebellion* as two different varieties of "actual and open resistance to [government] authority." *Insurrection* was "an actual uprising against the government" while *rebellion* "goes beyond insurrection in aim" and attempts actually to overthrow the government authority in question. "Insurrection" and "Rebellion," in 2 Bouvier's Law Dictionary & Concise Encycl. (Rawles Rev., 1897). Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as "contemporarily authoritative." Lynch, supra note 5, at 167 n. 80.

[253] "Aid and Comfort" in 1 Bouvier (1868), supra note 250, at 107.

[254] Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999).

[255] *M'Culloch*, 17 U.S. at 413-414. In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word "necessary" was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen, Marbury, supra note 66, at 2711; see also Michael Stokes Paulsen, *The Plausibility of Personhood,* 74 Ohio St. L. J. 13, 33 n. 72 (2013).

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Might the Constitution's other usages of terms that also appear in Section Three serve as such markers of meaning for "insurrection" and "rebellion," and "aid or comfort" to enemies, as those terms are used in Section Three? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel Invasions."[256] The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or invasion the public Safety may require it."[257] In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid and comfort" to enemies—borrows the nearly identical language of the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.[258] Moreover, in the 1860s, the pairing of "aid" and/or "comfort" had be-

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[256] U.S. Const. art. I, §8 cl. 15.

[257] U.S. Const. art. I, §9 cl. 2.

[258] Perhaps the most notable U.S. treason case to date was Ex parte Bollman, in which Chief Justice Marshall delivered an opinion for the Court granting habeas to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American (then-)southwest and attempt to form his own independent nation. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part because of Article III's text ("only in levying war") with a relatively broad construction of complicity. Thus on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason," id. at 126, but on the other hand, "if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." Id. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: first, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, that though they might not qualify as treason, remain great and culpable legal wrongs; second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose; third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman*'s construction was sufficiently established to be read in to Section Three itself, it was cited occasionally in the 1860s Congress. See, e.g., 37th Congress 2nd Session Cong. Globe 414 (1862)

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come ubiquitous in legal and public discourse as a general allegation of improper assistance, making it still less clear that it was perfectly coterminous with the law of the Treason Clause.[259]

Finally, the words "insurrection" and "rebellion" also appear elsewhere in the Fourteenth Amendment itself, but again in ways that give little external light on Section Three. A person's "participation in *rebellion*" is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state's representation as a consequence.[260] Section Four of the amendment prohibits payment of debts or obligations "incurred in aid of *insurrection* or *rebellion*."[261] These neighboring sections use slightly different phrases for the behavior they cover ("participation" and "engaged in"; "aid or comfort" and "in aid of"), but it is difficult to say if the variations are meaningful.

4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms "insurrection," "rebellion," and "engaging in," as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in the landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, "insurrection" or "rebellion." A wide range of actions supportive of secession appears to have constituted "engaging in" or giving "aid or comfort" to rebellion or insurrection.

This leads us to what we think an obvious "sure shipwreck"[262] for understanding Section Three's terms. Whatever else "insurrection or rebellion" might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned: first, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly "seceded" state governments and their confederation into the "Confederate States of America"; and second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting

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(statement of Sen. Sumner) (citing *Bollman* passage quoted above during the proceedings to expel Senator Jesse Bright for writing a letter to Jefferson Davis).

[259] See Harold Holzer, Lincoln and the Power of the Press: The War for Public Opinion 361 (2014) (referring to the phrase "aid and comfort to the enemy" (by the press) as "that catch-basin phrase again.").

[260] U.S. Const. amdt. XIV, sec. 2.

[261] U.S. Const. amdt. XIV, sec. 4.

[262] Morse, supra note 227.

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either secession or armed resistance to U.S. authority constituted "engaging in" or giving "aid or comfort to" the Union's enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. President Lincoln

An extremely important contemporaneous source for understanding the public constitutional meaning of "insurrection" and "rebellion" in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating "secession" as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln's view, a "war" between the United States and another sovereign.[263] It was not subject to Congress's Article I, section 8, *clause 11* power to "declare War," but was rather an illegal *rebellion*—a "giant insurrection"—to be suppressed by executive authority pursuant to Congress's Article I, section 8, *clause 15* power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[264]

Consider just a few prominent and illustrative statements: In his First Inaugural Address, on March 4, 1861, Lincoln, after setting forth arguments that "no State upon its own mere motion can lawfully get out of the Union," concluded that "acts of violence within any State or States against the authority of the United States" are "*insurrectionary or revolutionary, according to circumstances.*"[265] Following the attack on Fort Sumter, Lincoln's April 15, 1861 proclamation calling forth the militia

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[263] On Lincoln's understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war) see sources cited in note 231. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L. Rev. 807, 814-823 (2006).

[264] Compare U.S. Const. art. I, §8, cl. 11 (Declare War Clause) with U.S. Const. art. I, §8, cl. 15 (power "to provide for calling forth" the Militia for law execution and to suppress insurrections"). Congress's exercise of this power – the Insurrection Acts of 1795 and 1807 – is discussed infra Part IV.A.5.a.

[265] Abraham Lincoln, First Inaugural Address (March 4, 1861), IV Complete Works of Lincoln ("CWL") 262, 265.

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similarly characterized the attack as fitting the statutory definition of *insurrection*.[266] And in his July 4, 1861 Message to Congress, Lincoln labelled the South's purported secession a "*giant insurrection*" and, vividly, as "*rebellion* ... sugar coated." The "so-called 'Confederate States'" had formed an "*insurrectionary* government."[267] In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, section 9, clause 2 of the Constitution, which used exactly that language of "rebellion."[268] Lincoln's use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators, no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion*.

Two years later, at the height of the war, Lincoln returned to the characterization of the South's actions as "rebellion" (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio Congressman Clement Vallandigham, a notorious racist and prominent "Copperhead" pro-South, anti-Union northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the propriety of the Union's war effort.

Lincoln distinguished law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: "Ours is *a case of Rebellion*—so called by the resolutions before me—in fact, *a clear, flagrant, and gigantic case of Rebellion*." And that, Lincoln concluded, was what allowed suspension of habeas corpus.[269] In the course of his argument, Lincoln described rebellion as "*sudden and extensive uprisings against the government*."[270] This is a useful description that supports our working definition: Rebellion is an "uprising." It is something more than mere protest. It is, often, "sudden." It is "extensive." It is directed "against the government." *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham's actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy

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[266] Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), IV CWL 331, 332.
[267] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), IV CWL 421, 427-428, 432-437.
[268] Id. at 429-431 (emphasis added).
[269] U.S. Const. art. I, §9, cl. 2.
[270] Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), VI CWL 260, 264 (emphasis added).

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cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, "under cover of 'Liberty of speech,' 'Liberty of the press,' and 'Habeas corpus,'" rebel sympathizers "hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways."[271] Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied "cover" for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person's refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a "man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy." He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now "occupying the very highest places in the rebel war service," such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[272] Lincoln's position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.[273] In a colorful metaphor, Lincoln ventured:

> I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the

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[271] Id. at 263.

[272] Id. at 265.

[273] In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those distinguishing pure speech from speech linked to prohibited *conduct*; recognizing limits on speech posing a danger of inciting to crime or lawlessness; recognizing "compelling interest" overrides in exceptional circumstances, including for reasons of national security or military secrecy; finding that government's motives and purposes for a particular action may matter to its lawfulness; and noting where an incidental limitation on expression leaves open alternative channels for expression of the same message. See Paulsen, *Civil War, supra* note 231, at 698-702 & n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment's freedom of speech).

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> right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.[274]

Lincoln also stressed a distinction between speech directed at criticism of the government's political policy—fully protected by the freedom of speech—and expression more or less directly aimed at harming the military's recruitment and war effort. If Vallandigham had been arrested merely because he was "damaging the political prospects of the administration" or "the personal interests of the general," that would be one thing, Lincoln observed. "[I]f there was no other reason for the arrest, then I concede that the arrest was wrong." But as Lincoln understood it, the arrest "was made for a very different reason"—that Vallandigham was "laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Vallandigham was, in short, "warring upon the military." He who "dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle." Desertion was punishable by death, of course. In a famous line, Lincoln asked, rhetorically "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[275] Lincoln's answer was no: "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy." [276]

Lincoln continued: "If I be wrong on this question of constitutional power," he added, "my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them -- in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security."[277]

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action.

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[274] Letter to Corning (June 12, 1863), VI CWL at 267. (*Emetics* referred to a medicine or substance used to induce vomiting.)
[275] Letter to Corning, VI CWL at 266.
[276] Id. at 266-67.
[277] Id. at 267.

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Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms "insurrection or rebellion," and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct, *all* constituted forms of support for and participation in "insurrection" or "rebellion." And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions of the post-war status of persons who had participated in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.[278]

b. Congress

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: We think two specific enactments of Congress during the Civil War are especially probative of the understandings of "insurrection" and "rebellion" and of what conduct was publicly understood to constitute having "engaged in" or given assistance to rebellion. First, there is the so-called "Ironclad Oath," adopted

[278] Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as "the rebellion." Annual Message to Congress (Dec. 8, 1863), VII CWL at 51 In his accompanying offer of amnesty and pardon, in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the "rebellion" that "now exists whereby the loyal State governments of several States have for a long time been subverted" (id. at 53), to "said rebellion and treason" (id. at 54), to "said rebellion" (id.) and to persons who had provided "aid" to the "rebellion" in various forms. Interestingly, Lincoln *excepted* from his offer of forgiveness – in language that would seem to presage the similar terms of Section Three – "all who have left judicial stations under the United States to aid the rebellion" and "all who resigned commissions in the army or navy in the United States, and afterwards aided the rebellion." Id. at 55. Lincoln also left to the respective houses of Congress the exclusive judgment "whether members sent to Congress from any State shall be admitted to seats."

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on July 2, 1862 as the oath one must be able to swear in order to hold federal office.[279] Second, there is the "Second Confiscation Act," adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting "rebellion" or "insurrection."[280] These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

i. The Ironclad Oath

Congress adopted The Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.[281] The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.[282] It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath's list of never-have-I-evers particularly instructive. Here's the oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

> I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor attempted to exercise the functions of any office whatever,* under any authority or pretended authority in hostility to the United States; that I have [4] *not yielded a*

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[279] 12 Stat. 502.

[280] 12 Stat. 589 (1862). 12 Stat. 627 (1862).

[281] 23 Stat. 21 (1884). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, 15 Stat. 85 (1868), and in 1871 it added that anybody "who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution" yet would otherwise "not be able on account of his participation in the late rebellion to take" the Ironclad Oath, could take the forward-looking oath instead, 16 Stat. 412 (1871). These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

[282] For this reason, Lincoln famously wrote: "On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*." Endorsement of Abraham Lincoln in Letter from R.M. Edwards to Edwin Stanton, February 5, 1864, 7 Lincoln Papers 169.

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> *voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-evers would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms, of course. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution* . . . hostile or inimical" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: What the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.[283]

ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act." Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"[284]

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.[285] The Second Confiscation Act was long and vigorously debated in Congress, much discussed in the press and in public discourse, objected to by many on constitutional grounds, and nearly vetoed by President Lincoln.[286] Enactment of the Second Confiscation Act gave rise to very public pressure

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[283] The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the oath to its own members, during and after the enactment of Section Three. These applications are detailed infra Part IV.A.5.b.

[284] 12 Stat. 589 (1862). See also 12 Stat. 627 (1862) ("explanatory" joint resolution).

[285] An earlier act had provided for forfeiture more specifically of property or slaves actually *used* in service of rebellion. 12 Stat. 319 (Aug. 6, 1861).

[286] See generally David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1185-1195 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an "explanatory" joint resolution (which Lincoln signed together with the bill). Lincoln nonetheless appended his original draft veto message setting forth his objections. For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of

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on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order. The Second Confiscation Act was a big deal. [287]

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime, and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who "*engaged in*," "*incite[d]*," "*set on foot*," or "*assist[ed]*" "*rebellion*" or "*insurrection*" or who had "*given aid or comfort*" to rebellion or done acts "*aiding and abetting*" rebellion. The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

Specifically: Section 2 made it a new crime, distinct from treason, to "*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*" or to "*give aid or comfort thereto*" or to "*engage in, or give aid and comfort to*," any "*existing rebellion or insurrection.*"[288] It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with "rebellion or insurrection." Those terms are described as involving acts "against

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action in signing it but nonetheless appending his objections, see id. at 1193-1194; Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War 105-106 (2007) (noting Lincoln's initial concern that the act would violate Article III's limitations on the punishment for treason and the objections of others that the act was a bill of attainder); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 215-217 (2010). For Lincoln's July 17, 1862 message to Congress, detailing his objections, see V Complete Works of Lincoln 328-331.

[287] A month after the Act had been adopted, Horace Greeley published a scathing editorial titled "The Prayer of Twenty Millions," in which he demanded that Lincoln "EXECUTE THE LAWS" faithfully with specific reference to the Second Confiscation Act. Greeley condemned Lincoln's "mistaken deference to Rebel Slavery" and his failure to rebuke his generals for having "habitually disregarded" the Confiscation Act. Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and "widely reprinted," defending his course of action. V Complete Works of Lincoln 388-389; see Holzer, supra note 259, at 400-401. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual *authority* for his proclamation). V Complete Works of Lincoln at 434-435 (stating that "attention is hereby called to" provisions of the act but relying for authority on his powers as executive and military Commander in Chief). See also Foner, Fiery Trial, supra note 286, at 215 (noting that "the Second Confiscation Act embodied a major shift in national policy").

[288] 12 Stat. 589, 590. (emphasis added). Section 2 provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act's disqualification from *federal* office, *id.*, as well. 18 U.S.C. §2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). Needless to say, a prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

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the authority of the United States, or the laws thereof" (a formulation closely conforming to our working definitions). Section 2 imposes criminal liability on persons who "incite" such acts; who "set on foot" such acts; who "assist" such acts; who in any other way "engage in" such conduct; or who "give aid and comfort to" such conduct. All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section 3 of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."[289] Section 5 directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who "shall hereafter *assist and give aid and comfort to* such rebellion."[290] Officeholding in a rebel government or military was *per se* blameworthy participation; but general giving of assistance or aid or comfort also qualified as participation in rebellion. Section 6 provided a further authorization for seizure of the property of any person not already mentioned who, "being *engaged in* armed *rebellion* against the government of the United States, or *aiding* or abetting such *rebellion*," and, after sixty days' notice issued by the President, did not "cease to *aid, countenance, and abet such rebellion*, and return to his allegiance to the United States."[291] Section 7 and Section 8 provided for in rem proceedings against property "found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto,*" in which case it "shall be condemned as *enemies'* property."[292] And Section 9 famously emancipated slaves of persons "who shall hereafter be *engaged in rebellion*" against the Union or who "shall *in any way give aid or comfort thereto.*"[293] Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: "engaged in," "rebellion," "aid or comfort," "abet," "countenance," "enemies."

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time. For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located. At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning those areas.[294] Similarly, as a practical matter, criminal prosecutions of rebels for

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[289] 12 Stat. 589, 590.
[290] Id. (emphasis added.)
[291] Id. at 591.
[292] Id.
[293] Id.
[294] See McPherson, supra note 231, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of "*in rem* proceedings by district courts that were of course not functioning in the rebellious states"); Foner, Fiery Trial, supra note 286, at 215 ("For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold

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treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.)[295] The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act's specific policies. The administration, according to one scholar, "chose not to implement the law vigorously."[296] Attorney General Bates "exerted no more than a minimal effort to make the first and second confiscation acts work."[297] And the Act's section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln's far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander in Chief power.

But in some ways the lack of enforcement cases is beside our point here, which concerns the Act's prominence in national discussions and its pervasive use of terms, phrases, and concepts—rebellion, insurrection, engage in, aid or comfort—that would reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation we think helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three's terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. The Supreme Court's decision in *The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.[298] There, the majority upheld the constitutionality of Lincoln's unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports. In a truly landmark decision, the Supreme Court held that the President's war powers (including the power to impose a blockade) were triggered immediately, as soon as the South's rebellion took the form of organized military resistance to the authority of the U.S. government. The President's power to

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under its provisions."). See also Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-1862, at 238 (2005) (remarking that "[t]he confiscation bill that finally emerged was neither sweeping nor enforceable" though opining that "if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.").

[295] See Eric L. McKitrick, Andrew Johnson and Reconstruction 141-152 (1960).

[296] John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 55 (2005).

[297] Id. at 72; see also James G. Randall, Constitutional Problems Under Lincoln 288-292 (1926) (describing minimal enforcement of the Second Confiscation Act).

[298] 67 U.S. (2 Black) 635 (1863).

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wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held. A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections" but "sprung forth suddenly ... in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[299]

The Court's decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution's allocation of war powers. At the time, the case had other hugely consequential implications: the principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln's constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.[300] The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court's usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government: "*Insurrection* against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government," the majority said.[301] A civil war "becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[302] Where a rebellion has come to possess certain military characteristics, the "party in rebellion" might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an '*insurrection*' by one side, and the insurgents be considered as rebels or traitors."[303]

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on "rebellion." A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

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[299] Id. at 668-669; see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J. 149, 177-180 (2004).
[300] Paulsen, *Emancipation*, supra 263, at, 814-823.
[301] 67 U.S. at 666 (emphasis added).
[302] Id. at 666
[303] Id. at 668.

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The Prize Cases also held that persons engaged in insurrection or rebellion could be treated as "*enemies*" (as well as traitors) for legal purposes. Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in "commerce" that "supplies" rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner. Even "neutral" powers' shipping could be seized when it violated a blockade: "Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as "enemies' property."'"[304]

The Prize Cases' treatment of the concepts of insurrection and rebellion, of who constituted "enemies," and of what actions constituted support for rebellion, would have been very much part of the legal culture of the day and provides important legal background as to how these terms would have been understood at the time of the drafting of Section Three of the Fourteenth Amendment, just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to "the lawful authority of the Government," with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—"insurrection," "rebellion," and what it meant to "engage in" or provide "aid or comfort" to enemies—highly probative of Section Three's original public meaning. President Lincoln, repeatedly and insistently; Congress, pointedly and consistently; and the Supreme Court, decisively, used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more

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[304] Id. at 674 (quoting 3 Wash. C.C.R. 183). That said, the Court also cautioned that " 'enemies' property" was "a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law." Id. at 674. The point that, in a military context, property could be treated as "enemies' property" irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation: even though Lincoln's proclamation purported to free the slaves of *all* persons in rebel-controlled territory – including slaves held by persons claiming to be loyal to the Union – such "property" constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *Emancipation*, supra note 263. See generally John Fabian Witt, Lincoln's Code (2012).

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general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

5. Other Extant Statutory Sources and Notorious Examples

a. The Insurrection Acts (and Insurrections Generally)

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as well as its other war powers over the army and navy. The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach; the forms and degree of opposition to government authority that were believed to trigger the statutes' application; and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

The 1795 act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections." But it also applied to repel invasions and to enforce federal law. Together, these were the three circumstances where Congress had the power to provide for calling out the militia.[305] Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the government thereof."[306] Section Two allowed the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[307] Section Two encompasses insurrections against the United States.[308] (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call out the army and navy in similar circumstances: "in all cases of insurrection, or obstruction to the

[305] U.S. Const. art. I, sec. 8, cl. 15.
[306] 2 Stat. 424 (1795), sec. 1.
[307] Id. sec. 2. (emphasis added).
[308] That said, because Section Two is supported by *both* Congress's power to "suppress Insurrections" *and* its power "to execute the Laws of the Union," U.S. Const. art. I, sec. 8, cl. 15. it could encompass instances of law enforcement that do not rise to the level of a constitutional "insurrection."

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laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary ..." The 1807 act thus carried forward and repeated the 1795 act's understanding of insurrection.[309]

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe "*rebellion*." It allowed the President to call forth the militia "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . ."[310]

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation; it entails "combinations" or "assemblages," acting together, to "oppose[s]" or "obstruct" the ability of government to "execute" the law, in numbers "too powerful" to be suppressed by the usual means of law enforcement.[311]

Moreover, several famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding "insurrection" or "rebellion." Consider just a few.

The "Whiskey Rebellion" was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilleries. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their

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[309] 2 Stat. 443 (1807).

[310] 12 Stat. 281 (1861).

[311] Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, supra note 5, at 168, 214-215. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President's proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection; but it is not an insurrection only because he proclaims it one.

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duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).[312]

We believe the "Whiskey Rebellion" would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.[313] Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.[314] In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an "insurrection" or "rebellion."

"Fries Rebellion," in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.[315] President John Adams invoked the 1795 Act to suppress the "insurrection," as he called it,[316] which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters. In at least one instance, armed opponents of the government successfully freed prisoners from federal custody. The Adams administration's suppression of the insurrection led to widely publicized treason prosecutions[317] of leaders and instigators of the unlawful resistance, including John Fries. As with the Whiskey Rebellion, Fries Rebellion was characterized by

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[312] See generally Elkins & McKitrick, The Age of Federalism 461-474 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties – including tarring and feathering, whipping, surrounding of officials' homes by armed mobs, and kidnapping and coerced repudiation of federal authority); see also Ron Chernow, Alexander Hamilton 468-478 (2004) (similar); Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 43-68 (1988) (documenting the resistance and military response).

[313] To be sure, one scholar of the Acts suggests that "[i]t may have been dubious whether actions of the Whiskey Rebellion farmers truly rose to the level of insurrection," and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, at 161 n. 46; see also Coakley, supra note 312, at 67 (suggesting that to "characterize the . . . affair as a 'riot' and the participants as 'rioters'" is "far closer to the truth"). But later sources called it at least an insurrection, see infra note 314, and this goes to show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government.

[314] See 1 Francis Wharton. State Trials of the United States during the Administrations of Washington and Adams 102-184 (1849) (describing "The Trials of the Western Insurgents"); Townsend Ward, The Insurrection of the Year 1794, in the western counties of Pennsylvania (J.B. Lippincott 1858); H.M. Brackenridge, History of the western insurrection in western Pennsylvania: commonly called the whiskey insurrection (W.S. Haven, 1859).

[315] Coakley, supra note 312, 69-77.

[316] John Adams, Proclamation on Insurrection in Pennsylvania, 12 March 1799, https://founders.archives.gov/documents/Adams/99-02-02-3377.

[317] These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed "insurrection," describing it as a "rising of any body of the people" and arguing that it qualified as treason because "an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States." Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800). See also 1 Wharton, supra note 314, at 458-609 (describing these proceedings as "The Trial of the Northampton Insurgents").

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concerted acts of forcible interference with federal officials' ability to perform their duties under law.[318]

Nat Turner's Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.[319] But it surely would have been a classic illustration of at least an "insurrection" and perhaps even a "*rebellion*"—a concerted uprising seeking forcibly to overturn the legal order and thwart government's ability to execute the law. A published report of Turner's own account called it both an insurrection[320] and in one instance an "open rebellion."[321] This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked "the 'higher law' doctrine" to openly harbor freed slaves to the point that President Millard Fillmore "threatened to send in federal troops."[322] In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland. This was denounced as an "act of insurrection," and this time President Fillmore did call out federal troops.[323] In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.[324] And of course John

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[318] As with the Whiskey Rebellion, these events show that an "insurrection" in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See also Elkins & McKitrick at 696-700 (questioning "whether the circumstances really called for military force of any kind").

[319] Federal troops were used to suppress this and other slave rebellions, but "without following the legal procedures laid down in the statutes of 1795 and 1807." Coakley, supra note 312, at 92-94. Coakley suggests that this the failure to go through the Insurrection Acts reflected "the universal dread of slave revolts" at the time and the fact that "t]he slaves had no political constituency." Id. at 94.

[320] See The Confessions of Nat Turner, The Leader of the Late Insurrection in Southampton, VA, as fully and voluntarily made to Thomas R. Gray, at 3, 5, 7, 20, 22 (1831) (calling it "insurrection"); see also Thomas Wentworth Higginson, Nat Turner's Insurrection, 8 Atlantic Monthly 173 (1861)

[321] See Turner, supra note 320, at 3 ("The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves") (emphases added).

[322] See McPherson, supra note 231, at 81-84; Cf. Coakley, supra note 312, at 130-131 (noting debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

[323] McPherson, supra note 231, at 84-85. See also Thomas Slaughter, Bloody Dawn: The Christian Riot and Racial Violence in the Antebellum North (1991); and cf. id. at ix ("The line between riot and rebellion was shifting during the antebellum period.").

[324] See generally H. Robert Baker, The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (2006) (describing resistance, in the mid-to-late1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

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Brown's fateful raid on Harper's Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.[325] These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection* nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr's Rebellion, in Rhode Island, in 1841-1842 which led to the Supreme Court's 1849 decision in *Luther v. Borden*.[326] There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter). The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government. The practical result of the decision—relevant to our inquiry– was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "*insurrection*" against the rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force"[327] and as having attempted "to assert the authority of [the Dorr government] by force,"[328] as amounting to having "engaged in the insurrection."[329] The Court also referred to the government's actions as having been designed to suppress that "insurrection."[330] The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.[331] While these

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[325] McPherson, supra note 231, 202-208. Federal troops helped suppress this insurrection and rebellion too. See Coakley, supra note 312, at 193 ("This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities.").

[326] Luther v. Borden, 58 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see Coakley, supra note 312, at 119-127.

[327] Luther, 58 U.S. (7 How.) at 8.

[328] Id. at 37

[329] Id. at 46

[330] Id. at 45.

[331] By this time, the Act had been amended yet again. See 17 Stat. 13, 14-15 (1871), §§ 3-4.

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events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection" as displayed by important usage within a few years of adoption of the Fourteenth Amendment. Briefly summarized: In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus, among other actions) to secure order in dealing with the Ku Klux Klan.[332] In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous "Colfax Massacre" of April 13, 1873, in which a white mob attacked and massacred perhaps 150 black citizens who had been defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government. President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.[333] Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d'etat that had overthrown the Republican governor by force.[334] Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of the capital—New Orleans at the time. (The conflict lasted until 1877, when Reconstruction was abandoned by the national government and white supremacists took full control of the state.) In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.[335] Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.[336] And in 1876, in South Carolina, Grant invoked the Insurrection Act to protect the gubernatorial election process from white supremacist groups.[337] Common to each of these instances during the Grant administration was

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[332] Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871); http://www.presidency.ucsb.edu/ws/?pid=70253; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871); for background see Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 Harv. Nat'l Sec. J. 537, 613-14 (2014); Lou Falkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872, at 39-49 (1996).

[333] Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) http://www.presidency.ucsb.edu/ws/index.php?pid=70364

[334] Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) http://www.presidency.ucsb.edu/ws/index.php?pid=70422

[335]Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), http://www.presidency.ucsb.edu/ws/?pid=70459.

[336] Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874) http://www.presidency.ucsb.edu/ws/?pid=70420.

[337] Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876) http://www.presidency.ucsb.edu/ws/?pid=70542.

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the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shays' Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or perhaps given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. The Congressional Exclusion Debates

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."[338] Moreover, several of these proceedings occurred right around the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.[339]

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[338] Lynch, supra note 5, at 196. Lynch ably and accurately describes the most important such cases. See id. at 196-201, 207-210. We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

[339] See generally 1 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, ch. 14, pp. 431-486 (1907).

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First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy, during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.[340] A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."[341] Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."[342]

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility" to the Government or provided "aid or comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort."

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."[343] It also involved an incident of pure *speech* as disqualifying a member-elect from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

> *Editors Louisville Courier:*
>
> My attention has been called to the following paragraph, which appeared in your paper of this date:
>
> "JOHN YOUNG BROWN'S POSITION.– This gentleman, in reply to some searching interrogatories put to him by Governor Helm,

[340] Id. §448 at 442.
[341] Id. at 443 (emphasis added).
[342] Id.
[343] Id. at 445.

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said, in reference to the call of the President for four regiments of volunteers to march against the South—

'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State.*"

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.[344]

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. This became a precedent for the House's subsequent actions in other cases. The standard applied—whether the facts, "proved by clear and satisfactory testimony," showed that an individual had, by an "act or speech ... overt and public ... done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion"—had been satisfied by Brown's letter.[345]

Similarly, in March 1868, the House excluded John D. Young under this standard. Young's case also involved speech. The Young case involved numerous expressions of support and sympathy for the South and against the Union, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."[346] But Young's case was overdetermined, because there was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with* the open acts of 'aid and comfort to the enemies of the United States,'" established that he could not "'honestly and truly take the oath,'"[347] and the full House agreed.

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[344] Quoted in id. at §449, p. 445.
[345] Id. at §449, pp. 443, 448.
[346] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).
[347] Id. at §451, p. 452 (quoting House Report 40-29 (1868)) (emphasis added).

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The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was opposed to "voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.[348]

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson, who had served as a state court judge in the eastern region of Tennessee during the Confederate regime; and Representative-elect R.R. Butler, who had retained his seat in the state legislature during secession, while opposing it—the respective house ultimately admitted the applicant to his seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.[349]

A potentially broad understanding of "aid or comfort" also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.[350] What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son $100 on the way out the door. The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son's taking up arms against the United States and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas's treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan's Treasury Secretary because he disagreed with the President's decision to send federal reinforcements to

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[348] Id. at §453, p. 459.

[349] Id. at §453, 455, pp. 459-461, 462-465. In Butler's case, two-thirds of both houses voted him amnesty. Id. at 464-465. In Patterson's case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it, id. at 46, but perhaps that is okay, if application of the Ironclad Oath, to members of Congress, is a function of each house's *separate* power to make rules governing its proceedings. U.S. Const. art. I §5.

[350] Hinds' at §§457, 458 at pp. 465-470.

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Charleston Harbor.[351] Either theory of Thomas's exclusion suggests that "aid or comfort" to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one's son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia's sixth district, but the House committee found that Christy, by his own admission, had given "aid, countenance, counsel, and encouragement" to persons in armed hostility against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath, and he was not seated.[352] In 1869, the House sat John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.[353] The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of two witnesses.[354] In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or the other, the House ultimately voted to table the issue, leaving Booker in office.[355] Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia house of

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[351] Hinds' at §459, pp. 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas's son "it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action."). See also Cong. Globe 40th Cong. 2nd Sess. at 1260-1262 (Feb. 19, 1868).

[352] Hinds' at §459, pp. 470-472. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment," id.

[353] Hinds' at §460, pp. 472-473.

[354] Congressional Globe, 41st Cong, 2nd Sess. pp. 5442-5447 (July 11, 1870). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states; but everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "No war exist[ed] at the time" and it was before "the policy of the Government had been announced." Id. at 5443 (Butler); see also id. at 5445 (Garfield). Nor could Rice be excluded solely because of his politics. See id. at 5445 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

[355] Hinds' at §461, pp. 474-475.

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delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters. Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.

Finally, in 1871, the Senate declined to seat Senator-elect Zebulon Vance from North Carolina.[356] The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.[357] If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.[358]

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But there was no bright line, for instance, protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces appears generally to have been thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.[359]

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[356] See generally Hinds' at §463, pp. 478-486.

[357] See generally Richard E. Yates, *Zebulon B. Vance: as War Governor of North Carolina*, 1862-1865, 3 J. Southern Hist. 43 (1937).

[358] Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress, Act of May 22, 1872, ch. 193, 17 Stat. 142; https://bioguide.congress.gov/search/bio/V000021. Cf. Franklin Ray Shirley, Zebulon Vance, Tarheel Spokesman 71 & 152 n. 36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance), but Congress then passed a private bill granting him individual amnesty. 17 Stat. 691 (June 10, 1872). Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1884. Magliocca, *Amnesty*, supra note 5, at 111 n. 126.

[359] Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See supra notes 222-224 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section

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6. Legislative History

There is only a little fruit to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress's debates over its various provisions and of state ratification debates. The Fourteenth Amendment's legislative history is famously voluminous, and Section Three—like the other "forgotten" sections of the Amendment (Section Two and Section Four)—was much more salient to the debates then than it is to today.[360] As briefly noted above, the legislative history supports the key propositions we have advanced earlier in this article—that Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction; that Section Three's disqualification was seen by proponents and opponents alike to be self-executing and automatic; and that Section Three was understood to supersede (or satisfy) prior constitutional limitations.[361]

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences: there appears to have been substantial agreement—by both opponents and proponents—that the provision would cover a broad range of activity supporting or assisting the South's efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding and, further, would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have "engaged in" insurrection or rebellion or given "aid or comfort" to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents simply thought such breadth appropriate, necessary, and valuable.[362]

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather

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Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

[360] See generally Graber, Volume 1, supra note 8.

[361] See supra notes 12, 59, & 184.

[362] See generally Graber Section Three manuscript, supra note 12.

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than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).[363] As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

7. Early Applications of Section Three

A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they still can be informative.[364] Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.[365]

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress by enacting new, republican, Reconstruction-compliant constitutions—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified

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[363] Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply – *e.g.*, only to persons who joined the Confederacy while still holding prior office under the U.S. Constitution; only to persons who had sworn oaths to the Constitution since 1851; only to persons who had not received presidential pardons; and only to persons who had *voluntarily* served the confederacy. Republican defenders of Section Three successfully opposed these proposed limitations on Section Three's scope, arguing that limiting the ban to persons who still held office under the Constitution when they joined the Confederacy would indulge the pretext that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. Cong. Globe, 39th Cong. 1st Sess. p. 2770 (statement of Sen. Howard). Republicans likewise rejected the proposed limitation to persons who had "voluntarily" assisted or participated in rebellion, because it would raise unnecessary and difficult proof problems and permit spurious claims of involuntary participation. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he "never entered into the rebellion voluntarily"! Cong. Globe, 39th Cong., 1st Sess. p. 2918 (statement of Sen. Willey).

[364] See, e.g., Baude, *Liquidation*, supra note 242, at 61-62; Paulsen, *Most Dangerous*, supra note 242, at 293, 303.

[365] Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three, see supra Part IV.A.5.b.

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under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state's constitutional convention.[366]

Andrew Johnson's attorney general, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.[367] Stanberry's opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and ex post facto in this context.[368] Even so, Stanberry's opinion found Section Three's definition of what constituted participation in rebellion to be quite broad:

> "*All those who*, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done *any overt act* for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."[369]

As to individuals, Stanberry also reiterated several times that *any* voluntary support, even if not violent, was covered and culpable. He found "it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,"[370] and added that "wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law."[371]

Subsequent cases took even broader positions. For instance, in the 1869 decision of Worthy v. Barrett, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court's reasoning on this issue was succinct but clear:

> What will amount to having engaged in the rebellion?
>
> (1st.) Holding any of these offices under the Confederate government.

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[366] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428, 429, sec. 5-6 (March 2., 1867).
[367] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867); Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 182 (1867).
[368] 12 Op. Att'y Gen. at 159-160. But see supra Part III.A-B (explaining why the constitutional ex post facto and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).
[369] Id. at 161-162 (emphasis added)
[370] Id. at 161.
[371] Id. at 165.

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> 2d Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.[372]

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.[373]

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation – Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring *quo warranto* actions to remove officials holding office "contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution" and to bring criminal prosecutions against person who "shall hereafter knowingly accept or hold" office in violation of Section Three.[374] In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell, for accepting an appointment as county sheriff despite being covered by Section Three.[375] Powell's alleged act of rebellion was having "furnished a substitute for himself to the Confederate army," and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.[376] This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

> [T]he word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will

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[372] Worthy v. Barrett, 63 N.C. 199, 203 (1869). The court also applied the Worthy rule to the even easier case of a county attorney who "took part in th[e] rebellion by serving in the Confederate army, voluntarily." In Re Tate, 63 N.C. 308 (1869).

[373] By contrast, Stanberry had concluded that officers who "discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion." 12 Op. Att'y Gen. 162.

[374] 16 Stat. 140, 142-143, sections 14 & 15. See supra note 54.

[375] United States v. Powell, 27 F. Cas. 605 (C.C.D.N.C 1871).

[376] Id. at 607.

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> excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant's action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.[377]

In other words, only great duress *and* pure heart would be a defense if one's conduct otherwise provided material support to the rebellion. Section Three's disqualification for having "engaged" in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee. the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.[378] Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee's purported secession, and traveling to Washington to attempt to represent the state in Congress.[379] While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.[380]

The other scattered discussion of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section Three's substantive disqualification—broad interpretations of insurrection, rebellion, "engaged in," and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was "a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States."[381] Other cases are consistent with similarly

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[377] Id. Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry. Id.

[378] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 Tenn. B.J. 20 (2013); see also Magliocca, *Amnesty*, supra note 5, at 109-110.

[379] For one fawning account of Nelson, see Oliver P. Temple, Notable Men of Tennessee From 1833 to 1875. at 166-215 (1912).

[380] Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, supra note 378.

[381] In re Griffin, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

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broad assumptions.[382] We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have "engage[d] in insurrection and rebellion," or given "aid or comfort" to "enemies" was understood to embrace an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, the sum total of evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of "insurrection" and "rebellion" to which they applied; and finally early practice enforcing Section Three—points in a consistent direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably broad understanding of what types of conduct constitute engaging in or perhaps giving aid or comfort to such movements.

B. What Prior Officeholders are Covered? What Future Offices are Barred?

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

> No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States or under any State … [383]

[382] Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. Magliocca, *Amnesty*, supra note 5, at 109-110.
[383] U.S. Const. amdt. XIV, sec. 3.

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Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

> … who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States … [384]

We begin with a few observations.

First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.[385] Keep this in mind as we proceed: we think readers should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that "Senators and Representatives . . . Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."[386] Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will "faithfully execute the Office of President of the United States" and

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[384] Id.

[385] See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 Albany L. Rev. 671, 674-76 (1995). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. William Michael Treanor, *The Case of the Dishonest Scrivener: Guverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 20-24 (2021). Putting aside whether this story is really true, David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Governeur Morris as Dishonest Scrivener*, 120 Mich. L. Rev. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semi-colon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *West Virginia*, supra note 130, at 338-339 & n. 151.

[386] U.S. Const. art. VI, cl.3.

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"'to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'"[387]

Section Three's listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three's list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to "military" offices—including state military offices—whether or not they would be considered "executive" offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text's overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified.

With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, "triggering" clause): Section Three's disqualification attaches to persons who previously swore an oath to support the Constitution as:

> [i] a "*member*" of Congress, or as
> [ii] an "*officer* of" the United States, or as
> [iii] a "*member*" of any State legislature, or as
> [iv] an "*executive or judicial officer* of" any State.[388]

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[387] U.S. Const. art. II, §1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L. Rev. 1257, 1260-1267 (2004); on "to the best of my Ability," see William Baude, *Signing Unconstitutional Laws*, 86 Ind. L.J. 303, 310 (2011).
[388] U.S. Const. amdt. XIV, sec. 3.

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These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

> [i] "a *Senator* or *Representative*" in Congress (paralleling "*member,*" a seemingly purely stylistic variation) or
> [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
> [iii] holding "*any office, civil or military,*" "under" either federal or state government (paralleling "officer" of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of "military" officers).

The description "civil" office, in the disqualified-from list seems designed to embrace the categories of "executive or judicial" officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a "civil" office within the language and design of Section Three, reading the word "office" in this context in an ordinary, non-technical sense.[389]

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for president and vice president (and clarifying "military"). The legislative positions in question are the relevant *elected* offices—*members* of the legislature, whether a state legislature or the federal Congress—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an "office" within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an "office," held by an "officer"—as opposed to non-officer, non-"office"-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?[390] Like-

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[389] Hemel, *How-to Guide*, supra note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from "civil" offices.); contra John Randolph Tucker, *General Amnesty*, 126 N. Am. Rev. 53, 54 (1878). None of this in our view affects the question whether a Member of Congress may properly be designated as an "Officer" to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995) with John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995).

[390] Serious scholarship has explored those questions with respect to the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

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wise, for the federal judicial branch, Article III judges and justices are plainly covered. (Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,[391] are presumably covered as well—as well as perhaps bankruptcy judges, magistrate judges and the like.)[392] Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive "office" held by "officers" (thus, perhaps, the special need for designation "military," to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* "under" the United States, is not properly classified as an "*officer of*" the United States.[393] On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this[394]—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three's consequences.

We do not buy it, for many reasons: First, it adopts precisely the type of "secret code" hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: an insurrectionist *President* is not covered by Section Three's disqualification (though nearly every other federal or state officeholder is); the President is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.[395]

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[391] 38 U.S. 230, 258 (1839) ("[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned"). To be clear, Hennen dealt with the clerk of court, not what we would now call a term judicial law clerk.

[392] That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III* 133 Harv. L. Rev. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly "officers" at all. Again, we leave this issue for another day.

[393] Josh Blackman & Seth Barrett Tillman, *Is The President An "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021).

[394] See, e.g., id. at 6, 17, 21.

[395] To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comm. 245 (1997); (suggesting the possibility that a straightforward reading of the constitutional text yields the "stupid" – and surely inadvertent – result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, Grounding, supra note 9, at 1468. But that does not mean we should close our eyes to plausibility and common sense, *especially* when the proposed textual reading is such a stretch. See also Paulsen, supra, Nothing But the Text, supra note 10, at 1439-1440 (noting cautions concerning use of the "absurdity" canon to

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Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the "office" of President innumerable times. It specifies the length of term for which the President "holds his Office," certain minimum qualifications for eligibility "to that Office," what happens upon the President's removal "from Office," or inability to discharge "the Powers and Duties of said Office," and the oath he shall take before entering "on the Execution of his Office."[396] If the Presidency is not an office, nothing is.

So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an "office *under*" the United States but is not an "officer *of*" the United States? This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer *"of"* the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause ("officer of") and the positions-disqualified clause ("office under")—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.[397] Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different prepositions: the Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.[398]

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deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

[396] See generally U.S. Const. Art. II.

[397] For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. Const. amdt. XIII, sec. 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amdt. XIC, sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); id. amdt. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *West Virginia*, supra note 130, at 348 (giving examples).

[398] One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (Jul. 28, 2016) https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare id. (foreign gifts to Washington) with Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

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Third, a variant of the Blackman-Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred.[399] "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?"[400] Johnson was complaining that these two officers *should* be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Maine interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'"[401] Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."[402]

The Blackman-Tillman argument is not *quite* the same, but it is the mirror image of Johnson's concern. Johnson's inquiry was whether a covered, insurrectionist nonetheless might become president. The Blackman-Tillman argument is that an insurrectionist president is not an "officer of" the United States whose prior position triggers Section Three's restrictions on future office. The Johnson-Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.[403] Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining

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Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. U.L. Rev. Colloquy 180, 190 (2013) (contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, supra this note (Hamilton's list) with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107 (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms); cf. Blackman & Tillman, supra note 393, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

[399] Cong. Globe, 39th Cong., 1st sess. at 2899 (1866)

[400] Id.

[401] Id.

[402] Id.

[403] Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate Congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, supra 393, at 45-46 (acknowledging this). While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification these incidents would have shown that to be a glaring and dangerous omission.

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textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds "*office under*" the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

If Blackman and Tillman maintain that the President does *not* hold "office under" the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold "office under" the United States, then they must maintain a sharp and crucial distinction between "office under" and "officer of." As Mark Graber has observed, this distinction was *also* contradicted by Section Three's framers: "[T]he members of the Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office 'under the United States' were officers 'of the United States.' During the debates over Section 3, no representative or senator alluded to the existence of a distinction between 'of' and 'under'. Representatives and senators often described the president as having an 'office under the United States' and being an 'officer of the United States.'"[404] If a secret code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman-Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text's many references to the office of the Presidency as an "office"; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned

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[404] Mark Graber *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023). Professor Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'" In addition, "[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished between 'officers under' and 'officers of' or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; see also Lynch, supra note 5, at 158-160 (collecting authorities supporting the same point); Magliocca, *Foreground*, supra note 62, at 16 n. 48 ("My research . . . shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States").

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by the Radical Reconstruction Congress that drafted the Fourteenth Amendment; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the "under/of" difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or "triggering" language, insurrectionists who once served as President and Vice President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

C. The Attempted Overthrow of the 2020 Presidential Election

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020-2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress's and the Vice President's counting of such lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

Taken as a whole, these actions represented an effort to prevent the lawful, regular, termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or perhaps given "aid or comfort" to those who did? We will consider those questions in turn.

1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any re-

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spect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020-2021, but let us first focus on the events of January 6, 2021.[405] These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[406] The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was in part coordinated, not merely a riot.[407] Some members of the group were armed,[408] and many used force to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.[409]

Furthermore, it seems that, as a whole, the group's goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power, by disrupting a necessary formal step in the constitutional process.[410] The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that

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[405] In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. 117-000 (117th Cong., 2nd Sess.). Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally supra Part II.B.

[406] Supra Part IV.A.1. The fact that President Trump may have supported the insurrection, see infra II.C.2.b, does not change this. In our system the President is not "the government," and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

[407] See, e.g., January 6 Report, supra note 405, at 499-502, 530-531.

[408] Id. at 640-642.

[409] Id. at 646-647, 651-659.

[410] Id. at 502-510, 521-530.

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day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries' Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.[411] Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.[412]

Our assessment of the events of January 6, specifically, as an "insurrection" confirms the judgment made by public authorities: An act of Congress, to "award four congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,"[413] found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: "On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers."[414] Another finding noted the historic magni-

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[411] See supra Part IV.A.4.c.

[412] What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, amounted to "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect," and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course if there were any other insurrections against the United States, Section Three applies to them all.

[413] Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322.

[414] Id. sec. 1(1). In the state Section Three proceedings against Marjorie Taylor Greene, supra notes 68-73 and accompanying text, the hearing officer cited this statute to conclude "Congress has characterized the Invasion as an insurrection." Initial Decision, Rowan v. Greene, No. 2222-582-OSAH-SEC-STATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022). The hearing officer found it unnecessary to decide for himself, however, "Whether the Invasion of January 6 amounted to an insurrection." Id. at 18.

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tude and symbolic importance of that insurrection against democracy: "The desecration of the U.S. Capitol, which is the temple of American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation's history."[415] The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th.[416] The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th *was* an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.[417]

Finally, there is an additional possibility that we should see the events of January 6, 2021, as just one part of a broader "rebellion" against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

We acknowledge that applying the term "rebellion" to the events of 2020-2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an "*open and avowed renunciation of the authority* of the government," as Webster would have it, nor (outside of the insurrection of January 6) "*the taking up of arms*" or "*forcible* opposition" as Bouvier would have it.[418] It is not a perfect fit.

Nonetheless, consider the argument that the term "rebellion" could be used more broadly to describe a coup d'etat seeking to overthrow the constitutional order—including a so-called "bloodless" coup d'etat (where no force is used) and a successful "self-coup" of the bloodless variety[419] (where the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: 1. A military coup d'etat upending lawful government by use of force surely qualifies,

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[415] Pub. Law. 117-32, sec. 1(4).
[416] H. Res. 24 (117th Cong., 1st Sess. Jan 25, 2021).
[417] For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, supra note 62, at 23 n.65; Vlahoplus, supra note 404, at 1; Farah Peterson, *Our Constitutionalism of Force*, 122 Colum. L. Rev. 1539, 1622-25 (2022); see also Hemel, *How-to Guide*, supra note 5; Mark A. Graber, Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021, Lawfare (Sep. 26, 2022) at https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021.
[418] See supra Part IV.A.2.
[419] See generally Daniel J. Hemel, *Self-Coup and The Constitution*, 37 Const. Comm. (forthcoming 2023).

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constitutionally, as a "rebellion." It is literally an effort unlawfully to overthrow constitutional government, by force. 2. It follows that a military coup d'etat upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*. 3. A military coup d'etat by the *existing* regime—a "self-coup," would seem, legally, to be the same thing. In such a case the regime does not *seize* power, by show or threat of force; it *retains* power by show or threat of force. But it is logically identical to situations #1 and #2. 4. A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3. Indeed, it seems fair to say that situation #4 is merely an instance of situation #3. 5. The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020-2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.[420]

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.[421]

2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Additionally, perhaps, who might be said to have provided "aid or comfort" to those insurrectionists and rebels?*

As detailed at great—perhaps excruciating—length above, "engaged in" under Section Three is properly understood to embrace a broad range of willful participatory

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[420] In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. See supra Part IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'etat (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

[421] For the sake of completeness, we add that we think the events of 2020-2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.

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conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as "insurrection" or "rebellion." And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving "aid or comfort" arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three's disqualification.[422]

Who, then, engaged in such behavior?

a. General Principles Concerning Culpable Participation

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual's voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Part II, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution's criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three's broad sweep, it is clear that at least two purported factual defenses are simply immaterial:

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported "insurrection" or "rebellion" because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to "stop the steal." The problem is that the premise is simply false. Decisionmakers can and should act on the well settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.[423]

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[422] See generally supra Part IV.A.

[423] See not only the January 6 Report, supra note 405, but also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson &

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Second, it likewise is no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South's secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.[424] Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual's wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.[425]

b. Section Three Disqualifies Donald Trump from Future Office

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the 2020 election and the events leading to the January 6 attack.

The case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential election result, calling it "stolen" and "rigged";[426] that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,[427] to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,[428] to assemble and induce others to submit bogus slates of competing state electors,[429] to persuade or pressure Congress to refuse to count electors' votes submitted by several states,[430] and finally, to pressure the

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Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022)*, https://lostnotstolen.org.

[424] This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., Counterman v. Colorado, 600 U.S. ___, at 4 n.2 (2023).

[425] Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted "insurrection"? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d'etat are not.

[426] And not that it matters, see supra Part IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, supra note 405, 100-01, 103-04, 203, 213, 789.

[427] Id. at 202-203, 263-265; see also id. at 223-231,

[428] Id. at 296-300.

[429] Id. at 341-354.

[430] Id. at 431.

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Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors' votes.[431]

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.[432] Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump's defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: "Big protest in D.C. on January 6th. Be there, will be wild!"[433] According to testimony amassed by the House's January 6th Commission, Trump's supporters interpreted this as a call to arms, sometimes literally.[434]

Then there are the events of January 6 specifically. When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to the Capitol to oppose what he had been calling the "steal" of the election. Trump reiterated his false claim that he had in fact won the election—"we won this election and we won it by a landslide"—but that the Democrats and the media had "stolen" the election and "rigged" a false outcome. "They rigged it like they've never rigged an election before," he charged. "Make no mistake, this election was stolen from you, from me and from the country. … This [is] the most corrupt election in the history, maybe of the world." The crowd was "gathered together in the heart of our nation's capital for one very, very basic and simple reason: To save our democracy." Trump called on the crowd to march on the Capitol. "Our country has had enough. We will not take it anymore and that's what this is all about. … We will stop the steal." He urged the assembled mass of thousands, some of whom Trump knew to be armed, to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[435]

Some might quibble that the speech is ambiguous.[436] Not all of Trump's rambling address called literally for the crowd to "fight." Some of his statements were

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[431] Id. at 441-458.
[432] Id. at 441-458.
[433] Quoted in id. at 499.
[434] Id. at 499-540.
[435] For the quotations in this paragraph, see "Transcript of Trump's Speech at Rally Before US Capitol Riot," Associated Press, (Jan. 13, 2021), available at https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27. See also id. ("And again, most people would stand there at 9 o'clock in the evening and say, 'I want to thank you very much,' and they go off to some other life. But I said something is wrong here, something is really wrong, can't have happened, and we fight. We fight like hell, and if you don't fight like hell you're not going to have a country anymore.").
[436] See Michael Conklin, *Capital Offense: Is Donald Trump Guilty of Inciting a Riot at the Capital?*, 15 U. St. Thomas J.L. & Pub. Pol'y 483 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 Const. Comm. at 2-3, 20-21 (forthcoming 2023).

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ambiguous and at one point he remarked that the crowd would be marching "peacefully and patriotically."[437] He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take "strong" and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump's speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.[438] It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steeled them to action, knew that they were ready to take immediate action, and directed them to take it.[439] But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standards of participation in and support for "insurrection or rebellion," and it qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.[440] First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had attacked the Capitol, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.[441] During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not "hav[ing] the courage to do what should have been done to protect our Country and our Constitution,"[442] a statement that the January 6th Commission concluded was "a statement that could

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[437] Transcript, supra note 435.

[438] 395 U.S. 444 (1969); compare Conklin, supra note 436, with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 Wake Forest L. Rev. 971 (2022); see also Rozenshtein & Shugerman, supra note 436, at 3 n.3 (citing these and other sources and describing this disagreement).

[439] As Rozenshtein and Shugerman also emphasize, "Trump's speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol," which they argue takes it outside of the Brandenburg framework for that reason. Rozenshtein & Shugerman, supra note 436, at 38.

[440] See supra Part III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

[441] January 6 Report, supra note 405, at 577-606.

[442] Donald J. Trump, Tweets of January 6, 2021, available at https://www.presidency.ucsb.edu/documents/tweets-january-6-2021

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only further enrage the mob" and that in fact apparently did so.[443] Once Trump finally *did*—after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.[444]

This culpable inaction—failing to intervene to stop an insurrection in progress, declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump's responsibility for the January 6 insurrection. Section Three reaches a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.[445] Sitting by and doing nothing—declining to act to arrest a violent uprising, despite possessing the material capacity and legal responsibility to intervene—might qualify. Additionally and equally important, Trump's deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd's reaction was all a big mistake or misunderstanding.

Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump "engaged in" the January 6 insurrection through both his actions and his inaction. Officials—administrators, courts, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office,

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,[446] then Trump's complicity is even more obvious—as the leader, motive force, and chief attempted perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump, having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d'etat against the Constitution and its system of elections and overturn the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes "rebellion" against the Constitution, Trump's overall

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[443] January 6 Report, supra note 405, at 577.

[444] Even as he urged peace in a video to the insurrectionists ("we can't play into the hands of these people. We have to have peace") he continued to express affection for them ("So go home. We love you. You're very special.") and to reiterate that the "election was stolen from us." Donald J. Trump, Videotaped Remarks During the Insurrection at the United States Capitol, at https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol. Later that night he tweeted: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Trump Tweets, supra note 442.

[445] Cf. notes 350-351 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

[446] See supra notes 418-420 and accompanying text.

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course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump "engaged in" "insurrection or rebellion" and gave "aid or comfort" to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

c. Beyond Trump

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many others who are or may be connected to either the insurrection of January 6 or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution's provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories:

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico, and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as Section Three contemplates.[447] They present the easiest case of "engag[ing] in . . . insurrection." Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.[448] Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and "was near the Capitol during the attack."[449] Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.[450] Trump Chief of

[447] See supra notes 85-88, 114-116 and accompanying text.
[448] See supra notes 68-80 and accompanying text.
[449] January 6 Report, supra note 405, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See supra note 89.
[450] January 6 Report, supra note 405, at 536, 577, 581, 593-594, 608; https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat

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Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also "directed that [Giuliani] be allowed to speak" to the crowd.[451] These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,[452] the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines, invalidate election results, and rerun the vote in swing states won by Biden.[453] Would-be Trump electors (some of whom came from state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.[454] Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.[455] At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid or comfort.[456] These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol, should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020-2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a

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[451] January 6 Report, supra note 405, at 533, 535-536.
[452] See supra notes 418-420 and accompanying text.
[453] January 6 Report, supra note 405, 222.
[454] January 6 Report, supra note 405, at 352-353. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.
[455] January 6 Report, supra note 405, at 50.
[456] Id. at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

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great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

Conclusion

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders and comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independently of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and officials from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should refuse to seat or expel that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress

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through the impeachment process, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's constitutional disqualifications is properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges exercising the judicial power to faithfully apply and enforce Section Three according to its terms.

No official should shrink from these duties. It would be wrong – indeed, arguably itself a breach of one's constitutional oath of office—to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one's own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing, and enforcing, the Constitution's commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, or resentment, or opposition, or retaliation. The Constitution is not optional and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.[457] The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-2021, who refused to abide by election results and instead sought to overthrow them.)[458]

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are "political questions." Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House's judgment, Section Three is enforceable by the judiciary *as well as* by other officials.[459] Section Three's terms embody rules and standards, enforceable as any other constitutional provision

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[457] See Magliocca, *Foreground*, supra note 62, at 14-24 (arguing at length that "the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment," and that it "elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three").

[458] See William Baude, *The Real Enemies of Democracy*, 109 Cal. L. Rev. 2407, 2418-20 (2021) ("The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.").

[459] Supra note 95.

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is enforceable. There is no freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, it is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country. Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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Chase 364

Case No. 5,815, Chase, 364; 2 Am. Law T. Rep. U.S. Cts. 93; 8 Am. Law Reg. (N. S.) 358; 25 Tex. Supp. 623; 2 Balt. Law Trans. 433; 3 Am. Law Rev. 784 [1]

Circuit Court, D. Virginia.

GRIFFIN'S CASE.

May Term, 1869.

Synopsis

Appeal from the district court of the United States for the district of Virginia.

Caesar Griffin, a negro, was indicted in the county court of Rockbridge county, for an assault with intent to kill. He removed his case as under the law he had the right to do into the circuit court for that county, and was there tried by a jury which found him guilty and assessed his punishment at imprisonment for two years in the penitentiary. He was accordingly sentenced by the court to that imprisonment. While on his way thither, in the custody of the sheriff of Rockbridge county, he sent out this writ which was served on the sheriff. That officer produced the petitioner in the district court then in session in Richmond, and made return to the writ that he held him by virtue of the conviction and sentence of the circuit court for Rockbridge county, making the record of the trial and conviction there a a part of his return. This return the petitioner traversed, denying that there was any court or judge in Rockbridge county as pretended by said pretended record, and that the paper exhibited was any record as alleged. The state of Virginia appearing by the attorney-general, Mr. _____, Judge H. W. Sheffey, the judge of the circuit court for Rockbridge by Bradley T. Johnson, Esq., and the sheriff by James Neeson, Esq. they joined issue on this traverse. The petitioner then proved that Judge Sheffey had been a member of the house of delegates in 1849. That in 1862, he was speaker of the house of delegates, and that his votes were recorded for affording men, money and supplies to support Virginia and the Confederate States, in the war then flagrant with the United States. It was admitted that he was duly appointed on February 22, 1866, by the then government of Virginia, to be judge of the circuit including the county of Rockbridge; that he immediately entered on the duties of that office, and that he has ever since and still is discharging the functions of the same.

The cause was argued at great length in the district court, before the district judge in December, 1868, who ordered the discharge of the petitioner, whereupon an appeal was prayed by the sheriff under the habeas corpus act of 1867 [14 Stat. 385], to the circuit court, and the petitioner admitted to bail. Before the circuit court could meet other writs of habeas corpus were sued out by other parties convicted of felonies, two of them of murder, on the same ground as in this case, and the petitioners were discharged. A motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case. In consequence of the failure to oust the state officers disfranchised under the fourteenth amendment by these and similar judicial proceedings, congress in February, 1869, passed a joint resolution directing that all such officers should be removed by the military commanders of military districts into which the late Confederate States had been divided. Thus all the old officers of the state government of Virginia were removed except a very few, and new ones appointed not obnoxious to the denunciation of the federal bar—the supreme court of appeals of Virginia; the judges thereof having been removed by the major general commanding, he appointed as judges in their stead, a colonel of his staff, and two others, who had held or did then hold commissions in the United States army. The president judge of the court performed his functions and drew his pay as colonel and judge advocate on the staff, overlooking the execution of the laws of the military, and at the same time those of presiding judicial officer of the state.

West Headnotes (6)

[1] **Constitutional Law** ⇐ Effect and Consequences

A construction of a constitutional amendment, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms absolutely require such preference.

[2] **Constitutional Law** ⇐ Retroactive Operation

Persons in office, by lawful appointment or election, before the promulgation of the fourteenth amendment to the constitution of the United States, were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in section 3 of such amendment, U.S.C.A. Const., and they could continue to perform their official functions until congress should act.

1 Case that cites this headnote

[3] **Constitutional Law** ⇐ Particular Provisions

Persons in office, by lawful appointment or election, before the promulgation of the fourteenth amendment, U.S.C.A., were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in section 3, and they could continue to perform their official functions until congress should act.

2 Cases that cite this headnote

[4] **Constitutional Law** ⇐ Adoption of constitution and amendments

The recognition by the national government of the government established at Wheeling, Va., after the secession of the state, as the lawful government of Virginia, is binding on the judiciary.

2 Cases that cite this headnote

[5] **Habeas Corpus** ⇐ Courts; judges, magistrates, or officers

A person convicted by a jury and sentenced in court by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus.

1 Case that cites this headnote

[6] **Statutes** ⇐ Construction of Amendatory and Amended Statutes

Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.

Attorneys and Law Firms

*9 Mr. Bundy, for petitioner.

The first question to be met in the argument of this case, is the question of the power of this court of your honor as circuit judge, sitting at chambers, to interpose the arm of federal authority and grant us the relief which we ask: Whether, or not, this court would have a right, independent of any express grant of power in the statute, to interfere for the protection of citizens of the United States who were held in custody in violation of the constitution or laws of the United States, is a question which, happily for the patience of the court, we are relieved from considering at all by the act of February 5, 1867, under which this proceeding is brought, the important section of which is as follows: 'Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus, in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made, shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ, and bring the party before the judge who granted the writ, and certify the true cause

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of the detention of such person within three days thereafter, unless said person be detained beyond the distance of twenty miles, and if beyond the distance of twenty miles and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution and laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, and thereby, the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony, and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court, to the supreme court of the United States, on such terms and under such regulations and orders as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings as may be prescribed by the supreme court, or in default of such, as the judge hearing said cause may prescribe, and pending such proceedings or appeal, and until ***10** final judgment be rendered therein, and after final judgment of discharge in the same, any proceedings against such person so alleged to be restrained of his or her liberty in any state court, or by or under the authority of any state, for any matter or thing so heard and determined or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be null and void.'

It will be observed that the statute is so framed as to exclude, so far as language is able, all doubt or cavil as to what is the legislative will. No restrictive or ambiguous words, no qualifying clauses, no circuity of language, are employed. The fullest and largest powers are conferred upon the several courts of the United States, and the several judges and justices thereof: and to leave nothing to doubt as to the powers granted being cumulative, and in enlargement of the powers heretofore vested therein, it reads, 'in addition to the authority already conferred by law shall have power to grant, &c.' The necessary effect of such general and inclusive language is to render inapplicable to this case much of the judicial authority which two centuries of adjudication and discussion have thrown upon the nature and use of this ancient and beneficent writ.

From 1627, when the first statute of personal liberty—that of Charles Second of England—was wrung from kingly prerogative, down through our own Revolutionary annals, and at intervals ever since, crises have occurred in our national affairs which have called for the enlargement of the powers of courts by means of this remedial writ of habeas corpus, and so necessary a part has it become of our judicature that it has not inappropriately been termed the 'water of life to redeem from death of imprisonment.' Although the constitution (article 1, § 9) declared 'that the writ of habeas corpus shall not be suspended, except when in cases of rebellion or invasion the public safety may require it,' yet without an act of congress to give it 'life and activity' it would only exist as a bare right without the appropriate means and rules for its exercise: Hence the judiciary act of 1789, prescribed the jurisdiction of the federal courts and justices under this writ. The fourteenth section of this act provides—'That all the before mentioned courts of the United States (supreme court, circuit court, and district court), shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of inquiry into the causes of commitment, provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless when they are in custody under and by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.' This statute was deemed sufficient for all the purposes of security to personal liberty, until the year 1833, when the hostile attitude assumed by South Carolina

towards the general government, became the occasion for the passage of the act of March 2, 1833 [4 Stat. 634], which has especial reference to commitments by the courts and magistrates of the several states. It provides as follows: 'That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, anything in any act of congress, to the contrary notwithstanding.' Again, in 1842, the arrest and trial of Alexander McLeod by the state authorities of New York, upon the charge of burning the steamer Caroline in the Niagara river, and the apparent insufficiency of the statute to enable the general government to maintain good faith towards foreign nations, where the jurisdiction of a state had first attached, forced congress to pass the act of August 29, 1842 [5 Stat. 539], by which power was given justices of the supreme court and judges of the district courts of the United States to grant this writ, for the purpose of bringing before them all persons who are committed or confined, or in the 'custody of' the authority of any state, on account of any alleged order or sanction of any foreign state, the validity or effect whereof depends upon the law of nations. During the late war, the powers of the federal courts were again still further enlarged by the act of March, 1863, to extend to a class of offenders who had fallen into military custody, and who, but for this act devised for their relief, might languish in prison without a trial.

Next in the order of legislation by congress is the act of February 5, 1867, under which this proceeding is brought, and this act, like its predecessors, is sui generis, and expressly framed for the emergency that called it forth. What was that emergency? And what the proper scope and purpose of this act? Blackstone lays down the rule for the interpretation of statutes in his Commentaries (volume 1, marg. pp. 50–60) as follows: 'We must consider the cause that moved the legislature to enact the law. The fairest and most rational method of devising the will of the legislator is, by exploring his intentions at the time when the law was made by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effect and consequences, ***11** or the spirit and reason of the law.' The same rule is laid down by the United States supreme court in Ex parte Milligan, 4 Wall. [71 U. S.] 114. They say—'In interpreting a law the motives which must have operated with the legislature in passing it are proper to be considered.' With this rule for our authority, let us glance at the condition of the country, at the date of the passage of this act (Feb. 5, 1867), and therefrom seek for the motives of congress in passing it.

At the surrender of the armed forces of the Rebellion, the officers and soldiers were paroled to go home, there to remain free from molestation as long as they continued faithful to the laws of the land. Beyond this nothing was settled by the surrender. Over all the territory comprised within the ten states lately in arms, civil governments and all political institutions were completely demolished. The then incumbents of state and municipal offices had sworn to support the constitution of the 'Confederate States of America' against all enemies, and especially against the authority of the United States. The surrender of her armies left the legislative, executive, and judicial departments of each state, and of the central Confederate power, without the breath of life. Over the whole territory civil government was prostrate, and the inhabitants reduced to disorganized communities. Then followed two years of fruitless experiment with the 'policy' of the president. No power able to speak the dead to life had raised its voice until congress passed the series of reconstruction acts over the presidential veto by the constitutional majority of two-thirds, and then, for the first time, the disjointed parts of the framework of southern society began to come together, and the revolted states were put in train for re-admission to all the rights and privileges in states of the Union. The grounds upon which congress based its action are clearly set out in the preamble to that act, and are as follows: 'Whereas, no legal state governments or adequate protection for life or property now exists in the rebel states of Virginia, &c.; and, whereas, it is necessary that peace and good order should be enforced in said states until loyal and republican state governments can be legally established, Therefore, be it enacted, &c.' That act first sweeps away the debris of the civil wreck that occupied the territory of the rebel states, and supplies its place by a military establishment with the fullest powers over life, liberty and property, only limited by the conditions, 'that no cruel or unusual punishment can be inflicted,' and no sentence of death can be carried into effect without the approval of the president. So complete is the substitution of the military for the civil power by the scope and tenor of this act, that without the special discretion given the district commander in the third section, to 'allow local civil tribunals to take jurisdiction of, and to try offenders,' it was foreseen that he would be deprived of a useful means, familiar to the people, for the prevention and punishment of crime. But this permission to the district commander to

'allow the local tribunals,' &c., in no degree relieves him from his official responsibility to the government for the faithful execution of the laws. These local tribunals act only by his permission, and their acts have no validity or effect except as he 'allows' and approves them. This being the character of the tribunals known as 'courts,' within this state—little more than ministerial agents or agencies of the military commander—it is plain that many of the presumptions and maxims of the law that obtain in communities where the structure of civil society has remained undisturbed for many years, and where courts exist not by the orders of a military officer, but proprio vigore, do not here apply; for example, under the latter conditions of society, there is a presumption of law, that a 'man acting in a public capacity is duly authorized so to do,' and that 'the records of a court of justice have been correctly made according to the rule 'res judicata pro veritate accipitur," that 'the decision of courts of competent jurisdiction are well founded, and their judgments regular and legitimate,' &c., yet these presumptions, resting upon the general principle that the continued existence and regularity of long-established institutions will be presumed until the contrary is shown, can have no proper force within the unreconstructed states. But no correct interpretation of this act is possible without taking into one view all the other acts constituting the series of reconstruction acts. The first in order of these is the civil rights bill, then the joint resolution of June 16th, 1866, submitting, for ratification, to the several states, the constitutional amendment known as the fourteenth article. Then follows the habeas corpus act, and lastly, the act of March 2, 1867 [14 Stat. 428], to 'provide for the more efficent government of the rebel states,' and the acts amendatory thereof. Of this series of reconstruction measures only two, the constitutional amendment, and the habeas corpus act, are permanent in their nature. The other two are mere scaffolding, to be removed when they have served their temporary purpose in building up the strong pillars of the constitutional amendment. Although a considerable period of time elapsed between the passage of the first and last of these laws, the congressional history of that period will show that they were under consideration by the national legislature at the same time, and each was passed in view to its mutual and combined operation with the others. In this relation, then, should they be interpreted by the courts.

The facts in this case, as set forth in the petition, are briefly these: Caesar P. Griffin was tried in September last upon a charge of felony, and thereof convicted by the circuit ***12** court of Rockbridge county, Hon. Hugh W. Sheffey presiding as circuit judge. It is set out in the petition and fully proved upon the trial, that Hugh W. Sheffey falls within the class of persons who are expressly disqualified and forbidden by the fourteenth article of the amendments of the constitution from holding any office, civil or military, under the United States, or under any state. We claim, therefore, that being so disqualified to perform the functions of a judge, by constitutional prohibition, his acts as such judge are wholly null and void, and therefore, that the officer holding the petitioner in custody, having no valid authority in law for his detention, must be ordered by this court to discharge him. The return of the respondent merely sets out as his authority for holding the petitioner, the record of his trial, conviction and sentence: claiming for the court the authority of a de facto court, and for the record that it can not be disputed in any other court, whether state or national. The petitioner denies the truth of the return in toto, and reaffirms the allegations in his petition, thus putting squarely at issue both the legal validity and the authentication of the proceeding of the pretended court. The third section of the amendment provides that 'No person shall . . . hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an office of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but congress may by a vote of two-thirds of each house, remove such disabilities.' In the interpretation of this section of the amendment, it is important to know the proper and generally accepted meaning of the word 'hold'—as upon the signification of that word much of the force of the argument rests. Webster defines the word, to hold 'to stop, to confine; to restrain from escape; to keep fast, to retain,' and he remarks—'It rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined.'

I respectfully submit to the court the following propositions as applicable to this case, and as well founded in law. I. That the fourteenth article of the amendment acts proprio vigore, and without the aid of additional legislation to carry it into effect. II. That it is binding upon all courts, both state and national, and that every United States judge is required by his oath of office to take cognizance thereof. III. That the holding of the office of circuit judge by Hugh W. Sheffey, after the proper announcement that this amendment had been ratified, was a daily usurpation of office in open defiance of the highest law of the land. IV. That Hugh W. Sheffey being so disqualified and prohibited from holding any office, he was not in law a judge, either de jure or de facto, and his acts as a pretended judge have no legal validity whatsoever, but

are simply trespasses. V. That the act of February 5th, under which this proceeding is brought, authorizes this court to inquire into the authority by which the petitioner is deprived of his liberty, and to determine whether that authority is exercised in contravention of the constitution of the United States, and in such case to grant the prayer of the petitioner.

It is sufficient in support of the first proposition to cite the proclamation of the secretary of state, of the date of July 28, 1868, reciting among other things the joint resolution of the two houses of congress declaring the fourteenth article of the amendments duly ratified and adopted as a part of the constitution of the United States, and following with his own official declaration in these words: 'And I do further certify, that the said amendment has become valid to all intents and purposes as a part of the constitution of the United States,' and the formal recognition of the same fact by the judiciary in the person of the chief justice of the supreme court, in his charge to the grand jury at Wheeling, West Virginia, in August last. The second proposition is supported by the constitution itself (article 6, § 2), which declares—'This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' The truth of my third proposition necessarily follows from the two former.

The first serious difficulty is met in the support of the fourth proposition. We are met at the threshold of the inquiry with the objection that whatever may have been the personal disqualifications of Hugh W. Sheffey, his official acts are those of a de facto judge, and as such, they are shielded by the law from question in any other court, except upon writ of error or appear. But this is to beg the whole question. Exactly what we are contending for, and have set up and proved in this case, is that Hugh W. Sheffey was not, on the day of the trial of the petitioner, a judge in any character, either de facto or de jure, being then expressly disqualified and prohibited from holding such office, and that his acts are purely trespasses. It will be observed that the objection is not that we do not go the right way about this inquiry, but that the petitioner can not make the inquiry at all. We will suppose that a subject of some foreign power had sat in Sheffey's place, and had been able by force or fraud to usurp the powers of a court for the time being, and had sentenced the petitioner to be hanged, and ***13** this court had been called upon at the last hour to interfere by habeas corpus. Would it be a sufficient return to this writ to set out the record of his trial and conviction, attach thereto a seal, and under the protection of that seal, to claim for the court proceedings, whatever may have been their character, absolute immunity from investigation? and yet the objection must go so far as this or it is good for nothing; and this rule once adopted within the territory of Virginia, the habeas corpus act of 1867 becomes a dead letter, and there is absolutely no right of appeal to the federal courts in the very class of cases that this act was devised and intended to meet. Again, if this rule that we can not go behind a court record by this proceeding, is to prevail, what is to prevent Lynch law from overriding all legal authority: providing only, the 'regulations' can obtain a court seal with which to cover the record of their violence? Suppose Judge Lynch were to open his court at some four corners within this state for the trial of a band of horse-thieves. The 'jury' arraign the prisoners, hear the evidence, and condemn them to death; one of them has powerful friends who sue out a writ of habeas corpus in his behalf; he is brought before the United States circuit court, with the cause of his detention duly certified by the pretended officer, who sets out in his return that he holds the prisoner by virtue of a judgment and sentence of a 'court' (meaning Judge Lynch's court), which has found him guilty of horse-stealing. Would this court be debarred from inquiry into the jurisdiction of such a judge, and from discharging the prisoner, merely because the mob have proceeded under the forms of law? and hence are a de facto court? And yet such a tribunal has as much claim to power as the circuit court for Rockbridge county. Both are illegal tribunals for want of judicial authority; and the judgments of both, however righteous in themselves, are absolutely void; for such a court has no more power to render a just than an unjust judgment, and no power at all to render either the one or the other, because both tribunals are forbidden by the supreme law of the land. No human being in this country can exercise any kind of public authority, which is not conferred by law, and under the United States it must be conferred by the special words of a written statute. While it is true that I have not been able to find any adjudicated case that could be followed as a precedent in the case now before the court, the sufficient reason for that is found in the fact that no historical parallel for the political and civil condition of this state is known to exist. For certain purposes Virginia is a conquered territory, while for certain other purposes she is held never to have severed her relations with the Federal government as a state. But whatever may be the present practical relations of the state to the general government, the allegiance of the people comprised within her limits, was never successfully withdrawn. In the language of Chief Justice Chase, in Shortbridge v. Macon [Case No. 12,812], an opinion delivered in Raleigh, North Carolina in

June, 1867, under the reconstruction act. 'On no occasion, however, and by no act have the United States ever renounced their constitutional jurisdiction over the whole territory, or over all the citizens of the Republic, or conceded to citizens in arms against the country the character of alien enemies, or to their pretended government the character of a de facto government.'

But independent of the habeas corpus act, there are many decisions of authority that stop but little short of the extent to which we contend this right of one court to inquire into the legal authority of another should be carried. The supreme court of the United States in Williamson v. Berry, 8 How. [49 U. S.] 540, says: 'It is a well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has risen under the laws of nations, the practice in chancery, or the municipal laws of states.' This court applied it as early as the year 1794, in the case of Glass v. The Betsey, 3 Dall. [3 U. S.] 7; again, in 1808, in the case of Rose v. Himely, 4 Cranch [8 U. S.] 241; afterwards, in 1828, in Elliott v. Piersol (in case of ejectment) 1 Pet. [26 U. S.] 328, 340. In the last case it is said—'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority its judgment and orders are nullities; they are not voidable, but simply void.' See likewise, Wilcox v. Jackson, 13 Pet. [38 U. S.] 499; Schriver v. Lynn, 2 How. [43 U. S.] 59; Lessee of Hickey v. Stewart, 3 How. [44 U. S.] 750; also, Serg. Const. Law, 286; U. S. v. Almeida [Case No. 14,433]; and Mead v. Deputy Marshal [Id. 9,372]; case of Ex parte Pleasants [Id. 11,225]; also case of Ex parte Randolph [Id. 11,558]. This right to inquire into the validity of a judgment has been so repeatedly exercised by all the states, that I do not deem it necessary to cite more than two or three cases. In Massachusetts the question was made in 1814. Com. v. Harrison, 11 Mass. 63. On the trial of this case, counsel for the defense cited the opinion of Kent, C. J., in Ferguson's Case, 9 Johns. 239, that the state courts have no jurisdiction in cases of this kind. The court answered very briefly, but emphatically—'This court has authority, ***14** and it will not shun the exercise of it, on proper occasions, to inquire into the circumstances under which any person brought before them by a writ of habeas corpus is confined or restrained of his liberty.'

While upon this general subject, what defects will render judgment and process absolutely void, I will cite two leading cases, that of Brooks v. Adams, 11 Pick. 441, where it is held that jurisdiction may be shown to be defective in the organization of the court, and Slocum v. Simms, 5 Cranch [9 U. S.] 363, where it is held by Chief Justice Marshall that a judgment may be defective in respect to the qualification of the officer, where a magistrate was held incompetent to sit in the discharge of a debtor under the insolvent laws of Virginia, and the judgment of discharge rendered by magistrates, of which he was one, was declared to be wholly void: and this too when this decision was against personal liberty, and its effect the recommittal of the bankrupt to prison, where the law should receive a restrained construction. See, also, Hill v. Wait, 5 Vt. 124, and Bates v. Thompson, 2 D. Chip. 96, for the effect upon a judgment where the justice is related to one of the parties, and therefore disqualified by statute. But it is sometimes said that the judges in Virginia, holding their offices directly under the authority of the military district commander, they are not accountable to any civil tribunal. The answer we make to this, is, that we are not trying nor seeking to try Hugh W. Sheffey. We are merely trying the effect of this judgment, and that depends upon his legal authority to make it. If he had no such authority—if the usurped a jurisdiction which the law had forbidden him any longer to exercise, then his acts are absolutely void, and no military order from whatever source can make them valid; for says the supreme court in Ex parte Milligan, 4 Wall. [71 U. S.] 120, 121, 'The constitution of the United States is a law for rulers and people equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' So that whatever may have been the right of the district commander to employ or 'allow' courts of this character to try offenders before the ratification of the fourteenth article, he certainly had no such right or authority after the ratification of that article, because it then became a law to him as well as to the courts. The language of the third section of the fourteenth article is, that 'no person shall hold any office, civil or military, under the United States or under any state.' This language is in the alternative, and if the officer in question be found to belong to either the one or the other of these classes, then the constitutional prohibition applies, and the incumbent who falls into the disqualified class of persons, was on July 28, 1868, divested of his judicial powers and authority, and became that day, in the fullest sense of

the word, functus officio. But it is sought to break the force of these deductions by the suggestion, that the constitution has no application nor force in the unreconstructed states. If so, when was it withdrawn by the general government, or when was it thrown off by Virginia? Did congress, by the act of March 2, 1867, design to withdraw the constitution from the states to which that act applies? It is not denied that such an act might have been done by the law-making power, but certainly it is not conceivable that it would be done by a mere implication, without express words of solemn enactment. And that it was not done, is sufficiently evidenced by the notorious fact that the highest court of the nation had under consideration at its last session, and still has, undecided, the question of the constitutionality of this very act. But it is an indignity offered to this court to assert that it is now sitting for a judicial district that is situated without the pale of the constitution, unless forsooth that pleasant fiction of the law of nations that clothes our ambassadors to foreign courts with an atmosphere of our own nationality can be applied to our federal judges, and they can be said to reside 'near' the city of Richmond in the province of Virginia, as the former are said to reside 'near' the court of St. James and St. Cloud. But the judge must then fetch and carry the constitution with him, for it is his own 'vital breach,' and his coming and going would indeed mark the summer and winter solstice of this dreary blank in the republic.

If, then, the constitution of the United States is in force within this state, and 'is a law for rulers and people,' the plain infraction of its provisions, by Hugh W. Sheffey, in trying and committing the petitioner, furnishes the occasion for which the remedy provided by congress in the habeas corpus act of February 5, 1867, may be rightfully invoked; for that act empowers judges and courts 'to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty, in violation of the constituion of the United States.' The objections to this theory are variously stated, but they can mainly be resolved into two, one of which, at least, is founded in a misapprehension of the effect and nature of this remedy. It is said by those whose dependence upon the honor or profits of office, seems to have quickened their sensibilities to the dangers of any scrutiny into their qualifications, that we cannot attack the authority of a judge in such a collateral proceeding; that our proper remedy is by proceeding in the nature of a quo warranto, and they add, that this can only be carried on by the supreme authority of the state. This has already been answered by showing that the object had in view by us, is not to unseat Hugh W. Sheffey, and no judgment of this court can have that effect. The public discussion of this question will doubtless tend to call public attention to the effrontery of his pretension that he can continue to perform the functions of a judge in ***15** daily defiance of the supreme law of the land. But the direct and avowed purpose sought by this petition, is the release of Caesar P. Griffin from unlawful imprisonment, and beyond this the court is neither asked nor expected to go.

The remaining objection to granting the prayer of the petitioner is found in the principle sought to be applied to this case, that the acts of a 'judge de facto, if within the rightful jurisdiction of the office he exercises, are as valid and binding as the acts of an officer de jure.' The term 'de facto' from being applied to officers acting colore officii, and with apparent authority of law, has in this argument been used to describe every species of pretender to official character, however disqualified or prohibited he may be by law. This is certainly a great latitude of interpretation, and must have the effect to obscure or destroy the original and true meaning of the expression. According to the argument upon the other side it seems only necessary, in order to establish for any man the character of a de facto judge, to prove actual manual possession of the bench, and control of the seal, no matter how obtained. This argument, if carried out, would give full faith and credit to judicial acts of a deposed judge, done after conviction of impeachment, or judgment of ouster in a proceeding by quo warranto, and provided only the pretender were bold enough, he might perpetuate his offical character. In the 1st volume of J. J. Marshall's (Ky.) Reports (pages 206, 207) may be found the case of Hildreth's Heirs v. McIntire's Devisee, where Judge Robertson discusses at length the proper limits to be given to the use of the term 'de facto' in a state that is under a written constitution. The case arose upon an attempt of the legislature of Kentucky to supersede the court of appeals, and to provide a new court in its place. Under the new law four judges were duly appointed, and organized by the appointment of a clerk. An appeal was taken from Bourbon county to the court of appeals, and by them dismissed, because the record was not filed with F. P. Blair, who was acting as clerk to them. A certificate of dismissal signed by Blair, as clerk of the court of appeals, was presented to the clerk of the court of Bourbon, and though objected to by the counsel of the appellants, was received and entered upon the record of the court, and thereupon a habere facias was qirected to issue to carry into effect the original decree, to reverse which the appeal had been granted. Says the court—'The only question presented for our decision is whether the court erred in obeying the mandate of Messrs. Barry, &c., certified by F. P. Blair, and a solution of this question depends on another, viz., whether Barry, &c., were judges of the court of appeals, and Blair its clerk. Although

they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they have been regularly appointed under and according to the constitution. A de facto court of appeals cannot exist under a written constitution which ordains one superior court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them . . . Where there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky, as a de facto court of appeals. There can be no such court whilst the constitution has life and power. There has been none such.'

With him, L. H. Chandler, U. S. Dist. Atty.; H. H. Wells, Military Governor of Virginia.

Bradley T. Johnson, for Judge Sheffey.

The petitioner in this case was regularly indicted, tried, and convicted in the circuit court for Rockbridge county, of a felony under the laws of Virginia, and sentenced, according to the verdict of the jury which tried him, to imprisonment for two years in the penitentiary. While on his way thither, in the custody of the sheriff of that county, in obedience to the mandate of the court and the requirement of the law, the steps of that officer are arrested by the writ of habeas corpus issuing out of this court on the petition of the party. He applies to be discharged from custody, alleging that he is detained under color of a pretended judgment—pretended to have been entered by a pretended court, presided over by a pretended judge. He then charges that Hugh W. Sheffey, who acted as judge on his trial, which took place since the adoption of the constitutional amendment, was in law no judge at all, he having been disqualified from acting after the adoption of the constitutional amendment known as the fourteenth article; Judge Sheffey having taken the oath to support the constitution of the United States, and acted in a legislative office in the state of Virginia, and afterwards aided the Rebellion. To the writ, the sheriff makes return, producing the prisoner, that he holds him by virtue of a conviction for felony, and sentence thereon, of the circuit court for Rockbridge county, and that he was on his way to take him to the penitentiary when the writ was served. He exhibits the record of trial, conviction, and sentence of the Rockbridge court as part of his return. The petitioner files a reply or traverse to this return, denying that there is any court as alleged, or any judge as alleged, or that the paper produced and exhibited as a record is any record as alleged.

On this traverse the state joins issue. The petitioner then offered evidence: 1. To prove that Judge Sheffey was a member of the house of delegates of Virginia in 1849; and, 2. That in 1862, beng speaker of the then house of delegates, he voted men, money, and supplies to support the state of Virginia and the Confederate States, in the war then waging ***16** with the United States. To this evidence the state objected; but the court admitted it, and the state excepted. The petitioner then read from the journals of the house of 1849 and 1862 to prove these facts, and also by a former clerk of the senate who had been clerk since 1853, that it was the custom for members of the senate to produce to the clerk a certificate from a justice of the peace or other proper officer that such member had duly taken all the oaths required by the constitution to be taken. No evidence was offered that Judge Sheffey, as member of the house of delegates, took the oath to support the constitution of the United States. It was then admitted that the Hugh W. Sheffey mentioned in the journals of 1849 and 1862 was the same Hugh W. Sheffey who sat on the trial of the petitioner; and further it was admitted, that Hugh W. Sheffey was on the 22d day of February, 1866, duly appointed by the then existing government of Virginia to be judge of the circuit including the county of Rockbridge; that he immediately entered on the duties of that office, and that he has ever since, and still is, discharging the functions of the same. These are the facts on which the petitioner asks his discharge.

The proposition on which he bases his claim is this. That Judge Sheffey has been rendered ineligible as judge by the adoption of the constitutional amendment, and therefore all his acts since that period are void; in other words, that the acts of an officer illegally in office being void, the consequences of those acts are also void. A proposition so monstrous in its results, so extraordinary in its application to all the affairs of men, which strikes at the very foundation of civil society, deserves strick examination and careful investigation, if it be law. If it be not law, it must be peremptorily thrust out of a court of justice, branded with all the ignominy of judicial denunciation. If the acts of officers disfranchised by the constitutional amendment are void, and of no effect, then judgments rendered, decrees made, deeds acknowledged and recorded, wills proved, notes protested—all fall with the ineligible officer. If these acts of theirs are void, all acts are void; although qualified themselves, they may have been sworn into, appointed, or elected to office by disqualified officers. The source being corrupt, the whole stream of consequences partakes of that corruption. Disqualification from bribery, dueling, non-residence, age, citizenship, or

alienage, all work the same result. If a judge is appointed by a legislature, some of whose members are disqualified from holding their seats, then his appointment, according to this argument, is void, and his acts are void. The legislature itself may all be eligible, but some members may have been elected by illegal votes. Therefore the acts of the legislature, being vitiated by the original taint of illegaility, all the consequences flow from it. If a constitution be adopted by illegal votes, then all officers under it become mere intruders and pretenders to official functions. The existence of this very fourteenth article itself may be attacked in precisely the mode the judicial functions of Judge Sheffey are sought to be invalidated. One of the state legislatures at least, adopted it by the votes of members who were afterwards declared ineligible, and their seats vacated; and under this theory of law, the inquiry might be pursued, until it was found that it had never received the assent of a sufficient number of legal legislatures composed of legal members duly sworn in by legal officers, and elected by legal voters. The statement of such a proposition is its own sufficient refutation. If it be true, no legal act, no legal existence anywhere is secure. All may be attacked by showing that somewhere, at some time, some person disqualified by law from holding office contributed by some official act to it. That established, the whole falls.

I propose to show that no such proposition has been sanctioned in any court for centuries of any such principle of law, and that an unbroken current of authorities in this country, and in England, against it, is never rippled by a dissenting or even objecting opinion from any court, any judge, or any law-writer. The writ of habeas corpus is the writ of right, say the fathers of the law; but it is in no case a writ of error, and it never had been used to review the decisions of other tribunals. From the earliest times down to later days it has been universally held that where the party applying for it appeared on his own application to be committed by the judgment of a court of competent jurisdiction, the writ would be refused him, or that where such commitment appeared on the return to the writ, that such return was conclusive. This is the settled law of habeas corpus in England and here. Crosby's Case, 3 Wils. 188;3 Wils. 188; Ex parte Kearney, 7 Wheat. [20 U. S.] 45;Ableman v. Booth, 21 How. [62 U. S.] 506. The only inquiry that could be made was: 1. Had the court jurisdiction over the subject and the subject-matter? and, 2. Did that jurisdiction legally attach Sir William Chancey's Case, 12 Reporter [Coke] 82; Goldswain's Case, 2 W. Bl. 1207; Gardener's Case, Cro. Eliz. 821; 2 Hawk. P. C. c. 15, § 78; People v. Cassels, 5 Hill, 164? And this was the law of the federal courts under the act of 1789 [1 Stat. 73], which authorized them to issue writs of habeas corpus, 'agreeably to the principles and usages of law.' In the course of time, however, collisions became inevitable between the concurrent state and federal jurisdictions.

Parties might be deprived of their liberty contrary to the laws of the United States. The slow process of writ of error from the state courts contemplated by the judiciary act was utterly ineffectual as a remedy for such wrong, and the writ of habeas corpus, ***17** the return showing the party to be held by judgment of a court of competent jurisdiction, could afford no relief. Besides, in many states the record on writ of error would disclose nothing contrary to federal laws and federal right. A party might be indicted, tried, and convicted for robbery, and the record would only show that charge, no bill of exceptions being allowed in criminal cases at common law, or in states adhering to common law. The appeal, therefore, to the federal tribunal would be vain, while in truth and fact the robbery for which the party was convicted was collection of federal taxes. To meet such cases, the jurisdiction in habeas corpus was extended by the act of 1833, which provided, that whenever any officer of the United States was in custody, for any act done or omitted to be done by federal authority, then the federal court might on habeas corpus inquire into all the circumstances of his committal or conviction, and vindicate his federal rights. This act extended over all officers of the Federal government, the perfect and complete panoply of the federal jurisdiction, and secured them perfect protection for all acts done by them in the execution of their office. Though passed to force South Carolina, attempting to nullify, it was never practically operative until applied to cases arising under those state laws which actually did, by personal liberty acts, nullify the laws of congress and the constitution of the United States. And the federal judges, without exception, applied the law, and protected officers of the United States in the discharge of their duties. They released them when held by state authority in definance of their federal rights. U. S. v. Morris [Case No. 15,811]; Ex parte Sifford [Id. 12,848]; Ex parte Jenkins [Id. 7,259]. After this, however, it was found that other cases might arise requiring federal intervention to protect other cases of violated right. McLeod committed a felony within the jurisdiction of the state of New York, and was tried for it by the state authorities. The government of Great Britain, whose officer he was, assumed the responsibility of his act, and under the law of nations, the agent should have been released, and the principal alone held responsible. New York, however, refused to release McLeod, and in consequence, the act of 1842 was passed, extending federal protection to all aliens held anywhere, by any authority, in violation of treaty rights, or those under the

laws of nations. Treaty rights, created by federal authority, or international rights, recognized and guaranteed by federal authority. This law also was to intervene the federal authority to protect federal rights. The act itself is in the main a copy of the act of 1833, so far as those provisions go, which give the federal courts the right to inquire into the cause of commitment. By these two acts of congress, therefore, the aegis of the federal power was thrown around its officers and those aliens partaking of its hospitality. Those two classes alone were thus secured by this prompt and efficient remedy from any infringement of rights secured to them by the federal authority. They could not be obliged, when held to answer in a state court, to wait the slow process of trial there, appeal to the state supreme tribunal, and thence to the supreme federal court, with the certainty in many cases, as I have shown, of being unable to prove by the record in what manner their rights were injured. Whenever they were injured, habeas corpus afforded a remedy, simple and prompt. But no other person had such a right. A citizen of one state, going into another state, might there be molested in some mode contrary to his federal rights, and if his liberty was restrained, his only remedy was by process of appeal or writ of error. Prior to 1867, it was considered necessary to remedy this omission in the law. It was charged that many southern states, under the pretense of labor, police, and vagrant laws, were endeavoring to evade the force of the constitutional amendment abolishing slavery, and were shaping their policy so as to restore the substance of involuntary servitude, under the name of penalty for crimes. Therefore the act of 1867 [14 Stat. 385], was passed, extending the habeas corpus to all cases where any person was restrained of his liberty, contrary to the constitution, laws, or treaties of the United States. It is a copy of those provisions of the acts of 1833 and 1842, as to the right of the court to examine into the cause of detention, whether by judgment of a court or otherwise, and in effect strikes out the provisions limiting the application of the act of 1833 to officers of the United States, and of 1842 to aliens, and inserts, instead of those provisions, the words, 'all persons restrained of their liberties, in contravention of the constitution, laws, or treaties of the United States.' The federal protection before extended only to federal officers and federal guests, i. e., aliens, was now made to embrace all persons, citizen and alien, officers, and those who wanted to be officers, of the federal government; in fact, all mankind. 'It brings within its scope,' says Chase, C. J., 'every possible case of privation of liberty, contrary to the laws, constitution, or treaties of the United States. It is impossible to widen the jurisdiction.' Ex parte McCardle, 6 Wall. [73 U. S.] 326.

The writ of habeas corpus, therefore, when issued by a federal court, embraces every case where a person is alleged to be deprived of his liberty in contravention of the constitution, laws or treaties of the United States. And the court issuing the writ is authorized in every case to go behind every return, and to pass upon the facts in every case, and if it appear that the party applying is injured in his federal rights, then such court is authorized to protect him by discharging him, whether committed on a charge of, or on a conviction for, crime. Therefore, it only remains ***18** to this court to inquire if this person, the petitioner, is deprived of his liberty, contrary to the constitution, the laws, or the treaties of the United States? Has he, by state authority, been injured in his federal rights? The first question that presents itself is, What are his federal rights? 1. Those secured by treaty or under the laws of nations do not apply in this case. 2. Those enuring to federal officers to be protected in their functions are not involved here. 3. The federal rights secured by the constitution to all persons are: (1) The right of every citizen of a state to be secured in those rights in every other state, which provision is universally construed to mean civil rights as distinguished from political rights. (2) The rights of trial by jury as secured by the reservations in the original amendments to the constitution. (3) The right to be secured against involuntary servitude, except as a punishment for crime. (4) The right to a republican form of government. In this proceeding, this court is to inquire if this petitioner has been injured in any of these federal rights? Has be been denied any of them? If, on a full investigation of all the facts, without regard to the form of the record, it is found that he is denied federal rights, then he is to be discharged; if not, he is to be remanded.

No question as to form of government, or to involuntary servitude, or to the rights of citizens of different states enjoying all the civil rights of citizens of this state, arises in this case, and therefore the first, third, and fourth sub-divisions of rights have no application. The only question to be considered is whether the petitioner has been denied his right to be tried by a jury? The universal judgment of all courts, federal and state, heretofore has been that this right is only to secure a trial by jury in federal courts. But for the sake of the argument, we concede that every person within the United States, has a right to the trial by jury, according to the course of the common law. This is the extreme proposition in favor of the petitioner, and although against the law, we concede it for the purpose of this argument. This court is therefore to inquire, whether the petitioner has been deprived of his right to a trial by jury, according to the course of the

common law? Admitting that this is a federal right, we are limited to the inquiry as to whether it has been infringed in this case. It is charged that, although tried by jury, under a law denouncing a penalty against a felony, equally applicable to all persons, triable and punishable in the same way as to all persons, citizens, aliens or officers, without regard to color, state or condition, still, nevertheless, the judge being disfranchised by the constitution of the United States from sitting as judge, that the trial was no trial; was contrary to that constitution, and that thereby the petitioner was deprived of his federal rights, and denied a trial by jury which implies the presence of a legal judge. That Judge Sheffey, being constitutionally ineligible from the moment of the adoption of the constitutional amendment, became eo instanti dead as a judge, and by no possibility could be author of a legal trial of any person.

I shall first admit, for the purpose of this argument in this place, that Sheffey was, by the adoption of the constitutional amendment on July 28, 1868, rendered ineligible for his office, and from that moment became, in law, incapable of holding it. This being admitted, for the sake of the argument, and also it being admitted in the cause, that he was appointed judge in 1866, and has ever since, and is now discharging the functions of judge, I shall prove: 1. That he was judge do facto when the judgment against petitioner was entered. 2. That the act of a judge de facto has precisely the same legal effect as that of a judge de jure. If one is binding, the other is, and that there is legally no difference between the acts of a judge de facto and of one de jure, except when those of a judge de facto may enure to his own advantage.

First. Was he a judge de facto? There is no better definition of an officer de facto than that laid down by Lord Ellenborough in the case of King v. Corporation of Bedford Level, 6 East, 368; 'An officer de facto,' says he, 'is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.' And it plainly appears that Judge Sheffey was, and is, such an officer. No matter whether he be denounced by the constitutional amendment or whether he be disqualified by law, or ineligible to his assumed office, he was, and is, a judge de facto, having the reputation of being the judge he assumes to be, and yet, according to the assumption, is not a good officer in point of law. This, I think, is conclusive. At the time of this judgment he was judge de facto.

Next I will prove that as to the acts of an officer de facto and an officer de jure, there is no legal difference except where the acts of an officer de facto inure to his own benefit. Wherever they do, wherever they are tainted with selfish considerations, they are invalid, but whenever they inure alone to the benefit of the public, they are as good and binding as if done by a judge, anointed by oil which ever was poured on the head of a legitimate monarch by an archbishop consecrated through a line of a hundred predecessors.

It is a fundamental maxim, not of the law, but of civilized society, that the acts of officers de facto are valid. Without it, there would be no security for life, or liberty, or property. It took form and shape in a statute in the time of Edward as to the rights of a king de facto, but its foundation was beyond that. Without the rights of de facto governments, who would recognize the Norman titles against the Saxon barons? Who ***19** the varying rights of York and Lancaster, or Tudor and Plantagenet, of king and commonwealth, and king again, of Stuart and Orange, or Stuart and Brunswick? Where would you find your resting place in the history of civilization? In the Roman empire? In its Gothic conquerors? In the house of Charlemagne? In that of Hugh Capet? In the Bourbon or the Buonaparte? The kingdom, the republic, the empire, the kingdom, the republic, the empire again. In 1789, in 1783, in 1800, in 1815, in 1848, or in 1852? When, where, and how, would you base your rights de jure? Brandenburgh rises on the ruins of other houses, as Hapsburg before it, and will fall again, as Hapsburg has done. The history of the world is the history of kingdoms and empires, and civilizations de facto, becoming de jure, because they are de facto.

Whenever a power, or a government, or an officer are able to maintain themselves in power, it becomes necessary for the peace, the progress, the development of society, that such government, power, or officer should be recognized pro tempore as the legal power, and full effect and validity be given to acts under it. This is the rule of law as well as the rule of reason. Governments acknowledge it. After the war of 1812, the supreme court of the United States decided that the port of Castine having been captured by the British, and held during the war, the British domination was to be considered de facto and pro hac, released the citizens of Castine from their obligations de jure, as citizens of the United States. U. S. v. Rice, 4 Wheat. [17 U. S.] 253. Subsequently, in the war of the South American republics, the secretary of state of the United States held that a sale of guano islands made by a de facto government to citizens of the United States, conveyed a title which the United States were bound to recognize and protect. The doctrine that acts of de facto officers are as valid as if by officers de jure, is undenied and undeniable. It is affirmed in Blackstone, Kent, and every

elementary author, and illustrated in Bacon, Comyns, Viner, and every abridgment of the common law. I spare the court the recital from such authorities, and content myself with producing the adjudications of the older English courts and the latest American ones on these questions. I have with some labor compiled the decisions in all the states up to the present time, and instead of presenting the court with a mere reference to cases, have gathered the sense of each particular adjudication, to illustrate the general meaning and signification of the doctrine.

The whole uninterrupted current of decisions is that the acts of an officer de facto are good, valid, and binding. They can not be questioned collaterally, nor in any way, except in a proceeding against the incumbent of the office, to oust him therefrom. Whenever a party holds office, having, as Lord Ellenborough says, 'the reputation of being the officer he assumes to be, although not a good officer in point of law,' then, in such cases, his acts have precisely the validity and force as if performed by an officer de jure. A person by color of election may be officer de facto, though indisputably ineligible. Knight v. Corporation of Wells, 1 Lutw. 508; 16 Vin. Abr. 114. Where there was a bishop of Ossory, and another was installed bishop de facto, judicial acts of latter held good. O'Brian v. Knivan, Cro. Jac. 552. Where a steward of a manor, appointed without authority of law, yet acting as steward, and being de facto steward, his grant of copyhold land held good by Lord Bacon: 'Acts done by one who keeps court as steward without authority, if they come in by presentment from the jury, are good.' Harris v. Jays, Cro. Eliz. 699. A commission to take testimony executed by judges after the demise of James I., when their terms expired, and they were not judges, but acting without authority, was held good. The judges certified that 'no inconvenience could arise on such proceedings before notice of the king's demise; but, if otherwise, it would draw in question many trials by verdict of nisi prius, and trials and attainders upon jail delivery; whereupon divers have been arraigned and executed since the king's demise.' Sir Randolph Crew's Case, Cro. Car. 97. Officers de facto of corporation bind the corporation. Ang. & A. Corp. 280; Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64. Whether sheriffs be de facto or de jure can not be questioned collaterally. Morse v. Calley, 5 N. H. 223. Acts of sheriffs de facto valid as respects third persons. Doty v. Gorham, 5 Pick. 487; Fowler v. Bebee, 9 Mass. 231; Com. v. Fowler, 10 Mass. 290; Buckman v. Ruggles, 15 Mass. 180. In action of ejectment the title of a constable who sold the land not to be questioned. Being de facto sufficient. Burke v. Elliott, 4 Ired. 355. In same action, title of register who registered the deed, not to be questioned. Gilliam v. Riddick, Id. 368. In action of trespass for seizing a hog by town commissioner. Acts of those holding de facto good. Commissioners of Trenton v. McDaniel, 7 Jones (N. C.) 107. In action against defendant for trespass, his acting as officer proves him officer de facto. Id. 375. Judicial act of an alderman de facto holding and exercising the office not under mere color of right, but possessing a commission on its face, constitutional and legal, can only be examined in a proceeding to which he is party, and in which he can be heard. Cornish v. Young, 1 Ashm. 153.Cornish v. Young, 1 Ashm. 153. Party relying on the record of a deed need not show that he who recorded it was an officer de jure—de facto is sufficient. Brush v. Cook, Brayt. 89. The acts of an officer de facto who comes into office by color of title are valid, as it concerns the public or third persons. McInstry v. Tanner, 9 Johns. 135. Where one acts under a colorable title ***20** to an office, his title can only be examined before the supreme court, and that directly. McKim v. Somers, 1 Rawle, Pen. & W. 297. The acts of an officer de facto, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned; and neither the title of such an officer nor the validity of his acts as such can be indirectly called in question in a proceeding to which he is not a party. Plymouth v. Painter, 17 Conn. 586; Hoagland v. Culvert, 1 Spencer [20 N. J. Law] 387; Farmers' & Merchants' Bank v. Chester, 6 Humph. 458. An officer de facto holding colore officii is as well qualified to act while thus in office as if legally appointed and duly qualified. Smith v. State, 19 Conn. 493. The right of a person acting colore officii to the office in which he acts, can be tried only in a proceeding to which he is a party, directly presenting that question, and not in a collateral way, between third parties. Id. 499. A person acting as an officer under color of a commission is de facto such officer, until ejected by a proceeding having that object in view. His authority can not be questioned, in a collateral way, and his official acts, until ejected, are valid. Aulanier v. Governor, 1 Tex. 653. The regularity of the election or the qualifications of an officer can not be questioned collaterally. Bean v. Thompson, 19 N. H. 290. The general rule is that acts of officers de facto in which other parties or the public have an interest are valid. State v. Perkins, 4 Zab. [24 N. J. Law] 409. The acts of an officer de facto valid, and not to be questioned collaterally. State v. Brennan's Liquors, 25 Conn. 278. The official acts of an officer de facto can not be impeached collaterally. Stokes v. Kirkpatrick, 1 Metc. (Ky.) 138. The acts of officers de facto are valid when they concern the public or rights of third persons, who have an interest in the acts done. Venable v. Curd, 2 Head,

582; Patterson v. Miller, 2 Metc. (Ky.) 493; Gourley v. Hankins, 2 Cole (Iowa) 75. Acts of an officer de facto are valid when they concern the public or the rights of third persons, and can not be indirectly called into question in a suit to which said officer is not a party. It is only in a suit against him that his right can be questioned. Hooper v. Goodwin, 48 Me. 79. An officer who has entered on the discharge of the duties of his office is an officer de facto, and his eligibility can not be inquired into collaterally, though it may be by quo warranto. Satterlee v. San Francisco, 23 Cal. 314. The right to an office can not be determined by an action of replevin of its appurtenances. Desmond v. McCarthy, 17 Iowa, 525. A person elected as county judge for the full time may signify his refusal to qualify, and thereupon the office becomes vacant for that time, and an appointment may be made immediately, although, to prevent an interregnum, the old incumbent of the office is authorized to perform its functions until his successor has qualified. State v. Washburn, 17 Wis. 658; People v. Bangs, 24 Ill. 187. Acts of officers de facto valid. Scadding v. Lorant, 13 Q. B. 697; 66 E. C. L. 686. Where a judge was ousted from office on quo warranto, held that his acts while illegally in office were binding and valid. People v. Bangs, 24 Ill. 184. Where the law under which a judge was appointed was held to be unconstitutional, and, therefore, his appointment void. Acts done by such judge held valid and binding. Taylor v. Skrine, 2 Tread. Const. 696. When a judge was ousted on quo warranto and a party sentenced to penitentiary by him while illegally in office was discharged on habeas corpus after the judgment of ouster on quo warranto, the supreme court of Wisconsin reversed the decision of the lower court discharging the prisoner, and remanded him to the penitentiary, on the ground that the acts of the judge de facto were good as to all the world, although he was afterwards regularly pronounced not to be legally in office. State v. Bloom, 17 Wis. 521.

These authorities fully establish my proposition, that the acts of a de facto judge are as valid and binding as if done by a judge de jure, except where such acts are for his own benefit. And hence it follows that this petitioner has not in any way been injured or denied his rights under the federal constitution, so far as being tried by a legal judge is one of those rights. For his trial by a judge de facto has precisely the same legal effect as if by a judge de jure. But another view is equally conclusive: Whether the legal state government of Virginia was overthrown on April 17, 1861, at Richmond, or on April 9, 1865, at Appomattox, makes no difference for the purposes of this argument. If the former, then the occupation of the territory of Virginia was a mere re-occupation, a re-possession, a re-extension of federal laws over territory from which they had been temporarily excluded by belligerent forces. The laws of Virginia of course remained intact and in full force and vigor. On the other hand, if the legal government fell at Appomattox, then the possession of Virginia was conquest. On conquest, the conqueror is bound to administer the laws of the conquered country until he provides another code for them. This doctrine Lord Mansfield lays down in Campbell v. Hall, Cowp. 205, where he enters into a detailed statement of the conquests of Great Britain. And in Sir Thomas Picton's Case, 30 How. St. Tr. 225, the lord chief justice acted on it by allowing proof that the Spanish law in the conquered island of Granada allowed torture to be administered, and that, therefore, its application by the British military governor was justifiable and legal. The law of Virginia being, therefore, in force fully and perfectly, the section relating to de facto officers (Code, 101), exactly establishes the law by statute, as I have proved it by principle

***21** and authority. That section, in effect, declares that all acts of officers de facto shall be as valid and have the same effect as if done by officers de jure, except where such acts might inure to the benefit of such officer de facto. By it, therefore, all questions as to the validity of the acts of Judge Sheffey, or any other officer denounced by the constitutional amendment, are set at rest. All acts of all such officers are acts of officers de facto, and therefore are good and valid acts.

I have argued the case so far on the hypothesis that Judge Sheffey was in fact and in law rendered ineligible to office on July 28, 1868, and has ever since held office in defiance of law; and I have shown that even if he be disqualified for every cause known to the constitution and laws of Virginia or of the United States, if he be an alien, has fought a duel, be a non-resident, over or under the legal age, and in addition to all of these disqualifications, all of which he unites in his own proper person, he is disfranchised by the constitutional amendment, still, all his acts are good, valid and binding, and can never be challenged or questioned by reason of his said numerous disqualifications. It is argued that the adoption of the constitutional amendment operates like a judgment of ouster on a quo warranto by a court of competent jurisdiction; and that, therefore, from the moment it goes into effect, no person disfranchised by it can hold office colore officii, or can be an officer de facto. This would be true if the individual to which it was to be applied were designated and named in the article itself. It would doubtless be competent for the sovereign power to convict and punish individuals by name, without trial; but then like an act of attainder it must name those individuals. Where a party is so specially attainted, the law operates at once on him like a judgment of an ordinary

court. But until he is selected and condemned by name by due process of law, no judgment can have effect as against him. He must be personally condemned by an act of sovereignty like a constitutional amendment, or by a judgment of a court after trial and conviction. While, therefore, it may be true that a party condemned by a judge, ousted by name from office by a constitutional amendment, would be deprived of his liberty contrary to the constitution of the United States, it is clear that, until a judge is thus ousted by name, either by a sovereign act of attainder without trial, or by a conviction after trial, his holding office is still colore officii, and his acts those of a judge de facto. The constitutional amendment is a general act of attainder—a statute denouncing a general penalty for crime. The penalty applies to every person who is guilty; but his guilt can only be ascertained, the identity of the individual can only be made certain, the penalty applied to that particular individual, only by due process of law—i. e., trial, conviction and judgment. It might be competent for a constitutional amendment to declare that A. B. had been guilty of murder, and should be hung. In such case, the conviction of that individual would be final. But when it declares that all persons guilty of murder shall be hung, that penalty can only be applied to individuals according to law. Each person, before being hung, must be tried, convicted and adjudged that that particular penalty shall apply to him. The constitutional amendment only differs from a penal statute in this, that being ex post facto, it could only have become law by becoming part of the constitution. No other authority but the sovereign power could enact it. It is, therefore, an ex post facto law—legal only because part of the constitution. But its provisions are general, like every penal statute denouncing a general penalty, which general penalty can only be applied to each particular case by due course of law, trial, conviction and judgment. No officer, therefore, holding office, who is in fact ineligible under the constitutional amendment, can be affected by it until its provisions are applied to him according to law, nor can his holding be contrary to the constitution until such application is legally made. So it is clear that the constitutional amendment does not affect officers now in office. Future federal legislation may provide the mode of bringing it to operate on this class, but acting proprio vigore, it does not affect them. The deprivation of office is a punishment of the highest class. Taking that from a man which he has and enjoys, and is entitled to, and is in possession of, may be done as a punishment; but then it must be done according to law.

Garland's Case [4 Wall. (71 U. S.) 333] in the supreme court settled the law that test oaths were unconstitutional so far as they went to deprive him of his office of attorney, being ex post facto, and operating so as to make the party convict himself. This being the law, it must follow that a man enjoying the office of judge can not be deprived of it except by due process of law. No man, under the federal constitution, can be tried or convicted unless by a jury, and it is therefore clear that the only mode by which the fact that any person holding an office is within the constitutional amendment is by the verdict of a jury, on an indictment for aiding in rebellion. Aiding rebellion is a crime, and can only be proved for the purpose of punishing the party, by the oaths of two juries, by an indictment, a verdict, and a judgment. That is the only evidence that the law knows, or can know, of guilt or criminality. That a party held an office, and took an oath to support the constitution, may be proved by the best evidence that can be had; but that he aided the rebellion can only be proved by the record of his conviction—where he was confronted with the witnesses ***22** against him, was heard by the jury in his defense, and enjoyed all those protections and rights which the laws secure to parties charged with crime. It is clear that the constitutional amendment can operate on no man holding office when it went into operation, until such party is duly convicted of aiding rebellion, and even then it will require some process by which he can be ousted. Whether this can be done by the imposition of a test oath or not, it is useless now to inquire. It is certain that no means of any kind are provided for putting the amendment into operation. But further than this, it seems that Judge Sheffey is not in fact disfranchised. When he was in the legislature in 1849, the Code of 1819 was in operation; and by it no oath was required of members of the legislature to support the constitution of the United States. There is no proof in this cause that he ever took such an oath, and I am almost certain that, in point of fact, he never did take it. At any rate, it can not be presumed that he did take it when such tremendous criminal consequences are sought to be deduced from the taking of it. Being in office, every presumption is in favor of his being eligible. The burden of proof lies in those who charge his disqualification; and they must prove it. No presumption of law will make up for this deficiency of proof.

I have demonstrated: 1. That the only inquiry that can be made on the return to this writ is, whether the petitioner has, in the state court, been deprived of any federal right. 2. That, admitting Judge Sheffey to be disqualified under the constituional amendment, he was still acting as judge, colore officii, and was judge de facto, and that his presiding at the trial as judge in no way contravened any federal right of the petitioner. 3. That therefore the petitioner must be remanded. 4. That Judge Sheffey, in fact, is not disfranchised under the constitutional amendment according to the proof

in this cause. 5. That the only proof which is admissible of his aiding the Rebellion is the record of his conviction in a court of competent jurisdiction. 6. That the constitutional amendment can not operate proprio vigore on persons holding office at the time of its adoption, but requires further action by congress to prescribe the mode by which it can be applied to such persons. These propositions are conclusive, and the party must be remanded. He must, however, be remanded to the custody of the sheriff of Rockbridge county for another reason. Admitting even that his conviction is illegal, and is no conviction, still it appears by the return that he is charged on the oaths of twelve men with a felony committed in Rockbridge county. In any event, therefore, he must be remanded.

With him, James Neeson; Thos. R. Bowden, Attorney General of Virginia.

Opinion

CHASE, Circuit Justice.

This is an appeal from an order of discharge from imprisonment made by the district judge acting as a judge of the circuit court, upon a writ of habeas corpus, allowed upon the petition of Caesar Griffin. The petition alleged unlawful restraint of the petitioner, in violation of the constitution of the United States, by the sheriff of Rockbridge county, Virginia, in virtue of a pretended judgment rendered in the circuit court of that county by Hugh W. Sheffey, present and presiding therein as judge, though disabled from holding any office whatever by the fourteenth amendment of the constitution of the United States. Upon this petition a writ of habeas corpus was allowed and served, and the body of the petitioner, with a return showing the cause of detention, was produced by the sheriff, in conformity with its command.

The general facts of the case, as shown to the district judge, may be briefly stated as follows:

The circuit court of Rockbridge county is a court of record of the state of Virginia, having civil and criminal jurisdiction. In this court, the petitioner, Caesar Griffin, indicted in the county court for shooting with intent to kill, was regularly tried, in pursuance of his own election; and, having been convicted, was sentenced according to the finding of the jury, to imprisonment for two years, and was in the custody of the sheriff to be conveyed to the penitentiary, in pursuance of this sentence.

Griffin is a colored man; but there was no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of color. It was not claimed that the grand jury, by which he was indicted, or the petit jury, by which he was tried, was not in all respects, lawful and competent. Nor was it alleged that Hugh W. Sheffey, the judge who presided at the trial, and pronounced the sentence, did not conduct the trial with fairness and uprightness.

One of the counsel for the petitioner, indeed, upon the hearing in this court, pronounced an eulogium upon his character, both as a man and as a magistrate, to deserve which might well be the honorable aspiration of any judge.

But it was alleged and was admitted that Judge Sheffey, in December, 1849, as a member of the Virginia house of delegates, took an oath to support the constitution of the United States, and also that he was a member of the legislature of Virginia in 1862, during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States; and it was claimed in behalf of the petitioner, that he thereby became, and was at the time of the trial of the petitioner, disqualified to hold any office, civil or military, under the United States, or under *23 any state, and it was specially insisted that the petitioner was entitled to his discharge upon the ground of the incapacity of Sheffey, under the fourteenth amendment, to act as judge and pass sentence of imprisonment. Upon this showing and argument, it was held by the district judge that the sentence of Caesar Griffin was absolutely null; and his imprisonment was in violation of the constitution of the United States, and an order for his discharge from custody was made accordingly.

The general question to be determined on the appeal from this order is whether or not the sentence of the circuit court of Rockbridge county must be regarded as a nullity because of the disability to hold any office under the state of Virginia, imposed by the fourteenth amendment, on the person, who, in fact, presided as judge in that court. It may be properly borne in mind that the disqualification did not exist at the time that Sheffey became judge. When the functionaries of the state government existing in Virginia at the commencement of the late Civil War took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia, which could be recognized as such by the national government. Their example of hostility to the Union, however, was not followed throughout the state. In

many counties, the local authorities and majority of the people adhered to the national government; and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state. This government was recognized as the lawful government of Virginia by the executive and legislative departments of the national government; and this recognition was conclusive upon the judicial department. The government of the state thus recognized was in contemplation of law the government of the whole state of Virginia, though excluded, as the government of the United States was itself excluded, from the greater portion of the territory of the state. It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. To the formation of that state, the consent of its own legislature, and of the legislature of the state of Virginia, and of congress, was indispensable. If either had been wanting, no state, within the limits of the old, could have been constitutionally formed; and it is clear that if the government instituted at Wheeling was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries. It can not admit of question, then, that the government which consented to the formation of the state of West Virginia, remained in all national relations the government of Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force. Indeed, it is well known historically that the state and the government of Virginia, thus organized, was recognized by the national government. Senators and representatives from the state occupied seats in congress, and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state. As such it was entitled, under the constitution, to the same recognition and respect, in national relations, as the government of any other state.

It was under this government that Hugh W. Sheffey was, on February 22, 1866, duly appointed judge of the circuit court of Rockbridge county, and he was in the regular exercise of his functions as such when Griffin was tried and sentenced.

More than two years had elapsed after the date of his appointment, when the ratification of the fourteenth amendment, by the requisite number of states, was officially promulgated by the secretary of state, on July 28, 1868. That amendment, in its third section, ordains that 'no person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.'

And it is admitted that the office held by Judge Sheffey, at the time of the trial of Griffin, was an office under the state of Virginia, and that he was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.

The question to be considered, therefore, is whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power.

One of the counsel for the petitioner suggested that the amendment must be construed with reference to the act of 1867, which extends the writ of habeas corpus to a large class of cases in which the previous legislation did not allow it to be issued. And it is proper to say a few words on this suggestion here.

The judiciary act of 1789 expressly denied the benefit of the writ of habeas corpus to prisoners not confined under or by color of ***24** the authority of the United States. Under that act, no person confined under state authority could have the benefit of the writ. Afterwards, in 1833 and 1842, the writ was extended to certain cases specially described, of imprisonment under state process; and in 1867, by the act to which the counsel referred, the writ was still further extended 'to all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States.' And the learned counsel was doubtless correct in maintaining, that without the act of 1867, there would be no remedy by habeas corpus in the case of the petitioner, nor indeed in any case of imprisonment in violation of the constitution of the United States, except in the possible case of an imprisonment, not only within the provisions of this act, but also within the provisions of some one of the previous acts of 1789, 1833, and 1842.

But if, in saying that the amendment must be construed with reference to the act, the counsel meant to affirm that the existence of the act throws any light whatever upon

the construction of the amendment, the court is unable to preceive the force of his observation. It is not pretended that imprisonment for shooting, with intent to kill, is unconstitutional, and it will hardly be affirmed that the act of 1867 throws any light whatever upon the question, whether such imprisonment, in any particular case, is unconstitutional. The case of unconstitutional imprisonment must be established by appropriate evidence. It can not be inferred from the existence of a remedy for such a case. And, surely, no construction, otherwise unwarranted, can be put upon the amendment more than upon any other provision of the constitution, to make a case of violation out of acts which otherwise must be regarded as not only constitutional, but right.

We come, then, to the question of construction. What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?

The proposition maintained in behalf of the petitioner, is, that this prohibition, instantly, on the day of its promulgation, vacated all offices held by persons within the category of prohibition, and made all official acts, performed by them, since that day, null and void.

One of the counsel sought to vindicate this construction of the amendment, upon the ground that the definitions of the verb 'to hold,' given by Webster in his Dictionary, are 'to keep fast; to retain;' of which definitions, cape; to keep fast; to retain;' of which definitions, the author says that 'to hold rarely or never signifies the first act of siezing or falling on, but the act of retaining a thing when seized on or confined.'

The other counsel seemed to be embarrassed by the difficulties of this literal construction, and sought to establish a distinction between sentences in criminal cases, and judgments and decrees in civil cases. He admitted, indeed, that the latter might be valid when made by a court held by a judge within the prohibitive category of the amendment; but insisted that the sentences of the same court in criminal cases must be treated as nullities.

The ground of the distinction, if we correctly apprehend the argument, was found in the circumstance that the act of 1867 provided a summary redress to the latter class of cases; while in the former, no summary remedy could be had, and great inconvenience would arise from regarding decrees and judgments as utterly null and without effect.

But this ground of distinction seems to the court unsubstantial. It rests upon the fallacy already commented on. The amendment makes no such distinction as is supposed. It does not deal with cases, but with persons. The prohibition is general. No person in the prohibitive category can hold office. It applies to all persons, and to all officers under the United States, or any state. If upon a true construction, it operates as a removal of a judge, and avoids all sentences in criminal cases, pronounced by him after the promulgation of the amendment, it must be held to have the effect of removing all judges and officers, and annulling all their official acts after that date.

The literal construction, therefore, is the only one upon which the order of the learned district judge, discharging the prisoner, can be sustained; and was, indeed, as appears from his certificate, the construction upon which the order was made. He says expressly, 'the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said Hugh W. Sheffey, to act (that is, as judge), and so to sentence the prisoner under the fourteenth amendment.'

Was this a correct construction? In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument, it is true, can not prevail over plain words or clear reason. But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition.

The amendment applies to all the states of the Union, to all offices under the United States or under any state, and to all persons in the category of prohibition, and for all time present and future. The offenses, for which exclusion from office is denounced, are not merely engaging in insurrection or rebellion against the United States, but the ***25** giving of aid or comfort to their enemies. They are offenses not only of civil but of foreign war.

Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country, and, nevertheless, held some office on July 28, 1868, or subsequently.

Is it a reasonable construction of the amendment which will make it annul every official act of such an officer? But, let another view be taken. It is well known that many

persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government, and it is not to be doubted that not a few among them, as members of congress, or officers of the United States, or as members of state legislatures, or as executive or judicial officers of a state, had before the war taken an oath to support the constitution of the United States. In their new homes, capacity, integrity, fitness, and acceptability, may very possibly have been more looked to than antecedents. Probably some of these persons have been elected to office in the states which have received them.

It is not unlikely that some of them held office on July 28, 1868. Must all their official acts be held to be null under the inexorable exigencies of the amendment? But the principal intent of the amendment was, doubtless, to provide for the exclusion from office, in the lately insurgent states, of all persons within the prohibitive description.

Now, it is well known that before the amendment was proposed by congress, governments acknowledging the constitutional supremacy of the national government had been organized in all these states. In some, these governments had been organized through the direct action of the people, encouraged and supported by the president, as in Tennessee, Louisiana, and Arkansas, and in some through similar action in pursuance of executive proclamations, as in North Carolina, Alabama, and several other states. In Virginia, such a state government had been organized as has been already stated, soon after the commencement of the war; and this government had been fully recognized by congress, as well as by the president.

This government, indeed, and all the others, except that of Tennessee, were declared by congress to be provisional only. But, in all these states all offices had been filed, before the ratification of the amendment, by citizens who, at the time of the ratification, were actively engaged in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the constitution, and had afterwards engaged in the late Rebellion; and most, if not all of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that by its operation their offices could be vacated without some action of congress.

If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers. No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity. It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states.

The argument from inconveniences, great as these, against the construction contended for, is certainly one of no light weight. But there is another principle which, in determining the construction of this amendment, is entitled to equal consideration with that which has just been stated and illustrated. It may be stated thus: Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.

And here it becomes proper to examine somewhat more particularly the character of the third section of the amendment. The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national government, in those states which had attempted to break up their constitutional relations with the Union, and to establish an independent Confederacy.

All citizens who had, during its earlier stages, engaged in or aided the war against the United States, which resulted inevitably from this attempt, had incurred the penalties of treason under the statute of 1790 [1 Stat. 112].

But, by the act of July 17, 1862 [12 Stat. 589], while the Civil War was flagrant, the death penalty for treason, committed by engaging in rebellion, was practically abolished. Afterwards, in December, 1863, full amnesty, on conditions which now certainly seem to be moderate, was offered by President Lincoln, in accordance with the same act of congress; and after organized resistance to the United States had ceased, amnesty was again offered in accordance with the same act by President Johnson, in May, 1865. In both these offers of amnesty extensive exceptions were made.

In June, 1866, little more than a year later, the fourteenth amendment was proposed; and was ratified in July, 1868. The only punitive section contained in it is the third, now under consideration. It is not improbable ***26** that one of the objects of this section was to provide for the security of

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the nation and of individuals, by the exclusion of a class of citizens from office; but it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense.

It is true that in the judgment of some enlightened jurists, its legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the Rebellion. But this very effect shows distinctly its punitive character.

Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.

If there were no other grounds than these for seeking another interpretation of the amendment than that which we are asked to put upon it, we should feel ourselves bound to hold them sufficient. But there is another and sufficient ground, and it is this, that the construction demanded in behalf of the petitioner, is nugatory except for mischief.

In the language of one of the counsel, 'the object had in view by us is not to unseat Hugh W. Sheffey, and no judgment of the court can effect that.' Now the object of the amendment is to unseat every officer, whether judicial or executive, who holds civil or military office in contravention of the terms of the amendment. Surely a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found.

Is there, then, any other reasonable construction? In the judgment of the court there is another, not only reasonable, but very clearly warranted by the terms of the amendment, and recognized by the legislation of congress. The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress.

Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision of this article.'

There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment. These are its words: 'But congress may, by a vote of two-thirds of each house, remove such disability.' Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

It results from the examination that persons in office by lawful appointment or election before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section; but that legislation by congress is necessary to give effect to the prohibition, by providing for such removal. And it results further that the exercise of their several functions by these officers, until removed in pursuance of such legislation, is not unlawful.

The views which have been just stated receive strong confirmation from the action of congress and of the executive department of the government. The decision of the district judge, now under revision, was made in December, 1868, and two months afterwards, ***27** in February, 1869 [15 Stat. 344], congress adopted a joint resolution entitled 'a resolution respecting the provisional governments of Virginia and Texas.' In this resolution it was provided that persons, 'holding office in the provisional governments of Virginia and Texas,' but unable to take and subscribe the test oath prescribed by the act of July 2, 1862 [12 Stat. 502], except those relieved from disability, 'be removed therefrom;' but a provision was added, suspending the operation of the resolution for thirty days from its passage.

The joint resolution was passed and received by the president on February 6, and not having been returned in ten days, became a law without his approval.

It can not be doubted that this joint resolution recognized persons unable to take the oath required, to which class belonged all persons within the description of the third section of the fourteenth amendment, as holding office in Virginia at the date of its passage, and provided for their removal from office.

It is not clear whether it was the intent of congress that this removal should be effected in Virginia by the force of the joint resolution itself, or by the commander of the first military district. It was understood by the executive or military authorities as directing the removal of the persons described, by military order. The resolution was published by command of the general of the army for the information of all concerned, March 22, 1869. It had been previously published by direction of the commander of the first military district, accompanied by an order, to take effect on March 18, 1869, removing the persons described from office. The date at which this order was to take effect, was afterwards changed to March 21.

It is plain enough from this statement that persons holding office in Virginia, and within the prohibition of the fourteenth amendment, were not regarded by congress, or by the military authority, in March, 1869, as having been already removed from office.

It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of congress, or to express any opinion concerning the validity of the joint resolution, or of the proceedings under it. The resolution and proceedings are referred to here only for the purpose of showing that the amendment had not been regarded by congress or the executive, so far as represented by the military authorities, as effecting an immediate removal of the officers described in the third section.

After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful. In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under sentence of a court held by such a judge.

Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the constitution ordaining that no person shall be a representative or senator, or president, or vicepresident, unless having certain pre-prescribed qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The election or appointment itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually elected, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid.

But it is unnecessary to pursue the examination. The cases cited by counsel cover the whole ground, both of principle and authority. Taylor v. Skrine, 2 Tread. Const. 696; State v. Bloom, 17 Wis. 521; People v. Bangs, 24 Ill. 184. This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.

It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

All Citations

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Footnotes

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Sweeping and Forcing the President into Section 3

by Josh Blackman* & Seth Barrett Tillman**

Does the full "sweep and force" of Section 3 of the Fourteenth Amendment disqualify Donald Trump from the presidency? In a new article, William Baude and Michael Stokes Paulsen argue that the answer is *yes* because "essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." This sweeping conclusion is not accurate. Establishing the original public meaning of Section 3 is difficult because there is originalist and textualist evidence pointing in different directions. Our research is built on more than a decade of scholarship in areas that are, regrettably, neglected in modern courts and scholarship, but would have been well understood in the 1860s.

Our Article proceeds in five parts. Part I begins with a threshold question: *Is Section 3 of the Fourteenth Amendment self-executing?* Baude and Paulsen say the answer is *yes*, pointing to other provisions of the Constitution as models. Yet, the answer is not so clear. Constitutional provisions are not automatically self-executing, nor is there any presumption of self-execution for such provisions. We will illustrate our position with discussions of the Supreme Court's appellate jurisdiction, Article I qualifications, and more. Section 1 of the Fourteenth Amendment, which includes the Due Process and Equal Protection Clauses, can only be wielded as a *sword supporting affirmative relief* with federal enforcement legislation, such as Section 1983. But, even absent enforcement legislation, Section 1 of the Fourteenth Amendment can be wielded as a *shield* as a set of defenses. Section 1 is self-executing in the latter regard, but not the former. If Section 1 is a guide, then Section 3 cannot be used as a sword to disqualify Trump, absent federal enforcement legislation. Trump has not been disqualified pursuant to any federal enforcement legislation.

Part II provides a careful study of *Griffin's Case*, a federal circuit court case decided by Chief Justice Salmon P. Chase in 1869. Chase stated expressly that Section 3 can only be enforced by Congress

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through federal legislation. Yet, Baude and Paulsen tar-and-feather *Griffin's Case*, and their article reads like an effort to discredit Chase. But their criticisms miss the mark. They fault Chase for not adhering to doctrines developed decades later, and they condemn Chase for breaching invented ethical standards. All things considered, *Griffin's Case* lies in the heartland of judicial thinking and scholarship. Baude and Paulsen misread *Griffin's Case*, misunderstood Chase, and misconstrued the holding. Chase's opinion was, and remains, reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing.

Part III turns to another case that Chief Justice Chase presided over. This case also implicated Section 3: the treason indictment against Jefferson Davis. A version of the case, reported nearly a decade *after* it was decided, includes a sentence which suggests that Chase viewed Section 3 as self-executing. If so, the *Case of Jefferson Davis* (1868) would seem to be in tension with *Griffin's Case* (1869). However, this sentence was added to the report by a former confederate general who had apparently plotted to kidnap Abraham Lincoln. Plus, the general was subsequently the lawyer for the respondent, another former confederate, in *Griffin's Case*. The reporter's connection to the self-execution issue is some cause for concern. A contemporaneous report, published in 1869, does not include that sentence. Even taken on these terms, the two Chase opinions can be reconciled. Griffin was an applicant in a collateral challenge; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield–as a defense in his criminal prosecution, and he could do so without enforcement legislation. Even under modern doctrine, *Griffin's Case* is not in tension with the *Case of Jefferson Davis*.

Part IV focuses on the conduct that can trigger a disqualification. The offense element of Section 3 has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they reflect longstanding aspects of domestic and international law. Yet, Baude and Paulsen conflate "engaged" in insurrection, a direct and substantive criminal law offense, with giving "aid or comfort" to enemies, which permits liability based on indirect and inchoate wrongs. And in the process, they constructed a new offense that does not appear in the text of Section 3: giving aid or comfort to insurrection. The text of Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. Nor does

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the "engage" prong extend to inaction—for example, failing to take action with regard to an insurrection or rebellion.

Part V considers another threshold question: was Trump ever subject to Section 3? President Trump was unique among all of his predecessors in that he did not hold any prior government position before he took the presidential oath of office on January 20, 2017. Section 3 of the Fourteenth Amendment could only disqualify Trump if the presidential oath he took on that date was as an "Officer[] of the United States." In 2021 we published an article concluding "that the President is not a Section 3 'officer of the United States.'" In their article, Baude and Paulsen summarily dismiss our position. But Baude and Paulsen disregard substantial evidence about the meaning of the phrase "Officers of the United States" in the Constitution of 1788. And they disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early Republic. Instead of parsing the Constitution of 1788 and early debates, Baude and Paulsen focus on original intentions and consequentialism. These sorts of arguments are weak evidence of original public meaning and do not pass originalist muster. More importantly, Baude and Paulsen offer no complete or comprehensive theory to explain what other positions are included and excluded by the phrase "Officer of the United States." Without ever explaining what Section 3's "officer of the United States"-language means, they only seek to establish that the President falls in that category. In short, Baude and Paulsen punched a textualist ticket good for one ride on the Trump train.

The theoretical defects and other errors in Baude and Paulsen's article are not insubstantial, and they span multiple independent issues. And we see no sound basis for their article's startling conclusion: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." We suggest that scholars, litigants, elections administrators, and judges allow Baude and Paulsen's article to percolate in the literature before placing too great a reliance on its novel claims.

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Introduction

In a recent article, Professor William Baude and Professor Michael Stokes Paulsen purport to set forth the "full sweep and force of Section Three" of the Fourteenth Amendment.[1] Baude and Paulsen make four primary arguments. First, they contend that Section 3 remains operational long after the American Civil War ended. Second, they argue that Section 3 is self-executing; as they view it, Section 3 may automatically remove covered officeholders and impose a disability on candidates' ballot access without the need for federal enforcement legislation, and perhaps, without any judicial proceedings. Third, they write that imposing such a disqualification does not run afoul of other provisions of the Constitution, such as prohibitions on retroactivity or the Free Speech Clause of the First Amendment. In their view, the later-in-time Section 3 modifies earlier provisions of the Constitution, as well as federal statutory law. Fourth, they interpret Section 3 to include "indirect participation" with an insurrection. Specifically, they contend that giving aid or comfort to an insurrection is sufficient to trigger a Section 3 disqualification. In this Article, we will disagree with their second, third, and fourth positions.

Baude and Paulsen conclude that Section 3 disqualifies former President Donald Trump from being re-elected as President. Indeed, Baude and Paulsen suggest that Trump is *already* disqualified from office, and States can prevent him from even appearing on the ballot. Baude and Paulsen unequivocally state, "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ."[2] This sweeping conclusion about

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[1] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024), https://ssrn.com/abstract=4532751.

[2] Baude and Paulsen's article is something of a moving target: they are actively updating and revising their article in advance of publication. The first version was published on SSRN on or about August 10, 2023. The first updated version, with some minor edits, was uploaded on or about August 24, 2023. The second updated version of Baude and Paulsen's article, with some substantial edits, was uploaded on or about September 19, 2023. We shared a draft of our article on September 11, 2023. Rather than revising the body of our article in response to each iteration of the Baude and Paulsen paper, we will discuss any relevant revisions by Baude and Paulsen in the Postscript that follows at the end of this Article. As a general matter, we will cite and quote from the original version that Baude and Paulsen posted on or about August 10, 2023.

With that in mind, this statement is from the authors' first draft. In a later draft, Baude and Paulsen revised this claim: "In the end, the sum total of evidence

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"essentially *all* the evidence" pointing in the same direction is not accurate.

Our research in this area, which began long before Baude and Paulsen shared their article,[3] demonstrates that establishing the original public meaning of Section 3 is difficult. This research is built on more than a decade of scholarship in areas that are, regrettably, neglected in modern courts and scholarship, but would have been well understood in the 1860s. Attempting to use Section 3 to disqualify Trump, along the lines Baude and Paulsen suggest, is not a slam dunk, and is likely to backfire. Our views here are not new. We have been continuously publishing in this and related areas, separately and jointly, for over a decade.

Indeed, the Baude and Paulsen article, which purports to be an originalist tour-de-force, views today's pressing question through a distinctly modern lens. Our position is that they have not put forward a sufficiently complete theoretical work needed to understand the major facets of Section 3 in the abstract sense that extends beyond Donald Trump's case. Baude and Paulsen offer no theory of how Section 3 would extend beyond the controversy of the day. They don't tell us how to determine which other officers might be disqualified by Section 3, beyond the President. They don't tell us how to define an "enemy" for purposes of Section 3 outside the context of the Civil War, even though that term is essential to their atextualist analysis. They don't provide a framework to determine whether other provisions of the Constitution are self-executing, including the grant of appellate jurisdiction to the Supreme Court and the Article I qualification standards. They conflate "engaged" in insurrection, a direct and substantive criminal law offense, with giving "aid or comfort" to enemies, which permits liability based on indirect and inchoate wrongs. And they extract and rearrange distinct parts of Section 3 into a new Section 3 chimera: "giving aid or comfort to insurrection"—an offense which does not actually appear in Section 3's text.

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concerning the original textual meaning . . . points in a consistent direction." *Id.* at 104. We leave it to the reader to contemplate if there is much difference between "essentially all" and "sum total," and between "same direction" and "consistent direction." It seems to us that, at the margin, their claim was softened, at least a bit. And if they softened their claim, they do not explain in what regard their prior claim was imprecise, and they do not explain what new evidence or arguments persuaded them to make this change.

[3] We are grateful that Baude and Paulsen shared an earlier draft of their paper with us, and we provided some comments on their draft. Their sharing the early draft also enabled us to make this timely response.

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They offer no principled explanation with regard to retroactivity, and they do not even recognize how *far* back Section 3 *could* sweep. They don't provide any grounded rule to explain which provisions of the Constitution and federal statutory law are repealed or limited by Section 3. To what extent should the courts peel back protections under the First Amendment and traditional free speech protections—could Congress enact seditious libel laws to enforce Section 3? What about the Judge of the Elections Clause—can courts review a House's decision to seat someone disqualified by Section 3? What about the Speech or Debate Clause—would a member be disqualified for opposing a declared war, thereby giving aid or comfort to enemies? And so on.

Beyond deficiencies with legal theory, significant errors recur throughout their article. They tar-and-feather a decision by Chief Justice Chase, *Griffin's Case* (1869), which, all things considered, lies in the heartland of judicial thinking and scholarship. Simply put, they have misread the caselaw. They criticize Chase's motives based on a single sentence in the *Case of Jefferson Davis* (1868)—a sentence which did not appear in the original report of the case and which was added to a later report by a former confederate general. They accuse Chase of judicial impropriety for discussing the views of his Supreme Court colleagues, even though three decades later the Supreme Court favorably quoted Chase's opinion on this exact point.

Baude and Paulsen's errors are not limited to Chase. They cite cases as evidence of Section 3's self-execution which in fact invoked a state law to disqualify state officials. They rely on a source that the Supreme Court expressly rejected in *The Prize Cases* (1863), having already told us that *The Prize Cases* are part of the intellectual infrastructure from which Section 3 arose. They conflate the Treason Clause of the Constitution with a federal treason statute signed into law by President Lincoln. They don't even address the fact that Section 3 speaks to "holding" elected positions, and it says nothing at all about ballot access or any other remedies in regard to regulating elections. They state that secession movements necessarily violate Section 3—members of the Puerto Rican independence movement would disagree. And much, much more.

Moreover, Baude and Paulsen's article is replete with hyperbole. They describe Chief Justice Chase's (purported) position in the *Case of Jefferson Davis* (1868) as "bonkers."[4] Indeed, Baude and Paulsen's hyperbole makes their position less convincing than it otherwise could be. The hyperbole distracts from the article's

[4] Baude & Paulsen, *supra* note 1, at 43.

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substance, and we acknowledge that there is much substance. That said: for Baude and Paulsen to be right about "essentially *all* the evidence," a great many other people—living and dead—must be dead-wrong about a great deal, which until 2020 very few thought controversial. We think humility counsels otherwise.

Baude and Paulsen's article places a bullseye on one person, and one person alone: Donald Trump. And to borrow from Justice Scalia's description of the independent counsel in *Morrison v. Olson*, with such a laser-focus, it is unsurprising they think they hit their target. But their laser-focus precluded them from seeing a wider universe of contrary evidence, which would have been readily visible had they approached Section 3 from a more abstract perspective apart from Trump. Their theoretical defects and substantive errors are endemic, and undermine the emphatic conclusion of the article: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ."[5] This statement is not accurate. Most originalists are loath to suggest that questions rooted in century-old and centuries-old texts are so easy to resolve. But Baude and Paulsen reach an emphatic conclusion on contested and contestable ground.

Our Article proceeds in five parts. Part I begins with a threshold question: *Is Section 3 of the Fourteenth Amendment self-executing?* Baude and Paulsen say the answer is *yes*. But the answer is not so clear. Constitutional provisions are not automatically self-executing; nor is there any presumption that such provisions are self-executing. Is the Supreme Court's appellate jurisdiction self-executing? Chief Justice Ellsworth said *no*, and Chief Justice Marshall said *yes*. Today, it appears that the prevailing view is that Ellsworth was correct. Are the Article I qualifications for office—including the minimum age requirement—self executing? What about the quorum rule? These internal rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner. What about treaties? Treaties like constitutional provisions and statutes are also the supreme law of the land; yet, treaties are *not* presumptively self-executing.

What about Section 1 of the Fourteenth Amendment? Certainly that provision, which includes the Due Process and Equal Protection Clauses, is self-executing, right? In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or *a defense*. And second, as a *sword*—or *a theory of liability* or *cause of action supporting affirmative relief*. The former is customarily asserted as a defense in an action brought by others; the

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[5] Baude & Paulsen, *supra* note 1, at 103.

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latter is asserted offensively by an applicant seeking affirmative relief. Section 1 can only be wielded as a sword with federal enforcement legislation. But Section 1 can be wielded as a shield without legislation. Section 1 is self-executing as a set of defenses. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*, and in more modern times, countless other cases invoke Section 1983 and its statutory antecedents. Moreover, a plaintiff asserting an *Ex parte Young* claim is actually asserting a defense as a *shield* in anticipation of a state lawsuit, prosecution, or other enforcement action. Baude and Paulsen fail to account for the two distinct senses of self-execution. It is these two senses of self-execution which reconcile Chief Justice Chase's two decisions, whose legal bona fides have only recently become controversial. In short, *Griffin's Case* and the *Case of Jefferson Davis* do not contradict one another.

Part II provides a careful study of *Griffin's Case*. This circuit court opinion was decided in May 1869. Salmon P. Chase, the Chief Justice of the United States, presided over the case. Chase stated expressly that Section 3 can only be enforced by Congress through federal legislation. One would think that this decision, issued within a year of the Fourteenth Amendment's ratification, by the Chief Justice of the United States, would be reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing. But, according to Baude and Paulsen and some other recent commentators, such is not the case.

Baude and Paulsen go to some lengths to ridicule his opinion and their article reads like an effort to discredit Chase. But their criticisms miss the mark. They fault Chase for not adhering to doctrines developed decades later, and they condemn Chase for breaching invented ethical standards. Baude and Paulsen are wrong on the law. Worse still, Baude and Paulsen repeatedly deride Chase in hyperbolic terms. They say that Chase was trying to "knee-cap[]" the Fourteenth Amendment and compare his opinion to *Dred Scott*![6]

We think Baude and Paulsen misread *Griffin's Case*, misunderstood Chase, and misconstrued the holding. We encourage the reader to compare our treatment of *Griffin's Case* with that of Baude and Pauslen. The stark contrast will demonstrate that this "evidence concerning the original textual meaning of Section Three . . . points" against Baude and Paulsen's position. Rather, Chief Justice Chase's opinion was, and remains, reasonably probative evidence of the

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[6] Baude & Paulsen, *supra* note 1, at 49.

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original public meaning of Section 3, and whether it is or is not self-executing.

Trump has not been disqualified pursuant to any federal enforcement legislation. Indeed, the Special Counsel did not even indict Trump, or anyone else involved with January 6, with charges of insurrection or rebellion, which could function as the criminal-law type predicates to Section 3 coverage.[7] If Chase was and remains correct, and Section 3 required and continues to require enforcement via federal legislation, then Trump cannot be disqualified in the manner Baude and Paulsen conclude.

Part III turns to another case that Chief Justice Chase presided over. This case also implicated Section 3: the treason case against Jefferson Davis. This proceeding, that is, *The Case of Jefferson Davis*, occurred in December 1868, several months before *Griffin's Case* was decided. The version of the case reported in *Federal Cases* (1894) includes this sentence: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment [against Davis] should be quashed, and all further proceedings barred by the effect of [Section 3] the fourteenth amendment to the constitution of the United States."[8] This sentence, on its face, seems to conflict with what Chase would write in *Griffin's Case* a few months later. Baude and Paulsen, and other scholars, have unquestionably accepted this statement as a report of what occurred in December 1868. Modern readers may take for granted that all reported versions of a case will be largely identical. But for much of Anglo-American legal history that assumption would have been wrong.

The *American Law Review*, published contemporaneously in 1869, offered an accounting of the trial, including detailed descriptions of arguments made by counsel for the defense and the government. But that publication did not include this particular sentence about Section 3. Indeed, we have found no contemporaneous public source confirming that Chase had adopted the view ascribed to him in the 1894 report of the case appearing in *Federal Cases*. To the contrary, we have found a contemporaneous source, a newspaper article, which states just the opposite of the position ascribed to Chase in the 1894 *Federal Cases* report. How did this sentence make its way into *Federal Cases*?

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[7] We discussed this statute in Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190, https://ssrn.com/abstract=3837615, https://illinoislawrev.web.illinois.edu/wp-content/uploads/2021/04/Blackman-Tillman.pdf.

[8] Case of [Jefferson] Davis, 7 F. Cas. 63, 102 (C.C.D. Va. 1871).

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That version of the case was first published in 1876 by Bradley T. Johnson, a former general in the (purported) confederate army.[9] General Johnson had apparently plotted to kidnap Abraham Lincoln, and later, he admitted to making changes to Chase's reports without Chase's knowledge. Plus, General Johnson was the lawyer for the respondent, a former confederate, in *Griffin's Case*. The reporter's connection to the self-execution issue is some cause for concern.

Even taken on these terms, *Griffin's Case* can be reconciled with the *Case of Jefferson Davis*. Griffin was an applicant in a collateral challenge; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield—as a defense in his criminal prosecution for treason, and he could do so without enforcement legislation. Finally, both opinions spoke to issues that were thought to be important by the public at the time they were issued (if not also for many years later). How is it that no one in the legal community (or elsewhere for all we know) noticed the inconsistency until circa 2020—about 150 years after-the-fact? Such a *no-one-noticed-until-me* argument is conceivable, but such a position calls for some explanation.

Part IV focuses on the conduct that can trigger a disqualification. The offense element of Section 3 has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they reflect longstanding aspects of domestic and international law. One can only be an enemy during a war. (Baude and Paulsen do not even try to define the term "enemy" outside the context of the Civil War.) But, as they admit, not all insurrections are war. One can engage in insurrection without aiding an enemy. One who engages in insurrection without aiding an enemy is an offender, a criminal, or a felon. But absent a war, he is not an enemy. And one can aid an enemy without engaging in insurrection or rebellion. Yet, Baude and Paulsen conflate a direct criminal law offense (engaging in insurrection) with an indirect wrong (giving aid or comfort to enemies). And in the

[9] Throughout this Article, we make an effort to refer to the confederate government, the confederacy, the confederate army, or the Confederate States of America as the "so-called" or "purported" confederacy, etc. Our nomenclature follows our legal system. *See, e.g.*, Second Confiscation Act, ch. 195, § 5, 12 Stat. 589 (1862) (referring to the "so-called Confederate States of America"); United States v. Keehler, 76 U.S. 83, 87 (1869) (noting that "throughout the year 1862 the *so-called* Confederate government had force sufficient to enforce its orders" (emphasis added)). If we have failed to use "so-called" or "purported" on any occasion, it was inadvertent.

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process, they constructed a new offense that does not appear in the text of Section 3: giving aid or comfort to insurrection. The text of Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. Baude and Paulsen's reconstruction of Section 3 is inconsistent with the provision's text. And it is only that expansive atextualist reconstruction of the text that could trigger Trump's disqualification, assuming his conduct stopped short of actually engaging in insurrection.

Part V considers another threshold question: was Trump ever subject to Section 3? President Trump was unique among all of his predecessors in that he did not hold any prior government position before he took the presidential oath of office on January 20, 2017. Section 3 of the Fourteenth Amendment could only disqualify Trump if the presidential oath he took on that date was as an "Officer[] of the United States." The President is an "Officer" and holds an "Office." That much is not disputed. But is the President an "Officer of the United States"? If the presidency is not an "Officer[] of the United States" for purposes of Section 3, then the "full sweep and force" of that provision could not touch Trump. In 2021 we published an article discussing whether the President is an "Officer[] of the United States" for purposes of Section 3.[10] We concluded "that the President is not a Section 3 'officer of the United States.'"[11]

In their article, Baude and Paulsen summarily dismiss our position. Baude and Paulsen contend that our textualist approach is "hidden-meaning hermeneutics" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati."[12] This sort of argumentation is, once again, misplaced hyperbole. Instead, Baude and Paulsen do not address the evidence we have put forward. And they left unrebutted several sources, from the period roughly contemporaneous with ratification, that support the position that the President is not an "Officer of the United States." To preempt an obvious, and predictable response, of course the President is an *officer* and holds an *office*. But that is not the relevant question. The relevant question is whether the President is an "Officer of the United States" as that phrase is used in Section 3. The Framers of the Constitution of 1788 and Section 3 used different "office"- and "officer"-language throughout the original Constitution and even

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[10] Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, 15 N.Y.U. J. L. & LIBERTY 1 (2021).

[11] *Id.* at 54.

[12] Baude & Paulsen, *supra* note 1, at 104.

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within Section 3. We should endeavor to establish the meaning of the language they chose, and we do not assume that when they chose terms which were readily distinguishable from one another that such terms had identical meanings. The presumption ought to be that when different language is chosen, it was intended and understood as having different meanings. That presumption ought not be casually disregarded. Yet, Baude and Paulsen do precisely that: they assume that Section 3's "Office . . . . under the United States"-language and "officer of the United States"-language are coextensive and both reach the presidency.

Baude and Paulsen disregard substantial evidence about the meaning of the phrase "Officers of the United States" in the Constitution of 1788. And they disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early Republic. These early debates discussed the meaning of "office"- and "officer"-language in the Constitution of 1788. Instead of parsing the Constitution of 1788 and early debates, Baude and Paulsen focus on original intentions and consequentialism. These sorts of arguments are weak evidence of original public meaning and do not pass originalist muster. Baude and Paulsen ignore authorities ranging from Justice Story's scholarship to Chief Justice Roberts's opinions for the Supreme Court. Baude and Paulsen conclude, "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ."[13] Yet Baude and Paulsen simply look away from contrary evidence.

What is Baude and Paulsen's theory of what "Officer of the United States" meant in 1868? They are positively certain that language included the President—a conclusion that would address Donald Trump's eligibility for re-election, but not much else. But they do not explain what other positions are included and excluded by the constitutional text at issue here. We suggest that if ever a full-accounting of the meaning of "Officer of the United States" was needed, it would be in a case that could disqualify a leading presidential candidate. Without ever explaining what Section 3's "officer of the United States"-language means, they only seek to establish that the President falls in that category. In short, Baude and Paulsen punched a textualist ticket good for one ride on the Trump train. They tell us the President is an "Officer of the United States," but they will not tell us much else. If we are correct on this textual point, then Trump cannot be disqualified under Section 3. Before Trump can be swept or forced

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[13] *Id.* at 103.

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into Section 3, Baude and Paulsen must fully grapple with all originalist and textualist evidence.

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We close with a general observation about this new article. Baude and Paulsen make more than a few novel claims, which we have not seen in any of their prior published scholarship. Rather than cautiously approaching their first foray in this area, Baude and Paulsen make some claims with absolute certitude, and then go on to re-express their position in different terms, and then to hedge on the central question. A simple example will suffice. In one place, Baude and Paulsen write that "it is not at all clear that [Section 3] inflicts *punishment*."[14] And in another place, Baude and Paulsen write that Section 3 is an "offense, conviction, and *punishment* all rolled into one."[15] Baude and Paulsen fail to explain whether Section 3 does or does not inflict a punishment. As a result of these and other internal discrepancies and tensions, their lengthy paper, *which they have and continue to substantively update*, presents something of a moving target.[16] They use charged language against long dead actors who, because they are dead, are in no position to defend themselves and their handiwork. Baude and Paulsen disagree with many, and those who disagree with them are not merely characterized as wrong, but as inept, unethical, disloyal, or occultish. For these reasons, and others, we have considerable methodological differences with Baude and Paulsen. And given the seriousness of the central issues, and the speed with which it may race through the state and federal courts and executive bodies controlling ballot access, reasonable caution and care are in order. We suggest that scholars, litigants, elections administrators, and judges allow their article to percolate in the literature before placing too great a reliance on its novel claims.

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[14] Baude & Paulsen, *supra* note 1, at 53.

[15] Baude & Paulsen, *supra* note 1, at 20. The language of the article has since changed. *See* discussion *supra* note 2. The former statement remains. *See id.* at 53. But they've tweaked the "rolled into one" line. The article now states that Section 3 "enacts its standard and imposes its consequences all at once." *Id.* at 20. A "consequence" seems to be a synonym for "punishment." The tension remains.

[16] *See* discussion *supra* note 2.

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I. Two Senses of Self-Execution: Sword and Shield

Throughout their article, Baude and Paulsen state unequivocally that Section 3 of the Fourteenth Amendment is self-executing. They write that "disqualification requires no further legislation or other action, by anybody, to be operative."[17] Rather, "[t]he disqualification simply *is*."[18] We do not disagree that a provision of the Constitution *is*. If that were all Baude and Paulsen meant by self-execution, that "A=A" or "Section 3 *is* because Section 3 *is*," we would not disagree, and we think few would or should care. But that tautological statement does not resolve *what* the scope of Section 3 is, and more importantly, *how* it is enforced. These are the actual questions at stake when we discuss "self-execution."

In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or *a defense*. And second, as a *sword*—or *a theory of liability* or *cause of action supporting affirmative relief*. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.

For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised *defensively*. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, "self-executing."

In the second sense, the Constitution is used *offensively–as a cause of action supporting affirmative relief*. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract.[19] Section 1983, including

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[17] Baude & Paulsen, *supra* note 1, at 18.

[18] *Id.*

[19] *See e.g.,* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326 (2015) (rejecting the proposition that "the Supremacy Clause creates a cause of action for its violation" in the federal court's equitable jurisdiction); Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (mem.) (stating that the federal government had

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its statutory antecedents (i.e., the Second Enforcement Act, also known as the Ku Klux Klan Act of 1871), is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.

Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing. Indeed, whether any particular provision is or is not self-executing is not obvious, and frequently, the issue cannot be resolved based solely on the provision's text. Consider Article III's grant of appellate jurisdiction to the Supreme Court. In an early decision, Chief Justice Marshall held that the Supreme Court would automatically enjoy all of the appellate jurisdiction granted by Article III if not cut back by a federal statute. But in even-earlier decisions, Chief Justice Ellsworth and Associate Justice Samuel Chase,[20] took the position that the grant of appellate jurisdiction was not self-executing. Rather, Congress had to affirmatively grant that jurisdiction by statute. Today, it appears that the Ellsworth–Chase view is the prevailing view. Still, with regard to Article III, there is no consensus that such self-execution is a default. Moreover, there is no presumption that treaties are self-executing.

Baude and Paulsen analogize between the qualifications in Article I (such as the age requirements) and the disqualifications in

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"made a sufficient showing at this stage that the plaintiffs have no cause of action"); *see also* Josh Blackman & Seth Barrett Tillman, *The Unresolved Threshold Issues in the Emoluments Clauses Litigation: The President Has Three Bodies and There Is No Cause of Action for Ultra Vires Conduct*, 19 GEO. J. L. & PUB. POL'Y 163, 214–15 (2022) ("The plaintiffs [in the Foreign Emoluments Clause litigation] cited *Armstrong*, but they failed to note that in this case the Supreme Court held that there was no equitable cause of action. Armstrong cuts against plaintiffs' free-floating claim to an equitable ultra vires cause of action." (citations omitted)). In any event, it is not clear how an equitable cause of action could be used to disqualify a candidate based on Section 3. To reinforce the point about the need for federal legislation, under the Court's "traditionally cautious approach to equitable powers," Congress is responsible for "any substantial expansion of past practice." *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999).

[20] Associate Justice Samuel Chase, from Maryland, was appointed to the Supreme Court by President Washington. Chase served on the Supreme Court from 1796 to 1811. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx. Justice Samuel Chase of Maryland should not be confused with Chief Justice Salmon Chase, from Ohio, who was appointed to the Supreme Court by President Lincoln. Chief Justice Salmon Chase served on the Supreme Court from 1864 to 1873. *Id.* There is no known relationship between the two Chases.

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Section 3. They contend that the former are *clearly* self-executing, so the latter should be self-executing as well. Not so. Congress's internal proceedings follow parliamentary rules. These rules include, for example, qualifications and the quorum rules. These internal rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner. For example, the House and Senate have issued oaths to members who were below the Article I age requirement. And both Houses, in the absence of a member's objection, will routinely hold sessions and conduct business in the absence of a "quorum," that is, a majority of members actually being present. We do not think there is any consensus with regard to whether Article I's qualification requirements are self-executing. Nor are treaties presumptively self-executing.

Is Section 1 of the Fourteenth Amendment self-executing? Our answer is two-fold. Section 1 can only be wielded as a sword by an applicant seeking affirmative relief if there is federal enforcement legislation, such as Section 1983 (and its statutory antecedents). But Section 1 can be wielded as a shield without legislation. Section 1 is self-executing as a set of defenses. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*, and in countless other cases that invoke Section 1983 and its statutory antecedents. Baude and Paulsen fail to account for the two senses of self-execution.

A. Is Article III's grant of appellate jurisdiction to the Supreme Court self-executing?

We think a good starting point to consider the question of whether Section 3 is self-executing in the courts and elsewhere, is to ask whether other constitutional provisions are self-executing. We examine Article III itself because it has been discussed continuously by courts and others during ratification and since. The canonical *Marbury v. Madison* was one such case.

The Constitution does not specify what lower federal courts, if any, Congress must create. And having created lower federal courts, what jurisdiction the lower federal courts possess, as general matter, is determined by Congress.[21]

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[21] *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73, https://avalon.law.yale.edu/18th_century/judiciary_act.asp; RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE

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The Supreme Court was different. Article III, Section 2, Clause 2 provided that the Supreme Court "shall have original Jurisdiction" in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[22] Once the Supreme Court was established by statute, the widely accepted (albeit not universal) view is that the Court would have had all those heads of original jurisdiction, even in the absence of implementing legislation.[23] And *Marbury v. Madison* teaches that Congress cannot expand the Supreme Court's original jurisdiction.

What about the Supreme Court's appellate jurisdiction? Article III, Section 2, Clause 2 provides further, "In *all* the other cases before mentioned, the Supreme Court *shall* have *appellate jurisdiction*, both as to law and fact, with such exceptions, and under such regulations as the Congress *shall* make."[24] The language here is strong. It uses words like "shall" and "all." Much of what is stated here appears mandatory. But the text also provides that Congress can make "exceptions" and "regulations" to that appellate jurisdiction. Which way does the text cut? Stated in modern terms, was the Supreme Court's Article III appellate jurisdiction self-executing? In other words, if Congress merely established the Supreme Court, but did not grant *any* appellate jurisdiction, would the Supreme Court automatically enjoy all the appellate jurisdiction "granted" by Article III or none at all? Not surprisingly, the answer is unclear.

In an early decision, Chief Justice Marshall said *yes*—the Court would enjoy all the Article III jurisdiction. But in even-earlier decisions, Chief Justice Ellsworth and Justice Chase took the position that the answer was *no*—the Court would enjoy no Article III jurisdiction. Today, it appears that the Ellsworth–Chase view is the prevailing view. These decisions did not use the language of self-executing or non-self-executing. Still, these decisions demonstrate that there is no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing. There is no consensus that such self-execution is a default.

FEDERAL SYSTEM 20 (6th ed. 2009) ("The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system.").

22 U.S. CONST. art. III, § 2, cl. 2.

23 Professor Akhil Amar has argued that Congress can grant the Supreme Court less than all the state-party-based original jurisdiction provided for in Article III. *See* Akhil Amar, Marbury, *Section 13, and the Original Jurisdiction over the Supreme Court,* 56 U. CHI. L. REV. 443, 481–83 (1989).

24 U.S. CONST. art. III, § 2, cl. 2 (emphases added).

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1. Chief Justice Marshall stated that Article III's grant of appellate jurisdiction for the Supreme Court was self-executing

There are two ways to understand Article III's "grant" of appellate jurisdiction. First, Article III's "grant" of appellate jurisdiction is an actual grant of jurisdiction. It might be described as a default. Once Congress establishes the Supreme Court, it enjoys all the appellate jurisdiction described in the provision, unless or until cut down by a congressional statute. Thus, no statute was required to put this provision into effect. Under this view, the provision could be characterized as self-executing.

An early proponent of this view was Chief Justice Marshall in *Durousseau v. United States*.[25] He stated: "The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial and by such other acts as have been passed on the subject."[26]

In Marshall's view, Congress did not need to vest the Supreme Court with its appellate jurisdiction. Marshall's statement was also endorsed by Chief Justice Salmon Chase in *Ex Parte McCardle*, albeit in dicta.[27] But this Marshall–Chase view was and is not the only view.

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[25] 10 U.S. (6 Cranch) 307, 314 (1810). *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 287 (7th ed. 2015) ("In *Durousseau* v. United States, 10 U.S. (6 Cranch) 307 (1810), the Court construed the Judiciary Act of 1789 as impliedly withdrawing the Supreme Court's appellate jurisdiction in every situation in which jurisdiction was not expressly conferred. As a result, the power to issue an extraordinary writ as an exercise of appellate jurisdiction, if outside the affirmative grant of authority by statute, may be deemed to have impliedly been precluded by Congress.").

[26] *Id.*

[27] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868) ("It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction. The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here.").

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2. Chief Justice Ellsworth and Justice Chase stated that Article III's grant of appellate jurisdiction for the Supreme Court was not self-executing

There is a second way to understand Article III's "grant" of appellate jurisdiction: as a jurisdictional ceiling. No appellate jurisdiction flows to the Supreme Court except if granted by Congress, and although Congress can grant less appellate jurisdiction than that described in the provision—or, perhaps, even none at all—it cannot grant more. Any actual appellate jurisdiction enjoyed by the Supreme Court requires a statute. If so, then this provision is not self-executing. The provision requires a congressional statute to put it into effect.

This view was articulated early on by Chief Justice Ellsworth in *Wiscart v. D'Auchy*.[28] Ellsworth stated:

> [T]he [Supreme Court's] appellate jurisdiction is, likewise, qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as the Congress shall make.' Here then, is the ground, and the only ground, on which we can sustain an appeal. *If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction*; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an *appellate jurisdiction*, is simply, whether Congress has established any rule for regulating its exercise?[29]

Simply put, if Congress did not enact a statute granting the Supreme Court's appellate jurisdiction, then the Supreme Court would have lacked that appellate jurisdiction. In theory at least, had Congress never given the Supreme Court appellate jurisdiction, it would have only maintained its original jurisdiction. Chief Justice Ellsworth was hardly alone in reaching this conclusion. In *Turner v. Bank of North America*,[30] Justice Chase put forth a similar view. Chase stated: "If congress has given the power to this court, we possess it, *not otherwise*: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal."[31]

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[28] 3 U.S. (3 Dall.) 321, 327 (1796) (Ellsworth, C.J.).

[29] *Id.* (emphases added).

[30] 4 U.S. (4 Dall.) 8 (1799).

[31] *Id.* at 10 n.1 (emphasis added).

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Many courts have endorsed the Ellsworth-Chase view. In *Barry v. Mercein*,[32] the Court cited *Wiscart*, and reasoned that "the Supreme Court have their appellate jurisdiction only in those cases in which it is affirmatively given by the acts of Congress, and no such appellate jurisdiction is given in this case."[33] In *Daniels v. Railroad Co.*,[34] the Court explained that "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."[35] In *The Francis Wright*,[36] the majority opinion quoted Justice Ellsworth's view from *Wiscart*, and noted that Ellsworth "spoke for the majority of the Court."[37] And so on.[38]

3. Particular constitutional provisions are not presumptively self-executing

Which view is correct as a matter of original public meaning? It is not obvious. What is the current view? The Congressional Research Service suggests that the Ellsworth-Chase view is the dominant one today.[39]

The question of whether or not Article III's appellate jurisdiction clause is self-executing is a matter of debate. In reaching their various conclusions and decisions, these Supreme Court Justices did not use the language of "self-executing" or "non-self-executing." The Justices did not exclusively rely on efforts to parse the words of

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32 46 U.S. (5 How.) 103 (1847).

33 *Id.* at 117.

34 70 U.S. (3 Wall.) 250 (1865).

35 *Id.* at 254.

36 105 U.S. 381 (1881)

37 *Id.* at 384–85 (quoting Ellsworth's view from *Wiscart*)

38 *See, e.g.*, Rogers v. Watson, 46 F.2d 753, 755 (7th Cir. 1931) (quoting Chase's view from *Turner*); *Ex parte* Lange, 85 U.S. 163, 205 (1873) (Clifford, J., dissenting) ("[I]it follows that the appellate jurisdiction conferred by the Constitution can only be exercised by this court in pursuance of an act of Congress." (citing Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796))).

39 *See* CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. Doc. No. 117-2, at 1173–74 (2022) ("However, later cases have generally take the view that 'the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress.'" (quoting Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847))).

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the provision. They put no stock in the fact that Article III uses apparently mandatory language like "shall" and "all." Rather, the courts examined Article III's language, history, purpose, and other factors. We have seen no suggestion of anything like a general rule that constitutional provisions are or are not self-executing. We have seen no decision of the Court affirming a general rule that constitutional provisions are even presumptively self-executing. This background should inform our discussion of whether or not Section 3 is self-executing

B. Are Article I qualifications self-executing?

Baude and Paulsen make a constitutional analogy. They claim that the disqualification element of Section 3 is self-executing in the same sense as the qualification elements in Article I of the Constitution of 1788. This analogy does not support their position. Rules governing the internal organization and proceedings of Congress are parliamentary rules. These rules include qualifications and quorum rules. These rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner.

For example, the House and Senate have not uniformly disqualified members who were below the age requirements in Article I. Indeed, Representative Victor L. Berger, the only member of Congress whose exclusion was purportedly premised on Section 3, was later allowed to serve in future Congresses. And state legislators, who also swear an oath to the Constitution, have elected several types of (purportedly) underage senators: (1) senators who had not yet reached the age of thirty when elected; (2) senators who would not reach the age of thirty by the time the new Congress's constitutional term had begun; (3) senators who would not reach the age of thirty when Congress was scheduled (by statute) to meet; and (4) even senators who would not reach the age of thirty by the *end* of the term for which the senators they chose were elected! And, these members-elect have been seated. Moreover, voters have also elected candidates who did not meet the Article I qualifications, and these members-elect also have been seated. This history does not support Baude and Paulsen's view that virtually everyone under the sun has an affirmative duty to disqualify candidates pursuant to Article I and, by analogy, under Section 3.

1. Parliamentary rules are enforced in a discretionary manner

When the Constitution puts forward a parliamentary rule, as a general matter, that rule is discretionary, and not mandatory. Such rules

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are best considered aspirational. Each house of Congress has the discretion to enforce its own practices pursuant to the "rules of its proceedings."

Consider a simple example. The Constitution requires that a "majority of each" house "shall constitute a Quorum to do Business."[40] It is widely observed and widely known, for example, that the Constitution's majority quorum rule is not always enforced: each House will meet, debate, and pass orders, resolutions, and votes absent a majority of its members present, and each House's presiding officers, absent objections, will continuously presume the existence of a quorum once established.

Any enforcement of the Constitution's quorum provision depends on each chamber's rules, and the rules' application depends on the members and each chamber's presiding officers—but all such enforcement is discretionary and voluntary. The presiding officers and the members are not required to notice the absence of a quorum. As a general matter, this presumption of a continuously-present quorum is disturbed when a member makes an objection suggesting the absence of a quorum. At which point the roll is called. When these rules are enforced, it is because someone chooses to do so, not because the Constitution mandates that he must. Of course each House could modify its rules to require a quorum call before or after any business is transacted. But Congress has not adopted any such rule.

Some observers may see Congress's regular practice as an unconstitutional power grab by those in attendance. But the alternative view is that quorum rules are discretionary, and that waiver is *part* of the Constitution's quorum rule itself. This argument can be premised on practice or constitutional liquidation. Or, this argument can be premised on originalism. That is, the original public meaning of the Constitution's quorum language incorporated the concept that the rule is only at-play based on a member's objection and that even objections must conform to chamber rules. From either a practice-based or an originalist perspective, the rule is not "under-enforced" at all. Again, if waiver is part of the rule, then the rule is not "under-enforced."

The Constitution's parliamentary provisions, including its qualification provisions, follow chamber rules. These rules may take the form of statutes or single house rules. And these provisions are enforced by members and by the chambers' presiding officers. In what sense are these provisions self-executing? The Constitution does not affirmatively state how the quorum provision should be enforced. Rather, yesteryear's, as well as today's practices unfolded as they did

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[40] U.S. CONST. art. I, § 5, cl. 1.

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because the Constitution's provisions were genealogical legal successors to prior rules in state constitutions, colonial assemblies, and other parliamentary chambers in the Westminster tradition. Did anyone think otherwise in 1265, 1689, 1788, or 1868? Did anyone believe a subject or citizen or any highly placed government official (outside the parliamentary chamber) had a legal right to vindicate a maximalist *enforce-at-all-costs* vision of these rules? We highly doubt it.

If you think otherwise, just try seeking a federal court order compelling a house of Congress to cease operations when a chamber lacks a quorum. Or, try seeking a federal court order declaring a statute unconstitutional or unenforceable based on its having been passed by a house of Congress which lacked a quorum. You will be stymied at every turn. Indeed, the D.C. Circuit rejected a challenge brought by members to a COVID-era House rule that allowed for proxy voting.[41] Under this rule, members didn't even have to be physically present in the chamber to vote.[42] The plaintiffs argued that this rule violated the Quorum Clause.[43] The court, however, declined to reach the merits, finding that this case was barred by the Speech or Debate Clause.

We think caution is especially appropriate when dealing with parliamentary rules. These rules are not the usual province of the courts and today's legal scholarship; rather, they are enforced in political processes. Moreover, these rules are part of a mimetic legal tradition largely guided by observation, as opposed to written texts, and this tradition may seem foreign to those not steeped in it.

2. The House and Senate have not disqualified several members-elect who were below the age requirements in Article I

The Constitution requires that members of the House and Senate must attain the ages of twenty-five and thirty, respectively. Baude and Paulsen write that the age-disqualification under Article I is "automatic" and the "Constitution's rule is self-executing."[44] Likewise, Mark Graber contends that "disqualification for insurrection is in legal

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41 McCarthy v. Pelosi, 5 F.4th 34, 37 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

42 *Id.* at 37 ("Any Member 'whose presence is recorded by a designated proxy,' or whose vote is cast by a proxy, 'shall be counted for the purpose of establishing a quorum.'" (quoting H.R. 965, 116th Cong. (2020))).

43 Opening Brief of Plaintiffs-Appellants at 40, McCarthy v. Pelosi, 5 F.4th 34 (D.C. Cir. 2021) (No. 20-5240) ("Because H. Res. 965 specifically authorizes absent Members to be counted toward the quorum requirement, it is unconstitutional."), https://perma.cc/X6HU-UF5F.

44 Baude & Paulsen, *supra* note 1, at 18.

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principle no different from disqualification for being underage or not a citizen."[45] But it simply isn't the case that the age requirements in the Constitution are self-executing in the sense that Baude and Paulsen describe. All execution requires rules, and even rules can be waived by majority action.

An under-age member-elect who arrives on Capitol Hill is not automatically denied a seat. Rather, enforcement of the age requirements of Article I are discretionary, and not mandatory. A member-elect who shows up lacking some qualification risks being lawfully excluded. And those who elect such persons take that risk too. The fact that some activity poses a risk does not, without more, make it illegal or unconstitutional. To put it another way, no one has an affirmative duty to investigate a member-elect's qualifications. And if a member or member-elect discovers that some other member-elect lacks a prescribed qualification, nothing in the text of the Constitution imposes any specific affirmative duty on the member to share that information with his fellow members. Nor is there any affirmative obligation to launch objections to the member-elect's becoming a member. Moreover, even if a house holds a vote to exclude, nothing in the Constitution mandates that other members attend the chamber when that specific vote is held. And even if a member is in attendance, the Constitution's text does not squarely compel anyone to vote anything other than present on the motion to exclude.

History supports this understanding of congressional practice. William Claiborne of Tennessee, who was born in 1775, was elected to and then began serving his two-year House term in 1797.[46] He was only 22 years old. The House did not disqualify him. Claiborne was re-elected in 1799, when he was still not yet twenty-five. It was only some time during his second term that he finally reached the age of twenty-five.

Other examples abound. In 1806, Henry Clay of Kentucky was elected to the Senate by his state legislature.[47] He took the oath, and he began serving while he was still twenty-nine years old. In 1816, the

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[45] Mark Graber, *Damn the Torpedoes: Disqualifying Donald Trump*, BALKINIZATION (Aug. 26, 2023), https://balkin.blogspot.com/2023/08/damn-torpedoes-disqualifying-donald.html.

[46] *The Youngest Representative in House History, William Charles Cole Claiborne*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, https://history.house.gov/Historical-Highlights/1800-1850/The-youngest-Representative-in-House-history,-William-Charles-Cole-Claiborne/.

[47] *Henry Clay: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Clay.htm.

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Senate administered the oath to Armistead Mason of Virginia, who was elected by the state legislature to a Senate term to fill a vacancy.[48] The unexpired term would stretch about a year. At the time of Mason's election, he was twenty-eight years old. His elected term ended in March 1817, and he was still several months shy of his thirtieth birthday when his term ended. In 1818, the Senate administered the oath to John Henry Eaton of Tennessee.[49] At the time, Eaton was only twenty-eight years old. According to the Senate Historical Office, "Apparently no one asked John Eaton how old he was."[50]

To further prove the point that the age qualifications are not self-executing, consider Rush Holt of West Virginia. In 1934, Holt defeated incumbent Senator Henry Hatfield, an incumbent. Holt was elected to the Senate at the age of twenty-nine. Holt pledged to wait until after his thirtieth birthday before taking the oath. Hatfield, Holt's defeated opponent, filed a petition with the Senate, contending that Holt did not meet the minimum age requirement. The Senate dismissed Hatfield's petition on the grounds that "the age requirement applies at the time of oath-taking rather than the time of election, or the time the term [to which the candidate is elected] begins."[51] Hatfield could not force his colleagues to declare Holt disqualified and his seat vacant. And we think Hatfield would have been unsuccessful had he tried to seek relief through judicial means in state or federal court.

Any analogy between the qualifications in Article I and the disqualification standard in Section 3 breaks down for another reason. The Judge of the Elections Clause imposes a judicial-like duty on each house as a whole. And by implication, that duty may extend to individual members who pass on the qualifications of other members or members-elect. In this role, individual members may serve in something like a judicial capacity. What happens if there is a member who objects to seating a member-elect based on the latter's failing to meet the Article I's qualifications? In such a proceeding, it is reasonable to interpret the Constitution to mean that members *should* vote to allow a qualified member to be seated, and concomitantly, that the members *should* vote not to seat (temporarily or permanently) a member-elect lacking some constitutional qualification (at least until

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48 *Youngest Senator*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Youngest_Senator.htm.

49 *Id.*

50 *Id.*

51 *Id.*

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the qualifications are met).[52] But the "force" of "should" here is weak, as the Constitution imposes no affirmative duty on the members to show up and vote in any particular proceeding. If members have any such duty as described here, that duty does not follow from the vagaries of Article I's twin qualifications clauses—for Representatives and Senators. Rather, that duty follows, if it follows at all, from the Judge-of-the-Elections Clause.[53]

However, Section 3 has no similar analogue to the Judge-of-the-Elections Clause. Section 3 does not explain who is to determine who is subject to disqualification, *other than Congress in Section 5*. And the text of Section 3 does not expressly burden Congress or anyone else with a judicial duty in resolving any Section 3 controversy. Any duty imposed by Section 5 to enforce Section 3 falls entirely in the sound discretion of Congress. If Section 3 is a traditional qualification, then Congress may very well have a power to act on Section 3 in regard to *its* members-elect. (Baude and Paulsen acknowledge this point.[54]) But Section 3 and the Constitution are otherwise silent as to who or what institutions are to enforce Section 3 in regard to other positions, including the presidency. Silent, except for Section 5 and the Necessary and Proper Clause which would impose that duty on Congress, by implication, not on the States.

None of what we have described above should be controversial. Yet, Baude and Paulsen write that the age-disqualification under Article I is "automatic" and the "Constitution's rule is self-executing."[55] Representative Claiborne and Senators Clay, Mason, and Eaton might have differed with Baude and Paulsen on that point. For each of these members, and for the voters and state legislators who elected them, the member-elect was seated immediately, or after a delay. That delay could have been due to a chamber's not taking action. Or, a chamber may decide to allow a member to delay taking his seat until he reached Article I's prescribed age. Nothing here is automatic or self-executing.

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52 *See generally* Powell v. McCormack, 395 U.S. 486 (1969); U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

53 U.S. CONST. art. 1, § 5, cl. 1.

54 *See* Baude & Paulsen, *supra* note 1, at 29 ("Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house has power to 'Judge of the Elections, Returns, and Qualifications' of 'its own Members.' Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member." (quoting U.S. CONST. art. 1, § 5, cl. 1.)).

55 Baude & Paulsen, *supra* note 1, at 18.

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Each rule is subject to customary parliamentary controls allowing for waiver, and each rule is enforced, if enforced at all, as a matter of discretion. These rules mimic: *Don't ask, don't tell*. That's how they are "enforced." By contrast, according to Baude and Paulsen, a great swathe of government officials, state and federal, have an affirmative duty to go out and enforce Section 3. If Section 3 is modeled on Article I's Qualifications Clauses, the result Baude and Paulsen prescribe does not follow.

Indeed, under Baude and Paulsen's approach, Section 3 modified the Free Speech Clause and prohibitions against retroactivity. Why wouldn't Section 3 also modify the Judge of the Elections Clause? Going forward, each Chamber may no longer have the sole power to determine whether a member-elect is subject to disqualification under Section 3. Rather, other constitutional actors, including the courts, can ensure that Congress does not allow former insurrectionists to take the oath as members. We cannot predict with any clarity what the results of Baude and Paulsen's position is because they put forward no theory of constitutional change explaining what prior law (constitutional or statutory) is upset or changed by Section 3. We discuss Baude and Paulsen's lack of a theory of constitutional change below.

Baude and Paulsen are correct that no legislation would have been needed to "disqualify," in the abstract sense, the underage members discussed above. The Constitution imposed the obligation to meet a minimum age. But some legal process was needed to execute that legal obligation. For enforcement, Article I's qualification rules are implemented or operationalized by both statutes and chamber rules. In that practical sense, even Article I's qualification rules are not "self-executing." Below, we will discuss Chief Justice Chase's opinion in *Griffin's Case*. We think this *practical* understanding of qualifications is what Chase addressed in his decision. Where positions other than members of Congress are at issue, enforcement of Section 3 requires statutes, which can only be supplied by Congress.

3. The 66th Congress excluded Victor L. Berger, allegedly for a Section 3 violation, but he was seated by the 68th Congress

Article I established age, citizenship, and inhabitancy qualifications for members of Congress. These provisions begin "No person shall be a Representative . . . ."[56] and "No person shall be a Representative . . . ."[57] Section 3 of the Fourteenth Amendment uses

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[56] U.S. CONST. art. I, § 2, cl. 2 (emphasis added).

[57] U.S. CONST. art. I, § 3, cl. 3 (emphasis added).

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similar language: "*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . . ." Based on the similarity in the text, the restrictions in Section 3 should function in the same manner as the qualifications in Article I.

If the restrictions in Section 3 function like the qualifications in Article I, then the former restrictions cannot apply prior to the start of the elected official's constitutional term. Indeed, the effect of those *eligibility* restrictions may even kick in *after* that time, that is, at the start of the elected official's constitutional term, should the candidate delay taking his constitutionally prescribed oath. For example, a member-elect who is subject to a Section 3 disqualification could delay taking the oath to afford both Houses of Congress an opportunity to relieve him of the disability by a 2/3 vote. And Congress could relieve him of that disability at *any* point during his two-year elected term. Section 3 would not prevent a purportedly disqualified candidate from being elected by the people. All the more so, Section 3 would not prevent a purportedly disqualified candidate from being placed on the ballot.[58]

If Article I qualifications can be enforced in a discretionary manner, can Section 3 restrictions also be enforced in a discretionary manner? A prominent example may illustrate this principle: the case of Representative Victor L. Berger.[59] In November 1918, Berger, a Socialist, was elected to represent a House district for Milwaukee, Wisconsin in the 66th Congress. In February 1919, Berger was convicted in federal district court proceedings for violating the Espionage Act of 1917. When the 66th Congress met on May 19, 1919, Berger was free on bail. Faced with this conviction, the House proceeded to exclude Berger by resolution on November 10, 1919. The standard narrative is that his exclusion was based upon his anti-war agitation during World War I—in other words, according to the standard narrative, his exclusion was founded upon Section 3 of the Fourteenth Amendment. However, the legal standard or rationale on which the House refused to seat Berger is far from clear.[60]

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[58] We discuss the interplay between presidential qualifications and Section 3 *infra* in Part II.B.5.h.3.

[59] *See* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 189–91 (2007); *BERGER, Victor Luitpold 1860–1929*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://bioguide.congress.gov/search/bio/B000407.

[60] Note, *The Power of a House of Congress to Judge the Qualifications of its Members,* 81 HARV. L. REV. 673, 681 (1968) ("[T]he majority of the reporting committee declared [in the Berger exclusion case] that the House had always had the right to disqualify on grounds other than the enumerated ones . . . ."). *But cf.*

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Berger's seat was declared vacant. A new election was held, in which Berger was a candidate, and notwithstanding his re-election to the seat, the 66th House refused to seat him a second time. In November 1920, Berger ran yet again in the general election for a seat in the 67th House.[61] He was not excluded from the ballot. Berger did not prevail in that election. In January 1921, before the 66th House expired, the Supreme Court overturned his conviction.[62] After the Supreme Court's ruling, Berger ran for, and prevailed, in three subsequent elections. He was seated in the 68th, 69th, and 70th Houses.

Baude and Paulsen write that "curiously, after the convictions were reversed the House allowed Berger to sit in the sixty-eighth through seventieth Congresses."[63] They do not explain why this seating was "curious." The Supreme Court's decision vacating a conviction under the espionage act could have no legal effect on a Section 3 disqualification. Only Congress can relieve that disability by a 2/3 vote of each House. And no such vote took place.

What lessons should be drawn from the case of Victor L. Berger? The first option is that Berger was in fact disqualified pursuant to Section 3. The 66th Congress enforced that disqualification by refusing to seat Berger. However, the 68th, 69th, and 70th Congresses declined to enforce that qualification—in much the same way that previous Houses seated members who had not yet reached the requisite age. Under this first option, constitutional qualifications, including Section 3, are simply not mandatory. Rather, they are discretionary, enforced under standing parliamentary rules, at the discretion of the members, who are not personally obligated to see that such provisions are carried out. If this option is the right one, then a discretionary Section 3 disqualification *cannot* be self-executing, in the expansive sense argued for by Baude and Paulsen—Section 3 does not impose an obligation on every level of government and every official to enforce the Constitution's provision.

There is a second option: the decision of the 66th House was lawful, and the decision of the 68th House to admit Berger, absent his disability being removed by a 2/3 vote of each house, was unlawful. This option, however, is in tension with a general principle: when faced with two rules of decision from equal authorities—e.g., the 66th House

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id. ("[I]t *seems* that the principal basis for exclusion was the applicability of section 3 of the fourteenth amendment." (emphasis added)).

61 Philip M. Glende, *Victor Berger's Dangerous Ideas*, *in* 26 ESSAYS IN ECONOMIC AND BUSINESS HISTORY 5, 17 n.44 (2008), https://tinyurl.com/53x9j465.

62 Berger v. United States, 255 U.S. 22 (1921).

63 Baude & Paulsen, *supra* note 1, at 61 n. 219.

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and the 68th House—the later-in-time decision is controlling.[64] Indeed, the fact that Berger again appeared on the ballot, and that voters elected Berger to the 68th, 69th, and 70th Houses, and that he was seated in each separate, consecutive two-year House constitutional term, provides even more support that the later-in-time decisions should be given more weight. Again, this second option is not consistent with a self-executing Section 3, if a later House can expressly disagree with an earlier House.

There is a third option: the 68th Congress recognized that the 66th Congress acted unconstitutionally, such that its prior decision was entirely void. In other words, the later-in-time House rejected the determination of the earlier-in-time House. And why was the 66th House's decision void? Because the 66th House was relying on a general power to exclude apart from qualifications in the Constitution's text. In our view, a single House cannot enforce Section 3, absent an actual federal statute putting Section 3 into effect. Such a statute could conceivably authorize enforcement by a single House vote—that is through a vote of exclusion or expulsion. But absent such a statute, the 66th House's decision to exclude Berger, under the purported authority of Section 3, was also lawless and void. Indeed, it isn't even clear that a joint session of Congress, acting outside the confines of bicameralism and presentment, could enforce Section 3 absent a federal statute.

Those who have relied upon the Berger Exclusion Case as a sound precedent for Section 3 enforcement have got it entirely backwards. The 66th House's decision to exclude Berger may not have relied upon Section 3 at all. If the House relied upon Section 3, it only did so because its decision was supported by a prior conviction in federal district court proceedings, and the House receded from its exclusion decision after that conviction was overturned. In short, the Berger Exclusion Case supports the general view that exclusion under Section 3 requires a federal statutory basis.

4. State legislatures, who were bound by the Supremacy Clause, elected senators who were below the age requirement in Article I

The history of enforcement of Article I qualifications for members does not support Baude and Paulsen's position. These provisions are not self-executing. Rather, the practice concerning these

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[64] Baude and Paulsen at n.173 ("Hamilton continued, 'a mere rule of construction,' but it was an appropriate one, 'consonant to truth and propriety,' consistently recognized by courts as interpreters of law: that, as 'between the interfering acts of an equal authority that which was the last indication of its will should have the preference.'" (quoting *Federalist No. 78* (Hamilton)).

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provisions suggests that Congress must take affirmative action to enforce Article I qualification requirements.

By contrast, Baude and Paulsen characterize Article I's qualifications rules as "binding rule[s] of constitutional law."[65] What they do not make clear is that the binding force or bite of such rules is very limited. If Section 3 works in the same fashion as Article I's qualification rules, then Section 3 also has a very limited bite.

Let's assume that Baude and Paulsen are correct. Let's assume that if Congress is responsible for enforcing the qualifications in Article I, it follows that Congress is likewise responsible for enforcing the disqualification provisions in Section 3. After all, Section 5 gives the enforcement power to Congress, and no one else is expressly assigned any similar or coordinate power.

Yet, Baude and Paulsen argue that virtually everyone under the sun has an obligation to enforce Section 3. They write that this duty is imposed on "anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office."[66] Baude and Paulsen provide a list of individuals covered by this mandate:

> state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president.[67]

Once again, the analogy to Article I qualifications offers Baude and Paulsen little support. We discussed above how the legislatures of Kentucky, Tennessee, and Virginia elected Senators who had not yet reached the age of thirty, who would not be 30 at the start of their constitutional term, and even one who would not be 30 by the end of his constitutional term. Those state legislators swore an oath to the Constitution, and presumably, they too saw themselves bound by the Supremacy Clause. Yet, they elected Senators who failed to meet the constitutional requirements. Did they violate their oath? Could they have been sued in court for violating the self-executing requirements in

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65 *Id.*

66 *Id.* at 22.

67 *Id.* at 23.

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Article I? We think the answer has to be *no* and *no*. And we doubt Baude and Paulsen would argue otherwise. But if we are in agreement on this point, then Baude and Paulsen need to consider qualifying their statements that qualifications in Article I or Section 3 impose some sort of urgent, strong, self-enforcing, and mandatory obligation on anyone who swears an oath to the Constitution.

We think this history demonstrates that enforcement of Article I qualification rules is, in a substantial sense, discretionary and voluntary. We think it highly unlikely that a federal court would second-guess a house's exclusion or non-exclusion decision on the grounds enumerated in Article I. (*Powell v. McCormack* involved an alleged exclusion of a member on grounds beyond those enumerated in Article I.) Yet Baude and Paulsen argue that enforcement of Section 3 is somehow obviously mandatory. We think this conclusion is in conflict with practice from centuries of parliamentary practice, in addition to congressional practice from the antebellum era, which should be entitled to some weight.

5. Voters elect candidates who are below the age requirement in Article I

Baude and Paulsen omitted one group from their list of positions of who should go out and actively seek to enforce Section 3. Did you catch it?

Voters.

Of course, Baude and Paulsen could respond: "Voters are not part of the government." But why should that matter? Or, they could respond that voters do not have a "job . . . to figure out whether someone is legally qualified to office."[68] Is that so? In some States, for example, Florida, and perhaps many others, for voters to register, they must take an oath or affirmation to uphold the U.S. Constitution.[69] So do voters in Florida and elsewhere have an affirmative constitutional duty to enforce Section 3 via Florida state law procedures for objecting to candidates? If they fail in that duty, could the voters be sued or prosecuted? Would voting for a Section 3-covered candidate amount to giving "aid or comfort" to an enemy? (We'll come back to the "enemy" question later.) Moreover, at least some voters also serve in the government, and swear an oath to the Constitution. Do voters who hold

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[68] *Id.* at 22.

[69] *See* FLA. STAT. § 97.051; Fields v. Askew, 279 So. 2d 822, 824 (Fla. 1973) (upholding statutory oath requirement), *appeal dismissed*, 414 U.S. 1148 (1974) (mem.).

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public office have an obligation to abstain from voting for a candidate who does not meet constitutional qualifications?

The absence of voters from Baude and Paulsen's list is remarkable in another way. Candidate ballot access is largely a matter of state election law. Yet, Baude and Paulsen provide an extensive list of government officials, state and federal, who they urge to enforce Section 3 pursuant to extant election laws. But many of these government officials are not connected to proceedings related to ballot control or election law in any obvious way. Why is the President on the list? Why governors? Why are governors listed at all? (Stay tuned.)

Indeed, we know of no government official who has the power to strike a candidate from the ballot on his own authority. As a general matter, when a state election law administrator or administrative body or court strikes a candidate from the ballot, it is done in the context of a challenge or contest brought by a registered voter or by another candidate. So even if Section 3 can be enforced by state election administrators, it is not self-executing; rather, as a general matter, such enforcement requires state statutes putting into effect a whole scheme of state ballot law including objections and contests. Whether the Fourteenth Amendment permits state legislatures to enact, and election administrators to enforce, Section 3 absent a federal statute authorizing such state action is, part and parcel, of what we are debating.

It is certainly true that some state election law administrators have struck candidates from the ballot absent any voter challenge or candidate contest. This limited exception has been permitted by courts in cases where there is an obvious defect on the face of a candidate's ballot petition. Such defects include a missing document, a missing candidate's signature on his statement of candidacy, etc. And even then, a candidate can object after-the-fact. But where an evidentiary hearing is necessary, state election law administrators cannot act sua sponte. This would seem to be Baude and Paulsen's position in regard to Trump, as they do not affirm that the factual "evidence" in regard to alleged insurrection is conclusive; rather, they write: "*If* the public record is accurate, the *case* [against Trump] is not even close."[70] So even Trump is entitled to some due process according to Baude and Paulsen.

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[70] Baude & Paulsen, *supra* note 1, at 121.

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C. Is Section 1 of the Fourteenth Amendment self-executing?

The Fourteenth Amendment has five sections. Section 1 includes the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. These provisions are generally understood to constrain state power and recognize certain individual rights. Section 2 reduces a State's representation in Congress when that State denies adult males the right to vote. Section 3, the subject of this Article, does not impose any restrictions on state power. Nor does it recognize any individual rights. Rather, this provision disqualifies certain people from holding certain public positions in certain circumstances. And only the Congress can remove those disqualifications. Section 4 provides that "public debt of the United States . . . shall not be questioned," and that the United States and the States shall not be liable for debts based on "insurrection or rebellion" or for the "emancipation of any slave."[71] Section 4, like Section 3, does not recognize individual rights. Section 5 provides that Congress has the "power to enforce, by appropriate legislation, the provisions of this article"[72]—that is, sections one through four.

All agree that Congress can enact legislation to enforce the Fourteenth Amendment. And, indeed Congress has long relied on this power to enact enforcement legislation. But what if Congress does not enact such legislation? The prevailing view is that Section 2, at least, can only be enforced through federal legislation.[73] There is some recent debate about whether the President can unilaterally invoke Section 4, in the absence of federal legislation, to raise the debt ceiling. But what is the effect of Section 1 of the Fourteenth Amendment, standing on its own? Stated differently, is Section 1 self-executing?

The question of whether Section 1 is self-executing has been argued to have some bearing on the question of whether Section 3 is self-executing. Some scholars contend that if Section 1 of the Fourteenth Amendment is self-executing, then it must be the case that Section 3 of the Fourteenth Amendment is likewise self-executing. (We think the enforcement of Sections 2 and 4 make the linkage between Sections 1 and 3 less than entirely clearcut.) Miles Lynch, for example,

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71 U.S. CONST. amend. XIV, § 4.

72 U.S. CONST. amend. XIV, § 5.

73 Section 2 was only enforced once, following the 1870 census, and not since. *See* Gerard Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 787–92 (2018).

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wrote that "[i]t would be inherently inconsistent to interpret" the language in Section 1 "as self-executing" but the language in Section 3 "as requiring enacting legislation."[74] Professor Michael Dorf explained that in light of the fact that the provisions in Section 1 are self-executing, including the Due Process Clause and Equal Protection Clauses, then Section 3 should likewise be viewed as self-executing.[75] Baude and Paulsen likewise contend that "We take it as obvious that Section One is self-executing."[76] They add, "Nobody thinks (for example) that the prohibitions of Section One are inoperative unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life."[77] That may be so, but the better question is in what fashion *is* Section 1 self-executing?

The answer to the self-execution question is two-fold. Section 1 is not self-executing in court as *a set of causes of action providing affirmative relief* unless Congress provides for its enforcement. Section 1 can only be wielded as a *sword* with federal legislation. But Section 1 can be wielded as a *shield* without federal legislation. Section 1 is self-executing as a set of defenses in court. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*. Of course, the fact that a plaintiff or defendant sought to use Section 1 as a sword or shield does not mean that they prevailed on the merits. And plaintiffs have relied on Section 1983, and its historical antecedents in landmark cases like *Brown v. Board of Education*, *Roe v. Wade*, and *Obergefell v. Hodges*. These cases invoked federal enforcement legislation. These statutes provided the federal cause of action which made it possible to use the Fourteenth Amendment as a sword.

1. Section 1 and Treaties as a shield

Many of the Supreme Court's formative Fourteenth Amendment cases arose in a defensive posture. That is, defendants

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74 Myles Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 206 (2021).

75 Michael C. Dorf, *What It Means to Say That Section 3 of the 14th Amendment is Self-Executing*, DORF ON LAW (Aug. 28, 2023), https://www.dorfonlaw.org/2023/08/what-it-means-to-say-that-section-3-of.html.

76 Baude & Paulsen, *supra* note 1, at 19.

77 *Id.*

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asserted that some state action would violate Section 1 of the Fourteenth Amendment. In other words, these defendants wielded Section 1 as a shield. There are many cases to choose from, but here we will focus on three. First, *The Slaughter-House Cases* arose from the Louisiana Attorney General's enforcement of a state law restricting the slaughtering of animals. As a defense, the defendants argued that the state law violated Section 1 of the Fourteenth Amendment. Second, *United States v. Cruikshank* arose from a motion to dismiss a criminal indictment on the grounds that the Fourteenth Amendment did not support the charges. (This case has some similarities with the *Case of Jefferson Davis*, which we will discuss below.) Third, *Plessy v. Ferguson* arose from a prosecution for violating a segregation law. In his defense, the defendant argued that the state law violated Section 1 of the Fourteenth Amendment. These landmark cases did not need to rely on enforcement legislation because Section 1 was used in a defensive posture.

a. The *Slaughter-House Cases*

The *Slaughter-House Cases* (1873) was the Supreme Court's first definitive interpretation of the Privileges or Immunities Clause. The 5-4 decision construed that provision to protect only a narrow set of federal rights. *Slaughter-House* arose from a suit instituted by the Louisiana Attorney General against the Live Stock Dealers' and Butchers' Association of New Orleans. Specifically, the Attorney General argued that the butchers were violating a local law that restricted where animals could be slaughtered. The Louisiana Supreme Court observed that "[i]n their answer the defendants deny the right of the Attorney General to bring this suit; and they allege that the act . . . is unconstitutional."[78] The key point is that in the *Slaughter-House Cases*, the defendants' Fourteenth Amendment, Section 1-related rights were asserted as defenses. The majority ruled against the defendant-butchers, finding that the Privileges or Immunities Clause did not protect any sort of right to pursue a calling. And, for those keeping score at home, in regard to which Justices supported a broad interpretation of the Fourteenth Amendment, Chief Justice Chase dissented in *Slaughter-House*. Here, at least, Chase did not "knee-cap" the Fourteenth Amendment.

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[78] State *ex rel.* Belden v. Fagan, 22 La. Ann. 545, 546 (1870).

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b. *United States v. Cruikshank*

United States v. Cruikshank (1876) arose from the Colfax Massacre.[79] More than one hundred freedmen were murdered by white militiamen. The United States indicted members of the gang, including William Cruikshank, for violating Section 6 of the Enforcement Act of 1870. That statute made it a crime to violate the "enjoyment of any right or privilege granted or secured . . . by the Constitution."[80] The United States argued that the lynch mob violated the rights of the freedmen to peaceably assemble and bear arms. The case turned, then, on whether those rights were rights secured by the Constitution. Those rights were secured in the First and Second Amendments. But under the rule in *Barron v. Baltimore*, the provisions of the Bill of Rights only constrained the federal government. In *Cruikshank*, the United States argued that the Fourteenth Amendment also protected the rights of peaceable assembly and the right to bear arms against wrongful invasion by individual conduct. And, the United States further argued that Congress had the power to enact laws, and here did enact such a law, that prohibited individual defendants from depriving others of rights protected by the Fourteenth Amendment.

After the defendants were convicted, the defendants moved to dismiss the indictment through a "motion in arrest of judgment."[81] Cruikshank argued that the Fourteenth Amendment did not protect the rights which the government sought to protect. Therefore, he contended, an indictment premised on violating these rights was deficient.[82] In other words, because these rights were not protected by Section 1, they were not protected by the Enforcement Act. Here, Cruikshank favored a narrow construction of the Fourteenth Amendment as a means to narrow the scope of the Enforcement Act. In contrast with the butchers in *Slaughter-House*, Cruikshank advanced a reading of Section 1 that did not protect individual rights—that is, the right of the freedmen to peaceably assemble and bear arms. But

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79 92 U.S. 542 (1876).

80 Enforcement Act of 1870, ch. 114, 16 Stat. 140, 141.

81 *Cruikshank*, 92 U.S. at 548.

82 *Id.* at 546 ("The parties thus convicted moved in arrest of judgment on the following grounds:—1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st May, 1870, entitled 'An Act to enforce the right of citizens of the United States,' &c."). Cruikshank raised other defenses that are not relevant here.

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Cruikshank's reading favored *his own* individual liberty. It is perhaps unsettling to frame the case in this fashion, but criminal defendants routinely mount their defenses in these terms: the defendant argued that he had the liberty to engage in the harmful acts he did, because the federal government had no license to criminalize his actions. His argument resembles that of Alfonso Lopez, who argued that he had the right to carry a gun into a school zone precisely because Congress lacked the power to criminalize his actions.[83] Lopez used a narrow construction of the Commerce Clause as a shield against his indictment. Likewise, Cruikshank used a narrow construction of Section 1 as a shield against his indictment. (Later, we will discuss how Jefferson Davis wielded Section 3 in a similar fashion as a shield against his treason indictment.)

In the federal circuit court, the opinions of the judges were divided, and the case was certified to the Supreme Court. On appeal, the Supreme Court agreed with Cruikshank. Chief Justice Waite wrote for the Court that the rights of peaceable assembly and the right to bear arms were rights that applied *only* against the federal government. In the Court's view, the Fourteenth Amendment did not disturb the rule in *Barron v. Baltimore*. Stated differently, the Fourteenth Amendment did not prohibit private individuals from violating these rights. Waite explained that the Fourteenth Amendment did not "add any thing to the rights which one citizen has under the Constitution against another."[84] Therefore, the Enforcement Act, which enforced federal law, including Section 1, did not prohibit private individuals from violating these rights. In short, the United States, pursuant to the Enforcement Act, could not prosecute defendants for depriving people of these federal rights.[85] Under the federal constitution, and the Enforcement Act, Cruikshank had the freedom to take the actions he did.

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83 *See generally* United States v. Lopez, 514 U.S. 549 (1995).

84 *Cruikshank*, 92 U.S. at 554–55.

85 *Id.* at 552–53 ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. . . . [the Second Amendment] has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States.").

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In short, Cruikshank successfully wielded the Fourteenth Amendment as a shield, and advanced that argument on direct appeal to the Supreme Court.

c. *Plessy v. Ferguson*

The posture of *Plessy v. Ferguson* (1896) was far simpler. The landmark separate-but-equal challenge arose when Homer Plessy was arrested for riding in the segregated train car. (John J. Ferguson was actually the Louisiana judge who presided over Plessy's trial.) The Louisiana Supreme Court upheld Plessy's conviction. Plessy then "prayed for a writ of error from [the Supreme Court of the United States], which was allowed by the chief justice of the supreme court of Louisiana."[86] Plessy argued that the segregation law violated the Fourteenth Amendment. Here, Plessy raised Section 1 as a shield.[87] As all know, the Court rejected Plessy's claim.

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Section 1 of the Fourteenth Amendment is self-executing, when used as a defense, with regard to state officers who took state action against the private individual defendants. Such private individuals could raise the Fourteenth Amendment as a defense, just as private individuals could raise rights in the Bill of Rights as a defense against actions taken by federal officers. Using the Constitution as a defense was and remains part-and-parcel of everyday judicial review. For example, *Lawrence v. Texas* arose from a criminal prosecution for the violation of a state sodomy law. The defendants raised Section 1 of the Fourteenth Amendment as a shield to the prosecution.[88] And they would prevail on the merits.

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86 Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

87 *Ex parte* Plessy, 11 So. 948, 948 (La. 1892), *aff'd sub nom.* Plessy v. Ferguson, 163 U.S. 537 (1896) ("He alleges that he is being prosecuted for a violation of Act No. 111 of 1890; that said act is unconstitutional; that his plea of its unconstitutionality has been presented to, and overruled by, the respondent judge.").

88 Lawrence v. Texas, 539 U.S. 558, 563 (2003) ("The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.").

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d. Treaties as a shield

According to the Supremacy Clause, treaties, along with the Constitution itself, are the "supreme Law of the Land."[89] Treaties, however, are not presumptively self-executing. Rather, the Supreme Court "has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."[90] In *Medellin v. Texas*, Chief Justice Roberts's majority opinion observed that "[t]he label 'self-executing' has on occasion been used to convey different meanings."[91] (Indeed, Roberts' position is also and especially correct in the context of the Fourteenth Amendment.) Self-executing does not mean that a treaty simply *is*. Instead, self-execution means "that the treaty has automatic domestic effect as federal law upon ratification."[92] A treaty that is "non-self-executing" can only have "domestic effect" if there is federal enforcement legislation.[93]

In *Medellin*, a criminal defendant raised as a defense to a state murder charge an "international law obligation," which "flow[ed] from treaties" the United States had ratified.[94] In other words, the defendant sought to use supreme federal law as a *shield* against allegedly unlawful state action. Above, we explained that the Fourteenth Amendment can be raised as a defense, even in the absence of enforcement legislation. But in *Medellin*, the Court held that the relevant treaty was not-self-executing, and therefore could not even be raised as a shield without federal enforcement legislation. With regard to treaties, the concept of self-execution is more stringent: a non-self-executing treaty, without implementing legislation, cannot be wielded even as a shield.

Bond v. United States presented a different case. There, the federal government prosecuted a person for violating a statute that implemented a non-self-executing international agreement.[95] The

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89 U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

90 Medellin v. Texas, 552 U.S. 491, 504 (2008).

91 *Id.* at 505 n.2.

92 *Id.*

93 *Id.*

94 *Id.* at 504.

95 Bond v. United States, 572 U.S. 844, 850–51 (2014) ("Although the Convention is a binding international agreement, it is 'not self-executing.' . . . Congress gave

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defendant raised the Tenth Amendment as a defense. In effect, she argued that the prosecution violated the separation of powers. The Supreme Court ruled that Bond had standing to raise this provision as a shield to her conviction.[96] There was no occasion to consider whether Bond had a cause of action to raise the Tenth Amendment as a sword, since the case arose in a defensive posture.

Professor Dorf observed, "Section 3 is self-executing in the exact same way that a self-executing treaty is."[97] But that observation presumes the correct analogy is to a self-executing treaty, rather than to a non-self-executing treaty, like the obligations at issue in *Medellin* and in *Bond*. We contend just the opposite is true: Section 3 more closely resembles the *presumptive* non-executing treaty. With treaties, as with the Fourteenth Amendment, there is no presumption of self-execution.

2. Section 1 as a sword

Today, many Fourteenth Amendment cases are litigated offensively. Plaintiffs generally rely on Section 1983, which traces its roots to the Second Enforcement Act (also known as the Ku Klux Klan Act of 1871). However, these plaintiffs cannot invoke the Fourteenth Amendment as a sword without federal enforcement legislation. One of the Supreme Court's formative cases, in which the Fourteenth Amendment was raised as a sword, was *Bradwell v. Illinois*. One or more federal statutes would have provided Bradwell with a cause of action to challenge the deprivation of her rights secured by the Constitution. *Ex Parte Young* is consistent with this principle. A plaintiff asserting an *Ex parte Young* claim is actually asserting a defense in anticipation of a state lawsuit, prosecution, or other enforcement action. Finally, in *Bivens*, the Supreme Court recognized an implied cause of action with regard to the Fourth Amendment, but this remedy has since been narrowly construed, and not expanded beyond Fourth Amendment rights to other provisions of the Bill of Rights.

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the Convention domestic effect in 1998 when it passed the Chemical Weapons Convention Implementation Act.").

96 Bond v. United States, 564 U.S. 211, 220 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines.").

97 Dorf, *supra* note 75.

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a. Section 1983

In modern times, significant Fourteenth Amendment cases reach the Court in an offensive posture, often in the context of a pre-enforcement review--that is, a challenge that begins before the statute even goes into effect. In *Whole Woman's Health v. Jackson*,[98] the Supreme Court observed that "pre-enforcement review under" Section 1983 "was not prominent until the mid-20th century."[99] During the Civil Rights Movement, groups like the NAACP brought suits in an *offensive posture* to challenge state policies. These offensive posture suits, however, did not rely on the Fourteenth Amendment, standing on its own. They invoked the legal antecedents of 42 U.S.C. § 1983, which includes the Second Enforcement Act a/k/a Ku Klux Klan Act of 1871. A recent amicus brief filed in *Jackson* by the Lawyer's Committee for Civil Rights under Law observed that Section 1983 "has been used to vindicate a broad array of federal rights, including in some of [the] Court's landmark civil rights rulings."[100] The organization explained that "it is no surprise that many of this Court's landmark rulings enforcing constitutional rights were the result of successful challenges under Section 1983."[101] These cases include *Shelley v. Kraemer*,[102] *Brown v. Board of Education*,[103] *Obergefell v. Hodges*,[104] and others. Norma McCorvey, better known as Jane Roe, invoked Section 1983.[105] The list goes on and on. All of these *offensive* cases invoked federal enforcement legislation. None relied on any notion that the Fourteenth Amendment was self-executing, in the sense that it provided private individuals with a free-standing cause of action which could be raised absent federal legislation.

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98 Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).

99 *Id.* at 49.

100 Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 4, Whole Woman's Health v. Jackson, 595 U.S. 30 (2021) (No. 21-463), https://www.supremecourt.gov/DocketPDF/21/21-463/197883/20211027165950602_Brief.pdf.

101 *Id.* at 14.

102 334 U.S. 1 (1948).

103 347 U.S. 483 (1954).

104 576 U.S. 644 (2015).

105 Roe v. Wade, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970).

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b. *Bradwell v. Illinois*

Some of the earliest Fourteenth Amendment cases invoked Section 1 as a sword. In these cases, parties invoked federal enforcement legislation to challenge state laws as violating Section 1. Consider *Bradwell v. Illinois*. Myra Bradwell, a married woman in Illinois, petitioned the Illinois Supreme Court for a law license.[106] However, the Illinois Supreme Court denied Bradwell's application based on the court's interpretation of state law. That decision was rendered during the September 1869 term of the Illinois Supreme Court.[107] Circa September 1870, Bradwell appealed the case to the United States Supreme Court.[108] The transcript of record before the Supreme Court was dated September 30, 1870. Senator Matthew H. Carpenter of Wisconsin argued on behalf of Bradwell in January 1872.[109] The Supreme Court's decision in *Bradwell* was announced on or about April 15, 1873.[110] The *Slaughter-House Cases* was announced on April 14, 1873. (The reason why we specify the dates will become clear shortly.)

In *Bradwell*, the Court's 8-1 decision held that the Fourteenth Amendment did not protect the right of a woman to obtain a law license. Once again, Chief Justice Chase was in dissent, as he was the only Justice willing to support this broad reading of the newly-ratified amendment. (Even a brief study of Chase's jurisprudence further undermines Baude and Paulsen's claim that Chase was trying to undermine the Fourteenth Amendment.)

Justice Miller's opinion for the Court stated that "[t]he [Illinois Supreme] court having overruled [Bradwell's] claims of right founded on the clauses of the Federal Constitution before referred to, those propositions may be considered as properly before this court."[111] But

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[106] Bradwell's briefs are reproduced in the *Chicago Legal News*, which she edited. *See A Woman Cannot Practice Law or Hold any Office in Illinois. Full Report of the Proceedings in the Supreme Court upon the Application of Myra Bradwell to be Admitted to the Bar.*, 2 CHI. LEGAL NEWS, Feb. 5, 1870, at 145, 145–46, https://perma.cc/5YNQ-J3ER.

[107] *In re* Bradwell, 55 Ill. 535, 535 (1869), *aff'd sub nom.* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

[108] D.C. EVENING STAR at 3 (Sept. 26, 1870).

[109] D.C. Daily Morn Chronicle at 1 (Jan. 20, 1872).

[110] D.C. EVENING STAR at 1 (April 16, 1873); D.C. Evening Star at 2 (May 9, 1873).

[111] Bradwell v. Illinois, 83 U.S. 130, 138 (1873). A scanned copy of the *U.S. Reports*, without any notations provided by West, can be found at https://perma.cc/N9HP-8Z3X.

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the opinion of the Court does not cite a precise basis on which jurisdiction was premised. Justice Miller observed, "The record in this case is not very perfect."[112] He was right. Bradwell's lawyer, Senator Carpenter, stated that that denial from the bar was a judicial act, "and that such proceedings are subject to review on writ of error or appeal, as the case may be."[113] The Court's opinion begins on Page 138 of the report. Earlier, page 133 of the reported decision states, "Mrs. Bradwell [sic] brought the case here as within the twenty-fifth section of the Judiciary Act, or the recent act of February 5th, 1867, amendatory thereto."[114] We are not certain who wrote this sentence. The writ of error, which is signed by the Clerk of the Supreme Court, alludes to the language in both statutes.[115] Bradwell's brief makes no reference to either statute.[116] Even in the face of an unclear record, we are reasonably confident that the Court would have had to rely on one or more of these statutes to resolve the case. And our view is supported by the record, likely entered by the clerk, that made its way into the *United States Reports*.

The first statute referenced, Section 25 of the Judiciary Act of 1789, provided the Supreme Court with jurisdiction to review "an authority exercised under any State, on the ground of their being repugnant to the constitution . . . upon a writ of error."[117] The second statute referenced, the Act of February 5, 1867, provided the federal courts with authority to "grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution."[118]

Like the Judiciary Act of 1789, the 1867 act was enacted *prior* to the ratification of the Fourteenth Amendment. But in the wake of ratification, the 1867 Act would provide the federal courts with jurisdiction to review violations of the newly-ratified Fourteenth Amendment. (Indeed, Griffin would invoke this same statute to collaterally attack his conviction in state court.[119]) Here, Bradwell

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112 *Id.* at 137.

113 Transcript of Record, Bradwell v. Illinois, 83 U.S. 130, 138 (1873) (No. 16-130), https://perma.cc/QP5F-JF2V.

114 *Bradwell*, 83 U.S. at 133.

115 Transcript of Record, *supra* note 113, at 14.

116 *See* Argument for Plaintiff in Error, Bradwell v. Illinois, Bradwell v. 83 U.S. 130 (1873) (No. 16-130), https://perma.cc/8AWS-C8JZ.

117 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73,85–86.

118 Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385.

119 Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 12 (C.C.D. Va. 1869) (No. 5,815) ("That the act of February 5th, [1867] under which this proceeding is brought,

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could have wielded the federal habeas statute as a sword to challenge the Illinois Supreme Court's denial of her law license. Her argument failed on the merits, but federal legislation still provided her with a vehicle to present the argument.

There was another statute that was relevant. In 1871—after Bradwell's appeal was filed but before the case was argued—Congress enacted the Second Enforcement Act.[120] This statute would have expressly provided Bradwell with a cause of action to challenge the deprivation of her rights secured by the Constitution. Bradwell may have relied upon this statute mid-litigation as a sword, although the record is not clear on this point.

c. *Ex Parte Young*

Ex parte Young permits plaintiffs to assert constitutional rights *offensively*, even absent any express enforcement legislation. Some cases will state that a plaintiff making an *Ex parte Young*-type claim is asserting a constitutional right *offensively*. For example, *Edelman v. Georgia* stated that *Ex parte Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."[121] As a formalism, it is true that *Ex parte Young* allows a plaintiff to assert a constitutional right as a plaintiff or applicant. The right *is* asserted offensively. Nevertheless, these types of claims are consistent with the sword-and-shield framework we describe. Why? A plaintiff asserting an *Ex parte Young* claim is actually asserting a defense in anticipation of a state lawsuit, prosecution, or other enforcement action. The *Ex parte Young* claim acts as a bar against government wrongdoing. As a general matter, such relief compels state government officers to *stop* what they have been or will be doing. But such a claim cannot support a direct claim seeking *affirmative relief.*

Rather, *Ex parte Young* limits the remedy which such a plaintiff can seek to *prospective negative injunctions* directing state government officers to stop ongoing, imminent, or future constitutional rights violations. An *Ex parte Young* claim seeks *negative relief*; it is there to *stop* the state government's enforcement action, lawsuit, or

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authorizes this court to inquire into the authority by which the petitioner is deprived of his liberty, and to determine whether that authority is exercised in contravention of the constitution of the United States, and in such case to grant the prayer of the petitioner.").

[120] Second Enforcement Act, ch. 99, 16 Stat. 433–40 (1871).

[121] 415 U.S. at 664.

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prosecution. In other words, if a plaintiff or applicant seeks to assert a constitutional right *offensively as a cause of action supporting affirmative relief*, then *Ex parte Young* will not rescue his lawsuit, and federal enforcement legislation is still needed.

Judge Sutton described *Ex parte Young* in terms of the sword-and-shield framework:

> Private parties who act in compliance with federal law may use *Ex parte Young* as a *shield against the enforcement of contrary (and thus preempted) state laws.* That makes sense, because an existing cause of action for that relief exists: an equitable anti-suit injunction. As classically understood, anti-suit injunctions permit potential defendants in legal actions to raise in equity a defense available at law. That's what happened in *Ex parte Young*: Several railroad companies asserted in equity the Fourteenth Amendment's Due Process Clause as a defense against future indictment for violating Minnesota's mandatory railroad rates. But matters differ when litigants wield *Ex parte Young* as a *cause-of-action-creating sword.* In that setting—today's setting—the State is not threatening to sue anyone, precluding an anti-suit injunction from doing the work. [In those circumstances,] [w]hat is required is that Congress create[] a cause of action for injunctive relief in the statute or otherwise made § 1983 available. This follows from the longstanding notion that courts of equity cannot create a remedy in violation of law, or even without the authority of law.[122]

We agree with Judge Sutton.

d. *Bivens*

Of course, *Bivens*,[123] a very modern judicial creation, is an exception to this framework. *Bivens* allows private individuals to assert Fourth Amendment claims against federal officers. Since 1971, the Supreme Court has not systematically expanded this singular exception to other federal rights, even those in the Bill of Rights. And those precedents demonstrate that constitutional provisions are not

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[122] Mich. Corr. Org. v. Mich. Dep't. of Corr., 774 F.3d 895, 906 (6th Cir. 2014) (internal citations omitted) (emphasis added).

[123] 403 U.S. 388 (1971).

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automatically, or even presumptively, self-executing. In any event, we have substantial doubts that *Bivens*, although considered by some to be normatively desirable, could be defended as a matter of original public meaning.

In *Griffin's Case*, Chief Justice Chase held that the Fourteenth Amendment was not self-executing and that only a congressional statute could put it into effect (as a sword). *Bivens* and related case law suggested that *the federal courts* have an independent role to create remedies for violations of federal constitutional rights—even absent federal legislation. But we are not aware of any coordinate body of case law or scholarship suggesting that States have a role akin to Congress and *the federal courts* for remedying federal constitutional rights violations in a similar fashion.[124]

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Professor Mark Graber wrote that a guest essay that Blackman and Tillman had published in the *New York Times* was "grossly misleading" with regard to whether the Fourteenth Amendment is self-executing.[125] Graber wrote, "Contemporary justices, both conservative and liberal, aggressively wield the Fourteenth Amendment today [as did Justices from an earlier era]. Judicial conservatives do not ask permission from Congress when declaring bans on guns or affirmative action unconstitutional."[126] But they do ask for permission. In *Brown v. Board of Education*, *District of Columbia v. Heller*, *Students for Fair Admission v. UNC*, and countless other cases in an *offensive posture*, the Court declared laws unconstitutional where Congress provided enforcement legislation, such as Section 1983. But no such cause of

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[124] *See generally* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

[125] Mark Graber, *Legislative Primacy and the Fourteenth Amendment*, BALKINIZATION (Apr. 22, 2022, 7:23 PM), https://balkin.blogspot.com/2022/04/legislative-primacy-and-fourteenth.html. Our *New York Times* guest essay entirely relied on Chief Justice Chase's ruling in *Griffin's Case*. *See* Josh Blackman and S.B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html. Given that *Griffin's Case* has never been overruled, we could see how Professor Graber might write that, on originalist grounds, that is, apart from judicial precedent, we somehow erred. But his decision to characterize our opinion editorial's substance and conclusions as "grossly misleading" is part-and-parcel of the hyperbole which has taken over wide swathes of legal discourse—even among academics, and perhaps, especially among academics. What sources we rely on in our publications is a choice.

[126] Graber, *supra* note 125.

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action was needed in Fourteenth Amendment cases that arose in defensive postures. Again, the meaning of self-execution *depends*.

With the Constitution, there is no presumption of self-execution. This concept applies in different fashions to the jurisdictional grants in Article III, the qualifications in Article I, the provisions of the Bill of Rights, and the Fourteenth Amendment. Our view is that it is a gross oversimplification to simply say the Constitution is self-executing and, then, call it a day. Professor Graber wrote that "Blackmun [*sic*] and Tillman cite no historical evidence from the 1860s that supports their view that anyone when Section Three was framed believed courts without legislation could implement provisions of the Fourteenth Amendment to 'shield' persons from liability but not as a 'sword' to impose liability."[127] This myopic focus on Section 3 disregards how the sword and shield dynamic describes offensive and defensive constitutional litigation writ large. The precise terminology of "sword" and "shield" is far less important than how constitutional rights were litigated. These precepts were well-established when the Fourteenth Amendment was ratified.[128] And these

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[127] Mark A. Graber, Section Three of the Fourteenth Amendment: Our Questions, Their Answers, at 13, n. 58.

[128] *See, e.g.*, State v. John Keeran, 5 R.I. 497, 507 (R.I. 1858) (Ames, C.J.) ("this article, as it stands in our [state] constitution, admits of no such vague and general application. With us, it is the constitutional shield of *one accused of crime* against the sovereign many who are prosecuting him; and not a sword to cut down the power of the many, legislatively expressed, to declare what shall constitute a crime . . . ."); *see also, e.g.*, City of Fergus Falls v. Fergus Falls Water Co., 72 F. 873, 877 (8th Cir. 1896) (Sanborn, J., dissenting) ("Now, the provision of the constitution under consideration is a *shield*, and not a *sword*. It does not lay the foundation for, or create, a *cause of action* or a contract. It simply preserves and protects contracts already made, and *causes of action* which are founded upon them, from the unlawful assaults of state legislation. Every *cause of action* that rests under the protection of this clause of the constitution may be legally and logically stated without referring to the law which by its terms impairs the contract, or to the constitution which protects it from that law, because the contract and its breach themselves constitute a *good cause of action*." (emphasis added)); *cf.* Kellogg v. Warmouth, 14 F. Cas. 257, 258 (C.C.D. La. 1872) (No. 7667) (Durell, J.) ("It was impossible that so large body of people should be suffered to remain exposed to the assaults of the prejudices naturally growing out of their former condition, without securing to them, through congressional legislation, a free and perfect use of the vote which the fifteenth amendment gave to them as a shield and a sword of protection for their persons, their liberties, and their property."). For an even earlier reference, Lord Mansfield stated that "A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is that it never shall be turned into an offensive weapon to assist fraud and injustice." Carroll v. Harrison, 49 F. Supp. 283, 289 (W.D. Va.), *aff'd*, 139 F.2d 427 (4th Cir. 1943) (quoting Zouch

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principles would have been understood by practicing lawyers at the time--especially by one of the most well-regarded lawyers in the country. This background provides a segue to a central focus in the Section 3 debate: Chief Justice Salmon Chases' federal circuit court opinion in *Griffin's Case*. Chase stated that Section 3, at least in the context of that case, was not self-executing. His conclusion is consistent with the understanding of self-execution we sketched above.

II. Chief Justice Chase's Decision in *Griffin's Case*

In 1869, Chief Justice Salmon P. Chase presided over *Griffin's Case* in the federal Circuit Court for the District of Virginia.[129] Griffin had been convicted of a crime, and that case was presided over by Judge Sheffey, a state court judge. Sheffey had previously served in the (purported) confederate Virginia legislature. Griffin brought a collateral attack in federal court on the prior state court proceedings. Griffin argued that Judge Sheffey was disqualified pursuant to Section 3. Neither the procedural posture, nor the holding were simple. But most relevant for our purposes was Chase's view with regard to self-execution. He wrote "that legislation by Congress is necessary to give effect to" Section 3 of the 14th Amendment, and "only" Congress can enact that legislation.[130] Chief Justice Chase added that the removal of disqualified officeholders "can only be provided for by Congress."[131] Congress must create the procedure that would determine if a defendant violated Section 3, and that procedure would effectuate removal. One would think that this statement, issued within a year of the Fourteenth Amendment's ratification, by the Chief Justice of the United States, would be reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing. But, according to Baude and Paulsen and some other recent commentators, such is not the case.

Baude and Paulsen's discussion of *Griffin's Case* ridicules Chase's opinion and their article reads like an effort to discredit Chase.

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v. Parsons, 3 Burr. 1794, 1802 (KB 1765) (Mansfield, LCJ)); *see also In re* Radway, 20 F. Cas. 154, 161 (E.D. Va. 1877) (same).

[129] Griffin's Case (*In re* Griffin), 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

[130] *Id.* at 26.

[131] *Id.*

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They charge that Chase issued a "half-advisory opinion," which suggests that he lacked jurisdiction.[132] They fault Chase for not adhering to the constitutional avoidance doctrine. They challenge his application of traditional habeas law. They argue that different strands of Chase's opinion are contradictory. They allege that Chase violated judicial norms in announcing the views of his colleagues on the Supreme Court. They suggest that Chase's opinion was motivated by his political ambitions. They compare Chase's opinion with *Dred Scott*![133]

Each of these criticisms misses the mark. First, Chase's analysis about the self-execution issue was not expressed in jurisdictional terms. Rather, Chase had jurisdiction based on the federal habeas statute that Griffin invoked. Second, there was nothing "advisory" about Chase's opinion. The case presented several complex issues, and Chase offered alternative rationales. But with regard to the self-execution issue, Chase only decided upon an issue which was properly before him. Chase's rationales supported his final order. Third, the constitutional avoidance doctrine, as we know it today, was only formally announced in the twentieth century. A critique of *Griffin's Case* based on the constitutional avoidance doctrine is unfair and unfounded because it is historically anachronistic. Fourth, Chase ruled that a habeas petitioner's claim based on the trial judge's being only a de facto officer cannot succeed. Baude and Paulsen cite no contemporaneous precedents undermining Chase's understanding of traditional federal habeas law. Fifth, the alternative rationales that Chase advanced were not contradictory. Sixth, Chase did not violate any judicial norms by indicating how his colleagues viewed a mere abstract legal issue unconnected to the specific facts and parties he was addressing in *Griffin's Case*. To prove the point, in 1899, a unanimous Supreme Court decision favorably cited Chase's reference to how his colleagues in 1869 approached federal habeas law.[134] Baude and Paulsen do not even cite that 1899 decision.

Chief Justice Chase's opinion was, and remains, reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing.

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[132] Baude & Paulsen, *supra* note 1, at 45.

[133] *Id.* at 46.

[134] *Ex parte* Ward, 173 U.S. 452, 454–55 (1899).

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A. What did *Griffin's Case* actually decide and not decide?

Prior to the Civil War, Judge Hugh W. Sheffey of Virginia had held a Section 3-triggering public position, and so, he had taken an oath to support the Constitution of the United States. Afterwards, he served as a member of the (purported) confederate Virginia legislature. Following the war, Sheffey was appointed as a state court judge by the recognized government of Virginia. Sheffey's original appointment predated ratification of the Fourteenth Amendment; thus, the lawfulness of his original appointment, at the time it was made, was not in doubt. After the Fourteenth Amendment went into effect, Judge Sheffey presided over the trial and conviction of Mr. Caesar Griffin, a black man, for shooting with an intent to kill.

Subsequently, Griffin collaterally challenged his state court conviction in federal court. He sought habeas corpus relief from a federal court in regard to his prior state court conviction. Griffin invoked the Habeas Corpus Act of 1867.[135] More specifically, in terms of relief, Griffin, who was represented by counsel, did not call for Sheffey's removal per Section 3. Why Griffin did not call for Sheffey's removal is not entirely clear: it may have been a good strategic choice—or a tactical error, particularly because Section 3's language only offers one express remedy: a disability against certain persons holding certain state and federal positions. Instead, Griffin argued that Section 3 disqualified Sheffey from having served as judge in his criminal trial, and so his (Griffin's) sentence should be vacated. Griffin prevailed in the Virginia federal district court. That case was presided over by Judge Underwood.

The state appealed. And the appeal was heard in the federal Circuit Court for the District of Virginia by Chief Justice Salmon P. Chase. Chase was Chief Justice Taney's successor and a Lincoln appointee.[136]

Chase decided three primary issues. Each of these issues were capable of resolving the case before the court, and therefore, it was within judicial norms for Chase to resolve each of these issues. First, there was the question of whether Section 3 required federal enforcement legislation. No such legislation had yet been enacted. If Section 3 required such enforcement legislation, then Sheffey remained

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[135] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, https://uslaw.link/citation/stat/14/385.

[136] We wrote about this decision in a *New York Times* guest essay. *See* Blackman & Tillman, *supra* note 125.

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in his position as judge. But if Section 3 did not require enforcement legislation, then Sheffey was disqualified from serving as the judge at the time Griffin was convicted, and if so, that would put Griffin's conviction in doubt.

Stated plainly, if Section 3 was not self-executing, Sheffey had been lawfully appointed because he had been appointed by the lawful, recognized Virginia government prior to enactment of the Fourteenth Amendment, and he had not been removed by the enactment of the Fourteenth Amendment. In these circumstances, Griffin could not prevail. Griffin's claim was raised directly under the Fourteenth Amendment.

Second, there was the question of the so-called De Facto Officer doctrine. In modern times, the Supreme Court has explained that, in certain circumstances, the "de facto officer doctrine . . . 'confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient.'"[137] Under the De Facto Officer doctrine, even if Sheffey was not a judge de jure (i.e., a judge according to law) his public acts would still be upheld as a judge de facto (i.e., a judge in fact). And, as a de facto judge, the sentence handed down by Judge Sheffey would still be enforced. If Sheffey was a judge de jure, the sentence was valid. If Sheffey was a judge de facto, then the sentence would still be treated as valid. In either scenario, Griffin loses. To be clear, the De Facto Officer doctrine was raised in opposition to Griffin's Fourteenth Amendment claim. Griffin opposed the application of the doctrine. In other words, even assuming Griffin could raise a claim directly under the Fourteenth Amendment, if the De Facto Officer doctrine was applicable, then the sentence would remain valid.

The third legal issue turned on the federal habeas statute. Federal courts, then and now, do not have the power to remedy all possible defects in state court criminal proceedings. Chase's authority as circuit justice sitting on the federal circuit court was constrained by the federal habeas statute. (Indeed, at the time, the Supreme Court was *stripped* of its appellate jurisdiction to review habeas decisions.) For reasons Chase develops and which we explain below, Chase ruled against Griffin on his habeas claim.

To sum up, Chase ruled in the alternative. According to Chase, Sheffey was a judge de jure, and so Sheffey's sentence was lawful. Chase suggested that if Section 3 were self-executing, and if he had

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[137] Nguyen v. United States, 539 U.S. 69, 77 (2003) (quoting Ryder v. United States, 515 U.S. 177, 180 (1995)).

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found that Sheffey was a mere judge de facto, Griffin's sentence would be upheld under the De Facto Officer doctrine. And, finally, Chase held that habeas law does not provide any relief based on allegations, true or not, that the trial court judge was a mere judge de facto.

Chase ruled against Griffin on all three points. In a sense, this is not all that surprising: the evidentiary burden of persuasion and proof fell squarely on Griffin, the applicant. And no one made any argument that Griffin was a victim of prejudice and unfair procedures or that Griffin was actually innocent.

What was the precise basis of Chase's ruling? Stated differently, what did Chase decide, and what did Chase not decide? In candor, Chase discussed *all* three of these issues. And Chase's decision to write about all three issues has created some confusion more than 150 years later. But the fact that some are confused now, does not show that any were confused in 1869. Indeed, Baude and Paulsen point to *no* contemporaneous critiques of Chase's decision. That's a tell.

Chase spent the bulk of his decision discussing whether Section 3 was self-executing. Towards the end of the opinion, Chase reasoned "that legislation by Congress is necessary to give effect to" Section 3 of the 14th Amendment — and that "only" Congress can enact that legislation. Chase added that the removal of disqualified officeholders "can only be provided for by Congress."[138] Congress must create the procedure that would determine if a defendant had violated Section 3. Section 5 of the 14th Amendment emphasizes this principle: Congress, it states, "shall have the power to enforce, by appropriate legislation, the provisions of this article."

But is this analysis about self-execution the holding of the case? The answer to this question turns on a careful reading of the final four paragraphs of the decision. We reproduce each paragraph, and provide headings and commentary to describe each of them.

> [1] [*Chase on 14th Amendment Self-Execution*] After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful. In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto,

[138] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815).

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> exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under sentence of a court held by such a judge.[139]

Prior to these four paragraphs, that is, prior to Paragraph [1], above, Chase had largely developed his position that Section 3 is not self-executing—in the sense that it cannot be used as a sword or offensively to remove a Section 3-covered official. The first of these last four paragraphs, that is, the paragraph above, concludes that discussion. This paragraph and the one which immediately follows also bring up an alternative rationale for Chase's ruling: the De Facto Officer doctrine.

> [2] [*Chase on Elected Federal Officials*]
> Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the constitution ordaining that no person shall be a representative or senator, or president, or vicepresident [sic], unless having certain pre-prescribed [?] qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The *election* or *appointment* itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually *elected*, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid.[140]

The second paragraph distinguishes the legal position of elected federal officials from appointed officers, such as Sheffey—the state

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[139] *Id.* at 27.

[140] *Id.* (emphasis added).

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judge at issue in *Griffin's Case.* In other words, although the De Facto Officer doctrine supports his ruling, which extends to an *appointed state officer*, Chase, in a guarded and cautious approach, points out that precedents associated with *elected federal officials* are not entirely on-point. For example, what would happen to the votes cast by a member of the House who was below the age of twenty-five, or a Senator who was below the age of thirty? (We discussed several such members above.) Chase suggests that the actions of these elected officials would not be held invalid.

> [3] [*Chase on Habeas Corpus*]
> But it is unnecessary to pursue the examination [in the second paragraph above]. The cases cited by counsel cover the whole ground, both of principle and authority. This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[141]

The third paragraph explains that a habeas claim cannot succeed based on the argument that the adjudicator is a mere de facto officer. In other words, even if a "judge" was not a judge de jure, but rather was only a judge de facto, the prisoner still could not receive relief under the habeas statute.

> [4] [*Chase's Order*]
> It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.[142]

The fourth and last paragraph is Chase's final order. In that final order, Chase reversed Judge Underwood's final order in the federal district court proceedings below. Underwood had granted Griffin

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[141] *Id.*

[142] *Id.*

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habeas relief; Chase reversed that decision, thereby authorizing the sheriff to take Griffin into custody.

Now that we have laid out what *Griffin's Case* decided, and did not decide, we turn to what Baude and Paulsen thought *Griffin's Case* decided and did not decide.

B. Baude and Paulsen misstate the grounds of decision in *Griffin's Case*

Our description of *Griffin's Case* above reflects a case that might have been rightly decided or might have been wrongly decided—we think it was rightly decided. But either way, it was and remains in the mainstream of judicial thought. Baude and Paulse view the case very differently.

Baude and Paulsen wrote: "*In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three."[143] Many will know, but we believe more than a few will not, that the underscored language was Senator Charles Sumner's condign judgment against the late Chief Justice Taney—expressed on the occasion of congressional debate on a bill to pay for a Taney bust for public display.[144] Baude and Paulsen believe *Griffin's Case* was wrongly decided. Fair enough. But why do Baude and Paulsen resurrect such charged language against a federal circuit court decision and, in effect, its author, who wrote that decision? What purpose does this sort of language serve? And why not use normal quotation marks and concomitantly give credit to their source under prevailing academic norms? No doubt Chase, like Taney, like any of us, had his faults. Few of us are perfect. And no doubt Chase's handiwork in *Griffin's Case* is not a perfect opinion. Few written decisions are. We do not criticize Baude and Paulsen for a lack of charity towards Chase. Our concern is more that putting aside dispassionate language, and failing to adhere to public reason, will tend to distort the authors' sense of fair play and the readers' accurate understanding of the substantive legal issues. It is these ideals which we believe to be the goals of scholarship, and we assume that Baude and Paulsen agree with us.

Baude and Paulsen do not simply write that *Griffin's Case* was wrongly decided. They call it "appalling" and then worse.[145] Despite these criticisms, Baude and Paulsen recognize, quite properly, that

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[143] Baude & Paulsen, *supra* note 1, at 6 (underscore added).

[144] Charles Noble Gregory, *A Great Judicial Character*, 18 YALE L.J. 10, 21 (1908).

[145] Baude & Paulsen, *supra* note 1, at 10 n.14.

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Griffin's Case had more than one line of argument supporting its holding. Again, the three possible lines of argument concern (i) whether Section 3 was self-executing, (ii) whether Sheffey's ruling was insulated by the De Facto Officer doctrine, and (iii) whether federal habeas law provided Griffin with a remedy. Chase discussed all three of these issues. And Baude and Paulsen take great exception with Chase's approach. We disagree. Our view is that Chase decided this fairly complex case in a decision well within the bounds of judicial norms, in 1869 and today.

Here, we pose five primary questions and criticisms in regard to how Baude and Paulsen characterize Chase's opinion in *Griffin's Case*. Specifically, what did Baude and Paulsen think *Griffin's Case* decided and did not decide?

1. Were Baude and Paulsen complaining about Chase's jurisdiction?

In regard to the last sentence of Paragraph [1], Baude and Paulsen state: "By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely Chase was not actually done. [Chase] then launched into the weirdest part of his opinion, a sort of *half-dictum*, *half-advisory* opinion that cast further doubt on all that had come before . . . ."[146] Baude and Paulsen's complaint here is under-explained. What precisely is a "*half-dictum*" opinion? What precisely is a "*half-advisory* opinion"? Indeed, based on our research, we are not sure that these terms have been used in a reported case or other legal scholarship to criticize a judicial decision.[147] Judges frequently put forward alternative rationales for their ruling. The federal courts are prohibited from issuing advisory opinions; indeed, such opinions lack subject matter jurisdiction. We don't even know which half of the opinion would be advisory. Are Baude and Paulsen complaining that Chase lacked subject matter jurisdiction? In any event, Chase's announcement that his first line of reasoning (Paragraph [1]) supported his ruling did not preclude his announcing additional rationales.

Of course, Chief Justice Taney's *Dred Scott* opinion has been criticized because having reached a conclusion based on an absence of federal jurisdiction, Taney went on to opine on other legal issues where

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146 *Id.* at 45 (emphases added).

147 A search on Westlaw revealed zero hits for the term "half-advisory opinion." We found only one hit for "half-dictum" and it was positive. *See* Stover v. United States, 332 F.2d 204, 206 (9th Cir. 1964) ("But we cannot call it pure dicta. If it was *half dicta*, we believe it good dicta." (emphasis added)).

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(by Taney's own admission) the Court lacked judicial power. By contrast, Chase's first line of reasoning was that Section 3 was not self-executing, but Chase does not express that rationale in jurisdictional terms. Indeed, even if Chase's position on self-execution should be characterized as jurisdictional, Chase still had jurisdiction in relation to Griffin's statutory habeas claim.

2. Were Baude and Paulsen complaining that Chase's decision was dicta or an advisory opinion?

Again, Baude and Paulsen do not explain what precisely their objection is. They also characterize the alternative holdings as dictum. As a formal matter, whenever alternative rationales are presented in a judicial decision, each rationale can be fairly characterized as dicta. Why? Because no individual rationale was strictly necessary to its holding.[148] But dicta of that sort is not a fair ground to criticize an opinion. In order to criticize an opinion for dicta, one must show that the adjudicator reached out to *adjudicate* (or, better, pre-*adjudicate*) facts and legal issues not properly before the court. Here, the issue of whether or not Section 3 was self-executing was before the court. Thus, *contra* Baude and Paulsen, Chase's alternative rationales were neither dicta (of the sort we should criticize) nor an "advisory opinion." In adjudicating this issue, i.e., the self-execution issue, Chase only decided upon an issue which was properly before him, and his reasoning on this issue supported a concrete judicial order, as opposed to merely putting forward abstract legal views. So nothing in Chase's opinion is an "advisory opinion."

3. Were Baude and Paulsen complaining that Chase violated the constitutional avoidance doctrine?

Again, Baude and Paulsen do not explain what precisely is their objection to Paragraph [1]. One might guess that their objection is that Chase failed to adhere to the doctrine of constitutional avoidance: that is, where a federal court can reach a decision on narrow statutory or other non-constitutional grounds (e.g., the habeas argument in Paragraph [3]), the court should avoid reaching and deciding the case on constitutional grounds. *If* this is the ground of Baude and Paulsen's

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[148] Blackman wrote about the difference between holding and dictum in an early paper. *See* Josh Blackman, Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction between Holding and Dictum (Dec. 22, 2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318389.

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objection, and they do not say clearly that it is, then we think it is somewhat misplaced.

The Supreme Court has developed multiple doctrines counseling avoidance and abstention for the federal courts. Each carries its own jurisprudential history. The constitutional avoidance doctrine is now settled law, but it appears it was only formally announced in the twentieth century. Some well-known cases which make use of that doctrine include: *Rescue Army v. Municipal Court of Los Angeles*[149] and, of course, Justice Brandeis' concurrence in *Ashwander v. Tennessee. Valley Authority*.[150] Its earliest recognizable, formal invocation, we suspect, was *Siler v. Louisville & Nashville Railroad Co*.[151] And even in *Siler*, the Court announced it as a rule of practice or a default, which should be adhered to, but could be "departed from" for "important reasons."[152] We suggest that a critique of *Griffin's Case* based on the constitutional avoidance doctrine is unfair and unfounded because it is historically anachronistic.

Still, even if Baude and Paulsen could point to pre-*Siler* cases applying the constitutional avoidance doctrine, in *Griffin's Case* there were "important reasons" not to adhere to that doctrine. What reasons? The Fourteenth Amendment was ratified in 1868. *Griffin's Case* was decided in 1869. Now, imagine a counterfactual. Imagine that Chase had ruled narrowly, and he had only announced his narrow habeas-based ruling in Paragraph [3]. Imagine further that Chase had refrained from announcing his broader Paragraph [1] views—i.e., Section 3 requires enforcement legislation. If Chase had taken this alternate path, that very same substantial (perhaps, momentous) issue would likely arise in a different posture, maybe as much as a year or two later, in federal trial court proceedings, federal circuit court proceedings, and on direct review or a certificate of division up to the Supreme Court. In these circumstances, what would be the upshot if the Supreme Court agreed with Chase's self-execution position? If the lower courts disagreed with Chase's position and removed officials covered via the Fourteenth Amendment, then Supreme Court review would return those officials to office—not just returned, but returned as "Lost Cause" heroes. Alternatively, had the lower courts enforced Chase's

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149 331 U.S. 549, 568 (1947).

150 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Justices Stone, Roberts, and Cardozo joined the concurrence. *See id.*

151 213 U.S. 175, 193 (1909). *See generally* ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW (2014), https://perma.cc/K4SH-DDKH.

152 *Id.*

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(unannounced) position, then those who the amendment ultimately sought to displace would be left in positions of political power. So time would have been lost. And it is not just time which would have been lost, but also the opportunity to displace all Section 3-covered officials might be lost too. Chase's decision gave guidance to other lower federal courts how to rule in similar cases. And Chase's decision gave guidance to a loyal, Unionist Congress to act *now* (actually, *then*) to enact enforcement legislation while they continued to hold ⅔ majorities in both houses.[153]

It is not unheard of for federal judges to send signals to other judges, and indeed, to Congress through judicial decisions. To use a contemporaneous example, in 1871, Circuit Justice Joseph Bradley wrote to District Judge William Wood, encouraging him to hold that Congress had the power to enforce the provisions of the First Amendment through the newly-enacted Enforcement Act of 1870.[154] (This issue would arise later in *United States v. Cruikshank* (1876).)

We think Chase's decision reflects a respectful constitutional dialogue between the courts and Congress. And this dialogue may have been reciprocated, with the enactment of the Enforcement Act of 1870. About one year after *Griffin's Case*, Congress's Enforcement Act of 1870 created a quo warranto mechanism whereby federal prosecutors could remove office-holders who were disqualified by Section 3. Had Chase not written his opinion that addressed self-execution, Congress may not have thought or chosen to take that step. Moreover, Chase's self-execution position was one he put forward with humility. In putting it forward, Chase was only speaking for himself, and not his Supreme Court colleagues. (Again, Chase's reference in *Griffin's Case* to his colleagues concerned the habeas corpus statute, not the self-execution question.) If Congress believed that the Fourteenth Amendment was, in fact, self-executing, then Congress could choose to do nothing and put the nation's fate in the hands of any five of the

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[153] In 1866, Representative Thaddeus Stevens opined on the importance and urgency of enacting the draft version of Section 3, which was then undergoing debate. He said, "Without [Section 3], [the proposed constitutional amendment] amounts to nothing. I do not care the snap of my finger whether it be passed or not if that be stricken out. Before another Congress shall have assembled here, and before [the rest of the proposed Fourteenth Amendment] can be carried into full effect, there will be no friends of the Union left on this side of the House to carry it out . . . . [T]he House will be filled with yelling secessionists and hissing copperheads. Give us the third section or give us nothing." CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866).

[154] RANDY BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 756 (4th ed. 2021).

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eight Justices then in office in May 1869.[155] If Congress, agreed with Chase or just sought not to chance the issue being decided wrongly by the lower federal courts and the Supreme Court as it then stood, then Congress could pass a statute to allay all concerns. Baude and Paulsen see Chase as a wrongdoer, or, at least, wrongheaded. But we do not.

Baude and Paulsen accuse Chase of "knee-capping the Fourteenth Amendment."[156] We think that hyperbole gets the situation exactly backwards. We think the better view is that Chase was, in fact, reinforcing the Fourteenth Amendment. Had Chase ruled only on the more narrow habeas grounds, and then only a year or two later, in another case on direct review, put the nation on notice that the Fourteenth Amendment was not self-executing, Chase would have been setting back the effort to disqualify Section 3-covered persons, that is, many former confederates. By signaling that enforcement legislation was needed, Chase was helping to carry the provision into prompt execution. Had Chase declined to address the self-execution issue, would Baude and Paulsen really be saying (today) that Chase was a modest judge who favored the passive virtues and judicial minimalism? Perhaps, they and others might. But we doubt it. We doubt it because Chase could have, but did not, reach out to address the precise legal position of Section 3-covered judges and other officers, who unlike Sheffey, received their appointments *after* the Fourteenth Amendment was ratified. Chase addressed the facts and law relevant to the case before him: no more, no less. Yet, today's critics give him no credit for his issuing an opinion limited to the facts before him.

The more important point is that the consequences of Chase's having taken the particular alternative minimalist approach supported by Baude and Paulsen leave us wondering if Baude and Paulsen, as well as Chase's contemporaries and subsequent commentators, would have concluded that such a minimalist approach was naively unaware of the underlying political drama, lacked transparency, and would have been perceived, not as "knee-capping the Fourteenth Amendment,"[157] but as a sucker-punch to the national gut.

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[155] *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx.

[156] Baude & Paulsen, *supra* note 1, at 49.

[157] Baude & Paulsen, *supra* note 1, at 49.

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4. Chase ruled that a habeas petitioner's claim based on the trial judge's being only a de facto officer cannot succeed. Baude and Paulsen say otherwise. Who was/is right?

In Paragraph [3], Chase cites multiple state cases for the proposition that "a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus."[158] To be clear, here, Chase did not say that the De Facto Officer doctrine was correct *in all procedural contexts*; he merely held that a claim grounded in a trial judge's being a judge de facto and not a judge de jure cannot succeed in a *habeas posture*. Here, Chase's analysis was limited to the posture of the case: a collateral attack. He was not addressing how that claim might have been resolved on direct appeal. Chase offered a legal interpretation of the scope of the pre-modern habeas remedy.

Baude and Paulsen challenge Chase's position on this issue, but they do not actually directly state that Chase was wrong. Baude and Paulsen do not state that Chase mischaracterized the cases Chase had cited as authority, nor do Baude and Paulsen affirm that there were, at that time, other streams of habeas case law permitting a challenge to a criminal conviction on the grounds that the trial judge was a mere judge de facto. Instead, Baude and Paulsen argue:

> One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally." On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack. Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.
>
> But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer's appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution. On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction. The de

[158] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5,815).

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> facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities. Indeed, these technicalities were argued by the parties and they were the main subject of Judge Underwood's opinion below.[159]

So Baude and Paulsen suggest Chase could have taken another route based upon Sheffey's purported "fundamental inability to exercise power."[160] But once again, Baude and Paulsen's challenge is anachronistic. They do not cite any nineteenth century authority or pre-nineteenth century authority from any state in the Union or from any federal court, or from any court in the common law world contrary to Chase's position. We suggest that Chase's position, in 1869, was the widely (if not universally) held one. For example, Owen Dixon, later Chief Justice of Australia, in an academic paper[161] wrote: "Higginbotham C.J. [of the Supreme Court of Victoria] distinguishes between objections to the jurisdiction of a Court and objections to the validity of its constitution [that is, its membership]. *In re Armstrong* [1878], 4 [Victoria Law Reports] (L.) 101 the fact that a Chairman of General Sessions was invalidly appointed was held no ground for a habeas for a prisoner convicted before him."[162]

Of course, Judge Underwood's district court opinion took a contrary view, but Baude and Paulsen do not defend Underwood's opinion and its reasoning. Maybe for good reason? Underwood, like many others, were among the colorful, prominent, and newsworthy historical figures who held federal or state positions during the Civil War and Reconstruction. Underwood was appointed by Lincoln in 1863 to the federal district court. [163] Underwood was elected to the U.S. Senate by the loyal Virginia legislature, but the U.S. Senate refused to seat him.[164]

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159 Baude & Paulsen, *supra* note 1, at 48 (footnotes omitted).

160 *Id.* (emphasis omitted).

161 Owen Dixon, *De Facto Officers*, 1 RES JUDICATAE 285 (1938), http://classic.austlii.edu.au/au/journals/ResJud/1938/71.html.

162 *Id.* at 287 n.13.

163 Brent Tarter, *John C. Underwood (1809–1873)*, ENCYCLOPEDIA VA., https://encyclopediavirginia.org/entries/underwood-john-c-1809-1873/.

164 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 384, at 333–34 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V1/pdf/GPO-HPREC-HINDS-V1.pdf.

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Baude and Paulsen cite a 1963 unsigned law review note as authority for their position.[165] That note affirms that *Ex parte Ward*, an 1899 U.S. Supreme Court decision, stood for the position that a collateral attack in habeas proceedings on the validity of a judge's presidential appointment was disallowed even though based on constitutional grounds.[166] (We'll come back to *Ex parte Ward* in Part II.B.6.b below.)

Baude and Paulsen point to some pre-*Griffin's Case* authority, such as *Hayburn's Case*,[167] to support the legal narrative that Chase's use of the De Facto Officer was a choice, and not the steady application of established law. We do not find Baude and Paulsen's discussion convincing. Those cases did not involve attacking a particular judge's right to hold the position due to a disqualification, but rather involved a generic attack on the power assigned to the judge. Specifically, in those cases, the power was alleged to belong to the sovereign or to another branch, or that the judicial position itself was unconstitutional irrespective of who held it. Griffin's position, by contrast, was an attack on the particular judge's right to hold his position. No one disputes that Sheffey's judicial office was constitutional. And no one disputes that a non-Section 3-covered individual could have lawfully adjudicated Griffin's trial. So this line of cases, put forward by Baude and Paulsen, has no ready application to *Griffin's Case.* Recently Judge Murphy explained: "[H]istory refutes the theory that the Constitution of its own force compels courts to treat as 'void' any action taken by officers whose exercise of an office does not comport with a constitutional command. That view would treat the de facto officer doctrine *itself* as unconstitutional. Yet it formed part of the legal backdrop against which the founders enacted the Constitution."[168]

The student note cited by Baude and Paulsen discusses modern counter-authority supporting Baude and Paulsen's position that a

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[165] *See* Baude & Paulsen, *supra* note 1, at 48 n.166 (citing Note, *The "De Facto" Officer Doctrin*e, 63 COLUM. L. REV. 909, 910, 919 (1963) [hereinafter *De Facto Officer Doctrine*], https://www.jstor.org/stable/1120535).

[166] *See De Facto Officer Doctrine*, *supra* note 165, at 917 n.58 (citing *Ex parte* Ward, 173 U.S. 452 (1899)). In the parenthetical describing *Ward*, the Note states: "collateral attack on validity of presidential appointment disallowed even though based on constitutional grounds." *Id.*

[167] 2 U.S. (2 Dall.) 409 (1792).

[168] Calcutt v. FDIC, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting) (citing Baude and *Griffin's Case*, and fully expounding on the scope and history of the De Facto Officer doctrine), *rev'd on other grounds*, 598 U.S. 623 (2023).

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disqualified judge has a "fundamental inability to exercise power,"[169] and so a decision by such a judge could be set aside in habeas proceedings. However, that line of authority first appears many decades after *Griffin's Case* was decided.[170] Again, we, at least, would not fault Chase for not being a clairvoyant, nor would be fault him for adhering to established habeas law. It is not convincing to suggest that Chase should have departed from established law based on a line of cases from a half-century later. All of these criticisms seem unduly harsh. Moreover, much (perhaps all) of the modern line of authority Baude and Paulsen rely on for this point relates to federal habeas proceedings "reviewing" underlying federal court convictions over federal charges where the alleged constitutional defect involved a challenge based on federal separation of powers. For example, in *United States v. Allocco*,[171] the President's power to recess appoint a federal judge was at issue, as was the issue of when the Senate was in recess for a constitutionally valid presidential appointment.[172] It is very unclear how that stream of authority could help Griffin, who was convicted in state court proceedings involving a state judge on state charges.

Still, even if we cannot impose on Chase the obligation to be a clairvoyant, we can ask if Chase was in some meaningful sense wrong on the narrow habeas issue. Was he? Think about it this way. Some people have thought, and some continue to think, that the Due Process Clause of the Fourteenth Amendment encompasses an actual cornucopia of rights. Some do not. It is a matter of legitimate disagreement and debate. One reason some people do not see the cornucopia is that there is no specific language in the Fourteenth Amendment announcing what rights are created by the Due Process Clause and what the boundaries of those rights are. The same is true for habeas corpus. Baude and Paulsen's article teaches that constitutional amendments change prior constitutional law. We do not disagree. But there is nothing in Section 3 about habeas corpus.

To put it another way, and leaving aside for now the issue of whether authorizing federal legislation is necessary to enforce Section 3, we note that Section 3 imposes a disability on some persons in some circumstances. Section 3 says that certain persons in certain circumstances shall not hold certain government positions. Section 3

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169 Baude & Paulsen, *supra* note 1, at 48 (emphasis omitted).

170 *See* Johnson v. Manhattan Ry., 61 F.2d 934 (2d Cir. 1932), *aff'd*, 289 U.S. 479 (1933).

171 305 F.2d 704 (2d Cir. 1962).

172 *See generally id.*

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does *not* say, using any express language, what should happen if notwithstanding Section 3's limitations, a Section 3-covered person is elected to, appointed to, or holds a position contrary to law. Likewise, if a state judge holds a position contrary to Section 3, can a state court criminal conviction be attacked collaterally in federal habeas proceedings? Nothing in the text of Section 3 answers that question with anything approaching clarity.

Again, nothing in the text of Section 3 upsets prior understandings of the scope of the habeas remedy. So even if Section 3 upset some prior law (which it undoubtedly did) was there any good reason for Chase to think background habeas law had been changed by Section 3? In this situation, is it any surprise that Chase looked to Congress to provide guidance for applying Section 3 on both direct review and in regard to collateral habeas proceedings? No, it is no surprise at all. Moreover, it was on this limited habeas point that Chase pointed to his colleagues' expressing agreement with his position.

Finally, in 1870, Congress expressly created a procedure through which those holding Section 3-covered positions could be removed from their positions by federal prosecutors.[173] This mechanism was not available when Griffin was convicted. Specifically, a federal, but not a state, prosecutor can seek a writ of quo warranto to remove an incumbent officer from office. This language authorizes a single traditional remedy: a writ of quo warranto. Congress did not create a remedy that would allow the States to remove a federal official from his elected or appointed position. Nor did Congress create a more limited remedy allowing the States to remove a candidate for a federal elected position from the ballot. Here, the writ of quo warranto remedy, on the motion of a federal prosecutor, and *only* a federal prosecutor, permits a federal court, and *only* a federal court, to determine whether a specific person has the legal right to hold an office. (Professor Samuel Bray explained this writ during the kerfuffle over who was the actual director of the CFPB.[174])

We draw two general conclusions from this Enforcement Act. First, Congress did not grant the States any role to enforce Section 3. This task was given to federal prosecutors. Indeed, the state courts had no role to play in this matter. Section 8 of the Enforcement Act stated that the federal courts had *exclusive* jurisdiction over claims brought under the Enforcement Act. That's a tell too.

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[173] Second Enforcement Act, ch. 99, 16 Stat. 433, 438 (1871).

[174] Samuel Bray, *English or Mulvaney at the CFPB? Time for Quo Warranto!*, REASON: VOLOKH CONSPIRACY (Nov. 25, 2017, 10:41 AM), https://reason.com/volokh/2017/11/25/english-or-mulvaney-at-the-cfp/.

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Second, Congress included Section 14 in the Enforcement Act *after* Chase's decision. It is reasonable to presume that Congress was aware of *Griffin*'s *Case*. Congress could have responded to *Griffin's Case* by enacting a statute saying that Section 3 was self-executing. And Congress could have given the States a role in these or analogous removal or election processes. But instead, Section 14 expressly delegates Section 3-enforcement to a federal prosecutor—and critically, only the federal courts (and not state courts) play a role in that process. Moreover, as recounted in a recent biography, Chase was close to the Congress that drafted and ratified the Fourteenth Amendment, and later enacted the Enforcement Act.[175] That is some reason to believe that Chase's views were consistent with those in Congress. Indeed, as we will discuss later, *Griffin's Case* may be understood as a signal to the Reconstruction Congress about what measures would pass muster both before him, amongst his Supreme Court colleagues, and the lower federal and loyal state judiciaries.

There are more than a few Reconstruction Era cases touching on Section 3. Some recent scholarship has cited these cases in support of the position that officeholders were purportedly removed absent implementing legislation.[176] One such case is *United States v. Powell*.[177] *Powell* was a prosecution brought under Section 15 of the 1870 Act. It was bought, not to enforce abstract Section 3 qualifications absent authorizing legislation, but to enforce a concrete federal criminal statute. So there was federal statutory authority. Moreover, the prosecution came with all the constitutional protections (then) normally associated with federal criminal protections—procedural and substantive.

5. Baude and Paulsen argue that Chase was wrong about retroactivity

Section 3 was ratified in the wake of the Civil War. Again, it provides:

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[175] *See* WALTER STAHR, SALMON P. CHASE: LINCOLN'S VITAL RIVAL 546(2022) (noting that Congress considered a proposed version of what would become the Fourteenth Amendment, which was drafted by Chase)

[176] Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, LAWFARE (June 7, 2022, 1:32 PM), https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.

[177] 27 F. Cas. 605 (C.C.D. N.C. 1871).

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> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[178]

At a minimum, this provision was designed, ultimately, to disqualify from holding certain state and federal positions (a "Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state"), certain people who had held certain state or federal positions ("a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state"), and had sworn an oath to the Constitution in connection with those positions, and afterwards engaged in insurrection or rebellion. There were two lists: a list of positions which could trigger disqualification, and a list of positions from which a wrongdoer would be disqualified from holding. These two lists of positions were textually distinct. (We will revisit these textualist arguments *supra* in Part V.)

Section 3 would impose a *future* disqualification based on *past* conduct. That is, a person could be disqualified after the ratification of the Fourteenth Amendment for conduct that occurred before the ratification of the Fourteenth Amendment. Section 3 could also impose a *future* disqualification based on *future* conduct. In other words, a person could be disqualified after the ratification of the Fourteenth Amendment for conduct that occurred after the ratification of the Fourteenth Amendment.

Furthermore, Section 3 may also impose a *past* or *retroactive* disqualification based on *past* conduct. In other words, the language of Section 3 can be read in this way also: after the ratification of the Fourteenth Amendment, a person could be deemed retroactively disqualified for conduct that occurred before the ratification of the Fourteenth Amendment.

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[178] U.S. CONST. amend. XIV, § 3.

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Baude and Paulsen do not recognize how far back retroactivity can go. Indeed, without a clear theory of retroactivity, Section 3 could sweep to past conflicts, including the Mexican-American War, and apply to conduct from prior to Section 3's ratification *even* where the officeholder's term of office ended prior to Section 3's ratification. In *Griffin's Case*, Chief Justice Chase understood these risks, and addressed them in a candid fashion. His opinion laid out a roadmap to understand retroactivity and with regard to the De Facto Officer doctrine. Chase's roadmap had two other important implications. First, Chase explained that because Section 3 was not self-executing, only a federal statute could put it into effect. Second, a state statute would not suffice. The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the Fourteenth Amendment and enforcement legislation were enacted precisely because state institutions, state officials, and state courts were *not* considered trustworthy by the national government. Indeed, the idea that Section 3 permitted States, via ballot control, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems (at least to us) novel and very unlikely.

a. Section 3 operates retroactively and prospectively

Section 3 might be thought to operate in two ways: retroactively and prospectively.

Under one view, Section 3 might impose a retroactive disability on covered persons in their current positions. In other words, covered persons who hold positions contrary to Section 3 would be removed from their positions by some process. If they were appointed after the Fourteenth Amendment was ratified, the effective date of their removal is backdated to the date of their appointment. If they were appointed before the enactment of Section 3, the effective date of their removal is backdated to the date on which the Fourteenth Amendment was ratified. In such circumstances, the covered person's prior acts might be determined to be void (or, possibly, voidable), and the covered person may face personal liability for the public acts he had taken during the period where he acted absent good authority. Indeed, the de jure government might sue the covered person for restitution: that is, the return of any compensation or other emoluments paid while holding office.

Under the second view, Section 3 might impose a disability on covered persons against their holding a position in the future. And if a

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covered person holds such a position contrary to Section 3, some legal process would effectuate removal, but such a removal is not backdated. Here, the covered person's removal takes effect at the conclusion of some legal process. Because the removal is not backdated, we do not think there would be any likely occasions for the De Facto Officer doctrine to apply. Concomitantly, such a person would not face any personal liability for the public acts he had taken during the period in which he held his position. In other words, a covered person's public acts prior to his removal would be upheld because prior to removal the covered person held his position de jure, and not de facto.

Both alternatives above have an element of retrospectivity–both would impose a burden based on conduct that had been completed prior to the enactment of the Fourteenth Amendment. Both alternatives are consistent with the Fourteenth Amendment, as both, in some fashion, effectuate removal of covered persons. But the first alternative more greatly offends ex post facto principles and retrospectivity norms.

Section 3 does not explain which of these two choices to apply. And Griffin did not actually move to have Sheffey removed. Given these facts, is it any wonder that Chase believed that these issues, as well as other Section 3-related policy choices were for Congress to decide?

b. Disqualifying Jefferson Davis, Alexander Stephens, and West Hughes Humphreys

Consider a hypothetical. A person took an oath to the Constitution as a member of Congress. After his terms concluded, he actively and voluntarily joined the (purported) confederacy. Did this former-member of Congress violate his oath of office? Baude and Paulsen state the answer is unequivocally *yes*.

> [E]ven after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had *notoriously violated previously sworn oaths* to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). These men who arrived in Washington included several who had held prominent positions in the rebel Confederacy: "four Confederate generals, four colonels, several Confederate congressmen and members of Confederate

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> state legislatures, and even the vice president of the Confederacy, Alexander Stephens."[179]

Baude and Paulsen offer one example by name to illustrate this oath-breaking: Alexander Hamilton Stephens of Georgia.[180] Before the Civil War, Stephens had served eight terms in the U.S. House of Representatives from 1843 through 1859.[181] In November 1861, he began serving as vice president of the (purported) confederacy.[182] At that time, Stephens was no longer serving a term in the United States Congress. Baude and Paulsen assume that Stephens "violated" his oath to the United States when he became vice president.[183] But this assumption is tenuous.

The pre-Civil War oath Stephens took while serving in Congress was basically the same one members had taken since 1789, and it is basically the same one taken today. It states: "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." The words are forward-looking. And if you think these words last unto eternity, then that oath bound Stephens in 1861, and ever-after. If so, then Baude and Paulsen would be correct to assert that Stephens violated his oath when he became vice president of the (purported) confederacy.

But there is another view: oaths of office last as long as the holder (lawfully) remains in his position. Thus, when an elected term lawfully ends, the holder's oath no longer has force. During

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[179] Baude & Paulsen, *supra* note 1, at 4 (emphasis added); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 421 (2012) ("[S]ection 3 of the Fourteenth Amendment imposed special political disqualifications on officials who had not merely sided with the Confederacy, but in the process *betrayed* previously sworn oaths." (emphasis added)); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 377 (2005) [hereinafter AMAR, BIOGRAPHY] ("Suspicion of the South's good faith ran especially high in the mid-1860s because a large percentage of Southern leaders had in fact *treasonably betrayed* their antebellum Article VI oaths to uphold the federal Constitution.").

[180] Baude & Paulsen, *supra* note 1, at 4 (citing AMAR, BIOGRAPHY, *supra* note 179, at 377).

[181] Chad Morgan, *Alexander Stephens (1812–1883)*, NEW GA. ENCYCLOPEDIA (June 6, 2017), https://www.georgiaencyclopedia.org/articles/government-politics/alexander-stephens-1812-1883/.

[182] *Alexander Stephens*, AM. BATTLEFIELD TR., https://www.battlefields.org/learn/biographies/alexander-stephens.

[183] *See also* AMAR, BIOGRAPHY, *supra* note 179, at 377 ("Suspicion of the South's good faith ran especially high in the mid-1860s because a large percentage of Southern leaders had in fact treasonably betrayed their antebellum Article VI oaths to uphold the federal Constitution.").

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congressional debates over Section 3, for example, Senator Reverdy Johnson of Maryland distinguished between the "legal obligation of the oath" and the "moral obligation" of the oath.[184] Even if the moral obligation may extend beyond the holder's term in office, the legal obligation "expire[s] at the termination of the term of office to which the party had been elected or appointed."[185] We think this view is the overwhelmingly predominant view. This has been Congress's understanding since 1791. In 1791, some members of the House returned for a second consecutive two-year term. If forward-looking oaths last unto eternity, then a returned House member would have no cause to take his oath again. But the practice has always been to mandate oaths for *all* House members at the start of *any* two-year term. Likewise, new oaths were taken by senate members who were returned to the Senate by the voters, or prior to the Seventeenth Amendment, by the state legislatures. Moreover, President George Washington took a new oath of office when his second term began. To this day, members of Congress have to take current oaths without regard to prior oaths that they may have taken in prior terms, or for service in regard to the other chamber, or without regard to having held some other government position which required the same oath. The same is true for second term presidents and a variety of other and lesser positions we are all familiar with. Federal district court judges who are elevated to the federal circuit court, or elevated to the United States Supreme Court, also take a new oath of office. When one swears as a witness to tell the truth, the whole truth, and nothing but the truth in court, does that oath of truthfulness extend beyond that trial, and into, for example, a subsequent trial with different parties? Could one be held in contempt of court for lying a few months later in an entirely different proceeding? We think the answers to these questions are *no*.

In 1861, at the time Stephens was elected to the (purported) confederate congress, and then to the position of vice president of the (purported) confederacy, Stephens was not a member of the U.S. Congress. His last term had already ended in 1859. So did Stephens violate his oath? It is a matter reasonable people can dispute. But Baude and Paulsen are wrong to state the answer is unequivocally *yes*.

Why does this question matter? Under the prevailing view, a person like Stephens could not be accused of violating his constitutional oath from before the Civil War. Part of Section 3's

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184 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2898–99 (1866). There were similar comments about the scope of Article VI oaths from other members, including Senator John Sherman of Ohio. *Id.*

185 *Id.*

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achievement was to eliminate the need to consider that issue. Section 3 reached back and disqualified certain people who had taken a constitutional oath for covered positions, even if they were no longer holding that covered position when they committed a Section 3-related offense. Stephens could have been disqualified pursuant to Section 3. Section 3 took off the table any consideration that a covered person violated his oath or committed perjury when he took it. This facet of Section 3 thus reduced the moral opprobrium attached to any finding of Section 3 liability. Chase also alluded to this point in *Griffin's Case*. Chase stated: "[O]ne of the objects of . . . [S]ection [3] was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office . . . ."[186] This is not the tone of a discussion relating to an odious crime.

That analysis goes some distance towards resolving any issue concerning Section 3's coverage of the (purported) vice president of the (purported) confederacy. What about the confederacy's (purported) president? A Section 3 disqualification would not turn on whether Senator Jefferson Davis was still in office when he went rebel.[187] Davis could have been disqualified pursuant to Section 3 based on his oath *before* he went rebel.[188]

We offer one more example to illustrate the point about retroactivity. Baude and Paulsen affirm that any wrong for which a person should be disqualified for under Section 3 would also be an impeachable offense.[189] With this affirmation, we might expect scores

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[186] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 25–26 (C.C.D. Va. 1869) (No. 5,815).

[187] *Jefferson Davis' Farewell Address (Jan. 21, 1861)*, *reprinted in* THE PAPERS OF JEFFERSON DAVIS, https://jeffersondavis.rice.edu/archives/documents/jefferson-davis-farewell-address; *see also Jefferson Davis's Farewell,* U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Jefferson_Davis_Farewell.htm. We assume that Davis's farewell address was a lawful resignation, but Section 3 liability does not hinge on this issue.

[188] Lest there be any doubt, our position is that former U.S. Senators and Representatives who took their Article VI oath and then actively and voluntarily joined the confederacy were all squarely covered by Section 3. *See* Blackman & Tillman, *supra* note 8, at 35. That said, enforcement requires a statute.

[189] Baude & Paulsen, *supra* note 1, at 124 ("And if a candidate for President, or an already-elected President, is constitutionally disqualified from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress through the *impeachment process*, and by the Vice-President, cabinet and, Congress in carrying out the Twenty-fifth Amendment." (emphasis added)); *id.* at 29 n.90 ("An officeholder who has engaged in insurrection or rebellion or given aid and comfort to enemies of the United States has surely committed a 'high Crime or Misdemeanor' within the meaning of

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of impeachments and disqualifications of then-current, or perhaps even former,[190] "officers of the United States," who gave aid and comfort to the confederacy. Yet only one person was impeached in regard to Civil War wrongdoing. Who was it?

It was not Jefferson Davis or Alexander Stephens, who both had served in the United States Congress. It was West Hughes Humphreys. Who was he? In 1861, hundreds, if not thousands, of elected and appointed, federal and state, officials and officers in seceding States supported the confederacy, and then took positions in the rebel national and state governments. More than a dozen United States judges in seceding States became judges in the (purported) confederate courts. Humphreys was one such judge.[191] He was impeached, convicted, and disqualified for supporting the (purported) confederate government.[192] Humphreys remains one of only three defendants in U.S. history to have been disqualified by the Senate.

Why did Congress impeach *only* him? Why did Congress focus like a laser beam on him alone among former U.S. officials, officers, and judges? Unlike the other judges, Humphreys, for whatever reason, failed or chose not to resign from his Union position *before* taking his

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Article II, section 4's description of the scope of the *impeachment* and removal power." (emphasis added)).

190 Baude wrote that the Senate can try an impeachment of a former "officer of the United States. *See* Will Baude, *Does the Chief Justice Preside over an Ex-President's Impeachment Trial?*, REASON: VOLOKH CONSPIRACY (Jan. 15, 2021, 7:24 AM), https://reason.com/volokh/2021/01/15/does-the-chief-justice-preside-over-an-ex-presidents-impeachment-trial/. *See generally* Brian Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 1 (2001). In this Article, we take no position on whether the Senate can try a former-office holder who was impeached while still in office. In this Article, we take no position on whether the House can impeach a former-office holder who is no longer in office.

191 Amy H. Sturgis, *West H. Humphreys*, TENN. ENCYCLOPEDIA, https://tennesseeencyclopedia.net/entries/west-h-humphreys/; Kaitlin E. O'Brien & Ian Binnington, West H. Humphreys: A Civil War Impeachment, Powerpoint Presentation, https://sitesmedia.s3.amazonaws.com/history/files/2013/11/Kaitlin-E.-O%E2%80%99Brien-work-with-Ian-Binnington-summer-2013.pdf.

192 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ch. LXXIV, §§ 2385–97, 805–20 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; *id.* § 2390 (reproducing articles of impeachment, and Article I expressly alleging that Humphreys violated his oath).

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confederate one.[193] Humphreys *violated* his Article VI oath, and he was held accountable for it.

However, the case was less clear for others who were out of office when they went rebel, or who actively and lawfully resigned their Union positions prior to going rebel. They presented a more difficult case precisely because it was not clear if they violated their oaths. As an aspirational matter, one could say that Humphreys and all these other judges violated their oaths, but as a legal matter, other than Humphreys, the others who had resigned prior to going rebel probably did not. (The House may have also concluded, *contra* Baude, that a former official, e.g., one who had resigned, could not be impeached and disqualified, but it was still possible to impeach Humphreys precisely because he had not resigned.)

Section 3 avoided this issue: it covered people who had previously taken an oath, but were no longer in office. Such persons could still be subject to future disqualification. Moreover, Section 3 pinned liability on those persons who had taken prior oaths to uphold the U.S. Constitution, without conditioning liability on their having violated that oath or having committed perjury when taking it.

We do not doubt that Baude and Paulsen can find records of many in the 1860s who would have characterized Stephens and others similarly situated just as they (Baude and Paulsen) do: people who had violated their oaths. But the fact that *none* of these people were impeached provides some evidence against their position. Moreover, these scattered statements, untethered to actual enforcement actions taken, are simply evidence of original intent and expectations. In interpreting Section 3, our goal ought to be to *understand* Section 3's words and the parliamentary and legal history of oath-taking which it incorporated.

These debates about Stephens, Davis, and Humphreys raises an even deeper question: how far back could Section 3 reach?

c. How far back would a retroactive Section 3 reach?

There is another possibility in regard to retroactivity. This view might even more greatly offend our intuitions rooted in fair play and due process—so hang on.

Section 3 makes three temporal references. First, Section 3 applies to a person "having *previously* taken an oath" in a covered position. We think this language would squarely include a person who swore such an oath *before* and *after* the Fourteenth Amendment was

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[193] *See* O'Brien & Binnington, *supra* note 191.

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ratified. Indeed, the hook to disqualify most rebels was that they had previously sworn an oath to the Constitution before the Civil War began. Second, a Section 3 disqualification is triggered if a person "*shall* have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Baude and Paulsen emphatically contend that this provision was not restricted to the Civil War. Under their reading, the word "shall" refers to conduct both *before* and *after* the Fourteenth Amendment was ratified. Again, the hook to disqualify rebels was that they engaged in insurrection. But, Baude and Paulsen contend, this provision was by no means limited to the Civil War.

These first two temporal references should not be controversial. But the third temporal problem is not so clear. The disqualification element of Section 3 begins, "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state," if he is subject to a Section 3 disqualification. What does "shall" mean here?

If "shall" only has a *prospective* meaning, then the disqualification element would read "No person *shall* [after this amendment is ratified] be a Senator or Representative in Congress, [etc] …." Under this reading, the amendment was prospective in regard to its effects, but allowed for retrospectivity in relation to the elements establishing the disability. This reading of Section 3's first "shall" would not raise any unique concerns regarding retrospectivity. But that is not the only reading.

In the offense element of Section 3, Baude and Paulsen contend that the word *shall* refers to a period of time both *before* and *after* the Civil War. That is, Section 3 was not limited to disqualifying confederates rebels, but will apply to future insurrections as well. What if "shall" has the same meaning in the disqualification element of Section 3 as it does in the offense element? What if the Fourteenth Amendment retroactively disqualified people prior to 1868, who had engaged in an insurrection before 1868? The Fourteenth Amendment could be read in this fashion: "No person *shall* [ever] be a Senator or Representative in Congress, [etc] . . . ." Under this reading, the amendment allows for retrospectivity in regard to all its elements, including the elements establishing liability and the disability created.

Your first response might be, *there is no way the Framers of the Fourteenth Amendment would have intended this result*. This response falls for the fallacy of original intentions. (More on that later.[194]) The

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[194] *See infra* subpart V(E).

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original public meaning of a constitutional text does not always neatly map onto the intentions of those who framed the document. Sometimes constitutional text leads to unanticipated consequences. Look no further than debates over the Eleventh Amendment. Baude and Paulsen do not concede this point; rather, they have emphatically embraced it.

Your second reaction might be, *so what?* Why would it matter if a person, who left office before the Fourteenth Amendment was ratified, was retroactively disqualified from office after the Fourteenth Amendment was ratified? He was already out of office, so who cares? Yet this question resembles the question presented in *Griffin's Case*: What happens to the actions of a person who was disqualified by virtue of Section 3? Are those actions invalid, or are those actions saved by something akin to the De Facto Officer doctrine? We suggest that these questions were on Chief Justice Chase's mind—and he alluded to this situation in his opinion.

Chase offered a hypothetical. "Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country . . . ."[195] He then asked, "Is it a reasonable construction of the amendment which will make it annul every official act of such an officer?"[196] Baude and Paulsen dismiss this statement, as part of a "parade of horribles [that] assumes, without argument, the correctness of his own apparent policy prejudices."[197] They add a dismissive parenthetical "(so?),"[198] as if to ask, "*So what?*" This hyperbole is poorly placed. Many modern readers may have misunderstood the relevance of Chase's reference to the Mexican–American War. But the legal issues arising from that war would have been well known to Chase's generation.

In 1868, in addition to Chief Justice Chase, there were all sorts of Republicans, former Republicans, and others who supported the Fourteenth Amendment. Some of them were former Whig Party members, former Unionist Party members, former Free Soil Party members, former American Party members (a/k/a Know Nothing Party members), not to mention many other members of many other smaller long-forgotten parties and independents. Abraham Lincoln was one such person, and Lincoln had opposed President Polk's war: the Mexican-American War. And that may be the primary reason he was a one-term Congressman.

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[195] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 25 (C.C.D. Va. 1869) (No. 5,815).

[196] *Id.*

[197] Baude & Paulsen, *supra* note 1, at 40.

[198] *Id.*

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Lincoln actively opposed a *declared war* between *belligerents which recognized one another internationally*. It was not messy—it was not like the Civil War. Mexico was an "enemy" nation of the United States.[199] Was Lincoln's speech in public and private proscribed under Section 3?[200] Did he give aid and comfort to an enemy of the United States? Baude and Paulsen develop all sorts of precedents in regard to speech; they have very general views on the subject. But they put forward no grounded, clear rule of law to decide how far Section 3 could limit First Amendment rights and free speech principles during war time. What they are sure about is that Section 3 overturns prior constitutional law, including prohibitions on retroactivity. Under Baude and Paulsen's view, there are substantive questions to be asked and answered: Does Section 3 repeal, at least in part, the Free Speech Clause of the First Amendment and then extant free speech norms? Did Section 3 disqualify those who had opposed a declared war? Could Section 3 have retroactively disqualified those who were convicted of violating the Alien & Sedition Act—if any were still alive? Did Section 3 repeal, at least in part, the Speech or Debate Clause? Did Section 3 repeal, at least in part, the Judge of the Elections Clause?[201] Baude and Paulsen have no theory to explain how prior provisions of the constitution were modified by Section 3. (We will address this question below.)

Had Lincoln survived until 1868, would he have been a Section 3-covered person? Would his conduct during the Mexican-American War have disqualified him from holding future office? Baude and Paulsen's theory leave us with no clear answers. Of course, he was dead by 1868, so neither then nor now could he be disqualified in the sense

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[199] CARLTON F.W. LARSON, ON TREASON: A CITIZEN'S GUIDE TO THE LAW 136 (2020) ("Only five wars have been formally declared under the United States Constitution: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. All the convictions under the Constitution for adhering to the enemy have come in one of these wars. In each case, the countries against which we declared war were enemies from the moment of the declaration of war until the final conclusion of peace, and the provision of aid and comfort to them constituted treason.").

[200] Speech delivered by Abraham Lincoln in the House of Representatives, January 12, 1848, *reprinted in* MODERN LATIN AMERICA: SUPPLEMENT FOR THE 8TH EDITION, BROWN U. LIBR., https://library.brown.edu/create/modernlatinamerica/chapters/chapter-14-the-united-states-and-latin-america/primary-documents-w-accompanying-discussion-questions/abraham-lincoln-on-the-mexican-american-war-1846-48/.

[201] *See supra* section I(B)(2) (noting that under Baude and Paulsen's view of the impact of Section 3, each house may no longer be the "sole" judge of its own elections).

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of being actively removed. But the analysis does not stop there. The rabbit hole goes deeper. In the same sense that we can ask if Judge Sheffey was actually a judge for *Griffin's Case*, we can also ask: If Lincoln were a Section 3-covered person, was he *ever* President? And if his actions brought him under the aegis of Section 3, what becomes the status of his official acts?

Now you might respond: Of course, Lincoln was President. Two elections and a universe of public records confirm that. But it is not quite that easy. Baude and Paulsen explain that later constitutional amendments are superior to prior constitutional provisions, and *a fortiori*, it follows that later amendments certainly can upset legal conclusions established under prior law. As to retrospectivity: if you will allow the position-triggering element, the oath, and the offense element to be evaluated for pre-1868 conduct, why not also allow the disqualification to reflect holding positions prior to 1868? What is the principled grounds (if any) for the distinction? Indeed, textualists would favor a reading where the same word, used twice in the same sentence, has the same meaning. In Section 3, "shall" is such a word. And that meaning would include *both* the period before and after 1868. But it is not the text that distinguishes the two readings. Rather, it is the sense that one reading more greatly offends our dearly held moral intuitions about fair-play and justice. As to retrospectivity, that ship had already sailed in *Calder v. Bull* (1798), when the Supreme Court limited the scope of the Ex Post Facto Clause to criminal proceedings. That ship reached port when the Senate in 1837 retrieved the 1834 *Senate Journal* and proceeded to expunge the prior Senate's censure of President Jackson.[202] Indeed, we suggest anyone favoring late impeachment should be untroubled by the retrospectivity possibilities and concerns we raise here.[203]

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[202] *Senate Reverses a Presidential Censure*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/parties-leadership/senate-reverses-a-presidential-censure.htm.

[203] See Michael Stokes Paulsen, *The Constitutional and Moral Imperative of Immediate Impeachment*, THE BULWARK (Jan. 8, 2021, 5:37 AM), https://www.thebulwark.com/the-constitutional-and-moral-imperative-of-immediate-impeachment/ ("There is a fair argument that the Constitution would permit impeachment, conviction and disqualification from future office even of a former president, in order to impose the punishment of disqualification."); Baude, *supra* note 190.("President Trump has been impeached, and the trial seems unlikely to begin until he is no longer the President. There is some dispute about whether the Senate can try an impeachment of an ex-official. But it has done so in the past, most famously in the case of ex-Secretary of War William Belknap, and for reasons adequately covered by others I think that is proper.").

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Is it really that implausible to think that Section 3 could apply retroactively to a person who was already out of office? Retrospective law-making is an American tradition. Consider the case of Senator Hiram Revels, who was the first black person elected to the United States Senate.[204] His Senate term began in 1870. At the time, did he meet the requirements of being a citizen for seven years? After all, stretching from 1857 to 1863, *Dred Scott* was still the law of the land, and the Fourteenth Amendment was only ratified in 1868. Some senators argued that Revels was not qualified. But the Senate administered the oath to Revels, in effect retroactively applying Section 1 of the Fourteenth Amendment 's citizenship provision. Prior to 1868, Revels might not have experienced life as an American citizen for seven years. Under *Dred Scott* (1857), he was not a citizen. But the Fourteenth Amendment changed all that. Section 1 apparently retroactively made Revels a citizen for the time period he had experienced life as a non-citizen. And the Senate seated Revels.

So what follows? Here we pose a hypothetical: If Lincoln was never President, and if some strong version of the De Facto Officer does not apply, it means all the bills that were presented to him, were not presented to a President, and all the bills he signed in the last ten days prior to the end of Congress's adjournment were not signed by a President. Every one of those latter bills was a pocket veto. One such bill was the Treason Act of 1862.[205] That's the statute that Jefferson Davis was tried under.

So you see, Chase had some good reason, in *Griffin's Case*, to distinguish the position of elected officials from others covered under Section 3.[206] He had good reason to consider the De Facto Officer doctrine. He had good reason to flag the Mexican-American War. He also had good reason to flag these issues to the public and Congress. Baude and Paulsen characterize Chase's opinion in *Griffin's Case* as a "power grab."[207] It was anything but that. Chase left it to Congress to define the scope of Section 3's retroactivity and to define the limits of how far the De Facto Officer doctrine should apply. He put Congress on notice that it could, if it so chose, distinguish elected officials and

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[204] *Hiram Revels: First African American Senator*, SENATE HIST. OFF.: SENATE STORIES BLOG (Feb. 25, 2020), https://www.senate.gov/artandhistory/senate-stories/First-African-American-Senator.htm.

[205] Baude and Paulsen discuss the Second Confiscation Act at some length. *See* Baude & Paulsen, *supra* note 1, at 81–84. We discuss this statute below. *See infra* subpart IV(B).

[206] For a discussion of this issue, see *infra* subsection II(B)(5)(g).

[207] Baude & Paulsen, *supra* note 1, at 47.

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appointed officers, and that the scope of the habeas remedy was one for them to decide, and until they do so, he would apply settled law. If this is not judicial humility, then what is? All these issues were difficult to resolve. Humility, and not hyperbole, is the order of the day—for Chase, as well as for those of us who would second-guess his judgments.

d. A theory for how constitutional amendments modify or repeal earlier provisions of the Constitution

It is well known that certain constitutional amendments modify or even repeal earlier provisions of the Constitution. These changes can be made expressly. For example, the Twenty-First Amendment stated clearly that "The eighteenth article of amendment to the Constitution of the United States is hereby repealed."[208] Prohibition was repealed, though the States were granted some constitutional authority to regulate "intoxicating liquors."[209] Likewise, the Eleventh Amendment restricted the "judicial power" of the federal courts that had been originally granted by Article III—though exactly what that amendment accomplished remains debated to this day.[210] The Twelfth Amendment modified the process by which the President and Vice President are elected.[211] And the Seventeenth Amendment provided for the direct election of Senators.[212] Other amendments modify earlier provisions of the Constitution without an express statement. For example, in the Three-Fifth Clause, the phrase "other Persons" referred to slaves.[213] The Thirteenth Amendment abolished slavery.[214] As a result, the Three-Fifth Clause no longer operated. This repeal was clear, even if not express.

Other amendments are expressly prospective. The Seventeenth Amendment, which provided for the popular election of senators, would not affect the terms of senators *already* elected by state legislatures: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution." Similarly. prohibition under the Eighteenth

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208 U.S. CONST. amend. XXI.

209 *Id.*

210 U.S. CONST. amend. XI.

211 U.S. CONST. amend. XII.

212 U.S. CONST. amend. XVII.

213 U.S. CONST. art. I, § 2, cl. 3.

214 U.S. CONST. amend. XIII.

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Amendment was expressly prospective; it would only go into effect "one year from the ratification of this article." The Twentieth Amendment, which changed when the President's term began, and also when Congress assembled, was also expressly prospective. That amendment would "take effect on the 15th day of October following the ratification of this article." The Twenty-Second Amendment imposed a two-term limit for the presidency. But the amendment included fairly intricate rules to ensure it was not applied retroactively: "But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term."[215]

For the Eleventh, Twelfth, Thirteenth, Seventeenth, and Twenty-First Amendments, it was fairly obvious which earlier-in-time provisions were being amended. But what about Section 3 of the Fourteenth Amendment? Which (if any) earlier-in-time provisions of the Constitution were modified?

Baude and Paulsen tell us that "Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment."[216] Stated differently, in the absence of Section 3, it would violate the First Amendment to disqualify a person from certain positions for engaging in protected speech. But with Section 3, the argument goes, a person could be disqualified for engaging in otherwise protected speech, notwithstanding the First Amendment. This is a robust and sweeping claim. Section 3 says nothing at all about modifying the First Amendment. Yet for Baude and Paulsen's argument to work, Section 3 would have had to *sub silentio* modify the freedom of speech. But how was it modified? And what are the contours of Baude and Paulsen's theory? They offer nothing close to a generally-applicable theory that would extend beyond Trump's case.

Consider the example of Congressman Clement Vallandigham of Ohio. Vallandigham, a Democrat, served in Congress from 1858 to 1863. He was a prominent critic of President Lincoln's prosecution of the Civil War.[217] In 1863, after his last term as a Representative had

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215 U.S. CONST. amend. XII, § 1.

216 Baude & Paulsen, *supra* note 1, at 53.

217 *Representative Clement Vallandigham of Ohio*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES,

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ended, he gave a fiery anti-war speech. He was later charged by a military commission with "publicly expressing . . . his sympathies with those in arms against the Government of the United States."[218] The charge was akin to Section 3's "giving aid and comfort to enemies"-language. Vallandigham claimed that his speech was protected by the First Amendment. Yet, he was still convicted. The case made its way to the Supreme Court. However, the Supreme Court held that it lacked the authority to hear his appeal from the military tribunal.[219] Thus, the Court had no occasion to consider the First Amendment issue. Today, the widely held view is that Vallandigham's speech should have been protected by the First Amendment. For example, Chief Justice Rehnquist questioned the decision to "arrest[] and try[] Vallandigham, who had simply expressed views strongly critical of the administration."[220]

Could Vallandigham have been disqualified pursuant to Section 3, for giving aid and comfort to confederates and the confederacy–actual wartime enemies? Stated differently, would the First Amendment prohibit the use of Section 3, based on Vallandigham's speech? Or, did Section 3, enacted in 1868, retroactively repeal the Free Speech Clause and its protections, that Vallandigham otherwise would have enjoyed when he gave his speech in 1863? Baude and Paulsen do not tell us. They are noncommittal. They state: "It is conceivable (though we do not prejudge the point) that [Congressman] Vallandigham's anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech."[221] Which is it? Why are they noncommittal? We very much appreciate a cautious approach. Our problem is that Baude and Paulsen have engaged with the issue, but they do not answer it, and they put forward no rule thatcould provide us with an answer. Instead, they reproduce case histories and illustrate how they were resolved by the courts or by Congress. But they do not explain which precedents ought to be followed and why.

Baude and Paulsen assert that their view on the interplay between Section 3 and prior constitutional provisions is not just plausible, but emphatically correct. Indeed, they affirm: "essentially *all*

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https://history.house.gov/Historical-Highlights/1800-1850/Representative-Clement-Vallandigham-of-Ohio/.

218 *Id.*

219 *See Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 253–54 (1864).

220 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 73 (1998).

221 Baude & Paulsen, *supra* note 1, at 60.

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the evidence concerning the original textual meaning of Section Three . . . points in the same direction."[222] If they want to represent that they understand Section 3's original public meaning, then they should be able to articulate how Section 3 would be applied to one of the most prominent antiwar critics who had served in Congress. Did Vallandigham face liability under Section 3 for his speech or actions or both? If they can't resolve the status of Vallandigham's speech and conduct during the 1860s in light of Section 3—an issue that the Nation and the Reconstruction Congresses were familiar with—how can Baude and Paulsen provide guidance resolving the status of Trump's 2021 speech and other conduct in light of Section 3? If you cannot resolve the former, how is it possible to resolve the latter?

Baude and Paulsen should also be able to discuss whether Abraham Lincoln could have been disqualified for his opposition to the Mexican–American War for his conduct and speeches during the time he served in the House.[223] Did Section 3 retroactively repeal, in any way, the traditional protections of the Speech or Debate Clause? Baude and Paulsen state that "Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause," but we do not see where they ever explain how they arrived at the conclusion.[224] Indeed, the phrase "Speech or Debate" appears nowhere else in their article. Members of Congress, including Jefferson Davis and Clement Vallandigham, gave speeches on their chamber's floor supporting or tending to support the (purported) confederacy.[225] Thus, it is likely that this sort of conduct would have been on the minds of those who framed and sought to understand Section 3 in 1868. Yet, Baude and Paulsen provide no concrete answers.

Let's state the issue more clearly through a series of hypotheticals. Imagine that the United States finds itself in a declared war against a recognized belligerent foreign nation. Which of the following acts, if any, singly or collectively, by a member of Congress would trigger disqualification under Section 3:

1. Voting against a declaration of war;
2. Speaking against continuing the war on the floor;
3. Voicing the view that the war is unjust and illegal on and off the floor;

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[222] *Id.* at 103.

[223] *See supra* subsection II(B)(5)(c).

[224] Baude & Paulsen, *supra* note 1, at 52.

[225] See *supra* subsection II(B)(5)(b).

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4. Voicing the view that those who fight and support the war are sinful, deserving of G-d's wrath, and the moral opprobrium of neighbors, and that who oppose the war (even unlawfully) deserve G-d's bounty, praise, and the good will of neighbors;
5. Condemning those who fight in the war and those who do not seek to lawfully escape any duty to fight;
6. Repeating all these views in public and private, communications with the member's constituents, the public, and the media;
7. Voting against funding the armed forces in relation to prosecuting the war;
8. Voting against providing funding to the Justice Department in relation to prosecuting deserters;
9. Asking the public to vote against the administration and all other elected officials who support the war;
10. Urging like-minded voters to coordinate their opposition to the war "by all legal means";
11. Promising that if a majority of like-thinking members and a candidate for President should prevail at the next election, the new administration would use the government and its resources to pardon those who had already violated the law in opposing the government's war policies;
12. Promising that the new, like-thinking administration would seek to punish those who had promoted and prosecuted the war, for any legal violation they had committed, no matter how inconsequential and even if those violations were not connected, in any way, to war itself.

Careful readers should see historical analogs in at least some of the hypotheticals above. Would any or all of the hypotheticals above permit Section 3 sanctions against the member? If Baude and Paulsen cannot clarify what their position is in regard to these Vallandigham-lite and Vallandigham-like hypotheticals above and how they arrived at that position, then they do not have a theory of constitutional change or a fully fleshed-out theory of the scope of Section 3. We think they need both.

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e. Retroactivity in Griffin's Case

Chase raised concerns about retroactivity in his *Griffin's Case* opinion. The prior two sections illustrate a few of the implications of Section 3-related retroactivity. Baude and Paulsen's response is that the Fourteenth Amendment changed prior law, and that it was so understood as breaking with past retrospectivity principles. Of course, Baude and Paulsen are correct on this narrow point. Chase and Congress and the country also knew that Section 3 imposed a retroactive burden of some sort. But what sort? Chase still needed to know what *particular* retroactive burdens the Fourteenth Amendment imposed.

Again, Chase reasoned that if Section 3 is applied retroactively, absent authorizing legislation, then covered persons' subsequent official acts may be void or, at least, otherwise in doubt. The reliance interests which would be upset, both private and public, would be significant and that such retrospective liability is not consistent with traditional ex post facto and retrospectivity principles. All this counsels against imposing a retroactive disability. On the other hand, Chase also states, as a potential alternative basis for his holding, that Sheffey's public acts are saved under the De Facto Officer doctrine. If the latter position based on the De Facto Officer doctrine is correct, then the feared undesirable consequences associated with imposing retroactive liability are muted. Baude and Paulsen see Chase as having issued two inconsistent positions.

Now consider how the Congress and loyal public opinion may have understood Chase's opinion. If Chase was *wrong* about the Fourteenth Amendment being non-self-executing, could and should Congress have relied on the Supreme Court and the loyal federal judiciary to correct Chase's mistake?

No appeal to the Supreme Court was possible in *Griffin's Case*. Chase would have the last word in that particular litigation. Why? Because of the Act of March 27, 1868.[226] This statute was a set of jurisdictional and other reforms, famously discussed in *Ex parte McCardle*,[227] which sought to restrict Supreme Court appellate review in order to insulate from Supreme Court review what is, and what was sometimes called, Radical Reconstruction. But there would be other circuit justices in other circuits who might rule differently from Chase. The optics of that potential circuit split would be bad—as the resulting rights accruing to Section 3-covered persons would vary circuit by

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[226] Act of March 27, 1868, ch. 34, 15 Stat. 44.

[227] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 509–10 (1868).

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circuit. Likewise, if the Congress took this approach, and risked one or more circuit splits, they would be leaving Chase's decision intact in Virginia: the former capital of the former (purported) confederacy. Such a circuit split would have created significant problems across the Nation. Congress could also take the approach that even if no direct appeal was possible in *Griffin's Case*, the decision could be overruled in a subsequent Supreme Court case arising under the Court's remaining appellate jurisdiction or, possibly, under its original jurisdiction. But if Congress trusted the Court's members, then it would not have passed the Act of March 27, 1868. And, of course, waiting for the same issue to reach the Supreme Court might be undesirable: as it left Section 3's ultimate objective in limbo until such a case should be decided in accord with Congress's Section 3-related objective.

To put it another way, Congress responded to *Griffin's Case* by passing substantive enforcement legislation: just as Chase thought Congress needed to do.[228] The Enforcement Act of 1870 was passed about a year after Chase issued his *Griffin's Case* opinion. Admittedly, individual members might have had any number of reasons to pass this legislation. But the key reason we suggest was not that its members feared Chase was *wrong* on the self-execution issue, but that they feared, as a legal matter, Chase was *correct*. What do we mean by correct? Correct in the sense that Congress's members feared that (at least) four other of the eight Supreme Court Justices (in office in May 1870) agreed with Chase, along with a substantial number of judges on the inferior courts.[229] Indeed, at this juncture, when the Enforcement Act of 1870 was enacted, the Supreme Court included: 5 Lincoln appointees (including Chief Justice Chase), 2 Grant appointees, as well as Grier—the author of the majority opinion in *The Prize Cases* (decided Mar. 10, 1863). Surely no one can impugn the loyalty of these men. If, in fact, so many judges and Justices agreed with Chase, is not that some good reason to think that Chase's position was in the heartland of the mainstream of legal thinking for his day? Is not that some reason to think his position credible, if not creditable?

Baude and Paulsen see Chase's opinion in *Griffin's Case* as chock full of "weird[] thing[s]"—an incoherent outlier, aggressively deciding issues not properly before the court, and making arguments in

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[228] *See, e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140. The Enforcement Act of 1870 is also known as the "Civil Rights Act of 1870," the "First Ku Klux Klan Act," and the "Force Act."

[229] *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx.

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tension with itself.[230] We see something else—an opinion within the mainstream, in dialogue with the Congress and the loyal populace. But most of all, we see Chase's opinion as a constitutional roadmap.

f. Chase's roadmap to understand Section 3 and retroactivity

Going forward, we will assume that a retroactive disability could only be imposed starting either when the person took his position or when the Fourteenth Amendment was enacted–whichever is later–but not beforehand.

In other words, this is our understanding of how Chase saw Section 3: If the disability is imposed prospectively, then the applicability of the De Facto Officer doctrine need not be reached. But if the disability is imposed retroactively, then the De Facto Officer doctrine is the default rule, but Congress is free to upset that default rule. Likewise, even if Congress displaces the De Facto Officer doctrine, that is not enough reason to expand the reach of the habeas remedy—which has its own jurisprudential history apart from the De Facto Officer doctrine. The default rule for the habeas remedy is that it does not reach claims based upon the illegality of the composition of the trial court. But here too, Congress is free to upset that default rule.

Chase's opinion referenced legislation that operated prospectively. In February 1869, both houses of Congress approved a joint "resolution respecting the provisional Governments of Virginia and Texas."[231] (A joint resolution is a statute.) The joint resolution provided, in part:

> That the persons now holding civil offices in the provisional governments of Virginia and Texas, who cannot take and subscribe the oath presented by the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July 2, 1862, shall, on the passage of this resolution, be removed therefrom.[232]

In other words, under the February 1869 statute, if a person was currently holding a "civil office[]" in Virginia and Texas could not take

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230 Baude & Paulsen, *supra* note 1, at 45.

231 Res. No. 8, 40th Cong., 15 Stat. 344 (1869), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=377.

232 *Id.*

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the Ironclad Oath,[233] then they would be removed from office. Chase reasoned that the officeholders who were unable to take the Ironclad Oath would likely be subject to the disqualification element of Section 3. Stated differently, those subject to disqualification pursuant to Section 3 would be removed pursuant to the February 1869 act. From this statute, Chase drew an inference: Congress did not regard officeholders in Virginia, who were *already* subject to disqualification under Section 3 of the Fourteenth Amendment, which had been ratified in 1868, "as having been *already* removed from office."[234] If Section 3 had been self-executing, a Section 3-covered person would already have been removed from office, and the February 1869 joint resolution would have been unnecessary. Chase added that this joint resolution further supports his conclusion that Section 3 did not "effect[] an immediate removal of the officers."[235] Indeed, Chase found "strong confirmation" for his position in this joint resolution.[236] In short, subsequent legislation would be necessary to remove Section 3-covered persons from office.

Professor Magliocca has expressed the view that the reason Chase may have taken the position that congressional enforcement mechanisms may have been necessary in *Griffin's Case* was that, during Reconstruction, Virginia was not a properly reconstructed State, and so, the State was not in a position to make statutes to enforce Section 3.[237] In that situation, only Congress could do so. In correspondence, Professor Magliocca identifies the key features of Reconstruction as a lack of representation in Congress and military governance. (The authors thank Professor Magliocca for his willingness to clarify his position in private correspondence. Such cooperation among scholars who disagree with one another has become all too rare.)

Still, Magliocca does not say that elections were not held at that time for state positions. He does not say that the state legislature was not meeting or was disabled from making laws—including election

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[233] Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502 (1862), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=533; Margaret Wood, *Oath of Office*, LIBR. OF CONG. BLOGS: IN CUSTODIA LEGIS (Jan. 6, 2015), https://blogs.loc.gov/law/2015/01/oath-of-office/.

[234] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5,815).

[235] *Id.*

[236] *Id.* at 26.

[237] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. 87, 105 n.92 (2021).

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laws—even if subject to review by federal military authorities. More importantly, he does not tie the disabilities Virginia faced during this period to any inability to make state election law that might recognizably enforce Section 3. In 1869, the precise legal status of Virginia was murky: was it reconstructed or unreconstructed? Chase said "It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of congress."[238] We suggest that Chase did not tie his conclusion to the precise status of Virginia at this time.

g. Enforcement by the States

Chase's roadmap had two other important implications. First, Chase explained that because Section 3 was not self-executing, only a statute could put it into effect. But not just any statute: federal or state. It had to be a federal statute. Second, a state statute would not suffice. In Chase's view, a state statute could not operationalize Section 3—at least not absent congressional authorization. He wrote that Section 3 would be made "operative" by the "legislation of congress in its ordinary course."[239] Chase explained that specific proceedings "are indispensable" to "ensure effective results" under Section 3, and these proceedings "can only be provided for by congress."[240] Chase expressly tied his analysis to Section 5 of the Fourteenth Amendment, which "gives to congress absolute control of the whole operation of the amendment."[241]

Congress understood how to assign a role to the States to implement Section 3. For example, on June 25, 1868, about two weeks before the Fourteenth Amendment was ratified on July 9, 1868,[242] Congress enacted a statute that set conditions for the readmission of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress.[243] Section 3 of this Act provides, in part:

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238 *Griffin's Case*, 11 F. Cas. at 27.

239 *Id.* at 26.

240 *Id.*

241 *Id.*

242 *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment.

243 An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat.

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> [N]o person prohibited from holding office under the United States or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided by said amendment . . . .[244]

Through this statute, Congress required the States to deem ineligible those individuals who were disqualified from holding "any office in either of said States."[245] (We think this phrase only concerns state positions in "said states" and not federal positions.) This statute demonstrates that Congress understood how to assign the States a role to enforce Section 3. And this statute was self-executing upon its enactment.

Of course, even in the absence of federal legislation, a state could pass a statute and mirror Section 3's "qualifications," and any such state statutory "qualifications" could extend to its own officials and officers (subject to federal constitutional constraints). This is a power states had before, during, and even after the enactment of the Fourteenth Amendment *for state positions*.[246] But absent congressional authorization, a state statute (even one mirroring Section 3's "qualifications") could not apply to federal officials and officers. Chase read Section 5 as giving Congress a monopoly over enforcement of Section 3.

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73 (1868), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=106.

244 *Id.* § 3.

245 *See generally id.*

246 *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 678 n.1 (Thomas M. Cooley ed., 4th ed. 1873) (explaining that a "State may provide for judicially inquiring into the holding of a state office in violation of this provision"); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) ("In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution.").

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Two state cases which have been discussed[247] are: *Worthy v. Barrett*,[248] and *In re Tate*.[249] The latter relies entirely upon the former case. *Worthy* was a case heard in state court, involving a state position, county sheriff, and it was adjudicated under state law. The state statute incorporated by reference Section 3 of the Fourteenth Amendment. The cause of action was a state cause of action, not a federal one. Judge Reade stated:

> *Our statute* provides that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." Acts of 1868 ch. 1. sec. 8.
>
> The Fourteenth Article of the Amendments to the Constitution of the United States, sec. 3, is as follows . . . .[250]

Thus, Section 3 furnishes the categories for which disqualification would apply. But Section 3 was not applied directly. Actually excluding a person from office still required a state statute supplying a cause of action. A state legislature can supply such a statute for a *state* position because a state always has authority to do so (subject to a few federal constitutional limitations). But there is no such coordinate authority for a *state* legislature to supply a statute which would remove a person from a federal position or deny that person a line on the state ballot for a *federal* elective position—at least, there is no such authority absent a *federal* authorizing statute. We are not aware of any such case, where absent federal authorizing legislation, a candidate for a federal elective position was denied a position on the state ballot[251] based on purported Section 3 disqualification.

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247 *See* Baude & Paulsen, *supra* note 1, at 101; Parloff, *supra* note 176.

248 63 N.C. 199 (1869).

249 63 N.C. 308 (1869).

250 *Worthy*, 63 N.C. at 200 (emphasis added).

251 The secret, written paper ballot was implemented at different times in different states. When we speak about keeping a candidate off the ballot, we are also speaking about instructions to elections officials not to count and tabulate "votes" cast for purportedly disqualified candidates and/or not to grant a certificate of election to a candidate with the greatest number of "votes" because that candidate has been purportedly disqualified. Even if there is no physical, mechanical, or electrical "ballot," judges of election and elections administrators control many other aspects of election administration that, in effect, can exclude a candidate.

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Baude and Paulsen characterize *Worthy* as standing for the proposition that "a state sheriff was disqualified under Section 3."[252] And Professor Mark Graber wrote that in *Worthy* and *Tate*, the "State courts in the absence of federal legislation determined whether persons were disqualified from holding office because of their participation in the insurrection."[253] But those restatements of the two cases are not correct. *Worthy* stood for the proposition that a state officer could be disqualified under a state statute that incorporated or mirrored Section 3's terms. That a state had such power over its own officers was true before, during, and after the ratification of the Fourteenth Amendment. Section 3 was not self-executing, it required a statute, and here the statute was applied to state officers–not any federal positions. Again, Baude and Paulsen's characterization of *Worthy* is not correct.

To make the point a different way, the Fourteenth Amendment was in some ways a constitutional revolution. It expanded federal power vis-a-vis traditional state power.[254] It did so because the experience of the Civil War and early Reconstruction showed that state institutions failed and that the Nation's hopes and aspirations rested, not with the traditional legal system as a whole, federal and state, but with the national government. In short, the States and state governments could *not* be trusted.[255]

The Fourteenth Amendment and contemporaneous federal Reconstruction legislation, both that which implemented the Fourteenth Amendment and other Reconstruction legislation, were enacted precisely because state institutions, state officials, and state courts were *not* considered trustworthy by the national government. The idea was to make federal institutional authority paramount. Indeed, the very sort of powers that Baude and Paulsen believe could be used by state authorities, absent federal authorizing legislation implementing Section 3, could have been used by former confederates (and their sympathizers) to disqualify freedmen and other loyal persons

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252 Baude & Paulsen, *supra* note 1, at 101.

253 Graber, *supra* note 118 at 11.

254 *See* United States v. Washington, 20 F. 630, 631 (C.C.W.D. Tex. 1883) ("The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 255 (2000) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.").

255 *See* GEORGE WASHINGTON PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED xxiv (W.H. & O.H. Morrison, Law Booksellers 1868) (explaining that the purpose and effect of the Reconstruction era amendments was to "enlarge[] the powers of the nation, [and] abridge[] those of the States").

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in former confederate states from holding elective positions.[256] Nor would judicial review solve this problem. Southern state judges were not known for remaining staunchly unionist during the Civil War and Reconstruction. In our view, the idea that the Fourteenth Amendment automatically entrusted state institutions with an independent enforcement power over Section 3 or the Fourteenth Amendment is flatly ahistorical.

The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the whole point of the Fourteenth Amendment was that they could not be trusted. Ask yourself: in 1868, who could have believed that Section 3 was a grant of power to the States? Our argument here is not that allowing States to enforce Section 3 against federal officials and officers risked "abuse" (which it certainly did), but that any argument that Section 3 was a grant of power to state institutions was not one, which in 1868, was likely to be understood to arise in connection with the Fourteenth Amendment's and Section 3's text, history, or purposes. Baude and Paulsen point to floor debate in Congress reporting that Section 3 was "self-executing." We do not see that they reported any sources–*any*–suggesting that the scope of self-execution extended to the States, particularly those States which had recently rebelled against the national authority. And it was these latter States that the Fourteenth Amendment was directed against.

Chase, in Paragraph [2] above, put Congress on notice that *elected* officials stand in a different legal position from *appointed* officers. And Congress followed Chase's advice. The Enforcement Act of 1870 established a federal quo warranto procedure which provided for prospective removal of a Section 3-covered officials and officers, but there was a carve out. It did not apply to legislators.

We suggest that Chase saw no tensions among the different strands of his opinion. He was responding to the legal issues before him, and he was providing a roadmap for Congress and the political process. It was for Congress to prescribe enforcement measures and those detailed measures would resolve any such tensions through the normal political process.

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[256] *See, e.g.*, Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 122–27 (1998). In other words, disqualification is a two-edged sword. *See generally, e.g.*, Tom Ginsburg, Aziz Z. Huq & David Landau, *The Law of Democratic Disqualification*, 111 CALIF. L. REV. (forthcoming 2023), https://ssrn.com/abstract=3938600.

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Let's assume Baude and Paulsen are correct that Section 3 is self-executing as a matter of original public meaning. Let's further assume that States have a coordinate power with Congress to enforce Section 3. Section 3's proscription precludes Section 3-covered persons from "holding" certain "office[s]" and other listed positions. It does not, on its face, give or grant any power vis-a-vis the organization of state ballot procedures. Indeed, many (if not all of) the earliest efforts to enforce Section 3 were quo warranto proceedings by federal prosecutors to remove persons allegedly in office contrary to Section 3 or its early statutory analogues. As Baude and Paulsen repeatedly tell us: the Constitution is a text, and that text is law. Section 3 prohibits a covered person's holding the listed positions, and not his participating in elections for those positions. Saying Section 3 authorizes state ballot control mechanisms over federal positions amounts to an inference akin to a protective jurisdiction. And what we mean by protective jurisdiction is a legal fiction; something not otherwise directly supported by the text.

To put it another way, Baude and Paulsen are putting their paper forward as part-and-parcel of the rule of law project via original public meaning. They also acknowledge that the "centralized, government-administered [secret] ballot did not come to America[] until the late Nineteenth Century."[257] If that is the case, then Section 3 was not written with our current election system in firm view. It follows that if Section 3 (old law) applies to modern state balloting schemes (new law), then an argument has to be made to support that position. But Baude and Paulsen do not make any such argument. They just assume that if the quo warranto remedy to remove a Section 3-covered person was available under Section 3, then it follows that Section 3 also allows ballot restrictions at election time to prevent a Section 3-covered person from running for a listed position. But that is hardly obvious. Indeed, given that Congress authorized federal officials to carry out quo warranto actions against Section 3-covered persons, but later Congress expressly removed that power from U.S. enforcement officials, does it really make sense to think that Congress or the public believed that the States, but not the federal government, retained an unauthorized and independent Section 3 enforcement power?

During the postbellum era, the secret, written ballot was introduced. To implement the new voting regimes, states introduced administrative and/or judicial frameworks to control ballot access. State administrative bodies and state courts regularly determine ballot challenges based on qualifications—including Article I and Article II

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[257] Baude & Paulsen, *supra* note 1, at 23 n.65.

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qualifications for elected federal positions. If this practice was never actually authorized by Congress, the practice certainly appears to be one which Congress has long acquiesced in. Nor is the result surprising. The background understanding of Article I, Article II, and the Constitution of 1788 as a whole was that the States and new federal government would divide and share political power. Powers would be enjoyed concurrently. States were not only components, in a sense, of the national government, but the federal government relied upon the States to carry out many functions without which the federal government could not function. Indeed, the power of the States was seen, by some, as a protection against future federal overreach. In that world, one could make a reasonable argument in support of the position that Articles I and II permitted States to monitor federal qualifications for elected positions on the state ballot.

But in 1868, it was a different world. States were not trusted institutions. Section 3 and the Fourteenth Amendment as a whole were a projection of federal power against the States. So the idea that Section 3 permitted States, via ballot control or other elections procedures, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems (at least to us) very unlikely. And that question hinges on whether Section 3 was self-executing in the sense that it could be used offensively in a suit or proceeding brought by a private person. Chase answered that question with a *no*. Today, the question for us is: Was Chase correct or not?

h. How could the States enforce Section 3 with regard to the presidency?

In light of Chief Justice Chase's opinion in *Griffin's Case*, the States would have no role in enforcing Section 3–at least, absent congressional authorization. But we acknowledge that a state may try to enforce Section 3. This part addresses how that enforcement may roll out. We believe there are two primary approaches which a state could attempt to block a presidential candidate from being awarded a state's electoral votes based on a (purported) Section 3 disqualification. The first approach would involve a state statute authorizing state elections officers to block the (purportedly) disqualified presidential candidate from appearing on the ballot. This approach is not likely to prevent write-in votes. As far as we are aware, no such state statute actually exists. And we do not think the Supremacy Clause, standing by itself, permits (much less obligates) state officials to enforce Section 3.

The second approach would be to prohibit electors from voting for a (purportedly) disqualified presidential candidate. Under the

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principle from *U.S. Term Limits v. Thornton*, states cannot add additional qualifications for the president, but in light of *Chiafalo v. Washington*, it is conceivable that the States have the authority to direct presidential electors to not vote for a disqualified candidate. To be sure, *Chiafalo* did not reach or have occasion to reach this issue.

(1) Does any state statute expressly incorporate Section 3 as a qualification for President?

As far as we are aware, no State has enacted a statute that expressly blocks a presidential candidate from appearing on the ballot based on a Section 3 disqualification. Some states have laws that expressly reference the qualifications for the President that appear in Article II: a candidate must be thirty-five years old, a natural born citizen, and fourteen years a resident of the United States. We have not purported to undertake a fifty-state survey to determine if some states have statutory provisions generally referencing qualifications in the federal Constitution, or something to that effect, which could incorporate Section 3.[258]

In states that *lack* such an express statute, the secretaries of state would not have the power to remove a candidate from the ballot on the basis of a (purported) Section 3 disqualification. A recent opinion from the New Hampshire Attorney General demonstrates this point.[259] The relevant state law "does not afford the Secretary of State discretion to withhold a candidate's name from the ballot on the grounds that the candidate may be disqualified under Section Three when a candidate has not been convicted or otherwise adjudicated guilty of conduct that would disqualify a candidate under Section Three."[260] Rather, the state

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[258] The National Association of Secretaries of States has published an index of presidential qualification laws in all states. *See generally* NAT'L ASS'N OF SEC'Y OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL BALLOT ACCESS FOR THE GENERAL ELECTION (2020), https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20_0.pdf

[259] N.H. Att'y Gen. Off., Opinion Letter on The Applicability of Section Three of the Fourteenth Amendment to the United States Constitution to Presidential Primary Candidates in the State of New Hampshire (Sept. 13, 2023), https://www.doj.nh.gov/news/2023/documents/20230913-section-3-14th-amendment-guidance.pdf

[260] *Id.* at 3. The New Hampshire Attorney General also explained that: "For the purposes of this guidance as applied to Mr. Trump, it is not necessary to determine what, *if any*, conviction or adjudication might permit the Secretary of State to decline to place a presidential primary candidate's name on the ballot . . . ." *Id.* at 4 n.3 (emphasis added).

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can only "review[] the sufficiency of a declaration of candidacy," and cannot "hear[] disputes over whether a candidate is disqualified under Section Three."[261] Likewise, the declaration of candidacy only references the well-known requirements set out in Article II, Section 1, Clause 4 of the Constitution: age, citizenship, and residency. New Hampshire state law does not "empower[] or permit[] the Secretary of State to engage in independent investigation or to conduct an adjudicative process related to a candidate's qualifications under Section Three."[262]

We think the New Hampshire Attorney General's analysis is sound. (And for those keeping score at home, Footnote 1 of the opinion states, "For purposes of this letter, I *assume* that Section Three applies to the Office of the President."[263]). We also think this opinion provides further reasons why state officials cannot determine whether a presidential candidate is disqualified pursuant to Section 3.

(2) The Supremacy Clause does not empower Secretaries of State to enforce Section 3

We address an alternative argument. In New Hampshire, the Attorney General determined that state law does not authorize the Secretary of State to remove from the ballot a candidate based on a (purported) Section 3 disqualification. But would the New Hampshire Secretary of State, who is bound by the Supremacy Clause, still be required to enforce Section 3? In other words, even in the absence of a state statute, does the federal Constitution itself require the Secretary of State to remove a candidate from the ballot based on Section 3?

There is a threshold problem with this alternative argument: it presumes that Section 3 is self-executing. In *Griffin's Case* (1869), Chief Justice Chase held that Section 3 was not self-executing. If Chief Justice Chase was correct, then the role of implementing Section 3, or, at least, authorizing Section 3's implementation, falls initially, squarely, and exclusively with Congress. In the absence of such a federal statute, state officials have no obligation and no power to enforce Section 3–even where a state statute otherwise authorizes such enforcement.

For argument's sake, let's assume that Section 3 does not require federal implementing legislation. In those circumstances, would the Supremacy Clause permit or require a secretary of state to

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[261] *Id.* at 2.

[262] *Id.* at 3.

[263] *Id.* at 1 n.1 (emphasis added).

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determine whether a candidate for federal office is disqualified under Section 3? Stated differently, could a state's secretary of state or any other state elections official, who takes an oath to the federal Constitution, place a candidate on a ballot that he believed to be disqualified by Section 3?

Baude and Paulsen advance a related argument. They criticize a recent decision from the Arizona Supreme Court.[264] In that case, the plaintiff sought to make use of Arizona state election law procedures to give effect to Section 3 by excluding three incumbents from the primary ballot. In short, Hansen, an Arizona voter, claimed that state representative Finchem, U.S. Representative Gosar, and U.S. Representative Biggs had participated in an insurrection on January 6, 2021 in Washington, D.C. The trial court had denied Hansen all relief. The appeal went directly to the state supreme court, which affirmed the judgment below.

The Arizona Supreme Court held that a relevant state statute enforced qualifications for office, and it did not enforce *dis*qualifications from office. Relevant, for our purposes, the court reasoned that the state statute "does not provide a private right of action to invoke the [Fourteenth Amendment's] Disqualification Clause against the Candidates." Baude and Paulsen describe the Court's reasoning as "muddied," "unfortunate[]," "cryptic[]," and "nonsensical."[265] (Their hyperbole is not just reserved for jurists long dead—the members of a state's highest court, here interpreting their own state statute, are at the receiving end of such charged language as well.) We don't understand why Baude and Paulsen have any doubt as to what was the basis of the Arizona Supreme Court's holding. Nothing was "cryptic." The highest court of Arizona addressed the scope and meaning of one of its own state statutes. The text of the statute referred to "qualifications" and not to "disqualifications." Section 3, as Baude and Paulsen repeatedly state, starts with "No person shall be"—so, the Arizona Supreme Court understood it to be a disqualification, rather than a qualification. The state court drew a distinction under state law between qualifications and disqualifications. And this distinction has roots in election law. Probably, the earliest post-independence American decision on this point was *Hall v. Hostetter* in the Kentucky

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[264] Hansen v. Finchem, U.S. Representative Paul Gosar, and U.S. Representative Andy Biggs, No. CV2022-004321, 2022 WL 1468157 (Ariz. May 9, 2022) (en banc).

[265] Baude & Paulsen, *supra* note 1, at 25.

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Court of Appeals.[266] Here, Kentucky's highest court recognized that this distinction had "a good deal of plausibility," and proceeded to rule that as a matter of Kentucky law "qualifications" also encompassed "disqualifications." The court defended its position for two pages. But, one judge—apparently, a deeply committed textualist!—dissented from the court's holding, producing a 2-to-1 decision. We don't hold up the majority or dissent in *Hostetter* as a correct interpretation of Kentucky law. Rather, we suggest that the Arizona Supreme Court's analysis was not "nonsensical," but was at a minimum "plausible." And in no sense was it "cryptic."

Further, Baude and Paulsen charge that the Arizona Supreme Court was wrong as a matter of federal constitutional law. They write, "Congress's power to enforce federal law, including constitutional law, is not exclusive of the states, and the states regularly enforce federal law including federal constitutional law in their own courts."[267] Here, Baude and Paulsen cited the Supreme Court's decision in *Tafflin v. Levitt*.[268]

This citation was misplaced. *Tafflin* was not about causes of action; it was about jurisdiction. The majority opinion mentions the phrase "cause of action" only once, and in passing. We were surprised by this citation. Why? We doubt jurisdiction-focused arguments advance Baude and Paulsen's position. Moreover, Baude and Paulsen's bringing up *Tafflin* did not advance their argument because any discussion of jurisdiction should have red-flagged the historical tradition that Article III is not self-executing.[269] Rather, legislation is needed to create federal courts, to assign jurisdiction, and to create federal causes of action. Again, Congress has not created any federal cause of action with regard to Section 3. And when Congress did enact

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266 56 Ky. (17 B. Mon.) 764 (1856) ("[I]t is insisted that the ineligibility of a sheriff for a third term is a mere disqualification, which does not apply to a marshal, who is only required by the constitution to have the same qualifications as sheriffs, but is not subjected to the same disqualifications. There is a good deal of plausibility in the argument in support of the last position, and we have felt its force; but after a careful examination of the constitution, we have come to the conclusion that the words, qualifications and qualified, are used therein, in their most comprehensive sense, to signify not only the circumstances that are requisite to render a citizen eligible to office, or that entitle him to vote, but also to denote an exemption from all legal disqualifications for either purpose.").

267 Baude & Paulsen, *supra* note 1, at 25.

268 Blackman discussed the limits of *Tafflin* and its tension with *Printz v. United States* in Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033.

269 *See supra* subpart I(A) (discussing how the grant of Article III jurisdiction to the lower courts is not self-executing).

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such a process through the Enforcement Act of 1870, the federal courts had *exclusive* jurisdiction to hear the *quo warranto* suits brought by federal prosecutors.[270] State courts and state election officials had no role in this process.

Baude and Paulsen invoke another federal courts chestnut. They write that "in some circumstances state law not only can but *must* enforce Section Three."[271] Specifically, "[u]nder the rule of *Testa v. Katt*, where a state does open its courts to a[n] [analogous state] cause of action, it must apply federal law evenhandedly to that cause of action."[272] Baude and Paulsen contend, "If the [Arizona Supreme] [C]ourt meant to distinguish federal constitutional qualifications from state statutes [mandating qualifications], it seems to have violated *Testa* [*v. Katt*]."[273] Again, we do not think that Baude and Paulsen correctly read what the Arizona court held as a matter of state law. But we also think they are incorrect with regard to *Testa* and federal law.

If the Arizona Supreme Court had meant to distinguish federal constitutional qualifications from state statutory qualifications, would that distinction have violated *Testa v. Katt*? No. *Testa v. Katt* stands for the proposition that state courts of competent jurisdiction must be open to federal statutory causes of action created by Congress if the state court is already open to analogous causes of action under state law. It is a (default) mandatory nondiscrimination principle. *Testa* has not one word to say about state courts being open to federal causes of action purportedly provided in the *U.S. Constitution*, in the absence of federal legislation.

So *Testa* is not on-point here, and Baude and Paulsen point to no other on-point authority suggesting that *Testa* has expanded or ought to be expanded to cover purported causes of action provided in the Constitution. We should also be hesitant to determine how the Fourteenth Amendment, ratified in 1868, should be enforced in light of *Testa v. Katt*, a Supreme Court precedent from 1947. Indeed, there is some originalist argument to be made that *Testa* and its progeny went too far.[274]

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270 Second Enforcement Act, ch. 99, 16 Stat. 433, 438 (1871).

271 Baude & Paulsen, *supra* note 1, at 25.

272 *Id.*

273 *Id.*

274 Haywood v. Drown, 556 U.S. 729, 756–57 (2009) (Thomas, J., dissenting) ("[T]he Constitution did not impose an obligation on the States to accept jurisdiction over such claims . . . . The Constitution instead left the States with the choice—but not the obligation—to entertain federal actions." (internal citations omitted)); *id.* at 752 ("This historical record makes clear that the

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Now one might reason by analogy: if causes of action in federal statutes must be enforced in state courts under *Testa*'s mandatory nondiscrimination principle, then causes of action in the federal constitution must also be enforced in state courts. After all, both the federal constitution as well as federal statutes are the supreme law of the land per Article VI and, therefore, binding upon every state court and every state court judge. But that proves too much. The Supreme Court has rejected the proposition that "the Supremacy Clause creates a cause of action . . . ."[275] Moreover, U.S. treaties with foreign states are also part of the supreme law of the land, but there is no presumption that they are self-executing.[276] And the Reconstruction Congress well understood how to enact federal statutes–which, of course, were self-executing.[277] But Congress has taken no such action with regard to Section 3. And in the absence of such federal legislation, state courts should hesitate before extending *Testa* to this novel context.

Still, we recognize that the law here is not entirely clear. For that reason, we note that a State could attempt to obviate the *Testa* issue and enact a statute that expressly incorporates Section 3 as a qualification for the President. What then?

(3) What about a hypothetical state statute that expressly incorporates Section 3 as a qualification for President?

We are not aware of any state statutes that expressly incorporates Section 3 qualifications as a ballot control mechanism for a presidential candidate. And we do not think that Section 3, by virtue of the Supremacy Clause, imposes a freestanding obligation on state

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Supremacy Clause's exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the courts lack jurisdiction."); *see also*, Printz v. United States, 521 U.S. 898, 968 (Stevens, J., dissenting) ("That language [the Supremacy Clause] commands state judges to 'apply federal law' in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims . . . ."). For more criticism of *Testa*, see Blackman, *supra* note 268, at 2048–51.

275 *See, e.g.*, Armstrong v. Exceptional Child Ctr., 575 U.S. 320, 326 (2015). *See supra* note 19 (discussing how the Supremacy Clause is not self-executing as a sword).

276 *See supra* subsection I(C)(1)(d) (discussing that treaties are presumptively not self-executing).

277 *See supra* subsection II(B)(5)(g) (discussing enforcement statute enacted on June 25, 1868).

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officials to determine whether a presidential candidate is disqualified by Section 3.

Still, to demonstrate *how* a state law could purport to block a presidential candidate from the ballot based on a Section 3 disqualification, we consider a hypothetical state statute–enacted by the state legislature absent express authorization from a federal statute. This hypothetical statute expressly empowers a state official to determine whether a presidential candidate is disqualified pursuant to Section 3, and to prevent such a candidate from appearing on the presidential ballot. Moreover, to make the hypothetical sound, this statute provides the affected candidate with all the basics of due process, including ample notice, an evidentiary hearing before a neutral magistrate, appellate review through the state court system, with an ultimate appeal to the United States Supreme Court. Would such a statute be constitutional? (Again, we assume for argument's sake that a Section 3 disqualification extends to the presidency.)

In our view, because Section 3 requires federal enforcement legislation, such a state statute would not be constitutional. Congress would have to create a specific procedure to determine whether a person is disqualified under Section 3, or, at least, authorize the states to do so. But assume further for argument's sake that we are wrong on the self-execution point. Would such a hypothetical state statute be constitutional? We think not.

Section 3 says nothing at all about appearing on a ballot. A person squarely disqualified by Section 3 can run for any office he wishes. And he can even be elected to that office. The disability would only kick in when the person seeks to actually "hold" a covered position. Again, we think that Section 3 requires some federal enforcement legislation. State officials cannot make these determinations on their own in the absence of federal legislation specifying the applicable process or authorizing the state to do so—even if a state statute purports to authorize such decisionmaking by state election officials. But there is an even deeper problem with a state official blocking a candidate from the ballot—Congress always retains the power to relieve a person of a Section 3 disability by a 2/3 vote of each house. Any attempts to preemptively remove a person from the ballot anticipates that Congress will not relieve such a disability. As a matter of realpolitik, perhaps this prognostication is sound. But as a matter of constitutional authority, this prediction denies the people the practical ability to vote for a candidate who would have been otherwise eligible and would have been able to hold the position should Congress have granted a Section 3 amnesty. (For this reason, any ballot-access challenges in court based on Section 3 would be categorically *unripe*--

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the disqualification would only begin after the person actually holds or attempts to execute the duties of the covered position.)

Consider a far more mundane example. Article I, Section 2 provides that a Representative "when elected, [shall] be an Inhabitant of that State in which he shall be chosen." In practice, this provision means that a candidate must be an inhabitant of a state *on* election day.[278] But that requirement does not attach at any earlier point--not when the candidate declares his candidacy, not when a primary election is held, and not when the general election ballots are printed. The inhabitancy requirement only kicks in when the representative is "elected" on election day. Under the rule in *U.S. Term Limits v. Thornton*, it would be unconstitutional for a state to require a candidate to be an inhabitant of that state *prior* to election day, in order to appear on the ballot. Such a state law would be adding additional qualifications for holding a congressional seat.

Section 3 applies even further down the road--not on election day, but at the instant in which a disqualified person attempts to hold the covered position. This argument is supported by the text of the qualifications in Article I and the text of the restrictions in Section 3: these provisions begin with the phrase "No person shall be. . . ."[279] The *qualifications* in Section 3 track the *qualifications* in Article I. In our view, both sets of qualifications, which use similar language, only apply when the elected official's constitutional term begins.[280] And, in our view, both sets of qualifications should be tested (at earliest) when the member-elect's constitutional term begins, or when Congress first meets (which may be after the beginning of the constitutional term), or as late as when the member-elect seeks to take his oath of office. By contrast, Article II does not state "No person shall be"—that is hold—

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[278] *See* Schaefer v. Townsend, 215 F.3d 1031, 1037 (9th Cir. 2000), *cert denied sub nom.* Jones v. Schaefer, 532 U.S. 904 (2001) ("California's requirement that candidates to the House of Representatives reside within the state before election violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause." (emphasis omitted)).

[279] U.S. CONST. art. I, § 2, cl. 2 ("*No Person shall be* a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.") (emphasis added); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); U.S. CONST. am. XIV, § 3 ("*No person shall be* a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . . .").

[280] *See supra* Part I.B.3.

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a position. But rather, in two places, the text refers to a person being *eligible* for the position.[281] Eligible could mean either "eligible to hold office," and so function like the qualifications in Article I, or it could mean "eligible to be *elected* to office."[282] We think that the different language used in Article I and Article II suggests that these phrases have different meaning. As a result, the Article II eligibility standards would take effect at the time of the election, and not at the start of the president-elect's constitutional term or when the president-elect chooses to take his oath after the start of his term. As a result, a presidential candidate who is 34 years old on election day would never be eligible for the presidency. However, when we are dealing with a Section 3 disqualification, as applied to the presidency, we are not dealing with the Article II language of *eligibility*, but rather with the Article I language of *No person shall be*. And those requirements kick in much later.

We will assume for present purposes that a Section 3 disqualification extends to the Presidency. With this assumption in place, any potential disqualification would only arise on inauguration day, that is, at the start of the president's four-year term. And it is *impossible* for state election officials to know whether Congress would waive the disability if the candidate won the election. We imagine that if a disqualified candidate in fact was actually elected President, there would be some significant pressure on Congress to remove that disability. But we cannot be certain that such pressure would in conjunction with the candidate's own party members amount to two-thirds of both houses of Congress.

Enforcing Section 3 through ballot access would, in effect, add an additional requirement beyond those stated in the Fourteenth Amendment: that is, such a purported Section 3 disqualification would apply to a person *seeking* the presidency *before* inauguration day. *Powell v. McCormack* and *Term Limits* held that Congress and the

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[281] U.S. Const. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, *shall be eligible* to the Office of President; neither shall *any person be eligible* to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") (emphasis added).

[282] *Compare, e.g.*, Carson v. McPhetridge, 15 Ind. 327, 331 (Ind. 1860) ("The term eligible, as used in our Constitution, relates to capacity . . . of being elected to, an office."), *with* Brady v. Howe, 50 Miss. 607, 626 (1874) (defining "eligibility" in the state constitution as a "disqualification . . . is "to take and hold" a position), *with* State *ex rel.* Schuet v. Murray, 28 Wis. 96, 99 (1871) ("The term 'ineligible' means as well disqualification to hold an office, as disqualification to be elected to an office.").

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States cannot add additional qualifications for members of Congress. These cases did not have occasion to consider whether additional qualifications can be added for presidential candidates.[283] However, the lower courts have extended the holding of *Powell* to the qualifications for the presidency in Article II. Chief Judge Posner wrote that Congress could not modify the requirement "that the President [must] be at least 35 years old . . . ."[284] Derek Muller observed, "courts have occasionally treated the holding in *U.S. Term Limits, Inc. v. Thornton*, which found the qualifications for members of Congress enumerated in the Constitution as exclusive, applicable to presidential elections, too."[285] Recently, California attempted to require presidential candidates to submit their tax returns, but this policy was ruled unconstitutional.[286] And the Arizona legislature passed a bill that would require presidential candidates to submit a birth certificate, but that bill was vetoed.[287]

There is another reason why such prognostication is constitutionally problematic: Congress retains the power to lift a Section 3 disability even *after* inauguration day. The Twentieth Amendment provides that "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." This provision expressly contemplates that the President-elect may not be qualified to hold office but may later become qualified. Again, assuming that a Section 3 disability extends to a person holding the office of the President, Congress could relieve that disability at *any* time during a President-elect's four-year term. Once the disability is relieved, under the Twentieth Amendment, the President-elect would become the President. The operation of the Twentieth Amendment strongly suggests that the States cannot

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283 Our analysis above focuses solely on the Section 3 qualifications, rather than the differently worded eligibility standards set out in Article II and the Twelfth Amendment. Section 3's language tracks Article I's qualifications language, and not Article II's and the Twelfth Amendment's eligibility language.

284 Herman v. Local 1011, United Steelworkers of Am., 207 F.3d 924, 925 (7th Cir. 2000).

285 Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 571 (2015) (footnotes omitted).

286 Stephanie Becker & Kate Sullivan, *California Supreme Court Says Law Requiring Presidential Candidates to Turn over Tax Returns Is Invalid*, CNN (Nov. 21, 2019, 2:57 PM), https://www.cnn.com/2019/11/21/politics/california-tax-returns-trump/index.html

287 Derek Muller, *2011 Flashback: Could Arizona Determine Whether Presidential Candidates Were "Natural Born Citizens"?*, ELECTION L. BLOG (Sept. 14, 2023, 12:52 PM), https://electionlawblog.org/?p=138710

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preclude a candidate from appearing on the ballot simply because he may or may face a Section 3 disability on election day.

Again, consider a far more mundane example. Assume a prevailing presidential candidate is elected who is thirty-four years old on inauguration day. At that time, the Vice President can act as the President. And, once the President-elect turns thirty five, he can be sworn in as President. This waiting game works so long as the President-elect will turn thirty-five at some point during his four-year term. By similar logic, a person disqualified under Section 3, who is not qualified on inauguration day, could become qualified at any point before his term ends. But to draw a contrast, this process would not work for a presidential candidate who was not a natural born citizen, or who would be below the age of thirty-one on inauguration day. It would be *impossible* (absent a constitutional amendment having retroactive effect) for that candidate to ever become qualified during the four-year term for which he was elected.

In short, if *Term Limits* extends to the presidency, then the States cannot disqualify a presidential candidate from appearing on the ballot based on a (purported) Section 3 disqualification. But there may be some other vehicle by which a State could engineer the same result.

(4) What about a hypothetical state law that restricts who electors can vote for?

There is another approach by which a State could attempt to block a candidate who is (purportedly) disqualified under Section 3 from being awarded the state's electoral votes. And this approach could be framed in such a way as to avoid the question of whether Section 3 is self-executing. Indeed, this approach may not have to rely on Section 3 at all. This approach begins with two provisions of the Constitution of 1788 that gave the States power to regulate elections of federal officials.

First, the Congressional Elections Clause provides, "The Times, Places and *Manner* of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[288] The Congressional Elections Clause affords the States some latitude regarding the "Manner of holding Elections" for congressional races. For example, *Moore v. Harper* observed that this provision gave the

[288] U.S. CONST. art. I, § 4, cl. 1.

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States discretion to hold elections by ballot or by voice vote.[289] But Congress retains the power to alter any regulations the state adopts concerning congressional elections, with the exception of the places of choosing Senators.

Second, the Presidential Electors Clause provides, "Each State shall appoint, in *such Manner* as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the congress."[290] If the Congressional Elections Clause gave the states some latitude, the Presidential Electors Clause gave the States a similar, and, perhaps, broader power. And unlike the Congressional Election Clause, Congress may not "make or alter such Regulations" for appointing electors. *McPherson v. Blacker* observed that the Presidential Electors Clause "was manifestly used as conveying the broadest power of determination" in appointing electors.[291] And *Bush v. Gore* described "the state legislature's power to select the manner for appointing electors [as] plenary."[292] Indeed, this provision gave the States the power to *direct* the appointment of electors without regard to the people casting any votes.[293] In the early Republic, some state legislatures directly chose their state's electors.[294] The South Carolina legislature continued to appoint its electors through 1860, and nothing in the Constitution would prevent a state from returning to this practice.[295]

Can the President Electors Clause be used as a manner to enforce qualifications for the presidency? (Again, we will assume for argument's sake that a Section 3 disqualification extends to the Presidency.) Professor Derek Muller contended that under the Presidential Electors Clause, the States have even greater latitude regarding the "Manner" of appointing presidential electors. He wrote that "because the legislatures may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an ex ante examination of candidates'

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289 600 U.S. 1, 25–26 (2023).

290 U.S. CONST. art. II, § 1, cl. 2.

291 146 U.S. 1, 27 (1892).

292 531 U.S. 98, 104 (2000).

293 *McPherson*,146 U.S. at 25 (accepting as a premise that "the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated").

294 *Id.* at 29.

295 *Id* at 32.

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qualifications."[296] We do not think that Muller suggests that the Presidential Electors Clause expressly delegates to the States the power to determine whether a presidential candidate meets the requisite qualifications. Rather, this authority is granted implicitly. Given the fact that the States have the greater power to *direct* the appointment of electors without regard to the people casting any votes, the States have the lesser power to present to voters only qualified candidates. In other words, the "manner" of appointing electors may include the power to remove from the ballot electors pledged to a presidential candidate who does not meet the constitutional qualifications. To our knowledge, no state has a law on the books that bars from the ballot electors who are pledged to a presidential candidate who is disqualified under Section 3.[297]

Would such a hypothetical statute have a *Term Limits* problem? Again, the Section 3 disqualification only kicks in when a person attempts to hold a covered position--and not a moment sooner. With regard to the President (assuming the Presidency is covered by Section 3), that disqualification would begin on inauguration day–at the earliest. The electors, however, are appointed *prior* to inauguration day, and prior to the joint session of Congress that tabulates the electors' votes. It seems to follow from *Thornton* that this hypothetical state law would be adding additional qualifications--that is, under *Thornton*, a mere candidate or president-elect, cannot be disqualified by Section 3, prior to actually holding the office. Of course, here the restriction is applied against the electors and not against the candidate.

We think this argument is likely correct, but we hesitate slightly because of *Chiafalo v. Washington*. That case held that the States have

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[296] Muller, *supra* note 285, at 604. *See also* Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 104–05 (2020) ("The 'manner' in presidential elections need not be exercised by the people as other constitutional provisions command, because the states choose the mode of appointment. The state may add qualifications to the office of presidential elector. The state may fix the qualifications of the voters. And the state might investigate the qualifications of candidates.").

[297] Indiana Law provides that an elector can be disqualified under Section 3, but the statute says nothing about whom the elector can vote for. IN Code § 3-8-1-6 (2021)("Sec. 6. (a) A candidate for the office of President or Vice President of the United States must have the qualifications provided in Article 2, Section 1, clause 4 of the Constitution of the United States. (b) A candidate for the office of presidential elector or alternate presidential elector must have the qualifications provided in Article 2, Section 1, clause 2 of the Constitution of the United States and Section 3 of the Fourteenth Amendment to the Constitution of the United States."). [Seth: PLEASE CHECK]

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broad power to place conditions on the votes of electors.[298] We do know know to what extent *Chiafalo* may have limited the applicability of the *Term Limits* doctrine with regard to presidential electors. Again, a State can *direct* the appointment of electors without even holding an election. And a state can *direct* their electors to vote for the particular candidate to whom they are pledged. Given all that, does it stand to reason that the States can exercise the lesser power of limiting the types of candidates that electors can vote for?

Consider a state statute that bars an electors from casting a vote for, or being pledged to, a candidate, who: (1) is not thirty-five years old on election day; (2) was not born in a state or federal territory;[299] (3) failed to produce a long-form birth certificate;[300] (4) failed to provide all federal and state tax returns over the past decade;[301] (5) engaged in conduct that would trigger a Section 3 disqualification; or (6) was indicted in a federal or state court.[302]

Would any or all of these restrictions be valid under *Chiafalo*? Indeed, none of these restrictions would turn on the nuances of Section 3 or self-execution. A State is simply regulating how its electors cast their votes. And if it would be illegal for electors to vote for a particular candidate, then a State would also likely have the power to remove that

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298 *See, e.g.*, Chiafalo v. Washington, 140 S. Ct. 2316, 2324 (2020) ("And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect."); *id.* at 2324 ("And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors."); *id.* ("Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's."); *id.* ("Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government).").

299 This statute would have excluded two recent presidential candidates: Senator John McCain, who was born in the Panama Canal Zone, and Senator Ted Cruz, who was born in Canada.

300 There were attempts to disqualify President Obama from the ballot on this ground.

301 California attempted to impose a similar qualification on presidential candidates (President Trump in particular) but did not attempt to impose the restriction on whom the electors could vote for.

302 This restriction would not require any factual determinations. A court could simply take notice of a federal or state indictment; no conviction would be necessary.

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particular candidate from the ballot altogether. After all, when voters cast a vote for a presidential candidate, they are really voting for a slate of electors. The candidate's name is merely a proxy for that slate. Would this approach be valid? We admit the answers to these questions are unclear after *Chiafalo*. Our view is that the better answer is that *Term Limits* should preclude each statute, but this result is hardly clear.

6. Baude and Paulsen argue that Chase violated judicial norms in announcing his colleagues' views.

Griffin's Case was decided in a very different time. In the 1860s, members of the Supreme Court still rode circuit. Indeed, a Circuit Justice could hear a case twice—first on the circuit, and again if the case was certified for Supreme Court review. And going back to the Marshall Court, members of the Supreme Court would often discuss how to resolve pending cases on the circuit, in an effort to promote inter-circuit uniformity. This context helps to explain an aspect of Chase's opinion that Baude and Paulsen ridicule.

In *Griffin's* Case, Chief Justice Chase stated that he was "authorized to say" that all of his colleagues on the Supreme Court concurred "that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus."[303] Chase's colleagues did not opine on Chase's broader and important self-execution position, nor did they opinion on the De Facto Officer doctrine *per se*. All they agreed to was Chase's views on the narrow question of the scope of the habeas remedy. Baude and Paulsen misread what Chase was conveying with this statement. Moreover, Baude and Paulsen charged that Chase violated some unwritten judicial ethics norm. Finally, Baude and Paulsen do not acknowledge that in 1899, the Supreme Court favorably quoted Chase's opinion on this exact point. None of those later Justices were troubled by Chase's opinion or that he communicated the views of his colleagues. Chase's purported breach of judicial norms escaped any criticism until 2020. Indeed, to this day, circuit court judges routinely circulate draft opinions to their colleagues, to flag potential issues that warrant attention. Baude and Paulsen failed to establish that Chase did anything wrong in 1869.

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[303] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5,815).

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a. Baude and Paulsen's criticism of Chase's announcement

The issues raised by Griffin with regard to the federal habeas statute would not be limited to his case. Similar arguments were already being advanced in many other contexts. The judiciary was no doubt aware of how these issues could arise on collateral review. In his opinion, Chief Justice Chase addressed this question. Chase wrote:

> This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.[304]

In discussing this passage, Baude and Paulsen wrote:

> Chase *represented that the full Supreme Court unanimously agreed with him* that on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with reference to this and kindred cases in this district." The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion in some form of advisory preemptive appellate jurisdiction!?
>
> To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account defends the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Court on a matter pending in the Circuit Court." Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ

304 *Id.*

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> of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws. Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance.[305]

First, let's correct a few points. (At this juncture, it may be helpful to review the final four paragraphs of Chase's opinion, which we discussed in Part II.A above.) The argument at issue here, i.e., the argument Chase's colleagues agreed to, relates to the scope of habeas relief. That is the argument developed in Paragraph [3]. Chase's colleagues did *not* opine on Chase's broader and important self-execution position developed prior to and in Paragraph [1]. Likewise, Chase's colleagues did *not* agree to Chase's partially developed discussion relating to the De Facto Officer doctrine in Paragraph [2]. All they agreed to was Chase's views on the narrow question of the scope of the habeas remedy. *Contra* Baude and Paulsen: this was not a wholesale adoption by the Court's members of the De Facto Officer doctrine. And *contra* Baude and Paulsen, this was not "a legal question of great importance,"[306] particularly because it in no way addressed whether officers in Judge Sheffey's position could be removed in habeas proceedings. According to Chase, they cannot. Here, we think Baude and Paulsen misread Chase.

Second, Chase did not state that the Supreme Court "decided" this issue in the "last term." That's reading too much into the text. Rather, Chase stated that the "judges of the Supreme Court" gave the issue "consideration" at the last term. Judges can have views on legal issues; they can discuss those issues in chambers and in conference, and they can make those views public. *It is desirable that they do so*. Here, the other Justices gave Chase permission to announce their views. If *Griffin's Case* could have been appealed to the Supreme Court, then it would have been less than cautious for the other Justices to have voiced their views in this fashion. But, as Baude and Paulsen acknowledge in a footnote, *Griffin's Case* was not subject to appeal to the Supreme Court. (We discussed this statute, which was analyzed in *Ex Parte McCardle*, above.) In effect, the other Justices expressed a view on an abstract legal issue, not connected to any one specific case, and Chase reported their views in his *Griffin's Case* opinion. Moreover, the other Justices shared their views without opining on the specific facts of *Griffin's Case*. They gave Chase permission to share their

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[305] Baude & Paulsen, *supra* note 1, at 46–47 (footnotes omitted).

[306] *Id.* at 47.

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views on a legal issue which had been discussed during the prior Supreme Court term, and not in relation to the specific facts before Chase.

There is evidence going back to the Marshall Court that circuit Justices would often discuss pending cases with each other. Gerard Magliocca published a definitive treatment of Justice Bushrod Washington, including discussion of his practices while riding circuit. Magliocca wrote, "When the justices were uncertain about how to resolve their circuit cases, they would turn to one another for help."[307] Specifically, "Many such letters were exchanged among Chief Justice Marshall, Justice Joseph Story, and Justice Washington."[308] Magliocca points to one letter from John Marshall to Bushrod Washington, in which, apparently, Washington persuaded Marshall to change his approach on a pending case.[309] Chief Justice Chase also engaged in this practice, while riding circuit. In June 1869, Chase sent a letter from Richmond to Justice Nathan Clifford about federal habeas corpus law.[310]

Magliocca suggests that "this sort of communication might be deemed improper, in that another justice was not part of the circuit court that heard the arguments." Even assuming Magliocca's criticism is correct, it is not on-point in regard to Chase's correspondence with his colleagues. Here, Chase was discussing his colleagues' views on an abstract legal issue, apart from the specific facts and parties before him, and that abstract legal issue had received consideration by the court's members before, and would certainly arise again. Furthermore, Magliocca points out that "[p]art of the motivation for these inquiries was to make circuit decisions uniform without resorting to Supreme Court review, though sometimes these exchanges made clear that the

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307 GERARD MAGLIOCCA, WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON 88 (2022).

308 *Id.*

309 Letter from John Marshall to Bushrod Washington (July 13, 1821), *in* PAPERS OF JOHN MARSHALL DIGITAL EDITION (Charles Hobson ed.) ("I thank you for the opinion you have been so good as to give me in the case on which I consulted you. I have from the first thought it doubtful but shall decide it in conformity with your opinion.").

310 Letter from Salmon P. Chase to Justice Nathan Clifford (June 22, 1869), *in* 5 THE SALMON P. CHASE PAPERS: CORRESPONDENCE, 1865–1873, at 309 (John Niven ed., 1998) ("I find no instance in which a justice of the Supreme Court has ever allowed a writ of habeas corpus to bring before him a person imprisoned in any district not included in any district not included in the circuit to which he was allotted.").

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Supreme Court needed to hear arguments on a tough issue."[311] Indeed, that is akin to what Chase was trying to do—to publicize the already-existing uniformity amongst the various Circuit Justices.

Finally, a contemporary press account found nothing to criticize about Chase reporting the view of his colleagues.[312] We have been unable to find anyone at the time who thought this part of the opinion was improper.

b. The Supreme Court in 1899 favorably quoted Chase's opinion on the very ethical issue raised by Baude and Paulsen

Baude and Paulsen think Chase's and his colleagues' transparency is somehow objectionable. Is it? It is well known that the United States Court of Appeals for the Second Circuit circulates draft opinions to other circuit judges, that is, to judges who are *not* on the panel charged with "deciding" the case before the appellate court. Magliocca, who clerked on the Second Circuit, observed that the correspondences between Justice Washington and his colleagues was "similar to the way that some modern circuits operate when judges seek revisions to panel opinions rather than calling for an en banc hearing of the full circuit court."[313]

The judges on a Second Circuit panel exchange e-mails and memoranda with their non-panel colleagues. And the panel judges very well may revise their draft opinion in response to what they receive. Indeed, that's the purpose of this process. And in some cases, an opinion will note that en banc review was or was not triggered. What is done here is not in public, and it is not well documented. But it is the practice of federal judges, and several other circuits have practices similar to Second Circuit practice.[314] This is basically what Chase did. He discussed a legal issue with colleagues, and he reserved the ultimate decision for himself. The difference between what Chase did, in *1869*, and Second Circuit practice, *today*, is that Chase was transparent and

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311 MAGLIOCCA, *supra* note 307, at 88.

312 BALTIMORE SUN, May 12, 1869 ("The Chief Justice stated, in the conclusion of his opinion, that the subject received the consideration of the judges of the Supreme Court at the last term with reference to this and kindred cases in that district, and he was authorized to say that they unanimously concurred in the opinion that a person convicted by a jury, and sentenced in court held by a judge de facto, acting under color of office . . . cannot properly be discharged upon habeas corpus.").

313 MAGLIOCCA, *supra* note 307, at 88 n.82.

314 *See generally* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021).

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documented what he and his colleagues had done. Yet Baude and Paulsen would fault Chase? For what? For improving on today's practice?

There is a further reason why Baude and Paulsen's criticism of the Chase Court misses the mark. The Supreme Court favorably cited Chase's discussion of the views of his colleagues.

In *Ex parte Ward* (1899), Chief Justice Fuller, for a unanimous Court, held:

> We need not, however, consider the elaborate argument of counsel in this behalf, since we regard the well-settled rule applicable here, that where a court has jurisdiction of an offense and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge holding the court may be only an officer de facto, and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus. In *Griffin's Case*, Chase, 364, 425, Fed. Cas. No. 5,815, this was so ruled, and Mr. Chief Justice Chase said: 'This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district; and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto, acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus.'[315]

Baude and Paulsen do not cite *Ex parte Ward* in their article. Baude and Paulsen do not cite *Ex parte Ward* in regard to the scope of the habeas remedy. And Baude and Paulsen do not cite *Ex parte Ward* in relation to their discussion of Chase's and his colleague's ethics in *Griffin's Case*.

We do not reproduce this passage to illustrate that the rule of law announced by Chase as to the scope of the habeas remedy remained good law in 1899, some 30 years later. (It did.) Instead, we reproduce

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[315] *Ex parte* Ward, 173 U.S. 452, 454–55 (1899).

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this passage because it shows that a successor Supreme Court saw nothing wrongful with Chase's reporting his colleagues' views. Indeed, Chief Justice Fuller not only quotes Chief Justice Chase's view on the scope of the habeas remedy, but he also quotes Chase's announcing his (Chase's) colleagues' views. Fuller would hardly do that if he thought Chase and his colleagues had acted wrongfully.

The practices discussed above by the Second Circuit, and in *Ward*, arise in the context of judicial decision-making. Even outside this context, there is a tradition of the Chief Justice of the United States articulating the views of his colleagues on issues of national importance. In 1937, the Senate Judiciary Committee invited Chief Justice Hughes to testify about President Roosevelt's Court packing bill.[316] Hughes declined to testify in person. Rather, he intended to submit a letter that would be signed by all nine Justices. But he was only able to secure approval from two other members: Justice Brandeis (the leader of the Court's liberal wing) and Justice Van Devanter (one of the four conservative horsemen). Hughes wrote in his letter to the Senate:

> I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.[317]

Hughes's letter opined on the constitutionality of the bill. He suggested that cases must be heard by all members of the Court, and not, as the bill would require, by "divisions" or panels. Hughes wrote, "The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."[318]

For generations, Hughes's letter has been praised as an act of judicial statesmanship. He opined on a matter of pressing concern, in a timely fashion. He also weighed in on the constitutionality of a provision of the bill. Unable to quickly obtain the views of all of his

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316 *See* Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 22 J. SUP. CT. HIST. 76, 79 (1997), https://core.ac.uk/download/pdf/232690607.pdf.

317 *Text of Hughes Letter*, N.Y. TIMES, Mar. 23, 1937, at 1, https://perma.cc/4PG7-59ZK.

318 *Id.*

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colleagues, Hughes stated that the entire Court would likely agree with him. He may not have been correct. Indeed, Professor Friedman suggests that Hughes "expressed more confidence than he was entitled to, for the Brethren certainly were not unanimous in approving his statement on the constitutionality of separate panels."[319] According to Friedman, Stone and Cardozo disagreed with the message, but remained silent at the next conference, because the letter was already public. Hughes went out on a limb, and did not accurately express the views of his colleagues. Yet the letter was instrumental in halting the Court packing plan. The letter was published on the front page of the *New York Times*. More recently, Chief Justice Roberts sent a letter to the Senate Judiciary Committee concerning potential ethics reform on the Supreme Court. Roberts suggested that legislation imposing an ethics code on the Supreme Court would be unconstitutional.[320] It is not clear if all of his colleagues agreed to that statement.[321] Roberts also "attach[ed] a Statement of Ethics Principles and Practices to which all of the current Members of the Court subscribe."[322] Hughes and Roberts follow a tradition of Chief Justices who articulated the views of their colleagues on matters of national importance outside of judicial decision-making.

c. Chase's purported breach of judicial norms escaped any criticism until 2020

If Baude and Paulsen were correct here, and Chase's reporting his colleagues' views was a violation of some judicial norm or ethical rule, then one would think that Chase's contemporaries and later commentators would have had something to say on this issue. Did any judges, state or federal, or former Justices chastise or criticize Chase and his colleagues? Members of the bar? Academics? Members of Congress? The press? Anyone at all? The only criticism reported by

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319 Friedman, *supra* note 316, 82.

320 Letter from Chief Justice John G. Roberts, Jr. to Senator Richard J. Durbin (Apr. 25, 2023), https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf.

321 Josh Blackman, *Chief Justice Roberts's Letter to Senator Durbin*, REASON: VOLOKH CONSPIRACY (April 26, 2023, 5:39 PM), https://reason.com/volokh/2023/04/26/chief-justice-robertss-letter-to-senator-durbin/.

322 Josh Blackman, *The Supreme Court's Statement of Ethics Principles and Practices*, REASON: VOLOKH CONSPIRACY (April 27, 2023, 12:45 AM), https://reason.com/volokh/2023/04/27/the-supreme-courts-statement-of-ethics-principles-and-practices/.

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Baude and Paulsen of Chase's *Griffin's Case* opinion is Trump-era and post-Trump-era criticism. And the only prior critique of Chase, on this issue, which Baude and Paulsen point to is from Professor Charles Fairman, writing in 1971. Fairman offered the tepid critique that Chase's announcement was "unusual."[323] We think Baude and Paulsen erred by casually eliding from "unusual" to "irregular." That something happens infrequently does not make it improper or a violation of judicial ethics.

In any event, Fairman actually *defended* Chase's decision to state the views of his colleagues.[324] Fairman acknowledged that Chase's announcement was "unusual," but "the occasion was unusual."[325] Here, District Judge Underwood had ordered the release of several prisoners based on the argument that judges who presided over their cases were disqualified by Section 3. And, more importantly, Underwood attempted to insulate his rulings from review by deciding the cases alone in the Circuit Court, and *while Chase was absent*. With this approach, there could not be a certificate of division, so a case could not be certified to the Supreme Court. This strategy did not go unnoticed by the third-parties in the press.[326] In January 1869, Chase wrote to Underwood, asking him to wait till Chase arrived in Richmond, rather than proceeding to decide the cases by himself.[327]

Although we do not adopt Fairman's position, Baude and Paulsen cite Fairman as authority. Fairman supported Chase's conduct. Fairman observed, "Here a District Judge, persisting in an abuse of power, was menacing the authority of the State judiciary." Fairman wrote that "prompt action was needed," as all of the "Justices were clear that the District Judge was wrong."[328] And Chase's expressing the views of his colleagues was such prompt action. According to Fairman, "the Court took this direct way to assert its supervisory power and put an end to the mischief" by Judge Underwood.[329] Baude and Paulsen charge Chase with violating judicial norms. However, Chase, his

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323 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, PART ONE 607 (1971).

324 *Id.* at 607.

325 *Id.*

326 *Id.* at 604.

327 *Id.* at 604 ("If any such application has been made I will join you in hearing it. It may be heard here if you can attend. If not let it be postponed till I can come to Richmond.").

328 *Id.* at 607.

329 *Id.*

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colleagues, and Fairman, agreed that this statement was an appropriate response to Underwood's (purported) misbehavior. At the end of the day, Fairman was no critic of Chase.

The January 1869 letter was not Chase's first attempt to reach out to Underwood concerning his rulings and with Underwood's efforts to insulate his rulings from review. In November 1868, Chase had already sent a letter to Underwood on the same topic.[330] Chase asked Underwood, "would it not be best to postpone the decision till next week & then we can confer on the subject." Chase explained that an 1866 statute restricted when the Circuit Court could hold terms in Richmond.[331] Specifically, under the statute, only the Chief Justice could adjourn terms. Yet, Chase pointed out that Underwood, absent authorization from Chase, was "holding, doubtless, an adjourned term, and the legality of it becomes important."[332] Fairman saw nothing objectionable about the substance, or tenor of Chase's letter. And neither do we.

How do Baude and Paulsen describe this November 1868 letter? They charge, "Chief Justice Chase then wrote to Underwood with a 'veiled threat,' floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court . . . ."[333] Baude and Paulsen recharacterization of a legal discussion between judges sharing circuit court duties does not withstand scrutiny. There was no threat, veiled or otherwise. Certainly, Fairman did not characterize Chase's conduct in such terms. We see no indication that Chase's contemporaries or later historians have viewed Chase's conduct as anything other than correct.

Again, Chase expressed the view that Underwood acted without authority by hearing cases during an adjourned session of the Circuit Court. Chase argued that Underwood's adjourning the session might not be lawful, and that the statute required the Chief Justice to adjourn the session. Baude and Paulsen do not say Chase was wrong on the law. Indeed, Fairman suggests Chase was right on the law. If Chase was right, how was his conferring with Underwood anything like a "threat"? Perhaps ironically, if Underwood had held court during an adjourned

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330 *Id.* at 603–04.

331 *Id.* at 603 n.155 ("He pointed to an Act of Congress of May 21, 1866, 14 Stat. 51. That statute provided that the Circuit Court hold terms in Richmond on the first Monday in May and the fourth Monday in November; special our adjourned terms might be held 'as may be ordered and prescribed by the Chief Justice of the Supreme Court of the United States. . . . .'").

332 *Id.*

333 Baude & Paulsen, *supra* note 1, at 36 n.122 (emphasis added).

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session, his actions could possibly be saved by the De Facto Officer doctrine. In those circumstances, Underwood and anyone relying on his prior judgments would assert a position *ad idem* with Chase's opinion in *Griffin's Case*. Doesn't this counterfactual suggest yet another reason to think Chase's opinion in *Griffin's Case* was substantially correct?

As we explained, the sources cited by Baude and Paulsen indicate that Chase asked for Underwood to modify his practice so that both Chase and Underwood could evaluate the decision for the Circuit Court on appeal, and that would allow the Circuit Court to issue a certificate of division to the Supreme Court. Chase was trying to assist appellate review; Underwood was trying to frustrate it. Again, modern readers may think it strange that a Chief Justice would ever have any correspondences with an inferior court judge. But in the 1860s, the Circuit Justice would routinely hold court with the District Judge. They worked together, and necessarily, had to have discussions on this and many other procedural issues relating to Circuit Court administration and practice. There is nothing inappropriate here—and certainly not a veiled threat.

d. Griffin's Case has been cited repeatedly without criticism for more than 150 years

We criticize Baude and Paulsen's critique of *Griffin's Case*. Their assertion that the Chief Justice violated ethical norms and that he threatened Judge Underwood is, at best, hyperbole. Our critique relates to these points, but they are equally apt in relation to all too many of the substantive critiques Baude and Paulsen put forward in relation to Chase's *Griffin's Case* opinion. Baude and Paulsen only tell one side of a complex story, and they do so in hyperbolic terms.

Baude and Paulsen take the position that Chase is wrong on the self-execution issue, wrong on the habeas issue, wrong on judicial ethics, and wrong on just about everything (or nearly everything) else. If there is any point Baude and Paulsen suggest Chase decided correctly, we missed it.

Again, they speak of Chase's opinion in *Griffin's Case* with the same scorn that Charles Sumner derided Chief Justice Taney, who had been discredited for his *Dred Scott* opinion. If Baude and Paulsen are correct, one would think that they could point to multiple, independent, substantive critiques of *Griffin's Case* from the 150-plus years between 1869 and 2020—including judicial decisions–aligning with their views. But Baude and Paulsen do not point to any such string of

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authorities. And that's a tell. Albeit, we acknowledge that the intellectual landscape began to shift during and after Trump's term.

But, prior to 2020, courts, federal, state, and foreign have cited Chase's decision in *Griffin's Case* for many (perhaps all) of its major legal positions. We see no report of any pre-2021 case citing it otherwise than favorably. We already mentioned how the Supreme Court favorably cited *Griffin's Case* in *Ex Parte Ward*.[334] There are many more such citations. *Griffin's Case* has been cited for the proposition that Section 3 was not self-executing.[335] *Griffin's Case* has been cited in regard to habeas law.[336] *Griffin's Case* was cited in regard to constitutional construction.[337] *Griffin's Case* was cited in regard to legislative or statutory construction.[338] *Griffin's Case* was cited in regard to the status of West Virginia and Virginia during and after the Civil War.[339] *Griffin's Case* was cited in regard to the De Facto Officer

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334 *See Ex parte* Ward, 173 U.S. 452, 455 (1899).

335 *See* Cale v. City of Covington, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for its sword-&-shield reasoning); *In re* Brosnahan, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same); State v. Buckley, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same); *see also* Va. Op. Att'y Gen. No. 21-003, at 3 (2021)("[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative." (citing *Griffin's Case*)), https://www.oag.state.va.us/files/Opinions/2021/21-003-Carter-issued-1-22-21.pdf.

336 Daniels v. Towers, 7 S.E. 120, 121–22 (Ga. 1887) (Bleckley, C.J.) (citing *Griffin's Case* favorably in regard to its habeas holding); *In re* Sheehan, 122 Mass. 445, 449 (1877) (Gray, C.J.) (same).

337 Edye v. Robertson (*The Head-Money Cases*), 18 F. 135, 143 n.26 (C.C.E.D. N.Y. 1883) (Blatchford, Justice) (citing *Griffin's Case* in regard to constitutional construction), *aff'd*, 112 U.S. 580 (1884); Duane v. City of Philadelphia, 185 A. 401, 403 (Pa. 1936) (Kephart, C.J.) (same); Coyle v. Smith, 113 P. 944, 948 (Okla. 1911) (Williams, J.) (same).

338 *Ex parte* Klune, 240 P. 286, 287 (Mont. 1925) (Callaway, C.J.) (citing *Griffin's Case* in regard to statutory construction); Brooke v. Turner, 30 S.E. 55, 56 (Va. 1898) (Riely, J.) (same); Sartain v. State, 10 Tex. Ct. App. 651, 654 (1881) (White, P.J.) (same); Deaney v. Linen Thread Co., 118 A.2d 28, 36 (N.J. 1955) (Heher, J., dissenting) (same).

339 Woodland v. Newhall's Adm'r, 31 F. 434, 439 (C.C.W.D. Va. 1887) (Paul, J.) (citing *Griffin's Case* for the proposition that the state government in West Virginia was the lawful and recognized government of the entire state of Virginia); Commonwealth v. Chalkley, 61 Va. (20 Gratt.) 404, 409 (1871) (Joynes, J.) (citing *Griffin's Case* for the proposition that the restored government of Virginia was the lawful government); *In re* Gunn, 32 P. 948, 955 (Kan. 1893) (Allen, J., dissenting) (citing *Griffin's Case* favorably for the

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doctrine.[340] *Griffin's Case* was cited in regard to oaths.[341] *Griffin's Case* was cited in regard to other provisions of law.[342] *Griffin's Case* was even cited by a foreign court.[343]

Moreover, contemporary press accounts in 1869 praised Chase's decision. It could be expected that southern newspapers would sympathize with the decision.[344] But northern newspapers, which had no favor for former confederates, also agreed with Chase. Consider a few samples. *The New York Tribune* observed that Chase's decision was "mainly notable . . . and for its reversal of Judge Underwood's remarkable decision of last fall under which a general jail delivery was begun."[345] The newspaper continued, "By the construction of the Chief-Justice the ineligibility of certain judges, under the Fourteenth Constitutional Amendment, does not go to the extent of invalidating their official actions, prior to their removal from office."[346] *The Baltimore Sun* opined that Chase could not "have decided [the case] in any [other] way" than by "reversing the decision of the incompetent and partisan Underwood."[347] Indeed, *The Chicago Tribune* commended

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proposition that political decisions taken by the elected branches in regard to the organization of Virginia were conclusive on the courts).

340 Calcutt v. FDIC, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting) (citing Baude and *Griffin's Case*, and fully expounding on the scope and history of the De Facto Officer doctrine), *rev'd on other grounds*, 598 U.S. 623 (2023).

341 State v. Stephens, 664 S.W.3d 293, 304 n.46 (Tex. Crim. App. 2022) (Slaughter, J., dissenting) (citing *Griffin's Case* for the history of congressionally imposed oaths).

342 McGovern v. Mitchell, 63 A. 433 *passim* (Conn. 1906) (Hamersley, J.) (citing *Griffin's Case* for multiple legal propositions).

343 Toronto Ry. Co. v. City of Toronto (1918), 51 D.L.R. 69 (Can. Ont. C.A.) (Meredith, C.J.O.) (citing *Griffin's Case* favorably in regard to habeas law), *rev'd on other grounds*, (J.C.P.C. 1920).

344 STAUNTON (VIRGINIA) SPECTATOR, May 18, 1869 ("The decision by Chief Justice Chase in the Caesar Griffin case is treated silently by the Radicals and argumentatively by the Democrats. The former don't care about saying anything on the subject; the latter regard it as a true and logical opinion rendered by a just and able judge, who does not swerve from the right to pamper to party prejudices.").

345 NY TRIBUNE, May 11, 1869.

346 *Id.*

347 BALTIMORE SUN, May 12, 1869.

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Chase for avoiding politics, and deferring to Congress.[348] And there were many more such accounts.[349]

Professor Gerard Magliocca located one newspaper editorial that was critical of *Griffin's Case*,[350] which Professor Graber cited.[351] The editorial stated that "The report of [Chase's] opinion was not given verbatim in the papers at the time, so that it could not be said to perfectly represent the positions taken by the Chief Justice." (This piece, dated June 7, 1869, came about a month after the other newspaper articles cited above were published.) The editorial stated further, "A fuller report and a better understanding of the position he has taken may clear up his legal reasoning," but the author observed that if "the public mind should distrust [Chase's] political bias, he has only himself to thank." It is difficult to put much weight on an editorialist who didn't even read Chase's reasoning, and was partial to the theory that Chase was politically biased. Still, we don't doubt there were some other criticisms of this decision. But this editorial should be balanced against the weight of praise we have cited above.

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348 CHICAGO TRIBUNE, May 13, 1869 ("Chief Justice Chase is holding a session of the United States Court at Richmond, Virginia, and, as usual, most of his time is occupied in reversing the decisions of the erratic Judge Underwood of that district. . . . Of course Judge Chase had to reverse this remarkable judgement and return the prisoners to the jails to which they had been condemned. The decision of the Chief Justice, though in its direct effect upon the cases before him no more than any rational person might expect, is important from the cumulative authority it gives the often-repeated, but so little understood, decision of all the courts, that in matters purely political the judiciary will always accept the action of the national legislature as final.").

349 *See, e.g.*, NY HERALD, May 12, 1869 ("Master Underwood, the exuberant but rather empty-headed personage who is United States Judge in the district of Virginia, some time ago discovered a mare's nest. He found that certain Virginia judges were ineligible under the fourteenth amendment, and though they were left alone by the appropriate legislation, he, on his own account, proceeded to set free from Virginia jails all persons condemned by those judges. His judgements have been reviewed by Chief Justice Chase, who tells Underwood that the appropriate legislation should have been his guide, and that the decisions of de facto judges are always entitled to respect.").

350 "Justice Chase and the Fourteenth Amendment," The Bangor (Me.) Daily Whig and Courier, June 7, 1869, p. 3 (reprinting an editorial from the Boston Journal) ("The Fourteenth Amendment . . . is the sheet-anchor of our great acquisitions by the war, and too much care cannot be taken in establishing precedents for its construction, It is such inestimable guaranties as [Section One], which as some think, Judge Chase would make dependent upon the public convenience or the floundering will of a majority of Congress.").

351 Graber, *supra* note 118, at 10 n.44 ("Thanks to Gerard Magliocca for sharing this clipping.").

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Could *all* of these jurists and journalists have been so wrong to have relied on such a misguided decision from the Chief Justice of the United States? And how could *Griffin's Case* have escaped any criticism until 2020? The more likely explanation is that Baude and Paulsen misread *Griffin's Case*, and they failed to place the decision in its proper historical and intellectual context.

Professor Mark Graber charged that "[n]othing in the text or history of the Fourteenth Amendment provides any reason for thinking that any member of Congress or politically active citizen other than Salmon Chase . . . thought that the Thirteenth Amendment, Section One of the Fourteenth Amendment, and Section Four of the Fourteenth Amendment were self-executing, but that Section Three required implementing legislation."[352] Graber's claim really is that Salmon P. Chase was the only sentient being in the 1860s who expressed the view that Section 3 was not self-executing. We could even begin to think of the work needed to show that this sentiment was never expressed anywhere by any person during this time period. But we don't have to engage in such a herculean task. The judicial decisions that cite Chase's case with regard to self-execution suffice to prove that Graber's categorical statement is unsupported.

Graber also charged that Chief Justice Chase's opinion in *Griffin's Case* "is the *only* historical material Blackmun [*sic*] and Tillman present from the 1860s that supports their view that Americans when Section Three was framed did not believe that provision was self-executing." We had thought a decision from the Chief Justice of the United States from months after the amendment was ratified would be persuasive authority. But wait—there's more! Professor Graber seems to have missed two relevant statements that Professor Kurt Lash identified.[353] First, Representative Thaddeus Stevens of Pennsylvania explained that Section 3 "would be remedied by congressional enabling legislation."[354] Stevens said that Congress "must legislate to carry out many parts of" the amendment. He added that "It will not execute itself . . ." We acknowledge that Stevens was referring to different aspects of the Fourteenth Amendment, and there were different versions of Section under consideration, but his statement is consistent with Chase's conclusion that Section 3 requires enabling legislation.

Second, Professor Lash brought forward a colloquy from the ratification debates in Pennsylvania. (As best as we can tell, Professor

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352 Graber, *supra* note 118, at 10.

353 Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, https://ssrn.com/abstract=4591838 at __ 38.

354 Lash, , *supra* note 340, at 19.

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Graber cites zero records from the ratification debates, instead focusing exclusively on debates from the Thirty-Ninth Congress.) Thomas Chalfant served in the Pennsylvania House of Representatives in 1867.[355] Professor Lash explained that Chalfant thought that "of course there would have to be some kind of trial prior to a person's disqualification" under Section 3.[356] Chalfant said, "But, you will say, and say properly, that in order to make this section of any effect whatever, the guilt must be established."[357] Lash observed that "Chalfant assumes his colleagues agree that disqualification under Section Three cannot take place absent some kind of a prior judgment regarding the person's guilt." And, that judgment would have to flow from some sort of process established by Congress. Lash, who reviewed the "hundreds of pages of debate in the Pennsylvania assembly," concluded that "no member appears to have denied Chalfant's basic assumption that Section 3 required enabling legislation."

Albeit, we are not certain if Chalfant was stating that Section 3 required enabling legislation, or whether enabling legislation would be a good policy. We lean towards the former reading, but acknowledge some uncertainty. Still, Chalfant's statement is consistent with Chase's conclusion that Section 3 requires enabling legislation.

Other commentators have endorsed Baude and Paulsen's views about *Griffin's Case*. Former-judge J. Michael Luttig and Professor Laurence Tribe wrote that *Griffin's Case* was "poorly reasoned" and "Baude and Paulsen decisively dismantle[d] *Griffin* as a precedent."[358] We believe that any claim that the case is "poorly reasoned" is based on a misreading of *Griffin's Case.* We do not suggest *Griffin's Case* was perfect, but, as *Ex parte Ward* and any number of other federal, state, and foreign cases show, it was in the mainstream of judicial thought.

We suggest that, as in court proceedings, the better practice might have been for Tribe and Luttig to have waited a reasonable amount of time for contrary views to percolate in the literature before a rush to judgment. Again, *Griffin's Case* is not perfect—no decision

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355 *Thomas Chalfant,* ARCHIVES: PA. HOUSE OF REPRESENTATIVES, https://archives.house.state.pa.us/people/member-biography?ID=7463

356 Lash, *supra* note 340, at 38.

357 We thank Professor Lash for providing us a copy of Chalfant's colloquy.

358 J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump from Ever Being President Again*, THE ATLANTIC (Aug. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048/.

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is. But it is defensible, for the reasons we described above and for others we discuss below. To say that the case is "decisively dismantle[d]" is hyperbole, perhaps, infected by the perceived needs of today as some perceive those needs. Those immersed in the present moment should hesitate before concluding they understand the Fourteenth Amendment better than the Chief Justice who presided during that era, and generally sought to give that constitutional amendment broad effect (indeed, broader than his colleagues) in cases like *The Slaughter-House Cases* and *Bradwell v. Illinois*.

C. Griffin wielded Section 3 as a "sword"

In our view, Griffin invoked Section 3 in an offensive posture, that is, as a cause of action in support of affirmative relief, but he lacked a federal statute authorizing his doing so. We do *not* put this view forward as an after-the-fact invention or ahistorical gimmick which merely accommodates otherwise inconsistent or difficult to explain prior case law. Our position is that this is what Chase was saying in 1869, how he was understood, and how courts and commentators understood the Fourteenth Amendment until . . . until about 2020, and more recently, by Baude and Paulsen. For example, in *Cale v. Covington* (1978), the U.S. Court of Appeals for the Fourth Circuit, held:

> It is true that in [*T*]*he Civil Rights Cases* [(1883)] the [Supreme] Court referred to the Fourteenth Amendment as self-executing, [and] when discussing the Fifteenth, but it is also true that earlier in the opinion, discussing s 1 of the Fourteenth Amendment, the [Supreme] [C]ourt stated: "in order that the national will, thus declared, may not be a mere Brutum fulmen [a mere warning without effect], the last section of the amendment invests Congress with power to enforce it by appropriate legislation." *The Civil Rights Cases* did not overrule *Ex parte Virginia*, and any apparent inconsistency between the two just quoted statements in [*T*]*he Civil Rights Cases* may be resolved, we think, by reference to the protection the Fourteenth Amendment provided of its own force as a ***shield*** under the doctrine of judicial review. See the dissent of Mr. Justice Harlan in the *Civil Rights Cases* quoted infra. See also the *Slaughter-House Cases*, 16 Wall. at 81, where the Court, referring to the equal protection clause of the Fourteenth Amendment,

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> had stated that when it is a State dealt with and not alone the validity of a State law, the matter should be left until Congress should has exercised its power or some case of State oppression by denial of equal justice in its courts claims a decision at the hands of the Supreme Court. Another early opinion, not by the Supreme Court but by Chief Justice Chase sitting as a Circuit Justice, is *Griffin's Case*, 11 Fed. Cases 7 (C.C.D. Va. 1869), which held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action . . . With this understanding in mind, we believe that the Congress and Supreme Court of the time were in agreement that ***affirmative relief*** under the amendment should come from Congress.[359]

And what authority did the Fourth Circuit look to and cite: *Griffin's Case*. Former Fourth Circuit Judge Michael Luttig, who recently wrote that *Griffin's Case* was "poorly reasoned," seems unaware of his former court's precedents.[360]

We don't doubt that there are some exceptions to the sword-and-shield framework which we have put forward. *Bivens* is one exception; Takings Clause cases and inverse condemnation proceedings, another.[361] We suspect other exceptions may exist where

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[359] Cale v. City of Covington, 586 F.2d 311, 316 (4th Cir. 1978) (emphases added). We note that *Cale* was decided after *Ex parte Young*, 209 U.S. 123 (1908) and after *Edelman v. Jordan*, 415 U.S. 651 (1974). If, as we have argued and as Chase held, Section 3 is not self-executing for the purpose of seeking affirmative relief, then *Ex parte Young* cannot fill the legal gap in Baude and Paulsen's theory. *See supra* subsection I(C)(2)(d). A voter or candidate seeking to exclude Trump from the ballot is seeking positive relief via state administrative or judicial action. The relief sought by the voter or candidate is that the state strike Trump from the ballot. And as Judge Sutton explained, such relief still requires a federal statute. *See* Mich. Corr. Org. v. Mich. Dep't. of Corr., 774 F.3d 895, 906 (6th Cir. 2014) ("But matters differ when litigants wield *Ex parte Young* as a cause-of-action-creating sword. In that setting—today's setting—the State is not threatening to sue anyone, precluding an anti-suit injunction from doing the work. [In those circumstances,] [w]hat is required is that Congress create[] a cause of action for injunctive relief in the statute or otherwise made § 1983 available." (internal citation omitted)).

[360] Luttig & Tribe, *supra* note 358.

[361] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2171 (2019) ("Because of 'the self-executing character' of the Takings Clause 'with respect to compensation,' a property owner has a constitutional claim for just compensation at the time of the

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concrete property rights are in dispute under Article III's equity prong, as opposed to the law prong. There may be other exceptions too. But they are individually and collectively exceptions–often of recent judicial creation. The historically dominant view is what was put forward by Chase in *Griffin's Case*. Our view is that this sword-and-shield framework undermines Baude and Paulsen's core position: they believe that the Fourteenth Amendment is self-executing. If Baude and Paulsen believe all constitutional provisions are self-executing in both senses–as a sword and shield, we think they are in error. If they believe that Section 3 is distinguishable from other constitutional provisions, and yet Section 3 is self-executing in both senses, as a sword and shield, even if other constitutional provisions are not, then we fail to see how they distinguish Section 3 from other constitutional provisions.

III. Chief Justice Chase's Decision in the *Case of Jefferson Davis*

Chief Justice Chase presided over another case that had implications for Section 3. Yet, Baude and Paulsen only mention that case in passing.[362] While most people have never heard of Caesar Griffin—indeed, there are some records suggesting his first name was actually Caspar—the other case involved one of the best-known confederates: Jefferson Davis.[363] Yes, Chase presided over the treason prosecution of the former president of the (purported) confederate government.

What Baude and Paulsen do say about the case employs hyperbole rarely seen in legal scholarship. Baude and Paulsen characterize Chase's position as "bonkers," and they support their position on atextualist consequentialist grounds.[364] But not everyone has shared Baude and Paulsen's views on this point. In *Cramer v. United States*, Justice Robert H. Jackson, as did the Solicitor General,

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taking." (quoting First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987))).

362 Baude & Paulsen, *supra* note 1, at 43–44.

363 *Foreign News, England*, THE DAILY DISPATCH (Richmond), Nov. 18, 1868.

364 Baude & Paulsen, *supra* note 1, at 43.

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favorably cited the *Case of Jefferson Davis*.[365] Justice Jackson and the Department of Justice did not think the decision was "bonkers."

What makes Baude and Paulsen's drive-by treatment even more striking is that Chase is reported to have made a statement that provides support for Baude and Paulsen's position. The standard version of the *Case of Jefferson Davis* is the version as reported by *Federal Cases*. The decision ends with these paragraphs:

> THE CHIEF JUSTICE. Very well. The certificate of disagreement has been made, as requested by the defendant. It may be filed, and a copy forwarded immediately to Washington.
>
> Whereupon the court adjourned.
>
> No further proceedings were had in the cause. The proclamation of general amnesty by the president of the United States at the end of December, 1868 effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the supreme court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the circuit court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.
>
> THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment [against Davis] should be quashed, and all further proceedings barred by the effect of [Section 3] the fourteenth amendment to the constitution of the United States.[366]

This statement, standing on its own, might seem to suggest that Section 3, in the absence of federal enforcement legislation, was self-executing. Although Professor Gerard Magliocca considers this statement at some length, Baude and Paulsen do not even mention it.

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[365] Cramer v. United States, 325 U.S. 1, 25 n.38 (1945) (Jackson, J.); *see also* Kawakita v. United States, 190 F.2d 506, 517 n.14 (9th Cir. 1951) (same).

[366] 7 THE FEDERAL CASES COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, DART–DUNBAR, CASE NO. 3,583–CASE NO. 4,130, at 102 (West. Publ'g. Co. 1894) [hereinafter 7 FEDERAL CASES], https://perma.cc/AL7X-UDU4.

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Just as well. This statement is not the slam dunk it seems at face value. And it isn't even clear when, if ever, Chase actually made this statement. Moreover, the case was reported by a former confederate general who allegedly plotted to kidnap Abraham Lincoln. Not exactly a neutral source. Plus, the reporter admitted that he revised Chase's opinions, years later, sometimes with and sometimes without the Chief Justice's knowledge. Oh, and the reporter was Judge Sheffey's lawyer in *Griffin's Case*. There are many good reasons to discount this statement.

Still, even if we assume this statement was an accurate representation of Chase's views during (or, even, after) the *Davis* trial, we can reconcile the *Case of Jefferson Davis* with *Griffin's Case*. Griffin was an applicant; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield–as a defense in a criminal prosecution, and he could do so without enforcement legislation. The two cases can be reconciled. How was Section 3 used as a shield? Davis's position was that Section 3 displaced federal criminal treason-related prosecutions, and furthermore, Section 3 was the exclusive punishment which could be brought against Section 3-covered persons. We take no position whether or not this position was correct on the merits. Our point is that this framing in regard to how Section 3 was used permitted Davis to invoke Section 3 absent enforcement legislation.

A. What did Chase's Opinion in the *Case of Jefferson Davis* case decide, and not decide?

After the Civil War, Jefferson Davis, the former president of the (purported) confederacy, was indicted on federal treason charges. His lawyers argued that Section 3 displaced all federal criminal treason-related prosecutions in favor of disqualification as the exclusive punishment for those falling within Section 3's reach.[367] Thus, Section

[367] Judge Richardson of the Fourth Circuit contended that Davis's "defense team made the astonishing argument that, because § 3 of the Fourteenth Amendment was a punishment and not a qualification, he could not be convicted for treason under the Fifth Amendment's prohibition on double jeopardy." Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring) (citing Dwight J. Davis, *The Legal Travails of Jefferson Davis: A Review and Lessons Learned*, 23 J.S. LEGAL HIST. 27, 73 (2015)). And, Richardson wrote, it was Chief Justice Chase himself who suggested the idea to Davis's defense team, as it would allow a procedural ruling that might "save Chase from making a

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3 foreclosed a prosecution under the federal treason statute. We take no position whether or not this position was correct on the merits. This position, which invoked Section 3 as a defense, did not need to rely on federal enforcement legislation.

If you're looking for a clear statement of how Chase viewed the question, you're out of luck. And the absence of any such opinion is due to how the federal courts were structured in 1868. At the time, federal criminal prosecutions were tried before the federal circuit court, and certain cases were heard by the District Judge and the Circuit Justice sitting together.[368] As you might have surmised, the two judges at this trial, which was held in Richmond, Virginia, were District Judge Underwood and Chief Justice Salmon Chase. Under the rules in effect, a federal criminal prosecution could be appealed to the United States Supreme Court if the district court judge and the circuit justice

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decision on the question of whether or not secession is treason." *Id.* (citing C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1196 (2009)). Richardson's position baffles us. There is not one word about double jeopardy or the Fifth Amendment mentioned anywhere in the reported decision. The Sixth Amendment is discussed by Chase, but it is difficult to see how this could be a source of confusion for Judge Richardson or anyone else. As to Chase's having suggested the argument to Davis's attorneys, we would not be a bit surprised if that claim were true. *See generally* CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 295–96 (2017); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 853 (2006). And given the political realities at the time, we would not be a bit surprised if the prosecutors thanked Chase for doing just that. We add: Even if Davis's jury were selected from a venire of Virginia Unionists and other men who sat the war out, without openly supporting the rebels, how could anyone have any confidence that it would convict? *See* Francis MacDonnell, *Reconstruction in the Wake of Vietnam: The Pardoning of Robert E. Lee and Jefferson Davis*, 40 CIV. WAR HIST. 119, 122 n.5 (1994) ("[T]he government doubted its ability to convict Davis before a Virginia jury, and an innocent verdict in favor of the Rebel leader would have caused intense embarrassment."); ELI N. EVANS, JUDAH P. BENJAMIN: THE JEWISH CONFEDERATE 365 (1988) ("The Johnson government, it seemed, was afraid it would be disgraced by the failure of its case against Davis."); FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 263 (1987) ("Whether a conviction would be possible from a Richmond jury was uncertain."); *id.* at 264 (Chase, during 1866–1867, "feared that a Richmond jury would never convict a fellow southerner . . . ."). The prosecutors might have felt as if they had just won the lottery when Chase put forward a legal position amounting to kicking the can down the road without the government's being publicly humiliated by a divided jury or, worse, an actual unanimous acquittal. Again, the case was being heard in Richmond, Virginia—the former rebel capital.

368 Judiciary Act of 1802, 2 Stat. 156, 159, § 6.

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disagreed. Specifically, the two judges would submit a certificate of division to the Supreme Court.

The *American Law Review*, published in 1869, offered an account of the trial, including detailed descriptions of arguments made by counsel for the defense and the government.[369] After the arguments were submitted, there would be no unanimous resolution of the case. The report states, "After a brief consultation, the following certificate of division of opinion was made by the court."[370] The certificate provides, in part:

> The question arose, whether, by the operation and effect of the third clause of the Fourteenth Amendment of the Constitution, the defendant is exempted from liability to indictment or prosecution for treason in levying war, participating or engaging in the late Rebellion. And upon that question the judges [Underwood and Chase] were opposed. And thereupon the said point is, upon the request of the said defendant, stated under the direct[ion] of the said judges, and certified under the seal of the said Circuit Court to the Supreme Court of the United States at its next session.[371]

The *American Law Review* report of the case observed, "The certificate, with an exemplification of the record, was filed in the Supreme Court at the beginning of the December Term."[372] A copy of this certificate can be found in the National Archives.[373]

The certificate does not say how each of the Judges voted. Nor does it say why the judges cast their votes. What we do know is that Chase voted one way, and Underwood the other. We do not know that Chase would have voted the same way and for the same reasons had he

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369 United States v. Jefferson Davis, 3 AM. L. REV. 368 (1869), https://perma.cc/Y9PG-6TCB. A reproduction of the full issue can be found at https://bit.ly/44PsUHz.

370 *Id.* at 372.

371 *Id.*

372 *Id.*

373 Certificate of Division, Case of Jefferson Davis, 7 F. Cas. 63 (C.C.D. Va. 1867–1871) (No. 324), https://perma.cc/K7QC-4YZJ. Appellate Jurisdiction Case Files in Record Group 267, Records of the Supreme Court of the United States, at the National Archives. The record from the Supreme Court case can be found at https://perma.cc/FFK7-GHQD.

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been the lone decision-maker where his vote was both determinative and precedent setting.

For all we know, Chase may have voted in opposition to Underwood to ensure the Supreme Court could decide the issue promptly—such a position would have the benefit of nation-wide legitimacy and uniformity across circuits. A letter from Chase to Judge Underwood in January 1869 concerning *Griffin's Case* provides some support for this theory. Chase wrote, "The best and quickest way of obtaining an authoritative & final decision of the point which has arisen is to certify to a division of opinion in the Caesar Griffin case now in the Circuit Court on appeal."[374] Remember, at the time, the Supreme Court could only hear such an appeal if there was a certificate of division.[375] This practice would not have been uncommon. There is some circumstantial evidence that in *United States v. Cruikshank*, Circuit Justice Joseph Bradley intentionally registered disagreement with the District Judge (and future Justice) William Wood, even though he agreed with Wood on the merits, for the purpose of allowing the Supreme Court to hear the case.[376]

We have found no contemporaneous public source discussing Chase's reasons for how he voted on this case. The 1894 report of the case in *Federal Reports*, the version used by most scholars and courts today, states that Chase took the position that the Fourteenth Amendment barred the treason indictment against Davis. Recently, this view of the case has been put forward to show that Chase believed that Section 3 was self-executing.

However, we have found a contemporaneous source which states just the opposite of the position ascribed to Chase in *Federal Cases*. An article appeared in the Richmond *Daily Dispatch* on December 7, 1868. The article stated that, "It was generally believed that the Chief Justice was in favor of sustaining the motion to quash [the indictment of Davis], while Judge Underwood wished to overrule it. But the Chief Justice stated in private conversation that he wished it distinctly understood that he had expressed no opinion on the subject."[377]

Again, there is no contemporaneous public source explaining why Chase voted the way he did. And the case would never be decided

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374 Fairman, *supra* note 324, at 604-05.

375 Fairman, *supra* note 324, at 602.

376 Barnett & Blackman, *supra* note 154, at 756.

377 *The Case of Jeff. Davis, Disagreement of the Court,* THE DAILY DISPATCH (Richmond), Dec. 7, 1868.

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by the Supreme Court. Within a few weeks of the case's referral to the Supreme Court, President Andrew Johnson announced an amnesty and the treason charges were no more. Eight years later, and after Chase's death, another account of Chase's opinion would be published.

B. Chase's opinion in the *Case of Jefferson Davis* as reported by Bradley T. Johnson

Modern readers may take for granted that all reported versions of a case will be largely identical. But for much of Anglo-American legal history that assumption would have been wrong. Accounts of judicial decisions were recorded by hand and may be incomplete. Some reporters were deemed more reliable than others. Such is the situation with the *Case of Jefferson Davis*.

The version of the case reported in *Federal Cases*, published in 1894, includes an important sentence that does not appear in the 1869 version in *American Law Review*: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States."[378]

Instead, *Federal Cases* relies on a report by Bradley T. Johnson, who published cases that Chief Justice Chase decided on the Circuit Court of Virginia. Johnson included that same pivotal statement. But it is not known *when*, if ever, Chase instructed Johnson to add that statement. We are somewhat skeptical that Chase made it, at least during or immediately after the trial. This statement was not made in open court. Indeed, the tense shifts from the present tense to past tense ("as having been").[379] And we have found no contemporaneous record of Chase's making this statement in other public sources. And there is some good reason to treat Johnson as less than a neutral observer. He had served as a general in the (purported) confederate army, plotted to kidnap Abraham Lincoln, and later became a defender of the "Lost Cause." Plus General Johnson represented Judge Sheffey in *Griffin's Case*. So just maybe the reporter had some connection to the self-execution issue which should be a cause for concern.

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[378] Case of Jefferson Davis, 7 F. Cas. 63, 102 (C.C.D. Va. 1867–1871).

[379] *Id.*

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1. Federal Cases

Let's work backwards chronologically. In 1894, the West Publishing Company published the seventh volume of *The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States*.[380] The *Case of Jefferson Davis* stretches from page 63 through page 102. The very first footnote on page 63 states, "Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 3 Am. Law. Rev. 368, contains only a partial report."[381] On page 102, the report notes that the court adjourned.[382] The final two paragraphs state:

> No further proceedings were had in the cause. The proclamation of general amnesty by the president of the United States at the end of December, 1868, effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the supreme court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the circuit court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.
>
> THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States.[383]

If we simply stopped our analysis here, and took General Johnson's account at face value, then Baude and Paulsen would have some strong evidence that Chase viewed Section 3 as self-executing in the *Davis* case. But there is some reason to keep digging.

2. Reports of Cases Decided by Chief Justice Chase by Bradley T. Johnson

As the footnote observes, this report of the case came from a book published by Bradley T. Johnson in 1876, titled *Reports of Cases*

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380 7 FEDERAL CASES. *Supra* note 366.

381 Case of Jefferson Davis, 7 F. Cas. 63, 63 (C.C.D. Va. 1867–1871).

382 *Id.* at 102.

383 *Id.*

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Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit.[384] The book has a subtitle, *Revised and Corrected by the Chief Justice*. The report of the *Case of Jefferson Davis* is the first case in the book. The report begins with a "Statement of the Case," and includes detailed accounts of the proceeding.[385] The report concludes on Page 124, including the two paragraphs noted above.[386]

The first paragraph above was necessarily written at some point after the case was transmitted to the Supreme Court, and after President Johnson issued an amnesty for Davis. We know this because that paragraph refers to President Johnson's amnesty.[387] The events described in that paragraph would necessarily have occurred *after* the case had already been certified to the Supreme Court, and President Johnson issued the amnesty. We do not know when, if at all, the Chief Justice instructed the reporter, Bradley T. Johnson, to record his view on the case. It did not happen in open court. There is no indication that Judge Underwood made a similar request. For all we know, it could have happened, if it happened at all, at any point between December 1868, when President Johnson issued his amnesty, and May 1873, when Chase died. Or Johnson could have added the statement *on his own accord* at some point after Chase's death, and before the book was published in 1876.

For some evidence in Bradley Johnson's favor, the preface of the book explains how Chase was involved in the editing process. Johnson relayed that he "proposed to the Chief Justice that, if agreeable to him, [Johnson] would undertake the work of collecting his Circuit Court decisions for publication."[388] Chase "assented to the suggestion with gratification, and subsequently furnished [Johnson] with copies of his decisions as fast as they were made on circuit."[389] During 1872–

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384 BRADLEY T. JOHNSON, REPORTS OF CASES DECIDED BY CHIEF JUSTICE CHASE IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH CIRCUIT (Diossy & Co. 1876), https://perma.cc/UC4N-3FBC. The phrase "Fourth Circuit" in the title of the book did not refer to the U.S. Court of Appeals for the Fourth Circuit which came into existence many years later. Rather, at that time, the "Fourth Circuit" included certain States, such as Virginia. Each state had its own federal circuit court of appeals, and Chase presided over the individual circuit courts in those States.

385 *Id.* at 1.

386 *Id.* at 124.

387 *Id.* at 11.

388 *Id.* at iv.

389 *Id.*

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1873, Johnson submitted the manuscript to Chase "for revision, and he went over the whole of it with the reporter, making such corrections as he deemed necessary."[390] Johnson explained that the changes "were generally merely verbal, and in the main consisted of softening the language or expressions used in alluding to the war."[391] For example, Chase "struck out the words 'rebellion,' 'rebels,' 'insurrection,' and 'insurgents,' and substituted the words 'civil war,' 'belligerents,' &c., wherever the sense of the text would permit, and instructed me to do so wherever he had overlooked it."[392]

In April 1872, Chase wrote to his daughter, Janet Chase Hoyt, that he visited General Johnson. During that visit Chase "was aiding [Johnson's] revision of [Chase's] decisions."[393] Chase quipped, "I could and would have done more and enjoyed more, if I had been in better health, but I did very well for an invalid."[394] By Johnson's own admission, Chase instructed him to modify reported decisions several years after the fact, with an eye towards softening any negative language towards the former confederates. It is entirely possible that Chase asked Johnson to include the final paragraph at this point, nearly five years after the *Davis* case concluded. That very well could have been Chase's opinion five years later, but, again, we have found no contemporaneous public statement that described Chase's view in the *Davis* case.

Recently, Judge Richardson of the Fourth Circuit, in a concurring opinion, suggested that Chase in fact took a position on whether Section 3 was self-executing *during* the *Davis* trial—at least, this is how we read Richardson's "on the record" language. In any event, Judge Richardson, like many others, certainly ascribes the position to Chase. Judge Richardson wrote:

> While Andrew Johnson's pardon of Davis eventually mooted the case, Chief Justice Chase went on the record anyway. He agreed with the defendant's argument that § 3 was a punishment and that "it executes itself." *In re Davis*, 7 F. Cas. 63, 90 (C.C.D. Va. 1871). "THE CHIEF JUSTICE instructed the reporter to record him as having

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390 *Id.*

391 *Id.*

392 *Id.* at iv–v.

393 Letter from Chase to Janet Chase Hoyt (Apr. 12, 1872) *in* 5 THE SALMON P. CHASE PAPERS, 1865–1873, 368 (John Niven, ed 1994), https://perma.cc/25TJ-5XWC.

394 *Id.*

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> been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* at 102.[395]

We have discussed above the provenance of the Chief Justice's purported instructions to the reporter, which were added by Bradley T. Johnson. Judge Richardson's putting "it executes itself" in quotation marks is somewhat confusing. The quoted language is something Davis's attorney—Judge Robert Ould—stated, not Chase. Ould was a former judge advocate in the (purported) confederacy, so he was referred to as "Judge." Ould said, Section 3 "executes itself, acting *proprio vigore*. It needs no legislation on the part of congress to give it effect."[396] Chase never uttered the words "it executes itself" in the record. Indeed, Chase expressed no agreement or disagreement with Ould at that time. Indeed, Chase's only on-the-record comment immediately following Ould's statement concerned the timing of a recess. Contrary to Judge Richardson, we see no clear evidence that Chase, at any time during the *Davis* trial, took any position with regard to whether Section 3 is self-executing.

The *American Law Review* report of the case, published in 1869, soon after the *Davis* case, does not include the final paragraph about Chase's purported views. By contrast, Bradley's report, which was published nearly eight years later, which admittedly modified text without Chase's direct oversight, and which may have inured to the benefit of his clients, including former confederates, did include the final paragraph. Based on these facts alone, we would rely on the earlier report in *American Law Review*. But there is much, much more.

3. Who was Bradley T. Johnson?

Bradley T. Johnson was hardly a neutral reporter. A brief sketch of his history reveals why. According to one account, Johnson was "[t]he man who perhaps did the most to promote Maryland's involvement in the Confederate cause, despite the state remaining in the Union."[397] In 1861, after Maryland remained loyal to the Union, he

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[395] Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring) (citing *In re Davis*, 7 F. Cas. 63, 90 (C.C.D. Va. 1871)).

[396] 7 FEDERAL Cases, *supra* note 366, at 90.

[397] *Bradley T. Johnson,* AMERICAN BATTLEFIELD TRUST, https://www.battlefields.org/learn/biographies/bradley-t-johnson.

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organized a pro-southern militia.[398] Later his unit crossed the Potomac and was incorporated into General Stonewall Jackson's brigade.[399] He led his Marylanders into several prominent battles.[400] He would achieve the rank of brigadier general in the (purported) confederate army.[401] Apparently, in 1864, "Johnson conceived of a plan to kidnap Lincoln while he was at the Soldiers' Home near the outskirts of Washington, DC," but his plans were thwarted.[402] He commanded a (purported) confederate prison until 1865, when he surrendered to Union forces.[403]

After the war, in addition to reporting Chase's cases, Johnson became "increasingly involved with the Lost Cause."[404] Before the war, Johnson was elected as state's attorney for Frederick County, Maryland.[405] This position very well may have triggered his own disqualification under Section 3. Johnson was also indicted for treason against the United States in Maryland.[406] Circuit Justice Chase referred to him as a "'double traitor' to both Unionist Maryland and the country."[407] Albeit, in May 1866, President Johnson gave Bradley Johnson a "full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said rebellion" on certain conditions.[408] Bradley Johnson would also have been covered by the 1872 and 1898 congressional pardons issued under the authority

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398 *Id.*

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.*

403 *Id.*

404 *Id. See also* Laura Castro Lindarte, *John Wilkes Booth's Abduction Plot Gone Wrong,* BOUNDARY STONES (Mar. 2, 2018), https://boundarystones.weta.org/2018/03/02/john-wilkes-booths-abduction-plot-gone-wrong ("These were not the only plots to kidnap Lincoln. Two members of the Confederacy army also had plans to abduct the President. One was Joseph Walker Taylor, the nephew of former president Zachary Taylor. The other was Colonel Bradley T. Johnson. Neither was carried out and it is unknown whether [John Wilkes] Booth knew about them.").

405 A Guide to the Bradley T. Johnson Papers, U. OF VA. LIBR., https://perma.cc/P9GG-RWNB ("Johnson served as Maryland State's Attorney, Chairman of the Maryland State Democratic Committee, and delegate to both National Conventions of 1860.").

406 NICOLETTI, *supra* note 367, at 171.

407 NICOLETTI, *supra* note 367, at 171, 195.

408 Pardon of Bradley T. Johnson by President Andrew Johnson (May 11, 1866), https://perma.cc/CA5P-4768.

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of Section 3. After the Fourteenth Amendment came into effect, it was unclear if those who had already been pardoned by the President were subject to Section 3 disqualification.[409]

There's more. Johnson was Judge Sheffey's lawyer in *Griffin's Case*! Richmond was a small world. Only a few months after the Jefferson Davis trial concluded, General Johnson was Judge Sheffey's advocate in the District Court and in the Circuit Court.[410] And wouldn't you know it? Johnson reported *Griffin's Case* in his volume on Chase's decisions. It appears starting on page 364. *Federal Cases* once again relied on Johnson.[411]

It is not unreasonable to be skeptical of the final paragraph of General Johnson's report of the *Case of Jefferson Davis*. That passage attributed to Chase was added by a former confederate. That lawyer also argued in *Griffin's Case* that Section 3 should not disqualify Judge Sheffey. Indeed, the lengthy statement of the case that preceded the *Davis* report was written in a very pro-confederate fashion. A 1953 book observed, "[p]erhaps the able lawyer and distinguished Confederate soldier, Bradley T. Johnson, expressed the best contemporary Southern viewpoint on the question of treason as it touched the supporters of the Confederacy. He set forth his opinion in a long 'Statement of the Case' of Jefferson Davis in his *Reports of Cases Decided by Chief Justice Chase*, 1865-69, published in 1876."[412] In Johnson's view, "any attempt, therefore, to punish Jefferson Davis and other leaders of the Confederacy would be considered disgraceful to the American people."[413] Johnson, a defender of the so-called "lost

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409 18 Op. Att'y Gen. 149 (1885) (explaining that Section 3-covered persons that had been pardoned by the President *before* the adoption of the Fourteenth Amendment were not precluded by Section 3 from holding office under the United States).

410 Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 15 (C.C.D. Va. 1869) ("The state of Virginia appearing by the attorney-general, Mr. _____, Judge H. W. Sheffey, the judge of the circuit court for Rockbridge by Bradley T. Johnson, Esq., and the sheriff by James Neeson, Esq. they joined issue on this traverse.").

411 *Id.* at 7 n.1 ("Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 2 Am. Law T. Rep. U.S. Cts. 93, 3 Am. Law Rev. 784, and 8 Am. Law Reg. (N. S.) 358, contain only partial reports."). Volume VIII of the *American Law Register* of 1869 (not to be confused with the *American Law Review* of 1869) includes a version of the case starting at page 358, https://perma.cc/K9VS-896L, https://archive.org/details/americanlawregi05lawgoog.

412 JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON 106 (1953), https://perma.cc/EC27-QQ5K.

413 *Id.* at 107.

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cause," even included an appendix with the (purported) constitution of the (purported) Confederate States of America![414] The inclusion of this document, after Chase had already died, appears to be a decision of Johnson alone.

We would be very skeptical to rely on the following statement, as reported by Bradley T. Johnson: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States."[415] This statement was not made in open court. And we have found no contemporaneous record of Chase's making this statement in other public sources. Still, we cannot rule out the possibility that such sources may exist. Let's assume that Chase actually said it.

Can we reconcile *Griffin's Case*, which was litigated by Bradley Johnson, with the *Case of Jefferson Davis*, which was reported by Bradley Johnson? Yes, we can.

C. Reconciling *Griffin's Case* and the *Case of Jefferson Davis*

Going forward, we will assume that the statement appended at the end of Bradley Johnson's report in fact reflected the view of Salmon P. Chase during the *Davis* trial. That statement may seem to be in tension with Chase's view a few months in *Griffin's Case*. Recently, Professor Gerard Magliocca has argued that Chase's positions in these two cases were contradictory. According to Magliocca, Chase determined that Section 3 was self-executing in *Case of Jefferson Davis*, but was not self-executing in *Griffin's Case*. Magliocca wrote, "Chief Justice [Chase] offered no explanation, and my opinion is that this pair of results is simply illogical and cannot be explained by legal analysis."[416] Magliocca added, "These two different assessments about whether Section Three was self-executing in Virginia are almost impossible to reconcile . . . ."[417] Commentator Roger Parloff endorsed Magliocca's view.[418] Baude and Paulsen favorably quote a 2017 book

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414 Johnson, *supra* note 384, at 557–78.

415 Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring) (citing *In re Davis*, 7 F. Cas. 63, 102 (C.C.D. Va. 1871)).

416 Magliocca, *supra* note 228, at 105.

417 *Id.* at 100.

418 Parloff, *supra* note 176.

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suggesting that Chase had ulterior political motives in the *Davis* case.[419] Professor Mike Dorf wrote that "Chief Justice Chase cannot be trusted on this question."[420] Professor Mark Graber charged that "when self-execution served Chase's political goals, as in the treason trial of Jefferson Davis, Chase took the position that Section Three had immediate legal consequences even in the absence of implementing legislation."[421] Graber added that Chase was "not a reliable source for Republican thinking about Section Three."[422]

Judge Richardson of the Fourth Circuit likewise agreed with Magliocca. Richardson found that *Griffin* was "a reversal from [Chase's] opinion in *Davis*."[423] Richardson contended that both cases are "in question" due to their "contradictory holdings, just a few *years* apart."[424] (The cases were decided a few months apart.) Richardson wrote that these contradictory opinions "make it hard to trust Chase's interpretation."[425] Indeed, Judge Richardson even gave credence to the argument that Chase could have been "motivated by Confederate sympathies or some sort of prejudice, as he twisted § 3 one way to help arch-Confederate Jefferson Davis and then twisted it the other to ratify decisions by a former-Confederate judge."[426] Richardson rejected such insinuation as "probably not right," as Chase was a prominent abolitionist.[427] But Richardson settled on a "more likely . . . [that] Chase was against § 3 for pragmatic reasons."[428] Richardson remarked that "Chase had worked vigorously to keep § 3 out of the Fourteenth

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419 Baude & Paulsen, *supra* note 1, at n.152 ("Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them" (quoting CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 293-300 (2017))).

420 Dorf, *supra* note 75.

421 Graber, *supra* note 118, at 11.

422 Graber, *supra* note 118, at 13

423 Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring).

424 *Id.* (emphasis added).

425 *Id.*

426 *Id.*

427 *Id.* (citing *Magliocca* at 106) (noting that Chase was "was one of America's greatest antislavery lawyers, and his record refutes any inference of racial animus").

428 *Id.*

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Amendment, fearing that it 'was too harsh on former Confederate officials,' making reunification harder."[429]

Richardson concluded that regardless of "Chief Justice Chase's reasons," he would "not take either *Davis* or *Griffin* for much useful background" about Section 3.[430] And Richardson explained that Chase's discussion did not provide "much evidence of broader contemporary understanding" in light of Chase's "shifting legal conclusions, Chase's pragmatic political concerns, and the obvious conflict*s* [*!*] of interest."[431] (What these multiple "obvious conflicts" are, Judge Richardson did not say.) Richardson wrote that the *Case of Jefferson Davis* and *Griffin's Case* "are too confused and confusing to help much."[432]

Finally, Judge Richardson wrote that Chase's opinions while riding circuit were not "binding on" the Fourth Circuit.[433] We are uncertain about this last point. We do not know how the U.S. Court of Appeals for the Fourth Circuit treats precedents from its predecessor courts, including the Circuit Court for the District of Virginia. Indeed, the Fourth Circuit favorably cited *Griffin's* case in a decision about five decades ago. The opinion in *Cale v. City of Covington* explained that "Chief Justice Chase sitting as a Circuit Justice . . . [in] *Griffin's Case* . . . held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action."[434] (We discussed Judge Widener's Fourth Circuit opinion in *Cale* above.) The Fourth Circuit, which is Judge Richardson's court, added, "[W]e believe that the Congress and Supreme Court of the time were in agreement that affirmative relief under the [Fourteenth] [A]mendment should come from Congress."[435] At a minimum, *Cale* would be circuit precedent for Judge Richardson to consider. In any event, there was no indication that Chase's decision was in any regard outside the mainstream of Fourth Circuit jurisprudence circa 1978.

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[429] *Id.* (citing C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1196 (2009)).

[430] *Id.*

[431] *Id.* (emphasis added).

[432] Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring).

[433] *Id.*

[434] Cale v. City of Covington, 586 F.2d 311, 316 (4th Cir. 1978).

[435] *Id.*

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These intellectual indictments from Maglioca, Parloff, Richardson, Baude, Paulsen, and others, directed against Chase's opinions are damning, but only if the defects the critics allege are real. We think the defect is in the purported errors. Rather, there is a far simpler way to reconcile *Case of Jefferson Davis* and *Griffin's Case*. In the former case, a criminal prosecution, the defendant could raise Section 3 as a defense in the absence of enforcement legislation. In the latter, Griffin was an applicant; he sought to use Section 3 as a sword, *offensively* as a *cause of action seeking affirmative relief*, but he could not do so without enforcement legislation.

Case of Jefferson Davis did not turn on whether Section 3 was self-executing as a sword, while *Griffin's Case* did. Chase acted consistently and in accordance with well-established principles of federal litigation. With regard to the *Case of Jefferson Davis*, any discussion of Section 3 as "self-executing" or "non-self-executing" is better reconceptualized as the application of judicial review, which has traditionally allowed constitutional rights to be asserted as defenses absent enforcement legislation.

In short, the two holdings can be distinguished through traditional legal analysis. We find this doctrinal rationale at least as plausible as allegations that Chase acted based on political, pragmatic, and even personal biases.[436] Rather, the Chief Justice of the United States faithfully decided the cases before him based on the particulars of those disputes. And both cases differed in substance and in their procedural postures.

To our knowledge, contemporary critics did not object to these rulings as contradictory. It is difficult to imagine any alleged inconsistency falling under the radar. Both opinions were announced at about the same time. Both opinions were announced by the same court and, subsequently, appeared in the same reporter. Both opinions were announced by the Chief Justice of the United States. Both opinions spoke to issues that were thought to be important by the public at the time they were issued (if not also for many years later). How is it that no one noticed the inconsistency until 2020—about 150 years after-the-fact? Such a *no-one-noticed-until-me* argument is conceivable, but such a position calls for some explanation. What is that explanation?

Professor Magliocca and Ron Fein referred to our position as a "clever . . . post hoc explanation" that was "never suggested by Chief

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[436] MICHAEL J. GERHARDT, THE LAW OF PRESIDENTIAL IMPEACHMENT 155 (2024) (Section 3 "hardly seems self-executing, because some determination must be made about insurrection or rebellion . . . .").

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Justice Chase himself."[437] We disagree. The fact that no one objected to Chase's opinion suggests no one, until 2020, thought there was an inconsistency. Magliocca and Fein are looking for a needle in a haystack, but they miss the forest and the trees. Magliocca and Fein added that our position "did not occur to any of the hundreds of ex-Confederates who petitioned Congress for amnesty before 1870 despite the lack of congressional enforcement legislation." Our position is that no one wanted a Sword of Damocles hanging over their head. Prior to *Griffin's Case*, and prior to any other court of record deciding this issue, it was unclear whether Section 3 was self-executing or not. Former confederates would have had good reason to petition for amnesty as soon as possible. And even after *Griffin's Case* was decided, the Sword of Damocles remained, as Congress could enact enforcement legislation—and indeed, enacted such legislation in 1870. Magliocca and Fein wrote further that "Nor can Chief Justice Chase's position in Griffin's Case be rescued by a post hoc distinction between federal and state offices, suggesting that even if state procedures suffice for state officials, federal procedures are still needed for federal officials (or office-seekers). *Griffin's Case* itself involved a state official, and nothing in its thin rationale would apply more to federal office than to state office." In Part II.B.5.g, we explained that state statutes incorporated by reference Section 3 of the Fourteenth Amendment. States could have removed disqualified persons from state positions, pursuant to state law, without the need for federal enforcement legislation. Those who petitioned for federal amnesty before 1870 were nevertheless subject to disqualification from state positions pursuant to state legislation. In fact, even after federal amnesty, these people may have still been subject to disqualification from state positions pursuant to state legislation.

In *Griffin's Case*, Chase explained that his position was supported by "enlightened jurists."[438] Baude and Paulsen take

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[437] RON FEIN & GERARD MAGLIOCCA, FREE SPEECH FOR PEOPLE ISSUE REPORT 2023-01, STATES CAN ENFORCE SECTION THREE OF THE FOURTEENTH AMENDMENT WITHOUT ANY NEW FEDERAL LEGISLATION 1 n.1, 11 n.9 (2023), https://freespeechforpeople.org/wp-content/uploads/2023/03/14.3-fsfp-magliocca-report-mar-2023.pdf.

[438] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("It is true that in the judgment of some enlightened jurists, [Section 3's] legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the Rebellion. But this very effect shows distinctly its punitive character.").

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exception to Chase's characterization because they believe Chase was *only* referring to the views he had expressed in the *Case of Jefferson Davis*.[439] That is, Chase was the enlightened jurist. Their criticism misses the mark. First, there is nothing improper, at all, with a jurist referring back to his own writings. Today, Supreme Court Justices will often cite their prior opinions, concurrences, and dissents, even from cases they had adjudicated while serving on lower federal courts. Second, the phrase "enlightened jurists" seems to have been a reasonably common usage at the time.[440] And such usage continues to this day. Recently, a joint dissent by the United States Supreme Court praised "judges of wisdom."[441] Even if Chase was referring to himself, he may have used the phrase in a self-deprecating manner, and not to inflate his own regard. Third, unlike Baude and Paulsen, we are not at all sure that Chase, in *Griffin's Case* (1869), was referring to his own views, as he had apparently previously put forward in the *Case of Jefferson Davis* (1868). We write "apparently" because there is some good evidence that Chase did not make this statement on the record in the *Case of Jefferson Davis* (1868). Indeed, no account of that statement in the *Case of Jefferson Davis* would be made until the 1876 publication of General Johnson's book. Moreover, Chase referred to "enlightened *jurists*," plural.[442] Chase was but one jurist. It seems

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439 Baude & Paulsen, *supra* note 1, at 44 ("Who were these 'enlightened jurists' who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.").

440 *See, e.g.*, Michoud v. Girod, 45 U.S. 503, 558–59 (1846) ("[I]n Louisiana, where the civil law exists in a modified form, and is still often the rule of decision by its enlightened jurists."); Parker v. Stiles, 18 F. Cas. 1163, 1172 (C.C.D. Ohio 1849) ("And it is now a principle, settled by the concurrent opinions of some of the most enlightened jurists of this country . . . ."); Goodyear Dental Vulcanite Co. v. Willis, 10 F. Cas. 754, 755 (C.C.E.D. Mich. 1874) (introducing a point with: "in the opinion of the most enlightened jurists"); Russel v. The Empire State, 21 F. Cas. 23, 25 (D. Mich. 1857) ("The most enlightened jurists of this country have refused to apply . . . . "); United States v. One Thousand Three Hundred & Sixty-Three Bags of Merch., 27 F. Cas. 340, 341 (D. Mass. 1863) ("These rules could not indeed bind his own judgment; but, having been practically adopted by enlightened jurists."); Latham v. United States, 1 Ct. Cl. 149, 154 (1864) ("Many more cases might be cited to show that the most eminent and enlightened jurists and the highest courts.").

441 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom.").

442 Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815).

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unlikely that Chase was referring to a legal position that he, alone, had apparently made at the time (assuming he had made it all). Rather, Chase may have been alluding to the views of commentators on international law and treason.

Long before the American Civil War, jurists had written about punishing people for treason after a long conflict, civil war, or war of conquest, and whether such punishments were applicable. The substantive question here is not whether Chief Justice Chase, while on circuit, actively cited himself or any other source for his position as to the effect of Section 3 on treason cases. Rather, the question is whether Chase's views as to the effect of Section 3 comported with long-standing public international law norms governing the behavior of belligerents during and after a war.

For example, in response to disturbances along the United States-Upper Canada frontier during the Rebellions of 1837-1838 and the 1838 Patriot War, law officers of the crown furnished the (U.K.) Secretary of State for War with a legal opinion. The law officers wrote:

> Where an insurrection against a Government has become so formidable as to assume the aspect of an equally balanced civil war, the laws of war are to be observed between the Government and the insurgents; and [even] native-born subjects taken prisoners could not be tried [under the criminal law as] as traitors.[443]

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[443] 2 INTERNATIONAL LAW OPINIONS: PEACE 146, 147–48 (Lord McNair ed., Cambridge Univ. Press 1956) (reproducing the August 21, 1838 opinion from crown law officers, and nowhere naming the short-lived Republic of Canada in their opinion) (emphasis added), http://tinyurl.com/5h58ktbj, *reprinted in* WILLIAM FORSYTH, CASES AND OPINIONS ON CONSTITUTIONAL LAW 199, 202 (London, Stevens & Haynes 1869); JOEL PARKER, THE DOMESTIC AND FOREIGN RELATIONS OF THE UNITED STATES 19 (Welch, Bigelow, and Co. 1862) ("[I]n proportion to the magnitude and gravity of the warfare [during an insurrection], it gradually loses, in the public mind, its distinctive character of an insurrection, being known as a civil war; and then it is hardly expedient to insist upon the enforcement of the extreme penalties of treason . . . ."); *see also* Calvin v. Smith (Calvin's Case, or Case of the Postnati), 77 Eng. Rep. 377, 384 (K.B. 1608) (Ellesmere LC, Coke CJ, and others) ("But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason . . . and therefore he shall be put to death by martial law."); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 35 (1716) (explaining that when "aliens" invade the kingdom in a "hostile manner," they "cannot be punished as traitors, but shall be dealt with by martial law" under the laws of war); S.C. Biggs, *Treason and the Trial of William Joyce*, 7 U. TORONTO L.J. 162, 165 (1947) ("Since no duty of allegiance can arise in the absence of its counterpart protection, an enemy alien (whether civilian or soldier) cannot commit the crime of treason."); Jennifer Scott, *Northern Ireland legacy bill approved by MPs - but legal fight could be*

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The law officers cite no authorities, perhaps, because none were needed. This jurisprudence developed prior to the ratification of Section 3.

Like the law officers of the crown, Chase put forward no citations in support of the view that Section 3 precludes a federal treason prosecution. There might be some reasons for that. More than one U.S. Senator supported Chase's so-called "bonkers" view during debate on Section 3.[444] Chase, writing in 1869; was about 60 years old

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coming, SKY NEWS (Sept. 6, 2023, 15:32), https://news.sky.com/story/northern-ireland-legacy-bill-approved-by-mps-but-legal-fight-could-be-coming-12955977 (explaining that the bill, if enacted, "will stop new cases and inquests being opened into killings on both sides of the conflict"). By the time of the American Revolution, in the English-speaking world, the willingness of Parliamentarians and Royalists, during and after the English Civil Wars, and other seventeenth century court-affiliated and country-affiliated factions to try one another for treason or any other Civil War-related crime (other than for violations of the law of war) is remembered as a disgrace, and not as a confirmation of the rule of law. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 2940 (1866) (Senator Hendricks opining on Section 3 and noting "This measure is in the spirit that pursued the supporters of Cromwell and the Parliament after the Restoration."); Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99 AM. HIST. REV. 1137, 1139 (1994) ("In a civil war, laws of war came into conflict with laws of peace that punished taking arms against authority as treason. When fighting began in [the English Civil War in] 1642, the status of the conflict as war was not self-evident. The history of the English civil war is in part a history of why it was fought as a foreign war and of lapses from that mode."); *id.* at 1141 ("Despite difficulties, however, the principle had been made explicit: the laws of war rather than the laws of the civil state were applicable, and Englishmen confronted each other [not as prosecutor and traitor, but] as 'lawful enemies.'"); James R. Phifer, *Law, Politics, and Violence: The Treason Trials Act of 1696*, 12 ALBION: A QUARTERLY JOURNAL CONCERNED WITH BRITISH STUDIES 235, 238 (Autumn 1980) ("In the course of the century Royalist and Parliamentarian were in turn pulled down by charges of treason, and violence became an ordinary part of the political struggle."); *id.* at 243 ("Reflecting on the 1680s, spokesmen from the two parties urged those among their colleagues who still longed for a violent revenge to consider the virtues of moderation and to end the use of treason as a weapon.").

444 CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866) (Senator Sherman noting that "after the attempted revolution in England in 1745, the English Government was considered extremely liberal when, two years after the Pretender had been overthrown by force of arms, all the pains and penalties imposed by Great Britain on his adherents were removed, except the power to hold office; and I believe all who took part in that rebellion were forever disfranchised from holding an office of honor, trust, or profit in the kingdom of Great Britain. It was considered extremely liberal that all the other penalties of treason were removed. . . . The effect of this section [three, then under debate] is simply to remove all the penalties that rest on these men for treason except the power to hold office . . . ."); *id.* at 2900 (Senator Doolittle stating that "nobody can doubt that. It is in the

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and only a few years from death. He was on circuit—more than one hundred miles from the capitol and his home. He had no computer. He had no law clerk. For all we know, he had no good law library. He was on his own–in the former rebel capital. Just perhaps, under these conditions, one might say Chase's work-product was, at least, broadly consistent with professional standards of the day? *Contra* Baude and Paulsen, we think all things considered, as a matter of domestic law applicable in federal courts, Chase *may* have been wrong in the *Case of Jefferson Davis* with regard to whether a treason prosecution was precluded by Section 3. But right or wrong, Chase's position was not "bonkers."

Moreover, as a practical matter, Chase's analysis regarding treason would have limited effect. At the time, the statute of limitations for treason was three years.[445] The Civil War drew to a close, with the Battle of Palmito Ranch and the capture of Jefferson Davis, both in May 1865. By the time the Fourteenth Amendment was ratified in July 1868, any new treason claims arising from the Civil War would have been time barred. And, with hindsight, we know that President Johnson's amnesty in December 1868 terminated all pending treason cases.[446]

Finally, does not normal humanity counsel that we cut Chase just a little slack? Do we really need to say that "Chief Justice Chase

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nature of a bill of pains and penalties, imposed by constitutional enactment it is true, but it is a punishment different from the punishment now prescribed by law. What is the effect of adopting it? What is the legal effect of adopting a new punishment for an offense which has already been committed? It repeals the old punishment, and that cannot be inflicted. If today the punishment for the crime of murder is death, and tomorrow you change your punishment to imprisonment for life, the old penalty is repealed; it cannot be inflicted upon a culprit who has been guilty previous to the passage of the law. Such has been decided by the courts many times to be the law; and if by a constitutional amendment you impose a new punishment upon a class of offenders who are guilty of crime already, you wipe out the old punishment as to them, not as to those who are not embraced within this.").

445 Act of Apr. 30, 1790, ch. IX § 32, 1 Stat. 112 (An Act for the Punishment of certain Crimes against the United States); *see also* WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES: MILITARY ARRESTS, RECONSTRUCTION, AND MILITARY GOVERNMENT 130 (Leonard W. Levy ed., De Capo Press, 43d ed. 1972) (1871) (noting that by the Act of 1790, a defendant must be indicted within 3 years from commission of crime of treason where capital punishment is sought, and two years from commission where fine or forfeiture sought); *id.* at 130 (10th ed. 1864) (same).

446 See *infra* note ## (discussing federal treason prosecutions).

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was not shooting straight in his applications of Section Three."[447] As a general matter, we are doubtful courts and others would or should generally review a post-bellum case with such a jaundiced lens that questions the motivation of the authoring judge—at least we doubt that they should do this absent the clearest proofs of gross negligence or bad faith. The situation Chase faced had been and continued to evolve quickly. It was complex. And the legal and political stakes were high. Even if Davis's jury were selected from a venire of Virginia Unionists and men who sat the war out, without openly supporting the rebels, how could anyone have any confidence that it would convict? And there was also the possibility that former rebels or sympathetic family members of former rebels would be on the jury. Had Davis been convicted, it risked turning him into a martyr for the Lost Cause.[448] Had he been acquitted, he would have made rebellion the law of the land.[449] Even putting Davis before a jury risked giving him a national forum allowing him to refight the Civil War in a federal courtroom. All these possibilities posed dangers, and who could predict the consequences? Chase's vote worked a delay for Supreme Court review–was that really so wrong? And Supreme Court review would lead to national uniformity on this point of law, and it would have greater legitimacy with the wider public than a lower court decision by Underwood and Chase, acting separately or jointly.

IV. Section 3, Insurrection, Enemies, and Treason

The first three parts of this article explained why an applicant cannot wield Section 3 as a sword or cause of action seeking affirmative relief absent federal enforcement legislation. Part IV will address the offense element of Section 3, which imposes disqualification if a covered person "shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." The offense

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447 Baude & Paulsen, *supra* note 1, at 44.

448 Larson, *supra* note 199, at 123 ("The second problem was that if Davis was convicted, the [Andrew] Johnson administration would have to decide whether to pardon him or to execute him. Neither option was especially appealing. A pardon looked like irresolution in the face of clear treason, but an execution risked turning Davis into a Southern martyr, around which Confederate sympathizers could rally for generations.").

449 *Id.*

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element has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they reflect longstanding aspects of domestic and international law. One can only be an enemy during a war. But not all insurrections are war. One can engage in insurrection without aiding an enemy. One who engages in insurrection without aiding an enemy is an offender, a criminal, or a felon. But, absent a war, he is not an enemy. And one can aid an enemy without engaging in insurrection or rebellion. Yet, Baude and Paulsen conflate these two elements. They effectively rewrite the offense element such that a Section 3-covered person is one who shall have engaged in or have given aid or comfort to insurrection or rebellion or to the enemies of the United States. That is not what the text says. And that is not what long-standing principles of domestic and international law support.

Moreover, Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. However, the "aid or comfort" prong does seem to extend beyond direct crimes and direct wrongdoing. It includes "aid[ing] and comfort[ing]" an enemy. This prong might very well extend to inchoate and indirect wrongs, akin to accessory liability. Here, Baude and Paulsen's atextual reading allows them to transform a direct substantive offense (i.e., engaging in insurrection) into an indirect or inchoate offense (i.e., aiding or comforting enemies). But the Framers of Section 3 did not make this choice. Nor does the "engage" prong extend to inaction—for example, failing to take action with regard to an insurrection or rebellion.

Worse still, Baude and Paulsen never actually define what an enemy is. Their conception of this term is limited to the Civil War. We acknowledge that many confederates would have *both* engaged in insurrection and given aid to an enemy. This dual liability was possible because the Civil War was an insurrection, and an undeclared, but de facto war. Baude and Paulsen make no effort to define "enemy" outside the context of the Civil War. They see no need to, because their atextual reading only requires giving aid and comfort to an insurrection. But a cursory study of how enemies are traditionally defined shows that the word "enemy" is not coextensive or overlapping with insurrection or rebellion. Baude and Paulsen rely on an atextual reading that conflates the two prongs. They have some duty to explain what exactly they think an "enemy" is. Instead of defining what is an enemy, Baude and Paulsen tell us that enemies and insurrectionists are the same or overlapping categories. But that conclusion is not supported, and it certainly is not a reading based on the plain text. Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto

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"rebellion and insurrection" does not succeed. Finally, Baude and Paulsen suggest that secession movements categorically amount to Section 3 insurrections. That is not accurate. Peaceful advocates for Puerto Rico's independence, for example, should have no fear of treason charges and no fear of Section 3 disqualification.

A. The two prongs of Section 3's offense element

Section 3 defines the conduct that may trigger disqualification. In our prior publications we did not offer an interpretation of Section 3's offense element.[450] Here we put forward a view as to how the offense element should be understood.

Section 3 imposes a disqualification if a covered person "shall have engaged in *insurrection or rebellion* against the same, or given aid or comfort to the *enemies* thereof." (italics and underscores added). The text includes two prongs: (i) engaged *in insurrection or rebellion against the United States*, and (ii) given aid or comfort *to the enemies thereof*. Under a plain reading of the text, these two acts are distinct. They are separated by a comma and the disjunctive *or*. A covered person can be disqualified for engaging in insurrection or rebellion, without ever having given aid or comfort to enemies. And a covered person can be disqualified for giving aid or comfort to enemies, without ever having engaged in insurrection or rebellion. This separation suggests that the meaning of "insurrection or rebellion" is distinct from the meaning of "enemies." Likewise, the meaning of "engaged" is distinct from the meaning of "given aid or comfort." Section 3 attaches to two different branches of conduct.

We do not think these basic textualist readings should be controversial. Yet, Baude and Paulsen conflate the two prongs of the offense element. In their view, a covered person may be disqualified if he gives aid or comfort to insurrection or rebellion. They state that Section 3 liability is premised on a person's having "engage[d] in or giv[en] aid and comfort to an insurrection."[451] They repeat this conflation throughout their Article.[452] Baude and Paulsen's reading

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[450] Blackman & Tillman, *supra* note 10, at 3 ("This article does not focus on the offense element [2] and the amnesty element [4].").

[451] Baude & Paulsen, *supra* note 1, at 5.

[452] *Id.* at 57 (asking: "Likewise, what is the relationship between the disqualification for having given '*aid or comfort*' to insurrectionists, rebels, or other enemies of the United States and the First Amendment?" (emphasis added)); *see also id.* at 74 ("Conduct participating in, advancing, supporting, or assisting either

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effectively rewrites Section 3 in this fashion: a Section 3-covered person is one who shall have engaged in or given aid or comfort to insurrection or rebellion or to the enemies of the United States. In other words, Baude and Paulsen take the position that the "aid or comfort" language, which applies to "enemies," also extends to "insurrection or rebellion" or, perhaps better, the "aid or comfort" language extends to those who commit "insurrection or rebellion." This category would include insurrectionists. As a result, a person who never gave *aid and comfort* to an *enemy*, and never *engaged* in *insurrection or rebellion*, could still be disqualified if he gave *aid and comfort* to an *insurrection or rebellion*. If Section 3's text means what Baude and Paulsen think it means, then it would have been very simple for its drafters to have written it the way Baude and Paulsen understand it. But they did not.

Indeed, there is some good reason to reject this reading. The Insurrection Act of 1862, which President Lincoln signed into law, made it a crime to "give[] aid or comfort" to "any rebellion or insurrection."[453] The modern version of that statute uses similar language.[454] The Framers of the Fourteenth Amendment could have used the Insurrection Act as a model. The Framers of the Fourteenth Amendment could have drafted the offense-element of Section 3 to cover giving aid or comfort to an insurrection or rebellion. But they did not. They drafted the provision to cover giving aid or comfort to an enemy.

Baude and Paulsen offer two primary lines of reasoning supporting their significant reconstruction of the text. First, they argue that "engage" is a "capacious" term, that is, one which incorporates

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secession or armed resistance to U.S. authority constituted 'engaging in' or giving 'aid or comfort to' the Union's enemies.")

[453] Act of July 17, 1862, ch. 195 § 2, 37 Stat. 590 ("That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give and comfort, to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.").

[454] 18 U.S.C. § 2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."). We trace the history of this statute in Blackman & Tillman, *supra* note 7, at 200.

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inchoate and indirect wrongs and crimes.[455] Baude and Pauslen state that the meaning of "engage" extends to lesser wrongs or crimes involving "assistance, or encouragement . . . in the form of either words or deeds."[456] Likewise, Baude and Paulsen write that the "engage" prong in Section 3 "resembles" common law "accomplice liability," as well as "conspiracies, attempts, incitements, and advocacy."[457] If Baude and Paulsen are correct about this "resemblance," that too would be some reason to justify mapping "aid or comfort" back onto "rebellion or insurrection."

Second, Baude and Paulsen claim that just as "rebellion" and "insurrection" are largely synonymous or overlapping terms, "enemies" is a similar term or has largely overlapping scope.[458] For example, they write that "Given the history and context of Section Three 'enemies' seems to include the domestic rebels and insurrectionists just described earlier in the sentence."[459] Likewise, Baude and Paulsen contend that "giving 'aid or comfort' to enemies will be similar to the kind of conduct that counts as having 'engaged in' insurrection or rebellion."[460] If correct, this analogy would also be some reason to justify mapping "aid or comfort" back onto "rebellion or insurrection."

Both of Baude and Paulsen's arguments are problematic. We will address both arguments in turn. We will also explain why failing to take action to stop an insurrection does not amount to engaging in insurrection.

B. Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect

We think Baude and Paulsen's reading is difficult to justify as a purely textualist matter. The two prongs are distinct. But even more problematic, this atextualist reading radically expands the scope of

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455 *See, e.g.*, Baude & Paulsen, *supra* note 1, at 63 (characterizing all the primary terms under discussion as "capacious").

456 *Id.* at 67.

457 *Id.* at 67 n.31, 53.

458 *Id.* at 68.

459 *Id.*

460 *Id.* at 67–68 (discussing "obvious overlap" among the primary terms under discussion, and stating that "Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution").

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Section 3's "insurrection and rebellion" prong to include wrongs and crimes that are inchoate or indirect. The text of Section 3's offense element resembles a traditional criminal offense. In general, insurrection and rebellion are thought of as traditional crimes, with traditional defenses, as defined by congressional statutes and pre-statutory common law principles. This crime is defined by the Insurrection Act of 1862, which remains largely unchanged to this day. Traditional crimes have elements, defenses, and customarily, one determines liability for a crime through the criminal process with all its constitutional protections, procedures, substantive and procedural.

In our view, "engag[ing]" in insurrection or rebellion might mean committing the actus reus of those crimes, and, perhaps, establishing liability through the criminal law. In other words, Section 3 imposes punishment or liability for *actually* committing insurrection or rebellion. The word "engaged" does not seem to include inchoate offenses, such as attempted insurrection or rebellion, conspiracy to commit insurrection or rebellion, or accessory liability (before- or after-the-fact) in relation to insurrection or rebellion. The "engage" prong addresses direct wrongs, not indirect or inchoate wrongs.

To draw a contrast, the Insurrection Act of 1862, discussed above, does prohibit inchoate crimes with regard to insurrection. The statute made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection."[461] It was also a crime to "engage in, or give and comfort, to any such existing rebellion or insurrection." In the 1862 Act, the Framers of Section 3 had a ready model that would prohibit inchoate and indirect crimes based on insurrection. But they did not use words like "incite, set on foot, [or] assist" or "give and comfort" to insurrection. In the first prong, the Framers only used the verb "engage." The contrast between the Insurrection Act and the offense-element of Section is some evidence against Baude and Paulsen's analysis.

By contrast, in Section 3's offense-element, the "aid or comfort" prong does seem to extend beyond direct crimes. It includes "aid[ing] or comfort[ing]" the commissioning of a crime or wrong. This prong might very well extend to inchoate and indirect crimes, as well

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[461] Act of July 17, 1862, ch. 195 § 2, 37 Stat. 590 ("That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give and comfort, to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.").

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as to accessory liability. This prong might even extend to non-criminal activity entirely, as long as that activity gave "aid or comfort" to "enemies." (We will address below who the "enemies" may be.)

Baude and Paulsen swept together the first and second prongs. Doing so forced inchoate and indirect crimes into the "engage" prong. This move allowed them to conclude that Section 3 included indirect participation with an insurrection. But we should hesitate before transforming a direct crime, like "engaging in insurrection" to an inchoate crime or to indirect participation in an insurrection. This caution is especially well-placed because the second prong reflects liability premised on well-understood inchoate and indirect activity—indeed, the Treason Clause defines, in part, the outer limits or scope of the offense of treason, by using "aid and comfort" and "enemies" language. This point was made recently by former Judge Michael McConnell, who is also Baude and Paulsen's constitutional law casebook co-author. McConnell stated, "Section 3 uses the verb 'engage in,' which connotes active involvement and not mere support or assistance."[462]

Further support for our reading can be found in the Second Confiscation Act of 1862.[463] Just as Baude and Paulsen discuss the Insurrection Act of 1862, Baude and Paulsen also spend several pages discussing the Confiscation Act of 1862.[464] The Second Confiscation Act provides:

> [I]f any person shall hereafter *incite, set on foot, assist, or engage* in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give *aid or comfort* thereto, or shall *engage in, or give aid and comfort* to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he

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462 Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, REASON: VOLOKH CONSPIRACY (Aug. 12, 2023, 6:58 PM), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

463 Second Confiscation Act, ch. 195, 12 Stat. 589 (1862).

464 Baude & Paulsen, *supra* note 1, at 81–84.

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> have; or by both of said punishments, at the discretion of the court.[465]

We think this statutory language undermines Baude and Paulsen's reasoning. If it were clear that "engage" was capacious and that it was understood to include "aid or comfort," then it was hardly necessary to include such both "engage"- and "aid and comfort"-language in the 1862 statute, and it was hardly necessary to include such language immediately alongside one another. Likewise, if "engage" included inchoate and indirect participation in insurrection and rebellion, then why does this provision separately list "incite, set on foot, [and] assist"? More importantly, Baude and Paulsen assert that this statute was one of several contemporaneous working models for drafting Section 3 in the Fourteenth Amendment. But the drafters of Section 3 substantially departed from the 1862 statutory model, and they used relatively textually limited and restricted language. We submit that a reasonable person circa 1866–1868, when the Fourteenth Amendment was proposed and ratified, would have understood the scope of Section 3's language to have been limited compared to this statute's broad language above.

Insurrection and rebellion are crimes. Everyone knew this in 1868, and everyone knows this today. Where a constitutional provision makes a crime a condition of disqualification, we think it quite reasonable to suggest that the insurrection or rebellion prong was understood as requiring a full criminal trial, prior to or part of any proposed Section 3 proceeding, where the "defendant" had a right to all the standard criminal law defenses and all the customary constitutional safeguards, protections, and procedures. The first prong was hard to establish, unless it was preceded by a criminal conviction establishing guilt.[466] We think it highly unlikely that the original public meaning of Section 3 permitted administrative officials—the

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[465] Second Confiscation Act, ch. 195, 12 Stat. 589 (1862) (emphases added).

[466] In Part I.B.3, we discussed the exclusion of Representative Victor Berger by the 66th House. At the time of exclusion, he had been convicted of violating the Espionage Act of 1917. However, in 1921, the Supreme Court overturned his conviction. Berger v. United States, 255 U.S. 22 (1921). Berger was later elected to, and seated in, the 68th, 69th, and 70th Congresses. To the extent that Berger's exclusion was premised on Section 3—and it is not clear that it was—this sequence of events would seem to indicate that congressional enforcement of Section 3, where not actually authorized by statute, at the very least, depends on a prior conviction secured in traditional federal criminal judicial proceedings, and that continued enforcement of Section 3 against a defendant is set aside where the conviction is overturned.

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predecessors of modern-day election boards—to make such determinations in civil proceedings.

By contrast, the "enemies" prong was not premised on an established crime. (For example, to establish treason, one must do more than give aid and comfort to enemies—one must also *adhere* to the enemies.) Who gave "aid or comfort" to the (purported) confederacy was no secret. Most of its supporters were not ashamed for having supported and having fought for the (purported) confederacy, and they did not deny or hide their participation. Reliable public records, including (purported) confederate records, recorded their deeds. Enforcing the "enemies" prong was relatively easy. A "defendant" had no entitlement to standard criminal law defenses and customary constitutional safeguards, protections, and procedures. It might all be determined administratively or via judicial notice in a civil proceeding (assuming notice and an opportunity to be heard before a neutral adjudicator). Therefore, it could be enforced outside the traditional confines of substantive and procedural criminal law.

We will turn to the enemies prong below. As a practical matter, it would be much simpler to establish Section 3 liability under the "gave aid or comfort to enemies" prong, than under the "engaged in insurrection" prong. But first, we consider a related question: does one engage in insurrection by failing to take steps to stop an insurrection?

C. Section 3's "engage" prong does not extend to inaction with regard to an insurrection

In our view, the "engage" prong is limited to direct substantive offenses, and it does not extend to wrongs or crimes that are inchoate or indirect. There is a corollary to this position: the "engage" prong does not extend to *inaction* with regard to an insurrection. The language of Section 3 uses active verbs. It speaks to having "engaged" in wrongdoing. In other words, failing to take actions to address an insurrection does not, by itself, amount to engaging in insurrection. As a general matter, failing to act does not support the imposition of liability. Contrary to the series finale of *Seinfeld*, generally, the American legal tradition does not support so-called *Good Samaritan* laws. However, liability may be imposed if a person has some positive duty of care.

Baude and Paulsen recognize this issue. They argue that the Take Care Clause of the Constitution imposes such a duty to stop an alleged insurrection. Specifically, they charge Trump with "deliberate

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inaction against the January 6 attack."[467] Baude and Paulsen write that Trump "took no action to urge" his supporters to leave the Capitol, "despite having a constitutional duty to take care that the laws be faithfully executed."[468] Baude and Paulsen's position amounts to an intuition: On January 6, 2021, a proper President would not have acted the way Trump acted, and from that they conjure a positive duty that he should have acted differently, and his having violated that newly-minted duty amounts to a Section 3 violation for which he should be disqualified.

There are many problems with this intuition. For starters, Baude and Paulsen offer no accounting of what exact duty the Take Care Clause imposes. They point to no precedents where Section 3 and the Take Care Clause have been used in the manner they suggest. They point to no scholarship. They point to no debates—in Congress or in the state legislatures or among the public, suggesting that the text of Section 3 was or should have been understood in 1868 along the lines they suggest. Indeed, the phrase "Take Care" appears only once in the article. (Once again, Baude and Paulsen make a blanket statement about a complex provision of constitutional law, with no further development.[469]) This is a gap in their argument. Or perhaps they think that Section 3 actually modified the Take Care Clause, and imposed an affirmative duty on the President to stop an insurrection? Who knows? Without a theory of constitutional change and the scope of Section 3 retroactivity, just about anything might be possible under Section 3.[470] Perhaps, this issue will be developed in some future paper.

Even assuming their reading of the Take Care Clause has some support, Baude and Paulsen do not even begin to explain what other species of presidential inaction would run afoul of the Take Care Clause. Not everything is about Trump. There is a much more relevant historical inquiry: the inaction of President James Buchanan prior to Lincoln's inauguration very well may have triggered disqualification under Baude and Paulsen's theory. And Buchanan's inaction would have been on the minds of those who framed and ratified Section 3.

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467 Baude & Paulsen, *supra* note 1, at 112.

468 *Id.* at 120.

469 Blackman has developed the relationship between the Take Care Clause and failure to faithfully execute the laws with regard to the enforcement of federal immigration law. *See* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215 (2015).

470 *See supra* subsection II(B)(5)(d) (discussing Baude and Paulsen's lack of a constitutional theory with regard to retroactivity).

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President Buchanan is usually rated the worst or among the very worst of our former presidents.[471] That view is not an entirely modern one. He was not well liked by a large segment of Unionist sentiment during the Civil War. What did President Buchanan do wrong? One thing: during secession, he did next to nothing. Buchanan was unwilling to use force—particularly the U.S. Army and U.S. Navy—to enforce federal law in States which had (purportedly) seceded; to protect loyal federal judges and other loyal federal officers in carrying out their lawful duties in States which had (purportedly) seceded; to protect federal enclaves and property in States which had (purportedly) seceded; and, to stop the formation of the (purported) confederate government in violation of United States law.

Would Baude and Paulsen argue that Buchanan "took no action to" stop an insurrection "despite having a constitutional duty to take care that the laws be faithfully executed"? Did Buchanan violate his oath of office? Could Buchanan, during his term, have been impeached and disqualified for failing to take care that the laws were being faithfully executed? Could Buchanan have been impeached and disqualified after he left office for the same offenses?[472] Would Buchanan, a former Senator, have been disqualified when Section 3 was ratified? Any theory of Section 3 premised on inaction must at least address James Buchanan. Yet, Baude and Paulsen only mention Buchanan once in an unrelated context.

History suggests that the answers to these questions, and more, are *no*. There was no serious move to impeach him while he was president. And there was no serious move to impeach Buchanan after Lincoln succeeded to the presidency. (Albeit, one reason for the latter may have been because the issue of late impeachment always would complicate the legal analysis.) With the departure of all southern Democrats from the House and all southern Democrats from the Senate, Senator Andrew Johnson excepted, impeachment by the House should have been a snap, even if securing a Senate conviction would not have been entirely certain. One wonders: Why was Buchanan not impeached for failing to enforce the law, or for failing to defend the country, etc, etc?

We submit there is a reason: What might look like *inaction* from outside the White House could look like *deliberation* from within the

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[471] Hailey Philbin, *The Unforgettably Forgettable President: A Look at Mr. Buchanan*, NAT'L MUSEUM OF AM. HIST. (Mar. 4, 2019), https://americanhistory.si.edu/blog/buchanan.

[472] Baude and Paulsen both recently supported the position that late impeachment was constitutional. *See supra* note 194 (discussing late impeachment).

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White House, at each step of the process. Buchanan may have had hope that there would be a change of political opinion in the seceded states. (Alas, that hope was forlorn.) Buchanan may have feared that moves by the U.S. armed forces to compel compliance with federal law would be perceived as an invasion, and that would consequently push undecided border states towards secession. (With hindsight, we know this consequence happened under Lincoln.) Buchanan may have determined that a civil war would be costly in treasure and lives. (According to some modern estimates, the war resulted in over 600,000 Union dead and wounded, and in over 400,000 confederate dead and wounded.) Buchanan may have worried that a Union victory was not possible or, at least, was not assured. (Especially in the early days, victory for the Union was certainly not assured.) Buchanan may have determined that if disunion came, if it came amicably, then in the future, partial or total, reunification remained a real possibility. (Ex ante, this position would not have been unreasonable.)

We do not suggest that Buchanan was right and that Lincoln was wrong. But one reason Americans, today, think Lincoln was right is because by 1865, he and the armed might of the United States prevailed. But in 1861, after Fort Sumter—and especially prior to Gettysburg, and prior to Sherman's taking Atlanta, and prior to the election of 1864—it was hardly clear that the Union would prevail.

Buchanan's efforts, such as they were, were grounded in a moral vision and policy choice. It may be a policy choice that you disagree with. But that sort of choice is part of normal democratic politics—albeit, normal politics, including wartime politics, where the central issue on the table is the continued existence of the nation itself. That is what elections are meant to and must decide, because if it is not decided by elections, then it can only be resolved by accident and violence.[473] Buchanan's inaction violated no statute or any other positive law. Buchanan did not take a bribe or act for self-interested ends.[474] Here the President had lawful discretion if and when to use force. He acted in a disinterested manner (i.e., akin to complying with a fiduciary duty of loyalty); he was fully informed (i.e., akin to complying with a fiduciary duty of care). Buchanan did not go rebel, like Jefferson Davis. He did not give speeches in support of the confederacy, like Clement Vallandigham. Buchanan's actions were transparent—albeit, objectionable to many. A retrospective inquest on

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[473] See THE FEDERALIST NO. 1 (Alexander Hamilton).

[474] Josh Blackman & Seth Barrett Tillman, *Defining a Theory of 'Bribery' for Impeachment*, LAWFARE (Dec. 6, 2019, 12:43 PM), https://www.lawfaremedia.org/article/defining-theory-bribery-impeachment.

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a disputed policy matter cannot convert inactivity into a constitutional "high crime and misdemeanor" and cannot amount to "engaging in insurrection or rebellion."[475]

Indeed, all law enforcement officers face Buchanan's choice. In every law enforcement action, there is always a question of if, and when, and how much lawful force should be used, and how long (if at all) enforcement can and should be delayed, and once started, how long the enforcement policy should continue. Those questions are always a judgment call, where not guided by statute or other positive law or court orders. For these reasons, we have no history of impeaching officers based upon a retrospective investigation and trial which reaches a different conclusion than that which had been reached by the original officeholder as to what precisely was best policy *ab initio*.

One reason such trials and investigations are to be feared is that they will be conducted by subsequently elected officials seeking to vindicate different values and goals. Likewise, Section 3 has not been used in this manner: disqualifying office-holders based on a prior failure to act.

At least with regard to Trump, we feel a sense of déjà vu. The first Trump impeachment was premised on charges of "abuse of office." At the time, we warned about the fundamental danger of this charge.[476] It was a vague standard that converted normal democratic disagreement, where elected officials must make decisions in real-time based upon imperfect information, into investigations and trials, and then seeks to disqualify political opponents. We are seeing that effort again, but here, the controversy will not be limited to Congress. Rather, executive bodies and the courts have been and will be co-opted into the process.

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475 *See* U.S. CONST. art. II, § 4 ("The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office [that has] engaged in insurrection or rebellion . . . .").

476 Josh Blackman, *Trump Acts Like a Politician. That's Not an Impeachable Offense*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/opinion/trump-impeachment-defense.html [https://perma.cc/D5GG-RLA4].

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D. Enemies are not coextensive with insurrectionists or rebels

Baude and Paulsen suggest that the word "enemies" is a similar term or has a largely overlapping scope to "insurrection or rebellion."[477] Therefore, they contend, a covered person may be disqualified under Section 3 by giving aid and comfort to an insurrection.[478] To their credit, Baude and Paulsen develop at some length the meaning of "rebellion" and "insurrection."[479] They illustrate the views of different authorities, and explain how the terms may be coextensive or overlapping. We do not contest that research here.[480] Yet, Baude and Paulsen have surprisingly little to say about how to identify "enemies." Instead, they wrote:

> Finally, aid or comfort to whom? "[T]he enemies thereof." We believe that "enemies" as employed in Section Three, embraces enemies both foreign and domestic. That now-familiar phrase ("enemies foreign and domestic") comes from the "Ironclad Oath," written into law in 1862, in the midst of the Civil War, and it seems clear from the political context of Section Three, enacted in the wake of a domestic civil war, that domestic enemies are enemies. It is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text. Given the history and context of Section Three "enemies" seems to include the domestic rebels and insurrectionists just described earlier in the sentence.[481]

Here Baude and Paulsen state a conclusion: "enemies" would include Civil War rebels and insurrectionists, but they do not actually identify who (or what) is or is not an "enemy," in the abstract, apart from the Civil War. Their conclusion is likely correct in the context of the Civil War. Although we suggest they are correct, in regard to many potential Section 3-defendants from that era, it is *not* because "enemy" and "insurrectionist" are *always* co-extensive or overlapping categories.

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477 Baude & Paulsen, *supra* note 1, at 68.

478 *Id.*

479 *Id.* at 64–69.

480 *Id.*

481 *Id.* at 68.

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Rather, Section 3-covered persons from the Civil War era faced *dual* liability under each Section 3 prong in connection with the particular facts and circumstances of the Civil War: they *both* (i) engaged in insurrection and (ii) gave aid or comfort to enemies.

A key difficulty with Baude and Paulsen's position is that they do not offer any developed position as to what defines an enemy. (In much the same fashion, Baude and Paulsen insist the President is an "Officer of the United States" without ever identifying what an "Officer of the United States" is.)[482] Baude and Paulsen's failure to define the term "enemy," outside the context of Section 3-covered confederates, is an omission, and we think a substantial one. They insist that Section 3 is a clause for all seasons, and it is not limited to the Civil War.[483] But their analysis is so limited. This omission is even more significant because there is law and scholarship expounding on the meaning of *enemy*. And that jurisprudence predates the Civil War and was developed during the Civil War.

We make four points. First, we settle some terminology. An "enemy" is a nation that the United States is at war with. Enemies can only exist during a war. Not all insurrections or rebellions amount to war. Therefore, in the absence of a war, there can be no enemies. Likewise, treason can only be committed in relation to a war.

Second, these principles were reflected by the Union's prosecution of the Civil War in the courts and on the battlefield. Though the Civil War was not a declared war, it was still a de facto war. Most confederates who supported the (purported) de facto confederate government were insurrectionists *and* gave aid or comfort to an enemy. As a result, many Civil War-era Section 3-covered persons would have been subject to disqualification under *both* prongs of Section 3's offense element.

Third, this background demonstrates that the word "enemy" is not coextensive or overlapping with insurrection or rebellion. Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto "rebellion and insurrection" must fail.

Fourth, Baude and Paulsen's are laser-focused on the Civil War and January 6, but disregard other historical and political events. (In much the same fashion, they are laser-focused on whether the President is an "officer of the United States," but offer no attempt to define that term in the abstract.) Such myopia disregards a basic premise of self-governance: secession movements may be lawful, and not traitorous. Today, many Puerto Ricans seek independence from the United States,

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[482] *Id.* at 104–11.

[483] *Id.* at 16.

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without fear of treason charges. A century ago, Filipinos likewise sought independence from the United States. Around the world, secession movements in the United Kingdom (i.e., Brexit), Scotland (i.e., from the United Kingdom), and other jurisdictions and would-be jurisdictions are supported by loyal citizens. This longstanding history further demonstrates why Baude and Paulsen misunderstand the relationship between secession and Section 3.

1. Defining the terminology: enemy, war, and treason

Here, we will define three primary terms and related topics. First, we define an "enemy." An "enemy" is an "enemy nation" and, sometimes, an "enemy national." Second, we demonstrate that enemies can only exist during a war. Third, we explain that treason can only be committed in relation to a war.

a. Who or what is an enemy?

An "enemy," on some occasions is used to refer to an "enemy nation." An enemy nation is a nation that your country is at war with. An enemy nation could be a nation de jure, as in an internationally recognized country, or a nation de facto, as in a nation lacking the indicia of international recognition. Whatever sort of nation it is–it is only an enemy if it is at war with your own.

In regard to individuals, who is an "enemy"? It is not the case that any crime, even a felony, makes one an "enemy" of the United States. Customarily, a person who commits a crime is termed a wrongdoer, offender, or, depending on the character of the crime, a felon. We submit an "enemy" is something substantially different.

The Constitution of 1788 includes the word "enemies" in the Treason Clause: "Treason against the United States, shall consist only in levying War against them, or in adhering to their *Enemies*, giving them Aid and Comfort."[484] "Enemy," as used in the Treason Clause was, and remains, a term from international law.[485] There are two senses

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[484] U.S. CONST. art. III, § 3, cl. 1 (emphasis added).

[485] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Calif. 1863) (No. 15,254) ("The term 'enemies' as used in the second clause [of the Treason Clause], according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy [national] is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason.").

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of the term *enemies* as applied to individuals. First, a national of an enemy nation is an *enemy national.* Second, a person living in territory controlled by an enemy nation is also sometimes characterized, considered, or treated as an enemy, even if his loyalties do not run to the de facto government.[486] We do not suggest that *enemies* as used in the Treason Clause in the Constitution of 1788 is coextensive with *enemies* as used in Section 3 of the Fourteenth Amendment (1868). The former included enemy nations as well as enemy nationals, the latter only included enemy nations. We do not doubt that the so-called confederacy was an enemy nation for Section 3 purposes.

In the *Prize Cases*, the Supreme Court used "enemy" in both senses: an enemy is an *enemy nation* and also as an *enemy national*.[487] The Court construed as an enemy nation the (purported) confederacy, which was the de facto government in a de facto war with the United States. We carefully describe that (purported) government as "de facto." The (purported) confederate government controlled territory and asserted its independence. However, the United States did not recognize the (purported) Confederate States of America, and the United States sought to ensure that other nations did not do so either. The Court also construed as enemies the nationals of that enemy nation who were loyal to that (purported) government—that is, they gave "aid and comfort" to that nation. The Court also construed as enemies, for some purposes, those who were living in the territory that the enemy nation controlled.

Section 3 was drafted, passed by Congress, and ratified, several years after the *Prize Cases* was decided. Section 3 did *not* adopt both senses of "enemies."[488] Merely being a national living in an enemy nation, for example, would not trigger disqualification. We think residents of West Virginia (before it was organized as a loyal

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[486] *See generally* Ford v. Surget, 97 U.S. (7 Otto) 594, 604 (1878); *see also* Jennifer K. Elsea, CONG. RSCH. SERV., R42337, DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS (2014); Larson, *supra* note 199, at 134 ("The Treason Clause carefully distinguishes between levying war and aiding enemies, because each defines a distinctive form of treason. The levying war provision looks inward, to internal rebellions. Persons who owe allegiance to the United States and rebel against it are not enemies, but traitors subject to prosecution for levying war. By contrast, the enemies provision looks outward; an enemy is always a foreign state, group, or person who owes no allegiance to the United States.").

[487] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863).

[488] 1 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 159 (Sollom Emlyn ed., 1736) (affirming that only foreigners "come properly under the name of enemies").

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government) during the Civil War could fit this bill.[489] And what was true in West Virginia, was equally true for many parts of all or nearly all of the States under control of the (purported) confederacy. It was the case that some residents in States that (purportedly) seceded in fact remained loyal to the Union, and they did not grant aid and comfort to the (purported) confederate government. Rather, to trigger disqualification, it is necessary to give "aid or comfort" to enemies. Some affirmative act is required. *Section 3 liability is only imposed for giving aid and comfort to enemies—no Section 3 liability is imposed for being an "enemy" or an "enemy" nation*. This analysis establishes that, in Section 3, "enemies" refers exclusively to enemy nations, and not enemy nationals. Enemy nationals only face Section 3 liability if they give "aid or comfort" to an enemy. Professor Carlton Larson wrote "An enemy under the Treason Clause only exists if there is a declaration of war between the United States and a foreign nation, open hostilities between the United States and a foreign nation, or open hostilities between the United States and a foreign person or group."[490] He added, "Failure to understand this point contributes to the most significant misapprehensions of American treason law."[491] We suspect that Professor Larson is correct. But again, we do not suggest that *enemies* as used in the Treason Clause in the Constitution of 1788 is coextensive with *enemies* as used in Section 3 of the Fourteenth Amendment (1868).

The *Prizes Cases* also provides some guidance on how to define the word enemy.[492] Justice Grier wrote for the Court, "But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.'"[493] Grier continued that "'enemies' property'" "is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law."[494] Grier's language is opaque—to twenty-first century American lawyers, even to those immersed in English history and English common law. And, for reasons, we explain, perhaps, especially to them. But in 1863, it would have been otherwise. The background to understanding Grier was that

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489 *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional*, 90 CAL. L. REV. 291 (2002).

490 Larson, *supra* note 199, at 135–36.

491 *Id.* at 135–36.

492 The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863).

493 *Id.* at 674.

494 *Id.*

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King James I, through his Attorneys-General for England and Wales, reviewed the *Earl of Oxford's Case* (1615).[495] In effect, the King was deciding which of two competing judgments, and, by implication, which of two competing legal systems, to uphold. The choice was between Coke's judgment, as Chief Justice of the King's Bench, or Lord Ellesmere's judgment, as Lord Chancellor. Coke was the expositor of the common law and the representative of the common law courts, and Ellesmere was the expositor of equitable principles and the Court of Chancery. The *Earl of Oxford's Case* established that, in the event of conflict between the two systems, equity prevails over the common law. Like Coke, *Fleta* or Fleta's treatise is another (much earlier) exposition of the common law of England. In rejecting *Fleta* and Coke, and the common law, Grier was, instead, looking to equity, natural law, and public international law as the proper sources to understand the Constitution's use of "enemies." As a matter of original public meaning, we suspect Grier was correct. To be sure, we do not know.

Baude and Paulsen cite Lord Coke in their discussion of what it means to give "aid or comfort" to "enemies."[496] In the *Prize Cases*, Justice Grier expressly disagrees with Coke's understanding.[497] Baude and Paulsen tell us that the *Prize Cases* were core to the intellectual background that informed Section 3.[498] The *Prize Cases* expressly reject using Coke as a source.[499] It seems inconsistent, then, for Baude and Paulsen to rely on Coke.

b. Enemies can only exist during an actual war, including de facto war, declared war or undeclared war

War—what is good for?[500] With regard to enemy status, absolutely everything. An enemy can only exist during a war. Thus, to

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[495] The King's Order and Decree in Chancery (1616), 21 Eng. Rep. 61, Cary 115, *affirming Earl of Oxford's Case*, 21 Eng. Rep. 485 (Eng. Ct. Ch. 1615) (Ellesmere LC), http://www.commonlii.org/uk/cases/EngR/1615/2.pdf. As is well known, the King used "take care" language in his decree. *See generally* Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66; Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77. [SETH: I HAVE REJECTED YOUR PROPOSED CHANGE: leave in everything following "affirming".]

[496] Baude & Paulsen, *supra* note 1, at 71.

[497] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 674 (1863).

[498] Baude & Paulsen, *supra* note 1, at 84.

[499] 67 U.S. at 674.

[500] EDWIN STARR, WAR, Genius, https://genius.com/Edwin-starr-war-lyrics (1970).

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define *enemy*, we must examine the term *war*. War might include a publicly declared war or an undeclared war. And just as not every crime is a felony, and not every felony is an insurrection or rebellion, not every insurrection or rebellion is a war. The *sine qua non* of liability based on enemy status was the existence of actual war. This principle was recognized in the seriatim opinions in *Bas v. Tingy*,[501] which "comes as close as the Supreme Court has ever come to providing a definition for the term 'war.'"[502]

The Prize Cases observed that neutrals "have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy."[503] Actual war was sufficient to establish enemy-based/war-based liability. That rule covered the Civil War, which was a de facto war among combatants that did not recognize one another. Such a war was sufficient to establish liability based on enemy status. In the *Prize*

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[501] Bas v. Tingy, 4 U.S. 37, 39 (1800) (Moore, J.) ("But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of enemies?"); *id.* at 41 (Washington, J.) ("In support of this position, it has been observed, that in no law prior to March 1799, is France styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because as to France, she was sufficiently described by the title of the French republic; and as to America, the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government."); *id.* at 44 (Chase, J.) ("As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of 'enemy' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy; but still she was an enemy."). *See generally* 1 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 164 (Sollom Emlyn ed., 1736) ("[S]o that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility," and further explaining that in order to establish adherence to an enemy there must be a war).

[502] *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 198 (2020).

[503] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 665–66 (1863).

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Cases, the Supreme Court treated the Civil War as a de facto war.[504] The Court made this finding, i.e., the existence of a state of war, in substantial part, based on the fact that the courts of the de jure government had been closed by the insurgents.[505]

Our position can be summarized in five points. First, Section 3-liability premised on the enemies prong is based on the existence of an enemy. Second, Section 3-liability can be premised on a war among combatants who recognize one another or combatants who do not recognize one another, but there must be some actual war. Third, Section 3-liability can be premised on a war that is a declared war or an undeclared war, but there must be some actual war. Fourth, Section 3-based liability, as the text states, does not extend to being an enemy; liability only extends to giving an enemy aid or comfort. Fifth, an "enemy" in everyday English usage *could* be used to refer to enemy nations or enemy nationals, but in Section 3 "enem[y]" only refers to an enemy nation and liability is premised on giving that wartime enemy nation aid or comfort. If our analysis is correct, then Baude and Paulsen have erred in mapping the second prong's "aid and comfort" language onto the first prong's "insurrection or rebellion" language. Why? Because liability under the second prong is premised on actual war, and liability under the first prong only requires an insurrection or rebellion, which do not require an actual war.

c. Treason can only be committed during an actual or de facto war

The Constitution defines treason in only two fashions—both of which require a state of war. First, as "consist[ing] . . . in levying War against" the United States.[506] And second, "in adhering to their Enemies, giving them Aid and Comfort."[507] This second prong refers to enemy nations that the United States is at war with. If there is no war—whether actual or de facto—there are no "enemies." It is impossible to

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504 *Id.* at 667 ("'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge.").

505 *Id.* at 667, 670.

506 U.S. CONST. art. III, § 3, cl. 1.

507 *Id.*

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commit treason absent a war.[508] This principle was followed in the wake of the American Revolution.[509]

However, not all support of enemy nations would constitute treason. The Treason Clause imposes a relatively exacting standard. Moreover, not all conduct that may disqualify a person under Section 3 would constitute treason. In some ways, Section 3 liability was substantially wider than what was permitted under the Treason Clause. Specifically, the "aid or comfort" prong of Section 3 was not coextensive with the outer bounds of the crime of treason as defined by the Treason Clause. We put forward three reasons in defense of this position.

First, Section 3 does not characterize the "aid or comfort" prong as treason. The subject of treason was on everyone's mind immediately before, during, and after the Civil War. Indeed, Jefferson Davis, the former president of the (purported) confederacy was indicted on charges of treason. The Civil War was considered a *de facto* undeclared war. There does not need to be a declared war to support a treason charge. However, the Framers of Section 3 did not use the word "treason." Why? We can surmise that the provision was not designed to disqualify people from Section 3-covered positions based on treason, which was a traditional criminal offense. For example, the "aid or comfort" prong referred to a lesser wrong.

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[508] *See also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 126 (1807) (Marshall, C.J.) ("Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.' To constitute that specific crime for which the prisoners now before the court have been committed, *war must be actually levied against the United States*. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason.") (emphasis added).

[509] *See* Respublica v. Chapman, 1 U.S. (1 Dall.) 53, 57 (Pa. 1781) ("Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity; unless there is a power to execute them. But that is not the case at present . . . for before the meeting of Council in March, 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of High Treason might have been committed by any person, who was then a subject of the Commonwealth."); *see also* Josh Blackman, Essay, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95, 113 (2010) ("A person deemed to be a subject of England could wage war against America, and could not be found guilty of treason, for his loyalty lay with the crown. In contrast, a disloyal citizen of the United States could be prosecuted for treason, for his loyalty was to the United States.").

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Second, the Treason Clause's second- or enemies-prong required that a defendant adher[ed] to their enemies *and* g[ave] their enemies "aid and comfort."[510] We suggest Treason requires both elements: "adhering to" was the criminal intent, and "aid and comfort" was the actus reus.[511] But Section 3 had no intent language. If a covered person gave "aid or comfort" to an enemy, but did not adhere to the enemies, he may be disqualified pursuant to Section 3, but would not be liable for treason. Thus, a Section 3 disqualification based on Section 3's second- or enemies-prong was not tantamount to establishing the elements of treason. In consequence, Section 3-liability did not carry the same moral opprobrium that attached to treason.

Finally, treason under the Constitution required proof that the defendant gave "aid *and* comfort." However, Section 3 only required "aid *or* comfort." The threshold for establishing treason is higher than the threshold or establishing disqualification under Section 3. Again, Section 3 liability under Section 3's second- or enemies-prong was not predicated on establishing treason or any other established crime. Because no known crime is associated with Section 3's second prong, and certainly not treason, a defendant did not enjoy an established right to all the standard criminal law defenses and all the customary constitutional safeguards, protections, and procedures–substantive and procedural connected to alleged violations of federal criminal law. By contrast, liability under the first prong was characterized as criminal wrongdoing: insurrection or rebellion. The federal criminal statute prohibiting insurrection was signed by President Lincoln before the ratification of the Fourteenth Amendment.[512] (To date, as far as we know, no one involved in January 6 has been charged with violating this statute.[513])

The first prong relates to criminal liability and the second prong does not. For these two reasons, and others, Baude and Paulsen err by mapping the second prong's relatively expansive "aid or comfort" language back on to the first prong's relatively narrow "engage" language.

Baude and Paulsen also err in regard to treason. They assert that "In one of many strange asides, Chase noted the possibility that Section

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510 *See also* Cramer v. United States, 325 U.S. 1, 6 (1945) (Jackson, J.).

511 *See also id.*

512 The modern version of that statute appears at 18 U.S.C. § 2383. We discussed this statute in Blackman & Tillman, *supra* note 7, at 200.

513 Josh Blackman, *What The Trump Indictment Left Out*, REASON: VOLOKH CONSPIRACY (Aug. 1, 2023, 11:22 PM), https://reason.com/volokh/2023/08/01/what-the-trump-indictment-left-out/.

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Three had *implicitly repealed the Treason Clause*. . . ."[514] Chase was not referring to the Treason Clause of the Constitution. He was referring to the Treason Act, which President Lincoln signed into law in 1862. That was the statute that Jefferson Davis was indicted under. This conflation also mistakes how the Treason Clause operates. The Constitution's Treason Clause restricted how Congress may define treason, and it restricted what evidence and procedures would support such a charge. The Treason Clause was not self-executing. Only Congress could put it into effect, and the States had no coordinate power to define treason against the United States. If Chase had held that Section 3 superseded the Treason Clause, then that would have *expanded* congressional power to define treason. If anything, Chase was suggesting that Section 3 *limited* the scope of Congress's treason statute. We think this is yet another example of how Baude and Paulsen have misunderstood Chase and his thinking.

We also suggest that Baude and Paulsen's position may actually provide some support for Chase's conclusion regarding the treason statute. Jefferson Davis's lawyers argued that Section 3 displaced all federal criminal treason-related prosecutions in favor of disqualification as the exclusive punishment for those falling within Section 3's reach. If Baude and Paulsen are correct that Section 3 modified statutory law, such as federal habeas law,[515] why couldn't Section 3 also modify other statutory law, such as the treason statute? We do not endorse that argument. We merely point out Baude and Paulsen provide no fixed rule, or even any stopping point, explaining how to determine what prior law, including constitutional law and statutory law, was upset by Section 3. Once we start from the Baude-Paulsen presumption that Section 3 reached back, with the potential of upsetting all facets of federal law, even retroactively, Davis's and Chase's (purported) position in the *Case of Jefferson Davis* cannot be rejected out of hand.[516]

2. Section 3's two prongs mirror the Union's dual-track legal theory for prosecuting the Civil War

During and after the Civil War, the Union's law officers followed a dual-track legal theory to prosecute the war and to punish

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[514] Baude & Paulsen, *supra* note 1, at 43.

[515] *See supra* section II(B)(4).

[516] *See supra* section II(B)(5).

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Civil War era wrongdoing.[517] The first track permitted criminal prosecutions. Americans and foreigners who engaged in insurrection or rebellion (or worse) could be prosecuted as criminals. And Americans and, in certain circumstances, foreigners who adhered to the (purported) confederacy, and gave that enemy nation "aid and comfort," could be prosecuted for treason. (Again, Jefferson Davis was charged with treason.) Generally, former confederates who faced sanctions for insurrection could also be liable for treason.

Criminals and traitors were prosecuted through the criminal law in civilian courts. The government could charge those captured in the field, as well as those who were part of the planning stage. The government could also charge those who supported and maintained the (purported) confederacy's armies and militias in the field. An alleged criminal would have the benefit of traditional criminal law defenses: voluntariness, duress, incapacity, etc. However, very few captured rebels were tried in civilian courts.

The second track relied on military force. The Union fought the (purported) confederacy as an enemy nation. In doing so, the Union was not recognizing the (purported) confederacy under international law, much less recognizing the legitimacy of secession. Rather, the Union recognized the existence of a de facto war against a de facto government. This limited recognition of actual belligerency in the field permitted the Union to take actions in regard to persons and property that were not otherwise permitted in peacetime, but were permitted in war time as a matter of international law. And this authority was supplemented by the Lieber Code, which was the military law that governed the Union Army. This authority was also supplemented by constitutionally granted presidential war powers, and by acquiescence and affirmative actions by Congress generally. This authority was also supplemented by extant statutory authorities, such as e.g. the Militia Acts and Insurrection Acts, as amended. It was a messy legal theory in a messy war.

The Prize Cases (1863) and other Civil War era federal cases recognized these principles.

The Union's dual track theory of the Civil War expanded the lawful options available to the Union's military and civilian courts and administrators. First, the Union's law officers contended that captured rebels *could* be tried as criminals in civilian courts for federal statutory crimes. It was on this authority that Jefferson Davis was indicted following the Civil War. (As we discussed above, Chief Justice Chase

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[517] *See* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed. 1964).

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presided over that trial in federal court.) Second, the Union's law officers contended that captured military rebels *could* be tried in military tribunals for war crimes. Captain Henry Wirz, for example, was tried before a United States Military Commission in Washington.[518] Wirz was convicted, and he was sentenced to death.[519] Third, the Union also contended that captured rebels *could* be detained, as prisoners of war under the law of land warfare–at least until hostilities concluded. For example, confederate prisoners of war were held by the Union at Camp Douglas in Illinois.[520] There was another possibility, at the margins of the law. In theory, civilians loyal to the (purported) confederacy *might* have been detained as enemy nationals. This status was provided in the Enemy Aliens Act of 1798, one of the several acts later known as the Alien and Sedition Acts enacted during the Adams Administration. But the Union did not follow this path.

Section 3's two disqualification prongs mirrored the Union's dual-track legal theories for prosecuting the war and for punishing Civil

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[518] *The Trial of Captain Henry Wirz*, *reprinted in* 8 AMERICAN STATE TRIALS 657 (John D. Lawson ed., 1917), https://perma.cc/55BQ-AQDP.

[519] *Myth: Henry Wirz was the Only Person Tried for War Crimes in the Civil War*, NAT'L PARK SERV., https://www.nps.gov/ande/learn/historyculture/wirztribunal.htm (Apr. 14, 2015). Jefferson Davis was, perhaps, the most famous person indicted and tried for treason against the U.S. before a U.S. civilian court for Civil War activities. Davis was not alone. *See, e.g.*, United States v. Greathouse, 26 F. Cas. 18 (C.C.N.D. Calif. 1863) (No. 15,254) (Field, Circuit Justice and Hoffman, District Judge) (convicted by jury, sentenced to imprisonment, and commuted by President Lincoln); United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15,262)(Cadwalader, District Judge and Grier, Circuit Justice) (discharged from custody based on a surety of $10,000 and recognizance to keep the peace and obey the laws). President Johnson's amnesty terminated the *Case of Jefferson Davis*. As far as we know, William Mumford was the only person tried, convicted, and executed for treason against the U.S. for Civil War activities—but Mumford was convicted by a wartime military tribunal, and not in a civilian court. The Union's lack of interest in treason prosecutions goes some way to explain why Chase *may* have believed that Section 3 superseded federal treason prosecutions. Chase was being practical; his rulings were in line with the loyal population's sentiment—or, so he may have believed.

[520] DENNIS KELLY, A HISTORY OF CAMP DOUGLAS, ILLINOIS UNION PRISON, 1861–1865, at 5. *But cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.").

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War era wrongdoing. Section 3 could disqualify those who engaged in insurrection and rebellion, and those who gave aid or comfort to the enemy. There is no secret code here. Section 3 *was* expansive in that Section 3-covered persons could be disqualified from public positions in two ways: (i) under the first prong based on criminal law violations encumbered by traditional constitutional protections, or (ii) under the second prong's enemies-language. But the *sine qua non* of being an enemy or giving an enemy aid and comfort demands a war.

3. Baude and Paulsen err by mapping the "aid and comfort" prong onto the insurrection prong

An "enemy" can be an insurrectionist. And an insurrectionist can be an "enemy." We think many former confederates fit both descriptions during the Civil War. But in the abstract, the word "enemy" is not coextensive or overlapping with one who committed insurrection or rebellion. They are not coextensive terms, and they are not overlapping terms. A person can be guilty of the crimes of insurrection or rebellion absent a war, and a person can give aid or comfort to an enemy nation absent involvement in any insurrection or rebellion. Consider a hypothetical: a U.S. national aids a foreign nation in mounting a foreign invasion on the United States. That person could be liable for giving aid and comfort to enemies, but he would not be liable for engaging in insurrection or rebellion. But a person cannot give aid or comfort to an enemy nation absent a war. It is actual war that gives an enemy the character of being an enemy. And such a war includes declared and undeclared wars, among combatants who recognize one another and among combatants who do not.

Baude and Paulsen write: "As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war."[521] We agree. And this is another good reason not to rewrite the two prongs of Section 3: the first prong focuses on insurrection and rebellion, and the second focuses on enemies and war. Because not every insurrection is a war, one cannot map the second prong's "aid or comfort" language onto the first prong's "insurrection or rebellion" prong.

Judge McConnell likewise observed that the phrase "giving aid or comfort" is "reserved for giving aid and comfort to the 'enemies' of the United States, which has historically meant enemies in war."[522] We

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[521] Baude & Paulsen, *supra* note 1, at 113.

[522] Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, REASON: VOLOKH CONSPIRACY (Aug. 12, 2023, 6:58 PM), https://reason.com/volokh/2023/08/12/prof-michael-

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agree. For these reasons, Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto "rebellion and insurrection" does not succeed.

4. Not all secessionists are insurrectionists or enemies

There is another reason to reject Baude and Paulsen's characterization of Section 3-based liability. They write that "Conduct participating in, advancing, supporting, or assisting either *secession* or armed resistance to U.S. authority constituted 'engaging in' or giving 'aid or comfort to' the Union's enemies."[523] We think this statement cannot be directed against all secession movements, and not even against all secession movements directed towards seceding from the United States.

Secession in 1861 was wrongful because it was unilateral in character, illegal in how it was carried out, and violent. It was not only violent. It was not only an insurrection and rebellion. It was a war–a civil war. But not all secessions take that character–not all are wrongful, unilateral, illegal, and amount to war-making.

Baude and Paulsen quote from Lincoln's March 4, 1861 inaugural address.[524] Lincoln stated: "It follows from these views that *no State upon its own mere motion* can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that *acts of violence* within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances."[525] Lincoln did not reject secession in all regards. Rather, he objected to the particulars of the secessions of the (purported) confederacy because of its unilateral, violent, and illegal character. Yet, Baude and Paulsen characterize secession per se as amounting to a Section 3 violation. That reading cannot be squared with Lincoln's own understanding of the Civil War.

Baude and Paulsen's broad understanding of Section 3 would brand members of many pacific and lawful secession movements as enemies, traitors, or worse. Let's start with Puerto Rico. Recently, Justice Sotomayor discussed at some length the independence

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mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

523 Baude & Paulsen, *supra* note 1, at 74 (emphasis added).

524 *Id.* at n.228 (citing 2 ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1859–1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES & PROCLAMATIONS 217–18).

525 *Id.* (emphasis added).

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movement in Puerto Rico, which was grounded in domestic law, international law, and popular sovereignty.[526] Justice Sotomayor did not offer even the slightest intimation that people who favored independence could be seen as "'engaging in' or giving 'aid or comfort to' the Union's enemies."[527] In 2022, the United States House of Representatives passed a bill that would allow Puerto Rico to hold a binding referendum on statehood or independence.[528] Were the representatives who supported that bill giving aid and comfort to the enemy? Of course not. Imagine if the governor of Puerto Rico had at some point taken a Section 3 oath, and then he openly supported and presided over a territorial secession convention for Puerto Rico. If that convention failed, and Puerto Rico became a state, would the governor be disqualified under Section 3 from serving in the United States Senate? Did he support an insurrection? Give aid or comfort to enemies? We think the answers to all of these questions must be emphatically *no*. (Hint: because there was no war in our hypothetical!)

Let's go further back in time. William Howard Taft was the Governor General of the Philippines, a United States territory, from 1901–1903.[529] Taft had previously served as a federal circuit court judge, and he had taken an oath to the Constitution. What if Taft, as Governor General of the Philippines, had voiced political support for political disunion? Imagine he simply entertained a meeting with members of the community who opposed the Philippine's continuing status in the United States, and as a territory within the United States. And imagine that meeting gave legitimacy to a nascent secession movement. Would Taft, in Baude and Paulsen's words, have "assisted" a "secession" to "U.S." authority, and thus given "aid and comfort" to

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526 Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1677 (2020) (Sotomayor, J., concurring) ("Thus, in the eyes of the international community looking in, as well as of the Federal Government looking out, Puerto Rico has long enjoyed autonomous reign over its internal affairs. Indeed, were the Federal Government's representations to the United Nations merely aspirational, the United States' compliance with its international legal obligations would be in substantial doubt.").

527 Baude & Paulsen, *supra* note 1, at 74.

528 Farnoush Amiri & Danica Coto, *House approves referendum to 'decolonize' Puerto Rico*, ASSOCIATED PRESS (Dec. 15, 2022, 2:30 PM), https://apnews.com/article/referendums-puerto-rico-b96884274da9c970e710b6d7d2f65a4d.

529 *William Howard Taft*, ENCYC. BRITTANICA (Sept. 11, 2023), https://www.britannica.com/biography/William-Howard-Taft.

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the Union's enemies? Would Taft have been disqualified under Section 3? Again, we think the answer is emphatically *no*.[530]

Now, let's look overseas. Many secession movements were completely lawful and completely pacific. Would those who supported Brexit be deemed traitors? Only a very foolish person would suggest that Scots voting for or against independence from the United Kingdom were somehow anything but loyal and law-abiding. What about the breakup of Czechoslovakia?

Liability based on Section 3's second prong is limited to those who give "aid and comfort" to the enemies of the United States in relation to an actual war, and it does not extend to those engaging in normal democratic politics. Secession in 1861 was not normal democratic politics. But secession, in the abstract, can be, and it frequently is normal democratic politics. This point reflects a broader criticism of Baude and Paulsen's article. They approach Section 3 from two very important, but very narrow vantage points: the American Civil War and Washington, D.C. on January 6. They attempt to pigeonhole the language of Section 3 to fit neatly into those two events. But their theory only fits well into one. The language designed in consequence of the Civil War experience is not a tight fit for all subsequent events. The language that Section 3's second prong spoke to was in relation to wartime enemies. And there is nothing in Section 3 which suggests that all secession movements are created equal.

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Does our analysis about the scope of Section 3's offense element prove that Baude and Paulsen are wrong? We think they are wrong. At the very least, we think they need to be more forthcoming and define the scope of Section 3's "enemies" language. We also think they need to define the scope of the Section 3's "office" and "officer" language–the issue to which we now turn.

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[530] In reality, Taft "became the unofficial leader of a 'retentionist' movement to stop the US Democratic Party from making any firm promise of future independence for the islands, which he saw as a 'policy of scuttle.'" Adam D. Burns, *Retentionist in Chief: William Howard Taft and the Question of Philippine Independence, 1912-1916*, 61 PHIL. STUD.: HIST. & ETHNOGRAPHIC VIEWPOINTS 163, 163 (2013), https://www.jstor.org/stable/42634756 [https://perma.cc/RU4S-BH36]. But other Section 3-covered positions, including several members of Congress, favored independence for the Philippines.

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V. Is the President an "Officer of the United States" for purposes of Section 3?

So far, we have addressed two necessary conditions to finding that a person is disqualified under Section 3. First, is Section 3 self-executing, such that it can be enforced in the absence of any federal legislation? Second, can a Section 3 disqualification be triggered if a person gives aid and comfort to an insurrection? *Contra* Baude and Paulsen, for both of these questions, we do not think that *all* or even most of the originalist evidence points towards a *yes* answer. In Part V, we will address another threshold question: which types of positions are covered by Section 3? Section 3 applies to a person "who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States . . . ."

What is the meaning of the phrase "officer of the United States" in Section 3? Baude and Paulsen address this question from a singular focus: is the President (the position that Donald Trump held) an "officer of the United States." They offer no theory at all to determine which *other* positions fit within the scope of this language. Indeed, they raise the atextualist argument that the phrase "Officer of the United States" in Section 3 is indistinguishable from the phrase "Office . . . under the United States," which is also used in Section 3. If they were writing on a blank slate, perhaps this position would be understandable. But Tillman, and later Blackman, have been writing on this position for some time. Indeed, some seven years ago, Baude publicly praised Tillman's scholarship on the Constitution's "office"- "and "officer"-language.

In their article, Baude and Paulsen summarily dismiss our position. Baude and Paulsen contend that our textualist approach is "hidden-meaning[] hermeneutic[s]" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati."[531] Baude and Paulsen do not address the evidence we put forward, instead choosing to disparage our position in hyperbolic terms. We suppose we are in good company, as Baude and Paulsen use the same sort of charged language against us, as they used against Chief Justice Chase.

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[531] Baude & Paulsen, *supra* note 1, at 104, 108.

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There is no secret code. Our 2021 article cites sources from the period roughly contemporaneous with ratification to support the position that the President is not an Officer of the United States. During an 1876 impeachment trial, a Senator said, "the President is not an officer of the United States."[532] An election law treatise from 1878 stated "[i]t is *obvious* that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"[533] This position has support in jurisprudence from Justice Story to Chief Justice Roberts.

Baude and Paulsen pay very little attention to the most obvious source of the meaning of the "office"-language in Section 3: the same and similar language in the Constitution of 1788. Section 3 resembles the Article VI Oath or Affirmation Clause, which uses the phrase "Officers . . . of the United States." The President does not take an Article VI Oath. Instead, he has always taken his own Article II oath. The conventional view is that the President is not an "Officer of the United States" for purposes of the Article VI Oath or Affirmation Clause. Baude and Paulsen also fail to address other provisions of the Constitution of 1788 that use the phrase "Officers of the United States": the Impeachment Clause, the Appointments Clause, and the Commissions Clause. The conventional view is that in each provision, the President is not included under the aegis of the term, "Officers of the United States."

Instead of parsing the Constitution of 1788, they focus on original intentions and consequentialism. These sorts of arguments do not pass originalist muster. All of the usual rejoinders to original intentions and consequentialism—which are well known to originalist debates—apply here with full force. More pressingly, Baude and Paulsen fail to account for our evidence concerning the original meaning of the phrase "Officers of the United States," and instead rely on scattered statements concerning other language, such as "Office . . . under the United States." Further, Baude and Paulsen fail to fully address the positions that were enumerated in Section 3, which suggests

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[532] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California)

[533] DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Philadelphia, J.B. Lippincott & Co. 1878) (emphasis added)

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that the Framers did not purport to include all positions in all regards. Section 3 was not all-encompassing. It did not cover the "waterfront."[534]

At bottom, Baude and Paulsen simply look away from contrary evidence. On this issue, it is simply not the case that "essentially all the evidence concerning the original textual meaning of Section Three . . . points in [their] direction."[535] Indeed, much of the evidence points in our direction. And if the presidency is not an "Officer of the United States," then the full sweep and force of Section 3 cannot touch Trump.

A. There is no "secret code"

Baude and Paulsen dismiss our textualist approach as "hidden-meaning hermeneutics."[536] Baude and Paulsen reject our reading of Section 3, which apparently renders the provision "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati."[537] They claim our support was written in "disappearing ink."[538]

Our reading is not "secret" at all, and our evidence is written in plain black-and-white text. Our 2021 article cites several sources from the period roughly contemporaneous with ratification to support the position that the President is not an Officer of the United States.[539] For example, we wrote:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States."[540] Instead, Booth stated, the President is "part of the Government."[541] Two years later, David McKnight

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534 *See* Baude & Paulsen, *supra* note 1, at 105 (opining that Section 3 "was designed to be reasonably comprehensive, covering the waterfront").

535 *Id.* at 103.

536 *Id.* at 108.

537 *Id.* at 104.

538 *Id.* at 109 n.393.

539 Blackman & Tillman, *supra* note 10, at 30.

540; BELKNAP, *supra* note 518 at 145. see *also id.* at 130 (reproducing May 25, 1876 statement of George Sewell Boutwell, Senator from Massachusetts, who stated: "[F]or according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers.").

541 *Id.* at 145.

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> wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is *obvious* that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"[542]

Maybe Booth and McKnight were right, or maybe they were wrong. No doubt, there are other competing authorities. The important point is that Booth and McKnight were not writing in "disappearing ink." They were not Illuminati priests. Booth was speaking on the Senate floor, and McKnight's writing appeared in a well-regarded treatise which continues to be cited nearly 150 years later. Both were speaking and writing to the American public. Nothing here is in any way secret or hidden or confined to a select priestly interpretive caste. Indeed, McKnight thought his position was "obvious." And Baude has studied and written about the Belknap impeachment trial, in which Senator Booth testified.[543] These sources were not hidden. Moreover, this position has been adopted by leading jurists who were not divining prophecies from entrails with a haruspex.[544] They were reading the same text we all are reading.

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[542] MCKNIGHT, *supra* note 519 (emphasis added); *see also* Blackman & Tillman, *supra* note 10, at 30.

[543] Will Baude, *Does the Chief Justice Preside over an Ex-President's Impeachment Trial?*, REASON: VOLOKH CONSPIRACY (Jan. 15, 2021, 7:24 AM), https://reason.com/volokh/2021/01/15/does-the-chief-justice-preside-over-an-ex-presidents-impeachment-trial/.

[544] Former-Attorney General Mukasey wrote that the President is not an "Officer of the United States" for purposes of Section 3. Michael Mukasey, Opinion, *Was Trump 'an Officer of the United States'?*, WALL ST. J., (Sept. 7, 2023, 12:59 PM), https://wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26 ("The use of the term 'officer of the United States' in other constitutional provisions shows that it refers only to appointed officials, not to elected ones."); Steven Calabresi, Opinion, *President Trump Can Not Be Disqualified*, WALL ST. J. (Sept. 12, 2023, 4:30 PM), https://wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b ("Former U.S. Attorney General Michael Mukasey's op-ed 'Was Trump "an Officer of the United States"?' (Sept. 8) has caused me to change my mind about an argument that I have had with Prof. Seth Barrett Tillman for 25 years. Mr. Mukasey is right: Looked at in the context of the Disqualification Clause of the 14th Amendment, the president is neither an 'officer of the United States,' nor, obviously, a 'member of Congress.' That must be why the Constitution prescribes a separate oath for the president."); Steven Calabresi, *Donald Trump Should be on the Ballot and Should Lose*, REASON: VOLOKH CONSPIRACY, https://reason.com/volokh/2023/09/16/steve-calabresi-donald-trump-should-be-on-the-ballot-and-should-lose/ (Sept. 16, 2023, 2:08 AM) ("I have now changed my mind and have concluded that since Trump was

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We acknowledge that not everyone agrees with our position today,[545] and in the past. Still, we conclude that the interpretive issue here is a common one—it is the sort of question on which dispassionate, reasonable minds can disagree after having reviewed competing streams of authority, argument, and evidence. In addition to Booth and McKnight, our 2021 publication on Section 3 also discussed other contemporaneous authorities, as well as related antebellum and modern authorities. These authorities include Justice Joseph Story's celebrated *Commentaries on the Constitution*, and modern Supreme Court decisions, including one from Chief Justice Roberts, that support our position as to the scope of the Constitution's "Officer[] of the United States"-language. Far from a "secret code" or "hidden-meaning hermeneutics," our view was and remains well-known.

Baude and Paulsen do not acknowledge, consider, and balance these contrary authorities in any systematic fashion against their own preferred positions. Moreover, Baude and Paulsen pay very little attention to the most obvious source of the meaning of the "office"-language in Section 3: the same and similar language in the Constitution of 1788.

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not 'an officer of the United States' on January 6, 2021, the Insurrection Clause does not apply to Trump. I am also much more doubtful than I was a week ago of the correctness of the University of Pennsylvania Law Review law review article by William Baude and Michael Paulsen, The *Sweep and Force of Section Three*, which argues that former President Trump is disqualified from running again for President. A draft law review article taking issue with Baude and Paulsen, co-written by Josh Blackman and Seth Barrett Tilman, entitled *Sweeping and Forcing the President into Section 3: A Response to William Baude and Michael Stokes Paulsen* makes a good case . . . that the Baude/Paulsen reading of Section 3 of the Fourteenth Amendment is wrong. I think Josh Blackman and Seth Tillman are more likely right than not."); Adam Liptak, *An About-Face on Whether the 14th Amendment Bars Trump From Office*, N.Y. TIMES (Sept. 18, 2023, 5:02 AM), https://perma.cc/4ZNG-QKYM ("Professor Calabresi wrote that his thinking had been influenced by a new article posted on Tuesday by two other professors, Josh Blackman of South Texas College of Law Houston and Seth Barrett Tillman of Maynooth University in Ireland, who have long pressed arguments that some provisions of the Constitution do not cover the president.").

[545] Josh Blackman & Seth Barrett Tillman, *Professor Akhil Amar, On His Podcast, Responds to Attorney General Mukasey and the Tillman-Blackman Position*, REASON: VOLOKH CONSPIRACY (Sept. 14, 2023, 1:08 AM), https://reason.com/volokh/2023/09/14/professor-akhil-amar-on-his-podcast-responds-to-attorney-general-mukasey-and-the-tillman-blackman-position/ (noting that Professor Amar called the Tillman–Blackman position "genuinely stupid," "embarrassing," "daft," "wrong," "silly," and more). It could be worse: Professor Amar refrained from calling our position "appalling" or "bonkers."

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B. What about the Constitution of 1788?

Section 3 of the Fourteenth Amendment was not written on a blank slate. Compare the Oath of Affirmation Clause in Article VI with Section 3 of the Fourteenth Amendment.

Oath or Affirmation Clause (1788)	Section 3 (1868)
"The [1] Senators and Representatives before mentioned, and the Members of the [2] several State Legislatures, and [3] *all executive and judicial Officers, both of the United States* [4] and of the several states, shall be bound by Oath or Affirmation, to support this Constitution"	"No person . . . who having previously taken an oath, as a [1] member of Congress, or as [3] *an officer of the United States*, or as a [2] member of any state legislature, or as an [4] executive or judicial officer of any State, to support the Constitution of the United States. . . ."

Both provisions reference, in some fashion, the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] members of the state legislatures, [3] executive and judicial officers of the United States, and [4] executive and judicial officers of the states.

We do note one subtle distinction between Article VI and Section 3. Article VI refers to "Senators and Representatives;" by contrast, Section 3 refers to "members of Congress." We are not surprised by this different choice of language. We are not surprised that Article VI made use of "Senators and Representatives"-language and that Section 3, by contrast, made use of "member of Congress"-language. In 1787–1788, when the Constitution was drafted, proposed, and ratified there were no members of Congress (under the Constitution of 1788). Article VI acted prospectively on these positions which were not yet filled by election—so the language of membership would have been less than exact. By contrast, Section 3 acted on extant institutions (e.g., Congress) with extant members. That may be why both Article VI and Section 3 referred to members of the state legislatures: a set of institutions and officials that were already in existence when the original Constitution and Section 3 went into effect. If we are correct, it illustrates that constitutional draftspersons, in 1787–1788 and 1866–1868, closely adhered to parliamentary drafting conventions.

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If these drafting conventions now appear to some like a secret code, it is: [i] because legislative drafting is no longer considered a central skill within the legal profession and among legal academics (who may never take a course in it, much less teach it), and [ii] more importantly, because of the decline of any continuity in Anglo-American (oral) parliamentary culture and the concomitant decline of the mimetic transfer of legal knowledge in favour of a judiciary-centred legal culture giving voice to separation of powers norms.[546]

Which position(s) is/are not mentioned in Article VI and in Section 3? Among others, the President. Perhaps there is a reason for both provisions' failing to expressly incorporate any reference to the President? We do not know whether Baude and/or Paulsen would suggest that the President is covered by the phrase "Officer[] of the United States" in the Article VI Oath of Affirmation Clause. No President has ever taken an Article VI oath, as defined by statute. Rather, presidents have always relied on their Article II oath. President Washington took his Article II oath before the first statutory oath was enacted.[547] Indeed, that bill could not have even become law until it was presented to *President* Washington.[548] These textual arguments, buttressed by an uninterrupted historical practice since President Washington, would seem to indicate that the President is not fairly encompassed by Article VI's "Officers of the United States"-language.

There may be yet another reason to conclude that the President is not fairly encompassed by Article VI's "Officers of the United States"-language. The presidential oath in Article II provides that the President "will to the best of my Ability, *preserve, protect and defend the Constitution* of the United States." Article VI uses different language: a covered position "shall be bound by Oath or Affirmation,

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[546] *See also* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § 1 (Washington, D.C., Samuel Harrison Smith 1801) (starting his manual with: "Mr. Onslow, the ablest of the Speakers of the House of Commons, used to *say* . . . ." (emphasis added)); *cf.* Haym Soloveitchik, *Rupture and Reconstruction*, 28 TRADITION 64 (1994) ("One learns best by being shown, that is to say, mimetically. When conduct is learned from texts, conflicting views about its performance proliferate, and the simplest gesture becomes acutely complicated."), https://traditiononline.org/rupture-and-reconstruction/. [seth: leave the subtitle out!]

[547] Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 424–28 (2023) (discussing the oaths for President Washington, Vice President Adams, and the First Congress).

[548] An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

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to *support this Constitution*." Indeed, Section 3 uses very similar language: "to support the Constitution of the United States."[549] President Trump's attorneys contended that this different language provides further support for the position that the President's oath would not be covered by the oath provisions of Article VI and Section 3.[550]

And there is some good evidence to conclude that in the 1860s, the public would have recognized the similarities between the officer-language in the Oath or Affirmation Clause and the officer-language in Section 3. In 1867, Attorney General Stanbery wrote an opinion opining on the officer-language used in the not-then-yet ratified language of Section 3 of the Fourteenth Amendment. With regard to state officers, Stanbery observed that the "same term of descriptions" was used in the first oaths statute, enacted in 1789, as was used in Section 3. Attorney General Stanbery was not an Illuminati priest. It is reasonable to conclude that the public would have likewise seen the similarities between the phrase "Officers of the United States" in the Oath or Affirmation Clause, and the phrase "Officer of the United States" in Section 3.

How would the public in 1868 have understood this language? Would they parse it in light of today's (that is, 1868's) meanings or by incorporating by reference—that is, transplanting the meanings from 1788 as a result of copying the 1788 language? We do not say this question has an obvious answer. Rather, we say it does not have an obvious one. If so, ambiguity leans against extending disqualifications. In examining the effect of this ambiguous language, then-Attorney General Stanbery wrote: "Those who are expressly brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the

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549 On the meaning of "this Constitution," see Cass R. Sunstein, *This*, 46 HARV. J. LAW & PUB. POL'Y 395 (2023). =

550 Respondent Donald J. Trump's Motion to Dismiss at 17, Anderson v. Griswold, No. 2023CV32577, 2023 WL 6446965 (Colo. Dist. Ct., Denver Cnty. Sept. 29, 2023) ("On one hand, the Constitution requires members of Congress and those appointed to offices under the United States to take an oath to' "support' the Constitution. On the other hand, the Constitution requires the President to take an oath to 'preserve, protect and defend' the Constitution. This difference is significant for two reasons. First, it shows that the drafters of the Fourteenth Amendment did not understand or intend the President to be an Officer of the United States, because his oath does not require "support" of the Constitution. Second, taking an oath to support the Constitution further limits the class the people to whom Section Three applies, and President Trump (who never took such an oath) is not one of those people.").

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law . . . ."[551] Here, we think Stanbery articulated the premises of the Democracy Canon.[552]

Furthermore, Stanbery was not a lone voice: early[553] and later commentators[554] on Section 3 indicated that the list of triggering positions, notwithstanding its "officer of the United States"-language, was coextensive with those who took the Article VI oath. Again, those commentators provide some good reason to exclude from the force of Section a president who to date had *only* taken the Article II oath.

Professor Mark Graber wrote that "No member of the Congress that drafted the Fourteenth Amendment distinguished between the presidential oath mandated by Article II and the oath of office for other federal and state officers mandated by Article VI." Again, Graber seems to disregard any evidence from outside the Thirty-Ninth Congress, including George Washington Paschal's 1868 treatise.[555] However, the evidence Graber cites does not support his categorical claim. For example, Graber stated, "Senator Garrett Davis of Kentucky saw no legal difference between the constitutional requirement that "all

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[551] The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867).

[552] *See generally* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

[553] *See* PASCHAL, *supra* note 255, at xxxviii (opining that the Article VI oath and Section 3 apply to "precisely the same class of officers"); *id.* at 250 n.242 (Section 3 is "based upon the higher obligation to obey th[e] [Article VI] oath"); *id.* at 494 (noting that the "persons included in this [Section 3] disability are the same who had taken an official oath under clause 3 of Article VI").

[554] *See, e.g.*, GARRETT EPPS: READING THE U.S. CONSTITUTION 177–78 (2013) ("And political power, beyond the mere act of voting, would be withheld from that group of people who had sworn an individual oath before secession to support the Constitution and had then violated that oath by joining the Confederacy. There were three classes of such people: (1) former members of the United States Congress; (2) appointed federal officials and US military officers (both were 'officer[s] of the United States'); and (3) *state officials, whether judges, legislators, or executive officials, who had taken the oath prescribed for all state officials in Article VI, Section Two, to regard the Constitution as 'the supreme law of the land.'* If anyone meeting this description had joined the Confederate cause by 'engag[ing] in insurrection or rebellion against the same, or giv[ing] aid or comfort to the enemies thereof,' he was barred from certain political offices. These forbidden offices are, in order, (1) member of Congress; (2) presidential elector; (3) *officer of the United States, meaning an appointed official either in the military or in the civil government*; and (4) state officer of any kind." (emphasis added)); Christopher R. Green, *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1202 (2019) (noting that "section 3 of the Fourteenth Amendment is *limited* to those rebels who broke Article VI oaths" (emphasis added)).

[555] See PASCHAL, *supra* note 255 (citing Paschal).

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officers, both Federal and State, should take an oath to support" the Constitution and the constitutional requirement that the president 'take an oath, to the best of his ability to preserve, protect, and defend the Constitution.'"[556] Davis was not comparing the oaths taken by the President and other positions. He was merely listing different provisions of the Constitution, including the President's obligation to take an oath, the President's duty to take care that the laws are faithfully executed, and Congress's power to raise armies. Graber cited Senator James Doolittle of Wisconsin, who "declared that Congress need not pass laws requiring presidents to swear to support the Constitution because that 'oath is specified in the constitution.'"[557] Here, Doolittle was discussing whether Congress can create a different oath for the Vice President.[558] (The issue of the proper oath for the Vice President created some confusion for John Adams and the First Congress.[559])

Graber quoted Senator John Henderson of Missouri as stating that Section Three "strikes at those who have heretofore held high office position."[560] From this snippet, Graber observed that "Republicans when describing Section Three often stated that the persons subject to disqualification were those who held offices, which included past and [current] presidents of the United States."[561] This statement suggests that Henderson thought the language used in Section 3 was sweeping. But Henderson actually made the exact opposite point. In the very next sentence, Henderson stated, "When the section is closely scrutinized, it will be seen that comparatively few men will fall subject to the exclusion." Critically, Henderson explained that Section 3 "does not, as sometimes supposed, reach all who may have taken an oath to support the Constitution of the United States." He observed, "I have but little idea what number of persons will be reached as former members of Congress. The number cannot be very great." *Nothing* about Henderson's statement suggests that he thought that presidents would be covered by the oath language. To the contrary, he

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[556] Graber, *supra* note 118 at 18 (citing CONG. GLOBE, 39th Cong., 1st Sess., App.234 (1866).

[557] Graber, *supra* note 118 at 18 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2915 (1866).

[558] CONG. GLOBE, 39th Cong., 1st Sess. 2915 (1866).

[559] Tillman & Blackman, *supra* note 533, at 424–28 (discussing the oaths for President Washington, Vice President Adams, and the First Congress).

[560] Graber, *supra* note 118 at 19 (citing CONG. GLOBE, 39th Cong., 1st Sess. 3035–36 (1866)).

[561] Graber, *supra* note 118 at 19.

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read that language *narrowly*. Graber's snippet does not provide a full context of this colloquy.

Although we do not know, we can suppose that Baude and Paulsen embrace the conventional view: the President is not an "Officer[] of the United States" as used in Article VI and the other provisions of the Constitution of 1788. Given all that, Baude and Paulsen might consider acknowledging and dealing with the textualist difficulty for their position: Given that the President is not covered by the phrase "Officer[] of the United States" in the Article VI Oath or Affirmation Clause, what about Baude and Paulsen's position offers sufficient clarity for their reading of Section 3—that is, that the President is an "Officer[] of the United States" as that phrase is used in Section 3?

Baude and Paulsen also fail to address three other relevant provisions in the Constitution of 1788 that use the phrase "Officers of the United States."

- The Impeachment Clause: "The President, Vice President and all civil *Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[562]
- The Appointments Clause: The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States* . . . ."[563]
- The Commissions Clause: The President "shall Commission all the *Officers of the United States*."[564]

First, presidents fall under the scope of the Impeachment Clause precisely because there is express language in the clause providing for presidential impeachments; the Impeachment Clause does not rely on general "office"- or "officer"-language to make presidents impeachable. We think this is the common convention with regard to drafting constitutional provisions. When a proscription is meant to control elected positions, those positions are expressly named, as opposed to relying on general "office"- and "officer"-language.

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[562] U.S. CONST. art. II, § 4.

[563] U.S. CONST. art. II, § 2, cl. 2.

[564] U.S. CONST. art. II, § 3.

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Congress does not hide the Commander in Chief in mouseholes or even foxholes. For example, in 1969, future-Chief Justice William H. Rehnquist, then an Executive Branch attorney, addressed this sort of clear-statement principle. Statutes that refer to "officers of the United States," he wrote, generally "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."[565] Five years later, future-Justice Antonin Scalia, then also an Executive Branch attorney, reached a similar conclusion with regard to the Constitution's "office"-language.[566] These Executive Branch precedents would counsel against deeming the President an "officer of the United States."

Second, as to the Appointments Clause, which uses "Officers of the United States"-language, Presidents do not appoint themselves or their successors. The Supreme Court hears a never-ending stream of cases that ask if a particular position is a *principal* or *inferior* officer of the United States—even though the Appointments Clause does not even distinguish between those two types of positions.[567] Where has the Court ever suggested that the President falls in the ambit of the Appointments Clause's "Officers of the United States"-language?

To the contrary, the Court has asserted just the opposite. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the

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[565] Memorandum from William H. Rehnquist to Egil Krogh Re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969), https://perma.cc/P229-BAKL.

[566] Memorandum from Antonin Scalia to Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President (Dec. 19, 1974), https://perma.cc/GQA4-PJNN.

[567] See Tillman & Blackman, *supra* note 547, at 392 ("The Constitution does not expressly say that 'principal officers . . . must be appointed by the President with the advice and consent of the Senate.' Indeed, the text of the Appointments Clause does not distinguish between principal and inferior officers, generally. The Appointments Clause does refer to 'inferior Officers,' which are 'Officers of the United States' but, the phrase 'principal Officer' does not appear in the Appointments Clause. The phrase 'principal Officer' appears in the Opinion Clause—Article II, Section 2, Clause 1."). And the text of the Constitution says nothing at all about what duties can and cannot be assigned to those positions. *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018, 2:50 PM), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/XK32-Q3JW] (concluding that under current precedent, Special Counsel Mueller was not an "Officer[] of the United States," but a mere "employee of the United States").

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'Officers of the United States.'"[568] Rather, the Appointments Clause requires appointment of these individuals. Chief Justice Roberts reaffirmed this position in *Seila Law LLC v. CFPB*.[569] He wrote, "Article II distinguishes between two kinds of officers—principal officers (who must be *appointed* by the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the President, courts, or heads of Departments)."[570] Both categories of positions are *appointed*.

And, finally, the Commissions Clause, refers to "all the Officers of the United States." Presidents do not commission themselves, their vice presidents, their successor presidents, or successor vice presidents.[571] Yet the clause uses the word "all" before "Officers of the United States."[572]

In all, there is a rich history illustrating that when the Constitution of 1788's text uses "Officers of the United States"-

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568 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2, and then citing THE FEDERALIST NO. 72 (Alexander Hamilton)); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

569 140 S. Ct. 2183, 2199 n.3 (2020).

570 *Id.*

571 *See* Tillman & Blackman, *supra* note 547, at 412–19 (discussing practice under the Commissions Clause).

572 Professor Ilya Somin argued that the President does in fact commission himself by taking the oath of office. Ilya Somin, *Why President Trump Is an "Officer" Who Can be Disqualified from Holding Public Office Under Section 3 of the 14th Amendment [Updated]*, REASON: VOLOKH CONSPIRACY (Sept. 16, 2023, 5:47 PM), https://reason.com/volokh/2023/09/16/why-president-trump-is-an-officer-who-can-be-disqualified-from-holding-public-office-under-section-3-of-the-14th-amendment/ ("My answer is that the President does indeed 'commission' himself. He does so by taking the oath of office required by the Constitution. Without that, he cannot take office, just like lower-level officers cannot do so without a commission issued by the president. The forms are different. But the substance is similar."). Somin did not cite any historical evidence that the presidential oath has ever been thought to be some sort of self-commission. We are not aware that any such evidence exists. To the contrary, long-standing congressional practice established that the Commissions Clause "does not mean that [the President] is to commission Members of Congress . . . and he does not commission himself, nor does he commission the Vice-President[.]" *See* 1 HINDS, *supra* note 164, at 547; *see also* Case of Brigham H. Roberts, of Utah, H.R. REP. No. 56-85, at 36 (1900). *See* Tillman & Blackman, Part III, *supra* note 533 at 416-18 (discussing how the President does not commission himself).

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language, that phrase does not reach the presidency. (In the third installment of our ten-part series, we explain at some length why the President is not considered a "Officer[] of the United States" in these three provisions, as well as the Oath or Affirmation Clause.[573])

We are not sure if Baude and Paulsen would argue that the President is covered by the "Officers of the United States"-language in any of these constitutional provisions from the 1788 Constitution. Perhaps, they (too) are "non-committal"? It is possible that they agree with us on this limited issue. If so, why might they agree?

We do *not* suggest that these authorities—from the text of the Constitution of 1788, Chief Justice Roberts, Justice Story, Senator Booth, and David McKnight—prove that we are *undoubtedly* correct as to the meaning of Section 3's "Officer of the United States"-language, and that Baude and Paulsen are *unequivocally* wrong. But we do think, at the very least, that the authorities, evidence, and arguments we have marshaled are probative of the interpretive issue at hand and deserving of a response consistent with prevailing academic norms. So why all the talk about "secret codes," "hidden-meaning hermeneutics," "disappearing ink," and "illuminati priests." Why all the hyperbole?

These textual arguments lead to what we think is a point of agreement with at least one of the two authors. Footnote 393 of Baude and Paulsen's article points out that in 2016, Baude "complimented Tillman's prior scholarship" in *Jotwell* regarding the office- and officer-language in the Constitution of 1788.[574] In 2016, Baude wrote, Tillman's "position has [not] been conclusively proven. But at this point, I think he has singlehandedly shifted the burden of proof."[575] Thus, it may be that the core of our current disagreement is whether the 1788 meaning *drifted* on the road to 1868. To establish such drift, Baude and Paulsen would need substantial evidence that the phrase "Officers of the United States" included the elected President. The

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573 *See* Tillman & Blackman, *supra* note 547.

574 Baude & Paulsen, *supra* note 1, at 109 n.393.

575 William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/. It may be that Professor Baude's 2023 co-authored article illustrates that he has changed his mind, in whole or in part, from the views he put forward in *Jotwell* in 2016. That is something he is perfectly entitled to do, and in no way should anything we write be understood as a criticism directed against him for any apparent or real inconsistency. People are entitled to change their minds. It is a good thing to reopen old questions, and courageous to do especially when one knows that criticism (as we put forward here) will follow. We only ask, if he has changed his mind, what are the reasons, including new evidence and new arguments, that account for this new position?

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originalist evidence must be substantial because the effect of Section 3 is to disqualify a candidate and to limit the ability of voters to elect the candidate of their choice. We do have statements that the phrase "Officers of the United States" excluded the President—see Booth, McKnight, and others discussed above. We wait for concrete evidence that the President was considered an "Officer of the United States," as that phrase was used in Section 3.

We do acknowledge, and have long acknowledged, the possibility that meaning may have drifted from 1788 to 1868 with regard to *another* phrase within Section 3.

C. Potential linguistic drift for "Office . . . under the United States"

In our view, the phrase "Office . . . *under* the United States" as used in the Constitution of 1788 did not refer to elected positions like the President. We have made efforts to establish this position in the fourth installment of our ten-part series, and will not rehash those arguments here in detail.[576] In short, our position is that "Officers of the United States" encompasses appointees in the judicial and executive branches of the federal government, and "Office . . . under the United States" includes all "Officers of the United States" and also those holding appointed positions in the national legislature. Indeed, seven years ago, Baude suggested that our position had some merit.[577]

Still, we are not so certain the meaning of "Office . . . under the United States" remained constant over the decades. In our 2021 article, we wrote:

> But we have been very careful to avoid resolving the scope of the phrase "office . . . under the United States" in the disqualification element [of Section 3]. Suffice to say, in light of the possibility of linguistic drift from 1788 till 1868, we think this issue is contestable.[578]

We presented what we thought was a reasonable position: the evidence put forward to date does not support linguistic drift with regard to the

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[576] *See generally* Tillman & Blackman, *Offices and Officers of the Constitution, Part IV: The "Office . . . under the United States" Drafting Convention*, 62 S. TEX. L. REV. 455 (2023).

[577] *See* Baude, *supra* note 575.

[578] Blackman & Tillman, *supra* note 10, at 53–54.

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phrase "Officers of the United States," but linguistic drift with regard to "Office . . . under the United States" was less clear.

Baude and Paulsen appear baffled by what they see as a bifurcated position. They wrote we "equivocate" and we are "non-committal." In our view, we were being careful. There is no logic or scholarly tradition in requiring *every* academic paper to address *every* issue; rather, a good paper should add something *new* to the body of scholarship. We would prefer to *add* to the body of scholarship and be *correct*, rather than *overreach* and be *wrong*.

For example, we think the Appointments Clause ought to be read to *define* the phrase "Officers of the United States." And there are Supreme Court cases adjudicating Appointments Clause challenges that discuss the clause's "Officers of the United States"-language. Again, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[579]

In contrast to the Constitution's Appointments Clause which defines the phrase "Officers of the United States," there is no similar provision within the Constitution defining the scope of the phrase "Office . . . under the United States." The Foreign Emoluments Clause, for example, which uses "Office . . . under the United States"-language, does not expressly indicate which positions are covered. In other words, because of the absence of any constitutional provision defining "Office . . . under the United States," it would have been more likely for the meaning of that phrase to have drifted from its 1788 moorings than for the meaning of "Officer[] of the United States" to have drifted. The latter phrase's meaning was less likely to have drifted precisely because its meaning was hardwired or fixed by the Constitution's text, i.e., the Appointments Clause.

Finally, even if there was the possibility of linguistic drift with regard to the phrase "Office . . . under the United States," there is some evidence from the Thirty-Ninth Congress that the disqualification element of Section 3 was not designed to reach the presidency. Professor Lash carefully traced the drafting history of Section 3. He pointed out that an early version of Section 3 by Representative Samuel McKee of Kentucky provided that certain rebels would not be "qualified" and would not "hold the office of President or vice president of the United States." However, the version of Section 3, as ratified, "omits the express prohibition on qualifying for office, the

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[579] 561 U.S. 477, 497–98 (2010) (citing U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 72 (Alexander Hamilton)).

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express ban on holding the office of President."[580] Rather, Section 3 "protects the Presidency by ensuring only loyal electors can vote for the President of the United States." Lash concluded that "the publication of prior drafts in this case may well have led the public to understand the final draft of Section Three as not including the office of President of the United States."

Ultimately, even if there was linguistic drift with regard to the phrase "Office . . . under the United States," the decision to list some elected positions in Section 3, but not others, gave rise to the reasonable inference that the President was not covered by this language.

D. What is Baude and Paulsen's theory?

Baude and Paulsen have not put forward a fully fleshed out theory about what Section 3's "office"- and "officer"-language means. Rather, their focus is on the one position which is on everyone's mind today–the Presidency. The risk of taking that route, with its singular focus on the *now*, is that it might very well lead to distorting their understanding of Section 3's original public meaning. In *Morrison v. Olson*, Justice Scalia's dissent warned about similar risks when a single-minded independent counsel proceeds on an Inspector Javert-like hunt of a single target. We think the same risk applies to legal scholarship. One way of minimizing this risk is to develop broad, generally applicable theories, at a reasonably high level of abstraction, that extend beyond any present controversy. We have spent the better part of the past decade on that enterprise.[581]

But Baude and Paulsen never actually define what positions Section 3's "office"- and "office"-language include. They do suggest that the preposition "of" is linked with "officer" and the preposition "under" is linked to "office."[582] It is true that the Framers of the

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[580] Lash, *supra* note 340 at 23.

[581] *See generally* Tillman & Blackman, *supra* note 576; Tillman & Blackman, *supra* note 547; Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021). The remaining 6 parts are scheduled to appear over the course of 2023 through 2025.

[582] Baude & Paulsen, *supra* note 1, at 108 ("The minor textual difference between the triggering clause ('officer of') and the positions-disqualified clause ('office under')—a choice between prepositions—appears to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in

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Constitution carefully used language, always referring to an "officer of" and "office under," but never an "officer under" or an "office of."[583] We have argued that this consistency supports our position that different "office"- and "officer"-language have different meanings.[584] Baude and Paulsen draw the opposite inference: that carefully-used, different language, was in fact used to convey the same meaning. The inference they draw seems less than well supported. Without a grounded theory, Baude and Paulsen cannot explain why the Framers of Section 3 carefully distinguished between an "officer of" and an "office under." Why did not Section 3's drafters simply use either: (i) *officers of the United States* and *offices of the United States*; or, (2) *officers under the United States* and *offices under the United States*. Why try to confuse one-and-all by using "of" and "under" if the same meaning was intended? Baude and Paulsen also made no effort to reconcile the two clauses of Section 3, which list positions, with the language of the Constitution of 1788.

Without any textualist support, Baude and Paulsen revert to sense and sensibilities. They state, "Far more *sensible and*

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meaning."). Here, Baude and Paulsen echo an argument made by Akhil Reed Amar and Vikram David Amar concerning the Succession Clause. *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995) (noting that "[a]s a textual matter," these varied references to "Officers of the United States" and "Office[s] . . . under the United States" "seemingly describe[] the same stations."). We have addressed the problems with the Amar's atextualist position at some length. Tillman & Blackman, Part II, *supra* note 581, at 357–68. Like Baude and Paulsen, the Amars put forward no principled account supporting their view that the Constitution's disparate "office"- and "officer"-language all mean the same thing.

583 *See* Tillman & Blackman, *supra* note 547, at 360 (observing consistent usage of "office"- and "officer"-language in the Constitution of 1788).

584 Tillman & Blackman, *supra* note 576, at 484 ("And there was coordination. The framers of the Articles of Confederation and of the Constitution used the phrase 'Office . . . under the United States' without any apparent material inconsistency or variation between the two documents. Indeed, absent this drafting convention, it is nearly impossible to explain the Constitution's 'office'- and 'officer'-language."); *see also* Asher Steinberg, *The Textual Argument That the President Does Not Hold an "Office Under the United States"*, NARROWEST GROUNDS BLOG (Sept. 21, 2017), https://narrowestgrounds.blogspot.com/2017/09/the-textual-argument-that-president.html [https://perma.cc/MS3J-6MKL] ("This settled British legal and linguistic tradition of understanding office under the Crown to exclude elected office explains how the framers and ratifiers could have coordinated around the otherwise cryptic and novel phrase, 'office under the United States.' Indeed, something like a practice of this kind is almost necessary to explain how such coordination was possible.").

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straightforward to conclude, we think, that the officeholder holding the office of President is an officer '*of*' the United States who holds office *under* the authority of the United States."[585] That move is unexplained. Why reference "office under the authority of the United States" at all? That phrase does not appear in Section 3. The only constitutional provision to use that phrase, i.e., "office under the authority of the United States" is the Sinecure Clause.[586] The Framers of the Fourteenth Amendment would have been aware of the Sinecure Clause, which directly limited the ability of members of Congress to accept presidential appointments. Again, Baude and Paulsen fail to assess the baseline language used in the Constitution of 1788.

It is difficult to figure out how Baude and Paulsen decide which positions to include in the aegis of "Officers of the United States," other than to reject a distinction between "Officers of the United States" and "Office . . . under the United States." Rather, they focus on one, and only one elected position: the President. And they are certain that the President is covered by that language. Their intellectual position is not well supported merely by uttering the intuition that it is "sensible and straightforward." No intellectual position is well supported merely by making such an announcement. And that principle is just as true for the most mundane questions of constitutional law as it is for the most important questions, whatever they may be.

E. Original meaning and intentions

Our scholarship attempts to illustrate the original public meaning with regard to the Constitution's "Officers of the United States"-language. We focus, in large part, on the meaning of that term in the Constitution of 1788, and we attempt to show there is no substantial evidence of linguistic drift. Baude and Paulsen, in their efforts to determine the original public meaning of Section 3, do not acknowledge, consider, and balance these contrary authorities in any systematic fashion against their own preferred positions and evidence. Rather, they focus on many instances of original intentions and expectations. We are not alone in making this observation. Professor Eric Segall, a prominent critic of originalism, wrote "throughout the

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585 Baude & Paulsen, *supra* note 1, at 108.

586 U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil *Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been encreased during such time."). We discuss the meaning of the "office"-language in the Sinecure Clause in Part II of our ten-part series.

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126 pages, the authors use original intent repeatedly."[587] Baude and Paulsen parse statements from members of the Reconstruction Era Congress about the phrase "Office under the United States" to determine the meaning of the phrase "Officers of the United States." Of course, this argument based on original intentions and expectations only works (if at all) if the two phrases have the same meaning, and that atextualist position itself also requires substantial evidence.

To determine the meaning of Section 3, Professor Mark Graber focused *exclusively* on original intentions and expectations. His work relied almost exclusively on congressional debates over the Fourteenth Amendment from the Thirty-Ninth Congress. (As best as we can tell, he cites zero records from the ratification debates in the States.) Graber wrote, "[t]he records of the Thirty-Ninth Congress provide no evidence that any Representative or Senator was self-consciously aware that the language of Section Three contained a specialized 'legal term of art' or thought the drafters of any provision of the Fourteenth Amendment had an obligation to be clear when making colloquial usage of words that were sometimes used as a legal term of art."[588] He added that Blackman and Tillman, and other commentators, do not "point[] to any statement made during the process of framing and ratifying the Fourteenth Amendment or, for that matter, any statement made during the 1860s that supports their position on the office of the presidency."[589] He repeats the point: "Nevertheless, no commentator who claims that the president is not an 'officer of the United States' points to any statement made during the process of framing and ratifying the Fourteenth Amendment or, for that matter, any statement made during the 1860s that supports their position on the office of the presidency."[590]

We submit that Graber's analysis gets things backwards. His view attempts to impose a new disqualification on a presidential candidate. He bears the burden to show that the phrase "Officer of the United States," as that term was used in Section 3, includes the presidency. It is not our burden to prove the negative: that the phrase "Officer of the United States," as that term is used in Section 3, does not include the presidency. Moreover, determining the meaning of the text *cannot* be restricted to the scattered debates in the Thirty-Ninth Congress between 1866 and 1868. Graber's gerrymandering of the relevant period to the

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[587] Eric Segall, *Of Insurrections, Presidents, and the Utter Failure of Constitutional Law to Address the Real Issues*, DORF ON LAW (Aug. 14, 2023), https://www.dorfonlaw.org/2023/08/of-insurrections-presidents-and-utter.html.

[588] Graber, *supra* note 118 at 21.

[589] Graber, *supra* note 118 at 20.

[590] Graber, *supra* note 118 at 20.

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1860s excludes evidence that we put forward by Booth and McKnight from the 1870s.

Section 3 used language similar to the Article VI Oath or Affirmation Clause. And those who ratified the Fourteenth Amendment would have likely understood that the President is not covered by the Article VI Oath or Affirmation Clause. But there is evidence from the 1860s. In 1868, George Washington Paschal wrote that Section 3 is "based upon the higher obligation to obey th[e] [Article VI] oath."[591] In a later edition of his book from 1876, Paschal opined that the Article VI oath and Section 3 apply to "precisely the same class of officers." Paschal was not speaking in a secret code. Graber never even mentions the Constitution of 1788, as if constitutional meaning of the Fourteenth Amendment can be determined solely based on colloquies held in the confines of the Capitol building. Graber's evidence provides some support for his position, but it is not the only evidence. He ignores contrary evidence, and thus, is in no position to balance conflicting views.

One of the more relevant pieces of historical evidence that Baude and Paulsen put forward to support this atextualist position actually rebuffs the "secret code" argument. In 1866, a five-member select committee of the House of Representatives prepared a report.[592] The proceedings stretch more than 300 pages. What was it about? In April 1865, Roscoe Conkling of New York was selected as a judge advocate—a special prosecutor—to investigate misconduct in the military.[593] For his services, Conkling was paid $3,000.[594] During this period, Conkling became a member-elect of the House.

The primary issue before the Conkling Committee was whether Conkling violated various statutes that prohibit those holding certain government positions from also holding other positions or receiving outside compensation.[595] One of the statutes provided, "no person hereafter who holds or shall hold, any *office under the Government of the United States*, whose salary or annual compensation shall amount to a sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office."[596]

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591 See supra note 553 and accompanying text (discussing Paschal).

592 *See* H.R. Rep. No. 39-93 (1836) (hereinafter Conkling Report). The Conkling Report begins at page 566 of this PDF: https://perma.cc/P5TP-GH85.

593 *Id.* at 10.

594 *Id.*

595 *Id.* at 12–13.

596 *Id.* at 10 (emphasis added). On page 21, this statute is referred to as the Act of August 31st, 1852, but on page 17 it is referred to as the Act of July 21st, 1852.

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As a threshold matter, the committee found that Conkling, as a member-elect, did not hold an "'office' in such sense as to bring him within the prohibition of the act of 1852."[597] That finding, standing alone, could have fully determined the matter before the Committee.

Nevertheless, the Committee then proceeded to consider the issue further. The Committee quoted eight provisions of the Constitution of 1788 that use different office- and officer-language.[598] None of these provisions use the precise phrase used in the statute: "office under the government of the United States." The closest language in the Constitution of 1788 is the Necessary and Proper Clause, which refers to any officer *of* the government of the United States.[599] We have previously written that "officers *of* the government of the United States," as that term is used in the Necessary and Proper Clause, would include the elected President.[600] Professor Graber located several instances in which "members of the Thirty-Ninth Congress spoke of all elected members of the national government as 'officers of the government.'"[601] But that phrase is different from "Officers of the United States."

In our prior scholarship, we have not had occasion to opine on the phrase "office under the government of the United States." Again, this phrase does not appear in the Constitution of 1788 or in the Fourteenth Amendment. We will discuss below how this language is used in the Ironclad Oath statute of 1862. Based on our reading of that statute, this language includes *all* appointed federal positions and *all* elected federal positions in the Legislative, Executive, and Judicial Branches. This language would include the President and members of Congress. That said, having examined eight constitutional provisions, the Committee did not reach any determinative conclusion. Rather, the

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The Supreme Court used the former citation in 1884, and placed the citation at 10 Stat. 100. *See* United States v. Brindle, 110 U.S. 688 (1884), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=010/llsl010.db&recNum=121.

597 Conkling Report, *supra* note 592, at 17.

598 *Id.* at 19.

599 U.S. CONST. art. I, § 8 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

600 Tillman & Blackman, Part II, *supra* note 581 at 408-416 (discussing the phrase "Officers of the Government of the United States" in the Necessary and Proper Clause).

601 Graber, supra, *supra* note 118 at 18.

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Committee concluded that this issue, the scope of the Constitution's "office"- and "officer"-language, did not need to be reached.[602]

The Committee still felt compelled to interpret language in an 1852 statute by referring to language in the Constitution of 1788, including the Impeachment Clause. (Baude and Paulsen rely on the Committee report, but do not bring forward the Committee's discussion of the Constitution of 1788.) As an example, the Committee invoked the 1797-1799 house impeachment and senate trial of Senator William Blount.[603] And those proceedings were centered around debates on the Constitution's Impeachment Clause and other provisions using "office"- and "officer"-language.

The conventional view of the *Blount* case is that it determined that members of Congress are not "Officers of the United States," and thus, they are not subject to impeachment. However, the members of the Conkling Committee seem to cast some doubt on that conventional view. The Committee was "wholly unable to come to the conclusion that the members of the national Congress are not, *in the enlarged and general sense of the Constitution*, officers of their government."[604] In other words, the Committee suggested that members of Congress are "Officers of the United States," and can be impeached. Here, the Committee rejected the standard understanding of what the *Blount* case determined. We do not know if Baude and Paulsen agree with the Committee, and, perhaps, reject the conventional view of the *Blount* case. If Baude and Paulsen disagree with the Committee's apparent rejection of *Blount*, then they may be skeptical about some of the Committee's other conclusions.

For example, the Committee favorably quotes from Alexander J. Dallas, a lawyer for Blount. The Committee wrote, quoting Dallas, "But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are (as said by Mr. Dallas in this Blount case, p. 277) 'indiscriminately used in the Constitution.'"[605]

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602 Conkling Report, *supra* note 592, at 22 ("In the opinion of the committee, the determination of this point is not necessary to the right determination of all that is before the committee, and this is not, perhaps, a proper case in which to make a precedent upon so vital a constitutional question.").

603 *Impeachment Trial of Senator William Blount, 1799*, UNITED STATES SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-blount.htm.

604 Conkling Report, *supra* note 592, at 21–22 (emphasis added).

605 *Id.* at 20; CONG. GLOBE, 39th Cong., 1st Sess. 3939 (1866), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=074/llcg074.db&recNum=100.

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That statement provides some evidence for Baude and Paulsen's position. Indeed, that position was made by Dallas six decades before the Fourteenth Amendment was drafted. And this debate on the scope of the Constitution's "office"-language predates not just the Fourteenth Amendment, but goes back to 1788-89.

Yet, Dallas's view was not the only view expressed during the *Blount* proceedings. The views of the parties and attorneys at the *Blount* proceedings were not monolithic. The Committee did not quote from Blount's other attorney, Jared Ingersoll.[606] Ingersoll contended that the phrase "Officers of the United States" was different from the phrase "Office . . . under the United States."[607] He explained, "[t]he expression [in the Appointments Clause] is not, that the President shall appoint all officers holding under the United States, but all officers of the United States." Ingersoll did not view "Officers of the United States" and "Office under the United States" as synonymous. We discussed Ingersoll's views in the third installment of our ten-part series.[608]

We do not provide Ingersoll's quote to show that he was correct or incorrect. Rather, since 1788, debates have ensued about the meaning of the Constitution's "office"- and "officer"-language. Baude and Paulsen wrote, "If a secret code was really at work, it was an extraordinarily well-kept secret." But there was no secret. There is no secret code. Ingersoll, Dallas, and Conkling were not Illuminati priests. And the five members of the House committee, which Baude and Paulsen rely on, were not the Oracles at Delphi. The view advanced by Dallas was just one view. The Committee relied on Dallas's view. But the Committee gave no explanation why Dallas's view should be preferred over all the other views that were expressed at the *Blount* proceeding.

There is also a problem with the manner that Baude and Paulsen presented this material. In Footnote 399, Baude and Paulsen quote from a post Professor Mark Graber wrote on *Lawfare*.[609] Baude and Paulsen state:

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606 *Jared Ingersoll*, PENN LIBRS., https://archives.upenn.edu/exhibits/penn-people/biography/jared-ingersoll/.

607 5 ANNALS OF CONG. 2289 (1798), http://bit.ly/3sw38KR.

608 Tillman & Blackman, *supra* note 547, at 405–08.

609 Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 22, 2023, 4:40 PM), https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress ("A unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that "a

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> Professor [Mark] Graber notes further that a "unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that 'a little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'''[610]

Here is the original text, as it appears in the Congressional Globe:

> "But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are *(as said by Mr. Dallas in this Blount case, p. 277)* 'indiscriminately used in the Constitution.'"[611]

Baude and Paulsen accurately quoted Graber. But Graber omitted the parenthetical: "(as said by Mr. Dallas in this Blount case, p. 277)." The customary use of ellipses would have been appropriate here.[612] As a result of Graber's omission, Graber's readers were not informed that the Committee was quoting from the *Blount* case's hearings transcript, and that the Committee was *not* interpreting the meaning of the 1852 statute based on its plain text. Rather, the Committee was interpreting the 1852 statute with reference to debates from 1797–1798 on the Constitution of 1788. Likewise, this information has not been readily conveyed to Baude and Paulsen's readers.

The Committee's 1866 report relied on Dallas—just one view from the *Blount* hearing. But they put forward no reason why that view was more reliable than any other view put forward in the 1790s. No

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little consideration of this matter will show that 'officers of' and 'officers under' the United States are 'indiscriminately used in the Constitution.'").

610 Baude & Paulsen, *supra* note 1, at 110 n.399.

611 CONG. GLOBE, 39th Cong., 1st Sess. 3939 (1866) (emphasis added).

612 Graber offered this explanation for his failure to use ellipses: "My blog post intentionally omitted '(as said by Mr. Dallas in this Blount case, p. 277)' which I interpreted as a footnote in the original House Report being reproduced in a Congressional Globe that did not include footnotes (I was also madly cutting to stay within word limits). Blackman and Tillman correctly point out that some members of Congress in 1797 disagreed with Dallas when Dallas claimed that no difference exists between 'officers of' and 'officers under'; So what." Mark Graber, *Section Three "Of" and "Under" Nonsense: The Sequel*, BALKANIZATION (Sept. 13, 2023), https://balkin.blogspot.com/2023/09/section-three-of-and-under-nonsense.html

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matter how hard Baude and Paulsen try to stay in the 1860s, they cannot escape the gravitational force of the Constitution of 1788.[613]

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We recognize that we do not have a clear statement during the debates over Section 3 of the Fourteenth Amendment that the President *is not* an "Officer[] of the United States." Nor have Baude and Paulsen (or any others) yet put forward any clear statements from the debates that the President *is* an "Officer[] of the United States" for purposes of Section 3. In fact, many (but not all) such sources, especially those which merely express conclusions or expectations, and do so without explanation or reasons, are not particularly probative as a matter of original public meaning. We say this even if such sources support our or Baude and Paulsen's position in regard to how Section 3 uses "Officers of the United States." For this reason and because of the paucity of contemporaneous commentary, today's commentators, including ourselves, have turned to other sources beyond the debates on the Fourteenth Amendment to determine the meaning of Section 3's "Officer of the United States"-language. We think the search for that meaning starts with the Constitution of 1788, discussed above. Below, we also look to the 1862 Ironclad Oath statute to illustrate our views, and we do so *because* Baude and Paulsen have argued that this act forms a part of the background that informed how Section 3 was understood.

F. Original meaning and consequentialism

Beyond intentions, the locus of Baude and Paulsen's argument focuses on consequentialism. They ridicule "the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned by the Radical Reconstruction Congress that drafted the Fourteenth Amendment."[614] Their view, as we understand it, is that Blackman and Tillman's position *has* to be wrong because it would lead to what Baude and Paulsen view as bad outcomes. We disagree with their methodological choice. Original meaning cannot be supplanted by consequentialism. But let's take their approach on its own terms. Could the framers of the Fourteenth Amendment possibly have excluded a person who took one, and only one oath as President (or Vice President), from the scope of Section 3? It is undisputed that no such living person existed in 1868.

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613 *See generally* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013).

614 Baude & Paulsen, *supra* note 1, at 111.

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And from 1789 through 2016, all of the presidents and vice presidents had previously taken a Section 3-related constitutional oath in some other government position—state or federal, civilian or military.

The Framers of the Fourteenth Amendment were not omniscient. Could they have failed to anticipate that a businessman would ascend to the presidency without having held any prior office tied to any Article VI oath? Yes, of course, they could have. It is equally possible that they failed in this manner because their legal focus was on the nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction.[615] If Section 3's Framers failed to imagine such an outcome, and, if, as a result, they chose language that failed to account for a possibility that they had not experienced or considered, then we should not be surprised and we cannot play *let's pretend*—we have no warrant to alter the meaning of the words which they have actually chosen.

Finally, Baude and Paulsen seem to assume that the "office"-language in Section 3 should "sweep" as broadly as possible, to include the widest range of positions. But the text of Section 3, as a whole, suggests otherwise. Consider the positions listed in the first two clauses:

> 1. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . .
> 2. who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States . . . .

The second clause does not expressly list several categories of positions: e.g., presidential electors, appointed officers of state legislatures, members of state constitutional conventions, and state militia officers. The first clause does not expressly list several categories of positions: e.g., members of the state legislatures, and members of state constitutional conventions. Neither list expressly mentions the President and Vice President. More fundamentally, the

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615 *See id.* at 3 (Section 3 "was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War"); *id.* at 8 ("Section Three plainly was designed for a specific historical situation—the circum-stances of Reconstruction following the end of the Civil War.").

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two lists are different, and they are different in ways that Baude and Paulsen make no effort to account for. If the goal was to cover the "waterfront," as Baude and Paulsen suggest, then Section 3's Framers could have used the same basic language in both lists. The Framers left out some important positions. The "office"- and "officer"-language within both clauses in Section 3 was not all-encompassing. We will address some of those omissions here.

1. Presidential electors

Presidential electors are listed in the first clause.[616] A person disqualified by Section 3 cannot serve as a presidential elector. One could reasonably infer that because electors are expressly listed in the first clause, they are not covered by the language "any office, civil or military, under the United States, or under any State."[617] Were they covered by this language, there likely would not have been a need to list them separately. However, presidential electors are not expressly listed in the second clause.[618] If presidential electors were not covered by the second clause, a person who took an oath as a presidential elector before the Civil War, and then engaged in insurrection, could still hold a position otherwise prescribed by Section 3.

Presidential electors pose a significant problem for Baude and Paulsen's theory. Baude and Paulsen suggest that electors circa 1868

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616 U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or *elector* of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . ." (emphasis added)).

617 In our view, electors hold "public Trust[s] under the United States." Tillman & Blackman, Part II, *supra* note 581, at 340 ("These individuals are appointed by the states to elect the President. Unlike irregular and transitional positions, the centrally important role played by Presidential Electors remains very relevant today."). The precise status of presidential electors was at issue in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020). *See* Josh Blackman & Seth Barrett Tillman, *What are Presidential Electors?,* REASON: VOLOKH CONSPIRACY (May 21, 2020, 5:17 PM), https://reason.com/volokh/2020/05/21/what-are-presidential-electors/. However, the Court did not resolve this issue. *See* Chiafalo v. Washington, 140 S. Ct. 2316 (2020); *see also* Josh Blackman & Seth Barrett Tillman, Chiafalo v. Washington *Did Not Resolve The Precise Status of Electors*, REASON: VOLOKH CONSPIRACY (July 6, 2020, 5:17 PM), https://reason.com/volokh/2020/07/06/chiafalo-v-washington-did-not-resolve-the-precise-status-of-electors/ ("The Court studiously avoided this unresolved question. There is not a word about how to characterize electors.").

618 U.S. CONST. amend. XIV, § 3 ("who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States . . . .").

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did not take oaths to the Constitution, so listing them in the second clause would not have triggered any Section 3 disqualification.[619] Baude and Paulsen put forward no reason to believe that the rationale which they suggest is what motivated the disparate language between the first and second clauses. They simply advance an assumption.

More importantly, this assumption is not supported. Baude and Paulsen do not explain *why* they believe the majority practice of States in the Union, circa 1868, was that electors were not required to take an oath to support the Constitution. Baude and Paulsen's theory as to why presidential electors are excluded from the list of triggering positions, but included in the list of positions a Section 3-covered person is disqualified from holding, only makes sense if they can point to some meaningful research as to what electors actually did on or about December 7, 1864–the last meeting of presidential electors prior to Congress's agreeing to the text of the Fourteenth Amendment in 1866. Yet, they offer no empirical support for this assumption.

Our research suggests there may be some contrary authority.[620] And, in modern times, States impose an oath requirement on its presidential electors. Maryland and Colorado, for example, require electors to take an oath "support the Constitution of the United States."[621] just as required by Section 3.

Baude and Paulsen write that presidential electors were not "required" by Article VI to take an oath to support the Constitution.[622]

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619 Baude & Paulsen, *supra* note 1, at 105 ("In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution.").

620 *See Electoral College*, ALBANY J., Dec. 7, 1864, at 1 (explaining that when the electors met "the usual oath office was administered"); *New York Electoral College*, N.Y. DAILY TRIBUNE, Dec. 7, 1864, at 4 (noting that the Secretary of State "called the College to order, and administered the Constitutional oath to each member").

621 *See* MD. CODE ANN., ELECTION LAW, § 8-505 (citing Article I, § 9 of the Maryland Const of 1867), https://casetext.com/statute/code-of-maryland/article-election-law/title-8-elections/subtitle-5-presidential-elections/section-8-505-presidential-electors-meeting/1; Colorado Secretary of State Election Rules, 8 CCR 1505-1 (2021), https://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-1/Rule24.pdf. We must admit: to determine the common practice of electors circa 1864–1868—to take an oath to uphold the U.S. Constitution or not to do so—would be an intense research project. And given that Baude and Paulsen are the proponents of a novel position leading to a limit on democratic participation, the burden of persuasion lies with them.

622 Baude & Paulsen, *supra* note 1, at 105 ("In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons *required* to swear an oath to the Constitution." (emphasis added)).

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But this response is not relevant. Section 3 is *practical*. Section 3's list of positions that trigger liability extends to those who held a listed position and had "taken an oath . . . to support the Constitution" in connection with that position--whether or not that oath was required by Article VI. Presidential electors may have taken such an oath under the aegis of state election law or the common practice among electors since 1789 (or since their state's admission to the Union), or even as a result of a mistake of law. In any of these situations, or others, the text of Section 3 would control, and not a theoretical position in regard to the scope of Article VI's oath requirement. Indeed, Baude and Paulsen repeatedly make the point that there is no mistake of law defense in regard to Section 3 liability.[623] If the principle Baude and Paulsen have announced is correct, that is, there is no mistake of law defense under Section 3, then that principle would apply, as Baude and Paulsen suggest, to the substantive conduct prongs (e.g., engaging in insurrection), and it would equally apply to Section 3's predicate conduct (i.e., holding a triggering office and taking an oath to support the Constitution).

We must admit that determining the common practice of electors circa 1864-1868–to take an oath to uphold the U.S. Constitution or not to do so–would be an intense research project. And given that Baude and Paulsen are the proponents of a novel position leading to a limit on democratic participation, the burden of persuasion lies with them. It would be a substantial undertaking to determine what was the common practice at the time Congress passed and the States ratified the Fourteenth Amendment. But without this research, Baude and Paulsen merely assume that the common practice aligns with their position, and then proffer that assumption to account for the different language used in Section 3's list of positions which trigger disqualification and Section 3's list of positions from which a disqualified person is excluded from holding. But their assumption is just that: an assumption absent support.

Taking the position that electors are not required to take an Article VI oath would require Baude and Paulsen to argue that presidential electors are not "officers of the United States" or "officers . . . of the several states" for purposes of the Article VI Oath or Affirmation Clause, at least for purposes of the Constitution of 1788. *See* Baude, *supra* note 575 ("Next time you confront a separation of powers problem or read through parts of the Constitution, keep Professor Tillman's chart in hand. Suddenly, it will be hard to assume that the Constitution's textual variations are meaningless. Indeed, Professor Tillman's theory makes sense of patterns that most of us never saw. It brings order out of chaos.").

623 *See, e.g.*, Baude & Paulsen, *supra* note 1, at 65 ("Mistake of law is no defense to a coup d'etat.").

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If electors regularly took an oath to support the Constitution, then Baude and Paulsen's theory explaining the textual choices in Section 3 falls to the ground. The two different lists of positions in the first and second clauses of Section 3 pose a challenge to Baude and Paulsen's position. This different language between the two lists suggests that as far-reaching Section 3 was, it was not meant to be all-encompassing. Not all positions were *swept* in. Our job as interpreters is to determine what the language effectively encompassed.

There's more, much more.

2. Members of state legislatures

Baude and Paulsen write that Section 3's overall project of office-listing, in both clauses, "was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified."[624] But the text suggests that the Framers did not cover the waterfront.

Members of state legislatures are enumerated in the second clause, but not in the first. Still, Baude and Paulsen reason that insurrectionists would be disqualified by Section 3 from serving in the state legislatures. Baude and Paulsen write that "[t]hough somewhat more awkward, we think an elected office in a state legislature also qualifies as a 'civil' office within the language and design of Section Three, reading the word 'office' in this context in an ordinary, non-technical sense."[625] Awkward or not, the failure to enumerate membership in the state legislatures in the first clause was significant. Former insurrectionists were not expressly or clearly disqualified from serving in state legislatures. We think Baude and Paulsen's "somewhat . . . awkward" hedge is something of an understatement. Since the congressional proceeding involving the impeachment and trial of Senator Blount, 1797–1799, the prevailing view has been that the Constitution's "Office"-language does not reach legislators—state or federal. (Professors Akhil and Vikram Amar have been the leading modern proponents of this view.) Is it Baude and Paulsen's view that the drafters of Section 3 were ignorant of this traditional understanding

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624 Baude & Paulsen, *supra* note 1, at 105 (emphases added).

625 *Id.* at 106.

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of the scope of "office"-language as used in the Constitution? On the other hand, if they were aware of this traditional understanding, why would they risk departing from it? Why not just include "members of the state legislatures" among the proscribed positions in the first clause as opposed to risk lumping such positions within the provision's general "any office . . . under the United States"-language?

Given that the draftspersons of Section 3 expressly included Senators and Representatives in the first and second clause, why did they not also include analogous language for state legislators in the list of positions in the first clause? After all, they could have done so just by relying on Article VI-like language. Why rely on generalized "office"-language if one seeks to disqualify a Section 3-covered person from being members of the state legislators? To put it another way, with a focus on contemporaneous history, it was the state legislatures of the (purported) confederate states that *caused* secession, raised armies to fight the Civil War, and funded those armies. The state legislatures authorized the secession conventions. If Section 3's drafters intended to encompass state legislators among the positions within the first list, one would think such language would have enjoyed pride of place and listed in the most direct and explicit terms. The fact is that the drafters of Section 3 did not take this path. On that basis, might not one fairly conclude that Section 3's drafters did not intend any broad sweep among all federal and state positions (where holders had taken a prior Article VI oath)? Indeed, membership in the state legislature was in every sense of the word an "important" position. So, one might fairly conclude that Section 3's drafters did not intend any broad sweep even among "important" federal and state positions (where holders had taken an Article VI oath)?

Indeed, this particular risk—involving membership in state legislatures—would have been far more apparent in 1868 than a hypothetical in which an insurrectionist former president (not otherwise subject to disqualification) ran for re-election. But the Framers, at a minimum, left the issue of state legislators not as clear as Baude and Paulsen would have us believe. And this omission was both significant, in that it involved an important position, and, in that it was noticed by commentators. A decade after the ratification of the Fourteenth Amendment, John Randolph Tucker, a congressman from Virginia, stated that "[I]t is clear that a member of a State Legislature is not a civil or military officer under any State, any more than a member of Congress is a civil or military officer under the United

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States . . . ."[626] Baude and Paulsen cite Tucker as counter-authority. But they offer no explanation why he was wrong.

The Framers of Section 3 stopped far short of covering the "waterfront." The list of Section 3 positions a disqualified person is disqualified from holding (i.e., the first clause) *does not* expressly include membership in the state legislature. But the list of positions leading to disqualification (i.e., the second clause) *does* include membership in a state legislature. To be sure, the second list only reaches members of a state legislature, it does *not* reach appointed officers of the state legislative houses: e.g., the secretaries of the state legislative upper houses, the clerks of the state legislative lower houses, the sergeants-at-arms, the doorkeepers, the parliamentarians, etc. And we are not the first to notice this omission. Attorney General Stanbery observed, "The terms of exclusion are not the members and officers of a State legislature, but simply the members of a State legislature." All these appointed positions are excluded from the operation of Section 3—there is no way to shoehorn these positions into the list of Section 3-triggering positions leading to disqualification.

3. Members of state conventions

What about analogues to state legislative houses? Here we include state conventions to amend state constitutions (*akin to state conventions to secede from the Union*—something which the drafters were likely to have given some thought to), state conventions to ratify proposed federal constitutional amendments meeting under the aegis of Article V, as well as state delegates to an Article V national convention. Attorney General Stanbery observed, "those who have been members of conventions framing or amending the constitution of a State, prior to the rebellion, are not subject to disqualification." Again, there is no way to shoehorn these positions into the list of positions leading to disqualification, and these positions, likewise, are not in any obvious way covered by the first clause listing the positions that a Section 3-covered person is excluded from.

Baude and Paulsen provide no clarity or guidance as to how (if at all) Section 3 covers these positions. That's not surprising: the Second Confiscation Act expressly distinguished state legislative membership from membership in a state convention.[627] Or, perhaps,

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[626] John Randolph Tucker, *General Amnesty*, 126 N. AM. R. 53, 55 (1868), https://www.jstor.org/stable/i25110155.

[627] Second Confiscation Act, ch. 195, § 5, 12 Stat. 589, 590 (1862) (authorizing the seizure of property of "any person acting as governor of a state, *member of a*

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Baude and Paulsen think these positions were less than "important"? If Section 3 did not apply to state conventions, which were the *immediate* cause of secession, then Section 3 simply does not cover the waterfront of positions that everyone had firmly in mind in 1868. The 1860s—just prior to the Civil War, during the war, and during Reconstruction—was awash with state conventions, including special conventions to decide on seceding from the Union and those charged with adopting Reconstruction-era constitutions. Can Baude and Paulsen really suggest that such positions were less than "important"? We wonder.

4. State militia officers

But there is still more. Earlier, we referenced an opinion by Attorney General Stanbery. (Baude and Paulsen have also cited this opinion with regard to the opinion's Ex Post Facto Clause analysis.) Stanbery wrote that state militia officers are *not* encompassed within the list of Section 3-triggering positions (i.e., the second clause). In fact, Stanbery wrote: "I begin then with the inquiry whether officers of the militia of a State are embraced within [the second clause], and I have no doubt that they are not."[628] Stanbery also excluded municipal officers and those holding a mere employment as coming within the purview of the list of Section 3-triggering positions.[629] We do not suggest that Stanbery was the first and last word on the meaning of the text of Section 3 of the Fourteenth Amendment. What we do suggest is that the scope of Section 3's "Office"-language is hardly obvious.

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We do not identify these specific gaps (and we could have identified others) between the first and second clauses as some sort of *gotcha* argument. Rather, we merely show that the "office"- and "officer"-language within both clauses in Section 3 was not all-encompassing. The Framers did not subject all federal and state positions to Section 3. They left out some positions, and some of those positions were important. Thus, *contra* Baude and Paulsen (and others), there is no strong presumption that the presidency was shoehorned into Section 3's general "officer of the United States"-language.

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convention or legislature, or judge of any court of any of the so-called confederate states of America." (emphasis added)).

628 The Reconstruction Acts, 12 Op. Att'y Gen. 141, 151 (1867).

629 *Id.* at 152–57.

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G. Baude and Paulsen's Reliance on the 1862 Ironclad Oath Statute Undermines Their Position

In 1862, Congress enacted the Ironclad Oath statute.[630] This statute required certain officeholders to swear an oath. Committing perjury in taking the oath falsely was a crime, and upon conviction, the person would be disqualified from holding certain positions in the future. The statute has two relevant parts. The first part lists those who had to take the new statutory oath: "hereafter every person elected or appointed to *any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States*."[631] These individuals "shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation."[632] The second part of the statute lists the positions that a convicted person may be disqualified from holding: "And any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offence, shall be deprived of his office and rendered incapable forever after of holding *any office or place under the United States.*"[633]

We make three primary observations based on the plain text. First, the "office"-language in the first part is different from the "office"-language in the second part. The former refers to "any office of honor or profit under the *government* of the United States." The latter refers to "any office or place under the United States." The fact that the same statute uses different "office"-language strongly suggests that that the language refers to different positions. In much the same way, Section 3 refers to different categories of offices: "Officers of the United States" and "Offices . . . under the United States." (The Ironclad Oath does not make use of any "Officers of the United States"-language.) The use of different lists with different language suggests different meanings. Where the same meaning is intended, one chooses the same phrase, and if a different meaning is intended, one varies the language. That's what a good draftsperson would do, and that's how

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630 Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502 (1862); *see also* CONG. GLOBE, 38th Cong., Spec. Sess. 1551 (1863) (the Senate debate regarding the "Ironclad Test Oath" passed on July 2, 1862).

631 Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502 (1862).

632 *Id.*

633 *Id.*

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one normally interprets a legal document. What the public saw in 1862 was two different phrases. Therefore, the public likely understood each phrase as meaning something different. We believe the presumptive view, which should not be set aside absent concrete evidence, is that the two phrases are *not* coextensive.

We make a second observation based on the plain text of the Ironclad Oath statute. The President is expressly excluded from the scope of the term "office of honor or profit under the government of the United States."[634] The fact that the Framers expressly excluded the President from this category suggests that the President would otherwise hold an "office of honor or profit under the government of the United States." Why was the presidency excluded from the list of positions that had to take the oath? Perhaps he was excluded for policy reasons. It may have been considered inappropriate to require the President to take the Ironclad Oath. If, e.g., Lincoln was re-elected, would he have been required to take the oath? What about Lincoln's successors? There is another possibility. As we discussed above, the President has always taken a separate Article II oath, rather than an Article VI oath. Congress may have understood the Article II oath as exclusive, and that the Article VI Oath or Affirmation Clause reached all the most significant appointed and elected officials, except the President. Under this Article-II-is-exclusive view, the President, alone among federal officials, could not be compelled to take a statutory oath. Either way, the text of the provision shows an active choice by the draftspersons. Where the statute's draftspersons intended to exclude the President, they were in command of language to do just that. So two reasons for excluding the President are possible. But under either rationale, the phrase "office of honor or profit under the government of the United States" was viewed differently than the other phrase used later in the statute. This latter phrase omits "the government": "any office or place under the United States."

We make another observation. The President is not expressly excluded from the scope of the term "any office or place under the United States."[635] This textual decision can be understood in three fashions. First, perhaps the President was not thought to hold an "office or place under the United States," so there would be no reason to exclude him from that category. This reading would be consistent with how we understand the phrase "office . . . under the United States" in the Constitution of 1788. Second, perhaps the meaning of the phrase "office . . . under the United States" in the statute was unclear. If so,

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634 *Id.*

635 *Id.*

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that counsels against using this statute as a model to understand Section 3, and it tells us that similar language in Section 3 was unclear. But we think a lack of clarity would have been extremely problematic in the context of disqualification. A statute should clearly spell out which positions are covered. Third, perhaps the President was thought to hold an "office or place under the United States," and the Framers intended that a person convicted of violating the Ironclad Oath statute *would* be disqualified from holding the presidency. This alternate reading is not inconsistent with our position. Again, we acknowledge the possibility that there was linguistic drift with regard to the phrase "office . . . under the United States" between 1788 and the 1860s. But for good reason, this statute does not provide evidence of linguistic drift.

The dominant view at the time of the framing, and today, is that Congress cannot enact statutory qualifications for elected federal positions. *Federalist No. 60* provides some substantial originalist support for this position. Hamilton wrote, "The qualifications of the persons who may choose or be chosen [for Congress], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [national] legislature."[636] And the Supreme Court reaffirmed this historical analysis in *Powell v. McCormack*[637] and *U.S. Term Limits v. Thornton*.[638] *Powell* adopted Hamilton's position from *Federalist No. 60*: Congress cannot add qualifications to elected federal positions such as Representative and Senator, and by implication, to the presidency. *U.S. Term Limits* examined whether the States, as opposed to Congress, have the power to add to the Constitution's qualifications for elected federal positions. The *Thornton* Court explained that "the debates at the state conventions . . . 'also demonstrate the framers' understanding that the qualifications for members of Congress had been fixed in the Constitution.'"[639] We do not think this position is controversial;[640] indeed, Senator Trumbull announced this very principle during debate on Section 3.[641] For all

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636 THE FEDERALIST NO. 60 (Alexander Hamilton).

637 395 U.S. 486, 539–40 (1969).

638 514 U.S. 779, 792 (1995).

639 *Id.* (quoting *Powell*, 395 U.S. at 541).

640 *See* Tillman & Blackman, *supra* note 576, at 520–24 (contending that statute enacted by First Congress should not be construed to add qualifications to federal elected officials).

641 CONG. GLOBE, 39th Cong., 1st Sess. 2901 (1866) (Senator Trumbull stating that "[s]o far as the members of this body and of the other House are concerned, the Constitution of the United States has provided the qualifications for a Senator and for a Representative, and it has been held more than once that it is

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these reasons, in this statute, the phrase "Office . . . under the United States" should not be read to include the elected presidency.

The Ironclad Oath statute creates some difficulties for Baude and Paulsen. They contend that the phrase "Office . . . under the United States," which is used in Section 3, *obviously* includes elected positions like the presidency. And they also rely on the Ironclad Oath, which is best read to suggest that the presidency is *not* an "Office . . . under the United States." If Baude and Paulsen are correct, and the framers of the Ironclad Oath intended to reach the president, then Congress enacted an unconstitutional statute.

The better explanation is that the statute can easily be read as constitutional. And no dexterous saving construction is needed. The phrase "Office . . . under the United States" should be read, as in the Constitution of 1788, to exclude the elected president. Does this argument counsel that "Office . . . under the United States," here and in Section 3, does not extend to the elected officials, including the President. We say *yes*. Our view explains why there was no textual exclusion for the presidency and other elected officials in the second list: because the second list's "office under the United States"-language was not understood as reaching the presidency and other elected officials. We think there are two conceivable interpretations of the phrase "Office . . . under the United States" in the statute. First, if that "office"-language reaches the presidency, then the statute is unconstitutional. Second, if that language does not reach the president, then the statute is constitutional. Which construction should we and the courts adopt? We should favor the construction that maintains the statute's constitutionality. And this language is not just in the Ironclad Oath. Those who violate the Second Confiscation Act are similarly disqualified from holding "any office under the United States."[642]

If in 1862 "office under the United States"-language did not reach the presidency, and if this statute was a model for Section 3, as Baude and Paulsen argue, then that is a substantial reason to conclude that Section 3's "office under the United States" language did not reach the presidency. Textualism and original public meaning and methods trump conclusory analysis and original expectations.

Finally, we acknowledge the limits of our argument. We would be remiss if we left the reader with the impression that every pre-1868 statute in *Statutes at Large* supports our position. In the nearly 80 years

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incompetent to add to those qualifications by law."), <http://14th-amendment.com/Historical_Documents/Congressional_Globe/14th_15th_Amendments/Congressional_Debates_of_the_14th_Amendment.pdf>.

642 Second Confiscation Act, ch. 195, § 3, 12 Stat. 589, 590 (1862),

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between 1789 and 1868, there were countless federal statutes using "office"- and "officer"-language. We don't doubt that somewhere, at sometime, there might exist one or more statutes supporting Baude and Paulsen's views. Then again, a more recent statute, which generated some discussion regarding candidates for the 2016 and 2024 presidential elections, provides some support for our position.[643] Our point is that two of the statutes Baude and Paulsen *do* cite, both of which were enacted in 1862—the Ironclad Oath Statute and the Second Confiscation Act[644]—do not support their atextual position. In fact, the language in both statutes cuts against their position.

Baude and Paulsen wrote: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . .

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[643] In 2016, Tillman argued that then-candidate Hillary Clinton could not be disqualified from the presidency for violating 18 U.S.C. § 2071(b). That statute, which prohibits destruction of certain government records, disqualifies a convicted person from "holding any office under the United States." *See* Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95 (2016). Former-Attorney General Michael Mukasey, who had previously contended that Clinton could be disqualified, was persuaded by Tillman. He wrote "on reflection, … Professor Tillman's [analysis] is spot on, and mine was mistaken . . . ." *See* Eugene Volokh & Seth Barrett Tillman, *No, Hillary Clinton wouldn't be legally ineligible for the Presidency even if she had violated government records laws*, WASH. POST: VOLOKH CONSPIRACY (Aug. 26, 2015, 12:54 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/26/no-hillary-clinton-wouldnt-be-legally-ineligible-for-the-presidency-even-if-she-had-violated-government-records-laws/; *see also* Charlie Savage, *If Trump broke a law on the removal of official records, would he be barred from future office?*, N.Y. TIMES (Aug. 8, 2022, 10:18 PM), https://www.nytimes.com/2022/08/09/us/politics/trump-fbi-investigation.html ("But in considering that situation, several legal scholars — including Seth B. Tillman of Maynooth University in Ireland and Eugene Volokh of the University of California, Los Angeles — noted that the Constitution sets eligibility criteria for who can be president, and argued that Supreme Court rulings suggest Congress cannot alter them."). More recently, former-Attorney General Mukasey wrote that the President is not an "Officer of the United States" for purposes of Section 3. Michael Mukasey, *Was Trump 'an Officer of the United States'?*, WALL ST. J. (Sept. 7, 2023, 12:59 PM), https://wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26. As the world turns, in 2022, the search warrant for former-President Donald Trump's home at Mar-A-Lago invoked Section 2071. *See* Josh Blackman, *No, 18 U.S.C. § 2071 Cannot Disqualify Trump from the Presidency*, REASON: VOLOKH CONSPIRACY (Aug. 8, 2022, 11:25 PM), https://reason.com/volokh/2022/08/08/no-18-u-s-c-%C2%A7-2071-cannot-disqualify-trump-from-the-presidency/. Ultimately, Trump was not indicted with violating this statute.

[644] *See supra* subpart IV(B).

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points in the same direction . . . ."[645] Again, that's hyperbole. Our point is more limited, Section 3 is difficult to interpret, there is evidence pointing in different directions. If Section 3 is ambiguous, such ambiguities furnish no good ground to exclude a candidate from the ballot or denying a voter his preferred choice.

H. Parting thoughts on the phrase "Officer of the United States" in Section 3

To this day, it remains quite common for legal documents to distinguish appointed officers from elected, apex officials when discussing constitutions, as well as in many other contexts. For example, in the corporate law setting, insurance against suits alleging a violation of fiduciary duties is most commonly called: "directors and officers insurance" or "directors and officers liability insurance." Identifying such insurance as "directors and other officers insurance" or as "directors and other officers liability insurance" is virtually unheard of.[646]

Many parliamentary draftsmen and learned scholars wrote that way in 1788 and in 1868. That linguistic convention still survives to this day. Recently, two learned scholars wrote:

> These actors [enforcing Section 3] might include (for example): state election officials; *other state executive or administrative officials*; state legislatures and *governors*; the two houses of Congress; the *President* and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president.[647]

The scholars, of course, are Baude and Paulsen. We flagged this passage earlier in subsection I(B)(3). When Baude and Paulsen wrote

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[645] Baude & Paulsen, *supra* note 1, at 103.

[646] Google returns over 600,000 results for "directors and officers insurance" and "directors and officers liability insurance." By contrast, Google returns under 10 results for "directors and other officers insurance" and "directors and other officers liability insurance." Directors are elected apex officials; officers are appointed by and work for directors. It is no surprise that corporate law and constitutional law share this linguistic tradition—both areas of law have a common genealogical heritage.

[647] Baude & Paulsen, *supra* note 1, at 23.

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the passage above, they did not notice they implicitly followed this linguistic convention: there was no reason to list "governors" if they were dead sure that such positions were already incorporated in "other state executive or administrative officials." That's a tell.

Likewise, when Baude and Paulsen list the President, they list that position expressly and contrast it with "subordinate executive branch officers." Why use that language? You will not find "subordinate executive branch officers" in the Constitution or in any of the statutes they suggest were models for Section 3. Indeed, under the Supreme Court's precedents, Article II distinguishes between *principal* officers of the United States and *inferior* officers of the United States—all of whom are subordinate to the President. Yet no one would describe the President as a principal officer. The President is distinguished from officers of the United States.

To communicate with the reader, Baude and Paulsen depart from the language of Article VI and Section 3. When they want you to know the presidency is included, they list his position expressly. When Section 3 does not expressly use such language, they want you to believe that general "office"- and "officer"-language achieves the same effect. They know how to write and communicate clearly and proceed to do so. Yet, Baude and Paulsen want you to believe that the Framers of the Constitution of 1788 and Section 3 lacked such basic communication skills.

In both cases, involving governors and the President, Baude and Paulsen did not hide the apex official in a mousehole. They listed the apex official separately, because they knew readers would not naturally include it in the more general phrase, "state executive or administrative officials" or in other phrases using general "office"- and "officer"-language. Or maybe they listed the apex official separately because they were not sure, and they wanted to eliminate any doubts.

If Baude and Paulsen are not entirely sure about whether a Governor is a "state executive," then they should exhibit caution when concluding whether the President is an "Officer of the United States." Why? Because, as Attorney General Stanbery explained circa 1868, efforts to restrict the scope of democratic participation by positive law require us to be sure, and if in doubt, we give the benefit of that doubt to letting the candidate participate and letting the voter vote for the candidate of his choice.[648] The Democracy Canon demands no less.[649]

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[648] The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867).

[649] *See generally* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

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Some scholars have argued that our reading of "officers of the United States" is *absurd*.[650] In *Reading Law*, Justices Scalia and Garner describe the *absurdity doctrine* as a contextual canon: "A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."[651] Prominent textualists have argued that courts should be very hesitant before invoking the absurdity doctrine.[652] Scalia and Garner recognized that "error-correction for absurdity can be a slippery slope," which "can lead to judicial revision of public and private texts to make them (in the judges' view) more reasonable."[653] We think this concern is especially apt with regard to Section 3. At bottom, a broader reading of "Officer of the United States" reduces the universe of candidates who can hold office. Applying the absurdity doctrine in this fashion is necessarily anti-democratic. And from a textualist perspective, it is not enough to argue that some people—including law professors—think there is an absurdity. Rather, Scalia and Garner tell us, "[t]he absurdity must consist of a disposition that *no reasonable person* could intend."[654] Something that "may seem odd . . . is not absurd."[655] Or, as Justice Story put it:

> "[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision of the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say,

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650 Somin, *supra* note 572 (using the word "absurd" five times in the span of five paragraphs).

651 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 189 (2012).

652 Scalia & Garner, *supra* note __ at 189 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476–79 (2003) (noting the Supreme Court's ill-founded use of the absurdity doctrine in the Holy Trinity case (1892) and correctly suggesting that modern textualists use a reasonable-user-of-language approach to assess whether a statute produces absurd results)). *See also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168 (2010) ("Making exceptions either to achieve greater equity or avoid absurdity offends the rule of law norm because '[o]nce the court provisionally identifies a statute's (otherwise clear) meaning, the absurdity doctrine invites the court to make adjustments based on social values whose content and method of derivation are both unspecified ex ante.'" (quoting *id.*)).

653 SCALIA & GARNER, *supra* note 651, at 189.

654 *Id.* at 189.

655 *Id.*

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> it must be one, where the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[656]

We don't doubt that some people, including law professors, view Trump's re-election as something so "monstrous, that all mankind would, without hesitation, unite in rejecting the application." We think tens of millions of voters would disagree. But in any event, that is not the relevant inquiry for textualism. Rather, the question is whether a reasonable person could conclude that the President is not an "Officer of the United States" for purposes of Section 3. Part V of this article may not fully persuade you that the President is not an "Officer of the United States." But our textual and historical arguments clear the "reasonable person" threshold.

Moreover, Scalia and Garner explain, the absurdity "doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." As we noted above, the "Framers of the Fourteenth Amendment were not omniscient" and may not have "anticipate[d] that a businessman would ascend to the presidency without having held any prior office tied to any Article VI oath."[657] Finally, even if you still are not certain, the Democracy Canon, as articulated by Attorney General Stanbery, should prevail over a nebulous application of the Absurdity Canon: we should give the benefit of doubt to letting the candidate participate and letting the voter vote for the candidate of his choice.

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In writing this analysis of the phrase "officers of the United States," we find ourselves disagreeing with two scholars we know and admire. It is conceivable that they are correct, and we, wrong. It is also conceivable that we are right, and they, wrong. It is also possible that we are both wrong. That said: we cannot both be correct. The Constitution and Section 3 must have meant something in 1788 and 1868, or, at the very least, one discovered or constructed meaning is better.

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656 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 303 (1st ed. 1833). For those keeping score at home, Justice Story's Commentaries supports our textualist position. *See supra* Tillman & Blackman, Part III, *supra* note 533 at 399 (noting that Story's *Commentaries on the Constitution* contends that the President is not an "Officer of the United States").

657 *Supra* subpart V(F).

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Early in their paper, Baude and Paulsen made use of a reasonably well-known quotation, absent a citation, and absent quotation marks. Here, we return the favor with a lesser-known quotation, with attribution.

> [T]he Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure.
>
> Such a function has led us all[,] I think[,] to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[658]

Is our reading of the Constitution's "office"- and "officer"-language "excessively legalistic"? We plead guilty.

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Our position is that the phrase "Officers of the United States," as used in the Constitution of 1788, does not refer to elected positions. Baude and Paulsen have put forward little substantial evidence that the meaning changed by 1868, and that the specific phrase in Section 3 includes the elected president. If we are right that the President is not a Section 3 "Officer of the United States," then the courts and Congress will, or at least, should be spared the need to decide if President Trump engaged in insurrection or rebellion for Section 3 purposes.

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[658] Swearing In of Sir Owen Dixon as Chief Justice (Apr. 12, 1952), *in* (1952) 85 C.L.R. xi, xiii-xiv.

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Conclusion

We conclude this article where we began: establishing the original public meaning of Section 3 is difficult. Is it true that "essentially all the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ."? No.

First, the question of whether Section 3 of the Fourteenth Amendment is self-executing cannot be resolved by pointing to Section 1 of the Fourteenth Amendment or to other provisions of the Constitution. The caselaw in those areas does not support any presumption that constitutional provisions are self-executing. Trump has not been disqualified pursuant to any federal enforcement legislation.

Second, in *Griffin's Case*, Chief Justice Chase wrote that Section 3 could only be implemented through federal enforcement legislation. This decision, handed down within a year of the Fourteenth Amendment's ratification, was, and remains, reasonably probative evidence with regard to whether Section 3 is self-executing. Indeed, this decision was repeatedly cited for much of the past 150 years, and it only became subject to criticism in 2020 or so. Furthermore, the *Case of Jefferson Davis* can be reconciled with *Griffin's Case*. If Chase was correct, then States cannot unilaterally remove Trump from the ballot.

Third, a Section 3 disqualification is triggered by a covered person who (i) engages in insurrection or rebellion against the United States or who (ii) gives aid or comfort to the enemies thereof. A state cannot allege that Trump gave aid and comfort to enemies, since there was no actual war. And, *contra* Baude and Paulsen, no one can be disqualified for giving aid or comfort to an insurrection because Section 3 lists no such offense. Disqualification can only result from the direct substantive offense: *engaging in insurrection*. And failing to stop an insurrection is not the same as actually engaging in insurrection. As far as we know, as of today, neither Trump, nor anyone else, has been charged with any offense concerning insurrection in regard to January 6. If Trump did not actually engage in insurrection, then States cannot unilaterally remove Trump from the ballot under the authority of Section 3.

Fourth, we have put forward substantial evidence that the President is not an "officer of the United States" for purposes of Section 3. Numerous sources that we cited discussed this issue; no one spoke in a "secret code," as Baude and Paulsen charge. If we are correct, Trump is not subject to Section 3 at all. If we are right, then States cannot unilaterally remove Trump from the ballot under the authority

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of Section 3. Moreover, if we are correct, then there is no need to decide whether Section 3 is self-executing, or whether Trump's conduct amounted to engaging in insurrection or rebellion.[659]

What about Baude and Paulsen's article? The theoretical defects and other errors are not insubstantial and span multiple independent issues. We see no sound basis for their Article's startling conclusion: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." Indeed, we cannot remember having seen such a conclusion in any academic publication before–at least, none comes readily to mind. We cannot remember having seen an academic article repeatedly making hyperbolic claims–at least, none comes readily to mind. Baude and Paulsen's article tells only one side of a complex story, and it does not fully respond to (and sometimes fails to see) contrary evidence. Their article is now a draft posted on the Social Science Research Network. We suggest that scholars, litigants, elections administrators, and judges allow their article to percolate in the literature before placing too great a reliance on its novel claims.

Still, however Baude and Paulsen's article should evolve, we worry about the impact it has already had. We think the effect of their article is to take the focus off voters and traditional election law administrators and to transfer, in substantial part, the responsibility for Section 3 enforcement to a whole host of high level government officials, including elected officials, who have no clear duties related to traditional election law proceedings. We don't say that their article articulates precisely that result, but we think it will be and, perhaps, already has been understood that way.

Inevitably, this issue will be thrust into the courts, and in the end, quite possibly the Supreme Court. We recently observed that "[a] Supreme Court ruling on [Trump and Section 3] could make *Bush v.*

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[659] Blackman & Tillman, *supra* note 10, at 54 ("In 2020, the U.S. Supreme Court was able to avoid resolving any of the major election disputes. But 2024 may be different. A Supreme Court ruling on this issue could make *Bush v. Gore* seem mild by comparison. There are many prudential reasons for the Court to avoid deciding whether Trump engaged in insurrection, or whether Trump can be—or perhaps was already—disqualified. The Court should stay out of that MAGA thicket. A narrow finding that the President is not an "officer of the United States" ends the case. That opinion would be entirely consistent with Supreme Court authority from *Mouat* to *Free Enterprise Fund*. It would track the text of Section 3. It would be consistent with the Constitution of 1788. And, most importantly, it allows the people to elect the next President, and not the courts, much less partisan election boards.").

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Gore seem mild by comparison."[660] But instead of potentially disqualifying thousands of ballots in South Florida, the Court would potentially disqualify a candidate who may receive tens of millions of votes across the country in 2024. Perhaps that step could be justified if "essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." But it doesn't.

Postscript

In some regards, our article, and Baude and Paulsen's articles, are like two ships passing in the night, that are headed towards the same port.[661] We are both updating and revising our articles on separate publication schedules, all in anticipation of fast-moving litigation that could culminate in review by the United States Supreme Court or a joint session of Congress or both. It would be impossible, and indeed undesirable, were we to respond to each other at every iteration, with substantial revisions. Rather, we include this *Postscript* section to highlight several substantial changes that Baude and Paulsen have made after our initial draft was shared on September 11, 2023. We do not suggest that every, or even any, change they made was in response to our draft.

- Our first draft focused, at some length, on a claim Baude and Paulsen made towards the end of their article: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction." Baude and Paulsen revised this claim: "In the end, the sum total of evidence concerning the original textual meaning . . . points in a consistent direction." We leave it to the reader to contemplate if there is much difference between "essentially all" and "sum total," and between "same direction" and "consistent direction." It seems to us that, at the margin, their claim was softened, at least a bit. And if they softened their claim, they do not explain in what regard their prior claim was imprecise, and they do not explain what new evidence or arguments persuaded them to make this change.
- Our first draft criticized Baude and Paulsen for suggesting that engaging in any secession movements would necessarily amount to conduct that violates Section 3. Peaceful secession movements,

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660 *Id.*

661 *See supra* note 2.

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we contended, would not trigger disqualification under Section 3. Baude and Paulsen made several changes throughout their most recent draft to stress that only "unilateral secession" would trigger disqualification under Section 3. They write "As a clarification: we use the term 'secession' here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory." We agree that their revised position is improved over their original language. Perhaps, we can also convince them that it is perfectly appropriate for scholars to reserve judgment on difficult issues, at the risk of others' characterizing their limited positions as being "non-committal"?

- Our first draft concluded that Baude and Paulsen were wrong to suggest that "enemies" could exist in the absence of a war. Now, Baude and Paulsen at least acknowledge this point. They write: "we cannot rule out another narrower possibility, that 'enemies' is limited to those with whom the US are effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war. This would create a more complicated two-track system where Section Three covers all insurrections and rebellions, as well as 'aid or comfort' to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out." This "narrower" position is supported by substantial evidence. And that substantial evidence still undermines Baude and Paulsen's attempts to conflate Section 3's two conduct prongs: "engage in insurrection" and giving "aid or comfort to enemies."
- Our first draft faulted Baude and Paulsen for not explaining how Section 3 may affect the Speech or Debate Clause. Now, Baude and Paulsen suggest that "each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three." This position comes with no ready explanation—it is merely announced. If, as they have repeatedly argued, Section 3 can retroactively modify, amend, or supersede all prior constitutional text, including everything from the Ex Post Facto Clause to the First Amendment, why could not Section 3 also modify Congress's pre-existing sole powers over elections, returns, and qualifications of its members? Why couldn't the federal judiciary, charged with enforcing Section 3—according to Baude and Paulsen—disqualify a sitting member of Congress? Indeed, if, as Baude and Paulsen have argued, Section 3 powers are shared with the

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States, then state courts and state administrative bodies might equally disqualify a member-elect from being seated in Congress.

- Our first draft faulted Baude and Paulsen for taking internally inconsistent positions. For example, they wrote "it is not at all clear that [Section 3] inflicts *punishment*," and also wrote that Section 3 is an "offense, conviction, and *punishment* all rolled into one." The former statement remains, but they've tweaked the "rolled into one" line. The article now states that Section 3 "enacts its standard and imposes its consequences all at once." A "consequence" seems to be a synonym for "punishment." The tension remains.
- Baude and Paulsen stated that Alexander Stephens, who had *previously* served as a member of Congress before the Civil War began, violated his oath of office. In our view, oaths of office last as long as the holder (lawfully) remains in his position. When Stephens joined the (purported) confederacy, he was no longer subject to this oath of office as a member of Congress. Baude and Paulsen made a very subtle change to acknowledge this point. In their initial draft, they wrote that "These men," which referenced Stephens, "had notoriously violated previously sworn oaths to support the U.S. Constitution." Their article now drops "These men," and referred more generally to "The former Confederates." We take it that Baude and Paulsen have shifted from their original position, and that they recognize that the issue is not so clear, or perhaps, they now agree with our understanding of the standard view of the temporal scope of oaths: i.e., it is not possible for a person to violate an oath of office he took, after he no longer holds that office.

As best as we can tell, these were the only revisions that addressed points raised in our first draft. Our other criticisms have not yet been addressed. Baude and Paulsen still insist that giving aid and comfort to an insurrection or insurrectionists could trigger disqualification under Section 3. They continue to characterize Chief Justice Chase's opinion in *Griffin's Case* as "appalling." They do not address *Cale v. Covington*, a Fourth Circuit decision from 1978, which read *Griffin's Case* as holding "that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action." *Cale* stands for the proposition that one cannot get affirmative relief under the Fourteenth Amendment absent a federal enforcement statute, which would seem to ban any relief under

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Section 3 unless Congress enacts such an enforcement statute. Maybe *Cale* is "bonkers" too. There is still no effort to define what an "Officer of the United States"—other than to affirm that whatever is included, that category must include the presidency. (Their discussion of our textualist position was virtually unchanged.) And all too much of their language was and remains hyperbole.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/30/2023 6:07:39 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]

Subject: Check-in
Location: Microsoft Teams Meeting

Start: 10/30/2023 7:00:00 PM
End: 10/30/2023 7:30:00 PM
Show Time As: Tentative

Recurrence: (none)

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Microsoft Teams meeting

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Click here to join the meeting

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/30/2023 2:14:34 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: States United 14.3 tracker
Attachments: 14A Litigation tracker (Oct. 26).docx

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Heather:

Please find attached the updated 14.3 Litigation Tracker with updates highlighted.

Some things of note:

Colorado:

- In *Anderson v. Griswold*:
- The court denied Trump's remaining motions to dismiss (based on the Colorado ballot statutes and 14.3) and the Colorado Republican party's motion to dismiss. With respect to Trump's Motion to Dismiss based on 14.3, the court rejected Trump's argument that the claims are nonjusticiable political questions and found that states can apply 14.3 to state statutes without federal enforcement legislation. The court noted that the questions of whether 14.3 applies to a president and whether Trump engaged in insurrection will be considered at the hearing.
- The court denied Trump's motion to realign Secretary Griswold as a Petitioner: "The Court holds while Secretary Griswold might have her own personal views of Intervenor Trump, in the context of this litigation she is not antagonistic such that realignment is appropriate."
- The parties have been briefing several evidentiary issues.
- Trump filed a Petition for Relief to the Colorado Supreme Court under a Colorado statute that gives the Colorado Supreme Court original jurisdiction over certain matters. Trump argues the trial court was wrong to deny his motions to dismiss.
- The court will start its five-day hearing next **Monday, October 30 at 8am MT**. The hearing should be available via livestream here: https://judicial.webex.com/meet/d02-dnvr-courtroom209.

Michigan

- In *Davis v. Benson* and *La Brant v. Benson*:
- The court issued an order denying Trump's motion to intervene without prejudice based on the insufficiency of the intervention filings. The court granted the motion for Trump to file an Amicus Curiae pleading and noted it would allow Trump to present oral argument in this capacity. The court held in abeyance Trump's motion for summary disposition.

Minnesota

- In *Growe v. Simon*:
- The Court ordered supplemental briefings to address a 2012 case filed under Minnesota law to remove Barack Obama from the ballot based on citizenship (*Oines v. Ritchie*). The case was dismissed by the Minnesota Supreme Court in an unpublished order based on laches and the court's determination that Congress decides challenges to the qualifications of presidential candidates pursuant to 3 USC § 15.
- Oral Argument will be held next **Thursday, November 2 at 10am CT.** The OA should be available via livestream here: https://www.mncourts.gov/supremecourt.aspx.

Jonathan L. Williams | Senior Counsel
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From: Zack Goldberg [zack@statesuniteddemocracy.org]
Sent: 10/30/2023 7:05:21 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Subject: CO Hearing Link

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https://live.coloradojudicial.gov/?streamId=35b1db1b-2ccc-47e8-9f59-33cd656391f9

The stream is available at "Denver Courtroom 209" on the right side of the screen.

Zack Goldberg (he/him) | Counsel
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/1/2023 6:10:36 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: 10/25 CO court order

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One thing to note is that the CO judge's decision on the political question doctrine was tentative. See page 18:

The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong "textually demonstrable commitment" necessary for the Court to find the matter nonjusticiable. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members"); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a "textually demonstrable commitment" to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

The Court will, however, revisit this ruling when it makes a final ruling following the hearing set to begin October 30, 2023 to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, November 1, 2023 at 2:04 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: RE: 10/25 CO court order

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, November 1, 2023 1:54 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: 10/25 CO court order

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This order from Colorado addresses political question, self-execution, and some other issues.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/20/2023 1:00:00 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 update
Attachments: 14A Litigation tracker (Oct. 19) [91].docx

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Heather,

Please find attached the 14.3 Litigation Tracker for this week with updates highlighted.

Some things of note:

Colorado:

- In *Anderson v. Griswold*:
- The court denied Trump's Anti-SLAPP Motion to Dismiss.
- Secretary Griswold notified the court that her office received candidacy materials for Trump but would hold the application as pending while awaiting direction from the court.
- Trump filed a Motion to Realign Secretary Griswold as a Petitioner, citing her intent to hold Trump's candidacy application, comments she has made publicly about Trump, and the statement in her 9/29 Omnibus Response that "the Secretary believes that Mr. Trump incited the insurrection."

Michigan

- In *Davis v. Benson* and *La Brant v. Benson*:
- Secretary Benson filed a brief answering questions posed by the court. Secretary Benson argued that the Secretary has no affirmative legal duty or authority to decide whether the Fourteenth Amendment renders Trump eligible to be placed on the ballot prior to a court's review of the issue. Secretary Benson took no position as to the constitutional questions raised by 14.3 but laid out arguments raised on both sides.
- Trump filed motions to intervene and motions for summary disposition.
- A hearing is tentatively scheduled for November 6.

Minnesota

- In *Growe v. Simon*:
- The court denied the 2024 Trump Campaign's motion to intervene for procedural reasons. The court invited the Trump Campaign to file an amicus brief, which it did.
- Secretary Simon filed his brief arguing that Petitioners have standing and that the case is ripe. In the alternative (if the case is not ripe), Secretary Simon argues that the case is functionally justiciable and should be decided immediately.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/20/2023 7:51:30 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Brater testimony
Attachments: 6_VI_Eastman0630_Grimmer_Brater.pdf

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Hi Heather,

Mike asked me to send you the transcript of Jonathan Brater's testimony in the Eastman trial.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/20/2023 7:51:30 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Brater testimony
Attachments: 6_VI_Eastman0630_Grimmer_Brater.pdf

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Hi Heather,

Mike asked me to send you the transcript of Jonathan Brater's testimony in the Eastman trial.

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STATE BAR COURT

OF THE STATE OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of:	Case No. SBC-23-O-30029-YDR
JOHN CHARLES EASTMAN, ESQ.,	
Respondent.	VOLUME VI

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE YVETTE D. ROLAND
FRIDAY, JUNE 30, 2023
845 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017

APPEARANCES:

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Audio Reporter: E. Alvarez

Proceedings recorded by digital recording; transcript produced by:

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Lakeside, California 92040
(310) 410-4151

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APPEARANCES: (cont'd.)

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Justin Grimmer (recalled)	VI- 16	VI- 72	VI-122	--
Jonathan Brater	VI-138	VI-190	VI-217	--

EXHIBITS		IDENTIFIED	RECEIVED
State Bar's			
99	Video of Sterling press conference	(prev.)	VI-134
112	Michigan audit report for 2020 general election	VI-153	VI-158
113	Michigan Bureau of Elections performance audit	VI-158	VI-162
169	Affidavit submitted by Brater in Dominion v. Fox matter	VI-162	VI-179
305	New York Supreme Court, Appellate Division, First Judicial Department, decision re: Giuliani, pp. 21-23 only	(prev.)	VI-130
Respondent's			
1036	Document	VI- 41	--
1043	Document entitled "2020 Presidential Election: Startling Vote Spikes"	VI-207	--

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EXHIBITS (cont'd.)		IDENTIFIED	RECEIVED
Respondent's			
1044	Document entitled "Edison Time Series Distribution Analysis in the 2020 Presidential Election"	VI-207	--
1046	Document entitled "2020 Presidential Election Contrast Analysis"	VI-209	--

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THE CLERK: Please come to order. The State Bar Court is now in session, the Honorable Yvette Roland presiding.

We're on the record, your Honor.

THE COURT: Good morning, everyone. We're on the record in the continued hearing of John Charles Eastman, in Case Number 23-O-30029.

Counsel, please make your appearance.

MR. CARLING: Duncan Carling for the State Bar. Good morning.

THE COURT: Good morning, Mr. Carling.

MS. WANG: Good morning. Christina Wang for the State Bar.

THE COURT: Good morning, Ms. Wang.

MR. BECKERMAN: Good morning. Samuel Beckerman for the State Bar.

THE COURT: Good morning, Mr. Beckerman.

MR. MILLER: Good morning, your Honor. Randy Miller for Respondent John Eastman.

THE COURT: Good morning, Mr. Miller.

MR. EASTMAN: Good morning, your Honor. John Eastman, Respondent.

THE COURT: Good morning, Doctor Eastman.

MR. MAYER: Zach Mayer for Respondent. Good morning, your Honor.

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THE COURT: Good morning, Mr. Mayer.

Okay. I am hearing some feedback. Is that --

THE CLERK: (Indiscernible.)

THE COURT: Mr. Carling, I understand that this morning you're going to continue with the direct examination of Doctor Grimmer?

MR. CARLING: That's correct.

THE COURT: And then, after that, Mr. Miller will have an opportunity to cross-examine Doctor Grimmer. And then, this afternoon, you plan to begin with the testimony of Jonathan Brater?

MR. CARLING: Correct.

THE COURT: And (indiscernible) hearing. (Indiscernible) testimony yesterday, Mr. Miller. You have asserted a number of objections with regard to that testimony. (Indiscernible) objections along the lines that the testimony of Doctor Grimmer (indiscernible) opinions which did not get offered at his deposition.

MR. MILLER: I think that captures it, your Honor, yes.

THE COURT: Specifically which opinions are you referring to? Because I had an opportunity to review the transcript, and I certainly (indiscernible) a number of things (indiscernible) he testified about yesterday.

MR. MILLER: Yes. I remember the questions and

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the testimony yesterday, and where I had made the objections. The essence of the subject matter was about efforts that Doctor Grimmer took to respond to specific pieces of evidence, some of it from Doctor Eastman's answer to the NDC, commenting and critiquing each of those. So that was one area that was not offered, despite opportunity, in Doctor Grimmer's deposition transcript. I think that's a good starting point.

THE COURT: So, just to be clear, you're objecting to Doctor Grimmer's expert opinions offered regarding representations made by Doctor Eastman in his response to the notice of disciplinary charges?

MR. MILLER: In a broad sense, yes, that's correct. So the undertaking by Doctor Grimmer, the Court understands, was in part to look at the answer of Doctor Eastman to the NDC. He was questioned about the work that he did in the deposition. He was ask several times whether he has expressed all of his opinions in that regard, and at no point in time in the deposition did Doctor Grimmer offer any testimony about any specific critique he had done, or examination or investigation, with respect to those parts of Doctor Eastman's answer where he referred to a document or a video or a transcript of some sort, or a case. So that, I think, was the essence of --

THE COURT: Where Doctor Eastman --

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MR. MILLER: I'm sorry.

THE COURT: Where Doctor Eastman referred to a video or the details that you just outlined?

MR. MILLER: The answer was very long, 111 pages long. So I think, as I understood the undertaking by Doctor Grimmer, is that he went through that, and whatever the references were that were included in Doctor Eastman's answer -- there were references to cases. There were references to reports. There were references to video footage. There were references to transcription of hearings, a whole panoply of information that was contained in Doctor Eastman's answer. It was very, very, very complete.

So, when I inquired of Doctor Grimmer in the deposition what work he had done and what opinions he was prepared to offer, I asked him a number of questions about his opinions, and then asked him if had anything else to offer. He said, "Yes, I do. I have my four buckets I'd like to explain." And I said, "Okay. Go ahead and do so." At the end of that passage, I asked Doctor Grimmer, "Do you have any other opinions to offer?" And he says, "No, I think that's it."

And I asked him also if he plans on doing any future work. The answer was, other than preparing for the hearing, nothing else was contemplated. I said, "If you

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have anything more, different opinions or supplemental opinions, will you let me know?" And the representation was "Yes, we would let you know," and that communication was never made.

So, as far as I was concerned, your Honor, the record was very complete, in that Doctor Grimmer was given the opportunity to explain his opinions. We closed that out, as, you know, good examiners do, and I made sure that everything was captured, and he had the opportunity to explain what his opinions were, and the bases for those opinions.

THE COURT: So, just to be clear, your objection goes to Doctor Grimmer's testimony regarding any reference to Doctor Eastman's response?

MR. MILLER: That's one area.

So I think, if I remember correctly, your Honor, yesterday, the objection was made at the point where Mr. Carling started to inquire of Doctor Grimmer, you know, "What else did you do?," something along those lines, and he started to explain, "Well, I looked at all this information in the answer, and I developed opinions with respect to the credibility or the reliability of those sources of information that Doctor Eastman listed in his answer." And that's when I said, "I think he's beyond the scope, because we've closed this out."

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So that was a starting point. I think there's other work that Doctor Grimmer apparently did, but did not testify about in the deposition, and he apparently did other critiques of forensic reports with respect to the 2020 election, and that was another area where I think I re-raised the objection that this is beyond the scope of his opinions set forth in the deposition.

So I think that captures it, generally. I don't have the transcription of yesterday's proceedings yet, but I think that's what I recall were the points and the bases for my Kennemur -- the case, Kennemur -- objection.

THE COURT: Okay. And the last objection goes to forensic work done by Doctor Grimmer which you contend he did not offer an expert opinion on?

MR. MILLER: That went beyond the opinions he expressed in the deposition, so when he started to venture into "Well, I looked at all these other reports as well. I looked at this state or that state," or "I looked at this testimony" or "I looked at this evidence," and none of that was expressed in his deposition.

So I think that's another sort of general area where Doctor Grimmer started to offer opinions that were inconsistent with the opinions that he had expressed and that I closed out in the deposition.

THE COURT: Were they inconsistent, or you're

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contending that they were supplemental?

MR. MILLER: Well, "supplemental" is probably a better way to put it. They were opinions that weren't expressed despite questions right on point, that weren't expressed during the opportunity to do so in the deposition. My word was inconsistent with that, but I think it's better to say that they were supplemental to those opinions that were expressed. I'll accept that characterization.

THE COURT: Okay. Mr. Carling, would you like to be heard on that objection?

MR. CARLING: Yes. I'll add a few things to my comments from yesterday. As I mentioned yesterday, Doctor Grimmer did submit an expert file, and it was not voluminous, and, in fact, during his deposition, he provided a "Further Notes" file to Mr. Miller which contained an outline of his opinions on various things, much of which was covered yesterday, and it involves Doctor Eastman's testimony to the Georgia subcommittee.

He mentions the parallel snakes, Francis Ryan, signature matching. That was part of Exhibit 3 to the deposition, which I don't believe the Court was provided with, but I understand Mr. Miller's position is that the expert file is somehow separate. But our position is that they were on notice as of the day of the deposition that Doctor Grimmer had opinions on these things.

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I will also note that Doctor Grimmer was showing his expert designation during the deposition and said, "Yes, that's what I'm going to be offering opinions on," which, as the Court noted yesterday, included responding to Doctor Eastman's evidence cited in his answer, and, re-reading the transcript last night, I note that when Mr. Miller asked him if those were all of his opinions, what Doctor Grimmer said was, "Well, there's more details, of course, for each of these categories."

And then, as I think the Court probably last night, after that I said, you know, "You're prepared to speak about each particular piece of evidence?" And he said he was. So I believe we met our obligation of giving them an opportunity to ask more questions. His testimony yesterday has been consistent with what he said at deposition. He's just gone into more detail, which Respondent was on notice he would be doing.

THE COURT: Mr. Miller?

MR. MILLER: I sort of disagree with that procedure, your Honor. I don't think that attaching an expert file, regardless of its contents, is an opportunity to expand the opinions. When a file is created by the expert, brought to the deposition, and the expert is asked, "Do you have any opinions?," that would have been the opportunity to say, "Yes. As a matter of fact, I've got

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this big file, and that contains a bunch of stuff that I'd like to go into, Mr. Miller, because those form the bases for my opinions." That did not happen.

So the idea that, you know, the record is sort of seeded by the conclusion of the expert notes or an expert file, it doesn't overcome the expert's obligation to be truthful about the nature of their opinions. If I asked him two hours into the deposition, "Is that it?," you know, an expert testifying honestly would say, "No, I've got a lot more. You didn't go into this. I'd like to go into that now." But I asked him three times, "Is that it? Do you have any more opinions to offer?" And his testimony was "No, I don't."

So it's not on me to somehow extract that from him, and the fact that there's notes or whatever work product that the expert generated doesn't alleviate the obligation to be honest and fulsome with respect to the opinions that they have, and when they're asked -- because, obviously, they're there at the deposition.

They know what the opinions they expressed. They say, "That's a good question, because I think I have two or three more that I haven't expressed." So, when I close it out, then that's when this becomes a locked box. If it goes beyond that at any time, including a hearing, then the examining party has a right to say, "You didn't tell me

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about that," later on.

So, you know, your Honor talked about trial by ambush yesterday. This is an example of that, where there's a new opinion that appears at trial, and, as your Honor knows, the reason why we go through the exercise of taking a deposition is to lock it in, put it in a locked box, and so I know when I come to prepare for trial I'm not going to hear anything else from that expert.

And I don't know that I will. You know, most of the time, lawyers and experts are very faithful to the scope of their opinions in the deposition. So it sorts of goes to the point of having given you the transcript yesterday, because I had no idea that there would be, you know, some venture beyond the scope of the opinions given at the deposition. When it came up, I was prepared to deal with it.

So that's my view of this, and that's why it is prejudicial for Respondent to be hearing those opinions for the first time now, when there was opportunity to have provided those during the course of the deposition. The Kennemur case, which has been around for 40 years, makes that very clear. That's why we call it a "Kennemur objection."

THE COURT: Right. And I think that the -- I am going to review the transcript again, given your

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clarification as to the nature of your objections.

I will note, though, that when -- first of all, as far as the expert file is concerned, it was appropriate to turn over the expert file. The expert file, on the other hand, does not substitute in for expert witness testimony.

Nevertheless, Doctor Grimmer was asked -- I'm looking at pages nine through 10 of the transcript, where, Mr. Miller, you inquired about whether -- about the various categories of expert opinions that Doctor Grimmer had been designated to testify about in connection with the expert designation, and so Doctor Grimmer started, on page 10, to say yes, that he was going to testify about those three categories of opinions referenced in the designation, and he began to characterize them, and to give his testimony, and say that those could be put into the four broad buckets, and so we heard him begin to testify about his characterization of this expert opinion information in this forum, and then you said, at line -- he, Doctor Grimmer, said, from lines seven through 17, that he --

MR. MILLER: I'm sorry to interrupt, your Honor. Is that page nine? I apologize.

THE COURT: I'm looking at page 10 now.

MR. MILLER: Ten. Thank you.

THE COURT: Yes, at page 10, where you -- first, going back to line three, you said, "Are these three

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categories in paragraph 11A, B, and C an accurate description of those categories in which you are prepared to offer expert testimony in this case?"

And he answered at line seven, "Yes, these are accurate. Another way to think about the categories here is to really think broadly about the evidence that John Eastman provided for illegal votes or fraudulent votes after the 2020 election, and my opinion," he goes on to say, "is that there's either no evidence for fraud or -- and what's more is that the evidence that was offered is based on either profound misunderstandings of statistics, or illogical use of evidence, or fundamental misunderstandings the way data merges work, and we can put these into four broad buckets."

And then you said, Mr. Miller, "Wait, wait, wait, wait, wait. Wait, wait, Mr. Grimmer." And then you went on to ask about the opinion. So Doctor Grimmer jumped into the opinions. I appreciate that, as the deposition progressed, you did ask on a number of occasions about his opinions, and you also directed his attention to his analysis of work done by Doctor Young, by Mr. Valentine, and he gave very specific opinions and answers regarding that.

On page 87 -- well, actually, he's giving a great deal of testimony starting with page 84. He is testifying about his view of -- his, if you want to think of it -- his four-bucket analysis, and he talks about what he considered

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to be the third set of claims, the first set of claims, the second, and he gives some extensive opinion testimony about that, through page 88, when, at the top of page 88, on line four, Mr. Miller, you ask, "May I refer to these categories as the 'four buckets,' using your phrasing?"

He says yes, and then you go on to say, "Have you now provided us with all of your opinions with respect to each of the four buckets of your critique?" And Doctor Grimmer responds, "Yes. Obviously, there would be -- as we discussed, there would be more details that come into each one of those buckets, but yes."

And so your next area of examination is not an inquiry into what those details are, but, rather, you being to ask Doctor Grimmer whether he has set out this, I'm going to call it, "four-bucket analysis," whether he's set that out in writing anywhere, and he acknowledges he did not produce a report, a written report.

You ask him whether or not he provided any testimony to a public body regarding these four buckets, this four-bucket analysis, and he answers that question regarding a particular case, testimony he gave in Gilbert v. Lombardo, and you then -- after inquiring about testimony to a public body, you inquire about his -- about consultations.

So it would appear that, while Doctor Grimmer identified or stated that there are more details associated

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with each of these buckets, and with his analysis regarding these various matters on which it was identified in March of 2023 that he was going to testify, that there was not the follow-up.

Like I said, I will go back and take a closer look to see if -- at least with regard to that first concern that you have, the first component of your objection regarding the testimony, or your challenge to his testimony regarding the NDC responses -- I'm sorry, regarding Doctor Eastman's response to the NDC. Then I will take a look at that as well, but, at this juncture, I don't see where that objection is well founded.

All right. Are we ready to go forward with Doctor Grimmer's testimony?

MR. CARLING: The State Bar is ready. I believe Doctor Grimmer is in the Zoom waiting room.

THE COURT: Okay. Would you bring him in, Elizabeth.

THE CLERK: Yes.

Good morning, Mr. Grimmer. Can you hear us and see us?

MR. GRIMMER: You're a little muffled.

THE CLERK: I'm sorry. Can you hear us and see us?

MR. GRIMMER: Yes.

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THE CLERK: Okay. Thank you.

THE COURT: Okay. Thank you.

Good morning, Doctor Grimmer.

MR. GRIMMER: Good morning.

THE COURT: Just a minute.

Mr. Miller, are you having some technical difficulties?

MR. MILLER: No. We just added those corrected exhibits onto my laptop, and Mr. Benveniste (phonetic) was loading them on. I think I'm all set now, but thank you for asking.

THE COURT: Got it. Okay. Thank you.

All right. Doctor Grimmer, we're going to continue with your testimony.

Would you again re-swear Doctor Grimmer.

THE CLERK: Yes.

Doctor Grimmer, can you go ahead and raise your right hand.

JUSTIN GRIMMER - STATE BAR'S WITNESS - PREVIOUSLY SWORN

THE CLERK: Thank you. Can you go ahead and state and also spell your first and last name for the record, please.

THE WITNESS: Yes. My first name is Justin, J-U-S-T-I-N, and my last name is Grimmer, G-R-I-M-M-E-R.

THE CLERK: Thank you so much.

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THE COURT: Okay. Thank you, Doctor Grimmer. We're going to continue with your direct examination by Mr. Carling, and then, when Mr. Carling finishes, then Mr. Miller will have an opportunity to cross-examine you this morning. All right?

Okay. Mr. Carling.

MR. CARLING: Thank you.

DIRECT EXAMINATION (RESUMED)

BY MR. CARLING:

Q Good morning, Doctor Grimmer.

A Good morning.

Q When we left off yesterday, I believe we were talking about the extent to which signature-matching issues were related to rejection of absentee ballots in Georgia. Doctor Grimmer, had we completed your testimony on that topic?

A I believe I've expressed my opinions about signature matching in Georgia, yes.

Q Okay. I'd like to direct your attention to page 64 in Doctor Eastman's answer, and, for the record, this is State Bar Exhibit 9.

THE COURT: I'm sorry. Just a second.

BY MR. CARLING:

Q Do you see a reference, Doctor Grimmer, to the Secretary of State in Pennsylvania eliminating signature verification on this page?

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A I believe I see it at line four to five, perhaps.
Q I'm sorry. I found the page I was looking for. This is page 62, I'm sorry, of Doctor Eastman's answer. This is it. Okay. All right. I apologize. Do you see the page that we're looking at now?
A I do, yes.
Q This is 63. Okay. It's confusing because the PDF says 64. Okay. In the middle of the page, starting at line nine, there is a line that says:

> "The Secretary of State's elimination of signature verification, contrary to Pennsylvania law" -- and cites a statute -- "caused, or least contributed to, a dramatic decline from 4.45 percent in 2018 to .28 percent in 2020, and the number of ballots that were disqualified because the signatures did not match the signatures on file, or, in other words, were illegally signed by someone other than the registered voter, affected more than 2.6 million ballots, of which nearly 60,000 would likely have been disqualified, using historic disqualification rates, when signature verification was conducted."

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Do you see that?
A I do see that, yes.
Q All right. Did you believe the claim that signature verification issues affected, potentially, 2.6 million ballots in the 2020 election?
A Well, I believe the claim there is that's the number of mail-in and absentee ballots that were submitted in the state of Pennsylvania. That's where the 2.6 million number comes from.
Q Okay. Do you have an opinion as to whether signature verification issues caused or contributed to a dramatic decline in the ballots that were disqualified?
A So here it's similar to the issue in Georgia, where an aggregate decline is being used to explain some counterfactual, where "What would have happened had some other policy been in place?" But, like in Pennsylvania, there are many other reasons -- like in Georgia, excuse me -- there are many reasons why ballots can be rejected, including that they arrive after a deadline, and so, if they arrive after a deadline, that's another reason for rejection.
What's more, it's a little bit of an apples -- not even a little bit -- it's an apples-to-oranges comparison because there was -- in 2018, Pennsylvania did not have no-excuse absentee voting. That started in the 2020 election. And so

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it's difficult to make that comparison. And so I don't see the sort of evidence that we would expect to see in order to make a reliable claim that a change in the signature verification procedure caused a certain number of ballots that would have otherwise been disqualified to be then voted and accepted.

Q And what was the change that happened in 2018 in Pennsylvania?

A So, in 2019, as part of Act 77, no-excuse absentee voting was allowed in Pennsylvania.

THE COURT: I'm sorry. I missed what you said as to the effect of the 2019 no-excuse absentee balloting -- excuse me, absentee ballots being allowed.

THE WITNESS: So, prior to the 2020 election, Pennsylvania only had excused absentee voting, which required voters to have a particular excuse to vote not -- sorry -- to vote via a mail-in ballot, rather than a polling place. And then, for the 2020 election, Pennsylvania initiated no-excuse absentee voting, which allows individuals to apply for and then receive an absentee ballot without having to cite an excuse like being out of town, for example.

And so, because of that, that changes the composition of people who are voting, and so it makes it difficult to say that a reduction in the rejection rate is

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due to a particular policy, because there's, of course, lots of things changing. There's a big change in the way in which -- sorry -- the population of people who will be voting with a ballot that arrives by mail or through the County Clerk, and, of course, there's other things happening during the 2020 presidential election, such as candidates educating voters about how and when to return their ballots.

BY MR. CARLING:

Q And, Doctor Grimmer, just to orient the Court and everyone else, the bucket that we're talking about today is your second one, correct, which is generally related to data analysis of voter records or administrative records? Is that correct?

A That's correct, yes.

Q Okay. So how is this claim about the Pennsylvania decline in absentee ballot rejections an example of this bucket of unreliable analysis?

A So here there's a claim being made, based on historical aggregate rejection rates, that a certain population of ballots should have been rejected, even though there is no underlying detail provided about a change in the underlying reason for those ballots being rejected, and so, while it is the case that the rejection rate in Pennsylvania in 2018 was around 4.45 percent -- I believe that to be an accurate number, to the best of my recollection -- we cannot

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attribute all of that to signature verification. In fact, it's unclear how to contribute what share of that to signature verification that may have occurred in 2018, compared to 2020.

In reports from data journalists, analyzing data from the 2010 and 2014 elections, obviously not as close and as perfect of data, but, nevertheless, useful, they report something on the order of 85 to 91 percent of ballots being rejected because they arrive after the deadline, which, of course, would have nothing to do with signature verification.

Q So 80 to 90 percent of the rejections are for reasons other than signature verification?

A Well, I want to be precise about this. So this is data that I've seen from the 2010 and 2014 midterm elections, and, again, it has the same critique about comparing 2018 to 2020. We see that in '10 and '14 because there's no -- in 2010 and 2014, there is only excused absentee voting in Pennsylvania, but, nevertheless, if we're going to use those years -- and that's years for which I have seen data about reasons for rejection in those years. I have seen estimates that are between 85 to 91 percent of ballots being rejected because they arrived after the deadline.

Q All right. Apart from signature-matching issues, do you have other examples of data analysis related to

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administrative records or voter records that is unreliable?
A Yes. So another important category of claims that are made were made about individuals voting who are deceased or perhaps on a list of individuals still serving a felony term, and so these claims are made in Mr. Geels' affidavits in Trump v. Raffensperger, and then, I believe, are repeated in other locations.
Q All right. I want to --
A And --
Q I'm sorry. Were you done?
A Go ahead.
Q Well, I didn't want to interrupt you. Were you done with your answer?
A I was, yes.
Q Okay. All right. Doctor Grimmer, I'd like to show you Bryan Geels' affidavit in the Raffensperger case. This is Respondent's Exhibit 1048, Exhibit 3.
THE CLERK: I'm sorry. You said 1048 or 3?
THE COURT: 1048.
MR. CARLING: Well, the way Respondent did it is 1048 has a Sub-Exhibit 3.
THE CLERK: I see. Okay. Thank you.
BY MR. CARLING:
Q All right. Doctor Grimmer, I'm directing you to -- this is page 12 of the exhibit, and paragraph 29. Can you

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see this?
A I can see this, yes.
Q And have you seen this affidavit before?
A I have, yes.
Q All right. And what is your understanding of what Mr. Geels is claiming in paragraph 29?
A So here you can see he's saying -- he's making an estimate of what he views as the number of individuals who were on the state's -- called the "active inmate file," or list of individuals who are currently serving a felony sentence, and, therefore, would be ineligible to vote in Georgia, and his estimate here is it's up to 2,560 individuals were on this list, the active inmate list, and, therefore, unable to cast vote, and cast a vote in 2020. That's the estimate that he made here.
Q All right. And do you believe that's a reliable estimate?
A I don't believe it's a reliable estimate, and, in fact, in Mr. Geels' affidavit, he makes clear that this sort of approach to estimating this quantity is going to result in errors, and to see why it's going to result in errors, we can think about what the specific process is by which he came up with this estimate.
So, in Georgia, he has information on individuals who turned out to vote, and he has information on individuals

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who are registered to vote. You can link that information exactly, because Georgia provides a unique voter identification number, what's called a "registration number," and given that unique key, you can move from one data set to the other, precisely, but that same key is not present on the active inmate file.

So, instead, to link up the active inmate file with the voter registration file, Mr. Geels here uses an individual's first name, last name, and birth year, and, as Mr. Geels acknowledges here in this paragraph, it is well known that using first name, last name, and birth year will cause what's called "false positives." That is, it will cause individuals to be matched to this active inmate file who, in fact, are not serving out a felony sentence, and, therefore, were quite eligible to vote.

This issue is well known, and it's, I think, a bit intuitive, because, if we only have someone's first, last, and birth year, depending on the name, if someone's name is John Smith, and born in 1960, you could imagine that could generate many false positives, and, as he says, the full analysis really needs to be done by the state of Georgia, because they will have a unique key in order to link up that active inmate to the voter registration to remove those false positives.

Q And so the Secretary of State has access to the active

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inmate file?

A Yes, they have access to that, and my understanding is that they also have access to individual -- another unique key you could use, which is the Social Security number, and using --

Q So --

A Sorry.

Q Well, I was going to say, so, if someone is trying to determine whether any felons were allowed to cast votes in the 2020 election, would going to the Secretary of State to try to get that information be more accurate?

A That would be the way to make this determination. There is a robust literature within political science that also merges in statistics and public policy about the risks that come when we're merging data sets like this, and in that literature, the current state of the art when doing this sort of merge is to use address, which is, you know, some street address where they live, date of birth, not just birth year but date of birth, so that's month, day, and year, gender, and name.

It's an algorithm called "ADGN," so address, date of birth, gender, name, and the best evidence that we have is that that approach gets something close to Social Security number-level matches across data sets. But, in the absence of having that information to be able to do that link, the

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risk in producing this sort of analysis is that you're going to overestimate the number of people in this category, as Mr. Geels recognizes here.

Q So is one of the issues with a technique that provides a lot of false positives that it will inaccurately inflate the numbers?

A Yes, just sort of by the nature of the error here. This is a procedure that's going to -- the false positive will cause us to overestimate. That means that we'll identify individuals who are on this active inmate list who are, in fact, eligible to vote, and so we'll have an overestimate of the number of individuals.

Q All right. Turning your attention to paragraph 27, there's an opinion expressed by Mr. Geels here around the number of deceased people that voted. Do you see that?

A I see that, yes.

Q And do you have any opinion as to the reliability of Mr. Geels' information in this paragraph?

A So here, again, it's going to suffer from the same problem. So, again, you can see Mr. Geels here running on to the second page that's on the screen. He has a death file, and this death file is a list of individuals who have deceased, and from that death file, he has first, last, and birth year. Here, again, though, this is a procedure that can generate many false positives, because there are many

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individuals who have the same first and last name and born in a particular year, and the result of that is that it's going to inflate the number of individuals who he is flagging as having been deceased and cast a vote.

Q All right. Those are examples of errors related to matching procedures across data sets. Is that correct?

A That's correct, yes.

Q Okay. Are there other examples of unreliable techniques in the data analysis related to voter records, administrative records?

A In Mr. Geels' affidavit, he has a particular analysis regarding the number of people who were underage when they registered, and then cast a vote in the 2020 election, and there, there's a number of issues with that.

So the first thing to say, before even getting into the specifics of what's sort of wrong with this analysis and some updated numbers that have happened, the specific way in which Mr. Geels ran this query was that it looked over, in his view, the expanse of Georgia history to find individuals who he thought were added to the Georgia registration file before they were 17.

So, for example, if an individual was born in 1937, and was added to the file in 1953, they would be flagged in this procedure, flagged in this query, even though, obviously, that individual is certainly of the age of majority by the

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2020 election.

What's more, though, this particular number, in reading a response from Doctor Charles Stewart, who's a professor at MIT who wrote a reply to it, Doctor Charles Stewart, in the reply, says, "I simply -- I can't replicate this number. I can't find anything that looks like this number."

In an updated version of this expert report that was attached to a motion -- I'm trying to get the case right, but there's a second Bryan Geels report. It's either Trump v. Raffensperger or -- yes. It's an update in Trump v. Raffensperger. Mr. Geels revises the number downward to 2,000 or so, numbers for individuals who are in this category, and in examining exhibits and -- sorry. In examining discovery for this case, there is a third update from Mr. Geels, who, after adding a registration column to this query, now updates this number to be around 700.

And so these sorts of big changes to the numbers of individuals, in addition to identifying individuals who are quite old by the time they cast their vote, would be an indication that this is, you know, just an unreliable way to identify what were, in his view, potentially problematic individuals who cast votes.

Q And in the second Geels affidavit, where the number was adjusted from 66,000 to approximately 2,000, do you recall if Mr. Geels explained in that report why the number changed

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so dramatically?
A I did not see an explanation in that report, no.
Q Are there other examples of numbers changing significantly between Mr. Geels' first and second report?
A Yes. So I believe in -- make sure I have this correct. In paragraph 25, Mr. Geels has somewhere on the order of 6,600 individuals who he said were added to the voter registration file before 2016.
Q And, Doctor Grimmer, I want to interrupt you for a second. The exhibit in front of you has a paragraph 25 on it. Do you see that?
A Yes.
Q And is this what you're referring to?
A That is what I'm referring to, yes.
Q Okay. All right.
A And so, here, this number here are individuals who he says were added to the voter file before 2016, and are in the voter file in 2020 and cast a vote, but, for whatever reason, are not in the voter file in 2016, if that makes sense. So, in the 2020 voter file, he says these individuals -- it says were added before 2016, and yet they're not present, he says, in the 2016 voter file.

In a subsequent declaration, this number is increased, I believe, on the order of 86,000, is the number that Mr. Geels has in his second declaration.

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Q Doctor Grimmer, I'm going to try to put that up for you. I believe this is Respondent's Exhibit 1049.1. All right. Do you see category five in front of you?

A I do, yes.

Q All right. And is this what you were referring to as essentially -- well, how does this relate to paragraph 25 that we were just looking at in his first report?

A This looks to be the same individuals who were in paragraph 25. There is a small difference here. The small difference is that, in the previous example, it was just individuals who cast their vote by absentee, but here these are individuals who both cast their vote by absentee and vote in person.

But my assessment of the difference across this, because he does provide this data in an attachment to his report, is that that alone cannot explain the difference here. What it appears is that there was an additional constraint placed on this query, in the initial report, that was then relaxed in the second report.

Q And what would be the effect of relaxing that in the second report?

A It would expand the number of individuals. If we think about running a query, we're basically saying you have to satisfy some logical set of rules in order to end up as a result of the query. If I have two rules, and I remove one

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of them, it must be the case that what results is either the same or a bigger set.

Q Doctor Grimmer, directing your attention to page 60 of Respondent's Exhibit 1049.1, there's a table of illegal vote totals, presuming the state of Georgia election data is reliable. Do you see that?

A I do see this, yes.

Q You've seen this before?

A I have, yes.

Q What is your understanding of this table?

A So what Mr. Geels is doing here is, across his buckets, he's adding together the individuals who are in each category. He's making an attempt to de-duplicate that, so that no individual will appear twice. That's what the note says down there. And so this is his estimate of the number of people who are in these particular categories.

Q And based on your understanding of Mr. Geels' report, do you believe this information is reliable?

A I do not believe this information is reliable, no.

Q Why not?

A For the reason I just described. This analysis of individuals who he says should have been in the voter file but aren't, that alone is 86,000 in the second report, but it was 6,000 in the first report. So that alone drives up this number.

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Many of the examples that are here either have to do with determinations made by the post office or an individual submitting a change of address, which does not invalidate the registration, or it has to do with extremely small -- what amounts to clerical errors in the data set, or clerical errors that can be made -- what looks to be a clerical error made by accounting.

So, for example, in this third bucket here, we have same -- sorry, not the third bucket here. One second. I'm misreading the buckets.

Q You're referring to the table?

A Yes. Sorry. I'm referring to the table, exactly.

Q Not your buckets, but the table rows?

A Not my buckets, the table. Yes, yes, yes, yes.

Okay. There is a category that he has that says, "Ballots that were issued before they were allowed to be issued, on September 15th," but a simple examination of that reveals that about 40 percent of those come from all the ballots in Grady County, which appears to have, for at least those ballots on September 8th -- when ballots were accepted from Grady County, it looks like they weren't accepted until September 23rd, and so, while I can't confirm that it was a clerical error, it would be surprising if there was a 15-day lag from when the ballots were sent to when they were returned. You don't see that elsewhere in the state of

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Georgia. And so that's an example of a clerical error that can increase -- that can result in numbers appearing in this table.

Q What about the claim about vacant residential addresses?

A So the vacant residential address claim is related to the vacant mailing address claims. The vacant mailing address claim there, Mr. Geels is looking only at individuals who voted absentee, and in vacant residential address, he looks at the expanse of individuals who cast their vote in the 2020 election.

So vacancy is a determination made by the United States Postal Service. It's made based on the -- according to the United States Postal Service, based on the appearance of a home, or whether mail is being collected when it's being delivered to a home, but it's not an indication -- it's not a certain indication that a home is vacant, or that no one is -- that someone is no longer living there.

In fact, there's a FAQ page on the United States Postal Service page that says, "If your home is labeled vacant, this is how you can proceed," and it also describes how the United States Postal Service will retain your mail for you.

Q Did you read the expert reports in Trump v. Raffensperger that were submitted by the defendants in that case?

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A I did, yes.
Q And do you recall whether those reports addressed some of these same reliability issues that you've been talking about?
A Those reports did. In particular, Doctor Charles Stewart, again, a professor at MIT, addressed many of these same issues. Yes.
Q And is his explanation of these issues, in your opinion, something that a layperson would understand?
A That is my understanding.
MR. MILLER: Objection, your Honor, the question lacks foundation, and it's also beyond the scope.
THE COURT: Well, sustained as to lacks foundation.
BY MR. CARLING:
Q Well, based on your review of Charles Stewart's declaration and your understanding of his criticisms, were his criticisms expressed in his declaration something that requires statistical expertise to understand, or were they criticisms that a person without that expertise could understand?
MR. MILLER: Same objection. It's also compound.
THE COURT: Overruled. You can answer the question.
THE WITNESS: Doctor Stewart's characterizations

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were made in very plain language, and conveyed many intuitive ideas about why we might be worried about things, like using first, last, and birth year to do data merges, or why determining that a home is -- or why relying on something like a national change of address is an improper way to assess who is ineligible or it's illegal for them to cast a vote.

BY MR. CARLING:

Q All right. Before we turn to what I believe would be your third bucket, do you have any other examples of issues you saw in Doctor Eastman's discovery related to the second bucket, data analysis related to administrative records or voter records?

A I think those are the primary examples.

Q All right. What did you say was the third category that you put this evidence into?

A The third category are a group of affidavits that come from individual voters who relay some experience they had when trying to cast their vote, or relay the experience a relative had while either trying to cast their vote or noticing that something happened with a deceased individual.

Q Sorry. The pagination is off between the exhibit and the answer. Doctor Eastman (sic), directing your attention to line 14 of this, it says there was sworn testimony by --

THE COURT: Just a minute. This is Exhibit 9?

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MR. CARLING: It is Exhibit 19.

THE COURT: You said page 14?

MR. CARLING: It's page 61 of the answer, but page 62 of the exhibit, because the exhibit has an extra page at the beginning, just part of why I've been struggling to put us on the right page.

THE COURT: All right.

BY MR. CARLING:

Q At line 14, Doctor Grimmer, it says there was sworn testimony by Grace Lennon, a Georgia Tech college student, in the Georgia Senate subcommittee hearing, indicating that someone had applied for and voted an absentee ballot in her name after having the ballot redirected to an address unknown to her, without her knowledge or consent. Do you see that?

A I see that, yes.

Q And are you familiar with this claim by Grace Lennon?

A I'm familiar with it, yes.

Q All right. May I ask, also, Doctor Grimmer, did you read a report by Senator Ligon from the Georgia State Legislature?

A I did, yes.

Q Okay. And do you recall whether this was one of the examples he listed in his report?

A I believe this was an example, and she testified at a

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hearing that he held, I believe.
Q Right, testified at the hearing. Okay. So have you looked into this incident?
A I looked at the state's absentee voter history in order to try to understand what happened with this particular incident, yes.
Q Okay. And is that information that's available to anyone in the public?
A Yes, it is. The absentee voter history are a set of files that are promulgated by the Secretary of State's Office, and were available after the 2020 election.
Q And did your review of that publicly available information show that someone voted an absentee ballot in Grace Lennon's name?
A So my review of the absentee voter history showed that it is the case that there was a mail-in absentee ballot application that was submitted for Elizabeth Grace Lennon. That's her name. That ballot was directed to an address in Fayetteville, with an Arkansas zip code, but, for some reason, the application had it going to Arizona. If I look up that address, it looks like it's near the Arkansas football stadium.
However, that ballot, on its status, it says it was canceled, and the status reason says it was an administrative cancellation, and it's the case that, on

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October 23rd, Ms. Lennon was able to cast her vote early, in person, which is also a record that's recording in the absentee voter file, and so, according to the state records, that's the ballot that was accepted and counted in the election.

Q All right. So the state records show that an absentee ballot was not voted in Grace Lennon's name?

A According to the absentee voter history, the mail-in ballots was canceled, and then Ms. Lennon voted early, in person, and that was the ballot that's marked as accepted in the absentee voter history.

Q So, if Ms. Lennon testified that she was unable to vote in person because of the absentee ballot, is that inconsistent with what the absentee voter file shows?

A If I'm recalling the testimony from Ms. Lennon, it's that she was given the capacity to vote, but was unsure if it was counted, and perhaps received subsequent information that perhaps it wasn't counted, but that is a concern that could have been resolved by looking at the state's records.

Q And the state records show that her in-person vote was, in fact, counted?

A That's correct.

Q Okay. Can you think of -- so is Grace Lennon's testimony regarding her votes an example of an affidavit by a voter that you would put in this third bucket?

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A This is an example I would put in this third bucket, yes.
Q Okay. Are there any other examples that come to mind?
A There were two affidavits that were submitted in Trump v. Raffensperger that have a related argument, that I'd also put in this bucket. So one came from an individual, Lisa Holst, who expressed a concern that her deceased father-in-law had voted in the 2020 election, had voted in prior elections.
Q Doctor Grimmer, I'm going to show you Respondent's Exhibit 1048, Sub-Exhibit 5. This is an affidavit of Lisa Holst, looking at page two. Is this what you're referring to?
A That's what I'm referring to, yes.
Q All right.
THE COURT: Just a minute. This is 1048?
MR. CARLING: 1048, Sub-Exhibit 5.
THE COURT: Okay. Which page is that?
MR. CARLING: The affidavit is on page two.
THE COURT: In the overall numbering of the exhibit, what page is that?
MR. CARLING: Mine is a three-page Exhibit, for 1048, Sub-Exhibit 5, because 1048 has sub-PDFs, although, if you're looking at a paper one, it may be different.
THE COURT: Yes, it appears to be.

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MR. MILLER: It's 585, your Honor.

MR. CARLING: I see, 585.

THE COURT: 1048. Okay. I don't have a 585 in Exhibit 1048. Okay. One second. Okay. I'm not sure if you changed the exhibits. What's provided to the Court under 1048 is Trump v. Raffensperger. Maybe I do not have a correct copy of the exhibit. This is the actual complaint.

THE CLERK: Sixty-four pages. That's what we have.

THE COURT: So the exhibit record reflects that 1048 contains the Georgia federal complaint, Trump v. Kemp, but what I have at 1048 is Trump v. Raffensperger.

MR. CARLING: It is Respondent's exhibit, your Honor --

THE COURT: Yes. I'm waiting for Mr. Miller to --

MR. CARLING: -- so I may not have a full understanding, but I have noted that the evidence submitted in Trump v. Raffensperger, I believe, was resubmitted in Trump v. Kemp, which might be part of the confusion around the exhibit record.

THE COURT: Yes. The caption reads Trump v. Raffensperger. Let me see the case number. So do you have another copy of 1048? In the interests of time, we can move forward. I'll follow along on the electronic version.

MR. CARLING: I don't think we'll be on here for

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too long, and Doctor Grimmer maybe can explain.

THE COURT: Okay. Well, I'll expect the Respondent to provide a copy, a full copy of 1048.

MR. MILLER: There is, maybe, a work-around on this, your Honor. Some of the exhibits in the Trump v. Raffensperger case have been marked a couple of times as exhibits. So, if you go to Exhibit 1036, page 584, you'll --

THE COURT: Okay. One second.

MR. MILLER: -- that should get you there, and then, if Mr. Carling wants to use that exhibit, per my offer, that might be a way to get you there, since you're the most important person to follow this.

THE COURT: 1036.

MR. MILLER: So the number was 1036, and it appears on page 584, on my version.

MR. CARLING: Yes. Ours is broken into multiple PDFs, but we may be able to get there. I'm sorry. What was the page number?

MR. MILLER: Five eighty-four.

MR. CARLING: Okay. We'll switch that.

MR. MILLER: It's the same.

THE COURT: Okay.

MR. MILLER: It's your choice, Counsel, but that way, the Court could be on the same page.

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THE COURT: Well, actually, let's see.

MR. CARLING: That's fine. We can put that one up. Let's put up 1036, page 584.

BY MR. CARLING:

Q Doctor Grimmer, do you see the affidavit of Lisa Holst?

A I do see this, yes.

Q All right. Is this what you were talking about?

A This is what I was talking about, yes.

Q All right. And, generally, this category that we're talking about, these are affidavits of people who voted, or are related to someone who voted in the 2020 election. Is that correct?

A That's correct.

Q All right. So why is this affidavit not evidence that fraud occurred?

A The confusion here arises because Walter's wife, who I believe is Mary Holst, is registered as "Mrs. Walter Holst" in the voter file. So, in 2020, the vote was cast absentee, early, in person, and as the affidavit from Frances Watson in this confirms, Walter Holst's registration record was canceled in 2010, and Mary Holst is registered as "Mrs. Walter Holst," which is a phenomenon that is sufficient common on -- there's a Georgia My Voter Page information, and there it even will say -- if you're having trouble finding your information, it will say, potentially, you're

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registered as "Mrs.," and then your husband's name.
Q Can anyone use that web site to look up that information?
A Yes. So you would need to know the first initial, last name, and date of birth for the individual.
Q And so how does that -- why does that publicly available information lead you to believe that a ballot was not cast for a deceased Walter Holst?
A So, first, just by my review of the absentee voter history, it's the case that this was cast early, in person, which in Georgia requires showing photo identification. Second, as I was performing a search of this, I searched for Walter Holst. I found his obituary. I saw his wife, Mary, and then very easily found the date of birth. So I looked up her voter history on that My Voter Page, and, very clearly, she is the one who had voted, and from the obituary, I could see Walter Holst's date of birth, and he was no longer in the Georgia voter registration.
Q And that absentee voter history, that's publicly available information?
A The absentee voter history is the same one I was just describing before, promulgated by the Secretary of State's Office's. Yes.
Q Any other affidavits of voters that are an example of this category?

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A I believe there's one with the last name Rumph, maybe John Clint Rumph.

Q Well, we may run into the same issue here. Let's start with Respondent's Exhibit 1048, Sub-Exhibit 6.

MR. CARLING: So our records show, your Honor, this is Respondent's Exhibit 1048, page 587. Does the Court have page 587 of 1048?

THE COURT: No.

MR. CARLING: All right. Let's find it in 1036.

THE COURT: What is the document?

MR. CARLING: It's a declaration of Sandy Rumph.

THE COURT: Okay. I don't have it.

MR. MILLER: There's a similar work-around on this, your Honor, if you want to try this. If we go back to Exhibit 1036, which is a duplicate, page 587 should get you to the same declaration and exhibit.

THE COURT: Okay. Page 587. Okay. It's actually 588 on the hard copy, but thank you. Yes, I have it.

BY MR. CARLING:

Q Okay. I think we're there. It's Respondent's 1036, and this is page 588, as the Court noted. Okay. Doctor Grimmer, we'll put that up on the screen for you. All right. Do you see the affidavit of Sandy Rumph?

A I see this, yes.

Q Is this related to the issue you were just discussing?

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A It is, yes.
Q All right. And what is your understanding of what Sandy Rumph is saying in this affidavit?
A To be clear, the claim here is not that there was a vote cast that was inappropriate, but, rather, her father-in-law passed away, and then, after he passed away, his registration was changed from deceased to active, and she found that to be suspicious.
Q And do you have an opinion as to whether there's any indication in this affidavit that voter fraud occurred?
A It seems clear that there was no ballot cast. There's no argument that a ballot was cast.
Q Aside from that, do you have an opinion as to whether the phenomenon she describes is suspicious?
A Well, what appears to have happened, which is based on the affidavit from Frances Watson from the Secretary of State's Office, is that Mr. Rumph's identity was stolen after he passed away, and there was a contact made with the Department of Driver Services in Georgia.

Now, Georgia has a procedure in place called "automatic voter registration," so that, when an individual goes to renew a driver's license, there is information that's automatically passed for voter registration purposes, and that contact with the Department of Driver Services is likely the explanation for the movement from deceased to

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active. But, as Frances Watson describes in the affidavit, they know this to be an instance of identity theft.

Q So, Doctor Grimmer, generally, with this category of affidavits, in Doctor Eastman's discovery, did you encounter a number of affidavits from people who either voted or were related to someone who voted?

A I saw a lot of things like that, yes.

Q Okay. And did any of those affidavits present a reliable indication of fraudulent voting?

MR. MILLER: Objection, over-broad.

THE COURT: Overruled.

THE WITNESS: I did not see an -- to the best of my recollection, I did not see an indication of that. In most instances, I saw individuals who had a surprising experience when they went to vote, or had an unpleasant administrative experience when they went to vote, but no indication of either voter fraud or other manipulation of their ballots.

BY MR. CARLING:

Q And are the examples we've discussed today representative, generally, of this category of affidavits?

A To the best of my recollection, yes.

Q Okay. There was a fourth bucket. What was the fourth bucket?

A The fourth bucket were affidavits from individuals who

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were election workers or otherwise worked in the process of administering the election, who identified things that they found to be suspicious or surprising in the conduct of their work as an election administrator.

Q Were these affidavits of suspicious or surprising observations, in your opinion, evidence that fraud had occurred?

A In fact, to the best of my recollection, in no single affidavit did someone say, "I identified an instance of a fraudulent ballot being case," or "This is the specific ballots that were identified as being cast." Rather, these affidavits identified what they found to be practices that they had trouble reconciling, objections to the way certain observers were being treated, or observations about the delivery of certain kinds of ballots to various places.

Q I believe you said earlier that you read the Ligon report that was related to the December 3rd Georgia subcommittee testimony?

A I did, yes.

Q And does that report contain examples of this fourth category?

A It does, yes.

THE COURT: I'm sorry. Which report, again?

MR. CARLING: This is the Ligon report, which I believe is Respondent's Exhibit 1050, but I don't think we

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need to put that up right now.
BY MR. CARLING:
Q So, Doctor Grimmer, people's affidavits describing things that they found objectionable, that is not an indication that a fraudulent ballot was cast. Is that what you were saying?
A In those affidavits, no one said, "I saw a fraudulent ballot being cast," or "I uncovered a network of individuals who are conspiring or administering election fraud." No one said, you know, "I uncovered 10 ballots that obviously were fraudulent, and I caught the person red-handed, and they were arrested and are being indicted."

There was never an affidavit that made that sort of argument. Instead, it was individuals who observed things they had difficulty understanding, or they didn't like how they were being treated as an observer, or observations about the way things were being delivered.
Q So, Doctor Grimmer, looking back over all these different examples and things you've testified about, many of them involved errors in statistical methodology. Is that correct?
A That's correct, yes.
Q In your opinion, do those errors require -- well, let me ask you a different question. In one of your PNAS articles, I believe you said that evaluating some of the

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statistical fraud claims requires expertise in statistics. Did you say that?

A That's what we wrote, yes. That's one thing.

Q Okay. So, suppose someone doesn't have expertise in statistics. Is there a way that someone without that expertise could have assessed the statistical fraud claims to evaluate whether they were indicative of fraud?

A I believe so.

MR. MILLER: Objection, lacks foundation, beyond the scope, not relevant.

THE COURT: Overruled.

THE WITNESS: I believe so, yes.

BY MR. CARLING:

Q How would they do that?

A When confronted with statistical evidence, even if one isn't a statistical expert, there are some basic questions that I think we all might want to know. For example, is this statistical procedure accurate as an indication of fraud? How often, when it says there's fraud, is there actually fraud, and how often, when it says there's not fraud, is there not fraud? That's a sort of basic question.

A second question that someone might ask is if the logic of the statistical analysis is coherent or consistent with basic understandings of the way elections occur in the United States. Take the Cicchetti analysis, for example.

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What Cicchetti does in that analysis is he compares either the vote count or vote share between Biden and Clinton in 2020 and 2016, and flags it as anomalous that there's some difference, but a sort of basic logical assessment of that would say that there are lots of reasons we expect these things to be different across elections, and there's no established literature, empirical pattern, or even common knowledge that would say election results are the same in every state.

In fact, if we took these tests to a logical extreme, if we think about Cicchetti's test, that says, if an election is not anomalous, then the results should be the same, it would imply we could just run one election, once when a state is founded, and then every election would subsequently be the same.

Obviously, that's not the case. Things change. Times change. Voters' preferences may change. Conditions change that people are persuaded. And so that's a basic way we can make that sort of assessment. In general, I think making basic inquiries about why individuals think particular analyses are indicative of fraud is a thing someone can do without a basis in statistics.

Q What would be those basic inquiries that someone could make?

A Again, asking about the accuracy of fraud, assessing

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the basic logic of the statistical analysis that's being conducted, and even inquiring about whether there is a research literature that supports these sorts of conclusions.

There is a robust field across statistics, economics, political science, even into machine learning, that makes assessments of how elections work. Libraries are filled with this literature. And so it's worth asking if the analysis that's being conducted has any basis in that voluminous literature, or any basis in any scholarly research at all.

Q Well, if someone asks, you know, basic questions about, for example, how accurate Stanley Young's contrast analysis is at indicating fraud, was there any evidence or indication that his technique was accurate at finding fraud?

MR. MILLER: Objection, beyond the scope, lacks foundation, not relevant.

THE COURT: Explain to me how that's beyond the scope.

MR. MILLER: Because the question is intended to elicit an opinion from Doctor Grimmer about what a layperson, I think was the original call of the question, could do to determine the accuracy of forensic data, voting information.

THE COURT: Okay. I think that is an incorrect

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premise. Could you repeat the question, please?

MR. MILLER: Well, sorry, your Honor, but I wasn't exactly repeating the question that Mr. Carling posed. I think I was stating the basis for my objection. But I'm happy to continue with --

THE COURT: I'm assuming your objection has some relationship to the question that was asked.

MR. MILLER: The line of questions. So I've made a couple of objections to this line of questions, which is essentially, you know, "What would a layperson be able to do with data like this to be able to verify the accuracy?" And I was starting to explain that, but I'm happy to defer to your Honor and however you want me to proceed. I'm happy to explain the basis for that objection.

THE COURT: Okay. As I understand the question, and this line -- and I see this is something of a different line, but this line of questioning -- going to Doctor Young's analysis, not necessarily from the perspective of a layperson's understanding or lack of understanding of Doctor Young's analysis, but Doctor Young's analysis.

MR. MILLER: Well, but still the question invites an opinion from Doctor Grimmer about how one would be able to determine the accuracy of Doctor Young's opinions or conclusions. I think that's the call of the question, in my mind, and I have a way to explain to your Honor why I think

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that's objectionable, but I'll wait until you prompt me to respond further.

THE COURT: Well, Doctor Grimmer testified regarding his analysis of Doctor Young's vote anomaly analysis in his deposition, and he gave a fair amount of detailed testimony about that. So I am not sure about the basis of your objection. If you think you need to elaborate more, feel free to do that.

MR. MILLER: Well, perhaps it will be more crystallized when we get questions that will get closer to questions that have been asked in the past, but the point I was going to make is that, to the extent that Doctor Grimmer is asked to provide an opinion about what a reasonable person would do to verify the accuracy of data with respect to voter irregularities, that that's where I have the problem, with that line of questions, because it's beyond the scope, and it lacks foundation, and it's not relevant, and I'm happy to explain that.

THE COURT: Okay. Do you still have the question -- the objection is overruled. Do you still have the question in mind, Doctor Grimmer?

THE WITNESS: If you could just repeat it, Mr. Carling.

THE COURT: Would you -- yes. Would you repeat it, please, Mr. Carling.

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MR. CARLING: I was afraid you were going to say that.

BY MR. CARLING:

Q All right. Doctor Grimmer, one of the things you had said is that a layperson, when evaluation claims, could ask, "How accurate is this method for indicating fraud?," correct?

A That's what I said, yes.

Q All right. So, taking Stanley Young's contrast analysis -- well, first, what is your opinion as to whether that method is accurate at indicating fraud?

A Doctor Young provides no indication or assessment of the accuracy of his method for indicating voter fraud or even voting anomalies.

Q All right. You haven't seen that in any of the writings of Doctor Young that you've reviewed?

A I have not seen that, no.

Q What about for the parallel snakes phenomenon? Have you seen any information or indication that that technique is accurate at identifying fraud?

A I've seen no indication that that's accurate.

Q And you haven't seen any -- in the writings of the proponents of that statistical theory, you haven't seen any of them offer any information or indication that that's an accurate method of indicating fraud. Is that correct?

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A I have not seen them offer any indication that it's an accurate indicator of fraud. That's correct.
Q And the other, I suppose, semi-statistical theory we talked about is the phenomenon of the denominator relating to vote percentages, indicating electronic vote flipping. Do you recall that?
A I recall that, yes.
Q Have you ever seen any evidence or information to indicate that that's an accurate methodology for indicating electronic voting fraud?
A I've seen no indication that that's an accurate indicator of electronic voter --
THE COURT: I'm sorry. That that's an indicator of voter fraud, you're saying?
THE WITNESS: Yes. I've seen no indication that examining an estimated number of votes to be counted on election night, and seeing that increase, is an accurate indicator of voter fraud.
BY MR. CARLING:
Q All right. And you mentioned that, for some of these statistical claims, there's a logical component which, in your opinion, is not logical. Is that correct?
A I don't --
Q I may have framed that poorly, but can you explain the issue with logically coherent theories?

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A So, when evaluating a statistical exercise, even if we are unfamiliar with how particular statistics are being calculated, it is the case that we can examine the underlying logic of the tests. So, for example, I'm going to go back to the Cicchetti example. Are there differences across these two elections? If we do see a difference, is that an indication of fraud? So the basic logic there is not -- as a basic logical matter, it doesn't follow that, if you see a difference, then there is fraud, and an individual, you know, vaguely familiar to U.S. elections, would know that, from year to year, states change in the vote shares candidates receive.

Q And they wouldn't require any statistical expertise to see that basic logical flaw. Is that correct?

A That's correct.

Q What about the bucket related to data analysis, records of illegal votes based on voter files and administrative records? If someone doesn't have expertise in elections or data, is there a way they could have assessed the reliability of those claims?

A There is, yes.

Q How would they do that?

A Well, for some of the claims, it just goes back to understanding election practices in the state. So, for example --

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THE COURT: Just a minute. Exactly which claims are you referring to, Doctor Grimmer?

THE WITNESS: So the first claim that I'll talk about here with knowing election practices would have to do with individuals who are on the rollover list in the state of Georgia, and just to refresh, the rollover lists are the set of individuals who apply for an absentee ballot, perhaps in a primary election, that indicate that they're either over 65, disabled, or qualified because they fall under UOCAVA, they're overseas, and these individuals apply once for an absentee ballot in the primary, and then will continue to receive absentee ballots for the elections, essentially, associated with that primary, so if there's a primary runoff, a general, and then a general runoff.

The fact that those individuals have their absentee ballot application recorded earlier is not an indication of something illegal, ineligible, or otherwise surprising. It's just an example of how the election is conducted in the state of Georgia. So that's one example of that.

BY MR. CARLING:

Q I just want to pick up where you left off, Doctor Grimmer. Were you giving examples of how someone could have assessed the reliability of claims related to data analysis and voter files without having expertise in elections and

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data analysis?

A That's correct.

MR. MILLER: Objection, lacks foundation.

THE COURT: Just a minute, Doctor Grimmer.

I'm sorry. Go ahead.

MR. MILLER: That's okay. Yes. It lacks foundation, it's beyond the scope, and it's not relevant. So now, your Honor, we're back to a question that does pose the issue, I think, more squarely that I wanted to raise with the Court, so, generally, questions surrounding, you know, would a layperson or somebody not trained in statistics be able to discern the accuracy of voting irregularity information? That's essentially my view of the call of the question. I don't know --

THE COURT: I see, but isn't it true that expert witnesses can, and often do, give testimony regarding what might be otherwise considered to be a hypothetical?

MR. MILLER: I don't think that question calls for a hypothetical. I do agree that experts can be asked hypothetical questions all the time. It's an effective examination tool, and a way to elicit helpful evidence to the trier of fact.

THE COURT: But the bottom line is, an expert doesn't have to have personal knowledge, right? And experts can testify, providing expert opinion, based on a variety of

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factors which do not include personal knowledge.

MR. MILLER: I agree. Oftentimes they don't testify from personal knowledge. Here, I think we might have a blend of personal knowledge, as well as expert opinions as an extrapolation of, you know, the data that he's been asked to look at it. But let me see if I can focus the Court on my concern here. I don't know what issue in this case the questions regarding whether a layperson would have had the ability to discern an inaccuracy of election irregularity information -- to me, that's not an issue in the case. The only --

THE COURT: Okay. So you have a relevance objection, then. Is that --

MR. MILLER: That's what I'm trying to focus the Court on, is the thrust of this issue, but that's not an issue in this case.

THE COURT: Okay.

MR. MILLER: The --

THE COURT: Mr. Carling -- and I'm going to give you a chance to finish in just a minute -- but addressing, first of all, what sounds as though it's a relevance objection, how is this line of questioning relevant, regarding a layperson's ability to understand or comprehend the nature of the statistical analysis?

MR. CARLING: Well, as the designation for Doctor

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Grimmer indicated, he would be talking about Respondent's proffered evidence in his answer supporting his claims of election fraud, and Doctor Grimmer is talking about the reliability of that evidence, and the extent to which the reliability of that evidence could have or should have been something that Doctor Eastman could have learned is directly related to the allegations charging him with misrepresentations regarding that evidence. It's related to the mental state requirement, and it's just part and parcel of testimony about Doctor Eastman's statements claiming election fraud.

THE COURT: Okay. The objection, at least that aspect of it, is overruled.

Is there something you wanted to add, Mr. Miller?

MR. MILLER: Well, I wanted to respond to one point that Mr. Carling raised, and that is, it was in the designation, but the fact that an expert is going to testify -- let me be more specific -- that Doctor Grimmer is going to testify about a certain subject matter doesn't make it relevant. That has, really, no bearing at all, other than giving the responding party notice that that's an opinion that the expert intends to offer.

THE COURT: Is going to offer, right. That's true. However, what is at issue here is Doctor Eastman's conduct, what he knew or didn't know, and how he

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communicated, and with whom he communicated some of that information. That's a part of, not, obviously, all of, the nature of the alleged misconduct here, and so this testimony would be relevant on that issue.

MR. MILLER: If I could respond to that, and I agree with the Court's characterization of that issue in the case, which gets us back to Doctor Grimmer and this line of questioning. This line of questioning can only be relevant to the issue of Doctor Eastman's ability to look at reports of voter fraud, just to pick a clear example, and determine whether that was reliable or not. This witness can't testify about what Doctor Eastman did or did not do or should have done.

THE COURT: And that's not what he's being asked to testify about. He's being asked to testify about whether a reasonable or a layperson could have had access to some of this information, like the absentee voter files, for example.

MR. MILLER: The extrapolation of that is, Doctor Eastman is a layperson. So, if the argument is eventually going to be in this case "Well, a layperson could have done that so easily. Doctor Eastman could have done that so easily," that's the only relevance of this line of questioning.

THE COURT: You'll have an opportunity to put on

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your case, and regarding will have an opportunity to testify regarding this issue. Okay?

MR. MILLER: Thank you. We look forward to that. But I still want to focus on why this is a relevant line of inquiry. The only place that this line of inquiry could end up would be attempt to support the argument that Doctor Eastman had means to be able to discern whether the information that he was speaking about, or advancing, or talking about was reliable, and Doctor Grimmer is not capable of testifying as to what an attorney, or, in particular, Doctor Eastman, could or should do with that information. That's the only way this line of questioning becomes relevant, and Doctor Grimmer is disqualified from being able to offer that opinion. That's where we're at.

So where we're going to end up with is a situation where the Court might say, "Well, this should have been easily found out, unwound, you know, by a layperson, so, therefore, Doctor Eastman should have been able to look at this information and say, 'I can't accept that, and I'm going to do my own due diligence about it.'" That's where this line of inquiry goes. This witness can't testify to that. The Bar could have put on a case that said, "Here's an attorney expert who's going to talk about the obligations and the duties that a" --

THE COURT: What Doctor Grimmer has testified

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about is the measures that he took to ascertain information relative to the allegations made in the various affidavits, made by Ms. Holst and a number of other individuals, and whose affidavits were considered to be support for certain positions adopted by Doctor Eastman and others.

So, for that reason, this is definitely going to be relevant. The objection is overruled. You've made your record, and we'll move on.

Okay. Mr. Carling, your next question.

MR. CARLING: Before I ask my next question, your Honor, it occurs to me that the Court accepted Doctor Grimmer as an expert yesterday while I was doing my initial establishing of his expertise and credentials, but I don't know that the Court specifically said in what, and so I'd like an opportunity to make the proffer for Doctor Grimmer that I was going to make yesterday, which is that, based on all of the research and teaching and publications that he described yesterday, that the State Bar is presenting him as an expert in voting and elections, including research methods and statistical analysis of elections and election administration and claims of voter fraud.

THE COURT: Okay. Any objection, Mr. Miller?

MR. MILLER: I don't object to that, your Honor.

THE COURT: Okay.

MR. MILLER: I think that's an accurate

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characterization.

THE COURT: All right. And as the Court previously stated, Doctor Grimmer is abundantly qualified to testify regarding those topics as an expert.

So let's move on.

BY MR. CARLING:

Q Doctor Grimmer, I believe we left off -- you were testifying about ways that a layperson could have assessed claims in November of 2020 or December of 2020 regarding these analyses of voter files that were claimed to indicate fraud.

A Yes.

Q I'll confess I don't recall where you left off, but could you give us another example?

A Absolutely. So, even if someone doesn't have expertise merging data files, or hasn't look at big data sets, I think it is intuitive to know that, in a state like Georgia, that there could be many people who have the same first and last name who were born in the same year.

You might have that, you know, experience from their own life, or, you know, certainly, if an individual performs a Google search for themselves, they might find individuals who have those same characteristics. So there, even though someone may not have an understanding of false positives rates, they would know that it would be unlikely that first,

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last, and birth year would provide a unique key to merge across data sets.

Q Were you following the 2020 election in November and December of 2020?

A I was, yes.

Q All right. And during that time, were you following claims that were circulating regarding allegations of voter fraud?

A I was, yes.

Q And, by the way, when I say "voter fraud," what do you understand "voter fraud" to mean?

A It's a good question. I understand voter fraud to be the casting of a ballot that is not tied to that particular -- to the individual to whom the ballot was tied. So, for example, if a person is deceased and ballot is cast by someone, that could be an indication of fraud.

Q In November and December of 2020, what resources were available to members of the general public to help them evaluate claims of voter fraud?

MR. MILLER: Your Honor, I'm sorry to interrupt Doctor Grimmer. I apologize. I just want to make sure that I have a -- the record is made with respect to this line of inquiry, because now it's being pursued.

THE COURT: Okay. You have a continuing objection. Thanks.

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MR. MILLER: Thank you, your Honor.

THE WITNESS: So certainly, in November and December, state officials were putting out a number of statistics, but, for example, in the state of Georgia, the absentee voter file, absentee voter history, was promulgated sufficiently early that it was able to be used in cases where the -- by both plaintiff and defendant expert witnesses.

So, for example, in, I believe, the case Pearson v. Kemp, there's an expert report filed for the plaintiffs, Doctor Benjamin Overholt, who performed an analysis very similar to the numbers that I reported, identifying the rate of ballots being rejected for signature-related issues, and that report was then evaluated by Doctor Kenneth Mayer, who is a professor at the University of Wisconsin, political science professor, and they were able to use the voter history in order to construct those expert reports in November and December.

In addition to the information from official states, in addition to data that was being promulgated, there were individuals, experts in the field, writing memos and explaining why particular patterns were not indicative of fraud.

BY MR. CARLING:

Q And how would a member of the general public find that

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information?
A Sort of making a basic investigation into an issue, looking for information on the Internet, is one way to do this, and I would suggest, though, that following up with individuals -- even if someone is skeptical, perhaps, of a fact-checking organization, one can follow up with those individuals who offer those opinions in those articles.

So, for example, it wasn't in November or December, but a neighbor of mine heard about my research, and he himself was skeptical of some of the results of the 2020 election, and I've had long conversations with him, sort of explaining the limitations of some of the claims that he believed.

And so there's lots of opportunity both to ask individuals or to find information on line, or to use official data and statistics in order to understand the particular claims that are being made.

Q And you've referred at various times in your testimony to publicly available information about voter histories or absentee voter histories. Is that correct?
A That's correct.
Q When you've referenced information that was publicly available, was that information publicly available in November and December of 2020?

MR. MILLER: Objection, over-broad.

THE COURT: Sustained.

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BY MR. CARLING:

Q I believe you referenced that at least with regard to the state of Georgia. Is that correct?

A I did reference that with the state of Georgia, yes.

Q All right. So did Georgia have its voter information publicly available in November and December of 2020?

A Georgia promulgated its absentee voter history and its voter history in November 2020.

Q Okay. Do states vary in terms of how much of that information is made public?

A They do vary, yes.

Q So, in other states, are there ways that members of the general public can get information about voter data or the reliability of the election?

A So certainly from official sources, say, secretaries of state, and related official organizations will provide that data. That's one way in order to make that verification, yes.

THE COURT: Doctor Grimmer, isn't it true, though, that in that time frame, November, December 2020, and even up to today, that individuals can consult the Internet, can go on line, and there is a lot of misinformation on line about the 2020 election? Would you say that's true?

THE WITNESS: So certainly, if one is going to look on line and try to find information about the 2020

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election, the quality of that information varies quite a bit, ranging from, you know, official data or reports or memos from individuals who have expertise in that area to, like you said, misinformation or information that sort of lacks a foundation. So I agree that it could be the case that, in attempting to explore this information, individuals would have to use their best ability to discern what's a reliable source, which can be challenging.

THE COURT: Okay. So your testimony regarding individuals searching on line for 2020 election information, is that directed to obtaining certain types of information on line?

THE WITNESS: So, if we just think about how would an individual encounter official state information, either they would see it in a news report or they themselves would seek out that information. That's one way they can acquire that information, and so I imagine that that would happen through a search.

THE COURT: Okay. Mr. Carling.

BY MR. CARLING:

Q And, Doctor Grimmer, for all of the claims of voter fraud or illegality that were circulating in November and December of 2020, a layperson could have obtained information to help them evaluate the reliability of those claims. Is that correct?

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A That's correct, yes.
Q And based on your review of the discovery that Doctor Eastman produced on this case, you found no reliable evidence of outcome-determinative fraud. Is that correct?
A That's correct.
MR. MILLER: Objection, leading.
THE COURT: Sorry?
MR. MILLER: Leading.
THE COURT: Okay. Sustained.
BY MR. CARLING:
Q All right. In your review of Doctor Eastman's discovery, all the information that he's produced, and in his answer, did you find any reliable evidence of outcome-determinative fraud?
A I did not, no.
Q And for all of those claims or proffered evidence, those were the types of claims that a layperson could have obtained information about in November and December of 2020 to help them evaluate the reliability of those claims?
MR. MILLER: It's leading and it's vague.
THE COURT: Sustained.
BY MR. CARLING:
Q All right. For all of the discovery and information in Doctor Eastman's answer, were those the types of claims that a layperson could have obtained information about in

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November or December of 2020 to help them evaluate the reliability of those claims?

MR. MILLER: Objection, it's vague and it's over-broad.

THE COURT: Overruled.

THE WITNESS: Those claims -- there's obviously different ways to understand why claims fail, but the claims that I've identified all share a characteristic that we can understand, that they fail with a sort of basic understanding of the logic of what's going on in the test. It doesn't require understanding -- having taken a statistics class, but, rather, just understanding what's the comparison being made, and why would we expect this test to perform well, and my understanding is that a layperson could understand that.

MR. MILLER: Your Honor, I don't think we've defined what a "layperson" is, and I know that we've now gone probably a couple of hours of examination. It's not clear to me if that has an accepted use here.

THE COURT: That's a valid point, and you can inquire about that on cross-examination.

MR. MILLER: Thank you.

MR. CARLING: I don't have any more questions for Doctor Grimmer right now. Thank you.

THE COURT: Okay. Thank you.

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THE COURT: Mr. Miller?

MR. MILLER: Do you mind if we take a short break, your Honor? Would that be appropriate?

THE COURT: Okay. Why don't we take a 10-minute break, and then we'll resume. I'd rather for us to finish with Doctor Grimmer, so we can release him before our lunch hour. So we'll take a late lunch hour, obviously.

MR. MILLER: Okay. I think I can do that.

THE COURT: Okay. So I have 12:00. Let's resume at 12:10. Let's go off the record.

THE CLERK: We're off the record, your Honor.

THE COURT: Thank you.

(Proceedings recessed briefly.)

THE CLERK: We're back on the record, your Honor.

THE COURT: Thank you.

We're back on the record on the record in the continued hearing of John Charles Eastman, in Case Number 23-O-30029.

Okay. Mr. Miller, cross-examination?

MR. MILLER: Thank you, your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q Good afternoon, Doctor Grimmer.

A Good afternoon.

Q So, Doctor Grimmer, were there incidences of voter

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fraud in the 2020 presidential election?
A My understanding from official sources is that there were a small number of incidents that could be identified as voter fraud. So I think, for example, the state of Georgia identified two individuals who perhaps voted someone else's absentee ballot, if I'm remembering this correctly, or there was like a signature issue. So that would be one example.
Q Okay. Well, let's move beyond just Georgia, because my question wasn't limited to the state of Georgia. It was really for the entirety of the 2020 general election. So let me ask it again and see how you respond. There were incidences of voter fraud in the 2020 general election, true?
A There were a small number of incidents of votes being cast that would be called "fraudulent," yes.
Q Okay. I'll take the last part of that as your answer, as yes. Do I have that right?
THE COURT: Counsel, the answer is pretty clear. He's repeated it twice now. Let's move on.
BY MR. MILLER:
Q Okay. And there was voting irregularities in the 2020 general election, true?
A Can you define what you mean by an "irregularity," please?
Q Well, you defined it for me in the deposition. You

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remember my question asking you what the definition of "voter fraud" was, and "voter irregularities"?

A Yes. Apologies.

Q Okay.

A Yes.

Q Okay. And you told me there that "voter irregularities" was allegations about where individuals casting ballots who are or may be ineligible to vote, and, therefore, those would be illegally cast ballots. Those would be voting irregularities. Do you agree with that testimony, Doctor Grimmer?

A So, in the sense that an allegation that a vote was illegal -- that would be what could be classified as an irregularity. I want to be clear that the allegation of it being illegal doesn't then make it illegal. Rather, if we say an irregularity is a thing an individual is alleging, I believe that's what I'm saying there.

Q Okay. Well, let's use your definition of voting -- of irregularity. So let me ask my question again, so you can answer it. There were voting irregularities in the 2020 general election?

A Yes. There were allegations of illegal cast in the 2020 general election, yes.

Q Okay. Well, not just allegations, Doctor Grimmer. You said you were following the 2020 general election pretty

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closely, and you've testified now for nearly four hours about a number of different parts of the general election results. So I'm not asking you whether there were allegations of voting irregularities. My question is, were there voting irregularities in the 2020 general election/

A I just want to be clear here, because you then went back to my definition from my deposition. I defined an irregularity as an allegation of an illegal vote. So I just want to be responsive to the question there, but there also were individuals who -- there also were ballots cast in the 2020 election that were illegally cast. That is true. That's true of every election in U.S. history.

Q Okay. So your answer is yes. Is that correct, Doctor Grimmer?

A That's correct.

MR. CARLING: Objection, it's been asked and answered, and his answer speaks for itself.

THE COURT: Sustained.

BY MR. MILLER:

Q Now, I just want to focus -- I'm going to start sort of broad, and then we'll work it down to more specific, Doctor Grimmer. Let's talk about Georgia for a minute. So you provided a lot of testimony about your assessment of the opinion of Doctor Geels, correct?

A That's correct.

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Q Okay. And other than the information in the various Geels reports that you critiqued, did you perform your own investigation to determine the accuracy of the Georgia results in the 2020 general election?

A Can you say a bit more about what investigation you want me to conduct to assess accuracy of an election?

Q I'm just asking you whether you did an investigation to determine the accuracy of the Georgia election, 2020.

A In relation to objections made in the Geels affidavit, for example, I assessed those claims, but political scientists and social scientists generally do not set out to assess the accuracy of elections in this way. That's not an analysis I would expect myself to conduct.

Q Okay. So I take it, then, your answer, Doctor Grimmer, is that you did not undertake that analysis. Is that true?

MR. CARLING: Objection, it's vague and over-broad as to what he means by "analysis of the election."

THE COURT: Yes. I think that mischaracterizes the witness' testimony, too. You asked him whether or not he performed an investigation, which can be different from an analysis.

MR. MILLER: Fair enough, your Honor. Let me try to clarify it.

BY MR. MILLER:

Q So thank you, Doctor Grimmer. Did you undertake an

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investigation to determine the accuracy of the voting results in Georgia, 2020?

A Actually, in the memo that was circulated called "Evaluating the Look Ahead America Report," we engaged in extensive analysis of claims made by Mr. Braynard, Matt Braynard, in both his affidavit and in claims made afterwards, and in so doing that investigation, it spoke to issues around the eligibility, and, therefore, the accuracy of those election results.

What we found in that -- first just in the conduct of that research, what we found was that individuals who applied to be on the national change of address, that's not an indication that they're ineligible, because there's a number of reasons why someone might appear on the national change of address, and then not -- and not have yet relinquished their residency in Georgia, or might not yet ever relinquish their residency in Georgia.

What's more, in that analysis, we found a number of sort of basic statistical mistakes, but that's one way in which we investigated a component of a claim made about inaccuracy. But I did not undertake an assessment of the accuracy of the election results.

Q Okay. Well, we just flipped the words again, so I want to make sure we've got a good record, Doctor Grimmer. I think I changed the question to ask if you had done an

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investigation, and I think the last part of your answer said, "I didn't do an assessment."

So let me make sure that we've got a clear record here. Is it true, Doctor Grimmer, that you did not undertake an independent investigation of the accuracy of the 2020 general election in Georgia?

MR. CARLING: Objection, it's vague as to "the accuracy of the election in Georgia," because, as Doctor Grimmer has testified, he did investigate aspects of the accuracy in certain claims.

THE COURT: Okay. Overruled. You can answer the question.

THE WITNESS: Across a variety of analyses, I've assessed how individuals cast their ballots, how those ballots are returned, and how that aligns with allegations made about inaccuracy, and an assessment of the accuracy of an election is not an analysis that I conducted, or that I would understand that social scientists would conduct in order to verify an election.

BY MR. MILLER:

Q Did you undertake an investigation to determine the effect of voter fraud and voting irregularities in the 2020 general election?

A I did undertake an assessment of the role of voter fraud and irregularities in the 2020 election, yes. I've

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done --

Q Nationwide?

A Across a number of states, we have undertaken that investigation, yes.

Q What states?

A So we've evaluated claims of voter fraud in Georgia, Pennsylvania -- make sure I have the states correct from our PNAS paper. That would include the swing states, which were bundled up with a series of claims made by individuals such as John Lott and other individuals about the effect of Dominion machines, which I think Russell Ramsland has made claims about.

And then, subsequently, in some of our work rebutting claims made by Doctor Frank, we've undertaken an examination of his claims of voter fraud in -- I don't want to misrepresent this -- I think it's in 42 states and in 28 counties across the U.S., and evaluated his claim in every single one of those counties, and shows that it fails in every single one of those counties.

THE COURT: I'm sorry. What was the issue that you evaluated in connection with the 42 states and 28 counties?

THE WITNESS: Yes. Sorry. I'll repeat that. My apologies. So this is related to Mr. Miller's question about our investigation about the 2020 election and the role

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of voter fraud.

An individual, Doctor Douglas Frank, has made a series of claims throughout the country that he has statistical evidence that voting machines are being used in order to predetermine election results, and what we've done is undertake an analysis of that claim, which he says occurs at the county level. We've done that across 2,800 counties or so and, I believe, 42 states.

THE COURT: Okay. Thank you.

Mr. Miller.

MR. MILLER: Thank you.

BY MR. MILLER:

Q So you used the word or the phrase "layperson" several times in your testimony, Doctor Grimmer. How do you define a "layperson"? Is that anybody but you?

A I would not define it that way.

Q How would you define it?

A Just as an example, when writing for the Proceedings of the National Academy of Sciences, you author a thing called a "significant statement" for an article, and that's intended to be interpretable by a layperson, which is taken to mean someone without the subject-specific expertise in that area. So here, for the discussion we are having, you might say someone who hasn't taken formal coursework in statistics, or perhaps formal coursework in the statistics

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of U.S. elections.
Q Now, you've testified that the claims or statements made by Doctor Eastman in this case were not based on reliable data. Do I have that right so far?
A I don't think I made a representation entirely about the data. I think my claims were that a combination of the data and statistical procedures that are deployed, or analysis strategies that are used, led to unreliable conclusions.
Q Unreliable conclusions by those that had prepared the reports?
A It would be an unreliable conclusion by anyone who undertook that analysis, yes.
Q Right. Well, I just want to be clear. When you say, "By anyone who undertook that analysis," that would be the person who actually undertook the research and prepared the report, correct?
A I mean, so I mean "unreliable" to modify the conclusion, not to assign it to an actor.
Q Okay. Well, here the "actor" that you're talking about is the person or persons who undertook the investigation, and performed the research, and came to the conclusion that there was some voter fraud or voter irregularities. Do I have that right?
A So they undertook a methodology that led to a

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conclusion that I found to be unreliable.
Q Okay. And so, when you say "they" in your answer, Doctor Grimmer, I just want to be clear that you're talking about those that actually undertook the investigation, did the research, and prepared the report containing conclusions. Correct?
A I just want to be sure I get the antecedent to this "they" correct. So, when making a conclusion, I'm characterizing that conclusion as unreliable. The person who produced the conclusion is the person who undertakes the analysis.
Q Okay. Good. I'm sorry, Doctor Grimmer. I didn't mean to cut you off. Did you complete your response?
A I did, yes.
Q Okay. Thank you. So we agree that the person that you're talking about, or persons that you're talking about, are those that actually undertook the research to produce the results that you consider to be unreliable. Good so far?
MR. CARLING: I'm going to object that asking him whether they agree is not the right way to frame his questioning. He can ask Doctor Grimmer and get answers, but asking to establish whether Doctor Grimmer agrees with Mr. Miller isn't a proper question.
THE COURT: Overruled.

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THE WITNESS: Again, I just want to be sure I'm not getting tripped up on the language here. So I'm thinking about individuals who undertake the analysis. They're the ones who reach the conclusion, and I'm characterizing that conclusion as unreliable, and if that refers back to what I said with the "they," then I agree with the question that you asked.

BY MR. MILLER:

Q Okay. And, generally speaking, the basis for your saying that the conclusions in the report, or some of the conclusions in the report, were not reliable, because it was based on faulty methodology. Fair way to put it?

A No, that is not.

Q Okay. So you read Doctor Eastman's answer to the notice of disciplinary charges here, correct?

A I did, yes.

Q And in that, did you see that there were, as part of this case, certain charges that have been brought against Doctor Eastman based on statements or representations he made about voting irregularities or voter fraud? Correct?

A I did see that, yes.

Q Okay. And you're not here, Doctor Grimmer, to offer an opinion about anything that appeared in the charges here, correct?

MR. CARLING: Objection, vague as to "appeared in

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the charges." I mean, if he's asking about culpability or something, that would be one thing, but his testimony is obviously related to the charges.

THE COURT: Sustained.

BY MR. MILLER:

Q You're not an attorney, correct, Doctor Grimmer?

A I am not an attorney, no.

Q And you're not here to testify about the actions that a reasonable lawyer must take to determine the reliability of information in, as an example, expert reports?

A No, I'm not here to testify --

Q Okay. You have no basis to offer an opinion on that issue, correct?

A I'm not an attorney.

Q Well, I'm not sure you answered my question. You have no basis to offer an opinion on that question, correct?

MR. CARLING: May I ask that we re-ask what that question is? Because I just want to make sure the answer is --

THE COURT: Okay. Could you restate the question, please, Mr. Miller.

MR. MILLER: Sure.

BY MR. MILLER:

Q So you are not going to offer an opinion in this case, Doctor Grimmer, as to whether Doctor Eastman had the

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obligation or duty to do any further research or investigation on the expert reports that he was relying on?

A I'm not offering an opinion about that, no.

MR. MILLER: Now, I want to talk about the Exhibit 174. Mr. Benveniste, if you could pull that up and put it on the screen for Doctor Grimmer.

BY MR. MILLER:

Q Doctor Grimmer, in the meantime, I don't think you've memorized the exhibit numbers, so I think we called this -- or you called this the PNAS report.

A Yes.

Q Correct?

A I see it on my screen now, yes.

Q Okay. Great. And so we call this a report or a paper or a publication? What's the best way to refer to it?

A It's a publication.

Q Okay. And so you and a couple of others were the authors of this publication, correct?

A That's correct.

Q Okay. And in it, I think you were attempting to characterize, were you not, Doctor Grimmer, various categories or areas of claims that had been made with regard to voter fraud or voting irregularities, correct?

A That's correct, yes.

Q And it was your intention in this publication to

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provide your and your team's evaluation as to whether those claims of voter fraud and voter irregularity were reliable, correct?

A We, yes, made an assessment about whether those claims had a basis in evidence or not.

Q So I went through Exhibit 174, because I was trying to determine the basis for your selection of the voter fraud claims that had been made, and I found four or five different names. The first one was Charlie Kirk, correct, K-I-R-K?

A That's correct.

Q Okay. And the bases for -- well, you used Mr. Kirk's representations about voter fraud as part of your analysis, correct?

A That's correct.

Q Yes. And Charlie Kirk, is he a radio commentator?

A My understanding is that he is both a radio commentator and heads up an organization that I'm not remembering the name of that works at colleges as well.

Q And the claims that Mr. Kirk was advancing, that you critiqued in Exhibit 174, were made via Mr. Kirk's tweets, correct?

A That's correct.

Q Okay. So you started with, basically, looking at Mr. Kirk's tweets as the starting point of debunking or

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evaluating the claims that he had made in those tweets, correct?

A This is one place in which he made those claims, and we used --

Q Okay. And how was it --

THE COURT: Just a minute. I'm sorry. I didn't hear your answer, Doctor Grimmer.

THE WITNESS: Just that this is one place that he made those claims. I can't recall if this is the first place we encountered this specific claim from Charlie Kirk, and, if I do recall, a number of other individuals were making similar sorts of claims after the election, and we used this as a sort of exemplar of the claim.

BY MR. MILLER:

Q Okay. So, when you say others were "making similar sorts of claims," you mean they were making similar sorts of claims to the ones that Mr. Kirk had made in his tweets, correct?

A That's correct.

Q And there wasn't, you know, a report or an investigation that was something else that Mr. Kirk drafted, and offered this as reliable information on voter fraud, as an example, correct?

A To the best of my knowledge, he did not produce anything like that, no.

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Q Okay. And as far as you know, Mr. Kirk didn't have any training or experience in econometrics or statistics, correct?
A That's correct.
Q And Mr. Kirk was not holding himself out as an expert in that field?
A I don't know that. He's offering some pretty detailed analyses here, and reaching a summary conclusion that it's suspicious. So perhaps he is saying that he has some ability to discern what is suspicious or not, based on some analysis of statistical data.
Q Okay. Well, other than the tweets that you looked at for Mr. Kirk, was there any other information or data that you or your team had with respect to the claims that he was making?
A I can't recall at the moment. I believe that there's other articles that make similar sorts of claims, though.
Q Okay. Well, right now we're just talking about Mr. Kirk. Did you have any other information for Mr. Kirk, other than the tweets?
A I can't recall
Q Okay. And, by the way, in your work leading up to the production of Exhibit 174, you didn't see that -- well, let me ask a different question. You didn't see that Doctor Eastman -- in all the work that you did as part of your

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engagement in this case, you didn't see that Doctor Eastman relied in any way on Mr. Kirk's tweets, correct? In other words, when you went through the answer to the notice of disciplinary charges here, you didn't see Doctor Eastman referring to or relying on any information received from Mr. Kirk, correct?

A I did not see Mr. Eastman -- I mean, excuse me, Doctor Eastman -- rely on tweets from Mr. Kirk, no.

Q Okay. And you didn't see Mr. Kirk's name listed, or his information or statements referenced, anywhere in Doctor Eastman's answer to the NDC, correct?

A As best as I can recall, I did not see it, no.

Q By the way, Exhibit 174, when was that published?

A I think it's going to -- it would be at the end of 2021 it would have been published. You can see the -- you see the "Edited by" line there? It will give the sort of history of it.

So it was received for review February 2022 -- sorry, February 22 of 2021 -- and then it received final approval August 30th. The production of this -- of course, there were a series of memos that went into the production of this that had an earlier appearance on line.

Q Okay. Well, I don't want to go into the other memos that went into this or were a basis of Exhibit 174. I just want to talk about 174. So is it fair to say, Doctor

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Grimmer, that 174 was published sometime after August 2021?

THE COURT: Let me just -- the exhibit itself, on page one, in the second column, at the bottom, says, "Published November 2, 2021." Does that sound accurate, in footnote one? Is it the same article?

THE WITNESS: Yes. And I just want to be clear that -- so "published" here means that it was placed in an issue of the Proceedings of the National Academy of Sciences. It doesn't mean that this is first time the article appeared on line.

BY MR. MILLER:

Q Okay. All right. So we'll use your publication date, then, according your definition, of November 2021. Fair?

A Again, I just want to be clear that "published" here means a very specific thing, which is about when it appeared in an issue of the Proceedings of the National Academy of Sciences. It's not the first time that this article appeared on line, or that the contents were circulated on line.

Q And earlier version of -- well, were there earlier versions of Exhibit 174?

A So the antecedent of 174 was a memo that we wrote that -- sorry, excuse me -- Andy Eggers, Professor Andrew Eggers, and I wrote, and put on line -- I believe that would have been January 2nd or 3rd -- about claims that Doctor

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John Lott was making about evidence of voter -- anomalous voting in Georgia. And so that was like the -- that was the initial antecedent of this, and then we built on that work in order to produce this paper.

Q All right. Let's move to another category that appeared in Exhibit 174. You call this "Biden's Share of Bellwether Counties Not Anomalous," find that on page two. You remember that as a second category that you were analyzing here as part of Exhibit 174?

A I do, yes.

Q Okay. And the original source of that claim about some anomaly in bellwether counties, that came from Bill Binney, right, B-I-N-N-E-Y?

A That would be one source, but, also, I believe President Trump was making similar representations in public speeches. It was a claim being regularly repeated, so that was, an exemplar of someone making this claim.

Q All right. Well, for Mr. Binney, the source of Mr. Binney's statement or representation about the anomaly in bellwether counties -- that came from a tweet from Mr. Binney, did it not?

A I thought it came from a popularly available article in The Federalist. Do I not recall that correctly?

Q I don't think so, according to the appendix here, Doctor Grimmer, but you're the expert, so what do you

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recall?
A Well, again, I'm doing my best to recall. I remember a number of individuals making claims about bellwether counties in the 2020 election. Whether the initial source of that was a tweet or an article that we read about it bring surprising that Joe Biden won despite not securing a large share of bellwether counties, it's quite possible we cited a tweet as the source, but there's a number of sources for it.
Q All right. Well, let me ask you this, Doctor Grimmer. Going back to Doctor Eastman's answer to the NDC, you didn't see that Doctor Eastman had relied on Mr. Binney's tweet or tweets in any way in the information that Doctor Eastman set forth in his answer?
A I did not see that, no.
THE COURT: I'm sorry. Whose tweets?
MR. MILLER: It would be Mr. Binney, was the question, your Honor.
THE COURT: Mr. Binney. Okay. Thank you.
BY MR. MILLER:
Q Another category of Exhibit 174 were "Differences Between 2016 and 2020 Are Not Anomalous." This was a category that you identified that you wanted to address in Exhibit 174, right?
A Correct.

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Q And here you cited Mr. Cicchetti's declaration in the Texas v. Pennsylvania litigation, correct?
A That's correct.
Q Okay. And in Exhibit 174, you provided your critique of Doctor -- or, excuse me, Mr. Cicchetti's declaration or declarations in the Texas v. Pennsylvania case, correct?
A Yes. We articulated that critique, yes.
Q And, by the way, in the Texas v. Pennsylvania litigation, is it true, Doctor Grimmer, that you only reviewed Mr. Cicchetti's original declaration attached to the complaint?
A Yes. That's what we focused on in this paper, is the original declaration. That's correct.
Q Okay. And I'm sorry to interrupt, Doctor Grimmer. And you understood that Mr. Cicchetti had prepared and submitted and provided to the Court a supplemental declaration in that case, correct?
A Correct.
Q Okay. And that's not anything you analyzed in Exhibit 174, correct?
A Not in Exhibit 174, no.
Q And have you ever reviewed the supplemental declaration of Mr. Cicchetti in the Texas v. Pennsylvania case?
A I have, yes.
Q All right. We'll get back to that in a minute. So the

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next category was, in 174, your "Patterns of Straight-Ticket and Split-Ticket Voting in Michigan Was Not Anomalous," right?

A That's correct, yes.

Q Okay. And here the claim that you were analyzing was a YouTube video that was prepared or produced by Shiva, S-H-I-V-A, Ayyadurai, A-Y-Y-A-D-U-R-A-I. Remember that?

A I do, yes.

Q Okay. And so the claim that you're analyzing as part of Exhibit 174, and trying to debunk here, was a YouTube video, right?

A Yes. What's important about this claim, though, is it's directly related to claims that are also made in litigation. There's going to be the same basic issue here, which was not a thing I realized at the time of writing this but do realize now, that the same statistical error that Doctor Ayyadurai makes in this YouTube video, and promulgated, is found in other places as well.

Q Well, I wasn't talking about what you did subsequent with respect to the preparation of 174, Doctor Grimmer. Just so my question is clear, I'm only talking about what went into Exhibit 174. So you and I agree that what you were assessing in this exhibit, 174, was Mr. Ayyadurai's tweets?

A No, I don't agree to that.

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Q I'm sorry?
A I don't agree that I was assessing his tweets.
Q Okay. Well, that was one piece of information that you were assessing in 174, correct?
A I think it says, "YouTube video."
Q I apologize. So let me re-ask the question so I get it right. So, in 174, one of the things that you were assessing was Mr. Ayyadurai's YouTube video, correct?
A That's correct.
Q And apparently, in this YouTube video, there was some assessment of the issue or anomalies with respect to the issues of straight-ticket versus split-ticket voting, correct?
A That's correct.
Q Okay. And when you went through the answer of Doctor Eastman to the notice of disciplinary charges here, you didn't see Mr. Ayyadurai's name listed anyplace?
A I don't believe so, no.
Q Okay. So the next issue you have in 174 is what you called "Dominion Voting Machines Do Not Decrease Trump Vote Share," right?
A That's correct.
Q Okay. And in Exhibit 174, you attribute those claims to attorneys Rudy Giuliani and Sidney Powell, correct?
A I believe that these claims come from what was at the

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time an anonymous expert report, but I believe now that this is a report authored by Russell Ramsland. So similar claims are made in litigation, so, in part, the specific claims here are articulated by Rudy Giuliani and Sidney Powell, but the analysis that we undertake is in response to a specific report, and you'll see in SI Appendix, Section E, we undertake an extensive analysis of that specific report, and that specific report appears in some of the post-election litigation.

Q And the issue in that report was a critique of the Dominion voting machines. Do I have that right?

A It's not a critique of the Dominion voting machines.

Q Okay. Well, characterize the issue that you were responding to with respect to Dominion voting machines. These are your words, so that's what I'm going to use.

A The report makes the claim that Dominion voting machines caused a 5.6 percentage-point shift in votes to Joe Biden. So you see the quote here that:

> "Also indicates" -- so here it's Dominion or Hart voting machines -- "indicates that Biden consistently received 5.6 percent more votes in those counties than he should have."

Q All right. Well, let's move on. Exhibit 174, another category was "The Turnout Was Not Unusually High in Counties

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Where Republicans Made Fraud Accusations." Do I have that next one right?

A I just want to be sure that -- I think you skipped a category.

Q I may have.

A Okay. So that's not the next one, but you want to direct my attention there, just to be sure?

Q Sure.

A Yes.

THE COURT: Which one, again, page five?

MR. MILLER: Yes.

THE COURT: "Turnout Was Not Unusually High"?

MR. MILLER: Yes. That's the one I'm addressing now. Thank you, your Honor.

THE COURT: Okay. All right. Thank you.

BY MR. MILLER:

Q All right. So let's talk about that one. And so, on that, you list -- well, let me ask it better. You were responding to claims that somebody by the name of John Lott, L-O-T-T, had made with respect to this allegation of turnout, correct?

A That's correct.

Q Okay. And, by the way, in Doctor Eastman's answer to the notice of disciplinary charges, you didn't see that Doctor Eastman relied on Mr. Lott's tweets in any way?

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A This is not an assessment of John Lott's tweets.
Q Okay. Well, where did the information come from with respect to -- that you attribute to Mr. Lott here?
A John Lott circulated a paper in mid to late December where he made this claim and the claims that were in the previous section.
Q Fair enough. All right. So let me ask it again with respect to Doctor Eastman's answer to the NDC. There was nothing in his answer that you saw that related to this paper that John Lott wrote?
A The paper was in discovery, but it was not in the notice of disciplinary charges, in Mr. -- I mean, Doctor Eastman's response.
Q Okay. Fair enough. So you didn't see Mr. Lott's name listed anywhere in Doctor Eastman's answer?
A The best I recall, I did not, no.
Q Okay. So is it true, Doctor Grimmer, that the only name that you can testify to that you found in Doctor Eastman's answer that was discussed in Exhibit 174 was Mr. Cicchetti, right?
A To the best I recall, yes, but there is a subsequent appendix where we include a set of address analyses. I'm not sure if any of those analyses are there. And, also, just to be clear -- no, you asked about names. So I'll stop myself there.

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Q Yes. Okay. Well, I looked at the appendix, and I didn't see anything else that mentioned anything that Doctor Eastman raised in his answer, but you tell me whether you agree with that or not.

A To the best of my recollection, that is correct.

Q Okay. Fair enough. So you also testified about Stanley Young, correct?

A That's correct.

Q All right. Now, your assessment of Doctor Young's analysis was based on his use of voter count, correct?

A That's correct.

Q And another way to think of voter count is raw numbers, right, number of voters, correct?

A It is the number --

Q Or number of ballots. Let me be more clear, Doctor Grimmer, with you. When we ask about or use the phrase "voter count," we're talking about the number of ballots, correct?

THE COURT: Well, that's vague. When you say you're talking about the number of ballots, are you talking about absentee ballots, counted ballots, rejected ballots? So could you clarify that, Mr. Miller?

MR. MILLER: Sure. Well, I meant to be all-inclusive, your Honor. Thank you for the clarification, and so any ballot that ends up being canvassed and counted.

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THE COURT: And counted?
MR. MILLER: Yes.
THE COURT: Okay.
MR. MILLER: Thank you.
THE COURT: All right. Do you understand the question, Doctor Grimmer?
THE WITNESS: Yes. So Doctor Young's analysis is about the number of votes cast for a particular candidate.
BY MR. MILLER:
Q Okay. It's a better way to put it. Thank you, Doctor Grimmer. So the number of votes case, all right, not necessarily -- well, are votes cast and votes counted -- are they the same?
A In this case, it's going to be the votes cast and counted, yes.
Q Okay. Good. All right. And did you -- have you ever looked at a report by Doctor Young where he doesn't use votes cast or counted, he uses voter share?
A So there are other issues in Doctor Young's analysis. For example, in Pennsylvania, where --
Q Well, wait, wait, wait. Sorry to interrupt, Doctor Grimmer, because it doesn't sound like you're going to be responding to my question. So I wasn't asking you to critique anything. My question is very simple, and that is, did you ever see a report by Doctor Young where, instead of

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using votes cast, he uses voter share as part of his analysis as to whether there was anomalies?

A He undertakes an analysis that involves vote share, but it is not the same contrast analysis that I critiqued. It is a different analysis.

Q Okay. So let's go back to the beginning of that, so you and I can be on the same page. You did review a report by Doctor Young where he used vote share, in other words, a percentage, as opposed to votes cast, true?

A Yes, but it was a completely different analysis. That was not the contrast analysis.

Q I understand that. I'm just wanting to make sure that you and I have apples and apples here. So let's do this. Let's pull up Exhibit 1041. So, on the screen, Doctor Grimmer, we put up Exhibit 1041. This is the Pennsylvania 2020 voting analysis report of November 2020. Do you see that?

A I see that, yes.

Q And you reviewed that, correct?

A I did --

Q And there was a--

A -- yes.

Q I'm sorry to interrupt, Doctor Grimmer. There was a portion of Exhibit 1041 that Doctor Young drafted, correct, or was attributed to him?

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A He's listed as the author, yes.
Q Yes. Okay. And in Exhibit 1041, Doctor Young used vote share to calculate or support his conclusions, correct?
A There are analyses where the defendant variable, variable that's being analyzed, is vote share, but, again, it's different than the subject I analyzed, which was his contrast analysis. It's a completely different analysis, and I'm happy to describe why that is not a reliable methodology to detect --
Q I'm sorry. Yes. You've done that, Doctor Grimmer, so we know what you have to say about that. All I'm trying to ask you to look at here is whether this is a report where Doctor Young uses vote share, or percentages, as opposed to vote count, which you critiqued in your testimony earlier today and yesterday.
A The critique, though, is not that we can never vote counts to uncover something about the world. The critique was, in this particular analysis, vote count was inappropriate.
Q Okay. Well, did you analyze Doctor Young's conclusions in Exhibit 1041?
A With regard to vote share, I --
Q Yes.
A Sorry. I was answering. I'm sorry. I did, and provided that in the code that I submitted with my expert

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file.
Q So using vote share -- well, let me back up. So, across Pennsylvania, for example, you recall that Biden's vote share was roughly 70 percent of registered Democrats, true?
A Can we please go the analysis? Because there's a number of issues here that get into details, and I want to be sure I get it right.
Q Well, that's okay. I'm not actually focusing on this particular analysis right now. I'm asking another line of questions. So let me see if you can answer that one.
THE COURT: Just a minute. Could you restate the question?
MR. MILLER: Sure.
BY MR. MILLER:
Q Is it true that Biden's vote shares were roughly 70 percent of registered Democrats in Pennsylvania?
A I'm not recalling that particular statistic broken out. I know I've reviewed it before, but I'm not remembering that particular tabulation.
Q And do you know what I mean when we talk about the "10 anomalous counties"?
A I do know what we're talking about there, yes.
Q Okay. And is it true, Doctor Grimmer, that, in the 10 anomalous counties, that Doctor Young analyzed the

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percentage of Biden votes was 101 percent?
A It's really going to be helpful if we go to the analysis, because this is a mischaracterization of what happens, what Doctor Young does in the analysis. He does not have data broken out by an individual registered Democrat and the vote share for Joe Biden. He is instead calculating a vote relationship between these two variables.
Q By the way, do you have any assessment of Doctor Young's credentials with respect to analyzing voting data?
A I've never seen a published paper about elections or the statistics of elections, and, based on the papers I reviewed, I have concerns about his ability to review and analyze election data and data generally, yes.
Q Only because of what you reviewed, right?
A Well, I was not familiar with Doctor Young before.
Q Okay. So you never looked at his CV or background or scholarly attributes?
A I mean, I know he has a PhD and has published extensively in a non-election field, but I'm not in a position where I'm going to make an assessment about his work on, you know, the environment, which I know that he's published on.
Q Okay. Well, with respect to your critique of Doctor Young's analysis, do I have this right, Doctor Grimmer, that you essentially made the same critique of Mr. Cicchetti, and

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that was that he was using raw votes, as opposed to vote shares, in his analysis?

A So Mr. Cicchetti also undertakes an analysis that involves vote shares, and makes a claim about that being anomalous, and in the replication code for the paper that we were just describing, the exhibit before this, we show that that is also a faulty way to perform that task.

Q Right. So you looked at both analyses by Mr. Cicchetti, both that was based on raw votes, or vote count, and vote shares. Is that true?

A They're directly related as the same basic analysis. So Mr. Cicchetti is saying, "I see a difference in vote counts or a difference in vote share," and he wants to make a comparison there. What Doctor Young is doing in this report instead is he says, "I find these anomalous counties, and now I want to run what's called a regression, or find a line of best fit between the share of votes for Joe Biden in that county and the" -- this is why it would be good to see it.

I can't remember if it's the number or share of Democratic registered voters in that county. I believe it's the share of registered voters who are Democratic, and he says there's something anomalous about this. Of course, there's nothing anomalous about -- first of all, it's a very different analysis, has nothing to do with the contrast

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analysis. It's a completely different undertaking.

And what's more, we can't make an inference about how Democrats voted or how other individuals voted using this particular kind of data. It is a well-known problem. It's known as the "ecological inference problem." You cannot make an inference about individual voter behavior based on aggregate data.

And so the particular analysis that Doctor Young conducts cannot possibly inform how individual Democrats voted, or the rate at which Democrats voted for Joe Biden. What's more, if we were to look at what Doctor Young does in this report, what you'll find is that, for him to obtain what calls "anomalous," he has to make a series of ad hoc analysis decisions that are in no way justified or clearly articulated a reason for.

At one point, he says, "Because these two counties are odd, we have to remove them," and as I show in the code that I provided in my expert file, if you don't make those two counties, which he includes in the anomalous counties -- if you don't remove them, what he calls "anomalous" is no longer anomalous.

So this analysis is just very distinct from his contrast analysis. It's distinct from comparing Cicchetti using numbers and shares, and it is also in error, and unreliable evidence of voter fraud. It's not really an

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indication of anything.

THE COURT: Just a minute. Doctor Grimmer, you testified that Mr. Young makes a series of ad hoc -- were they ad hoc assumptions or ad hoc -- I didn't hear the word that followed.

THE WITNESS: Analysis decisions. Just to give an example --

THE COURT: Analysis decisions. Okay.

THE WITNESS: -- he says, "I'm going to calculate a rate" -- what he wants to say is a rate at which Democratic voters voted for Joe Biden, but, in order to perform that calculation from that regression, he then says, "I need to drop Allegheny and Philadelphia County," and provides no reasoned basis for this, other than to say that they're odd.

Well, in the evaluation of statistical literature in the evaluation of peer review, it's well known that when individuals make decisions like that, it can lead to a phenomenon that's often called "fishing" or it's called "P hacking," because it's often associated with statistical significance.

In these situations, individuals make decisions because it helps them to lead to a particular conclusion. Now, of course, I don't know if Doctor Young did that, but I do know from my analysis using data from Pennsylvania that

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the only way to reach what Doctor Young says is anomalous is to drop those two counties.

THE COURT: Okay. Thank you.

BY MR. MILLER:

Q By the way, you've prepared reports for litigated matters previously, Doctor Grimmer, correct?

A That's correct.

Q Okay. And one of those was a case in Nevada. Remind me of the name.

A I think it's Gilbert v. Lombardo.

Q Gilbert v. Lombardo. You were retained by the defendant in that case to perform an analysis, correct?

A That's correct.

Q And did you provide a written analysis with respect to the issues that were raised in the Gilbert v. Lombardo case?

A I did, yes.

Q And did you provide that to a lawyer?

A I did, yes.

Q And was it submitted to the Court?

A It was, yes.

Q And did you expect that the lawyer would rely on the conclusions that you made in the report?

A It was not a sort of blind reliance. We had a lot of conversations. I worked with a really excellent lawyer, Sam Mirkovich (phonetic), in Nevada, and in that particular

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case, it was a set of claims made about voter fraud that were at first difficult to disentangle, because they were sort of 90 pages of mathematical gibberish.

And so, over the course of the 10 days in the production of that report, I both made my expert assessment of what was going on in that evidence, and talked to Mr. Mirkovich about the evidence and the reliability of the evidence I was producing, and he would ask questions and make inquiries about the particular lines of argument I was making. So it wasn't as if I submitted something and then he said, "Well, whatever you submit I'll take as gospel." He made inquiries.

Q So you talked about Mr. Geels' work with respect to the Georgia election, 2020, correct?

A That's correct.

Q And you looked at Doctor Geels' affidavit or declaration that he submitted to the Court in the Trump v. Raffensperger matter, correct?

A I think there's three affidavits, but I viewed all of them, yes.

Q Okay. Well, why don't we pull up Exhibit 1036.

THE COURT: 1036?

MR. MILLER: Yes.

THE COURT: Which page?

MR. MILLER: Well, I wanted to get up the first

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page here, your Honor, but you'll find that at 545.

THE COURT: All right. Okay. Thank you.

MR. MILLER: It's 1035, 545.

THE COURT: All right. I have that. Thank you.

MR. MILLER: Thank you.

BY MR. MILLER:

Q So do you see this, Doctor Grimmer? You were asked some questions about this by Bar counsel, correct?

A Correct.

Q And this is one of the -- well, we'll get to it in a second, but this contains one of the declarations of Mr. Geels that you looked at, correct?

A I believe -- if I'm recalling, Exhibit 3 was the -- was Mr. Geels' exhibit, but that's just based on my recollection.

Q Sure. Well, let's go to page 554, and let's look at paragraph 24.

MR. MILLER: And if you could blow that up, Mr. Benveniste.

BY MR. MILLER:

Q So here you testified in response to questions from Mr. Carling on this, but paragraph 24 talks about the illegally cast ballots for underage voters, in essence, true?

A His estimate of voters who are registered, he says, before their 17th birth.

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Q Correct. Okay. So we have that right. So what's being expressed here in paragraph 24 by Mr. Geels is the registration of underage voters, correct?

A It's the registration and having -- well, what he calls "registration," the "Date Added" field in this voter file, and it's individuals who both cast a vote in the 2020 election and, he says, were added early.

Q I'm sorry. I missed the very last part of that, Doctor Grimmer.

A No problem. I'll just repeat it. It's the combination of individuals who voted in the 2020 election and individuals who he says were added before their 17th birthday.

Q And do you recall, Doctor Grimmer, that Mr. Geels had submitted a subsequent declaration correcting the information here depicted in paragraph 24?

A I recall that he submitted that. I know that the numbers are updated. It was not outlined as a correction. The numbers were updated, though.

Q Okay. So we know that it went from -- in the subsequent declarations, it went from 66,247 to a number more like 2,400, correct?

A I think it's even lower than 2,400, but it's, you know, 2,000 and change. We'll say it's approximately 2,000.

Q Okay. All right. So let's say it's approximately

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2,000. So you were aware that there was a subsequent declaration by Mr. Geels that had reduced it from 66 and change to something around 2,000, correct?

A Correct.

Q Okay. And then I think you testified that there was even a third declaration from Mr. Geels, where it was revised further to something around 700, correct?

A Correct.

Q And was it your -- did you have any critique of whether the 700 registered voters was an accurate number?

A So the key issue, I believe, is, has this individual had another interaction where they would essentially have the opportunity to update their registration while being of age. So, even if you take the date added, even if you take the registration date to get down to this lower number of 700, when these individuals do something like interact with the Department of Driver Services in Georgia, they have the opportunity to update that registration, and at which point they would have registered as of age.

Q Okay. So I'm not sure that answered my question, but, of the 700 that was depicted by Mr. Geels in his third declaration, do you agree or disagree that that number represented voters that had illegally registered, in violation of Georgia law?

A I have no basis upon which to make the assessment,

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because, first, date added and registration date will have, sometimes, an unclear relationship to when someone was registered.

And, second, even if someone had been added when they were 16, you have to make an assessment about whether they re-interacted with the state, which would include going to the Department of Driver Services and updating a license. At that point, they would have updated their registration, which would have happened when they were the age of majority.

Q Did you ever independently research the same issue, as to whether there was any voter that had registered illegally under Georgia law for the 2020 election?

A I have not assessed whether individuals illegally registered to vote in the 2020 election in Georgia.

Q All right. So you disagree with Mr. Geels' characterization of those numbers, but you hadn't come to an independent conclusion yourself, true?

A So that's just the characterization of the numbers. I'm disagreeing with how Mr. Geels is interpreting the state voter registration file, and saying that that interpretation cannot possibly yield that number without more information. I have not undertaken my own analysis of the state voter file to make a determination of the number of individuals who, you know, have supposedly registered underage.

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Q Okay. Had you undertaken that analysis, Doctor Grimmer, you don't know what that would have yielded, then, correct?

A I don't know what it would yielded, no. Presumably, given that we're now talking about including additional filters, so it looks as if -- if we go from date added, and then we add on registration, as Mr. Geels did, and then we add on this additional "Did you interact with the Department of Driver Services or re-register otherwise?," it would be less than that 700 number that he has in this subsequent -- in the final affidavit that he submitted on this matter.

Q Sure. But greater than zero?

A Or equal to zero.

Q Okay. Did you ever hear from any source that Mr. Geels had made a mistake in paragraph 24 and transposed some numbers that resulted in generating the 66,247 number there on the screen?

A So let me think. I believe, in other reading, I was sort of searching to try to understand what was going on with this Geels, and I believe there is a reference in a response Doctor Eastman made in a litigation about something involving the January 6th Committee, and I'm sorry for not knowing the exact case name, and I believe there's a footnote where that transposition is articulated.

Q You also testified about Mr. Geels' opinion with

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respect to the applications for absentee ballots pursuant to Georgia law?
A Do you mean specifically the rollover list?
Q Yes.
A Yes, I did testify about that.
Q Okay.
A Yes.
Q And make sure I understand this. You had provided an opinion that the entire number of those on the rollover list, or the list, were rollover eligible, correct?
A That's my understanding of that, yes.
Q Okay. And were there any other factors in you coming to a conclusion with regard to the application for absentee ballots?
A I'm sorry. I don't know what you mean by "factors." I'm sorry.
Q Sure. You testified about Mr. Geels' opinions with respect to the applications for absentee ballots, correct?
A That's correct.
Q Okay. And tell my your conclusion with respect to -- or your critique of Mr. Geels with respect to that issue.
A Yes. So he identifies 300,000 individuals who are -- who applied -- what he says is outside the legal window for absentee ballots. Doctor Charles Stewart, in his reply to this brief, points out that, on his assessment of these

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individuals who have applied outside of this window, a large share of these individuals are over 65, which would be an indication that they're eligible for this rollover list.

And so, from that, it's a reasonable conclusion that individuals who are applying outside of this window, given that practice in Georgia, is that individuals who roll over will have their application date set 180 days before the election, and, given Doctor Charles Stewart's analysis that -- I think he said something like 90, but I'm not recall exactly -- of these individuals over 65, it's a reasonable inference that what's going on here is that these are the individuals who are eligible to roll over.

Q And you didn't do an independent analysis of Mr. Stewart's conclusions in that regard, did you?

A I did not do an independent analysis of Doctor Stewart's conclusions, no.

Q Now, you talked about HB 316 and its impact on absentee ballot application, correct?

A I believe I spoke primarily about it, with the return of absentee ballots, but HB 316 does cover absentee ballot applications. There's some revisions there as well.

Q Well, HB 316 required that there be certain bona fides about the ballot being returned, correct?

A There is a verification process that HB 316 requires.

Q Sure, that required the envelope to be signed, correct?

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A Yes.
Q And it provided that the signature on the absentee ballot match the signature on record, correct?
A That's my understanding of the law, yes.
Q Okay. And that the voter also needs to furnish other information that was requested on the envelope, like date of birth?
A I thought HB -- so maybe I'm misremembering here, but I thought HB 316 revised it so that no longer had to provide date of birth and address on the envelope.
Q Okay. Well, my understanding, Doctor Grimmer -- you can tell me whether you agree with this or not -- is that that came about as a result of a 2018 court decision. Is that your understanding as well, in other words, the fact that you didn't have to provide date of birth further on the absentee envelope?
A I thought that was explicitly revised in HB 316, but I can't remember, you know, the specific part of the code that did it.
Q Before HB 316, voters were allowed to cure an issue with an absentee ballot, correct?
A Again, my impression was HB 316 enabled the cure process. That's what passed -- that was led to curing happening in Georgia.
Q Okay. So you think that was a change made by HB 316,

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as opposed to something that had been mandated by Georgia law?

A HB 316 certainly revised the curing process.

Q In what way?

A Again, my impression was that it enabled election plaintiffs to contact individuals who had their ballots rejected in order to have those revised, in order to have those rejections cured. That is, they provide information in order to successfully cast the ballot.

Q So I think your testimony in response to questions by Bar counsel was that there were other reasons for -- this was one of your buckets -- other reasons for the signature mismatch, correct?

A I don't think I testified about other reason for a signature mismatch.

Q Okay. Well, what was the issue with respect to signature mismatch in 2020?

A So my understanding is that a claim is made that the reduction in absentee ballot rejection rates is due to a change in the way signatures were matched in 2020, and I did offer testimony about that claim, yes.

Q Okay. And what was your conclusion with respect to whether there was a higher rate of rejection based on signature mismatch in 2020?

A Compared to --

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Q 2018 or 2016.
A Okay. So it is the case that absentee ballot rejections went down from 2016, 2018, compared to 2020, but when we look at the reasons for those rejections, the biggest decreases happened because individuals returned their ballot before the deadline, and because individuals -- there is a simplified oath envelope which corresponds to the information that's on the outside of the ballot that's returned. It's the envelope on the outside.

The smallest reduction of those three reasons has to do with either the signature being matched or the signature not being there on the ballot, and that stated reason. So, just to reprise, the numbers that I confirmed when comparing to the Secretary of State's numbers, in 2016, it looks like something like 0.28 percent of absentee ballots were rejected for a signature reason, either a signature mismatch or it's missing, and in 2018, I believe it was 0.2 percent, and then, in 2020, by my calculation, it was something -- it was 0.15 percent of absentee ballots were rejected for that reason.

Q Just on that topic really quickly --

THE COURT: Just one second. The 0.15 percent, was that your calculation in the overall 2020 general election vote count --

THE WITNESS: That was -- apology.

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THE COURT: -- or as to a particular state? I'm sorry?

THE WITNESS: Yes. I'm sorry. So this is in reference to the state of Georgia, and then, just to be even more clear about what's in the denominator there, so this counts all mail-in absentee ballots that were accepted or rejected. Those would go in the denominator, and then the numerator, it counts ballots that were rejected for a signature reason. That means that the status reason in the absentee voter history is either that the ballot was rejected because there was a signature mismatch or no signature. That's how it would end up in that grouping.

THE COURT: Okay. Thank you.

BY MR. MILLER:

Q For Georgia, Doctor Grimmer, does the Secretary of State information include the reason for the disqualification?

A It does, yes.

Q Okay. And that's in the voter history file?

A It's in the absentee voter history file, and it was actually used by an expert in Pearson v. Kemp, both a plaintiff expert and then defendant expert. So the plaintiff expert was Doctor Benjamin Overholt, and then the defendant expert was Doctor Kenneth Mayer.

Q So, just to make sure I'm clear, that information with

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respect to the reason for the disqualification is maintained in the voter history file in Georgia?

A I'm sorry. I want to be super clear. It's that absentee voter history file, and so voter history file will be an aggregation of everyone who turned out to vote in the election, and just to get a sense of what that file will look like, it merely contains a registration number, and then it will give you an election code. So it's like the general election and election date, and then it will say whether the person voted absentee, provisional -- there's another column called "Supplemental." I believe that exhausts the columns.

The "Absentee" is an indication of everyone who -- if it's yes, it would be an indication they'd be in this absentee voter history file in Georgia. In there, that includes everyone who either voted mail in person -- or, sorry, they voted mail-in ballot, or early in person, would be in that absentee file. There's a third category. A very small number of voters in Georgia, like throughout the company, vote electronically through UOCAVA.

And so, in that absentee voter history, which is different than the voter history, there is a field called "Status Reason," and so one is able to make an assessment of the reasons for the ballot being rejected based on the provided status reason.

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MR. MILLER: Your Honor, I think I'm close to being finished with Doctor Grimmer on my exam. May I take a few minutes to speak with Doctor Eastman? And then I'll come back and finish up.

THE COURT: Okay. Let's take a five-minute break.

MR. MILLER: That's sufficient.

THE COURT: Okay.

THE CLERK: We're off the record, your Honor.

THE COURT: Thank you.

(Proceedings recessed briefly.)

THE CLERK: We're back on the record, your Honor.

THE COURT: Thank you.

We're back on the record in the continued hearing of John Charles Eastman, in Case Number 23-O-30029.

Mr. Miller.

MR. MILLER: Thank you, your Honor. I don't have any further questions at this point.

THE COURT: Okay. Thank you.

Redirect, Mr. Carling?

REDIRECT EXAMINATION

BY MR. CARLING:

Q Just, Doctor Grimmer, on your definition of "voter fraud," I want to make sure I understood it. Does voter fraud include attempts to cast large numbers of votes without the voters' knowledge, for example, elector vote

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flipping?

THE COURT: Just a minute. For example -- what did you say?

MR. CARLING: Electronic vote flipping.

THE COURT: Electronic vote flipping. Okay.

THE WITNESS: Yes, that would be included in voter fraud.

BY MR. CARLING:

Q And what is -- is "ballot stuffing" an expression in your field?

A I think I know what someone would mean by "ballot stuffing." It isn't sort of like a term of art that's used in the analysis of elections, although it might be. So the basic idea of ballot stuff is, perhaps, fraudulent votes are added to a collection of votes which might -- I think the origin comes from 19th century elections, which were conducted in a very different sort of context, where individuals, on election day, may insert additional ballots into the ballot, which would be ballot stuffing, I think.

Q And would you consider those to be fraudulent ballots?

A If the insertion of those ballots were not connected to an individual who had cast those ballots, I would, yes.

Q Okay. And are there -- can instances of voter fraud involve fraud perpetrated by election officials?

A An election official could facilitate or themselves

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commit an act that would lead to ballots being cast that's not being voted by that particular voter, yes.

MR. CARLING: All right. I don't have any other questions. Thank you.

THE COURT: Okay. Thank you.

Mr. Miller?

MR. MILLER: Nothing further, your Honor.

THE COURT: Okay. Thank you, Doctor Grimmer. We appreciate your participation in this proceeding. You're excused as a witness.

THE WITNESS: Thank you.

(The witness was excused.)

THE COURT: Okay. So are you still planning to call Mr. Brater after lunch?

MR. CARLING: We are, your Honor. I believe he's somewhat flexible, so, whenever the Court would like to return from lunch, I believe he'll be available.

THE COURT: Okay. Why don't we take our lunch break from now until 2:45. Let's go off the record.

THE CLERK: We're off the record, your Honor.

THE COURT: Thank you.

(Proceedings recessed to reconvene.)

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AFTERNOON SESSION

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THE CLERK: We're back on the record, your Honor.

THE COURT: Thank you.

We're back on the record in the continued hearing of John Charles Eastman, in Case Number 23-O-30029.

Before the next witness is called, there are a few housekeeping matters that I want to sort out, and then we can -- which should only take a few more minutes.

First of all, I don't think, Mr. Miller, that you re-filed that motion in limine. Did you?

MR. MILLER: You want us to renumber it to seven?

THE COURT: Yes.

MR. MILLER: I don't think we've done that yet, no, but we will.

THE COURT: Okay. Well, if that could be done, say, by Monday, that would be great.

MR. MILLER: That's fine.

THE COURT: Okay. And then I'll expect the Office of Chief Trial Counsel to file its opposition no later than July the 10th.

Another housekeeping matter. I don't -- regarding OCTC's motion in limine, which would be the only one I haven't ruled on so far, motion in limine number six, did the parties meet and confer in an effort to resolve that

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issue?

MR. MILLER: I reached out to Mr. Carling early this morning, and we're trying. I'm certain we'll get it done.

MR. CARLING: He did, and we talked about discussing it later today, or as sooner after as possible. So, not yet.

THE COURT: Okay. Well, I can tell you at this point the Court is inclined to exclude the testimony of William Briggs, Patrick Colbeck, Anthony Cox, Junior, Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O'Donnell -- just a minute -- and Jeffrey O'Donnell, given the fact that those individuals were not identified in the pre-trial statement.

The Court is inclined to allow the testimony of Joseph Fried as a percipient witness, given the fact that Respondent did provide notice of Mr. Fried's testimony, although his testimony, I'm assuming, would not be the testimony that -- he was identified as an expert -- that, as a percipient, he would testify regarding the other -- well, matters about which a percipient witness could testify.

And then the Court would allow the testimony of Kurt Olsen as a percipient witness, based on the characterization of his percipient witness testimony on page 64 of the joint pre-trial statement.

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So that is my tentative. The parties can inform the Court next week sometime with what you are -- where you end up, and then I will determine whether or not to go ahead and file this as a final order on motion in limine number six. Okay?

Any questions about that?

MR. MILLER: If it turns out that we can't reach any common ground in our meet-and-confer, your Honor, Respondent would like to be heard on that, and we're willing, obviously, to defer to the Court on scheduling, but I just want to make it clear that we'd like to be heard on that.

THE COURT: Okay. Well, given the fact that we will not -- the parties are not available again until August, and I would assume that these needs to be sorted our regarding these witnesses before that time frame. Would you like to be heard on that today after the -- after we finish with our next witness?

MR. MILLER: I haven't gotten back to it to be able to discuss it today. I think I was waiting for Mr. Carling and I to be able to meet and confer on that, expected -- I'm not sure what I expected, but I wanted to at least go through that process, and I'm certain that we'll have a fulsome discussion, but, if it works with the --

THE COURT: Okay. Well --

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MR. MILLER: Go ahead. I'm sorry.

THE COURT: Well, also, I will expect to hear from the parties regarding -- before I file an order on motion in limine number six, I'll expect to hear from the parties, no later than June 7th.

MR. MILLER: July, your Honor?

THE COURT: I'm sorry. Well, yes, let's get in the right month.

MR. MILLER: We're leaving June.

THE COURT: Thank you. Yes, yes. I don't want to get stuck in June when everybody else is moving on to July. Right. July the 7th.

MR. MILLER: And one last detail on that, your Honor. I think one of the reasons why we deferred this yesterday is that Bar counsel didn't have an opportunity to file an opposition, and so perhaps that has to happen. I think the way I took it yesterday was give Bar counsel the opportunity to oppose it, and then we'll go from there.

THE COURT: I'm talking about motion in limine number six. A response was filed on that June 28th.

MR. MILLER: Okay. I mixed them up.

THE COURT: You're thinking about number seven?

MR. MILLER: I am.

THE COURT: Yes. Okay. Well, that's what I was saying. On number seven, the Office of Chief Trial Counsel

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will have until after the same day, July 7th, to file its opposition to motion in limine number seven, which is -- we're renumbering the one that Respondent characterized as one. Okay?

MR. CARLING: Your Honor, would it be possible for us to have July 10th, as the Court originally indicated? I'm taking Monday off.

THE COURT: Did I originally say the 10th?

MR. CARLING: You had said July 10th for our opposition.

THE COURT: Okay. Then I will leave it on the 10th. Sorry. I didn't write the 10th down.

MR. CARLING: Okay. Thank you.

THE COURT: So I had thought the 7th. All right. Okay. So that's motions in limine six and seven.

Also, the Court previously, yesterday, took under submission an issue that arose regarding Exhibit 305, and Exhibit 305 is the New York Supreme Court's Appellate Division, First Judicial Department, decision with regard to the matter of Rudy Giuliani, and let me just go back for a minute.

Mr. Carling, were you seeking the admission of Exhibit 305?

MR. CARLING: We were. We sought to move into evidence.

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THE COURT: Okay. And I recall that Mr. Miller objected to that. The Court would note that Exhibit 305 is a court document. However -- so, therefore, the Court would take judicial notice of that. However, the Giuliani decision does contain a great deal of hearsay. Under the State Bar Court Rule 5.104(d), I believe -- just let me confirm that -- yes. 5.104(d) provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but, over a timely object, will not be sufficient in opposition -- let me see what's going on here -- will not be sufficient in itself, excuse me, to support a finding unless it would be admissible over admission in civil actions.

And so the information contained in Exhibit 305 is hearsay. However, it is hearsay that is admissible with regard to the information found on pages 21, 22, and 23, which all address the issue that Doctor Eastman testified about previously, specifically regarding the Georgia video that, according to the allegations contained in one of the filings that he testified about, contained allegations of ballots being found in a suitcase or suitcases under a table in Georgia, and that being an example of illegal and/or irregular voting practices in Georgia.

So, therefore, Exhibit 305, pages 21 through 23, received into evidence.

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MR. MILLER: I --

THE COURT: And I'm not going to deny the motion, as in the request, as to the other pages, but, at this point, we do not have evidence that would support -- evidence that we cannot -- a finding has not been made regarding other evidence found in Exhibit 305. And if you're like to be heard on that, feel free to let me know that.

MR. MILLER: I would like to be heard on that. Yesterday I -- excuse me. Today, your Honor, I believe -- yesterday, when Bar counsel had asked to move 305 into evidence, we did make an objection, which resulted in the Court taking it under submission, and I appreciate that. I think the record is probably clear in terms of the objection, and the bases for objections. I think that it was hearsay.

The Exhibit 305 was hearsay, and also not relevant, and I think the further points that I made were that it's a different proceeding, with a party, in a different state, with different rules, different arguments, different evidence, a different disciplinary system, all of which would lead to, at least in my advocacy, that it would no bearing at all in any issue in this case. The fact that it bears a factual similarity to an allegation that was made there, to an allegation here, would not be reason to

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consider this.

Now, I'm prepared to argue, if the Court stands by its ruling that it should be given no weight, so I'll certainly reserve on that, but, as a foundational matter, the proceedings, or at least the portion of the proceedings that the Court has found have some bearing here, in my view, has no such bearing, no such relevance here. It's not res judicata. It's not collateral estoppel. It's not issue preclusion or resolution. And what I don't know, but I'll argue, just to preserve it -- I'm not even sure this is a final ruling.

So there is a review process in New York, as there is here, and the last I checked, this was in that process. So I think we need to exercise a lot of caution -- or, when I say "we," I mean the Court.

THE COURT: Well, the first cautionary measure that should be taken is for you to determine whether or not you really want to make that argument, that this document or this proceeding is final.

Either way, this document speaks for itself in terms of what is set forth there regarding the very narrow issue that it is being, at this point, admitted for, with regard to pages 21 to 23, regarding the testimony that Doctor Eastman gave yesterday. This would appear to supplement and/or explain his testimony about the

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allegations found in Exhibit 270, relating to the allegations about Fulton County election officials' activities with regard to suitcases under a table at the State Farm Arena, and the surveillance video in conjunction with that.

So it's not the disciplinary proceeding itself that is being -- is a subject of the underlying basis for the admission of those pages, but, rather, those pages relate to the video evidence from the security cameras, and, further, is offered to explain and/or supplement Doctor Eastman's testimony yesterday.

But I cut you off. Is there anything else you want to add for the record before --

MR. MILLER: No, your Honor. Thank you. I appreciate that clarification. I think my initial concern, and probably as well as yesterday, was that there was -- at least potentially, this was being offered to establish either culpability or some level of discipline based on the finding in New York. But your clarification helps me, your Honor, so thank you.

THE COURT: Right. That's not the basis for the admission of those pages.

MR. MILLER: I do understand that now, your Honor. Thank you.

THE COURT: Okay. All right. Thank you.

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And, Mr. Carling, do you have anything to address on that issue?

MR. CARLING: No

THE COURT: Okay. All right. So those are -- with regard to Exhibit 99, the Court also took Exhibit 99, a video transcript of a C-SPAN video of a news conference by a Georgia official. Let's see, here. I think it was Gabriel Sterling.

And so the Court took judicial notice of that document, which was appropriate in that it was not a video of a -- it was a video that broadcast an official public proceeding, which was that -- wait. Let me have a look. Let me find that. Okay. Which was the press conference of Gabriel Sterling on January 4, 2021. And so the Court is going to -- I already took judicial notice of that. I said I would revisit that, and I did, and it's appropriate. Okay?

Anything else before we go on to calling the next witness?

MR. CARLING: Just to clarify the Court's ruling just now, the Court was admitting Exhibit 99 into evidence, not just judicially noticing it but admitting it. Is that correct?

THE COURT: Judicially noticing and admitting 99 into evidence, yes.

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MR. CARLING: Thank you.

THE COURT: And, again, 305 is admitted as to pages 21 through 23. Okay? All right.

Do have any other loose ends that we need to address before we call the next -- before the next witness is called?

MR. BECKERMAN: No, your Honor.

THE COURT: Okay. Thank you.

Mr. Miller?

MR. MILLER: No, your Honor. Thank you.

THE COURT: Okay. And I understand the next witness is Jonathan Brater --

MR. BECKERMAN: Yes, your Honor.

THE COURT: -- B-R-A-T-E-R?

MR. BECKERMAN: My apologies. Yes, your Honor.

THE COURT: Okay. Brater. Okay. Thank you.

Okay. Can you contact Mr. Brater? Is he --

MR. BECKERMAN: He's ready.

THE COURT: All right. Great.

THE CLERK: Good afternoon, Mr. Brater. Can you hear us and see us?

THE COURT: I don't think he can hear us or see us.

THE CLERK: Good afternoon, Mr. Brater. Can you hear us and see us?

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MR. BRATER: Yes.

THE CLERK: Thank you. Okay, Judge. Would you like me to swear --

THE COURT: Okay. Thank you.

Good afternoon, Mr. Brater. This is Judge Roland, and we appreciate you taking time out of your schedule today to participate in this proceeding.

You will first be sworn as a witness by Elizabeth Alvarez. After that, your direct examination will begin. It will be conducted, I assume, by Mr. Braverman (sic), and then, after he finishes with his direct examination, the cross-examination will take place, and Mr. Miller will conduct the cross-examination.

Right?

MR. MILLER: Yes, your Honor.

THE COURT: Okay. All right. And then the parties might go back and forth with some additional questions after that. Okay? Can you hear me?

THE WITNESS: Yes, I did. I understand, your Honor.

THE COURT: All right. I don't know. You sound a bit garbled. Are you close to a speaker?

THE WITNESS: Is that better, your Honor?

THE COURT: Much better. Thank you. Okay. All right. And if there's anything that you're unclear about,

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if you can't hear or, you know, see anyone, then make sure that you bring that to my attention, please. Okay?

THE WITNESS: Understood.

THE COURT: All right. Okay. Mr. Braverman (sic).

THE CLERK: I need to swear him.

THE COURT: Sorry?

THE CLERK: I need to swear him in.

THE COURT: Yes, please.

THE CLERK: Okay. Mr. Brater, can you go ahead and raise your right hand.

JONATHAN BRATER - STATE BAR'S WITNESS - SWORN

THE CLERK: Thank you. Can you go ahead and state and spell both your first and last name for the record, please.

THE WITNESS: Yes. Jonathan, J-O-N-A-T-H-A-N, Brater, B-R-A-T-E-R.

THE CLERK: Thank you.

THE COURT: Okay. And I apologize, Mr. Beckerman. I gave Mr. Beckerman a new last name. It's Mr. Beckerman who will be conducting your direct examination.

MR. BECKERMAN: Thank you, your Honor. You weren't the first, you won't be the last. I appreciate that.

THE COURT: I hope I am. Go ahead.

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DIRECT EXAMINATION

BY MR. BECKERMAN:

Q Good afternoon, Mr. Brater, or perhaps for you it's good evening?

A It is.

Q Could you tell us, what do you do for a living?

A I am the Director of the Michigan Bureau of Elections, which is part of the Michigan Department of State. In that capacity, I supervise the Bureau of Elections, which supports the Michigan Secretary of State, who's the chief election official for the state of Michigan, administering Michigan's election law and supervising local and county clerks in their duties under the election.

Q And when did you begin in that role?

A January 2020.

Q And what, if anything, drew you to that position?

A Well, I had long been interested in election, in governmental policy. So, previously to my role as Director of Elections, I had worked at the Michigan Department of the State, beginning in 2019, as the department's Legal Policy Director, and when the previous Director of Elections retired, I applied for the position and was hired.

Q Mr. Brater, I'm going to turn now to the 2020 general election conducted in Michigan. Could you tell us how, if at all, that was impacted by the COVID pandemic?

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A Certainly. Well, in the first instance, because of the nature of elections, which ordinarily involve a lot of people in a confined space for an extended period of time, both on election day, when voting, but also in clerk's offices, when clerks are working in close quarters, when voters are coming in to register to vote, to apply for absentee ballots in Michigan, and many other functions, all of those things became much more difficult to do safely because of the pandemic, and so the primary impact in terms of the way people voted was that it shifted the need to have a much higher percentage of people voting by what we call in Michigan "absentee ballots," but which are generally vote-by-mail ballots.

So the biggest it had from an election administration standpoint was that the Bureau of Elections, in addition to municipal clerks and county clerks in Michigan, had to prepare for a much larger number of absentee ballots. That also included having the necessary tabulators, voting equipment to process those ballots. It involved making sure that there were enough election inspectors, which are what we call "poll workers," to process those ballots, and it also involved educating voters in the process of voting by mail.

Additionally, another major impact was the need to put in place protocols to ensure that, when people did need to

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be in person with each other, that they could do so in a safe manner. So that meant changing, sometimes, the layout of a typical polling place, when possible, making sure that social distancing was followed, including personal protective equipment whenever possible, such as masks or face shields or plexiglass dividers and hand sanitizer.

It also impacted elections with regard to the supply chain, so it made much more difficult for election officials to order supplies, including voting equipment, paper. It affected the Postal Service with regard to the way election mail moved around. So, in general, you know, overall, it required much more voting to be done by mail, and also a lot of security and safety procedures to be put in place that ordinarily would not be necessary when it came to in-person election activities.

Q As part of your work in election administration, are you in contact with county election officials in Michigan?

A Yes.

Q And why is that?

A Well, in Michigan, elections are run in a decentralized manner. So the Secretary of State is the chief election official, but the actual administration of elections is done, in fact, primarily by city and township clerks.

In Michigan, there are 1,520 different cities and townships, which are the election jurisdictions in Michigan,

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and those clerks, which we interact with frequently, are primarily responsible for setting up polling places, setting up tabulators, retaining election records after election day, but also, in Michigan, county clerks play important roles in the election process.

So we have 83 counties, and the county clerks also have important responsibilities such as ordering ballots, procuring voting equipment, and supporting the county canvass which is done after each election.

Q So you just mentioned a county canvass. Is that one of the safeguards in place to secure an accurate election in Michigan?

A Yes.

Q So I'd like to get into those safeguards. Perhaps it would be easiest to divide them into pre-election and post. Are there pre-election safeguards in Michigan that were in place during the 2020 general election?

A Yes.

Q Could you please describe those for us?

A Certainly. There's a number of safeguards that apply both to verifying the identity and eligibility of voters, and also to the equipment and materials that are used on election day. So, in Michigan, before voting, you have to register to vote. That requires you to provide information about your identity and residency, including a signature,

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which is used to establish your voter registration record.

When you go to vote, if you vote in person, your registration is available to the election inspectors on an electronic poll book that has your name and registration on it, and you must also complete a paper application to vote before being issued a ballot.

If you are voting absentee or by mail, you first have to apply for an absentee ballot, and the absentee ballot is not issued to you unless the signature on your absentee ballot application matches your voter file signature that the clerk has, and then, again, when you return your actual absentee ballot, that ballot is not accepted for tabulation unless the signature on the absent voter ballot envelope matches the signature on file.

When it comes to equipment and materials, firstly, before any voting equipment can be used in Michigan, it has to be certified by the Board of State Canvassers. That is a bipartisan board composed of two Democrats and two Republicans. It is independent of the Secretary of State. It does not report to the Secretary of State.

The Bureau of Elections provides administrative support to that entity, but that entity must certify voting equipment before it can be used, and before doing so, equipment is subject to review and testing by the Bureau of Elections, after it has been reviewed by an accredited

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voting system test laboratory, which has to be accredited by the National Institute of Standards and Technology, along with the Election Assistance Commission. So that governs the way that equipment has to be certified for use.

Additionally, before each election, prior to being used in polling places, tabulators have to first undergo what we call "logic and accuracy testing," which is essentially ensuring that they are tabulating the paper ballots as expected. In Michigan, everyone votes using a hand-marked paper ballots. Voters with disabilities and others can also use a ballot-marking device that can produce a paper ballot, but that paper ballot is also put into a tabulator.

So there are generally two stages of testing. There's a preliminary test that is done when the ballots are printed, and then there is another public accuracy testing, which anyone can attend, which is done to verify that the ballots are being tabulated correctly. So, before election day begins, all of that testing has to occur. So those are generally the safeguards that apply to both the voters and the voting equipment that's used before election day.

Q Are the results of the testing you just described that occurs pre-election -- are those made public?

A Yes.

Q And pertains to the 2020 general election, approximately when were those results made public for the

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various tests you described?
A Well, they're made public, essentially, in real time, is my understanding, as soon as the test is completed, which, again, is a public meeting. Those materials are available. They also have to be retained after the election, so they can be reviewed by anyone by submitting a Freedom of Information Act request. They're also reviewed when the Bureau of Elections and county clerks conduct post-election audits.
Q You mentioned certification of the voting equipment. Could you tell us, what is the purpose of such certification?
A It's essentially to ensure that the equipment meets the standards required for use in Michigan. Certification in Michigan I don't think is particularly different from the processes used in other states or at the federal level by the Election Assistance Commission, but, essentially, it requires extensive review by a voting system test laboratory, which is comprised of, really, the biggest experts when it comes to the way voting equipment works.
They thoroughly test all the elements of the voting system to make sure that it performs as expected. The Bureau of Elections then conducts its own testing and review, and prepared a report for the Board of State Canvassers, and they certify it only if they believe that it

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is appropriate for use in Michigan, based on a thorough review of all the components.

Q You mentioned the Board of State Canvassers. Who are they? What is that entity?

A It is a four-person body. It is composed of two Democrats and two Republicans, and they serve various functions in Michigan. They are independent of the Secretary of State. They do not work for or report to her. They are an independent body, and they serve various functions including certifying election results, determining whether there have been sufficient numbers of ballot signatures on nominating petitions for candidates, as well as initiate petitions for ballot initiatives, and then, as I noted, they also certify voting equipment.

Q Are there any other pre-election safeguards that were in place in Michigan for the 2020 general election?

A I believe I've described, generally, the processes in place as regards voting, registration to vote, identifying voters before they're issued ballots, and then the certification of voting equipment. So those are generally safeguards that are in place.

Q So, then, what, if any --

A I guess one more --

Q My apologies.

A -- one more (indiscernible) is that there are also

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paper backups for materials that are used. So I had noted previously that election officials use an election poll book on election day to verity voters when they come in to cast ballots, that they're registered to vote.

That is a program that's developed by the Michigan Bureau of Elections, and it is displayed on a laptop computer that's used at polling places. That laptop computer is not connected to the Internet, and, also, there are paper backups of the electronic poll book so that clerks can use -- or the election inspectors --

THE COURT: I'm sorry, Mr. Brater. Are you saying paperback -- or what is the --

THE WITNESS: I'm sorry. I'll slow down.

THE COURT: Is that an acronym you're using?

THE WITNESS: I'm sorry, your Honor. Electronic poll books. I didn't understand.

THE COURT: Electronic -- what was the word you said after that?

THE WITNESS: I'm sorry. I will try to slow down, your Honor. In addition to the electronic poll book tool that is used at polling places by election inspectors, who are our poll workers in Michigan, there is also paper backup of that poll book, so that, in the event that the electronic tool is not working properly, the election inspectors, the poll workers have a paper list that they can use to verify

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that voters are registered when they come in to cast ballots.

THE COURT: Okay. Mr. Beckerman.

BY MR. BECKERMAN:

Q Now that we've discussed the pre-election safeguards in place, can you tell us what, if any, safeguards were in place in Michigan to ensure a secure and accurate election result?

A Certainly. Well, that begins on election night, so, at the conclusion of election night, after all ballots have been tabulated, first a bipartisan set of election inspectors has to close out the polling place. They have to seal all paper ballots in containers, ballot containers that are sealed with tamper-evident seals. The seal number is recorded, and that ensures the security of the ballots for other post-election processes.

All the materials, including copies of the poll book materials, are then delivered to a receiving board, which retains the materials, as well as copies that are sent to the County Clerk, which holds them for the county canvass. So, firstly, you know, of course, the ballots themselves are secured, along with the other materials that are used on election day, including the poll book.

Following that process, there is then a county canvass. Each of the 83 counties conducts a canvass of all the

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election -- unofficial election returns in their county, and verifies that the returns are accurate. They do that first by verifying that the paper printouts of the tabulators that show the counts of the ballots cast match the unofficial electronic results that have been recorded. If there any apparently tabulation errors, the county boards of canvassers then -- you know, they have the ability to re-tabulate is there is some kind of error.

They can also bring in the municipal officials and clerks and materials as needed to review any discrepancies, and they also verify and balance out the precincts at the municipal level to ensure that either the number of ballots tabulated matches the number of names in the poll book, or, if they do not, the explanation for why those numbers are different, like, for example, somebody being issued a ballot but then walking out of the polling place without tabulating it.

So only after that process is complete do the bipartisan county canvassers certify at the county level each result, and, again, like the Board of State Canvassers, each county board of canvassers -- and there are 83 of them -- is composed of two Democrats and two Republicans. Following the county canvass, then the results go to the Board of State Canvassers. As I noted, that is a bipartisan body of two Democrats and two Republicans.

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The Board of State Canvassers then reviews the materials that have been submitted by each of the 83 county canvassers and verify their accuracy. Only after Bureau of Elections staff have reviewed those materials and presented them to the board does the Board of State Canvassers then certify those results. Following the certification --

THE COURT: Just a minute, Mr. Brater. Roughly, what's the period of time between when the -- or at least in connection with the 2020 election results -- in the time frame between when the county canvasser results went to the state canvassers?

THE WITNESS: The county canvasses are completed 14 days after the election, and the Board of State Canvassers convenes 20 days after the election.

THE COURT: Okay. Thank you.

THE WITNESS: So, following the certification at the state level by the Board of State Canvassers, candidates then have the opportunity, if they so choose, to request a re-count. So, if any candidate believes that the results are not accurate, for example, if a candidate believes that the ballots were not tabulated correctly by tabulators, they have the opportunity to request a re-count, and they can request a re-count statewide, if they're a statewide candidate. They can request a re-count of certain specified precincts, and, if they do, that re-count is conducted by a

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hand-count of paper ballots. So a bipartisan group of volunteers working under supervision of county clerks and, in the case of a statewide result, the Board of State Canvassers, will then hand-review those paper ballots to verify that they're accurate.

Following the re-count, or if no re-count is requested, the election results are then final. In the case of a presidential election, there's then the Electoral College, and then, following all of that, there are post-election audits that are conducted. I mentioned those previously, but that involves primarily county clerks, but also the Board of State Canvassers and the Bureau of Elections, reviewing precincts across the state to verify that the tabulators counted ballots accurately, once again, and also ensuring that all of the required documentation was created and retained.

In the case of a presidential election or statewide elections, Michigan recently began implementing risk-limiting audits, which also involve a statewide random sample of ballots to again verify that the results of the election were correct.

BY MR. BECKERMAN:

Q You mentioned that the Board of State Canvassers is tasked with the certification of the results. Did the Board of State Canvassers in Michigan certify the results of the

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2020 general election in Michigan?
A Yes.
Q You mentioned that candidates can request a re-count. Did that occur in the 2020 general election in Michigan?
A No candidate for statewide office requested a re-count.
Q What about for President?
A No.
Q Okay. And then you mentioned the two types of post-election auditing. What was the result of those audits conducted as pertaining to the 2020 general election in Michigan?
A Well, as pertains to the precinct-level audits, both county clerks and the Bureau of Elections determines that procedures were widely followed. You know, it's never the case that every single jurisdiction does everything perfectly, but, by and large, procedures were followed, and records were retained as necessary. When it came to the ballot audits, those audits showed on every case that the voting equipment correctly tabulated ballots.
Q After the Board of State Canvassers certified the results, did the Secretary of State or any other executive in Michigan further certify the election results pertaining to the 2020 general election?
THE COURT: I'm sorry. Just a minute. Could you repeat the question?

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MR. BECKERMAN: Yes.

THE COURT: After the --

BY MR. BECKERMAN:

Q After the State Board of Canvassers' certification -- sorry, there was a bit of feedback -- did the Department of State or any other executive further certify the election results in Michigan?

THE COURT: Okay. Thank you.

THE WITNESS: Well, in the case of a presidential election, the electors meet to determine how Michigan's electoral votes will be determined. So that process involves the signing of certificates by the electors as well as other state officials. I believe, if I'm not mistaken, the Secretary of State and the Governor sign those.

BY MR. BECKERMAN:

Q And after those results were certified, did your department receive any pressure to decertify the results?

A There were various entities and individuals that made claims that the election should not be certified or should be decertified. I would note there is not a provision, at least not that I'm aware of, in Michigan election law to decertify a presidential election results, but we received various claims to that effect.

Q And did any of those claims came from a state legislature, as a body?

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A No.
Q I'd like to turn your attention now to Exhibit 112. Mr. Brater, can you see Exhibit 112?
A Yes.
Q And have you seen this document before?
A Yes.
Q And could you tell us what it is?
A This a report that summarizes the audits that were conducted in the November 2020 general election. It describes the precinct procedural audits and their outcomes. It also describes the statewide risk-limiting audit exercise that I described to you involving randomly selecting ballots statewide, reviewing them, and again confirming that the random sample of paper ballots matched the results of the statewide race for president.

In the case of the 2020 election, there were also some additional audits that were conducted, really more than any previous election, including a review of absent voter counting boards in four cities to determine why, in some cases, those precincts were out of balance as of election night between the number of names and the number of ballots. In most cases, we determined that they could be resolved with more time.

And then, finally, this report also includes description of a full hand-count that was conducted in

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Antrim County, and confirming that the ballots tabulated. The ballots were tabulated correctly the tabulators in that county.

THE COURT: I'm sorry. Which county was that?

THE WITNESS: Antrim County.

THE COURT: Antrim County. Okay. Thank you.

BY MR. BECKERMAN:

Q I'd like to direct your attention to page three of Exhibit 112, looking at the -- towards the end of the second paragraph there. There's a part at the end of the second paragraph that reads:

"Unofficial results reporting errors were not new to 2020, but received substantial attention when they were amplified to support other false claims about election results."

Do you see that, Mr. Brater?

A Yes.

Q Could you explain to us what that means?

A Sure. Well, as I noted, the official election results are determined by boards of county canvassers in a process that can take up to two weeks, and so election results are not official at the county level for up to two weeks after the election, and they're not official at the state level until the Board of State Canvassers certifies them 20 days

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later.

However, of course, people want to know who appeared to win the election, so Michigan, like other states, makes unofficial results available as soon as possible on election night, and that way that is done is using technology to electronic transmit, from the cards that are used to program the tabulators on election night, the unofficial results, which are then quickly added to on-line resources like county web sites so that, you know, members of the public, members of the press can see who appeared to win the election. Most people tend to just view these as the election results, but they're technically unofficial until the canvass process and the other processes I described are complete.

It is often the case that, with 1,520 municipal jurisdictions and thousands of precincts, that, from time to time, there will be some errors made in producing the unofficial results. That can happen for a variety of reasons.

For example, a clerk may accidentally upload a card twice to the unofficial reporting software, which could result in, you know, doubling those returns for the unofficial results. It can sometimes happen that they will fail to upload a card, which can result in zeros when there actually, of course, were votes cast.

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There was one particularly notable one in Antrim County, however, which occurred because, in that case, the County Clerk had failed to update all of the cards used in tabulators after programming change was made, and when that occurred, the unofficial results displayed inaccurate results for elections in the county, including the presidential, and in Antrim County, which I mentioned earlier, on election day, all of the tabulators correctly tabulated the paper ballots in the presidential.

So the actual tapes that came out of the tabulators showed the correct results in the presidential election, and that was later confirmed also to be accurate by a hand-count of the paper ballots. However, when it came to the unofficial electronic results, those were initially erroneous, because of the human error in not updating all the program cards to match the election programming.

So, you know, although, you know, as noted here, results of this type are not, you know, unheard of, when it comes to a statewide election that's administered by thousands of individuals, in this case, there were individuals who amplified this to suggest that it somehow was indicative of fraud, or some sort of conspiracy, or claiming that this meant somehow that the voting equipment could not be trusted, when, in fact, the explanation for why the unofficial results were inaccurate was known very

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quickly, and was explained multiple times, and confirmed through numerous reports and audits, including, again, a complete hand-count of all the paper ballots in Antrim County.

Q And what type of voting equipment was used in Antrim County for the 2020 general election?

A Antrim County used Dominion Voting Systems equipment.

Q Okay. And those systems were certified in Michigan?

A Yes.

Q I'd like to direct your attention to page four of Exhibit 112. We'll be looking towards the top. At the top here, it reads, "Post-election audits of the 2020 general election were the most extensive in Michigan's history." In what way, Mr. Brater, were the post-election audits the most extensive in the state's history?

A Well, the precinct procedure audits that are listed there are the same audits that were done in prior elections, but the next two categories had never been done before in statewide elections in Michigan.

So we reviewed -- we conducted a full review of absent voter counting boards, which are the special precincts that are used to count absentee ballots in some jurisdictions, in four of the largest municipal jurisdictions in Michigan, specifically, Detroit, Livonia, Grand Rapids, and Sterling Heights, which are four of the largest cities in Michigan.

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That had never been done before, so, in this case, we scrutinized and reviewed the process of checking in and tabulating absentee ballots in a way that had never been done before.

Additionally, risk-limiting audits had never been done for a statewide election in Michigan. This is the first time we had conducted an exercise in which we randomly selected thousands of ballots from more than a thousand local jurisdictions to verify that, from that poll of random ballots, the results matched the tabulated results for the presidential election. That had also never been done before.

And then, finally, we also conducted a full hand-count audit in Antrim County, as I had mentioned earlier. That had also never been done before. There of course had been re-counts, which are similar to a hand-count audit, but a whole county had never been audited in the way that we did Antrim County for the 2020 election.

MR. BECKERMAN: Your Honor, may Exhibit 112 be admitted into evidence?

THE COURT: Any objection?

MR. MILLER: No objection.

THE COURT: Exhibit 112 is received into evidence.

BY MR. BECKERMAN:

Q I'd like to turn now to Exhibit 113. Mr. Brater, can

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you see Exhibit 113 on your screen?
A Yes.
Q And have you seen this document before?
A Yes.
Q And have you reviewed this document prior to today?
A Yes.
Q Could you tell us what it is?
A The Office of the Auditor General is an entity that is part of the Michigan State Legislature, and it conducts performance audits of state agencies in Michigan, including the Bureau of Elections. So this was a performance audit that was conducted over the course of mostly 2021, reviewing various functions that the Bureau of Elections is responsible for performing.

In this case, the Office of the Auditor General is reviewing the Bureau of Elections maintenance of the state-qualified voter file, which is the statewide voter registration system, along with the training of election officials and the supervision of post-election audits. Those are the primary subjects of this audit.
Q And are you aware of the conclusions reached in this audit?
A Yes.
Q I'd like to direct your attention now to page 11. The first bullet point reads:

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"99.1 percent of registered electors information in QVF accurately reflected data contained in the SOS driver's license file, DLF, for electors with an active driver's license or state identification."

First, do you know the meaning of those acronyms?

A Yes.

Q Could you tell us what a QVF is?

A Yes. "QVF" is the acronym that is used for the qualified voter file, which is our statewide voter registration database.

Q And who maintains that?

A The Bureau of Elections.

Q And is "SOS" an acronym for Secretary of State?

A Yes.

Q And do you agree with that conclusion?

A Yes.

Q Moving now to the second bullet point, which reads:

"99.99 percent of the electors who cast votes during our audit period were within acceptable age parameters. We followed up on the 13 individuals with recorded ages under 18 who cast votes, and noted election officials manually

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added 12 to the electric poll book on the day of the elector, and one had an inaccurate birth date in the QVF. We also noted one additional individual with a recorded age over 122, whose birth date was not verified or updated as of the date the individual cast a vote. These 14 instances occurred in 10 different counties."

Do you agree with that conclusion?

A Yes, although I would clarify that. The fact that an individual in the qualified voter file has a recorded age over 122 does not mean that that individual is actually over 122 years old. It could be the case that they had a placeholder birth date, which I think is likely the explanation here, because this report came out in 2022, and the placeholder birth date usually used is January 1st, 1900, which would be 122 years prior to that. So, with that clarification, I do agree with this conclusion.

Q Understood. Moving on to the third bullet point, which reads:

"99.99 percent of votes cast during our audit period were not identified as a duplicate vote. Since the prior audit, BOE developed a process to review

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potentially duplicate votes using the QVF voter history."

Skipping down a few lines within that bullet point: "BOE further reviewed the remaining 150 records, and resolved 109 of them at the time of our review, and referred 41 for further investigation to either the Secretary of State's Office of Investigative Services or the Department of Attorney General."

Do you agree with that conclusion?

A Yes.

MR. BECKERMAN: Your Honor, may Exhibit 113 be admitted?

THE COURT: Any objection?

MR. MILLER: No objection, your Honor.

THE COURT: Exhibit 113 is received into evidence.

BY MR. BECKERMAN:

Q I'd like to move on now to Exhibit 169. Mr. Brater, can you see Exhibit 169 on your screen?

A Yes.

Q Have you seen this document before? And if it's helpful, we can scroll through a bit.

A Yes.

Q What is this document?

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A This is an affidavit that I submitted in the Dominion lawsuit. I believe the defendant was Fox News in this case.

Q And I'd like to now move down to page eight, and if we could scroll down, actually, to page nine. Mr. Brater, do you see what we've just scrolled through, pages eight through 10?

A Yes.

Q Could you tell us what we're looking at here?

A This is a declaration that I submitted in the matter, I believe, of King v. Whitmer.

Q And if we could -- just a moment. If we could look at page 16, and I'm going to direct your attention to paragraph 17, which addresses claims of Mr. Ramsland. Who is Mr. Ramsland?

A Mr. Ramsland is an individual who submitted a report in support of claims that were made, I believe, in possibly multiple litigation matters, but, in this case, it was King v. Whitmer, and the materials he submitted contained a number of factual errors.

Q Paragraph 17 reads?

"Mr. Ramsland's claims, cited by plaintiffs, demonstrate a fundamental lack of understanding of basic facts about Michigan's election system. He includes in his claims two counties,

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Macomb and Oakland, that do not use Dominion Voting Systems."

Could you explain what you mean by "fundamental lack of understanding"?

A Well, in this case, Mr. Ramsland was claiming that these two counties, and records from those counties, somehow supported a theory that Dominion Voting Systems equipment was not functioning properly or was not reliable. In fact, these two counties, Macomb County and Oakland County, those are the second- and third-largest counties in the state of Michigan, aside from Wayne. They use different equipment.

So Macomb County uses ES and S, Elections Systems and Software equipment, whereas Oakland County uses Hart InterCivic equipment, and so I believe what this is referring to is, in his report, he was using results from those counties to support an argument that Dominion Voting Systems equipment was not working properly, when, in fact, those counties don't even use that equipment.

Q So is it fair to say you've reviewed the claims of Mr. Ramsland?

A Yes.

Q Do you find them credible?

A No.

Q Why?

A Well, there are, as noted here, just some very basic

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errors about election administration in Michigan. It appears to me that it was a series of statements thrown together to try to justify a conclusion that was not supported by evidence, that there had been some kind of massive fraud in Michigan, which there was not.

I think number 18 is a good example of that. He claimed that it was suspicious that a large number of votes were reported at the same time for unofficial result reporting, so he thought it was suspicious that thousands of votes had been recorded simultaneous by jurisdictions because, in his view, it would have impossible for thousands of people to put their ballots through tabulators at the same time, but that's not what's happening when results are recorded, unofficial or otherwise.

What's happening is the ballots that have been tabulated all throughout the day, since the polls open at 7:00 a.m., or since jurisdictions start counting absentee ballots at 7:00 a.m., those ballots are being put into tabulators all day, but the results are not going, like, one vote at a time to the unofficial result reporting software. In fact, they are not reported until the election is closed out, and that's when the entire file, with the results, unofficial in this case, of all the ballots that were tabulated go to the county for the unofficial result reporting.

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So this is just such a fundamental misunderstanding of the basics of election administration, frankly, and I think other states as well, not just Michigan, but I think it's indicative of the level of seriousness with which these individuals are trying to support their claims that the election in Michigan was somehow fraudulent or stolen.

THE COURT: Just to be clear, Mr. Brater, it's your testimony that these claims, the claims you're referring to, reflect a fundamental misunderstanding of what?

THE WITNESS: Of the practices that are used to conduct elections in Michigan.

THE COURT: Okay. Thank you.

BY MR. BECKERMAN:

Q I'd like to draw your attention now to page 17 of Exhibit 169, paragraph 19. Just a moment. I'm summarizing now, but paragraph 19 indicates a lack of proof that large numbers of ballots were illegally counted in Detroit. Can you explain the basis of that?

A Certainly. There were various claims made by the plaintiffs in this case and others that, in Detroit, there were somehow large numbers, thousands of ballots, that were not real ballots, or ballots that had not been submitted by real voters, that were being counted. There were various claims, such as, like, truckloads of ballots being brought

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in that didn't correspond to voters, or ballots that were being run through tabulators multiple times.

I think, in some cases, these stemmed just misunderstanding of what people were looking at, not understanding those practices. For example, a lot of these claims originated at the absent voter counting board location in Detroit, where all the absentee ballots are tabulated.

So, for example, some individuals saw absentee ballots that were being brought in late at night or early in the morning Because those absentee ballots had been delivered by voters to the City Clerk's Office by 8:00 p.m. on election night, and they thought that that was suspicious, but that's actually the normal practice. When ballots come in, they first have to be checked in by the clerk, and then brought over.

I think some individuals were also confused when they saw blank ballots that were being brought in to the counting center. The reason for those is that when, for example, ballots for members of the military come in, they come in in a different format, and they often need to be duplicated, by a bipartisan team of election inspectors, onto another ballot, so that they can be put through tabulators. So that's done to make sure that members of our military and others overseas are able to vote. So, again, I think

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individuals didn't understand what they were looking at, and thought that that was evidence of fraud.

And then, finally, you know, another example I mentioned was ballots going through tabulators multiple times. In reality, sometimes, when you're using high-speed scanners, which are the types of tabulating equipment that is used at absent voter counting boards, you might put through a batch of ballots, for example, 50 ballots, and the scanner may reject that. It may be an invalid scan.

So, when that happens, the tabulator doesn't accept those results, and you take the batch again and scan it through until it accepts the results. So these ballots aren't being counted multiple times, but they be put through the scanner multiple times to ensure they can be reported.

So there were various, you know, sort of other even more baseless claims that were being made about Detroit, but the explanation here just indicates why there's really no way any of these claims could have been remotely accurate or remotely close to the scale of any kind of illegal voting that could have occurred. So, for example --

THE COURT: I'm sorry. I missed what you said. There is no way -- what was your last sentence?

THE WITNESS: There's no way that these claims could have actually been any kind of reliable estimate of any kind of illegal voting that could have occurred in

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Detroit, and the reason for that is that, in fact, there were not an unusually large number of ballots that were counted or tabulated in Detroit compare to the rest of the state. In fact, it was somewhat lower.

From 2016 to 2020, turnout in Detroit went up by about four percent, so turnout increased slightly, but that was actually a lot lower than statewide. Statewide, our turnout in Michigan was 15 percent higher. So, again, that was true of many states across the country. There was very high --

THE COURT: Wait. Fifteen percent higher than what?

THE WITNESS: Than 2016.

THE COURT: Okay.

THE WITNESS: So that was consistent with a lot of states, where turnout in 2020 was very high, but the point here is that these allegations that somehow there were, you know, heaps of illegal ballots and an unusual number of ballots getting counted in Detroit aren't supported by this data, which actually shows that the number of ballots in Detroit were relatively low compared to the state as a whole.

Another thing that is notable here is that former President Trump actually got a higher percentage of votes in Detroit in 2020 than he did in 2016. Detroit is obviously,

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as these numbers show, a very heavily Democratic city, but, in 2016, Mr. Trump got only about three percent of votes in Detroit, where, in 2020, he actually got five percent of votes in Detroit. So this theory that ballots in Detroit were somehow being used to rig the election against Mr. Trump are again not supported by the fact that he actually did better there than he did in 2016.

And then, finally, the suggestions that the ballots that were being tabulated at the TCF Center, which was the location of the absent voter counting board, were somehow not corresponding to real voters, is also not supported by this data, because, in fact, at the Detroit absent voter counting board, just like at every other counting board, the election officials have a list of voters who have submitted absentee ballots that they compare to the total number of ballots that were tabulated.

In this case, it was about 174,000 absentee ballots for Detroit, and, in fact, the number of names on the poll books was quite similar to the number of ballots tabulated. It didn't match exactly because there are sometimes small errors in checking in voters and things like that, but, in fact, the number of ballots tabulated actually was slightly lower than the number of names of voters who had submitted absentee ballots. So, again, if there had been some sort of massive fraud involving fake ballots that

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didn't correspond to real voters, the number of ballots would have, in fact, been much higher than the number of voters, rather than slightly lower.

So these are some examples of why these claims can be easily disproven just by looking at the election data from Detroit.

BY MR. BECKERMAN:

Q Mr. Brater, you mentioned in the context of claims of double counting or ballots that a batch could be rejected by a tabulating machine such that a batch would have to be re-scanned. Could you explain for us what might lead to a batch being rejected by the machine?

A Sure. I mean, these are -- so what are used at large absent voter counting boards are called "high-speed scanner," or sometimes they're called "high-speed tabulators." In the case of Dominion, it's equipment called ImageCast Central, which is used, again, for absentee ballots, as opposed to the ImageCast Precinct, which is used primarily in in-person voting locations.

So, at an in-person voting location, the voter will go up one at a time. Each voter will go up and put their ballot into the tabulator, and the ballot (sic) will either accept or reject that ballot. You know, if they reject it, the voter might have to put it back in, or it might be telling the voter that they had, you know, over-voted a

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race, voted for too many candidates, or something like that, but then the voter eventually puts their ballot in and moves on.

High-speed scanners are designed for use with absentee ballots because, in this case, there's a large number of ballots that need to be counted in a short period of time, and the ballots aren't being put in there by the voter, because they're absentee ballots. So, instead, they're being put in by an election worker, and so, typically, the way these -- the way this (indiscernible) works is it's essentially a scanner, which is attached to a computer that has the programming and the election management software on it.

So the ballots are put on in a stack into the scanner. You then hit, basically you know, "Scan," or whatever the term is on the software, and the scanner will then attempt to scan through all the ballots in the stack, but, just like any other sort of scanning operation, there's all sorts of reasons why it may reject a scan. There could be two ballots that get stuck together, or something gets folded over. Whatever it might be, when you get to the end or halfway through the scanning of a stack of ballots, the machine may tell you, "This batch was not scanned properly."

When that happens, the tabulation equipment is not actually counting those ballots yet. It doesn't count them

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until all the ballots are scanned through and you click "Accept" for that batch. So, if there is a problem, and you have to re-scan them, you just take the stack out and, you know, you might try to figure out why it didn't go through, if there was a, you know, corner folded over or something, and then you would scan it through again, and then, when it ultimately accepts the batch, only then do you hit "Accept."

So, you know, an individual who is unfamiliar with the way this works might see an election worker taking the same batch of ballots and scanning them through multiple times, but that's, in fact, a totally ordinary process, and each ballot is actually only counted once.

Q Now, Mr. Brater, we've been discussing your affidavit from the King v. Whitmer case. Did you attach exhibits with that affidavit?

A I don't remember.

Q Well, let's look at page 65.

A Okay.

Q Mr. Brater, do you recognize what we're looking at on the screen, page 65 of Exhibit 169?

A Yes.

Q And what is this?

A This is a report that was completed by the Michigan State Senate Oversight Committee. The Senate Oversight Committee conducted a series of hearings regarding the

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November 2020 election, and at the conclusion of that process, they issued this report.

Q And have you reviewed this report prior to today?

A Yes.

Q Okay. I'd like to turn your attention to page 67.

THE COURT: Sixty-seven?

MR. BECKERMAN: Yes, your Honor, and we're going to look at the fifth paragraph there, which states:

"This Committee found no evidence of widespread or systematic fraud in Michigan's prosecution of the 2020 election."

BY MR. BECKERMAN:

Q Do you see that, Mr. Brater?

A Yes.

Q And do you agree with that statement?

A Yes.

Q I'm going to turn now to page 69, the top paragraph, which states:

"Extraordinary claims require extraordinary proof, and claiming to find something extraordinary requires first eliminating the ordinary. Also, sources must lose credibility when it is shown they promote falsehoods, even more

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when they never take accountability for those falsehoods."

Do you see that there?

A Yes.

Q And that's a statement from Senator Edward McBroom. Do you know -- can you tell us, who is Senator Edward McBroom?

A Yes. He's a senator. He's in the Michigan State Senate. At this -- he represents the Upper Peninsula of Michigan. It's a largely rural area. He is a member of the Republican Party, and at this time, he was the chair of the Senate Oversight Committee. He is still in the State Senate now, but is no longer the chair of that committee because, at this time, the Michigan State Senate is now controlled by the Democrat party.

Q I'd like to turn your attention to page 99. Again, we're going to be looking at the top paragraph under "Conclusion," which reads:

"The Committee can confidently assert that it has been through" -- sorry -- "that it has been thorough in examination of numerous allegations of unlawful actions, improper procedures, fraud, vote theft, or any other description which would cause citizens to doubt the integrity of Michigan's

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2020 election results. Our clear finding is that citizens should be confident the results represent the true results of the ballots cast by the people of Michigan."

Do you agree with that conclusion?

A Yes.

Q I'd like to turn now to page 121 of Exhibit 169. Can you see this document which is at page 121, Mr. Brater?

A Yes.

Q Have you reviewed this document before?

A Yes.

Q Could you tell us what it is?

A Certainly. Well, this was -- as I noted earlier when I was talking about the unofficial election night result errors, and the way that they were amplified and used to make false claims about elections, this is describing, basically, what occurred in Antrim County, so it's a document that the Department of State put out after the Bureau of Elections had discussed this issue both with the Antrim County Clerk as well as Dominion Voting Systems and ElectionSource, which is another company that helps clerks use Dominion Voting Systems.

After we conducted those discussions, we determined, basically, the source of the issue, which is that the county

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had not properly updated all the cards that were used to program the tabulators in the county, so that, even though the presidential election results were actually accurately tabulated by the tabulators, and even though the tapes that came out of the tabulators correctly indicated the results from those tabulators in Antrim County, the unofficial results were incorrect, temporarily, because of that programming error. So this was a basic explanation of what occurred in Antrim County.

MR. BECKERMAN: Your Honor, may Exhibit 169 be admitted into evidence?

THE COURT: Any objection?

MR. MILLER: There is an objection, your Honor. It lacks foundation. 169 is an amalgam of a number of different documents, none of which Mr. Brater has been questioned about, and, therefore, there is no foundation. The only exception would be on pages 121 and 122, which is the one document that Mr. Brater had the foundation the testify about, or personal knowledge to testify about the foundation.

MR. BECKERMAN: May I be heard, your Honor?

THE COURT: Yes.

MR. BECKERMAN: Your Honor, this exhibit has been judicially noticed as part of the court filing.

THE COURT: Okay. But I understand that Mr.

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Miller is objecting on the grounds of lacks foundation. I assume that's with regard to -- that's a challenge as to Mr. Brater's knowledge about this document --

MR. MILLER: Yes, essentially.

THE COURT: -- or the contents of the --

MR. MILLER: I mean, there's no witness that's been able to lay the foundation for this, except for those two pages that identify --

THE COURT: Okay. Mr. Beckerman?

MR. BECKERMAN: Your Honor, my understanding is that the purpose of the request for judicial notice was to establish that these documents are all part of the court filing, and to establish the authenticity and foundation for these documents. I can further represent to the Court that the first declaration in Exhibit 169 is from Mr. Brater laying out his knowledge of the various attached exhibits. Our position is that wouldn't even be necessary, to lay the authentication and foundation, given the judicial notice of this court filing.

THE COURT: Well, I think the objection goes to whether or not Mr. Brater has knowledge of the information contained in the document, and/or drafted, reviewed, played a role in connection with the information there, played a role in connection with generating any of the information there.

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MR. BECKERMAN: And, your Honor, if I may, each of the subsequent documents after the affidavits are official government records. Again, a foundation has been laid. They have been authenticated, both on the face of them -- there's indicia of reliability -- as well as through the information provided in our request for judicial notice.

THE COURT: Okay. Mr. Brater, have you seen this document before?

THE WITNESS: Your Honor, are you referring to the entirety of Exhibit 169 or just these --

THE COURT: Yes, I am.

THE WITNESS: I believe that I have, yes.

THE COURT: Okay. And did you play a role in connection with the preparation of any aspect of Exhibit 169?

THE WITNESS: Yes.

THE COURT: Okay. The objection is overruled.

BY MR. BECKERMAN:

Q Mr. Brater, I'd like to discuss with you now some claims of fraud or illegality made pertaining to Michigan's administration of the 2020 general election. Have you heard the claim that the Secretary of State in Michigan sent out ballots to all registered voters, contrary to state law, in the 2020 general election?

A Yes.

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Q And could you tell us your thoughts on that claim?
A It's inaccurate in two important ways.
Q Could you tell us both of those ways?
A Yes. Well, the first reason that it's not accurate is that the Secretary of State did not sent ballots to anybody. The Secretary of State sent out absent voter ballot applications, not ballots. So, in order to actually get a ballot, an individual would have to complete that application, sign it, and submit it to their local municipal clerk, who would then review the application before issuing a ballot to that voter.

Also, importantly, absent voter ballot applications are widely available in Michigan. You can download one from the Michigan Department of State web site. You can even write your own, if you want, on a napkin. There is no specific required format for an absent voter ballot application, as long as it includes the required elements, most importantly the voter's signature, which is what the clerk uses to identify the identity of the voter before issuing a ballot to the voter. So there's a big difference between sending an application and sending a ballot.

Secondly, it was not in violation of state law. The courts in Michigan have confirmed that the Secretary of State has the authority send absent voter ballot applications to voters.

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Q Are you aware of claims that Michigan established remote drop boxes only in heavily Democrat precincts, without the statutorily mandated video surveillance?

A I'm aware of claims of that nature. I'm not sure whether I've heard it phrased exactly that way.

Q What are your thoughts on claims of that nature?

A They're without basis in fact.

Q What do you base that statement on?

A Well, first of all, absent voter ballot drop boxes have been utilized in Michigan for a number of years. If you went around the state in past years, you would see that municipal jurisdictions use drop boxes for a variety of purposes. They may be for absent voter ballot envelopes. They may be for absent voter ballot applications. They may for other things, like taxes or other things you might need to submit to your municipal government.

So there's nothing new about the use of drop boxes in Michigan, and they've been used across the state. It certainly is true that there were more absent voter ballot drop boxes that were utilized in Michigan in 2020, because of the large increase in absent voter ballots, because of the desire to facilitate the ability of people to drop off those ballots safety, what with social distancing, and also because of concerns about the U.S. Mail and the ability for the absent voter ballots to mail it back through the mail on

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time.

But, in connection with that, the drop boxes were distributed all across the state. It was not simply in heavily Democratic areas. The Michigan Department of State purchased boxes at any jurisdiction, regardless of what the political makeup of that jurisdiction might be, to order, and jurisdictions were also able to secure drop boxes from other sources. So there's just no basis of the claim that the Department of State was somehow placing drop boxes in certain areas and not others.

Secondly, the claim about legally mandated video surveillance, you know, first of all, the Department of State doesn't place video surveillance on municipal property. That's something that's done by the local jurisdiction, and depending on when those drop boxes were installed, there may or may not have actually been any requirement for there to be video surveillance. So that statement is inaccurate in a large number of respect.

Q In what way does that depend on when a drop box was installed?

A There is a statute that was passed -- I don't remember the exact time, but I believe it was sometime in 2020 -- that included some requirements for video monitoring, but drop boxes that had previously been installed, prior to the legislation passing, which I think was sometime in the fall

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of 2020, were exempt from that requirement. They're essentially grandfathered in.

Q Are you aware of the claim that in Michigan, pertaining to the 2020 general election, absentee ballots were delivered at 3:00 a.m., were counted without affording candidates the opportunity to observe, contrary to state law?

A I've heard a claim of that nature, yes.

Q What are your thoughts on the claim of that nature you heard?

A Well, in the first respects, for the reasons I discussed previously, in Detroit, it was the case that, in some cases, absent voter ballots were not actually counted until the early morning hours, or even the later hours on Wednesday, and there are multiple reasons for that. One is that there was a huge volume of absentee ballots in Michigan in 2020, and under the Michigan election law, in 2020, jurisdictions were not allowed to begin tabulating those ballots until the polls open on election day at 7:00 a.m.

So, unlike some other states, where they can actually start processing or even tabulating those absentee ballots before election day, and, therefore, get through them all easily in term to release the results shortly after the polls close, that's not the case in Michigan. So, in Michigan, in many cases, especially larger cities, it took a

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long time to get through all the ballots, and in many cases, certainly, at 3:00 a.m., ballot counting was still ongoing.

Secondly, voters have the right to return their absentee ballot as late as 8:00 p.m. on election night, which is when the polls close. So, if that happens, steps have to be taken before that absent voter ballot can actually be tabulated. First, the absent voter ballot envelope has to be brought to the Clerk's Office. For example, if it was brought to a drop box or a satellite location, it would need to be brought to the Clerk's Office.

Then the municipal clerk would need to review the envelope, match the signature, and then accept the ballot into the qualified voter file system to indicate that that voter had returned their ballot. Then the envelope would have to be delivered to the absent voter counting location, and then it would need to be sorted into the right counting board, or precinct, and only then would it be -- the envelope be opened, and then tabulated. So the whole process could, you know, take several hours, especially on a busy night like the November 2020 election night.

And then, with respect to the notion that candidates weren't allowed to observe the process, I mean, first of all, candidates themselves don't serve as challengers or monitors in polling places. Those are appointed by the political parties, or they can also -- you know, other

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entities can also appoint challengers. But it's not the candidates themselves that are reviewing the process.

But, in any case, in the locations at which absent voter ballots were counting, challengers and poll watchers were permitted to view the process by which absent voter ballots were processed and tabulated.

Q Did you hear claims, pertaining to Michigan in the 2020 general election, about ballots being delivered from vehicles with out-of-state license plates?

A Yes.

Q Do you have thoughts on those claims?

A Well, they don't seem relevant to me in any way, but I honestly don't know whether or not that occurred. But absent voter ballots, for the reasons I mentioned, would be brought from the City Clerk's Office to the location at which the absent voter counting was taking place, and so they were, I believe, delivered using automobiles. I don't know what the license plates on those automobiles said, but I am confident that the city and township clerk, in all instances, controlled the automobile that was being used to deliver absent voter ballots from the Clerk's Office to the counting location.

Another thing I would note is that there were all sorts of misperceptions about people thinking they were seeing things that they weren't really seeing on election night. I

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believe there was one instance in which an individual claimed that some ballots or some other materials were being illegally offloaded from a truck, and it later turned out that that was actually a media organization that was unloading its cameras or equipment to do its news coverage. So I'm not even convinced that, if an automobile that had an out-of-state plate was present near an absent voter counting location, that anything coming out that vehicle actually would have been an absent voter ballot.

THE COURT: Mr. Brater, a few minutes ago, you testified that the Secretary of State did not sent ballots out, but sent out absentee ballot applications. Who were those sent to?

THE WITNESS: Those were sent to registered voters in Michigan.

THE COURT: Okay. Only individuals who had previously registered in Michigan, then? Is that right?

THE WITNESS: That's correct, your Honor, yes.

THE COURT: Okay. Thank you.

Okay. Mr. Beckerman.

MR. BECKERMAN: Thank you, your Honor.

BY MR. BECKERMAN:

Q Mr. Brater, does Michigan -- strike that.

Does Michigan law hold that ballot counted without an observer present be thrown out?

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A No.
Q Could you elaborate?
A Well, challengers and poll watchers have the right to observe the process, but there's no guarantee that challengers or poll watchers will actually come, and, in fact, in most locations, they don't. So there's places all across the state where there's absent voter counting boards set up, and absent voter ballots are being tabulated by a bipartisan team of election inspectors, but there isn't anyone there who is a challenger.

So, obviously, the voters don't get disenfranchised because a challenger not to show up to the watch the process in those cases. Even if, you know, there was something that occurred where a challenger was trying to observe the process and wasn't able to, the remedy for that would not be to disenfranchise the voter by not counting their ballot. There's no provision in the election law that says that, if some other procedure isn't followed, that the ballots aren't counted.

Q Mr. Brater, was the 2020 general election conducted in Michigan secure and accurate?
A Yes.
Q What do you base that on?
A I think that the first thing that's important to understand is that election administration in Michigan is

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heavily decentralized and heavily bipartisan. So the actual election is conducted by local officials across the state, city and township clerks who are Democrats, who are Republicans, who are nonpartisan. There is no central control of the way that voters can submit their ballots, either in absentee ballots or in in-person ballots.

And then, additionally, beyond the clerks themselves, the actual polling places are operated by election inspectors who are ordinary citizens who are, you know, Democrats and Republicans. There are requirements that there be a balance between Democrats and Republicans who operate as election inspectors.

So, just like in every other election that's been conducted in Michigan in, you know, history, or at least recent decades, as far as I know going back, the same procedures were used by the same bipartisan, decentralized set of individuals who conducted the election, and so there's -- just as that process has worked to deliver secure and accurate and fair results in every other election, it was also used in 2020.

But, even if that weren't the case, even if you somehow were to believe that thousands of Democratic and Republican and independent clerks and election inspectors were somehow part of some incomprehensibly complex conspiracy to, you know, conduct a fraudulent election, there is also

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independent verifiable paper evidence that can be reviewed, and was reviewed, to demonstrate the election results were accurate.

When it comes to claims about voting equipment, regardless of what anyone tries to put forth in some sort of expert report or other, regardless of what sort of claims they make about voting equipment being insecure, or prone to error, or baseless claims that it's intentionally designed to be fraudulent, notwithstanding the extensive testing and certification that's done before it's used, even if you believed all that, we have paper ballots that can be reviewed for the entire election.

So you could look at every paper ballot in the state of Michigan, and we would have done that if someone requested a re-count, and verify what the actual hand-marked paper ballots said about the election. So, even if you somehow believes these claims about tabulators not working properly, for whatever reason, we still have those actual paper ballots

We also have paper records that correspond to every individual who voted in Michigan. So, to vote in Michigan, you either need to complete an application for absentee ballot, to vote absentee, or you have to complete a paper application to vote, to get your ballot in person, and so those records also exist, and are also retained, and can be

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reviewed to verify that each individual who cast a ballot was a real person.

And, again, you know, between all of that evidence that exists in paper form, and was retained for the required retention period, no individual has provided any serious evidence or any proof based on those records that any sort of widespread fraud occurred in the election in Michigan in 2020.

So, between the checks and balances that we have in place with our decentralized system, both on election day and afterwards, during the county canvass and the state canvass, in between the independently verifiable paper records, there's simply no way that the types of claims that were being made about the election in 2020 could have been true.

MR. BECKERMAN: Thank you. Nothing further

THE COURT: Okay. Mr. Miller?

MR. MILLER: Thank you, your Honor.

CROSS EXAMINATION

BY MR. MILLER:

Q Good evening, Mr. Brater. My name is Randy Miller, and I represent the Respondent, John Eastman, in this proceeding. How are you?

A I am good. How are you?

Q Good. So you're an attorney licensed to practice law

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in Michigan, correct?
A I am an attorney licensed to practice law in New York. I'm not licensed to practice law in Michigan.
Q Fair enough. Okay. So your licensing is in New York, and how long have you been a licensed attorney in New York?
A Since 2012, I believe.
Q Okay. I'm going to ask you some questions about some litigation that I found involved the state of Michigan relating to the 2020 general election. I'm going to start with a case, to see if you're familiar with it, called Genetski, G-E-N-E-T-S-K-I. Are you familiar with that case?
A I believe there may be multiple cases.
THE COURT: Just a minute. Is that litigation that was filed in Michigan?
MR. MILLER: Yes.
THE COURT: Yes.
THE WITNESS: I believe there may be multiple cases involving that name, but I am familiar with at least one, yes.
BY MR. MILLER:
Q Okay. And I guess, because of your position, what comes along with that is that you get named as a defendant in these cases, in your official capacity, correct?
A Yes.
Q And so, in the Genetski cases or related cases with the

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same name, what sort of involvement do you have personally with respect to that litigation?

A Well, if I'm --

MR. BECKERMAN: I'm going to object that it's vague. We don't know which of these amorphous Genetski cases we're talking about.

THE COURT: Sustained.

BY MR. MILLER:

Q Well, we've got -- so let me give you the one that I first came across here. This is called Robert Genetski, versus Ms. Benson and yourself. This is in the Michigan Court of Claims, and this was filed on November 20 -- excuse me, November 2, 2020. Does that ring a bell to you, Mr. Brater?

A Yes.

Q Okay. So let's start with that one, and I'll go back to the question I asked you previously. What sort of involvement do you have, in your official capacity, with the Genetski case?

A Well, it depends on the case. I believe, in that case, I was a defendant. I may have submitted an affidavit or some factual material. I don't remember whether I did nor not in that case. And I would discuss the case with our legal counsel, which would have been the Michigan Department of Attorney General.

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Q And in your official capacity, again, as a named defendant in these cases, would you have familiarized yourself with the nature of the allegations in the Genetski case?

A To the best of my ability, yes.

Q Yes. Can you summarize, generally, the allegations in the Genetski matter?

A I believe that involved a challenge to instructions or guidance that the Bureau of Elections had provided to clerks with regard to reviewing signatures on absent voter ballot applications and absent voter ballot envelopes.

Q And do you know what the outcome of that Genetski matter was?

A As I recall, the Court determined that the document that the Bureau of Elections provided was guidance, but was not binding on clerks, that clerks were not required to follow it as a mandate, because it had not been promulgated as a rule under the Administrative Procedures Act.

Q Another case that I found. This one is called O'Halloran, versus Ms. Benson and yourself. Do you remember this one, Mr. Brater?

THE COURT: I'm sorry. What's the name, again?

MR. MILLER: It's O'Halloran, O, apostrophe, H-A-L-L-O-R-A-N, and some other individuals, but that's the lead plaintiff, and the defendants are Ms. Benson and Mr.

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Brater.

BY MR. MILLER:

Q The question, Mr. Brater, is do you remember this matter?

A Can you tell me when that lawsuit was filed? I remember a lawsuit of that nature, but I don't remember -- with that name on it, but I don't remember when it was filed.

Q It was filed in October 2020.

A Yes. I mean, I don't remember specifically what that lawsuit was about.

Q Well, maybe I can help you remember, refresh your recollection in this. O'Halloran, at least my review of it, related to a poll challenger manual, and the allegation essentially was that that infringed on the rights of the poll challengers. Does that refresh your recollection about the nature of that matter?

A And you said this was October 2020?

Q Yes.

A I remember a lawsuit involving poll challengers in 2020. I don't actually remember whether the Secretary of State or myself were a defendant in that case, but I do remember a lawsuit being filed on that subject.

Q Okay. Well, I can represent to you, Mr. Brater, that the caption does list your name, as well as Ms. Benson, as

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the named defendants in that case, in your official capacities. Do you know -- do you recall in the O'Halloran matter whether there was a court ruling relating to the invalidation of the poll challenger manual that the state of Michigan had in place?

MR. BECKERMAN: Objection, lacks foundation.

THE COURT: Sustained.

BY MR. MILLER:

Q Well, what do you remember about the outcome of that matter?

MR. BECKERMAN: Objection, vague, lacks foundation.

THE WITNESS: I don't remember --

THE COURT: Just a minute.

THE WITNESS: All right.

THE COURT: The objection is overruled. However, as I recall, Mr. Brater has testified he doesn't recall this case.

Is that right, Mr. Brater?

THE WITNESS: I do not recall the case -- what the case is about. I do recall a lawsuit being filed by an individual named O'Halloran. I believe that counsel stated that it was from October 2020.

THE COURT: That's correct. Do you have an understanding -- or do you have any knowledge regarding the

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outcome of this O'Halloran v. Benson and Brater matter?

THE WITNESS: I don't specifically remember the outcome of that case, at least with respect to Mr. Miller's claim that a challenger guidance document was invalidated in 2020. I don't remember that specifically.

THE COURT: Okay. Then the objection is overruled -- I'm sorry, the objection is sustained. Sorry.

Mr. Miller.

MR. MILLER: Thank you, your Honor.

BY MR. MILLER:

Q What is the acronym "APA"?

MR. BECKERMAN: Objection, vague.

THE COURT: Overruled. Do you know, Mr. Brater?

BY MR. MILLER:

Q Well, let me try it this way, and we can move this along. Is that the Administrative Procedures Act?

A In Michigan, the acronym APA is generally used to the Michigan Administrative Procedures Act.

Q Okay. Well, where I'm reading, it looks like it may be abbreviated as the Administrative Procedures Act. Do you believe that they're one and the same?

MR. BECKERMAN: Objection, vague as to source, where this is coming from.

THE COURT: Okay. Sustained.

What are you looking at, Mr. Miller?

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MR. MILLER: The court order.

THE COURT: Okay. Which court order?

MR. MILLER: It's the court order --

THE COURT: Is this an exhibit, first of all?

MR. MILLER: It's not an exhibit, no.

THE COURT: Okay. So a court order in which matter, in which case?

MR. MILLER: Well, that reference actually was taken from the Genetski case, as to that acronym.

THE COURT: Okay.

MR. BECKERMAN: If I may, your Honor?

THE COURT: Yes.

MR. BECKERMAN: I'm also going to object to counsel testifying regarding facts not in evidence.

THE COURT: Okay. Overruled.

What is your next question?

BY MR. MILLER:

Q Maybe you can't identify the specific case, Mr. Brater. I appreciate that. Do you recall that there was a matter filed in Michigan that challenged something called a "poll challenger manual"?

A Yes. I'm not sure the exact term was "poll challenger manual," but I am aware of a case on that subject matter.

Q Fair enough. And are you familiar with a poll challenger manual or something like that, that related to

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the role of poll challengers?
A Yes.
Q And tell me what that is. I take a manual means this is a book that's provided to election workers that regulates the rights of poll challengers. Do I have that essentially correct?
A It's a document that describes the provisions in the Michigan election law that apply to both poll challengers and poll watchers, along with the requirements that apply to clerks and election inspectors with respect to poll challengers and poll watchers.
Q And do you recall, Mr. Brater, whether the O'Halloran decision had anything to do with the poll challenger manual that you just discussed?
MR. BECKERMAN: I'm going to object based on foundation.
THE COURT: Just a minute. Overruled. You can answer the question, Mr. Brater.
THE WITNESS: Well, again, I'm not really sure what lawsuit you're referring to. I believe you said there was a lawsuit from 2020. I am familiar with a lawsuit, I think, from 2022 on that subject, but I don't recall one specifically (indiscernible) 2020.
BY MR. MILLER:
Q Well, the date of the court order I'm looking at in the

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O'Halloran matter, dealing with the poll challenger manual, is March 9, 2021. Does that help you orient whether this is something that you recall?

A No. I mean, I don't recall specifically what that order was.

THE COURT: Okay. Let's move on. The witness -- you've asked him just about every way you can. You have not been able to refresh his recollection regarding this O'Halloran matter. So let's move on.

MR. MILLER: Okay, your Honor. Thank you.

BY MR. MILLER:

Q Do you recall a case called Carra, C-A-R-R-A? That would be the name of the plaintiff, and I'll represent that you were named in your official capacity as a defendant in that matter. Do you recall that?

A That sounds familiar, the plaintiff name, but I don't specifically recall that lawsuit.

Q Okay. Fair enough. Do you recall a case brought against you in your official capacity dealing with the issue of the six-foot separation between poll workers?

A I don't recall a lawsuit involving a six-foot separation between poll workers.

Q Was that a COVID --

A (Indiscernible.)

Q I apologize, Mr. Brater. I may have interrupted you.

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Go ahead and complete your thought.
A There may have been some litigation involving how far away poll challengers had to stand. I don't recall anything about poll workers having to stand six feet apart from each other.
Q Okay. Was the six feet apart -- was that a COVID regulation?
MR. BECKERMAN: Objection, vague as to what we're referring to by the "six feet apart."
THE COURT: Sustained.
BY MR. MILLER:
Q Do you recall whether, as of November 2020, there was a regulation in force in the state of Michigan that required poll workers to stay at least six feet apart from each other?
A I don't recall a regulation that required poll workers to stand six feet apart from each other.
Q Okay. Well, are you differentiating a regulation from state law?
A I was just answering your question. I don't recall a state law, either, that required poll workers to stand six feet apart from each other.
Q Fair enough. I'm going to pull up an exhibit and have you look at it, Mr. Brater. It is Exhibit 1042, and you'll see this on the screen just like the exhibits shown to you

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by Mr. Beckerman. So do you see the first page of what we've marked as Exhibit 1042? The title is "Michigan 2020 Voting Analysis Report."

A Yes.

Q Are you familiar with Exhibit 1042?

A I've looked at it.

Q And in what way did you familiarize yourself or become familiar with Exhibit 1042?

A I'm not sure when I first saw this document. I believe I probably saw it at some point in 2020.

Q Okay. And what's the process that either the Secretary of State or Bureau of Elections -- I don't know which one you're formally part of, maybe both -- but what's the process when you come into receipt of material like this that related to the 2020 general election?

A I don't know that there's a specific process. It would depend on the nature -- the manner in which we became in receipt of it and what was being requested. So, if it were being submitted to us in connection with, for example, a Board of State Canvassers meeting, we would provide it to the Board of State Canvassers for their review. If it were a litigation matter, we would forward it to the Department of Attorney General. So it really just depends on the nature in which we receive the information.

Q Okay. Well, how about this exhibit, the Michigan 2020

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Voting Analysis Report? Do you know how that was handled internally once you became aware of it?

A No.

Q Do you recall any of the allegations or -- let me strike that.

Do you recall any of the information or data depicted in the Michigan 2020 Voting Analysis Report?

A I can't recall that simply by looking at the cover of the report, no.

Q Well, let's take a look at page eight, and if we can blow up maybe the top half of -- well, actually, it's the third full paragraph, the one starting with "Findings." So I want to just read this to you, Mr. Brater. Can you see that okay? We blew it up for you on the screen.

A Yes.

Q Okay. So this one from Exhibit 1042 says:

> "Two Michigan counties stand out as problematic, Wayne and Oakland counties, 40,000 and 46,000 estimated excessive votes, respectively. Problematic districts and precincts within these counties demonstrate unusual Democrat-Republican ratios relative to their history and excessive vote in favor of Biden, often in excess of new

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Democratic registrations."

Does that refresh your recollection about the nature of the Exhibit 1042 report?

A I remember reading that statement.

Q And do you know what was done internally within the Department of State to investigate the findings that I just read to you in this report?

A No, but I would note that, I mean, there's -- just from reading the statement, it's clearly not a reflection of -- an accurate review of data, because there is no registration by party in Michigan. So the end clause there, where it says, "New Democrat registrations," that could not refer to anything in Michigan, because you don't register by party in Michigan.

THE COURT: Okay. Just a minute. I'm sorry. I missed what you said. So, in Michigan, voters are not registered by party? Was that your testimony?

THE WITNESS: That's correct, your Honor.

BY MR. MILLER:

Q And I don't know that you responded to my question, Mr. Brater. My question is, what investigation Department of State undertake after it received this report? I think you went on to explain that it didn't make sense to you, what you were reading here, but that wasn't quite the call of the question. The question was, what did you do about it?

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THE COURT: Just a minute. Wait. I think you need to lay a foundation as to who generated this report, and Mr. Brater has testified that he recalls seeing the report sometime in 2020. Mr. Miller, who generated the report?

MR. MILLER: There are different parts of the report that were generated by different specialists. So, for example, the Court might appreciate this guidance on page five. There's a section here, "Analysis of Michigan County Vote Counts," and that's by Doctor Young.

THE COURT: Okay. Mr. Brater, you testified that you saw this report sometime in 2020. How did you happen to see the report in 2020? How was it -- do you recall how it was provided to you or how you -- how it came into your possession?

THE WITNESS: I don't remember whether it was provided to me or delivered to the Bureau of Elections, or if I just saw it on the Internet. I really don't remember how I first saw this.

THE COURT: Okay. Thank you.

Mr. Miller.

MR. MILLER: Yes. Thank you, your Honor.

BY MR. MILLER:

Q I think the question was, what did you do to investigate this? And I'm not sure we got a response yet,

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Mr. Brater, so, if you have one, I'd appreciate it.
A Well, I don't recall taking any steps to investigate the impossibility of Democrat registrations in our state, given the fact that you don't register by party in our state.
Q Do voters in Michigan register by party leaning?
A I don't understand what that means.
Q Sure. Is the voter data tracked at all by the state of Michigan?
THE COURT: That's vague. Which voter data are you referring to?
MR. MILLER: Well --
THE COURT: I mean, address, date of birth?
MR. MILLER: Let me try it differently, your Honor.
BY MR. MILLER:
Q Do the political parties track voter data in Michigan for Michigan voters?
MR. BECKERMAN: Objection, foundation.
THE COURT: Overruled. You can answer if you know.
THE WITNESS: I believe they use private tools that predict voter behavior to identify people they think may be Democrats or Republicans, but I don't really know how that works.

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THE COURT: When you say "they," who are you referring to?

THE WITNESS: The political parties. Sorry, your Honor.

BY MR. MILLER:

Q And do you know whether the issues raised in this report, Exhibit 1042, were resolved in any way?

MR. BECKERMAN: Objection, vague.

THE COURT: Sustained.

BY MR. MILLER:

Q Did the Department of State take any action to address the issues raised in Exhibit 1042?

MR. BECKERMAN: Objection, asked and answered.

THE COURT: Overruled.

MR. BECKERMAN: Also vague as to the issues within Exhibit 1042, which haven't been established.

THE COURT: Sustained. This report appears to be at least 24 pages in length.

BY MR. MILLER:

Q Other than what I read to you, Mr. Brater, do you have any understanding of the detail in Exhibit 1042 with respect to voting issues in the 2022 general election?

A I believe this report had some claims regarding the number of votes cast, ballots cast, in Michigan and in certain areas in Michigan. Beyond that, I don't remember

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the details of any claims that were made, and I'm not aware of any action that the department took to attempt to verify any of these claims.

Q So let's have you take a look at what we've marked as Exhibit 1043. First question, Mr. Brater, is do you recognize at least the first page of Exhibit 1043, which is entitled "2020 Presidential Election: Startling Vote Spikes"?

A I don't remember whether I've seen this document before.

Q Let's put up Exhibit 1044, and I'm showing you the first page of Exhibit 1044. The title of this is "Edison Time Series Distribution Analysis in the 2020 Presidential Election." Mr. Brater, does this look familiar to you?

A I believe I've seen this before.

Q And do you know if the Department of State took any effort to investigate the information that was depicted in this report?

MR. BECKERMAN: Objection, vague, and lack of foundation. We don't know in what capacity Mr. Brater even saw this.

THE COURT: Sustained.

MR. MILLER: I think I missed part of the objection. Was the objection "capacity," don't know what capacity --

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THE COURT: Do you want to repeat your objection, Mr. Beckerman?

MR. BECKERMAN: That the question was vague. It's unclear in what capacity Mr. Brater received this. It's unclear to the extent he's aware of the various claims within this document.

THE COURT: Okay. And the objection is sustained.

BY MR. MILLER:

Q Would you have seen Exhibit 1044 in your capacity in the Department of State?

A I would have reviewed this document while working. I don't know that reviewing it necessarily would have been in connection with any specific responsibility, other than being generally aware of election issues in Michigan.

Q Okay. And do you know if any action was taken by the department in response to Exhibit 1044?

A Well, first, I don't see anything specific to Michigan here, in case I'm -- unless I'm missing something. Secondly, as I previously explained, this appears to be asserting that -- what they call a "dump of votes," which I understand to be lots of unofficial results appearing at the same time.

As I've explained, that's the way that unofficial results are reported. They're reported all at once, once the jurisdiction submits its ballot -- its election data,

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after all ballots have been tabulated. So, if we saw something that was saying it was suspicious that lots of election results were delivered at the same time, that's not something we would investigate, because it's not suspicious, but, having said that, I don't recall us, the Bureau of Elections, taking any specific action with regard to the claims made in this document.

MR. MILLER: If we can show Mr. Brater Exhibit 1046. This is another report, entitled "2020 Presidential Election Contrast Analysis."

BY MR. MILLER:

Q Let me ask you to start, Mr. Brater, does this report look familiar to you?

A I don't remember whether I've seen this document.

THE COURT: I'm sorry. You don't remember whether you've seen it, or when?

THE WITNESS: I'm sorry, your Honor. I don't remember whether I've seen this document or not.

THE COURT: Or not. Okay. Thank you. I just didn't hear you.

BY MR. MILLER:

Q Now, in response to some earlier questions -- I think I have this right, but correct me if I'm wrong -- you mentioned that Michigan uses voting machines. Is that a good way to put it, "tabulating voting machines"?

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A I think a more accurate way of putting it would be that Michigan uses tabulators to scan hand-marked paper ballots.
Q Fair enough. We often see the phrase "voting machines," and I think it's probably a little bit generic. So I think that you put it is correct, that these are tabulators. We understand each other on that terminology?
A Yes.
Q Okay. And you mentioned earlier that there were different types of tabulators used in different counties or townships in Michigan. Do I have that right so far?
A Well, to clarify, all cities and townships within a county will use the same type of equipment, "type" meaning Dominion, Hart, or ES and S, but all three systems are used in Michigan by various counties.
Q So ESS is just another manufacturer of a tabulator, correct?
A Yes.
Q And Hart is another manufacturer of a tabulator, correct?
A Yes.
Q And Dominion would be a third?
A Yes.
Q And all three, do those comprise the manufacturers of the tabulators for counties in Michigan?
A Yes. Those are the only three that our counties use.

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Q Okay. And do they operate similarly in terms of their functionality?

A I would say generally, yes, in the sense that they involve an election management system that is used to program cards which are placed in the tabulators, which are then used to tabulate and scan the paper ballots. Of course, there are differences in the, you know, specifics of how each system works, but generally they do the same thing.

Q And is it left up to the counties, at least initially, as to what manufacturer of tabulators it will use for its constituents?

A Yes. The County Clerk decides which manufacturer to use, or what equipment. They are instructed to consult with their city and township clerks, but the County Clerk makes the decision.

Q So let me ask you about a couple more cases, Mr. Brater. Another one is called League of Women Voters v. Secretary of State, and I know that you were named in your official capacity as a defendant in that one as well. Do you recall that case? And I'll represent, just to give you an orientation on the time, that that was filed in May 2020.

A I generally remember a case being filed by the League of Women Voters at that time, but I don't remember what, specifically, that one was about.

THE COURT: I'm sorry. You said May 2020?

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MR. MILLER: May 22, 2020, is the filing date.

THE COURT: Okay. Thank you.

BY MR. MILLER:

Q And do you recall that the League of Women Voters case had challenged mail ballot return?

A I don't recall it "challenging" that, as you phrased it. I don't understand what you mean by that.

Q Sure. Let me break it down a little bit further. Did it deal with the deadline for mail ballot returns?

A I remember a case having to do with a deadline for returning absent voter ballots. I don't remember whether it was that case specifically.

Q Okay. And as of -- this would be, obviously, before the November 2020 general election. What was the deadline to return mail ballots as of May 2020?

A The ballot had to be received by the clerk by 8:00 p.m. on election day.

Q Okay. And did that later change, either -- well, did that change before the general election in November 2020?

A No. That was the requirement for the November 2020 election.

Q Okay. And do you recall the outcome of the League of Women Voters matter that I just described for you?

MR. BECKERMAN: Objection, the witness has already stated he doesn't remember that case.

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THE COURT: Sustained.

BY MR. MILLER:

Q I'm going to try another one, Mr. Brater, a case called Leaf, L-E-A-F, v. Whitmer. The filing date on that is December 2020. Do you remember a case styled in that way?

A Not specifically. I do remember a case with that plaintiff name.

Q Do you recall a case, regardless of the name, that had raised the issue of the destruction of election data?

A I believe that there was one or more lawsuit in which allegations were made or claims were made regarding election data being allegedly destroyed, but I don't recall the names of those cases.

Q Okay. And for the November 2020 general election, what were the regulations with respect to the preservation of election data?

MR. BECKERMAN: Objection, relevance.

THE COURT: What is the relevance of that question? Well, first of all, what are you referring to as "election data"? Because there's, we know, a massive amount of information that is obtained and compiled in conjunction with elections. So what is the election data that your question is referring to?

MR. MILLER: It would be whatever -- state by state, but whatever information is retained with respect to

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the voting history, is primarily what it is.

THE COURT: Are you specifically asking Mr. Brater about a decision in -- or litigation that was filed in Michigan regarding the alleged destruction of election data?

MR. MILLER: Yes.

THE COURT: Which election data are you referring to?

MR. MILLER: Well, yes. I mean, it would go back however long it goes back. So there's regulations of the amount of time where that data is obligated to be retained, and that was one of the allegations --

THE COURT: I'm not asking about the -- your question assumes that Mr. Brater has an understanding as to what you're referring to as "election data." Specifically, what are you referring to?

MR. MILLER: Well, do you want me to ask Mr. Brater, and we can get the information from him? I mean, I can tell you what --

THE COURT: I think you need to first clarify what you're referring to in your question.

MR. MILLER: Sure. The data is information on individual voters. It's voting history. It's whether they voted by absentee or in person. It would contain addresses. It would obtain some other demographic information. Any number of fields of information constitute the voter data,

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changes from state to state.

THE COURT: Wait. Okay.

MR. MILLER: Yes.

THE COURT: I understood your question to be one regarding -- to pose to Mr. Brater as to whether he recalled a case that raised the issue of destruction of election data, not voter data. Are you now asking him about voter data?

MR. MILLER: Yes.

THE COURT: Okay. That's a different question.

Mr. Brater, you can answer that question.

THE WITNESS: I'm sorry. Could you repeat the question? I'm not sure that I'm being asked.

BY MR. MILLER:

Q Sure. Fair enough. So do you recall a case in 2020 that had raised the issue of destruction of voter data?

A I don't recall specifically whether an allegation was made that voter data was being destroyed. As I noted, I do recall there was one or more lawsuits filed that involved claims that election records were being destroyed.

Q Okay. And what sorts of election records did you understand were alleged to have been destroyed, what sort of data?

A I believe it may have related to electronic copies of electronic poll book data, but I don't specifically

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remember.
Q And what were the regulations in place for the November 2020 election with respect to the preservation of election data, perhaps poll book, P-O-L-L, B-O-C-K (sic)?
A Well, if by "regulations" you mean legal requirements, there's a variety that apply. When it comes to federal elections, the Civil Rights Act, I believe, of 1960 -- or I could say, "Civil Rights Act" -- requires the preservation of federal election records for 22 months following the election. That would include any election records covered by that act.

Additionally, there are state laws that have specific required retention periods for election records. They vary by the type of record. Some of them might go as long as six years. Some of them are much shorter. But all of those statutes would have been in effect for any applicable records for the November 2020 election.
Q For the state records that were required to be maintained for a certain period of time, do you recall whether there was a court finding or court order that those regulations had not been complied with by the state?
A No.

MR. MILLER: I don't have any further questions, Mr. Brater. Thank you very much.

THE COURT: Okay. Redirect, Mr. Beckerman?

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MR. BECKERMAN: Your Honor, if you could grant me just a moment to confer?

THE COURT: Okay. Let's take five minutes. I know we're going late, and I know it's very late there, Mr. Brater, but I figured we might as well try to finish up with you, so we don't have to ask you to return. Okay? So let's take a five-minute break.

THE CLERK: We're off the record.

THE COURT: And, Mr. Brater -- I'm sorry, just one second -- you can mute your electronic device and stop your video during the break, but don't click "Leave," please.

THE CLERK: We're off the record, your Honor.

THE COURT: Thank you.

(Proceedings recessed briefly.)

THE CLERK: We're back on the record, your Honor.

THE COURT: Okay. Thank you.

We're back on the record in the continued hearing of John Charles Eastman, in Case Number 23-O-30029.

Okay. Mr. Beckerman?

MR. BECKERMAN: Thank you, your Honor. I just have a very brief question.

REDIRECT EXAMINATION

BY MR. BECKERMAN:

Q Mr. Brater, does the Department of State in Michigan receive allegations of fraud pertaining to elections?

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A Yes.
Q Are those, to a certain extent, unsolicited?
MR. MILLER: Objection, vague.
BY MR. BECKERMAN:
Q I'll re-ask. Are those solicited or unsolicited from your department?
MR. MILLER: Still vague.
THE COURT: Overruled.
THE WITNESS: I would say they are primarily unsolicited, but they may be solicited to the extent that we instruct election officials to contact us if they have become aware of any election law violations.
BY MR. BECKERMAN:
Q Is there a threshold finding or a threshold investigation that is done by your department before determining whether to act or further investigate claims of fraud or illegality?
THE COURT: I'm sorry. Would you repeat the question?
MR. BECKERMAN: Yes.
BY MR. BECKERMAN:
Q Is there a threshold that needs to be met, as found by your department, as to the credibility or reasonableness of allegations of fraud before you investigate further?
MR. MILLER: Objection, vague.

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THE COURT: Sustained.

MR. MILLER: It's also compound.

THE COURT: Sustained.

BY MR. BECKERMAN:

Q Let me try that again. Are all claims of fraud received by your office investigated?

A No.

Q Why not?

A Well, in order to devote resources to the investigation of possible illegal activity, the department needs some sort of plausible or actionable information to investigate. So, generally speaking, the Department of State has an Office of Investigative Services, which will review potential criminal or other illegal activities, and then, at times, will refer things further to the Department of Attorney General or the Michigan State Police for criminal investigation.

In order for the Bureau of Elections to refer something to the Office of Investigative Services, the Bureau needs to have something that they can review and verify the veracity of. So, for example, the Auditor General report that we reviewed earlier discussed our investigation of potential duplicate voting. So, in that case, if we become aware that a voter record appears to have multiple vote entries, that's something that we can investigate. We can review the data, the qualified voter file. We can contact the clerk of the

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municipal jurisdiction and ask them to look at the paper records.

Then, based on what we find, that may be something where we determine it actually wasn't one person voting twice, but it was some of record keeping error, like a "Junior" and "Senior" getting mixed up, or we may find that it's suspicious, in which case we'll refer it for the Office of Investigative Services to review. But, you know, we are not a law enforcement entity, so, generally speaking, you know, we need something that we can actually look and review, that has some sort of verifiable, actionable information, before we can refer it for further investigation.

MR. BECKERMAN: Thank you. Nothing further.

THE COURT: Okay. Mr. Miller?

MR. MILLER: No further questions, your Honor.

THE COURT: Thank you, Mr. Brater. Again, I know it is very late where you are, and we appreciate you staying and participating in the proceeding today. You are excused as a witness. Have a good weekend.

THE WITNESS: Thank you, your Honor.

(The witness was excused.)

THE COURT: Okay. Let's see. Do we have anything else we need to address, other than the scheduling issue? I remember that Mr. Miller indicated, I think it was yesterday

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or maybe even the day before, that you'd like to address scheduling. At this point, our next -- we'll again be in session on this matter on August the 22nd, the 22nd through the 25th.

MR. MILLER: Yes, your Honor. Thank you.

THE COURT: Well, you know what? Before we get to that, let me ask Mr. Carling where things stand in connection with the Office of Chief Trial Counsel's case in chief.

MR. CARLING: We still have Doctor Eastman's testimony to finish, and we have our expert, Matthew Seligman, to call, and we have two remaining state officials, Bo Dul and Jake Rollow.

As I notified Mr. Miller, we're going to call Secretary of State Jocelyn Benson in aggravation only, so wouldn't be part of our case in chief. So our remaining witnesses are completing Doctor Eastman, Matthew Seligman, Bo Dul, and Jake Rollow.

THE COURT: Okay. Doctor Eastman, Matthew Seligman, Bo Dul, and who was the last, fourth, person?

MR. CARLING: Jake Rollow, R-A-L-L-O-W (sic).

THE COURT: Yes, I remember. He's on the witness list. Okay. And so how much more time do you think you're going to need with Doctor Eastman?

MR. CARLING: If we had a full day, I think we

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could complete that. I know it's been coming in piecemeal and slowly, but I don't think our testimony would take longer than that.

THE COURT: Okay. And then, Mr. Miller, are you inclined to cross-examine Doctor Eastman after the Office of Chief Trial Counsel completes his examination, or are you inclined to examine him in conjunction with your case in chief after OCTC rests?

MR. MILLER: Well, normally, I would probably take my client, if they're a defendant, as part of the plaintiff's case, or, here, OCTC case. Depends on when Mr. Seligman is going to be examined.

THE COURT: Okay. Because -- explain the relationship. If Doctor Seligman testifies, at what period of time will that determine which approach you're going to take?

MR. MILLER: Yes. Well, if we -- if Mr. Seligman comes before Doctor Eastman, then I would probably do Doctor Eastman's examination then, as soon as Mr. Carling completes. If Mr. Seligman is coming later, then I would probably wait to put on Doctor Eastman as part of my case.

THE COURT: Okay. And how much time do you think you're going to need with Doctor Seligman, Mr. Carling?

MR. CARLING: I think the State Bar's examination of him would be a half-day.

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THE COURT: Okay.

MR. MILLER: My view is that that's ambitious, but I certainly trust the good faith estimate.

MR. CARLING: Well, I wasn't including Mr. Miller's cross-examination.

MR. MILLER: I didn't think that it did.

MR. CARLING: Okay.

MR. MILLER: It just would seem -- and that's not intended to have a reflection on the length of examination.

THE COURT: It kind of does --

MR. MILLER: Everybody is going to do the best they can.

THE COURT: -- but it's okay.

MR. MILLER: Yes.

THE COURT: Okay. Well, these are --

MR. MILLER: It has gone --

THE COURT: We're just -- these are estimates. These are estimates.

MR. MILLER: Fair.

THE COURT: I'm trying to figure out where we stand.

MR. MILLER: I'll leave it alone.

THE COURT: Okay. Bo Dul, how much time you'll need for that witness?

MR. CARLING: An hour.

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THE COURT: Okay. And Jake Rollow?

MR. CARLING: An hour.

THE COURT: And that will be it for OCTC's witnesses?

MR. CARLING: Yes, for our case in chief.

THE COURT: Right, for your case in chief.

And then, Mr. Miller, with regard to your witnesses, in what order are you inclined to put them on? You've identified a number of character witnesses, but I read your identification of those witnesses to mean that some you anticipate will offer testimony, either in person or remotely, and then others will provide declarations. So how many do you anticipate will testify, and how many will offer declarations? I don't need to know exactly who, just to kind of get a sense of how much time we'll need for testimony.

MR. MILLER: Mr. Mayer can correct me, but I believe that we had three or so that were planning on testifying live.

MR. MAYER: Three to four sounds right.

MR. MILLER: Three to four of the character witnesses. I had discussed, but not resolved, with Mr. Carling about just submitting those that didn't testify live by declaration. I think he was still considering that. Other than that, we can put them on the screen and they can

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testify. I think it was our offer that they be able to testify by declaration, which would obviously have a great effect on the time needed for those witnesses.

THE COURT: Right. And I understand, then, that that issue is still being sorted out between the two of you, right?

MR. MILLER: It's on the table. We've discussed it. I don't know that we've gotten back to that one.

THE COURT: Okay. So, then, you all can talk about that during this upcoming break in the proceedings.

Okay. And then, with regard to other witnesses that you identified, Mr. Miller, which -- let me see. Where are they? They would be in your offer of proof. How many other witnesses, other than the good moral character witnesses, other than Doctor Eastman, do you intend to call?

MR. MILLER: Mr. Mayer, can you give us the scorecard?

MR. MAYER: About 20, except for the one she's excluding.

MR. MILLER: Non-character witnesses, we have approximately 20, and the schedules will undoubtedly change as we move into August. I don't know that we've choreographed all that perfectly yet.

I would say I would tend to take Doctor Eastman toward the beginning of that, but that may move around a

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little bit. Doctor Eastman will clearly be, you know, the longer, depending on how much I've done as part of the Bar case, but that testimony from Doctor Eastman will be considerable.

THE COURT: Okay. So does this mean that the parties -- unfortunately, I don't even see what I did with my calendar, but does this mean that the parties are anticipating that you're going to make yourselves available not only the week of August the 22nd, but the week after that?

MR. MILLER: Well, we tackled that as part of the conversations to lead to the next scheduled session, the August 22nd through the 25th. I know that we did come up with dates that were compatible as a second week. We never got that far with your Honor. We just scheduled the August 22nd through the 25th dates.

I'd have to go back and refresh our recollections about what dates that we -- another four days that we were going to ask the Court if you wanted to schedule those as well. I believe it was --

THE COURT: What are those dates?

MR. MILLER: -- in early September.

THE COURT: I don't want the time to pass and then, by August, folks say, "I'm sorry. I have something else set for those dates," because we're not going to drag

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this out forever.

MR. MILLER: I think that was our intent, honestly, your Honor, was let's pick as many dates as we can right now, and we've worked hard to select dates that were compatible with all the schedules here, and I could probably find it, and Mr. Carling may know, but I believe it was sometime in early September. And I agree, if we're going to do that -- and to me, it sounds like we need it -- we should do it know, before those dates don't become available. I'll take a quick look to see if I can find it.

THE COURT: Okay. I need for you all to figure out those dates, so I can -- wait. I can look at --

MR. CARLING: The week you had proposed was September 12th through the 15th.

MR. MILLER: Yes. Then I trust you on that, and that would mean that I had cleared it with our office. Mr. Carling and his office were available, and Doctor Eastman was available. So I think the result of our conversations was August 22 to 25, and September 12 through 15.

THE COURT: I'm really hesitant to set September 12th through the 15th, but I'm going to ask the parties to hold those open, because, if the parties move expeditiously, this really -- this case -- thank you very much -- really should be resolved by the 25th of August. So the parties are not available that following week, the 29th through the

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1st of September?

MR. CARLING: I'm available, your Honor.

MR. MILLER: Yes. I mean, I would have gone through the process in good faith to identify when in that time period I was available. I can look up specific calendaring issues, but I'm pretty certain there's probably a trial in there.

THE COURT: Or the week of September 5th through the 8th?

MR. CARLING: I'm available that week.

MR. MILLER: Yes. I'm in trial downtown.

THE COURT: The week of September 5th?

MR. MILLER: Yes, and I can tell you when it starts. Yes, that was the problem. It starts on the 28th of August.

THE COURT: I see.

MR. MILLER: So I'm cutting it real close with the dates here and then the dates --

THE COURT: Is that likely to go? Do you have a settlement conference set in that?

MR. MILLER: I don't believe there's a settlement conference attached to this trial date.

THE COURT: Which department? Which department is that?

MR. MILLER: I believe it's 72. Let me check. It

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is 72, Judge Kraber (phonetic), maybe?

MR. MAYER: Kin. Who is it, Kin?

MR. MILLER: Kin? Okay.

THE COURT: I'm sorry. Which judge?

MR. MILLER: Kin. K-I-N?

MR. MAYER: K-I-N.

MR. MILLER: K-I-N. Judge Kin.

THE COURT: Okay. Well, I'm going to ask the parties to hold. Between now and the end of August, you could have a very successful settlement conference in that matter, which would mean that it sounds like the parties would then be ready to proceed that last week of August.

So I'm going to ask you to hold that week, just in case your case does settle, and if not, then -- well, I'm going to say, then, in addition to that week. I'm asking you to hold that week of the 12th, starting on September 12th, through the 15th, and that will be it. Okay?

And, of course, if that settles, Mr. Miller, I'll expect you to notify my courtroom and to contact -- copy Mr. Carling and Mr. Beckerman and Ms. Wang as well, informing them about the status of that case. Okay?

MR. MILLER: Of course.

THE COURT: All right. Thank you.

Okay. So, when we return on the 22nd -- well, first of all, I think -- 22nd of August. The Court's order

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remains in effect that requires the party to identify, at least five court days in advance, which witnesses you intend to call.

So I would expect OCTC to comply with that, at least five court days in advance of the August 22nd date, and, of course, that order also provides that the counts, the exhibits, et cetera, to be identified -- that are anticipated to be used, but that would (indiscernible) to be identified as well. Okay?

Let's see. So that leaves our -- the refiling of what will be characterized as "Motion in limine number seven," the OCTC's opposition to that motion in limine to be filed, and I think -- okay. So we changed that to July the 10th, and I think that's about it. Yes. And the parties are to report to the Court regarding motion in limine number six, whether an agreement was reached, and, if not, I will go ahead and get my final order out by July 7th.

MR. MILLER: Is that -- Mr. Carling, is that date acceptable with you? You wanted to move the last July 7th date.

MR. CARLING: I can do that. We can confer about that, and that's fine.

MR. MILLER: Okay.

THE COURT: Okay. Does anyone have anything else? I want to make sure we wrap any other loose ends, so that we

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don't forget them when we return in August.

MR. CARLING: Not from the State Bar.

THE CLERK: I have a question, Judge. On Exhibit 169, I know you objected -- I'm sorry, Mr. Miller objected. You overruled the objection, so is 169 admitted?

THE COURT: 169?

THE CLERK: Yes, State Bar's.

THE COURT: Elizabeth is inquiring about Exhibit 169.

MR. BECKERMAN: I understand it was admitted.

THE CLERK: I know you overruled the objection --

THE COURT: One second. Let me grab -- here it is.

THE CLERK: -- so I just wanted to make sure you admitted it.

THE COURT: I believe I did it. I received 169 into evidence.

THE CLERK: Okay. Thank you.

THE COURT: The other thing is that there was another exhibit. Let's see. 305. Seems to me there was another exhibit.

THE CLERK: You addressed Exhibit 305 --

THE COURT: Yes, and 99.

THE CLERK: -- and you addressed 99. Yes.

THE COURT: Yes, I addressed both of those, but

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there's another exhibit. Okay. One second. Let me just take a quick look. Okay. So I think that's probably it, then. I don't know what the other one was.

Okay. Does anyone have anything else?

MR. CARLING: Not from the State Bar.

MR. MAYER: The only other unresolved issue, your Honor, would be the offer of proof that we just received from the Office of Trial Counsel yesterday, which concerns the harassment of election officials. I don't believe we've gotten a ruling on that.

THE COURT: No, you haven't gotten a ruling on that. You actually -- as I recall, that was just filed -- was it yesterday?

THE CLERK: I think it was yesterday.

THE COURT: Yes.

MR. BECKERMAN: Yes, your Honor, yesterday.

THE COURT: Let me see if I have it with me. I mean, are you seeking to exclude that evidence? Okay. Somebody needs to -- we're going to get out of here in five minutes. Hold off. I hear somebody's cell phone. I don't even think I have that up here with me.

THE CLERK: Mr. Carling gave me it yesterday, but it was hole-punched on the top.

THE COURT: Okay. Let me just see which one -- no, not this one. They're talking about filing regarding

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the offer of proof, OCTC's offer of proof re: harassment evidence.

THE CLERK: Here it is. Sorry I gave you the wrong one.

THE COURT: Right.

So, Mr. Mayer, you're inquiring as to whether I'm going to make a ruling on the offer of proof?

MR. MAYER: Well, yes. We're looking for some guidance or instruction regarding the adequacy of their offer of proof. We didn't file a motion in limine to exclude the evidence, but we did request an offer of proof. So I think we're looking to the Court of some indication of whether it feels that the response is sufficient or adequate.

THE COURT: Okay. I will have to drill down into this a bit more. I have not had a chance to take a close look at it.

MR. MAYER: Thank you, your Honor.

THE COURT: Okay. Does anyone have anything else?

MR. CARLING: No.

THE COURT: Mr. Miller?

MR. MILLER: Nothing from Respondent, your Honor. Thank you.

THE COURT: Okay. Thank you.

MR. MILLER: Thank you.

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THE COURT: All right. Everyone enjoy your weekend and your 4th of July, and I will see you all -- and I guess Labor -- no, not Labor Day yet. I will see you all in August. Thank you.

MR. MILLER: Thank you, your Honor.

MR. BECKERMAN: Thank you, your Honor.

MR. CARLING: Thank you.

MS. WANG: Thank you, your Honor.

MR. MILLER: Thanks for the extra time today, too.

THE CLERK: We're off the record, your Honor.

MR. BECKERMAN: Thank you, Madame Clerk.

(Proceedings concluded.)

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CERTIFICATION OF TRANSCRIBER

I, Holly Steinhauer, do hereby certify that the foregoing 234-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript of the hearing in the matter of John Charles Eastman, Esq., held on June 30, 2023.

_____ _____

Date Transcriber

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/1/2023 5:54:19 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 10/25 CO court order
Attachments: 10_25_2023 Order re Donald J_ Trump's Motion to Dismiss Filed September 29, 2023.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

This order from Colorado addresses political question, self-execution, and some other issues.

Jonathan L. Williams | **Senior Counsel**
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DATE FILED: October 25, 2023 8:38 AM

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN **v.** **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP **and** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	**Δ COURT USE ONLY Δ** Case No.: 2023CV32577 Division: 209

ORDER RE: DONALD J. TRUMP'S MOTION TO DISMISS FILED SEPTEMBER 29, 2023

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 29, 2023. Having considered the parties' briefing, the relevant legal authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

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I. LEGAL STANDARD

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as "documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Denver Post*, 255 P.3d at 1088.

II. ANALYSIS

In his Motion to Dismiss, Intervenor Trump makes the following arguments: (1) the question before the Court is a non-justiciable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from

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judging presidential qualifications; (4) Section 3 of the Fourteenth Amendment does not apply to Intervenor Trump; (5) the Petition fails to state a claim that violence constituted an insurrection or President Trump engaged in an insurrection; and (6) the case should be moved to Washington, D.C. under Colorado's *forum non conveniens* statute.

a. Non-Justiciable Political Question

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). A case "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United* States, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) In such a case, the United States Supreme Court has held that a court lacks the authority to decide the dispute before it. *Zivotofsky*, 566 U.S. at 195. This exception is narrow. *Id.* A court cannot avoid its responsibility to enforce a specific statutory right because the issues have political implications. *Id.* at 196.

In this case, Intervenor Trump argues that the U.S. Constitution reserves exclusively to the U.S. Congress the decision as to whether a candidate is unqualified under Section 3 of the Fourteenth Amendment.[1] He does not argue the second basis

[1] Intervenor Trump claims that Courts have dismissed "*every* Section Three challenge brought against President Trump—and every other federal candidate or officeholder—arising from the events of January 6, 2021." Intervenor Trump, however, cites nary a case. Presumably, this is because those cases have been dismissed for lack of federal standing. In this case, C.R.S. § 1-1-113 clearly gives Petitioners standing.

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under the political question doctrine—that a Court is incapable of resolving the question—nor could he. Instead, Intervenor Trump argues the U.S. Constitution reserves exclusively for the United States Congress the power under Section 3 of the Fourteenth Amendment to determine whether a party may take office. In doing so, Intervenor Trump relies on cases that address the question of whether various Presidential candidates (Barack Obama, John McCain, and Ted Cruz) were natural born citizens. He does not cite a case holding that the question before this Court (whether a candidate is barred under Section 3 of the Fourteenth Amendment) is barred under the political question doctrine.

i. Intervenor Trump's Cases

Intervenor Trump cites the Third Circuit in *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) for the proposition that the question of whether Barack Obama was a natural born citizen was a non-justiciable political question outside the province of the judiciary. The Court in *Berg* makes no such holding. Instead, when describing the history of the case, the Third Circuit states, "[w]e also denied that motion, reiterating Berg's apparent lack of standing and also stating that Berg's lawsuit seemed to present a non-justiciable political question." *Id.* This Court does not have this order in front of it, in which the Third Circuit apparently stated, "the lawsuit seemed to present a non-justiciable political question." *Id.* However, even if it did, it appears that whatever the Third Circuit did say regarding the political question doctrine was *dicta*.

In addition to *Berg*, Intervenor Trump cites a series of trial court opinions, and one California appellate opinion, some published, some unpublished, that largely hold

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or state in *dicta* that the plaintiffs' claims are likely also barred under the political question doctrine as a question committed to a coordinate political department. The Court addresses the cases Intervenor Trump cites below.

In *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145 (N.D. Cal. 2008), an elector pledged to a third-party candidate filed a motion for preliminary injunction seeking to remove John McCain from the ballot because he was allegedly not a natural born citizen. The Court denied the motion for preliminary injunction because the plaintiff was not likely to succeed on the merits. *Id.* at 1146. The Court then noted that Article II of the Constitution prescribes the number of presidential electors to which each state is entitled, and the Twelfth Amendment prescribes the manner in which the electors shall elect the President. *Id.* The Court examined 3 U.S.C. § 15 which directs that Congress "shall open, count, and record the electoral votes" and provides a mechanism for objections. *Id.* at 1147. Finally, it turned to the Twentieth Amendment which provides instructions on how to proceed if a president elect fails to qualify. *Id.* Having looked at these various constitutional provisions and statutes, the *Robinson* Court then concluded, without invoking the political question doctrine, that "[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course." *Id.* The course it referred to was a 3 U.S.C. § 15 objection to a candidate and the Twentieth Amendment procedures addressing a failure to qualify. The idea, however, of Court intervention after "Congressional processes have run their course" is directly contrary to a holding that this is a political question—where there is no judicial review permitted.

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In *Kerchner v. Obama,* 669 F.Supp.2d 477, 479-80 (D. N.J. 2009), two citizens brought actions against various government officials, including the U.S. Congress, alleging President Obama was not a natural born citizen and seeking to compel Congress to hold hearings, conduct investigations, and take certain actions following said investigations. The Court held the plaintiffs did not have Article III standing. *Id.* at 483. In a footnote, the Court noted that even if there was standing, the case likely fell into "the category of generalized grievances that are most appropriately handled by the legislative branch." *Id.* at n. 5. It continued that "it appears that Plaintiffs have raised claims that are likewise barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department," citing to Article II, Section 1 of the U.S. Constitution and the Twelfth Amendment, Section 3. *Id.*

Keyes v. Bowen, 117 Cal.Rptr.3d 207 (Cal. Ct. App. 2010) is the only appellate court opinion cited that has addressed the issue. There, the appellate court held the Secretary of State had no duty to investigate presidential eligibility and extensively cited *Robinson, supra*, for the proposition that "presidential qualification issues are best resolved in Congress." *Keyes*, 117 Cal.Rptr.3d at 216.

Of the cases Intervenor Trump relies on, the Court in *Grinols v. Electoral Coll.,* No. 2:12-CV-02997-MCE-DAD, 2013 WL 2294885 (E.D. Cal. May 23, 2013) (unpublished), *aff'd*, 622 F.App'x 624 (9th Cir. 2015) had the most extensive analysis. First, it noted that the "natural born citizen" requirement does not designate which branch should address whether the candidate is qualified. *Id.* at *6. It further noted Article II, Section 1 of the Constitution establishes that the Electoral College elects the

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President. *Id.* It then pointed out that "[t]he Twelfth Amendment empowers the President of the Senate to preside over the meeting between the House of Representatives and the Senate in which the President of the Senate counts the electoral votes." *Id.* According to the Court, "[t]he Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the Unites States [sic]." *Id.* Finally, the Court pointed out that "the Twenty-Fifth Amendment provides for removal of the President should he be unfit to serve." *Id.* Based on those provisions, the Court held "the Constitution make[s] clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States." *Id.*

In *Strunk v. New York State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (unreported disposition), *aff'd*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015) the Court held the framework for the Electoral College and its voting procedures for President and Vice President is found in Article II, Section 1 of the Constitution. More specifically, the Court noted that 3 U.S.C. § 15 dictates "the counting of electoral votes and the process for objecting" to votes. *Id.* According to the Court, "[n]o objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made." *Id.*

Finally, in *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (unpublished), the Court, relying on *Keyes* and *Grinols, supra*, held "this court can find no authority in the Constitution

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which would permit it to determine that a sitting president is unqualified for office or a president-elect in unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government."

ii. Petitioners' Cases

Petitioners primarily cite *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016),[2] *aff'd*, 134 A.3d 51 (Pa. 2016), *cert. denied*, 580 U.S. 867 (2016). There, the Court reviewed Article II, Section 1 and the Twelfth Amendment of the United States Constitution which set forth the procedure by which a person is elected to the office of the President. *Id.* at 650. The Court in *Elliot* described Article II, Section 1 and the Twelfth Amendment as accomplishing the following:

> 1. vested in the legislatures of the several states, not Congress, the power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled."
> 2. commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation's seat of government.
> 3. commanded, upon receipt, the President of the Senate open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives.
> 4. provide that only in the case of a tie, or the absence of a majority, does the Constitution allow Congress to choose the President and Vice President.

Id. (quoting U.S. CONST. art. II, § 1, cl. 2).

After reviewing the various constitutional provisions that supposedly support the Court dismissing the case due to the political question doctrine, the Court in *Elliot* concluded that the Constitution does not vest the Electoral College with the power to

[2] The Pennsylvania Commonwealth Court is an appellate court that also has original jurisdiction to hear election cases.

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determine eligibility of a presidential candidate. *Id.* at 650-51. The Court similarly concluded that Congress has no control over the process other than deciding the day on which electors "'give their votes.'" *Id.* at 651 (quoting U.S. CONST. amend. XII). The Court then compared the provisions regarding Presidential eligibility with those regarding the eligibility of Congress where the U.S. Constitution clearly vests in Congress the power to determine the eligibility of its own members. *Id.* The Court concluded that because the Constitution does not vest any entity of the federal government with the power to ensure that only persons who are constitutionally eligible become the President, that determination is reserved for the Courts. *Id.*

The only other case the Petitioners cite that squarely addresses this issue is *Williams v. Cruz*, OAL Dkt. No. STE 5016-16, pp. 4-5 (N.J. Off. of Admin. Law Apr. 12, 2016), a New Jersey administrative law decision where the judge examined the various Constitutional provisions and held:

> While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship . . . Congress is not afforded any similar role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to the Congress.

iii. Analysis

Intervenor Trump argues the weight of the law favors a holding that the political question doctrine precludes judicial review, and that Petitioner can only cite "two idiosyncratic state cases that never received appellate review."[3] The Petitioners, on the

[3] The Pennsylvania Supreme Court affirmed the decision in *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016).

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other hand, argue nothing in the Constitution commits to Congress and the Electoral College the exclusive power to determine presidential qualifications and that Intervenor Trump's cases are distinguishable because in none of those cases did the plaintiffs bring pre-election suits in state court under a state law authorizing ballot access challenges.

The Court agrees with Intervenor Trump that the weight of cases have held that challenges to an individual's qualifications to be President are barred by the political question doctrine. The Court, however, agrees with Petitioners that most of the cases Intervenor Trump cites involved post-election attempts to remove former President Obama from office and that there is at least some distinction between ballot access cases and removing a sitting President. Further, most of the cases concluding that the political question doctrine applies did so with very little analysis of what the constitutional provisions they rely on provide. For that reason, the Court looks to the specific provisions to determine if they meet the "textually demonstrable constitutional commitment of the issue to a coordinate political department" standard. *Baker*, 369 U.S. at 217.

ARTICLE II OF THE U.S. CONSTITUTION

U.S. CONST. art. II, § 1, cl. 2 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This clause vests the States authority to appoint electors. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to

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determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 3 provides:

> The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

This clause directs that the Electors shall meet and certify a list of whom the Electors voted for and transmit it to the President of the Senate. The President of the Senate shall the open the Certificates and count them. It also outlines what happens if there is a tie. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

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U.S. CONST. art. II, § 1, cl. 4 provides: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

This clause says that Congress sets the date that the Electors meet to certify their votes. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 5 provides:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

While this clause sets out certain constitutional qualifications, it says nothing regarding what branch of the government shall determine if the candidate meets those eligibility qualifications.

U.S. CONST. art. II, § 1, cl. 6 provides:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This clause addresses what happens when a President is removed and does not address who determines whether a candidate for President or President-elect meets eligibility qualifications.

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THE TWELFTH AMENDMENT

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

The Twelfth Amendment modifies Article II, Section 1, Clause 3 and makes it clear that the President and Vice President are chosen separately but together. If there

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is no majority or a tie for President, the House of Representatives chooses the President. In the interim, the newly elected Vice President will serve as President. While the Twelfth Amendment references the "constitutional disability of the President" and that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President," the Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for president or a President-elect is constitutionally ineligible.

SECTION 3 OF THE TWENTIETH AMENDMENT

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX, § 3.

This provision addresses what happens if the President-elect dies or fails to qualify. It also allows Congress to make law to provide for the case when neither the President-elect nor the Vice President-elect qualify. *Robinson*, 567 F.Supp.2d at 1147; *Keyes*, 117 Cal.Rptr.3d at 216; and *Grinols,* 2013 WL 2294885 at *6 cite the Twentieth Amendment for the proposition that it empowers Congress to create a procedure if neither the President-elect nor Vice President-elect qualifies to serve as President of the United States. *See Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905, 911 (E.D. Cal.

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2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) ("Section 3 [of the Twentieth Amendment] was intended to provide for a then-unprovided for contingency: the selection and succession of the presidency in the event that the president elect, vice president elect, or both could not assume office" (citing 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable))). And Congress did just that when it passed the Presidential Succession Act of 1947, 3 U.S.C. § 19. What Congress has not done is provide for any process to determine whether a President qualifies and what entity is supposed to make that determination. Further, nothing in the text of the Amendment commits to Congress the exclusive authority to render judgment on a presidential candidate's fitness to be placed on the ballot. *See Lindsay*, 750 F.3d at 1065 ("nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president" (emphasis in original)). However, unlike the other Constitutional provisions relied on by the decisions Intervenor Trump relies on, section 3 of the Twentieth Amendment does include the word "qualify" and suggests that someone or something has decided whether a President qualifies to be President. It is for this reason that the Court has asked the Parties to provide the Court with testimony regarding the historical meaning and interpretation of this Amendment, if such evidence exists.

3 U.S.C. § 15

Finally, the decisions Intervenor Trump cites rely heavily on 3 U.S.C. § 15 for the proposition that there is an objection process when the electoral college votes are counted and that it is during this process that the objections to the qualifications of a

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President should be made. *Robinson*, 567 F.Supp.2d at 1147 ("It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify"); *Keyes*, 117 Cal.Rptr.3d at 216 (quoting *Robinson, supra*); *Strunk*, 2012 WL 1205117 at *12 ("the counting of electoral votes and the process for objecting for the 2009 Presidential election is found in 3 USC § 15. . . . This required the meeting of the joint session of Congress to count the 2008 electoral votes. . . . No objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made. This is the exclusive means to resolve objections to the electors' selection of a President or a Vice President"); *Taitz*, 2015 WL 11017373 at *13 (noting that the *Keyes* Court cited the Twelfth Amendment and 3 U.S.C. § 15 when it "stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy"); *see also Oines v. Ritchie*, Dkt. No. A12-1765 (Minn. Oct. 18, 2012) (citing *Keyes* in support of the conclusion that 3 U.S.C. § 15 provides the avenue for challenging constitutional qualifications of presidential candidates).

Congress, however, amended 3 U.S.C. § 15 in 2022. As amended, 3 U.S.C. § 15(d)(2)(B)(ii) provides: "The only grounds for objections shall be as follows: (I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1). (II) The vote of one or more electors has not been regularly given."

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As such, it appears that Congress has disavowed any ability it once had to consider objections other than the two listed above—including any regarding the constitutional qualifications of the President-elect.

SECTION 3 OF THE FOURTEENTH AMENDMENT

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

U.S. CONST. amend. XIV, § 3.

This provision clearly gives Congress the ability to remove a constitutional disability should a person be disqualified under Section Three of the Fourteenth Amendment. However, it says nothing regarding what government body would adjudicate or determine such disability in the first instance.[4] The Court notes, however, it would be strange for Congress to be the only entity that is empowered to determine the disability and then also the entity that is empowered to remove it.

[4] Intervenor Trump argues that "Section Three itself contains an exclusive grant of jurisdiction to Congress." The argument is that if this Court were to disqualify Intervenor Trump from being a candidate, it would strip Congress of the ability to remove the disability. The Court disagrees. If this Court were to disqualify Intervenor Trump, there would be nothing standing in the way of Congress immediately removing that disability. In fact, there is nothing standing in Congress's way of removing the disability prior to Secretary Griswold or this Court determining whether Intervenor Trump is disqualified in the first instance.

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The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong "textually demonstrable commitment" necessary for the Court to find the matter nonjusticiable. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members"); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a "textually demonstrable commitment" to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

The Court will, however, revisit this ruling when it makes a final ruling following the hearing set to begin October 30, 2023 to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. *Baker*, 369 U.S. at 198 ("In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.")

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b. Whether the Fourteenth Amendment Is Self-Executing

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues "Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing Plaintiffs to bring such a claim in court." Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response causing the authors "to substantially modify their own analysis" and for a well-respected constitutional scholar, Steven Calabresi, to reverse his position on the matter. The Court has reviewed the modifications of the Baude and Paulsen law review article and the modifications do not in any way reverse their positions. Further, the retraction from Calabresi had nothing to do with whether Section Three was self-executing but was rather based on whether Section Three applies to Presidents. This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions.

Intervenor Trump argues there is "[a]mple precedent" supporting Blackman and Tillman's conclusion that Section Three was not self-executing. But the only precedent cited is *In re Griffin*, 11 F.Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit.

The Petitioners, on the other hand, argue that whether Section 3 is self-executing is irrelevant because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action. The Court agrees. To the extent that the Court ultimately

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holds that C.R.S. § 1-4-1204 allows the Court to order Secretary Griswold to exclude a candidate under the Fourteenth Amendment, the Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation. *See, e.g., State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3 challenge under state *quo warranto* law); *Worthy v. Barrett*, 63 N.C. 199, 200-01 (1869) (adjudicating Section 3 challenge as *mandamus* action), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869) (adjudicating Section 3 challenge as *mandamus* action); *State ex rel. Sandlin v. Watkins*, 21 La.Ann. 631, 632 (La. 1869) (adjudicating Section 3 challenge under state *quo warranto* law); *Rowan v. Greene*, Dkt. No. 2222582-OSAH-SECSTATE-CE-57- Beaudrot (Ga. Off. Admin. Hr'gs May 6, 2022) (state administrative Section 3 challenge).[5]

[5] Intervenor Trump argues that none of the cited cases are relevant as such cases "relied upon state laws patterned after Section Three that applied to state officials." Not so. In these cases, state law provided the procedural avenue for challenging a candidate's fitness for office, but the substantive question remained qualification under the Fourteenth Amendment, not merely a state law patterned after Section Three. *See Griffin*, 2022 WL 4295619 at *16 ("The Court therefore concludes that . . . Mr. Griffin became disqualified under Section Three of the Fourteenth Amendment"); *Worthy*, 63 N.C. at 200 (procedural statute in question "provides that no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State" (internal quotation omitted)); *Tate*, 63 N.C. at 309 (applying the rule in *Worthy* to bar County Attorneys from office, to wit: "We are of the opinion that he is disqualified from holding office under the 14th Amendment of the Constitution of the United States"); *Sandlin*, 21 La.Ann. at 631-33 (in *quo warranto* proceeding brought under "the intrusion act (No. 156, acts of 1868)," qualification of candidate was assessed under both the "eligibility act, No. 39, of the acts of the State Legislature of 1868, and the third Section of the Fourteenth Amendment to the Constitution of the United States." Supreme Court of Louisiana held that the eligibility act was not applicable to the proceeding, and that "[t]he inquiry in this case is, has the defendant, under the provisions of the fourteenth amendment to the Constitution of the United States and those of the act of Congress of twenty-fifth June, 1868 [re-admitting secessionist states to the Union, requiring compliance with Section 3 of the Fourteenth Amendment], the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District.").

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c. Whether Federal Preemption Applies

Intervenor Trump argues that federal law has preempted the States from governing ballot access for presidential candidates.

Under the field preemption doctrine, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

> [Congressional] intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In support of this argument, Trump cites the Twelfth Amendment, the Twentieth Amendment, and 3 U.S.C. § 15 for the proposition that federal law occupies the field.

Based on the discussion above regarding the political question doctrine, it is unclear to the Court that there is any mechanism under federal law to determine whether a candidate for President or President-elect meets the eligibility requirements let alone a framework of regulation so pervasive that Congress left no room for the States to supplement it. The Court declines to dismiss this action based on the field preemption doctrine.

d. Whether Section Three of the Fourteenth Amendment Applies to a President

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

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e. Whether President Trump Engaged in an Insurrection

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

f. Forum Selection Clause

Lastly, Intervenor Trump seeks dismissal of the action based on the forum. Colorado law sets out five requirements which all must be met to dismiss on *forum non conveniens* grounds. Pursuant to C.R.S. § 13- 20-1004(1), they are:

1. "The claimant or claimants are not residents of the state of Colorado." C.R.S. § 13-20-1004(1)(a). Here, all Petitioners are Colorado Residents.

2. "An alternative forum exists." C.R.S. § 13-20-1004(1)(b). Intervenor Trump has not identified a viable alternative forum. The three forums he suggests are: (1) Congress—but as discussed above, there is no mechanism by which a Colorado elector can object to Intervenor Trump's qualification to Congress; (2) Criminal Prosecution—Intervenor Trump provides no explanation about how the Petitioners can seek criminal prosecution against Intervenor Trump in Washington, D.C.; and (3) Federal Court in Washington, D.C. But, as Intervenor Trump acknowledges, the Petitioners do not have standing in Federal Court. No adequate alternative forum, therefore, has been identified.

3. "The injury or damage alleged to have been suffered occurred outside of the state of Colorado." C.R.S. § 13-20-1004(1)(c). The alleged injury, in this case, is having an ineligible candidate on the ballot. That injury will occur in Colorado.

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4. "A substantial portion of the witnesses and evidence is outside the state of Colorado." C.R.S. § 13-20-1004(1)(d). Here, Intervenor Trump concludes this is the case but has not put forth any specific witness that he'd like to attend that is unavailable at trial.

5. "There is a significant possibility that Colorado law will not apply to some or all of the claims." C.R.S. § 13-20-1004(1)(e). There is no doubt that Colorado election law will play a significant part in any decision this Court renders.

As Intervenor Trump acknowledges, except in the "most unusual circumstances," a resident plaintiff's choice of forum is honored. *McDonnell-Douglas Corp. v. Lohn,* 557 P.2d 373, 374 (Colo. 1976). In fact, Colorado courts have "extremely limited discretion under this doctrine to dismiss an action filed by a resident plaintiff." *Cox v. Sage Hosp. Res., LLC*, 413 P.3d 302, 304 (Colo. App. 2017). Here, the Petitioners all reside in Colorado and have exercised their right to object to Intervenor Trump's name being placed onto the ballot under C.R.S. § 1-1-113 and C.R.S. § 1-4-1204. While Trump argues that they are nominal plaintiffs, he fails to explain who the actual plaintiffs are in this matter.

In short, Intervenor Trump's motion under the *forum non conveniens* statute fails because he has not articulated why this is a "most unusual circumstance," nor has he offered an alternative forum or identified witnesses he cannot call because they won't come to Colorado. Rather, it appears that he is simply objecting to the C.R.S. § 1-1-113 process.

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III. CONCLUSION

For all the above reasons, the Court DENIES Intervenor Trump's Motion to Dismiss, filed September 29, 2023.

DATED: October 25, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 10/30/2023 9:02:28 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Butz v Zelmanski et al - motion to intervene filed yesterday

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Thanks!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, October 30, 2023 at 3:44 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: Butz v Zelmanski et al - motion to intervene filed yesterday

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From: Meingast, Heather (AG)
Sent: Friday, October 27, 2023 10:57 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>; Fracassi, Adam (MDOS) <FracassiA@michigan.gov>; Bourbonais, Lori (MDOS) <bourbonaisl@michigan.gov>; McInerney, Jenny (MDOS) <McInerneyJ1@michigan.gov>; Schaar, Meghan (MDOS) <SchaarM1@michigan.gov>; Lillie, Erin (MDOS) <LillieE@michigan.gov>
Cc: Albro, Lisa (AG) <AlbroL@michigan.gov>; Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Butz v Zelmanski et al - motion to intervene filed yesterday
Importance: High

Hi All,

We filed the motion to intervene in the lead FOIA case, Butz v Zelmanski, which is the City of Roseville defendants. The hearing on our motion is November 13 at 10:30 a.m. by Zoom. Will keep you posted.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/8/2023 10:47:35 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: MN decision on 14th amendment disqualification
Attachments: Growe v. Simon Dismissal Order.pdf

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Hi Heather,

As you may have seen, the Minnesota Supreme Court today rejected an attempt to prohibit Trump from appearing on the Republican primary ballot. The order is attached. An opinion will follow.

DPP MCL 15.243(1)(m)

Please let us know if you'd like more information or to discuss.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

FILED
November 8, 2023
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A23-1354

Joan Growe, et al.,

Petitioners,

vs.

Steve Simon, Minnesota Secretary of State,

Respondent.

O R D E R

On September 12, 2023, petitioners filed a petition pursuant to Minnesota Statutes section 204B.44 (2022) asking, in part, for an order declaring that Donald J. Trump, who served as President of the United States and has filed federal paperwork as a candidate for President in the 2024 election, is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the United States Constitution; and directing the Secretary of State to exclude Donald J. Trump from the ballot for the March 5, 2024, presidential nomination primary and from the ballot for the November 5, 2024, general election as a candidate for the office of President of the United States. Absentee voting for the presidential nomination primary will begin January 19, 2024. *See* Minn. Stat. § 204B.35, subd. 4 (2022); *see also* Minn. Stat. § 204B.45, subd. 2 (2022).

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Before considering petitioners' request to pursue discovery and hold an evidentiary hearing, we determined first to address threshold and potentially dispositive legal issues of justiciability and the legal construction of Section 3 of the Fourteenth Amendment to the United States Constitution. We directed petitioners, the Secretary of State, the Republican Party of Minnesota, and former President Trump to file briefs addressing these issues and held a hearing on November 2, 2023.

We conclude that petitioners have standing and that their claims are ripe as to the issue of whether former President Trump should be excluded from the 2024 Republican presidential nomination primary. We reach a different conclusion regarding petitioners' claim that it would be error for the Secretary of State to place former President Trump's name on the ballot for the 2024 general election ballot. That claim is neither ripe, nor is it "about to occur" as section 204B.44(a) requires.

With respect to the only ripe issue before us at this time, we conclude that under section 204B.44, there is no "error" to correct here as to the presidential primary election if former President Trump's name is included on the presidential primary ballot after the Chair of the Republican Party of Minnesota provides his name to the Secretary of State, notwithstanding petitioners' claim that former President Trump is disqualified from holding office under Section 3 of the Fourteenth Amendment. The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other states and territories and choose a presidential candidate who will subsequently appear on general election ballots. *See* Minn.

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Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v. Simon*, 940 N.W.2d 477, 492 (Minn. 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494–95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office.

Because there is no error to correct here as to the presidential nomination primary, and petitioners' other claims regarding the general election are not ripe, the petition must be dismissed, but without prejudice as to petitioners bringing a petition raising their claims as to the general election.

Based upon all the files, records, and proceedings herein,

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IT IS HEREBY ORDERED THAT:

1. The petition is dismissed, but without prejudice as to the general election.

2. So as not to impair the orderly election process, this order is issued with an opinion to follow.

Dated: November 8, 2023

BY THE COURT:

Natalie E. Hudson

Natalie E. Hudson
Chief Justice

CHUTICH, PROCACCINI, JJ., took no part in the consideration or decision of this case.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/14/2023 8:03:00 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: still reading

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Thanks!

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Tuesday, November 14, 2023 at 2:55 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: still reading

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 9/9/2022 5:52:14 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: Re: AZ voting machine/decertification lawsuit

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That's great news, Heather. Thanks for sharing the order.

From: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Date: Friday, September 9, 2022 at 1:25 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: RE: AZ voting machine/decertification lawsuit

Thanks, we also received a nice order on the TRO request in our case. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Heather

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, September 9, 2022 12:40 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>; Christine Sun <christine@statesuniteddemocracy.org>
Subject: Re: AZ voting machine/decertification lawsuit

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Quick update: We just learned that the Arizona Supreme Court dismissed the case yesterday. The text of the order is in the final two pages of the PDF.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Friday, September 9, 2022 at 11:59 AM
To: "Meingast, Heather (AG)" <MeingastH@michigan.gov>
Cc: Robert Cotter <Robert@statesuniteddemocracy.org>, Christine Sun <christine@statesuniteddemocracy.org>
Subject: AZ voting machine/decertification lawsuit

Good morning, Heather. I've attached the filings from the Arizona lawsuit I mentioned yesterday that seeks to decertify Arizona's election results based on claims that the voting machines were not properly certified and also seeks to compel retention of documents from the 2020 election. You'll see that Russell Newman, the Nokomis, FL-based attorney who is affiliated with Gen. Flynn's America Project, is involved with both the Arizona and Michigan Actions.

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/14/2023 7:53:48 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Albro, Lisa (AG) [AlbroL@michigan.gov]
Subject: MI 14.3 decision

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather (and Lisa),

I'm seeing that Judge Redford rejected the attempt to keep Trump off the ballot. Would you mind sending along the order when you have a chance?

Thanks!

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/9/2023 2:43:13 PM
To: Hammoud, Fadwa (AG) [HammoudF1@michigan.gov]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]; Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: New Powell disciplinary letter--privileged
Attachments: 2023-11-08 SBOT Letter-Sidney Powell SUDC-LDAD With Attachments.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good morning. Following up on our previous discussion of Texas disciplinary proceedings concerning Sidney Powell, I'm sharing the attached letter that States United, Lawyers Defending American Democracy, and others sent to the State Bar of Texas yesterday, seeking to have Sidney Powell disciplined based on her guilty plea in Georgia.

We'd be happy to discuss the status of the ongoing Texas proceedings and any interest you might have in submitting a similar letter given recent developments.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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States United DEMOCRACY CENTER

LAWYERS DEFENDING AMERICAN DEMOCRACY

VIA EMAIL

Seana Willing
Chief Disciplinary Counsel
State Bar of Texas
1414 Colorado Street
Austin, Texas 78701
swilling@texasbar.com

November 8, 2023

Re: Request for Disciplinary Action against Sidney Powell Pursuant to Texas Rule of Disciplinary Procedure 8.01

Dear Ms. Willing,

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. Helping to ensure that democracy violators are held accountable, including those in the legal profession who betray their professional responsibilities to uphold the rule of law, is a critical component of our mission.

Lawyers Defending American Democracy (LDAD) is a nonpartisan organization, the purpose of which is to foster adherence to the rule of law. LDAD is devoted to ensuring that individual lawyers are held accountable for participating in assaults on fundamental principles of our American democracy.

We, together with the additional signatories below, write to urge the Office of Chief Disciplinary Counsel to initiate a disciplinary action seeking compulsory discipline against attorney Sidney Powell and to place the matter on the Board of Disciplinary Appeals' January 2024 docket. Attorneys licensed in Texas must "maintain the highest standards of ethical conduct." *See Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 764 (Tex. 1995) (Cornyn, J., concurring); *see also* Tex. Disc. R. Prof. Cond., Pmble., 1. As set forth below, through acts undertaken in the aftermath of the 2020 presidential election, Ms. Powell fell far short of those standards.

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I. Brief Background

On August 14, 2023, attorney Sidney Powell and 18 others were charged in Fulton County, Georgia with a conspiracy to overturn the 2020 presidential election.[1]

On October 19, 2023, Ms. Powell pled guilty to six misdemeanor counts of conspiracy to commit intentional interference with performance of election duties (O.C.G.A. 16-4-8- and 21-2-597) arising out of a plot to unlawfully obtain access to voting machines in Coffee County, Georgia.[2] Per the Indictment, Ms. Powell was a key figure in that conspiracy, engaging in illegal efforts to access voting equipment, in Georgia and elsewhere. Ms. Powell hired and directed the technology firm SullivanStrickler to unlawfully access Coffee County, Georgia's sensitive voting equipment and confidential voting technology.[3] At Ms. Powell's direction, SullivanStrickler and others involved in the conspiracy "stole data, including ballot images, voting equipment software, and personal voter information. The stolen data was then distributed to other members of the enterprise, including members in other states."[4]

Under the terms of the plea agreement, Powell is subject to six years of probation (12 months for each count), a fine of $6,000, and restitution of $2,700. She is further required to write a letter of apology for her actions and to testify truthfully against her co-defendants.[5]

II. Standard for Compulsory Discipline

The Texas Rules of Disciplinary Procedure provide that "when an attorney licensed to practice law in Texas has been placed on probation for an Intentional Crime with or without an adjudication of guilt, the Chief Disciplinary Counsel *shall* initiate a Disciplinary Action seeking compulsory discipline[.]" Tex. R. Disc. Pro. 8.01 (emphasis added). An Intentional Crime includes "any Serious Crime that requires proof of knowledge or intent as an essential element[.]" Tex. R. Disc. Pro. 1.06V(1). In relevant part, a Serious Crime includes "any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes."[6] Tex. R. Disc. Pro. 1.06GG.

---

[1] *See* Indictment, *State of Georgia v. Donald J. Trump, et al*, 23SC188947 (Aug. 14, 2023), available at https://int.nyt.com/data/documenttools/georgia-indictment-trump/daed97d37562a76f/full.pdf.

[2] A true and correct copy of the filed Accusation is attached hereto as Attachment 1. A true and correct copy of the filed Plea Statement is attached hereto as Attachment 2. *See also* Video of plea hearing, *State of Georgia v. Sidney Katherine Powell*, 23SC188947 (Oct.19, 2023), available at https://www.youtube.com/watch?v=bHTz OGYVo.

[3] *See* Indictment, Acts 33, 91, and 144-149.

[4] *See id.* at p. 18 (Unlawful Breach of Election Equipment in Georgia and Elsewhere).

[5] *See* Attachment 2.

[6] That Ms. Powell's plea agreement includes a statement that her crimes did not involve "moral turpitude" has no bearing on the Office of Chief Disciplinary Counsel's duty to seek compulsory discipline under the applicable rules and, even if it did, that determination would rest with the Texas Bar.

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Rule 8.05 provides that such attorneys subject to Rule 8.01 "shall be disbarred unless the Board of Disciplinary Appeals, under Rule 8.06, suspends his or her license to practice law." Tex. R. Disc. Pro. 8.05. The Board of Disciplinary Appeals has the discretion to determine whether to suspend or disbar an attorney who receives a fully probated sentence. *See In re Caballero*, 272 S.W.3d 595, 597 (Tex. 2008) (holding the Board did not abuse its discretion in disbarring attorney who received a fully probated sentence and affirming disbarment).

As set forth below, since Ms. Powell has pled guilty to Intentional Crimes, the Office of Chief Disciplinary Counsel's *must* commence an action for seeking her disbarment under the rules.[7]

III. Sidney Powell's October 19, 2023 Guilty Plea

On October 19, 2023, Ms. Powell pled guilty to six counts of Conspiracy to Commit Intentional Interference with Performance of Election Duties between December 1, 2020 and January 7, 2021.[8] Specifically, as set forth in the attached Accusation (*see* Ex. 1), Ms. Powell pled guilty to unlawfully conspiring to intentionally interfere with, hinder, and delay co-defendant Misty Hampton – then the elections director for Coffee County, Georgia – in the performance of her duties under Georgia's Election Code by contracting with, paying and causing the employees of the firm SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia:

1. for the purpose of *willfully tampering with electronic ballot markers and tabulating machines* (Count 1);
2. for the purpose of *causing certain members of the conspiracy*, who were not officers charged by law with the care of ballots and who were not persons entrusted by any such officer with the care of ballots for purpose required by law, *to possess official ballots outside of the polling place* (Count 2);
3. for the purpose of *using computer* with knowledge that such use was without authority and *with the intention of taking and appropriating information, data, and software, the property of Dominion Voting Systems Corporation* (Count 3);
4. for the purpose of *using computer* with knowledge that such use was without authority and *with the intention of removing voter data* from said computer (Count 4);
5. for the purpose of *using computer with the intention of examining personal voter data* with knowledge that such examination was without authority (Count 5); and
6. for the purpose of *using computer* with knowledge that such use was without authority and *with the intention of removing Dominion Voting Systems Corporation data* from said computer (Count 6).

---

[7] The ongoing case against Ms. Powell by the Commission for Lawyer Discipline has no bearing on the Office of Chief Disciplinary Counsel's obligation to commence an action for compulsory discipline under the rules. *See* Tex. R. Disc. Pro. 8.01 ("Proceedings under this part are not exclusive[.]")

[8] *See* note 2, *supra*.

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See Ex. 1 (Accusation) (Emphases added). As shown above, each count has an intentionality element and at least four (Counts 2, 3, 4, and 6) involve theft of property, thereby subjecting Ms. Powell to compulsory discipline.

The fact that Ms. Powell entered her guilty plea under Georgia's first offender law has no impact on the compulsory discipline she must face.[9] The Georgia Supreme Court routinely upholds attorney discipline imposed following first-offender pleas under the law. *See, e.g., In the Matter of Davis*, 292 Ga. 897 (2013); *In re Waldrop*, 283 Ga. 80 (2008); *In the Matter of Caroway*, 279 Ga. 381 (2005); *In the Matter of Lewis*, 282 Ga. 649 (2007); and *In the Matter of Calhoun*, 268 Ga. 877 (1998). Likewise, although the Texas penal code does not have a first offender law applicable under these circumstances,[10] Texas does require attorneys to face compulsory discipline in similar situations. *See* Tex. R. Disc. Pro. 8.03 (providing for compulsory discipline for a probated sentence obtained through deferred adjudication). *See also In the Matter of Alfred Isassi*, BODA No. 57699 (May 8, 2017) (imposing compulsory discipline after attorney was released from all penalties and disabilities by discharge under Tex. Code Crim. Pro. Art. 42.12 § 20). Neither Rule 8.03 nor *Isassi* say anything about excluding first offenders.

IV. Conclusion

For the reasons set forth above, we respectfully assert that the Chief Disciplinary Counsel must initiate a compulsory disciplinary action against Ms. Powell seeking her disbarment, pursuant to Rule 8.01 of the Texas Rules of Disciplinary Procedure. We further request that the matter be placed on the Board of Disciplinary Appeals' January 2024 docket.

Respectfully submitted,

STATES UNITED DEMOCRACY CENTER

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Washington, D.C. 20036
(202) 999-9305
gillian@statesuniteddemocracy.org

Norman Eisen
Executive Chair, Board of Directors
Former White House Special Counsel for
Ethics and Government Reform*

Joanna Lydgate, Chief Executive Officer
Former Chief Deputy Attorney General of
Massachusetts

LAWYERS DEFENDING AMERICAN DEMOCRACY

John T. Montgomery
Lawyers Defending American
Democracy Board Member

[9] Ms. Powell's plea deal was obtained under Georgia's first offender law. Ga. Code § 42-8-60.
[10] Texas has a first offender program for juveniles. *See* Tex. Fam. Code § 52.031.

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Governor Christine Todd Whitman, Co-Chair
Former Governor of New Jersey

Gillian Feiner, Senior Counsel
Meagan Harding, Counsel (TX Bar No. 24080179)
Christine P. Sun, Senior Vice President, Legal

Additional signatories*

Donald Ayer
Adjunct Professor, Georgetown Law School U.S. Attorney (E.D. Cal.) (1982-86)
Principal Deputy Solicitor General (1986-88) Deputy Attorney General (1989-90)

Governor Steve Bullock
Former Governor of Montana
Former Attorney General of Montana

Honorable Tom Coleman
Former Missouri Congressman

Honorable John J. Farmer Jr.
Former Attorney General of New Jersey
Former Assistant U.S. Attorney, District of New Jersey

Honorable Trey Grayson
Former Secretary of State of Kentucky

Dicky Grigg
Past President of TEX-ABOTA

Honorable Jim Hood
Former Attorney General of Mississippi

Honorable Jahna Lindemuth
Former Attorney General of Alaska

Honorable Patricia A. Madrid
Former Attorney General of New Mexico

Professor Richard W. Painter
S. Walter Richey Professor of Corporate Law, University of Minnesota Law School
Former Associate Counsel to the President

Honorable Sarah R. Saldaña
Former Director of the U.S. Immigration and Customs Enforcement
Former U.S. Attorney, Northern District of Texas

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Terry Tottenham
Past President, State Bar of Texas

*Titles and affiliations for identification purposes only

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ATTACHMENT 1

Obtained by Judicial Watch, Inc. v. Michigan FOIA

23SC188947 GC

ACCUSATION

mc Afee EJIS

Clerk No. 23SC190370

FULTON SUPERIOR COURT

THE STATE OF GEORGIA

V.

SIDNEY KATHERINE POWELL
DA #: 23DA07679

Fulton County Superior Court
FILED KS
Date: 10/18/2023
Che Alexander, Clerk of Court

1 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**
2 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**
3 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**
4 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**
5 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**
6 **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597**

PERSONID: 8852937

FANI T. WILLIS, District Attorney

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

_____
Defendant

_____
Attorney for Defendant

_____
Assistant District Attorney

This ____ day of _____, _____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

_____
Defendant

_____
Attorney for Defendant

_____
Assistant District Attorney

This ____ day of _____, _____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

_____
Defendant

_____
Attorney for Defendant

_____
Assistant District Attorney

This ____ day of _____, _____

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF GEORGIA, COUNTY OF FULTON

IN THE SUPERIOR COURT OF SAID COUNTY

On behalf of the People of the State of Georgia, the undersigned, **Fani T. Willis**, District Attorney, as prosecuting attorney for the County and State aforesaid, does charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of willfully tampering with electronic ballot markers and tabulating machines, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 2 of 6

The undersigned, as prosecuting attorney, does further charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fultou County, Georgia, to Coffee County, Georgia, for the purpose of causing certain members of the conspiracy, who were not officers charged by law with the care of ballots and who were not persons entrusted by any such officer with the care of ballots for a purpose required by law, to possess official ballots outside of the polling place, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

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COUNT 3 of 6

The undersigned, as prosecuting attorney, does further charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of using a computer with knowledge that such use was without authority and with the intention of taking and appropriating information, data, and software, the property of Dominion Voting Systems Corporation, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 4 of 6

The undersigned, as prosecuting attorney, does further charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And co-conspirator SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of using a computer with knowledge that such use was without authority and with the intention of removing voter data from said computer, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

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COUNT 5 of 6

The undersigned, as prosecuting attorney, does further charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And co-conspirator SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of using a computer with the intention of examining personal voter data with knowledge that such examination was without authority, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 6 of 6

The undersigned, as prosecuting attorney, does further charge and accuse **SIDNEY KATHERINE POWELL** with the offense of **CONSPIRACY TO COMMIT INTENTIONAL INTERFERENCE WITH PERFORMANCE OF ELECTION DUTIES O.C.G.A. §§ 16-4-8 & 21-2-597,** for the said accused, in the County of Fulton and State of Georgia, on and between the **1st day of December 2020 and the 7th day of January 2021, unlawfully conspired to intentionally interfere with, hinder, and delay Misty Hampton AKA Emily Misty Hayes, another person, in the performance of a duty imposed by Chapter 2 of Title 21 of the Official Code of Georgia;**

And co-conspirator SIDNEY KATHERINE POWELL entered into a contract with SullivanStrickler LLC in Fulton County, Georgia, delivered a payment to SullivanStrickler LLC in Fulton County, Georgia, and caused employees of SullivanStrickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of using a computer with knowledge that such use was without authority and with the intention of removing Dominion Voting Systems Corporation data from said computer, which were overt acts to effect the object of the conspiracy; -contrary to the laws of said State, the good order, peace and dignity thereof;

FANI T. WILLIS, District Attorney

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Related Clerk No:

Complaint #:

Defendant	DA #	Booking	Race	Sex	Birthdate	OTN	Agency
POWELL, SIDNEY KATHERINE	23DA07679		White	Female	05/01/1955		

WITNESS LIST

Obtained by Judicial Watch, Inc. v. Michigan FOIA

ATTACHMENT 2

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Fulton County Superior Court
EFILEDNY
Date: 10/19/2023 2:34 PM
Che Alexander, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	**INDICTMENT NO:** 23SC190370
vs.	*	
Sidney Katherine Powell	*	**JUDGE SCOTT F. MCAFEE**

PLEA OF GUILTY

1. What is your legal name? Sidney Katherine Powell
2. At this time are you under the influence of any alcohol, drugs or medication? No
3. How old are you? 68
4. How far did you go in school? B.A. J.D.
5. Are you able to read and write English? Yes
6. Have you ever received psychiatric treatment or been in a mental hospital? If so, when and where? No
7. Do you wish to plead guilty to the offense(s) in this case? Yes
8. Do you understand you have the right to plead either "guilty" or "not guilty" to the charges? Yes
9. Do you understand that by pleading "guilty" you:
   - ✓ (a) agree that you understand the nature of the charges.
   - ✓ (b) waive the right to trial by jury.
   - ✓ (c) waive the right to the presumption of innocence.
   - ✓ (d) waive the right to confront witnesses called to testify against you.
   - ✓ (e) waive the right to subpoena witnesses.
   - ✓ (f) waive the right to testify and to offer other evidence on your behalf.
   - ✓ (g) waive the right to assistance of counsel during trial.
   - ✓ (h) waive the right not to testify against yourself and that by pleading not guilty or remaining silent and not entering a plea you could obtain a jury trial.
10. Do you understand that you may obtain a jury trial should you elect to plead "not guilty" or remain silent? Yes
11. Do you acknowledge that you have entered this plea freely, voluntarily and with a full understanding of all the rights you are giving up? Yes
12. Do you acknowledge that no one has made any promises or threats to influence your decision to plead guilty? Yes
13. Do you understand the prosecutor is recommending the following sentence: Cts 1-6 - 12 mos probation on each consecutively $2K fine, $750 restitution Apology letter, Truthful testimony at trial and other proceedings, No communication with Co-as, Witnesses, media until all cases have been closed, full probation and provide documents
14. Do you understand that although this a negotiated plea, the Judge is not bound to accept the prosecutor's recommendation? Yes If the Judge does not accept the recommendation, you will have the right to withdraw your plea of guilty. **(If the plea is non-negotiated, counsel should strike through this provision as it does not apply.)**
15. Do you acknowledge you have been advised the maximum sentence you can receive is 6 years and the minimum sentence you can receive is 0 ?

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16. Do you acknowledge you have been advised if you are not a citizen of the United States a plea of guilty may impact your immigration status and could result in deportation? [redacted] Yes
17. Do you acknowledge you have been advised a plea of guilty could be used to aggravate the punishment you could receive in any subsequent criminal prosecution? Yes
18. Do you acknowledge you have had sufficient time to discuss this case with your attorney and you are satisfied with your attorney's services? Yes
19. Do you acknowledge if you plead guilty, there will be no trial and the Court will impose such sentence as it finds appropriate under the law? Yes
20. Do you acknowledge you understand if you wish to seek relief from this sentence through a Writ of Habeas Corpus you will have four (4) years from today's date to file your petition as to any felony sentence and one (1) year from today's date to file your petition as to any misdemeanor sentence? Yes
21. How do you plead to the charges: **"Guilty" or "Not Guilty"**? Guilty

Respectfully submitted this 19th day of October, 2023

Sidney Katherine Powell
Printed Name of Defendant

Signature of Defendant

CERTIFICATION OF COUNSEL

I, as attorney for the Defendant, hereby certify the following:

1. I have read and fully explained to the Defendant all of the charges contained in the Indictment/Accusation in this case.
2. I have explained and discussed with the Defendant the facts and elements of the case which the Prosecution must prove and the defense(s) that may be available to the charge(s).
3. I have explained to the Defendant the maximum penalty provided by law for the offense(s) charged in the Indictment/Accusation to which the Defendant offers a plea of guilty and the possible consequences of a guilty plea.
4. The defendant **DOES/DOES NOT QUALIFY** for First Offender Treatment and **IS/IS NOT** asking for disposition under the First Offender Statue. **(Circle options that apply.)**
5. The plea of guilty offered by the Defendant is, in my opinion, knowingly, freely and voluntarily made, and is consistent with my advice to the Defendant.
6. To the best of my knowledge and belief, the statements, representations and declarations made by the Defendant in the foregoing Plea of Guilty are in all respects true and accurate.
7. I have read and reviewed this plea sheet with the Defendant and answered any questions the Defendant may have concerning this plea sheet.
8. I do not know of any reason why the Court should not accept the Defendant's plea of guilty.

Respectfully submitted this 19th day of October, 2023.

Brian T. Rafferty
Printed Name of Attorney for Defendant

Signature of Attorney for Defendant

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 11/22/2023 9:30:37 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]

Subject: Canceled: Check-in
Location: Microsoft Teams Meeting

Start: 11/27/2023 3:30:00 PM
End: 11/27/2023 4:00:00 PM
Show Time As: Free

Importance: High

Recurrence: (none)

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: States United Democracy Center [info@statesuniteddemocracy.org]
Sent: 9/9/2022 9:00:03 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: The Uneven Rules of Voter Fraud Prosecution

The Uneven Rules of Voter Fraud Prosecution

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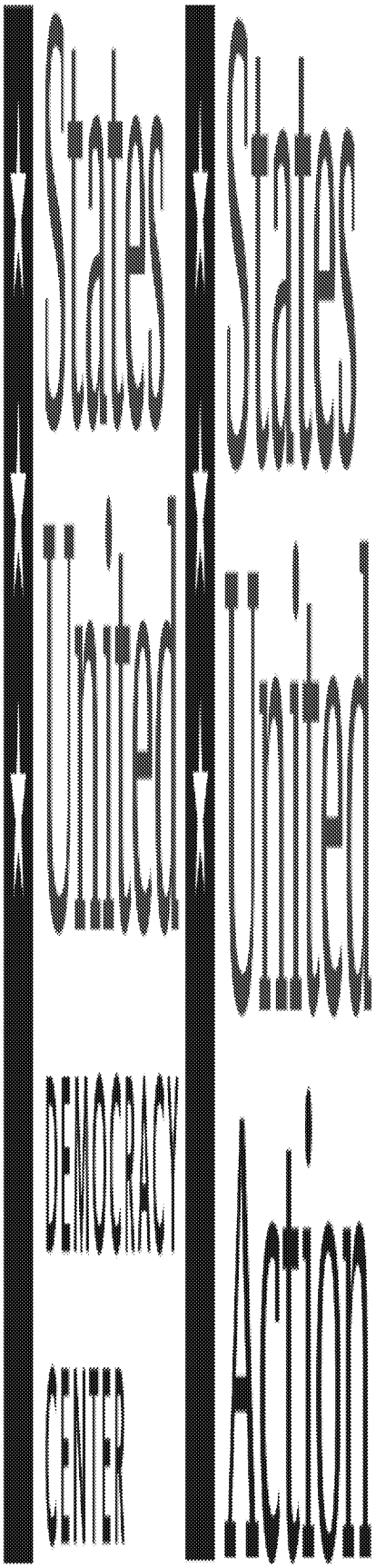

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Only have a minute?

- A New Mexico judge ordered that **Couy Griffin**, an Otero County commissioner and founder of Cowboys for Trump who was convicted of illegally entering the Capitol during the Jan. 6 attack, be removed from office. The judge cited a clause in the 14th Amendment that bars anyone who has **participated in an insurrection** from holding public office.

- Rep. Jamie Raskin of Maryland said he expects the House January 6 Select Committee to release its final report by the end of the year. Raskin said the committee has a responsibility to "report to the American people about **how to prevent coups, insurrections, political violence and attacks on our democratic process** going forward."

- A majority of Americans say former **President Trump**'s Make America Great Again movement is undermining democracy, according to a Reuters/Ipsos poll released this week. The poll was completed after **President Biden** urged Americans in a speech last week to "**stop the assault on American democracy.**"

The Uneven Rules of Voter Fraud Prosecution

Our elections are free, fair, and secure. We know voter fraud is rare. Microscopic, in fact. One researcher identified only 31 cases of voter impersonation in the United States from 2000 to 2014—out of more than a billion votes cast.

But there's another reason to be skeptical of voter fraud claims: **Prosecution of alleged voter fraud is extremely inconsistent**, and the heaviest penalties often fall on poor Americans and communities of color.

As The New York Times noted this week in a detailed examination of voter fraud cases since 2017, prosecutions "are blue-moon events, and often netted people who didn't realize they were breaking the law."

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In 2016, a Black woman in Texas named **Crystal Mason** cast a provisional ballot, believing she was eligible to vote. State officials determined she was not eligible because, at the time, she was on supervised release for a federal conviction.

Mason's ballot was never counted. Despite the absence of criminal intent or any harm, she was prosecuted for illegal voting and ultimately sentenced to five years in prison.

In July 2021, **States United** teamed up with a group of former state and federal prosecutors to file a friend-of-the-court brief in a Texas appeals court, arguing that Mason's case was "far outside the bounds of any reasonable exercise of prosecutorial power."

The brief was notable for the wide range of former prosecutors who signed it—11 of them in all, Republicans and Democrats, and many of them from Texas.

In May, the Texas Court of Criminal Appeals told a lower court to take another look at Mason's conviction, raising the possibility that this miscarriage of justice might eventually be righted.

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As the Times's story makes clear, Mason's story is all too common. While it's important to take election security seriously—and we do—we must also keep perspective when partisan politicians and far-right pundits raise alarms about voter fraud. It's almost always about something else: sowing doubt about our free and fair elections.

State of the States

In Georgia, surveillance video published this week by CNN shows that a woman who posed as a fake elector for former **President Trump** also escorted two operatives into the Coffee County election office in January 2021, on the same day that a voting system there was breached. That breach is under investigation by the Georgia Bureau of Investigation and by Fulton County District Attorney **Fani Willis**, who is conducting a wide-ranging probe of efforts to overturn the 2020 election results in Georgia. Video reviewed by The Washington Post shows that **Doug Logan**, the former CEO of Cyber Ninjas, also visited the Coffee County election office twice in January 2021. Cyber Ninjas was later contracted by the Arizona Senate to run an unprofessional sham audit of the results in that state. Logan also faces a criminal probe in Michigan.

In Michigan, six plaintiffs, including a local clerk, filed a federal lawsuit seeking to decertify the results of the 2020 election—a step that has no basis in the law or the Constitution. **President Biden** won the state by more than 150,000 votes, and the result has been upheld repeatedly. As a spokesman for Secretary of State **Jocelyn Benson** told The Detroit News, the 2020 election in Michigan "was the most scrutinized election in state history," and "more than 250 audits, the state Senate Oversight Committee, and the state's Auditor General all affirmed the integrity and accuracy of the election." A previous suit that sought to overturn the Michigan results failed last year, and a judge called it "a historic and profound abuse of the judicial process."

In the News

PolitiFact: Fact-checking Joe Biden's speech about democracy before the 2022 midterms. By Louis Jacobson and Amy Sherman.

*"... The **States United Democracy Center**, a Washington, D.C.-based nonprofit group, has*

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been tracking legislation nationwide that would allow state legislatures to interfere with elections, by usurping control over election results, requiring partisan 'audits' of results or creating burdens for election officials such as requiring them to count all ballots by hand. A few states have considered bills that would give legislators the power to reject election results, but none has passed in 2022, although a few bills remain pending in Pennsylvania."

Heartland Signal: Democracy is on the ballot this fall. Let's thank those that brought the threat to light and led the early effort to turn the tide. Then let's get back to work. By Edwin Eisendrath.

"... Americans have not shrunk in fear. Instead, we enter this all-important election season ready for the fight. Speaking for myself, I begin the campaign season with gratitude. Here are some who have helped turn the tide, especially in the last two years. ... Americans joined together to find new ways to identify the nature of the attack on our democracy, to uncover its funding sources, to testify to the threat. ***States United Democracy Center*** *and Pen America show the breadth of the effort."*

The New York Times: Cameras, Plexiglass, Fireproofing: Election Officials Beef Up Security. By Neil Vigdor.

"As the nation hurtles closer to the midterm elections, those who will oversee them are taking a range of steps to beef up security for themselves, their employees, polling places and even drop boxes, tapping state and federal funding for a new set of defenses. The heightened vigilance comes as violent rhetoric from the right intensifies and as efforts to intimidate election officials by those who refuse to accept the results of the 2020 election become commonplace."

The Arizona Republic: Arizona State Bar investigates lawyer involved in 'fake electors' effort by state Republicans. By Ronald J. Hansen.

"The State Bar of Arizona is investigating multiple attorneys related to the 2020 election, with one inquiry requesting the emails of a lawyer who was prominently involved in assembling the 'fake electors' who falsely claimed then-President Donald Trump won the state."

Arizona Mirror: Brnovich joins 12 other GOP AGs in 'independent state legislature' case. By Jerod MacDonald-Evoy.

"Arizona Attorney General Mark Brnovich joined 12 other Republican attorneys general backing North Carolina's GOP-led legislature in a U.S. Supreme Court case that could drastically alter how federal elections are conducted, handing more power to state legislatures and blocking state courts from intervening."

Reuters: Top state court judges defend their election oversight at U.S. Supreme Court. By Nate Raymond.

"A group representing the top judges in all 50 states is urging the U.S. Supreme Court not to shield actions taken by state legislatures affecting federal elections—such as reconfiguring electoral districts and imposing voting restrictions—from the scrutiny of state courts.

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Clip of the Week

Michigan Secretary of State Jocelyn Benson joined CBS's "Face the Nation" to talk about how state officials are making sure we have a "healthy, robust, transparent democracy where everyone can have confidence that their vote is counted and their voice is heard." She drew a distinction between honest questions about the process and efforts to undermine our elections:

We're Hiring!

The States United team is growing. We're building out key positions as we work to protect the integrity of our elections and serve as a resource to state leaders. You can check out our open positions and apply here.

Follow **States United** on Twitter and Facebook to stay up-to-date!

The States United newsletter will be on hiatus next week.
It will return Friday, Sept. 23.

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About the States United Democracy Center

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. We are more than a think tank—we are an action tank. And together, we are committed to making sure every vote is counted, every voice is heard, and every election is safe. To learn more, visit www.statesuniteddemocracy.org.

About States United Action

States United Action is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values. To learn more, visit www.statesuniteddemocracy.org/states-united-action.

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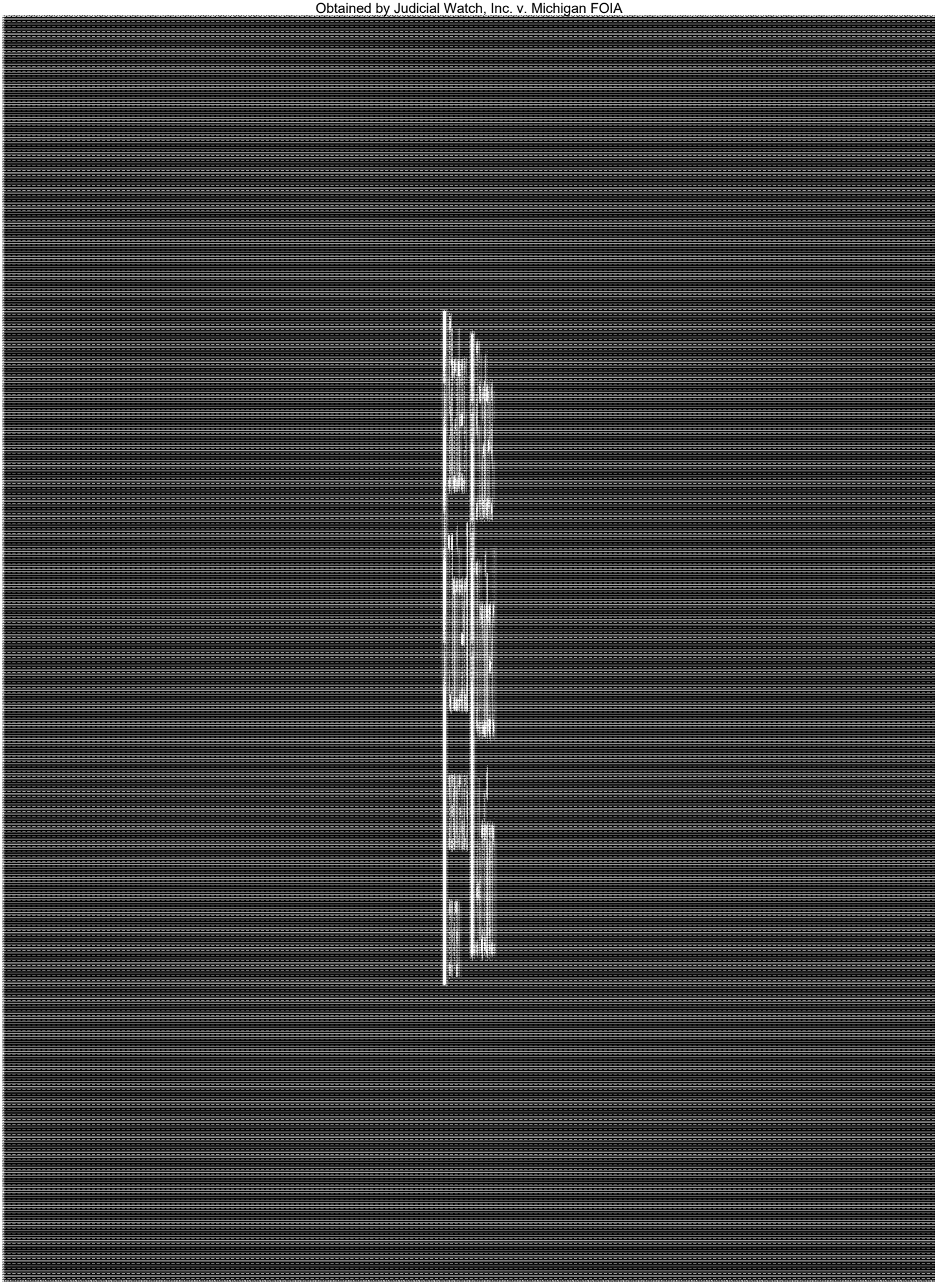

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/1/2023 5:54:42 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Automatic reply: 14.3 case status--privileged

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I am traveling on business through Thursday and will be delayed in responding to your message. If this is urgent, please contact another member of the States United team.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/1/2023 5:40:11 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 tracker
Attachments: 14A Litigation tracker (Nov.30).docx

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Heather,

Please find attached the 14.3 Litigation Tracker for this week with updates highlighted. Items of note are below.

Colorado:

In *Anderson v. Griswold*:

- Oral argument in the Colorado Supreme Court will be held on December 6. A live feed should be available here: https://www.courts.state.co.us/Courts/live/

Michigan

In *LaBrant v. Benson*:

- The Michigan Court of Appeals granted a motion for immediate consideration. Trump's motion to intervene was granted.
- The court agreed to an expedited schedule; briefs are due on November 30 and December 6, and replies are due December 8 with no extensions. A decision will be made without oral argument.

New Hampshire

- In *Castro v. Scanlan*, the First Circuit affirmed the district court's dismissal based on standing grounds. The court held that Castro failed to show that he was a "direct and current competitor" of Trump for the 2024 New Hampshire primary at the time his complaint was filed, and accordingly, he failed to show a concrete and particularized injury-in-fact required to establish standing.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
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jonathan@statesuniteddemocracy.org

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From: Teszlewicz, Barbara (AG) [teszlewiczb@michigan.gov]
on behalf of Grossi, Christina (AG) [GrossiC@michigan.gov]
Sent: 10/6/2022 5:52:02 PM
To: Brady, Mike (MDOS) [BradyM@michigan.gov]; Bagley, Nick [BagleyN1@michigan.gov]; Dax Goldstein [dax@statesuniteddemocracy.org]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; 'katie@statesuniteddemocracy.org' [katie@statesuniteddemocracy.org]; 'caroline@statesuniteddemocracy.org' [caroline@statesuniteddemocracy.org]; 'kk@isdglobal.org' [kk@isdglobal.org]; 'jdc@isdglobal.org' [jdc@isdglobal.org]; 'janae@statesuniteddemocracy.org' [janae@statesuniteddemocracy.org]; 'lizzie@statesuniteddemocracy.org' [lizzie@statesuniteddemocracy.org]; 'jonathan@statesuniteddemocracy.org' [jonathan@statesuniteddemocracy.org]; 'ij@isdglobal.org' [ij@isdglobal.org]; 'jr@isdglobal.org' [jr@isdglobal.org]; 'jd@isdglobal.org' [jd@isdglobal.org]; 'jh@isdglobal.org' [jh@isdglobal.org]; 'kerrin@statesuniteddemocracy.org' [kerrin@statesuniteddemocracy.org]; McCann, Amber (AG) [McCannA@michigan.gov]; 'greg@statesuniteddemocracy.org' [greg@statesuniteddemocracy.org]; 'sharon@statesuniteddemocracy.org' [sharon@statesuniteddemocracy.org]
CC: Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]; Teegardin, Rachel [TeegardinR1@michigan.gov]; Hill, Darryl (MDOS) [HillD16@michigan.gov]; Rollow, Jake (MDOS) [RollowJ@michigan.gov]; Brater, Jonathan (MDOS) [BraterJ@michigan.gov]; Smiley, Melissa (MDOS) [SmileyM1@michigan.gov]; Weare, Jessica [WeareJ@michigan.gov]

Subject: Weekly Call re: **Wk Prod MCL 15.243(1)(h)**
Location: Microsoft Teams Meeting

Start: 7/28/2022 4:00:00 PM
End: 7/28/2022 4:30:00 PM
Show Time As: Tentative

Recurrence: Weekly
every Thursday from 12:00 PM to 12:30 PM
Required Attendees: Brady, Mike (MDOS); Bagley, Nick; Dax Goldstein; Sargent, Aubrey (AG); Meingast, Heather (AG); Hagaman-Clark, Danielle (AG); 'katie@statesuniteddemocracy.org'; 'caroline@statesuniteddemocracy.org'; 'kk@isdglobal.org'; 'jdc@isdglobal.org'; 'janae@statesuniteddemocracy.org'; 'lizzie@statesuniteddemocracy.org'; 'jonathan@statesuniteddemocracy.org'; 'ij@isdglobal.org'; 'jr@isdglobal.org'; 'jd@isdglobal.org'; 'jh@isdglobal.org'; 'kerrin@statesuniteddemocracy.org'; McCann, Amber (AG); 'greg@statesuniteddemocracy.org'; sharon@statesuniteddemocracy.org
Optional Attendees: Sitts, Jennifer (MDOS); Teegardin, Rachel; Hill, Darryl (MDOS); Rollow, Jake (MDOS); Brater, Jonathan (MDOS); Smiley, Melissa (MDOS); Weare, Jessica

10/6: Changing calls to weekly instead of bi-weekly

10/5: added sharon@statesuniteddemocracy.org

9/27: added greg@statesuniteddemocracy.org

9/8: added kerrin@statesuniteddemocracy.org

8/22: added

- ij@isdglobal.org
- jr@isdglobal.org
- jd@isdglobal.org
- jh@isdglobal.org

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Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Or join by entering a meeting ID
Meeting ID: Security MCL 15.243(1)(u)
Passcode:

Or call in (audio only)
Security MCL 15.243(1)(u) United States, Pontiac
Phone Conference ID: Security MCL 15.243(1)(u)
Find a local number | Reset PIN

Learn More | Meeting options

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/5/2023 10:00:56 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: New MI-relevant January 6 filing
Attachments: 2023.12.05 404(b) Notice.pdf

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Hi Heather,

A/C Priv MCL 15.243(1)(g)

Happy to discuss any questions you might have.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 23-cr-257 (TSC)**
	*	
DONALD J. TRUMP,	*	
	*	
Defendant.	*	
	*	

GOVERNMENT'S NOTICE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

The Government will provide the defendant and the Court extensive advance notice of the intrinsic evidence it plans to introduce at trial, including through its exhibit and witness lists, motions in limine, and a detailed trial brief setting forth the Government's planned trial presentation. In an abundance of caution, the Government below notices evidence that, although intrinsic to the charged crimes, pre- or post-dates the charged criminal conspiracies. If the Court were to find that any part of the noticed evidence below is extrinsic, the evidence is also admissible under Federal Rule of Evidence 404(b), because the Government will offer it not to show the defendant's criminal propensity, but to establish his motive, intent, preparation, knowledge, absence of mistake, and common plan.

A. Historical Evidence of the Defendant's Consistent Plan of Baselessly Claiming Election Fraud

As set forth in the indictment, the defendant's criminal conspiracies relied on his knowingly false claims of election fraud. *See, e.g.*, ECF No. 1 at ¶ 2, 4. At trial, the Government will introduce a number of public statements by the defendant in advance of the charged conspiracies, claiming that there would be fraud in the 2020 presidential election. These statements sowed mistrust in the results of the presidential election and laid the foundation for the defendant's criminal efforts. In addition to this intrinsic evidence of false statements about the

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2020 election, the Government will offer evidence reflecting the defendant's historical record of making such claims. For example, as early as November 2012, the defendant issued a public tweet making baseless claims that voting machines had switched votes from then-candidate Romney to then-candidate Obama. During the 2016 presidential campaign, the defendant claimed repeatedly, with no basis, that there was widespread voter fraud—including through public statements and tweets (for instance, on October 17, 2016, tweeting, "Of course there is large scale fraud happening on and before election day. Why do Republican leaders deny what is going on? So naive!"). The defendant's false claims about the 2012 and 2016 elections are admissible because they demonstrate the defendant's common plan of falsely blaming fraud for election results he does not like, as well as his motive, intent, and plan to obstruct the certification of the 2020 election results and illegitimately retain power.

B. Historical Evidence of the Defendant's Common Plan to Refuse to Commit to a Peaceful Transition of Power

To ensure the destabilizing impact of his widespread election fraud claims, in the run-up to the 2020 election, the defendant repeatedly refused to commit to a peaceful transition of presidential power if he lost the election. The Government will offer proof of this refusal as intrinsic evidence of the defendant's criminal conspiracies because it shows his plan to remain in power at any cost—even in the face of potential violence. For instance, at a September 23, 2020, news conference the defendant was asked whether, "win, lose or draw in this election," in light of "rioting in many cities across this country—red and—your so called red and blue states," he would "commit to making sure there is a peaceful transferal of power after the election." The defendant responded, "Well, we're going to have to see what happens. You know that. I've been complaining very strongly about the ballots. And the ballots are a disaster. And, and--". A reporter interrupted the defendant and repeated, "I understand that, but people are rioting; do you

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commit to making sure there is a peaceful transferal of power?" The defendant responded, "I know. I know. We want to have—get rid of the ballots and you'll have a very trans—we'll have a very peaceful—there won't be a transfer, frankly; there'll be a continuation. The ballots are out of control. You know it."

Similarly, the Government will offer evidence that the defendant pursued the same strategy four years earlier, in 2016. In the presidential debate on October 19, 2016, the defendant was asked whether he would accept the results of that election, to which he responded that he would "look at it at the time." The debate moderator followed up, "There is a tradition in this country—in fact, one of the prides of this country—is the peaceful transition of power and that no matter how hard-fought a campaign is, that at the end of the campaign that the loser concedes to the winner . . . and that the country comes together in part for the good of the country. Are you saying you're not prepared now to commit to that principle?" The defendant responded, "What I'm saying is that I will tell you at the time. I'll keep you in suspense. OK?" The defendant's consistent refusal to commit to a peaceful transition of power, dating back to the 2016 presidential campaign, is admissible evidence of his plan to undermine the integrity of the presidential transition process when faced with the possibility of an election result that he would not like, as well as his motive, intent, and plan to interfere with the implementation of an election result with which he was not satisfied.

C. Evidence of the Defendant and Co-Conspirators' Knowledge of the Unfavorable Election Results and Motive and Intent to Subvert Them

The indictment lists multiple examples of the defendant's efforts, during the charged conspiracies, to pressure state officials to change election results or appoint invalid electors in spite of the election results. *See, e.g.*, ECF No. 1 at ¶¶ 15, 24, 31, 35. The Government also plans to introduce evidence of an effort undertaken by an agent (and unindicted co-conspirator) of the

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defendant who worked for his campaign ("the Campaign Employee") to, immediately following the election, obstruct the vote count. On November 4, 2020, the Campaign Employee exchanged a series of text messages with an attorney supporting the Campaign's election day operations at the TCF Center in Detroit, where votes were being counted; in the messages, the Campaign Employee encouraged rioting and other methods of obstruction when he learned that the vote count was trending in favor of the defendant's opponent. [redacted] The Government will also show that around the time of these messages, an election official at the TCF Center observed that as Biden began to take the lead, a large number of untrained individuals flooded the TCF Center and began making illegitimate and aggressive challenges to the vote count. Thereafter, Trump made repeated false claims regarding election activities at the TCF Center, when in truth his agent was seeking to cause a riot to disrupt the count. This evidence is admissible to demonstrate that the defendant, his co-conspirators, and agents had knowledge that the defendant had lost the election, as well as their intent and motive to obstruct and overturn the legitimate results.

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D. Pre- and Post-Conspiracy Evidence That the Defendant and Co-Conspirators Suppressed Proof Their Fraud Claims Were False and Retaliated Against Officials Who Undermined Their Criminal Plans

The indictment provides evidence that the defendant repeatedly sidelined advisors and officials who told him or the public the truth about the election results, and who pushed back on his false claims. *See, e.g.*, ECF No. 1 at ¶¶ 11d, 13, 92. The Government will introduce additional evidence that this was the plan of the defendant and his co-conspirators, and that even after the charged conspiracies, they continued their efforts to stifle any dissent to their false claims of election fraud.

One such example is the effort by the defendant and Co-Conspirator 1, beginning during the charged conspiracies and stretching into the summer of 2021, to retaliate against the former Chief Counsel to the Republican National Committee (RNC) for publicly refuting the defendant and Co-Conspirator 1's lies about election fraud. [redacted]

The Government will also introduce post-conspiracy evidence of continued retaliation against the Chief Counsel for publicly speaking the truth about the falsity of the defendant's

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claims—including the defendant, [redacted]

Finally, in the summer of 2021, Co-Conspirator 1 took to Twitter to publicly attack the Chief Counsel over the same issue.

The defendant and his co-conspirators' and agents' aggression in stifling dissent against election fraud claims before, during, and after the charged conspiracies is admissible to demonstrate the defendant and his co-conspirators' knowledge that their fraud claims were false, to establish their plan for depicting their election lies as true, and to show their intent to silence anyone who refuted their false claims.

E. Pre- and Post-Conspiracy Evidence of the Defendant's Public Attacks on Individuals, Encouragement of Violence, and Knowledge of the Foreseeable Consequences

As the Government has set forth at length in briefing related to the Court's Rule 57.7 Order, *see, e.g.*, ECF Nos. 57 and 64, the defendant has an established pattern of using public statements and social media posts to subject his perceived adversaries to threats and harassment. *See* ECF Nos. 57, 64, 120. The indictment includes examples of the defendant's targeting, including against his Vice President. *See* ECF No. 1 at ¶ 97. At trial, the Government will introduce evidence of this conduct—including the defendant's public endorsement and encouragement of violence—and further will elicit testimony from witnesses about the threats and harassment they received after the defendant targeted them in relation to the 2020 election.

The Government plans to introduce evidence from the period in advance of the charged conspiracies that demonstrates the defendant's encouragement of violence. For instance, in response to a question during the September 29, 2020, presidential debate asking him to denounce the extremist group the Proud Boys, the defendant instead spoke publicly to them and told them to

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"stand back and stand by." Members of the group embraced the defendant's words as an endorsement and printed merchandise with them as a rallying cry. As discussed below, after the Proud Boys and other extremist groups participated in obstructing the congressional certification on January 6, the defendant made clear that they were acting consistent with his intent and direction in doing so.

Long after the charged conduct, the defendant continued to falsely attack two Georgia election workers despite being on notice that his claims about them in 2020 were false and had subjected them to vile, racist, and violent threats and harassment. As set forth in the indictment, during the charged conspiracy, the defendant and his co-conspirators spread knowing lies about the election workers and inspired death threats against them. *See* ECF No. 1 at ¶¶ 26, 29, 31a. In late December 2022, the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol published transcripts of its interviews with the election workers, in which the women provided graphic testimony about the threats and harassment they endured after the defendant and his agents falsely accused them. In apparent response, the defendant then doubled down and recommenced his attacks on the election workers in posts on Truth Social. He even zeroed in on one of the election workers, falsely writing that she was an election fraudster, a liar, and one of the "treacher[ous] . . . monsters" who stole the country, and that she would be in legal trouble.

The Government will introduce such evidence to further establish the defendant and his co-conspirators' plan of silencing, and intent to silence, those who spoke out against the defendant's false election fraud claims; the defendant's knowledge that his public attacks on officials—like those on his Vice President as described in the indictment—could foreseeably lead to threats, harassment, and violence; and the defendant's repeated choice to attack individuals with full knowledge of this effect. It also constitutes after-the-fact corroboration of the defendant's intent, because even after it was incontrovertibly clear that the defendant's public false claims

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targeting individuals caused them harassment and threats, the defendant persisted—meaning that the jury may properly infer that he intended that result. Finally, evidence of the defendant's encouragement of violence and the consequences of his public attacks is admissible to allow the jury to consider the credibility and motives of witnesses who may be the continuing victims of the defendant's attacks.

F. Post-Conspiracy Evidence of the Defendant's Steadfast Support and Endorsement of Rioters

As described in the Government's opposition to the defendant's motion to strike language from the indictment, ECF No. 140, the Government plans to introduce evidence at trial showing that in the years since the January 6 attack on the Capitol, the defendant has openly and proudly supported individuals who criminally participated in obstructing the congressional certification that day, including by suggesting that he will pardon them if re-elected, even as he has conceded that he had the ability to influence their actions during the attack.

Of particular note are the specific January 6 offenders whom the defendant has supported—namely, individuals convicted of some of the most serious crimes charged in relation to January 6, such as seditious conspiracy and violent assaults on police officers. During a September 17, 2023, appearance on Meet the Press, for instance, the defendant said regarding Proud Boys leader Enrique Tarrio—who was convicted of seditious conspiracy—"I want to tell you, he and other people have been treated horribly." The defendant then criticized the kinds of lengthy sentences received only by defendants who, like Tarrio, committed the most serious crimes on January 6. Similarly, the defendant has chosen to publicly and vocally support the "January 6 Choir," a group of defendants held at the District of Columbia jail, many of whose criminal history and/or crimes on January 6 were so violent that their pretrial release would pose a danger to the public. The defendant nonetheless has financially supported and celebrated these offenders—many of whom

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assaulted law enforcement on January 6—by promoting and playing their recording of the National Anthem at political rallies and calling them "hostages."

Evidence of the defendant's post-conspiracy embrace of particularly violent and notorious rioters is admissible to establish the defendant's motive and intent on January 6—that he sent supporters, including groups like the Proud Boys, whom he knew were angry, and whom he now calls "patriots," to the Capitol to achieve the criminal objective of obstructing the congressional certification. In addition, his statements in this time period agreeing that he then held, and still holds, enormous influence over his supporters' actions is evidence of his knowledge and intent to obstruct the certification, as he chose not to exercise that influence to mitigate the violence on January 6. Perhaps most importantly, the defendant's embrace of January 6 rioters is evidence of his intent during the charged conspiracies, because it shows that these individuals acted as he directed them to act; indeed, this evidence shows that the rioters' disruption of the certification proceeding is exactly what the defendant intended on January 6. And finally, evidence of the defendant's statements regarding possible pardons for January 6 offenders is admissible to help the jury assess the credibility and motives of trial witnesses, because through such comments, the defendant is publicly signaling that the law does not apply to those who act at his urging regardless of the legality of their actions.

Respectfully submitted,

Jack Smith
Special Counsel

/s/Molly Gaston
Molly Gaston
Thomas P. Windom
Senior Assistant Special Counsels
950 Pennsylvania Avenue NW
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/11/2023 2:21:31 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]

Subject: Check-in
Location: Microsoft Teams Meeting

Start: 12/11/2023 3:30:00 PM
End: 12/11/2023 4:00:00 PM
Show Time As: Tentative

Recurrence: (none)

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Microsoft Teams meeting

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/11/2023 3:26:38 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 litigation tracker
Attachments: 14A Litigation tracker (Dec. 7)[66].docx

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Hi Heather,

Please find attached last week's 14.3 Litigation Tracker (coming to you late thanks to my first bout of Covid). Items of note are below.

Colorado:

Anderson v. Griswold:

- The Colorado Supreme Court heard oral argument on December 6. Several justices questioned the trial court's conclusion that the president is not an "officer of the United States." But they seemed to be skeptical of CREW's arguments as well, particularly on the question of the Secretary's authority to exclude a candidate from the ballot and whether prudential concerns weigh in favor of finding the matter nonjusticiable.

Michigan

LaBrant v. Benson:

- The appeal before the Michigan Court of Appeals will be fully briefed and submitted on Friday, December 8. No oral argument will be held.
- The Michigan Supreme Court declined to hear the case before it is considered by the Court of Appeals.

Oregon

Nelson v. Griffin-Valade:

- On December 6, Free Speech for People filed a petition for a writ of mandamus on behalf of Oregon voters in the Oregon Supreme Court. The petition asks the court to issue a writ requiring the Secretary of State to exclude Trump from the primary and general ballots in Oregon in 2024.

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: NV letter
Attachments: 689766361-RNC-letter-to-Nevada-Secretary-of-State[41].pdf

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December 4, 2023

Francisco V. Aguilar
Nevada Secretary of State
101 N Carson Street, Suite 3
Carson City, NV 89701

Dear Secretary Aguilar:

As you are aware, the National Voter Registration Act (NVRA) requires States to maintain an accurate and current voter registration roll for elections for federal office. Based on our analysis, Nevada is in violation of Section 8 of the NVRA. By comparing publicly available voter registration records with the U.S. Census Bureau's 2021 citizen voting age population data, we have determined that three counties have more registered active voters than adult citizens over the age of 18. We have identified five other counties that have voter registration rates that exceed 90 percent of adult citizens over the age of 18, a figure that far eclipses the voter registration rate nationwide in recent elections. This evidence shows that your office and officials in these counties are not conducting appropriate list maintenance to ensure that the voter registration roll is accurate and current, as required by federal law.

Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. §20501(b)(3). Specifically, it enacted Section 8 "to ensure that accurate and current voter registration rolls are maintained." *Id.* §20501(b)(4). Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. After all, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Section 8 of the NVRA obligates States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. 52 U.S.C. §20507(a)(4). And as the U.S. Supreme Court has recently confirmed, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

This letter provides statutory notice that the Republican National Committee, Nevada Republican Party, and Scott Johnston, acting as political parties and a registered Nevada voter with substantial interests in secure elections, will bring a lawsuit against you and, if appropriate, against the counties named in this letter, if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law. *See Green v. Bell*, No. 321-cv-00493, 2023 WL 2572210, at *3 (W.D.N.C. Mar. 20, 2023). Furthermore, while we hope to avoid litigation, we still formally request that the Nevada Secretary of State and the eight counties named in this letter (if they maintain separate records) act to preserve documents as required by Section 8(i) of the NVRA. 52 U.S.C. §20507(i)(1)-(2).

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As the Secretary of State, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. *Id.* §20509. Nevada law designates the Secretary of State as the State's chief election officer charged with overseeing and maintaining voter registration. *See* Nev. Rev. Stat. §293.675. This letter explains how we concluded that Nevada and the eight named counties are violating Section 8 of the NVRA, and the curative steps needed to avoid litigation.

I. The NVRA protects election integrity by requiring States to make reasonable efforts to maintain accurate and current lists of registered active voters.

Nevada's voter registration list maintenance program must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. §20507(b)(1). Section 8 requires that States "remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant" to outside of his or her current voting jurisdiction. *Id.* §20507(4)(A)-(B).

Additionally, the Help America Vote Act (HAVA) mandates that States adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. *Id.* §21083(a)(2)(A). States must "ensure that voter registration records in the State are accurate and are updated regularly," a process which must include making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* §21083(a)(4). HAVA's list maintenance mandates include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under State law due to felony conviction. *Id.* §21083(a)(2)(A)(ii)(I)-(II).

As the chief election official for Nevada, the responsibility rests with you to coordinate and oversee the list maintenance activities of local and county election officials. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) ("[T]he NVRA's centralization of responsibility counsels against … buck passing."); *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (explaining that a State or chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted"); *see also, e.g.*, Nev. Rev. Stat. §293.675 (setting forth requirements for the Secretary of State to conduct regular voting list maintenance activities).

II. Three Nevada counties have more registered active voters than voting-eligible citizens, and five others have suspiciously high rates of voter registration.

Based on data gathered from the U.S. Census Bureau's 2021 citizen voting age population data and the most up-to-date count of registered active voters available from the Nevada Secretary of State, Nevada is failing to meet its list maintenance obligations. Comparing the registered active voter count to the 2021 Census data reveals that these

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three counties have greater than 100 percent voter registration: Douglas (105%), Lyon (106%), and Storey (114%).

In other words, there are more registered voters than eligible voters. This impossible statistic shows that voter registration records are not being maintained. Meanwhile, five other counties across the State have voter registration rates of 90 percent or greater: Carson City (92%), Churchill (90%), Clark (92%), Eureka (91%), and Washoe (92%).

These voter registration rates are abnormally or, in the case of counties with greater than 100 percent registration, impossibly high. This constitutes strong evidence that Nevada's voter rolls are not being properly maintained. According to the U.S. Census Bureau, only 69.1% of the citizen voting-age population was registered nationwide in the November 2022 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, for States: November 2022*, perma.cc/XQ3R-E4FT. Similarly, only 72.7% of the citizen voting-age population was registered nationwide in the November 2020 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration, for States: November 2020*, perma.cc/7BUT-ZLDA. The U.S. Census Bureau further reported that Nevada's statewide voter registration rates for the 2022 and 2020 elections were 65.1% and 66.2% of the citizen voting-age population, respectively. *Id.* Thus, these eight counties are significant outliers, touting voter registration rates 17 to 45 percentage points higher than the national figures from 2022 and 2020, and 23 to 49 percentage points above the State figures for the same period. Discrepancies on this scale cannot be attributed to above-average voter participation and instead point to deficient list maintenance.

Nevada's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2024 federal election, and signals to voters that elections in Nevada are not being properly safeguarded.

III. Avoiding litigation

The NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. §20510(b)(1)-(2); *see Green*, 2023 WL at *1-*7. If the violations we have identified are not corrected within 90 days of receipt of this letter, we will have to file a lawsuit. *See* 52 U.S.C. §20510(b)(2).

We hope to avoid litigation and would welcome immediate efforts by your office to bring Nevada into compliance with Section 8. We ask that you evaluate your current list maintenance procedures and protocols to identify the cause of the compliance failures discussed in this letter. We also ask that you modify your current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law. Your list maintenance program must identify and remove these categories of individuals from the official lists of eligible voters:

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1. All persons who are ineligible to vote by reason of a change in residence;
2. Deceased individuals;
3. Persons who are incarcerated;
4. All other ineligible voters.

We also ask that you, and should they want to respond separately, each named county, respond in writing within 45 days of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake before the 2024 general election to bring Nevada into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, state, and local entities outlined below. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election. To avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus require legal action, you should know that the NVRA authorizes courts to award "reasonable attorney fees, including litigation expenses, and costs" to the prevailing party. 52 U.S.C. §20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

IV. Preservation of records

We also ask that you act to preserve certain records as required under the NVRA, should they be needed in the future or for possible litigation. 52 U.S.C. §20507(i). These documents and records include, but are not limited to:

1. A copy of the most recent voter registration database for the State of Nevada and for each named county, including pertinent information on each voter (name, date of birth, home address, voter activity, and active or inactive status);
2. Internal communications and emails of the Nevada Secretary of State's office, applicable county boards of elections, and any divisions, bureaus, offices, third party agents, and contractors relating to voter list maintenance;
3. All emails or other communications between the Nevada Secretary of State and county elections officials concerning their list maintenance activities, their duties to maintain accurate and current lists, and any consequences arising from a failure to do so;
4. All email or other communications between the Nevada Secretary of State and any State or federal offices and agencies, in which the Nevada Secretary of State seeks or obtains information about registered voters who have moved, been convicted and imprisoned, died, or are otherwise ineligible, for use in list maintenance activities; and

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5. All email or other communications between the Nevada Secretary of State and any other State, as well as email and communications with the Electronic Registration Information Center, the American Association of Motor Vehicle Authorities, and the National Association for Public Health Statistics and Information Systems, regarding obtaining information about voters who are deceased or who have moved for use in list maintenance activities.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of Nevada's voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if Nevada fails to take the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

We look forward to your response.

Sincerely,

/s/ Thomas R. McCarthy

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Subject: Colorado Trump Decision--Privileged
Attachments: Anderson v. Griswold Opinion (Co. Supreme Court) 12.19.pdf

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All:

You may have seen that the Colorado Supreme Court just held that Trump is disqualified from the office of the President under Section Three of the Fourteenth Amendment. The decision is attached here.

The court stayed the decision until January 4, 2024 contemplating review in the US Supreme Court:

"Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court. "

We'll send a summary of the decision tomorrow.

Best,

Jonathan

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Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Judicial Branch's homepage at http://www.courts.state.co.us. Opinions are also posted on the Colorado Bar Association's homepage at http://www.cobar.org.

ADVANCE SHEET HEADNOTE
December 19, 2023

2023 CO 63

No. 23SA300, *Anderson v. Griswold*—Election Law—Fourteenth Amendment—First Amendment—Political Questions—Hearsay.

In this appeal from a district court proceeding under the Colorado Election Code, the supreme court considers whether former President Donald J. Trump may appear on the Colorado Republican presidential primary ballot in 2024. A majority of the court holds that President Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the United States Constitution. Because he is disqualified, it would be a wrongful act under the Election Code for the Colorado Secretary of State to list him as a candidate on the presidential primary ballot. The court stays its ruling until January 4, 2024, subject to any further appellate proceedings.

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The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 63

Supreme Court Case No. 23SA300
Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)
District Court, City and County of Denver, Case No. 23CV32577
Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian,

v.

Respondent-Appellee:

Jena Griswold, in her official capacity as Colorado Secretary of State,

and

Intervenor-Appellee:

Colorado Republican State Central Committee, an unincorporated association,

Intervenor-Appellee/Cross-Appellant:

Donald J. Trump.

Order Affirmed in Part and Reversed in Part
en banc
December 19, 2023

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PER CURIAM.
CHIEF JUSTICE BOATRIGHT dissented.
JUSTICE SAMOUR dissented.
JUSTICE BERKENKOTTER dissented.

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PER CURIAM.[1]

¶1 More than three months ago, a group of Colorado electors eligible to vote in the Republican presidential primary—both registered Republican and unaffiliated voters ("the Electors")—filed a lengthy petition in the District Court for the City and County of Denver ("Denver District Court" or "the district court"), asking the court to rule that former President Donald J. Trump ("President Trump") may not appear on the Colorado Republican presidential primary ballot.

¶2 Invoking provisions of Colorado's Uniform Election Code of 1992, §§ 1-1-101 to 1-13-804, C.R.S. (2023) (the "Election Code"), the Electors requested that the district court prohibit Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), from placing President Trump's name on the presidential primary ballot. They claimed that Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") disqualified President Trump from seeking the presidency. More specifically, they asserted that he was ineligible under Section Three because he engaged in insurrection on January 6, 2021, after swearing an oath as President to support the U.S. Constitution.

---

[1] Consistent with past practice in election-related cases with accelerated timelines, we issue this opinion per curiam. *E.g.*, *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478; *In re Colo. Gen. Assemb.*, 332 P.3d 108 (Colo. 2011); *In re Reapportionment of Colo. Gen. Assemb.*, 647 P.2d 191 (Colo. 1982).

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¶3 After permitting President Trump and the Colorado Republican State Central Committee ("CRSCC"; collectively, "Intervenors") to intervene in the action below, the district court conducted a five-day trial. The court found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three. *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). But, the district court concluded, Section Three does not apply to the President. *Id.* at ¶ 313. Therefore, the court denied the petition to keep President Trump off the presidential primary ballot. *Id.* at Part VI. Conclusion.

¶4 The Electors and President Trump sought this court's review of various rulings by the district court. We affirm in part and reverse in part. We hold as follows:

- The Election Code allows the Electors to challenge President Trump's status as a qualified candidate based on Section Three. Indeed, the Election Code provides the Electors their only viable means of litigating whether President Trump is disqualified from holding office under Section Three.
- Congress does not need to pass implementing legislation for Section Three's disqualification provision to attach, and Section Three is, in that sense, self-executing.
- Judicial review of President Trump's eligibility for office under Section Three is not precluded by the political question doctrine.

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- Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error.
- The district court did not abuse its discretion in admitting portions of Congress's January 6 Report into evidence at trial.
- The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection."
- The district court did not err in concluding that President Trump "engaged in" that insurrection through his personal actions.
- President Trump's speech inciting the crowd that breached the U.S. Capitol on January 6, 2021, was not protected by the First Amendment.

¶5 The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot.

¶6 We do not reach these conclusions lightly. We are mindful of the magnitude and weight of the questions now before us. We are likewise mindful of our solemn duty to apply the law, without fear or favor, and without being swayed by public reaction to the decisions that the law mandates we reach.

¶7 We are also cognizant that we travel in uncharted territory, and that this case presents several issues of first impression. But for our resolution of the Electors' challenge under the Election Code, the Secretary would be required to include President Trump's name on the 2024 presidential primary ballot.

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Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court.

I. Background

¶8 On November 8, 2016, President Trump was elected as the forty-fifth President of the United States. He served in that role for four years.

¶9 On November 7, 2020, Joseph R. Biden, Jr., was elected as the forty-sixth President of the United States. President Trump refused to accept the results, but President Biden now occupies the office of the President.

¶10 On December 14, 2020, the Electoral College officially confirmed the results: 306 electoral votes for President Biden; 232 for President Trump. President Trump continued to challenge the outcome, both in the courts and in the media.

¶11 On January 6, 2021, pursuant to the Twelfth Amendment, U.S. Const. amend. XII, and the Electoral Count Act, 3 U.S.C. § 15, Congress convened a joint session to certify the Electoral College votes. President Trump held a rally that morning at the Ellipse in Washington, D.C. at which he, along with several others,

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spoke to the attendees. In his speech, which began around noon, President Trump persisted in rejecting the election results, telling his supporters that "[w]e won in a landslide" and "we will never concede." He urged his supporters to "confront this egregious assault on our democracy"; "walk down to the Capitol . . . [and] show strength"; and that if they did not "fight like hell, [they would] not . . . have a country anymore." Before his speech ended, portions of the crowd began moving toward the Capitol. Below, we discuss additional facts regarding the events of January 6, as relevant to the legal issues before us.

¶12 Just before 4 a.m. the next morning, January 7, 2021, Vice President Michael R. Pence certified the electoral votes, officially confirming President Biden as President-elect of the United States.

¶13 President Trump now seeks the Colorado Republican Party's 2024 presidential nomination.

II. Procedural History

¶14 On September 6, 2023, the Electors initiated these proceedings against the Secretary in Denver District Court under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the Secretary's authority to list President Trump "as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three]."

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¶15 President Trump intervened and almost immediately filed a Notice of Removal to federal court, asserting federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a), 1446. In light of the removal, the Denver District Court closed the case on September 8. On September 12, the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing and the Secretary had neither joined nor consented to the removal.

¶16 Once the Electors filed proof with the Denver District Court that all parties had been served, the court reopened the case on September 14. At a status conference four days later, on September 18, the Secretary emphasized that she must certify the candidates for the 2024 presidential primary ballot by January 5. *See* § 1-4-1204(1). The court set the matter for a five-day trial, beginning on October 30. On September 22, with the parties' input, the court issued expedited case management deadlines for a host of matters, including the disclosure of expert reports, witness lists and exhibits, as well as for briefing and argument on several motions. The court also granted CRSCC's motion to intervene on October 5.

¶17 On October 11, the Secretary's office received (1) President Trump's signed and notarized statement of intent to run as a candidate for a major political party in the presidential primary; (2) the approval form for him to do so, signed by the chair of the Colorado Republican Party, asserting that President Trump was "bona

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fide and affiliated with the [Republican] party"; and (3) the requisite filing fee. *See* § 1-4-1204(1)(c).

¶18 On October 20, the district court issued an Omnibus Order addressing many outstanding motions. Regarding President Trump's motions, the court reached three conclusions that are relevant now: (1) the Electors' petition involved constitutional questions, but remained "a challenge against an election official based on her alleged duties under the Election Code," and "such a claim [was] proper under [section] 1-1-113 as a matter of procedure"; (2) "[section] 1-4-1204 expressly incorporates [section] 1-1-113, and [section] 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is 'about to' take an improper or wrongful act"—thus, because the Electors had alleged such an act, the matter was ripe for decision; and (3) it could not conclude, as a matter of law, that the Fourteenth Amendment excludes a candidate from the presidential primary ballot or that the Secretary has the authority to determine candidate qualifications, so those issues would be determined at the trial.

¶19 Regarding CRSCC's motions, the court, in relevant part, concluded that the state does not violate a political party's First Amendment associational rights by excluding constitutionally ineligible candidates from the presidential primary ballot, but also rejected CRSCC's argument to the extent it purported to raise an

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independent constitutional claim beyond the proper scope of a section 1-1-113 proceeding.

¶20 On October 23, President Trump filed a petition for review in this court, asking us to exercise original jurisdiction to halt the scheduled trial. Four days later, we denied the petition without passing judgment on the merits of any of President Trump's contentions.

¶21 On October 25, the district court denied President Trump's Fourteenth-Amendment-based motion to dismiss. As relevant now, the court concluded that (1) it would not dismiss the case under the political question doctrine, but it reserved the right to revisit the doctrine "to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress"; (2) whether Section Three is self-executing is irrelevant because section 1-4-1204 allows the Secretary to exclude constitutionally disqualified candidates, and states "can, and have, applied Section [Three] pursuant to state statutes without federal enforcement legislation"; and (3) it would reserve for trial the issues of whether Section Three applies to a President and whether President Trump had engaged in insurrection.

¶22 The trial began, as scheduled, on October 30. The evidentiary portion lasted five days, with closing arguments almost two weeks later, on November 15.

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During those two weeks, the Electors, the Secretary, President Trump, and CRSCC submitted proposed findings of fact and conclusions of law. The court issued its written final order on November 17, finding, by clear and convincing evidence, that the events of January 6 constituted an insurrection and President Trump engaged in that insurrection. The court further concluded, however, that Section Three does not apply to a President because, as the terms are used in Section Three, the Presidency is not an "office . . . under the United States" nor is the President "an officer of the United States" who had "previously taken an oath . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3; *see Anderson*, ¶¶ 299–315. Accordingly, the Secretary could not exclude President Trump's name from the presidential primary ballot. *Anderson*, Part VI. Conclusion.

¶23 On November 20, both the Electors and President Trump sought this court's review of the district court's rulings under section 1-1-113(3). We accepted jurisdiction of the parties' cross-petitions. Following extensive briefing from the parties and over a dozen amici, we held oral argument on December 6 and now issue this ruling.

III. Analysis

¶24 We begin with an overview of Section Three. We then address threshold questions regarding (1) whether the Election Code provides a basis for review of the Electors' claim, (2) whether Section Three requires implementing legislation

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before its disqualification provision attaches, and (3) whether Section Three poses a nonjusticiable political question. After concluding that these threshold issues do not prevent us from reaching the merits, we consider whether Section Three applies to a President. Concluding that it does, we address the admissibility of Congress's January 6 Report (the "Report") before reviewing, and ultimately upholding, the district court's findings of fact and conclusions of law in support of its determination that President Trump engaged in insurrection. Lastly, we consider and reject President Trump's argument that his speech on January 6 was protected by the First Amendment.[2]

A. Section Three of the Fourteenth Amendment and Principles of Constitutional Interpretation

¶25 The end of the Civil War brought what one author has termed a "second founding" of the United States of America. *See* Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019). Reconstruction ushered in the Fourteenth Amendment, which includes Section Three, a provision

[2] President Trump also listed a challenge to the traditional evidentiary standard of proof for issues arising under the Election Code as a potential question on appeal, claiming that "[w]hen particularly important individual interests such as a constitutional right [is] at issue, the proper standard of proof requires more than a preponderance of the evidence." As noted above, the district court held that the Electors proved their challenge by clear and convincing evidence. And because President Trump chose not to brief this issue, he has abandoned it. *See People v. Eckley*, 775 P.2d 566, 570 (Colo. 1989).

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addressing what to do with those individuals who held positions of political power before the war, fought on the side of the Confederacy, and then sought to return to those positions. *See* National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%2013,Rights%20to%20formerly%20enslaved%20people [https://perma.cc/5EZU-ABV3] (explaining that the Fourteenth Amendment was passed by Congress on June 13, 1866, and officially ratified on July 9, 1868); *see also* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

¶26 Section Three provides:

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

U.S. Const. amend. XIV, § 3.

¶27 In interpreting a constitutional provision, our goal is to prevent the evasion of the provision's legitimate operation and to effectuate the drafters' intent. *People v. Smith*, 2023 CO 40, ¶ 20, 531 P.3d 1051, 1055. To do so, we begin with

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Section Three's plain language, giving its terms their ordinary and popular meanings. *Id.* "To discern such meanings, we may consult dictionary definitions." *Id.*

¶28 If the language is clear and unambiguous, then we enforce it as written, and we need not turn to other tools of construction. *Id.* at ¶ 21, 531 P.3d at 1055. However, if the provision's language is reasonably susceptible of multiple interpretations, then it is ambiguous, and we may consider "the textual, structural, and historical evidence put forward by the parties," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and we will construe the provision "in light of the objective sought to be achieved and the mischief to be avoided," *Smith*, ¶ 20, 531 P.3d at 1055 (quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254).

¶29 These principles of constitutional interpretation apply to all sections of this opinion in which we address the meaning of any constitutional provision.

B. The State Court Has the Authority to Adjudicate a Challenge to Presidential Candidate Qualifications Under the Election Code

¶30 The Electors' claim is grounded in sections 1-4-1204 and 1-1-113 of the Election Code. They argue that it would be a breach of duty or other wrongful act under the Election Code for the Secretary to place President Trump on the presidential primary ballot because he is not a "qualified candidate" based on

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Section Three's disqualification. § 1-4-1203(2)(a), C.R.S. (2023). The Electors therefore seek an order pursuant to section 1-1-113 directing the Secretary not to list President Trump on the presidential primary ballot for the election to be held on March 5, 2024 (or any future ballot).

¶31 President Trump and CRSCC contend that Colorado courts lack jurisdiction over the Electors' claim and that the Electors cannot state a proper section 1-1-113 claim, in part because the Electors' claim is a "constitutional claim" that cannot be raised in a section 1-1-113 action under this court's decisions in *Frazier v. Williams*, 2017 CO 85, 401 P.3d 541, and *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478 (per curiam). CRSCC also argues that the Secretary lacks authority to interfere with a political party's decision-making process or to interfere with the party's First Amendment right of association to select its own candidates. Lastly, President Trump argues that the expedited procedures under section 1-1-113 are insufficient to evaluate the Electors' claim.

¶32 Before considering each of these arguments in turn, we first explain the standard of review for statutory interpretation and then provide an overview of the Election Code provisions at issue. Turning to Intervenors' contentions, we first conclude that the district court had jurisdiction to adjudicate the Electors' claim under section 1-1-113. But, recognizing that the ability to exercise *jurisdiction* here does not mean the Electors can state a *proper claim* under section 1-1-113, we

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explore whether states have the constitutional power to assess presidential qualifications. We conclude that they do, provided their legislatures have established such authority by statute. Analyzing the relevant provisions of the Election Code, we then conclude that the General Assembly has given Colorado courts the authority to assess presidential qualifications and, therefore, that the Electors have stated a proper claim under sections 1-4-1204 and 1-1-113. We next address Intervenors' related arguments and conclude that limiting the presidential primary ballot to constitutionally qualified candidates does not interfere with CRSCC's associational rights under the First Amendment. Finally, we conclude that section 1-1-113 provides sufficient due process for evaluating whether a candidate satisfies the constitutional qualifications for the office he or she seeks.

1. Standard of Review

¶33 We review the district court's interpretation of the relevant statutes de novo. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 16, 462 P.3d 1081, 1084. In doing so, "[o]ur primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574 (alteration in original) (quoting *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)). When a term is undefined, "we construe a statutory term in accordance with its ordinary or natural meaning." *Id.* (quoting *Cowen v. People*, 2018 CO 96, ¶ 14,

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431 P.3d 215, 218). If the language is clear, we apply it as written. *Ferrigno Warren*, ¶ 16, 462 P.3d at 1084.

¶34 If, however, the language is reasonably susceptible of multiple interpretations, we may turn to other tools of construction to guide our interpretation. *Cowen*, ¶ 12, 431 P.3d at 218. These may include consideration of the purpose of the statute, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. § 2-4-203(1), C.R.S. (2023). We also avoid constructions that would yield illogical or absurd results. *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶ 27, 531 P.3d 986, 993.

2. Presidential Primaries Under the Election Code

¶35 Before addressing the merits, we provide a brief overview of the Election Code's provisions relating to presidential primary elections. Article VII, Section 11 of the Colorado Constitution commands the General Assembly to "pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Pursuant to this constitutional mandate, the Secretary's duties under the Election Code include supervising the conduct of primary and general elections in the state and enforcing the provisions of the Election Code. § 1-1-107(1)(a)–(b), (5), C.R.S. (2023).

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¶36 Part 12 of article 4 of the Election Code governs presidential primary elections. *See generally* §§ 1-4-1201 to -1207, C.R.S. (2023).[3] Section 1-4-1201, C.R.S. (2023), explains that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." This reference indicates that the legislature envisioned part 12 as operating in harmony with

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[3] Before 1990, Colorado's political parties used caucuses to nominate their presidential candidates. That year, Colorado voters adopted a referred measure establishing presidential primary elections. *See generally* Ch. 42, sec. 1–2, §§ 1-4-1101 to -1104, 1990 Colo. Sess. Laws 311, 311–13. The legislature later amended these statutes as part of a 1992 repeal and reenactment of the Election Code. *See* Ch. 118, sec. 7, §§ 1-4-1201 to -1207, 1992 Colo. Sess. Laws 624, 696–99. These amendments added the precursor to current section 1-4-1204(4): they permitted "challenges concerning the right of any candidate's name to appear on the ballot of the presidential primary election" but directed the Secretary (not a court) to hear and assess the validity of such challenges. Ch. 118, sec. 7, § 1-4-1203(4), 1992 Colo. Sess. Laws at 697–98.

Colorado eliminated presidential primary elections in 2003. Ch. 24, sec. 6, 2003 Colo. Sess. Laws 495, 496. In 2016, however, voters restored such elections through Proposition 107, a citizen-initiated measure. Proposition 107, Ballot Initiative No. 140, https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/7TX8-J59L]. Proposition 107 largely preserved the pre-2003 version of section 1-4-1204(4) that vested the Secretary with the power to hear challenges to the listing of presidential primary candidates. *Id.* at 61. In a 2017 clean-up bill, the General Assembly adopted several amendments to the citizen-initiated measure "to facilitate the effective implementation of the state's election laws." S.B. 17-305, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). Relevant here, the legislature directed challenges under section 1-4-1204(4) away from the Secretary and instead to the district court through section 1-1-113 proceedings. *Id.* at 4–5. Section 1-4-1204(4) has remained otherwise unchanged since its reenactment.

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federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.

¶37 The Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election."[4] (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary.[5] *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized

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[4] In full, the quoted language reads: "[E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election." § 1-4-1203(2)(a). The phrase "pursuant to this section" sheds no light on the meaning of "qualified candidate." Section 1-4-1203 simply establishes the mechanics of presidential primaries, such as the date of the primary, elector party affiliation rules, and the content of primary ballots. § 1-4-1203(1), (2)(a), (4). Thus, "pursuant to this section" modifies the "presidential primary election" in which qualified candidates are entitled to participate: an election conducted in accordance with section 1-4-1203.

[5] In this context, the legislature appears to have used "statement" and "affidavit" interchangeably.

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"statement of intent" in order for votes to be counted for that candidate and stating that "such affidavit" must be accompanied by the requisite filing fee).

¶38 The Secretary's statement-of-intent form for a major party presidential primary candidate requires the candidate to affirm via checkboxes that he or she meets the qualifications set forth in Article II of the U.S. Constitution for the office of President; specifically, that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. Colo. Sec'y of State, *Major Party Candidate Statement of Intent for Presidential Primary*, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/YA3X-3K9T] ("Intent Form"); *see also* U.S. Const. art. II, § 1, cl. 5. The form further requires the candidate to sign an affirmation that states, "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*."[6] Intent Form, *supra* (emphasis added). No party has challenged the Secretary's authority to require candidates to provide this information on the statement-of-intent form.

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[6] The Affidavit of Intent for write-in candidates for the presidential primary has the same requirements. *Affidavit of Intent for Presidential Primary Write-In Designation*, Colo. Sec'y of State (last updated June 20, 2023), https://www.sos.state.co.us/pubs/elections/Candidates/files/PresidentialPrimaryWrite-In.pdf [https://perma.cc/V83P-HLAD].

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¶39 Section 1-4-1204(1) requires the Secretary to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots" not later than sixty days before the presidential primary election. For the 2024 election cycle, that deadline is January 5, 2024.

¶40 Section 1-4-1204(1) further states:

> The only candidates whose names shall be placed on ballots for the election shall be those candidates who:
>
> . . . .
>
> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors . . . .

For the 2024 election cycle, the deadline to submit these items was December 11, 2023.

¶41 Section 1-4-1204(4) allows for "challenge[s] to the listing of any candidate on the presidential primary election ballot." Any such challenge must be brought "no later than five days after the filing deadline for candidates" and "must provide notice . . . of the alleged impropriety that gives rise to the complaint." *Id.* The district court must hold a hearing no later than five days after the challenge is filed

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to "assess the validity of all alleged improprieties." *Id.* The statute does not limit the length or content of the hearing; it does, however, require the district court to issue findings of fact and conclusions of law no later than forty-eight hours after the hearing concludes. *Id.* "The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." *Id.*

¶42 Challenges under section 1-4-1204(4) must be brought through the special statutory procedure found in section 1-1-113 for adjudicating controversies that arise under the Election Code. § 1-4-1204(4) (providing that any challenge to the listing of a candidate on the presidential primary ballot "must be made in writing and filed with the district court in accordance with section 1-1-113(1)" and "any order entered by the district court may be reviewed [by the supreme court] in accordance with section 1-1-113(3)").

¶43 Section 1-1-113 has deep roots in Colorado election law. It originated in an 1894 amendment to Colorado's Australian Ballot Law, first adopted by the Eighth General Assembly in 1891. Ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65. Much like its present-day counterpart, the original provision established procedures for adjudicating controversies between election officials and any candidate, political party officers or representatives, or persons making nominations.[7] *Id.*

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[7] Over time, the legislature amended the law to strengthen the courts' power to resolve election disputes. For example, in 1910, the General Assembly passed

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¶44 The current version of section 1-1-113 establishes (with exceptions not relevant here) "the *exclusive method* for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4) (emphasis added). It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code *has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith *perform the duty or to desist from the wrongful act*

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primary election legislation (not then applicable to presidential elections) authorizing district courts to accept verified petitions alleging, among other things, "that the name of any person has been or is about to be wrongfully placed upon" primary ballots and to order the Secretary (among other election officials) to correct such errors. Ch. 4, § 25, 1910 Colo. Sess. Laws. 15, 33. The 1910 law also gave this court the power to review the district court's decision. *Id.* at 34; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 657 (Colo. 1924) (confirming that if a proper entity "has violated a duty with which it is charged under the act, the court has power to direct it to correct the wrong").

In 1963, the General Assembly repealed and reenacted Colorado's Election Code. *See generally* Ch. 118, 1963 Colo. Sess. Laws 360. The 1963 code allowed for "any elector" to show "by verified petition . . . that any neglect of duty or wrongful act by any person charged with a duty under this act has occurred or is about to occur," mirroring the language in today's section 1-1-113. Ch. 118, § 203, 1963 Colo. Sess. Laws at 457. The legislature's next reenactment of the code in 1992 codified this procedure at section 1-1-113. Ch. 118, sec. 1, § 1-1-113, 1992 Colo. Sess. Laws 624, 635.

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> or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphases added).

¶45 Section 1-1-113 proceedings also provide for expedited, albeit discretionary, appellate review in this court. § 1-1-113(3). Either party may seek review from this court within three days after the district court proceedings conclude. *Id.* If this court declines jurisdiction of the case, the district court's decision is final and is not subject to further appellate review. *Id.*

¶46 Although Colorado's expedited statutory procedure for litigating election disputes may be unfamiliar nationally, our courts, particularly the Denver District Court (the proper venue when the Secretary is the named respondent), are accustomed to section 1-1-113 litigation. Such cases arise during virtually every election cycle, and this court has exercised jurisdiction many times to review these disputes. *E.g.*, *Kuhn*, ¶ 1, 418 P.3d at 480; *Frazier*, ¶ 1, 401 P.3d at 542; *Carson v. Reiner*, 2016 CO 38, ¶ 1, 370 P.3d 1137, 1138; *Hanlen v. Gessler*, 2014 CO 24, ¶ 3, 333 P.3d 41, 42. Moreover, it is not uncommon for section 1-1-113 cases to require courts to take evidence and grapple with complex legal issues. *E.g.*, *Ferrigno Warren*, ¶¶ 9–13, 462 P.3d at 1083–84 (describing a district court hearing, held one month after the petitioner filed her verified petition and after the parties filed briefing, to determine whether "substantial compliance" was the appropriate standard for a minimum signature requirement, how to apply that standard, and

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whether, based on a four-factor test, a prospective U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 4, 15–18, 418 P.3d at 480–82 (describing a district court hearing to assess evidence and testimony concerning the residency of seven circulators of a petition to reelect a congressional representative); *Meyer v. Lamm*, 846 P.2d 862, 867 (Colo. 1993) (requiring an evidentiary hearing in district court that involved, among other things, the content of ballots cast for a write-in candidate). Even early cases recognized that the original 1894 provision "contemplate[d] the taking of evidence where the issues require[d] it." *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897).

3. The District Court Had Jurisdiction to Adjudicate the Electors' Claim Under the Election Code

¶47 President Trump argues that the district court lacked jurisdiction over the Electors' section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications. A district court has jurisdiction pursuant to section 1-1-113(1) when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act.

¶48 The district court plainly had jurisdiction under section 1-1-113 to hear the Electors' claim. First, the Electors are "eligible elector[s]" within the meaning of the Election Code because, as Republican and unaffiliated voters, they are

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"person[s] who meet[] the specific requirements for voting at a specific election"; namely, the Republican presidential primary election. § 1-1-104(16), C.R.S. (2023); *see also* § 1-4-1203(2)(b) (providing that unaffiliated voters may vote in presidential primary elections); § 1-7-201(1), C.R.S. (2023) (identifying eligible electors for the purpose of primary elections). Second, the Electors timely filed their verified petition under sections 1-1-113 and 1-4-1204(4) in the proper district court. Third, their petition was filed against the Secretary, an election official charged with duties under the Election Code. *See* § 1-1-107 (prescribing the powers and duties of the Secretary); § 1-4-1204(1) ("[T]he secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots."). And fourth, the petition alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not constitutionally qualified to hold office.

¶49 Though it does not affect the district court's *jurisdiction*, President Trump's assertion that the Secretary does not have a duty under the Election Code to determine a candidate's constitutional qualification raises the question of whether the Electors presented a *proper claim*. To answer that question, we must first determine whether, generally, states have the authority to determine presidential qualifications.

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4. States Have the Authority to Assess Presidential Candidates' Qualifications

¶50 "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution delegates to states the authority to prescribe the "Times, Places and Manner" of holding congressional elections, U.S. Const. art. I, § 4, cl. 1, and states retain the power to regulate their own elections, *Burdick*, 504 U.S. at 433. States exercise these powers through "comprehensive and sometimes complex election codes," regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("*Celebrezze*"); *see also, e.g.*, § 1-4-501(1), C.R.S. (2023) (setting qualifications for state office candidates). These powers are uncontroversial and well-explored in U.S. Supreme Court case law.

¶51 But does the U.S. Constitution authorize states to assess the constitutional qualifications of presidential candidates? We conclude that it does.

¶52 Under Article II, Section 1, each state is authorized to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. So long as a state's exercise of its appointment power does not run afoul of another constitutional constraint, that power is plenary. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

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¶53 But voters no longer choose between slates of electors on Election Day. *Chiafalo*, 140 S. Ct. at 2321. Instead, they vote for presidential candidates who serve as proxies for their pledged electors. *Id.* Accordingly, states exercise their plenary appointment power not only to regulate the electors themselves, but also to regulate candidate access to presidential ballots. Absent a separate constitutional constraint, then, states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President. And nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to such candidates. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

¶54 No party in this case has challenged the Secretary's authority to require a presidential primary candidate to confirm on the required statement-of-intent form that he or she meets the Article II requirements of age, residency, and citizenship, and to further attest that he or she "meet[s] all qualifications for the office prescribed by law." Moreover, several courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots. *See id.* (upholding California's refusal to place a twenty-seven-year-old candidate on the presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 948–49 (10th Cir. 2012) (affirming the Secretary's decision to exclude a naturalized citizen from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp.

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109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois's exclusion of a thirty-one-year-old candidate from the presidential ballot).

¶55 As then-Judge Gorsuch recognized in *Hassan*, it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F. App'x at 948.

¶56 The question then becomes whether Colorado has exercised this power through the Election Code. We conclude that it has. Section 1-4-1204(4) is Colorado's vehicle for advancing these state interests. When eligible electors challenge the Secretary's listing on the presidential primary ballot of a candidate who is not constitutionally qualified to assume office, section 1-4-1204(4), as exercised through a proceeding under section 1-1-113, offers an exclusive remedy under the Election Code. *See* § 1-1-113(4).

5. The Electors Have Stated a Proper Claim That Is Not Precluded by *Frazier* and *Kuhn*

¶57 President Trump argues that the Electors' claim cannot be properly litigated in a section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications and because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. Although we agree that the Secretary has no duty to independently investigate the qualifications of a presidential primary candidate, we conclude that the Electors may

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nevertheless challenge a candidate's qualifications under section 1-4-1204(4), and that the Electors' claim here is not a "constitutional claim" precluded by our decisions in *Frazier* and *Kuhn*.

¶58 In presidential primary elections, the Secretary's duty is to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." § 1-4-1204(1). The conditions that must be satisfied before she can exercise this duty are limited to timely receiving (1) confirmation that the prospective candidate is a "bona fide candidate" under the party's rules, (2) a notarized statement of intent from the candidate, and (3) the requisite filing fee or a petition signed by at least 5,000 eligible electors affiliated with the candidate's political party who reside in Colorado. § 1-4-1204(1)(b)–(c).

¶59 Where a candidate does not submit (or cannot comply with) the required attestations on the statement of intent form, the Secretary cannot list the candidate on the ballot. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (D. Colo. 2012), *aff'd* 495 F. App'x at 948. But if the contents of a signed and notarized statement of intent appear facially complete (i.e., the candidate has filled out the Secretary's form confirming that he or she meets the Article II requirements of age, residency, and citizenship, and further attesting that he or she "meet[s] all qualifications for the office prescribed by law"), the Secretary has no duty to further investigate the

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accuracy or validity of the information the prospective candidate has supplied.[8] To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

¶60 The fact that the Secretary has complied with her section 1-4-1204(1) duties does not, however, foreclose a challenge under section 1-4-1204(4). As discussed above, section 1-4-1204(4) permits "[a]ny challenge to the listing of any candidate on the presidential primary election ballot," using section 1-1-113(1) as a procedural vehicle. Section 1-1-113(1), in turn, creates a cause of action for electors alleging a breach of duty *or other wrongful act* under the code. *See Frazier*, ¶ 3, 401 P.3d at 542 (construing "wrongful act" in section 1-1-113 as limited to a wrongful act under the Election Code). Section 1-1-113 then requires the district court—not the election official—to adjudicate an eligible elector's challenge to a candidate's eligibility. *Carson*, ¶ 8, 370 P.3d at 1139 (observing that the Election Code reflects an intent for challenges to the qualifications of a candidate to be

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[8] In contrast, with respect to elections for state office, section 1-4-501(1), C.R.S. (2023), provides that "[t]he designated election official shall not certify the name of any designee or candidate . . . *who the designated election official determines is not qualified* to hold the office that he or she seeks based on residency requirements." (Emphasis added.) This provision for state office expressly charges the Secretary with a duty to investigate whether a candidate "meets any requirements of the office relating to registration, residence, or property ownership," among others. *Id.*

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resolved by the courts); *Hanlen*, ¶ 40, 333 P.3d at 50 ("[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility.").

¶61 As we have explained, the Secretary has complied with her limited duty to accept President Trump's properly completed paperwork. But the Electors have alleged an impending "wrongful act," which is "more expansive than a 'breach' or 'neglect of duty.'" *Frazier*, ¶ 16, 401 P.3d at 545 (quoting § 1-1-113(1)). Indeed, section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code," *Carson*, ¶ 17, 370 P.3d at 1141, including any act that is "inconsistent with the Election Code," *Frazier*, ¶ 16, 401 P.3d at 545.

¶62 We conclude that certifying an unqualified candidate to the presidential primary ballot constitutes a "wrongful act" that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code. Nothing in section 1-4-1204(4) limits challenges under that provision to those based on a breach of the Secretary's duties under section 1-4-1204. And section 1-4-1203(2)(a) clearly limits participation in the presidential primary to political parties fielding "qualified" candidates. Although section 1-4-1203(2)(a) does not define "qualified," nearby provisions regarding write-in candidates indicate that "qualified" refers to a candidate's qualifications for office. As with bona fide major party candidates under section 1-4-1204(1), write-in candidates for the presidential primary must

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file a "notarized candidate statement of intent." § 1-4-1205. Under the Election Code, such statements for all write-in candidates (regardless of the type of election) must indicate that the candidate "desires the office and is *qualified* to assume its duties if elected." § 1-4-1101(1) (emphasis added). The Election Code's explicit requirement that a write-in candidate be "qualified" to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be "qualified" in the same manner.[9]

¶63 Reading the Election Code as a whole, then, we conclude that "qualified" in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President. It has to, as section 1-4-1203(2)(a) supplies the only textual basis in the Election Code for the Secretary's authority to require a presidential primary candidate to attest to his or her qualifications for office in the candidate statement (or affidavit) of intent. Moreover, to read "qualified" *not* to encompass federal constitutional qualifications would undermine the purpose of the Election Code—"to secure the

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[9] This interpretation is further supported by the Election Code's treatment of uncontested primaries. The Election Code allows the Secretary to cancel a primary when every political party has no more than one affiliated candidate, whether that candidate is certified to the presidential primary ballot pursuant to section 1-4-1204(1) or is a write-in candidate entering under section 1-4-1205. § 1-4-1203(5). Because the General Assembly plainly treats such candidates as equivalent for purposes of 1-4-1203(5), we conclude that the legislature also viewed the "qualified" requirement in both provisions as equivalent.

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purity of elections"—while compromising the Secretary's ability to advance that purpose. Colo. Const. art. VII, § 11; § 1-1-107(1), (5).

¶64 We therefore reject such an interpretation as contrary to the purpose of the Election Code. Instead, we conclude that, under the Election Code, "qualified" candidates for the presidential primary are those who, at a minimum, are qualified to hold office under the provisions of the U.S. Constitution.

¶65 We recognize that the Supreme Court has twice declined to address whether Section Three—which *disqualifies* an oath-breaking insurrectionist from *holding* office—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute "qualification[s]" for office because "both sides agree[d] that [the candidate] was not ineligible under" Section Three or any other, similar provision); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of *additional* qualifications for office). But lower courts, when presented squarely with the question, have all but concluded that Section Three is the functional equivalent of a qualification for office. *See, e.g.*, *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) ("Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct

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from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected."); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (N.M. Dist. Ct. Sept. 6, 2022) ("Section Three imposes a qualification for public office, much like an age or residency requirement . . . .").

¶66 We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office, at least for the purposes of the section 1-1-113 claim here. Either way, it would be a wrongful act for the Secretary to list a candidate on the presidential primary ballot who is not "qualified" to assume the duties of the office. Moreover, because Section Three is a "part of the text of the Constitution," assessing a candidate's compliance with it for purposes of determining their eligibility for office does not improperly "add qualifications to those that appear in the Constitution." *U.S. Term Limits*, 514 U.S. at 787 n.2. Doing so merely renders the list of constitutional qualifications more complete.

¶67 Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for* or *being elected to* office because Section Three bars individuals only from *holding* office. *Hassan* specifically rejected any such distinction. 495 Fed. App'x at 948. There, the candidate argued that even if Article II "properly holds him ineligible to *assume the office* of president," Colorado could

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not "deny him *a place on the ballot*." *Id.* The *Hassan* panel concluded otherwise. *Id.* In any event, the provisions in the Election Code governing presidential primary elections do not recognize such a distinction. Rather, as discussed above, those provisions require all presidential primary candidates to be constitutionally "qualified" *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1).

¶68 Were we to adopt President Trump's view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II. *See* U.S. Const. art. II, § 1, cl. 5 (setting forth the qualifications to be "*eligible to the Office of President*" (emphasis added)). It would mean that the state would be powerless to exclude a twenty-eight-year-old, a non-resident of the United States, or even a foreign national from the presidential primary ballot in Colorado. Yet, as noted, several courts have upheld states' exclusion from ballots of presidential candidates who fail to meet the qualifications for office under Article II. *See Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App'x at 948; *Ogilvie*, 357 F. Supp. at 113.

¶69 Lastly, we reject President Trump and CRSCC's argument that state courts may not hear the Electors' claim because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. *See Frazier*, ¶ 3, 401 P.3d at 542;

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Kuhn, ¶ 55, 418 P.3d at 489. The Electors have not asserted a constitutional claim, so *Frazier* and *Kuhn* do not control here.

¶70 Both *Frazier* and *Kuhn* addressed whether a petitioner could shoehorn a claim challenging the constitutionality of the Election Code into a section 1-1-113 proceeding. *Frazier*, ¶ 6, 401 P.3d at 543; *Kuhn*, ¶ 55, 418 P.3d at 489. In *Frazier*, we concluded that section 1-1-113 is not a proper vehicle to resolve claims under 42 U.S.C. § 1983 because they do not arise under the Election Code and because the sole remedy available under section 1-1-113 is a court order directing compliance with the Election Code. *Frazier*, ¶¶ 17–18, 401 P.3d at 545. Similarly, in *Kuhn*, we held that to the extent the candidate sought to challenge the constitutionality of the petition circulator residency requirement under the Election Code, the court lacked jurisdiction to address such arguments in a section 1-1-113 proceeding. ¶ 55, 418 P.3d at 489.

¶71 Here, however, the Electors do not challenge the constitutionality of the Election Code. Nor do they allege a violation of the Constitution. Instead, they allege a "wrongful act" under section 1-1-113. That the Electors' claim has constitutional implications or requires interpretation of a constitutional provision does not make it a separate "constitutional claim" of the sort prohibited by *Frazier* and *Kuhn*. And neither President Trump nor CRSCC suggests that a section 1-1-113 claim cannot have constitutional implications. Indeed, as the Secretary

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notes in her brief, there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues."

¶72 As discussed above, the Electors' claim is that the Secretary will commit a wrongful act under the Election Code if she lists a candidate on the presidential primary ballot who is not qualified for office. While this claim requires resolving constitutional questions, it remains a challenge brought by eligible electors against an election official regarding an alleged wrongful act under the Election Code. Section 1-1-113 is the "exclusive" vehicle for litigating such challenges prior to an election; the Electors have no other viable option. § 1-1-113(4).

6. Limiting Presidential Primary Ballot Access to Constitutionally Qualified Candidates Does Not Interfere with CRSCC's First Amendment Rights

¶73 CRSCC argues that section 1-4-1204(1)(b) vests it with the sole authority to determine who the Republican nominees will be on a ballot—a reflection, CRSCC contends, of its constitutional right to freely associate and exercise its political decisions. *See* U.S. Const. amend. I; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."). Taken to its logical end, CRSCC's position is that it has a First Amendment right to deem any person to be a "bona fide candidate" pursuant to their party rules, § 1-4-1204(1)(b), and subsequently mandate that individual's

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placement on the presidential ballot, without regard to that candidate's age, residency, citizenship, *see* U.S. Const. art. II, § 1, cl. 5, or even whether the candidate has already served two terms as President, *see id.* at amend. XXII ("No person shall be elected to the office of the President more than twice . . . ."). We disagree with this position.

¶74 As a threshold matter, we acknowledge that the district court dismissed CRSCC's argument on this issue, ruling that it raised a separate constitutional claim improperly litigated in a section 1-1-113 action. *Anderson*, ¶ 12. We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113. *See Kuhn*, ¶ 55, 418 P.3d at 489; *Frazier*, ¶ 3, 401 P.3d at 542. But to the extent that CRSCC argues in its Answer Brief that the Secretary lacks authority to interfere with CRSCC's associational rights, we respond briefly to those concerns.

¶75 We distinguish between (1) CRSCC's right to decide the candidates with whom it affiliates and recognizes as bona fide, and (2) CRSCC's ability to place candidates on the presidential primary ballot. CRSCC's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and "[a]s a result, political parties' government, structure,

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and activities enjoy constitutional protection," *Timmons*, 520 U.S. at 358. In other words, CRSCC is well within its rights to choose with whom it affiliates and to decide which candidates it recognizes as bona fide. "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359 (noting that a "particular candidate might be ineligible for office," for example).

¶76 As a practical matter, any state election law governing the selection and eligibility of candidates affects, to some degree, the fundamental right to associate with others for political ends. *Celebrezze*, 460 U.S. at 788. Even so, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¶77 Accordingly, to determine if a state election law impermissibly burdens a party's associational rights, courts must weigh the "'character and magnitude'" of the burden imposed by the rule "against the interests the State contends justify that burden," and then consider whether the state's interests make the burden necessary. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Limiting ballot access "to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick*, 504 U.S. at 440 n.10.

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¶78 Here, the Election Code limits presidential primary ballot access to only qualified candidates. Such a restriction is an "eminently reasonable" regulation that does not severely burden CRSCC's associational rights. To hold otherwise would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of "political expression" or "political choice," that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land. U.S. Const. art. VI, cl. 2.

7. Section 1-1-113 Proceedings Provide Adequate Due Process for Litigants

¶79 Lastly, President Trump asserts that section 1-1-113 is not a valid way to litigate complex constitutional legal and factual issues. He complains of unfairness inherent in the expedited procedures that section 1-1-113 demands. But President Trump's argument disregards how the Electors' claim proceeded here.

¶80 Initially, we note that to the extent President Trump purports to challenge the constitutionality of section 1-1-113 under the Fourteenth Amendment's Due Process clause as a defense to the Electors' claim, he raises precisely the type of independent constitutional claim he recognizes is barred by *Kuhn*. *See Kuhn*, ¶ 55, 418 P.3d at 489. As discussed above, constitutional challenges to provisions of the Election Code fall outside the scope of a proper section 1-1-113 challenge because these expedited statutory proceedings entertain only one type of claim—election

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officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code. *See Kuhn*, ¶ 55, 418 P.3d at 489; § 1-1-113(1); *accord Frazier*, ¶¶ 17–18, 401 P.3d at 545.

¶81 Furthermore, because section 1-1-113 proceedings are designed to address election-related disputes, they move quickly out of necessity. *Frazier*, ¶ 11, 401 P.3d at 544 ("Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Lawyers who practice in this area are well-aware of this. Looming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot. And a state's interest in "protecting the integrity of the election process and avoiding voter confusion," *Lindsay*, 750 F.3d at 1063 (citing *Timmons*, 520 U.S. at 364–65), allows a state to expedite the process by which a candidate's qualifications, once challenged, are subsequently determined. That the form of section 1-1-113 proceedings reflects their function—to expeditiously resolve pre-election disputes over an election official's wrongful act—does not mean these proceedings lack due process.

¶82 Nor does the need for expedited proceedings in election disputes preclude a district court from using traditional means of case management in a section

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1-1-113 proceeding to construct a schedule that accommodates legally or factually complex issues. *See Ferrigno Warren*, ¶¶ 8–13, 462 P.3d at 1083 (explaining that the district court ordered briefing and held a hearing one month after the candidate filed a section 1-1-113 petition). President Trump contends that the expedited nature of section 1-1-113 proceedings do not provide time for the kinds of procedures he believes the complexities of this case require—for example, filing C.R.C.P. 12 motions testing the legal sufficiency of the Electors' claims before the litigation proceeds, allowing for extended discovery and disclosure procedures, and providing the opportunity to depose expert witnesses. But he has never specifically articulated how the district court's approach lacked due process. He certainly does not contend that he was prejudiced because the district court moved too *slowly* or failed to resolve the case in a week. He made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered. Moreover, his arguments throughout this case have focused predominantly on questions of law and not on disputed issues of material fact.

¶83 In addition, the district court took many steps to address the complexities of the case. For example, the first hearing in this case was a status conference on September 18—four days after the case was reopened after being remanded from federal court. In recognition of the complexity of the case, the district court—with the parties' input—adopted a civil-case-management approach to the litigation

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that afforded the parties the opportunity to be heard on a wide range of substantive issues.

¶84 The district court's case-management approach worked. After permitting multiple intervenors to participate, the district court allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged. It then issued three substantive rulings on these motions, including an omnibus ruling addressing four of Intervenors' motions, all in advance of the trial. The trial took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window section 1-4-1204(4) requires.

¶85 In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action, substantially complying with statutory deadlines while demonstrating the flexibility inherent in such a proceeding to address the various issues raised by Intervenors. And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense. If any case suggests that it is *not* impossible to "fully litigate a

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complex constitutional issue within days or weeks," this is it. *Frazier*, ¶ 18 n.3, 401 P.3d at 545 n.3.

¶86 For these reasons, we conclude that the Election Code allows Colorado's courts, through challenges brought under sections 1-4-1204(4) and 1-1-113, to assess the constitutional qualifications of a candidate—and to order the Secretary to exclude from the ballot candidates who are not qualified. These provisions advance Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process" by allowing the Secretary to "exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948. Moreover, these provisions neither infringe on a political party's associational rights nor compromise the validity of a court's rulings on complex factual and legal issues. Rather, they provide a robust vehicle through which to protect the purity of Colorado's elections.[10] *See* Colo. Const. art. VII, § 11.

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[10] We note that Colorado's Election Code differs from other states' election laws. Michigan's election law, for example, does not include the term "qualified candidate," does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State's responsibilities in the context of presidential primary elections. *See* Mich. Comp. Laws §§ 168.613, 168.620a (governing presidential primary elections in Michigan). The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the "affidavit of identity" that other candidates must submit to indicate that they "meet[] the constitutional and statutory qualifications for the office sought." *See Davis v. Wayne Cnty. Election*

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¶87 Because the Electors have properly invoked Colorado's section 1-1-113 process to challenge the listing of President Trump on the presidential primary ballot as a wrongful act, we proceed to the other threshold questions raised by Intervenors.

C. The Disqualification Provision of Section Three Attaches Without Congressional Action

¶88 The Electors' challenge to the Secretary's ability to certify President Trump as a qualified candidate presumes that Section Three is "self-executing" in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress. Because Congress has not authorized state courts to enforce Section Three, Intervenors argue that this court may not consider President Trump's alleged disqualification under Section Three in this section 1-1-113 proceeding.[11] We disagree.

Comm'n, No. 368615, 2023 WL 8656163, at *14 (Mich. Ct. App. Dec. 14, 2023) (unpublished order) (quoting Mich. Comp. Laws § 168.558(1)–(2)). Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate. *Id.* at *16.

[11] Intervenors and their supporting amici occasionally assert that the Electors' claim is brought pursuant to Section Three and that the Section is not self-executing in the sense that it does not create an independent private right of action. But as mentioned above, the Electors do not bring any claim directly under Section Three. Their claim is brought under Colorado's Election Code, and resolution of that claim requires an examination of President Trump's qualifications in light of

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¶89 The only mention of congressional power in Section Three is that "Congress may by a vote of two-thirds of each House, remove" the disqualification of a former officer who had "engaged in insurrection." U.S. Const. amend. XIV, § 3. Section Three does not determine who decides whether the disqualification has attached in the first place.

¶90 Intervenors, however, look to Section Five of the Fourteenth Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," to argue that congressional authorization is necessary for any enforcement of Section Three. *Id.* at § 5. This argument does not withstand scrutiny.

¶91 The Supreme Court has said that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). To be sure, in the *Civil Rights Cases*, the Court was directly focused on the Thirteenth Amendment, so this statement could be described as dicta. But an examination of the Thirteenth, Fourteenth, and Fifteenth Amendments

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Section Three. The question of "self-execution" that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

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("Reconstruction Amendments") and interpretation of them supports the accuracy and broader significance of the statement.

¶92 Section Three is one of four substantive sections of the Fourteenth Amendment:

- Section One: "No State *shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor *shall* any State deprive any person of life, liberty, or property, without due process of law . . . ."
- Section Two: "Representatives *shall* be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."
- Section Three: "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."
- Section Four: "The validity of the public debt of the United States . . . *shall* not be questioned."

U.S. Const. amend. XIV, §§ 1–4 (emphases added). Section Five is then an enforcement provision that applies to each of these substantive provisions. *Id.* at § 5. And yet, the Supreme Court has held that Section One is self-executing. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds*

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as recognized in Ramirez v. Collier, 595 U.S. 411, 424 (2022). Thus, while Congress *may* enact enforcement legislation pursuant to Section Five, congressional action is not *required* to give effect to the constitutional provision. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five gives Congress authority to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but not disputing that the Fourteenth Amendment is self-executing).

¶93 Section Two, moreover, was enacted to eliminate the constitutional compromise by which an enslaved person was counted as only three-fifths of a person for purposes of legislative apportionment. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,* 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 51–52), https://ssrn.com/abstract=4532751. The self-executing nature of that section has never been called into question, and in the reapportionment following passage of the Fourteenth Amendment, Congress simply treated the change as having occurred. *See* The Apportionment Act of 1872, 17 Stat. 28 (42nd Congress) (apportioning Representatives to the various states based on Section Two's command without mentioning, or purporting to enforce, the Fourteenth Amendment). Similarly, Congress never passed enabling legislation to effectuate Section Four.

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¶94 The same is true for the Thirteenth Amendment, which abolished slavery and involuntary servitude. Section One provides the substantive provision: "Neither slavery nor involuntary servitude . . . *shall* exist within the United States . . . ." U.S. Const. amend. XIII, § 1 (emphasis added). Section Two provides the enforcement provision: "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2. Discussing this Amendment, the Supreme Court recognized that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it," but that "[b]y its own unaided force it abolished slavery" and was "undoubtedly self-executing without any ancillary legislation." *The Civil Rights Cases*, 109 U.S. at 20.

¶95 Like the other Reconstruction Amendments, the Fifteenth Amendment, which established universal male suffrage, contains a substantive provision—"[t]he right of citizens of the United States to vote *shall* not be denied or abridged . . . on account of race, color, or previous condition of servitude"—followed by an enforcement provision—"[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, §§ 1–2 (emphasis added). As with Section One of both the Thirteenth and Fourteenth Amendments, the Supreme Court has explicitly confirmed that the Fifteenth Amendment is self-executing. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Section One of the Fifteenth Amendment "has always been

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treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice").

¶96 There is no textual evidence that Congress intended Section Three to be any different.[12] Furthermore, we agree with the Electors that interpreting any of the Reconstruction Amendments, given their identical structure, as not self-executing would lead to absurd results. If these Amendments required legislation to make them operative, then Congress could nullify them by simply not passing enacting legislation. The result of such inaction would mean that slavery remains legal; Black citizens would be counted as less than full citizens for reapportionment; non-white male voters could be disenfranchised; and any individual who engaged in insurrection against the government would nonetheless be able to serve in the

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[12] It would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not. *See* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* at § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* at art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

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government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent.

¶97 Intervenors argue that certain historical evidence requires a different conclusion as to Section Three. We generally turn to historical and other extrinsic evidence only when the text is ambiguous, which it is not here. Nonetheless, we will consider these historical claims in the interest of providing a thorough review.

¶98 Intervenors first highlight a statement Representative Thaddeus Stevens made during the Congressional framing debates: "[Section Three] will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866); *see also* Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment 42 (Oct. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838. But as one of the amici points out, this statement referenced a deleted portion of Section Three that disenfranchised all former Confederates until 1870. In any event, given the complex patchwork of perspectives and intentions expressed when drafting these constitutional provisions, we refuse to cherry-pick individual statements from extensive debates to ground our analysis. *See generally* Baude & Paulsen, *supra* (manuscript at 39–53).

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¶99 Intervenors next direct us to the non-binding opinion written by Chief Justice Salmon Chase while he was riding circuit: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").[13] There, Caesar Griffin challenged his criminal conviction as null and void because under Section Three, the judge who had entered his conviction was disqualified from holding judicial office, having formerly sworn a relevant oath as a state legislator and then engaged in insurrection by continuing to serve as a legislator in Virginia's Confederate government. *Id.* at 22–23. It was undisputed that the judge fell within Section Three's scope, but the question Chief Justice Chase sought to answer was whether Section Three "operat[ed] directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

¶100 In interpreting the scope of the provision, Chief Justice Chase observed that, after the end of the Civil War but before the Fourteenth Amendment was ratified, many southern states had established, with the approval of the federal government, provisional governments to keep society functioning. *Id.* at 25; *see*

[13] Between 1789 and 1911, U.S. Supreme Court justices traveled across the country and, together with district court judges, sat on circuit courts to decide cases. *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). Decisions written by the justices while they were riding circuit were not decisions of the Supreme Court.

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also Baude & Paulsen, *supra* (manuscript at 36). And, within these provisional governments, many offices were filled with citizens who would fall within Section Three's scope. *Griffin's Case*, 11 F. Cas. at 25. Chief Justice Chase observed that giving Section Three a literal construction, as Griffin advocated, would "annul all official acts performed by these officers. No sentence, no judgment, no decree, . . . no official act [would be] of the least validity." *Id.* He reasoned that it would be "impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states." *Id.*

¶101 And so, Chief Justice Chase turned to what he termed the "argument from inconveniences" and the interpretive canon that, when faced with two or more reasonable interpretations, the interpretation "is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* He then explained that, while it was not "improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office," it could also "hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id.* at 25–26. To find the provision self-executing under the circumstances, he argued, would be contrary to due process because it would, "at

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once without trial, deprive[] a whole class of persons of offices held by them." *Id.* at 26.

¶102 Chief Justice Chase therefore concluded that the object of the Amendment—"to exclude from certain offices a certain class of persons"—was impossible to do "by a simple declaration, whether in the constitution or in an act of congress . . . . For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* To accomplish "this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable; and . . . can only be provided for by congress." *Id.* Thus, Chief Justice Chase concluded that Section Three was not self-executing. *Id.*

¶103 *Griffin's Case* concludes that congressional action is needed before Section Three disqualification attaches, but this one case does not persuade us of that point. Intervenors and amici assert that *Griffin's Case* "remains good law and has been repeatedly relied on." Because the case is not binding on us, the fact that it has not been reversed is of no particular significance. And the cases that cite it do so either with no analysis—*e.g.*, *State v. Buckley*, 54 Ala. 599 (1875), and *Rothermel v. Meyerle*, 136 Pa. 250 (1890)—or for the inapposite proposition that Section Three does not create a self-executing cause of action—*e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978), and *Hansen v. Finchem*, CV 2022-004321 (Sup. Ct.

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of Ariz., Maricopa Cnty. Apr. 22, 2022), *aff'd on other grounds,* 2022 WL 1468157 (May 9, 2022). Moreover, *Griffin's Case* has been the subject of persuasive criticism. *See, e.g.*, Magliocca, *Amnesty and Section Three*, *supra*, at 105–08 (critiquing the case because the other provisions of the Fourteenth Amendment were understood as self-executing and the notion that Section Three was not self-executing was inconsistent with congressional behavior at the time); Baude & Paulsen, *supra* (manuscript at 37–49) (criticizing Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction).

¶104 Although we do not find *Griffin's Case* compelling, we agree with Chief Justice Chase that "it must be ascertained what particular individuals are embraced by the definition." 11 F. Cas. at 26. While the disqualification of Section Three attaches automatically, the determination that such an attachment has occurred must be made before the disqualification holds meaning. And Congress has the power under Section Five to establish a process for making that determination. But the fact that Congress *may* establish such a process does not mean that disqualification pursuant to Section Three can be determined *only* through a process established by Congress. Here, the Colorado legislature has established a process—a court proceeding pursuant to section 1-1-113—to make the determination whether a candidate is qualified to be placed on the presidential

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primary ballot. And, for the reasons we have already explained, that process is sufficient to permit a judicial determination of whether Section Three disqualification has attached to a particular individual.

¶105 We are similarly unpersuaded by Intervenors' assertions that Congress created the only currently available mechanism for determining whether a person is disqualified pursuant to Section Three with the 1994 passage of 18 U.S.C. § 2383. That statute makes it a crime to "assist[] or engage[] in any rebellion or insurrection against the authority of the United States." True, with that enactment, Congress criminalized the same conduct that is disqualifying under Section Three. All that means, however, is that a person charged and convicted under 18 U.S.C. § 2383 would *also* be disqualified under Section Three. It cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law.

¶106 In summary, based on Section Three's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action. Intervenors' contrary arguments do not persuade us otherwise.

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¶107 That said, our conclusion that implementing legislation from Congress is unnecessary for us to proceed under section 1-1-113 does not resolve the question of whether doing so would violate the separation of powers among the three branches of government. We turn to this justiciability question next.

D. Section Three Is Justiciable

¶108 President Trump next asserts that presidential disqualification under Section Three presents a nonjusticiable political question. Again, we disagree.

¶109 "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine is a narrow exception to this rule, and a court may not avoid its responsibility to decide a case merely because it may have "political implications." *Id.* at 195–96 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983)).

¶110 A controversy involves a nonjusticiable political question when, as relevant here, "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) (noting that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers" and identifying the above-described instances, and four

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others not relevant here, as examples of political questions). The requisite textual commitment must be "[p]rominent on the surface of any case." *Baker*, 369 U.S. at 217.

¶111 Here, President Trump argues that this case is nonjusticiable because, in his view, the Constitution and federal law commit the question of the qualifications of a presidential candidate to Congress. The Electors point out that President Trump did not argue before us that the questions presented in this appeal are also nonjusticiable based on a lack of judicially discoverable and manageable standards, and therefore, he arguably waived any such argument. We nevertheless address that issue, again in the interest of providing a thorough review.

1. No Textually Demonstrable Constitutional Commitment to Congress of Section Three Disqualification

¶112 Contrary to President Trump's assertions, we perceive no constitutional provision that reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

¶113 As discussed in Part B.4 above, Article II, Section 1, Clause 2 of the Constitution empowers state legislatures to direct how presidential electors are

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appointed, and the Supreme Court has recognized that this provision affords the states "far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo*, 140 S. Ct. at 2324. In furtherance of this delegation of authority, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections," the "selection and qualification of candidates," among other things. *Storer*, 415 U.S. at 730. The Election Code is an example of such a "comprehensive" code to regulate state and federal elections. And the fact that Article II, Section 1, Clause 4 authorizes Congress to determine the time for choosing the electors and the date on which they vote does not undermine the substantial authority provided to the states to regulate state and federal elections.

¶114 In our view, Section Three's text is fully consistent with our conclusion that the Constitution has not committed the matter of presidential candidate qualifications to Congress. As we have noted, although Section Three requires a "vote of two-thirds of each House" to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place. *See* U.S. Const. amend. XIV, § 3. Moreover, if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three, as President Trump asserts, then this would nullify Section Three's supermajority requirement.

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¶115 President Trump's reliance on Article II, Section 1, Clause 5 of the Constitution and on the Twelfth, Fourteenth, and Twentieth Amendments is misplaced. We address each of these provisions, in turn.

¶116 Article II, Section 1, Clause 5 provides that no person shall be eligible to serve as President unless that person is "a natural born Citizen" who is at least thirty-five years of age and who has resided in the United States for at least fourteen years. This provision, however, says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate's qualifications are challenged. *See id.*

¶117 The Twelfth Amendment charges the Electoral College with the task of selecting a candidate for President and then transmitting the electors' votes to the "seat of the government of the United States," and it provides the procedure by which the electoral votes are to be counted. U.S. Const. amend. XII. Nothing in the Twelfth Amendment, however, vests the Electoral College with the power to determine the eligibility of a presidential candidate. *See Elliott v. Cruz*, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) (mem.). Nor does the Twelfth Amendment give Congress "control over the process by which the President and Vice President are normally chosen, other than the very limited one of determining the day on which the electors were to 'give their votes.'" *Id.* at 651 (citing U.S. Const. amend. XII). And although the Twelfth Amendment provides

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for the scenario in which no President is selected by March 4 and specifies that no person constitutionally ineligible to serve as President shall be eligible to serve as Vice President, the Amendment does not assign to Congress (nor to any other branch) the task of determining whether a candidate is qualified in the first place.

¶118 Section Five of the Fourteenth Amendment authorizes Congress to pass legislation to enforce the provisions of the Fourteenth Amendment, but as discussed above, the Fourteenth Amendment is self-executing, and congressional action under Section Five is not required to animate Section Three's disqualification of insurrectionist oath-breakers. Nor does Section Five delegate to Congress the authority to determine the qualifications of presidential candidates to hold office. U.S. Const. amend. XIV, § 5.

¶119 Finally, the Twentieth Amendment, in relevant part, empowers Congress to enact procedures to address the scenario in which neither the President nor the Vice President qualifies for office before the time fixed for the beginning of their terms. U.S. Const. amend. XX, § 3. By its express language, however, this Amendment applies post-election. *Id.* (referring to the "President elect" and "Vice President elect"). Moreover, the Amendment says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office.

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¶120 For these reasons, we perceive no textually demonstrable constitutional commitment to Congress of the authority to assess presidential candidate qualifications, and neither President Trump nor his amici identify any constitutional provision making such a commitment. In reaching this conclusion, we are unpersuaded by the cases on which President Trump and his amici rely, which are predicated on inferences they assert can be drawn from one or more of the foregoing constitutional provisions or on the fact that the cases had political implications. *See, e.g.*, *Taitz v. Democrat Party of Miss.*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015); *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146–47 (N.D. Cal. 2008); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2010); *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *11–12 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd in part, dismissed in part*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015). As noted above, such inferences are insufficient to establish the requisite clear textual commitment to a coordinate branch of government, *see Baker*, 369 U.S. at 217, and we may not avoid our duty to decide a case merely because it may have political implications, *Zivotofsky*, 566 U.S. at 195–96.

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¶121 Moreover, we may not conflate "actions that are textually *committed*" to a coordinate political branch with "actions that are textually *authorized*." *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev'd on other grounds sub nom., Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). The Supreme Court has prohibited courts from adjudicating only the former. *Zivotofsky*, 566 U.S. at 195. Absent an affirmative constitutional *commitment*, we cannot abdicate our responsibility to decide a case that is properly before us. *Id.* at 194.

2. Section Three Involves Judicially Discoverable and Manageable Standards

¶122 The question of whether there are judicially discoverable and manageable standards for determining a case is not wholly separate from the question of whether the matter has been textually committed to a coordinate political department. *Nixon*, 506 U.S. at 228. "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228–29.

¶123 As we have said, President Trump has not argued before us that Section Three lacks judicially discoverable and manageable standards, and we believe for good reason. Section Three disqualifies from certain delineated offices persons who have "taken an oath . . . to support the Constitution of the United States" as an "officer of the United States" and who have thereafter "engaged in insurrection or rebellion." U.S. Const. amend. XIV, § 3. Although, as we discuss below, the

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meanings of some of these terms may not necessarily be precise, we can discern their meanings using "familiar principles of constitutional interpretation" such as "careful examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky*, 566 U.S. at 201.

¶124 Indeed, in this and other contexts, courts have readily interpreted the terms that we are being asked to construe and have reached the substantive merits of the cases before them. *See, e.g.*, *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,079) (defining "engage" as that term is used in Section Three); *United States v. Rhine*, No. 210687 (RC), 2023 WL 2072450, at *8 (D.D.C. Feb. 17, 2023) (defining "insurrection" in the context of ruling on a motion in limine in a criminal prosecution arising out of the events of January 6); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983) (defining "insurrection" in the context of an insurance policy exclusion); *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930) (defining "insurrection" as that term is used in a section of the U.S. Code), *aff'd*, 49 F.2d 1077 (2d Cir. 1931); *Hearon v. Calus*, 183 S.E. 13, 20 (S.C. 1935) (defining "insurrection" as that term is used in a provision of the South Carolina constitution).

¶125 Accordingly, we conclude that interpreting Section Three does not "turn on standards that defy judicial application." *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211). In so concluding, we respectfully disagree with the Michigan

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Court of Claims' finding that the interpretation of the terms now before us constitutes a nonjusticiable political question merely because "there are . . . many answers and gradations of answers." *Trump v. Benson*, No. 23000151-MZ, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023). In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us.

¶126 For these reasons, we conclude that the issues presented here do not, either alone or together, constitute a nonjusticiable political question. We thus proceed to the question of whether Section Three applies to the President.

E. Section Three Applies to the President

¶127 The parties debate the scope of Section Three. The Electors claim that this potential source of disqualification encompasses the President. President Trump argues that it does not, and the district court agreed. On this issue, we reverse the district court.

¶128 Section Three prohibits a person from holding any "office, civil or military, under the United States" if that person, as "an officer of the United States," took an oath "to support the Constitution of the United States" and subsequently

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engaged in insurrection. U.S. Const. amend. XIV, § 3. Accordingly, Section Three applies to President Trump only if (1) the Presidency is an "office, civil or military, under the United States"; (2) the President is an "officer of the United States"; and (3) the presidential oath set forth in Article II constitutes an oath "to support the Constitution of the United States." *Id.* We address each point in turn.

1. The Presidency Is an Office Under the United States

¶129 The district court concluded that the Presidency is not an "office, civil or military, under the United States" for two reasons. *Anderson*, ¶¶ 303–04; *see* U.S. Const. amend. XIV, § 3. First, the court noted that the Presidency is not specifically mentioned in Section Three, though senators, representatives, and presidential electors are. The court found it unlikely that the Presidency would be included in a catch-all of "any office, civil or military." *Anderson*, ¶ 304; *see* U.S. Const. amend. XIV, § 3. Second, the court found it compelling that an earlier draft of the Section specifically included the Presidency, suggesting that the drafters intended to omit the Presidency in the version that passed. *See Anderson*, ¶ 303. We disagree with the district court's conclusion, as our reading of both the constitutional text and the historical record counsel that the Presidency is an "office . . . under the United States" within the meaning of Section Three.

¶130 When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over "secret or technical meanings that would not have been

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known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Dictionaries from the time of the Fourteenth Amendment's ratification define "office" as a "particular duty, charge or trust conferred by public authority, and for a public purpose," that is "undertaken by . . . authority from government or those who administer it." Noah Webster, An American Dictionary of the English Language 689 (Chauncey A. Goodrich ed., 1853); *see also* 5 Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) (defining "office" as "a publick charge or employment; magistracy"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be 'a public charge or employment,' . . . ."). The Presidency falls comfortably within these definitions.

¶131 We do not place the same weight the district court did on the fact that the Presidency is not specifically mentioned in Section Three. It seems most likely that the Presidency is not specifically included because it is so evidently an "office." In fact, no specific *office* is listed in Section Three; instead, the Section refers to "any office, civil or military." U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an "office" in the Constitution. Instead, senators and representatives are referred to as "members" of their respective bodies. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications

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of its own Members . . . ."); *id.* at § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* at art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

¶132 Indeed, even Intervenors do not deny that the Presidency is an office. Instead, they assert that it is not an office "under the United States." Their claim is that the President and elected members of Congress *are* the government of the United States, and cannot, therefore, be serving "under the United States." *Id.* at amend. XIV, § 3. We cannot accept this interpretation. A conclusion that the Presidency is something other than an office "under" the United States is fundamentally at odds with the idea that all government officials, including the President, serve "we the people." *Id.* at pmbl. A more plausible reading of the phrase "under the United States" is that the drafters meant simply to distinguish those holding federal office from those held "under any State." *Id.* at amend. XIV, § 3.

¶133 This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an "Office" twenty-five times. *E.g.*, *id.* at art. I, § 3, cl. 5 ("The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice

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President, or when he shall exercise *the Office of President of the United States*." (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that "[n]o Person except a natural born Citizen . . . shall be eligible to the *Office of President*" and "[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years" (emphases added)). And it refers to an office "under the United States" in several contexts that clearly support the conclusion that the Presidency is such an office.

¶134 Consider, for example, the Impeachment Clause, which reads that Congress can impose, as a consequence of impeachment, a "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." *Id.* at art. I, § 3, cl. 7. If the Presidency is not an "office . . . under the United States," then anyone impeached—including a President—could nonetheless go on to serve as President. *See id.* This reading is nonsensical, as recent impeachments demonstrate. The Articles of Impeachment brought against both President Clinton and President Trump asked for each man's "removal from office[,] and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." Articles of Impeachment Against William Jefferson Clinton, H. Res. 611, 105th Cong. (Dec. 19, 1998); *see also* Articles of Impeachment Against Donald J. Trump, H. Res. 755, 116th Cong. (Dec. 8, 2019); Articles of Impeachment Against Donald J. Trump, H. Res. 24, 117th Cong. (Jan 13, 2021). Surely the impeaching members of Congress

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correctly understood that either man, if convicted and subsequently disqualified from future federal office by the Senate, would be unable to hold the Presidency in the future.

¶135 Similarly, the Incompatibility Clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. To read "office under the United States" to exclude the Presidency would mean that a sitting President could also constitutionally occupy a seat in Congress, a result foreclosed by basic principles of the separation of powers. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers . . . was woven into the [Constitution] . . . . The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, s 6 . . . ."), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¶136 Finally, the Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. To read the

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Presidency as something other than an office under the United States would exempt the nation's chief diplomat from these protections against foreign influence. But Presidents have long sought dispensation from Congress to retain gifts from foreign leaders, understanding that the Emoluments Clause required them to do so.[14]

¶137 The district court found it compelling that an earlier draft of the proposed Section listed the Presidency, but the version ultimately passed did not. *Anderson*, ¶ 303. As a starting point, however, we are mindful that "it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590. And the specifics of the change from the

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[14] *See, e.g.*, H. Rep. No. 23-302, at 1–2 (Mar. 4, 1834) (discussing the receipt of gifts from the Emperor of Morocco and noting that the President's "surrender of the articles to the Government" satisfied the "constitutional provision in relation to their acceptance"); 14 Abridgement of the Debates of Congress from 1789 to 1856, 140–41 (Thomas Hart Benton ed., 6 1860) (displaying (1) a letter from the Secretary of State to the Imaum of Muscat indicating that the President "directed" the Secretary to refuse the Imaum's gifts "under existing constitutional provisions" and (2) a letter from the President requesting that Congress allow him to accept the gifts); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (providing that the President is "authorized" to sell some of the Imaum's gifts and place the proceeds in the U.S. Treasury); Joint Resolution No. 20, A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, Mar. 15, 1862, 12 Stat. 616 (directing the King of Siam's gifts and letters to be placed in "the collection of curiosities at the Department of the Interior").

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earlier draft to what was ultimately passed do not demonstrate an intent to exclude the Presidency from the covered offices.

¶138 The draft proposal provided that insurrectionist oath-breakers could not hold "the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held *under appointment from the President of the United States, and requiring the confirmation of the Senate.*" Cong. Globe., 39th Cong., 1st Sess. 919 (1866) (emphasis added). Later versions of the Section—including the enacted draft—removed specific reference to the President and Vice President and expanded the category of office-holder to include "any office, civil or military" rather than only those offices requiring presidential appointment and Senate confirmation. *See* U.S. Const. amend. XIV, § 3.

¶139 It is hard to glean from the limited available evidence what the changes across proposals meant. But we find persuasive amici's suggestion that Representative McKee, who drafted these proposals, most likely took for granted that his second proposal included the President. While nothing in Representative McKee's speeches mentions why his express reference to the Presidency was removed, his public pronouncements leave no doubt that his subsequent draft proposal still sought to ensure that rebels had absolutely no access to political power. Representative McKee explained that, under the proposed amendment,

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"the loyal alone shall rule the country" and that traitors would be "cut[] off . . . from all political power in the nation." Cong. Globe, 39th Cong., 1st Sess. 2505 (1866); *see also* Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 22–23 (Univ. of Md. Legal Stud. Rsch. Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 ("*Our Questions, Their Answers*"); Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* 106, 114 (2023) (indicating that Representative McKee desired to exclude all oath-breaking insurrectionists from all federal offices, including the Presidency). When considered in light of these pronouncements, the shift from specifically naming the President and Vice President in addition to officers appointed and confirmed to the broadly inclusive "any officer, civil or military" cannot be read to mean that the two highest offices in the government are excluded from the mandate of Section Three.

¶140 The importance of the inclusive language—"any officer, civil or military"—was the subject of a colloquy in the debates around adopting the Fourteenth Amendment. Senator Reverdy Johnson worried that the final version of Section Three did not include the office of the Presidency. He stated, "[T]his amendment does not go far enough" because past rebels "may be elected President or Vice President of the United States." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). So, he asked, "why did you omit to exclude them? I do not understand them to be

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excluded from the privilege of holding the two highest offices in the gift of the nation." *Id.* Senator Lot Morrill fielded this objection. He replied, "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" *Id.* This answer satisfied Senator Johnson, who stated, "Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.* This colloquy further supports the view that the drafters of this Amendment intended the phrase "any office" to be broadly inclusive, and certainly to include the Presidency.

¶141 Moreover, Reconstruction-Era citizens—supporters and opponents of Section Three alike—understood that Section Three disqualified oath-breaking insurrectionists from holding the office of the President. *See* Montpelier Daily Journal, Oct. 19, 1868 (writing that Section Three "excludes leading rebels from holding offices . . . from the Presidency downward"). Many supporters of Section Three defended the Amendment on the ground that it would exclude Jefferson Davis from the Presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) (manuscript at 7–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; *see also, e.g.*, *Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (arguing that foregoing

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Section Three would "render Jefferson Davis eligible to the Presidency of the United States," and "[t]here is something revolting in the very thought").

¶142 Post-ratification history includes more of the same. For example, Congress floated the idea of blanket amnesty to shield rebels from Section Three. *See* Vlahoplus, *supra*, (manuscript at 7–9). In response, both supporters and dissenters acknowledged that doing so would allow the likes of Jefferson Davis access to the Presidency. *See id.*; *see also, e.g.*, The Pulaski Citizen, *The New Reconstruction Bill*, Apr. 13, 1871, at 4 (acknowledging as a supporter of amnesty that it would "make even Jeff. Davis eligible again to the Presidency"); The Chicago Tribune, May 24, 1872 (asserting that amnesty would make rebels "eligible to the Presidency of the United States"); Indiana Progress, Aug. 24, 1871 (similar).

¶143 We conclude, therefore, that the plain language of Section Three, which provides that no disqualified person shall "hold any office, civil or military, under the United States," includes the office of the Presidency. This textual interpretation is bolstered by constitutional context and by history surrounding the enactment of the Fourteenth Amendment.

2. The President Is an Officer of the United States

¶144 We next consider whether a President is an "officer of the United States." U.S. Const., amend. XIV, § 3. The district court found that the drafters of Section Three did not intend to include the President within the catch-all phrase "officer

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of the United States," and, accordingly, that a current or former President can engage in insurrection and then run for and hold any office. *Anderson*, ¶ 312; *see* U.S. Const., amend. XIV, § 3. We disagree for four reasons.

¶145 First, the normal and ordinary usage of the term "officer of the United States" includes the President. As we have explained, the plain meaning of "office . . . under the United States" includes the Presidency; it follows then that the President is an "officer of the United States." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained."). Indeed, Americans have referred to the President as an "officer" from the days of the founding. *See, e.g.*, The Federalist No. 69 (Alexander Hamilton) ("The President of the United States would be an officer elected by the people . . . ."). And many nineteenth-century presidents were described as, or called themselves, "chief executive officer of the United States." *See* Vlahoplus, *supra* (manuscript at 17–18) (listing presidents).

¶146 Second, Section Three's drafters and their contemporaries understood the President as an officer of the United States. *See* Graber, *Our Questions, Their Answers*, *supra*, at 18–19 (listing instances); *see also* Cong. Globe, 39th Cong., 1st Sess. 915 (1866) (referring to the "chief executive officer of the country"); *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) ("We have no *officers* in this government,

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from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (emphases added)).

¶147 President Trump concedes as much on appeal, stating that "[t]o be sure, the President is an officer." He argues, however, that the President is an officer of the Constitution, not an "officer of the United States," which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a "colloquial sense," and thus have no bearing on the term's use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term "officer" according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the "normal and ordinary as distinguished from technical meaning" should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

¶149 We also find Attorney General Stanbery's opinions on the meaning of Section Three significant. In one opinion on the subject, Stanbery explained that

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the term "'officer of the United States,' within [Section Three] . . . is used in its most general sense, and without any qualification, as legislative, or executive, or judicial." The Reconstruction Acts, 12 Op. Att'y. Gen. 141, 158 (1867) ("*Stanbery I*"). And in a second opinion on the topic, he observed that the term "Officers of the United States" includes "without limitation" any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 Op. Att'y. Gen. 182, 203 (1867) ("*Stanbery II*").

¶150 Third, the structure of Section Three persuades us that the President is an officer of the United States. The first half of Section Three describes the offices protected and the second half addresses the parties barred from holding those protected offices. There is a parallel structure between the two halves: "Senator or Representative in Congress" (protected office) corresponds to "member of Congress" (barred party); "any office . . . under the United States" (protected office) corresponds to "officer of the United States" (barred party); and "any office . . . under any State" (protected office) also has a corresponding barred party in "member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. amend. XIV, § 3. The only term in the first half of Section Three that has no corresponding officer or party in the second half is "elector of President and Vice President," which makes sense because electors do not take

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constitutionally mandated oaths so they have no corresponding barred party. *Id.*; *see also id.* at art. II, § 1 (discussing a presidential elector's duties without reference to an oath); *id.* at art. VI (excluding presidential electors from the list of positions constitutionally obligated to take an oath to support the Constitution). Save electors, there is a perfect parallel structure in Section Three. *See* Baude & Paulsen, *supra* (manuscript at 106).

¶151 Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no room to conclude that "officer of the United States" was used as a term of art. *Id.* The drafters of Section Three were motivated by a sense of betrayal; that is, by the existence of a broken oath, not by the type of officer who broke it: "[A]ll of us understand the meaning of the third section," Senator John Sherman stated, "[it includes] those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office . . . ." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866); *see also id.* at 2898 (Senator Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreeing that "the theory" of Section Three was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office."); *id.* at 3035–36 (Senator John B. Henderson

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explaining that "[t]he language of this section is so framed as to disfranchise from office . . . the leaders of any rebellion hereafter to come."); *Powell*, 27 F. Cas. at 607 (summarizing the purpose of Section Three: "[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability."). A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose.

¶152 We therefore conclude that "officer of the United States," as used in Section Three, includes the President.

3. The Presidential Oath Is an Oath to Support the Constitution

¶153 Finally, we consider whether the oath taken by the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, is an oath "to support the Constitution of the United States," *id.* at amend. XIV, § 3. The district court found that, because the presidential oath's language is more particular than the oath referenced in Section Three, the drafters did not intend to include former Presidents. *Anderson*, ¶ 313. We disagree.

¶154 Article VI of the Constitution provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to

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support this Constitution."[15] U.S. Const. art. VI, cl. 3. Article II specifies that the President shall swear an oath to "preserve, protect and defend the Constitution." *Id.* at art. II, § 1, cl. 8. Intervenors contend that because the Article II oath does not include a pledge to "support" the Constitution, an insurrectionist President cannot be disqualified from holding future office under Section Three on the basis of that oath.

¶155 This argument fails because the President is an "executive . . . Officer[]" of the United States under Article VI, albeit one for whom a more specific oath is prescribed. *Id.* at art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). This conclusion follows logically from the accepted fact that the Vice President is also an executive officer. True, the Vice President takes the more general oath prescribed by federal law, *see* 5 U.S.C. § 3331 (noting that anyone "except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take" an oath including a pledge to "support and defend the Constitution"),

[15] Article VI, however, does not provide any specific form of oath or affirmation.

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but it makes no sense to conclude that the Vice President is an executive officer under Article VI but the President is not.

¶156 The language of the presidential oath—a commitment to "preserve, protect, and defend the Constitution"—is consistent with the plain meaning of the word "support." U.S. Const. art. II, § 1, cl. 8. Modern dictionaries define "support" to include "defend" and vice versa. *See, e.g.*, *Support*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*support* [https://perma.cc/WGH6-D8KU] (defining "support" as "to uphold or defend as valid or right"); *see also Defend*, at *id.*, https://www.merriam-webster.com/dictionary/*defend* [https://perma.cc/QXQ7-LRKX] (defining "defend" as "to maintain or support in the face of argument or hostile criticism"). So did dictionaries from the time of Section Three's drafting. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Noah Webster, An American Dictionary of the English Language 271 (Chauncey A. Goodrich, ed., 1857) ("defend": "to support or maintain").

¶157 The specific language of the presidential oath does not make it anything other than an oath to support the Constitution. Indeed, as one Senator explained just a few years before Section Three's ratification, "the language in [the presidential] oath of office, that he shall protect, support [sic], and defend the Constitution, makes his obligation more emphatic and more obligatory, if possible,

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than ours, which is simply to support the Constitution." Cong. Globe, 37th Cong., 3d Sess. 89 (1862). And, in fact, several nineteenth-century Presidents referred to the presidential oath as an oath to "support" the Constitution. *See* James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897, Vol. 1 at 232, 467 (Adams, Madison), Vol. 2 at 625 (Jackson), Vol. 8 at 381 (Cleveland).

¶158 In sum, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). The most obvious and sensible reading of Section Three, supported by text and history, leads us to conclude that (1) the Presidency is an "office under the United States," (2) the President is an "officer . . . of the United States," and (3) the presidential oath under Article II is an oath to "support" the Constitution.

¶159 President Trump asks us to hold that Section Three disqualifies every oath-breaking insurrectionist *except the most powerful one* and that it bars oath-breakers from virtually every office, both state and federal, *except the highest one in the land.* Both results are inconsistent with the plain language and history of Section Three.

¶160 We therefore reverse the district court's finding that Section Three does not apply to a President and conclude that Section Three bars President Trump from

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holding the office of the President if its other provisions are met; namely, if President Trump "engaged in insurrection." U.S. Const. amend. XIV, § 3.

¶161 Before addressing the district court's findings that President Trump engaged in insurrection, however, we consider President Trump's challenge to the admissibility of a congressional report on which the district court premised some of its findings.

F. The District Court Did Not Err in Admitting Portions of the January 6 Report

¶162 President Trump asserts that the district court wrongly admitted into evidence thirty-one findings from a congressional report drafted by the Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("the Committee"), which recounted the Committee's investigation of the facts, circumstances, and causes of the attack on the Capitol. *See* H.R. Rep. No. 117-663 (Dec. 22, 2022) ("the Report"). In President Trump's view, the Report is an untrustworthy, partisan political document and therefore constituted inadmissible hearsay under Rule 803(8)(C) of the Colorado Rules of Evidence. We are unpersuaded. Under the deferential standard of review that governs, we perceive no error by the district court in admitting portions of the Report into evidence at trial.

¶163 We review a district court's evidentiary rulings for an abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25, 428 P.3d 517, 524. "A court abuses its discretion

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only if its decision is 'manifestly arbitrary, unreasonable, or unfair.'" *Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, ¶ 74, 285 P.3d 986, 1008 (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008)). We may not consider "whether we would have reached a different result," but only "whether the trial court's decision fell within a range of reasonable options." *Id.* (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006)).

¶164 Hearsay statements are out-of-court statements offered in court for the truth of the matter asserted. CRE 801(c). Such statements are generally inadmissible, CRE 802, but CRE 803(8) creates an exception for "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law." This exception, however, applies only if the report is trustworthy. *Id.*

¶165 The Federal Rules of Evidence (on which our evidentiary rules were modeled) contain a near-identical exception to Colorado Rule 803(8), *see* Fed. R. Evid. 803(8), so we may look to federal case law interpreting the federal rule for guidance on how to assess trustworthiness, *see Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 10, 287 P.3d 112, 115 (noting that, although we are "not bound to interpret our rules . . . the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions

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interpreting those rules for guidance"); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982) ("[C]ase law interpreting the federal rule is persuasive in analysis of the Colorado rule."). Under federal law, courts are instructed to "assume[] admissibility in the first instance." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). Thus, "the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy." *Barry v. Trs. of Int'l Ass'n*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). The federal courts have also identified four non-exclusive factors to help courts determine trustworthiness: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Id.* at 97; *see Beech Aircraft*, 488 U.S. at 167 n.11.

¶166 The district court employed the foregoing presumption and four factors to analyze the Report.[16] The court determined that "the first three *Barry* factors weigh

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[16] We also review a district court's trustworthiness analysis for an abuse of discretion. *See United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) ("Under [Fed. R. Evid. 803(8)], this Court must decide whether the district court abused its discretion by '[g]iving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant.'"(quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 266 (3d Cir. 1983))); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984) ("Rule 803(8)(C) also requires that the report not be subject to circumstances indicating a lack of trustworthiness. This determination is within the discretion of the trial court."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821–22 (10th Cir. 1981) ("We believe that 'the trial court

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strongly in favor of reliability." *Anderson*, ¶ 24. President Trump focuses his admissibility challenge on the fourth factor: "possible motivation problems." *Barry*, 467 F. Supp. 2d at 97.

¶167 First, President Trump claims the Report was biased against him because all nine Committee members voted in favor of impeaching him before their investigation began. Timothy Heaphy, Chief Investigative Counsel for the Committee, testified at trial, however, that although members "certainly had . . . hypotheses that were a starting point," such hypotheses did not impair the members' ability to be fair and impartial. *Anderson*, ¶ 26. The district court found "Mr. Heaphy's testimony on this subject to be credible and h[eld] that any perceived animus of the committee members towards [President] Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable." *Id.* We see no abuse of discretion. *See People v. Pitts*, 13 P.3d 1218, 1221 (Colo. 2000) ("It is the function of the trial court, and not the reviewing court, to weigh evidence and determine the credibility of the witnesses.").

¶168 Second, President Trump believes that the political backdrop against which the Report was created makes it unreliable. This argument proves too much. All

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is the first and best judge of whether tendered evidence meets th[at] standard of trustworthiness and reliability . . .' and [w]e cannot say the trial court abused its discretion by refusing to admit the report." (quoting *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944))).

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congressional reports contain some level of political motivation, yet neither CRE 803(8) nor the corresponding federal rule declares such reports per se inadmissible; instead, as the district court explained, a court is at liberty to admit what it deems trustworthy. *See Anderson*, ¶ 28; *see, e.g.*, *Barry*, 467 F. Supp. 2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F. Supp. 2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982) (admitting Congressional Committee report), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984).

¶169 Third, President Trump asserts that because Democrats outnumbered Republicans seven to two on the Committee, the Report's findings are necessarily biased. The district court determined that although the Report "would have further reliability had there been greater Republican participation," that deficit did not demonstrate "motivation problems." *Anderson*, ¶¶ 29–30. The district court observed that House Republicans opted to boycott the Committee after then-Speaker of the House Nancy Pelosi agreed to seat only three of the five Republicans recommended to her. *Id.* at ¶ 30. Despite then-Speaker Pelosi's "unprecedented" move, *id.*, the district court noted that "the two Republicans who did sit . . . were both duly elected Republicans," *id.* at ¶ 31; "[t]he investigative staff included . . . many Republican[]" lawyers, *id.* at ¶ 32; "the staffing decisions did

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not include any inquiry into political affiliation," *id.*; and "[t]he overwhelming majority of witnesses . . . were [President] Trump administration officials and Republicans," *id.* at ¶ 33. The court reasoned that "[t]hese facts all cut against Intervenors' argument that lack of participation of the minority party resulted in . . . unreliable conclusions." *Id.* at ¶ 34.

¶170 Again, we perceive no abuse of discretion. CRE 803(8) assumes admissibility, *Barry*, 467 F. Supp. 2d at 96, and President Trump has not met his burden of demonstrating that, contrary to the evidence the district court highlighted, the Report suffered from motivation problems. *See id.* Moreover, we remain mindful that this is a four-factor inquiry. No single factor is dispositive. Instead, any perceived shortcomings as to one must be weighed against the strengths of the others. Whatever the "possible motivation problems," the weight of the other three factors remains. As the district court explained, (1) passage of time does not impugn the Report, as the investigation began six months after the attack and was completed in under two years; (2) the investigative staff consisted of highly skilled lawyers, including two former U.S. Attorneys; and (3) there was a formal ten-day hearing in which seventy witnesses testified under oath. *Anderson*, ¶ 24. So, not only was the court's analysis of the fourth factor reasonable, but it also did not abuse its discretion in reaching its broader conclusion that the Report was trustworthy.

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¶171 President Trump nonetheless argues that, even if the Report is generally admissible under the CRE 803(8) exception, there were eleven admitted findings within the Report that remained independently inadmissible. Even if the general admissibility of the Report does not necessarily give a green light to multiple layers of hearsay, we conclude that only two of the eleven challenged findings constituted hearsay within hearsay.[17] And even if there was error in admitting those findings, neither is of sufficient consequence to warrant reversal. *See Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) (explaining that, under harmless error review, we will reverse only if, viewing the evidence as a whole, the error substantially influenced the outcome or impaired the fairness of the trial and that,

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[17] The nine remaining statements fall into three categories: statements made (1) by President Trump, (2) to President Trump, and (3) by his supporters during chants. First, President Trump's own statements are not hearsay under the party-opponent rule. *See* CRE 801(d)(2)(A). Second, various statements made to President Trump on January 6 are not hearsay because they were offered to show the statements' effect on the listener (i.e., that President Trump had knowledge of certain issues). *See* CRE 801(c); *People v. Vanderpauye*, 2023 CO 42 ¶ 21 n.4, 530 P.3d 1214, 1221 n.4 (accepting that a "statement was not hearsay because it was offered for its effect on the listener . . . not for the truth of the matter asserted"). Third, chants by President Trump's supporters were not offered to prove the truth of the chants, but simply to establish that the statements were made. That is not hearsay. CRE 801(c); *see People v. Dominguez*, 2019 COA 78 ¶ 20, 454 P.3d 364, 369 (stating that "verbal acts aren't hearsay" because such a statement is "offered not for its truth, but to show that it was made"). Thus, none of the findings in these three classes constitutes hearsay within the Report.

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"[i]n the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous").

¶172 First, the Report cited a newspaper article stating that the election was called for President Biden. Although this is hearsay, the district court did not rely on the statement in its analysis, so President Trump was not prejudiced by any error in admitting this statement. *See Raile v. People*, 148 P.3d 126, 136 (Colo. 2006) ("[T]here is no reasonable probability that Raile was prejudiced by the admission of the statements; thus, the trial court's error was harmless.").

¶173 Second, the Report explained that Chief of Staff Mark Meadows told White House Counsel Pat Cipollone that President Trump "doesn't want to do anything" to stop the violence. H.R. Rep. No. 117 663, at 110. The fact that this statement is hearsay is irrelevant: The district court expressly noted that "it has only considered those portions of the January 6th Report which are referenced in this Order and has considered no other portions in reaching its decision," *Anderson*, ¶ 38, and it did not mention this statement in its order, nor did it rely on it to reach any conclusions. Thus, President Trump's embedded hearsay argument is unavailing.

¶174 For these reasons, we conclude that the district court did not abuse its discretion by admitting portions of the Report into evidence.

¶175 We now consider the district court's findings that President Trump "engaged in" an "insurrection" within the meaning of Section Three.

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G. President Trump Engaged in Insurrection

¶176 President Trump challenges the district court's findings that he "engaged in" an "insurrection." The Constitution leaves these terms undefined. Therefore, we must make a legal determination regarding what the drafters and ratifiers meant when they chose to deploy these words in Section Three. Mindful of the deferential standard of review afforded a district court's factual findings, we conclude that the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and that President Trump engaged in that insurrection.

1. Standard of Review

¶177 As a general matter, we review findings of fact under either a clear error or abuse of discretion standard, and we review legal conclusions de novo. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000); *accord State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33, 529 P.3d 599, 607. When, however, the issue before an appellate court presents a mixed question of law and fact, Colorado courts have taken different approaches, depending on the circumstances. *455 Co.*, 3 P.3d at 22. For example, courts have sometimes treated the ultimate conclusion as one of fact and applied the clear error standard. *Id.* In other cases, courts have concluded that a mixed question of law and fact mandates de novo review. *Id.* And when a trial court made evidentiary findings of fact in

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support of its application of a legal principle from another jurisdiction, we have found it appropriate to conduct an abuse of discretion review of the evidentiary factual findings supporting the legal conclusion and a de novo review of the legal conclusion itself. *Id.* at 23.

¶178 For our purposes here, where we are called on to review the district court's construction of certain terms used in Section Three to the facts established by the evidence, we will review the district court's factual findings for clear error and its legal conclusions de novo.

2. "Insurrection"

¶179 Dictionaries (both old and new), the district court's order, and the briefing by the parties and the amici curiae suggest several definitions of the word "insurrection."

¶180 For example, Noah Webster's dictionary from 1860 defined "insurrection" as:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is equivalent to SEDITION, except that *sedition* expresses a less extensive rising of citizens. It differs from REBELLION, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction.

Noah Webster, An American Dictionary of the English Language 613 (1860); *accord* John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of

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the United States of America and of the Several States to the American Union (6th ed. 1856), available at https://wzukusers.storage.googleapis.com/user-32960741/documents/5ad525c314331myoR8FY/1856_bouvier_6.pdf [https://perma.cc/PXK4-M75N] (defining "insurrection" as "[a] rebellion of citizens or subjects of a country against its government").

¶181 Webster's Third New International Dictionary defines "insurrection" as "an act or instance of revolting against civil or political authority or against an established government" or "an act or instance of rising up physically." *Insurrection*, Webster's Third New International Dictionary (2002).

¶182 In light of these and other proffered definitions, the district court concluded that "an insurrection as used in Section Three is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." *Anderson*, ¶ 240.

¶183 Finally, we note that at oral argument, President Trump's counsel, while not providing a specific definition, argued that an insurrection is more than a riot but less than a rebellion. We agree that an insurrection falls along a spectrum of related conduct. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Case of Davis*, 7 F. Cas. 63, 96 (C.C.D. Va.

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1871) (No. 3,621a) ("Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war."); 77 C.J.S. *Riot; Insurrection* § 36, Westlaw (database updated August 2023) ("Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that, in insurrection, there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society."). But we part company with him when he goes one step further. No authority supports the position taken by President Trump's counsel at oral argument that insurrectionary conduct must involve a particular length of time or geographic location.

¶184 Although we acknowledge that these definitions vary and some are arguably broader than others, for purposes of deciding this case, we need not adopt a single, all-encompassing definition of the word "insurrection." Rather, it suffices for us to conclude that any definition of "insurrection" for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.

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The required force or threat of force need not involve bloodshed, nor must the dimensions of the effort be so substantial as to ensure probable success. *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). Moreover, although those involved must act in a concerted way, they need not be highly organized at the insurrection's inception. *See Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) ("[A]t its inception an insurrection may be a pretty loosely organized affair. . . . It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection.").

¶185 The question thus becomes whether the evidence before the district court sufficiently established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. We have little difficulty concluding that substantial evidence in the record supported each of these elements and that, as the district court found, the events of January 6 constituted an insurrection.

¶186 It is undisputed that a large group of people forcibly entered the Capitol and that this action was so formidable that the law enforcement officers onsite could not control it. Moreover, contrary to President Trump's assertion that no evidence

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in the record showed that the mob was armed with deadly weapons or that it attacked law enforcement officers in a manner consistent with a violent insurrection, the district court found—and millions of people saw on live television, recordings of which were introduced into evidence in this case—that the mob was armed with a wide array of weapons. *See Anderson*, ¶ 155. The court also found that many in the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons, including metal bars from the police barricades and officers' batons and riot shields and that throughout the day, the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol. *Id.* at ¶¶ 156–57. The fact that actual and threatened force was used that day cannot reasonably be denied.

¶187 Substantial evidence in the record further established that this use of force was concerted and public. As the district court found, with ample record support, "The mob was coordinated and demonstrated a unity of purpose .... They marched through the [Capitol] building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." *Id.* at ¶ 243. And upon breaching the Capitol, the mob immediately pursued its intended target—the certification of the presidential election—and reached the House and Senate chambers within minutes of entering the building. *Id.* at ¶ 153.

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¶188 Finally, substantial evidence in the record showed that the mob's unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election; that is, to preclude Congress from taking the actions necessary to accomplish a peaceful transfer of power. As noted above, soon after breaching the Capitol, the mob reached the House and Senate chambers, where the certification process was ongoing. *Id.* This breach caused both the House and the Senate to adjourn, halting the electoral certification process. In addition, much of the mob's ire—which included threats of physical violence—was directed at Vice President Pence, who, in his role as President of the Senate, was constitutionally tasked with carrying out the electoral count. *Id.* at ¶¶ 163, 179–80; *see* U.S. Const. art. I, § 3, cl. 4; *id.* at art. II, § 1, cl. 3. As discussed more fully below, these actions were the product of President Trump's conduct in singling out Vice President Pence for refusing President Trump's demand that the Vice President decline to carry out his constitutional duties. *Anderson*, ¶¶ 148, 170, 172–73.

¶189 In short, the record amply established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. Under any viable

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definition, this constituted an insurrection, and thus we will proceed to consider whether President Trump "engaged in" this insurrection.

3. "Engaged In"

¶190 Dictionaries, historical evidence, and case law all shed light on the meaning of "engaged in," as that phrase is used in Section Three.

¶191 Noah Webster's dictionary from 1860 defined "engage" as "to embark in an affair." Noah Webster, An American Dictionary of the English Language 696 (1860). Similarly, Webster's Third New International Dictionary defines "engage" as "to begin and carry on an enterprise" or "to take part" or "participate." *Engage*, Webster's Third New International Dictionary (2002). And Merriam-Webster defines "engage" as including both "to induce to participate" and "to do or take part in something." *Engage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/engage [https://perma.cc/7JDM-4XSB].

¶192 Attorney General Stanbery's opinions on the meaning of "engage," which he issued at the time the Fourteenth Amendment was being debated, are in accord with these historical and modern definitions. Attorney General Stanbery opined that a person may "engage" in insurrection or rebellion "without having actually levied war or taken arms." *Stanbery I*, 12 Op. Att'y Gen. at 161. Thus, in Attorney General Stanbery's view, when individuals acting in their official capacities act "in

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the furtherance of the common unlawful purpose" or do "any overt act for the purpose of promoting the rebellion," they have "engaged" in insurrection or rebellion for Section Three disqualification purposes. *Id.* at 161–62; *see also Stanbery II*, 12 Op. Att'y. Gen. at 204 (defining "engaging in rebellion" to require "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose"). Accordingly, "[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Stanbery II*, 12 Op. Att'y. Gen. at 205; *accord Stanbery I*, 12 Op. Att'y Gen. at 164.

¶193 Turning to case law construing the meaning of "engaged in" for purposes of Section Three, although we have found little precedent directly on point, cases concerning treason that had been decided by the time the Fourteenth Amendment was ratified provide some insight into how the drafters of the Fourteenth Amendment would have understood the term "engaged in." For example, in *Ex parte Bollman*, 8 U.S. 75, 126 (1807), Chief Justice Marshall explained that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In other words, an individual need not directly

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participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had:

> [I]t is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

In re Charge to Grand Jury-Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851).

¶194 We find the foregoing definitions and authorities to be generally consistent, and we believe that the definition adopted and applied by the district court is supported by the plain meaning of the term "engaged in," as well as by the historical authorities discussed above. Accordingly, like the district court, we conclude that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Anderson*, ¶ 254.

¶195 In so concluding, we hasten to add that we do not read "engaged in" so broadly as to subsume mere silence in the face of insurrection or mere acquiescence therein, at least absent an affirmative duty to act. Rather, as Attorney General Stanbery observed, "The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." *Stanbery I*, 12 Op. Att'y Gen. at 161; *see also* Baude & Paulsen, *supra* (manuscript at 67) (noting that "passive acquiescence, resigned acceptance,

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silence, or inaction is not typically enough to have 'engaged in' insurrection or rebellion . . . [unless] a person possesses an affirmative duty to speak or act").

¶196 The question remains whether the record supported the district court's finding that President Trump engaged in the January 6 insurrection by acting overtly and voluntarily with the intent of aiding or furthering the insurrectionists' common unlawful purpose. Again, mindful of our applicable standard of review, we conclude that it did, and we proceed to a necessarily detailed discussion of the evidence to show why this is so.

¶197 Substantial evidence in the record showed that even before the November 2020 general election, President Trump was laying the groundwork for a claim that the election was rigged. For example, at an August 17, 2020 campaign rally, he said that "the only way we're going to lose this election is if the election is rigged." *Anderson*, ¶ 88. Moreover, when asked at a September 23, 2020 press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused to do so. *Id.* at ¶ 90.

¶198 President Trump then lost the election, and despite the facts that his advisors repeatedly advised him that there was no evidence of widespread voter fraud and that no evidence showed that he himself believed the election was wrought with fraud, President Trump ramped up his claims that the election was stolen from him and undertook efforts to prevent the certification of the election

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results. For example, in a December 13, 2020 tweet, he stated, "Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime." *Id.* at ¶ 101. And President Trump sought to overturn the election results by directly exerting pressure on Republican officeholders in various states. *Id.* at ¶ 103.

¶199 On this point, and relevant to President Trump's intent in this case, many of the state officials targeted by President Trump's efforts were subjected to a barrage of harassment and violent threats by his supporters. *Id.* at ¶ 104. President Trump was well aware of these threats, particularly after Georgia election official Gabriel Sterling issued a public warning to President Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." *Id.* President Trump responded by retweeting a video of Sterling's press conference with a message repeating the very rhetoric that Sterling warned would result in violence. *Id.* at ¶ 105.

¶200 And President Trump continued to fan the flames of his supporters' ire, which he had ignited, with ongoing false assertions of election fraud, propelling the "Stop the Steal" movement and cross-country rallies leading up to January 6. *Id.* at ¶ 106. Specifically, between Election Day 2020 and January 6, Stop the Steal organizers held dozens of rallies around the country, proliferating President

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Trump's election disinformation and recruiting attendees, including members of violent extremist groups like the Proud Boys, the Oath Keepers, and the Three Percenters, QAnon conspiracy theorists, and white nationalists, to travel to Washington, D.C. on January 6. *Id.* at ¶ 107.

¶201 Stop the Steal leaders also joined two "Million MAGA Marches" in Washington, D.C. on November 14, 2020, and December 12, 2020. *Id.* at ¶ 108. Again, as relevant to President Trump's intent here, after the November rally turned violent, President Trump acknowledged the violence but justified it as self-defense against "ANTIFA SCUM." *Id.* at ¶ 109.

¶202 With full knowledge of these sometimes-violent events, President Trump sent the following tweet on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" *Id.* at ¶ 112.

¶203 At this point, the record established that President Trump's "plan" was that when Congress met to certify the election results on January 6, Vice President Pence could reject the true electors who voted for President Biden and certify a slate of fake electors supporting President Trump or he could return the slates to the states for further proceedings. *Id.* at ¶ 113.

¶204 Far right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters viewed President Trump's December 19, 2020 tweet as a

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"call to arms," and they began to plot activities to disrupt the January 6 joint session of Congress. *Id.* at ¶ 117. In the meantime, President Trump repeated his invitation to come to Washington, D.C. on January 6 at least twelve times. *Id.* at ¶ 118.

¶205 On December 26, 2020, President Trump tweeted:

> If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Id. at ¶ 121.

¶206 And on January 1, 2021, President Trump retweeted a post from Kylie Jane Kremer, an organizer of the scheduled January 6 March for Trump, that stated, "The calvary [sic] is coming, Mr. President! JANUARY 6 | Washington, D.C." President Trump added to his retweet, "A great honor!" *Id.* at ¶ 119.

¶207 The foregoing evidence established that President Trump's messages were a call to his supporters to fight and that his supporters responded to that call. Further supporting such a conclusion was the fact that multiple federal agencies, including the Secret Service, identified significant threats of violence in the days leading up to January 6. *Id.* at ¶ 123. These threats were made openly online, and they were widely reported in the press. *Id.* Agency threat assessments thus stated

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that domestic violent extremists planned for violence on January 6, with weapons including firearms and enough ammunition to "win a small war." *Id.*

¶208 Along the same lines, the Federal Bureau of Investigation received many tips regarding the potential for violence on January 6. *Id.* at ¶ 124. One tip said:

> They think they will have a large enough group to march into DC armed and will outnumber the police so they can't be stopped . . . . They believe that since the election was "stolen" it's their constitutional right to overtake the government and during this coup no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further.

Id.

¶209 The record reflects that President Trump had reason to know of the potential for violence on January 6. As President, he oversaw the agencies reporting the foregoing threats. *Id.* at ¶ 123. In addition, Katrina Pierson, a senior advisor to both of President Trump's presidential campaigns, testified, on behalf of President Trump, that at a January 5, 2021 meeting, President Trump chose the speakers for the January 6 event at which he, too, would speak (avoiding at least some extremist speakers) and that he knew that radical political extremists were going to be in Washington, D.C. on January 6 and would likely attend his speech. *Id.* at ¶¶ 48, 126.

¶210 January 6 arrived, and in the early morning, President Trump tweeted, "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even

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fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!" *Id.* at ¶ 127. He followed this tweet later that morning with another that said, "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" *Id.*

¶211 These tweets had the obvious effect of putting a significant target on Vice President Pence's back, focusing President Trump's supporters on the Vice President's role in overseeing the counting of the electoral votes and certifying the 2020 presidential election to ensure the peaceful transfer of power. *Id.* at ¶¶ 128, 291.

¶212 At about this same time, tens of thousands of President Trump's supporters began gathering around the Ellipse for his speech. *Id.* at ¶ 129. To enter the Ellipse itself, attendees were required to pass through magnetometers. *Id.* at ¶ 130. Notably, from the approximately 28,000 attendees who passed through these security checkpoints, the Secret Service confiscated hundreds of weapons and other prohibited items, including knives or blades, pepper spray, brass knuckles, tasers, body armor, gas masks, and batons or blunt instruments. *Id.* at ¶¶ 130–31. Approximately 25,000 additional attendees remained outside the Secret Service perimeter, thus avoiding the magnetometers. *Id.* at ¶ 132.

¶213 President Trump then gave a speech in which he literally exhorted his supporters to fight at the Capitol. Among other things, he told the crowd:

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- "We're gathered together in the heart of our nation's capital for one very, very basic reason: to save our democracy." *Id.* at ¶ 135.
- "Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And we're going to have to fight much harder." *Id.*
- "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you . . . ." *Id.*
- "[W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them. Because you'll never take back our country with weakness. You have to show strength and you have to be strong." *Id.*
- "When you catch somebody in a fraud, you're allowed to go by very different rules." *Id.*
- "This the most corrupt election in the history, maybe of the world. . . . This is not just a matter of domestic politics—this is a matter of national security." *Id.*
- "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore." *Id.*

¶214 Unsurprisingly, the crowd at the Ellipse reacted to President Trump's words with calls for violence. Indeed, after President Trump instructed his supporters to march to the Capitol, members of the crowd shouted, "[S]torm the capitol!"; "[I]nvade the Capitol Building!"; and "[T]ake the Capitol!" *Id.* at ¶ 141. And before he had even concluded his speech, President Trump's supporters followed his instructions. *Id.* at ¶ 146. The crowd marched to the Capitol, many carrying

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Revolutionary War flags and Confederate battle flags; quickly breached the building; and immediately advanced to the House and Senate chambers to carry out their mission of blocking the certification of the 2020 presidential election. *Id.* at ¶¶ 146–53.

¶215 By 1:21 p.m., President Trump was informed that the Capitol was under attack. *Id.* at ¶ 169. Rather than taking action to end the siege, however, approximately one hour later, at 2:24 p.m., he tweeted, "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *Id.* at ¶ 170.

¶216 This tweet was read over a bullhorn to the crowd at the Capitol, and produced further violence, necessitating the evacuation of Vice President Pence from his Senate office to a more secure location to ensure his physical safety. *Id.* at ¶¶ 171–75.

¶217 President Trump's next public communications were two tweets sent at 2:38 p.m. and 3:13 p.m., encouraging the mob to "remain peaceful" and to "[s]tay peaceful" (obviously, the mob was not at all peaceful), but neither tweet condemned the violence nor asked the mob to disperse. *Id.* at ¶ 178 (alteration in original).

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¶218 Throughout these several hours, President Trump ignored pleas to intervene and instead called on Senators, urging them to help delay the electoral count, which is what the mob, upon President Trump's exhortations, was also trying to achieve. *Id.* at ¶ 180. And President Trump took no action to put an end to the violence. To the contrary, as mentioned above, when told that the mob was chanting, "Hang Mike Pence," President Trump responded that perhaps the Vice President deserved to be hanged. *Id.* President Trump also rejected pleas from House Republican Leader Kevin McCarthy, imploring him to tell his supporters to leave the Capitol, stating, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.*

¶219 Finally, at 4:17 p.m., President Trump released a video urging the mob "to go home now." *Id.* at ¶ 186. Even then, he did not condemn the mob's actions. *Id.* at ¶ 187. Instead, he sympathized with those who had violently overtaken the Capitol, telling them that he knew their pain. *Id.* at ¶¶ 186–87. He told them that he loved them and that they were "very special." *Id.* at ¶ 186. And he repeated his false claim that the election had been stolen notwithstanding his "landslide" victory, thereby further endorsing the mob's effort to try to stop the peaceful transfer of power. *Id.* at ¶¶ 186–87.

¶220 A short while later, President Trump reiterated this supportive message to the mob by justifying its actions, tweeting at 6:01 p.m., "These are the things and

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events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace." *Id.* at ¶ 189. President Trump concluded by encouraging the country to "[r]emember this day forever!" *Id.*

¶221 We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection. President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.

¶222 We disagree with President Trump's contentions that the record does not support a finding that he engaged in an insurrection because (1) "engage" does not include "incite," and (2) he did not have the requisite intent to aid or further the insurrectionists' common unlawful purpose.

¶223 As our detailed recitation of the evidence shows, President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully

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underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.

¶224 Moreover, the record amply demonstrates that President Trump fully intended to—and did—aid or further the insurrectionists' common unlawful purpose of preventing the peaceful transfer of power in this country. He exhorted them to fight to prevent the certification of the 2020 presidential election. He personally took action to try to stop the certification. And for many hours, he and his supporters succeeded in halting that process.

¶225 For these reasons, we conclude that the record fully supports the district court's finding that President Trump engaged in insurrection within the meaning of Section Three.

H. President Trump's Speech on January 6 Was Not Protected by the First Amendment Right to Freedom of Speech

¶226 President Trump contends that his speech on January 6 was protected by the First Amendment and, therefore, cannot be used to justify his disqualification from office under Section Three. The district court concluded that this speech was unprotected by the First Amendment. *Anderson*, ¶ 298. We agree with the district court.

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1. Standard of Review

¶227 In considering President Trump's First Amendment challenge, we undertake an "independent review of the record . . . to be sure that the speech in question actually falls within [an] unprotected category" of communication. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). We have interpreted this independent review as being akin to de novo review. *See Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 46, 320 P.3d 830, 841, *rev'd on other grounds*, 571 U.S. 237 (2014); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997). *Bose* recognizes, however, that we may give some "presumption of correctness" to factual findings, 466 U.S. at 500, especially those that do not involve the application of standards of law, *id.* at 500 n.16, or those that arise from complex cases such as this one, where the district judge has "lived with the controversy," *id.* at 500. Focusing on the findings by the district court, we therefore "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* at 508 (first alteration in original) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

2. First Amendment Protections and Incitement

¶228 The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This

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robust protection for speech functions to "invite dispute," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¶229 Even so, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The First Amendment does not protect, for example, true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969); speech essential to criminal conduct, *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); or speech that incites lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It is this last strand of First Amendment jurisprudence that the parties debate here.

¶230 As the Supreme Court explained in *Brandenburg*, the First Amendment's "constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Under *Brandenburg* and its progeny, the modern test to determine whether speech is unprotected under the First Amendment because it incited lawless action is whether (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the

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speaker intended that the speech would result in the use of violence or lawless action; and (3) the imminent use of violence or lawless action was the likely result of the speech. *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018); *accord Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015).[18]

3. Applying the *Brandenburg* Test

a. Context

¶231 President Trump contends that the district court erred by examining the broader context in which President Trump's speech was made, thereby "expand[ing] the context relevant to a *Brandenburg* analysis beyond anything recognized in precedent." He asserts that we should examine his speech only in the narrow context in which it was made. We disagree.

¶232 In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court addressed, for the first time, advocacy of illegal conduct, and it recognized the

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[18] This tripartite formulation incorporates the holdings from *Brandenburg* and its progeny. *See Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding there was "no evidence or *rational inference* from the *import* of the language" that the defendant's words were intended to produce imminent disorder and thereby indicating that although illegal action must be imminent, advocacy of lawless action could be implicit (emphases added)); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982) ("When such [emotional] appeals [for unity and action in a common cause] do not incite lawless action, they must be regarded as protected speech.").

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importance of context in holding that "the character of every act depends upon the circumstances in which it is done." Although the Supreme Court has said little about how to analyze incitement since *Brandenburg*, it offered some guidance regarding a court's use of other statements for context in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¶233 In *Claiborne Hardware*, the Court considered speeches given by Charles Evers, the field secretary of the Mississippi NAACP, in connection with the NAACP's boycott of white merchants in Claiborne County from 1966 to 1969. 458 U.S. at 890. Evers declared to Black residents of Claiborne County that "blacks who traded with white merchants would be *answerable to him*," and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28. Evers's statements also included that "boycott violators would be 'disciplined' by their own people," and he "warned that the Sheriff could not sleep with boycott violators at night." *Id.* at 902. The Court held that Evers's speeches were protected by the First Amendment but said that "[i]f there [was] other evidence of [Evers's] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id.* at 929. By considering and placing value in the *absence* of corroborating evidence of Evers's violent intentions, the Court implied that courts may look to circumstances beyond the speech itself to determine intent. *See United States v. White*, 610 F.3d

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956, 961–62 (7th Cir. 2010) (relying on *Claiborne Hardware* in denying a motion to dismiss in a solicitation case based on the existence of "further evidence of . . . the relationship between [the defendant] and his followers which will show the posting was a specific request to [the defendant's] followers").

¶234 While incitement precedent is sparse, the case law on "true threats" is instructive regarding the importance of context. True threats and incitement are doctrinally distinct,[19] but true threats are the "closest cousin" to incitement under the First Amendment. *Counterman v. Colorado*, 600 U.S. 66, 97 (2023) (Sotomayor, J., concurring in part); *accord United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) ("The line between the two forms of speech [incitement and true threats] may be difficult to draw in some instances . . . ."); *see also* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1069 (2002) (explaining that both exceptions involve exhortations regarding violence that derive from *Schenck*'s "clear and present danger" test).

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[19] *Compare Brandenburg*, 395 U.S. at 447 (defining unprotected incitement as that "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"), *with Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

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¶235 And multiple federal circuit courts conducting a true-threat analysis confirm what common sense suggests: When assessing whether someone means to threaten another with unlawful violence, we sometimes need to consider more than the behavior exhibited on one occasion. *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002) (rejecting an argument that "'context' means the direct circumstances surrounding delivery of the threat," and instead concluding that "[w]e, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat" (internal citation omitted) (quoting *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984), *overruled on other grounds by Planned Parenthood*, 290 F.3d at 1066–77, *and United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002))); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (considering "whether the maker of the threat had made similar statements to the victim on other occasions" and "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence" when determining whether a true threat exists). So too with incitement. Context matters.

¶236 This is not to say, as President Trump contends the district court found, that we "may consider *any speech ever uttered* by [President Trump]" in evaluating incitement. Of course, there are limits. But we need not define those outer limits

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now. Instead, we simply conclude that it was appropriate for the district court to consider President Trump's "history of courting extremists and endorsing political violence as legitimate and proper, as well as his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress." *Anderson*, ¶ 289.

¶237 With this in mind, we review the district court's application of *Brandenburg*'s three-pronged test.

b. Encouraging the Use of Violence or Lawless Action

¶238 Again, the first prong of the test for incitement is that "the speech explicitly or implicitly encouraged the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609.

¶239 The district court made dozens of findings regarding the general atmosphere of political violence that President Trump created before January 6, many of which we have already outlined in discussing why the district court concluded that President Trump "engaged in" insurrection. We incorporate those observations here by reference and supplement them with other illuminating evidence from the record below. For example, the district court found that "[a]t [a] February 2016 rally, [President] Trump told his supporters that in the 'old days,' a protester would be 'carried out on a stretcher' and that he would like to 'punch him in the face.'" *Anderson*, ¶ 68. In March 2016, President Trump

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responded to questions about his supporters' violence by saying it was "very, very appropriate" and "we need a little bit more of" it. *Id.* at ¶ 69. And during the 2020 election cycle, "President Trump threatened to deploy 'the Military' to Minneapolis to shoot 'looters' amid protests over the police killing of George Floyd," *id.* at ¶ 76, and told the Proud Boys to "stand back and stand by" during a debate for the 2020 presidential election. *id.* at ¶ 77.

¶240 The district court also credited the testimony of Professor Peter Simi, a professor of sociology at Chapman University, whom it had "qualified . . . as an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6 attack relate to longstanding patterns of behavior and communication by political extremists." *Id.* at ¶ 42. He testified, according to the court's summary, that (1) "violent far-right extremists understood that [President] Trump's calls to 'fight,' which most politicians would mean only symbolically, were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability," *id.* at ¶ 84; and that (2) "[President] Trump's speech took place in the context of a pattern of [President] Trump's knowing 'encouragement and promotion of violence' to develop and deploy a shared coded language with his violent supporters," *id.* at ¶ 142.

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¶241 As we described in the foregoing section, the district court further found that President Trump encouraged and supported violence before and after the 2020 election by telling his supporters that "the only way we're going to lose this election is if the election is rigged. Remember that," *id.* at ¶ 88; that the election was "a fraud on the American public," *id.* at ¶ 92; *see also id.* at ¶ 101 ("Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime"); and that the Democrats had stolen an election that rightfully belonged to President Trump and his supporters, *id.* at ¶¶ 93, 96. The district court also found that "[m]any of the state officials targeted by [President] Trump's campaign of intimidation were subject to a barrage of harassment and violent threats by [his] supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to [President] Trump to 'stop inspiring people to commit potential acts of violence' or '[s]omeone's going to get killed.'" *Id.* at ¶ 104 (last alteration in original); *see also id.* at ¶ 105 (finding that "[f]ar-right extremists understood [President] Trump's refusal to condemn the violence [Sterling condemned] . . . as an endorsement of the use of violence to prevent the transfer of presidential power").

¶242 The district court then identified specific incendiary language in President Trump's speech at the Ellipse on January 6, some of which we alluded to earlier in

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this opinion. To reiterate: President Trump announced, "we're going to walk down, and I'll be with you, we're going to walk down . . . to the Capitol . . . ." *Id.* at ¶ 135. He "used the word 'fight' or variations of it [twenty] times during his Ellipse speech." *Id.* at ¶ 137; *see also, e.g., id.* at ¶ 135 ("And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."). He declared, "[w]hen you catch somebody in a fraud," a sentiment he had repeatedly said had occurred with the 2020 election, "you're allowed to go by very different rules." *Id.* at ¶ 135; *see also id.* at ¶ 138 ("You don't concede when there's theft involved."). And he claimed that "our election victory [was] stolen by emboldened radical-left Democrats . . . ." *Id.* at ¶ 135.

¶243 In short, the district court found that President Trump's speech at the Ellipse "was understood by a portion of the crowd as, a call to arms." *Id.* at ¶ 145. And the district court here is not the first or only court to reach this conclusion. In *Thompson v. Trump*, 590 F. Supp. 3d 46, 118 (D.D.C. 2022), the U.S. District Court for the District of Columbia found that President Trump

> invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election from them; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building . . . where those very politicians were at work to certify an election that he had lost.

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The court concluded that President Trump's speech was, therefore "plausibly . . . a positive instigation of a mischievous act."[20] *Id.* (quoting John Stuart Mill, On Liberty 100 (London, John W. Parker & Son, 2d ed. 1859)). Our independent review of the record in this case brings us to the same conclusion: President Trump incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power. The tenor of President Trump's messages to his supporters in exhorting them to travel to Washington, D.C. on January 6 was obvious and unmistakable: the allegedly rigged election was an act of war and those victimized by it had an obligation to fight back and to fight aggressively. And President Trump's supporters did not miss or misunderstand the message: the cavalry was coming to fight.

¶244 The fact that, at one point during his speech, President Trump said that "everyone here will soon be marching to the Capitol building to *peacefully and patriotically* make your voices heard" does not persuade us that the district court erred in finding that the first prong of the *Brandenberg* test was met. *See Thompson*, 590 F. Supp. 3d at 113–14. This isolated reference "cannot inoculate [President

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[20] *Thompson* involved a motion to dismiss. As a result, the court determined only that President Trump's speech "plausibly [involved] words of incitement not protected by the First Amendment." *Thompson*, 590 F. Supp. 3d at 115; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (requiring plaintiffs to show that their complaints are plausible to survive a motion to dismiss for failure to state a claim).

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Trump] against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id.* at 117.

c. Intent to Produce Violent or Lawless Action

¶245 The second prong of the test for incitement is that "the speaker intends that his speech will result in the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609. The Supreme Court has interpreted this second prong of the *Brandenburg* test to require specific intent.[21] *Counterman*, 600 U.S. at 79, 81 (establishing that "when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge," and defining acting purposely as "'consciously desir[ing]' a result"). So, we must consider whether President Trump's exhortations at the Ellipse on January 6 to "fight like hell," and his

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[21] There is some uncertainty as to whether *specific intent* to incite imminent lawless action is needed in civil cases such as the one before us now because most of the modern incitement cases arose in a criminal context. *See Counterman*, 600 U.S. at 70; *Hess*, 414 U.S. at 105; *Brandenburg*, 395 U.S. at 444; *but see Claiborne Hardware*, 458 U.S. at 890 (adjudicating complainants' request for injunctive relief and damages). The *Counterman* Court's justification for the specific intent standard was therefore tied to criminal liability. *Counterman*, 600 U.S. at 81 ("A strong intent requirement . . . was a way to ensure that efforts to *prosecute* incitement would not bleed over . . . to dissenting political speech at the First Amendment's core." (emphasis added)). But we need not resolve the issue because, regardless of whether it is required, we agree with the district court that President Trump acted with specific intent.

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urgings that his followers "go[] to the Capitol" and that they would get to "go by 'very different rules,'" were intended to produce imminent lawless action.

¶246 The district court concluded that President Trump exhibited the requisite intent here. It found that, before the January 6 rally, "[President] Trump knew that his supporters were angry and prepared to use violence to 'stop the steal' including physically preventing Vice President Pence from certifying the election," *Anderson*, ¶ 128, and that President Trump's response to the events following his speech "support . . . that [President] Trump endorsed and intended the actions of the mob on January 6," *id.* at ¶ 193 (second alteration in original). Based on these findings of fact, the court "conclude[d] that [President] Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." *Id.* at ¶ 293.

¶247 The district court found that President Trump knew, before he gave his speech, that there was the potential for violence on January 6. It found that "[President] Trump himself agrees that his supporters 'listen to [him] like no one else,'" *id.* at ¶ 63 (second alteration in original), and that federal agencies that President Trump oversaw identified threats of violence ahead of January 6, including "threats to storm the U.S. Capitol and kill elected officials," *id.* at ¶¶ 123–24.

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¶248 The court also found that President Trump's conduct and tweets, which we outlined above, from the time he was told of the attack on the Capitol at 1:21 p.m. until Congress reconvened later that night, indicated his intent to produce lawless or violent conduct. *See id.* at ¶¶ 169–73, 178, 183, 186, 189.

¶249 In conducting our independent review of the district court's factual findings, we agree that President Trump intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power. Despite his knowledge of the anger that he had instigated, his calls to arms, his awareness of the threats of violence that had been made leading up to January 6, and the obvious fact that many in the crowd were angry and armed, President Trump told his riled-up supporters to walk down to the Capitol and fight. He then stood back and let the fighting happen, despite having the ability and authority to stop it (with his words or by calling in the military), thereby confirming that this violence was what he intended.

¶250 We therefore conclude that the second prong of the *Brandenburg* test has also been met.

d. Likely to Incite or Produce Imminent Lawless Action

¶251 Finally, for speech to be unprotected, we must conclude that "the imminent use of violence or lawless action is the likely result of the speech." *Nwanguma*, 903 F.3d at 609.

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¶252 The district court found that:

> Professor Simi reviewed [President] Trump's relationship with his supporters over the years, identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed [President] Trump to know how his supporters responded to his calls for violence using a shared language that allowed him to maintain plausible deniability with the wider public.

Id. at ¶ 62.

¶253 Professor Simi then "testified about . . . examples of [these] patterns of call-and-response that [President] Trump developed and used to incite violence by his supporters." *Id.* at ¶ 64. In one such instance, a November 2015 political rally, "[President] Trump . . . t[old] his supporters to 'get [a protester] the hell out of here' and the protester was then assaulted. When asked about the attack the next day, Trump said 'maybe [the protester] should have been roughed up.'" *Id.* at ¶ 66 (third and fourth alterations in original).

¶254 Further, the district court found that "on January 1, 2021, [President] Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying, 'The calvary [sic] is coming, Mr. President!'" *Id.* at ¶ 119. It found that, according to Professor Simi, "[President] Trump's December 19, 2020 ['will be wild'] tweet had an immediate effect on far-right extremists and militias . . . , who viewed the tweet as a 'call to arms' and began to plot activities to disrupt the January 6, 2021 joint session." *Id.* at ¶ 117.

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¶255 These findings support the conclusion that President Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence. When President Trump told his supporters that they were "allowed to go by very different rules" and that if they did not "fight like hell," they would not "have a country anymore," it was likely that his supporters would heed his encouragement and act violently. We therefore hold that this final prong of the *Brandenburg* test has been met.

¶256 In sum, we conclude that President Trump's speech on January 6 was not protected by the First Amendment.

IV. Conclusion

¶257 The district court erred by concluding that Section Three does not apply to the President. We therefore reverse the district court's judgment. As stated above, however, we affirm much of the district court's reasoning on other issues. Accordingly, we conclude that because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot. Therefore, the Secretary may not list President Trump's name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him. *See* § 1-7-114(2), C.R.S. (2023) ("A vote for a write-in candidate shall not be counted unless that candidate is qualified to hold the office

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for which the elector's vote was cast."). But we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court.

CHIEF JUSTICE BOATRIGHT dissented.

JUSTICE SAMOUR dissented.

JUSTICE BERKENKOTTER dissented.

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CHIEF JUSTICE BOATRIGHT dissenting.

¶258 I agree with the majority that an action brought under section 1-1-113, C.R.S. (2023) of Colorado's election code ("Election Code") may examine whether a candidate is qualified for office under the U.S. Constitution. But section 1-1-113 has a limited scope. *Kuhn v. Williams*, 2018 CO 30M, ¶ 1 n.1, 418 P.3d 478, 480 n.1 (per curiam, unanimous) (emphasizing "the narrow nature of our review under section 1-1-113"). In my view, the claim at issue in this case exceeds that scope. The voters' (the "Electors") action to disqualify former President Donald J. Trump under Section Three of the Fourteenth Amendment presents uniquely complex questions that exceed the adjudicative competence of section 1-1-113's expedited procedures. Simply put, section 1-1-113 was not enacted to decide whether a candidate engaged in insurrection. In my view, this cause of action should have been dismissed. Accordingly, I respectfully dissent.

I. The Electors' Challenge Is Incompatible with a Section 1-1-113 Proceeding

¶259 Section 1-1-113 provides for the resolution of potential election code violations in a timely manner. In many scenarios, Colorado voters can challenge the Secretary of State's (the "Secretary") certification of a candidate's qualifications. *Carson v. Reiner*, 2016 CO 38, ¶ 17, 370 P.3d 1137, 1141 (acknowledging that section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by [Colorado's election] officials charged with

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duties under the code [and] comprehends a specific challenge to a designated election official's certification of a candidate"). While section 1-1-113 only offers voters a "narrow opportunity," *Kuhn*, ¶ 28, 418 P.3d at 484, that opportunity has proven effective as voters have compelled the Secretary to omit from the ballot unqualified candidates whom they would have otherwise listed. *E.g.*, *id.* at ¶ 57, 418 P.3d at 489 (barring a candidate from the ballot because his petition circulator was not a Colorado resident). Section 1-1-113's grant of discretionary review to this court has also vindicated voters' rights by preventing a decision that would have compelled the Secretary to place an unqualified candidate on the ballot. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 26, 462 P.3d 1081, 1087 (barring a candidate from the ballot because she failed to gather sufficient signatures).

¶260 Further, our election code suggests that a petitioner may base a challenge to the Secretary's certification of an aspiring presidential primary candidate on federal law. *Compare* § 1-4-1203(2)(a), C.R.S. (2023) (stating that a candidate must be "qualified"), *with* §1-4-1201, C.R.S. (2023) (declaring that the code conforms to federal law); *see also Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 20, 350 P.3d 849, 853 (relying on federal law to interpret "lawful activity" in a Colorado statute). We have previously held, however, that some federal law claims cannot be adjudicated under section 1-1-113. *E.g.*, *Frazier v. Williams*, 2017 CO 85, ¶ 19,

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401 P.3d 541, 545 (concluding that a 42 U.S.C. § 1983 claim cannot be the basis of, or joined to, a section 1-1-113 action).

¶261 But not all federal questions exceed the scope of section 1-1-113. A qualification challenge under Article II, Section 1[1] or the Twenty-Second Amendment[2] lends itself to section 1-1-113's procedures. Although a claim that a candidate is not thirty-five years old may be easier to resolve than a claim that a candidate is not a natural born citizen, these presidential qualifications are characteristically objective, discernible facts. Age, time previously served as president, and place of birth all parallel core qualification issues under Colorado's election code.[3] Conversely, all these questions pale in comparison to the complexity of an action to disqualify a candidate for engaging in insurrection.

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[1] U.S. Const. art. II, § 1, cl. 5 provides the presidential qualifications:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[2] U.S. Const. amend. XXII, § 1 provides further presidential qualifications:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

[3] *See also* Colorado Secretary of State, *Presidential Primary 2024 Candidate Qualification Guide* 3, https://www.coloradosos.gov/pubs/elections/

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¶262 Far from presenting a straightforward biographical question, Section Three of the Fourteenth Amendment proscribes insurrectionist U.S. officers from again holding office. U.S. Const. amend. XIV, § 3. Unlike qualifications such as age and place of birth, an application of Section Three requires courts to define complex terms, determine legislative intent from over 150 years ago, and make factual findings foreign to our election code. The Electors contend that there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues." However, the framework that section 1-1-113 offers for identifying qualified candidates is not commensurate with the extraordinary determination to disqualify a candidate because they engaged in insurrection against the Constitution. *See* Dis. op. ¶ 352 (Berkenkotter, J., dissenting) (noting that "the historical application of section 1-1-113 . . . has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election."). Recognizing this limitation of section 1-1-113 is not novel. *See Kuhn*, ¶ 1 n.1, 418 P.3d at 480 n.1 (emphasizing "the narrow nature of our review under section 1-1-113" and declining to address a First Amendment challenge to Colorado's residency requirement for petition

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Candidates/packets/2024PresidentialPrimaryGuide.pdf [https:// perma.cc/ KK3L-X8BM] (listing the "basic qualifications" for the presidency including the qualifications from Article II and the Twenty-Second Amendment but not mentioning the Fourteenth Amendment's disqualification for insurrectionists).

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circulators "because such claims exceed this court's jurisdiction in a section 1-1-113 action").

¶263 Dismissal is particularly appropriate here because the Electors brought their challenge without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process. Instead, the Electors relied on section 1-1-113 and its "breakneck pace" to declare President Trump a disqualified insurrectionist. *See Frazier*, ¶ 11, 401 P.3d at 544.

II. As Demonstrated by the Proceeding Below, the Statutory Timeline for a Section 1-1-113 Proceeding Does Not Permit a Claim as Complex as the Electors'

¶264 In addition to qualitative incompatibilities, the complexity of the Electors' claims cannot be squared with section 1-1-113's truncated timeline for adjudication. Section 1-1-113 actions for presidential primary ballots fulfill a need for speed by requiring the district court to hold a hearing within *five days* and issue its decision within forty-eight hours of the hearing:

> Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.

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§ 1-4-1204, C.R.S. (2023). This speed comes with consequences, namely, the absence of procedures that courts, litigants, and the public would expect for complex constitutional litigation. As President Trump, argues and the Electors do not contest, section 1-1-113's procedures do not provide common tools for complex fact-finding: preliminary evidentiary or pre-trial motions hearings, subpoena powers, basic discovery, depositions, and time for disclosure of witnesses and exhibits. This same concern was raised in *Frazier*; the then-Secretary argued that "it is impossible to fully litigate a complex constitutional issue within days or weeks, as is typical of a section 1-1-113 proceeding." ¶ 18 n.3, 401 P.3d at 545 n.3. While we avoided deciding if a claim could be too complex for a section 1-1-113 proceeding in *Frazier*, that question is unavoidable here, and it demands that we reconcile the complexity of this issue with the breakneck pace of a section 1-1-113 procedure. In my view, the answer to this question is dispositive.

¶265 This case's procedural history proves my point. Despite clear requirements, the district court did not follow section 1-4-1204's statutory timeline for section 1-1-113 claims. The proceeding below involved two delays that, respectively, violated (1) the requirement that the merits hearing be held within five days of the challenge being lodged, and (2) the requirement that the district court issue its order within forty-eight hours of the merits hearing.

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¶266 The Electors filed their challenge on September 6, 2023. Although the question of whether this action should be removed to federal court was resolved by September 14, the district court did not hold an evidentiary hearing until October 30. The majority appears to imply that a "status conference" on September 18 fulfills the statutory requirement that the hearing be held within five days of the Electors' challenge. Maj. op. ¶ 83. However, a status conference plainly does not satisfy the requirement: "No later than five days after the challenge is filed, a hearing must be held *at which time the district court shall hear the challenge and assess the validity of all alleged improprieties.*" § 1-4-1204 (emphasis added); *see Carson*, ¶ 21, 370 P.3d at 1142 (ruling that section 1-1-113 "does not permit a challenge to an election official's certification of a candidate to the ballot, solely on the basis of the certified candidate's qualification, once the period . . . for challenging the qualification of the candidate directly has expired . . . ."). It is no mystery why the statutory timeline could not be enforced: This claim was too complex.[4] The fact it took a week shy of two months to hold a hearing that "must" take place within five days proves that section 1-1-113 is an incompatible vehicle

[4] The intervals between the challenge and the hearing, and the hearing and the order, should not cast aspersions on the district court, which made valiant efforts to add some process above and beyond what the election code provides. However, the Colorado General Assembly, not the district court, decides when and how to change statutory requirements.

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for this claim. The majority recognizes the five-day requirement, Maj. op. ¶ 38, but it does not acknowledge the violation of section 1-4-1204's timeline or give consequence to that violation.

¶267 Nonetheless, the majority touts the fact that a hearing was held and lauds the district court's timely issuance of its decision as evidence that this matter was not too complex for a section 1-1-113 proceeding. Maj. op. ¶¶ 84–85. But was the order timely issued? Substantially, I think not. *Compare* Maj. op. ¶ 22 ("The trial began, as scheduled, on October 30 [a Monday]. The evidentiary portion lasted five days [through Friday, November 3], with closing arguments almost two weeks later, on November 15. . . . The court issued its written final order on November 17 . . . ."), *with* § 1-4-1204 ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Section 1-4-1204 only mandates two deadlines, and neither were honored. After all the evidence had been presented at a week-long hearing, the court suspended proceedings for two weeks. I find nothing in the record offering a reason grounded in the election code for the interval between the five consecutive days of the hearing and the solitary closing arguments. However, I understand the necessity to postpone the closing arguments for one reason: The complexity of the case required more time than "no later than forty-eight hours after the hearing" for the court to draft its 102-page order. Thus, while the district court formally

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issued its order within forty-eight hours of the closing arguments, the interval between the evidentiary hearings and the closing arguments was not in compliance with section 1-4-1204.

¶268 The majority condoned the district court's failure to observe the statutory timeline by concluding that it "substantially compl[ied]." *See* Maj. op. ¶ 85. This renders the statute's five-day and forty-eight-hour requirements meaningless. *Contra Ferrigno Warren*, ¶ 20, 462 P.3d at 1085 (holding that, under Colorado's election code, a "specific statutory command could not be ignored in the name of substantial compliance"); *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 25, 398 P.3d 599, 608 ("Where the language is clear, we must apply the language as written."). If a court must contort a special proceeding's statutory timeline to process a claim, then that claim is not proper for the special proceeding.

¶269 From my perspective, just because a hearing was held and Intervenors participated, it doesn't mean that due process was observed. Nor should it be inferred that section 1-1-113's statutory procedures, which were not followed, were up to the task. I cannot agree with the majority that the district court's extra-statutory delays and select procedure augmentations indicate that the Electors' claim was fit for adjudication under sections 1-4-1204(4) and 1-1-113. *Contra*, Maj. op. ¶ 81 ("In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action."). Dragging

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someone through a "makeshift proceeding" is not an indication that it was an appropriate process. *See* Dis. op. ¶ 274 (Samour, J., dissenting). Importantly, the Electors were not rushed into the process; they didn't have to file their challenge until they were prepared. Only Intervenors arguably had inadequate time to prepare.

¶270 Finally, only a two-thirds majority of both houses of Congress can overturn a Section Three disqualification. U.S. Const. amend. XIV, § 3. This remedy is extraordinary and speaks volumes about the gravity of the disqualification. Such a high bar indicates that an expedited hearing absent any discovery procedures and with a preponderance of the evidence standard is not the appropriate means for adjudicating a matter of this magnitude.[5] *See Frazier*, ¶¶ 17–18, 401 P.3d at 545 (holding that "inconsistencies" between the procedures of section 1-1-113 and a claim under 42 U.S.C. § 1983 "reinforce" the conclusion that not all federal law claims can be raised in section 1-1-113 proceedings).

[5] Although the district court made its findings using the clear and convincing standard, the election code calls for a preponderance standard. § 1-4-1204 ("The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.").

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III. Conclusion

¶271 My opinion that this is an inadequate cause of action is dictated by the facts of this case, particularly the absence of a criminal conviction for an insurrection-related offense.

¶272 The questions presented here simply reach a magnitude of complexity not contemplated by the Colorado General Assembly for its election code enforcement statute. The proceedings below ran counter to the letter and spirit of the statutory timeframe because the Electors' claim overwhelmed the process. In the absence of an insurrection-related conviction, I would hold that a request to disqualify a candidate under Section Three of the Fourteenth Amendment is not a proper cause of action under Colorado's election code. Therefore, I would dismiss the claim at issue here. Accordingly, I respectfully dissent.

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JUSTICE SAMOUR dissenting.

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

In re Griffin, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").

¶273 These astute words, uttered by U.S. Supreme Court Chief Justice Salmon P. Chase a century and a half ago, eloquently describe one of the bedrock principles of American democracy: Our government cannot deprive someone of the right to hold public office without due process of law. Even if we are convinced that a candidate committed horrible acts in the past—dare I say, engaged in insurrection—there must be procedural due process before we can declare that individual disqualified from holding public office. Procedural due process is one of the aspects of America's democracy that sets this country apart.

¶274 The decision to bar former President Donald J. Trump ("President Trump")—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot flies in the face of the due process doctrine. By concluding that Section Three of the Fourteenth Amendment is self-executing, the majority approves the enforcement of that federal constitutional provision by our state courts through the truncated procedural mechanism that resides in our

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state Election Code.[1] Thus, based on its interpretation of Section Three, our court sanctions these makeshift proceedings employed by the district court below—which lacked basic discovery, the ability to subpoena documents and compel witnesses, workable timeframes to adequately investigate and develop defenses, and the opportunity for a fair trial—to adjudicate a federal constitutional claim (a complicated one at that) masquerading as a run-of-the-mill state Election Code claim. And because most other states don't have the Election Code provisions we do, they won't be able to enforce Section Three. That, in turn, will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states, thereby risking chaos in our country. This can't possibly be the outcome the framers intended.

¶275 I agree that Section Three bars from public office anyone who, having previously taken an oath as an officer of the United States to support the federal Constitution, engages in insurrection. But Section Three doesn't spell out the

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[1] As pertinent here, Section Three provides that:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States, or under any State, who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . .

U.S. Const. amend. XIV, § 3.

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procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three. My colleagues in the majority concede that there is currently no legislation enacted by Congress to enforce Section Three. This is of no moment to them, however, because they conclude that Section Three is self-executing, and that the states are free to apply their own procedures (including compressed ones in an election code) to enforce it.[2] That is hard for me to swallow.

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[2] The majority repeatedly uses "self-executing" to describe Section Three, but then reasons that this part of the Fourteenth Amendment is enforceable in Colorado only because of the procedures our legislature has enacted as part of the state's Election Code. This strikes me as an oxymoron. If a constitutional provision is truly *self-executing*, it needs no legislation to be enforced. *See Self-executing*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/self-executing [https://perma.cc/4X7W-Y8AR] (defining "self-executing" as "taking effect immediately without implementing legislation"); *see also Self-enforcing*, Black's Law Dictionary (11th ed. 2019) ("self-enforcing" means "effective and applicable without the need for any other action; self-executing"). Much like Inigo Montoya advised Vizzini, "I do not think [self-executing] means what [my colleagues in the majority] think it means." *The Princess Bride* (20th Century Fox 1987) ("You keep using that word [inconceivable]. I do not think it means what you think it means.").

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¶276 Significantly, there is a federal statute that specifically criminalizes insurrection and requires that anyone convicted of engaging in such conduct be fined or imprisoned *and be disqualified from holding public office. See* 18 U.S.C. § 2383. If any federal legislation arguably enables the enforcement of Section Three, it's section 2383. True, President Trump has not been charged under that statute, so it is not before us. But the point is that this is the only federal legislation in existence at this time to potentially enforce Section Three. Had President Trump been charged under section 2383, he would have received the full panoply of constitutional rights that all defendants are afforded in criminal cases. More to the point for our purposes, had he been so charged, I wouldn't be writing separately to call attention to the substandard due process of law he received in these abbreviated Election Code proceedings.

¶277 I recognize the need to defend and protect our democracy against those who seek to undermine the peaceful transfer of power. And I embrace the judiciary's solemn role in upholding and applying the law. But that solemn role necessarily includes ensuring our courts afford everyone who comes before them (in criminal and civil proceedings alike) due process of law. Otherwise, as relevant here, how can we ever be confident that someone who is declared ineligible to hold public office pursuant to Section Three actually engaged in insurrection or rebellion after taking the prerequisite oath?

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¶278 In my view, what transpired in this litigation fell woefully short of what due process demands. Because I perceive the majority's ruling that Section Three is self-executing to be the most concerning misstep in today's lengthy opinion, I focus on that aspect of the legal analysis.

¶279 Context is key here. The Fourteenth Amendment was designed to address a particular juncture in American history. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 3), https://ssrn.com/abstract=4532751. The postbellum framers were confronted with the unprecedented nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forthcoming 2024) (manuscript at 214–15), https://ssrn.com/abstract=4568771. And their response, in some measure, sounded the clarion call of "a constitutional revolution." *Id.* at 99.

¶280 Indeed, the Fourteenth Amendment ushered in an expansion of federal power that undercut traditional state power. *See United States v. Washington*, 20 F. 630, 631 (C.C.W.D. Tex. 1883) ("The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly

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limits the States."). Forefront in the minds of the framers was the evident concern that the states would again seek to undermine the national government. In short, the states—state institutions, state officials, and state courts—were not to be trusted. *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

¶281 Thus, the indelible trespass of the former confederate states was met squarely by an overarching goal to render federal institutional authority paramount. Such is the contextual framework informing my view of the instant matter. To my mind, it compels the conclusion, soundly supported by the framers' intent and the weight of the relevant authorities, that Section Three of the Fourteenth Amendment is not self-executing, and that Congress alone is empowered to pass any enabling legislation.

¶282 My colleagues in the majority turn Section Three on its head and hold that it licenses states to supersede the federal government. Respectfully, they have it backwards. Because no federal legislation currently exists to power Section Three and propel it into action, because President Trump has not been charged under section 2383, and because there is absolutely no authority permitting Colorado state courts to use Colorado's Election Code as an engine to provide the necessary

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thrust to effectuate Section Three, I respectfully dissent.[3] I would affirm the district court's judgment in favor of President Trump, but I would do so on other grounds.[4]

I. Analysis

A. Pertinent Procedural Posture

¶283 The district court gave short shrift to the question of whether Section Three is self-executing. In its Omnibus Order, which denied President Trump's September 29 motion to dismiss, the court found the issue "irrelevant." The court ruled, in conclusory fashion, that states are empowered to execute Section Three via their own enabling legislation and that Colorado's Election Code constitutes such an enactment. This analytical shortcut, though convenient, is inconsistent with both the text of the Fourteenth Amendment and persuasive authority interpreting it.

¶284 *Griffin's Case* is the jumping-off point for any Section Three analysis.

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[3] There is a colorable argument that the majority incorrectly holds that Section Three applies to the President of the United States. Other parts of the majority's analysis, including the determinations that President Trump engaged in insurrection and that his remarks deserve no shelter under the First Amendment's rather expansive protective canopy, are at least questionable. Because I conclude that Section Three is not self-executing, and because that conclusion is dispositive, I don't address any other issue.

[4] The district court decided that Section Three does not apply to the President of the United States.

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B. *Griffin's Case*: The Fountainhead

¶285 In 1869, less than a year after the ratification of the Fourteenth Amendment, U.S. Supreme Court Chief Justice Chase presided over *Griffin's Case* in the federal circuit court for the district of Virginia.[5] *Griffin's Case* is the wellspring of Section Three jurisprudence. And, given the temporal proximity of Chief Justice Chase's pronouncements on the topic of self-execution to the passage and ratification of the Fourteenth Amendment, I consider the holding in *Griffin's Case* compelling.

¶286 Judge Hugh W. Sheffey presided over Caesar Griffin's criminal trial after the Fourteenth Amendment went into effect. *Griffin's Case*, 11 F. Cas. at 22. Before the Civil War, Sheffey held a Section Three-triggering position, and so, had taken an oath to support the Constitution of the United States. *Id.* Subsequently, Sheffey served in Virginia's confederate legislature. *Id.* It was not until after the war that Sheffey was appointed to a state court judgeship, the position he held at the time of Griffin's trial. *Id.* at 16. Following the jury's guilty verdict on the charge of assault with intent to kill, Judge Sheffey sentenced Griffin to two years' imprisonment. *Id.* at 22–23.

¶287 Griffin filed a collateral attack in federal district court. He argued that his sentence was null because Section Three had "instantly, on the day of its

[5] At the time, Supreme Court justices rode the circuit and sat in regional federal courts.

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promulgation, vacated all offices held by persons within the category of prohibition," thereby rendering Judge Sheffey ineligible to be on the bench. *Id.* at 24. More specifically, Griffin claimed that Sheffey was disqualified from being a judge because he had engaged in conduct prohibited by Section Three. *Id.* The federal district court agreed and ordered Griffin's immediate discharge from custody. *Id.*

¶288 On appeal, Chief Justice Chase framed the issue in the following terms: "[W]hether upon a sound construction of the amendment, it must be regarded as operating directly, *without any intermediate proceeding whatever*, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23 (emphasis added). Chief Justice Chase grounded his resolution of this self-execution inquiry in the "character of the third section of the amendment." *Id.* at 25. In other words, he focused on the context in which the disqualification clause of the Fourteenth Amendment was enacted. Of course, he recognized that the ultimate object of this part of the Fourteenth Amendment was "to exclude from certain offices a certain class of persons." *Id.* at 26. But his prefatory statements echo the bugle blow of constitutional revolution: "The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national

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government, in those states which had attempted . . . to establish an independent Confederacy." *Id.* at 25.

¶289 Crucially, he observed that "it is obviously impossible to [disqualify certain officers] by a simple declaration, whether in the constitution or in an act of congress." *Id.* at 26. He added that to carry out Section Three's punitive mandate and enforce "any sentence of exclusion," it must first "be ascertained what particular individuals are embraced by the definition." *Id.* Chief Justice Chase explained that "[t]o accomplish this ascertainment and ensure effective results," considerable procedural and normative mechanisms would need to be introduced; certainly, "proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.* And here's the kicker, the beating heart of *Griffin's Case*: Chief Justice Chase declared that these indispensable mechanisms "*can only be provided for by congress*." *Id.* (emphasis added).

¶290 It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article.'" *Id.* (emphasis added) (quoting U.S. Const. amend. XIV, § 3). Chief Justice Chase noted that Section Five "qualifies [Section Three] to the same extent as it would if the whole amendment consisted of these two

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sections." *Id.* And pivoting back to Section Three, he pointed out that, consistent with Section Five, its final clause "gives to congress absolute control of the whole operation of the amendment." *Id.*; *see* U.S. Const. amend. XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability.").

¶291 Chief Justice Chase, therefore, concluded:

> Taking the third section then, in its completeness with this final clause, *it seems to put beyond reasonable question* the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and *to be made operative in other cases by the legislation of congress in its ordinary course.*

Griffin's Case, 11 F. Cas. at 26 (emphases added).

¶292 I extract three seminal, and related, takeaways from this review of *Griffin's Case*. First, Section Three is not self-executing. Second, only Congress can pass the "appropriate legislation" needed to execute it. And third, this grant of power to Congress was not merely formalistic; it was also pragmatic. Indeed, it was indicative of the complex nature of the disqualification function. Chief Justice Chase perceived that Section Three would require an array of mechanisms—procedural, evidentiary, and definitional—to ascertain who was subject to disqualification and how they could be disqualified. More on this third notion later.

¶293 For now, though, it is worth stressing that, despite detractors in some quarters, the other premises have withstood the test of time: Section Three is not

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self-executing, and Congress has the exclusive authority to enforce it. *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for the proposition that Section Three is "not self-executing absent congressional action"); *State v. Buckley*, 54 Ala. 599, 616–17 (1875) (same); *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, *1 (Ariz. May 9, 2022) (affirming the lower court's ruling against disqualification on state law grounds but stating that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause"); *see also* Va. Op. Att'y Gen. No. 21-003, at 3 (Jan. 22, 2021) (citing *Griffin's Case* and stating that "the weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'").

¶294 I now address the criticisms launched by the Electors against the enduring vintage of *Griffin's Case*. For the reasons I articulate, I am not persuaded by any of the contentions advanced.

C. Harmonizing *Griffin's Case* and *Case of Davis*

¶295 The Electors argue that Chief Justice Chase took the opposite tack on Section Three a couple of years before deciding *Griffin's Case*. *See Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871). But *Griffin's Case* was decided after *Case of Davis*, and unlike

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Griffin's *Case*, *Case of Davis* is a two-judicial-officer, unwritten, split decision.[6] Hence, to put it mildly, *Case of Davis* is of questionable precedential value. Indeed, the majority doesn't rely on *Case of Davis* in its attempt to undermine *Griffin's Case*.

¶296 In *Case of Davis*, Chief Justice Chase, again sitting as a circuit court judge, presided over the treason prosecution of former confederate president, Jefferson Davis. *Id.* The question before the court was whether Section Three displaced the federal criminal treason charges levied against Davis. *Id.* at 102. Defense counsel asserted that Section Three provided the exclusive punishment for those within its reach, thus foreclosing prosecution under the federal treason statute. *Id.* at 90–91. Furthermore, defense counsel maintained that Section Three "executes itself" and "needs no legislation on the part of congress to give it effect." *Id.* at 90.

¶297 Due to the structure of the federal judiciary at the time, the case was heard by both a federal district court judge and Chief Justice Chase sitting together. *See* Judiciary Act of 1802, 2 Stat. 156, 159, § 6. The judicial officers, however, failed to reach consensus on the defense's motion to quash the indictment. *Case of Davis*,

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[6] Although the year in the citation for *Case of Davis* (1871) postdates the year in the citation for *Griffin's Case* (1869), it was in fact *Case of Davis* that came first. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100 n.66 (2021). Chief Justice Chase announced on December 5, 1868, that the court had failed to reach consensus in *Case of Davis*. *Case of Davis*, 7 F. Cas. at 102; Certificate of Division, *Case of Jefferson Davis*, 7 F. Cas. 63 (C.C.D. Va. 1867–1871) (No. 324), https://joshblackman.com/wp-content/uploads/2023/08/5220.pdf [https://perma.cc/K7QC-4YZJ].

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7 F. Cas. at 102. Accordingly, a certificate of disagreement was submitted for review by the Supreme Court at its next session. *Id.* Notably, though, the case was never heard by the Supreme Court because President Johnson issued a proclamation of general amnesty in December 1868, effectively disposing of the treason charges. *Id.*

¶298 Although the certificate of disagreement did not indicate the judicial officers' votes, the final sentence in the 1894 report of the case in the *Federal Reports* states that Chief Justice Chase "instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* Over the years, some have clung to this hearsay to posit that Chief Justice Chase was inconsistent in his application of Section Three, waffling on the issue of self-execution.

¶299 Certain legal scholars have sought to explain this purported incongruence by surmising that Chief Justice Chase's application of Section Three in *Griffin's Case* was politically motivated. Consequently, they criticize *Griffin's Case* as wrongly decided and the result of flawed logic. *See* Baude & Paulsen, *supra* (manuscript at 35–49). Other legal scholars, however, question whether the statement quoted above from the *Federal Reports* accurately represented Chief Justice Chase's views. They point out that the case reporter, a former confederate

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general, was the very attorney who represented Judge Sheffey in *Griffin's Case*.[7] *See* Blackman & Tillman, *supra* (manuscript at 15). Even assuming *Case of Davis* warrants any consideration at all, there is no need to join this affray because these cases can be reconciled in a principled manner by recognizing that there are two distinct senses of self-execution. *Id.* at 19. I find this distinction both helpful and borne out by the case law.

¶300 First, there is self-execution as a *shield*, allowing individuals to raise the Constitution defensively, in response to an action brought by a third party. Second, there is self-execution as a *sword*—such as when individuals invoke the Constitution in advancing a theory of liability or cause of action that supports affirmative relief. When acting as a *shield*, the Fourteenth Amendment is self-executing. *Cale*, 586 F.2d at 316. The Fourteenth Amendment, however, cannot act as a self-executing *sword*; rather, an individual seeking affirmative relief under the Amendment must rely on legislation from Congress. *Id.*

¶301 The Fourth Circuit aptly adopted this distinction in *Cale*, thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence. That case

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[7] *Griffin's Case* was decided in 1869 and the statement from the case reporter regarding *Case of Davis* appeared in the 1894 *Federal Reports*. Blackman & Tillman, *supra* (manuscript at 140).

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implicated a wrongful discharge action in which the plaintiff asked the court to sanction an implied cause of action arising under the Fourteenth Amendment's due process clause. *Id.* at 313. In examining whether an implied cause of action exists under the due process clause of the Fourteenth Amendment, the court turned to cases that have construed Section Five. It began by discussing *Ex parte Virginia*, where the Supreme Court explained that the Fourteenth Amendment derives much of its force from Section Five, which envisions enabling legislation from Congress to effectuate the prohibitions of the amendment:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] *Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.*

Ex parte Virginia, 100 U.S. at 345–46 (first emphasis in original, second emphasis added).

¶302 But shortly after deciding *Ex parte Virginia*, the Supreme Court declared the Fourteenth Amendment to be "undoubtedly self-executing without any ancillary legislation," while simultaneously making the seemingly inconsistent statement that Section Five "invests Congress with power to enforce" the Fourteenth Amendment "in order that the national will, thus declared, may not be a mere brutum fulmen." *The Civil Rights Cases*, 109 U.S. 3, 11, 20 (1883). Although at first

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blush the opinion in the *Civil Rights Cases* appears to be both internally inconsistent and inconsistent with *Ex parte Virginia*, the *Cale* court did not so hold. *Cale*, 586 F.2d at 316. Instead, the *Cale* court resolved any apparent inconsistencies by distinguishing between, on the one hand, "the protection the Fourteenth Amendment provide[s] of its own force as a shield under the doctrine of judicial review," and on the other, affirmative relief sought under the amendment as a sword, which is unavailable without legislation from Congress. *Id.*

¶303 In supporting this distinction, the *Cale* court found refuge in the *Slaughter-House Cases*. 83 U.S. 36 (1872). There, the defendants invoked the Fourteenth Amendment as a shield by arguing that a local law restricting where animals could be slaughtered deprived the city's butchers of their "right to exercise their trade." *Id.* at 60. The Supreme Court, however, held that given the history of the Reconstruction Amendments and their purpose of preventing discrimination against the newly liberated enslaved people, the butchers' "right to exercise their trade" was not a right that fell within the purview of the privileges-and-immunities provision of Section One of the Fourteenth Amendment. *Id.* at 81. Of particular interest for our purposes is the fact that the Court did not reject the use of the Fourteenth Amendment as a self-executing shield, but rather rejected the argument that the particular right in question fit within the Fourteenth Amendment's protection.

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¶304 Importantly, based on its examination of *Ex parte Virginia*, the *Civil Rights Cases*, and the *Slaughter-House Cases*, the *Cale* court observed that "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Cale*, 586 F.2d at 316. The *Cale* court added that it's only when state laws or proceedings are asserted "in hostility to rights and privileges" that the Fourteenth Amendment, and specifically Section One, may be raised as a self-executing defense to those laws or proceedings. *Id.* (discussing the *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting)); *see also The Slaughter-House Cases*, 83 U.S. at 81 (explaining that when "it is a State that is to be dealt with, and not alone the validity of its laws," the matter should be left in the hands of Congress).

¶305 The defensive-offensive dynamic of the Fourteenth Amendment is best exemplified by the interplay between 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). *See Cale*, 586 F.2d at 316–17. In *Ex parte Young*, multiple railroad companies wielded the Fourteenth Amendment's due process clause as a shield to request enjoinment of the future enforcement of Minnesota's mandatory railroad rates. 209 U.S. at 130. The Court ruled in their favor, holding that they could prospectively bring suit against a state official to prevent the enforcement of an act that violated the federal constitution. *Id.* at 167. But an *Ex parte Young* claim is not so much an affirmative cause of action as it is a defense that may be asserted in

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anticipation of the enforcement of state laws alleged to be unconstitutional. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Hence, *Ex parte Young* provides a means of vindicating Fourteenth Amendment rights without violating the grant of exclusive enforcement power to Congress. When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as section 1983.

¶306 Between affirmative relief provided by Congress and defensive *Ex parte Young* claims, constitutional rights are "protected in all instances." *Cale*, 586 F.2d at 316–17. Not surprisingly, after declining to find an implied cause of action permitting affirmative relief within the Fourteenth Amendment, the Fourth Circuit in *Cale* remanded to the district court with instructions to determine whether the plaintiff's wrongful discharge claim could be brought under section 1983, the proper enforcement mechanism. *Id.* at 312.

¶307 The majority devotes all of one sentence to *Cale* and disregards most of the Supreme Court jurisprudence to which that thoughtful opinion is moored. Maj. op. at ¶ 103. It is true that *Cale* was a Section One, not a Section Three, case. But *Cale* cited to *Griffin's Case* (a Section Three case) in determining that the Fourteenth Amendment cannot be used as a self-executing sword, thus tethering the distinction to both Sections. *Cale*, 586 F.2d at 316. Accordingly, while courts have

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seldom had occasion to interpret Section Three, the case law on Section One is instructive on the issue of self-execution.

¶308 Critically, the Supreme Court has affirmed that the Fourteenth Amendment, while offering protection under certain circumstances, does not provide a self-executing cause of action. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, [n]ot affirmative, and it carries no mandate for particular measures of reform."). Moreover, as pertinent here, the Supreme Court has retreated from recognizing implied causes of action, instead holding that for a cause of action to exist, Congress must expressly authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (refusing to recognize a private right of action because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

¶309 The majority nevertheless protests that interpreting any section of the Fourteenth Amendment as requiring legislation yields absurd results because the rest of the Reconstruction Amendments are self-executing. Maj. op. ¶ 96. I do not dispute that the Thirteenth and Fifteenth Amendments are self-executing. But I disagree that Section Three must therefore be deemed self-executing as well. The Thirteenth and Fifteenth Amendments, on the one hand, and the Fourteenth Amendment, on the other, are different.

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¶310 The Thirteenth and Fifteenth Amendments speak in affirmative, universal terms to abolish slavery, create the right to vote, and restrain not only government actors, but also private individuals. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008); *Guinn v. United States*, 238 U.S. 347, 363 (1915) (recognizing "the right of suffrage" created by the Fifteenth Amendment's "generic character"). The Fourteenth Amendment, however, was born out of a deep suspicion of the states and acts as a negative policing mechanism intended solely to curtail state power. *Adarand*, 515 U.S. at 255 (Stevens, J. dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."); *The Civil Rights Cases*, 109 U.S. at 11 (holding that the Fourteenth Amendment applies to state action, not private action). This curtailment applies both to state laws or actions abridging rights and to a state's selection of government officials. To give effect to this amendment while respecting our federalist system, courts have turned to the sword-shield paradigm of self-execution, thereby striking "a balance between delegated federal power and reserved state power" without forsaking the protection of constitutional rights "in all instances." *Michigan Corr. Org.*, 774 F.3d at 900; *Cale*, 586 F.2d at 317.

¶311 To draw a yet deeper line in the sand, unlike the Thirteenth and Fifteenth Amendments, Section Three does not indelibly ensure a right but instead allows

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the federal government to act as a protective check against a state's selection of government officials so as to preclude elected insurrectionists and safeguard democracy. This shift in power between the authority of the states to choose their own government officials and the authority of the federal government as a last defense is all the more reason to require a congressionally created cause of action to direct the execution of this federal oversight.

¶312 In sum, Chief Justice Chase's holding in *Griffin's Case* appears consistent and in alignment with both his alleged vote in *Case of Davis* and our framework for Fourteenth Amendment litigation. Griffin wielded Section Three as a self-executing sword, invoking the provision as a cause of action to disqualify Judge Sheffey. Davis, on the other hand, took a defensive posture and invoked Section Three as a self-executing shield, arguing that it provided the exclusive punishment for insurrection, thus displacing the federal criminal treason charges brought against him.

¶313 Having said that, I do not rely solely on *Griffin's Case*. Congress's own actions corroborate my understanding of Section Three.

D. Erstwhile Enabling Legislation

¶314 The majority's ruling that Section Three self-executes without the need for any federal enforcement legislation is further undermined by Congress's promulgation of just such legislation. One year after *Griffin's Case* was decided,

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and perhaps in response to it, Congress enacted the Enforcement Act of 1870. The Enforcement Act contained two provisions for the specific purpose of *enforcing Section Three*. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143–44. The first provided a quo warranto mechanism whereby a federal district attorney could bring a civil suit in federal court to remove from office a person who was disqualified by Section Three. *Id.* at 143. The second permitted a criminal prosecution for knowingly accepting or holding office in violation of Section Three, and included punishment by imprisonment of not more than a year, a fine of not more than $1,000, or both. *Id.* at 143–44.

¶315 The enforcement purpose behind the Act was evident in the congressional debates held on these very two provisions. Speaking in support of their adoption, Senator Lyman Trumbull, referring to Section Three, stated, "But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. *The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.*" Cong. Globe, 41st Cong., 1st Sess. 626 (1869) (emphasis added). He later reiterated this point as he explained that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* The debate on the floor focused not on whether the provisions were necessary for enforcing Section Three—that seemed to be a foregone conclusion—but instead on whether the

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second provision and its attendant punishments were necessary. The need for the first provision was so self-evident that it was not even debated. As Senator Garrett Davis put it, the first provision simply provided an "adequate remedy to prevent any of the criminals under the fourteenth amendment of the Constitution from holding office in defiance of its letter." *Id.* at 627.

¶316 While the quo warranto provision in the Enforcement Act would have provided a civil cause of action to challenge President Trump's eligibility to appear on Colorado's presidential primary ballot, Congress repealed it in 1948. *See* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 206 n.365 (2021) (citing Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993); *see also* Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808. The Enforcement Act's criminal provision, however, appears to have survived: As best I can tell, 18 U.S.C. § 2383 is its descendant. *Id.*

¶317 Presumably recognizing the civil-action gap created by the 1948 repeal, just months after the January 6, 2021 incident, legislation was proposed to allow the Attorney General of the United States to bring a civil action "against any Officeholder who engages in insurrection or rebellion, including any Officeholder who, after becoming an Officeholder, engaged in insurrection or rebellion." H.R. 1405, 117th Cong. (2021). H.R. 1405 would have disqualified such an Officeholder from federal or state office. *Id.* Furthermore, it would have provided

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what has been so apparently lacking from this state proceeding—clear designations of the appropriate procedures, forum, and standard of evidence, as well as the definition of "insurrection or rebellion." *Id.*

¶318 H.R. 1405 made it no further than introduction in the House. But the relevant point for our purposes remains: As recently as 2021, just months after the January 6 incident, Congress considered legislation to enforce Section Three through a civil proceeding. Why would Congress do so if, as the majority insists, Section Three is self-executing? Along the same lines, if the majority is correct that Section Three is self-executing, why did Congress pass the *Enforcement* Act to begin with (on the heels of *Griffin's Case*) and then allow it to remain in effect in its entirety until 1948? The majority offers no salient explanation.

¶319 If there is any enforcing legislation for Section Three currently on the books, it is arguably what remains from the Enforcement Act, 18 U.S.C. § 2383. Similar to its ancestor, that statute states that:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

While section 2383 might provide an enforcement mechanism for Section Three, it is not presently before us. That's because President Trump has never been charged

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with, let alone convicted of, violating it. The instant litigation feels to me like an end run around section 2383.

¶320 To the extent there is interest in seeking to disqualify President Trump from holding public office (one of the mandatory punishments provided in section 2383) based on the allegation that he engaged in insurrection (one of the acts prohibited by section 2383), why wasn't he charged under section 2383? And, relatedly, why isn't he entitled to more due process than that which he received in this constricted Election Code proceeding? To be sure, unlike section 2383, Section Three prescribes neither a fine nor a term of imprisonment as a consequence for engaging in an insurrection after taking the prerequisite oath. So, I'm not suggesting that President Trump should have been afforded all the rights to which a defendant would be entitled in a criminal case. But here, the district court found that he engaged in insurrection after taking the prerequisite oath, despite affording him subpar due process (even under civil-procedure standards).

¶321 Compellingly, although H.R. 1405 wouldn't have called for a criminal proceeding, it would have provided more due process than that available in a civil action. For example, H.R. 1405 would have required any action brought to be "heard and determined by a district court of three judges." H.R. 1405, § 1(d)(1). Additionally, any allegation of insurrection would have demanded proof by clear and convincing evidence, and any final order or injunction would have been

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reviewable by appeal directly to the U.S. Supreme Court. *Id.* at § (1)(d)(1)-(4). I infer from these provisions that at least some members of Congress acknowledged the need to provide ample due process (more than is available in typical civil cases) to anyone alleged to have violated Section Three.

¶322 My colleagues in the majority necessarily view as acceptable the diminished due process afforded President Trump as a result of enforcing Section Three through our Election Code. Instead, they prioritize their fear that a ruling disallowing the disqualification of President Trump from the primary ballot pursuant to Section Three would mean that "Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II." Maj. op. ¶ 68. They see this as a more insidious evil. As I discuss in the following section, however, my colleagues are mistaken in their understanding of the law, and their worry is therefore unjustified.

E. Section Three of the Fourteenth Amendment Is Unlike Other Constitutional Qualification Clauses

¶323 The U.S. Supreme Court has acknowledged a non-exhaustive list of constitutional Qualification Clauses. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969), which lists "qualifications" codified in the following provisions of the U.S. Constitution: (1) Art. I, § 2, cl. 2; (2) Art. I, § 3, cl. 7; (3) Art. I, § 6, cl. 2; (4) Art. IV,

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§ 4; (5) Art. VI, cl. 3; and (6) Amend. XIV, § 3). This list can fairly be expanded to include Article II, Section One, Clause Five, and perhaps also Section One of the Twenty-Second Amendment. *See* U.S. Const. art. II, § 1, cl. 5 (laying out three presidential eligibility requirements related to birth ("natural born Citizen"), age ("thirty five Years"), and residency ("fourteen Years a Resident"), which are similar to those specified in Art. I, § 2, cl. 2); U.S. Const. amend. XXII, § 1 (using the same "No person shall" language found in Art. I, § 2, cl. 2 and specifying a two-term limit for the presidency).

¶324 Although Section Three was included in *Powell* among the so-called Qualification Clauses, closer scrutiny reveals that it is unique and deserving of different treatment. That's because Section Three is the only one that is "qualifie[d]" by the following language: "[C]ongress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article." *Griffin's Case*, 11 F. Cas. at 26 (emphasis added) (quoting U.S. Const. amend. XIV, § 5 and stating that "[t]he fifth section qualifies the third"). None of the other Qualification Clauses—even when viewed in the context of the original Articles in toto—contains the "appropriate legislation" modifier. Indeed, that modifier only appears in certain other Amendments, none of which are objectively relevant to the instant matter. I need not contemplate what bearing, if any, this has on the self-executing nature of constitutional provisions more generally. While that might be an open question,

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see Blackman & Tillman, *supra* (manuscript at 23) (noting that there appears to be "no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing"), the demands of the instant matter counsel in favor of limiting my exposition to the Constitution's presidential qualifications, especially those found in Article II, Section One, Clause Five.

¶325 Here, once again, the interplay between Sections Three and Five of the Fourteenth Amendment is of great significance. *See Griffin's Case*, 11 F. Cas. at 26. As mentioned, Article II, Section One, Clause Five contains nothing akin to the "appropriate legislation" language in Section Five of the Fourteenth Amendment. Thus, unlike Section Three's disqualification clause, which is modified by Section Five's "appropriate legislation" language, the Article II presidential qualifications do not appear to have a constitutionally mandated reliance on congressional enabling legislation.

¶326 We are not at liberty to ignore this blistering lacuna in Article II's language. But that is exactly what my colleagues in the majority do. And in so doing, they err. Even if the presidential qualifications contained in Article II are self-executing or allow for state enabling legislation — thereby providing the Electors with a cause of action to enjoin the Secretary of State ("the Secretary") from certifying a candidate disqualified by birth, age, or residency, to the Colorado presidential primary ballot, *see, e.g.*, *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1194–95 (D. Colo.

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2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012); *see also* § 1-4-1203(2)(a), C.R.S. (2023)—the same does not hold true for Section Three's disqualification clause.

¶327 Moreover, I detect a principled reason underlying this discrepancy in the language of Article II and Section Three. It relates to what I previously identified as my third takeaway from *Griffin's Case*. Recall that the Fourteenth Amendment's grant of absolute power to Congress vis-à-vis Section Three's enforcement was pragmatic, not merely formalistic. It was motivated by the complex nature of the disqualification function. Chief Justice Chase presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements. It doesn't require much process, procedure, or legal acumen to determine whether a candidate is barred by the binary and clerical requirements of birth, age, residency, and term limits. Typically, a notarized statement of intent will do the trick. *See* § 1-4-1204(1)(c), C.R.S. (2023). By contrast, Section Three disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome. These include, to name but a few, instruction on discovery and evidentiary rules;

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guidance as to whether a jury must be empaneled or a bench trial will suffice; direction as to the proper standards of review and burdens of proof; and clarification about whether civil or criminal proceedings are contemplated. Additionally, there's a vital need for definitional counsel on such questions as who is an "officer of the United States"? What is an "insurrection"? What does it mean to "engage[] in" the same? Does "incitement" count?

¶328 By no means do I intend to undermine the sacred role of the judiciary in directing the course of similar issues through precedential pathways. Nor would I have the third branch hamstrung in its task of setting the metes and bounds of litigation practice. But when the enforcement power of a punitive constitutional mandate is delegated to Congress in such unequivocal terms, it would appear decidedly outside the judicial bailiwick to furnish the scaffolding that only "appropriate legislation" can supply. Because the Constitution gives this job to Congress, *and only Congress,* I consider it equally improper—indeed, constitutionally impossible—for state legislatures, in the absence of federal legislation, to create pseudo causes of action pursuant to Section Three's disqualification clause. This is precisely what the framers sought to prevent.

¶329 For this reason, the cases cited by the district court for the proposition that "states can, and have, applied Section [Three] pursuant to state statute without federal legislation" do not alter my analysis. *See Worthy v. Barrett*, 63 N.C. 199, 200

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(1869), *appeal dismissed sub no. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631–34 (La. 1869); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *15–22 (N.M. Dist. Sept. 6, 2022); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, 1 (Ga. Off. Admin. Hearings May 6, 2022). To the extent other state courts have concluded that their own state statutes allow them to adjudicate Section Three claims, I respectfully submit that they are flat out wrong. Unfortunately, the majority joins company with these misguided decisions and holds that our General Assembly not only can, but has, empowered Colorado's state courts to adjudicate Section Three claims via our Election Code.[8] Maj. op. ¶ 88 n.11. I turn next to why Colorado's Election Code cannot rescue the majority.

F. Colorado's Election Code Cannot Supply What Congress Has Withheld

¶330 There is zero authority permitting state legislatures to do that which, though delegated to it, Congress has declined to do. The majority, however, holds that the Electors' Fourteenth Amendment claim can be brought under sections 1-1-113

[8] Interestingly, the majority does not explain what should happen moving forward if nobody challenges a candidate whom the Secretary believes previously engaged in insurrection after taking the prerequisite oath. Without the state courts' involvement, is the Secretary supposed to decide on her own whether the candidate is disqualified from public office by Section Three? And if so, how would the Secretary go about doing that? Would the majority expect her to act as investigator, prosecutor, and adjudicator in that type of situation?

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and 1-4-1204(4), C.R.S. (2023), of the Colorado Election Code because the Secretary's listing of a constitutionally disqualified candidate on the presidential primary ballot would be a "wrongful act," as that term is used in section 1-1-113. *See* § 1-1-113(1). Maj. op. ¶¶ 4–5. But the truncated procedures and limited due process provided by sections 1-1-113 and 1-4-1204(4) are wholly insufficient to address the constitutional issues currently at play.

¶331 Section 1-1-113(1) provides that "when any eligible elector files a verified petition . . . alleging that a person charged with a duty *under this code* has committed or is about to commit a breach or neglect of duty or other *wrongful act*, . . . upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code." (Emphases added.) Section 1-4-1204(4) outlines the procedures to be followed when a section 1-1-113 challenge concerns the listing of a candidate on the presidential primary ballot. It provides that the challenge "must be made in writing and filed with the district court . . . no later than five days after the filing deadline for candidates." § 1-4-1204(4). The written challenge "must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." *Id.* Once the challenge is filed, the district court must hold a hearing within five days. *Id.* At that hearing, the district court must "hear the challenge and assess the validity of all alleged improprieties." *Id.* The filing party has the burden of sustaining the challenge by

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a preponderance of the evidence. *Id.* After the hearing, the district court must issue its findings of fact and conclusions of law within forty-eight hours. *Id.* An appeal from the district court's ruling must be brought before this court within three days of the district court's order, and this court has discretion to accept or decline jurisdiction over the case. § 1-4-1204(4); § 1-1-113(3).

¶332 As these statutory provisions make clear, a section 1-1-113 challenge to the certification of a candidate to the presidential primary ballot is meant to be handled on an expedited basis. *See Frazier v. Williams*, 2017 CO 85, ¶ 11, 401 P.3d 541, 544 ("[S]ection 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Indeed, "such proceedings generally move at a breakneck pace." *Id.* It's unsurprising, then, that this court has previously limited the types of claims that can be brought under section 1-1-113 to those "alleging a breach or neglect of duty or other wrongful act *under the Colorado Election Code*." *Id.* at ¶ 10, 401 P.3d at 543 (emphasis added).

¶333 Because section 1-1-113 constitutes a modest grant of power, until today, this court has expressly declined to use that section's reference to "other wrongful act[s]" to expand its scope to include constitutional claims and other claims that do not arise specifically under the Election Code. *Id.* at ¶ 14, 401 P.3d at 544. The "accelerated" nature of a section 1-1-113 proceeding and the limited remedy

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available in such a proceeding (i.e., an order requiring "substantial compliance with the provisions of [the Election Code]") render the statute incompatible with complex constitutional claims such as the one involved here. *See id.* at ¶¶ 16–18, 401 P.3d at 544–45.

¶334 An examination of the proceedings below highlights why a section 1-1-113 proceeding is a mismatch for a constitutional claim rooted in Section Three. The Electors filed their verified petition on September 6, 2023. The verified petition, far from being a "summary" notice of the alleged impropriety, *see* § 1-4-1204(4), was 105 pages in length. The district court did not hold a hearing within five days as required by section 1-4-1204(4). In fact, the court didn't hold its first status conference until September 18, twelve days after the verified petition was filed.[9] During that status conference, the court set deadlines for initial briefing. The district court gave the parties just four days, or until September 22, to file initial motions to dismiss with briefing on those motions to be completed by October 6. *Cf.* C.R.C.P. 12(b) (allowing twenty-one days from service of the complaint in a civil case to file motions to dismiss). The court also scheduled a five-day hearing to begin on October 30, or roughly eight weeks after the verified petition was filed.

[9] I recognize that the case was removed to federal court on September 7, the day after it was filed. But the federal court returned the case to the state court on September 12, six days before the first status conference was held.

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That's fifty-four days, which is nearly ten times the amount of time permitted by the Election Code. *See* § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held . . . .").

¶335 At the next status conference, on September 22, the court set more deadlines, this time related to exhibit lists, expert disclosures, and proposed findings of fact and conclusions of law. With respect to expert disclosures, the court ordered the Electors to provide expert reports by October 6, or twenty-four days before the hearing. *Cf.* C.R.C.P. 26(a)(2)(C)(I) (providing that in a civil case the claiming party's expert disclosures are typically due "at least 126 days (18 weeks) before the trial date"). It ordered President Trump to provide his expert reports no later than October 27, three days before the hearing was to begin. *Cf.* C.R.C.P. 26(a)(2)(C)(II) (stating that a defending party in a civil case is generally not required to provide expert reports "until 98 days (14 weeks) before the trial date"). And even though it was apparent from very early on in these proceedings that the Electors would rely heavily on expert testimony regarding both legal and factual matters to attempt to prove their challenge, the district court did not allow experts to be deposed. *Cf.* C.R.C.P. 26(b)(4)(A) (setting forth the default rule on the deposition of experts in civil cases: "A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial."). Instead, the court ordered that expert reports must

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be "fulsome" and that experts would not be allowed to testify to anything outside their reports.

¶336 As planned, the hearing began on October 30 and concluded on November 3. The district court gave each side eighteen hours to present its case. The parties presented closing arguments on November 15, and the court issued its final order on November 17, two weeks after the hearing concluded and seventy-two days after the verified petition was filed.

¶337 This was a severe aberration from the deadlines set forth in the Election Code, *see* § 1-4-1204(4), which require a district court to issue its ruling no more than forty-eight hours after the hearing and roughly a week after the verified petition is filed. Despite this clear record, my colleagues in the majority curiously conclude that the district court "substantially compl[ied]" with all the statutory deadlines. Maj. op. ¶ 85. That's simply inaccurate (unless the majority views complete failure as substantial compliance). The majority's reading of the record, while creative, doesn't hold water.

¶338 Given the complexity of the legal and factual issues presented in this case, it's understandable why the district court may have felt that adhering to the deadlines in section 1-4-1204(4) wouldn't allow the parties to adequately litigate the issues. But the district court didn't have the discretion to ignore those statutory deadlines. Section 1-4-1204(4) states that "a hearing *must* be held" no later than

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five days after a challenge is filed and that the district court "*shall* issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." *See Waddell v. People*, 2020 CO 39, ¶ 16, 462 P.3d 1100, 1106 ("[T]he 'use of the word "shall" in a statute generally indicates [the legislature's] intent for the term to be mandatory.'" (alteration in original) (quoting *People v. Hyde*, 2017 CO 24, ¶ 28, 393 P.3d 962, 969)); *Ryan Ranch Cmty. Ass'n v. Kelley*, 2016 CO 65, ¶ 42, 380 P.3d 137, 146 (noting that "shall" and "must" both "connote[] a mandatory requirement").

¶339 Rather than recognize that the Section Three challenge brought by the Electors was a square constitutional peg that could not be jammed into our Election Code's round hole, the district court forged ahead and improvised as it went along, changing the statutory deadlines on the fly as if they were mere suggestions. If, as the majority liberally proclaims, sections 1-1-113 and 1-4-1204(4) provide such a "robust vehicle" for handling the constitutional claim brought here, Maj. op. ¶ 86, why didn't the district court just drive it? Why, instead, did the district court feel compelled to rebuild such a "robust vehicle" by modifying the procedural provisions of the Election Code? I submit that, in reality, while sections 1-1-113 and 1-4-1204(4) are plenty adequate to handle ordinary challenges arising under the Election Code, they did not measure up to the task of addressing the Electors' Section Three claim. The result was a proceeding that was neither the

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"summary proceeding" envisioned by section 1-1-113 nor a full-blown trial; rather, it was a procedural Frankenstein created by stitching together fragments from sections 1-1-113 and 1-4-1204(4) and remnants of traditional civil trial practice.

¶340 Even with the unauthorized statutory alterations made by the district court, the aggressive deadlines and procedures used nevertheless stripped the proceedings of many basic protections that normally accompany a civil trial, never mind a criminal trial. There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.

¶341 There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.

¶342 I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom. In my experience, in our adversarial system of justice, parties are always allowed to

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conduct discovery, subpoena documents and compel witnesses, and adequately prepare for trial, and experts are never permitted to usurp the role of the judge by opining on how the law should be interpreted and applied.

¶343 The majority tries to excuse the due process shortcomings I have discussed by noting that section 1-1-113 proceedings "move quickly out of necessity" because "[l]ooming elections trigger a cascade of deadlines . . . that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot." Maj. op. ¶ 81. But that's exactly my point. The necessarily expedited nature of section 1-1-113 proceedings is precisely why the Electors should not have been allowed to piggyback a Section Three claim—an admittedly complex constitutional claim—on their Election Code claim in the first place. In any event, the majority's acknowledgement that section 1-1-113 proceedings "cannot accommodate protracted litigation" seems to directly contradict its determination that the Election Code endowed the district court with the "flexibility" to adequately accommodate the needs of this complex litigation. *Id.* at ¶¶ 81, 85.[10] The majority can't have its cake and eat it too.

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[10] Even if the majority were correct about the district court's "flexibility" to accommodate a constitutional claim, the "limit[ed] appellate review" available under the letter of section 1-1-113 further demonstrates why the Election Code is not an appropriate avenue for the prosecution of a Section Three claim. *Frazier*, ¶ 18, 401 P.3d at 545. This court has the sole discretion to review section 1-1-113 proceedings, § 1-1-113(3); § 1-4-1204(4), so, whenever we decline such review, "the

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¶344 The irregularity of these proceedings is particularly troubling given the stakes. The Electors ask us to hold that President Trump engaged in insurrection and is thus disqualified from being placed on the ballot for this upcoming presidential primary.[11]

¶345 Today's decision will have sweeping consequences beyond just this election. The majority's ruling that President Trump is disqualified under Section Three means that he can never again run for a Senate or House of Representatives position, or become an elector, or hold any office (civil or military) under the United States or under any state. In other words, he will be barred from holding any public office, state or federal, for the rest of time. His only possible out is if Congress at some point decides to remove the disqualification through a two-thirds vote by each House (which is no small feat). "A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not . . . . The serious nature of any such holding

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decision of the district court shall be final and not subject to further appellate review," *Frazier*, ¶ 18, 401 P.3d at 545 (quoting § 1-1-113(3)). Imagine, then, if we had declined to review the instant matter. Alarmingly, the adjudication of *federal* constitutional provisions, disqualifying President Trump from office, would have met its road's end in state district court. How can this court give its imprimatur to such an inverted conception of the supremacy doctrine? I, for one, cannot.

[11] This same ask has been made of other courts based on their state election codes. *See, e.g.*, *Trump v. Benson*, No. 23-00151-MZ (Mich. Ct. Cl. Nov. 14, 2023); *Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023). Ours is the first to take the bait.

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demands that the rules of procedural due process be complied with strictly." *Bohannan v. Arizona ex rel Smith*, 389 U.S. 1, 4 (1967) (Douglas, J., dissenting).

¶346 There was no strict compliance with procedural due process here. How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?

¶347 I cannot agree with the majority that the chimeric proceedings below gave President Trump process commensurate to the interest of which he has been deprived. Nor did the proceedings below protect the interest Coloradans have in voting for a candidate of their choosing. Of course, if President Trump committed a heinous act worthy of disqualification, he should be disqualified for the sake of protecting our hallowed democratic system, regardless of whether citizens may wish to vote for him in Colorado. But such a determination must follow the appropriate procedural avenues. Absent adequate due process, it is improper for our state to bar him from holding public office.

¶348 More broadly, I am disturbed about the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent.

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II. Conclusion

¶349 In the first American Declaration of Rights in 1776, George Mason wrote that "no free government, nor the blessings of liberty, can be preserved to any people, but by . . . the recognition by all citizens that they have . . . rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed." Va. Const. art. I, § 15. Some two and a half centuries later, those words still ring true. In 2023, just as in 1776, all, including those people who may have committed horrendous acts, are entitled to procedural due process.

¶350 Because I cannot in good conscience join my colleagues in the majority in ruling that Section Three is self-executing and that the expedited procedures in our Election Code afforded President Trump adequate due process of law, I respectfully dissent. Given the current absence of federal legislation to enforce Section Three, and given that President Trump has not been charged pursuant to section 2383, the district court should have granted his September 29 motion to dismiss. It erred in not doing so. I would therefore affirm its judgment on other grounds.

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JUSTICE BERKENKOTTER dissenting.

¶351 Today, the majority holds that former President Donald J. Trump ("President Trump") cannot be certified to Colorado's presidential primary ballot. Maj. op. ¶ 5. He is, the majority concludes, disqualified from being President of the United States again because he, as an officer of the United States, took an oath to support the Constitution and thereafter engaged in insurrection. *See* U.S. Const. amend. XIV, § 3[1]; Maj. op. ¶¶ 4–5. In reaching this conclusion, the majority determines as an initial matter that a group of Colorado Republican and unaffiliated electors eligible to vote in the Republican presidential primary ("the Electors") asserted a proper claim for relief under Colorado's Election Code ("Election Code"). *See* §§ 1-1-101 to 1-13-804, C.R.S. (2023); Maj. op. ¶ 57.

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[1] Section Three of the Fourteenth Amendment is a Civil War era amendment to the United States Constitution that was ratified in 1868. Its aim was to prohibit loyalists to the confederacy who had taken an oath to support the Constitution from taking various state and federal offices. It provides:

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

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¶352 I write separately to dissent because I disagree with the majority's initial conclusion that the Election Code—as currently written—authorizes Colorado courts to decide whether a presidential primary candidate is disqualified under Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") from being listed on Colorado's presidential primary ballot. Maj. op. ¶¶ 62–63, 66. In my view, the majority construes the court's authority too broadly. Its approach overlooks some of part 12 of the Election Code's plain language and is at odds with the historical application of section 1-1-113, C.R.S. (2023), which up until now has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election. Plus, the majority's approach seems to have no discernible limits.

¶353 To explain why the majority—to my mind—is wrong, first, I explain the process for challenging the listing of a candidate on the presidential primary ballot in Colorado and describe sections 1-1-113 and 1-4-1204(4), C.R.S. (2023), since those sections of the Election Code define the scope of the district court's authority to hear the case below. Then, I lay out the procedural history of this case. After that, I turn to the question of whether the district court erred in interpreting these two statutes and consider the majority's analysis with respect to each. In doing so, I conclude that the General Assembly has not granted courts the authority the

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district court exercised in this case and that the court, accordingly, erred in denying President Trump's motion to dismiss.

I. The Process for Challenging the Listing of a Candidate on the Presidential Primary Ballot in Colorado

¶354 Part 12 of the Election Code charges Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), with certifying the names and party affiliations of the candidates to be placed on presidential primary ballots no later than sixty days before the presidential primary election. *See* § 1-4-1204(1). Section 1-4-1204(4) details the process through which an eligible petitioner can challenge a candidate's listing on the presidential primary ballot. It states:

> Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113(3).

§ 1-4-1204(4).

¶355 Section 1-1-113 is Colorado's fast-track procedural process under the Election Code that allows candidates; political parties; individuals who have made nominations; and, as pertinent here, eligible electors to file section 1-4-1204(4) and

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other challenges in court, alleging that the Secretary or one of Colorado's sixty-four county clerks and recorders has committed or is about to commit a breach or neglect of duty or other wrongful act. It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or *when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphasis added).

II. Procedural History

A. The Electors' Petition

¶356 On September 6, 2023, the Electors sued the Secretary under sections 1-1-113 and 1-4-1204(4) of the Election Code, alleging that the Secretary certifying President Trump to the primary ballot would constitute an "impropriety" under section 1-4-1204(4), and thus a "breach or neglect of duty or other wrongful act" under section 1-1-113(1) because Section Three—which disqualifies insurrectionists from holding office—prohibits him from being listed. The Secretary's "breach or neglect of duty or other wrongful act," the Electors argued,

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authorized the district court to "issue an order requiring" the Secretary to "substantial[ly] compl[y]" with the Election Code by not certifying President Trump to the ballot. *See* § 1-1-113(1).

B. The Parties' Arguments in the District Court

¶357 Before trial, President Trump moved to dismiss the Electors' complaint. He argued that the court's authority to determine a claim under section 1-4-1204(4) is limited to the three criteria explicitly identified in section 1-4-1204(1)(b) and (c), which provide that the only candidates whose names shall be placed on the ballots for election are those who:

> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

¶358 President Trump acknowledged that the Secretary's "Major Candidates Statement of Intent" form requires a candidate to affirm that they meet the three

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qualifications set forth in Article II of the U.S. Constitution,[2] but emphasized that the form says nothing about Section Three. Thus, he urged the court to adopt a very narrow reading of section 1-4-1204(4): So long as a party candidate (1) is a bona fide presidential candidate; (2) timely submits a notarized statement of intent affirming that they meet the three Article II qualifications; and (3) pays the $500 fee, the Secretary must certify the candidate to the presidential primary ballot, thus fulfilling her duty under the Election Code.

¶359 Challenges based on anything other than those three criteria, including but not limited to a Section Three challenge, President Trump asserted in his motion, fall outside the court's authority to decide and fail to state a proper claim for relief under sections 1-4-1204(4) and 1-1-113. Any such claim, he posited, must be dismissed.

¶360 The Electors countered in their response to the motion to dismiss that section 1-4-1204(4) must be read in conjunction with the other provisions of the Election Code, including, specifically, section 1-4-1201, C.R.S. (2023), which states

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[2] Article II, Section 1, Clause 5 of the U.S. Constitution states:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).

¶361 The Electors also pointed to section 1-4-1203(2)(a), C.R.S. (2023), which states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

(Emphasis added.) And they leaned on section 1-4-1203(3), which provides, in part, that the Secretary and county clerk and recorders have "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." Based on this section, they argued that, in all "other primary elections and general elections," only candidates who meet all the qualifications to hold office may access the ballot. Finally, the Electors emphasized the text of section 1-4-1204(4), which allows for "*[a]ny challenge to the listing of any candidate*" and directs the district court to assess the validity of "*all alleged improprieties.*" (Emphases added.) In the Electors' view, part 12 of the Election Code, when read as a whole, necessarily encompasses challenges under Section Three.

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C. The District Court's Final Order

¶362 In its final order, the district court rejected President Trump's argument in his motion to dismiss that the Electors failed to state a proper claim under sections 1-4-1204(4) and 1-1-113. *Anderson v. Griswold*, No. 23CV32577, ¶ 224 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). It concluded that the Secretary lacked the authority under the Election Code to *investigate and determine* presidential primary candidate qualifications. *Id.* at ¶ 216. It then turned to whether it had the authority to adjudicate the Electors' complaint. *Id.* at ¶ 217. The court considered three cases in which this court concluded that the Election Code requires courts—not election officials—to determine candidate eligibility. *Id.* at ¶¶ 219–21; *see Hanlen v. Gessler*, 2014 CO 24, ¶ 40, 333 P.3d 41, 50 (holding that the Secretary exceeded his authority by passing a rule that permitted election officials to determine whether a candidate appearing on the state ballot was not qualified for office because "the election code requires a court, not an election official, to determine the issue of eligibility"); *Carson v. Reiner*, 2016 CO 38, ¶ 8, 370 P.3d 1137, 1139 ("[W]hen read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts . . . ."); *Kuhn v. Williams*, 2018 CO 30M, ¶ 40, 418 P.3d 478, 485 (per curiam) (a court may review the validity of a challenged candidate-nomination petition and consider extrinsic evidence in doing so). The district court found particularly instructive

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this court's conclusion in *Kuhn* that a challenger could "present evidence demonstrating that a petition actually fails to comply with the Election Code, even if it 'appear[ed] to be sufficient' in a paper review." ¶ 39, 418 P.3d at 485; *Anderson*, ¶ 219.

¶363 The court then interpreted two provisions of the Election Code to implicitly incorporate Section Three, which it concluded grants courts broad authority to review, through section 1-1-113's expedited procedures, whether a candidate is disqualified as an insurrectionist. *Anderson*, ¶¶ 222, 224. Specifically, the court interpreted the language in section 1-4-1201 stating that the provisions of part 12 of the Election Code are intended to "conform to the requirements of federal law" as incorporating the entire U.S. Constitution, including Section Three. *Anderson*, ¶ 222. And the court noted that section 1-4-1203(2)(a) provides that only political parties that have a "qualified candidate" are entitled to participate in the presidential primary process. *Anderson*, ¶ 222. Relying on these provisions, the court held that, while the Secretary is not empowered to investigate and adjudicate a candidate's potential disability under Section Three, courts are not so constrained. *Id.* at ¶ 224.

D. The Majority's Opinion

¶364 The majority also appears to construe part 12 very broadly. In sum, its view is that section 1-4-1201's reference to "federal law" speaks to the General

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Assembly's intent, that section 1-4-1203(2)(a) limits participation in the presidential primary to "qualified" candidates, and that certification of a candidate who is not "qualified" thus constitutes a "wrongful act" within the scope of section 1-1-113. Maj. op. ¶¶ 36–37, 62–64. The majority draws on other provisions of the Election Code to inform the meaning of the term "qualified candidate." *Id.* at ¶¶ 37, 62 (citing § 1-4-1205, C.R.S. (2023) (requiring presidential primary write-in candidates to file a "notarized . . . statement of intent"); § 1-4-1101(1), C.R.S. (2023) (a write-in candidate's "affidavit of intent" must affirm that the candidate "desires the office and is qualified to assume its duties if elected"); § 1-4-1203(5) (when every party has no more than one certified candidate, whether party-nominated or write-in, the Secretary may cancel the presidential primary for all parties and declare the sole candidate the winner)). According to the majority, these provisions suggest that major party candidates—who are also required to submit a statement of intent—must also be "qualified to assume [the office's] duties if elected." *Id.* at ¶ 62; *see* § 1-4-1101(1).

¶365 Read as a whole, the majority thus interprets the Election Code to provide that a major party candidate in a presidential primary must, at a minimum, be qualified to hold the Office of President under the U.S. Constitution. Maj. op. ¶ 63. As such, it concludes that the General Assembly, through the Election Code, granted courts broad authority to determine presidential primary candidates'

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constitutional eligibility, including eligibility under Section Three. *Id.* at ¶¶ 60–62, 65–66. In the majority's view, a reading of the Election Code that constrains courts from considering a candidate's constitutional qualifications would produce a result "contrary to the purpose of the Election Code." *Id.* at ¶ 64.

III. The Electors Failed to State a Cognizable Claim for Relief

¶366 Sections 1-4-1204(4) and 1-1-113 frame the threshold question this court must address before turning to the merits of the parties' appeal: Did the General Assembly intend to grant Colorado courts the authority to decide Section Three challenges? Based on my reading of sections 1-4-1204(4), 1-4-1201, and 1-4-1203(2)(a), I conclude that the answer to this question is no. As a result, I conclude that the Electors have not stated a cognizable claim for relief and their complaint should have been dismissed.

A. Section 1-4-1204(4) Allows for a Broad, but Not Unlimited, Range of Claims for Relief

¶367 As an initial matter, I acknowledge that the language in section 1-4-1204(4) is fairly broad insofar as it allows expedited challenges to the listing of any candidate on the presidential primary election ballot based on "alleged improprieties." And I agree with the majority that "section 1-1-113 'clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,'" Maj. op. ¶ 61 (quoting *Carson*, ¶ 17, 370 P.3d at 1141), "including any act that is 'inconsistent with the Election Code,'" *id.*

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(quoting *Frazier v. Williams*, 2017 CO 85, ¶ 16, 401 P.3d 541, 545). I also agree with the majority that a "wrongful act" is "more expansive than a 'breach' or 'neglect of duty.'" *Id.* (quoting *Frazier*, ¶ 16, 401 P.3d at 545).

¶368 But this language can only do so much. As we also held in *Frazier*, "other wrongful act" is limited to acts that are wrongful under the Election Code. ¶ 16, 401 P.3d at 545. We have also emphasized that section 1-1-113 is a *summary* proceeding designed to quickly resolve challenges brought by designated plaintiffs against state election officials prior to election day. *Id.* Indeed, past cases decided by this court reflect the generally straightforward nature of the cases filed under section 1-1-113, the lion's share of which involved disputes over state or local election residency or signature requirements. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 15, 462 P.3d 1081, 1084 (deciding whether the Election Code's minimum signature requirement mandates substantial compliance and whether a U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 1–6, 418 P.3d at 480–81 (deciding whether a non-resident signature circulator could legally collect signatures for a candidate's petition); *Frazier*, ¶ 1, 401 P.3d at 542 (considering whether the Secretary improperly invalidated signatures included on a U.S. Senate candidate's petition to appear on the primary election ballot); *Carson*, ¶ 21, 370 P.3d at 1142 (considering whether a challenge to a candidate's qualifications

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based on their residency was permitted after the Secretary certified the candidate to the ballot).

¶369 Don't get me wrong, the almost 450 entries in the district court register of actions in the two months and eleven days between September 6, 2023, the date on which the petition was filed, and November 17, 2023, the date on which the district court issued its 102-page final order, illustrate the extraordinary effort that the attorneys and the district court dedicated to this case. But that effort also proves too much. The deadlines under the statute were not met, nor could they have been. Setting aside the factual questions, an insurrection challenge is necessarily going to involve complex legal questions of the type that no district court—no matter how hard working—could resolve in a summary proceeding.

¶370 And that's to say nothing of the appellate deadline. Three days to appeal a district court's order regarding a challenge to a candidate's age? Sure. But a challenge to whether a former President engaged in insurrection by inciting a mob to breach the Capitol and prevent the peaceful transfer of power? I am not convinced this is what the General Assembly had in mind.

¶371 The various provisions of the Election Code on which the district court and the majority rely to suggest otherwise do not persuade me either.

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B. The Term "Federal Law" Does Not Support a Broad Grant of Authority to Colorado Courts to Enforce Section Three

¶372 The district court relied on the declaration of intent in part 12. *Anderson*, ¶ 222. It explains the intent of the People of the State of Colorado in the context of presidential primary elections. It provides: "In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).[3] In adopting a broad view of section 1-4-1204(4)'s reach, the court assumed that the term "federal law," as used in this section, refers to the entire U.S. Constitution, including Section Three. *Anderson*, ¶¶ 222–24.

¶373 The majority also leans on this reference to "federal law" in section 1-4-1201, though more obliquely, suggesting it means the General Assembly intended for part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. I am not persuaded.

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[3] As Professor Muller notes in his amicus brief, "A postpositive modifier like ['governing presidential primary elections'] attaches to both 'federal law' and 'national political party rules.'" Brief for Professor Derek T. Muller as Amicus Curiae Supporting Neither Party. Hence, the term "federal law" is properly understood not as a standalone term but as only relating to presidential primary elections.

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¶374 In my view, the term "federal law" is ambiguous at best. A brief dive into the history of part 12 explains why. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389 ("If, however, the statute is ambiguous, then we may consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history.").

¶375 Part 12 was enacted as part of the return to a primary system in Colorado. *See* § 1-4-1102, C.R.S. (1990) (governing Colorado's presidential primary system in the 1990s). From 2002 to 2016, presidential candidates were selected through a closed party caucus system. But in 2016, after "Colorado voters experienced disenfranchisement and profound disappointment with the state's [caucus] system," voters considered Proposition 107, which promised to restore presidential primary elections in Colorado, with one significant change—unlike prior iterations of its primary system, beginning in 2020, Colorado would host open presidential primaries, allowing unaffiliated voters to participate in these primary elections. *See* Proposition 107, § 1, https:// www.sos.state.co.us/pubs/ elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https:// perma.cc/2GA9-ZY7U] (noting that "restor[ing] [Colorado's] presidential primary" to an open primary system would enable the "35% of Colorado voters who are independent of a party" to "participat[e] in the presidential nomination

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process," and "encourage candidates who are responsive to the viewpoints of more Coloradans").

¶376 When Proposition 107 passed, the General Assembly amended the Election Code and adopted part 12 to formally re-introduce the presidential primary process. Nothing in this history indicates that one of the concerns animating either the proponents of Proposition 107 or the General Assembly was a need to challenge, through the courts, issues concerning candidates' constitutional disqualifications. In fact, the language in the current version of section 1-4-1201 mostly mirrors the 1990 version of part 12 (then, part 11): "It is the intent of the general assembly that the provisions of this part 11 *conform to the requirements of federal law and national political parties for presidential primary elections*." § 1-4-1104(3), C.R.S. (1990) (emphasis added).

¶377 There is some history surrounding Proposition 107 and part 12 which suggests that proponents of this new open presidential primary system were concerned about one specific constitutional issue: a potential First Amendment challenge to the new law based on political parties' private right of association. *See Independent Voters*, Denver Metro Chamber of Com., https://denverchamber.org/policy/policy-independent-voters-white-paper/ [https://perma.cc/T2TT-A2UD] (The Denver Chamber of Commerce, which launched Proposition 107, noted that a semi-open primary system, because it would permit

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unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary, could face legal challenges based on parties' First Amendment rights of association.); *see also* Christopher Jackson, *Colorado Election Law Update*, 46-SEP Colo. Law. 52, 53 (2017) (noting that the law was likely crafted in a manner designed to "stave off a First Amendment challenge" given the U.S. Supreme Court's 2000 decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which struck down California's "blanket primary" law).

¶378 Curiously, the earlier version of the statute required the Secretary to provide a "written report" to the General Assembly "concerning whether the provisions of this part 11 conform to the requirements of federal law and national political party rules for presidential primary elections[,]" and provided that "the general assembly shall make such reasonable changes to this part 11 as are necessary to conform to federal law and national political parties' rules." § 1-4-1104(3), C.R.S. (1990). It is unclear if those reports were intended to speak to potential First Amendment concerns or some other issue, as any reports that may have been submitted to the General Assembly appear to have been lost to the sands of time (or, according to the State Archivist's Office, possibly a flood).

¶379 At bottom, this legislative history does little to illuminate what the 2016 General Assembly meant by this language in section 1-4-1201. What this history does show, however, is that the term "federal law" is most certainly not an

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affirmative grant of authority to state courts to enforce Section Three in expedited proceedings under the Election Code.

C. The Term "Qualified Candidate" Does Not Support a Broad Grant of Authority to Colorado Courts

¶380 The other principal support for the district court's broad interpretation of section 1-4-1204(4) rests on the term "qualified candidate." The majority relies heavily on this language as well. Maj. op. ¶¶ 37, 62–64.

¶381 To understand the meaning of this term, it is critical to consider it in its full context. Recall, it states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

§ 1-4-1203(2)(a) (emphases added).

¶382 The district court construed this section expansively. It looked to the term "qualified candidate" as evidence of the General Assembly's intent to grant the court authority to determine if President Trump was disqualified under Section Three. The district court, like the Electors, appears to have read section 1-4-1203(2)(a) like a syllogism, such that if (1) participation in the presidential primary is limited to *qualified candidates*, and if (2) Section Three disqualifies insurrectionists, then (3) a court may appropriately consider a

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Section Three challenge. But that is not what the statute says. Rather, it provides: "[E]ach political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election." *Id.* (emphases added).

¶383 Section 1-4-1203(2)(a) addresses when and how presidential primary elections are conducted. It does not prescribe additional qualifications through its use of the term "qualified candidate." *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute."). Nor can it be read, given the fact that the term is explicitly tethered to subsection 1203, as expanding the criteria outlined in section 1-4-1204(1)(b) and (c): A candidate is eligible to be certified to the ballot by (1) being a bona fide candidate for president; (2) submitting a notarized candidate's statement of intent, and (3) paying the $500 filing fee or submitting a valid write-in petition. *See* § 1-4-1204(1)(b), (c).

¶384 It is significant, as well, that this part of the statute describes when a *political party* can participate in a presidential primary election. The consequence for a party that does not have a qualified candidate—that is, a candidate who does not meet the three-part criteria laid out in section 1-4-1204(1)(b) and (c)—is that the party cannot participate in the primary. Considered in context, then, the term

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"qualified candidate" does not offer support for an expansive reading of the court's authority to determine a challenge under Section Three.

¶385 The majority takes a slightly different approach. It points to section 1-4-1201's "federal law" declaration and suggests it means that the General Assembly intended part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. Then, like the district court, it gives great weight to the language in section 1-4-1203(2)(a), which it construes to mean that participation in the presidential primary is limited to "qualified candidates." *Id.* at ¶¶ 37, 62–64. It effectively reads "pursuant to this section" out of the statute by concluding that the phrase "sheds no light on the meaning of 'qualified candidate.'" *Id.* at ¶ 37 n.3 (quoting § 1-4-1203(2)(a)). The majority then asserts that, "[a]s a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a 'qualified candidate' is the 'statement of intent' (or 'affidavit of intent') filed with the Secretary." *Id.* at ¶ 37 (quoting § 1-4-1204(1)(c)).

¶386 And, it explains, the Secretary's statement of intent for a major party presidential candidate requires the candidate to affirm via checkboxes that the candidate meets the qualifications set forth in Article II of the U.S. Constitution for the Office of President, i.e., that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. *Id.* at ¶ 38; U.S. Const. art. II, § 1, cl. 5; *Major Party Candidate*

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Statement of Intent for Presidential Primary, Colo. Sec'y of State, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/RY72-ASSD]. As well, the form requires the candidate to sign an affirmation that states: "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*." *Major Party Candidate Statement of Intent for Presidential Primary*, *supra.*

¶387 The majority stitches these various parts of the Election Code together to conclude the General Assembly intended to grant state courts the authority to decide Section Three challenges. Maj. op. ¶¶ 36–38, 62. This approach falls short for five reasons.

¶388 First, there is nothing in section 1-4-1201's "federal law" declaration that indicates the General Assembly meant to refer to Section Three. Perhaps the declaration refers to the General Assembly's concern regarding a potential First Amendment right of association challenge to the open primary system created by part 12, perhaps not. The declaration's history is muddy at best.

¶389 Second, the term "qualified candidate" cannot be fairly read to grant Colorado courts authority to adjudicate Section Three disqualification claims. The term is best understood as describing when a political party can participate in the

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presidential primary process, not as the foundation for a wrongful act claim under section 1-4-1204(4) and section 1-1-113.

¶390 Third, even assuming the General Assembly intended to grant some authority to the courts through its reference to the candidate's statement of intent in the exceptionally roundabout manner suggested by the majority, there is no basis for concluding that authority extends beyond the fairly basic types of Article II challenges that have come before this court in the past, such as those involving a candidate's age, or other challenges like those alleging that petition circulators did not reside in Colorado.

¶391 Fourth, I am not persuaded by the majority's reliance on sections 1-4-1205 and 1-4-1101, which govern the requirements write-in candidates must satisfy before being certified to the ballot. *See* Maj. op. ¶¶ 37, 62. Like major party presidential primary candidates, write-in candidates for the presidential primary must file a "notarized . . . statement of intent" and submit to the Secretary "a nonrefundable fee of five hundred dollars . . . no later than the close of business on the sixty-seventh day before the presidential primary election." § 1-4-1205. Section 1-4-1101(1), which applies to all write-in candidates regardless of office, requires that the write-in candidate confirm "that he or she desires the office and *is qualified to assume its duties if elected.*" (Emphasis added.) According to the majority, "[t]he Election Code's explicit requirement that a write-in candidate be

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'qualified' to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be 'qualified' in the same manner." Maj. op. ¶ 62.

¶392 It is true that both major party candidates and write-in candidates must fill out statement of intent forms, and that the forms are similar in some respects. But, if anything, the General Assembly's decision to include a specific qualification provision for write-in candidates shows that when it wants to include an explicit qualifications requirement, like the one in section 1-4-1101(1), it knows how to do so. *See People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625 ("But, in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009))).

¶393 Fifth and finally, there is the problem that Section Three is a disqualification for office, not a qualification to serve. As the majority acknowledges, the U.S. Supreme Court has twice declined to address whether Section Three—which is described in the text as a "disability" and is referred to as the Disqualification Clause—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (observing that an academic suggested in a law review article in 1968 that the three grounds for disqualification (impeachment, Section Three, and the Congressional incompatibility clause) and two other similar provisions were

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each no less of a "qualification" than the Article II, Section 5 qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of additional qualifications for office); Maj. op. ¶ 65.

¶394 Given the fact that the U.S. Supreme Court has not weighed in on whether Section Three is a qualification for office, it seems all the more important to look for some affirmative expression by the General Assembly of its intent to grant state courts the authority to consider Section Three challenges through Colorado's summary hearing and appeal process under the Election Code. I see no such expression.

IV. Conclusion

¶395 The Electors' arguments below and before this court are, to my mind, unavailing. Too much of their position rests on text like "federal law" and "qualified candidate" that—on closer examination—does not appear to mean what they say it means because it is taken out of context. In short, these sections do not show an affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process.

¶396 Because it too relied on the provisions of part 12 regarding "federal law" and "qualified candidate," the district court's reasoning suffers from the same shortcomings.

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¶397 And, at the end of the day, while the majority's approach charts a new course—one not entirely presented by the parties—its approach has many of the same problems. It stitches together support from the Secretary's general authority to supervise the conduct of primary and other elections, § 1-1-107(1), C.R.S. (2023); the inference that section 1-4-1201's "federal law" declaration means something pertinent to Section Three; part, but not all, of the "qualified candidate" statute, § 1-4-1203(2)(a); inferences from the write-in candidate process statute, § 1-4-1101(1); and the novel suggestion that the General Assembly granted authority to state courts to adjudicate a Section Three challenge by virtue of its reference to the Secretary's statement of intent form in section 1-4-1204(1)(c). *See* Maj. op. ¶¶ 35–37, 62–63.

¶398 I agree with the majority that, if the General Assembly wants to grant state courts the authority to adjudicate Section Three challenges through the Election Code, it can do so. *See* U.S. Const. art. II, § 1, cl. 2 (authorizing states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (recognizing that it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). I just think it needs to say so.

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CC: Christine Sun [christine@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Re: Colorado Trump Decision--Privileged
Attachments: Anderson v. Griswold Opinion (Co. Supreme Court) 12.19[53].pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good afternoon,

As we noted yesterday evening, the Colorado Supreme Court (by a 4-3 vote) yesterday held that former President Trump is disqualified from holding the office of the President under Section Three of the Fourteenth Amendment ("14.3") because he engaged in an insurrection on January 6, 2021. The court determined that because Trump is disqualified, the Secretary of State in Colorado cannot place him on the primary ballot, pursuant to the state's Election Code.

The order of the court is stayed until January 4, 2024 to allow the parties to seek review in the U.S. Supreme Court prior to the Secretary's deadline to certify the presidential primary ballot (on January 5). If a party seeks review in the U.S. Supreme Court before the stay expires, the stay will remain in place "and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court." (9).

Below is a summary of the court's holdings on questions of state law, the construction of 14.3, and an evidentiary issue arising at trial. We've also included brief summaries on the dissents. The opinion is attached again here for convenience.

We'll have more on next steps soon. As always, please reach out if you have questions or need anything from us.

Summary of *Anderson v. Griswold* (Colorado Supreme Court)

- **State Election Law and the State's Authority re: Ballot Access** (pp. 17-49)
  - Under Colorado law, courts have authority to "assess presidential qualifications."
  - Pursuant to the Colorado Election Code, electors can raise challenges in district court alleging that a person with a duty under the code has committed or is about to commit a breach of duty or other "wrongful act." Certifying an unqualified candidate constitutes a "wrongful act" under the Election Code.
  - The U.S. Constitution authorizes states to assess presidential qualifications of candidates. This is through the Electors Clause and the state's plenary power.
  - Limiting the ballot to constitutionally qualified candidates does not interfere with the Colorado Republican party's associational rights and the state statutes at issue provide sufficient due process to candidates.
- **14.3 Construction**
  - 14.3 is "self executing" (pp. 49-51)
    - Based on 14.3's plain language and Supreme Court cases addressing other Reconstruction Amendments, the disqualification provision attaches without congressional action.

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- The court notes that holding otherwise would lead to absurd results: If any of the Reconstruction Amendments required additional legislation Congress could "nullify" them, simply by failing to pass such legislation. This would mean, among other things, that slavery would remain legal.

- 14.3 encompasses the Presidency and someone who has taken an oath as President (69-88)
  - The presidency falls "comfortably" under definitions of "office" at the time of the Fourteenth Amendment's ratification.
  - The Constitution refers to Presidency as "an office" 25 times.
  - The court doesn't place much weight on the fact that the presidency isn't explicitly mentioned in 14.3, noting this is likely because the presidency is so clearly encompassed.
  - "A construction of Section Three that would nevertheless allow a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose." (84)
  - The presidential oath is an oath to support the Constitution:
    - "[A] commitment to 'preserve, protect, and defend the Constitution'—is consistent with the plain meaning of the word 'support.'" (86)
- Trump "engaged" in an "insurrection"(pp. 96-116)
  - The district court did not clearly err in concluding that Trump "engaged in" the "insurrection" on January 6.
  - For purposes of Section Three, the court held that "insurrection" "would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country." (99)
    - Substantial evidence at trial showed January 6 falls under this definition
  - The court held that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." (105)
    - The court held that based on substantial evidence, Trump engaged in insurrection: "President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power." (115)
- **Political Question: Judicial review is not precluded by the political question doctrine** (pp. 61-68)
  - The court finds no constitutional provision that reflects a "textually demonstrable" commitment to Congress of the authority to determine presidential qualification.
  - Section Three involves "judicially discoverable and manageable standards"
    - Here the court notes its disagreement with the Michigan Court of Claims: "In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us." (69)
- **First Amendment: Trump's Speech on January 6 is not protected by the First Amendment (pp. 116-133)**
  - Pursuant to *Brandenburg v. Ohio*, 395 U.S. 447 (1969), Trump's speech was unprotected under the First Amendment because it incited lawless action.
- **Admission of the January 6th Report at Trial: The trial court did not err by admitting the January 6th Report at trial (88-95)**
  - The report follows under the following hearsay exception recognized under Colorado rules of evidence: "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law."

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- The court agreed with the trial court's finding that the report was "trustworthy" as required for the hearsay exception.

Dissents

- **Justice Boatright's** dissent is based on the Colorado Election Code. According to Justice Boatright, the issues presented "reach a magnitude of complexity not contemplated by the Colorado General Assembly for its election code enforcement statute." (11)
- **Justice Samour** found that the expedited procedures under the Colorado Election Code did not provide Trump with adequate due process and that Section Three is not self-executing.
- **Justice Berkenkotter** would hold that the Election Code doesn't authorize Colorado courts to determine disqualification under 14.3: there is no "affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process." (24)

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Subject: Colorado Trump Decision--Privileged

All:

You may have seen that the Colorado Supreme Court just held that Trump is disqualified from the office of the President under Section Three of the Fourteenth Amendment. The decision is attached here.

The court stayed the decision until January 4, 2024 contemplating review in the US Supreme Court:

"Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court. "

We'll send a summary of the decision tomorrow.

Best,

Jonathan

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Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Judicial Branch's homepage at http://www.courts.state.co.us. Opinions are also posted on the Colorado Bar Association's homepage at http://www.cobar.org.

ADVANCE SHEET HEADNOTE
December 19, 2023

2023 CO 63

No. 23SA300, *Anderson v. Griswold*—Election Law—Fourteenth Amendment—First Amendment—Political Questions—Hearsay.

In this appeal from a district court proceeding under the Colorado Election Code, the supreme court considers whether former President Donald J. Trump may appear on the Colorado Republican presidential primary ballot in 2024. A majority of the court holds that President Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the United States Constitution. Because he is disqualified, it would be a wrongful act under the Election Code for the Colorado Secretary of State to list him as a candidate on the presidential primary ballot. The court stays its ruling until January 4, 2024, subject to any further appellate proceedings.

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The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 63

Supreme Court Case No. 23SA300
Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)
District Court, City and County of Denver, Case No. 23CV32577
Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian,

v.

Respondent-Appellee:

Jena Griswold, in her official capacity as Colorado Secretary of State,

and

Intervenor-Appellee:

Colorado Republican State Central Committee, an unincorporated association,

Intervenor-Appellee/Cross-Appellant:

Donald J. Trump.

Order Affirmed in Part and Reversed in Part
en banc
December 19, 2023

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PER CURIAM.
CHIEF JUSTICE BOATRIGHT dissented.
JUSTICE SAMOUR dissented.
JUSTICE BERKENKOTTER dissented.

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PER CURIAM.[1]

¶1 More than three months ago, a group of Colorado electors eligible to vote in the Republican presidential primary—both registered Republican and unaffiliated voters ("the Electors")—filed a lengthy petition in the District Court for the City and County of Denver ("Denver District Court" or "the district court"), asking the court to rule that former President Donald J. Trump ("President Trump") may not appear on the Colorado Republican presidential primary ballot.

¶2 Invoking provisions of Colorado's Uniform Election Code of 1992, §§ 1-1-101 to 1-13-804, C.R.S. (2023) (the "Election Code"), the Electors requested that the district court prohibit Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), from placing President Trump's name on the presidential primary ballot. They claimed that Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") disqualified President Trump from seeking the presidency. More specifically, they asserted that he was ineligible under Section Three because he engaged in insurrection on January 6, 2021, after swearing an oath as President to support the U.S. Constitution.

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[1] Consistent with past practice in election-related cases with accelerated timelines, we issue this opinion per curiam. *E.g.*, *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478; *In re Colo. Gen. Assemb.*, 332 P.3d 108 (Colo. 2011); *In re Reapportionment of Colo. Gen. Assemb.*, 647 P.2d 191 (Colo. 1982).

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¶3 After permitting President Trump and the Colorado Republican State Central Committee ("CRSCC"; collectively, "Intervenors") to intervene in the action below, the district court conducted a five-day trial. The court found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three. *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). But, the district court concluded, Section Three does not apply to the President. *Id.* at ¶ 313. Therefore, the court denied the petition to keep President Trump off the presidential primary ballot. *Id.* at Part VI. Conclusion.

¶4 The Electors and President Trump sought this court's review of various rulings by the district court. We affirm in part and reverse in part. We hold as follows:

- The Election Code allows the Electors to challenge President Trump's status as a qualified candidate based on Section Three. Indeed, the Election Code provides the Electors their only viable means of litigating whether President Trump is disqualified from holding office under Section Three.
- Congress does not need to pass implementing legislation for Section Three's disqualification provision to attach, and Section Three is, in that sense, self-executing.
- Judicial review of President Trump's eligibility for office under Section Three is not precluded by the political question doctrine.

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- Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error.
- The district court did not abuse its discretion in admitting portions of Congress's January 6 Report into evidence at trial.
- The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection."
- The district court did not err in concluding that President Trump "engaged in" that insurrection through his personal actions.
- President Trump's speech inciting the crowd that breached the U.S. Capitol on January 6, 2021, was not protected by the First Amendment.

¶5 The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot.

¶6 We do not reach these conclusions lightly. We are mindful of the magnitude and weight of the questions now before us. We are likewise mindful of our solemn duty to apply the law, without fear or favor, and without being swayed by public reaction to the decisions that the law mandates we reach.

¶7 We are also cognizant that we travel in uncharted territory, and that this case presents several issues of first impression. But for our resolution of the Electors' challenge under the Election Code, the Secretary would be required to include President Trump's name on the 2024 presidential primary ballot.

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Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court.

I. Background

¶8 On November 8, 2016, President Trump was elected as the forty-fifth President of the United States. He served in that role for four years.

¶9 On November 7, 2020, Joseph R. Biden, Jr., was elected as the forty-sixth President of the United States. President Trump refused to accept the results, but President Biden now occupies the office of the President.

¶10 On December 14, 2020, the Electoral College officially confirmed the results: 306 electoral votes for President Biden; 232 for President Trump. President Trump continued to challenge the outcome, both in the courts and in the media.

¶11 On January 6, 2021, pursuant to the Twelfth Amendment, U.S. Const. amend. XII, and the Electoral Count Act, 3 U.S.C. § 15, Congress convened a joint session to certify the Electoral College votes. President Trump held a rally that morning at the Ellipse in Washington, D.C. at which he, along with several others,

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spoke to the attendees. In his speech, which began around noon, President Trump persisted in rejecting the election results, telling his supporters that "[w]e won in a landslide" and "we will never concede." He urged his supporters to "confront this egregious assault on our democracy"; "walk down to the Capitol . . . [and] show strength"; and that if they did not "fight like hell, [they would] not . . . have a country anymore." Before his speech ended, portions of the crowd began moving toward the Capitol. Below, we discuss additional facts regarding the events of January 6, as relevant to the legal issues before us.

¶12 Just before 4 a.m. the next morning, January 7, 2021, Vice President Michael R. Pence certified the electoral votes, officially confirming President Biden as President-elect of the United States.

¶13 President Trump now seeks the Colorado Republican Party's 2024 presidential nomination.

II. Procedural History

¶14 On September 6, 2023, the Electors initiated these proceedings against the Secretary in Denver District Court under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the Secretary's authority to list President Trump "as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three]."

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¶15 President Trump intervened and almost immediately filed a Notice of Removal to federal court, asserting federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a), 1446. In light of the removal, the Denver District Court closed the case on September 8. On September 12, the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing and the Secretary had neither joined nor consented to the removal.

¶16 Once the Electors filed proof with the Denver District Court that all parties had been served, the court reopened the case on September 14. At a status conference four days later, on September 18, the Secretary emphasized that she must certify the candidates for the 2024 presidential primary ballot by January 5. *See* § 1-4-1204(1). The court set the matter for a five-day trial, beginning on October 30. On September 22, with the parties' input, the court issued expedited case management deadlines for a host of matters, including the disclosure of expert reports, witness lists and exhibits, as well as for briefing and argument on several motions. The court also granted CRSCC's motion to intervene on October 5.

¶17 On October 11, the Secretary's office received (1) President Trump's signed and notarized statement of intent to run as a candidate for a major political party in the presidential primary; (2) the approval form for him to do so, signed by the chair of the Colorado Republican Party, asserting that President Trump was "bona

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fide and affiliated with the [Republican] party"; and (3) the requisite filing fee. *See* § 1-4-1204(1)(c).

¶18 On October 20, the district court issued an Omnibus Order addressing many outstanding motions. Regarding President Trump's motions, the court reached three conclusions that are relevant now: (1) the Electors' petition involved constitutional questions, but remained "a challenge against an election official based on her alleged duties under the Election Code," and "such a claim [was] proper under [section] 1-1-113 as a matter of procedure"; (2) "[section] 1-4-1204 expressly incorporates [section] 1-1-113, and [section] 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is 'about to' take an improper or wrongful act"—thus, because the Electors had alleged such an act, the matter was ripe for decision; and (3) it could not conclude, as a matter of law, that the Fourteenth Amendment excludes a candidate from the presidential primary ballot or that the Secretary has the authority to determine candidate qualifications, so those issues would be determined at the trial.

¶19 Regarding CRSCC's motions, the court, in relevant part, concluded that the state does not violate a political party's First Amendment associational rights by excluding constitutionally ineligible candidates from the presidential primary ballot, but also rejected CRSCC's argument to the extent it purported to raise an

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independent constitutional claim beyond the proper scope of a section 1-1-113 proceeding.

¶20 On October 23, President Trump filed a petition for review in this court, asking us to exercise original jurisdiction to halt the scheduled trial. Four days later, we denied the petition without passing judgment on the merits of any of President Trump's contentions.

¶21 On October 25, the district court denied President Trump's Fourteenth-Amendment-based motion to dismiss. As relevant now, the court concluded that (1) it would not dismiss the case under the political question doctrine, but it reserved the right to revisit the doctrine "to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress"; (2) whether Section Three is self-executing is irrelevant because section 1-4-1204 allows the Secretary to exclude constitutionally disqualified candidates, and states "can, and have, applied Section [Three] pursuant to state statutes without federal enforcement legislation"; and (3) it would reserve for trial the issues of whether Section Three applies to a President and whether President Trump had engaged in insurrection.

¶22 The trial began, as scheduled, on October 30. The evidentiary portion lasted five days, with closing arguments almost two weeks later, on November 15.

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During those two weeks, the Electors, the Secretary, President Trump, and CRSCC submitted proposed findings of fact and conclusions of law. The court issued its written final order on November 17, finding, by clear and convincing evidence, that the events of January 6 constituted an insurrection and President Trump engaged in that insurrection. The court further concluded, however, that Section Three does not apply to a President because, as the terms are used in Section Three, the Presidency is not an "office . . . under the United States" nor is the President "an officer of the United States" who had "previously taken an oath . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3; *see Anderson*, ¶¶ 299–315. Accordingly, the Secretary could not exclude President Trump's name from the presidential primary ballot. *Anderson*, Part VI. Conclusion.

¶23 On November 20, both the Electors and President Trump sought this court's review of the district court's rulings under section 1-1-113(3). We accepted jurisdiction of the parties' cross-petitions. Following extensive briefing from the parties and over a dozen amici, we held oral argument on December 6 and now issue this ruling.

III. Analysis

¶24 We begin with an overview of Section Three. We then address threshold questions regarding (1) whether the Election Code provides a basis for review of the Electors' claim, (2) whether Section Three requires implementing legislation

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before its disqualification provision attaches, and (3) whether Section Three poses a nonjusticiable political question. After concluding that these threshold issues do not prevent us from reaching the merits, we consider whether Section Three applies to a President. Concluding that it does, we address the admissibility of Congress's January 6 Report (the "Report") before reviewing, and ultimately upholding, the district court's findings of fact and conclusions of law in support of its determination that President Trump engaged in insurrection. Lastly, we consider and reject President Trump's argument that his speech on January 6 was protected by the First Amendment.[2]

A. Section Three of the Fourteenth Amendment and Principles of Constitutional Interpretation

¶25 The end of the Civil War brought what one author has termed a "second founding" of the United States of America. *See* Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019). Reconstruction ushered in the Fourteenth Amendment, which includes Section Three, a provision

[2] President Trump also listed a challenge to the traditional evidentiary standard of proof for issues arising under the Election Code as a potential question on appeal, claiming that "[w]hen particularly important individual interests such as a constitutional right [is] at issue, the proper standard of proof requires more than a preponderance of the evidence." As noted above, the district court held that the Electors proved their challenge by clear and convincing evidence. And because President Trump chose not to brief this issue, he has abandoned it. *See People v. Eckley*, 775 P.2d 566, 570 (Colo. 1989).

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addressing what to do with those individuals who held positions of political power before the war, fought on the side of the Confederacy, and then sought to return to those positions. *See* National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%2013,Rights%20to%20formerly%20enslaved%20people [https://perma.cc/5EZU-ABV3] (explaining that the Fourteenth Amendment was passed by Congress on June 13, 1866, and officially ratified on July 9, 1868); *see also* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

¶26 Section Three provides:

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

U.S. Const. amend. XIV, § 3.

¶27 In interpreting a constitutional provision, our goal is to prevent the evasion of the provision's legitimate operation and to effectuate the drafters' intent. *People v. Smith*, 2023 CO 40, ¶ 20, 531 P.3d 1051, 1055. To do so, we begin with

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Section Three's plain language, giving its terms their ordinary and popular meanings. *Id.* "To discern such meanings, we may consult dictionary definitions." *Id.*

¶28 If the language is clear and unambiguous, then we enforce it as written, and we need not turn to other tools of construction. *Id.* at ¶ 21, 531 P.3d at 1055. However, if the provision's language is reasonably susceptible of multiple interpretations, then it is ambiguous, and we may consider "the textual, structural, and historical evidence put forward by the parties," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and we will construe the provision "in light of the objective sought to be achieved and the mischief to be avoided," *Smith*, ¶ 20, 531 P.3d at 1055 (quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254).

¶29 These principles of constitutional interpretation apply to all sections of this opinion in which we address the meaning of any constitutional provision.

B. The State Court Has the Authority to Adjudicate a Challenge to Presidential Candidate Qualifications Under the Election Code

¶30 The Electors' claim is grounded in sections 1-4-1204 and 1-1-113 of the Election Code. They argue that it would be a breach of duty or other wrongful act under the Election Code for the Secretary to place President Trump on the presidential primary ballot because he is not a "qualified candidate" based on

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Section Three's disqualification. § 1-4-1203(2)(a), C.R.S. (2023). The Electors therefore seek an order pursuant to section 1-1-113 directing the Secretary not to list President Trump on the presidential primary ballot for the election to be held on March 5, 2024 (or any future ballot).

¶31 President Trump and CRSCC contend that Colorado courts lack jurisdiction over the Electors' claim and that the Electors cannot state a proper section 1-1-113 claim, in part because the Electors' claim is a "constitutional claim" that cannot be raised in a section 1-1-113 action under this court's decisions in *Frazier v. Williams*, 2017 CO 85, 401 P.3d 541, and *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478 (per curiam). CRSCC also argues that the Secretary lacks authority to interfere with a political party's decision-making process or to interfere with the party's First Amendment right of association to select its own candidates. Lastly, President Trump argues that the expedited procedures under section 1-1-113 are insufficient to evaluate the Electors' claim.

¶32 Before considering each of these arguments in turn, we first explain the standard of review for statutory interpretation and then provide an overview of the Election Code provisions at issue. Turning to Intervenors' contentions, we first conclude that the district court had jurisdiction to adjudicate the Electors' claim under section 1-1-113. But, recognizing that the ability to exercise *jurisdiction* here does not mean the Electors can state a *proper claim* under section 1-1-113, we

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explore whether states have the constitutional power to assess presidential qualifications. We conclude that they do, provided their legislatures have established such authority by statute. Analyzing the relevant provisions of the Election Code, we then conclude that the General Assembly has given Colorado courts the authority to assess presidential qualifications and, therefore, that the Electors have stated a proper claim under sections 1-4-1204 and 1-1-113. We next address Intervenors' related arguments and conclude that limiting the presidential primary ballot to constitutionally qualified candidates does not interfere with CRSCC's associational rights under the First Amendment. Finally, we conclude that section 1-1-113 provides sufficient due process for evaluating whether a candidate satisfies the constitutional qualifications for the office he or she seeks.

1. Standard of Review

¶33 We review the district court's interpretation of the relevant statutes de novo. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 16, 462 P.3d 1081, 1084. In doing so, "[o]ur primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574 (alteration in original) (quoting *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)). When a term is undefined, "we construe a statutory term in accordance with its ordinary or natural meaning." *Id.* (quoting *Cowen v. People*, 2018 CO 96, ¶ 14,

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431 P.3d 215, 218). If the language is clear, we apply it as written. *Ferrigno Warren*, ¶ 16, 462 P.3d at 1084.

¶34 If, however, the language is reasonably susceptible of multiple interpretations, we may turn to other tools of construction to guide our interpretation. *Cowen*, ¶ 12, 431 P.3d at 218. These may include consideration of the purpose of the statute, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. § 2-4-203(1), C.R.S. (2023). We also avoid constructions that would yield illogical or absurd results. *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶ 27, 531 P.3d 986, 993.

2. Presidential Primaries Under the Election Code

¶35 Before addressing the merits, we provide a brief overview of the Election Code's provisions relating to presidential primary elections. Article VII, Section 11 of the Colorado Constitution commands the General Assembly to "pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Pursuant to this constitutional mandate, the Secretary's duties under the Election Code include supervising the conduct of primary and general elections in the state and enforcing the provisions of the Election Code. § 1-1-107(1)(a)–(b), (5), C.R.S. (2023).

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¶36 Part 12 of article 4 of the Election Code governs presidential primary elections. *See generally* §§ 1-4-1201 to -1207, C.R.S. (2023).[3] Section 1-4-1201, C.R.S. (2023), explains that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." This reference indicates that the legislature envisioned part 12 as operating in harmony with

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[3] Before 1990, Colorado's political parties used caucuses to nominate their presidential candidates. That year, Colorado voters adopted a referred measure establishing presidential primary elections. *See generally* Ch. 42, sec. 1–2, §§ 1-4-1101 to -1104, 1990 Colo. Sess. Laws 311, 311–13. The legislature later amended these statutes as part of a 1992 repeal and reenactment of the Election Code. *See* Ch. 118, sec. 7, §§ 1-4-1201 to -1207, 1992 Colo. Sess. Laws 624, 696–99. These amendments added the precursor to current section 1-4-1204(4): they permitted "challenges concerning the right of any candidate's name to appear on the ballot of the presidential primary election" but directed the Secretary (not a court) to hear and assess the validity of such challenges. Ch. 118, sec. 7, § 1-4-1203(4), 1992 Colo. Sess. Laws at 697–98.

Colorado eliminated presidential primary elections in 2003. Ch. 24, sec. 6, 2003 Colo. Sess. Laws 495, 496. In 2016, however, voters restored such elections through Proposition 107, a citizen-initiated measure. Proposition 107, Ballot Initiative No. 140, https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/7TX8-J59L]. Proposition 107 largely preserved the pre-2003 version of section 1-4-1204(4) that vested the Secretary with the power to hear challenges to the listing of presidential primary candidates. *Id.* at 61. In a 2017 clean-up bill, the General Assembly adopted several amendments to the citizen-initiated measure "to facilitate the effective implementation of the state's election laws." S.B. 17-305, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). Relevant here, the legislature directed challenges under section 1-4-1204(4) away from the Secretary and instead to the district court through section 1-1-113 proceedings. *Id.* at 4–5. Section 1-4-1204(4) has remained otherwise unchanged since its reenactment.

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federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.

¶37 The Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election."[4] (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary.[5] *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized

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[4] In full, the quoted language reads: "[E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election." § 1-4-1203(2)(a). The phrase "pursuant to this section" sheds no light on the meaning of "qualified candidate." Section 1-4-1203 simply establishes the mechanics of presidential primaries, such as the date of the primary, elector party affiliation rules, and the content of primary ballots. § 1-4-1203(1), (2)(a), (4). Thus, "pursuant to this section" modifies the "presidential primary election" in which qualified candidates are entitled to participate: an election conducted in accordance with section 1-4-1203.

[5] In this context, the legislature appears to have used "statement" and "affidavit" interchangeably.

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"statement of intent" in order for votes to be counted for that candidate and stating that "such affidavit" must be accompanied by the requisite filing fee).

¶38 The Secretary's statement-of-intent form for a major party presidential primary candidate requires the candidate to affirm via checkboxes that he or she meets the qualifications set forth in Article II of the U.S. Constitution for the office of President; specifically, that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. Colo. Sec'y of State, *Major Party Candidate Statement of Intent for Presidential Primary*, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/YA3X-3K9T] ("Intent Form"); *see also* U.S. Const. art. II, § 1, cl. 5. The form further requires the candidate to sign an affirmation that states, "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*."[6] Intent Form, *supra* (emphasis added). No party has challenged the Secretary's authority to require candidates to provide this information on the statement-of-intent form.

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[6] The Affidavit of Intent for write-in candidates for the presidential primary has the same requirements. *Affidavit of Intent for Presidential Primary Write-In Designation*, Colo. Sec'y of State (last updated June 20, 2023), https://www.sos.state.co.us/pubs/elections/Candidates/files/PresidentialPrimaryWrite-In.pdf [https://perma.cc/V83P-HLAD].

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¶39 Section 1-4-1204(1) requires the Secretary to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots" not later than sixty days before the presidential primary election. For the 2024 election cycle, that deadline is January 5, 2024.

¶40 Section 1-4-1204(1) further states:

> The only candidates whose names shall be placed on ballots for the election shall be those candidates who:
>
> . . . .
>
> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors . . . .

For the 2024 election cycle, the deadline to submit these items was December 11, 2023.

¶41 Section 1-4-1204(4) allows for "challenge[s] to the listing of any candidate on the presidential primary election ballot." Any such challenge must be brought "no later than five days after the filing deadline for candidates" and "must provide notice . . . of the alleged impropriety that gives rise to the complaint." *Id.* The district court must hold a hearing no later than five days after the challenge is filed

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to "assess the validity of all alleged improprieties." *Id.* The statute does not limit the length or content of the hearing; it does, however, require the district court to issue findings of fact and conclusions of law no later than forty-eight hours after the hearing concludes. *Id.* "The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." *Id.*

¶42 Challenges under section 1-4-1204(4) must be brought through the special statutory procedure found in section 1-1-113 for adjudicating controversies that arise under the Election Code. § 1-4-1204(4) (providing that any challenge to the listing of a candidate on the presidential primary ballot "must be made in writing and filed with the district court in accordance with section 1-1-113(1)" and "any order entered by the district court may be reviewed [by the supreme court] in accordance with section 1-1-113(3)").

¶43 Section 1-1-113 has deep roots in Colorado election law. It originated in an 1894 amendment to Colorado's Australian Ballot Law, first adopted by the Eighth General Assembly in 1891. Ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65. Much like its present-day counterpart, the original provision established procedures for adjudicating controversies between election officials and any candidate, political party officers or representatives, or persons making nominations.[7] *Id.*

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[7] Over time, the legislature amended the law to strengthen the courts' power to resolve election disputes. For example, in 1910, the General Assembly passed

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¶44 The current version of section 1-1-113 establishes (with exceptions not relevant here) "the *exclusive method* for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4) (emphasis added). It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code *has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith *perform the duty or to desist from the wrongful act*

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primary election legislation (not then applicable to presidential elections) authorizing district courts to accept verified petitions alleging, among other things, "that the name of any person has been or is about to be wrongfully placed upon" primary ballots and to order the Secretary (among other election officials) to correct such errors. Ch. 4, § 25, 1910 Colo. Sess. Laws. 15, 33. The 1910 law also gave this court the power to review the district court's decision. *Id.* at 34; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 657 (Colo. 1924) (confirming that if a proper entity "has violated a duty with which it is charged under the act, the court has power to direct it to correct the wrong").

In 1963, the General Assembly repealed and reenacted Colorado's Election Code. *See generally* Ch. 118, 1963 Colo. Sess. Laws 360. The 1963 code allowed for "any elector" to show "by verified petition . . . that any neglect of duty or wrongful act by any person charged with a duty under this act has occurred or is about to occur," mirroring the language in today's section 1-1-113. Ch. 118, § 203, 1963 Colo. Sess. Laws at 457. The legislature's next reenactment of the code in 1992 codified this procedure at section 1-1-113. Ch. 118, sec. 1, § 1-1-113, 1992 Colo. Sess. Laws 624, 635.

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> or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphases added).

¶45 Section 1-1-113 proceedings also provide for expedited, albeit discretionary, appellate review in this court. § 1-1-113(3). Either party may seek review from this court within three days after the district court proceedings conclude. *Id.* If this court declines jurisdiction of the case, the district court's decision is final and is not subject to further appellate review. *Id.*

¶46 Although Colorado's expedited statutory procedure for litigating election disputes may be unfamiliar nationally, our courts, particularly the Denver District Court (the proper venue when the Secretary is the named respondent), are accustomed to section 1-1-113 litigation. Such cases arise during virtually every election cycle, and this court has exercised jurisdiction many times to review these disputes. *E.g.*, *Kuhn*, ¶ 1, 418 P.3d at 480; *Frazier*, ¶ 1, 401 P.3d at 542; *Carson v. Reiner*, 2016 CO 38, ¶ 1, 370 P.3d 1137, 1138; *Hanlen v. Gessler*, 2014 CO 24, ¶ 3, 333 P.3d 41, 42. Moreover, it is not uncommon for section 1-1-113 cases to require courts to take evidence and grapple with complex legal issues. *E.g.*, *Ferrigno Warren*, ¶¶ 9–13, 462 P.3d at 1083–84 (describing a district court hearing, held one month after the petitioner filed her verified petition and after the parties filed briefing, to determine whether "substantial compliance" was the appropriate standard for a minimum signature requirement, how to apply that standard, and

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whether, based on a four-factor test, a prospective U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 4, 15–18, 418 P.3d at 480–82 (describing a district court hearing to assess evidence and testimony concerning the residency of seven circulators of a petition to reelect a congressional representative); *Meyer v. Lamm*, 846 P.2d 862, 867 (Colo. 1993) (requiring an evidentiary hearing in district court that involved, among other things, the content of ballots cast for a write-in candidate). Even early cases recognized that the original 1894 provision "contemplate[d] the taking of evidence where the issues require[d] it." *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897).

3. The District Court Had Jurisdiction to Adjudicate the Electors' Claim Under the Election Code

¶47 President Trump argues that the district court lacked jurisdiction over the Electors' section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications. A district court has jurisdiction pursuant to section 1-1-113(1) when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act.

¶48 The district court plainly had jurisdiction under section 1-1-113 to hear the Electors' claim. First, the Electors are "eligible elector[s]" within the meaning of the Election Code because, as Republican and unaffiliated voters, they are

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"person[s] who meet[] the specific requirements for voting at a specific election"; namely, the Republican presidential primary election. § 1-1-104(16), C.R.S. (2023); *see also* § 1-4-1203(2)(b) (providing that unaffiliated voters may vote in presidential primary elections); § 1-7-201(1), C.R.S. (2023) (identifying eligible electors for the purpose of primary elections). Second, the Electors timely filed their verified petition under sections 1-1-113 and 1-4-1204(4) in the proper district court. Third, their petition was filed against the Secretary, an election official charged with duties under the Election Code. *See* § 1-1-107 (prescribing the powers and duties of the Secretary); § 1-4-1204(1) ("[T]he secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots."). And fourth, the petition alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not constitutionally qualified to hold office.

¶49 Though it does not affect the district court's *jurisdiction*, President Trump's assertion that the Secretary does not have a duty under the Election Code to determine a candidate's constitutional qualification raises the question of whether the Electors presented a *proper claim*. To answer that question, we must first determine whether, generally, states have the authority to determine presidential qualifications.

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4. States Have the Authority to Assess Presidential Candidates' Qualifications

¶50 "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution delegates to states the authority to prescribe the "Times, Places and Manner" of holding congressional elections, U.S. Const. art. I, § 4, cl. 1, and states retain the power to regulate their own elections, *Burdick*, 504 U.S. at 433. States exercise these powers through "comprehensive and sometimes complex election codes," regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("*Celebrezze*"); *see also, e.g.*, § 1-4-501(1), C.R.S. (2023) (setting qualifications for state office candidates). These powers are uncontroversial and well-explored in U.S. Supreme Court case law.

¶51 But does the U.S. Constitution authorize states to assess the constitutional qualifications of presidential candidates? We conclude that it does.

¶52 Under Article II, Section 1, each state is authorized to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. So long as a state's exercise of its appointment power does not run afoul of another constitutional constraint, that power is plenary. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

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¶53 But voters no longer choose between slates of electors on Election Day. *Chiafalo*, 140 S. Ct. at 2321. Instead, they vote for presidential candidates who serve as proxies for their pledged electors. *Id.* Accordingly, states exercise their plenary appointment power not only to regulate the electors themselves, but also to regulate candidate access to presidential ballots. Absent a separate constitutional constraint, then, states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President. And nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to such candidates. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

¶54 No party in this case has challenged the Secretary's authority to require a presidential primary candidate to confirm on the required statement-of-intent form that he or she meets the Article II requirements of age, residency, and citizenship, and to further attest that he or she "meet[s] all qualifications for the office prescribed by law." Moreover, several courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots. *See id.* (upholding California's refusal to place a twenty-seven-year-old candidate on the presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 948–49 (10th Cir. 2012) (affirming the Secretary's decision to exclude a naturalized citizen from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp.

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109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois's exclusion of a thirty-one-year-old candidate from the presidential ballot).

¶55 As then-Judge Gorsuch recognized in *Hassan*, it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F. App'x at 948.

¶56 The question then becomes whether Colorado has exercised this power through the Election Code. We conclude that it has. Section 1-4-1204(4) is Colorado's vehicle for advancing these state interests. When eligible electors challenge the Secretary's listing on the presidential primary ballot of a candidate who is not constitutionally qualified to assume office, section 1-4-1204(4), as exercised through a proceeding under section 1-1-113, offers an exclusive remedy under the Election Code. *See* § 1-1-113(4).

5. The Electors Have Stated a Proper Claim That Is Not Precluded by *Frazier* and *Kuhn*

¶57 President Trump argues that the Electors' claim cannot be properly litigated in a section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications and because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. Although we agree that the Secretary has no duty to independently investigate the qualifications of a presidential primary candidate, we conclude that the Electors may

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nevertheless challenge a candidate's qualifications under section 1-4-1204(4), and that the Electors' claim here is not a "constitutional claim" precluded by our decisions in *Frazier* and *Kuhn*.

¶58 In presidential primary elections, the Secretary's duty is to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." § 1-4-1204(1). The conditions that must be satisfied before she can exercise this duty are limited to timely receiving (1) confirmation that the prospective candidate is a "bona fide candidate" under the party's rules, (2) a notarized statement of intent from the candidate, and (3) the requisite filing fee or a petition signed by at least 5,000 eligible electors affiliated with the candidate's political party who reside in Colorado. § 1-4-1204(1)(b)–(c).

¶59 Where a candidate does not submit (or cannot comply with) the required attestations on the statement of intent form, the Secretary cannot list the candidate on the ballot. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (D. Colo. 2012), *aff'd* 495 F. App'x at 948. But if the contents of a signed and notarized statement of intent appear facially complete (i.e., the candidate has filled out the Secretary's form confirming that he or she meets the Article II requirements of age, residency, and citizenship, and further attesting that he or she "meet[s] all qualifications for the office prescribed by law"), the Secretary has no duty to further investigate the

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accuracy or validity of the information the prospective candidate has supplied.[8] To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

¶60 The fact that the Secretary has complied with her section 1-4-1204(1) duties does not, however, foreclose a challenge under section 1-4-1204(4). As discussed above, section 1-4-1204(4) permits "[a]ny challenge to the listing of any candidate on the presidential primary election ballot," using section 1-1-113(1) as a procedural vehicle. Section 1-1-113(1), in turn, creates a cause of action for electors alleging a breach of duty *or other wrongful act* under the code. *See Frazier*, ¶ 3, 401 P.3d at 542 (construing "wrongful act" in section 1-1-113 as limited to a wrongful act under the Election Code). Section 1-1-113 then requires the district court—not the election official—to adjudicate an eligible elector's challenge to a candidate's eligibility. *Carson*, ¶ 8, 370 P.3d at 1139 (observing that the Election Code reflects an intent for challenges to the qualifications of a candidate to be

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[8] In contrast, with respect to elections for state office, section 1-4-501(1), C.R.S. (2023), provides that "[t]he designated election official shall not certify the name of any designee or candidate . . . *who the designated election official determines is not qualified* to hold the office that he or she seeks based on residency requirements." (Emphasis added.) This provision for state office expressly charges the Secretary with a duty to investigate whether a candidate "meets any requirements of the office relating to registration, residence, or property ownership," among others. *Id.*

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resolved by the courts); *Hanlen*, ¶ 40, 333 P.3d at 50 ("[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility.").

¶61 As we have explained, the Secretary has complied with her limited duty to accept President Trump's properly completed paperwork. But the Electors have alleged an impending "wrongful act," which is "more expansive than a 'breach' or 'neglect of duty.'" *Frazier*, ¶ 16, 401 P.3d at 545 (quoting § 1-1-113(1)). Indeed, section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code," *Carson*, ¶ 17, 370 P.3d at 1141, including any act that is "inconsistent with the Election Code," *Frazier*, ¶ 16, 401 P.3d at 545.

¶62 We conclude that certifying an unqualified candidate to the presidential primary ballot constitutes a "wrongful act" that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code. Nothing in section 1-4-1204(4) limits challenges under that provision to those based on a breach of the Secretary's duties under section 1-4-1204. And section 1-4-1203(2)(a) clearly limits participation in the presidential primary to political parties fielding "qualified" candidates. Although section 1-4-1203(2)(a) does not define "qualified," nearby provisions regarding write-in candidates indicate that "qualified" refers to a candidate's qualifications for office. As with bona fide major party candidates under section 1-4-1204(1), write-in candidates for the presidential primary must

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file a "notarized candidate statement of intent." § 1-4-1205. Under the Election Code, such statements for all write-in candidates (regardless of the type of election) must indicate that the candidate "desires the office and is *qualified* to assume its duties if elected." § 1-4-1101(1) (emphasis added). The Election Code's explicit requirement that a write-in candidate be "qualified" to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be "qualified" in the same manner.[9]

¶63 Reading the Election Code as a whole, then, we conclude that "qualified" in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President. It has to, as section 1-4-1203(2)(a) supplies the only textual basis in the Election Code for the Secretary's authority to require a presidential primary candidate to attest to his or her qualifications for office in the candidate statement (or affidavit) of intent. Moreover, to read "qualified" *not* to encompass federal constitutional qualifications would undermine the purpose of the Election Code—"to secure the

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[9] This interpretation is further supported by the Election Code's treatment of uncontested primaries. The Election Code allows the Secretary to cancel a primary when every political party has no more than one affiliated candidate, whether that candidate is certified to the presidential primary ballot pursuant to section 1-4-1204(1) or is a write-in candidate entering under section 1-4-1205. § 1-4-1203(5). Because the General Assembly plainly treats such candidates as equivalent for purposes of 1-4-1203(5), we conclude that the legislature also viewed the "qualified" requirement in both provisions as equivalent.

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purity of elections"—while compromising the Secretary's ability to advance that purpose. Colo. Const. art. VII, § 11; § 1-1-107(1), (5).

¶64 We therefore reject such an interpretation as contrary to the purpose of the Election Code. Instead, we conclude that, under the Election Code, "qualified" candidates for the presidential primary are those who, at a minimum, are qualified to hold office under the provisions of the U.S. Constitution.

¶65 We recognize that the Supreme Court has twice declined to address whether Section Three—which *disqualifies* an oath-breaking insurrectionist from *holding* office—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute "qualification[s]" for office because "both sides agree[d] that [the candidate] was not ineligible under" Section Three or any other, similar provision); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of *additional* qualifications for office). But lower courts, when presented squarely with the question, have all but concluded that Section Three is the functional equivalent of a qualification for office. *See, e.g.*, *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) ("Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct

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from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected."); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (N.M. Dist. Ct. Sept. 6, 2022) ("Section Three imposes a qualification for public office, much like an age or residency requirement . . . .").

¶66 We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office, at least for the purposes of the section 1-1-113 claim here. Either way, it would be a wrongful act for the Secretary to list a candidate on the presidential primary ballot who is not "qualified" to assume the duties of the office. Moreover, because Section Three is a "part of the text of the Constitution," assessing a candidate's compliance with it for purposes of determining their eligibility for office does not improperly "add qualifications to those that appear in the Constitution." *U.S. Term Limits*, 514 U.S. at 787 n.2. Doing so merely renders the list of constitutional qualifications more complete.

¶67 Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for* or *being elected to* office because Section Three bars individuals only from *holding* office. *Hassan* specifically rejected any such distinction. 495 Fed. App'x at 948. There, the candidate argued that even if Article II "properly holds him ineligible to *assume the office* of president," Colorado could

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not "deny him *a place on the ballot*." *Id.* The *Hassan* panel concluded otherwise. *Id.* In any event, the provisions in the Election Code governing presidential primary elections do not recognize such a distinction. Rather, as discussed above, those provisions require all presidential primary candidates to be constitutionally "qualified" *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1).

¶68 Were we to adopt President Trump's view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II. *See* U.S. Const. art. II, § 1, cl. 5 (setting forth the qualifications to be "*eligible to the Office of President*" (emphasis added)). It would mean that the state would be powerless to exclude a twenty-eight-year-old, a non-resident of the United States, or even a foreign national from the presidential primary ballot in Colorado. Yet, as noted, several courts have upheld states' exclusion from ballots of presidential candidates who fail to meet the qualifications for office under Article II. *See Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App'x at 948; *Ogilvie*, 357 F. Supp. at 113.

¶69 Lastly, we reject President Trump and CRSCC's argument that state courts may not hear the Electors' claim because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. *See Frazier*, ¶ 3, 401 P.3d at 542;

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Kuhn, ¶ 55, 418 P.3d at 489. The Electors have not asserted a constitutional claim, so *Frazier* and *Kuhn* do not control here.

¶70 Both *Frazier* and *Kuhn* addressed whether a petitioner could shoehorn a claim challenging the constitutionality of the Election Code into a section 1-1-113 proceeding. *Frazier*, ¶ 6, 401 P.3d at 543; *Kuhn*, ¶ 55, 418 P.3d at 489. In *Frazier*, we concluded that section 1-1-113 is not a proper vehicle to resolve claims under 42 U.S.C. § 1983 because they do not arise under the Election Code and because the sole remedy available under section 1-1-113 is a court order directing compliance with the Election Code. *Frazier*, ¶¶ 17–18, 401 P.3d at 545. Similarly, in *Kuhn*, we held that to the extent the candidate sought to challenge the constitutionality of the petition circulator residency requirement under the Election Code, the court lacked jurisdiction to address such arguments in a section 1-1-113 proceeding. ¶ 55, 418 P.3d at 489.

¶71 Here, however, the Electors do not challenge the constitutionality of the Election Code. Nor do they allege a violation of the Constitution. Instead, they allege a "wrongful act" under section 1-1-113. That the Electors' claim has constitutional implications or requires interpretation of a constitutional provision does not make it a separate "constitutional claim" of the sort prohibited by *Frazier* and *Kuhn*. And neither President Trump nor CRSCC suggests that a section 1-1-113 claim cannot have constitutional implications. Indeed, as the Secretary

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notes in her brief, there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues."

¶72 As discussed above, the Electors' claim is that the Secretary will commit a wrongful act under the Election Code if she lists a candidate on the presidential primary ballot who is not qualified for office. While this claim requires resolving constitutional questions, it remains a challenge brought by eligible electors against an election official regarding an alleged wrongful act under the Election Code. Section 1-1-113 is the "exclusive" vehicle for litigating such challenges prior to an election; the Electors have no other viable option. § 1-1-113(4).

6. Limiting Presidential Primary Ballot Access to Constitutionally Qualified Candidates Does Not Interfere with CRSCC's First Amendment Rights

¶73 CRSCC argues that section 1-4-1204(1)(b) vests it with the sole authority to determine who the Republican nominees will be on a ballot—a reflection, CRSCC contends, of its constitutional right to freely associate and exercise its political decisions. *See* U.S. Const. amend. I; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."). Taken to its logical end, CRSCC's position is that it has a First Amendment right to deem any person to be a "bona fide candidate" pursuant to their party rules, § 1-4-1204(1)(b), and subsequently mandate that individual's

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placement on the presidential ballot, without regard to that candidate's age, residency, citizenship, *see* U.S. Const. art. II, § 1, cl. 5, or even whether the candidate has already served two terms as President, *see id.* at amend. XXII ("No person shall be elected to the office of the President more than twice . . . ."). We disagree with this position.

¶74 As a threshold matter, we acknowledge that the district court dismissed CRSCC's argument on this issue, ruling that it raised a separate constitutional claim improperly litigated in a section 1-1-113 action. *Anderson*, ¶ 12. We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113. *See Kuhn*, ¶ 55, 418 P.3d at 489; *Frazier*, ¶ 3, 401 P.3d at 542. But to the extent that CRSCC argues in its Answer Brief that the Secretary lacks authority to interfere with CRSCC's associational rights, we respond briefly to those concerns.

¶75 We distinguish between (1) CRSCC's right to decide the candidates with whom it affiliates and recognizes as bona fide, and (2) CRSCC's ability to place candidates on the presidential primary ballot. CRSCC's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and "[a]s a result, political parties' government, structure,

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and activities enjoy constitutional protection," *Timmons*, 520 U.S. at 358. In other words, CRSCC is well within its rights to choose with whom it affiliates and to decide which candidates it recognizes as bona fide. "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359 (noting that a "particular candidate might be ineligible for office," for example).

¶76 As a practical matter, any state election law governing the selection and eligibility of candidates affects, to some degree, the fundamental right to associate with others for political ends. *Celebrezze*, 460 U.S. at 788. Even so, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¶77 Accordingly, to determine if a state election law impermissibly burdens a party's associational rights, courts must weigh the "'character and magnitude'" of the burden imposed by the rule "against the interests the State contends justify that burden," and then consider whether the state's interests make the burden necessary. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Limiting ballot access "to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick*, 504 U.S. at 440 n.10.

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¶78 Here, the Election Code limits presidential primary ballot access to only qualified candidates. Such a restriction is an "eminently reasonable" regulation that does not severely burden CRSCC's associational rights. To hold otherwise would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of "political expression" or "political choice," that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land. U.S. Const. art. VI, cl. 2.

7. Section 1-1-113 Proceedings Provide Adequate Due Process for Litigants

¶79 Lastly, President Trump asserts that section 1-1-113 is not a valid way to litigate complex constitutional legal and factual issues. He complains of unfairness inherent in the expedited procedures that section 1-1-113 demands. But President Trump's argument disregards how the Electors' claim proceeded here.

¶80 Initially, we note that to the extent President Trump purports to challenge the constitutionality of section 1-1-113 under the Fourteenth Amendment's Due Process clause as a defense to the Electors' claim, he raises precisely the type of independent constitutional claim he recognizes is barred by *Kuhn*. *See Kuhn*, ¶ 55, 418 P.3d at 489. As discussed above, constitutional challenges to provisions of the Election Code fall outside the scope of a proper section 1-1-113 challenge because these expedited statutory proceedings entertain only one type of claim—election

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officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code. *See Kuhn*, ¶ 55, 418 P.3d at 489; § 1-1-113(1); *accord Frazier*, ¶¶ 17–18, 401 P.3d at 545.

¶81 Furthermore, because section 1-1-113 proceedings are designed to address election-related disputes, they move quickly out of necessity. *Frazier*, ¶ 11, 401 P.3d at 544 ("Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Lawyers who practice in this area are well-aware of this. Looming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot. And a state's interest in "protecting the integrity of the election process and avoiding voter confusion," *Lindsay*, 750 F.3d at 1063 (citing *Timmons*, 520 U.S. at 364–65), allows a state to expedite the process by which a candidate's qualifications, once challenged, are subsequently determined. That the form of section 1-1-113 proceedings reflects their function—to expeditiously resolve pre-election disputes over an election official's wrongful act—does not mean these proceedings lack due process.

¶82 Nor does the need for expedited proceedings in election disputes preclude a district court from using traditional means of case management in a section

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1-1-113 proceeding to construct a schedule that accommodates legally or factually complex issues. *See Ferrigno Warren*, ¶¶ 8–13, 462 P.3d at 1083 (explaining that the district court ordered briefing and held a hearing one month after the candidate filed a section 1-1-113 petition). President Trump contends that the expedited nature of section 1-1-113 proceedings do not provide time for the kinds of procedures he believes the complexities of this case require—for example, filing C.R.C.P. 12 motions testing the legal sufficiency of the Electors' claims before the litigation proceeds, allowing for extended discovery and disclosure procedures, and providing the opportunity to depose expert witnesses. But he has never specifically articulated how the district court's approach lacked due process. He certainly does not contend that he was prejudiced because the district court moved too *slowly* or failed to resolve the case in a week. He made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered. Moreover, his arguments throughout this case have focused predominantly on questions of law and not on disputed issues of material fact.

¶83 In addition, the district court took many steps to address the complexities of the case. For example, the first hearing in this case was a status conference on September 18—four days after the case was reopened after being remanded from federal court. In recognition of the complexity of the case, the district court—with the parties' input—adopted a civil-case-management approach to the litigation

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that afforded the parties the opportunity to be heard on a wide range of substantive issues.

¶84 The district court's case-management approach worked. After permitting multiple intervenors to participate, the district court allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged. It then issued three substantive rulings on these motions, including an omnibus ruling addressing four of Intervenors' motions, all in advance of the trial. The trial took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window section 1-4-1204(4) requires.

¶85 In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action, substantially complying with statutory deadlines while demonstrating the flexibility inherent in such a proceeding to address the various issues raised by Intervenors. And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense. If any case suggests that it is *not* impossible to "fully litigate a

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complex constitutional issue within days or weeks," this is it. *Frazier*, ¶ 18 n.3, 401 P.3d at 545 n.3.

¶86 For these reasons, we conclude that the Election Code allows Colorado's courts, through challenges brought under sections 1-4-1204(4) and 1-1-113, to assess the constitutional qualifications of a candidate—and to order the Secretary to exclude from the ballot candidates who are not qualified. These provisions advance Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process" by allowing the Secretary to "exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948. Moreover, these provisions neither infringe on a political party's associational rights nor compromise the validity of a court's rulings on complex factual and legal issues. Rather, they provide a robust vehicle through which to protect the purity of Colorado's elections.[10] *See* Colo. Const. art. VII, § 11.

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[10] We note that Colorado's Election Code differs from other states' election laws. Michigan's election law, for example, does not include the term "qualified candidate," does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State's responsibilities in the context of presidential primary elections. *See* Mich. Comp. Laws §§ 168.613, 168.620a (governing presidential primary elections in Michigan). The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the "affidavit of identity" that other candidates must submit to indicate that they "meet[] the constitutional and statutory qualifications for the office sought." *See Davis v. Wayne Cnty. Election*

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¶87 Because the Electors have properly invoked Colorado's section 1-1-113 process to challenge the listing of President Trump on the presidential primary ballot as a wrongful act, we proceed to the other threshold questions raised by Intervenors.

C. The Disqualification Provision of Section Three Attaches Without Congressional Action

¶88 The Electors' challenge to the Secretary's ability to certify President Trump as a qualified candidate presumes that Section Three is "self-executing" in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress. Because Congress has not authorized state courts to enforce Section Three, Intervenors argue that this court may not consider President Trump's alleged disqualification under Section Three in this section 1-1-113 proceeding.[11] We disagree.

Comm'n, No. 368615, 2023 WL 8656163, at *14 (Mich. Ct. App. Dec. 14, 2023) (unpublished order) (quoting Mich. Comp. Laws § 168.558(1)–(2)). Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate. *Id.* at *16.

[11] Intervenors and their supporting amici occasionally assert that the Electors' claim is brought pursuant to Section Three and that the Section is not self-executing in the sense that it does not create an independent private right of action. But as mentioned above, the Electors do not bring any claim directly under Section Three. Their claim is brought under Colorado's Election Code, and resolution of that claim requires an examination of President Trump's qualifications in light of

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¶89 The only mention of congressional power in Section Three is that "Congress may by a vote of two-thirds of each House, remove" the disqualification of a former officer who had "engaged in insurrection." U.S. Const. amend. XIV, § 3. Section Three does not determine who decides whether the disqualification has attached in the first place.

¶90 Intervenors, however, look to Section Five of the Fourteenth Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," to argue that congressional authorization is necessary for any enforcement of Section Three. *Id.* at § 5. This argument does not withstand scrutiny.

¶91 The Supreme Court has said that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). To be sure, in the *Civil Rights Cases*, the Court was directly focused on the Thirteenth Amendment, so this statement could be described as dicta. But an examination of the Thirteenth, Fourteenth, and Fifteenth Amendments

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Section Three. The question of "self-execution" that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

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("Reconstruction Amendments") and interpretation of them supports the accuracy and broader significance of the statement.

¶92 Section Three is one of four substantive sections of the Fourteenth Amendment:

- Section One: "No State *shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor *shall* any State deprive any person of life, liberty, or property, without due process of law . . . ."
- Section Two: "Representatives *shall* be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."
- Section Three: "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."
- Section Four: "The validity of the public debt of the United States . . . *shall* not be questioned."

U.S. Const. amend. XIV, §§ 1–4 (emphases added). Section Five is then an enforcement provision that applies to each of these substantive provisions. *Id.* at § 5. And yet, the Supreme Court has held that Section One is self-executing. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds*

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as recognized in Ramirez v. Collier, 595 U.S. 411, 424 (2022). Thus, while Congress *may* enact enforcement legislation pursuant to Section Five, congressional action is not *required* to give effect to the constitutional provision. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five gives Congress authority to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but not disputing that the Fourteenth Amendment is self-executing).

¶93 Section Two, moreover, was enacted to eliminate the constitutional compromise by which an enslaved person was counted as only three-fifths of a person for purposes of legislative apportionment. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,* 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 51–52), https://ssrn.com/abstract=4532751. The self-executing nature of that section has never been called into question, and in the reapportionment following passage of the Fourteenth Amendment, Congress simply treated the change as having occurred. *See* The Apportionment Act of 1872, 17 Stat. 28 (42nd Congress) (apportioning Representatives to the various states based on Section Two's command without mentioning, or purporting to enforce, the Fourteenth Amendment). Similarly, Congress never passed enabling legislation to effectuate Section Four.

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¶94 The same is true for the Thirteenth Amendment, which abolished slavery and involuntary servitude. Section One provides the substantive provision: "Neither slavery nor involuntary servitude . . . *shall* exist within the United States . . . ." U.S. Const. amend. XIII, § 1 (emphasis added). Section Two provides the enforcement provision: "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2. Discussing this Amendment, the Supreme Court recognized that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it," but that "[b]y its own unaided force it abolished slavery" and was "undoubtedly self-executing without any ancillary legislation." *The Civil Rights Cases*, 109 U.S. at 20.

¶95 Like the other Reconstruction Amendments, the Fifteenth Amendment, which established universal male suffrage, contains a substantive provision—"[t]he right of citizens of the United States to vote *shall* not be denied or abridged . . . on account of race, color, or previous condition of servitude"—followed by an enforcement provision—"[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, §§ 1–2 (emphasis added). As with Section One of both the Thirteenth and Fourteenth Amendments, the Supreme Court has explicitly confirmed that the Fifteenth Amendment is self-executing. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Section One of the Fifteenth Amendment "has always been

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treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice").

¶96 There is no textual evidence that Congress intended Section Three to be any different.[12] Furthermore, we agree with the Electors that interpreting any of the Reconstruction Amendments, given their identical structure, as not self-executing would lead to absurd results. If these Amendments required legislation to make them operative, then Congress could nullify them by simply not passing enacting legislation. The result of such inaction would mean that slavery remains legal; Black citizens would be counted as less than full citizens for reapportionment; non-white male voters could be disenfranchised; and any individual who engaged in insurrection against the government would nonetheless be able to serve in the

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[12] It would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not. *See* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* at § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* at art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

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government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent.

¶97 Intervenors argue that certain historical evidence requires a different conclusion as to Section Three. We generally turn to historical and other extrinsic evidence only when the text is ambiguous, which it is not here. Nonetheless, we will consider these historical claims in the interest of providing a thorough review.

¶98 Intervenors first highlight a statement Representative Thaddeus Stevens made during the Congressional framing debates: "[Section Three] will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866); *see also* Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment 42 (Oct. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838. But as one of the amici points out, this statement referenced a deleted portion of Section Three that disenfranchised all former Confederates until 1870. In any event, given the complex patchwork of perspectives and intentions expressed when drafting these constitutional provisions, we refuse to cherry-pick individual statements from extensive debates to ground our analysis. *See generally* Baude & Paulsen, *supra* (manuscript at 39–53).

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¶99 Intervenors next direct us to the non-binding opinion written by Chief Justice Salmon Chase while he was riding circuit: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").[13] There, Caesar Griffin challenged his criminal conviction as null and void because under Section Three, the judge who had entered his conviction was disqualified from holding judicial office, having formerly sworn a relevant oath as a state legislator and then engaged in insurrection by continuing to serve as a legislator in Virginia's Confederate government. *Id.* at 22–23. It was undisputed that the judge fell within Section Three's scope, but the question Chief Justice Chase sought to answer was whether Section Three "operat[ed] directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

¶100 In interpreting the scope of the provision, Chief Justice Chase observed that, after the end of the Civil War but before the Fourteenth Amendment was ratified, many southern states had established, with the approval of the federal government, provisional governments to keep society functioning. *Id.* at 25; *see*

[13] Between 1789 and 1911, U.S. Supreme Court justices traveled across the country and, together with district court judges, sat on circuit courts to decide cases. *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). Decisions written by the justices while they were riding circuit were not decisions of the Supreme Court.

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also Baude & Paulsen, *supra* (manuscript at 36). And, within these provisional governments, many offices were filled with citizens who would fall within Section Three's scope. *Griffin's Case*, 11 F. Cas. at 25. Chief Justice Chase observed that giving Section Three a literal construction, as Griffin advocated, would "annul all official acts performed by these officers. No sentence, no judgment, no decree, . . . no official act [would be] of the least validity." *Id.* He reasoned that it would be "impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states." *Id.*

¶101 And so, Chief Justice Chase turned to what he termed the "argument from inconveniences" and the interpretive canon that, when faced with two or more reasonable interpretations, the interpretation "is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* He then explained that, while it was not "improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office," it could also "hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id.* at 25–26. To find the provision self-executing under the circumstances, he argued, would be contrary to due process because it would, "at

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once without trial, deprive[] a whole class of persons of offices held by them." *Id.* at 26.

¶102 Chief Justice Chase therefore concluded that the object of the Amendment—"to exclude from certain offices a certain class of persons"—was impossible to do "by a simple declaration, whether in the constitution or in an act of congress . . . . For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* To accomplish "this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable; and . . . can only be provided for by congress." *Id.* Thus, Chief Justice Chase concluded that Section Three was not self-executing. *Id.*

¶103 *Griffin's Case* concludes that congressional action is needed before Section Three disqualification attaches, but this one case does not persuade us of that point. Intervenors and amici assert that *Griffin's Case* "remains good law and has been repeatedly relied on." Because the case is not binding on us, the fact that it has not been reversed is of no particular significance. And the cases that cite it do so either with no analysis—*e.g.*, *State v. Buckley*, 54 Ala. 599 (1875), and *Rothermel v. Meyerle*, 136 Pa. 250 (1890)—or for the inapposite proposition that Section Three does not create a self-executing cause of action—*e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978), and *Hansen v. Finchem*, CV 2022-004321 (Sup. Ct.

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of Ariz., Maricopa Cnty. Apr. 22, 2022), *aff'd on other grounds,* 2022 WL 1468157 (May 9, 2022). Moreover, *Griffin's Case* has been the subject of persuasive criticism. *See, e.g.*, Magliocca, *Amnesty and Section Three*, *supra*, at 105–08 (critiquing the case because the other provisions of the Fourteenth Amendment were understood as self-executing and the notion that Section Three was not self-executing was inconsistent with congressional behavior at the time); Baude & Paulsen, *supra* (manuscript at 37–49) (criticizing Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction).

¶104 Although we do not find *Griffin's Case* compelling, we agree with Chief Justice Chase that "it must be ascertained what particular individuals are embraced by the definition." 11 F. Cas. at 26. While the disqualification of Section Three attaches automatically, the determination that such an attachment has occurred must be made before the disqualification holds meaning. And Congress has the power under Section Five to establish a process for making that determination. But the fact that Congress *may* establish such a process does not mean that disqualification pursuant to Section Three can be determined *only* through a process established by Congress. Here, the Colorado legislature has established a process—a court proceeding pursuant to section 1-1-113—to make the determination whether a candidate is qualified to be placed on the presidential

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primary ballot. And, for the reasons we have already explained, that process is sufficient to permit a judicial determination of whether Section Three disqualification has attached to a particular individual.

¶105 We are similarly unpersuaded by Intervenors' assertions that Congress created the only currently available mechanism for determining whether a person is disqualified pursuant to Section Three with the 1994 passage of 18 U.S.C. § 2383. That statute makes it a crime to "assist[] or engage[] in any rebellion or insurrection against the authority of the United States." True, with that enactment, Congress criminalized the same conduct that is disqualifying under Section Three. All that means, however, is that a person charged and convicted under 18 U.S.C. § 2383 would *also* be disqualified under Section Three. It cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law.

¶106 In summary, based on Section Three's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action. Intervenors' contrary arguments do not persuade us otherwise.

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¶107 That said, our conclusion that implementing legislation from Congress is unnecessary for us to proceed under section 1-1-113 does not resolve the question of whether doing so would violate the separation of powers among the three branches of government. We turn to this justiciability question next.

D. Section Three Is Justiciable

¶108 President Trump next asserts that presidential disqualification under Section Three presents a nonjusticiable political question. Again, we disagree.

¶109 "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine is a narrow exception to this rule, and a court may not avoid its responsibility to decide a case merely because it may have "political implications." *Id.* at 195–96 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983)).

¶110 A controversy involves a nonjusticiable political question when, as relevant here, "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) (noting that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers" and identifying the above-described instances, and four

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others not relevant here, as examples of political questions). The requisite textual commitment must be "[p]rominent on the surface of any case." *Baker*, 369 U.S. at 217.

¶111 Here, President Trump argues that this case is nonjusticiable because, in his view, the Constitution and federal law commit the question of the qualifications of a presidential candidate to Congress. The Electors point out that President Trump did not argue before us that the questions presented in this appeal are also nonjusticiable based on a lack of judicially discoverable and manageable standards, and therefore, he arguably waived any such argument. We nevertheless address that issue, again in the interest of providing a thorough review.

1. No Textually Demonstrable Constitutional Commitment to Congress of Section Three Disqualification

¶112 Contrary to President Trump's assertions, we perceive no constitutional provision that reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

¶113 As discussed in Part B.4 above, Article II, Section 1, Clause 2 of the Constitution empowers state legislatures to direct how presidential electors are

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appointed, and the Supreme Court has recognized that this provision affords the states "far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo*, 140 S. Ct. at 2324. In furtherance of this delegation of authority, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections," the "selection and qualification of candidates," among other things. *Storer*, 415 U.S. at 730. The Election Code is an example of such a "comprehensive" code to regulate state and federal elections. And the fact that Article II, Section 1, Clause 4 authorizes Congress to determine the time for choosing the electors and the date on which they vote does not undermine the substantial authority provided to the states to regulate state and federal elections.

¶114 In our view, Section Three's text is fully consistent with our conclusion that the Constitution has not committed the matter of presidential candidate qualifications to Congress. As we have noted, although Section Three requires a "vote of two-thirds of each House" to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place. *See* U.S. Const. amend. XIV, § 3. Moreover, if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three, as President Trump asserts, then this would nullify Section Three's supermajority requirement.

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¶115 President Trump's reliance on Article II, Section 1, Clause 5 of the Constitution and on the Twelfth, Fourteenth, and Twentieth Amendments is misplaced. We address each of these provisions, in turn.

¶116 Article II, Section 1, Clause 5 provides that no person shall be eligible to serve as President unless that person is "a natural born Citizen" who is at least thirty-five years of age and who has resided in the United States for at least fourteen years. This provision, however, says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate's qualifications are challenged. *See id.*

¶117 The Twelfth Amendment charges the Electoral College with the task of selecting a candidate for President and then transmitting the electors' votes to the "seat of the government of the United States," and it provides the procedure by which the electoral votes are to be counted. U.S. Const. amend. XII. Nothing in the Twelfth Amendment, however, vests the Electoral College with the power to determine the eligibility of a presidential candidate. *See Elliott v. Cruz*, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) (mem.). Nor does the Twelfth Amendment give Congress "control over the process by which the President and Vice President are normally chosen, other than the very limited one of determining the day on which the electors were to 'give their votes.'" *Id.* at 651 (citing U.S. Const. amend. XII). And although the Twelfth Amendment provides

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for the scenario in which no President is selected by March 4 and specifies that no person constitutionally ineligible to serve as President shall be eligible to serve as Vice President, the Amendment does not assign to Congress (nor to any other branch) the task of determining whether a candidate is qualified in the first place.

¶118 Section Five of the Fourteenth Amendment authorizes Congress to pass legislation to enforce the provisions of the Fourteenth Amendment, but as discussed above, the Fourteenth Amendment is self-executing, and congressional action under Section Five is not required to animate Section Three's disqualification of insurrectionist oath-breakers. Nor does Section Five delegate to Congress the authority to determine the qualifications of presidential candidates to hold office. U.S. Const. amend. XIV, § 5.

¶119 Finally, the Twentieth Amendment, in relevant part, empowers Congress to enact procedures to address the scenario in which neither the President nor the Vice President qualifies for office before the time fixed for the beginning of their terms. U.S. Const. amend. XX, § 3. By its express language, however, this Amendment applies post-election. *Id.* (referring to the "President elect" and "Vice President elect"). Moreover, the Amendment says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office.

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¶120 For these reasons, we perceive no textually demonstrable constitutional commitment to Congress of the authority to assess presidential candidate qualifications, and neither President Trump nor his amici identify any constitutional provision making such a commitment. In reaching this conclusion, we are unpersuaded by the cases on which President Trump and his amici rely, which are predicated on inferences they assert can be drawn from one or more of the foregoing constitutional provisions or on the fact that the cases had political implications. *See, e.g.*, *Taitz v. Democrat Party of Miss.*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015); *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146–47 (N.D. Cal. 2008); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2010); *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *11–12 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd in part, dismissed in part*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015). As noted above, such inferences are insufficient to establish the requisite clear textual commitment to a coordinate branch of government, *see Baker*, 369 U.S. at 217, and we may not avoid our duty to decide a case merely because it may have political implications, *Zivotofsky*, 566 U.S. at 195–96.

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¶121 Moreover, we may not conflate "actions that are textually *committed*" to a coordinate political branch with "actions that are textually *authorized*." *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev'd on other grounds sub nom., Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). The Supreme Court has prohibited courts from adjudicating only the former. *Zivotofsky*, 566 U.S. at 195. Absent an affirmative constitutional *commitment*, we cannot abdicate our responsibility to decide a case that is properly before us. *Id.* at 194.

2. Section Three Involves Judicially Discoverable and Manageable Standards

¶122 The question of whether there are judicially discoverable and manageable standards for determining a case is not wholly separate from the question of whether the matter has been textually committed to a coordinate political department. *Nixon*, 506 U.S. at 228. "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228–29.

¶123 As we have said, President Trump has not argued before us that Section Three lacks judicially discoverable and manageable standards, and we believe for good reason. Section Three disqualifies from certain delineated offices persons who have "taken an oath . . . to support the Constitution of the United States" as an "officer of the United States" and who have thereafter "engaged in insurrection or rebellion." U.S. Const. amend. XIV, § 3. Although, as we discuss below, the

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meanings of some of these terms may not necessarily be precise, we can discern their meanings using "familiar principles of constitutional interpretation" such as "careful examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky*, 566 U.S. at 201.

¶124 Indeed, in this and other contexts, courts have readily interpreted the terms that we are being asked to construe and have reached the substantive merits of the cases before them. *See, e.g.*, *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,079) (defining "engage" as that term is used in Section Three); *United States v. Rhine*, No. 210687 (RC), 2023 WL 2072450, at *8 (D.D.C. Feb. 17, 2023) (defining "insurrection" in the context of ruling on a motion in limine in a criminal prosecution arising out of the events of January 6); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983) (defining "insurrection" in the context of an insurance policy exclusion); *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930) (defining "insurrection" as that term is used in a section of the U.S. Code), *aff'd*, 49 F.2d 1077 (2d Cir. 1931); *Hearon v. Calus*, 183 S.E. 13, 20 (S.C. 1935) (defining "insurrection" as that term is used in a provision of the South Carolina constitution).

¶125 Accordingly, we conclude that interpreting Section Three does not "turn on standards that defy judicial application." *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211). In so concluding, we respectfully disagree with the Michigan

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Court of Claims' finding that the interpretation of the terms now before us constitutes a nonjusticiable political question merely because "there are . . . many answers and gradations of answers." *Trump v. Benson*, No. 23000151-MZ, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023). In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us.

¶126 For these reasons, we conclude that the issues presented here do not, either alone or together, constitute a nonjusticiable political question. We thus proceed to the question of whether Section Three applies to the President.

E. Section Three Applies to the President

¶127 The parties debate the scope of Section Three. The Electors claim that this potential source of disqualification encompasses the President. President Trump argues that it does not, and the district court agreed. On this issue, we reverse the district court.

¶128 Section Three prohibits a person from holding any "office, civil or military, under the United States" if that person, as "an officer of the United States," took an oath "to support the Constitution of the United States" and subsequently

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engaged in insurrection. U.S. Const. amend. XIV, § 3. Accordingly, Section Three applies to President Trump only if (1) the Presidency is an "office, civil or military, under the United States"; (2) the President is an "officer of the United States"; and (3) the presidential oath set forth in Article II constitutes an oath "to support the Constitution of the United States." *Id.* We address each point in turn.

1. The Presidency Is an Office Under the United States

¶129 The district court concluded that the Presidency is not an "office, civil or military, under the United States" for two reasons. *Anderson*, ¶¶ 303–04; *see* U.S. Const. amend. XIV, § 3. First, the court noted that the Presidency is not specifically mentioned in Section Three, though senators, representatives, and presidential electors are. The court found it unlikely that the Presidency would be included in a catch-all of "any office, civil or military." *Anderson*, ¶ 304; *see* U.S. Const. amend. XIV, § 3. Second, the court found it compelling that an earlier draft of the Section specifically included the Presidency, suggesting that the drafters intended to omit the Presidency in the version that passed. *See Anderson*, ¶ 303. We disagree with the district court's conclusion, as our reading of both the constitutional text and the historical record counsel that the Presidency is an "office . . . under the United States" within the meaning of Section Three.

¶130 When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over "secret or technical meanings that would not have been

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known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Dictionaries from the time of the Fourteenth Amendment's ratification define "office" as a "particular duty, charge or trust conferred by public authority, and for a public purpose," that is "undertaken by . . . authority from government or those who administer it." Noah Webster, An American Dictionary of the English Language 689 (Chauncey A. Goodrich ed., 1853); *see also* 5 Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) (defining "office" as "a publick charge or employment; magistracy"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be 'a public charge or employment,' . . . ."). The Presidency falls comfortably within these definitions.

¶131 We do not place the same weight the district court did on the fact that the Presidency is not specifically mentioned in Section Three. It seems most likely that the Presidency is not specifically included because it is so evidently an "office." In fact, no specific *office* is listed in Section Three; instead, the Section refers to "any office, civil or military." U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an "office" in the Constitution. Instead, senators and representatives are referred to as "members" of their respective bodies. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications

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of its own Members . . . ."); *id.* at § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* at art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

¶132 Indeed, even Intervenors do not deny that the Presidency is an office. Instead, they assert that it is not an office "under the United States." Their claim is that the President and elected members of Congress *are* the government of the United States, and cannot, therefore, be serving "under the United States." *Id.* at amend. XIV, § 3. We cannot accept this interpretation. A conclusion that the Presidency is something other than an office "under" the United States is fundamentally at odds with the idea that all government officials, including the President, serve "we the people." *Id.* at pmbl. A more plausible reading of the phrase "under the United States" is that the drafters meant simply to distinguish those holding federal office from those held "under any State." *Id.* at amend. XIV, § 3.

¶133 This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an "Office" twenty-five times. *E.g.*, *id.* at art. I, § 3, cl. 5 ("The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice

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President, or when he shall exercise *the Office of President of the United States*." (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that "[n]o Person except a natural born Citizen . . . shall be eligible to the *Office of President*" and "[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years" (emphases added)). And it refers to an office "under the United States" in several contexts that clearly support the conclusion that the Presidency is such an office.

¶134 Consider, for example, the Impeachment Clause, which reads that Congress can impose, as a consequence of impeachment, a "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." *Id.* at art. I, § 3, cl. 7. If the Presidency is not an "office . . . under the United States," then anyone impeached—including a President—could nonetheless go on to serve as President. *See id.* This reading is nonsensical, as recent impeachments demonstrate. The Articles of Impeachment brought against both President Clinton and President Trump asked for each man's "removal from office[,] and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." Articles of Impeachment Against William Jefferson Clinton, H. Res. 611, 105th Cong. (Dec. 19, 1998); *see also* Articles of Impeachment Against Donald J. Trump, H. Res. 755, 116th Cong. (Dec. 8, 2019); Articles of Impeachment Against Donald J. Trump, H. Res. 24, 117th Cong. (Jan 13, 2021). Surely the impeaching members of Congress

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correctly understood that either man, if convicted and subsequently disqualified from future federal office by the Senate, would be unable to hold the Presidency in the future.

¶135 Similarly, the Incompatibility Clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. To read "office under the United States" to exclude the Presidency would mean that a sitting President could also constitutionally occupy a seat in Congress, a result foreclosed by basic principles of the separation of powers. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers . . . was woven into the [Constitution] . . . . The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, s 6 . . . ."), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¶136 Finally, the Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. To read the

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Presidency as something other than an office under the United States would exempt the nation's chief diplomat from these protections against foreign influence. But Presidents have long sought dispensation from Congress to retain gifts from foreign leaders, understanding that the Emoluments Clause required them to do so.[14]

¶137 The district court found it compelling that an earlier draft of the proposed Section listed the Presidency, but the version ultimately passed did not. *Anderson*, ¶ 303. As a starting point, however, we are mindful that "it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590. And the specifics of the change from the

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[14] *See, e.g.*, H. Rep. No. 23-302, at 1–2 (Mar. 4, 1834) (discussing the receipt of gifts from the Emperor of Morocco and noting that the President's "surrender of the articles to the Government" satisfied the "constitutional provision in relation to their acceptance"); 14 Abridgement of the Debates of Congress from 1789 to 1856, 140–41 (Thomas Hart Benton ed., 6 1860) (displaying (1) a letter from the Secretary of State to the Imaum of Muscat indicating that the President "directed" the Secretary to refuse the Imaum's gifts "under existing constitutional provisions" and (2) a letter from the President requesting that Congress allow him to accept the gifts); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (providing that the President is "authorized" to sell some of the Imaum's gifts and place the proceeds in the U.S. Treasury); Joint Resolution No. 20, A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, Mar. 15, 1862, 12 Stat. 616 (directing the King of Siam's gifts and letters to be placed in "the collection of curiosities at the Department of the Interior").

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earlier draft to what was ultimately passed do not demonstrate an intent to exclude the Presidency from the covered offices.

¶138 The draft proposal provided that insurrectionist oath-breakers could not hold "the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held *under appointment from the President of the United States, and requiring the confirmation of the Senate.*" Cong. Globe., 39th Cong., 1st Sess. 919 (1866) (emphasis added). Later versions of the Section—including the enacted draft—removed specific reference to the President and Vice President and expanded the category of office-holder to include "any office, civil or military" rather than only those offices requiring presidential appointment and Senate confirmation. *See* U.S. Const. amend. XIV, § 3.

¶139 It is hard to glean from the limited available evidence what the changes across proposals meant. But we find persuasive amici's suggestion that Representative McKee, who drafted these proposals, most likely took for granted that his second proposal included the President. While nothing in Representative McKee's speeches mentions why his express reference to the Presidency was removed, his public pronouncements leave no doubt that his subsequent draft proposal still sought to ensure that rebels had absolutely no access to political power. Representative McKee explained that, under the proposed amendment,

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"the loyal alone shall rule the country" and that traitors would be "cut[] off . . . from all political power in the nation." Cong. Globe, 39th Cong., 1st Sess. 2505 (1866); *see also* Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 22–23 (Univ. of Md. Legal Stud. Rsch. Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 ("*Our Questions, Their Answers*"); Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* 106, 114 (2023) (indicating that Representative McKee desired to exclude all oath-breaking insurrectionists from all federal offices, including the Presidency). When considered in light of these pronouncements, the shift from specifically naming the President and Vice President in addition to officers appointed and confirmed to the broadly inclusive "any officer, civil or military" cannot be read to mean that the two highest offices in the government are excluded from the mandate of Section Three.

¶140 The importance of the inclusive language—"any officer, civil or military"—was the subject of a colloquy in the debates around adopting the Fourteenth Amendment. Senator Reverdy Johnson worried that the final version of Section Three did not include the office of the Presidency. He stated, "[T]his amendment does not go far enough" because past rebels "may be elected President or Vice President of the United States." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). So, he asked, "why did you omit to exclude them? I do not understand them to be

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excluded from the privilege of holding the two highest offices in the gift of the nation." *Id.* Senator Lot Morrill fielded this objection. He replied, "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" *Id.* This answer satisfied Senator Johnson, who stated, "Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.* This colloquy further supports the view that the drafters of this Amendment intended the phrase "any office" to be broadly inclusive, and certainly to include the Presidency.

¶141 Moreover, Reconstruction-Era citizens—supporters and opponents of Section Three alike—understood that Section Three disqualified oath-breaking insurrectionists from holding the office of the President. *See* Montpelier Daily Journal, Oct. 19, 1868 (writing that Section Three "excludes leading rebels from holding offices . . . from the Presidency downward"). Many supporters of Section Three defended the Amendment on the ground that it would exclude Jefferson Davis from the Presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) (manuscript at 7–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; *see also, e.g.*, *Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (arguing that foregoing

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Section Three would "render Jefferson Davis eligible to the Presidency of the United States," and "[t]here is something revolting in the very thought").

¶142 Post-ratification history includes more of the same. For example, Congress floated the idea of blanket amnesty to shield rebels from Section Three. *See* Vlahoplus, *supra*, (manuscript at 7–9). In response, both supporters and dissenters acknowledged that doing so would allow the likes of Jefferson Davis access to the Presidency. *See id.*; *see also, e.g.*, The Pulaski Citizen, *The New Reconstruction Bill*, Apr. 13, 1871, at 4 (acknowledging as a supporter of amnesty that it would "make even Jeff. Davis eligible again to the Presidency"); The Chicago Tribune, May 24, 1872 (asserting that amnesty would make rebels "eligible to the Presidency of the United States"); Indiana Progress, Aug. 24, 1871 (similar).

¶143 We conclude, therefore, that the plain language of Section Three, which provides that no disqualified person shall "hold any office, civil or military, under the United States," includes the office of the Presidency. This textual interpretation is bolstered by constitutional context and by history surrounding the enactment of the Fourteenth Amendment.

2. The President Is an Officer of the United States

¶144 We next consider whether a President is an "officer of the United States." U.S. Const., amend. XIV, § 3. The district court found that the drafters of Section Three did not intend to include the President within the catch-all phrase "officer

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of the United States," and, accordingly, that a current or former President can engage in insurrection and then run for and hold any office. *Anderson*, ¶ 312; *see* U.S. Const., amend. XIV, § 3. We disagree for four reasons.

¶145 First, the normal and ordinary usage of the term "officer of the United States" includes the President. As we have explained, the plain meaning of "office . . . under the United States" includes the Presidency; it follows then that the President is an "officer of the United States." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained."). Indeed, Americans have referred to the President as an "officer" from the days of the founding. *See, e.g.*, The Federalist No. 69 (Alexander Hamilton) ("The President of the United States would be an officer elected by the people . . . ."). And many nineteenth-century presidents were described as, or called themselves, "chief executive officer of the United States." *See* Vlahoplus, *supra* (manuscript at 17–18) (listing presidents).

¶146 Second, Section Three's drafters and their contemporaries understood the President as an officer of the United States. *See* Graber, *Our Questions, Their Answers*, *supra*, at 18–19 (listing instances); *see also* Cong. Globe, 39th Cong., 1st Sess. 915 (1866) (referring to the "chief executive officer of the country"); *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) ("We have no *officers* in this government,

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from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (emphases added)).

¶147 President Trump concedes as much on appeal, stating that "[t]o be sure, the President is an officer." He argues, however, that the President is an officer of the Constitution, not an "officer of the United States," which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a "colloquial sense," and thus have no bearing on the term's use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term "officer" according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the "normal and ordinary as distinguished from technical meaning" should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

¶149 We also find Attorney General Stanbery's opinions on the meaning of Section Three significant. In one opinion on the subject, Stanbery explained that

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the term "'officer of the United States,' within [Section Three] . . . is used in its most general sense, and without any qualification, as legislative, or executive, or judicial." The Reconstruction Acts, 12 Op. Att'y. Gen. 141, 158 (1867) ("*Stanbery I*"). And in a second opinion on the topic, he observed that the term "Officers of the United States" includes "without limitation" any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 Op. Att'y. Gen. 182, 203 (1867) ("*Stanbery II*").

¶150 Third, the structure of Section Three persuades us that the President is an officer of the United States. The first half of Section Three describes the offices protected and the second half addresses the parties barred from holding those protected offices. There is a parallel structure between the two halves: "Senator or Representative in Congress" (protected office) corresponds to "member of Congress" (barred party); "any office . . . under the United States" (protected office) corresponds to "officer of the United States" (barred party); and "any office . . . under any State" (protected office) also has a corresponding barred party in "member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. amend. XIV, § 3. The only term in the first half of Section Three that has no corresponding officer or party in the second half is "elector of President and Vice President," which makes sense because electors do not take

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constitutionally mandated oaths so they have no corresponding barred party. *Id.*; *see also id.* at art. II, § 1 (discussing a presidential elector's duties without reference to an oath); *id.* at art. VI (excluding presidential electors from the list of positions constitutionally obligated to take an oath to support the Constitution). Save electors, there is a perfect parallel structure in Section Three. *See* Baude & Paulsen, *supra* (manuscript at 106).

¶151 Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no room to conclude that "officer of the United States" was used as a term of art. *Id.* The drafters of Section Three were motivated by a sense of betrayal; that is, by the existence of a broken oath, not by the type of officer who broke it: "[A]ll of us understand the meaning of the third section," Senator John Sherman stated, "[it includes] those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office . . . ." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866); *see also id.* at 2898 (Senator Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreeing that "the theory" of Section Three was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office."); *id.* at 3035–36 (Senator John B. Henderson

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explaining that "[t]he language of this section is so framed as to disfranchise from office . . . the leaders of any rebellion hereafter to come."); *Powell*, 27 F. Cas. at 607 (summarizing the purpose of Section Three: "[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability."). A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose.

¶152 We therefore conclude that "officer of the United States," as used in Section Three, includes the President.

3. The Presidential Oath Is an Oath to Support the Constitution

¶153 Finally, we consider whether the oath taken by the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, is an oath "to support the Constitution of the United States," *id.* at amend. XIV, § 3. The district court found that, because the presidential oath's language is more particular than the oath referenced in Section Three, the drafters did not intend to include former Presidents. *Anderson*, ¶ 313. We disagree.

¶154 Article VI of the Constitution provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to

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support this Constitution."[15] U.S. Const. art. VI, cl. 3. Article II specifies that the President shall swear an oath to "preserve, protect and defend the Constitution." *Id.* at art. II, § 1, cl. 8. Intervenors contend that because the Article II oath does not include a pledge to "support" the Constitution, an insurrectionist President cannot be disqualified from holding future office under Section Three on the basis of that oath.

¶155 This argument fails because the President is an "executive . . . Officer[]" of the United States under Article VI, albeit one for whom a more specific oath is prescribed. *Id.* at art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). This conclusion follows logically from the accepted fact that the Vice President is also an executive officer. True, the Vice President takes the more general oath prescribed by federal law, *see* 5 U.S.C. § 3331 (noting that anyone "except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take" an oath including a pledge to "support and defend the Constitution"),

[15] Article VI, however, does not provide any specific form of oath or affirmation.

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but it makes no sense to conclude that the Vice President is an executive officer under Article VI but the President is not.

¶156 The language of the presidential oath—a commitment to "preserve, protect, and defend the Constitution"—is consistent with the plain meaning of the word "support." U.S. Const. art. II, § 1, cl. 8. Modern dictionaries define "support" to include "defend" and vice versa. *See, e.g.*, *Support*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*support* [https://perma.cc/WGH6-D8KU] (defining "support" as "to uphold or defend as valid or right"); *see also Defend*, at *id.*, https://www.merriam-webster.com/dictionary/*defend* [https://perma.cc/QXQ7-LRKX] (defining "defend" as "to maintain or support in the face of argument or hostile criticism"). So did dictionaries from the time of Section Three's drafting. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Noah Webster, An American Dictionary of the English Language 271 (Chauncey A. Goodrich, ed., 1857) ("defend": "to support or maintain").

¶157 The specific language of the presidential oath does not make it anything other than an oath to support the Constitution. Indeed, as one Senator explained just a few years before Section Three's ratification, "the language in [the presidential] oath of office, that he shall protect, support [sic], and defend the Constitution, makes his obligation more emphatic and more obligatory, if possible,

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than ours, which is simply to support the Constitution." Cong. Globe, 37th Cong., 3d Sess. 89 (1862). And, in fact, several nineteenth-century Presidents referred to the presidential oath as an oath to "support" the Constitution. *See* James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897, Vol. 1 at 232, 467 (Adams, Madison), Vol. 2 at 625 (Jackson), Vol. 8 at 381 (Cleveland).

¶158 In sum, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). The most obvious and sensible reading of Section Three, supported by text and history, leads us to conclude that (1) the Presidency is an "office under the United States," (2) the President is an "officer . . . of the United States," and (3) the presidential oath under Article II is an oath to "support" the Constitution.

¶159 President Trump asks us to hold that Section Three disqualifies every oath-breaking insurrectionist *except the most powerful one* and that it bars oath-breakers from virtually every office, both state and federal, *except the highest one in the land.* Both results are inconsistent with the plain language and history of Section Three.

¶160 We therefore reverse the district court's finding that Section Three does not apply to a President and conclude that Section Three bars President Trump from

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holding the office of the President if its other provisions are met; namely, if President Trump "engaged in insurrection." U.S. Const. amend. XIV, § 3.

¶161 Before addressing the district court's findings that President Trump engaged in insurrection, however, we consider President Trump's challenge to the admissibility of a congressional report on which the district court premised some of its findings.

F. The District Court Did Not Err in Admitting Portions of the January 6 Report

¶162 President Trump asserts that the district court wrongly admitted into evidence thirty-one findings from a congressional report drafted by the Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("the Committee"), which recounted the Committee's investigation of the facts, circumstances, and causes of the attack on the Capitol. *See* H.R. Rep. No. 117-663 (Dec. 22, 2022) ("the Report"). In President Trump's view, the Report is an untrustworthy, partisan political document and therefore constituted inadmissible hearsay under Rule 803(8)(C) of the Colorado Rules of Evidence. We are unpersuaded. Under the deferential standard of review that governs, we perceive no error by the district court in admitting portions of the Report into evidence at trial.

¶163 We review a district court's evidentiary rulings for an abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25, 428 P.3d 517, 524. "A court abuses its discretion

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only if its decision is 'manifestly arbitrary, unreasonable, or unfair.'" *Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, ¶ 74, 285 P.3d 986, 1008 (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008)). We may not consider "whether we would have reached a different result," but only "whether the trial court's decision fell within a range of reasonable options." *Id.* (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006)).

¶164 Hearsay statements are out-of-court statements offered in court for the truth of the matter asserted. CRE 801(c). Such statements are generally inadmissible, CRE 802, but CRE 803(8) creates an exception for "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law." This exception, however, applies only if the report is trustworthy. *Id.*

¶165 The Federal Rules of Evidence (on which our evidentiary rules were modeled) contain a near-identical exception to Colorado Rule 803(8), *see* Fed. R. Evid. 803(8), so we may look to federal case law interpreting the federal rule for guidance on how to assess trustworthiness, *see Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 10, 287 P.3d 112, 115 (noting that, although we are "not bound to interpret our rules . . . the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions

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interpreting those rules for guidance"); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982) ("[C]ase law interpreting the federal rule is persuasive in analysis of the Colorado rule."). Under federal law, courts are instructed to "assume[] admissibility in the first instance." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). Thus, "the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy." *Barry v. Trs. of Int'l Ass'n*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). The federal courts have also identified four non-exclusive factors to help courts determine trustworthiness: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Id.* at 97; *see Beech Aircraft*, 488 U.S. at 167 n.11.

¶166 The district court employed the foregoing presumption and four factors to analyze the Report.[16] The court determined that "the first three *Barry* factors weigh

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[16] We also review a district court's trustworthiness analysis for an abuse of discretion. *See United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) ("Under [Fed. R. Evid. 803(8)], this Court must decide whether the district court abused its discretion by '[g]iving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant.'"(quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 266 (3d Cir. 1983))); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984) ("Rule 803(8)(C) also requires that the report not be subject to circumstances indicating a lack of trustworthiness. This determination is within the discretion of the trial court."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821–22 (10th Cir. 1981) ("We believe that 'the trial court

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strongly in favor of reliability." *Anderson*, ¶ 24. President Trump focuses his admissibility challenge on the fourth factor: "possible motivation problems." *Barry*, 467 F. Supp. 2d at 97.

¶167 First, President Trump claims the Report was biased against him because all nine Committee members voted in favor of impeaching him before their investigation began. Timothy Heaphy, Chief Investigative Counsel for the Committee, testified at trial, however, that although members "certainly had . . . hypotheses that were a starting point," such hypotheses did not impair the members' ability to be fair and impartial. *Anderson*, ¶ 26. The district court found "Mr. Heaphy's testimony on this subject to be credible and h[eld] that any perceived animus of the committee members towards [President] Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable." *Id.* We see no abuse of discretion. *See People v. Pitts*, 13 P.3d 1218, 1221 (Colo. 2000) ("It is the function of the trial court, and not the reviewing court, to weigh evidence and determine the credibility of the witnesses.").

¶168 Second, President Trump believes that the political backdrop against which the Report was created makes it unreliable. This argument proves too much. All

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is the first and best judge of whether tendered evidence meets th[at] standard of trustworthiness and reliability . . .' and [w]e cannot say the trial court abused its discretion by refusing to admit the report." (quoting *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944))).

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congressional reports contain some level of political motivation, yet neither CRE 803(8) nor the corresponding federal rule declares such reports per se inadmissible; instead, as the district court explained, a court is at liberty to admit what it deems trustworthy. *See Anderson*, ¶ 28; *see, e.g.*, *Barry*, 467 F. Supp. 2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F. Supp. 2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982) (admitting Congressional Committee report), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984).

¶169 Third, President Trump asserts that because Democrats outnumbered Republicans seven to two on the Committee, the Report's findings are necessarily biased. The district court determined that although the Report "would have further reliability had there been greater Republican participation," that deficit did not demonstrate "motivation problems." *Anderson*, ¶¶ 29–30. The district court observed that House Republicans opted to boycott the Committee after then-Speaker of the House Nancy Pelosi agreed to seat only three of the five Republicans recommended to her. *Id.* at ¶ 30. Despite then-Speaker Pelosi's "unprecedented" move, *id.*, the district court noted that "the two Republicans who did sit . . . were both duly elected Republicans," *id.* at ¶ 31; "[t]he investigative staff included . . . many Republican[]" lawyers, *id.* at ¶ 32; "the staffing decisions did

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not include any inquiry into political affiliation," *id.*; and "[t]he overwhelming majority of witnesses . . . were [President] Trump administration officials and Republicans," *id.* at ¶ 33. The court reasoned that "[t]hese facts all cut against Intervenors' argument that lack of participation of the minority party resulted in . . . unreliable conclusions." *Id.* at ¶ 34.

¶170 Again, we perceive no abuse of discretion. CRE 803(8) assumes admissibility, *Barry*, 467 F. Supp. 2d at 96, and President Trump has not met his burden of demonstrating that, contrary to the evidence the district court highlighted, the Report suffered from motivation problems. *See id.* Moreover, we remain mindful that this is a four-factor inquiry. No single factor is dispositive. Instead, any perceived shortcomings as to one must be weighed against the strengths of the others. Whatever the "possible motivation problems," the weight of the other three factors remains. As the district court explained, (1) passage of time does not impugn the Report, as the investigation began six months after the attack and was completed in under two years; (2) the investigative staff consisted of highly skilled lawyers, including two former U.S. Attorneys; and (3) there was a formal ten-day hearing in which seventy witnesses testified under oath. *Anderson*, ¶ 24. So, not only was the court's analysis of the fourth factor reasonable, but it also did not abuse its discretion in reaching its broader conclusion that the Report was trustworthy.

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¶171 President Trump nonetheless argues that, even if the Report is generally admissible under the CRE 803(8) exception, there were eleven admitted findings within the Report that remained independently inadmissible. Even if the general admissibility of the Report does not necessarily give a green light to multiple layers of hearsay, we conclude that only two of the eleven challenged findings constituted hearsay within hearsay.[17] And even if there was error in admitting those findings, neither is of sufficient consequence to warrant reversal. *See Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) (explaining that, under harmless error review, we will reverse only if, viewing the evidence as a whole, the error substantially influenced the outcome or impaired the fairness of the trial and that,

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[17] The nine remaining statements fall into three categories: statements made (1) by President Trump, (2) to President Trump, and (3) by his supporters during chants. First, President Trump's own statements are not hearsay under the party-opponent rule. *See* CRE 801(d)(2)(A). Second, various statements made to President Trump on January 6 are not hearsay because they were offered to show the statements' effect on the listener (i.e., that President Trump had knowledge of certain issues). *See* CRE 801(c); *People v. Vanderpauye*, 2023 CO 42 ¶ 21 n.4, 530 P.3d 1214, 1221 n.4 (accepting that a "statement was not hearsay because it was offered for its effect on the listener . . . not for the truth of the matter asserted"). Third, chants by President Trump's supporters were not offered to prove the truth of the chants, but simply to establish that the statements were made. That is not hearsay. CRE 801(c); *see People v. Dominguez*, 2019 COA 78 ¶ 20, 454 P.3d 364, 369 (stating that "verbal acts aren't hearsay" because such a statement is "offered not for its truth, but to show that it was made"). Thus, none of the findings in these three classes constitutes hearsay within the Report.

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"[i]n the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous").

¶172 First, the Report cited a newspaper article stating that the election was called for President Biden. Although this is hearsay, the district court did not rely on the statement in its analysis, so President Trump was not prejudiced by any error in admitting this statement. *See Raile v. People*, 148 P.3d 126, 136 (Colo. 2006) ("[T]here is no reasonable probability that Raile was prejudiced by the admission of the statements; thus, the trial court's error was harmless.").

¶173 Second, the Report explained that Chief of Staff Mark Meadows told White House Counsel Pat Cipollone that President Trump "doesn't want to do anything" to stop the violence. H.R. Rep. No. 117 663, at 110. The fact that this statement is hearsay is irrelevant: The district court expressly noted that "it has only considered those portions of the January 6th Report which are referenced in this Order and has considered no other portions in reaching its decision," *Anderson*, ¶ 38, and it did not mention this statement in its order, nor did it rely on it to reach any conclusions. Thus, President Trump's embedded hearsay argument is unavailing.

¶174 For these reasons, we conclude that the district court did not abuse its discretion by admitting portions of the Report into evidence.

¶175 We now consider the district court's findings that President Trump "engaged in" an "insurrection" within the meaning of Section Three.

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G. President Trump Engaged in Insurrection

¶176 President Trump challenges the district court's findings that he "engaged in" an "insurrection." The Constitution leaves these terms undefined. Therefore, we must make a legal determination regarding what the drafters and ratifiers meant when they chose to deploy these words in Section Three. Mindful of the deferential standard of review afforded a district court's factual findings, we conclude that the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and that President Trump engaged in that insurrection.

1. Standard of Review

¶177 As a general matter, we review findings of fact under either a clear error or abuse of discretion standard, and we review legal conclusions de novo. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000); *accord State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33, 529 P.3d 599, 607. When, however, the issue before an appellate court presents a mixed question of law and fact, Colorado courts have taken different approaches, depending on the circumstances. *455 Co.*, 3 P.3d at 22. For example, courts have sometimes treated the ultimate conclusion as one of fact and applied the clear error standard. *Id.* In other cases, courts have concluded that a mixed question of law and fact mandates de novo review. *Id.* And when a trial court made evidentiary findings of fact in

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support of its application of a legal principle from another jurisdiction, we have found it appropriate to conduct an abuse of discretion review of the evidentiary factual findings supporting the legal conclusion and a de novo review of the legal conclusion itself. *Id.* at 23.

¶178 For our purposes here, where we are called on to review the district court's construction of certain terms used in Section Three to the facts established by the evidence, we will review the district court's factual findings for clear error and its legal conclusions de novo.

2. "Insurrection"

¶179 Dictionaries (both old and new), the district court's order, and the briefing by the parties and the amici curiae suggest several definitions of the word "insurrection."

¶180 For example, Noah Webster's dictionary from 1860 defined "insurrection" as:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is equivalent to SEDITION, except that *sedition* expresses a less extensive rising of citizens. It differs from REBELLION, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction.

Noah Webster, An American Dictionary of the English Language 613 (1860); *accord* John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of

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the United States of America and of the Several States to the American Union (6th ed. 1856), available at https://wzukusers.storage.googleapis.com/user-32960741/documents/5ad525c314331myoR8FY/1856_bouvier_6.pdf [https://perma.cc/PXK4-M75N] (defining "insurrection" as "[a] rebellion of citizens or subjects of a country against its government").

¶181 Webster's Third New International Dictionary defines "insurrection" as "an act or instance of revolting against civil or political authority or against an established government" or "an act or instance of rising up physically." *Insurrection*, Webster's Third New International Dictionary (2002).

¶182 In light of these and other proffered definitions, the district court concluded that "an insurrection as used in Section Three is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." *Anderson*, ¶ 240.

¶183 Finally, we note that at oral argument, President Trump's counsel, while not providing a specific definition, argued that an insurrection is more than a riot but less than a rebellion. We agree that an insurrection falls along a spectrum of related conduct. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Case of Davis*, 7 F. Cas. 63, 96 (C.C.D. Va.

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1871) (No. 3,621a) ("Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war."); 77 C.J.S. *Riot; Insurrection* § 36, Westlaw (database updated August 2023) ("Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that, in insurrection, there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society."). But we part company with him when he goes one step further. No authority supports the position taken by President Trump's counsel at oral argument that insurrectionary conduct must involve a particular length of time or geographic location.

¶184 Although we acknowledge that these definitions vary and some are arguably broader than others, for purposes of deciding this case, we need not adopt a single, all-encompassing definition of the word "insurrection." Rather, it suffices for us to conclude that any definition of "insurrection" for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.

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The required force or threat of force need not involve bloodshed, nor must the dimensions of the effort be so substantial as to ensure probable success. *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). Moreover, although those involved must act in a concerted way, they need not be highly organized at the insurrection's inception. *See Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) ("[A]t its inception an insurrection may be a pretty loosely organized affair. . . . It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection.").

¶185 The question thus becomes whether the evidence before the district court sufficiently established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. We have little difficulty concluding that substantial evidence in the record supported each of these elements and that, as the district court found, the events of January 6 constituted an insurrection.

¶186 It is undisputed that a large group of people forcibly entered the Capitol and that this action was so formidable that the law enforcement officers onsite could not control it. Moreover, contrary to President Trump's assertion that no evidence

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in the record showed that the mob was armed with deadly weapons or that it attacked law enforcement officers in a manner consistent with a violent insurrection, the district court found—and millions of people saw on live television, recordings of which were introduced into evidence in this case—that the mob was armed with a wide array of weapons. *See Anderson*, ¶ 155. The court also found that many in the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons, including metal bars from the police barricades and officers' batons and riot shields and that throughout the day, the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol. *Id.* at ¶¶ 156–57. The fact that actual and threatened force was used that day cannot reasonably be denied.

¶187 Substantial evidence in the record further established that this use of force was concerted and public. As the district court found, with ample record support, "The mob was coordinated and demonstrated a unity of purpose .... They marched through the [Capitol] building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." *Id.* at ¶ 243. And upon breaching the Capitol, the mob immediately pursued its intended target—the certification of the presidential election—and reached the House and Senate chambers within minutes of entering the building. *Id.* at ¶ 153.

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¶188 Finally, substantial evidence in the record showed that the mob's unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election; that is, to preclude Congress from taking the actions necessary to accomplish a peaceful transfer of power. As noted above, soon after breaching the Capitol, the mob reached the House and Senate chambers, where the certification process was ongoing. *Id.* This breach caused both the House and the Senate to adjourn, halting the electoral certification process. In addition, much of the mob's ire—which included threats of physical violence—was directed at Vice President Pence, who, in his role as President of the Senate, was constitutionally tasked with carrying out the electoral count. *Id.* at ¶¶ 163, 179–80; *see* U.S. Const. art. I, § 3, cl. 4; *id.* at art. II, § 1, cl. 3. As discussed more fully below, these actions were the product of President Trump's conduct in singling out Vice President Pence for refusing President Trump's demand that the Vice President decline to carry out his constitutional duties. *Anderson*, ¶¶ 148, 170, 172–73.

¶189 In short, the record amply established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. Under any viable

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definition, this constituted an insurrection, and thus we will proceed to consider whether President Trump "engaged in" this insurrection.

3. "Engaged In"

¶190 Dictionaries, historical evidence, and case law all shed light on the meaning of "engaged in," as that phrase is used in Section Three.

¶191 Noah Webster's dictionary from 1860 defined "engage" as "to embark in an affair." Noah Webster, An American Dictionary of the English Language 696 (1860). Similarly, Webster's Third New International Dictionary defines "engage" as "to begin and carry on an enterprise" or "to take part" or "participate." *Engage*, Webster's Third New International Dictionary (2002). And Merriam-Webster defines "engage" as including both "to induce to participate" and "to do or take part in something." *Engage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/engage [https://perma.cc/7JDM-4XSB].

¶192 Attorney General Stanbery's opinions on the meaning of "engage," which he issued at the time the Fourteenth Amendment was being debated, are in accord with these historical and modern definitions. Attorney General Stanbery opined that a person may "engage" in insurrection or rebellion "without having actually levied war or taken arms." *Stanbery I*, 12 Op. Att'y Gen. at 161. Thus, in Attorney General Stanbery's view, when individuals acting in their official capacities act "in

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the furtherance of the common unlawful purpose" or do "any overt act for the purpose of promoting the rebellion," they have "engaged" in insurrection or rebellion for Section Three disqualification purposes. *Id.* at 161–62; *see also Stanbery II*, 12 Op. Att'y. Gen. at 204 (defining "engaging in rebellion" to require "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose"). Accordingly, "[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Stanbery II*, 12 Op. Att'y. Gen. at 205; *accord Stanbery I*, 12 Op. Att'y Gen. at 164.

¶193 Turning to case law construing the meaning of "engaged in" for purposes of Section Three, although we have found little precedent directly on point, cases concerning treason that had been decided by the time the Fourteenth Amendment was ratified provide some insight into how the drafters of the Fourteenth Amendment would have understood the term "engaged in." For example, in *Ex parte Bollman*, 8 U.S. 75, 126 (1807), Chief Justice Marshall explained that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In other words, an individual need not directly

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participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had:

> [I]t is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

In re Charge to Grand Jury-Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851).

¶194 We find the foregoing definitions and authorities to be generally consistent, and we believe that the definition adopted and applied by the district court is supported by the plain meaning of the term "engaged in," as well as by the historical authorities discussed above. Accordingly, like the district court, we conclude that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Anderson*, ¶ 254.

¶195 In so concluding, we hasten to add that we do not read "engaged in" so broadly as to subsume mere silence in the face of insurrection or mere acquiescence therein, at least absent an affirmative duty to act. Rather, as Attorney General Stanbery observed, "The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." *Stanbery I*, 12 Op. Att'y Gen. at 161; *see also* Baude & Paulsen, *supra* (manuscript at 67) (noting that "passive acquiescence, resigned acceptance,

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silence, or inaction is not typically enough to have 'engaged in' insurrection or rebellion . . . [unless] a person possesses an affirmative duty to speak or act").

¶196 The question remains whether the record supported the district court's finding that President Trump engaged in the January 6 insurrection by acting overtly and voluntarily with the intent of aiding or furthering the insurrectionists' common unlawful purpose. Again, mindful of our applicable standard of review, we conclude that it did, and we proceed to a necessarily detailed discussion of the evidence to show why this is so.

¶197 Substantial evidence in the record showed that even before the November 2020 general election, President Trump was laying the groundwork for a claim that the election was rigged. For example, at an August 17, 2020 campaign rally, he said that "the only way we're going to lose this election is if the election is rigged." *Anderson*, ¶ 88. Moreover, when asked at a September 23, 2020 press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused to do so. *Id.* at ¶ 90.

¶198 President Trump then lost the election, and despite the facts that his advisors repeatedly advised him that there was no evidence of widespread voter fraud and that no evidence showed that he himself believed the election was wrought with fraud, President Trump ramped up his claims that the election was stolen from him and undertook efforts to prevent the certification of the election

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results. For example, in a December 13, 2020 tweet, he stated, "Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime." *Id.* at ¶ 101. And President Trump sought to overturn the election results by directly exerting pressure on Republican officeholders in various states. *Id.* at ¶ 103.

¶199 On this point, and relevant to President Trump's intent in this case, many of the state officials targeted by President Trump's efforts were subjected to a barrage of harassment and violent threats by his supporters. *Id.* at ¶ 104. President Trump was well aware of these threats, particularly after Georgia election official Gabriel Sterling issued a public warning to President Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." *Id.* President Trump responded by retweeting a video of Sterling's press conference with a message repeating the very rhetoric that Sterling warned would result in violence. *Id.* at ¶ 105.

¶200 And President Trump continued to fan the flames of his supporters' ire, which he had ignited, with ongoing false assertions of election fraud, propelling the "Stop the Steal" movement and cross-country rallies leading up to January 6. *Id.* at ¶ 106. Specifically, between Election Day 2020 and January 6, Stop the Steal organizers held dozens of rallies around the country, proliferating President

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Trump's election disinformation and recruiting attendees, including members of violent extremist groups like the Proud Boys, the Oath Keepers, and the Three Percenters, QAnon conspiracy theorists, and white nationalists, to travel to Washington, D.C. on January 6. *Id.* at ¶ 107.

¶201 Stop the Steal leaders also joined two "Million MAGA Marches" in Washington, D.C. on November 14, 2020, and December 12, 2020. *Id.* at ¶ 108. Again, as relevant to President Trump's intent here, after the November rally turned violent, President Trump acknowledged the violence but justified it as self-defense against "ANTIFA SCUM." *Id.* at ¶ 109.

¶202 With full knowledge of these sometimes-violent events, President Trump sent the following tweet on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" *Id.* at ¶ 112.

¶203 At this point, the record established that President Trump's "plan" was that when Congress met to certify the election results on January 6, Vice President Pence could reject the true electors who voted for President Biden and certify a slate of fake electors supporting President Trump or he could return the slates to the states for further proceedings. *Id.* at ¶ 113.

¶204 Far right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters viewed President Trump's December 19, 2020 tweet as a

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"call to arms," and they began to plot activities to disrupt the January 6 joint session of Congress. *Id.* at ¶ 117. In the meantime, President Trump repeated his invitation to come to Washington, D.C. on January 6 at least twelve times. *Id.* at ¶ 118.

¶205 On December 26, 2020, President Trump tweeted:

> If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Id. at ¶ 121.

¶206 And on January 1, 2021, President Trump retweeted a post from Kylie Jane Kremer, an organizer of the scheduled January 6 March for Trump, that stated, "The calvary [sic] is coming, Mr. President! JANUARY 6 | Washington, D.C." President Trump added to his retweet, "A great honor!" *Id.* at ¶ 119.

¶207 The foregoing evidence established that President Trump's messages were a call to his supporters to fight and that his supporters responded to that call. Further supporting such a conclusion was the fact that multiple federal agencies, including the Secret Service, identified significant threats of violence in the days leading up to January 6. *Id.* at ¶ 123. These threats were made openly online, and they were widely reported in the press. *Id.* Agency threat assessments thus stated

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that domestic violent extremists planned for violence on January 6, with weapons including firearms and enough ammunition to "win a small war." *Id.*

¶208 Along the same lines, the Federal Bureau of Investigation received many tips regarding the potential for violence on January 6. *Id.* at ¶ 124. One tip said:

> They think they will have a large enough group to march into DC armed and will outnumber the police so they can't be stopped . . . . They believe that since the election was "stolen" it's their constitutional right to overtake the government and during this coup no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further.

Id.

¶209 The record reflects that President Trump had reason to know of the potential for violence on January 6. As President, he oversaw the agencies reporting the foregoing threats. *Id.* at ¶ 123. In addition, Katrina Pierson, a senior advisor to both of President Trump's presidential campaigns, testified, on behalf of President Trump, that at a January 5, 2021 meeting, President Trump chose the speakers for the January 6 event at which he, too, would speak (avoiding at least some extremist speakers) and that he knew that radical political extremists were going to be in Washington, D.C. on January 6 and would likely attend his speech. *Id.* at ¶¶ 48, 126.

¶210 January 6 arrived, and in the early morning, President Trump tweeted, "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even

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fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!" *Id.* at ¶ 127. He followed this tweet later that morning with another that said, "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" *Id.*

¶211 These tweets had the obvious effect of putting a significant target on Vice President Pence's back, focusing President Trump's supporters on the Vice President's role in overseeing the counting of the electoral votes and certifying the 2020 presidential election to ensure the peaceful transfer of power. *Id.* at ¶¶ 128, 291.

¶212 At about this same time, tens of thousands of President Trump's supporters began gathering around the Ellipse for his speech. *Id.* at ¶ 129. To enter the Ellipse itself, attendees were required to pass through magnetometers. *Id.* at ¶ 130. Notably, from the approximately 28,000 attendees who passed through these security checkpoints, the Secret Service confiscated hundreds of weapons and other prohibited items, including knives or blades, pepper spray, brass knuckles, tasers, body armor, gas masks, and batons or blunt instruments. *Id.* at ¶¶ 130–31. Approximately 25,000 additional attendees remained outside the Secret Service perimeter, thus avoiding the magnetometers. *Id.* at ¶ 132.

¶213 President Trump then gave a speech in which he literally exhorted his supporters to fight at the Capitol. Among other things, he told the crowd:

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- "We're gathered together in the heart of our nation's capital for one very, very basic reason: to save our democracy." *Id.* at ¶ 135.
- "Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And we're going to have to fight much harder." *Id.*
- "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you . . . ." *Id.*
- "[W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them. Because you'll never take back our country with weakness. You have to show strength and you have to be strong." *Id.*
- "When you catch somebody in a fraud, you're allowed to go by very different rules." *Id.*
- "This the most corrupt election in the history, maybe of the world. . . . This is not just a matter of domestic politics—this is a matter of national security." *Id.*
- "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore." *Id.*

¶214 Unsurprisingly, the crowd at the Ellipse reacted to President Trump's words with calls for violence. Indeed, after President Trump instructed his supporters to march to the Capitol, members of the crowd shouted, "[S]torm the capitol!"; "[I]nvade the Capitol Building!"; and "[T]ake the Capitol!" *Id.* at ¶ 141. And before he had even concluded his speech, President Trump's supporters followed his instructions. *Id.* at ¶ 146. The crowd marched to the Capitol, many carrying

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Revolutionary War flags and Confederate battle flags; quickly breached the building; and immediately advanced to the House and Senate chambers to carry out their mission of blocking the certification of the 2020 presidential election. *Id.* at ¶¶ 146–53.

¶215 By 1:21 p.m., President Trump was informed that the Capitol was under attack. *Id.* at ¶ 169. Rather than taking action to end the siege, however, approximately one hour later, at 2:24 p.m., he tweeted, "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *Id.* at ¶ 170.

¶216 This tweet was read over a bullhorn to the crowd at the Capitol, and produced further violence, necessitating the evacuation of Vice President Pence from his Senate office to a more secure location to ensure his physical safety. *Id.* at ¶¶ 171–75.

¶217 President Trump's next public communications were two tweets sent at 2:38 p.m. and 3:13 p.m., encouraging the mob to "remain peaceful" and to "[s]tay peaceful" (obviously, the mob was not at all peaceful), but neither tweet condemned the violence nor asked the mob to disperse. *Id.* at ¶ 178 (alteration in original).

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¶218 Throughout these several hours, President Trump ignored pleas to intervene and instead called on Senators, urging them to help delay the electoral count, which is what the mob, upon President Trump's exhortations, was also trying to achieve. *Id.* at ¶ 180. And President Trump took no action to put an end to the violence. To the contrary, as mentioned above, when told that the mob was chanting, "Hang Mike Pence," President Trump responded that perhaps the Vice President deserved to be hanged. *Id.* President Trump also rejected pleas from House Republican Leader Kevin McCarthy, imploring him to tell his supporters to leave the Capitol, stating, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.*

¶219 Finally, at 4:17 p.m., President Trump released a video urging the mob "to go home now." *Id.* at ¶ 186. Even then, he did not condemn the mob's actions. *Id.* at ¶ 187. Instead, he sympathized with those who had violently overtaken the Capitol, telling them that he knew their pain. *Id.* at ¶¶ 186–87. He told them that he loved them and that they were "very special." *Id.* at ¶ 186. And he repeated his false claim that the election had been stolen notwithstanding his "landslide" victory, thereby further endorsing the mob's effort to try to stop the peaceful transfer of power. *Id.* at ¶¶ 186–87.

¶220 A short while later, President Trump reiterated this supportive message to the mob by justifying its actions, tweeting at 6:01 p.m., "These are the things and

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events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace." *Id.* at ¶ 189. President Trump concluded by encouraging the country to "[r]emember this day forever!" *Id.*

¶221 We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection. President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.

¶222 We disagree with President Trump's contentions that the record does not support a finding that he engaged in an insurrection because (1) "engage" does not include "incite," and (2) he did not have the requisite intent to aid or further the insurrectionists' common unlawful purpose.

¶223 As our detailed recitation of the evidence shows, President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully

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underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.

¶224 Moreover, the record amply demonstrates that President Trump fully intended to—and did—aid or further the insurrectionists' common unlawful purpose of preventing the peaceful transfer of power in this country. He exhorted them to fight to prevent the certification of the 2020 presidential election. He personally took action to try to stop the certification. And for many hours, he and his supporters succeeded in halting that process.

¶225 For these reasons, we conclude that the record fully supports the district court's finding that President Trump engaged in insurrection within the meaning of Section Three.

H. President Trump's Speech on January 6 Was Not Protected by the First Amendment Right to Freedom of Speech

¶226 President Trump contends that his speech on January 6 was protected by the First Amendment and, therefore, cannot be used to justify his disqualification from office under Section Three. The district court concluded that this speech was unprotected by the First Amendment. *Anderson*, ¶ 298. We agree with the district court.

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1. Standard of Review

¶227 In considering President Trump's First Amendment challenge, we undertake an "independent review of the record . . . to be sure that the speech in question actually falls within [an] unprotected category" of communication. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). We have interpreted this independent review as being akin to de novo review. *See Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 46, 320 P.3d 830, 841, *rev'd on other grounds*, 571 U.S. 237 (2014); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997). *Bose* recognizes, however, that we may give some "presumption of correctness" to factual findings, 466 U.S. at 500, especially those that do not involve the application of standards of law, *id.* at 500 n.16, or those that arise from complex cases such as this one, where the district judge has "lived with the controversy," *id.* at 500. Focusing on the findings by the district court, we therefore "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* at 508 (first alteration in original) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

2. First Amendment Protections and Incitement

¶228 The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This

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robust protection for speech functions to "invite dispute," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¶229 Even so, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The First Amendment does not protect, for example, true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969); speech essential to criminal conduct, *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); or speech that incites lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It is this last strand of First Amendment jurisprudence that the parties debate here.

¶230 As the Supreme Court explained in *Brandenburg*, the First Amendment's "constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Under *Brandenburg* and its progeny, the modern test to determine whether speech is unprotected under the First Amendment because it incited lawless action is whether (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the

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speaker intended that the speech would result in the use of violence or lawless action; and (3) the imminent use of violence or lawless action was the likely result of the speech. *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018); *accord Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015).[18]

3. Applying the *Brandenburg* Test

a. Context

¶231 President Trump contends that the district court erred by examining the broader context in which President Trump's speech was made, thereby "expand[ing] the context relevant to a *Brandenburg* analysis beyond anything recognized in precedent." He asserts that we should examine his speech only in the narrow context in which it was made. We disagree.

¶232 In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court addressed, for the first time, advocacy of illegal conduct, and it recognized the

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[18] This tripartite formulation incorporates the holdings from *Brandenburg* and its progeny. *See Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding there was "no evidence or *rational inference* from the *import* of the language" that the defendant's words were intended to produce imminent disorder and thereby indicating that although illegal action must be imminent, advocacy of lawless action could be implicit (emphases added)); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982) ("When such [emotional] appeals [for unity and action in a common cause] do not incite lawless action, they must be regarded as protected speech.").

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importance of context in holding that "the character of every act depends upon the circumstances in which it is done." Although the Supreme Court has said little about how to analyze incitement since *Brandenburg*, it offered some guidance regarding a court's use of other statements for context in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¶233 In *Claiborne Hardware*, the Court considered speeches given by Charles Evers, the field secretary of the Mississippi NAACP, in connection with the NAACP's boycott of white merchants in Claiborne County from 1966 to 1969. 458 U.S. at 890. Evers declared to Black residents of Claiborne County that "blacks who traded with white merchants would be *answerable to him*," and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28. Evers's statements also included that "boycott violators would be 'disciplined' by their own people," and he "warned that the Sheriff could not sleep with boycott violators at night." *Id.* at 902. The Court held that Evers's speeches were protected by the First Amendment but said that "[i]f there [was] other evidence of [Evers's] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id.* at 929. By considering and placing value in the *absence* of corroborating evidence of Evers's violent intentions, the Court implied that courts may look to circumstances beyond the speech itself to determine intent. *See United States v. White*, 610 F.3d

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956, 961–62 (7th Cir. 2010) (relying on *Claiborne Hardware* in denying a motion to dismiss in a solicitation case based on the existence of "further evidence of . . . the relationship between [the defendant] and his followers which will show the posting was a specific request to [the defendant's] followers").

¶234 While incitement precedent is sparse, the case law on "true threats" is instructive regarding the importance of context. True threats and incitement are doctrinally distinct,[19] but true threats are the "closest cousin" to incitement under the First Amendment. *Counterman v. Colorado*, 600 U.S. 66, 97 (2023) (Sotomayor, J., concurring in part); *accord United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) ("The line between the two forms of speech [incitement and true threats] may be difficult to draw in some instances . . . ."); *see also* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1069 (2002) (explaining that both exceptions involve exhortations regarding violence that derive from *Schenck*'s "clear and present danger" test).

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[19] *Compare Brandenburg*, 395 U.S. at 447 (defining unprotected incitement as that "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"), *with Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

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¶235 And multiple federal circuit courts conducting a true-threat analysis confirm what common sense suggests: When assessing whether someone means to threaten another with unlawful violence, we sometimes need to consider more than the behavior exhibited on one occasion. *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002) (rejecting an argument that "'context' means the direct circumstances surrounding delivery of the threat," and instead concluding that "[w]e, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat" (internal citation omitted) (quoting *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984), *overruled on other grounds by Planned Parenthood*, 290 F.3d at 1066–77, *and United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002))); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (considering "whether the maker of the threat had made similar statements to the victim on other occasions" and "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence" when determining whether a true threat exists). So too with incitement. Context matters.

¶236 This is not to say, as President Trump contends the district court found, that we "may consider *any speech ever uttered* by [President Trump]" in evaluating incitement. Of course, there are limits. But we need not define those outer limits

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now. Instead, we simply conclude that it was appropriate for the district court to consider President Trump's "history of courting extremists and endorsing political violence as legitimate and proper, as well as his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress." *Anderson*, ¶ 289.

¶237 With this in mind, we review the district court's application of *Brandenburg*'s three-pronged test.

b. Encouraging the Use of Violence or Lawless Action

¶238 Again, the first prong of the test for incitement is that "the speech explicitly or implicitly encouraged the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609.

¶239 The district court made dozens of findings regarding the general atmosphere of political violence that President Trump created before January 6, many of which we have already outlined in discussing why the district court concluded that President Trump "engaged in" insurrection. We incorporate those observations here by reference and supplement them with other illuminating evidence from the record below. For example, the district court found that "[a]t [a] February 2016 rally, [President] Trump told his supporters that in the 'old days,' a protester would be 'carried out on a stretcher' and that he would like to 'punch him in the face.'" *Anderson*, ¶ 68. In March 2016, President Trump

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responded to questions about his supporters' violence by saying it was "very, very appropriate" and "we need a little bit more of" it. *Id.* at ¶ 69. And during the 2020 election cycle, "President Trump threatened to deploy 'the Military' to Minneapolis to shoot 'looters' amid protests over the police killing of George Floyd," *id.* at ¶ 76, and told the Proud Boys to "stand back and stand by" during a debate for the 2020 presidential election. *id.* at ¶ 77.

¶240 The district court also credited the testimony of Professor Peter Simi, a professor of sociology at Chapman University, whom it had "qualified . . . as an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6 attack relate to longstanding patterns of behavior and communication by political extremists." *Id.* at ¶ 42. He testified, according to the court's summary, that (1) "violent far-right extremists understood that [President] Trump's calls to 'fight,' which most politicians would mean only symbolically, were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability," *id.* at ¶ 84; and that (2) "[President] Trump's speech took place in the context of a pattern of [President] Trump's knowing 'encouragement and promotion of violence' to develop and deploy a shared coded language with his violent supporters," *id.* at ¶ 142.

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¶241 As we described in the foregoing section, the district court further found that President Trump encouraged and supported violence before and after the 2020 election by telling his supporters that "the only way we're going to lose this election is if the election is rigged. Remember that," *id.* at ¶ 88; that the election was "a fraud on the American public," *id.* at ¶ 92; *see also id.* at ¶ 101 ("Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime"); and that the Democrats had stolen an election that rightfully belonged to President Trump and his supporters, *id.* at ¶¶ 93, 96. The district court also found that "[m]any of the state officials targeted by [President] Trump's campaign of intimidation were subject to a barrage of harassment and violent threats by [his] supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to [President] Trump to 'stop inspiring people to commit potential acts of violence' or '[s]omeone's going to get killed.'" *Id.* at ¶ 104 (last alteration in original); *see also id.* at ¶ 105 (finding that "[f]ar-right extremists understood [President] Trump's refusal to condemn the violence [Sterling condemned] . . . as an endorsement of the use of violence to prevent the transfer of presidential power").

¶242 The district court then identified specific incendiary language in President Trump's speech at the Ellipse on January 6, some of which we alluded to earlier in

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this opinion. To reiterate: President Trump announced, "we're going to walk down, and I'll be with you, we're going to walk down . . . to the Capitol . . . ." *Id.* at ¶ 135. He "used the word 'fight' or variations of it [twenty] times during his Ellipse speech." *Id.* at ¶ 137; *see also, e.g., id.* at ¶ 135 ("And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."). He declared, "[w]hen you catch somebody in a fraud," a sentiment he had repeatedly said had occurred with the 2020 election, "you're allowed to go by very different rules." *Id.* at ¶ 135; *see also id.* at ¶ 138 ("You don't concede when there's theft involved."). And he claimed that "our election victory [was] stolen by emboldened radical-left Democrats . . . ." *Id.* at ¶ 135.

¶243 In short, the district court found that President Trump's speech at the Ellipse "was understood by a portion of the crowd as, a call to arms." *Id.* at ¶ 145. And the district court here is not the first or only court to reach this conclusion. In *Thompson v. Trump*, 590 F. Supp. 3d 46, 118 (D.D.C. 2022), the U.S. District Court for the District of Columbia found that President Trump

> invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election from them; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building . . . where those very politicians were at work to certify an election that he had lost.

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The court concluded that President Trump's speech was, therefore "plausibly . . . a positive instigation of a mischievous act."[20] *Id.* (quoting John Stuart Mill, On Liberty 100 (London, John W. Parker & Son, 2d ed. 1859)). Our independent review of the record in this case brings us to the same conclusion: President Trump incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power. The tenor of President Trump's messages to his supporters in exhorting them to travel to Washington, D.C. on January 6 was obvious and unmistakable: the allegedly rigged election was an act of war and those victimized by it had an obligation to fight back and to fight aggressively. And President Trump's supporters did not miss or misunderstand the message: the cavalry was coming to fight.

¶244 The fact that, at one point during his speech, President Trump said that "everyone here will soon be marching to the Capitol building to *peacefully and patriotically* make your voices heard" does not persuade us that the district court erred in finding that the first prong of the *Brandenberg* test was met. *See Thompson*, 590 F. Supp. 3d at 113–14. This isolated reference "cannot inoculate [President

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[20] *Thompson* involved a motion to dismiss. As a result, the court determined only that President Trump's speech "plausibly [involved] words of incitement not protected by the First Amendment." *Thompson*, 590 F. Supp. 3d at 115; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (requiring plaintiffs to show that their complaints are plausible to survive a motion to dismiss for failure to state a claim).

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Trump] against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id.* at 117.

c. Intent to Produce Violent or Lawless Action

¶245 The second prong of the test for incitement is that "the speaker intends that his speech will result in the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609. The Supreme Court has interpreted this second prong of the *Brandenburg* test to require specific intent.[21] *Counterman*, 600 U.S. at 79, 81 (establishing that "when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge," and defining acting purposely as "'consciously desir[ing]' a result"). So, we must consider whether President Trump's exhortations at the Ellipse on January 6 to "fight like hell," and his

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[21] There is some uncertainty as to whether *specific intent* to incite imminent lawless action is needed in civil cases such as the one before us now because most of the modern incitement cases arose in a criminal context. *See Counterman*, 600 U.S. at 70; *Hess*, 414 U.S. at 105; *Brandenburg*, 395 U.S. at 444; *but see Claiborne Hardware*, 458 U.S. at 890 (adjudicating complainants' request for injunctive relief and damages). The *Counterman* Court's justification for the specific intent standard was therefore tied to criminal liability. *Counterman*, 600 U.S. at 81 ("A strong intent requirement . . . was a way to ensure that efforts to *prosecute* incitement would not bleed over . . . to dissenting political speech at the First Amendment's core." (emphasis added)). But we need not resolve the issue because, regardless of whether it is required, we agree with the district court that President Trump acted with specific intent.

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urgings that his followers "go[] to the Capitol" and that they would get to "go by 'very different rules,'" were intended to produce imminent lawless action.

¶246 The district court concluded that President Trump exhibited the requisite intent here. It found that, before the January 6 rally, "[President] Trump knew that his supporters were angry and prepared to use violence to 'stop the steal' including physically preventing Vice President Pence from certifying the election," *Anderson*, ¶ 128, and that President Trump's response to the events following his speech "support . . . that [President] Trump endorsed and intended the actions of the mob on January 6," *id.* at ¶ 193 (second alteration in original). Based on these findings of fact, the court "conclude[d] that [President] Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." *Id.* at ¶ 293.

¶247 The district court found that President Trump knew, before he gave his speech, that there was the potential for violence on January 6. It found that "[President] Trump himself agrees that his supporters 'listen to [him] like no one else,'" *id.* at ¶ 63 (second alteration in original), and that federal agencies that President Trump oversaw identified threats of violence ahead of January 6, including "threats to storm the U.S. Capitol and kill elected officials," *id.* at ¶¶ 123–24.

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¶248 The court also found that President Trump's conduct and tweets, which we outlined above, from the time he was told of the attack on the Capitol at 1:21 p.m. until Congress reconvened later that night, indicated his intent to produce lawless or violent conduct. *See id.* at ¶¶ 169–73, 178, 183, 186, 189.

¶249 In conducting our independent review of the district court's factual findings, we agree that President Trump intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power. Despite his knowledge of the anger that he had instigated, his calls to arms, his awareness of the threats of violence that had been made leading up to January 6, and the obvious fact that many in the crowd were angry and armed, President Trump told his riled-up supporters to walk down to the Capitol and fight. He then stood back and let the fighting happen, despite having the ability and authority to stop it (with his words or by calling in the military), thereby confirming that this violence was what he intended.

¶250 We therefore conclude that the second prong of the *Brandenburg* test has also been met.

d. Likely to Incite or Produce Imminent Lawless Action

¶251 Finally, for speech to be unprotected, we must conclude that "the imminent use of violence or lawless action is the likely result of the speech." *Nwanguma*, 903 F.3d at 609.

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¶252 The district court found that:

> Professor Simi reviewed [President] Trump's relationship with his supporters over the years, identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed [President] Trump to know how his supporters responded to his calls for violence using a shared language that allowed him to maintain plausible deniability with the wider public.

Id. at ¶ 62.

¶253 Professor Simi then "testified about . . . examples of [these] patterns of call-and-response that [President] Trump developed and used to incite violence by his supporters." *Id.* at ¶ 64. In one such instance, a November 2015 political rally, "[President] Trump . . . t[old] his supporters to 'get [a protester] the hell out of here' and the protester was then assaulted. When asked about the attack the next day, Trump said 'maybe [the protester] should have been roughed up.'" *Id.* at ¶ 66 (third and fourth alterations in original).

¶254 Further, the district court found that "on January 1, 2021, [President] Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying, 'The calvary [sic] is coming, Mr. President!'" *Id.* at ¶ 119. It found that, according to Professor Simi, "[President] Trump's December 19, 2020 ['will be wild'] tweet had an immediate effect on far-right extremists and militias . . . , who viewed the tweet as a 'call to arms' and began to plot activities to disrupt the January 6, 2021 joint session." *Id.* at ¶ 117.

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¶255 These findings support the conclusion that President Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence. When President Trump told his supporters that they were "allowed to go by very different rules" and that if they did not "fight like hell," they would not "have a country anymore," it was likely that his supporters would heed his encouragement and act violently. We therefore hold that this final prong of the *Brandenburg* test has been met.

¶256 In sum, we conclude that President Trump's speech on January 6 was not protected by the First Amendment.

IV. Conclusion

¶257 The district court erred by concluding that Section Three does not apply to the President. We therefore reverse the district court's judgment. As stated above, however, we affirm much of the district court's reasoning on other issues. Accordingly, we conclude that because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot. Therefore, the Secretary may not list President Trump's name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him. *See* § 1-7-114(2), C.R.S. (2023) ("A vote for a write-in candidate shall not be counted unless that candidate is qualified to hold the office

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for which the elector's vote was cast."). But we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court.

CHIEF JUSTICE BOATRIGHT dissented.

JUSTICE SAMOUR dissented.

JUSTICE BERKENKOTTER dissented.

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CHIEF JUSTICE BOATRIGHT dissenting.

¶258 I agree with the majority that an action brought under section 1-1-113, C.R.S. (2023) of Colorado's election code ("Election Code") may examine whether a candidate is qualified for office under the U.S. Constitution. But section 1-1-113 has a limited scope. *Kuhn v. Williams*, 2018 CO 30M, ¶ 1 n.1, 418 P.3d 478, 480 n.1 (per curiam, unanimous) (emphasizing "the narrow nature of our review under section 1-1-113"). In my view, the claim at issue in this case exceeds that scope. The voters' (the "Electors") action to disqualify former President Donald J. Trump under Section Three of the Fourteenth Amendment presents uniquely complex questions that exceed the adjudicative competence of section 1-1-113's expedited procedures. Simply put, section 1-1-113 was not enacted to decide whether a candidate engaged in insurrection. In my view, this cause of action should have been dismissed. Accordingly, I respectfully dissent.

I. The Electors' Challenge Is Incompatible with a Section 1-1-113 Proceeding

¶259 Section 1-1-113 provides for the resolution of potential election code violations in a timely manner. In many scenarios, Colorado voters can challenge the Secretary of State's (the "Secretary") certification of a candidate's qualifications. *Carson v. Reiner*, 2016 CO 38, ¶ 17, 370 P.3d 1137, 1141 (acknowledging that section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by [Colorado's election] officials charged with

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duties under the code [and] comprehends a specific challenge to a designated election official's certification of a candidate"). While section 1-1-113 only offers voters a "narrow opportunity," *Kuhn*, ¶ 28, 418 P.3d at 484, that opportunity has proven effective as voters have compelled the Secretary to omit from the ballot unqualified candidates whom they would have otherwise listed. *E.g.*, *id.* at ¶ 57, 418 P.3d at 489 (barring a candidate from the ballot because his petition circulator was not a Colorado resident). Section 1-1-113's grant of discretionary review to this court has also vindicated voters' rights by preventing a decision that would have compelled the Secretary to place an unqualified candidate on the ballot. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 26, 462 P.3d 1081, 1087 (barring a candidate from the ballot because she failed to gather sufficient signatures).

¶260 Further, our election code suggests that a petitioner may base a challenge to the Secretary's certification of an aspiring presidential primary candidate on federal law. *Compare* § 1-4-1203(2)(a), C.R.S. (2023) (stating that a candidate must be "qualified"), *with* §1-4-1201, C.R.S. (2023) (declaring that the code conforms to federal law); *see also Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 20, 350 P.3d 849, 853 (relying on federal law to interpret "lawful activity" in a Colorado statute). We have previously held, however, that some federal law claims cannot be adjudicated under section 1-1-113. *E.g.*, *Frazier v. Williams*, 2017 CO 85, ¶ 19,

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401 P.3d 541, 545 (concluding that a 42 U.S.C. § 1983 claim cannot be the basis of, or joined to, a section 1-1-113 action).

¶261 But not all federal questions exceed the scope of section 1-1-113. A qualification challenge under Article II, Section 1[1] or the Twenty-Second Amendment[2] lends itself to section 1-1-113's procedures. Although a claim that a candidate is not thirty-five years old may be easier to resolve than a claim that a candidate is not a natural born citizen, these presidential qualifications are characteristically objective, discernible facts. Age, time previously served as president, and place of birth all parallel core qualification issues under Colorado's election code.[3] Conversely, all these questions pale in comparison to the complexity of an action to disqualify a candidate for engaging in insurrection.

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[1] U.S. Const. art. II, § 1, cl. 5 provides the presidential qualifications:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[2] U.S. Const. amend. XXII, § 1 provides further presidential qualifications:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

[3] *See also* Colorado Secretary of State, *Presidential Primary 2024 Candidate Qualification Guide* 3, https://www.coloradosos.gov/pubs/elections/

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¶262 Far from presenting a straightforward biographical question, Section Three of the Fourteenth Amendment proscribes insurrectionist U.S. officers from again holding office. U.S. Const. amend. XIV, § 3. Unlike qualifications such as age and place of birth, an application of Section Three requires courts to define complex terms, determine legislative intent from over 150 years ago, and make factual findings foreign to our election code. The Electors contend that there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues." However, the framework that section 1-1-113 offers for identifying qualified candidates is not commensurate with the extraordinary determination to disqualify a candidate because they engaged in insurrection against the Constitution. *See* Dis. op. ¶ 352 (Berkenkotter, J., dissenting) (noting that "the historical application of section 1-1-113 . . . has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election."). Recognizing this limitation of section 1-1-113 is not novel. *See Kuhn*, ¶ 1 n.1, 418 P.3d at 480 n.1 (emphasizing "the narrow nature of our review under section 1-1-113" and declining to address a First Amendment challenge to Colorado's residency requirement for petition

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Candidates/packets/2024PresidentialPrimaryGuide.pdf [https:// perma.cc/ KK3L-X8BM] (listing the "basic qualifications" for the presidency including the qualifications from Article II and the Twenty-Second Amendment but not mentioning the Fourteenth Amendment's disqualification for insurrectionists).

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circulators "because such claims exceed this court's jurisdiction in a section 1-1-113 action").

¶263 Dismissal is particularly appropriate here because the Electors brought their challenge without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process. Instead, the Electors relied on section 1-1-113 and its "breakneck pace" to declare President Trump a disqualified insurrectionist. *See Frazier*, ¶ 11, 401 P.3d at 544.

II. As Demonstrated by the Proceeding Below, the Statutory Timeline for a Section 1-1-113 Proceeding Does Not Permit a Claim as Complex as the Electors'

¶264 In addition to qualitative incompatibilities, the complexity of the Electors' claims cannot be squared with section 1-1-113's truncated timeline for adjudication. Section 1-1-113 actions for presidential primary ballots fulfill a need for speed by requiring the district court to hold a hearing within *five days* and issue its decision within forty-eight hours of the hearing:

> Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.

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§ 1-4-1204, C.R.S. (2023). This speed comes with consequences, namely, the absence of procedures that courts, litigants, and the public would expect for complex constitutional litigation. As President Trump, argues and the Electors do not contest, section 1-1-113's procedures do not provide common tools for complex fact-finding: preliminary evidentiary or pre-trial motions hearings, subpoena powers, basic discovery, depositions, and time for disclosure of witnesses and exhibits. This same concern was raised in *Frazier*; the then-Secretary argued that "it is impossible to fully litigate a complex constitutional issue within days or weeks, as is typical of a section 1-1-113 proceeding." ¶ 18 n.3, 401 P.3d at 545 n.3. While we avoided deciding if a claim could be too complex for a section 1-1-113 proceeding in *Frazier*, that question is unavoidable here, and it demands that we reconcile the complexity of this issue with the breakneck pace of a section 1-1-113 procedure. In my view, the answer to this question is dispositive.

¶265 This case's procedural history proves my point. Despite clear requirements, the district court did not follow section 1-4-1204's statutory timeline for section 1-1-113 claims. The proceeding below involved two delays that, respectively, violated (1) the requirement that the merits hearing be held within five days of the challenge being lodged, and (2) the requirement that the district court issue its order within forty-eight hours of the merits hearing.

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¶266 The Electors filed their challenge on September 6, 2023. Although the question of whether this action should be removed to federal court was resolved by September 14, the district court did not hold an evidentiary hearing until October 30. The majority appears to imply that a "status conference" on September 18 fulfills the statutory requirement that the hearing be held within five days of the Electors' challenge. Maj. op. ¶ 83. However, a status conference plainly does not satisfy the requirement: "No later than five days after the challenge is filed, a hearing must be held *at which time the district court shall hear the challenge and assess the validity of all alleged improprieties.*" § 1-4-1204 (emphasis added); *see Carson*, ¶ 21, 370 P.3d at 1142 (ruling that section 1-1-113 "does not permit a challenge to an election official's certification of a candidate to the ballot, solely on the basis of the certified candidate's qualification, once the period . . . for challenging the qualification of the candidate directly has expired . . . ."). It is no mystery why the statutory timeline could not be enforced: This claim was too complex.[4] The fact it took a week shy of two months to hold a hearing that "must" take place within five days proves that section 1-1-113 is an incompatible vehicle

[4] The intervals between the challenge and the hearing, and the hearing and the order, should not cast aspersions on the district court, which made valiant efforts to add some process above and beyond what the election code provides. However, the Colorado General Assembly, not the district court, decides when and how to change statutory requirements.

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for this claim. The majority recognizes the five-day requirement, Maj. op. ¶ 38, but it does not acknowledge the violation of section 1-4-1204's timeline or give consequence to that violation.

¶267 Nonetheless, the majority touts the fact that a hearing was held and lauds the district court's timely issuance of its decision as evidence that this matter was not too complex for a section 1-1-113 proceeding. Maj. op. ¶¶ 84–85. But was the order timely issued? Substantially, I think not. *Compare* Maj. op. ¶ 22 ("The trial began, as scheduled, on October 30 [a Monday]. The evidentiary portion lasted five days [through Friday, November 3], with closing arguments almost two weeks later, on November 15. . . . The court issued its written final order on November 17 . . . ."), *with* § 1-4-1204 ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Section 1-4-1204 only mandates two deadlines, and neither were honored. After all the evidence had been presented at a week-long hearing, the court suspended proceedings for two weeks. I find nothing in the record offering a reason grounded in the election code for the interval between the five consecutive days of the hearing and the solitary closing arguments. However, I understand the necessity to postpone the closing arguments for one reason: The complexity of the case required more time than "no later than forty-eight hours after the hearing" for the court to draft its 102-page order. Thus, while the district court formally

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issued its order within forty-eight hours of the closing arguments, the interval between the evidentiary hearings and the closing arguments was not in compliance with section 1-4-1204.

¶268 The majority condoned the district court's failure to observe the statutory timeline by concluding that it "substantially compl[ied]." *See* Maj. op. ¶ 85. This renders the statute's five-day and forty-eight-hour requirements meaningless. *Contra Ferrigno Warren*, ¶ 20, 462 P.3d at 1085 (holding that, under Colorado's election code, a "specific statutory command could not be ignored in the name of substantial compliance"); *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 25, 398 P.3d 599, 608 ("Where the language is clear, we must apply the language as written."). If a court must contort a special proceeding's statutory timeline to process a claim, then that claim is not proper for the special proceeding.

¶269 From my perspective, just because a hearing was held and Intervenors participated, it doesn't mean that due process was observed. Nor should it be inferred that section 1-1-113's statutory procedures, which were not followed, were up to the task. I cannot agree with the majority that the district court's extra-statutory delays and select procedure augmentations indicate that the Electors' claim was fit for adjudication under sections 1-4-1204(4) and 1-1-113. *Contra*, Maj. op. ¶ 81 ("In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action."). Dragging

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someone through a "makeshift proceeding" is not an indication that it was an appropriate process. *See* Dis. op. ¶ 274 (Samour, J., dissenting). Importantly, the Electors were not rushed into the process; they didn't have to file their challenge until they were prepared. Only Intervenors arguably had inadequate time to prepare.

¶270 Finally, only a two-thirds majority of both houses of Congress can overturn a Section Three disqualification. U.S. Const. amend. XIV, § 3. This remedy is extraordinary and speaks volumes about the gravity of the disqualification. Such a high bar indicates that an expedited hearing absent any discovery procedures and with a preponderance of the evidence standard is not the appropriate means for adjudicating a matter of this magnitude.[5] *See Frazier*, ¶¶ 17–18, 401 P.3d at 545 (holding that "inconsistencies" between the procedures of section 1-1-113 and a claim under 42 U.S.C. § 1983 "reinforce" the conclusion that not all federal law claims can be raised in section 1-1-113 proceedings).

[5] Although the district court made its findings using the clear and convincing standard, the election code calls for a preponderance standard. § 1-4-1204 ("The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.").

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III. Conclusion

¶271 My opinion that this is an inadequate cause of action is dictated by the facts of this case, particularly the absence of a criminal conviction for an insurrection-related offense.

¶272 The questions presented here simply reach a magnitude of complexity not contemplated by the Colorado General Assembly for its election code enforcement statute. The proceedings below ran counter to the letter and spirit of the statutory timeframe because the Electors' claim overwhelmed the process. In the absence of an insurrection-related conviction, I would hold that a request to disqualify a candidate under Section Three of the Fourteenth Amendment is not a proper cause of action under Colorado's election code. Therefore, I would dismiss the claim at issue here. Accordingly, I respectfully dissent.

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JUSTICE SAMOUR dissenting.

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

In re Griffin, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").

¶273 These astute words, uttered by U.S. Supreme Court Chief Justice Salmon P. Chase a century and a half ago, eloquently describe one of the bedrock principles of American democracy: Our government cannot deprive someone of the right to hold public office without due process of law. Even if we are convinced that a candidate committed horrible acts in the past—dare I say, engaged in insurrection—there must be procedural due process before we can declare that individual disqualified from holding public office. Procedural due process is one of the aspects of America's democracy that sets this country apart.

¶274 The decision to bar former President Donald J. Trump ("President Trump")—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot flies in the face of the due process doctrine. By concluding that Section Three of the Fourteenth Amendment is self-executing, the majority approves the enforcement of that federal constitutional provision by our state courts through the truncated procedural mechanism that resides in our

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state Election Code.[1] Thus, based on its interpretation of Section Three, our court sanctions these makeshift proceedings employed by the district court below—which lacked basic discovery, the ability to subpoena documents and compel witnesses, workable timeframes to adequately investigate and develop defenses, and the opportunity for a fair trial—to adjudicate a federal constitutional claim (a complicated one at that) masquerading as a run-of-the-mill state Election Code claim. And because most other states don't have the Election Code provisions we do, they won't be able to enforce Section Three. That, in turn, will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states, thereby risking chaos in our country. This can't possibly be the outcome the framers intended.

¶275 I agree that Section Three bars from public office anyone who, having previously taken an oath as an officer of the United States to support the federal Constitution, engages in insurrection. But Section Three doesn't spell out the

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[1] As pertinent here, Section Three provides that:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States, or under any State, who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . .

U.S. Const. amend. XIV, § 3.

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procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three. My colleagues in the majority concede that there is currently no legislation enacted by Congress to enforce Section Three. This is of no moment to them, however, because they conclude that Section Three is self-executing, and that the states are free to apply their own procedures (including compressed ones in an election code) to enforce it.[2] That is hard for me to swallow.

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[2] The majority repeatedly uses "self-executing" to describe Section Three, but then reasons that this part of the Fourteenth Amendment is enforceable in Colorado only because of the procedures our legislature has enacted as part of the state's Election Code. This strikes me as an oxymoron. If a constitutional provision is truly *self-executing*, it needs no legislation to be enforced. *See Self-executing*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/self-executing [https://perma.cc/4X7W-Y8AR] (defining "self-executing" as "taking effect immediately without implementing legislation"); *see also Self-enforcing*, Black's Law Dictionary (11th ed. 2019) ("self-enforcing" means "effective and applicable without the need for any other action; self-executing"). Much like Inigo Montoya advised Vizzini, "I do not think [self-executing] means what [my colleagues in the majority] think it means." *The Princess Bride* (20th Century Fox 1987) ("You keep using that word [inconceivable]. I do not think it means what you think it means.").

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¶276 Significantly, there is a federal statute that specifically criminalizes insurrection and requires that anyone convicted of engaging in such conduct be fined or imprisoned *and be disqualified from holding public office. See* 18 U.S.C. § 2383. If any federal legislation arguably enables the enforcement of Section Three, it's section 2383. True, President Trump has not been charged under that statute, so it is not before us. But the point is that this is the only federal legislation in existence at this time to potentially enforce Section Three. Had President Trump been charged under section 2383, he would have received the full panoply of constitutional rights that all defendants are afforded in criminal cases. More to the point for our purposes, had he been so charged, I wouldn't be writing separately to call attention to the substandard due process of law he received in these abbreviated Election Code proceedings.

¶277 I recognize the need to defend and protect our democracy against those who seek to undermine the peaceful transfer of power. And I embrace the judiciary's solemn role in upholding and applying the law. But that solemn role necessarily includes ensuring our courts afford everyone who comes before them (in criminal and civil proceedings alike) due process of law. Otherwise, as relevant here, how can we ever be confident that someone who is declared ineligible to hold public office pursuant to Section Three actually engaged in insurrection or rebellion after taking the prerequisite oath?

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¶278 In my view, what transpired in this litigation fell woefully short of what due process demands. Because I perceive the majority's ruling that Section Three is self-executing to be the most concerning misstep in today's lengthy opinion, I focus on that aspect of the legal analysis.

¶279 Context is key here. The Fourteenth Amendment was designed to address a particular juncture in American history. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 3), https://ssrn.com/abstract=4532751. The postbellum framers were confronted with the unprecedented nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forthcoming 2024) (manuscript at 214–15), https://ssrn.com/abstract=4568771. And their response, in some measure, sounded the clarion call of "a constitutional revolution." *Id.* at 99.

¶280 Indeed, the Fourteenth Amendment ushered in an expansion of federal power that undercut traditional state power. *See United States v. Washington*, 20 F. 630, 631 (C.C.W.D. Tex. 1883) ("The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly

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limits the States."). Forefront in the minds of the framers was the evident concern that the states would again seek to undermine the national government. In short, the states—state institutions, state officials, and state courts—were not to be trusted. *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

¶281 Thus, the indelible trespass of the former confederate states was met squarely by an overarching goal to render federal institutional authority paramount. Such is the contextual framework informing my view of the instant matter. To my mind, it compels the conclusion, soundly supported by the framers' intent and the weight of the relevant authorities, that Section Three of the Fourteenth Amendment is not self-executing, and that Congress alone is empowered to pass any enabling legislation.

¶282 My colleagues in the majority turn Section Three on its head and hold that it licenses states to supersede the federal government. Respectfully, they have it backwards. Because no federal legislation currently exists to power Section Three and propel it into action, because President Trump has not been charged under section 2383, and because there is absolutely no authority permitting Colorado state courts to use Colorado's Election Code as an engine to provide the necessary

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thrust to effectuate Section Three, I respectfully dissent.[3] I would affirm the district court's judgment in favor of President Trump, but I would do so on other grounds.[4]

I. Analysis

A. Pertinent Procedural Posture

¶283 The district court gave short shrift to the question of whether Section Three is self-executing. In its Omnibus Order, which denied President Trump's September 29 motion to dismiss, the court found the issue "irrelevant." The court ruled, in conclusory fashion, that states are empowered to execute Section Three via their own enabling legislation and that Colorado's Election Code constitutes such an enactment. This analytical shortcut, though convenient, is inconsistent with both the text of the Fourteenth Amendment and persuasive authority interpreting it.

¶284 *Griffin's Case* is the jumping-off point for any Section Three analysis.

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[3] There is a colorable argument that the majority incorrectly holds that Section Three applies to the President of the United States. Other parts of the majority's analysis, including the determinations that President Trump engaged in insurrection and that his remarks deserve no shelter under the First Amendment's rather expansive protective canopy, are at least questionable. Because I conclude that Section Three is not self-executing, and because that conclusion is dispositive, I don't address any other issue.

[4] The district court decided that Section Three does not apply to the President of the United States.

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B. *Griffin's Case*: The Fountainhead

¶285 In 1869, less than a year after the ratification of the Fourteenth Amendment, U.S. Supreme Court Chief Justice Chase presided over *Griffin's Case* in the federal circuit court for the district of Virginia.[5] *Griffin's Case* is the wellspring of Section Three jurisprudence. And, given the temporal proximity of Chief Justice Chase's pronouncements on the topic of self-execution to the passage and ratification of the Fourteenth Amendment, I consider the holding in *Griffin's Case* compelling.

¶286 Judge Hugh W. Sheffey presided over Caesar Griffin's criminal trial after the Fourteenth Amendment went into effect. *Griffin's Case*, 11 F. Cas. at 22. Before the Civil War, Sheffey held a Section Three-triggering position, and so, had taken an oath to support the Constitution of the United States. *Id.* Subsequently, Sheffey served in Virginia's confederate legislature. *Id.* It was not until after the war that Sheffey was appointed to a state court judgeship, the position he held at the time of Griffin's trial. *Id.* at 16. Following the jury's guilty verdict on the charge of assault with intent to kill, Judge Sheffey sentenced Griffin to two years' imprisonment. *Id.* at 22–23.

¶287 Griffin filed a collateral attack in federal district court. He argued that his sentence was null because Section Three had "instantly, on the day of its

[5] At the time, Supreme Court justices rode the circuit and sat in regional federal courts.

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promulgation, vacated all offices held by persons within the category of prohibition," thereby rendering Judge Sheffey ineligible to be on the bench. *Id.* at 24. More specifically, Griffin claimed that Sheffey was disqualified from being a judge because he had engaged in conduct prohibited by Section Three. *Id.* The federal district court agreed and ordered Griffin's immediate discharge from custody. *Id.*

¶288 On appeal, Chief Justice Chase framed the issue in the following terms: "[W]hether upon a sound construction of the amendment, it must be regarded as operating directly, *without any intermediate proceeding whatever*, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23 (emphasis added). Chief Justice Chase grounded his resolution of this self-execution inquiry in the "character of the third section of the amendment." *Id.* at 25. In other words, he focused on the context in which the disqualification clause of the Fourteenth Amendment was enacted. Of course, he recognized that the ultimate object of this part of the Fourteenth Amendment was "to exclude from certain offices a certain class of persons." *Id.* at 26. But his prefatory statements echo the bugle blow of constitutional revolution: "The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national

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government, in those states which had attempted . . . to establish an independent Confederacy." *Id.* at 25.

¶289 Crucially, he observed that "it is obviously impossible to [disqualify certain officers] by a simple declaration, whether in the constitution or in an act of congress." *Id.* at 26. He added that to carry out Section Three's punitive mandate and enforce "any sentence of exclusion," it must first "be ascertained what particular individuals are embraced by the definition." *Id.* Chief Justice Chase explained that "[t]o accomplish this ascertainment and ensure effective results," considerable procedural and normative mechanisms would need to be introduced; certainly, "proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.* And here's the kicker, the beating heart of *Griffin's Case*: Chief Justice Chase declared that these indispensable mechanisms "*can only be provided for by congress*." *Id.* (emphasis added).

¶290 It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article.'" *Id.* (emphasis added) (quoting U.S. Const. amend. XIV, § 3). Chief Justice Chase noted that Section Five "qualifies [Section Three] to the same extent as it would if the whole amendment consisted of these two

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sections." *Id.* And pivoting back to Section Three, he pointed out that, consistent with Section Five, its final clause "gives to congress absolute control of the whole operation of the amendment." *Id.*; *see* U.S. Const. amend. XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability.").

¶291 Chief Justice Chase, therefore, concluded:

> Taking the third section then, in its completeness with this final clause, *it seems to put beyond reasonable question* the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and *to be made operative in other cases by the legislation of congress in its ordinary course.*

Griffin's Case, 11 F. Cas. at 26 (emphases added).

¶292 I extract three seminal, and related, takeaways from this review of *Griffin's Case*. First, Section Three is not self-executing. Second, only Congress can pass the "appropriate legislation" needed to execute it. And third, this grant of power to Congress was not merely formalistic; it was also pragmatic. Indeed, it was indicative of the complex nature of the disqualification function. Chief Justice Chase perceived that Section Three would require an array of mechanisms—procedural, evidentiary, and definitional—to ascertain who was subject to disqualification and how they could be disqualified. More on this third notion later.

¶293 For now, though, it is worth stressing that, despite detractors in some quarters, the other premises have withstood the test of time: Section Three is not

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self-executing, and Congress has the exclusive authority to enforce it. *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for the proposition that Section Three is "not self-executing absent congressional action"); *State v. Buckley*, 54 Ala. 599, 616–17 (1875) (same); *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, *1 (Ariz. May 9, 2022) (affirming the lower court's ruling against disqualification on state law grounds but stating that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause"); *see also* Va. Op. Att'y Gen. No. 21-003, at 3 (Jan. 22, 2021) (citing *Griffin's Case* and stating that "the weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'").

¶294 I now address the criticisms launched by the Electors against the enduring vintage of *Griffin's Case*. For the reasons I articulate, I am not persuaded by any of the contentions advanced.

C. Harmonizing *Griffin's Case* and *Case of Davis*

¶295 The Electors argue that Chief Justice Chase took the opposite tack on Section Three a couple of years before deciding *Griffin's Case*. *See Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871). But *Griffin's Case* was decided after *Case of Davis*, and unlike

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Griffin's *Case*, *Case of Davis* is a two-judicial-officer, unwritten, split decision.[6] Hence, to put it mildly, *Case of Davis* is of questionable precedential value. Indeed, the majority doesn't rely on *Case of Davis* in its attempt to undermine *Griffin's Case*.

¶296 In *Case of Davis*, Chief Justice Chase, again sitting as a circuit court judge, presided over the treason prosecution of former confederate president, Jefferson Davis. *Id.* The question before the court was whether Section Three displaced the federal criminal treason charges levied against Davis. *Id.* at 102. Defense counsel asserted that Section Three provided the exclusive punishment for those within its reach, thus foreclosing prosecution under the federal treason statute. *Id.* at 90–91. Furthermore, defense counsel maintained that Section Three "executes itself" and "needs no legislation on the part of congress to give it effect." *Id.* at 90.

¶297 Due to the structure of the federal judiciary at the time, the case was heard by both a federal district court judge and Chief Justice Chase sitting together. *See* Judiciary Act of 1802, 2 Stat. 156, 159, § 6. The judicial officers, however, failed to reach consensus on the defense's motion to quash the indictment. *Case of Davis*,

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[6] Although the year in the citation for *Case of Davis* (1871) postdates the year in the citation for *Griffin's Case* (1869), it was in fact *Case of Davis* that came first. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100 n.66 (2021). Chief Justice Chase announced on December 5, 1868, that the court had failed to reach consensus in *Case of Davis*. *Case of Davis*, 7 F. Cas. at 102; Certificate of Division, *Case of Jefferson Davis*, 7 F. Cas. 63 (C.C.D. Va. 1867–1871) (No. 324), https://joshblackman.com/wp-content/uploads/2023/08/5220.pdf [https://perma.cc/K7QC-4YZJ].

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7 F. Cas. at 102. Accordingly, a certificate of disagreement was submitted for review by the Supreme Court at its next session. *Id.* Notably, though, the case was never heard by the Supreme Court because President Johnson issued a proclamation of general amnesty in December 1868, effectively disposing of the treason charges. *Id.*

¶298 Although the certificate of disagreement did not indicate the judicial officers' votes, the final sentence in the 1894 report of the case in the *Federal Reports* states that Chief Justice Chase "instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* Over the years, some have clung to this hearsay to posit that Chief Justice Chase was inconsistent in his application of Section Three, waffling on the issue of self-execution.

¶299 Certain legal scholars have sought to explain this purported incongruence by surmising that Chief Justice Chase's application of Section Three in *Griffin's Case* was politically motivated. Consequently, they criticize *Griffin's Case* as wrongly decided and the result of flawed logic. *See* Baude & Paulsen, *supra* (manuscript at 35–49). Other legal scholars, however, question whether the statement quoted above from the *Federal Reports* accurately represented Chief Justice Chase's views. They point out that the case reporter, a former confederate

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general, was the very attorney who represented Judge Sheffey in *Griffin's Case*.[7] *See* Blackman & Tillman, *supra* (manuscript at 15). Even assuming *Case of Davis* warrants any consideration at all, there is no need to join this affray because these cases can be reconciled in a principled manner by recognizing that there are two distinct senses of self-execution. *Id.* at 19. I find this distinction both helpful and borne out by the case law.

¶300 First, there is self-execution as a *shield*, allowing individuals to raise the Constitution defensively, in response to an action brought by a third party. Second, there is self-execution as a *sword*—such as when individuals invoke the Constitution in advancing a theory of liability or cause of action that supports affirmative relief. When acting as a *shield*, the Fourteenth Amendment is self-executing. *Cale*, 586 F.2d at 316. The Fourteenth Amendment, however, cannot act as a self-executing *sword*; rather, an individual seeking affirmative relief under the Amendment must rely on legislation from Congress. *Id.*

¶301 The Fourth Circuit aptly adopted this distinction in *Cale*, thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence. That case

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[7] *Griffin's Case* was decided in 1869 and the statement from the case reporter regarding *Case of Davis* appeared in the 1894 *Federal Reports*. Blackman & Tillman, *supra* (manuscript at 140).

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implicated a wrongful discharge action in which the plaintiff asked the court to sanction an implied cause of action arising under the Fourteenth Amendment's due process clause. *Id.* at 313. In examining whether an implied cause of action exists under the due process clause of the Fourteenth Amendment, the court turned to cases that have construed Section Five. It began by discussing *Ex parte Virginia*, where the Supreme Court explained that the Fourteenth Amendment derives much of its force from Section Five, which envisions enabling legislation from Congress to effectuate the prohibitions of the amendment:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] *Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.*

Ex parte Virginia, 100 U.S. at 345–46 (first emphasis in original, second emphasis added).

¶302 But shortly after deciding *Ex parte Virginia*, the Supreme Court declared the Fourteenth Amendment to be "undoubtedly self-executing without any ancillary legislation," while simultaneously making the seemingly inconsistent statement that Section Five "invests Congress with power to enforce" the Fourteenth Amendment "in order that the national will, thus declared, may not be a mere brutum fulmen." *The Civil Rights Cases*, 109 U.S. 3, 11, 20 (1883). Although at first

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blush the opinion in the *Civil Rights Cases* appears to be both internally inconsistent and inconsistent with *Ex parte Virginia*, the *Cale* court did not so hold. *Cale*, 586 F.2d at 316. Instead, the *Cale* court resolved any apparent inconsistencies by distinguishing between, on the one hand, "the protection the Fourteenth Amendment provide[s] of its own force as a shield under the doctrine of judicial review," and on the other, affirmative relief sought under the amendment as a sword, which is unavailable without legislation from Congress. *Id.*

¶303 In supporting this distinction, the *Cale* court found refuge in the *Slaughter-House Cases*. 83 U.S. 36 (1872). There, the defendants invoked the Fourteenth Amendment as a shield by arguing that a local law restricting where animals could be slaughtered deprived the city's butchers of their "right to exercise their trade." *Id.* at 60. The Supreme Court, however, held that given the history of the Reconstruction Amendments and their purpose of preventing discrimination against the newly liberated enslaved people, the butchers' "right to exercise their trade" was not a right that fell within the purview of the privileges-and-immunities provision of Section One of the Fourteenth Amendment. *Id.* at 81. Of particular interest for our purposes is the fact that the Court did not reject the use of the Fourteenth Amendment as a self-executing shield, but rather rejected the argument that the particular right in question fit within the Fourteenth Amendment's protection.

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¶304 Importantly, based on its examination of *Ex parte Virginia*, the *Civil Rights Cases*, and the *Slaughter-House Cases*, the *Cale* court observed that "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Cale*, 586 F.2d at 316. The *Cale* court added that it's only when state laws or proceedings are asserted "in hostility to rights and privileges" that the Fourteenth Amendment, and specifically Section One, may be raised as a self-executing defense to those laws or proceedings. *Id.* (discussing the *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting)); *see also The Slaughter-House Cases*, 83 U.S. at 81 (explaining that when "it is a State that is to be dealt with, and not alone the validity of its laws," the matter should be left in the hands of Congress).

¶305 The defensive-offensive dynamic of the Fourteenth Amendment is best exemplified by the interplay between 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). *See Cale*, 586 F.2d at 316–17. In *Ex parte Young*, multiple railroad companies wielded the Fourteenth Amendment's due process clause as a shield to request enjoinment of the future enforcement of Minnesota's mandatory railroad rates. 209 U.S. at 130. The Court ruled in their favor, holding that they could prospectively bring suit against a state official to prevent the enforcement of an act that violated the federal constitution. *Id.* at 167. But an *Ex parte Young* claim is not so much an affirmative cause of action as it is a defense that may be asserted in

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anticipation of the enforcement of state laws alleged to be unconstitutional. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Hence, *Ex parte Young* provides a means of vindicating Fourteenth Amendment rights without violating the grant of exclusive enforcement power to Congress. When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as section 1983.

¶306 Between affirmative relief provided by Congress and defensive *Ex parte Young* claims, constitutional rights are "protected in all instances." *Cale*, 586 F.2d at 316–17. Not surprisingly, after declining to find an implied cause of action permitting affirmative relief within the Fourteenth Amendment, the Fourth Circuit in *Cale* remanded to the district court with instructions to determine whether the plaintiff's wrongful discharge claim could be brought under section 1983, the proper enforcement mechanism. *Id.* at 312.

¶307 The majority devotes all of one sentence to *Cale* and disregards most of the Supreme Court jurisprudence to which that thoughtful opinion is moored. Maj. op. at ¶ 103. It is true that *Cale* was a Section One, not a Section Three, case. But *Cale* cited to *Griffin's Case* (a Section Three case) in determining that the Fourteenth Amendment cannot be used as a self-executing sword, thus tethering the distinction to both Sections. *Cale*, 586 F.2d at 316. Accordingly, while courts have

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seldom had occasion to interpret Section Three, the case law on Section One is instructive on the issue of self-execution.

¶308 Critically, the Supreme Court has affirmed that the Fourteenth Amendment, while offering protection under certain circumstances, does not provide a self-executing cause of action. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, [n]ot affirmative, and it carries no mandate for particular measures of reform."). Moreover, as pertinent here, the Supreme Court has retreated from recognizing implied causes of action, instead holding that for a cause of action to exist, Congress must expressly authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (refusing to recognize a private right of action because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

¶309 The majority nevertheless protests that interpreting any section of the Fourteenth Amendment as requiring legislation yields absurd results because the rest of the Reconstruction Amendments are self-executing. Maj. op. ¶ 96. I do not dispute that the Thirteenth and Fifteenth Amendments are self-executing. But I disagree that Section Three must therefore be deemed self-executing as well. The Thirteenth and Fifteenth Amendments, on the one hand, and the Fourteenth Amendment, on the other, are different.

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¶310 The Thirteenth and Fifteenth Amendments speak in affirmative, universal terms to abolish slavery, create the right to vote, and restrain not only government actors, but also private individuals. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008); *Guinn v. United States*, 238 U.S. 347, 363 (1915) (recognizing "the right of suffrage" created by the Fifteenth Amendment's "generic character"). The Fourteenth Amendment, however, was born out of a deep suspicion of the states and acts as a negative policing mechanism intended solely to curtail state power. *Adarand*, 515 U.S. at 255 (Stevens, J. dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."); *The Civil Rights Cases*, 109 U.S. at 11 (holding that the Fourteenth Amendment applies to state action, not private action). This curtailment applies both to state laws or actions abridging rights and to a state's selection of government officials. To give effect to this amendment while respecting our federalist system, courts have turned to the sword-shield paradigm of self-execution, thereby striking "a balance between delegated federal power and reserved state power" without forsaking the protection of constitutional rights "in all instances." *Michigan Corr. Org.*, 774 F.3d at 900; *Cale*, 586 F.2d at 317.

¶311 To draw a yet deeper line in the sand, unlike the Thirteenth and Fifteenth Amendments, Section Three does not indelibly ensure a right but instead allows

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the federal government to act as a protective check against a state's selection of government officials so as to preclude elected insurrectionists and safeguard democracy. This shift in power between the authority of the states to choose their own government officials and the authority of the federal government as a last defense is all the more reason to require a congressionally created cause of action to direct the execution of this federal oversight.

¶312 In sum, Chief Justice Chase's holding in *Griffin's Case* appears consistent and in alignment with both his alleged vote in *Case of Davis* and our framework for Fourteenth Amendment litigation. Griffin wielded Section Three as a self-executing sword, invoking the provision as a cause of action to disqualify Judge Sheffey. Davis, on the other hand, took a defensive posture and invoked Section Three as a self-executing shield, arguing that it provided the exclusive punishment for insurrection, thus displacing the federal criminal treason charges brought against him.

¶313 Having said that, I do not rely solely on *Griffin's Case*. Congress's own actions corroborate my understanding of Section Three.

D. Erstwhile Enabling Legislation

¶314 The majority's ruling that Section Three self-executes without the need for any federal enforcement legislation is further undermined by Congress's promulgation of just such legislation. One year after *Griffin's Case* was decided,

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and perhaps in response to it, Congress enacted the Enforcement Act of 1870. The Enforcement Act contained two provisions for the specific purpose of *enforcing Section Three*. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143–44. The first provided a quo warranto mechanism whereby a federal district attorney could bring a civil suit in federal court to remove from office a person who was disqualified by Section Three. *Id.* at 143. The second permitted a criminal prosecution for knowingly accepting or holding office in violation of Section Three, and included punishment by imprisonment of not more than a year, a fine of not more than $1,000, or both. *Id.* at 143–44.

¶315 The enforcement purpose behind the Act was evident in the congressional debates held on these very two provisions. Speaking in support of their adoption, Senator Lyman Trumbull, referring to Section Three, stated, "But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. *The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.*" Cong. Globe, 41st Cong., 1st Sess. 626 (1869) (emphasis added). He later reiterated this point as he explained that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* The debate on the floor focused not on whether the provisions were necessary for enforcing Section Three—that seemed to be a foregone conclusion—but instead on whether the

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second provision and its attendant punishments were necessary. The need for the first provision was so self-evident that it was not even debated. As Senator Garrett Davis put it, the first provision simply provided an "adequate remedy to prevent any of the criminals under the fourteenth amendment of the Constitution from holding office in defiance of its letter." *Id.* at 627.

¶316 While the quo warranto provision in the Enforcement Act would have provided a civil cause of action to challenge President Trump's eligibility to appear on Colorado's presidential primary ballot, Congress repealed it in 1948. *See* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 206 n.365 (2021) (citing Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993); *see also* Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808. The Enforcement Act's criminal provision, however, appears to have survived: As best I can tell, 18 U.S.C. § 2383 is its descendant. *Id.*

¶317 Presumably recognizing the civil-action gap created by the 1948 repeal, just months after the January 6, 2021 incident, legislation was proposed to allow the Attorney General of the United States to bring a civil action "against any Officeholder who engages in insurrection or rebellion, including any Officeholder who, after becoming an Officeholder, engaged in insurrection or rebellion." H.R. 1405, 117th Cong. (2021). H.R. 1405 would have disqualified such an Officeholder from federal or state office. *Id.* Furthermore, it would have provided

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what has been so apparently lacking from this state proceeding—clear designations of the appropriate procedures, forum, and standard of evidence, as well as the definition of "insurrection or rebellion." *Id.*

¶318 H.R. 1405 made it no further than introduction in the House. But the relevant point for our purposes remains: As recently as 2021, just months after the January 6 incident, Congress considered legislation to enforce Section Three through a civil proceeding. Why would Congress do so if, as the majority insists, Section Three is self-executing? Along the same lines, if the majority is correct that Section Three is self-executing, why did Congress pass the *Enforcement* Act to begin with (on the heels of *Griffin's Case*) and then allow it to remain in effect in its entirety until 1948? The majority offers no salient explanation.

¶319 If there is any enforcing legislation for Section Three currently on the books, it is arguably what remains from the Enforcement Act, 18 U.S.C. § 2383. Similar to its ancestor, that statute states that:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

While section 2383 might provide an enforcement mechanism for Section Three, it is not presently before us. That's because President Trump has never been charged

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with, let alone convicted of, violating it. The instant litigation feels to me like an end run around section 2383.

¶320 To the extent there is interest in seeking to disqualify President Trump from holding public office (one of the mandatory punishments provided in section 2383) based on the allegation that he engaged in insurrection (one of the acts prohibited by section 2383), why wasn't he charged under section 2383? And, relatedly, why isn't he entitled to more due process than that which he received in this constricted Election Code proceeding? To be sure, unlike section 2383, Section Three prescribes neither a fine nor a term of imprisonment as a consequence for engaging in an insurrection after taking the prerequisite oath. So, I'm not suggesting that President Trump should have been afforded all the rights to which a defendant would be entitled in a criminal case. But here, the district court found that he engaged in insurrection after taking the prerequisite oath, despite affording him subpar due process (even under civil-procedure standards).

¶321 Compellingly, although H.R. 1405 wouldn't have called for a criminal proceeding, it would have provided more due process than that available in a civil action. For example, H.R. 1405 would have required any action brought to be "heard and determined by a district court of three judges." H.R. 1405, § 1(d)(1). Additionally, any allegation of insurrection would have demanded proof by clear and convincing evidence, and any final order or injunction would have been

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reviewable by appeal directly to the U.S. Supreme Court. *Id.* at § (1)(d)(1)-(4). I infer from these provisions that at least some members of Congress acknowledged the need to provide ample due process (more than is available in typical civil cases) to anyone alleged to have violated Section Three.

¶322 My colleagues in the majority necessarily view as acceptable the diminished due process afforded President Trump as a result of enforcing Section Three through our Election Code. Instead, they prioritize their fear that a ruling disallowing the disqualification of President Trump from the primary ballot pursuant to Section Three would mean that "Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II." Maj. op. ¶ 68. They see this as a more insidious evil. As I discuss in the following section, however, my colleagues are mistaken in their understanding of the law, and their worry is therefore unjustified.

E. Section Three of the Fourteenth Amendment Is Unlike Other Constitutional Qualification Clauses

¶323 The U.S. Supreme Court has acknowledged a non-exhaustive list of constitutional Qualification Clauses. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969), which lists "qualifications" codified in the following provisions of the U.S. Constitution: (1) Art. I, § 2, cl. 2; (2) Art. I, § 3, cl. 7; (3) Art. I, § 6, cl. 2; (4) Art. IV,

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§ 4; (5) Art. VI, cl. 3; and (6) Amend. XIV, § 3). This list can fairly be expanded to include Article II, Section One, Clause Five, and perhaps also Section One of the Twenty-Second Amendment. *See* U.S. Const. art. II, § 1, cl. 5 (laying out three presidential eligibility requirements related to birth ("natural born Citizen"), age ("thirty five Years"), and residency ("fourteen Years a Resident"), which are similar to those specified in Art. I, § 2, cl. 2); U.S. Const. amend. XXII, § 1 (using the same "No person shall" language found in Art. I, § 2, cl. 2 and specifying a two-term limit for the presidency).

¶324 Although Section Three was included in *Powell* among the so-called Qualification Clauses, closer scrutiny reveals that it is unique and deserving of different treatment. That's because Section Three is the only one that is "qualifie[d]" by the following language: "[C]ongress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article." *Griffin's Case*, 11 F. Cas. at 26 (emphasis added) (quoting U.S. Const. amend. XIV, § 5 and stating that "[t]he fifth section qualifies the third"). None of the other Qualification Clauses—even when viewed in the context of the original Articles in toto—contains the "appropriate legislation" modifier. Indeed, that modifier only appears in certain other Amendments, none of which are objectively relevant to the instant matter. I need not contemplate what bearing, if any, this has on the self-executing nature of constitutional provisions more generally. While that might be an open question,

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see Blackman & Tillman, *supra* (manuscript at 23) (noting that there appears to be "no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing"), the demands of the instant matter counsel in favor of limiting my exposition to the Constitution's presidential qualifications, especially those found in Article II, Section One, Clause Five.

¶325 Here, once again, the interplay between Sections Three and Five of the Fourteenth Amendment is of great significance. *See Griffin's Case*, 11 F. Cas. at 26. As mentioned, Article II, Section One, Clause Five contains nothing akin to the "appropriate legislation" language in Section Five of the Fourteenth Amendment. Thus, unlike Section Three's disqualification clause, which is modified by Section Five's "appropriate legislation" language, the Article II presidential qualifications do not appear to have a constitutionally mandated reliance on congressional enabling legislation.

¶326 We are not at liberty to ignore this blistering lacuna in Article II's language. But that is exactly what my colleagues in the majority do. And in so doing, they err. Even if the presidential qualifications contained in Article II are self-executing or allow for state enabling legislation — thereby providing the Electors with a cause of action to enjoin the Secretary of State ("the Secretary") from certifying a candidate disqualified by birth, age, or residency, to the Colorado presidential primary ballot, *see, e.g.*, *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1194–95 (D. Colo.

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2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012); *see also* § 1-4-1203(2)(a), C.R.S. (2023)—the same does not hold true for Section Three's disqualification clause.

¶327 Moreover, I detect a principled reason underlying this discrepancy in the language of Article II and Section Three. It relates to what I previously identified as my third takeaway from *Griffin's Case*. Recall that the Fourteenth Amendment's grant of absolute power to Congress vis-à-vis Section Three's enforcement was pragmatic, not merely formalistic. It was motivated by the complex nature of the disqualification function. Chief Justice Chase presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements. It doesn't require much process, procedure, or legal acumen to determine whether a candidate is barred by the binary and clerical requirements of birth, age, residency, and term limits. Typically, a notarized statement of intent will do the trick. *See* § 1-4-1204(1)(c), C.R.S. (2023). By contrast, Section Three disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome. These include, to name but a few, instruction on discovery and evidentiary rules;

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guidance as to whether a jury must be empaneled or a bench trial will suffice; direction as to the proper standards of review and burdens of proof; and clarification about whether civil or criminal proceedings are contemplated. Additionally, there's a vital need for definitional counsel on such questions as who is an "officer of the United States"? What is an "insurrection"? What does it mean to "engage[] in" the same? Does "incitement" count?

¶328 By no means do I intend to undermine the sacred role of the judiciary in directing the course of similar issues through precedential pathways. Nor would I have the third branch hamstrung in its task of setting the metes and bounds of litigation practice. But when the enforcement power of a punitive constitutional mandate is delegated to Congress in such unequivocal terms, it would appear decidedly outside the judicial bailiwick to furnish the scaffolding that only "appropriate legislation" can supply. Because the Constitution gives this job to Congress, *and only Congress,* I consider it equally improper—indeed, constitutionally impossible—for state legislatures, in the absence of federal legislation, to create pseudo causes of action pursuant to Section Three's disqualification clause. This is precisely what the framers sought to prevent.

¶329 For this reason, the cases cited by the district court for the proposition that "states can, and have, applied Section [Three] pursuant to state statute without federal legislation" do not alter my analysis. *See Worthy v. Barrett*, 63 N.C. 199, 200

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(1869), *appeal dismissed sub no. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631–34 (La. 1869); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *15–22 (N.M. Dist. Sept. 6, 2022); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, 1 (Ga. Off. Admin. Hearings May 6, 2022). To the extent other state courts have concluded that their own state statutes allow them to adjudicate Section Three claims, I respectfully submit that they are flat out wrong. Unfortunately, the majority joins company with these misguided decisions and holds that our General Assembly not only can, but has, empowered Colorado's state courts to adjudicate Section Three claims via our Election Code.[8] Maj. op. ¶ 88 n.11. I turn next to why Colorado's Election Code cannot rescue the majority.

F. Colorado's Election Code Cannot Supply What Congress Has Withheld

¶330 There is zero authority permitting state legislatures to do that which, though delegated to it, Congress has declined to do. The majority, however, holds that the Electors' Fourteenth Amendment claim can be brought under sections 1-1-113

[8] Interestingly, the majority does not explain what should happen moving forward if nobody challenges a candidate whom the Secretary believes previously engaged in insurrection after taking the prerequisite oath. Without the state courts' involvement, is the Secretary supposed to decide on her own whether the candidate is disqualified from public office by Section Three? And if so, how would the Secretary go about doing that? Would the majority expect her to act as investigator, prosecutor, and adjudicator in that type of situation?

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and 1-4-1204(4), C.R.S. (2023), of the Colorado Election Code because the Secretary's listing of a constitutionally disqualified candidate on the presidential primary ballot would be a "wrongful act," as that term is used in section 1-1-113. *See* § 1-1-113(1). Maj. op. ¶¶ 4–5. But the truncated procedures and limited due process provided by sections 1-1-113 and 1-4-1204(4) are wholly insufficient to address the constitutional issues currently at play.

¶331 Section 1-1-113(1) provides that "when any eligible elector files a verified petition . . . alleging that a person charged with a duty *under this code* has committed or is about to commit a breach or neglect of duty or other *wrongful act*, . . . upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code." (Emphases added.) Section 1-4-1204(4) outlines the procedures to be followed when a section 1-1-113 challenge concerns the listing of a candidate on the presidential primary ballot. It provides that the challenge "must be made in writing and filed with the district court . . . no later than five days after the filing deadline for candidates." § 1-4-1204(4). The written challenge "must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." *Id.* Once the challenge is filed, the district court must hold a hearing within five days. *Id.* At that hearing, the district court must "hear the challenge and assess the validity of all alleged improprieties." *Id.* The filing party has the burden of sustaining the challenge by

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a preponderance of the evidence. *Id.* After the hearing, the district court must issue its findings of fact and conclusions of law within forty-eight hours. *Id.* An appeal from the district court's ruling must be brought before this court within three days of the district court's order, and this court has discretion to accept or decline jurisdiction over the case. § 1-4-1204(4); § 1-1-113(3).

¶332 As these statutory provisions make clear, a section 1-1-113 challenge to the certification of a candidate to the presidential primary ballot is meant to be handled on an expedited basis. *See Frazier v. Williams*, 2017 CO 85, ¶ 11, 401 P.3d 541, 544 ("[S]ection 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Indeed, "such proceedings generally move at a breakneck pace." *Id.* It's unsurprising, then, that this court has previously limited the types of claims that can be brought under section 1-1-113 to those "alleging a breach or neglect of duty or other wrongful act *under the Colorado Election Code*." *Id.* at ¶ 10, 401 P.3d at 543 (emphasis added).

¶333 Because section 1-1-113 constitutes a modest grant of power, until today, this court has expressly declined to use that section's reference to "other wrongful act[s]" to expand its scope to include constitutional claims and other claims that do not arise specifically under the Election Code. *Id.* at ¶ 14, 401 P.3d at 544. The "accelerated" nature of a section 1-1-113 proceeding and the limited remedy

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available in such a proceeding (i.e., an order requiring "substantial compliance with the provisions of [the Election Code]") render the statute incompatible with complex constitutional claims such as the one involved here. *See id.* at ¶¶ 16–18, 401 P.3d at 544–45.

¶334 An examination of the proceedings below highlights why a section 1-1-113 proceeding is a mismatch for a constitutional claim rooted in Section Three. The Electors filed their verified petition on September 6, 2023. The verified petition, far from being a "summary" notice of the alleged impropriety, *see* § 1-4-1204(4), was 105 pages in length. The district court did not hold a hearing within five days as required by section 1-4-1204(4). In fact, the court didn't hold its first status conference until September 18, twelve days after the verified petition was filed.[9] During that status conference, the court set deadlines for initial briefing. The district court gave the parties just four days, or until September 22, to file initial motions to dismiss with briefing on those motions to be completed by October 6. *Cf.* C.R.C.P. 12(b) (allowing twenty-one days from service of the complaint in a civil case to file motions to dismiss). The court also scheduled a five-day hearing to begin on October 30, or roughly eight weeks after the verified petition was filed.

[9] I recognize that the case was removed to federal court on September 7, the day after it was filed. But the federal court returned the case to the state court on September 12, six days before the first status conference was held.

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That's fifty-four days, which is nearly ten times the amount of time permitted by the Election Code. *See* § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held . . . .").

¶335 At the next status conference, on September 22, the court set more deadlines, this time related to exhibit lists, expert disclosures, and proposed findings of fact and conclusions of law. With respect to expert disclosures, the court ordered the Electors to provide expert reports by October 6, or twenty-four days before the hearing. *Cf.* C.R.C.P. 26(a)(2)(C)(I) (providing that in a civil case the claiming party's expert disclosures are typically due "at least 126 days (18 weeks) before the trial date"). It ordered President Trump to provide his expert reports no later than October 27, three days before the hearing was to begin. *Cf.* C.R.C.P. 26(a)(2)(C)(II) (stating that a defending party in a civil case is generally not required to provide expert reports "until 98 days (14 weeks) before the trial date"). And even though it was apparent from very early on in these proceedings that the Electors would rely heavily on expert testimony regarding both legal and factual matters to attempt to prove their challenge, the district court did not allow experts to be deposed. *Cf.* C.R.C.P. 26(b)(4)(A) (setting forth the default rule on the deposition of experts in civil cases: "A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial."). Instead, the court ordered that expert reports must

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be "fulsome" and that experts would not be allowed to testify to anything outside their reports.

¶336 As planned, the hearing began on October 30 and concluded on November 3. The district court gave each side eighteen hours to present its case. The parties presented closing arguments on November 15, and the court issued its final order on November 17, two weeks after the hearing concluded and seventy-two days after the verified petition was filed.

¶337 This was a severe aberration from the deadlines set forth in the Election Code, *see* § 1-4-1204(4), which require a district court to issue its ruling no more than forty-eight hours after the hearing and roughly a week after the verified petition is filed. Despite this clear record, my colleagues in the majority curiously conclude that the district court "substantially compl[ied]" with all the statutory deadlines. Maj. op. ¶ 85. That's simply inaccurate (unless the majority views complete failure as substantial compliance). The majority's reading of the record, while creative, doesn't hold water.

¶338 Given the complexity of the legal and factual issues presented in this case, it's understandable why the district court may have felt that adhering to the deadlines in section 1-4-1204(4) wouldn't allow the parties to adequately litigate the issues. But the district court didn't have the discretion to ignore those statutory deadlines. Section 1-4-1204(4) states that "a hearing *must* be held" no later than

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five days after a challenge is filed and that the district court "*shall* issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." *See Waddell v. People*, 2020 CO 39, ¶ 16, 462 P.3d 1100, 1106 ("[T]he 'use of the word "shall" in a statute generally indicates [the legislature's] intent for the term to be mandatory.'" (alteration in original) (quoting *People v. Hyde*, 2017 CO 24, ¶ 28, 393 P.3d 962, 969)); *Ryan Ranch Cmty. Ass'n v. Kelley*, 2016 CO 65, ¶ 42, 380 P.3d 137, 146 (noting that "shall" and "must" both "connote[] a mandatory requirement").

¶339 Rather than recognize that the Section Three challenge brought by the Electors was a square constitutional peg that could not be jammed into our Election Code's round hole, the district court forged ahead and improvised as it went along, changing the statutory deadlines on the fly as if they were mere suggestions. If, as the majority liberally proclaims, sections 1-1-113 and 1-4-1204(4) provide such a "robust vehicle" for handling the constitutional claim brought here, Maj. op. ¶ 86, why didn't the district court just drive it? Why, instead, did the district court feel compelled to rebuild such a "robust vehicle" by modifying the procedural provisions of the Election Code? I submit that, in reality, while sections 1-1-113 and 1-4-1204(4) are plenty adequate to handle ordinary challenges arising under the Election Code, they did not measure up to the task of addressing the Electors' Section Three claim. The result was a proceeding that was neither the

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"summary proceeding" envisioned by section 1-1-113 nor a full-blown trial; rather, it was a procedural Frankenstein created by stitching together fragments from sections 1-1-113 and 1-4-1204(4) and remnants of traditional civil trial practice.

¶340 Even with the unauthorized statutory alterations made by the district court, the aggressive deadlines and procedures used nevertheless stripped the proceedings of many basic protections that normally accompany a civil trial, never mind a criminal trial. There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.

¶341 There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.

¶342 I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom. In my experience, in our adversarial system of justice, parties are always allowed to

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conduct discovery, subpoena documents and compel witnesses, and adequately prepare for trial, and experts are never permitted to usurp the role of the judge by opining on how the law should be interpreted and applied.

¶343 The majority tries to excuse the due process shortcomings I have discussed by noting that section 1-1-113 proceedings "move quickly out of necessity" because "[l]ooming elections trigger a cascade of deadlines . . . that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot." Maj. op. ¶ 81. But that's exactly my point. The necessarily expedited nature of section 1-1-113 proceedings is precisely why the Electors should not have been allowed to piggyback a Section Three claim—an admittedly complex constitutional claim—on their Election Code claim in the first place. In any event, the majority's acknowledgement that section 1-1-113 proceedings "cannot accommodate protracted litigation" seems to directly contradict its determination that the Election Code endowed the district court with the "flexibility" to adequately accommodate the needs of this complex litigation. *Id.* at ¶¶ 81, 85.[10] The majority can't have its cake and eat it too.

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[10] Even if the majority were correct about the district court's "flexibility" to accommodate a constitutional claim, the "limit[ed] appellate review" available under the letter of section 1-1-113 further demonstrates why the Election Code is not an appropriate avenue for the prosecution of a Section Three claim. *Frazier*, ¶ 18, 401 P.3d at 545. This court has the sole discretion to review section 1-1-113 proceedings, § 1-1-113(3); § 1-4-1204(4), so, whenever we decline such review, "the

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¶344 The irregularity of these proceedings is particularly troubling given the stakes. The Electors ask us to hold that President Trump engaged in insurrection and is thus disqualified from being placed on the ballot for this upcoming presidential primary.[11]

¶345 Today's decision will have sweeping consequences beyond just this election. The majority's ruling that President Trump is disqualified under Section Three means that he can never again run for a Senate or House of Representatives position, or become an elector, or hold any office (civil or military) under the United States or under any state. In other words, he will be barred from holding any public office, state or federal, for the rest of time. His only possible out is if Congress at some point decides to remove the disqualification through a two-thirds vote by each House (which is no small feat). "A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not . . . . The serious nature of any such holding

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decision of the district court shall be final and not subject to further appellate review," *Frazier*, ¶ 18, 401 P.3d at 545 (quoting § 1-1-113(3)). Imagine, then, if we had declined to review the instant matter. Alarmingly, the adjudication of *federal* constitutional provisions, disqualifying President Trump from office, would have met its road's end in state district court. How can this court give its imprimatur to such an inverted conception of the supremacy doctrine? I, for one, cannot.

[11] This same ask has been made of other courts based on their state election codes. *See, e.g.*, *Trump v. Benson*, No. 23-00151-MZ (Mich. Ct. Cl. Nov. 14, 2023); *Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023). Ours is the first to take the bait.

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demands that the rules of procedural due process be complied with strictly." *Bohannan v. Arizona ex rel Smith*, 389 U.S. 1, 4 (1967) (Douglas, J., dissenting).

¶346 There was no strict compliance with procedural due process here. How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?

¶347 I cannot agree with the majority that the chimeric proceedings below gave President Trump process commensurate to the interest of which he has been deprived. Nor did the proceedings below protect the interest Coloradans have in voting for a candidate of their choosing. Of course, if President Trump committed a heinous act worthy of disqualification, he should be disqualified for the sake of protecting our hallowed democratic system, regardless of whether citizens may wish to vote for him in Colorado. But such a determination must follow the appropriate procedural avenues. Absent adequate due process, it is improper for our state to bar him from holding public office.

¶348 More broadly, I am disturbed about the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent.

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II. Conclusion

¶349 In the first American Declaration of Rights in 1776, George Mason wrote that "no free government, nor the blessings of liberty, can be preserved to any people, but by . . . the recognition by all citizens that they have . . . rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed." Va. Const. art. I, § 15. Some two and a half centuries later, those words still ring true. In 2023, just as in 1776, all, including those people who may have committed horrendous acts, are entitled to procedural due process.

¶350 Because I cannot in good conscience join my colleagues in the majority in ruling that Section Three is self-executing and that the expedited procedures in our Election Code afforded President Trump adequate due process of law, I respectfully dissent. Given the current absence of federal legislation to enforce Section Three, and given that President Trump has not been charged pursuant to section 2383, the district court should have granted his September 29 motion to dismiss. It erred in not doing so. I would therefore affirm its judgment on other grounds.

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JUSTICE BERKENKOTTER dissenting.

¶351 Today, the majority holds that former President Donald J. Trump ("President Trump") cannot be certified to Colorado's presidential primary ballot. Maj. op. ¶ 5. He is, the majority concludes, disqualified from being President of the United States again because he, as an officer of the United States, took an oath to support the Constitution and thereafter engaged in insurrection. *See* U.S. Const. amend. XIV, § 3[1]; Maj. op. ¶¶ 4–5. In reaching this conclusion, the majority determines as an initial matter that a group of Colorado Republican and unaffiliated electors eligible to vote in the Republican presidential primary ("the Electors") asserted a proper claim for relief under Colorado's Election Code ("Election Code"). *See* §§ 1-1-101 to 1-13-804, C.R.S. (2023); Maj. op. ¶ 57.

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[1] Section Three of the Fourteenth Amendment is a Civil War era amendment to the United States Constitution that was ratified in 1868. Its aim was to prohibit loyalists to the confederacy who had taken an oath to support the Constitution from taking various state and federal offices. It provides:

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

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¶352 I write separately to dissent because I disagree with the majority's initial conclusion that the Election Code—as currently written—authorizes Colorado courts to decide whether a presidential primary candidate is disqualified under Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") from being listed on Colorado's presidential primary ballot. Maj. op. ¶¶ 62–63, 66. In my view, the majority construes the court's authority too broadly. Its approach overlooks some of part 12 of the Election Code's plain language and is at odds with the historical application of section 1-1-113, C.R.S. (2023), which up until now has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election. Plus, the majority's approach seems to have no discernible limits.

¶353 To explain why the majority—to my mind—is wrong, first, I explain the process for challenging the listing of a candidate on the presidential primary ballot in Colorado and describe sections 1-1-113 and 1-4-1204(4), C.R.S. (2023), since those sections of the Election Code define the scope of the district court's authority to hear the case below. Then, I lay out the procedural history of this case. After that, I turn to the question of whether the district court erred in interpreting these two statutes and consider the majority's analysis with respect to each. In doing so, I conclude that the General Assembly has not granted courts the authority the

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district court exercised in this case and that the court, accordingly, erred in denying President Trump's motion to dismiss.

I. The Process for Challenging the Listing of a Candidate on the Presidential Primary Ballot in Colorado

¶354 Part 12 of the Election Code charges Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), with certifying the names and party affiliations of the candidates to be placed on presidential primary ballots no later than sixty days before the presidential primary election. *See* § 1-4-1204(1). Section 1-4-1204(4) details the process through which an eligible petitioner can challenge a candidate's listing on the presidential primary ballot. It states:

> Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113(3).

§ 1-4-1204(4).

¶355 Section 1-1-113 is Colorado's fast-track procedural process under the Election Code that allows candidates; political parties; individuals who have made nominations; and, as pertinent here, eligible electors to file section 1-4-1204(4) and

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other challenges in court, alleging that the Secretary or one of Colorado's sixty-four county clerks and recorders has committed or is about to commit a breach or neglect of duty or other wrongful act. It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or *when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphasis added).

II. Procedural History

A. The Electors' Petition

¶356 On September 6, 2023, the Electors sued the Secretary under sections 1-1-113 and 1-4-1204(4) of the Election Code, alleging that the Secretary certifying President Trump to the primary ballot would constitute an "impropriety" under section 1-4-1204(4), and thus a "breach or neglect of duty or other wrongful act" under section 1-1-113(1) because Section Three—which disqualifies insurrectionists from holding office—prohibits him from being listed. The Secretary's "breach or neglect of duty or other wrongful act," the Electors argued,

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authorized the district court to "issue an order requiring" the Secretary to "substantial[ly] compl[y]" with the Election Code by not certifying President Trump to the ballot. *See* § 1-1-113(1).

B. The Parties' Arguments in the District Court

¶357 Before trial, President Trump moved to dismiss the Electors' complaint. He argued that the court's authority to determine a claim under section 1-4-1204(4) is limited to the three criteria explicitly identified in section 1-4-1204(1)(b) and (c), which provide that the only candidates whose names shall be placed on the ballots for election are those who:

> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

¶358 President Trump acknowledged that the Secretary's "Major Candidates Statement of Intent" form requires a candidate to affirm that they meet the three

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qualifications set forth in Article II of the U.S. Constitution,[2] but emphasized that the form says nothing about Section Three. Thus, he urged the court to adopt a very narrow reading of section 1-4-1204(4): So long as a party candidate (1) is a bona fide presidential candidate; (2) timely submits a notarized statement of intent affirming that they meet the three Article II qualifications; and (3) pays the $500 fee, the Secretary must certify the candidate to the presidential primary ballot, thus fulfilling her duty under the Election Code.

¶359 Challenges based on anything other than those three criteria, including but not limited to a Section Three challenge, President Trump asserted in his motion, fall outside the court's authority to decide and fail to state a proper claim for relief under sections 1-4-1204(4) and 1-1-113. Any such claim, he posited, must be dismissed.

¶360 The Electors countered in their response to the motion to dismiss that section 1-4-1204(4) must be read in conjunction with the other provisions of the Election Code, including, specifically, section 1-4-1201, C.R.S. (2023), which states

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[2] Article II, Section 1, Clause 5 of the U.S. Constitution states:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).

¶361 The Electors also pointed to section 1-4-1203(2)(a), C.R.S. (2023), which states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

(Emphasis added.) And they leaned on section 1-4-1203(3), which provides, in part, that the Secretary and county clerk and recorders have "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." Based on this section, they argued that, in all "other primary elections and general elections," only candidates who meet all the qualifications to hold office may access the ballot. Finally, the Electors emphasized the text of section 1-4-1204(4), which allows for "*[a]ny challenge to the listing of any candidate*" and directs the district court to assess the validity of "*all alleged improprieties.*" (Emphases added.) In the Electors' view, part 12 of the Election Code, when read as a whole, necessarily encompasses challenges under Section Three.

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C. The District Court's Final Order

¶362 In its final order, the district court rejected President Trump's argument in his motion to dismiss that the Electors failed to state a proper claim under sections 1-4-1204(4) and 1-1-113. *Anderson v. Griswold*, No. 23CV32577, ¶ 224 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). It concluded that the Secretary lacked the authority under the Election Code to *investigate and determine* presidential primary candidate qualifications. *Id.* at ¶ 216. It then turned to whether it had the authority to adjudicate the Electors' complaint. *Id.* at ¶ 217. The court considered three cases in which this court concluded that the Election Code requires courts—not election officials—to determine candidate eligibility. *Id.* at ¶¶ 219–21; *see Hanlen v. Gessler*, 2014 CO 24, ¶ 40, 333 P.3d 41, 50 (holding that the Secretary exceeded his authority by passing a rule that permitted election officials to determine whether a candidate appearing on the state ballot was not qualified for office because "the election code requires a court, not an election official, to determine the issue of eligibility"); *Carson v. Reiner*, 2016 CO 38, ¶ 8, 370 P.3d 1137, 1139 ("[W]hen read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts . . . ."); *Kuhn v. Williams*, 2018 CO 30M, ¶ 40, 418 P.3d 478, 485 (per curiam) (a court may review the validity of a challenged candidate-nomination petition and consider extrinsic evidence in doing so). The district court found particularly instructive

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this court's conclusion in *Kuhn* that a challenger could "present evidence demonstrating that a petition actually fails to comply with the Election Code, even if it 'appear[ed] to be sufficient' in a paper review." ¶ 39, 418 P.3d at 485; *Anderson*, ¶ 219.

¶363 The court then interpreted two provisions of the Election Code to implicitly incorporate Section Three, which it concluded grants courts broad authority to review, through section 1-1-113's expedited procedures, whether a candidate is disqualified as an insurrectionist. *Anderson*, ¶¶ 222, 224. Specifically, the court interpreted the language in section 1-4-1201 stating that the provisions of part 12 of the Election Code are intended to "conform to the requirements of federal law" as incorporating the entire U.S. Constitution, including Section Three. *Anderson*, ¶ 222. And the court noted that section 1-4-1203(2)(a) provides that only political parties that have a "qualified candidate" are entitled to participate in the presidential primary process. *Anderson*, ¶ 222. Relying on these provisions, the court held that, while the Secretary is not empowered to investigate and adjudicate a candidate's potential disability under Section Three, courts are not so constrained. *Id.* at ¶ 224.

D. The Majority's Opinion

¶364 The majority also appears to construe part 12 very broadly. In sum, its view is that section 1-4-1201's reference to "federal law" speaks to the General

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Assembly's intent, that section 1-4-1203(2)(a) limits participation in the presidential primary to "qualified" candidates, and that certification of a candidate who is not "qualified" thus constitutes a "wrongful act" within the scope of section 1-1-113. Maj. op. ¶¶ 36–37, 62–64. The majority draws on other provisions of the Election Code to inform the meaning of the term "qualified candidate." *Id.* at ¶¶ 37, 62 (citing § 1-4-1205, C.R.S. (2023) (requiring presidential primary write-in candidates to file a "notarized . . . statement of intent"); § 1-4-1101(1), C.R.S. (2023) (a write-in candidate's "affidavit of intent" must affirm that the candidate "desires the office and is qualified to assume its duties if elected"); § 1-4-1203(5) (when every party has no more than one certified candidate, whether party-nominated or write-in, the Secretary may cancel the presidential primary for all parties and declare the sole candidate the winner)). According to the majority, these provisions suggest that major party candidates—who are also required to submit a statement of intent—must also be "qualified to assume [the office's] duties if elected." *Id.* at ¶ 62; *see* § 1-4-1101(1).

¶365 Read as a whole, the majority thus interprets the Election Code to provide that a major party candidate in a presidential primary must, at a minimum, be qualified to hold the Office of President under the U.S. Constitution. Maj. op. ¶ 63. As such, it concludes that the General Assembly, through the Election Code, granted courts broad authority to determine presidential primary candidates'

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constitutional eligibility, including eligibility under Section Three. *Id.* at ¶¶ 60–62, 65–66. In the majority's view, a reading of the Election Code that constrains courts from considering a candidate's constitutional qualifications would produce a result "contrary to the purpose of the Election Code." *Id.* at ¶ 64.

III. The Electors Failed to State a Cognizable Claim for Relief

¶366 Sections 1-4-1204(4) and 1-1-113 frame the threshold question this court must address before turning to the merits of the parties' appeal: Did the General Assembly intend to grant Colorado courts the authority to decide Section Three challenges? Based on my reading of sections 1-4-1204(4), 1-4-1201, and 1-4-1203(2)(a), I conclude that the answer to this question is no. As a result, I conclude that the Electors have not stated a cognizable claim for relief and their complaint should have been dismissed.

A. Section 1-4-1204(4) Allows for a Broad, but Not Unlimited, Range of Claims for Relief

¶367 As an initial matter, I acknowledge that the language in section 1-4-1204(4) is fairly broad insofar as it allows expedited challenges to the listing of any candidate on the presidential primary election ballot based on "alleged improprieties." And I agree with the majority that "section 1-1-113 'clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,'" Maj. op. ¶ 61 (quoting *Carson*, ¶ 17, 370 P.3d at 1141), "including any act that is 'inconsistent with the Election Code,'" *id.*

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(quoting *Frazier v. Williams*, 2017 CO 85, ¶ 16, 401 P.3d 541, 545). I also agree with the majority that a "wrongful act" is "more expansive than a 'breach' or 'neglect of duty.'" *Id.* (quoting *Frazier*, ¶ 16, 401 P.3d at 545).

¶368 But this language can only do so much. As we also held in *Frazier*, "other wrongful act" is limited to acts that are wrongful under the Election Code. ¶ 16, 401 P.3d at 545. We have also emphasized that section 1-1-113 is a *summary* proceeding designed to quickly resolve challenges brought by designated plaintiffs against state election officials prior to election day. *Id.* Indeed, past cases decided by this court reflect the generally straightforward nature of the cases filed under section 1-1-113, the lion's share of which involved disputes over state or local election residency or signature requirements. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 15, 462 P.3d 1081, 1084 (deciding whether the Election Code's minimum signature requirement mandates substantial compliance and whether a U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 1–6, 418 P.3d at 480–81 (deciding whether a non-resident signature circulator could legally collect signatures for a candidate's petition); *Frazier*, ¶ 1, 401 P.3d at 542 (considering whether the Secretary improperly invalidated signatures included on a U.S. Senate candidate's petition to appear on the primary election ballot); *Carson*, ¶ 21, 370 P.3d at 1142 (considering whether a challenge to a candidate's qualifications

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based on their residency was permitted after the Secretary certified the candidate to the ballot).

¶369 Don't get me wrong, the almost 450 entries in the district court register of actions in the two months and eleven days between September 6, 2023, the date on which the petition was filed, and November 17, 2023, the date on which the district court issued its 102-page final order, illustrate the extraordinary effort that the attorneys and the district court dedicated to this case. But that effort also proves too much. The deadlines under the statute were not met, nor could they have been. Setting aside the factual questions, an insurrection challenge is necessarily going to involve complex legal questions of the type that no district court—no matter how hard working—could resolve in a summary proceeding.

¶370 And that's to say nothing of the appellate deadline. Three days to appeal a district court's order regarding a challenge to a candidate's age? Sure. But a challenge to whether a former President engaged in insurrection by inciting a mob to breach the Capitol and prevent the peaceful transfer of power? I am not convinced this is what the General Assembly had in mind.

¶371 The various provisions of the Election Code on which the district court and the majority rely to suggest otherwise do not persuade me either.

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B. The Term "Federal Law" Does Not Support a Broad Grant of Authority to Colorado Courts to Enforce Section Three

¶372 The district court relied on the declaration of intent in part 12. *Anderson*, ¶ 222. It explains the intent of the People of the State of Colorado in the context of presidential primary elections. It provides: "In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).[3] In adopting a broad view of section 1-4-1204(4)'s reach, the court assumed that the term "federal law," as used in this section, refers to the entire U.S. Constitution, including Section Three. *Anderson*, ¶¶ 222–24.

¶373 The majority also leans on this reference to "federal law" in section 1-4-1201, though more obliquely, suggesting it means the General Assembly intended for part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. I am not persuaded.

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[3] As Professor Muller notes in his amicus brief, "A postpositive modifier like ['governing presidential primary elections'] attaches to both 'federal law' and 'national political party rules.'" Brief for Professor Derek T. Muller as Amicus Curiae Supporting Neither Party. Hence, the term "federal law" is properly understood not as a standalone term but as only relating to presidential primary elections.

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¶374 In my view, the term "federal law" is ambiguous at best. A brief dive into the history of part 12 explains why. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389 ("If, however, the statute is ambiguous, then we may consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history.").

¶375 Part 12 was enacted as part of the return to a primary system in Colorado. *See* § 1-4-1102, C.R.S. (1990) (governing Colorado's presidential primary system in the 1990s). From 2002 to 2016, presidential candidates were selected through a closed party caucus system. But in 2016, after "Colorado voters experienced disenfranchisement and profound disappointment with the state's [caucus] system," voters considered Proposition 107, which promised to restore presidential primary elections in Colorado, with one significant change—unlike prior iterations of its primary system, beginning in 2020, Colorado would host open presidential primaries, allowing unaffiliated voters to participate in these primary elections. *See* Proposition 107, § 1, https:// www.sos.state.co.us/pubs/ elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https:// perma.cc/2GA9-ZY7U] (noting that "restor[ing] [Colorado's] presidential primary" to an open primary system would enable the "35% of Colorado voters who are independent of a party" to "participat[e] in the presidential nomination

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process," and "encourage candidates who are responsive to the viewpoints of more Coloradans").

¶376 When Proposition 107 passed, the General Assembly amended the Election Code and adopted part 12 to formally re-introduce the presidential primary process. Nothing in this history indicates that one of the concerns animating either the proponents of Proposition 107 or the General Assembly was a need to challenge, through the courts, issues concerning candidates' constitutional disqualifications. In fact, the language in the current version of section 1-4-1201 mostly mirrors the 1990 version of part 12 (then, part 11): "It is the intent of the general assembly that the provisions of this part 11 *conform to the requirements of federal law and national political parties for presidential primary elections*." § 1-4-1104(3), C.R.S. (1990) (emphasis added).

¶377 There is some history surrounding Proposition 107 and part 12 which suggests that proponents of this new open presidential primary system were concerned about one specific constitutional issue: a potential First Amendment challenge to the new law based on political parties' private right of association. *See Independent Voters*, Denver Metro Chamber of Com., https://denverchamber.org/policy/policy-independent-voters-white-paper/ [https://perma.cc/T2TT-A2UD] (The Denver Chamber of Commerce, which launched Proposition 107, noted that a semi-open primary system, because it would permit

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unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary, could face legal challenges based on parties' First Amendment rights of association.); *see also* Christopher Jackson, *Colorado Election Law Update*, 46-SEP Colo. Law. 52, 53 (2017) (noting that the law was likely crafted in a manner designed to "stave off a First Amendment challenge" given the U.S. Supreme Court's 2000 decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which struck down California's "blanket primary" law).

¶378 Curiously, the earlier version of the statute required the Secretary to provide a "written report" to the General Assembly "concerning whether the provisions of this part 11 conform to the requirements of federal law and national political party rules for presidential primary elections[,]" and provided that "the general assembly shall make such reasonable changes to this part 11 as are necessary to conform to federal law and national political parties' rules." § 1-4-1104(3), C.R.S. (1990). It is unclear if those reports were intended to speak to potential First Amendment concerns or some other issue, as any reports that may have been submitted to the General Assembly appear to have been lost to the sands of time (or, according to the State Archivist's Office, possibly a flood).

¶379 At bottom, this legislative history does little to illuminate what the 2016 General Assembly meant by this language in section 1-4-1201. What this history does show, however, is that the term "federal law" is most certainly not an

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affirmative grant of authority to state courts to enforce Section Three in expedited proceedings under the Election Code.

C. The Term "Qualified Candidate" Does Not Support a Broad Grant of Authority to Colorado Courts

¶380 The other principal support for the district court's broad interpretation of section 1-4-1204(4) rests on the term "qualified candidate." The majority relies heavily on this language as well. Maj. op. ¶¶ 37, 62–64.

¶381 To understand the meaning of this term, it is critical to consider it in its full context. Recall, it states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

§ 1-4-1203(2)(a) (emphases added).

¶382 The district court construed this section expansively. It looked to the term "qualified candidate" as evidence of the General Assembly's intent to grant the court authority to determine if President Trump was disqualified under Section Three. The district court, like the Electors, appears to have read section 1-4-1203(2)(a) like a syllogism, such that if (1) participation in the presidential primary is limited to *qualified candidates*, and if (2) Section Three disqualifies insurrectionists, then (3) a court may appropriately consider a

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Section Three challenge. But that is not what the statute says. Rather, it provides: "[E]ach political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election." *Id.* (emphases added).

¶383 Section 1-4-1203(2)(a) addresses when and how presidential primary elections are conducted. It does not prescribe additional qualifications through its use of the term "qualified candidate." *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute."). Nor can it be read, given the fact that the term is explicitly tethered to subsection 1203, as expanding the criteria outlined in section 1-4-1204(1)(b) and (c): A candidate is eligible to be certified to the ballot by (1) being a bona fide candidate for president; (2) submitting a notarized candidate's statement of intent, and (3) paying the $500 filing fee or submitting a valid write-in petition. *See* § 1-4-1204(1)(b), (c).

¶384 It is significant, as well, that this part of the statute describes when a *political party* can participate in a presidential primary election. The consequence for a party that does not have a qualified candidate—that is, a candidate who does not meet the three-part criteria laid out in section 1-4-1204(1)(b) and (c)—is that the party cannot participate in the primary. Considered in context, then, the term

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"qualified candidate" does not offer support for an expansive reading of the court's authority to determine a challenge under Section Three.

¶385 The majority takes a slightly different approach. It points to section 1-4-1201's "federal law" declaration and suggests it means that the General Assembly intended part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. Then, like the district court, it gives great weight to the language in section 1-4-1203(2)(a), which it construes to mean that participation in the presidential primary is limited to "qualified candidates." *Id.* at ¶¶ 37, 62–64. It effectively reads "pursuant to this section" out of the statute by concluding that the phrase "sheds no light on the meaning of 'qualified candidate.'" *Id.* at ¶ 37 n.3 (quoting § 1-4-1203(2)(a)). The majority then asserts that, "[a]s a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a 'qualified candidate' is the 'statement of intent' (or 'affidavit of intent') filed with the Secretary." *Id.* at ¶ 37 (quoting § 1-4-1204(1)(c)).

¶386 And, it explains, the Secretary's statement of intent for a major party presidential candidate requires the candidate to affirm via checkboxes that the candidate meets the qualifications set forth in Article II of the U.S. Constitution for the Office of President, i.e., that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. *Id.* at ¶ 38; U.S. Const. art. II, § 1, cl. 5; *Major Party Candidate*

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Statement of Intent for Presidential Primary, Colo. Sec'y of State, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/RY72-ASSD]. As well, the form requires the candidate to sign an affirmation that states: "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*." *Major Party Candidate Statement of Intent for Presidential Primary*, *supra.*

¶387 The majority stitches these various parts of the Election Code together to conclude the General Assembly intended to grant state courts the authority to decide Section Three challenges. Maj. op. ¶¶ 36–38, 62. This approach falls short for five reasons.

¶388 First, there is nothing in section 1-4-1201's "federal law" declaration that indicates the General Assembly meant to refer to Section Three. Perhaps the declaration refers to the General Assembly's concern regarding a potential First Amendment right of association challenge to the open primary system created by part 12, perhaps not. The declaration's history is muddy at best.

¶389 Second, the term "qualified candidate" cannot be fairly read to grant Colorado courts authority to adjudicate Section Three disqualification claims. The term is best understood as describing when a political party can participate in the

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presidential primary process, not as the foundation for a wrongful act claim under section 1-4-1204(4) and section 1-1-113.

¶390 Third, even assuming the General Assembly intended to grant some authority to the courts through its reference to the candidate's statement of intent in the exceptionally roundabout manner suggested by the majority, there is no basis for concluding that authority extends beyond the fairly basic types of Article II challenges that have come before this court in the past, such as those involving a candidate's age, or other challenges like those alleging that petition circulators did not reside in Colorado.

¶391 Fourth, I am not persuaded by the majority's reliance on sections 1-4-1205 and 1-4-1101, which govern the requirements write-in candidates must satisfy before being certified to the ballot. *See* Maj. op. ¶¶ 37, 62. Like major party presidential primary candidates, write-in candidates for the presidential primary must file a "notarized . . . statement of intent" and submit to the Secretary "a nonrefundable fee of five hundred dollars . . . no later than the close of business on the sixty-seventh day before the presidential primary election." § 1-4-1205. Section 1-4-1101(1), which applies to all write-in candidates regardless of office, requires that the write-in candidate confirm "that he or she desires the office and *is qualified to assume its duties if elected.*" (Emphasis added.) According to the majority, "[t]he Election Code's explicit requirement that a write-in candidate be

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'qualified' to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be 'qualified' in the same manner." Maj. op. ¶ 62.

¶392 It is true that both major party candidates and write-in candidates must fill out statement of intent forms, and that the forms are similar in some respects. But, if anything, the General Assembly's decision to include a specific qualification provision for write-in candidates shows that when it wants to include an explicit qualifications requirement, like the one in section 1-4-1101(1), it knows how to do so. *See People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625 ("But, in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009))).

¶393 Fifth and finally, there is the problem that Section Three is a disqualification for office, not a qualification to serve. As the majority acknowledges, the U.S. Supreme Court has twice declined to address whether Section Three—which is described in the text as a "disability" and is referred to as the Disqualification Clause—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (observing that an academic suggested in a law review article in 1968 that the three grounds for disqualification (impeachment, Section Three, and the Congressional incompatibility clause) and two other similar provisions were

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each no less of a "qualification" than the Article II, Section 5 qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of additional qualifications for office); Maj. op. ¶ 65.

¶394 Given the fact that the U.S. Supreme Court has not weighed in on whether Section Three is a qualification for office, it seems all the more important to look for some affirmative expression by the General Assembly of its intent to grant state courts the authority to consider Section Three challenges through Colorado's summary hearing and appeal process under the Election Code. I see no such expression.

IV. Conclusion

¶395 The Electors' arguments below and before this court are, to my mind, unavailing. Too much of their position rests on text like "federal law" and "qualified candidate" that—on closer examination—does not appear to mean what they say it means because it is taken out of context. In short, these sections do not show an affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process.

¶396 Because it too relied on the provisions of part 12 regarding "federal law" and "qualified candidate," the district court's reasoning suffers from the same shortcomings.

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¶397 And, at the end of the day, while the majority's approach charts a new course—one not entirely presented by the parties—its approach has many of the same problems. It stitches together support from the Secretary's general authority to supervise the conduct of primary and other elections, § 1-1-107(1), C.R.S. (2023); the inference that section 1-4-1201's "federal law" declaration means something pertinent to Section Three; part, but not all, of the "qualified candidate" statute, § 1-4-1203(2)(a); inferences from the write-in candidate process statute, § 1-4-1101(1); and the novel suggestion that the General Assembly granted authority to state courts to adjudicate a Section Three challenge by virtue of its reference to the Secretary's statement of intent form in section 1-4-1204(1)(c). *See* Maj. op. ¶¶ 35–37, 62–63.

¶398 I agree with the majority that, if the General Assembly wants to grant state courts the authority to adjudicate Section Three challenges through the Election Code, it can do so. *See* U.S. Const. art. II, § 1, cl. 2 (authorizing states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (recognizing that it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). I just think it needs to say so.

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CC: Meingast, Heather (AG) [MeingastH@michigan.gov]; Christine Sun [Christine@statesunitedaction.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: Re: ATTORNEY CLIENT PRIVILEGE - Colorado case
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Hi Erik,

DPP MCL 15.243(1)(m)

Best,

Jonathan

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From: Grill, Erik (AG) <GrillE@michigan.gov>
Date: Thursday, December 21, 2023 at 10:10 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: RE: ATTORNEY CLIENT PRIVILEGE - Colorado case

Thank you, Jonathan. I appreciate the help!

Erik A. Grill
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Subject: Re: ATTORNEY CLIENT PRIVILEGE - Colorado case

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Hi Erik,

DPP MCL 15.243(1)(m)

Best,

Jonathan

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A/C Priv MCL 15.243(1)(g)

Heather

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Grill, Erik (AG) [GrillE@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: Colorado 14.3 SCOTUS petition
Attachments: Colorado-Republican-State-Central-Committee-v.-Anderson-Cert-Petition-PDFA_Redacted.pdf

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Privileged

Per the New York Times, Colorado Republican State Central Committee filed the attached cert petition, which is not yet docketed. Story here: https://www.nytimes.com/2023/12/27/us/colorado-supreme-court-trump.html?smid=nytcore-ios-share&referringSource=articleShare

In addition to the disqualification issue, the party raises a First Amendment issue about whether a state can exclude a nominee from a party's primary. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Trump does not appear to have filed yet.

DPP MCL 15.243(1)(m)

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No. _____

In the Supreme Court of the United States

COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. MELITO
MELITO LAW LLC
ROBERT A. KITSMILLER
PODOLL & PODOLL, P.C.
[redacted]

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Counsel for Petitioner

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QUESTIONS PRESENTED

The Supreme Court of Colorado held that states possess authority, regardless of the lack of congressional authorization, to determine that a presidential candidate is disqualified under Section Three of the Fourteenth Amendment and that former President Donald J. Trump is disqualified as an insurrectionist. The Questions Presented are:

1. Whether the President falls within the list of officials subject to the disqualification provision of Section Three of the Fourteenth Amendment?

2. Whether Section Three of the Fourteenth Amendment is self-executing to the extent of allowing states to remove candidates from the ballot in the absence of any Congressional action authorizing such process?

3. Whether the denial to a political party of its ability to choose the candidate of its choice in a presidential primary and general election violates that party's First Amendment Right of Association?

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PARTIES

Petitioner Colorado Republican State Central Committee was Intervenor-Appellee in the state courts. The following were Petitioners-Appellants/Cross-Appellees in the state courts and are respondents here: Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian. Jena Griswold, in her official capacity as Colorado Secretary of State, was Respondent-Appellee in the state courts and is a respondent here. Donald J. Trump was Intervenor-Appellee/Cross-Appellant in the state courts and is a nominal respondent here.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Anderson v. Griswold*, 2023 CO 63, No. 2023SA300 (CO S. Ct. Dec. 19, 2023) (disqualifying Pres. Trump from ballots)

- *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct. Nov. 17, 2023) (Held Pres. Trump is not disqualified from ballots)

- *Anderson v. Griswold*, No. 2023CV32577, (Colo Dist. Ct. Oct. 20, 2023) (denying motions to dismiss)

Counsel is not aware of any other related proceedings under Supreme Court Rule 14.1(b)(iii).

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OPINIONS BELOW

The *per curiam* opinion of the Colorado Supreme Court was published as *Anderson v. Griswold*, 2023 CO 63, Pet. App. A. The Final Order issued by the District Court for the City and County of Denver is as follows: *Anderson v. Griswold*, No. 2023CV32577, 2023 Colo. Dist. LEXIS 362 (Colo. Dist. Ct. Nov. 17, 2023), Pet. App. C. The District Court's Omnibus Ruling on Pending Dispositive Motions is available as *Anderson v. Griswold*, No. 2023CV32577, 2023 Colo. Dist. LEXIS 369 (Colo Dist. Ct. Oct. 20, 2023), Pet. App. B.

JURISDICTION

The Colorado Supreme Court issued its judgment on December 19, 2023, affirming in part and reversing in part the district court's order. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

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The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Section Three of the Fourteenth Amendment provides as follows:

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

U.S. CONST. amend. XIV, § 3.

STATEMENT OF THE CASE

I. Proceedings in the Denver District Court

Six Colorado electors filed a verified petition against Colorado Secretary of State Jena Griswold

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and President Trump in the Denver District Court on September 6, 2023. The electors sought an order under Colorado Revised Statute section 1-4-1204 declaring President Trump constitutionally disqualified from the presidency and directing the Colorado Secretary of State to exclude his name from the 2024 primary and general election ballots.[1]

The Colorado Republican State Central Committee ("Colorado Republican Party" or the "Party") intervened in Denver District Court with several claims: (1) the relief sought violates the Party's First Amendment rights; (2) Section Three of the Fourteenth Amendment does not apply to the President and is not self-executing such that a state disqualification proceeding would lie; and, (3) the Colorado Election Code does not allow for the Secretary of State to determine constitutional qualifications. The parties exchanged motions to dismiss. The district court issued an omnibus order on Oct. 20, 2023. Pet. App. 46b. In that order, the district court granted the Electors' Motion to Dismiss the Party's First Amendment claim. It denied President Trump's Motion to Dismiss, adopted by the Party, that was based on constitutional challenges to the suit's attempt to adjudicate whether President Trump is disqualified. The district court also denied the Party's Motion to Dismiss on statutory grounds.

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1 During litigation, the Electors dropped their declaratory claim leaving only their claim under C.R.S. § 1-4-1204. As a result, President Trump was technically removed as a defendant. However, he immediately and without objection intervened and reentered the proceeding.

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An evidentiary hearing was held October 30 through November 3, and the district court entered its final order on November 17, 2023. Pet. App. 125c. The court ruled that President Trump is not one of the "officers of the United States" described in Section Three of the Fourteenth Amendment and ordered the Colorado Secretary of State to place President Trump on the presidential primary ballot. *Id.*

Despite this dispositive ruling on the law in favor of President Trump, the district court also purported to make a factual finding that President Trump engaged in an insurrection.

II. Proceedings in the Colorado Supreme Court

Pursuant to C.R.S. § 1-1-113(3), the Electors sought review by the Supreme Court of Colorado on November 20, 2023. President Trump brought a cross-appeal. Oral arguments were held on December 6, 2023, and the Colorado Supreme Court issued its judgment on December 19, 2023. Pet. App. 223a. The supreme court affirmed in part and reversed in part the district court's order, ultimately concluding that President Trump was disqualified from appearing on the ballot. *Id.*

The Colorado Supreme Court held that "states have the constitutional power to assess presidential qualifications," Pet. App. 24a, that Colorado law authorizes such challenges, *id.*, and that Section Three of the Fourteenth Amendment imposes such a

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qualification regarding insurrections, Pet. App. 56a-58a.

The court further held that the Party's First Amendment right was not violated by excluding from the primary or general ballot a candidate the state determined, through its courts, to be disqualified. Pet. App. 63a-68a.

Reversing the district court, the Colorado Supreme Court held that Section Three does apply to the Office of the President. It also held that Section Three of the Fourteenth Amendment is self-executing and that Congress need not pass implementing legislation for the disqualification provision to attach.

Finally, the Colorado Supreme Court affirmed the trial court's factual findings and legal conclusions that President Trump had engaged in insurrection and so was disqualified from both the primary and general ballot.

Three justices dissented, arguing that the Colorado Supreme Court was without jurisdiction to decide this insurrection challenge.

The state supreme court stayed its order to allow review in this Court:

> [W]e stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until

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> the receipt of any order or mandate from the Supreme Court.

Pet. App. 224a. This petition followed.

REASONS FOR GRANTING THE WRIT

For the first time in American history, a former President has been disqualified from the ballot, a political party has been denied the opportunity to put forward the presidential candidate of its choice, and the voters have been denied the ability to choose their Chief Executive through the electoral process. This unprecedented decision urgently merits this Court's review to prevent "the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent." Pet. App. 316a (Samour, J., dissenting). By excluding President Trump from the ballot, the Colorado Supreme Court engaged in an unprecedented disregard for the First Amendment right of political parties to select the candidates of their choice and a usurpation of the rights of the people to choose their elected officials.

Rejecting a long history of precedent, a state's highest court has now concluded that individual litigants, state courts, and state election officials in each of the 50 states plus the District of Columbia possess legal authority to enforce Section Three of the Fourteenth Amendment to remove presidential candidates. With the number of challenges to

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President Trump's candidacy now pending in other states, ranging from lawsuits to administrative proceedings, there is a real risk the Colorado Supreme Court majority's flawed and unprecedented analysis will be borrowed, and the resulting grave legal error repeated. While fifty-one different solutions may be a great idea for federalist experimentation, *see* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018), it would be a recipe for national disaster if applied to the question whether a presidential candidate is constitutionally qualified for office.

The Colorado Supreme Court's decision is wrong for a host of reasons. As most relevant here, it improperly applied precedent establishing the First Amendment right of political parties, failed to apply precedent repeatedly holding that the Fourteenth Amendment is not a self-executing sword, *see, e.g.*, *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921), and incorrectly concluded that the President is an "officer of the United States." This alone would present grounds for review in any circumstance.

But it is the radical effects of the Colorado Supreme Court's decision that particularly necessitate this Court's review as soon as reasonably possible. The Colorado Supreme Court has decided "to bar former President Donald J. Trump ('President Trump')—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot." Pet. App. 244a (Samour, J., dissenting). The historical significance of this decision cannot be overstated. The

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Colorado Supreme Court has removed the leading Republican candidate from the primary and general ballots, fundamentally changing the course of American democracy. And its significance is not merely political, but legal. Rejecting a long history of precedent, a state Supreme Court has now concluded that individual litigants, state courts, and secretaries of state in all 50 states plus the District of Columbia have authority to enforce Section Three of the Fourteenth Amendment.

Unless the Colorado Supreme Court's decision is overturned, any voter will have the power to sue to disqualify any political candidate, in Colorado or in any other jurisdiction that follows its lead. This will not only distort the 2024 presidential election but will also mire courts henceforth in political controversies over nebulous accusations of insurrection.

Indeed, the catastrophic effects of the Colorado Supreme Court's decision are already foreshadowed in pending and recently decided cases involving attempts to deny President Trump access to the 2024 ballot:

> *Castro v. Dahlstrom*, No. 1:23-cv-00011-JMK (D. Alaska filed Sept. 29, 2023).
>
> *Castro v. Fontes*, No. 23-3960 (9th Cir. filed Dec. 8, 2023) (on appeal from *Castro v. Fontes*, No. CV-23-01865-PHX-DLR, 2023 U.S. Dist. LEXIS 215802 (D. Ariz. Dec. 4, 2023)) (pending, appeal filed by Plaintiff after case was dismissed for lack of subject-matter jurisdiction).

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Clark v. Weber, No. 2:23-CV-07489-DOC-DFMx, 2023 U.S. Dist. LEXIS 189172 (Cent. D. Cal. Oct. 20, 2023) (dismissed *sua sponte* with prejudice, Plaintiff lacked standing).

Castro v. Trump, No. 9:23-cv-80015-AMC, 2023 U.S. Dist. LEXIS 194440 (S.D. Fla. June 26, 2023) (dismissed, lack of standing and ripeness).

Caplan v. Trump, No. 0:23-cv-61628-RLR, 2023 U.S. Dist. LEXIS 199051 (S.D. Fla. Aug. 31, 2023) (dismissed, lack of subject matter jurisdiction).

Davis v. Wayne Cnty. Election Comm'n, Nos. 368615, 368628, 2023 Mich. App. LEXIS 9150 (Mich. Ct. App. Dec. 14, 2023) (affirmed dismissals, no jurisdiction for lack of actual controversy and lack of ripeness).

Growe v. Simon, No. A23-1354, 2023 Minn. LEXIS 571 (Minn. Sept. 12, 2023) (dismissed, no error as to the issue of the presidential primary and lack of ripeness as to the issue of the general election).

Castro v. Warner, No. 2:2023cv00598, 2023 U.S. Dist. LEXIS 195186 (S.D.W. Va. Sept. 7, 2023) (summary judgment granted for lack of standing on December 20, 2023).

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Other cases, not involving President Trump, have also raised questions surrounding the application of Section Three of the Fourteenth Amendment. *Cawthorn v. Amalfi*, 35 F.4th 245, 248 (4th Cir. 2022); *Greene v. Sec'y of State*, 52 F.4th 907, 910 (11th Cir. 2022); *Stencil v. Johnson*, 605 F. Supp. 3d 1109, 1113, 1119 (E.D. Wis. 2022); *Hansen v. Finchem*, No. CV 2022-004321, 2022 Ariz. Super. LEXIS 5 (Ariz. Sup. Ct. Apr. 21, 2022) (holding "no private right of action exists" to enforce the Disqualification Clause of the 14th Amendment). Most courts have rejected these lawsuits on jurisdictional grounds, but the Colorado Supreme Court has followed its own, path and split from the others, warranting this Court's review.[2]

The district court rightly concluded, in ruling that President Trump must be given access to the Colorado ballot, that any doubts regarding these interpretative questions should be resolved in favor of the democratic process. As Attorney General Stanbery noted after the Civil War, "[w]here, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867). The same is true here. Should this Court have any interpretative doubt, it

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2 The drastic effects of the Colorado Supreme Court's decision on the 2024 primary election necessitate this Court's immediate review, during this current term. The prompt hearing of this case is necessary to prevent the Colorado Supreme Court's decision from having an irreparable effect on the electoral process. Petitioner is prepared to abide by whatever expedited processes this Court may set. Along with the filing of this Petition for Certiorari, the Party is filing a Motion to Expedite.

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should resolve that doubt in favor of the democratic process.

I. The President Is Not an Officer of the United States Covered Within the Disqualification Provision of Section Three of the Fourteenth Amendment.

The trial court reached the correct conclusion: the President is not covered by Section Three. The Fourteenth Amendment only disqualifies those who serve in specific roles. Specifically, a person is disqualified only if he "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State." U.S. CONST. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies to him only if he was an "officer of the United States." *Id.* But that term as used in Section Three does not cover the President.[3]

The Constitution makes very clear that the President is not an officer of the United States. For example, the Commissions Clause states that the President "shall Commission all the Officers of the United States." U.S. CONST. art. II, § 4. If the

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3 Moreover, there are legitimate grounds for questioning whether the Presidency is included within the scope of offices *from* which individuals are disqualified. For example, Section Three, in listing positions from which people can be disqualified, specifies Electors, who are selected by the people. Thus, it is that stage of the process the drafters of Section Three chose to protect against insurrectionists, not the stage at which the President is elected.

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President is an officer of the United States, then the President commissions himself. On the contrary, the presidency is not among the specific roles enumerated, nor is the President an officer of the United States. "The people do not vote for the 'Officers of the United States.' . . . They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497-98 (2010) (internal citations omitted). *See United States v. Mouat*, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

It is undisputed that the presidency can be considered an "office." But Section Three does not disqualify all "officers" in a general sense. Instead, it only disqualifies "officers of the United States." This term of art is used in only three places in the Constitution: Section Three of the Fourteenth Amendment, The Commissions Clause, and The Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 3.

Accordingly, it is the President who appoints the officers of the United States and has authority to commission those officers. He is not, himself, therefore,

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an officer of the United States. "Officer of the United States" is limited, each time it is used, to explicitly not include the Presidency.

The Colorado Supreme Court reasoned that, because the President is an "officer" in a general sense, he is, therefore, also an "officer of the United States" in the specific sense intended by the drafters. That is not how constitutional interpretation works. The Constitution uses a distinct, specific term, "officer of the United States." Generic references to the term officer do not overcome the more specific meaning evidenced by the constitutional language. Nor does any historical source indicate that this term was not to be understood in the specific sense it is used in the Constitution's text. In fact, the historical evidence is to the contrary.

Less than a decade after the ratification of the Fourteenth Amendment, Senator Newton Booth posited, "the President is not an officer of the United States." Cong. Rec. Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap 145 (1876). Senator Boutwell likewise explained that "according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers." *Id.* at 130. Near the same time, a treatise determined "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States.'" DAVID MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 346 (1878).

Most importantly, Attorney General Henry Stanbery defined the term officer in the Fourteenth Amendment as "military as well as civil officers of the

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United States who had taken the prescribed oath." 12 U.S. Op. Att'y. Gen. at 158. He declared that the phrase "Officers of the United States" includes, "without limitation," any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." *Id.* at 203.

A president does not take the "official oath" that Attorney General Stanberry viewed as dispositive, and thus is not subject to Article Three. There are two oaths of office in the Constitution. Article VI, Section 3 of the Constitution provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, § 3. Thus, all executive officers take an oath to support the Constitution. But the President does not take such an oath: Article II, Section 1 states that the President, instead and singularly, takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1. This distinct phrasing further indicates that for the purposes of Article VI, Section 3, the President is clearly, explicitly, not an officer of the United States.

The actual language of the Fourteenth Amendment uses the words of Article VI, not Article II. The Colorado Supreme Court discussed extensively the overlapping duties between the two oaths, Pet. App. 142a-143a, but that similarity in practice does

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not erase the linguistic difference between the two oaths.

The court below cited this Court's statement, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). True enough. But here, the simplest and most obvious reading of Section Three is that it means what it says, disqualifying those who took an "official oath" to support the Constitution. 12 U.S. Op. Att'y Gen. at 203. No amount of discussion or obfuscation can change the simple fact that the President Trump did not take *that* oath. The Constitution is clear.

The Supreme Court of Colorado opined that it would make no sense to put in place an insurrectionist bar for every other federal office, but not for the President (or Vice-President). Pet. App. 140a. But there is a key difference. Every Senator or Representative represents a geographic area where sympathy for insurrection was (at the time of the post-Civil War era) a real and legitimate concern. Lower federal officers, meanwhile, are not elected and thus do not face national electoral scrutiny. Only the President (and Vice-President) face nationwide electoral accountability. And if an electoral majority of the voters determine that they want a certain individual as Chief Executive, regardless of alleged or even actual past transgressions, that is their national choice under the Constitution. In short, the President and his role is different in a way that matters.

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II. Section Three of the Fourteenth Amendment Is Not a Self-Executing Authority for State Courts and Litigants to Use as a Sword Against Presidential Candidates.

The decision below suffers from many flaws. But, as Justice Samour observed in his dissent, "the majority's ruling that Section Three is self-executing [is] the most concerning misstep." Pet. App. 249a-250a. Congress, and Congress alone, can enforce Section Three. Yet Congress has not provided a private cause of action under Section Three. And the only current enforcement mechanism even arguably available is 18 U.S.C. § 2383, a criminal statute banning insurrection and providing a penalty of disqualification. But President Trump has not been indicted under Section 2383, let alone tried and convicted as would be required to trigger application of Section Three. In fact, after nearly three years of investigation—first by the United States Attorney for the District of Colombia and then by a Special Counsel specifically tasked with investigating and prosecuting the events of January 6—President Trump, although indicted on several charges, has not been accused of violating Section 2383. Indeed, adding insult to injury, the only time President Trump actually faced a formal allegation of insurrection—in the context of an impeachment proceeding appropriate to political questions such as this—he was acquitted after a trial in the U.S. Senate. A lawsuit cannot provide an end-run around the

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mechanisms that Congress establishes for enforcing the Constitution.

This Court has repeatedly held that the Fourteenth Amendment does not itself create a self-executing cause of action. Section Five of the Fourteenth Amendment explicitly confers the enforcement power *on Congress* to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Accordingly, it is Congress that enforces the Fourteenth Amendment by positive legislation. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey*, 256 U.S. at 112 ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

The Colorado Supreme Court misunderstood this fundamental point. In support of its assertion that the Fourteenth Amendment is self-executing, it cited *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Pet. App. 79a-80a. But, as the Fourth Circuit carefully explained in *Cale v. Covington*, 586 F.2d 311, 316-17 (4th Cir. 1978) in direct response to the same argument, *The Civil Rights Cases* addressed whether the Fourteenth Amendment provides a self-executing *defense*, which it does. In some circumstances the Fourteenth Amendment is self-executing as a *shield*, providing a constitutional defense even if not explicitly provided for by law. But in no circumstance is the Fourteenth Amendment a

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self-executing *sword*. As the court thoroughly explained:

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

Cale, 586 F.2d at 316-17 (rejecting the argument that there is an implied cause of action under the Fourteenth Amendment because the Amendment is self-executing). The *Cale* court observed, "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Id.* at 316. As Justice Samour explained in his dissent, based in large part on his analysis of *Cale*, "I do not think [self-executing] means what [my colleagues in the majority] think it means." Pet. App. 247a (quoting

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The Princess Bride (20th Century Fox 1987); *see also* Pet. App. 269a-270a.

The Colorado Supreme Court also relied on *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), to support its assertion that the Fourteenth Amendment is self-executing. However, *City of Boerne* did not suggest that a Fourteenth Amendment case could proceed without Congress creating a cause of action. Instead, it cited with approval, *Katzenbach,* 384 U.S. at 651, which recognized both the existence of a self-executing *defensive* right and that, for an affirmative remedy to exist under the Fourteenth Amendment, Congress must create a cause of action.[4]

In the seminal *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869), Chief Justice Salmon Chase, riding circuit, specifically held that only Congress can provide the means of enforcing Section Three. Although not binding on this court, *Griffin's Case* nonetheless represents strong persuasive authority from one of this Court's most significant Chief Justices, an individual with close-in-time knowledge of the Fourteenth Amendment's meaning. No court before the recent debates over ballot eligibility has

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[4] The Colorado Supreme Court also reasoned from the fact that Section Two of the Fourteenth Amendment, eliminating the counting of enslaved persons as three-fifths of a person, appears to be self-executing. The most significant problem with this argument is that Congress did in fact, by reapportionment, enforce that provision. The Apportionment Act of 1872, 17 Stat. 28 (42d Cong.) (apportioning Representatives to the various states based on Section Two's command.) Because Congress *did* enforce Section Two, there was never a need to address whether it *could have* been enforced through a private cause of action.

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formally disagreed with Chief Justice Chase's analysis of this issue or held that Section Three is self-executing.

In *Griffin*, defendant Ceasar Griffin filed a federal action against Judge Sheffey, former Confederate Officer and judge in Griffin's trial, arguing that the Fourteenth Amendment automatically acted to remove Judge Sheffey from office, "operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23. The federal district court agreed and ordered Griffin's immediate discharge from custody.

On appeal, Chief Justice Chase observed that "it is obviously impossible to [disqualify] by a simple declaration . . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* Chase concluded that the Due Process Clause foreclosed the argument that Section Three automatically disqualifies someone from offense without a trial:

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

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> persons of offices held by them, for cause, however grave.

Id. at 26. Accordingly, Chief Justice Chase held that the provisions of Section Three can only be enforced by Congress. "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by Congress." *Id.* It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.'" *Id.* (quoting U.S. CONST. amend. XIV, § 5). He concluded that

> the intention of the people of the United States, in adopting the Fourteenth Amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislations of congress in its ordinary course.

Id.

Subsequent cases recognized the reasoning of *Griffin*. *See, e.g., Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) ("[G]iven the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert

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claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S. Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[I]t has also been held that the Fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same). The Colorado Supreme Court tried to distinguish these cases, pointing out that in some of them, such as *Rothermel*, the court's analysis was limited and instead simply acknowledged *Griffin*'s holding. Pet. App. 94a. But that has it backward. *Rothermel* and the like cases did not need to independently analyze *Griffin*, not because its holding was dubious, but because its holding was clear and well established. Needlessly reciting *Griffin*'s analysis would have been superfluous. Instead, the courts simply acknowledged *Griffin*'s unassailable conclusion.

The challengers here present *Griffin* as an outlier, but it is not. *Griffin* reflects this Court's repeated emphasis on the need for Congress to enforce the Fourteenth Amendment. No one at the time rejected or attacked *Griffin*. On the contrary, as the cases cited above indicate, it was repeatedly treated as authoritative.

Moreover, as Justice Samour discussed in his dissent below, implementing legislation is also critical for due process reasons. Without implementing legislation, there can be no clarity as to what standards may be required:

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> Section Three doesn't spell out the procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled, or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three.

Pet. App. 246a.

Likewise, immediately after *Griffin*, Congress enacted the Enforcement Act of 1870 for the specific purpose of enforcing Section Three. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143-44. The Enforcement Act provided a civil quo warranto action (that has now been abolished and is no longer in force), specifically for the purpose of enforcing Section Three of the Fourteenth Amendment. Senator Trumbull, discussing the provision in Congress, explained, "The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution." Cong. Globe, 41st Cong., 1st Sess. 626 (1869). He later reiterated this point, explaining that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* There does not appear to be any evidence of someone arguing in response at

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those debates that a congressional enforcement mechanism was unnecessary. As Justice Samour explained, Pet. App. 281a-283a, the fact that Congress adopted enforcement legislation almost immediately after Chief Justice Chase concluded enforcement legislation was necessary is strong evidence that *Griffin* was correctly decided and accepted by the people of his day, people who had just adopted Section Three.

That this legislation is no longer in place does not alter the fact that Congress recognized legislation was necessary when it adopted it in 1870. If there exists any current descendant of the Enforcement Act, it is 18 U.S.C. § 2383, which defines insurrection and provides a penalty of disqualification. As noted above, not only has President Trump not been convicted of violating § 2383, he never has been charged under that statute. State courts lack authority to nonetheless rule him disqualified.

Justice Samour explained:

> Chief Justice Chase presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements . . . , Section Three

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> disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome.

Pet. App. 294a-295a.

In footnote 11 of its opinion, the Colorado Supreme Court argued that

> [t]he question of 'self-execution' that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

Pet. App. 78a. This is fundamentally flawed. There is no authority "permitting state legislatures to do that which, though delegated to it, Congress has declined to do." Pet. App. 298a (Samour, J., dissenting). As this Court has previously explained, although states in general retain broad authority, that authority does not extend to setting new qualifications for federal office. *United States Term Limits v. Thornton*, 514 U.S. 779, 832-33 (1995) ("The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

Despite all its lengthy arguments, the error of the decision below is basic. The court feared "the

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absurd results" that would follow from not reaching a conclusion that Section Three is self-executing. Pet. App. 87a. But the true absurdity here would be rejecting 150 years of precedent to disqualify a former president for the first time in our history based on untested, novel Fourteenth Amendment theories. *Ownbey* 256 U.S. at 112 ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."). Congress alone can enforce Section Three. Indeed, the whole point of the Fourteenth Amendment was to reign in rebellious states. To read Section Three as giving states veto power over presidential candidates would be to turn that amendment upside down.

III. The Colorado Supreme Court's Decision Violates the Colorado Republican Party's First Amendment Associational Right to Choose Its Own Political Candidates.

The Colorado Supreme Court's unprecedented decision violates the Colorado Republican Party's First Amendment associational right to place the political candidates of its choice on both the primary and general electoral ballots. As this Court recognized in *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000):

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most

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> significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Id. See also Duke v. Cleland, 954 F.2d 1526, 1531 (11th. Cir. 1992).

The Colorado Supreme Court thus exceeded its authority in directing the removal of the Party's nominee from the ballot. As the Minnesota Supreme Court recently recognized in an analogous situation, *Growe v. Simon*, No. A23-1354 (Minn. Nov. 8, 2023), "although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes."

To more clearly elucidate the First Amendment violation that occurred here, consider the backdrop against which it occurred: The Colorado Election Code. On its face, the Election Code recognizes the rights of political parties and erects guardrails to constrain the Secretary of State from making discretionary (i.e., political, arbitrary) determinations that would violate those rights. These guardrails are critical, yet the Colorado Supreme Court crashed through them like a runaway truck. And the resulting legal disaster extends beyond misapplication of state law by a state's highest court. This disaster presents a constitutional crisis, national in scope. The Colorado Republican Party urges this Court to vindicate its First Amendment associational right disregarded below, and in so doing, avert the disaster.

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The Colorado Election Code says what it says for a reason—state political parties have well-established First Amendment rights. As the Colorado Republican Party explained below,

> [t]he First Amendment to the United States Constitution, and Colorado law, C.R.S. § 1-4-1204(1), work in tandem to protect the Party's and candidates' rights to freely associate for purposes of engaging in political advocacy and expression – with certain enumerated, non-discretionary, compliance-confirming authorities reserved to the Secretary of State, and the discretionary authority reserved to the political parties.

CO GOP's Mot. to Dismiss 12-13. Specifically, under C.R.S. § 1-4-1204(1)(b) and the First Amendment, the Colorado Republican Party, not the Secretary of State, has the ultimate authority to determine whether an individual is a "bona fide candidate for president of the United States pursuant to political party rules." *Id.* The Colorado Republican Party, not the Secretary, sets its internal rules and determines the requirements for Republican nominees. By directing the Secretary of State to disqualify candidates based on amorphous and contested factual findings subject to deferential review, Pet App. 160a, the Colorado Supreme Court violated the Republican Party's right to freely associate and choose its political standard bearer. While there may be limited circumstances not at issue here in which a state official might properly adjudicate straightforward, nonpolitical matters like

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age or residency, the First Amendment surely does not permit state authorities to go beyond and determine the complex, political question of insurrection.

Political speech is indispensable to a free society, and as such is afforded the broadest and most sacred First Amendment protections. Political speech includes "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). It embraces "[a]dvocacy of the election or defeat of candidates for federal office," "political policy," and "advocacy of the passage or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). A party's selection of a candidate is core political speech, further described as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

As this Court has recognized, the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983).

> We have repeatedly held that freedom of association is protected by the First Amendment. And of course, this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

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> Similarly, we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." . . .

Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). As this Court explained in *Timmons v. Twin Cities Area New Party*, "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." 520 U.S. 351, 357 (1997). States may not enact "unreasonably exclusionary restrictions" on ballot access. *Id.* at 369.

The Colorado Supreme Court paid lip service to this principle, recognizing the Republican Party's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." Pet. App. 65a (citing *Timmons*, 520 U.S. at 359). But after recognizing the existence of the principle, the court failed to appropriately apply it, resulting in the instant constitutional error. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams*, 393 U.S. at 31 (1968).

The Colorado Supreme Court properly recognized that certain appropriate and reasonable ballot exclusions may be permissible. For example, limiting ballot access "to those who have complied

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with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992). However, the imposition of an "insurrection disqualification" here is a horse of a different color.

First, with respect to primary elections, the associational rights of political parties are at their apex. Parties are free to make their own choices, and courts rightly refuse to deny parties the opportunity to set their own requirements. *Jones*, 530 U.S. 567 (2000) (statute providing that any voter could vote in a party's primary unconstitutional); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (statute's requirement that voters in a primary be members of that party unconstitutional). As the Minnesota Supreme Court correctly explained, a primary "is an internal party election to serve internal party purposes." *Growe v. Simon*, No. A23-1354 (Minn. Nov. 8, 2023). The cases cited by the Colorado Supreme Court as upholding an exclusion from the ballot, such as *Timmons*, 520 U.S. at 358, all involved an exclusion from the *general* ballot. This interference with the Party's internal decision-making during the primary election process is unprecedented.

Second, this Court is clear that even in the general elections, a political party retains First Amendment rights. States may not enact "unreasonably exclusionary restrictions." *Timmons*, 520 U.S. at 367. Laws regarding general ballot access must be "reasonable, politically neutral regulations." *Burdick*, 504 U.S. at 438. "[T]he State's asserted regulatory interests need only be 'sufficiently weighty

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to justify the limitation' imposed on the Party's rights." *Timmons*, 520 U.S. at 364 (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). *Timmons* does not give carte blanche to any purported election regulation. Instead, it explicitly requires that the State's proposed justification be both "reasonable" and "politically neutral." So, for example, courts have deemed age and residency requirements permissible under this standard. *See, e.g., Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) ("Distinctions based on undisputed ineligibility due to age do not "limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status." *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997))

By contrast, the requirement imposed by the Colorado Supreme Court here is heavily political, non-neutral, and not-generally-applicable. The state cannot impose its own, politically charged, interpretation of Section Three, when no congressional enactment has given it authority to do so. Congress defines the parameters of the enforcement of Section Three. Colorado exceeds its authority and violates the First Amendment by claiming the authority to remove a party's candidates from the ballot, absent a properly established adjudication of insurrection.

The Colorado Supreme Court reasoned that, "nothing in the U.S. Constitution expressly precludes states from limiting access to the presidential ballot to such candidates." Pet. App. 45a. But a state cannot purport to justify an infringement on a party's First

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Amendment rights by arguing from the absence of a parallel constraint on state's rights.

The Republican Party has been irreparably harmed by the decision below. The state has interfered in the primary election by unreasonably restricting the Party's ability to select its candidates. As a natural and inevitable result, the state has interfered with the Party's ability to place on the general election ballot the candidate of its choice. And it has done so based on a subjective claim of insurrection the state lacks any constitutional authority to make.

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CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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Counsel for Petitioner

December 27, 2023

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
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To: Meingast, Heather (AG) [MeingastH@michigan.gov]
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Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

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To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Ok, also I am hearing that Trump has filed.

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Will have comments to you this evening. As you may have seen, Secretary Griswold is not opposing cert., except on the First Amendment issue about parties' rights to have whomever they want on the ballot.

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---

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, January 3, 2024 at 12:17 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
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Hi Jonathan,

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A/C Priv MCL 15.243(1)(g)

Heather

Heather S. Meingast, Division Chief
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
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CC: Grill, Erik (AG) [GrillE@michigan.gov]; Christine Sun [christine@statesuniteddemocracy.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

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FYI - The Colorado State Republican Central Committee just filed its reply.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 4, 2024 at 2:00 PM
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Cc: Grill, Erik (AG) <GrillE@michigan.gov>, Christine Sun <christine@statesuniteddemocracy.org>, Victoria Bassetti <victoria@statesuniteddemocracy.org>
Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Will call you

Heather S. Meingast, Division Chief
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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
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To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Christine Sun <christine@statesuniteddemocracy.org>; Victoria Bassetti <victoria@statesuniteddemocracy.org>
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

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Hi Heather,

DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

I'm around this afternoon if you'd like to chat.

Best,

Jonathan

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 4, 2024 at 10:04 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
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Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Sounds good, thank you.

Heather S. Meingast, Division Chief
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Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

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Hi Erik and Heather,

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, January 3, 2024 5:33:34 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Ok, also I am hearing that Trump has filed.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, January 3, 2024 5:08 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Will have comments to you this evening. As you may have seen, Secretary Griswold is not opposing cert., except on the First Amendment issue about parties' rights to have whomever they want on the ballot.

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-696.html

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From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, January 3, 2024 at 12:17 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Hi Jonathan,

A/C Priv MCL 15.243(1)(g)

Heather

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/29/2023 2:31:07 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Grill, Erik (AG) [GrillE@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]
Subject: Maine 14.3 decision--privileged
Attachments: Decision in Challenge to Trump Presidential Primary Petitions.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather and Erik,

As you may have already seen, Maine Secretary of State Shenna Bellows determined yesterday that Donald Trump is disqualified from serving as president under the Fourteenth Amendment and therefore may not run in the presidential primary in Maine. (Unlike in Michigan, Maine law provides authority for the Secretary of State to make this kind of eligibility determination.) The 34-page ruling is attached and also available at https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf.

DPP MCL 15.243(1)(m)

Maine law provides for review in the Superior Court (trial court) and then in the Law Court (the highest court). Trump's deadline to seek review in the Superior Court is January 2. Like the Colorado Supreme Court, Secretary Bellows provided that her ruling would be stayed pending review.

Please let us know if you have any questions or would like to discuss.

Best,

Jonathan

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STATE OF MAINE
SECRETARY OF STATE

In re: Challenges of Kimberley Rosen, Thomas Saviello, and Ethan Strimling; Paul Gordon; and Mary Ann Royal to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States	**RULING OF THE SECRETARY OF STATE**

On December 15, 2023, I held a hearing under 21-A M.R.S. § 337 on three challenges to the nomination petition of Donald J. Trump, for the Republican primary for President of the United States. The first two challenges—one filed by Mary Ann Royal (the "Royal Challenge") and one (the "Rosen Challenge") filed by Kimberley Rosen, Thomas Saviello, and Ethan Strimling (the "Rosen Challengers")—contest Mr. Trump's qualification for office under Section Three of the Fourteenth Amendment to the U.S. Constitution. The third challenge, filed by Paul Gordon (the "Gordon Challenge"), contests Mr. Trump's qualification under the Twenty-Second Amendment. For the reasons set forth below, I conclude that Mr. Trump's primary petition is invalid. Specifically, I find that the declaration on his candidate consent form is false because he is not qualified to hold the office of the President under Section Three of the Fourteenth Amendment.

Procedural History

The Secretary of State's Office received three challenges to the nomination petition of Donald J. Trump, each filed under 21-A M.R.S. §§ 336 and 337. The deadline for filing those challenges was 5:00 pm on Friday, December 8, 2023. *See* 21-A M.R.S. § 337(2)(A). Each challenge was timely.

In the first challenge, Mary Ann Royal, a registered voter of Winterport, alleged that Mr. Trump violated his oath of office because he engaged in insurrection or rebellion against the United

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States, or has given aid or comfort to the enemies thereof. While Ms. Royal did not explicitly identify Section Three of the Fourteenth Amendment as the basis of her challenge, it clearly underpins the disqualification argument she set forth.

In the second challenge, Attorney Paul Gordon, a registered voter of Portland, argued that because Mr. Trump has expressly stated that he won the 2020 election, he is barred from office under the Twenty-Second Amendment to the U.S. Constitution, which sets a two-term limit on Presidents.

In the third challenge, Kimberley Rosen, a registered voter of Bucksport and former Republican State Senator; Thomas Saviello, a registered voter of Wilton and former Republican State Senator; and Ethan Strimling, a registered voter of Portland and former Democratic State Senator, collectively contended that Mr. Trump is barred from office because he engaged in insurrection as defined by Section Three of the Fourteenth Amendment.

On Monday, December 11, 2023, I issued a Notice of Hearing to all parties, indicating that a consolidated hearing would be held at 10:00 am on December 15, 2023, in Augusta. The Notice informed the parties that the hearing would be conducted in accordance with 21-A M.R.S. § 337 and the Maine Administrative Procedure Act ("APA"). The parties exchanged exhibit and witness lists during the afternoon of December 13, 2023, and the Secretary of State's Office received timely applications to intervene from the Citizens for Responsibility and Ethics in Washington ("CREW"); John Fitzgerald of Sedgwick; State Representative Mike Soboleski; Professor Mark A. Graber; and Michael Lake of Belgrade.

At the start of the hearing, I denied the intervention petitions of Mr. Fitzgerald and Mr. Lake because they were not present for the hearing. However, without objection from the parties, I ultimately accepted their submissions as amicus briefs. I also granted, without timely objection,

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the intervention requests of CREW and Representative Soboleski, who were present for the hearing, and the intervention request of Professor Graber, who intervened solely for the purpose of submitting an amicus brief.

At the start of the hearing, I noted for the parties that the following were already part of the administrative record:

- Mr. Trump's original petition
- Mr. Trump's candidate consent form, dated October 20, 2023
- The challenge of Mary Anne Royal, dated December 6, 2023
- The challenge of Paul Gordon, dated December 8, 2023
- The challenge of Kimberley Rosen, Thomas Saviello, and Ethan Strimling, dated December 8, 2023
- The Notice of Hearing sent by email and U.S. mail to the challengers and the candidate, dated December 11, 2023

Without objection from the parties, I admitted the Rosen Challengers' first five exhibits. They consist of Mr. Trump's signed consent form (identical to Mr. Trump's first and only exhibit[1]); the Rosen Challenge; and voter registration records for each Rosen challenger.[2] I provisionally admitted the Rosen Challengers' remaining exhibits, exhibits 6 through 112,[3] at the hearing pending resolution of any objections. I also provisionally admitted Attorney Gordon's three exhibits, all articles pertaining to Mr. Trump's claims regarding the 2020 election, as well as

[1] Mr. Trump attached additional exhibits to a brief he submitted after the hearing, which I have addressed below.

[2] No party has challenged the voter registration status of any challenger, and I therefore find that each challenge complies with 21-A M.R.S. § 337(2)(A).

[3] Exhibit 111 is a file folder containing a series of additional exhibits. For ease of reference, I have renumbered those exhibits as Rosen Ex. 111-1 through Ex. 111-56.

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Representative Soboleski's single exhibit, a YouTube video concerning Mr. Trump's role in the events of January 6, 2021.

At the hearing, Ms. Royal and Attorney Gordon testified under oath. The Rosen Challengers called one witness, Professor Gerard M. Magliocca, a law professor at the Indiana University School of Law. Mr. Trump called no witnesses. I also heard argument on the scope of my authority under state and federal law.

Without objection of the parties, I set a deadline of 5:00 pm on Monday, December 18, for articulation and briefing of objections to any provisionally admitted exhibits, and I therefore held the hearing record open. Mr. Trump timely filed a brief articulating objections, and the Rosen Challengers timely responded by the deadline I set at the hearing: 5:00 pm on Tuesday, December 19. No other party filed objections.

I likewise permitted the parties to submit final legal briefs regarding the merits of the challenges by Tuesday, December 19, at 5:00 pm. The Rosen Challengers and Mr. Trump chose to waive closing statements at the hearing, deferring instead to their legal briefs. I received timely closing briefs from the Rosen Challengers and Mr. Trump.

Following the Colorado Supreme Court's decision in *Anderson v. Griswold*, Case No. 23SA300, 2023 CO 63, 2023 WL 8770111 (Dec. 19, 2023), I invited additional briefing from the parties regarding the significance of that decision, if any, to this case by 8:00 pm on Thursday, December 21, 2023. The Rosen Challengers and Mr. Trump filed briefs by the deadline.

On Wednesday, December 27, sixteen days after he learned that I would preside over the hearing in this matter and shortly before issuance of my decision, Mr. Trump filed a Motion requesting that I disqualify myself due to alleged bias. That Motion is denied as untimely. *See* 5 M.R.S. § 9063(1) (requiring "timely charge of bias"). Moreover, had the Motion been timely, I

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would have determined that I could preside over this matter impartially and without bias. My decision is based exclusively on the record before me, and it has in no way been influenced by my political affiliation or personal views about the events of January 6, 2021.

Legal Requirements

Under Section 443 of Title 21-A, the Secretary of State is responsible for preparing ballots for a presidential primary election. The Secretary must "determine if a petition meets the requirements of," as relevant here, Section 336 of Title 21-A, "subject to challenge and appeal under section 337." 21-A M.R.S. § 443.

Section 336 requires that a candidate consent form be filed with the primary petition or at any earlier time during which signatures may be collected. *Id.* § 336. That form, which is prepared by the Secretary of State, "must include a list of the statutory and constitutional requirements of the office sought by the candidate." *Id.* § 336(1). The submitted form must also contain a "declaration of the candidate's place of residence and party designation and a statement that the candidate meets the qualifications of the office the candidate seeks, which the candidate must verify by oath or affirmation . . . that the declaration is true." *Id.* § 336(3).

"If, pursuant to the challenge procedures in section 337, any part of the declaration is found to be false by the Secretary of State, the consent and the primary petition are void." *Id.* To prevail on a challenge to a candidate's nomination petition, "the challenger has the burden of providing sufficient evidence to invalidate the petitions or any names upon the petitions." *Id.* § 337(2)(B).

Findings of Fact and Conclusions of Law

I have reviewed the exhibits submitted in this case. I also have carefully considered the arguments proffered by the parties. I take my role in this proceeding extremely seriously, given

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both the stakes and the novel constitutional questions at issue. For the reasons that follow, I conclude that Mr. Trump's primary petition is invalid.

A. Most of the Evidence Submitted by the Rosen Challengers, and Objected to by Mr. Trump, Is Admissible Under 5 M.R.S. § 9057.

Title 5, Section 9057 sets forth the governing standard for admissibility of evidence in Section 337 proceedings. It is more permissive than the Maine Rules of Evidence, *see* 21-A M.R.S. § 9057(1), and directs that "[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs," *id.* § 9057(2). I "may," though by no means must, "exclude irrelevant or unduly repetitious evidence." *Id.* This "relaxed evidentiary standard," *State v. Renfro*, 2017 ME 49, ¶ 10, 157 A.3d 775, affords me substantial latitude to decide what evidence to admit, though it generally favors admissibility.

Mr. Trump first makes a blanket objection, on Due Process grounds, to the fact that he was unable to review the Rosen Challengers' exhibits before the hearing. As discussed on the record, due to a technical difficulty suffered by the Rosen Challengers, a Dropbox link provided to the parties before the hearing and containing many of the Rosen Exhibits was inoperative. With assistance from my office, copies of the evidence were provided to counsel during the hearing.

This delay does not amount to a Due Process violation. There is no requirement under the APA that evidence be shared prior to an administrative hearing. The APA mandates that parties be permitted to "present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying." 5 M.R.S. § 9056(2). Mr. Trump was afforded those opportunities at the hearing.

Further, at my instruction, the Rosen Challengers circulated an exhibit list before 5:00 pm on Wednesday, December 13, that identified Rosen Exhibits 1 through 87. Additional exhibits that the Rosen Challengers entered into evidence at the hearing were identified by Intervenor

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CREW by email during the afternoon of Thursday, December 14. Therefore, by early evening on December 14, Mr. Trump was fully aware of all of the exhibits that would be offered against him at the hearing.

This was ample notice, in part because the majority of the evidence that the Rosen Challengers offered at the hearing had already been presented and litigated in *Anderson v. Griswold*. Scott Gessler, Mr. Trump's lead counsel here, is lead counsel for Mr. Trump in that case, too. *See generally Anderson*, 2023 CO 63. I also afforded all parties three additional days after the hearing to organize and file their objections to any exhibits, minimizing any disadvantage that may have resulted from the delay in the exhibits being shared. Mr. Trump's Due Process objection to the Rosen Challengers' exhibits is therefore overruled.

The notice the Rosen Challengers provided stands in stark contrast to how Mr. Trump has handled 25 exhibits,[4] never before referenced in this proceeding, that he cites in footnotes to his evidentiary objections brief. Mr. Trump has not requested that I enter these exhibits into evidence, nor would it be fair to do so over an objection three days after the hearing. Mr. Trump submitted an exhibit list prior to the hearing containing only one exhibit, and he could have supplemented the record with additional exhibits at the hearing. He chose not to do so, and I accordingly sustain the objection of the Rosen Challengers, as articulated in their response brief, to those exhibits. They will not be admitted.[5]

[4] The exhibits are numbered 26-51. Mr. Trump has never identified exhibits 1-25.

[5] Mr. Trump also attached a single exhibit to his closing brief, namely a report of the Inspector General of the U.S. Department of Defense on the events of January 6, 2021. Mr. Trump does not cite the exhibit in his brief, nor has its admission been objected to by the Rosen Challengers. I find that the exhibit is relevant and reliable and, without objection, will admit it into evidence as Trump Exhibit 2.

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Mr. Trump also makes a blanket challenge to the relevance of the Rosen Challengers' evidence, claiming that none pertains to the truth or falsity of Mr. Trump's declaration under Section 336(3). As discussed further below, I conclude that the evidence is relevant. *See* 5 M.R.S. § 9057(2). I accordingly overrule the objection.

The meat of Mr. Trump's objection brief is focused on the Rosen Challengers' Exhibit 7, the Final Report of the Select Committee to Investigate the January 6 Attack on the United States Capitol (the "January 6 Report"). Mr. Trump's objections to the admissibility of the report are overruled.

As an initial matter, Mr. Trump's objections hinge largely on rules of evidence that do not govern this proceeding. The fact that a report includes hearsay, contains irrelevant facts, or lacks foundation does not automatically render it inadmissible under the APA. Rather, the central question is whether, under Section 9057(2), it is the type of evidence on which reasonable persons are accustomed to rely in serious affairs.

I rule that that the January 6 Report meets this standard. Under the Federal Rules of Evidence, government investigative reports, including reports of Congress, are presumed admissible, with the party challenging admissibility bearing the burden of showing the report is untrustworthy. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988); *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Loc. Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). Trustworthiness is assessed according to a non-exhaustive list of four factors: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Barry*, 467 F. Supp. 2d at 97; *see also Beech Aircraft*, 488 U.S. at 167 n.11. Similarly, in Maine, "factual findings from a legally

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authorized investigation" are admissible under the Maine Rules of Evidence unless "sources of information or other circumstances indicate lack of trustworthiness. *See* Me. R. Evid. 803(8)(a).

I am not bound by either the federal or Maine rules of evidence because this is an APA proceeding. However, the four factors outlined above provide a useful framework for assessing the trustworthiness of the January 6 Report. The first three factors plainly counsel in favor of admissibility. Mr. Trump's objections focus primarily on the fourth factor, namely the motivation of the authors. But all Congressional reports are to some degree political, and many of the facts contained in the Report are corroborated by other documentary and video evidence in the record. I accordingly see no reason to exclude the January 6 Report in its entirety under 5 M.R.S. § 9057(2). That said, Mr. Trump's concerns are valid insofar as the Report reflects a curated view of the evidence and contains characterizations of that evidence. These limitations influence the weight that I assign to the Report.

Mr. Trump also objects to the records and evidence that the Rosen Challengers seek to admit from the proceedings in *Anderson*.[6] Mr. Trump's reliance on *Cabral v. L'Hereux*, 2017 ME 50, 157 A.3d 795, to support his objection is misplaced. In that case, the Law Court instructed that courts cannot of their own accord take *judicial notice* of testimony and exhibits from separate proceedings. *See id.*, 2017 ME 50, ¶ 11, 157 A.3d 795. But that is not what the Rosen Challengers have requested here. They have sought to admit each and every exhibit individually, and have provided a copy of each to me and to the parties.[7] The fact that the exhibits are associated with *Anderson* is, in other words, beside the point, as it is the evidence itself that the Rosen Challengers

[6] Mr. Trump likewise objects to inclusion of the final order issued in *New Mexico ex rel. White v. Griffin*. *See* Rosen Ex. 36. The objection is overruled. I may properly consider the legal analysis of a court on relevant legal issues to the extent the analysis is persuasive.

[7] Moreover, as noted above, testimony included in those exhibits was subject to cross-examination by Mr. Trump during the *Anderson* proceedings.

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have identified as exhibits. That is sufficient under 5 M.R.S. § 9057(2), and the objection is overruled.[8]

Mr. Trump also levies a number of individual objections to particular exhibits proffered by the Rosen Challengers.[9] I sustain these objections in part. Specifically, while I am not obligated to exclude irrelevant evidence, *see* 5 M.R.S. § 9057(2), I conclude that Rosen Exhibits 38-48, videos of speeches, town halls, and conferences from 2015-2019 and 2023, are too remote in time from the events of January 6, 2021, to be relevant, and I therefore will exclude them. I likewise sustain Mr. Trump's objection as to Rosen Exhibits 78 and 79—my predecessor's November 2017 press release, and letter of August 2018—for the same reason.

Otherwise, Mr. Trump's objections are overruled. Insofar as he has concerns about authenticity, foundation, completeness, hearsay, or improper legal argument, they do not render the challenged exhibits automatically inadmissible under the APA, and I find them reliable given they themselves contain sufficient indicia of reliability and are corroborated by other evidence in the record. I will consider Mr. Trump's concerns when assigning weight to these exhibits.[10]

In sum, I sustain Mr. Trump's objections as to Rosen Exhibits 38-48 and 78-79. I likewise sustain the Rosen Challengers' objection to the exhibits attached to Mr. Trump's evidentiary objections brief. Otherwise, Rosen Exhibits 6-112, which I admitted provisionally at the hearing,

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[8] Mr. Trump also makes a puzzling *res judicata* argument, suggesting that because he prevailed in a lower Colorado court, the Rosen Challengers cannot introduce evidence from that case against him. Putting aside the lack of any legal basis for this argument, I will assume that Mr. Trump no longer wishes to press it given the subsequent decision of the Colorado Supreme Court.

[9] The First Amendment argument that Mr. Trump included in his objections brief, and which has no bearing on the admissibility of evidence, is addressed in Part D.4, below.

[10] As to the legal briefs objected to—e.g., Rosen Exhibit 81, the amicus brief of Professor Magliocca in *Growe v. Simon*—I agree that they are not evidence of any fact and I admit them solely to consider their analysis of the applicable law.

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are admitted. All other exhibits that were provisionally admitted at the hearing are now admitted given no party filed an objection to their admission. With this ruling, the hearing record is now closed.

B. As a General Matter, the Secretary of State Has Authority to Keep Unqualified Candidates Off the Primary Election Ballot.

As a general matter, states have inherent authority over their ballots. Consistent with state authority to regulate the "Times, Places and Manner" of congressional elections under Article I, Section 4 of the U.S. Constitution, and to manage the selection process for presidential electors, *see* U.S. Const. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . . "); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892 ("[T]he appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."), "the States have evolved comprehensive . . . election codes regulating . . . . [the] selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The inevitable result of States managing their own elections is that each has different requirements and procedures for ballot access, even with respect to presidential candidates. President Biden, for example, will not appear on New Hampshire's 2024 Democratic presidential primary ballot, even though he has qualified for Maine's 2024 Democratic presidential primary ballot. At the same time, Mr. Chris Christie will not appear on the Maine's 2024 Republican presidential primary ballot, even though he will appear on New Hampshire's 2024 Republican presidential primary ballot.

Similarly, while state legislatures cannot create new qualifications for holding presidential office, they can choose to establish a process to exclude candidates who fail to meet the qualifications set forth in the U.S. Constitution. *See, e.g., Anderson*, 2023 CO 63, ¶¶ 53-56. As

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now-Justice Gorsuch observed in *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012), "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* at 948; *see also Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2022) (excluding age-ineligible candidate for president because "a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies" (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972))); *Socialist Workers Party of Ill v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (holding state was not obligated to place presidential candidate on the ballot who did not meet age requirement).

It is that authority that the Maine Legislature has delegated to me. As the Rosen Challengers note, under Section 443 of Title 21-A, the Secretary of State is statutorily obligated to determine if a nomination petition meets the requirements of Section 336. *See, e.g., Christie v. Bellows*, No. AP-23-42 (Me. Super. Ct., Ken. Cnty., Dec. 21, 2023) (affirming Secretary's decision to reject candidate petition of presidential candidate for lacking sufficient certified signatures). Section 336, in turn, requires all candidates, including presidential candidates, to submit a written consent containing a declaration of residency and party designation, and a statement that the candidate "meets the qualifications of the office the candidate seeks." 21-A M.R.S. § 336(3). Section 336 also renders any primary petition void where I find, pursuant to a challenge like those filed in this case, that "any part of the declaration is . . . false." *Id.*

Maine's election laws thus contemplate that I review the accuracy of a candidate's declaration that they meet the qualifications of the office they seek. I therefore disagree with Mr. Trump's contention that only Congress can adjudicate the qualifications of a Presidential candidate. The State's authority, and that delegated by the Legislature, require me to limit access

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to the primary ballot to qualified candidates *See, e.g., Christie*, No. AP-23-42; *Carey v. Sec'y of State*, No. CV-2022-09 (Me. Super. Ct., Oxford Cnty., May 10, 2022) (affirming decision to exclude candidate for District Attorney from primary ballot because "Maine election law required that [the candidate] certify . . . that he was qualified to serve as a District attorney" but he failed to so certify because by statute he was not qualified).

Two further aspects of my authority to exclude unqualified candidates from the primary ballot warrant mention. *First*, that authority is not limited to the specific qualifications set forth on a given year's candidate consent form. While Section 336 requires that the consent form list the statutory and constitutional requirements of the office sought by the candidate, 21-A M.R.S. § 336(1), the declaration refers not to the form, but to the qualifications: the candidate must "verify by oath or affirmation" that they "meet the qualifications of the office the candidate seeks." 21-A M.R.S. § 336(3); *accord Carey*, No. CV-2022-09. The statute reflects that the Legislature's principal concern was not whether a candidate is truthful on the form, but more fundamentally whether the candidate is *qualified for office*.

For this reason, the declaration on the 2024 consent form, which asks candidates to confirm that they "meet the qualifications to hold this office as listed above," Rosen Ex. 1 (signed consent), is not, as Mr. Trump claims, limited to the qualifications listed on that form. The word "as" in the declaration is significant. Absent the word "as," the phrase "meet the qualifications to hold this office listed above" would limit the scope of the declaration as Mr. Trump claims. Its presence, however, underscores that the qualifications are listed on the consent form as a convenience—the qualifications "as listed above"—consistent with my obligation to print them under Section 336(1).

Any alternative interpretation would suggest that I can pick and choose which qualifications are applicable in designing a candidate consent form, which I straightforwardly

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cannot do. *See Doane v. Dep't of Health & Hum. Servs.*, 2017 ME 193, ¶ 13, 170 A.3d 269 ("If a regulation conflicts with an existing statute, the statute controls."). The form, for example, omits reference to the Twenty-Second Amendment prohibition of serving as President for more than two terms, but that qualification plainly still applies. Similarly, if my office did not list the Article II qualifications on the form, I would not consequently be required to place a teenager on the presidential primary ballot. The declaration is instead applicable to *all* qualifications of the office sought, and there is nothing unfair about holding a candidate to them, as Section 336(3) contemplates.

Second, the fact that Section 336(3) separately refers to a "declaration of the candidate's place of residence and party designation and a statement that the candidate meets the qualifications of the office the candidate seeks" is of no moment. Counsel for Mr. Trump—who, before his co-counsel said the opposite, admitted at the hearing that the declaration and statement were legally indistinguishable—points to no aspect of the legislative history of Section 336 suggesting that the distinction is meaningful. Section 336(3) requires that both the declaration and statement be verified by oath or affirmation, and Section 355, which incorporates analogous requirements for nomination petitions of non-party candidates, collapses the distinction entirely and directly requires a declaration "that the candidate meets the qualifications of the office the candidate seeks." 21-A M.R.S. § 355(3).

That said, even if there were a distinction between the declaration and statement identified in Section 336(3), that would not meaningfully limit my obligation to keep unqualified candidates off the ballot. The Rosen Challenge, for example, cites both Section 336 and Section 337. While Section 336(3) addresses the declaration—and directs that the petition is invalid should I find that declaration false in any way—Section 337(2) authorizes challenges to the validity of primary

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petitions more broadly, underscoring my authority as Secretary of State to keep clearly unqualified candidates off the primary ballot. *Cf. Arsenault v. Sec'y of State*, 2006 ME 11, 905 A.2d 285 (reviewing whether Secretary properly interpreted relevant statute in disqualifying replacement candidate without questioning Secretary's authority to disqualify unqualified candidates).

C. Mr. Trump's False Claims Regarding the 2020 Election Do Not Disqualify Him Under the Twenty-Second Amendment.

The Twenty-Second Amendment provides that "[n]o person shall be elected to the office of the President more than twice." U.S. Const. amend. XXII, § 1. Attorney Gordon claims that given Mr. Trump won the 2016 election, and has repeatedly claimed to have won the 2020 election, he is disqualified. *See* Gordon Challenge 2 ("When a candidate makes a factual representation that disqualifies him from the office he seeks, he cannot appear on the ballot."); *see also* Gordon Exs. 1-3 (newspaper articles quoting Mr. Trump making these claims).

Attorney Gordon cites no authority for his interpretation of the Twenty-Second Amendment, which is contrary to the Amendment's plain meaning. Application of the term limit turns on whether an individual has *actually been elected President twice*, not on beliefs or assertions about that fact. *Cf. Nader v. Butz*, 398 F. Supp. 390, 397 (D.D.C. 1975) ("Having been elected to [the presidency] twice, [Richard Nixon] is precluded from serving again."). That Mr. Trump has falsely asserted that he won the 2020 election is no more disqualifying than it would be for him to proclaim that he is not a United States citizen. In other words, political grandstanding does not trigger the bar of the Twenty-Second Amendment.

When questioned at the hearing, Attorney Gordon admitted that, as a factual matter, Mr. Trump did not win the 2020 election. In fact, there appears to be no dispute between any of the parties that President Biden prevailed over Mr. Trump. Therefore, given Mr. Trump has only won

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a single election for President, he is not barred from being elected to the same office again under the Twenty-Second Amendment.

D. Mr. Trump Engaged in Insurrection Against the United States Such that He Is Not Qualified to Hold the Office of President.

1. Section 337 is an appropriate process by which to adjudicate a candidate qualification challenge based on Section Three of the Fourteenth Amendment.

The exercise of state authority to keep unqualified candidates off the ballot is contingent on the state creating a process by which to do so. *See Anderson*, 2023 CO 63, ¶¶ 53-56. Sections 336, 337, and 443 of Title 21-A describe that process in Maine. There is no other mechanism of which I am aware by which a Maine voter can challenge the qualifications of a candidate for office. It is the means by which I am authorized, and indeed duty-bound under the terms of the oath of office to which I swore, *see* Me. Const. art. IX, § 1, to enforce Maine's election laws.

The question of whether a petition is valid under Title 21-A is typically straightforward. If there is a dispute about the validity of signatures, or a candidate is underage or not a resident of the correct jurisdiction, the taking of extensive evidence may be unnecessary. Discharge of my duty in such cases requires little interpretation of governing law or the corresponding record. Rather, I am tasked with determining whether a statutory or constitutional requirement is met according to well-established standards.

As the Rosen Challengers have pointed out, however, my role in determining whether a candidate has qualified for the ballot is not always so simple. The Secretary of State has, for example, wrestled with complex evidentiary records regarding potential fraud of petition circulators. *See Boyer v. Dep't of the Sec'y of State*, Docket No. AP-18-20 (Me. Super., Ken. Cty., Apr. 26, 2018). The Secretary has also had to consider novel and difficult questions of state and federal constitutional law. *See, e.g., Jones v. Sec'y of State*, 2020 ME 113, 238 A.3d 982.

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This case presents similar hurdles. *See Anderson*, 2023 CO 63, ¶ 7 (recognizing that a challenge under Section Three of the Fourteenth Amendment is "uncharted territory" and presents "several issues of first impression"). But complexity is not a limitation on my authority under Sections 336, 337, or 443. These statutes do not suggest that I am restricted to adjudicating straightforward questions of law or fact. Nor do I have the discretion to decline to rule in ballot qualification cases simply because they present difficult issues. The statutes instead reflect that Maine has joined other states in choosing to enforce Section Three of the Fourteenth Amendment, and in doing so the Maine Legislature has delegated that authority to me. *See, e.g., Anderson*, 2023 CO 36, ¶ 56; *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022); *Worthy v. Barrett*, 63 N.C. 199, 202 (1869); *In re Tate*, 63 N.C. 308, 308 (1869); *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (1869).

Mr. Trump's concerns about the adequacy of this proceeding are therefore without merit. He has had the opportunity to present evidence; to call witnesses; to cross-examine; and to argue at length both the legal and factual issues germane to my decision. And while the timeline of the proceedings has, by necessity, been compressed, this is hardly the first time that Mr. Trump—or Attorney Gessler—has confronted the applicability of Section Three of the Fourteenth Amendment to a presidential candidate. It likewise is not the first time that Mr. Trump has had to grapple with whether the evidence presented here, which almost directly mirrors that which was offered in *Anderson*, demonstrates that he engaged in insurrection.[11] And Mr. Trump has the opportunity to appeal my decision, providing him with additional process in both the Superior Court and the Law Court. *See* M.R. Civ. P. 80C; 21-A M.R.S. § 337(D)-(E); *Amsden v. Moran*, 904 F.2d 748, 755

[11] In *Anderson*, Trump had the opportunity to engage in discovery, litigate dispositive motions, and present his full case at a five-day trial, obviating any concern that the speed of this proceeding is unfair. *Anderson*, 2023 CO 63, ¶¶ 79-86. In fact, both Mr. Trump and the Rosen Challengers heavily rely on the arguments and evidence from the *Anderson* proceeding.

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(1st Cir. 1990) (recognizing that the "existence of state remedies" is "highly relevant" to claims of due process violations).

While I am cognizant of the fact that my decision could soon be rendered a nullity by a decision of the United States Supreme Court in *Anderson*, that possibility does not relieve me of my responsibility to act. Nor do the deadlines set forth in Section 337 give me the option to delay my decision until the Supreme Court has ruled. I therefore conclude that I have the authority to adjudicate the Rosen and Royal Challenges, and that this Section 337 proceeding is appropriate for doing so.

2. Section Three of the Fourteenth Amendment Is Self-Executing Without Congressional Action and Applies to the President.

Section Three of the Fourteenth Amendment, ratified in 1868, provides, in relevant part, that:

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

U.S. Const. amend XIV, § 3.

As a threshold matter, the fact that Section Three refers to *holding* office, rather than *running for* office, is not noteworthy. Article II's qualifications do not refer to running for office, either, but rather are phrased in terms of eligibility "to the office." *See* U.S. Const. art. II, § 1, cl. 5. My obligation, here triggered by the Rosen and Royal Challenges, is to keep candidates unqualified to *take* office from Maine's presidential primary ballot. *See* 21-A M.R.S. § 336(3); *see also Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App'x at 948; *Ogilvie*, 357 F. Supp. at 113.

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Turning then to the principal question of whether Section Three of the Fourteenth Amendment applies to candidates for president, I conclude that it does, for the following reasons.

First, no Congressional action is necessary to render effective the qualification set forth in Section Three. The Supreme Court has described the Fourteenth Amendment as "undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing set of circumstances." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Contemporary evidence suggests the same is true, specifically, of Section Three. *See, e.g.*, Dec. 15, 2023 Hearing 5:46:50-5:48:52 (Magliocca). Both the military and states themselves, for example, began enforcing Section Three soon after adoption without any Congressional authorization. *See* Dec. 15, 2023 Hearing 5:26:50-5:27:20, 5:46:55-5:47-10 (Magliocca); *see also Worthy*, 63 N.C. at 202; *In re Tate*, 63 N.C. at 308; *Watkins*, 21 La. Ann. at 632; *State ex rel. Downes v. Towne*, 21 La. Ann. 490 (1869). Congress also began granting amnesties pursuant to its ability to "remove [the] disability" imposed by Section Three, which only would be necessary if Section Three had taken effect. *See* Dec. 15, 2023 Hearing 5:29:56-5:30:18, 5:47:35-5:47:58 (Magliocca).

I recognize that Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. But that does not mean that action pursuant to Section Five is a prerequisite to the substantive provisions of the Fourteenth Amendment having any legal force. Indeed, champions of the Section Three enforcement mechanism that Congress briefly authorized questioned whether it was necessary at all. *See Cong. Globe*, 41st Cong., 1st Sess., p. 626-28. It stands to reason that, like Section One of the Fourteenth Amendment, which the Supreme Court has recognized is self-executing, *see City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *see also* Cong. Globe, 39th Cong. 1st Sess., pp. 1095, 2459, 2498 (highlighting desire to ensure Section

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One could not functionally be repealed by a future Congress); the Thirteenth Amendment, which also contains an enforcement provision and is self-executing, *see* U.S. Const. amend. XIII; *see The Civil Rights Cases*, 109 U.S. at 20; and the qualifications of Article II, which are not contingent on enforcement legislation, Section Three requires no Congressional action in order to become effective. *See Anderson*, 2023 CO 63, ¶¶ 88-106.

On this point, I find *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), to be unpersuasive. It is not binding in Maine, does not assess whether states can enforce Section Three without Congressional authorization, and has been discredited. *See, e.g., Anderson*, 2023 CO 63, ¶ 103; Amicus Br. of Constitutional Law Professor Mark A. Graber 7-8 (Dec. 14, 2023).[12]

Second, the presidency is covered by Section Three. It is an "office, civil or military, under the United States," and the President is an "officer of the United States." U.S. Const. amend. XIV, § 3.

The U.S. Constitution repeatedly refers to the presidency as an office. *See* U.S. Const. art. I, § 3; art. II, §§ 1, 4; U.S. Const. amends. XII, XXII, XXV; *see also Anderson*, 2023 CO 63, ¶ 133 (noting Constitution refers to the presidency as an office 25 times). At first blush, it would seem odd to interpret the text of Section Three to incorporate the President through a catchall provision that follows the enumeration of Senators, Representatives, and presidential and vice-presidential electors. But none of those enumerated positions are "offices" under the Constitution. The Constitution does not refer to Senators and Representatives as such, *see, e.g.,* U.S. Const. art. I, § 5, cl. 1 (referring to "[m]embers" of Senate and House); *id.* art. I, § 6, cl. 2 (same); *id.* art. II, § 1,

[12] Dicta from *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal 2008), cited by Mr. Trump, is likewise unpersuasive. That case involved an attempt to obtain an order from a federal court barring John McCain from the ballot, rather than the enforcement of state laws designed to keep individuals unqualified for the office they seek off the ballot.

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cl. 2 (distinguishing Senators and Representatives from those holding office under the United States),[13] and electors are "no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in congress," *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890).

The history of Section Three firmly supports the idea that it covers the presidency. Professor Magliocca testified that Members of Congress believed the presidency to constitute an office when debating the language of Section Three,[14] as did contemporaries outside of Congress, including those who sought to keep Jefferson Davis from the presidency. *See* Dec. 15, 2013 Hearing 5:36:16-5:41:40; *see also Anderson*, 2023 CO 63, ¶ 140 (highlighting this understanding in debates around adopting the Fourteenth Amendment); *cf. District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (prioritizing normal and ordinary usage of words over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation"). Opinions issued by then–U.S. Attorney General Stanbury echoed this understanding, confirming the breadth of Section Three's reference to "officer under the United States." *See* 12 U.S. Op. Att'y Gen. 182, 203, 1876 WL 2127 (1867); 12 U.S. Op. Att'y Gen. 141, 158 (1867); *see also* Dec. 15, 2013 Hearing 5:42:50-5:44:00 (Magliocca).

[13] While the Court in *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), referred to both the President and Members of Congress as "federal officers," *see id.* at 805 n.17, that offhand statement in a footnote is hardly authoritative, never mind more persuasive than contemporaneous accounts of the meaning of Section Three. Additionally, references in the Constitution to offices in the House and Senate that Mr. Trump cites only support the Rosen Challengers' view, in that they distinguish offices like Speaker from the elected position of Representative or Senator. *See* U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . .").

[14] Members of Congress likewise did not distinguish between officers "of" and officers "under" the United States. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., p. 3939.

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Mr. Trump cites an early draft of Section Three that referred to the "office of President or Vice President," Cong. Globe, 39th Cong., 1st Sess. 919 (1866), as evidence that the adopted language was not intended to be as expansive. But the Rosen Challengers persuasively argue that (1) the early draft confirms that the drafters both intended the presidency to be covered by Section Three and considered the presidency an office; and (2) the adopted language of Section Three contains a much broader catchall than that which was included in the draft Mr. Trump cites, suggesting it was broadened to incorporate the office of the presidency. This makes good sense; it is implausible that the drafters of Section Three chose to exempt the highest office in our government from an amendment designed to keep confederates from positions of power. *See* Cong. Globe, 39th Cong., 1st Sess. 2505 (1866) (drafter of Section Three noting that his proposal would ensure "the loyal alone shall rule the country which they alone have saved" and that traitors would be "cut[] off . . . from all political power in the nation."); *see also* Dec. 15 Hearing 5:23:10-5:23:55 (Magliocca).

The uniqueness of the president's oath does not change the calculus, either.[15] While the Article II oath requires the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 8, which is technically different than Article VI's command that officers take an oath to "support this Constitution," *id.* art. IV, cl. 3, that is a distinction without a difference. *See, e.g.*, Cong. Globe 39th Cong., 1st Sess. App'x, p. 234 (statements of Kentucky Senator Garrett Davis referencing both oaths in listing constitutional protections against insurrection); *accord* Dec. 15, 2023 Hearing 5:25:41-5:26:33, 5:44:14-5:46:28 (Magliocca). To preserve, protect, and defend the Constitution is, necessarily, to support it. *See Anderson*, 2023 CO 63, ¶¶ 156-58.

[15] The parties do not contest that Mr. Trump took the presidential oath. *See* Rosen Ex. 6.

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In sum, the text, history, and context of Section Three of the Fourteenth Amendment make clear that it covers the President, and that it is a qualification enforceable by the states.

3. The record demonstrates that the events of January 6, 2021 were an insurrection.

The parties do not meaningfully dispute the events of January 6, 2021. Multiple government reports that the Rosen Challengers entered into evidence confirm that a large group of people violently attacked the Capitol with the intent of preventing the certification of the presidential election. This resulted in a lockdown of the Capitol complex, an evacuation of the Vice President and congressional leaders, an interruption of official House and Senate proceedings, and multiple deaths and injuries. As described in a United States Government Accountability Report:

> Over the course of about 7 hours, more than 2,000 protestors entered the U.S. Capitol on January 6, disrupting the peaceful transfer of power and threatening the safety of the Vice President and members of Congress. The attack resulted in assaults on at least 174 police officers, including 114 Capitol Police and 60 D.C. Metropolitan Police Department officers. These events led to at least seven deaths and caused about $2.7 billion in estimated costs.

Rosen Ex. 60 (GAO, Report to Congressional Requestors, Capitol Attack: Federal Agencies Identified Some Threats, but Did not Fully Process and Share Information Prior to January 6, 2021 (GAO-23-106625) (Feb. 2023) ("GAO Report")), at 1.

In making their case that the events of January 6, 2021 constitute an insurrection, the Rosen Challengers rely heavily on the proceedings in—and evidence from—the *Anderson* case. Much of that evidence is in the record here, and I find the reasoning of the Colorado Supreme Court

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compelling.[16] That said, even without the benefit of the *Anderson* decision, I have little trouble concluding that the events of January 6, 2021 were an insurrection within the meaning of Section Three of the Fourteenth Amendment.

Professor Magliocca defined an insurrection as a public use of violence by a group of people to hinder or prevent the execution of the Constitution. *See* Dec. 15, 2023 Hearing 5:30:30-5:31:08 (Magliocca). This definition is well supported by the historical record. *See id.* 5:31:12-5:33:04 (Magliocca); *see also* Noah Webster, An American Dictionary of the English Language 613 (1860) (defining insurrection as distinct from rebellion, and as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state").

Mr. Trump criticizes Professor Magliocca's definition as based on sources too "weak" and disparate in time, but he offers no workable alternative definition. *See* President Donald J. Trump's Closing Argument (Dec. 19, 2023) at 38. Specifically, Mr. Trump's claim that insurrection must be "violent enough, potent enough, long enough, and organized enough to be considered a significant step on the way to rebellion," *id.* at 39, is both ambiguous as a standard and poorly supported by the evidence he cites. *Accord Anderson*, 2023 CO 63, ¶ 183. An insurrection need not involve military-style weaponry, *see Case of Fries*, 9 F. Cas. 940 (C.C.D. Pa. 1800) ("[M]ilitary weapons" like "guns and swords" "are not necessary to make such insurrection or rising amount to levying of war"), involve bloodshed, *see In re Charge to Grand Jury*, 62 F. 828,

[16] In their supplemental brief, the Rosen Challengers go even further, arguing that the doctrine of collateral estoppel mandates that I accept the *Anderson* Court's factual determinations. But as the Challengers also recognize, non-mutual collateral estoppel is not mandatory in this case. *See Van Houten v. Harco Constr.*, 655 A.2d 331, 333 (Me. 1995) (nonmutual collateral estoppel is permissible only on a case-by-case basis where it serves the interests of justice) (Me. 1995); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 37 (Me. 1991). I conclude that it would be antithetical to the interests of justice to prohibit Mr. Trump, in this proceeding, from arguing that the Rosen Challengers did not demonstrate that Mr. Trump engaged in insurrection.

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830 (N.D. Ill. 1894), or even be highly organized, *see Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954).

Nonetheless, even if insurrection under Section Three were so limited, the evidence here shows that the events of January 6, 2021 meet that standard. As demonstrated by videos and documentary evidence in the record, a large and angry crowd entered the U.S. Capitol near midday on January 6 and assaulted the capitol police officers charged with defending it, vandalized and stole property, and ransacked offices. *See* Rosen Ex. 62 (Staff Report, Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, Committee on Homeland Security and Government Affairs & Committee on Rules and Administration ("Senate Staff Report")), at 1; Rosen Exs. 67-72, 75 (video of attack on Capitol). Many of those involved were armed with weapons—some brought to the Capitol, some wrested from police officers, and some repurposed items looted from inside the Capitol itself—and over a few hours they used them to breach barriers and attack those who resisted. *See* Rosen Ex. 62 (Senate Staff Report) at 28-29; *see also* Rosen Exs. 67-72, 75 (video of attack on Capitol). The crowd ultimately entered the Capitol as Members of Congress were meeting to certify the Electoral College vote count. *See* Trump Ex. 2 (Review of the DOD's Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and Its Aftermath at the U.S. Capitol Campus on January 6, 2021, Inspector General, U.S. Dep't of Defense, Report No. DODIG-2022-039 ("DOD Report")), at 5. In other words, the attack was violent enough, potent enough, and long enough to constitute an insurrection.

It also cannot reasonably be disputed that the rioters were organized behind a common purpose. That purpose is evident not only from the context, discussed in more detail below, but also from the very chants and recitations of the rioters themselves. They were present to "stop the steal," i.e., prevent by force the certification of the results of the 2020 presidential election that

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was scheduled to occur in the halls of Congress that afternoon. *See, e.g.*, Rosen Ex. 7 (Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, (Dec. 22, 2022), 117th Cong., 2d Sess., H. Rep. 117-663) ("Jan. 6 Report")) at 57, 105-07, 533; Rosen Ex. 37 at 75, 80 (tweets claiming then–Vice President Pence could reject electors).

This violent disruption of Congress's duty, through a transparently public use of force, meets both Professor Magliocca's historically accurate definition of an insurrection, and Mr. Trump's alternative definition. *See* Dec. 15, 2023 Hearing 5:49:18-5:51:08 (Magliocca); *accord Anderson*, 2023 CO 63, ¶¶ 186-89. I therefore conclude that the events of January 6, 2021, the "most significant breach of the Capitol in over 200 years," Rosen Ex. 62 (Senate Staff Report) at 21, constituted an insurrection.

4. The record demonstrates that Mr. Trump engaged in the insurrection of January 6, 2021.

The question of whether Mr. Trump *engaged* in insurrection is a closer one. It would not be difficult to answer had Mr. Trump had been found guilty—or not guilty—of insurrection in a court of law pursuant to 18 U.S.C. § 2883 (criminalizing insurrection). The applicability of Section Three of the Fourteenth Amendment does not turn on whether an office-seeker has been convicted of a crime, however. Instead, under Sections 336 and 337, I am obligated to assess the record before me and make a determination based on the preponderance of the evidence, just as my predecessors have in other ballot access cases. *See Douglas v. Bd. of Trustees of Me. State Retirement Sys.*, 669 A.2d 177, 179 (Me. 1996) (applying preponderance standard in APA proceeding).[17]

[17] The usual standard in an APA proceeding is preponderance of the evidence, and the parties have not argued that any other standard should apply.

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Professor Magliocca defined "engaged in" as a voluntary act, by word or deed, in furtherance of an insurrection, including words of incitement. Dec. 15 2023 Hearing 5:34:30-5:34:44 (Magliocca). The support for this interpretation is robust, as succinctly summarized by Professor Magliocca himself at the hearing. *Id.* 5:35:02-5:35:37 (Magliocca). Contemporaneous decisions from Attorney General Stanbury suggest that engaging in insurrection did not require "having actually levied war or taken arms," but rather was understood broadly to include official action "in furtherance of the common unlawful purpose" or "any overt act for the purpose of promoting the rebellion," including "incit[ing] others" to act accordingly "by speech or by writing." 12 Op. Att'y Gen. 141, 161-62 (1867); 12 Op. Att'y Gen. 182, 205 (1867); *see also Anderson*, 2023 CO 63, ¶ 192.[18] Judicial decisions of the time likewise interpreted Section Three as covering "a voluntary effort to assist the Insurrection or Rebellion," *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871); *accord Worthy*, 63 N.C. at 203; *Griffin*, 2022 WL 4295619, at *19; *United States v. Burr*, 25 F. Cas. 55, 178 (C.C.D. Va. 1807 ("[I]n treason, all are principals." (quoting 4 Tuck Bl. Comm. Append. 40-47)), and even defined "levying war" as including "inciting and encouraging others" to commit treason, *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1034 (C.C.S.D. N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048-49 (C.C.E.D. Pa. 1851); *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.).

On this basis, I adopt the definition outlined by Professor Magliocca and concur that "engaged in insurrection" under Section Three of the Fourteenth Amendment includes "incitement." *Accord Anderson*, 2023 CO 63, ¶ 194. The central question, then, is whether Mr.

[18] Mr. Trump's interpretation of these sources as suggesting that engagement is limited to official action that causes something more serious than an insurrection is unsupported by the record.

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Trump's statements and other conduct leading up to and including January 6, 2021—the essential facts of which are once again not in dispute—constitute incitement of insurrection.

Before the 2020 presidential election, Mr. Trump sowed doubt in its legitimacy. He declared, for example, at a campaign rally in Wisconsin that the only way he would lose "is if the election is rigged." *See* Rosen Ex. 53. A month later, at a White House Press Briefing on September 23, 2023, he refused to commit to a peaceful transfer of power, instead demurring that he would "have to see." *See* Rosen Ex. 55.

Consistent with this characterization, on Election Day and thereafter, and most prominently on social media, Mr. Trump repeatedly claimed that there had been widespread election fraud and that the presidency was being stolen from him. *See, e.g.*, Rosen Ex. 37 (tweets) at 10-16, 32-33, 38-40; Trump Ex. 2 (DOD Report) at 3, 18. He attacked the election's validity and pressured Republicans, in Georgia and elsewhere, to overturn its results. *See* Rosen Ex. 37 (tweets) at 2, 23, 29-31, 49. Mr. Trump simultaneously implored his supporters to "SAVE AMERICA" and "fight on!" *See* Rosen Ex. 37 (tweets) at 25, 35.

In response to Mr. Trump's inflammatory rhetoric, Gabriel Sterling, a Republican election official in the state of Georgia, publicly warned President Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." *See* Rosen Ex. 59 (video) at 1:50. Mr. Trump responded by retweeting a video of the press conference, proclaiming "Rigged Election" and "Expose the massive voter fraud in Georgia." *See* Rosen Ex. 37 (tweets) at 27. And when a November 14, 2020 rally in Washington, D.C. inspired by his continued attempts to "stop the steal" turned violent—there was a stabbing, numerous injuries, and multiple arrests—Mr. Trump justified the violence as self-defense against "ANTIFA SCUM." Rosen Ex. 37 (tweets) at 17; Ex. 60 (GAO Report) at 88-91; Trump Ex. 2 (DOD Report) at 18.

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On December 19, 2020, fully aware of how his words and deeds had bred violence and threatened more, Mr. Trump announced a rally in Washington on January 6, 2021, to protest certification of the election results. *See* Trump Ex. 2 (DOD Report) at 3. He tweeted:

> Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump https://washex.am/3nwaBCe. A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

See Rosen Ex. 37 (tweets) at 41. Multiple permit requests for rallies on January 5th and 6th followed, though none permitted a march from the Ellipse to the Capitol. *See* Rosen Ex. 7 (Jan. 6 Report) at 703-04. Mr. Trump apparently intended to call for such a march spontaneously. *Id.* at 704.

As the election machinery marched toward certification of the presidential election results on January 6, 2021, as required by the U.S. Constitution, *see* U.S. Const. art. II, § 1; *id.* amend. XII, Mr. Trump continued to press his case that the election was illegitimate. *See, e,g.,* Rosen Ex. 37 (tweets) at 47-48, 50. He repeatedly referenced the January 6, 2021 joint session of Congress at which the Electoral Votes would be counted on social media, and he reminded his supporters of the rally he had planned at the same time in Washington. *See, e.g., id.* at 47, 50, 55, 60, 62-63, 66, 72, 74-75; Rosen Ex. 62 (Senate Staff Report) at 22; Trump Ex. 2 (DOD Report) at 19.

The language Mr. Trump used was oftentimes inflammatory, too. On December 26, 2020, for example, Mr. Trump tweeted:

> If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Rosen Ex. 37 (tweets) at 49. That same day, Mr. Trump characterized the election as "the biggest SCAM in our nation's history" and told his reporters "History will remember. Never give up. See

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everyone in D.C. on January 6th." Rosen Ex. 37 (tweets) at 50. Far right militias interpreted Mr. Trump's tweets as a call to arms. *See* Rosen Ex. 7 (January 6 Report) at 499, 521.

A week later, on January 1, 2021, Mr. Trump retweeted a post from an organizer of the January 6 March for Trump stating "the calvary [sic] is coming, Mr. President!" calling it "[a] great honor!" *See* Rosen Ex. 37 (tweets) at 64. And as his supporters arrived in Washington on January 5, Mr. Trump again tweeted that the election had been "stolen," that the country "won't take it anymore!", and that "the thousands of people pouring into D.C. . . . won't stand for a landslide election victory to be stolen!" *See* Rosen Ex. 37 (Tweets) at 76.

On the morning of January 6, 2021, Mr. Trump implored then–Vice President Pence to block certification of the election. *See* Rosen Ex. 37 (tweets) at 80. A few hours later, in a speech that began at about noon following a variety of other speakers, *see id.* at 78; Trump Ex. 2 (DOD Report) at 5, 44, Mr. Trump in no uncertain terms urged Mr. Pence to "do the right thing," and asked his supporters to go to the Capitol; "show strength"; and demand that Congress not certify the election for President Biden. *See* Rosen Ex. 63 (speech) at 16:15-16:30; *see also* Rosen Ex. 62 (Senate Staff Report) at 22. The crowd chanted "fight for Trump." Rosen Ex. 63 (speech).

At the conclusion of his speech around 1:10 pm, minutes after the joint session of Congress to certify the election results had begun, *see* Rosen Ex. 7 (January 6 Report) at 461, 577; Rosen Ex. 62 (Senate Staff Report) at 23-24, Mr. Trump implored his supporters to

> [F]ight like hell. And if you don't fight like hell, you're not going to have a country anymore . . . So we're going to, we're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give . . . . We're going to try and give them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue.

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Rosen Ex. 63 (speech) at 1:09:30-1:11:19. As the President concluded his speech, a large crowd marched toward the Capitol and forced their way past security barricades. *See* Rosen Ex. 7 (Jan. 6 Report) at 638; Rosen Ex. 62 (Senate Staff Report) at 22; Trump Ex. 2 (DOD Report) at 5, 44.

Mr. Trump learned that the Capitol was under attack by 1:21 pm. *See* Rosen Ex. 7 (Jan. 6 Report) at 577. Yet Mr. Trump made no effort to mobilize federal law enforcement or the National Guard, nor for hours did he ask his supporters to leave the area. *See id.* Instead, an hour later, and minutes after the Capitol building itself had been breached, *see id.* at 708, Mr. Trump tweeted that "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a correct set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *See* Rosen Ex. 37 (tweets) at 83. Thereafter, on social media, Mr. Trump asked those at the Capitol to support law enforcement and stay peaceful, *see* Rosen Ex. 37 (tweets) at 83-84, but he neither denounced the violence nor intervened to stop it, *see* Rosen Ex. 7 (Jan. 6 Report) at 110.

Finally, at 4:17 pm, Mr. Trump released a video telling the assembled rioters to go home, but rather than condemning them or their actions he noted his sympathy, calling them "very special." *See* Rosen Ex. 76. Thereafter, Mr. Trump tweeted:

> These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!

See Rosen Ex. 37 (tweets) at 84.

This is a compelling narrative, the facts of which are not in serious dispute. I conclude, as did the Colorado Supreme Court, *see Anderson*, 2023 CO 63, ¶ 221, that the record establishes that Mr. Trump, over the course of several months and culminating on January 6, 2021, used a false narrative of election fraud to inflame his supporters and direct them to the Capitol to prevent

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certification of the 2020 election and the peaceful transfer of power. I likewise conclude that Mr. Trump was aware of the likelihood for violence and at least initially supported its use given he both encouraged it with incendiary rhetoric and took no timely action to stop it.

Mr. Trump's occasional requests that rioters be peaceful and support law enforcement do not immunize his actions. A brief call to obey the law does not erase conduct over the course of months, culminating in his speech on the Ellipse. The weight of the evidence makes clear that Mr. Trump was aware of the tinder laid by his multi-month effort to delegitimize a democratic election, and then chose to light a match.

The events of January 6, 2021 notwithstanding, Mr. Trump also claims that he cannot be disqualified from the presidency for his conduct because his public statements and speeches are protected by the First Amendment. But Mr. Trump cites no precedent—and I am unaware of any—that permits the First Amendment to override a qualification for public office. Section Three of the Fourteenth Amendment is not a criminal penalty, as in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007), nor is it a punishment, *cf.* Dec. 15, 2023 Hearing 5:24:08-5:24:30 (Magliocca) (describing historical understanding of Section Three). It is simply a qualification for office.

Additionally, because I conclude that Mr. Trump intended to incite lawless action, his speech is unprotected by the First Amendment. *See Anderson*, 2023 CO 63, ¶¶ 230-56; *accord Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (Ellipse speech "plausibly [contained] words of incitement not protected by the First Amendment"); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1979) (incitement of lawless action unprotected by the First Amendment). Principles of free speech do not override the clear command of Section Three of the Fourteenth

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Amendment, namely that those who orchestrate violence against our government may not wield the levers of its power.

Conclusion

I do not reach this conclusion lightly. Democracy is sacred, and the highest court of this State has repeatedly recognized that "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Melanson v. Sec'y of State*, 2004 ME 127, ¶ 14, 861 A.2d 641 (quoting *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (cleaned up)). I am mindful that no Secretary of State has ever deprived a presidential candidate of ballot access based on Section Three of the Fourteenth Amendment. I am also mindful, however, that no presidential candidate has ever before engaged in insurrection. The oath I swore to uphold the Constitution comes first above all, and my duty under Maine's election laws, when presented with a Section 336 challenge, is to ensure that candidates who appear on the primary ballot are qualified for the office they seek.

The events of January 6, 2021 were unprecedented and tragic. They were an attack not only upon the Capitol and government officials, but also an attack on the rule of law. The evidence here demonstrates that they occurred at the behest of, and with the knowledge and support of, the outgoing President. The U.S. Constitution does not tolerate an assault on the foundations of our government, and Section 336 requires me to act in response.

I conclude that the Rosen and Royal Challengers have met their burden under 21-A M.R.S. § 337(2)(B). They have provided sufficient evidence to demonstrate the falsity of Mr. Trump's declaration that he meets the qualifications of the office of the presidency. Therefore, as required by 21-A M.R.S. § 336(3), I find that the primary petition of Mr. Trump is invalid.

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Given the compressed timeframe, the novel constitutional questions involved, the importance of this case, and impending ballot preparation deadlines, I will suspend the effect of my decision until the Superior Court rules on any appeal, or the time to appeal under 21-A, Section 337 has expired. *Cf. In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 744 (Me. 1973) (noting administrative agencies are free to fashion their own rules of procedure).

Dated: December 28, 2023

Shenna Bellows
Secretary of State

NOTICE OF APPEAL RIGHTS

The challenger or candidate may appeal this decision by commencing an action in the Superior Court within 5 days of this date, pursuant to 21-A MRSA section 337, subsection 2, paragraph D.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/3/2024 11:07:09 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Grill, Erik (AG) [GrillE@michigan.gov]; Christine Sun [christine@statesuniteddemocracy.org]; Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief
Attachments: Colorado SCOTUS amicus 1.3.23_SUDC[8].docx

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Hi Erik and Heather,

DPP MCL 15.243(1)(m)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Wednesday, January 3, 2024 at 5:43 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

https://static01.nyt.com/newsgraphics/documenttools/9a52ab1adf471cda/dfe18fa1-full.pdf

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Wednesday, January 3, 2024 5:33:34 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: RE: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Ok, also I am hearing that Trump has filed.

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, January 3, 2024 5:08 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Re: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

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Will have comments to you this evening. As you may have seen, Secretary Griswold is not opposing cert., except on the First Amendment issue about parties' rights to have whomever they want on the ballot.

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-696.html

---

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Wednesday, January 3, 2024 at 12:17 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Attorney Client Privilege - Attorney Work Product - DRAFT amicus brief

Hi Jonathan,

A/C Priv MCL 15.243(1)(g)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 12/29/2023 2:41:21 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: 14.3 updates -- privileged

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Hi Heather,

Below is our weekly 14.3 update. I've covered all of this in separate, more in-depth emails. We'll be back with an updated tracker next week.

Colorado:

Anderson v. Griswold now *Colorado Republican State Central Committee v. Anderson*:

- The Colorado Republican Party filed a petition for a writ of certiorari in the U.S. Supreme Court asking for review of the Colorado Supreme Court's decision barring Trump from the state's primary ballot.
- Both the Colorado Republican Party and the Anderson Respondents (petitioners below) asked for expedited briefing on the petition and expedited merit briefing if the petition is granted.

Maine

- Secretary of State Shenna Bellows ruled that Trump is not eligible to rule in the presidential primary in Maine because he is disqualified under 14.3. In Maine, the secretary of state makes an initial decision regarding disqualification—based on petitions challenging eligibility—and the decision can then be appealed to the state's superior court.

Michigan

LaBrant v. Benson:

- On Wednesday, December 27, the Michigan Supreme Court declined to review the Court of Appeal's decision that Trump may appear on the primary ballot in Michigan. The decision below held only that Michigan law does not make eligibility to hold office a requirement for appearing on a presidential primary ballot. It did not address whether Trump is disqualified under 14.3.
- Secretary Benson said in a statement that the court correctly found she lacked authority to prevent Trump from appearing on the primary ballot but called on the U.S. Supreme Court to provide clarity on the issues going forward.

As always, please let us know if you have any questions or would like to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/5/2024 2:27:08 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Colorado amicus

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Thanks, Heather DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Friday, January 5, 2024 at 9:07 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Subject: FW: Colorado amicus

DPP MCL 15.243(1)(m)

Heather S. Meingast, Division Chief
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meingasth@michigan.gov
(517) 335-7659 (office)

From: Meingast, Heather (AG)
Sent: Friday, January 5, 2024 12:48 AM
To: Brady, Mike (MDOS) <BradyM@michigan.gov>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>; Brater, Jonathan (MDOS) <BraterJ@michigan.gov>
Subject: Colorado amicus
Importance: High

DPP MCL 15.243(1)(m)

Thanks,

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/5/2024 6:32:34 PM
To: Hammoud, Fadwa (AG) [HammoudF1@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]
Subject: National Archives ECA guidance

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Good afternoon. As you may have seen, the National Archives and Records Administration recently posted ECA guidance on its website: https://www.archives.gov/electoral-college/state-officials/so-instructions. One very helpful resource mentioned is the Archives' Office of the Federal Register's email list, which provides announcements and reminders from OFR. You can sign up by sending an email from your government email account to election.officials+subscribe@nara.gov.

We will be providing guidance and a checklist for general use later this year, but of course feel free to reach out with any questions for us in the meantime.

Best,

Jonathan

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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/5/2024 8:39:13 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Grill, Erik (AG) [GrillE@michigan.gov]
CC: Victoria Bassetti [victoria@statesuniteddemocracy.org]
Subject: PA -- privileged

Importance: High

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DPP MCL 15.243(1)(m)

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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/5/2024 10:19:56 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Order granting Trump petition

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https://www.supremecourt.gov/orders/courtorders/010524zr2_886b.pdf

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/16/2024 11:12:36 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: 14.3 update--Privileged

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Heather,

We are stopping the litigation tracker given the cert. grant. Below is a summary of the case and amicus briefs of interest as of Friday.

***

The Supreme Court granted Trump's petition for a writ of certiorari seeking review of the Colorado Supreme Court's decision disqualifying Trump from the primary ballot based on Section 3 of the Fourteenth Amendment (*Trump v. Anderson*). Trump's petition was not limited to the Colorado Supreme Court's construction of the Fourteenth Amendment. The petition raises the following issues:

- Whether Congress is the exclusive judge of whether a presidential candidate is disqualified;
- Whether Section 3 applies to the President;
- Whether Trump engaged in insurrection within the meaning of Section 3;
- Whether the Colorado Supreme Court violated the Electors Clause by interpreting state law to allow a presidential candidate to be barred from the ballot based on Section 3 and failing to adhere to statutory deadlines; and
- Whether Section 3 can be the basis for barring a presidential candidate from the ballot.

The Court set an aggressive schedule with oral arguments on **February 8**. Petitioner's merits brief and any amicus briefs in support or in support of neither party must be filed by January 18. Respondents' merits briefs as well as amicus briefs in support must be filed by January 31. Reply briefs must be filed by 5pm on February 5.

The Colorado Republican State Central Committee filed a separate petition for a writ of certiorari, which the Supreme Court has not acted on.

The cases attracted significant amicus interest at the *cert.* stage, particularly from *amici* supporting Trump. Some of the main amicus briefs are summarized below—with a focus on issues not raised by Trump—including a multi-state brief from 27 states supporting cert. and reversal.

As always, please let us know if you have any questions, including potential amicus opportunities.

Amicus Briefs in Trump v. Anderson

Filed at *Cert* Stage:

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- **States of Indiana, West Virginia, 25 Other States, and the Arizona Legislature**
  - The petition should be granted to avoid nationwide chaos and confusion
  - Congress should decide who is qualified to hold office under 14.3
  - The Colorado Supreme Court's definition of insurrection is "standardless and vague" and courts should not be the ones to define insurrection under 14.3

- **Steve Daines (Montana Senator, Chairman of NRSC) & National Republican Senatorial Committee (NRSC)**
  - The Colorado Supreme Court erred by modifying the qualifications for the office of president
  - By excluding Trump from the primary ballot, the Colorado Supreme Court violated the associational rights of Republican Party members protected by the First Amendment

Filed at Merits Stage:

- **Vivek Ramaswamy**
  - President Trump's opponents are using 14.3 because they don't think they can beat him in an election
  - Adopting the Colorado Supreme Court's theory requires the Court to adjudicate political questions
    - Under the Colorado Supreme Court's interpretation of 14.3, Presidents Carter, Reagan, Clinton, Obama, and Biden could (or could have) faced questions of eligibility based on actions taken during their presidencies

Amicus Briefs in Colorado Rep. State Central Committee v. Anderson

Filed at *Cert* Stage:

- **Public Interest Legal Foundation ("PILF") & Hans Von Spakovsky**
  - The continued legal viability of Section 3 is suspect
    - Congress removed disabilities imposed by 14.3 through the Amnesty Acts of 1872 and 1898
    - 14.3 is cabined to the "insurrection or rebellion upon which it was based, namely only the American Civil War"
  - State courts cannot overrule the Senate's acquittal of Trump for "incitement of insurrection"

- **Colorado Electors**
  - The Colorado Election Code does not vest Colorado courts with jurisdiction to adjudicate questions relating to 14.3
  - Congress removed any electoral disability via the 1872 and 1898 Amnesty Acts

Best,

Jonathan

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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/11/2024 5:05:18 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Re: Trump amicus brief - DRAFT

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Thanks. Will review now.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 11, 2024 at 11:57 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Trump amicus brief - DRAFT

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/11/2024 7:17:53 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Grill, Erik (AG) [GrillE@michigan.gov]
Subject: Re: Trump amicus brief - DRAFT
Attachments: Colorado SCOTUS amicus Jan 11 REV eag2 HSM_JW.docx

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DPP MCL 15.243(1)(m)

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 11, 2024 at 11:57 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Grill, Erik (AG) <GrillE@michigan.gov>
Subject: Trump amicus brief - DRAFT

Hi Jonathan,

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
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meingastH@michigan.gov
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/16/2024 11:09:44 PM
To: Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Erick Kaardal 14.3 brief

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FYI – Argues that the DC federal court's power to issue writ of "quo warranty" preempts states' power to determine qualifications of a presidential candidate.

https://www.supremecourt.gov/DocketPDF/23/23-719/295833/20240116172438239_AC%20Brief%20-%201-16-24.pdf

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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/11/2024 4:29:14 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Amanda Carberry [amanda@statesuniteddemocracy.org]
Subject: Re: Democracy check in times

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Thanks. Would anyone else attend? As I recall, Christina generally attended in 2022.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, January 11, 2024 at 9:46 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: RE: Democracy check in times

Either day likely works. I have a standing meeting at 9:30 on Mondays, so other than that I'm pretty flexible.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, January 11, 2024 9:02 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: Democracy check in times

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Heather,

For renewing the bi-weekly call, beginning 1/22 both Christina and Dan could do Mondays at 1:30p OR beginning 1/25 Thursdays at 10:30a. Could either of those times work for you and any others in your office who would attend? We will check with Mike separately.

Thanks.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/25/2024 9:57:27 PM
To: Hammoud, Fadwa (AG) [HammoudF1@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Electors and Elections Clauses Litigation Memo -- Privileged
Attachments: SUDC Elections Clause Litigation Memo (MDAG).docx

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DPP MCL 15.243(1)(m)

Best,

Jonathan

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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 1/30/2024 2:33:07 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: New Kaardal ISL lawsuit--privileged
Attachments: Keefer complaint.pl.pdf

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Hi Heather,

In case you don't have it, I've attached a complaint that Eric Kaardal filed last week in Pennsylvania. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

As in *Lindsey*, Kaardal represents a (very small) group of Pennsylvania legislators asserting claims under the Elections and Electors clauses. They allege that the federal government and Pennsylvania Governor Shapiro have usurped the plaintiffs' legislative authority related to voter registration practices: automatic voter registration instituted by Governor Shapiro and Biden's Executive Order 14019, which directs federal agencies to take action to facilitate voter registration. As in *Lindsey*, the legislator plaintiffs claim standing based on their status as legislators, taxpayers, and voters, so its resolution of standing issues will likely be informative if decided more promptly.

The lawsuit is in its very early stages. The plaintiffs haven't sought preliminary relief, nor does the complaint appear to have been served. We'll keep you updated on its progress.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

REPRESENTATIVES DAWN KEEFER, TIMOTHY BONNER, BARRY JOZWIAK, BARBARA GLEIM, JOSEPH HAMM, WENDY FINK, ROBERT KAUFFMAN, STEPHANIE BOROWICZ, DONALD (BUD) COOK, PAUL (MIKE) JONES, JOSEPH D'ORSIE, CHARITY KRUPA, LESLIE ROSSI, DAVID ZIMMERMAN, ROBERT LEADBETER, DANIEL MOUL, THOMAS JONES, DAVID MALONEY, TIMOTHY TWARDZIK, DAVID ROWE, JOANNE STEHR, AARON BERSTINE, KATHY RAPP, SENATOR CRIS DUSH—ALL PENNSYLVANIA LEGISLATORS,

Plaintiffs,

-vs-

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE UNITED STATES, OR HIS SUCCESSOR; JOSH SHAPIRO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF PENNSYLVANIA, OR HIS SUCCESSOR; AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH, OR HIS SUCCESSOR; JONATHAN MARKS, IN HIS OFFICIAL CAPACITY AS THE DEPUTY SECRETARY FOR ELECTIONS AND COMMISSIONS, OR HIS SUCCESSOR,

Defendants

COMPLAINT

FILE NO:_____

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Erick G. Kaardal (MN No. 229647)
Mohrman, Kaardal & Erickson, PA
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402
kaardal@mklaw.com
Attorneys for Plaintiffs

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Plaintiffs, by and through their undersigned counsel, respectfully allege and represent the following for their Complaint.

1. The Plaintiffs seek prospective declaratory and injunctive relief to establish their federal rights under the Electors Clause and Elections Clause of the U.S. Constitution against the above-named Defendants, who are federal and state executive branch officials, to exercise their Constitutional rights to be participants in the law-making process regulating federal elections for President and Congress.

2. The Defendants have each unconstitutionally excluded Plaintiffs from the law-making process regulating federal elections for President and Congress as further explained below.

JURISDICTION AND VENUE

3. This action arises under the Constitution of the laws of the United States.

4. This Court has jurisdiction pursuant to Article III of the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 28 U.S.C. § 1346(a)(2), and 42 U.S.C. § 1983.

5. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. § 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

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6. Venue is proper under 28 U.S.C. § 1391(b) because all events giving rise to Plaintiffs' claims against Defendants occurred in the state of Pennsylvania.

PARTIES

7. Plaintiffs are all Pennsylvania Legislators. All Plaintiffs are elected officials who represent constituents within their respective legislative districts, and each is responsible, on behalf of their constituents, for the drafting or passage of laws for enactment, including election laws affecting elections of federal officials. Plaintiffs are also voters and taxpayers in Pennsylvania.

8. As state legislators, plaintiffs have particular civil rights that are specifically granted to only 253 "real persons" in the Commonwealth of Pennsylvania.

9. Defendant Joseph R. Biden is the President of the United States. He is the chief executive officer for the United States of America. As such, he is responsible for implementing and enforcing the laws written by Congress.

10. Defendant Josh Shapiro is the Governor of Pennsylvania. He is the chief executive officer for the State of Pennsylvania with the duty to execute and enforce the law.

11. Defendant Al Schmidt is the Secretary of State. He is designated as the Commonwealth's Chief Election Official and thus has certain duties imposed upon him by the election code which are established by the legislature.

12. Defendant Jonathan Marks is the Deputy Secretary for Elections and Commissions.

13. Defendant Al Schmidt and Defendant Jonathan Marks are both within the executive office of the Pennsylvania Department of State.

14. The above-named Defendants or their successors are sued in their official capacity only. The above-named Defendants are not sued for damages, but for prospective declaratory and injunctive relief only.

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FACTUAL ALLEGATIONS

15. The Electors Clause of the U.S. Constitution, Article II, Section 1, Clause 2, states:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an Office of Trust or Profit under the United States shall be appointed an Elector.

16. The election for President and Vice President will be held on November 5, 2024.

17. At the Constitutional Convention of 1787, one of the most important decisions made was the incorporation of the Electors Clause which involved the appointment of electors to elect the President and Vice President.

18. The Constitutional Convention delegates adopted the Electors Clause late in the Convention, having reached no agreement regarding direct election by the people for president and vice-president.

19. The Electors Clause was a compromise between selecting the President pursuant to a popular election or leaving Congress to determine the President.

20. Justice Joseph Story, in his *Commentaries on the Constitution of the United States*, explained that the Framers viewed having an electoral college select the President rather than Congress would commit the decision "to persons, selected for that sole purpose . . . instead of persons, selected for the general purposes of legislation," --Joseph Story, Commentaries on the Constitution 3: § 1450 (1833).

21. The Electors Clause of the U.S. Constitution is a direct grant of federal authority to state legislatures to determine the manner of conducting presidential selection in their respective states.

22. The Electors Clause is similar to the U.S. Elections Clause in they both grant a particular federal power to state legislatures.

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23. The Elections Clause authorizes the state legislatures to regulate times, places and manners of Congressional elections, but subject to Congressional enactments:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const., Art. I, Sec. 4, Cl. 1.

24. The Electors Clause, applying only to presidential elections, does not make the federal authority granted to state legislatures subject to Congressional enactments like the Elections Clause does. Accordingly, the Electors Clause grants state legislatures the vested plenary federal authority to enact statutes governing presidential elections.

25. The state legislature under the Elections Clause and the Electors Clause is the entity assigned particular authority by the Federal Constitution.

26. It is the legislature that must provide a complete code for congressional elections including regulations relating to registration of voters.

27. The Pennsylvania Constitution, Article II, Section 1, provides that legislative power is vested in the Senate and House of Representatives which are two associations of elected legislators who enact laws subject to the Governor's veto.

28. Article VII, Section 1 of the PA Constitution provides:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.[1]

29. Therefore, under the Electors Clause, the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislators, as part of two associations called the senate and the

[1] The age at which a citizen is entitled to vote was subsequently changed from 21 to 18 years of age.

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house of representatives, respectively, must enact laws, subject to the Governor's veto, to regulate the times, places, and manner of Presidential and Congressional elections.

30. Thus, Plaintiffs, as state legislators, have federal civil rights under the Electors Clause and the Elections Clause to oversee and participate in making legislative decisions regulating the times, places, and manner of federal Presidential and Congressional elections.

31. Under the Elections Clause, but not the Electors Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places, and manner of Congressional elections.

32. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places, and manner of federal Congressional elections.

33. Article VII, Section 1 of the Pennsylvania Constitution clearly places the duty of passing laws involving the registration of electors on the General Assembly.

34. The Defendants have all violated the legislators' rights by unconstitutionally excluding Plaintiffs from the law-making process regulating federal elections for President and Congress as further explained below.

35. First, on March 7, 2021, President Biden signed Executive Order 14019 on "Promoting Access to Voting."

36. Executive Order 14019 is not legally authorized by any Congressional enactment.

37. The President of the United States does not have the power to regulate the time, place, and manner of Presidential or Congressional elections in Pennsylvania.

38. The PA state legislators have, through proper legislative acts, passed a law that prohibits the influence of third party entities in elections – Biden's Executive order contradicts Pennsylvania state election laws.

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39. President Biden does not have the unilateral power to oversee and participate in making legislative decisions regarding the time, place, and manner of Presidential and Congressional elections, including the registration of electors in Pennsylvania.

40. The President of the United States does not have the power to usurp the authority of Pennsylvania legislators with regard to the registration of Pennsylvania voters, as Article VII, Section 1 of the Pennsylvania Constitution clearly places the duty of "regulating the registration of electors" on the General Assembly.

41. Second, on September 19, 2023, Governor Shapiro announced that he was unilaterally implementing automatic voter registration in Pennsylvania.

42. Governor Shapiro's automatic voter registration is not legally authorized by any state law.

43. Pennsylvania state legislators have, through proper legislative acts, declined to pass a law authorizing automatic voter registration in Pennsylvania.

44. Governor Shapiro does not have the power to regulate the time, place, and manner of Presidential and Congressional elections.

45. The Governor does not have the power to legislate or to make law, to abrogate law, or even to interpret law. The function of the executive branch is to execute in a manner that is consistent with constitutional and statutory provisions.

46. Governor Shapiro's edict instituting automatic voter registration in Pennsylvania is inconsistent with existing Pennsylvania law.

47. Governor Shapiro does not have the unilateral power to oversee and participate in making legislative decisions regarding the times, places, and manner of Presidential and Congressional elections, including the registration of electors in Pennsylvania.

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48. Governor Shapiro does not have the power to usurp the authority of Pennsylvania legislators with regard to regulating the registration of Pennsylvania voters, as Article VII, Section 1 of the Pennsylvania Constitution clearly places the duty of "regulating the registration of electors" on the General Assembly.

49. Third, the Pennsylvania Department of State has issued and continues to issue numerous directives that contradict laws established by the legislators, including a 2018 "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications."

50. The Pennsylvania Department of State does not have the power to regulate the time, place, and manner of Presidential or Congressional elections.

51. The Secretary of the Commonwealth and other members of the executive branch, do not have the power in Pennsylvania to interpret law but simply must execute it.

52. Pennsylvania state legislators have, through proper legislative acts, passed a law regarding verification of information on voter registration applications. Directives issued by the executive branch through the Department of State contradict state election laws.

53. The Pennsylvania Department of State does not have the unilateral power to oversee and participate in making legislative decisions regarding the times, places, and manner of Presidential or Congressional elections, including the registration of electors in Pennsylvania.

54. The Pennsylvania Department of State does not have the power to usurp the authority of Pennsylvania legislators with regard to regulating the registration of Pennsylvania voters, as Article VII, Section 1 of the Pennsylvania Constitution clearly places the duty of "regulating the registration of electors" on the General Assembly.

55. In summary, the U.S. Constitution assigns the legal authority of regulating the time, place, and manner of Presidential and Congressional elections to state legislators.

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56. The US Constitution operates as a limitation upon the State in respect to any attempt to circumscribe legislative power to regulate federal elections. Rule changes by executive officials who lack authority to do so are severely damaging the separation of powers and the electoral system on which our self-governance so heavily depends.

57. The President, the Governor, the Department of State through the Secretary of the Commonwealth and the Deputy Secretary for Elections and Commissions, have repeatedly violated and continue to violate the Electors Clause and Elections Clause by usurping the rights of the state legislators by changing Pennsylvania election laws via Executive Orders, edicts, and directives without the state legislators' participation.

58. Plaintiffs seek to protect their Constitutional rights and put an end to these unlawful executive actions "**before the consequences become catastrophic**."

COUNT I

President's Violations of the State Legislators' Federal Rights Under the U.S. Constitution's Electors Clause and Elections Clause

59. Plaintiffs hereby incorporate by reference the above paragraphs as if fully restated herein.

60. On March 7, 2021, President Biden signed Executive Order 14019 which is not legally authorized by any Congressionally-enacted law.

61. Executive Order 14019 requires all federal agencies to develop a plan to increase voter registration, and increase voter participation, or get out the vote (hereinafter GOTV) efforts.

62. In 2022, in response to EO 14019, the U.S. Department of Health and Human Services announced that federal health centers located across the country, including in the state of Pennsylvania, "have discretion to participate in activities, including voter registration activities, that

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are outside the scope of the Health Center Program project, so long as the health centers' efforts in carrying out the Health Center Program project are not impaired." HHS, Voter Registration and Health Centers (See https://bphc.hrsa.gov/compliance/scope-project/voter-requirements)(last visited: Jan. 20, 2024). "Such voter registration activities may include making available voter registration materials to patients, encouraging patients to register to vote, assisting patients with completing registration forms, sending completed forms to the election authorities, providing voter registration materials in waiting rooms, and allowing private, non-partisan organizations to conduct on-site voter registration." Id.

63. In response to EO 14019, the U.S. Department of Housing and Urban Development likewise instructed more than 3000 public housing authorities, which manage approximately 1.2 million public housing units, across the country, including in the state of Pennsylvania, to run voter registration drives in those units. See Fred Lucas, HUD Pushes Voter Registration Drives in Public Housing Under Biden's Executive Order, The Daily Signal (2022), https://www.dailysignal.com/2022/04/27/hud-pushes-voter-registration-drives-in-public-housing-under-bidens-executive-order/ (last visited: Jan. 20, 2024). Federal housing officials also advised the local agencies on how to apply to become a "voter registration agency under the National Voter Registration Act," and how to set up drop boxes for ballots on the premises. Id.

64. In response to EO 14019, the U.S. Department of Education, which last year sent a "dear colleague" letter to universities, including those located in the state of Pennsylvania, directing them to use Federal Work Study funds "to support voter registration activities," whether they occur "on or off-campus." Federal Student Aid, (GEN-22-05) Requirements for Distribution of Voter Registration Forms, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-04-21/requirements-distribution-voter-registration-forms (last visited: Jan. 20, 2024).

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65. In response to EO 14019, the U.S. Department of Agriculture has issued letters to state agencies administering SNAP and WIC programs, including those located in the state of Pennsylvania, instructing them to carry out voter-registration activities with federal funds. See The White House, https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/ (last visited: Jan. 20, 2024).

66. Additionally, in response to EO 14019, the U.S. General Services Administration has announced that federally-owned buildings, including those located in the state of Pennsylvania, are now available for voter registration drives by third-party organizations, regardless of whether the agency or agencies that own or operate out of those buildings have received an NVRA designation. See GSA, *Federal Meeting Facilities: Use by federal agencies*, https://www.gsa.gov/policy-regulations/policy/real-property-policy-division-overview/federal-meeting-facilities#vote (last visited: Jan. 20, 2024).

67. EO 14019 directs *all* non-independent executive agencies to engage in voter registration and to solicit and facilitate third-party organizations to conduct voter registration on agency premises, including those located in the state of Pennsylvania, so it is certain that other agencies are carrying out similar efforts without disclosing their unlawful activities to the public or to the Pennsylvania state legislature.

68. EO 14019 requires all federal agencies to identify and partner with specified partisan third party organizations chosen by the Biden administration whose names and roles are not transparent but are willfully withheld from the public.

69. Under Executive Order 14019, taxpayer resources can be used to support the efforts of the third-party partners to do voter registration drives and GOTV activities.

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70. The Executive Order requires agencies to distribute voter registration and vote-by-mail ballot application forms.

71. The Executive Order directs agencies to assist applicants in completing voter registration and vote-by-mail ballot application forms.

72. The Executive Order directs agencies to solicit third-party organizations and directs state officials to provide voter registration services on agency premises.

73. Typically, private parties – including plaintiffs, campaigns, political parties, and organizations – conduct voter registration drives as acknowledged and regulated by federal campaign finance laws.

74. Federal campaign finance laws apply to private parties' voter registration activities. 11 C.F.R. § 100.133.

75. Voter registration drives and GOTV are a federally recognized private function, not a government function.

76. But, Biden's Executive Order requires agencies to develop plans for government-sponsored voter registration drives run by federal agencies and undisclosed third-party organizations.

77. The U.S. Election Assistance Commission has issued an advisory opinion that states that election officials are prohibited from using federal funds to conduct "voter registration drives."

> Neither Section 101 nor 251 funds may be used to conduct voter registration drives or get out the vote efforts; including advertising for the event, setting up booths, and paying salaries of employees who register new voters.

U.S. Election Assistance Commission Funding Advisory Opinion FAO-08-005. (Exhibit 1)

78. Since FY 2006, Office of Inspector General (OIG) audits of HAVA grants have resulted in 19 recommendations and just over $1 million dollars in questioned costs related to government-sponsored voter registration drives and GOTV activities.

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79. Mississippi expended HAVA funds for GOTV and voter registration forms, which are not allowable under the award's terms and conditions or HAVA. (Exhibit 2)

80. Florida charged salaries and benefits for poll workers serving at voter registration drives to HAVA grants, resulting in $139,056 in questioned costs. (Exhibit 3)

81. South Dakota spent $1,474 in HAVA funds for letters containing a sample voter registration form to be distributed to K-12 students for voter education. Students in grades K-12 are not eligible voters, making the expense unallowable. (Exhibit 4)

82. Colorado charged $315,830 to its HAVA grant for contractual services associated with a voter registration campaign, which included only an incidental educational component. As a result, the charges were questioned. (Exhibit 5)

83. Further, federal campaign finance laws are premised on voter registration drives being conducted by private parties, not the government. See 11 C.F.R. Section 100.133.

84. In 2022, Pennsylvania lawmakers passed Senate Bill 982 (also known as Act 88).

85. Senate Bill 982 was designed, in part, to ban outside, third party financial support for Pennsylvania elections and to eliminate the influence of nongovernmental third party organizations from elections in the Commonwealth.

86. Senator Phillips-Hill, in introducing the bill (SB 982) said, "No matter how well-intended, such outside support has the potential to unduly influence election procedures, policies, staffing, and purchasing, which in turn may unfairly alter election outcomes. Even more importantly, it stands to erode voter confidence in a pillar of our beloved democracy." See https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20210&cosponId=36370 (last visited: Jan. 20, 2024).

87. Act 88 amended the Pennsylvania Election Code by adding Section 107 "Public Funding of Elections" prohibiting private funding:

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(a) The cost and expense to State and local **governments relating to the registration of voters** and the preparation, administration and conduct of elections in this Commonwealth shall be funded **only upon lawful appropriation of the Federal, State and local governments**, and the source of the funding shall be limited to money derived from taxes, fees and other sources of public revenue.

(b) State and local **governments**, including their public officers, public officials, employees and agents, acting in their official capacity, **may not solicit**, apply for, enter into a contract for or receive or expend gifts, donations, grants or funding from any individual, business, organization, trust, foundation, or **any nongovernmental entity for the registration of voters** or the preparation, administration or conducting of an election in this Commonwealth. (Emphasis added).

88. The state legislators voted to prevent outside organizations from potentially influencing government administration of elections including the registration of voters through large donations from private donors and NGOs.

89. Certainly, outside organizations including campaigns and nonprofit organizations can and should –without collaboration with government agencies -- do compliant campaign related GOTV and voter registration drives.

90. To ensure this separation and prevent outside influence, the Pennsylvania legislature has specifically stated that any costs incurred by the government relating to the registration of voters "shall" be funded "only" through lawful appropriations. Thus, ensuring the oversight of the state legislature. No funds have been appropriated to support Biden's Executive Order 14019. Therefore, it is a violation of Pennsylvania law.

91. The law prohibits public officials from entering into agreements with third party entities for the registration of voters or the administration of elections.

92. Biden's EO 14019, which was largely drafted by a third party, nongovernmental organization, requires public officials to solicit and enter into partnership agreements with third-party

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nongovernmental organizations to conduct voter registration drives and get-out-the-vote activities. See: https://www.demos.org/policy-briefs/executive-action-advance-democracy-what-biden-harris-administration-and-agencies-can (last visited: Jan. 23, 2024)

93. The executive action taken by the President, nullifies the votes of the individual legislators, violates the Electors Clause, violates the Elections Clause, and deprives the legislators of their particular rights.

94. The legislators have suffered and continue to suffer an injury-in-fact because the President has denied them a voting opportunity to which the Constitution entitles them.

95. The injury is traceable to the President's conduct because he has taken actions to impact the conduct of his own election and in doing so has denied the legislators their Constitutional rights.

96. The injury can only be redressed by a favorable judicial decision which restores their authority to determine the manner of elections in the Commonwealth.

97. Biden's Executive Order 14019 gives agencies the ability to select third-party organizations, using unappropriated taxpayer funding, to register voters, distribute vote-by-mail ballots, and engage in get out the vote activities.

98. The Pennsylvania Constitution provides that the legislative power is vested in the senate and the house of representatives. Pa. Const., Art. II, Sec. 1.

99. The Pennsylvania Constitution vests the legislative power in the state senate and the house of representatives to regulate the registration of electors in Pennsylvania. Pa. Const., Art. VII, Sec. 1.

100. Therefore, under the Electors Clause, Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has

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the exclusive authority to enact laws, subject to the Governor's veto to regulate the times, places, and manner of Presidential and Congressional elections.

101. Under the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto to regulate the manner in which voters are registered to vote.

102. Accordingly, President Biden's Executive Order 14019 attempting to regulate the registration of Pennsylvania electors is unlawful. The order should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections.

103. Plaintiffs have standing under applicable federal statutes and rules of civil procedure to seek a declaratory judgment and related injunctive relief.

104. Plaintiffs, as legislators, are injured by Defendants when they support or enforce election laws that circumvent or usurp the authority of the legislature.

105. Plaintiffs under the Pennsylvania Constitution and state law have individual legislator standing to challenge usurpation of state legislative powers.

106. Plaintiffs, as state legislators have federal rights under the Electors Clause and the Elections Clause to oversee and participate in making legislative decisions regulating the times, places and manner of Presidential and Congressional elections.

107. Under the Elections Clause, but not the Electors Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places and manner of federal elections.

108. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

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109. Executive Orders announced unilaterally by the President which affect the times, places, and manner of federal elections, without legislative participation, including the debate and acts or actions of state legislators, is not an exception contemplated under the Electors Clause nor Elections Clause.

110. Defendant Biden caused injury to Plaintiffs with his Executive Order No. 14019 changing Pennsylvania election law, which usurps the state legislature's powers and violates the state legislators' federal civil rights under the Electors Clause and the Elections Clause.

111. Plaintiffs who draft, author, and support bills for passage in the state legislature are injured because the President's Executive Order is constitutionally invalid under the Electors Clause and the Elections Clause.

112. A controversy exists between Plaintiffs and Defendants on the issue of whether President Biden's Executive Order 14019 involving the regulating of registration of Pennsylvania electors is a legally valid regulation of federal elections. The implementation and effect of the Executive Order is ongoing. Moreover, if permitted to stand, similar executive orders can be signed in the future, hence, the controversy is continuing.

113. Defendant Biden causes injury to Plaintiffs when he supervises, misuses federal funds, or otherwise supports statewide unconstitutional Executive Orders.

114. Plaintiffs as state legislators are uniquely injured by such illegal disbursement or illegal use of taxpayer funds because through this unconstitutional order, there is a violation of the state legislators' federal civil rights under the Electors Clause and the Elections Clause.

115. Alternatively, Plaintiffs are also candidates on the ballot who will be impacted by the legally unauthorized changes made by President Biden.

116. Alternatively, the Plaintiffs also have standing as voters to bring this lawsuit as Defendant caused injury by unnecessarily burdening Plaintiffs' voting rights when he signed Executive

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Order 14019 giving federal agencies and third-party organizations, unprecedented power to make changes unilaterally and illegally to the manner of elections in Pennsylvania.

117. Alternatively, the Plaintiffs also have standing as taxpayers to bring this lawsuit as Defendants use taxpayer funds to support and enforce his unconstitutional executive order governing federal elections, without legislative involvement.

118. Plaintiffs seek prospective declaratory and injunctive relief against Executive Order 14019.

COUNT II

Governor's Violations of the State Legislators' Federal Rights Under the U.S. Constitution's Electors Clause and Elections Clause

119. Plaintiffs hereby incorporate by reference the above paragraphs as if fully restated herein.

120. Through a Press Release on September 19, 2023, Governor Shapiro announced automatic voter registration in Pennsylvania. (Exhibit 6). See: https://www.governor.pa.gov/newsroom/governor-shapiro-implements-automatic-voter-registration-in-pennsylvania-joining-bipartisan-group-of-states-that-have-taken-commonsense-step-to-make-voter-registration-more-streamlined-and-secure/ (last visited: Jan. 20, 2024).

121. Beginning on September 19, 2023, Commonwealth residents obtaining new or renewed driver licenses and ID cards are automatically registered to vote unless they opt out of doing so.

122. The Governor's change is legally unauthorized because state legislative approval was not obtained for this change to Pennsylvania's voter registration process.

123. The Governor, by edict, created automatic voter registration in Pennsylvania.

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124. Under the Electors Clause, Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto to regulate the times, places, and manner of Presidential and Congressional elections.

125. The Pennsylvania Constitution provides that legislative power is vested in the senate and the house of representatives. Pa. Const., Art. II, Sec. 1.

126. The Pennsylvania Constitution vests the legislative power in the state senate and the house of representatives to regulate the registration of electors in Pennsylvania. Pa. Const., Art. VII, Sec. 1.

127. Under the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto to regulate the manner in which voters are registered to vote.

128. Policy decisions regarding how one registers to vote in Pennsylvania have been clearly addressed by the Pennsylvania legislature.

> An individual qualified to register to vote under section 1301(a) (relating to qualifications to register) may apply to register as follows:
>
> (1) Under section 1322 (relating to in-person voter registration).
> (2) Under section 1323 (relating to application with driver's license application).
> (3) Under section 1324 (relating to application by mail).
> (4) Under section 1325 (relating to government agencies).

25 Pa.C.S.A. § 1321.

129. 25 Pa.C.S.A. § 1323(a)(1) provides:

> The Department of Transportation shall provide for simultaneous application for voter registration in conjunction with the process under 75 Pa.C.S. § 1510. An application under this subsection shall serve as an application to register to vote unless the applicant fails to sign the voter registration application. The secretary has the primary responsibility for implementing and enforcing the driver's license voter registration system created under this section. The secretary, in consultation with the Secretary of Transportation, may promulgate regulations for implementing this section.

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130. Section 1321 clearly requires an application for the registration process, whether relating to in-person voter registration, application with driver's license application, or application by mail.

131. Through Section 1323, the Pennsylvania legislature appointed "the secretary" as the party responsible for "implementing and enforcing" the system that the legislature "created under this section."

132. The process "relating to application with driver's license application" is defined in §1323(b) which states:

> 1)The Department of Transportation shall provide for an application for voter registration as part of a driver's license application.
> 2)The format of the driver's license/voter registration application shall be determined and prescribed by the secretary and the Secretary of Transportation.
> 3)The voter registration application portion of the application shall contain all the requirements of an official voter registration application specified in section 1327 (relating to preparation and distribution of applications).
>
> 25 Pa.C.S.A. § 1323(b).

133. Under 25 Pa.C.S.A. § 1327(a)(1) the "secretary" is to prescribe the form for the official "voter registration application."

134. The official voter registration application must contain a registration declaration and "the applicant" is required to affirm the information provided under penalty of perjury. See 25 Pa.C.S.A. § 1327(b)(2)(ii)(B) and 25 Pa.C.S.A. § 1327(b)(4).

135. An application, by definition, is a formal request to an authority. It requires an overt action by the person.

136. According to Merriam-Webster Dictionary, the term "apply" is defined as "to make an appeal or request especially in the form of a written application."

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137. Although not specifically defined in the Election Code, the General Assembly has defined the term "application" in other contexts. Specifically, in 7 Pa.C.S.A. § 6102, the term application is defined as "a request…"

138. Moreover, the PA legislature has already established that failure to check a box is considered a declination to register.

> 25 Pa.C.S.A. § 1325(c) states:
> Effect.—Failure to check either box under subsection (b)(3) shall be considered a declination to register to vote.

139. Pennsylvania jurisprudence requires that the basic policy choices involved in legislative power actually be made by the legislature as constitutionally mandated. This constraint serves two purposes. First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate. And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.

140. Governor Shapiro's edict is inconsistent with existing laws, and as such, is not legally authorized.

141. Although "the secretary" was given the task of "implementing and enforcing" the driver's license voter registration system, the legislature clearly mandated that a voter register through an application process.

142. According to Merriam-Webster Dictionary, the term "implement" is defined as to carry out or to accomplish. It does not mean to change or modify – but simply put into practice the lawfully enacted decisions made by the Pennsylvania legislature.

143. The Governor does not have the power to legislate or to make law, to abrogate law, or even to interpret law. The function of the executive branch is to execute in a manner that is consistent with constitutional and statutory provisions.

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144. Pennsylvania's constitution clearly gives the responsibility for regulating the registration of electors to the legislative branch.

145. Pennsylvania law regarding voter registration is clear. "An individual qualified to register to vote…may apply to register…" 25 Pa.C.S.A. § 1321.

146. Where provisions of a statute are unambiguous, the agency charged with administering cannot amend statutory provisions through interpretation.

147. Accordingly, Governor Shapiro's edict attempting to regulate the registration of Pennsylvania electors is unlawful. This edict should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections.

148. Governor Shapiro's edict is an abusive and capricious exercise of executive power which usurps the function of the Pennsylvania legislature.

149. Automatic registration is inconsistent with existing requirements that individuals must "apply" to register in Pennsylvania.

150. Through the years, several bills establishing automatic voter registration have been introduced but failed in the Pennsylvania legislature.

151. For example, in January 2023, PA State Senator Hughes introduced Senate Bill 20 Amending Title 25 Elections of the PA Consolidated Statutes in an effort to enact automatic voter registration. Like similar bills in prior legislative sessions, the bill failed because the legislature and the citizens of Pennsylvania do not support automatic voter registration.

152. Governor Shapiro circumvented the rights of the legislators and violated the U.S. Constitution and the Pennsylvania Constitution.

153. Plaintiffs have standing under applicable federal statutes and rules of civil procedure to seek a declaratory judgment and related injunctive relief.

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154. Defendants are responsible for enforcement of laws governing elections, including federal elections.

155. Plaintiffs, as legislators are injured by Defendants when they support or enforce election laws that circumvent or usurp the authority of the legislature.

156. Defendants support and enforce laws edicts/announcements that violate the Electors Clause and Elections Clause because such edicts/announcements are not law and are legally null and void under the Electors Clause and Elections Clause when they directly or indirectly regulate federal elections.

157. Plaintiffs have individual legislator standing under the Pennsylvania Constitution and law to challenge usurpation of state legislative powers.

158. Plaintiffs, as state legislators, have federal civil rights under the Electors Clause and the Elections Clause, to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

159. Under the Elections Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places and manner of federal elections.

160. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

161. There is no such exception under the Electors Clause.

162. Edicts announced by the Governor which affect the times, places, and manner of federal elections, without legislative participation, including the debate and acts or actions of state legislators, is not an exception contemplated under the Electors Clause nor the Elections Clause.

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163. Defendants caused injury to Plaintiffs when they announced changes to Pennsylvania laws regarding elections that usurped the state legislature's powers and violated the state legislator's federal rights under the Electors Clause and the Elections Clause.

164. Plaintiffs who draft, author, and support bills for passage in the state legislature are injured because the Governor's edict is constitutionally invalid under the Electors Clause and the Elections Clause.

165. The Governor's edict was not constitutionally enacted under the Electors Clause and the Elections Clause because state legislative approval and state legislator participation were not involved.

166. A controversy exists between Plaintiffs and Defendants on the issue of whether Governor Shapiro's edict involving automatic voter registration is a legally valid regulation of federal elections. The implementation and effect of the edict is ongoing. Moreover, if permitted to stand, similar edicts can occur again in the future, hence, the controversy is continuing.

167. Defendants cause injury to Plaintiffs when they supervise, fund, or otherwise support statewide unconstitutional edicts unilaterally announced by the Governor.

168. Plaintiffs as state legislators are uniquely injured by such illegal disbursement or illegal use of taxpayer funds because through this unconstitutional edict, there is a violation of the state legislators' federal rights under the Electors Clause and the Elections Clause.

169. Alternatively, Plaintiffs are also candidates on the ballot who will be impacted by the legally unauthorized changes made by the Governor.

170. Alternatively, the Plaintiffs also have standing as voters to bring this lawsuit as Defendants cause injury by unnecessarily burdening Plaintiffs' voting rights when they supervise, fund, or otherwise support statewide automatic voter registration illegally.

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171. Alternatively, the Plaintiffs also have taxpayer standing to bring this lawsuit because Defendants use taxpayer funds to support and enforce this unconstitutional edict governing federal elections, without legislative involvement.

172. Plaintiffs seek prospective declaratory and injunctive relief against the Governor's edict mandating automatic voter registration.

COUNT III

Department of State's Violations of the State Legislators' Federal Rights Under the U.S. Constitution's Electors Clause and Elections Clause

173. Plaintiffs hereby incorporate by reference the above paragraphs as if fully restated herein.

174. The Secretary of the Commonwealth acting through the Pennsylvania Department of State issues "guidance" and "directives" that usurp the legislature's authority including a 2018 "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers For Voter Registration Applications." (Exhibit 7). See https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/HAVA%20Matching%20Directive%202018.pdf (last visited: Jan. 20, 2024).

175. This guidance, issued by the Department of State, instructs Pennsylvania counties to register applicants even if an applicant provides invalid identification.

176. Based on the Department of State's directive, if an applicant simply affirms that they meet the age, citizenship, and the residency requirements to become a qualified elector, the applicant must be registered – regardless of verification of identity.

177. The Department of State's Directive specifically states:

> Counties must ensure their procedures comply with state and federal law, which means that if there are no independent grounds to reject a voter registration application other

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than a non-match, the application may *not* be rejected and must be processed like all other applications.

178. This directive is in direct contravention of clearly established Pennsylvania law, which requires verification of both identity and eligibility.

179. 25 Pa.C.S.A. § 1328(a)(1) and (2)(i) and (ii) relating to the "Approval of Registration Applications" states:

> (a) Examination.—Upon receiving a voter registration application, a commissioner, clerk or registrar of a commission shall do all of the following:
>
> (1) Initial and date the receipt of the application.
>
> (2) Examine the application to determine all of the following:
>
> (i) whether the application is complete.
>
> (ii) whether the applicant is a qualified elector.

180. Under Pennsylvania law, an application must be rejected if incomplete or inconsistent.

181. 25 Pa.C.S.A. § 1328(b) specifically states:

> (b) Decision.—A commission shall do one of the following:
>
> (1) Record and forward a voter registration application to the proper commission if the commission finds during its examination under subsection (a) that the applicant does not reside within the commission's county but resides elsewhere in this Commonwealth.
>
> (2) Reject a voter registration application, indicate the rejection and the reasons for the rejection on the application and notify the applicant by first class nonforwardable mail, return postage guaranteed of the rejection and the reason if the commission finds during its examination under subsection (a) any of the following:
>
> (i) the application was not properly completed and after reasonable efforts by the commission to ascertain the necessary information, the application remains incomplete or inconsistent.
>
> (ii) The applicant is not a qualified elector.

182. When the Department of State unilaterally issued guidance to Pennsylvania counties, directing the counties to register voters regardless of whether the driver's license numbers or the last

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four digits of the social security number match the records of PennDOT or the records of the Social Security Administration, thus eliminating any requirement for verification or confirmation of identity for new voters, it violated federal and state law.

183. In its illegal directive, the Department of State references a district court case from the state of Washington as the justification for its overreach.

184. *Washington Association of Churches v. Reed,* 492 F.Supp 2d 1264 (W.D. Wash. 2006), does not, however, stand for the proposition asserted by the Department of State.

185. According to *Washington Association of Churches*, if the state is unable to match an applicant's driver's license or social security number, then the applicant "shall be **provisionally** registered to vote." Id. See Stipulated Final Order and Judgment of March 15, 2007, Paragraph (1)(c), (Exhibit 8).

186. The Department of State's directive requires counties to process incomplete and inconsistent applications "like all other applications" and register the applicants with invalid identification.

187. The Department of State's attempt to circumvent state and federal law through this directive is a *per se* violation of the legislators' federal rights under the Electors Clause and the Elections Clause because the state legislators are not and were not involved.

188. The directive, unilaterally issued by the Department of State to Pennsylvania counties undermines the state legislature as "the entity assigned particular authority by the Federal Constitution" to regulate the times, places, and manner of Presidential and Congressional elections.

189. The directive, unilaterally issued through the Department of State to Pennsylvania counties, directing the counties to process incomplete or inconsistent voter registration applications like all other applications violates clear provisions of Pennsylvania law.

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190. The Pennsylvania Constitution provides that the legislative power is vested in the senate and the house of representatives. Pa. Const., Art. II, Sec. 1.

191. The Pennsylvania Constitution vests the legislative power in the state senate and the house of representatives to regulate the registration of electors in Pennsylvania. Pa. Const., Art. VII, Sec. 1.

192. Therefore, under the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto to regulate the times, places, and manner of federal elections subject only to Congressional enactments.

193. Under the Pennsylvania Constitution, the Pennsylvania state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto to regulate the manner in which voters are registered to vote.

194. In contravention of clearly established Pennsylvania law regarding the regulation of elections, the Pennsylvania Department of State has issued a directive to counties to disregard state law in verifying the identify and eligibility of electors.

195. Accordingly, the Department of State's "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications" attempting to regulate the registration of Pennsylvania electors is unlawful. This directive should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections.

196. Plaintiffs have standing under applicable federal statutes and rules of civil procedure to seek a declaratory judgment and related injunctive relief.

197. Defendants are responsible for enforcement of laws governing all elections, including federal elections.

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198. Plaintiffs, as legislators are injured by Defendants when they support or enforce election laws that circumvent or usurp the authority of the legislature.

199. Defendants support and enforce directives that violate the Electors Clause and the Elections Clause because such directives are not law and are legally null and void under the Electors Clause and Elections Clause when they directly or indirectly regulate federal elections.

200. Plaintiffs have individual legislator standing under the Pennsylvania Constitution and law to challenge usurpation of state legislative powers.

201. Plaintiffs, as state legislators have federal civil rights under the Electors Clause and the Elections Clause, to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

202. Under the Elections Clause, but not the Electors Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places and manner of federal elections.

203. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

204. Directives issued by the Department of State which affect the times, places, and manner of federal elections, without legislative participation, including the debate and acts or actions of state legislators, is not an exception contemplated under the Elections Clause—nor under the Electors Clause.

205. Defendants caused injury to Plaintiffs when they announced changes to Pennsylvania elections that usurped the state legislature's powers and violated the state legislator's federal civil rights under the Electors Clause and the Elections Clause.

206. Plaintiffs who draft, author, and support bills for passage in the state legislature are injured because the Department of State's "Directive Concerning HAVA-Matching Drivers' License

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or Social Security Numbers for Voter Registration Applications" is constitutionally invalid under the Electors Clause and Elections Clause.

207. The Department of State's Directive was not constitutionally enacted under the Electors Clause and the Elections Clause because state legislative approval and state legislator participation were not involved.

208. A controversy exists between Plaintiffs and Defendants on the issue of whether the Department of State's "Directive Concerning HAVA-Matching Drivers' License or Social Security Numbers for Voter Registration Applications" is a legally valid regulation of federal elections. The implementation and effect of the directive is ongoing. Moreover, if permitted to stand, similar directives can occur again in the future, hence, the controversy is continuing.

209. Defendants cause injury to Plaintiffs when they supervise, fund, or otherwise support statewide unconstitutional directives unilaterally issued by the Department of State.

210. Plaintiffs as state legislators are uniquely injured by such illegal disbursement or illegal use of taxpayer funds because through this unconstitutional edict, there is a violation of the state legislators' federal civil rights under the Electors Clause and the Elections Clause.

211. Alternatively, Plaintiffs are also candidates on the ballot who will be impacted by the legally unauthorized changes made by President Biden.

212. Alternatively, the Plaintiffs also have standing as voters to bring this lawsuit as Defendants cause injury by unnecessarily burdening Plaintiffs' voting rights when they supervise, fund, or otherwise support statewide illegal directives regarding voter registration applications.

213. Plaintiffs also have taxpayer standing to bring this lawsuit because Defendants use taxpayer funds to support and enforce unconstitutional directives which govern federal elections without legislative involvement.

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214. Plaintiffs seek prospective declaratory and injunctive relief against Executive Order 14019.

PRAYER FOR RELIEF

For the reasons stated in this complaint, the Plaintiffs, Pennsylvania Legislators, request that this Court grant the following relief:

1. Enter a declaratory judgment that President Biden's Executive Order 14019 is unconstitutional and violates the Electors Clause and the Elections Clause as it seeks to regulate the times, places and manner of Presidential and Congressional elections, and seeks to regulate the registration of Pennsylvania electors without the state legislature's approval and the state legislators' participation.

2. Issue an order granting injunctive relief enjoining President Biden from any actions funding, supporting, or facilitating Executive Order 14019 as it violates the Electors and Elections Clause and Art. VII, Section 1 of the Pennsylvania Constitution which gives the Pennsylvania General Assembly the power to "regulate the registration of electors…"

3. Enter a declaratory judgment that the edict or announcement by Governor Shapiro for the regulation of times, places, and manner of federal elections is unconstitutional and violates the Electors Clause and the Elections Clause because the state legislature's approval and the state legislators' participation are required.

4. Issue an order granting injunctive relief enjoining Defendants Shapiro, Schmidt, or Marks from any actions funding, supporting, or facilitating the edict or announcement regarding automatic voter registration as it violates the Electors and Elections Clause and Art. VII, Section 1 of the Pennsylvania Constitution which gives the General Assembly the power to "regulate the registration of electors…"

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5. Enter a declaratory judgment that the directive issued by the Department of State in 2018 regarding the verification of the identity and eligibility of Pennsylvania voters is unconstitutional, violates the legislators' federal rights, and violates established laws; and,

6. Issue an order granting injunctive relief enjoining Defendants Shapiro, Schmidt, or Marks from any actions funding, supporting, or facilitating the "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications" as this directive violates the Electors and Elections Clause and Art. VII, Section 1 of the Pennsylvania Constitution which gives the General Assembly the power to "regulate the registration of electors…"

7. Issue a declaratory judgment that Plaintiffs have prevailed on a 42 U.S.C. § 1983 claim;

8. Grant Plaintiffs their reasonable attorney fees, costs, and expenses incurred and authorized under 42 U.S.C. § 1988; and

9. Issue an order that prohibits the Defendants, all non-legislative executive officials, from making future changes to the election process in Pennsylvania without following the proper, lawful, legislative process.

10. Grant such other and further relief as is just and appropriate.

Respectfully submitted,

Dated: January 24, 2024

/s/Erick Kaardal
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Dated: January 24, 2024

/s/Karen DiSalvo
By: Karen DiSalvo (PA No. 80309)
Election Research Institute
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 2/4/2024 12:00:49 AM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: America First/social media—privileged

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Not urgent but passing along because I just saw this.

The article below discusses America First Legal's public records requests to Arizona offices, including SOS, presumably to set up First Amendment litigation. Flagging for awareness and let me know if you would like to discuss.

https://aflegal.org/america-first-legal-continues-fight-against-unlawful-censorship-files-records-requests-with-the-center-for-internet-security-and-arizona-agencies-and-counties-regarding-social-media-censorship-in-ari/

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To: Grossi, Christina [GrossiC1@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Brady, Mike (MDOS) [BradyM@michigan.gov]; Totten, Mark (USAMIW) [Mark.Totten@usdoj.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
CC: Phan, Shayla (USAMIW) [Shayla.Phan@usdoj.gov]

Subject: Elections Meeting
Location: Microsoft Teams Meeting

Start: 3/6/2024 4:30:00 PM
End: 3/6/2024 5:00:00 PM
Show Time As: Tentative

Required Attendees: Grossi, Christina; Osher, Daniel; Meingast, Heather (AG); Brady, Mike (MDOS); Totten, Mark (USAMIW); Jonathan Williams; Christine Sun
Optional Attendees: Phan, Shayla (USAMIW)

Briefing/Purpose:
A/C Priv MCL 15.243(1)(g)

Attendees:
Christina Grossi
Dan Osher
Mike Brady
Heather Meingast
Mark Totten
Jonathan Williams
Christine Sun

Meeting Location:
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Sent: 2/22/2024 11:33:26 PM
To: Brady, Mike (MDOS) [BradyM@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Caroline [caroline@statesuniteddemocracy.org]; CO [co@isdglobal.org]; Dax [dax@statesuniteddemocracy.org]; Greg [greg@statesuniteddemocracy.org]; Grossi, Christina [GrossiC1@michigan.gov]; Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; Janae [janae@statesuniteddemocracy.org]; JD [jd@isdglobal.org]; JDC [jdc@isdglobal.org]; JH [jh@isdglobal.org]; Jonathan [jonathan@statesuniteddemocracy.org]; 'JR' [jr@isdglobal.org]; Katie [katie@statesuniteddemocracy.org]; Kerrin [kerrin@statesuniteddemocracy.org]; Kk [kk@isdglobal.org]; LC [lc@isdglobal.org]; Lizzie [lizzie@statesuniteddemocracy.org]; LJ [lj@isdglobal.org]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Rollow, Jake (MDOS) [RollowJ@michigan.gov]; Sargent, Aubrey (AG) [SargentA1@michigan.gov]; Sharon [sharon@statesuniteddemocracy.org]; Sitts, Jennifer (MDOS) [SittsJ@michigan.gov]; SLA [sla@isdglobal.org]; Weare, Jessica [WeareJ@michigan.gov]; Aboona, Rebecca (AG) [AboonaR1@michigan.gov]
CC: ranjana@statesuniteddemocracy.org; tiger@statesuniteddemocracy.org; lucy@statesuniteddemocracy.org; zoe@statesuniteddemocracy.org; Osher, Daniel [OsherD@michigan.gov]; Anderson, Christina (MDOS) [AndersonC42@michigan.gov]; Benander, Angela (MDOS) [BenanderA1@michigan.gov]; Edevbie, Aghogho (MDOS) [EdevbieA@michigan.gov]; Craine, Khyla (MDOS) [CraineK@michigan.gov]; El-Sulayman, Halima (MDOS) [ElSulaymanH1@michigan.gov]; Hardmon, Cheri (MDOS) [HardmonC@michigan.gov]; jr@strongcitiesnetwork.org

Subject: States United - Additional Briefing Meeting
Attachments: New Monday meeting.msg
Location: Microsoft Teams Meeting

Start: 2/26/2024 10:00:00 PM
End: 2/26/2024 10:30:00 PM
Show Time As: Tentative

Required Attendees: Brady, Mike (MDOS); Banghart-Linn, Linus (AG); Caroline; CO; Dax; Greg; Grossi, Christina; Hagaman-Clark, Danielle (AG); Janae; JD; JDC; JH; Jonathan; JR; Katie; Kerrin; Kk; LC; Lizzie; LJ; Meingast, Heather (AG); Rollow, Jake (MDOS); Sargent, Aubrey (AG); Sharon; Sitts, Jennifer (MDOS); SLA; Weare, Jessica; Aboona, Rebecca (AG)
Optional Attendees: ranjana@statesuniteddemocracy.org; tiger@statesuniteddemocracy.org; lucy@statesuniteddemocracy.org; zoe@statesuniteddemocracy.org; Osher, Daniel; Anderson, Christina (MDOS); Benander, Angela (MDOS); Edevbie, Aghogho (MDOS); Craine, Khyla (MDOS); El-Sulayman, Halima (MDOS); Hardmon, Cheri (MDOS); jr@strongcitiesnetwork.org

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Sent: 2/22/2024 9:54:45 PM
To: King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]
CC: Caroline Chambers [caroline@statesuniteddemocracy.org]
Subject: New Monday meeting

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Hi Pier—I'm Tiger from States United, filling in for Janae while she's out of office. Janae kindly surveyed the group that usually meets for our regular briefings about times to meet for an additional briefing next week, and we've settled on next Monday, Feb. 26, from 5:00-5:30 ET. Would you be able to send out an invitation?

Thanks!

Tiger Mar (he/him) | Project Assistant
States United Democracy Center
(781) 800-3581 | @statesunited
tiger@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/4/2024 7:14:10 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Trump v. Anderson analysis
Attachments: 23-719_19m2[80].pdf

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Privileged and Confidential

Hi Heather,

As you have surely seen, in *Trump v. Anderson*, the Supreme Court this morning issued an unsigned per curiam decision reversing the Colorado Supreme Court and holding that former President Donald Trump cannot be excluded from the Republican primary ballot in Colorado under Section 3 of the Fourteenth Amendment.

According to the Court, "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States." (Slip op. at 12). This means not only that States cannot enforce Section 3 against federal candidates and officeholders but also that no part of the federal government may enforce Section 3 absent specific legislation from Congress providing for enforcement of the disqualification.

DPP MCL 15.243(1)(m)

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DPP MCL 15.243(1)(m)

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Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 23–719

DONALD J. TRUMP, PETITIONER *v.*
NORMA ANDERSON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 4, 2024]

PER CURIAM.

A group of Colorado voters contends that Section 3 of the Fourteenth Amendment to the Constitution prohibits former President Donald J. Trump, who seeks the Presidential nomination of the Republican Party in this year's election, from becoming President again. The Colorado Supreme Court agreed with that contention. It ordered the Colorado secretary of state to exclude the former President from the Republican primary ballot in the State and to disregard any write-in votes that Colorado voters might cast for him.

Former President Trump challenges that decision on several grounds. Because the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates, we reverse.

I

Last September, about six months before the March 5, 2024, Colorado primary election, four Republican and two unaffiliated Colorado voters filed a petition against former President Trump and Colorado Secretary of State Jena Griswold in Colorado state court. These voters—whom we refer to as the respondents—contend that after former

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President Trump's defeat in the 2020 Presidential election, he disrupted the peaceful transfer of power by intentionally organizing and inciting the crowd that breached the Capitol as Congress met to certify the election results on January 6, 2021. One consequence of those actions, the respondents maintain, is that former President Trump is constitutionally ineligible to serve as President again.

Their theory turns on Section 3 of the Fourteenth Amendment. Section 3 provides:

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

According to the respondents, Section 3 applies to the former President because after taking the Presidential oath in 2017, he intentionally incited the breaching of the Capitol on January 6 in order to retain power. They claim that he is therefore not a qualified candidate, and that as a result, the Colorado secretary of state may not place him on the primary ballot. See Colo. Rev. Stat. §§1–1–113(1), 1–4–1101(1), 1–4–1201, 1–4–1203(2)(a), 1–4–1204 (2023).

After a five-day trial, the state District Court found that former President Trump had "engaged in insurrection" within the meaning of Section 3, but nonetheless denied the respondents' petition. The court held that Section 3 did not apply because the Presidency, which Section 3 does not mention by name, is not an "office . . . under the United

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States" and the President is not an "officer of the United States" within the meaning of that provision. See App. to Pet. for Cert. 184a–284a.

In December, the Colorado Supreme Court reversed in part and affirmed in part by a 4 to 3 vote. Reversing the District Court's operative holding, the majority concluded that for purposes of Section 3, the Presidency is an office under the United States and the President is an officer of the United States. The court otherwise affirmed, holding (1) that the Colorado Election Code permitted the respondents' challenge based on Section 3; (2) that Congress need not pass implementing legislation for disqualifications under Section 3 to attach; (3) that the political question doctrine did not preclude judicial review of former President Trump's eligibility; (4) that the District Court did not abuse its discretion in admitting into evidence portions of a congressional Report on the events of January 6; (5) that the District Court did not err in concluding that those events constituted an "insurrection" and that former President Trump "engaged in" that insurrection; and (6) that former President Trump's speech to the crowd that breached the Capitol on January 6 was not protected by the First Amendment. See *id.*, at 1a–114a.

The Colorado Supreme Court accordingly ordered Secretary Griswold not to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." *Id.*, at 114a. Chief Justice Boatright and Justices Samour and Berkenkotter each filed dissenting opinions. *Id.*, at 115a–124a, 125a–161a, 162a–183a.

Under the terms of the opinion of the Colorado Supreme Court, its ruling was automatically stayed pending this Court's review. See *id.*, at 114a. We granted former President Trump's petition for certiorari, which raised a single question: "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?" See 601 U. S. ___ (2024). Concluding that it

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did, we now reverse.

II

A

Proposed by Congress in 1866 and ratified by the States in 1868, the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy" and thus "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 59 (1996); see also *Ex parte Virginia*, 100 U. S. 339, 345 (1880). Section 1 of the Amendment, for instance, bars the States from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person . . . the equal protection of the laws." And Section 5 confers on Congress "power to enforce" those prohibitions, along with the other provisions of the Amendment, "by appropriate legislation."

Section 3 of the Amendment likewise restricts state autonomy, but through different means. It was designed to help ensure an enduring Union by preventing former Confederates from returning to power in the aftermath of the Civil War. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 2544 (1866) (statement of Rep. Stevens, warning that without appropriate constitutional reforms "yelling secessionists and hissing copperheads" would take seats in the House); *id.*, at 2768 (statement of Sen. Howard, lamenting prospect of a "State Legislature . . . made up entirely of disloyal elements" absent a disqualification provision). Section 3 aimed to prevent such a resurgence by barring from office "those who, having once taken an oath to support the Constitution of the United States, afterward went into rebellion against the Government of the United States." Cong. Globe, 41st Cong., 1st Sess., 626 (1869) (statement of Sen. Trumbull).

Section 3 works by imposing on certain individuals a preventive and severe penalty—disqualification from holding

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a wide array of offices—rather than by granting rights to all. It is therefore necessary, as Chief Justice Chase concluded and the Colorado Supreme Court itself recognized, to "'ascertain[] what particular individuals are embraced'" by the provision. App. to Pet. for Cert. 53a (quoting *Griffin's Case*, 11 F. Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). Chase went on to explain that "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.*, at 26. For its part, the Colorado Supreme Court also concluded that there must be some kind of "determination" that Section 3 applies to a particular person "before the disqualification holds meaning." App. to Pet. for Cert. 53a.

The Constitution empowers Congress to prescribe how those determinations should be made. The relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass "appropriate legislation" to "enforce" the Fourteenth Amendment. See *City of Boerne* v. *Flores*, 521 U. S. 507, 536 (1997). Or as Senator Howard put it at the time the Amendment was framed, Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith." Cong. Globe, 39th Cong., 1st Sess., at 2768.

Congress's Section 5 power is critical when it comes to Section 3. Indeed, during a debate on enforcement legislation less than a year after ratification, Sen. Trumbull noted that "notwithstanding [Section 3] . . . hundreds of men [were] holding office" in violation of its terms. Cong. Globe, 41st Cong., 1st Sess., at 626. The Constitution, Trumbull noted, "provide[d] no means for enforcing" the disqualification, necessitating a "bill to give effect to the fundamental law embraced in the Constitution." *Ibid.* The enforcement mechanism Trumbull championed was later enacted as part of the Enforcement Act of 1870, "pursuant to the power

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conferred by §5 of the [Fourteenth] Amendment." *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 385 (1982); see 16 Stat. 143–144.

B

This case raises the question whether the States, in addition to Congress, may also enforce Section 3. We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond* v. *United States*, 572 U. S. 844, 854 (2014). Among those retained powers is the power of a State to "order the processes of its own governance." *Alden* v. *Maine*, 527 U. S. 706, 752 (1999). In particular, the States enjoy sovereign "power to prescribe the qualifications of their own officers" and "the manner of their election . . . free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor* v. *Beckham*, 178 U. S. 548, 570–571 (1900). Although the Fourteenth Amendment restricts state power, nothing in it plainly withdraws from the States this traditional authority. And after ratification of the Fourteenth Amendment, States used this authority to disqualify state officers in accordance with state statutes. See, *e.g.*, *Worthy* v. *Barrett*, 63 N. C. 199, 200, 204 (1869) (elected county sheriff); *State ex rel. Sandlin* v. *Watkins*, 21 La. Ann. 631, 631–633 (1869) (state judge).

Such power over governance, however, does not extend to *federal* officeholders and candidates. Because federal officers "'owe their existence and functions to the united voice of the whole, not of a portion, of the people,'" powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term*

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Limits, Inc. v. *Thornton*, 514 U. S. 779, 803–804 (1995) (quoting 1 J. Story, Commentaries on the Constitution of the United States §627, p. 435 (3d ed. 1858)). But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates.

As an initial matter, not even the respondents contend that the Constitution authorizes States to somehow remove *sitting* federal officeholders who may be violating Section 3. Such a power would flout the principle that "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump* v. *Vance*, 591 U. S. 786, 800 (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 521 (1914)). Indeed, consistent with that principle, States lack even the lesser powers to issue writs of mandamus against federal officials or to grant habeas corpus relief to persons in federal custody. See *McClung* v. *Silliman*, 6 Wheat. 598, 603–605 (1821); *Tarble's Case*, 13 Wall. 397, 405–410 (1872).

The respondents nonetheless maintain that States may enforce Section 3 against *candidates* for federal office. But the text of the Fourteenth Amendment, on its face, does not affirmatively delegate such a power to the States. The terms of the Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5.

This can hardly come as a surprise, given that the substantive provisions of the Amendment "embody significant limitations on state authority." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976). Under the Amendment, States cannot abridge privileges or immunities, deprive persons of life, liberty, or property without due process, deny equal protection, or deny male inhabitants the right to vote (without thereby suffering reduced representation in the House). See Amdt. 14, §§1, 2. On the other hand, the Fourteenth Amendment grants new power to Congress to enforce the

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provisions of the Amendment against the States. It would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office.

The only other plausible constitutional sources of such a delegation are the Elections and Electors Clauses, which authorize States to conduct and regulate congressional and Presidential elections, respectively. See Art. I, §4, cl. 1; Art. II, §1, cl. 2.[1] But there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates. Granting the States that authority would invert the Fourteenth Amendment's rebalancing of federal and state power.

The text of Section 3 reinforces these conclusions. Its final sentence empowers Congress to "remove" any Section 3 "disability" by a two-thirds vote of each house. The text imposes no limits on that power, and Congress may exercise it any time, as the respondents concede. See Brief for Respondents 50. In fact, historically, Congress sometimes exercised this amnesty power postelection to ensure that some of the people's chosen candidates could take office.[2] But if States were free to enforce Section 3 by barring candidates from running in the first place, Congress would be

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[1]The Elections Clause directs, in relevant part, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, §4, cl. 1. The Electors Clause similarly provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," who in turn elect the President. Art. II, §1, cl. 2.

[2]Shortly after the Fourteenth Amendment was ratified, for instance, Congress enacted a private bill to remove the Section 3 disability of Nelson Tift of Georgia, who had recently been elected to represent the State in Congress. See ch. 393, 15 Stat. 427. Tift took his seat in Congress immediately thereafter. See Cong. Globe, 40th Cong., 2d Sess., 4499–4500 (1868). Congress similarly acted postelection to remove the disabilities of persons elected to state and local offices. See Cong. Globe, 40th Cong., 3d Sess., 29–30, 120–121 (1868); ch. 5, 15 Stat. 435–436.

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forced to exercise its disability removal power before voting begins if it wished for its decision to have any effect on the current election cycle. Perhaps a State may burden congressional authority in such a way when it exercises its "exclusive" sovereign power over its own state offices. *Taylor*, 178 U. S., at 571. But it is implausible to suppose that the Constitution affirmatively delegated to the States the authority to impose such a burden on congressional power with respect to candidates for federal office. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819) ("States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress").

Nor have the respondents identified any tradition of state enforcement of Section 3 against federal officeholders or candidates in the years following ratification of the Fourteenth Amendment.[3] Such a lack of historical precedent is generally a "'telling indication'" of a "'severe constitutional problem'" with the asserted power. *United States* v. *Texas*, 599 U. S. 670, 677 (2023) (quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010)). And it is an especially telling sign here, because as noted, States *did* disqualify persons from holding state offices following ratification of the Fourteenth Amendment. That pattern of disqualification with respect to state, but not federal offices provides "persuasive evidence of a general understanding" that the States lacked enforcement power with respect to the latter. *U. S. Term Limits*, 514

[3]We are aware of just one example of state enforcement against a would-be federal officer. In 1868, the Governor of Georgia refused to commission John Christy, who had won the most votes in a congressional election, because—in the Governor's view—Section 3 made Christy ineligible to serve. But the Governor's determination was not final; a committee of the House reviewed Christy's qualifications itself and recommended that he not be seated. The full House never acted on the matter, and Christy was never seated. See 1 A. Hinds, Precedents of the House of Representatives §459, pp. 470–472 (1907).

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U. S., at 826.

Instead, it is Congress that has long given effect to Section 3 with respect to would-be or existing federal officeholders. Shortly after ratification of the Amendment, Congress enacted the Enforcement Act of 1870. That Act authorized federal district attorneys to bring civil actions in federal court to remove anyone holding nonlegislative office—federal or state—in violation of Section 3, and made holding or attempting to hold office in violation of Section 3 a federal crime. §§14, 15, 16 Stat. 143–144 (repealed, 35 Stat. 1153–1154, 62 Stat. 992–993). In the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending that certain prospective or sitting Members could not take or retain their seats due to Section 3. See Art. I, §5, cls. 1, 2; 1 A. Hinds, Precedents of the House of Representatives §§459–463, pp. 470–486 (1907). And the Confiscation Act of 1862, which predated Section 3, effectively provided an additional procedure for enforcing disqualification. That law made engaging in insurrection or rebellion, among other acts, a federal crime punishable by disqualification from holding office under the United States. See §§2, 3, 12 Stat. 590. A successor to those provisions remains on the books today. See 18 U. S. C. §2383.

Moreover, permitting state enforcement of Section 3 against federal officeholders and candidates would raise serious questions about the scope of that power. Section 5 limits *congressional* legislation enforcing Section 3, because Section 5 is strictly "remedial." *City of Boerne*, 521 U. S., at 520. To comply with that limitation, Congress "must tailor its legislative scheme to remedying or preventing" the specific conduct the relevant provision prohibits. *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 639 (1999). Section 3, unlike other provisions of the Fourteenth Amendment, proscribes conduct of individuals. It bars persons from holding office after

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taking a qualifying oath and then engaging in insurrection or rebellion—nothing more. Any congressional legislation enforcing Section 3 must, like the Enforcement Act of 1870 and §2383, reflect "congruence and proportionality" between preventing or remedying that conduct "and the means adopted to that end." *City of Boerne*, 521 U. S., at 520. Neither we nor the respondents are aware of any other legislation by Congress to enforce Section 3. See Tr. of Oral Arg. 123.

Any state enforcement of Section 3 against federal officeholders and candidates, though, would not derive from Section 5, which confers power only on "[t]he Congress." As a result, such state enforcement might be argued to sweep more broadly than congressional enforcement could under our precedents. But the notion that the Constitution grants the States freer rein than Congress to decide how Section 3 should be enforced with respect to federal offices is simply implausible.

Finally, state enforcement of Section 3 with respect to the Presidency would raise heightened concerns. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson* v. *Celebrezze*, 460 U. S. 780, 794–795 (1983) (footnote omitted). But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President . . . represent[s] *all* the voters in the Nation." *Id.*, at 795 (emphasis added).

Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations. Some States might allow a Section 3 challenge to succeed based on a preponderance of the evidence, while

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others might require a heightened showing. Certain evidence (like the congressional Report on which the lower courts relied here) might be admissible in some States but inadmissible hearsay in others. Disqualification might be possible only through criminal prosecution, as opposed to expedited civil proceedings, in particular States. Indeed, in some States—unlike Colorado (or Maine, where the secretary of state recently issued an order excluding former President Trump from the primary ballot)—procedures for excluding an ineligible candidate from the ballot may not exist at all. The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).

The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U. S., at 822. But in a Presidential election "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, the votes not allowed to be cast—"for the various candidates in other States." *Anderson*, 460 U. S., at 795. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times. The disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. Nothing in the Constitution requires that we endure such chaos—arriving at any time or different times, up to and perhaps beyond the Inauguration.

* * *

For the reasons given, responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States. The judgment of the Colorado

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Supreme Court therefore cannot stand.

All nine Members of the Court agree with that result. Our colleagues writing separately further agree with many of the reasons this opinion provides for reaching it. See *post*, Part I (joint opinion of SOTOMAYOR, KAGAN, and JACKSON, JJ.); see also *post*, p. 1 (opinion of BARRETT, J.). So far as we can tell, they object only to our taking into account the distinctive way Section 3 works and the fact that Section 5 vests *in Congress* the power to enforce it. These are not the only reasons the States lack power to enforce this particular constitutional provision with respect to federal offices. But they are important ones, and it is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this case. In our view, each of these reasons is necessary to provide a complete explanation for the judgment the Court unanimously reaches.

The judgment of the Colorado Supreme Court is reversed.

The mandate shall issue forthwith.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 23–719

DONALD J. TRUMP, PETITIONER *v.*
NORMA ANDERSON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 4, 2024]

JUSTICE BARRETT, concurring in part and concurring in the judgment.

I join Parts I and II–B of the Court's opinion. I agree that States lack the power to enforce Section 3 against Presidential candidates. That principle is sufficient to resolve this case, and I would decide no more than that. This suit was brought by Colorado voters under state law in state court. It does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced.

The majority's choice of a different path leaves the remaining Justices with a choice of how to respond. In my judgment, this is not the time to amplify disagreement with stridency. The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up. For present purposes, our differences are far less important than our unanimity: All nine Justices agree on the outcome of this case. That is the message Americans should take home.

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SUPREME COURT OF THE UNITED STATES

No. 23–719

DONALD J. TRUMP, PETITIONER *v.*
NORMA ANDERSON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 4, 2024]

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON, concurring in the judgment.

"If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 348 (2022) (ROBERTS, C. J., concurring in judgment). That fundamental principle of judicial restraint is practically as old as our Republic. This Court is authorized "to say what the law is" only because "[t]hose who apply [a] rule to particular cases . . . must of *necessity* expound and interpret that rule." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (emphasis added).

Today, the Court departs from that vital principle, deciding not just this case, but challenges that might arise in the future. In this case, the Court must decide whether Colorado may keep a Presidential candidate off the ballot on the ground that he is an oathbreaking insurrectionist and thus disqualified from holding federal office under Section 3 of the Fourteenth Amendment. Allowing Colorado to do so would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case. Yet the majority goes further. Even though "[a]ll nine Members of the Court" agree that this independent and sufficient rationale resolves this case,

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five Justices go on. They decide novel constitutional questions to insulate this Court and petitioner from future controversy. *Ante,* at 13. Although only an individual State's action is at issue here, the majority opines on which federal actors can enforce Section 3, and how they must do so. The majority announces that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment. In doing so, the majority shuts the door on other potential means of federal enforcement. We cannot join an opinion that decides momentous and difficult issues unnecessarily, and we therefore concur only in the judgment.

I

Our Constitution leaves some questions to the States while committing others to the Federal Government. Federalism principles embedded in that constitutional structure decide this case. States cannot use their control over the ballot to "undermine the National Government." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 810 (1995). That danger is even greater "in the context of a Presidential election." *Anderson* v. *Celebrezze*, 460 U. S. 780, 794–795 (1983). State restrictions in that context "implicate a uniquely important national interest" extending beyond a State's "own borders." *Ibid.* No doubt, States have significant "authority over presidential electors" and, in turn, Presidential elections. *Chiafalo* v. *Washington*, 591 U. S. 578, 588 (2020). That power, however, is limited by "other constitutional constraint[s]," including federalism principles. *Id.*, at 589.

The majority rests on such principles when it explains why Colorado cannot take Petitioner off the ballot. "[S]tate-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving," the majority explains, "would be quite unlikely to yield a uniform answer consistent with the basic principle that 'the President

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. . . represent[s] *all* the voters in the Nation.'" *Ante*, at 11 (quoting *Anderson*, 460 U. S., at 795). That is especially so, the majority adds, because different States can reach "[c]onflicting . . . outcomes concerning the same candidate . . . not just from differing views of the merits, but from variations in state law governing the proceedings" to enforce Section 3. *Ante*, at 11.

The contrary conclusion that a handful of officials in a few States could decide the Nation's next President would be especially surprising with respect to Section 3. The Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome* v. *United States*, 446 U. S. 156, 179 (1980). Section 3 marked the first time the Constitution placed substantive limits on a State's authority to choose its own officials. Given that context, it would defy logic for Section 3 to give States new powers to determine who may hold the Presidency. Cf. *ante*, at 8 ("It would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office").

That provides a secure and sufficient basis to resolve this case. To allow Colorado to take a presidential candidate off the ballot under Section 3 would imperil the Framers' vision of "a Federal Government directly responsible to the people." *U. S. Term Limits*, 514 U. S., at 821. The Court should have started and ended its opinion with this conclusion.

II

Yet the Court continues on to resolve questions not before us. In a case involving no federal action whatsoever, the Court opines on how federal enforcement of Section 3 must proceed. Congress, the majority says, must enact legislation under Section 5 prescribing the procedures to "'"ascertain[] what particular individuals"'" should be disqualified.

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Ante, at 5 (quoting *Griffin's Case*, 11 F. Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). These musings are as inadequately supported as they are gratuitous.

To start, nothing in Section 3's text supports the majority's view of how federal disqualification efforts must operate. Section 3 states simply that "[n]o person shall" hold certain positions and offices if they are oathbreaking insurrectionists. Amdt. 14. Nothing in that unequivocal bar suggests that implementing legislation enacted under Section 5 is "critical" (or, for that matter, what that word means in this context). *Ante*, at 5. In fact, the text cuts the opposite way. Section 3 provides that when an oathbreaking insurrectionist is disqualified, "Congress may by a vote of two-thirds of each House, remove such disability." It is hard to understand why the Constitution would require a congressional supermajority to remove a disqualification if a simple majority could nullify Section 3's operation by repealing or declining to pass implementing legislation. Even petitioner's lawyer acknowledged the "tension" in Section 3 that the majority's view creates. See Tr. of Oral Arg. 31.

Similarly, nothing else in the rest of the Fourteenth Amendment supports the majority's view. Section 5 gives Congress the "power to enforce [the Amendment] by appropriate legislation." Remedial legislation of any kind, however, is not required. All the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) "are self-executing," meaning that they do not depend on legislation. *City of Boerne* v. *Flores*, 521 U. S. 507, 524 (1997); see *Civil Rights Cases*, 109 U. S. 3, 20 (1883). Similarly, other constitutional rules of disqualification, like the two-term limit on the Presidency, do not require implementing legislation. See, *e.g.*, Art. II, §1, cl. 5 (Presidential Qualifications); Amdt. 22 (Presidential Term Limits). Nor does the majority suggest otherwise.

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It simply creates a special rule for the insurrection disability in Section 3.

The majority is left with next to no support for its requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose. It cites *Griffin's Case*, but that is a nonprecedential, lower court opinion by a single Justice in his capacity as a circuit judge. See *ante*, at 5 (quoting 11 F. Cas., at 26). Once again, even petitioner's lawyer distanced himself from fully embracing this case as probative of Section 3's meaning. See Tr. of Oral Arg. 35–36. The majority also cites Senator Trumbull's statements that Section 3 "'provide[d] no means for enforcing'" itself. *Ante*, at 5 (quoting Cong. Globe, 41st Cong., 1st Sess., 626 (1869)). The majority, however, neglects to mention the Senator's view that "[i]t is the [F]ourteenth [A]mendment that prevents a person from holding office," with the proposed legislation simply "affor[ding] a more efficient and speedy remedy" for effecting the disqualification. Cong. Globe, 41st Cong., 1st Sess., at 626–627.

Ultimately, under the guise of providing a more "complete explanation for the judgment," *ante,* at 13, the majority resolves many unsettled questions about Section 3. It forecloses judicial enforcement of that provision, such as might occur when a party is prosecuted by an insurrectionist and raises a defense on that score. The majority further holds that any legislation to enforce this provision must prescribe certain procedures "'tailor[ed]'" to Section 3, *ante,* at 10, ruling out enforcement under general federal statutes requiring the government to comply with the law. By resolving these and other questions, the majority attempts to insulate all alleged insurrectionists from future challenges to their holding federal office.

* * *

"What it does today, the Court should have left undone."

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Bush v. *Gore*, 531 U. S. 98, 158 (2000) (Breyer, J., dissenting). The Court today needed to resolve only a single question: whether an individual State may keep a Presidential candidate found to have engaged in insurrection off its ballot. The majority resolves much more than the case before us. Although federal enforcement of Section 3 is in no way at issue, the majority announces novel rules for how that enforcement must operate. It reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision. In a sensitive case crying out for judicial restraint, it abandons that course.

Section 3 serves an important, though rarely needed, role in our democracy. The American people have the power to vote for and elect candidates for national office, and that is a great and glorious thing. The men who drafted and ratified the Fourteenth Amendment, however, had witnessed an "insurrection [and] rebellion" to defend slavery. §3. They wanted to ensure that those who had participated in that insurrection, and in possible future insurrections, could not return to prominent roles. Today, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oathbreaking insurrectionist from becoming President. Although we agree that Colorado cannot enforce Section 3, we protest the majority's effort to use this case to define the limits of federal enforcement of that provision. Because we would decide only the issue before us, we concur only in the judgment.

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CC: Zack Goldberg [zack@statesuniteddemocracy.org]
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To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>
Subject: RE: Wk Prod MCL 15.243(1)(h)

Sure, anytime works.

H

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
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From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Monday, March 18, 2024 12:29 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Zack Goldberg <zack@statesuniteddemocracy.org>
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Hi Heather,

Is there a good time to check in about this briefly this afternoon, ideally between 2 and 4 pm?

Jonathan L. Williams | Senior Counsel
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jonathan@statesuniteddemocracy.org

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Barry County Sheriff's Office

1212 West State Street • Hastings, Michigan 49058

Sheriff Dar Leaf

March 17, 2024

The Honorable Jim Jordan
2056 Rayburn House Office Building
Washington, DC, 20515-3504

Dear Congressman Jordan,

My office is investigating criminal acts related to elections in Barry County, the State of Michigan, and the United States. I am in possession of evidence involving voting machines. Additionally, I have recently received a subpoena from Prosecutor D.J. Hilson of Muskegon County for my file. D.J. Hilson worked with the Michigan Attorney General to bury the Muskegon fraud investigation that was initially reported by the Muskegon local clerk. Not one person was charged related to the Muskegon fraud despite confessions, and physical evidence. Considering this, I am going to provide portions of my file to Congress for immediate review and investigation.

My office has come into possession of evidence that foreign nationals have accessed electronic voting machines in Michigan and other states. This evidence demonstrates that electronic voting machines and electronic election systems used for elections in Michigan and throughout the United States are not secure and an immediate investigation is needed by Congress.

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I have evidence in my file of Serbian foreign nationals entering our election system while the votes were being counted, and prior to certification. The election vendor, Dominion, hired these Serbian employees and disclosed in emails that they are not able to provide backgrounds on these individuals due to law in Serbia. It has only been a mere 25 years since conflict involving Serbia. Therefore, the United States has allowed a scenario where potentially Serbian military criminals are running our elections and remotely entering our election equipment.

I am investigating the role that some individuals inside the United States have played in conspiring with these foreign nationals, and who have even directed and instructed them to access and interfere with electronic voting machines and electronic voting systems during past elections, including the November 2020 election. Multiple false assurances from state and federal agencies, and private companies that our elections were secure and not compromised through remote network access or otherwise. Moreover, I have evidence that U.S. Dominion and its affiliates (Dominion) instructed its employees to alter or otherwise falsify the integrity of the software and hardware in its voting machines and systems to attain certification by the Election Assistance Commission (EAC), even when they knew that the systems could not be properly verified and certified. Additionally, I have evidence that the voting machines and systems are vulnerable to alteration and manipulation, i.e., interference, by the use of thumb drives and external devices that

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can be surreptitiously connected to voting machines before, during, and after elections.

As a result of this information, my office is also investigating conspiracy crimes, wire services fraud, honest services fraud, and perjury charges, among other criminal acts. The perjury charges stems from assurances by Dominion's CEO during sworn testimony before the Michigan Legislature that its voting machines and voting systems could not be accessed or connected to by outside networks and sources, and that it was a "US based company."

As I now have evidence that our election equipment is not secure and because election voting machines prevent transparency, and vendors have more oversight and authority to have them examined than the officials that are charged with the constitutional duty to insure our elections are secure, transparent, and fulfill our promise to each and every American that their votes will count, and will be properly tabulated, and not diluted, deleted or otherwise altered, I am presenting you with this letter and an initial tranche of this evidence so that you will review it, and be compelled to investigate this matter and call those responsible for this breach of our Constitution to give testimony concerning these criminal acts and breach of our national security. These matters impact not only us here in the State of Michigan, but every citizen voter in the country who relies on the Constitution's promise that each legal registered citizen voter should have one vote, and that vote should correctly reflect his or her will and choice.

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As a constitutional officer, my duties are defined by my oath of office, the Constitution, the statutes governing my office, and those powers at common law that were recognized as being attached to my position. In light of this evidence, I am suggesting that every election official consider an emergency back-up plan for upcoming elections to prepare to verify all ballots and voters, and to hand count actual paper ballots at the end of elections to confirm the accuracy of the vote, the voters, and that our election machines are working properly. There is no harm in confirming results to ensure that the will of the people is reflected.

Thank you, in advance, for your prompt attention to this matter. Please do not hesitate to contact me if you have any questions or would like additional information concerning my investigation. As it stands, I have no faith in the federal institutions that allowed this garbage in the first place therefore, I am attaching unredacted documents for your review. More importantly, for review by the American people. This should allow for Congress to issue subpoenas in an expedited fashion. I look forward to Congress working for the American people, and quickly addressing these election security problems while I pursue the criminal investigation with sheriffs across the country.

Sincerely,

/s/ Dar Leaf

Barry County Sheriff Dar Leaf

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/20/2024 4:56:38 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
CC: Gillian Feiner [Gillian@statesuniteddemocracy.org]; Beth Stevens [beth@statesuniteddemocracy.org]
Subject: Dar Leaf tweets/document
Attachments: Dar Leaf - tweets 3.18.24 - MI Share.docx

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Dan and Heather,

We've reviewed nearly all the documents that appear to be from the Dominion litigation posted on a new Twitter account purporting to belong to Dar Leaf over the weekend. Attached is a summary description of those documents. Let me know if you'd like anything more from us on this. Thanks!

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
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jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/20/2024 12:59:45 AM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
Subject: SUDC update re social media litigation
Attachments: Social Media Memo Updates 3.19.24 .pdf

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Heather and Linus,

I've attached a States United client update regarding recent Supreme Court developments related to the First Amendment and social media content moderation:

- The Court's decision last Friday in *Lindke v. Freed* (a case originating in Michigan) that addresses when individual government employees (and, by analogy, elected officials) using social media are treated as state actors susceptible to First Amendment lawsuits when they block users or delete comments.

- Oral arguments Monday in *Murthy v. Missouri* and *Vullo v. NRA*—two cases that concern when government efforts to persuade cross the line into potentially unlawful coercion. *Murthy* concerns efforts to combat disinformation on social media. *Vullo* concerns efforts to dissuade businesses from doing business with the NRA.

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From: Zack Goldberg [zack@statesuniteddemocracy.org]
Sent: 3/11/2024 6:34:18 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: United Sovereign Americans - New MD Case
Attachments: Complaint - United Sovereign Americans.pdf

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Hi Heather,

We wanted to flag for you a Maryland case filed last week that may be coming down the pike in Michigan.

A Missouri-based nonprofit called "United Sovereign Americans" sued the Maryland State Board of Elections seeking to enjoin the Board from certifying future elections until the Board, among other things, updates its voter rolls, decertifies its voting systems, and follows the guidance of a court-appointed Special Master to implement suggested programs to improve monitoring and transparency in the voting systems. The lawsuit alleges: (1) the state's voter registration database contains nearly 80K registration violations in violation of the NVRA; (2) the number of voting systems errors exceeds HAVA's maximum allowable error rate; (3) the state failed to properly certify its voting systems; (4) the state's voting systems improperly use modems to transmit results; (5) the state failed to appropriately respond to public information requests; and (6) the state's voting systems fail to give voters the ability to correct certain undervotes in violation of HAVA. The complaint claims that the Board is violating HAVA and the NVRA, as well as state election law. The full complaint is attached. As of now, the group has not filed for a preliminary injunction, but we will keep monitoring the docket.

Media reports indicate that this is the first of many suits the group plans to file across the country. The group says that it is "actively preparing litigation in 23 states," though it has not mentioned which specific states.

We will let you know if/when the group files suit in any other states.

Best,
Zack

Zack Goldberg (he/him) | Counsel
States United Democracy Center
917.656.6234 | @statesunited
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Maryland Election Integrity LLC 116 Defense Highway, Annapolis, MD 21401 *Plaintiff*	*	
United Sovereign Americans, Inc. 167 Lamp and Lantern Village Suite 194 Chesterfield, MO 63017 *Plaintiff*	*	
v.	*	Case No.:
Maryland State Board of Elections 151 West Street #200 Annapolis, MD 21401 SERVE ON: Michael G. Summers, In his representative capacity as the Chairman of the Maryland State Board of Elections 151 West Street #200 Annapolis, MD 21401 *Defendant*	*	

****

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Maryland Election Integrity LLC, a Maryland limited liability company, and United Sovereign Americans, Inc., a Missouri nonprofit corporation, Plaintiffs, by Hartman, Attorneys at Law, and C. Edward Hartman, III, hereby bring this Complaint for Declaratory and Injunctive Relief, and plead as follows:

PARTIES

1. Maryland Election Integrity LLC is a Maryland limited liability company. Its principal office is located in Maryland.

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2. United Sovereign Americans, Inc. is a nonprofit corporation incorporated in the state of Missouri.

3. Maryland State Board of Elections (hereinafter referred to as "MDSBE") is a government agency that administers elections in Maryland.

JURISDICTION AND VENUE

4. This action seeks declaratory and injunctive relief from deficient voter registration rolls leading to violations of Federal and state laws, the certification of results from a provably flawed, inaccurate, and obscure process outside the view of impartial witnesses or the public, including the use of voting systems in Maryland that are believed to have void EAC certifications in violation of federal law, and the refusal of the Maryland State Board of Elections to comply with Public Information Act (PIA) requests and Federally required transparency. This Court has subject matter jurisdiction over this complaint because the case presents substantial questions of federal law, and the state claims are so related to the federal claims that they form part of the same case or controversy. 28 U.S.C. §§ 1331 and 1367.

5. This court has authority to issue a declaratory judgment and to order injunctive and other relief that is necessary and proper pursuant to 28 U.S.C. §§2201 and 2202 as there exists a case of actual controversy.

6. This court has personal jurisdiction as the Defendant is a Maryland Agency.

7. Venue is proper in this district under 28 U.S.C. § 1391(e)(1).

STANDING

8. Maryland Election Integrity LLC is an organization comprised of members who are registered voters in the state of Maryland.

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9. The members have been and are currently harmed by the MDSBE and the ES&S voting systems currently and formerly in use in Maryland elections. The violations of Maryland election laws, the US Constitution, and Federal civil rights laws pertaining to voter registration rolls, transparency, compliance, and certification of the voting systems, and the serious issues hereinafter discussed with the overall voting systems exemplify their injury. The lack of transparency by MDSBE with respect to the voting systems and the reports generated by them has resulted in Plaintiffs being denied lawful Public Information Act (PIA) requests and the Federally mandated preservation of auditable items.
10. If the Court grants Plaintiffs' requested relief, the injury to the Plaintiffs' members would cease to exist.
11. The Supreme Court has indicated that if one party to a lawsuit has standing, other entities can join as parties without having to satisfy independently the demands of Article III, provided those parties do not seek a distinct form of relief from the party with standing. E.g., Horne v. Flores, 557 U.S. 433, 446 (2009).
12. United Sovereign Americans is not seeking a distinct form of relief and, therefore, has standing.

BACKGROUND

13. Article 1 Section 2 of the US Constitution grants the right to choose representatives to the people of the several states, according to the voting eligibility requirements of the state.
14. The Fourteenth Amendment Section 1 defines a citizen as all people born or naturalized in the United States, and subject to the jurisdiction thereof.
15. The Fourteenth Amendment Section 2 protects the eligible citizen voters of a state against both denial, or abridgment in any way, of their vote.

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16. The National Voter Registration Act (NVRA) was passed for the purpose of ensuring accurate, current voter registration rolls. Congress' power to pass NVRA comes from Article 1, Section 8, Clause 18 of the US Constitution, the Necessary and Proper Clause, making accurate voter rolls a requirement to uphold the right of the people to choose their representatives.

17. Of the three components of an election, voters, votes, and counts, in that order, each relies on the accuracy of the preceding component(s) in order to be trustworthy. Without all being intact, the system will not meet the requirements for certifying the vote, plainly needing the ability to prove both accuracy and compliance.

18. It is a settled legal principle that dilution of a qualified voter's vote is a form of disenfranchisement, Ex parte Siebold, 100 U. S. 371 (1879), United States v. Saylor, 322 U. S. 385 (1944), Reynolds v. Sims, 377 U.S. 533 (1964).

19. The Help America Vote Act requires that voter roll databases contain only the registrations of qualified citizen voters residing in that state. *52 USC § 21083(a).* Each qualified voter is granted a unique statewide identifier in the database, averting the risk of double-voting, or extra ballots being cast in the name of a particular voter. Further, the constitutional mandate is that the election system must only count eligible voters. Maryland cannot demonstrate that there is effective control of eligibility in Federal or State dimensions of those requirements and has implemented a system that does not guarantee accuracy or compliance with only allowing eligible voters to register and vote.

20. The Help America Vote Act requires that federal elections adhere to an accuracy standard, "...set at a sufficiently stringent level such that the likelihood of voting system errors affecting the outcome of an election is exceptionally remote even in the closest of

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elections." United States. (2002) *U.S. Federal Election Commission FEC.* United States. [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

21. For a voting system, accuracy is defined as the ability of the system to capture the intent of the voters without error. United States. (2002) *U.S. Federal Election Commission FEC.* United States. [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

FACTS

Voter Rolls

22. The National Voter Registration Act of 1993 (NVRA) states that "[t]he purposes of this act are to ensure that accurate and current voter registration rolls are maintained." *52 USC § 20501(b)(4).*

23. Meticulous analysis of the official Maryland State Voter Registration Database reveals a minimum of 79,392 current apparent registration violations (Voter Registration Database snapshots were purchased 8/2021, 12/2021, 7/2022, 8/2022, 12/2022, 1/2023, 2/2023, 3/2023, 4/2023, 5/2023, 6/2023, and 7/2023).

24. The analysis revealed 1,699 instances of duplicate registrations, 25,084 instances of registrants with questionable inactive status, 3,366 instances of active registrations without a certified US Post Office mailing address, 5,680 instances of active registrants who moved at least 4 years ago, 605 instances of registrations with no residential address, 296 instances of active registrants with a nonstandard address, 1,218 instances of active registrants who

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are deceased, 883 instances of age discrepant registration (younger than 18 or older than 115), and 40,518 instances of questionable registration date. A spreadsheet with the apparent registration violations is attached as **Exhibit A.**

25. **Exhibit A** shows the registration type, the number of apparent violations, and the Maryland election law/rule in violation.

26. The apparent violations are pursuant to Md. Election Law Code Ann. §§ 3-101, 102, 502, 503 & 504.

27. These numbers clearly show the voter rolls in Maryland are not accurate and current as required by the NVRA: *52 USC § 20501(b)(4)* and violate specific Maryland laws pertaining to voter registration, i.e. §§ 3-101, 102, 502, 503 & 504.

28. Inaccurate voter rolls have significant downstream consequences in elections.

29. The purpose of a voting system is to accurately record, store, consolidate and report the specific selections, and absence of selections, made by the voter as well as to accurately measure the intent of the total body of eligible voters that voted.

30. The definition of a voting system is found in HAVA Section 301. *52 USC § 21081.*

31. Under HAVA, a voting system is defined as "the total combination of mechanical, electromechanical, or electronic equipment (including software, firmware, and documentation required to program, control, and support the equipment) that is used to define ballots; to cast and count votes; to report or display election results; and to maintain and produce any audit trail information." *52 USC § 21081(b)(1)(A)-(D).*

32. The ability to "cast and count votes" begins with establishing eligibility, including citizenship, and registering only qualified citizens into voter registration databases, thus

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assuring that all ballots granted, and thereby all votes cast and counted, are lawfully cast and counted according to the US Constitution.

33. Voter registrations are used to create pollbooks, which can either be networked or non-networked. "Networked pollbooks are electronic pollbooks with a connection to an external database, and may include a direct connection to the voter registration database or a separate server." Cybersecurity and Infrastructure Security Agency, *Critical Infrastructure Security and Resilience Note*, Jul. 28, 2020, at 2-3, https://www.cisa.gov/sites/default/files/publications/cisa-election-infrastructure-cyber-risk-assessment_508.pdf.

34. Maryland is a state in which all local jurisdictions use E-Poll books, meaning the pollbooks have a direct connection to the voter registration database.

35. Following pollbook preparation is ballot preparation. Ballot preparation "generates the data necessary for tabulating votes within a voting machine, and aggregating tabulated votes within a jurisdiction or state." Cybersecurity and Infrastructure Security Agency, *Critical Infrastructure Security and Resilience Note*, Jul. 28, 2020, at 3, https://www.cisa.gov/sites/default/files/publications/cisa-election-infrastructure-cyber-risk-assessment_508.pdf.

36. Voting machines are used following ballot preparation. "Voting machines encompass both technology and processes used by election officials to prepare voting machines for ballot tabulation, and in some cases presentation. Specifically, this includes loading the ballot files created during ballot preparation onto voting machines." Cybersecurity and Infrastructure Security Agency, *Critical Infrastructure Security and Resilience Note*, Jul.

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28, 2020, at 3, https://www.cisa.gov/sites/default/files/publications/cisa-election-infrastructure-cyber-risk-assessment_508.pdf.

37. The U.S. election process seen above shows the link between voter registration and the ballot files being loaded onto voting machines.

38. It also shows voter registration is encompassed in the definition of a voting system as defined in *52 USC § 21081(b)* because a voting system consists of documentation required to program the voting machines.

39. As voter registration is part of the voting system, it is subject to the allowable error rates of voting systems as set forth in *52 USC § 21081(a)(5).*

Error Rates

40. Section 301 of HAVA regarding "Voting System Standards," states that the "error rate of [a] voting system in counting ballots…shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission[.]" *52 USC § 21081(a)(5)*

41. The accuracy requirements set under the Federal Election Commission (FEC) voting systems standards section 3.2.1 establish that "the system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions." United States. (2002) *U.S. Federal Election Commission FEC.* United States. [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

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42. The Voluntary Voting System Guidelines, Version 1.1, Section **4.1.1 – Accuracy Requirements** states in part, "[a]ll systems shall achieve a report total error rate of no more than one in 125,000." United States. (2015) *U.S. Election Assistance Commission*. United States. [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf.

43. The Voluntary Voting System Guidelines, Version 1.1, Section **4.1.1 – Accuracy Requirements** then states, "[t]he benchmark of one in 125,000 is derived from the "maximum acceptable error rate" used as the lower test benchmark in the 2005 Voluntary Voting System Guidelines Version 1.0. That benchmark was defined as a ballot position error rate of one in 500,000. The benchmark of one in 125,000 is expressed in terms of votes, however, it is consistent with the previous benchmark that the estimated ratio of votes to ballot positions is ¼." United States. (2015) *U.S. Election Assistance Commission*. United States. [Web Archive] Retrieved from the Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf.

44. Maryland voting systems are subject to the error rates defined in the FEC Voting System Standards 3.2.1 and explained in the Voluntary Voting System Guidelines (VVSG).

45. The number of apparent voting system errors in counting votes in the 2020 General Election, according to MDSBE raw data, was 62,075. A spreadsheet is attached showing the apparent voting violations in the 2020 and 2022 General Election as **Exhibit B.**

46. The number of apparent voting system errors in counting votes in the 2022 General Election, according to MDSBE raw data, was 27,623. This can also be seen in **Exhibit B.**

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47. The allowable number of voting system errors in counting votes to comply with HAVA is calculated by dividing the total number of Maryland voters who voted in a given election by 125,000.

48. For the 2020 General Election this is ~3,000,000 votes/125,000 = 24. For the 2022 General election this is ~2,000,000 votes/125,000 = 16.

49. The number of voting system errors in counting votes for the 2020 General election (62,075) greatly exceeded the maximum allowable error rate (24).

50. The number of voting system errors in counting votes for the 2022 General election (27,623) greatly exceeded the maximum allowable error rate (16).

51. In sum, the voting system error rates are exponentially above the maximum allowable error rates. Inaccuracy and the specter of fraud have irretrievably damaged the reliability and credibility of results.

52. The Members of Plaintiff exhausted every administrative remedy known to them in advance of the 2022 general election, to have these issues repaired. Plaintiffs continued in 2023 to seek redress and repair for these egregious violations through democratic means.

53. The Maryland State Board of Elections dismissed these concerns without any meaningful review or response and intends to administer and certify Maryland's 2024 general election under the same inaccurate conditions.

Requirements for Certifying Voting Systems

54. The requirement for certifying voting systems is set forth in Section 231 of the Help America Vote Act ("HAVA"). *52 USC § 20971.*

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55. Under HAVA there is a requirement for providing "for the testing, certification, decertification, and recertification of voting systems hardware and software by accredited laboratories." *52 USC § 20971(a)(1)*

56. While HAVA does allow for the "optional use by states," Maryland has adopted the certification requirements: "The State Board may not certify a voting system unless the State Board determines that…the voting system is (i) examined by an independent testing laboratory that is approved by the U.S. Election Assistance Commission; and (ii) shown by the testing laboratory to meet the performance and test standards for electronic voting systems established by the Federal Election Commission or the U.S. Election Assistance Commission[.]" *Md. Code Ann., Elec. Law § 9-102*

57. *Md. Code Ann., Elec. Law § 9-102* requires voting systems to conform with standards set by the Federal Election Commission and the U.S. Election Assistance Commission. Maryland also has received HAVA grants; therefore, the State is subject to the requirements set forth by HAVA.

58. Under HAVA, states that receive payments for improving the administration of elections must use the funds "in a manner consistent with each of the laws described in section 21145…and the proposed uses are not inconsistent with the requirements of title III." *52 USC § 20901(c).*

59. HAVA also sets forth the requirements for accrediting testing labs that perform certification tests on voting systems.

60. HAVA states that the requirements to be met by testing labs to become accredited are found in the Voluntary Voting Systems Guidelines ("VVSG").

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61. Maryland has also adopted guidelines for certification, which are governed by the Code of Maryland Regulations (COMAR), Title 33, and the Election Law of the Annotated Code of Maryland.

62. COMAR 33.09.03.04 requires that applicants submit a Technical Data Package, a Business Information Package, anti-bribery and anti-debarment affidavits, as well as voting equipment.

63. COMAR 33.09.03.05 details the requirements for the Technical Data Package.

64. Under COMAR 33.09.03.05(A) Required Information "[t]he technical data package shall contain all documentation previously submitted for the qualification testing of the system, including each of the following…(5) Software Source Code (both in the form of a listing and in a machine-readable form on media acceptable to the evaluation agent)[.]"

65. Election Systems & Software (ES&S) is the manufacturer of the voting systems currently in use in Maryland.

66. Page 4 of the ES&S EVS 5.2.0.0 Maryland State Board of Elections (MDSBE) certification report (the "Report"), dated December 4, 2014, states that the Technical Data Package was submitted.

67. Page 20 of the Report says that all listed requirements were provided **except** the Software Source Code. An excerpt of this report is attached as **Exhibit C.**

68. Under COMAR 33.09.03.05 requirements, Maryland was required to review the source code of the voting systems.

69. Maryland did not review the source code for ES&S EVS 5.2.0.0 as they were required to under Maryland Law and evidenced by the Report.

Modem Use

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70. In January 2020, the EAC received complaints about ES&S marketing to their customers that the use of a modem on the voting system is optional. The correspondence between the EAC and ES&S is attached as **Exhibit D.**

71. The EAC determined that ES&S violated Sections 5.14 and 5.15.1 of the EAC Testing and Certification Program Manual Version 2.0 by representing or implying that the DS200 with modem configuration is EAC certified when in fact attachment of a modem is disqualifying.

72. The EAC also determined that ES&S violated Section 5.16 by failing to warn purchasers that adding a modem to the DS200 would void the EAC certification of the voting system in its entirety.

73. This violation led to a number of states using modems on the ES&S voting systems.

74. Eleven of these states acknowledged using ES&S voting systems with attached modems while others have not admitted to using modems.

75. The voting systems with modems attached were likely used for years with void EAC certification.

76. ES&S created a proposal that was used for the purpose of persuading Colorado to use its voting system on December 4, 2013 (the "Colorado Proposal") the relevant portions of which are attached as **Exhibit E.**

77. In the Colorado Proposal, ES&S sets forth questions and answers.

78. One such question, on page 13 of Section 9.0 - General Questions, asks "[i]s there any remote communication technology associated with your proposed solution?"

79. In response to the question, they state in part "[t]he DS200 Tabulators use wireless modems to connect to the SFTP Server via the Internet."

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80. ES&S unequivocally admits that the voting systems use modems.

81. Contained in the ES&S EVS 5.2.0.0 certification report issued by the EAC, dated July 2, 2014, is a table titled "2005 VVSG Supported Functionality Declaration." The table states that modems are not a supported functionality of the voting machine. The relevant table from the certification report is attached as **Exhibit F.**

82. Page 10 of the Report for Maryland certification (December 2014) states that "[r]esults can be transferred by **modem** to the EMS server." The relevant portions of which are attached as **Exhibit G.**

83. Results in fact are not permitted to be transferred by modem as the EAC has never certified a voting system with a modem; further, simply attaching a modem will void the EAC certification.

84. Any voting system with an attached modem has a void EAC certification and is not allowed to be used according to the EAC.

85. The meeting minutes of the MDSBE meeting on July 16, 2015 show that in prior elections, three local boards – Baltimore, Montgomery, and Prince George's Counties – transmitted unofficial election results from either a polling place or a regional transmission center. The relevant portion of the meeting minutes is attached as **Exhibit H**.

86. Transmitting unofficial election results is typically accomplished by the use of a modem or email.

87. The only way to determine whether Maryland used modems to accomplish the transmission of the unofficial election results in this situation is to examine the various DS200 audit logs and configuration reports the machines generate. The logs and reports were requested from MDSBE and the Local Boards of Election, in at least 22 out of the 23 counties in Maryland,

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through PIA requests but not produced. The PIA requests and/or responses are attached as **Exhibit I**.

88. Transmitting unofficial election results from a polling place leaves the system vulnerable to cyber-attacks.

89. In an MDSBE meeting dated July 27, 2017, they stated "approximately 1,400 of the DS200 scanners have non-functioning modems installed that have not been used since delivery. ES&S has started removing these modems, which they wish to put back into their own inventory. Once each modem is removed, acceptance testing will be performed on the unit under SBE and local board supervision prior to returning to service." The relevant portion of the meeting minutes is attached as **Exhibit J**.

90. A voting system with a modem installed on it has a void EAC certification.

91. Approximately 1,400 voting systems being used in Maryland prior to 2017 had void EAC certifications.

92. Maryland. Code, Elec. Law § 9-103 states MDSBE ("(2) **shall** decertify a previously certified voting system if the voting system no longer meets one or more of the standards in § 9 102(d)(1)(i) through (iii) of this subtitle.") (emphasis added)

93. Md. Code, Elec. Law § 9-102 says ("(d) The State Board may not certify a voting system unless the State Board determines that: (1) the voting system will: (i) protect the secrecy of the ballot; (ii) protect the security of the voting process; (iii) count and record all votes accurately;")

94. The voting machines did not comply with Md. Code, Elec. Law § 9-102(d)(1)(i) and (ii) considering the transmission of the unofficial results is susceptible to cyber risks.

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95. In 2017 machines in Maryland had modems attached which were to be removed prior to "returning to service." This creates the presumption that the modems on the machines were in use, despite MDSBE claiming the modems were non-functioning and had not been used since delivery. This shows the machines were used in elections with attached modems. Whether the modems were functioning is irrelevant as attachment of a modem voids the EAC certification.

96. Once again, numerous PIA requests were made for the DS200 audit logs and configuration reports which would tend to show the modems were functioning or non-functioning, but not produced.

97. According to ES&S the configuration reports are automatically printed upon login to the machines; therefore, the PIA requests for these documents should have been fulfilled with responsive documents.

98. The systems were being used in elections with void EAC certifications.

Maryland Public Information Act

99. Maryland's Public Information Act ("PIA") gives the public the right to access government records without unnecessary cost and delay.

100. GP § 4-103(a) provides that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees."

101. In response to numerous PIA requests in most Maryland counties, MDSBE and the local Boards of Elections stated that they do not have any responsive documents.

102. The information being requested, audit logs, system logs, error logs, configuration reports, etc. of voting systems, is information that should be available because of the audit requirements set under HAVA and COMAR.

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103. ES&S also represents that these reports and logs are either automatically generated by the machines or easily accessed in their Colorado Proposal.

104. In Section 12.0 – UVS System Requirement of The Colorado Proposal ES&S goes into great detail about the audit logs the machines generate. The relevant portions of the Proposal are attached as **Exhibit K**.

105. Req. ID H-1 requires the systems to "Store sufficient data in an unalterable system audit log file to allow the auditing of all operations related to election setup, ballot creation, ballot tabulation, results consolidation and report generation."

106. ES&S's response states "[e]ach application has its own audit log to allow the auditing of all operations relating to the election setup, ballot creation, ballot tabulation, results consolidation and report generation. The ES&S proposed voting system audit log provides sufficient information to allow the auditing of all operations related to ballot tabulation, results consolidation, and report generation."

107. The rest of the response from ES&S goes through the system audit capabilities of all the components of the voting system.

108. ES&S responded to an inquiry for their audit trail techniques and reports in the Colorado Proposal. "Please explain what audit trail techniques and audit reports are incorporated in your proposed system."

109. For the DS200 Tabulator ES&S stated "[i] n addition to the audit log described previously that records all use operation and substantial application operations or errors, the DS200 has various configuration reports, ballot accounting reports, and results reports, all of which can be used forensically for auditing."

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110. These reports are created by the voting machines and were requested through PIA requests but not produced.

111. ES&S responded to an inquiry into their audit logs files, location, and access to them. "Please provide a list of all audit log files, the file location within the voting system, and the procedures to navigate to and retrieve them from the voting system."

112. For the DS200 Tabulator ES&S states "[t] he signed audit logs are written to the log directory on the removable media. The audit log events can be accessed on the DS200 onscreen or through a printed report. When the media is read back into the EMS the audit logs are also retrievable from the EMS through a machine audit log report or exported in a comma separated format."

113. These audit logs are created and were requested through PIA requests but not produced.

114. Next, ES&S addresses Req. ID H-15 in the Colorado Proposal which requires the systems to "[c]reate audit records prior to the initiation of ballot counting to verify hardware and software status. These particular audit records shall include the identification of the software release, the identification of the election to be processed and the results of hardware and software diagnostic tests."

115. ES&S's response states in part "[o]n power up, a configuration report is automatically printed to create a hard copy record of the relevant configuration and settings of the particular DS200."

116. The fact that the configuration reports are automatically printed is confirmed by the Dorchester County Board of Elections Chief Judges' Manual. The relevant portion of the manual is attached as **Exhibit L.**

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117. The configuration reports are **automatically printed** and were requested through PIA requests but not produced. To state there are no responsive documents to this request is clearly false as the voting machines automatically print them.

118. The Election Law of the Annotated Code of Maryland § 9-102(d) says that the "State Board may not certify a voting system unless the State Board determines that: (1) the voting system will… (vi) be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount, including a manual recount[.]"

119. Pages 15 and 16 of the Report for Maryland certification (December 2014) analyze the voting system with respect to COMAR 33.09.02.07.

120. COMAR 33.09.02.07 explains the audit trail requirement stating that: "[t]he voting system shall be capable of providing an audit trail of all ballots cast so that, in a recount, the election can be reconstructed, starting with the individual votes of all eligible voters."

121. The Board of Elections states in the Report that ES&S EVS 5.2.0.0 satisfied the audit requirements: "[a]ll tabulators and the EMS system maintain an audit log for each election."

122. The information Plaintiffs requested through the PIA requests is not new information that must be created. There are responsive documents to the requests, as opposed to Defendant's contentions.

123. The information is already available on the voting systems and ES&S details how to print the reports in Chapter 20 of their Electionware Volume V: Results User's Guide. The relevant portions of the guide are attached as **Exhibit M**.

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124. The information is stored in the course of an election on the voting systems and, if not, the systems do not conform to the representations made about their capabilities to create audit logs.

125. The PIA requests have been denied, notwithstanding the laws that were clearly drafted to allow for public review.

Blank Ballots, Undervotes, and Overvotes

126. HAVA Section 301 requires voting systems to "provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error.)" *52 USC §21081(a)(1)(A)(ii).*

127. Maryland creates a Cast Vote Records report for each county in Maryland for each election, which contains the total number of registered voters, the total number of ballots cast, and the results in that county.

128. The Cast Vote Records EL45a report shows the total number of blank ballots cast in each county in the state of Maryland for each election.

129. Upon calculation, the total number of blank ballots cast in the 2022 General Election in Maryland was 82,356.

130. Some counties had much higher percentages of blank ballot than others. Possible reasons for this can be explained below.

131. It is believed that many people did not intend to cast blank ballots in the 2022 General Election, and the settings of the machines were the reason for the ballots being cast blank.

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132. Upon further inquiry, it has been discovered that the ES&S DS200 tabulator can be configured to accept blank ballots, undervotes, and overvotes instead of rejecting them and notifying the voter to cure the mistake.

133. According to a DS200 Operators Guide dated July 18, 2019, an admin can establish the ballot handling options. The relevant portions of the guide are attached as **Exhibit N**.

134. Section 7.4.1 – **Establishing Ballot Handling Options** Page 108 of the DS200 Operators Guide states, "[w]hen you create your election definition, your Electionware settings determine for each ballot style how the DS200 handles specific types of ballot conditions. For each of these ballot condition, you can set the DS200 to always accept or always reject ballots with a specified conditions. For some of those conditions, you can instead have the DS200 query the voter to ascertain a voter's intent. You can set the DS200 to always accept, always reject, or query the voter for the following ballot conditions: Undervoted ballot; Blank Ballot; Overvoted Ballot; and Unreadable Marks on Ballot."

135. The DS200 operator's guide then goes to state, "Selecting **Always Accept** for any of these conditions causes the DS200 to skip the voter query function for that condition. The DS200 will not display the query screen for those conditions."

136. The DS200 operator's guide then goes through each of the conditions (blank ballots, overvoted ballots, undervoted ballots) to show what the query looks like on the machine if the settings allow for a query.

137. If **Always Accept** is selected on voting machines, voters are not provided the opportunity to change the ballot or correct the error before the ballot is cast and counted. This violates *52 USC §21081(a)(1)(A)(ii)* because voters are not notified of their deficient ballot and given a chance to cure the error before the machine accepts it.

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138. Section 7.11.3 – **Report Options** Page 124 of the DS200 Operators Guide details the reports and audit logs the machine generates.

139. It states that the Configuration Report, Event Log Report and Summary Event Log, and System Log can be generated.

140. Section 9.1 – **Reports Overview** Page 150 of the DS200 Operators Guide states "the DS200 can automatically print the Configuration, Zero Totals, and Ballot Status Accounting reports as part of the poll opening process."

141. At the bottom of this section Page 151 of the guide states, "[y]ou can also manually request additional copies of any reports that are generated automatically."

142. Section 9.6 – **Configuration Report** on Pages 158-160 of the DS200 Operators Guide contains a sample Configuration Report. The sample configuration report is attached as **Exhibit O**.

143. The configuration report shows if there is a modem attached on the DS200, whether the Event log will be printed on poll close, as well as the settings for accepting blank ballots, overvotes, and undervotes.

144. As stated previously, and emphasized by this section's findings, the configuration reports that the machines automatically print will confirm whether modems were in use and if the blank ballots were the product of machine settings.

145. COMAR 33.10.01.03(B) Auditability. "The tabulators shall provide a vote cast record of all ballots cast and audit log of alerts provided to voters and tabulator events and errors."

146. COMAR 33.10.01.03(B) proves the machine generates audit logs that would show alerts to voters. These alerts would show up for voters if they cast a blank ballot,

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undervoted, or overvoted. If there are no alerts for these conditions in the audit logs, the machines were set to automatically accept these deficient ballots.

147. The audit logs were, again, requested through PIA requests, which were not fulfilled despite statutory language stating the machines generate them.

148. COMAR 33.10.01.03(g) – **Actions Taken to Change Conditions** is relevant to the blank ballot and PIA issues.

149. COMAR 33.10.01.03(g)(1)(a),(b) states, "The system shall be capable of printing from its audit trail: actions taken by operators to change conditions; and the time of the occurrence."

150. COMAR 33.10.01.03(g)(2) then states, "System operators shall record in a logbook all actions to change conditions that cannot be printed from the audit trail. That logbook, as well as all reports produced by the printer, shall be retained by the local board."

151. This unequivocally shows that the reports and logbook must be retained by the local board under Maryland law.

152. These reports were requested from the Local Boards of Elections, they responded stating they had no responsive records.

153. Stating they have no responsive records for reports they are required to retain goes to show they either violated Maryland law and Federal law by failing to retain those records, or they are unlawfully denying PIA requests for the reports.

Count I

Declaratory Judgment - 28 U.S.C. § 2201

154. Plaintiffs incorporates by reference and realleges the averments of paragraphs 1 through 153.

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155. 28 U.S.C. § 2201 requires a case of actual controversy.

156. There exists an actual controversy of a justiciable issue between the Maryland State Board of Elections (MDSBE) and Maryland Election Integrity, LLC within the jurisdiction of this Court concerning the interpretation of The National Voter Registration Act of 1993: *52 USC §20501(b)(4)*, Maryland. Code, Elec. Law §§ 3-101, 102, 502, 503 & 504, HAVA: *52 USC §21081,* COMAR 33.09.03.05, Maryland. Code, Elec. Law § 9-103, Md. Code, Gen. Provisions § 4-103, The Election Law of the Annotated Code of Maryland § 9-102(d), COMAR 33.09.02.07, and COMAR 33.10.01.03.

157. Despite mandatory statutory language requiring current and accurate voter rolls, which shall include only the names and registration information of eligible citizen voters, and Maryland law specifying processes to do so, Maryland has failed to keep voter rolls accurate.

158. Despite mandatory statutory language stating the maximum allowable error rate of voting systems, the voting systems in Maryland are still in use in violation of the statutory scheme.

159. Despite mandatory statutory language stating the technical data package shall/must contain all documentation previously submitted, including the software source code, the Board of Elections did not receive and analyze the source code in violation of the statutory scheme.

160. Despite mandatory statutory language stating the MDSBE shall decertify machines that do not protect the secrecy of the ballot and protect the security of the voting process, the Board of Elections did not decertify the machines in violation of the statutory scheme.

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161. Despite mandatory statutory language stating all persons are entitled to have access to information about the affairs of government, and in particular, access to an audit trail from elections, the MDSBE is denying PIA requests for this information in violation of the statutory scheme.

162. Despite mandatory statutory language stating voters shall have the opportunity to change their ballot or correct any error before the ballot is cast, Maryland voters have been denied this in violation of the statutory scheme.

163. In accordance with 28 U.S.C. § 2201 claims are present between the parties involved which indicate imminent and inevitable litigation.

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court:

A. Determine and adjudicate the rights and liabilities of the parties with respect to Maryland laws and Federal laws in the context of voting systems and public access to voting system logs.

B. Enter a declaratory judgment order against Defendant declaring it did not properly comply with The National Voter Registration Act of 1993: *52 USC § 20501(b)(4)* and Md. Election Law Code Ann. §§ 3-101, 102, 502, 503 and 504 in maintaining accurate voter rolls.

C. Enter a declaratory judgment order against Defendant declaring the voting machines and the voting system being used in Maryland Elections exceed the maximum allowable error rate as set forth in HAVA: *52 USC § 21081.*

D. Enter a declaratory judgment order against Defendant declaring the certification of the ES&S EVS 5.2.0.0 voting system violates COMAR 33.09.03.05.

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E. Enter a declaratory judgment order against Defendant declaring they failed to decertify a voting system that did not protect the secrecy of the ballot and security of the voting process, thus violating Maryland. Code, Elec. Law § 9-103.

F. Enter a declaratory judgment order against Defendant declaring it did not properly comply with Md. Code, Gen. Provisions § 4-103, The Election Law of the Annotated Code of Maryland § 9-102(d), COMAR 33.09.02.07, and COMAR 33.10.01.03. in refusing to produce election-related documents requested through PIA requests.

G. Enter a declaratory judgment order against Defendant declaring the configuration of the voting systems did not comply with *52 USC § 21081(a)(1)(A)(ii)*.

H. Grant such other and further relief as the nature of this cause may require.

COUNT II

Injunction

164. Plaintiffs incorporates by reference and realleges the averments of paragraphs 1 through 163.

165. There is a balancing test that courts typically employ in determining whether to issue an injunction. To seek a permanent injunction, the plaintiff must pass the four-step test: (1) that the plaintiff has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (3) that the remedy in equity is warranted upon consideration of the balance of hardships between the plaintiff and defendant; and (4) that the permanent injunction being sought would not hurt public interest. See, e.g., Weinberger v. Romero—Barcelo, 456 U.S. 305, 311–313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

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166. Plaintiffs, as Maryland voters and interested citizens with standing, have been irreparably injured by the voting systems currently in use in Maryland and the MDSBE. Plaintiffs allege that voter rolls are highly inaccurate, error rates on the voting systems exceed the maximum allowable error rates, voting systems were not certified correctly, machines have been used that have VOID EAC certifications, large numbers of blank ballots were cast, and the MDSBE is unlawfully withholding evidence of such. This has caused abridgement to their right to vote "[a]nd the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" *Reynolds v. Sims*, (377 U.S. 533). The right to vote is paramount "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533 (1964). Inaccurate voter registration practices have led to voting system error rates well above the statutory threshold causing dilution of eligible voter's votes. Use of the ES&S Voting Systems in a noncompliant manner has resulted in dilution of Plaintiff's votes and has resulted in an impaired election process resulting in concrete harm to Plaintiff's rights to vote. Denial of Plaintiff's PIA requests resulted in Plaintiffs not being able to access information in which they are entitled.

167. The remedies available at law are wholly inadequate to compensate Plaintiffs for the injuries to their right to vote in a free and unimpaired manner and their statutory right to access public information.

168. Plaintiffs' harms are to basic rights and the interests are clear whereas Defendant's interest in using the ES&S voting system is simply for ease of use, despite the inaccuracies

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and deficiencies. Defendants have no interest in failing to keep accurate voter rolls. Defendants' interest in not fulfilling PIA requests is unknown. Any abridgment to the right to vote needs to be meticulously scrutinized and this weighs in favor of Plaintiffs.

169. This injunction is necessary for public interest as it would notify millions of Maryland voters their rights are being abridged, and that they will no longer be, thus restoring trust in the voting process. Also, it would definitively give Marylander's access to certain public information, rather than the illusion of having access.

170. The Defendant failed to follow the statutory scheme requiring them to provide accurate and current voter rolls. The Defendant should be mandated to cure and address any discrepancies in the voter rolls; ensure votes counted are from qualified citizen voters; ensure the number of votes counted is equal to the number of voters who voted; adhere to the accuracy requirements for federal elections; and ensure systems, machines, security measures, procedures, infrastructure, policy, and conduct are compliant with the law regarding certification, testing, operational validation, and operational implementation.

171. The error rates of the voting system in place in the 2020 and 2022 General Election greatly exceeded the maximum acceptable error rate. The Defendant should be mandated to decertify the machines used in the 2020 and 2022 General Election in Maryland and enjoined from using them in subsequent elections.

172. The Defendant failed to follow the statutory scheme put in place by the state of Maryland which details the procedure to be followed in certifying voting systems. The nonadherence to the statutory scheme creates grounds for the decertification of the voting system ES&S EVS 5.2.0.0. Defendant should be mandated to decertify the voting system ES&S EVS 5.2.0.0 and enjoined from using it in subsequent elections.

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173. The Defendant failed to follow the statutory scheme requiring them to protect the secrecy and security of an election. The Defendant should be mandated to decertify the voting system ES&S EVS 5.2.0.3 and enjoined from using it in subsequent elections.

174. The Defendant failed to produce requested documents in response to numerous PIA requests. The Defendant should be mandated to produce, including but not limited to, audit logs, system logs, error logs, configuration reports, etc. of voting systems.

175. The Defendant failed to allow voters the opportunity to change their ballot or correct any error before the ballot is cast. The Defendant should be mandated to configure voting machines to notify voters they are casting blank ballots, overvotes, and undervotes instead of automatically accepting them.

176. The Defendant has shown willful and gross negligence in assuring the system of processes, procedures, human conduct and machines are unable to produce reliable, accurate or compliant measurements of voter intent. The Defendant should be mandated to fix the entire voting system to ensure legal compliance and required functionality. Further, the Defendant should implement a system of comprehensive testing, monitoring and auditing by a certified and accredited independent auditor to ensure the repaired system functions as required. If the electoral process cannot be proven to be accurate and compliant, the election shall not be certified, and a special election shall be held within 30 days correcting any deficits in conduct.

177. The Defendant has flaunted the Constitutional requirement to only allow known citizens eligible to vote, to vote. Registrations, mail-in and in person voting must be required to prove identity, eligibility, and citizenship.

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178. Since it is impossible to guarantee that ballots mailed in are not tampered with or lost in transit, the Defendant should be ordered to implement a tracking system first from the printer to the voter, and then from the voter to the tabulator, so that no ballots are lost or tampered with or destroyed. In such cases the voter must be actively notified their ballot is lost and given a chance to submit a new ballot.

179. Since a large number of unexplained blank ballots have been registered, and a larger number of votes were counted than voters that were counted as having voted, the Defendant shall be ordered to implement control mechanisms to insure chain of custody of all ballots is maintained, and forgery protection at least equal to financial security standards with bonds and currency are maintained on ballots and with ballot handling.

180. As demonstrated by irrefutable statistics, the Defendant has lost control of the voting system. The Defendant should be mandated to use comprehensive batch control systems, as in the financial industry with item processing.

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court:

A. Issue an injunction mandating Defendant update and keep accurate the voter rolls in Maryland as well as address the discrepancies previously shown.

B. Issue an injunction enjoining Defendant from administering or certifying any election wherein the voter registration database is not certified to contain only qualified citizen voters, with compliant registration records.

C. Issue an injunction enjoining Defendant from administering or certifying any election where the entire voting system, from the qualified voters' hands to the tabulated count, is not provably secure and compliant.

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D. Issue an injunction enjoining Defendant from administering or certifying any election wherein all system steps and all components thereof are not fully auditable on a transaction/action by action basis.

E. Issue an injunction enjoining Defendant from administering or certifying any election wherein the entire system is not monitored effectively to detect real time variances from legal conduct.

F. Issue an injunction enjoining Defendant from administering or certifying any election wherein the entire system is not open and transparent for auditing by trusted parties outside the control of the state election boards and state executives, from qualified voters' hands to the certified count.

G. Issue an injunction enjoining Defendant from certifying any election wherein the results do not accurately and provably reflect voter intent, individually and collectively, in compliance with the law.

H. Issue an injunction enjoining Defendant from using the voting systems used in the 2020 and 2022 General Elections in future elections in Maryland due to the exceptionally high error rates and mandating the decertification of the system or systems.

I. Issue an injunction enjoining Defendant from using the ES&S EVS 5.2.0.0 voting system in future elections in Maryland and mandating the decertification of the system.

J. Issue an injunction enjoining Defendant from using the ES&S EVS 5.2.0.3 voting system in future elections in Maryland and mandating the decertification of the system.

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K. Issue an injunction mandating Defendant comply with PIA requests for, including but not limited to, audit logs, system logs, error logs, configuration reports, etc. of voting systems.

L. Issue an injunction mandating Defendant to program voting machines to query voters in the case they are attempting to cast a blank ballot, undervote, or overvote instead of automatically accepting such ballots.

M. Establish a Special Master to guide the Maryland State Board of Elections to institute change prior to the November 2024 election and subject to the approval of this court to:

   i. Insure we know who is voting and that each voter is provably a U.S. citizen.

   ii. Insure that the entire system from the Voter's hands to the tabulated count is provably secure including ballots from printer to storage.

   iii. Insure that all system steps and all components thereof are fully auditable on a transaction/action by action basis.

   iv. Implement a monitoring system able to effectively detect real-time variances from legal conduct.

   v. Implement a system that allows end to end insured and certified audits by trusted parties outside the control of the State Election bureaucrats and executives, from the voters' hands to the certified count. such audits to be paid for by the State. Such audits will be done at sufficient scale to prove the intent of the voters was determined accurately and in compliance with the law.

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vi. Prevent elections from being certified that are unable to prove they accurately determine voter intent; individually and collectively, in compliance with the law.

N. Grant such other and further relief as the nature of this cause may require.

Respectfully submitted,

HARTMAN, Attorneys at Law

Date: March 6, 2024

By: */s/ C. Edward Hartman, III*

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AFFIDAVIT

I have personal knowledge of the facts alleged in this Complaint. Based on my personal knowledge I verify that the matters stated in this Complaint are true.

I declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: 3/6/2024

Katherine A Sullivan
Class A Member of Md Election Integrity LLC

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/18/2024 9:51:36 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Nevada lawsuit
Attachments: 1. Complaint.pdf; 1-1. Compl. Ex. A.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Nevada was sued by the RNC, as well.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

REPUBLICAN NATIONAL COMMITTEE, NEVADA REPUBLICAN PARTY, and SCOTT JOHNSTON,

Plaintiffs,

v.

FRANCISCO AGUILAR, *in his official capacity as Nevada Secretary of State*; LORENA PORTILLO, *in her official capacity as the Registrar of Voters for Clark County*; WILLIAM "SCOTT" HOEN, AMY BURGANS, STACI LINDBERG, and JIM HINDLE, *in their official capacities as County Clerks*,

Defendants.

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiffs the Republican National Committee, the Nevada Republican Party, and Scott Johnston bring this action under the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §20507, against Defendants for declaratory and injunctive relief. Plaintiffs allege as follows:

INTRODUCTION

1. Section 8 of the NVRA requires States to maintain clean and accurate voter registration records.

2. Nevada has failed to live up to the NVRA's requirements.

3. At least five counties in Nevada have inordinately high voter registration rates.

4. At least three Nevada counties have more registered voters than they have adult citizens who are over the age of 18. That number of voters is impossibly high.

5. An additional two counties have voter registration rates that exceed 90 percent of adult citizens over the age of 18. That figure far eclipses the national and statewide voter registration rate in recent elections.

6. Based on this and other evidence, Defendants are failing to make a reasonable effort to conduct appropriate list maintenance as required by the NVRA.

JURISDICTION AND VENUE

7. The Court has subject-matter jurisdiction because this case alleges violations of the NVRA. *See* 28 U.S.C. §1331; *Ex parte Young*, 209 U.S. 123 (1908).

8. Venue is proper because a substantial part of the events or omissions giving rise to the claims occurred in this District and because some Defendants "reside" here. 28 U.S.C. §1391.

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PARTIES

9. Plaintiff, the Republican National Committee (RNC), is the national committee of the Republican Party, as defined by 52 U.S.C. §30101(14), with its principal place of business at 310 First Street S.E., Washington, DC 20003.

10. The RNC represents over 30 million registered Republicans in all 50 states, the District of Columbia, and the U.S. territories. It is comprised of 168 voting members representing state Republican Party organizations, including three members who are registered voters in Nevada.

11. The RNC works to elect Republican candidates to state and federal office. In November 2024, its candidates will appear on the ballot in Nevada for numerous federal and state offices.

12. The RNC has vital interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Nevada elections and elsewhere. The RNC brings this suit to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

13. The RNC and its members are concerned that Defendants' failure to comply with the NVRA's voter-list maintenance obligations undermines the integrity of elections by increasing the opportunity for ineligible voters or voters intent on fraud to cast ballots. The RNC thus monitors state and local election officials' compliance with their NVRA list maintenance obligations through publicly available records from jurisdictions across the nation.

14. In addition, the RNC relies on voter registration lists to determine its plans and budgets. The RNC relies on registration lists to estimate voter turnout, which

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informs the number of staff the RNC needs in a given jurisdiction, the number of volunteers needed to contact voters, and how much the RNC will spend on paid voter contacts. If voter registration lists include names of voters who should no longer be on the list, the RNC may spend more resources on mailers, knocking on doors, and otherwise trying to contact voters, or it may misallocate its scarce resources among different jurisdictions.

15. Plaintiff Nevada Republican Party (NVGOP) is a political party in Nevada with its principal place of business at 2810 West Charleston Blvd. #69, Las Vegas, NV 89102. The Nevada Republican Central Committee (NRCC) is the NVGOP's governing body. The NVGOP and NRCC exercise their federal and state constitutional rights of speech, assembly, petition, and association to "provide the statutory leadership of the Nevada Republican Party as directed in the Nevada Revised statutes," to "recruit, develop, and elect representative government at the national, state, and local levels," and to "promote sound, honest, and representative government at the national, state and local levels." NRCC Bylaws, art. II, §§1.A-1.C.

16. The NVGOP represents over 550,000 registered Republican voters in Nevada.

17. The NVGOP has the same interests in this case as the RNC and seeks to vindicate those interests in the same ways.

18. Plaintiff Scott Johnston is a registered Nevada voter and 60-year resident of Nevada. He regularly votes in Nevada's primary and general elections. He plans to vote in Nevada's upcoming elections, including for U.S. President, U.S. Congress, and other federal, local, and statewide offices and ballot measures.

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19. Because Defendants do not maintain accurate voter rolls, Mr. Johnston reasonably fears that ineligible voters can and do vote in Nevada elections. Those votes will dilute his legitimate vote. And Nevada's inaccurate rolls undermine Mr. Johnston's confidence in the integrity of Nevada elections, which also burdens his right to vote.

20. Mr. Johnston is an active member of the Republican Party. He works in Nevada to advance conservative policies and to help elect Republican candidates. He is a member of the Washoe Central Committee, which is the governing body of the Washoe County Republican Party. Mr. Johnston has served as a precinct captain for the Galena Forest Estates area since 2020, and a Nevada State Central Committee person since 2021.

21. Because Defendants do not maintain accurate voter rolls, Plaintiffs must spend more of their time and resources monitoring Nevada elections for fraud and abuse, mobilizing voters to counteract it, educating the public about election-integrity issues, and persuading elected officials to improve list maintenance.

22. Plaintiffs have expended substantial time and resources investigating Defendants' failure to comply with their list-maintenance obligations. They have communicated with Nevada officials and concerned members about Defendants' failures, and they have researched statements made by Defendants in their correspondence.

23. Were it not for Defendants' failure to comply with their list-maintenance obligations, Plaintiffs would have expended those resources on other activities or would not have expended them at all. Instead, they diverted their scarce resources to counteract Defendants' noncompliance and to protect the rights of their members and supporters.

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24. Defendant Francisco Aguilar is the Secretary of State of Nevada. He serves "as the Chief Officer of Elections" for Nevada and "is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in" Nevada. Nev. Rev. Stat. §293.124. He is sued in his official capacity.

25. Defendant Lorena Portillo is the Registrar of Voters for Clark County. She is the county's chief election officer and plays a direct role in list maintenance. *See* Nev. Rev. Stat. §§244.164, 293.530. Defendant Portillo is sued in her official capacity.

26. Defendant William "Scott" Hoen is the Clerk for Carson City. He is the county's chief election officer and plays a direct role in list maintenance. *See* Nev. Rev. Stat. §§293.503, 293.530. Defendant Hoen is sued in his official capacity.

27. Defendant Amy Burgans is the Clerk for Douglas County. She is the county's chief election officer and plays a direct role in list maintenance. *See* Nev. Rev. Stat. §§293.503, 293.530. Defendant Burgans is sued in her official capacity.

28. Defendant Staci Lindberg is the Clerk for Lyon County. She is the county's chief election officer and plays a direct role in list maintenance. *See* Nev. Rev. Stat. §§293.503, 293.530. Defendant Lindberg is sued in her official capacity.

29. Defendant Jim Hindle is the Clerk for Storey County. He is the county's chief election officer and plays a direct role in list maintenance. *See* Nev. Rev. Stat. §§293.503, 293.530. Defendant Hindle is sued in his official capacity.

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BACKGROUND

I. Federal law requires States to maintain accurate voter rolls.

30. Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. §20501(b)(3). Specifically, section 8 was enacted "to ensure that accurate and current voter registration rolls are maintained." *Id.* §20501(b)(4).

31. Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. "Confidence in the integrity of our electoral processes is," in turn, "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

32. Section 8 obligates States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. 52 U.S.C. §20507(a)(4). "[F]ederal law makes this removal mandatory." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018).

33. Each State's program for maintaining voter-registration lists must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. §20507(b)(1).

34. Specifically, section 8 requires States to "remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant or (B) a change in the residence of the registrant" to outside her current voting jurisdiction. 52 U.S.C. §20507(4)(A)-(B).

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35. The Help America Vote Act (HAVA) also mandates that states adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. 52 U.S.C. §21083(a)(2)(A).

36. States must "ensure that voter registration records in the State are accurate and are updated regularly," an obligation that includes a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. §21083(a)(4).

37. HAVA's list-maintenance requirements include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under state law due to a felony conviction. 52 U.S.C. §21083(a)(2)(A)(ii)(I)-(II).

38. According to the bipartisan Carter-Baker Commission, "registration lists lie at the root of most problems encountered in U.S. elections." Comm. on Federal Election Reform, Building Confidence in U.S. Elections 10 (Sept. 2005) (Carter-Baker Report). Inaccurate voter rolls that contain "ineligible, duplicate, fictional, or deceased voters" invite "fraud." *Id.* Although voter fraud is often difficult to detect, "the risk of voter fraud [is] real," and can "affect the outcome of a close election." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). And regardless of whether fraud is detected, "the perception of possible fraud contributes to low confidence in the system." Carter-Baker Report, *supra*, at 18. The Supreme Court agrees. *See Crawford*, 553 U.S. at 193-97.

39. Other courts and experts have likewise recognized that voter fraud is both real and notoriously "difficult to detect and prosecute." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 396 (5th Cir. 2020); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th

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Cir. 2004) ("Voting fraud is a serious problem in U.S. elections … and it is facilitated by absentee voting."); *Veasey v. Perry*, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014) (finding broad "agreement that voter fraud actually takes place in abundance in connection with absentee balloting"); *Tex. Democratic Party*, 961 F.3d at 414 (Ho, J., concurring) ("[C]ourts have repeatedly found that mail-in ballots are particularly susceptible to fraud.").

40. Voter fraud is very real in Nevada. Several recent elections have suffered from voter fraud. *See, e.g.*, Nev. Att'y Gen., *Attorney General Ford Announces Guilty Plea of Las Vegas Man Charged with Voter Fraud* (Nov. 16, 2021), https://perma.cc/WN9D-T9V2; Nev. Att'y Gen., *Attorney General Ford Announces Guilty Plea of Las Vegas Man for Voting Twice in 2016 Election* (Feb. 17, 2021), https://perma.cc/XP2E-EDWE.

41. Maintaining accurate voter rolls is especially important given Nevada's recent transition to universal mail-in voting. Since the passage of Assembly Bill 321 in 2021, all active registered voters in Nevada receive a ballot by mail unless they submit an opt-out form to their respective county clerks. Mailing ballots based on inaccurate registration lists further damages the integrity of Nevada's elections.

42. To help address voter fraud and ensure compliance with federal election law, the NVRA includes a private right of action. It empowers any "person who is aggrieved by a violation" to "provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. §20510(b)(1). "If the violation is not corrected within 90 days after receipt of a notice, … the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief." *Id.* §20510(b)(2).

II. Defendants have specific obligations under the NVRA.

43. Federal and state law make Nevada's Secretary of State primarily responsible for list maintenance.

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44. The NVRA requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. 52 U.S.C. §20509.

45. Nevada law designates the Secretary of State as the State's chief election officer charged with overseeing and maintaining voter registration. *See* Nev. Rev. Stat. §293.124.

46. Ultimate responsibility for coordinating and overseeing all list maintenance activities rests with the Secretary. A chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted." *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008).

47. Indeed, "the NVRA's centralization of responsibility counsels against ... buck passing." *Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014). Courts have rejected the view that, "once the state designates" a local entity to assist with complying with federal law, "her responsibility ends." *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008). "[I]f every state passed legislation delegating" their responsibilities "to local authorities, the fifty states would be completely insulated from any enforcement burdens." *Id.*

III. Defendants have failed to comply with their list-maintenance obligations.

48. Just a decade ago, "24 million voter registrations in the United States—about one in eight—[were] either invalid or significantly inaccurate." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 760 (2018) (citing Pew Center on the States, Election Initiatives Issue Brief (Feb. 2012)). Nevada is no exception, and the evidence underscores the *in*accuracy of Nevada's registration records.

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49. Based on data gathered from the U.S. Census Bureau's 2022 American Community Survey and the most up-to-date count of registered active voters available from the Nevada Secretary of State, three counties have more active registered voters than voting-eligible citizens, and two other counties have suspiciously high rates of active voter registration.

50. Comparing the registered active voter count to the 2022 Census data reveals that these three counties have voter registration rates at or above 100 percent: Douglas (104%), Lyon (105%), and Storey (113%).

51. An additional two counties have voter registration rates of 90 percent or greater: Carson City (92%) and Clark (91%).

52. These voter registration rates are abnormally or, in the case of counties with greater than 100 percent registration, impossibly high.

53. According to the U.S. Census Bureau, only 69.1% of the citizen voting-age population was registered nationwide in the November 2022 election.

54. Similarly, only 72.7% of the citizen voting-age population was registered nationwide in the November 2020 election.

55. The U.S. Census Bureau further reported that Nevada's statewide voter registration rates for the 2022 and 2020 elections were 65.1% and 66.2% of the citizen voting-age population, respectively.

56. Thus, these five counties are significant outliers, touting voter registration rates 18 to 44 percentage points higher than the national figures from 2022 and 2020, and 25 to 48 percentage points above the State figures for the same period. Discrepancies on this scale cannot be attributed to above-average voter participation and instead point to deficient list maintenance.

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57. There is no evidence that these counties experienced above-average voter participation compared to the rest of the country or State. The only explanation for these discrepancies is substandard list maintenance.

58. "[S]ignificantly high registration rates" such as these "give rise to the inference" that election officials are "not properly implementing a program to maintain an accurate and current voter registration roll, in violation of the NVRA." *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 791 (W.D. Tex. 2015).

59. Nevada's maintenance efforts are especially deficient when it comes to removing voters who have changed residence. *See* 52 U.S.C. §20507(d)(1).

60. In 2023, the U.S. Election Assistance Commission published its biannual report covering the registration period between the 2020 and 2022 general elections. *See* U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2022 Comprehensive Report* (June 2023), https://perma.cc/28SQ-T24L.

61. Among other things, the EAC's survey requests data concerning the number of registrations removed for voters' failure to respond to an address confirmation notice.

62. The most recent census data shows that more than 15% of Nevada's residents were not living in the same house as a year ago.

63. In response to the EAC's survey for the 2020-2022 period, Mineral County and Esmeralda County reported removing less than 2% of their registration lists for residency changes during that period. That is, registrations removed because the voter moved away or failed to respond to an address confirmation notice represented just 2% of the total number of registrants in those counties. And those removals are spread out over a two-year period, which means that these counties removed on average less than

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1% of their registration lists per year for residency changes. Larger counties such as Washoe experienced high relocation rates (16%) but relatively low removal rates (2%).

64. In fact, Esmeralda, Lincoln, Mineral, and Storey Counties removed *no voters* for failing to respond to an address-confirmation notice and then not vote over two election cycles, and Elko and Pershing Counties removed only two voters for that reason. Those numbers are implausibly low.

65. In addition, several Nevada counties have inordinately high inactive registration rates, indicating that Defendants do not make a reasonable effort to remove outdated registrations.

66. The EAC report indicates that in 2022 Nevada reported 359,403 inactive registrations, representing 16.3% of the total registrations. The number is well above the national average of 11.1%.

67. Over 5,000 inactive registrations currently on the rolls were listed as inactive in the June 10, 2019 voter file, which means they should have been removed after the 2022 election.

68. In addition, several Nevada counties currently have inactive registration rates of 17% or greater, well above the state and national averages. Those counties are Elko (31%), Eureka (23%), Humboldt (26%), Lincoln (25%), Mineral (30%), Nye (31%), Washoe (17%), and White Pine (23%).

69. Having a high percentage of inactive registrations is an indication that a state or jurisdiction is not removing inactive registrations after two general federal elections.

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70. Nevada's impossibly high registration rates, large rates of inactive registered voters, low numbers of removals, and inconsistent enforcement across counties indicate an ongoing, systemic problem with its voter-list maintenance efforts.

71. Defendants' failure to maintain accurate voter rolls violates federal law and jeopardizes the integrity of the State's upcoming elections.

72. Similarly bloated voter rolls in other States have led to litigation that exposes these NVRA violations.

73. For example, the United States sued Indiana for violating the NVRA in 2006, noting in its complaint that "25 counties had registration totals of 90-95%" of their voting-age population. Indiana quickly confessed to violating the NVRA in a consent decree.

74. Private organizations sued Indiana in 2012, explaining that "26 counties … have voter registration rolls that contain between 90% and 100% of TVAP." The court denied the defendants' motion to dismiss, and Indiana agreed to conduct a significant, statewide process to clean up its voter rolls.

75. Ohio was sued on the same grounds, and it ultimately agreed to implement heightened review of the accuracy of its voter rolls.

76. In December 2019, another organization sued Detroit under the NVRA, alleging that "Detroit has more registered voters than adult citizens of voting age (106%)." The suit was dismissed on June 29, 2020, because Detroit removed substantial numbers of invalid registrations.

77. In June 2020, a voter sued Michigan's Secretary of State and Direct of Elections for violating the NVRA. The complaint alleged that one county had more registered voters than adult citizens over the age of 18, and an additional 15 counties

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had voter registration rates that exceeded 90 percent of adult citizens over the age of 18. The court denied the defendants' motion to dismiss, and Michigan agreed to slate 177,000 erroneous registrations for cancellation and implement other list-maintenance reforms.

78. In September 2021, voters sued North Carolina, alleging that "40 counties in North Carolina have registration rates that far eclipse the national and statewide voter-registration rate in recent elections." The district court denied the defendants' motion to dismiss, and the case is now in discovery.

IV. Plaintiffs provided Defendants notice of their statutory violations.

79. Under the NVRA, "Plaintiffs have [statutory] standing assuming they provided proper notice within the meaning of 52 U.S.C. §20510(b)(1)." *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1362 (S.D. Fla. 2016).

80. On December 4, 2023, Plaintiffs mailed a statutory notice letter to Secretary of State Francisco Aguilar, notifying him of these NVRA violations and formally requesting that he correct the violations within 90 days. *See* Exh. A.

81. Plaintiffs have since received updated comparisons based on recently available data. Those numbers are reflected in the allegations above.

82. The notice stated that Plaintiffs "hope[d] to avoid litigation and would welcome immediate efforts by your office to bring Nevada into compliance with Section 8."

83. Plaintiffs asked that Defendants ensure they have a "comprehensive, nondiscriminatory" list maintenance program in place that complies with federal law, and to "identify and remove" several categories of ineligible individuals "from the official lists of eligible voters."

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84. Plaintiffs also asked that Defendants "respond in writing within 45 days of the date of this letter," "fully describ[ing] the efforts, policies, and programs [they] are taking, or plan to undertake before the 2024 general election to bring Nevada into compliance with Section 8," as well as when they "plan to begin and complete each specified measure and the results of any programs or activities [they] have already undertaken."

85. Additionally, Plaintiffs asked Defendants to state "what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities," and "a description of the specific steps [Defendants] intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election."

86. Finally, Plaintiffs requested that Defendants take steps to preserve documents as required by section 8(i) of the NVRA, 52 U.S.C. §20507(i)(1)-(2), and other federal law. *See, e.g.*, *In re Enron Corp. Sec., Derivative & Erisa Litig.*, 762 F. Supp. 2d 942, 963 (S.D. Tex. 2010) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.").

87. The notice letter stated that Plaintiffs would file a lawsuit under 52 U.S.C. §20510(b)(2) if the identified violations were not corrected within 90 days of receipt of the letter.

88. Defendants have failed to correct the violations of the NVRA identified in the notice letter and this complaint.

89. Plaintiff Scott Johnston and all individual members of the RNC and NVGOP who are lawfully registered to vote in Nevada have rights under both the U.S.

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Constitution and the Nevada Constitution to vote in federal and state elections, as well as statutory rights under both federal and state law to the safeguards and protections set forth in the NVRA.

90. Defendants' failure to comply with their NVRA voter-list maintenance obligations burdens the right to vote of Mr. Johnston and the individual members of the RNC and NVGOP who are lawfully registered to vote in Nevada by undermining their confidence in the integrity of the electoral process, discouraging their participation in the democratic process, and instilling in them the fear that their legitimate votes will be nullified or diluted by unlawful votes.

91. Defendants' failure to satisfy their list-maintenance obligations also infringes the federal and state statutory rights of Mr. Johnston and the individual members of the RNC and NVGOP who are lawfully registered to vote in Nevada. These individuals have a statutory right to vote in elections for federal office that comply with the procedures and protections required by the NVRA.

92. Defendants' NVRA violations have also caused economic, financial, and political injury to the Plaintiffs. Defendants' inaccurate voter rolls have forced Plaintiffs to allocate additional resources and misallocate their scarce resources in ways they otherwise would not have.

COUNT
Violation of the NVRA

93. Plaintiffs incorporate all their prior allegations.

94. Defendants have failed to make reasonable efforts to conduct voter-list maintenance as required by 52 U.S.C. §20507(a)(4).

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95. Plaintiffs have suffered irreparable injuries as a direct result of Defendants' violation of section 8 of the NVRA.

96. Plaintiffs will continue to be injured by Defendants' violations of the NVRA until Defendants are enjoined from violating the law.

97. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs ask this Court to enter judgment in their favor and provide the following relief:

A. A declaratory judgment that Defendants are in violation of section 8 of the NVRA;

B. A permanent injunction barring Defendants from violating section 8 of the NVRA;

C. An order instructing Defendants to develop and implement reasonable and effective registration list-maintenance programs to cure their failure to comply with section 8 of the NVRA and to ensure that ineligible registrants are not on the voter rolls;

D. Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees; and

E. All other further relief that Plaintiffs may be entitled to.

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Dated: March 18, 2024

Respectfully submitted,

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EXHIBIT A

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December 4, 2023

Francisco V. Aguilar
Nevada Secretary of State
101 N Carson Street, Suite 3
Carson City, NV 89701

Dear Secretary Aguilar:

As you are aware, the National Voter Registration Act (NVRA) requires States to maintain an accurate and current voter registration roll for elections for federal office. Based on our analysis, Nevada is in violation of Section 8 of the NVRA. By comparing publicly available voter registration records with the U.S. Census Bureau's 2021 citizen voting age population data, we have determined that three counties have more registered active voters than adult citizens over the age of 18. We have identified five other counties that have voter registration rates that exceed 90 percent of adult citizens over the age of 18, a figure that far eclipses the voter registration rate nationwide in recent elections. This evidence shows that your office and officials in these counties are not conducting appropriate list maintenance to ensure that the voter registration roll is accurate and current, as required by federal law.

Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. §20501(b)(3). Specifically, it enacted Section 8 "to ensure that accurate and current voter registration rolls are maintained." *Id.* §20501(b)(4). Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. After all, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Section 8 of the NVRA obligates States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. 52 U.S.C. §20507(a)(4). And as the U.S. Supreme Court has recently confirmed, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

This letter provides statutory notice that the Republican National Committee, Nevada Republican Party, and Scott Johnston, acting as political parties and a registered Nevada voter with substantial interests in secure elections, will bring a lawsuit against you and, if appropriate, against the counties named in this letter, if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law. *See Green v. Bell*, No. 321-cv-00493, 2023 WL 2572210, at *3 (W.D.N.C. Mar. 20, 2023). Furthermore, while we hope to avoid litigation, we still formally request that the Nevada Secretary of State and the eight counties named in this letter (if they maintain separate records) act to preserve documents as required by Section 8(i) of the NVRA. 52 U.S.C. §20507(i)(1)-(2).

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As the Secretary of State, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. *Id.* §20509. Nevada law designates the Secretary of State as the State's chief election officer charged with overseeing and maintaining voter registration. *See* Nev. Rev. Stat. §293.675. This letter explains how we concluded that Nevada and the eight named counties are violating Section 8 of the NVRA, and the curative steps needed to avoid litigation.

I. The NVRA protects election integrity by requiring States to make reasonable efforts to maintain accurate and current lists of registered active voters.

Nevada's voter registration list maintenance program must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. §20507(b)(1). Section 8 requires that States "remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant" to outside of his or her current voting jurisdiction. *Id.* §20507(4)(A)-(B).

Additionally, the Help America Vote Act (HAVA) mandates that States adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. *Id.* §21083(a)(2)(A). States must "ensure that voter registration records in the State are accurate and are updated regularly," a process which must include making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* §21083(a)(4). HAVA's list maintenance mandates include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under State law due to felony conviction. *Id.* §21083(a)(2)(A)(ii)(I)-(II).

As the chief election official for Nevada, the responsibility rests with you to coordinate and oversee the list maintenance activities of local and county election officials. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) ("[T]he NVRA's centralization of responsibility counsels against … buck passing."); *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (explaining that a State or chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted"); *see also, e.g.*, Nev. Rev. Stat. §293.675 (setting forth requirements for the Secretary of State to conduct regular voting list maintenance activities).

II. Three Nevada counties have more registered active voters than voting-eligible citizens, and five others have suspiciously high rates of voter registration.

Based on data gathered from the U.S. Census Bureau's 2021 citizen voting age population data and the most up-to-date count of registered active voters available from the Nevada Secretary of State, Nevada is failing to meet its list maintenance obligations. Comparing the registered active voter count to the 2021 Census data reveals that these

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three counties have greater than 100 percent voter registration: Douglas (105%), Lyon (106%), and Storey (114%).

In other words, there are more registered voters than eligible voters. This impossible statistic shows that voter registration records are not being maintained. Meanwhile, five other counties across the State have voter registration rates of 90 percent or greater: Carson City (92%), Churchill (90%), Clark (92%), Eureka (91%), and Washoe (92%).

These voter registration rates are abnormally or, in the case of counties with greater than 100 percent registration, impossibly high. This constitutes strong evidence that Nevada's voter rolls are not being properly maintained. According to the U.S. Census Bureau, only 69.1% of the citizen voting-age population was registered nationwide in the November 2022 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, for States: November 2022*, perma.cc/XQ3R-E4FT. Similarly, only 72.7% of the citizen voting-age population was registered nationwide in the November 2020 election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2020, Table 4a, Reported Voting and Registration, for States: November 2020*, perma.cc/7BUT-ZLDA. The U.S. Census Bureau further reported that Nevada's statewide voter registration rates for the 2022 and 2020 elections were 65.1% and 66.2% of the citizen voting-age population, respectively. *Id.* Thus, these eight counties are significant outliers, touting voter registration rates 17 to 45 percentage points higher than the national figures from 2022 and 2020, and 23 to 49 percentage points above the State figures for the same period. Discrepancies on this scale cannot be attributed to above-average voter participation and instead point to deficient list maintenance.

Nevada's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2024 federal election, and signals to voters that elections in Nevada are not being properly safeguarded.

III. Avoiding litigation

The NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. §20510(b)(1)-(2); *see Green*, 2023 WL at *1-*7. If the violations we have identified are not corrected within 90 days of receipt of this letter, we will have to file a lawsuit. *See* 52 U.S.C. §20510(b)(2).

We hope to avoid litigation and would welcome immediate efforts by your office to bring Nevada into compliance with Section 8. We ask that you evaluate your current list maintenance procedures and protocols to identify the cause of the compliance failures discussed in this letter. We also ask that you modify your current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law. Your list maintenance program must identify and remove these categories of individuals from the official lists of eligible voters:

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1. All persons who are ineligible to vote by reason of a change in residence;
2. Deceased individuals;
3. Persons who are incarcerated;
4. All other ineligible voters.

We also ask that you, and should they want to respond separately, each named county, respond in writing within 45 days of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake before the 2024 general election to bring Nevada into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, state, and local entities outlined below. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election. To avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus require legal action, you should know that the NVRA authorizes courts to award "reasonable attorney fees, including litigation expenses, and costs" to the prevailing party. 52 U.S.C. §20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

IV. Preservation of records

We also ask that you act to preserve certain records as required under the NVRA, should they be needed in the future or for possible litigation. 52 U.S.C. §20507(i). These documents and records include, but are not limited to:

1. A copy of the most recent voter registration database for the State of Nevada and for each named county, including pertinent information on each voter (name, date of birth, home address, voter activity, and active or inactive status);
2. Internal communications and emails of the Nevada Secretary of State's office, applicable county boards of elections, and any divisions, bureaus, offices, third party agents, and contractors relating to voter list maintenance;
3. All emails or other communications between the Nevada Secretary of State and county elections officials concerning their list maintenance activities, their duties to maintain accurate and current lists, and any consequences arising from a failure to do so;
4. All email or other communications between the Nevada Secretary of State and any State or federal offices and agencies, in which the Nevada Secretary of State seeks or obtains information about registered voters who have moved, been convicted and imprisoned, died, or are otherwise ineligible, for use in list maintenance activities; and

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5. All email or other communications between the Nevada Secretary of State and any other State, as well as email and communications with the Electronic Registration Information Center, the American Association of Motor Vehicle Authorities, and the National Association for Public Health Statistics and Information Systems, regarding obtaining information about voters who are deceased or who have moved for use in list maintenance activities.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of Nevada's voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if Nevada fails to take the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

We look forward to your response.

Sincerely,

/s/ Thomas R. McCarthy

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/22/2024 8:32:24 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Curling litigation guidance
Attachments: MDAG - Curling v. Raffensperger.docx

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Heather,

Here's the memo on the Curling v. Raffensperger litigation that I mentioned earlier today. Have a great weekend.

Jonathan L. Williams | **Senior Counsel**
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/27/2024 11:17:19 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
CC: Robert Cotter [Robert@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: CA bar court recommends disbarring Eastman
Attachments: SBC-23-O-30029_-_Decision_-_Trial.pdf

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He can appeal but will not be able to practice during the appeal. Will review decision (attached) for references to Michigan tomorrow. Please let Mike know. Thank you.

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FILED
3/27/2024
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

Public Matter

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case No. SBC-23-O-30029-YDR
	)	
JOHN CHARLES EASTMAN,	)	DECISION AND ORDER OF
	)	INVOLUNTARY INACTIVE
State Bar No. 193726.	)	ENROLLMENT
	)	

Introduction

In this contested disciplinary proceeding, the Office of Chief Trial Counsel of the State Bar of California (OCTC) charged John Charles Eastman (Eastman) with 11 counts of misconduct arising from certain activities surrounding his representation of former president Donald J. Trump and the 2020 presidential election. Eastman is charged with one count of failing to support the Constitution and laws of the United States (Bus. & Prof. Code § 6068, subd. (a));[1] two counts of seeking to mislead a court (§ 6068, subd. (d)); six counts of moral turpitude by making various misrepresentations (§ 6106); and two additional counts of moral turpitude (§ 6106).

After full consideration of the record, the court finds that OCTC has satisfied its burden of proving all charges except for count eleven, which the court dismisses with prejudice.[2] In

[1] All further statutory references are to the Business and Professions Code, unless otherwise indicated.

[2] OCTC has the burden of proving the charges by clear and convincing evidence. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the

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view of the circumstances surrounding Eastman's misconduct and balancing the aggravation and mitigation, the court recommends that Eastman be disbarred.

Significant Procedural History

On January 26, 2023, OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Eastman filed a response to the NDC on February 15. Thereafter, the court held an initial status conference wherein the court set trial to commence on May 10.

On March 30, 2023, OCTC filed its motion in limine No. 1, to exclude the testimony of two witnesses. The court granted the motion on May 23.[3]

On April 12, 2023, the court granted the parties' joint motion to continue trial; continuing the trial to June 20.

Thereafter, the court made numerous rulings regarding various motions in limine, requests for judicial notice, and abatement of the proceedings, including: a June 16, 2023 ruling on motion in limine No. 2;[4] a June 16 ruling on motion in limine No. 3;[5] a June 16 ruling on

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unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.) This "standard of proof . . . which requires proof making the existence of a fact highly probable—falls between the 'more likely than not' standard commonly referred to as a preponderance of the evidence and the more rigorous standard of proof beyond a reasonable doubt." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995.)

[3] The court precluded Eastman from offering the testimony of the Honorable Janice Rogers Brown and Rebecca Roiphe regarding: (1) whether OCTC is entering "unchartered territory" in charging Eastman with ethical violations under the facts and circumstances presented in this case; and (2) whether Eastman's statements are constitutionally protected or if he may be disciplined for such statements.

[4] Eastman was precluded from offering expert testimony from Joseph Fried regarding whether it was proper to certify the 2020 election based on the professional standards for certified audits in certain states.

[5] Eastman was permitted to offer the expert testimony of Stanley Young.

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motion in limine No. 4;[6] a June 20 ruling on motion in limine No. 5;[7] a June 21 ruling on request for judicial notice; an August 16 ruling on motion in limine No. 6;[8] an August 23 ruling on motion in limine No. 7;[9] and an August 25 ruling on Eastman's motion to abate the disciplinary proceeding.[10]

The parties filed a stipulation to undisputed facts on June 12, 2023. A 34-day, in-person trial commenced on June 20.[11] OCTC was represented by Supervising Attorney Duncan Carling, Deputy Trial Counsel Samuel Beckerman, and Deputy Trial Counsel Christina Wang. Eastman

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[6] Eastman was precluded from offering expert testimony from John Valentine regarding his findings about voter registration anomalies he found while searching the voter rolls for numerous states and whether there was voter fraud in the 2020 election.

[7] Eastman was precluded from offering expert testimony from John Yoo regarding "whether it would be frivolous to assert that Vice President Pence had the authority to unilaterally adjourn the Joint Session of Congress" and "that [Eastman]'s argument that Pence could refuse to count certain electoral votes was non-frivolous."

[8] Eastman was precluded from offering the testimony of William M. Briggs, Anthony Cox, Jr., Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O'Donnell, and Wendy Rogers. Joseph Fried and Bruce Patrick Colbeck were permitted to testify as percipient witnesses—excluding any expert opinion testimony. Kurt Olsen was permitted to testify as a percipient witness as specified on page 64 of the June 5, 2023 joint pretrial statement regarding his involvement with the *Texas v. Pennsylvania case*—excluding any expert opinion testimony. The court clarified its ruling on October 2. In a later October 12 order, the court precluded Joseph Fried's testimony as a percipient witness.

[9] OCTC was not precluded from offering evidence that Eastman conspired to create alternative slates of electors to those that certified the 2020 presidential election.

[10] Eastman sought to abate the case based on the August 1, 2023, federal indictment of former president Donald J. Trump for conspiracy to defraud the United States and other crimes. Eastman maintained that abatement is necessary because although currently unnamed, the potential exists that he may be charged as a co-conspirator and indicted in the criminal case against former president Trump. Eastman argued that abatement was necessary to protect his Fifth Amendment rights against self-incrimination. Subsequently, Eastman was indicted in Fulton County, Georgia on August 14. The court denied the abatement motion, finding that Eastman was aware of his possible criminal exposure and his right to plead the Fifth Amendment before he testified during the disciplinary proceeding, he waived his Fifth Amendment rights, and the factors outlined in rule 5.50 of the Rules of Procedure of the State Bar did not weigh in Eastman's favor.

[11] Trial took place on June 20 – 23; June 29 – 30; August 24 – 25; September 5 – 8; September 12 – 15; September 26 – 29; October 3 – 6; October 17 – 20; October 23 – 24; October 30; November 2 – 3; November 8; and November 13.

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was represented by Randall A. Miller, Zachary Mayer, and Jeanette Chu of Miller Law Associates, APC.

On October 3, 2023, Eastman filed a request for judicial notice that was granted, in part, and denied, in part, on October 23. Both parties filed closing argument briefs on December 1 and the case was submitted for decision on the same date.

Thereafter, on December 26, 2023, OCTC filed a notice of errata seeking to correct an error in its closing brief. On December 28, Eastman filed a response to OCTC's notice of errata. As a result, on February 15, 2024, the court issued an order accepting for consideration OCTC's notice of errata and Eastman's response, vacating the December 1, 2023 submission for decision and taking the matter under submission for decision, nunc pro tunc, as of December 28.

Jurisdiction

Eastman was admitted to the practice of law in California on December 15, 1997, and has been a licensed attorney of the State Bar of California at all times since that date.

Findings of Fact[12]

The NDC alleges misconduct surrounding Eastman's involvement in the efforts to reject, delay and/or obstruct the electoral vote after the 2020 presidential election. Despite the depth, breadth, and complexity of the case law and historical context cited by the parties, this

[12] The following findings of fact are based on the parties' stipulation to undisputed facts and the testimonial and documentary evidence admitted at trial.

Pursuant to the Rules of Procedure of the State Bar, "[a]ny relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Rules Proc. of State Bar, rule 5.104(C).) It follows that even hearsay evidence must be admitted so long as it is relevant and reliable. However, it may only be "used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Rules Proc. of State Bar, rule 5.104(D).)

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disciplinary proceeding boils down to an analysis of whether or not Eastman, in his role as the attorney for then-President Donald Trump (hereinafter referred to as President Trump) and his re-election campaign, acted dishonestly in his comments and advice given regarding the issue of whether then-Vice President Mike Pence (hereinafter referred to as Vice President Pence) had authority to unilaterally reject certain states' slate of electors and/or delay or recess the electoral count during the Joint Session of Congress on January 6, 2021, and the manner in which he pursued legal action aimed at obstructing the lawful electoral process.

Pertinent Background re Election Law and the Electoral Process[13]

Several provisions of the United States Constitution (Article II and the Twelfth Amendment), along with certain statutory provisions (including the Electoral Count Act), govern the election of the President of the United States, which involves numerous steps before, during, and after Election Day.

After Election Day, as determined by popular vote for a presidential candidate, electors are appointed by the States. As stated in the United States Constitution: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." (U.S. Const. art. II, §1, cl. 2.)

[13] In the context of this disciplinary proceeding, the court only addresses some of the most significant constitutional issues relevant to the 2020 presidential election and the charges alleged against Eastman. The court does not set forth a detailed constitutional analysis of election law or election law-related issues.

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The Electoral Count Act (ECA), which was enacted in 1887 and until 2022, had only minor revisions, further details the electoral process.[14] Section 7 of the ECA requires State electors to meet "the first Monday after the second Wednesday in December" to vote for the President and Vice President as determined by State law. (3 U.S.C. §7.) Furthermore, as set forth in Section 6, it is the duty of the Governor of each State, as the "executive of each State", to provide as soon as practicable after ascertainment, the final certificate of ascertainment of the electoral votes to the Archivist of the United States and the President of the Senate, among others. (3 U.S.C. § 6.)

Section 15 of the ECA, addresses the Joint Session of Congress, including the manner in which, on January 6, each state's governor-certified electoral votes contained in the certificate of ascertainment will be counted and how objections shall be resolved:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; ***and the votes having been ascertained and counted according to the rules in this subchapter*** provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcements shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States…[If objections are raised as to any vote from a State], the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of

[14] See Consolidated Appropriations Act of 2023, Pub. L. No. 117-328 (December 29, 2022) 136 Stat. 4459, 5233-5241. Here, the court addresses the ECA as it existed at the time of Eastman's alleged misconduct.

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> Representatives for its decision; and ***no electoral vote or votes from any State which shall have been regularly given***[15] ***by electors whose appointment has been lawfully certified*** to according to section 6 of this title from which but one return has been received ***shall be rejected***, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. ***If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed***…."

(3 U.S.C. § 15, italics and emphasis added.)

Section 15 of the ECA further details the procedures to be followed by each chamber in connection with its individual and joint consideration of objections to a State's votes and, the procedure to be followed if the two Houses disagree: "if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." (3 U.S.C. § 15.) Significantly, section 15 of the ECA provides "[n]o votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of." (*Id.*)

Section 15 of the ECA is replete with references to electoral votes that must be "certified" and "ascertained" and clearly reflects that when electoral slates are disputed, those electoral votes contained within a certificate of ascertainment executed by the governor of a State, are to be prioritized in the counting and tabulating of votes for President of the United

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[15] Eastman contends that the contested states' votes were not "regularly given" due to illegalities that resulted in the appointment of former Vice President Biden electors and under the ECA, that could include electoral votes certified after an election that was conducted in violation of state electoral law. (R.T. Vol. XI, pp.123-125.) However, as Congressional Record 52 reflects, in 1886, Representative Adams explained that "[r]egularly given" referred to actions of the elector, not the way in which the elector was appointed. (Exh. 34, p. 7.)

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States. So, whether they are called alternate, contingent, or "dual" slates, those slates of electors that are not certified by the governor of the State they purport to represent, are constitutionally invalid and they are not to be counted when a State has final a slate certified by its governor.

Finally, as relevant here, the ECA specifically provided that either chamber could call a recess during the January 6 joint meeting of Congress but does not provide that the President of the Senate could "direct a recess." (3 U.S.C. §16.) Between 1789 and 2016, Congress initiated or controlled every recess or adjournment of an electoral count. (Exh. 179, p. 84.) Section 16 of the ECA also imposed restrictions on the period of each chamber's recess, limiting each House of Congress from recessing "beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock," but "if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House."[16] (*Ibid.*) It also unequivocally stated that the "joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared." (*Ibid.*)

Importantly, the Twelfth Amendment contains the following language: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." (U.S. Const., 12th Amend.)[17]

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[16] Limits were also imposed on the period of time to debate objections while each House of Congress was meeting in separate sessions; "each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate." (3 U.S.C. §17.)

[17] The Twelfth Amendment, ratified in 1804, required that electors cast two sets of votes for President and Vice President, and changed the requirement previously set forth in Article II, section 1, clause 3, that allowed the candidate with the second most number of electoral votes to assume the role of Vice President, sometimes resulting in a President and Vice President who represented opposing parties. (See exh. 179, p. 11.)

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Eastman's Relationship with President Trump and Trump's Re-Election Campaign

On September 3, 2020, Eastman was invited to join an Election Integrity Working Group, formed in anticipation of post-election litigation, in connection with the upcoming November 3 presidential election, and organized at President Trump's request. Eastman began his representation of President Trump, as a presidential candidate, and his campaign at or around that time.

On December 6, 2020, Eastman received a formal engagement letter for legal services, dated December 5, from President Trump's 2020 presidential re-election campaign committee (Trump's Campaign). The engagement letter was between Eastman and President Trump, in his capacity as a presidential candidate, and Trump's campaign. It defined the scope of the legal representation as follows: "[Eastman] agrees to represent [President Trump and Trump's Campaign], as its interests may appear, in connection with the 2020 presidential general election, including potential litigation matters and matters related to the Electoral College." (Exh. 1, p. 1.)

Eastman's Involvement in *Texas v. Pennsylvania* (filed December 7, 2020)

Subsequent to the 2020 presidential election, but prior to the deadline for the certification of the states' electors, Eastman participated in various election challenges which disputed the results of the 2020 presidential election, including a lawsuit filed by the State of Texas.

Texas v. Pennsylvania

On December 7, 2020, the State of Texas filed, in the United States Supreme Court, a motion for leave (Motion for Leave) to file a bill of complaint (Bill of Complaint) against defendant states Georgia, Michigan, Wisconsin and the Commonwealth of Pennsylvania (*Texas v. Pennsylvania*). Texas sought expedited consideration of its Motion for Leave on the grounds that "[a]bsent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on

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January 6, tainting the election and the future of free elections." (Exh. 260, p. 96.) In its brief in support of the Motion for Leave, Texas asserted that the central question revolved around whether Georgia, Michigan, Wisconsin, and Pennsylvania (the Defendant States) violated the Electors Clause of the U.S. Constitution[18] by implementing non-legislative actions to alter their state election rules governing the appointment of 2020 presidential electors. (*Id.* at p. 60.)

Texas argued that the Defendant States used the COVID-19 pandemic as a ruse or justification to "[usurp] their legislatures' authority and unconstitutionally [revise] their state's election statutes" by "executive fiat or friendly lawsuits thereby weakening ballot integrity" while "flood[ing] the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little or no chain of custody and, at the same time, weaken[ing] the strongest security measures protecting the integrity of the vote—signature verification and witness requirements." (*Id.* at pp. 8-9, footnote omitted.) Texas contended that there were significant grounds to question the legitimacy of the election outcomes in the Defendant States and urged the United States Supreme Court to extend the December 14, 2020 deadline for certification of presidential electors in those states to allow for thorough investigations to take place. Texas further argued that its citizens "have the right to demand that all other States abide by the constitutionally set rules in appointing presidential electors to the electoral college" (*id.*at p. 69) because "[i]f Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by [Texas]'s electors, that operates to defeat [Texas]'s interests," (*id.* at p. 71)[19] the State of Texas and the citizens of Texas would suffer injury from the Defendant States' alleged unconstitutional non-legislative actions.

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[18] See United States Constitution, Article II, Section 1, Clause 2, discussed *supra*.

[19] For example, Texas argued that "[u]nlike Defendant States, [Texas] neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means." (*Id.* at p. 71, fn. 5.)

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Factual Allegations in Support of Texas's Motion for Leave and Bill of Complaint

Texas's Bill of Complaint contained 127 paragraphs of factual allegations. The Motion for Leave and Bill of Complaint contained the following generalized allegations which are relevant in this disciplinary proceeding:

- "Rampant lawlessness arising out of Defendant States' unconstitutional acts" and irregularities in the electoral process that "[t]aken together, these flaws affect an outcome-determinative numbers (sic) of popular votes in a group of States that cast outcome-determinative numbers of electoral votes." (Exh. 260, pp. 4, 11.)

- "The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (i.e., 1 in $1,000,000,000,000,000^4$). [Citation]." (*Id.* at pp. 13-14.)

- "The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in $1,000,000,000,000,000^5$. [Citation.]" (*Id.* at p. 14.)

- "Put simply, there is substantial reason to doubt the voting results in the Defendant States." (*Id.*)

- "The number of absentee and mail-in ballots that have been handled unconstitutionally in Defendant States greatly exceeds the difference between the vote totals of the two candidates for President of the United States in each Defendant State." (*Id.* at p. 15.)

Texas's Claims of Outcome-Determinative Fraud

Texas alleged "rampant lawlessness arising out of Defendant States' unconstitutional acts" described in unidentified, pending lawsuits filed in Defendant States, which included: "the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at

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tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter [footnote omitted]"; "[v]ideos of: poll workers erupting in cheers as poll challengers are removed from vote counting centers . . . [and] suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave"; and "a laptop and several USB drives, used to program Pennsylvania's Dominion voting machines, were mysteriously stolen from a warehouse in Philadelphia." (Exh. 260, pp. 11-12.) Texas did not offer any support for the factual claims of widespread lawlessness and failed to elucidate how the alleged unconstitutional actions of any Defendant State were connected to the alleged rampant lawlessness it identified.

According to Texas, Defendant States expanded absentee and mail-in voting opportunities for their voters and by so doing, "created a *massive opportunity* for fraud." (*Id.* at p. 20, italics added.) Citing to the Pew Research Center, Texas acknowledged that "in the 2020 general election, a record number of votes—about 65 million—were cast via mail compared to 33.5 million mail-in ballots cast in the 2016 general election—an increase of more than 94 percent." (*Id.* at p. 19.) Texas attributed that large increase in the number of mail-in ballots to the "public-health response to the COVID-19 pandemic [as well as] the urging of mail-in voting's proponents, and most especially executive branch officials in Defendant States." (*Ibid.*) Again, without support, Texas stated that "[s]ignificantly, in Defendant States, Democrat voters voted by mail at two to three times the rate of Republicans", which "unconstitutional usurpation of legislative authority, and the weakening of legislative mandated ballot security measures" greatly benefited former Vice President Biden. (*Id.* at p. 20.)

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Texas tiptoed around the issue of fraud. Although it alleged actions in Defendant States that resembled fraud,[20] it left the door open, arguing: "While investigations into allegations of unlawful votes being counted and fraud continue, *even the appearance of fraud in a close election* would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, *even if no election fraud had resulted*." (*Id* at p. 90, italics added.)

Texas's Claims Specific to Philadelphia and Allegheny Counties

In its Bill of Complaint, Texas included factual claims asserting that election officials at both state and local levels in Philadelphia and Allegheny counties—aiming to benefit former Vice President Biden in the 2020 election—allegedly violated Pennsylvania's election code by failing to adhere to Pennsylvania Statutes, title 25, section 3146.8, subdivision (b).[21] Texas asserted that Pennsylvania, by adhering to the guidance issued by Pennsylvania Secretary of the Commonwealth Kathy Boockvar on September 11, 2020,[22] neglected the signature verification requirements outlined in its election code.

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[20] E.g., according to Ethan J. Pease, who subcontracted with the United States Postal Service (USPS) to deliver mail-in ballots to the Madison, Wisconsin sorting center, employees in Wisconsin were allegedly backdating ballots received after November 3, 2020, as well as reporting that there were 100,000 missing ballots, which Texas stated would far exceed former Vice President Biden's margin of 20,565 votes over President Trump. (Exh. 260, pp. 42-43.)

[21] 25 P.A. § 3146.8, subd. (b) provides: "Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded."

[22] Secretary Boockvar advised the county board of elections that it was responsible for approving ballots to be counted during pre-canvassing. She further advised that "[t]o promote consistency across the 67 counties, the county boards of elections should follow [certain] steps when processing returned absentee and mail-in ballots." (Exh. 125, p. 3) For returned absentee and mail-in ballots, the county board of elections was directed to examine the voter declaration on the envelope of the absentee or mail-in ballot return and "compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the 'Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File.' [¶] If the Voter's Declaration on the

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Without support, Texas further alleged "[a]pproximately 70 percent of the requests for absentee ballots were from Democrats and 25 percent from Republicans. Thus, this unconstitutional abrogation of state election law greatly inured to former Vice President Biden's benefit." (Exh. 260, p. 22.)

Texas also claimed that "[s]tatewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, violated Pennsylvania's election code and adopted differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden. [Citation]" (*Id.* at p. 24.) Although Texas cited to its November 18, 2020 complaint in *Donald J. Trump for President, Inc. v. Boockvar* filing as support for some of these allegations, Texas did not reference the earlier Pennsylvania state and federal cases—all of which rejected those factual allegations outlined in the Bill of Complaint.

Notably, prior to the 2020 presidential election, Secretary Boockvar sought declaratory relief from the Supreme Court of Pennsylvania (Middle District) regarding the guidance she provided. On October 14, 2020, the Pennsylvania Supreme Court granted Secretary Boockvar's request for declaratory relief, allowing it to examine the question of whether the guidance provided by Secretary Boockvar on September 11, 2020, was in accordance with the Pennsylvania Elections Code—specifically, whether the Pennsylvania Election Code authorizes

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return envelope is blank, that ballot return envelope must be set aside and not counted. . . . If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code. [¶] *The Pennsylvania Election Code does not authorize the county of board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections*." (*Ibid*, italics added.)

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county election boards to reject voter absentee and/or mail-in ballots during the pre-canvassing[23] and canvassing[24] period based on an alleged or perceived signature match variance. (Exh. 233, pp. 1-2.) On October 23, 2020, the Pennsylvania Supreme Court determined that "the Election Code does not authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter's signature on the 'declaration' [the pre-printed statement] contained on the official ballot return envelope for the absentee or mail-in ballot." (*Id.* at p. 2.) Accordingly, the Pennsylvania Supreme Court directed "the county boards of elections not to reject absentee or mail-in ballots for counting, computing, and tallying based on signature comparisons conducted by county elections officials or employees, or as the result of third-party challenges based on such comparisons." (*Ibid.*)

Thereafter, on November 21, 2020, the United States District Court, Middle District of Pennsylvania, in *Donald J. Trump For President, Incl., et al. v. Kathy Boockvar, et al.*, case No. 4:20-CV-02078, granted Secretary Boockvar and certain Pennsylvania counties' motions to dismiss the Trump Campaign's action that sought "to disenfranchise almost seven million voters" by presenting "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence." (Exh. 222, p. 2.)

Six days later, on November 27, 2020, the United States Court of Appeals for the Third Circuit (Third Circuit) rejected the Trump Campaign's appeal from the Middle District of Pennsylvania., entitled *Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania, et*

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[23] The Pennsylvania Elections Code defines "pre-canvassing" as the "'inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.' 25 P.S. § 2602." (Exh. 233, p. 1, fn. 3.)

[24] Pursuant to the Pennsylvania Elections Code, "canvassing" is the 'gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots." (*Id.* at pp. 1-2, fn. 3.)

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al. The Trump Campaign's appeal was based on the narrow argument that it should be allowed to amend its complaint a second time and it requested that the Third Circuit issue "an injunction to prevent the [Pennsylvania] certified vote totals from taking effect." (Exh. 223, p. 9.) The Third Circuit rejected the Trump Campaign's "claim that, '[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted.' [Citation.]" The court found that "'[u]pon information and belief' is a lawyerly way of saying that the [Trump] Campaign does not know that something is a fact but just suspects it or has heard it." (*Id.* at p. 12.) The Third Circuit further stated that "'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.' *Iqbal*, 556 U.S. at 679. Yet the [Trump] Campaign offers no specific facts to back up these claims." (*Ibid.*) The Third Circuit's opinion also rejected other Trump Campaign claims regarding Pennsylvania as unfounded—stating, "[f]ree, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here." (*Id*. at p. 2.)

The Cicchetti Declarations Filed in Support of Texas's Motion for Leave

Texas filed two declarations by Charles J. Cicchetti, PhD,[25] in support of its Motion for Leave, on December 7 and 11, 2020, respectively. (Exhs. 260, pp. 115-122; 1034.)

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[25] In his declaration filed December 7, 2020, Dr. Cicchetti described himself as an *economist* with three years of Post Graduate Research in applied economics and econometrics who "was formally trained [sic] statistics and econometrics and accepted as an expert witness in civil proceedings. (Exh. 260, p. 115.) He further stated that he has "been engaged to design surveys, draw random samples and analyze and test data for significance, and [has] conducted epidemiology analysis using logit models to determine the significance of relative odds of outcomes and relative risk" and that he has "also been tasked with evaluating the work of other experts on the data and methods used and to detect and opine on bias, particularly missing variable bias." (*Ibid.*) Econometrics is defined as "the application of mathematical and statistical techniques to economic problems and theories." (*Merriam-Webster.com*, Merriam-

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The December 7, 2020 Cicchetti Declaration was cited by Texas in support of several of its arguments, including the assertion that there was a one in a quadrillion statistical improbability of former Vice President Biden winning over President Trump in the Defendant States. (Exh. 260, pp. 13-14.) Texas did not argue that this statistical improbability was evidence of fraud, but instead advanced the statistical improbability argument on the assumption that in 2020, former Vice President Biden should have received the same vote share (or number of votes) that former Secretary of State Clinton received in 2016 and because former Vice President Joe Biden received more votes or vote share than former Secretary of State Clinton, the ballots that would have been invalid and rejected in 2020 were improperly handled and counted.[26] Dr. Cicchetti concluded: "There are many possible reasons why people vote for different candidates. However, I find the increase of Biden over Clinton is statistically incredible if the outcomes were based on similar populations of voters supporting the two Democrat candidates. The statistical differences are so great, this raises important questions about changes in how ballots were accepted in 2020 when they would be found to be invalid and rejected in prior elections." (*Id.* at p. 118.)

Dr. Cicchetti neither identified nor provided an analysis of what constituted the "similar populations of voters supporting the two Democrat candidates in 2016 and 2020" or why an anomaly would result if the two Democratic candidates did not have the same vote share. Dr. Cicchetti also failed to provide any support for that assumption (or null hypothesis). As

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Webster, 2024, March 19, 2024.) Dr. Cicchetti did not identify any expertise, education, or experience in the analysis of elections, election data, or political methodology, which involves the application and development of statistical methods for the purpose of studying political science questions.

[26] For example, Dr. Cicchetti compared the number of votes cast in Georgia for former Secretary of State Clinton in 2016 (1,877,963) and former Vice President Biden in 2020 (2,474,507) with President's Trump in 2016 (2,089,104) and President Trump in 2020 (2,461,837). (Exh. 260, p. 117.)

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testified to by Dr. Justin Grimmer,[27] not only did Dr. Cicchetti fail to establish that the probability of former Vice President Biden winning the 2020 election was one in a quadrillion, Dr. Cicchetti's conclusions were based on erroneous assumptions and a null hypothesis methodological error.[28] (R.T. Vol. V, pp. 175-176.)

In an April 2022 article published in Academia Letters, Dr. Cicchetti criticized and disavowed the Texas Bill of Complaint arguments which were purportedly based on his declarations. (Exh. 1181.) Dr. Cicchetti noted that antithetical to "various critiques the Cicchetti Declarations did not claim Trump won or any evidence of fraud was found." (*Id.* at p. 2.) Rather, he noted that "[s]ome critics base their statements on the Texas Attorney General Ken Paxton's complaint which *erroneously* claimed the December 7, 2020 Declaration placed exceptional odds in favor of Trump winning"[29] and pointedly stated that "[t]he Declarations do

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[27] Dr. Grimmer, a tenured Stanford University professor in the Political Science Department and a Senior Fellow at the Hoover Institution thinktank at Stanford University, was designated as an expert by OCTC. Based on his educational experience as a Harvard University Department of Government graduate with master's and PhD degrees in political science; graduate coursework in American politics, political methodology and statistics; scholarly and peer-reviewed publications regarding statistical methods, statistical theory, election administration, congressional elections and claims of voter fraud, this court found Dr. Grimmer to be well-qualified to give and support the opinions he was offering. (R.T. Vol. V, pp. 117, 118-125.)

[28] As Dr. Grimmer explained: "[w]hat Cicchetti does in that analysis is he compares either the vote count or vote share between Biden and Clinton in 2020 and 2016, and flags it as anomalous that there's some difference, but a sort of basic logical assessment of that would say that there are lots of reasons we expect these things to be different across elections, and there's no established literature, empirical pattern, or even common knowledge that would say election results are the same in every state. *In fact, if we took these tests to a logical extreme, if we think about Cicchetti's test, that says, if an election is not anomalous, then the results should be the same, it would imply we could just run one election, once when a state is founded, and then every election would subsequently be the same.* Obviously, that's not the case. Things change. Times change. Voters' preferences may change. Conditions change that people are persuaded. And so that's a basic way we can make that sort of assessment." (R.T. Vol. VI, p. 50, italics added.)

[29] In an endnote, Dr. Cicchetti stated, "'Complaint 1 of the State of Texas aver, [T]he probability of former Vice President Biden winning . . . is less than one in a quadrillion. . . .' Texas cited Dr. Cicchetti without his knowledge of the filing or input to how Texas interpreted

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not support what Paxton claimed about Trump winning or the odds of this were overwhelmingly [sic]." (*Ibid*, italics added.)

President Trump's Motion to Intervene in Texas v. Pennsylvania

On December 9, 2020, two days before the United States Supreme Court denied Texas's Motion for Leave, Eastman, as counsel of record for President Trump,[30] filed a Motion to Intervene and a Proposed Bill of Complaint in Intervention in *Texas v. Pennsylvania* (Motion to Intervene). President Trump sought the following relief in his proposed Bill of Complaint in Intervention: (1) a declaration that the Defendant States violated the Electors Clause; (2) a declaration that Electoral College votes cast by Defendant States' electors would not be counted; (3) to enjoin Defendant States from using 2020 election results to appoint electors unless their legislatures approve the use of those results in a constitutional manner; (4) if they had already appointed electors using 2020 election results, Defendant States would be directed to appoint new electors or not to appoint electors at all; (5) award costs to President Trump as plaintiff in intervention; and (6) grant other relief the court deemed proper. (Exh. 262, pp. 17-18.)

Before filing the Motion to Intervene, Eastman reviewed the entire Texas Motion for Leave and Bill of Complaint, including the attached Cicchetti Declaration, which Eastman did not analyze or seek the assistance of an expert to evaluate. In fact, Eastman did not have any communication with Dr. Cicchetti before filing the Motion to Intervene. (R.T. Vol. XXV, pp. 208-209.) Instead, Eastman reviewed Dr. Cicchetti's declaration, including the one in a

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his Declaration. The following discussion repeatedly demonstrates that Dr. Cicchetti did not reach such a conclusion in his statistical analyses, and he also states he found no evidence of fraud in the analysis he performed or reviewed." (Exh. 1181, p. 4, endnote 7.)

[30] President Trump sought to intervene in his personal capacity as a candidate for re-election.

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quadrillion statistical improbability reference and considered it to be sufficient as, in his view, the remark was "preliminary" and not particularly material to the main claims in the intervenor brief.[31] Eastman assumed that Dr. Cicchetti's declaration and the analysis therein was accurate because he considered the attorneys who drafted the Motion for Leave to be very competent and "very scrupulous in the evidence." (R.T. Vol. I, pp. 111-112.)

Despite his reliance on the work of other attorneys and Dr. Cicchetti, Eastman had conducted extensive reviews of factual information that related to what he considered election irregularities and created a spreadsheet on which he recorded and tracked 2020 election litigation challenges found in court documents available on Westlaw, PACER, and other databases.[32] The District Court for the Middle District of Pennsylvania opinion and the Pennsylvania Supreme Court opinions were specifically analyzed and placed in Eastman's spreadsheet. (Exh. 1055.) While Eastman acknowledged his responsibility to ensure the accuracy of statements presented in court, he refrained from verifying the validity or invalidity of the Texas arguments and the

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[31] Eastman testified: "I think I have a duty to try and verify, given the time constraints and materiality, everything to the extent a reasonable lawyer would, and when I saw that clause there, and looked at Mr. Cicchetti's thing, on the quick 24-hour turnaround we had to do for this brief, it looked accurate on first blush, and because it wasn't more substantive for the allegations that were being made in the rest of the brief, it was more preliminary, setting the stage type of assessment. That was sufficient." (R.T. Vol. V, p. 20.) Nonetheless, Eastman agreed that he had an obligation to verify the substance of preliminary and all other material in his filings. (*Id.* at p. 21.)

[32] Eastman testified: "let me catalog the things that I have done, and see if I can think of anything that I—we haven't already talked about . . . And then the case law through Westlaw, the state case law through various state court dockets, to the extent they were available. They're disappointingly not as widely available or as easily available as federal court dockets. The federal court cases, I would look at those dockets, either via Pacer or most often, via CourtListener, which replicates the Pacer – the Pacer dockets and provides access, public access to the pleadings in the federal cases.... For the court cases that I was able to obtain access to, I frequently also pulled up the exhibits to look at the various sworn affidavits that were being submitted, or the expert reports that were being submitted in those cases, to try and make my best assessment of the validity of the claims that were being filed." (R.T. Vol. XXVII, pp. 172-173.)

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purported supporting facts. Rather, with few modifications, the Motion to Intervene joined and adopted by reference the purported factual allegations and arguments asserted in the Texas Bill of Complaint. (Exh. 262, p. 13.)

Among the most notable difference between the Motion to Intervene and Texas's Motion for Leave, is Eastman's inclusion of additional facts and allegations regarding "non-legislative changes to State election law by executive-branch election officials of the State, or by judicial officials, in Defendant States . . . in violation of the Electors Clause." (*Id.* at pp. 16-17.) The additional facts stated that Georgia's Secretary of State entered into a settlement agreement with the Democratic Party of Georgia to materially alter Georgia's statutory requirements for signature verification. This allowed absentee ballots to be counted if the signature matched only the signature on the absentee ballot application rather than requiring the absentee ballot signature match the absentee ballot application and the voter registration card signature. Eastman argued that this change resulted in a drastically reduced number of invalid absentee ballots with an invalid rate reduction from three percent to .37 percent, resulting in the counting of about 40,000 ballots that based on historical rejection rates, should not have been counted. The additional facts also provided that Georgia's legislature did not ratify this material statutory change or the statutory change regarding the early opening of ballots. (*Id.* at pp. 15-16.) Eastman further argued that the constitutional issue was not whether voters committed fraud but whether state officials loosened ballot integrity so that fraud became undetectable. (*Id.* at p. 37.)

Without explanation or support for any partisan malfeasance regarding the Georgia absentee ballots, Eastman argued that an "unconstitutional change in Georgia law appeared to materially benefit Vice President Biden. According to the Secretary of State's office, Vice President Biden had almost double the number of absentee votes (849,729) as President Trump (451,157) and that the change in signature verification measures "made it more likely that ballots

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without matching signatures would be counted, [and] had a material impact on the outcome of the election." (*Id.* at p. 16.)

Similar to Texas's Motion for Leave, Eastman attempted to finesse a discussion about fraud by pointing to the following examples of Defendant States allegedly weakening ballot security and integrity:

> Pennsylvania's Secretary of State issued guidance purporting to suspend the signature verification requirements, in direct violation of state law. In Michigan, the Secretary of State illegally flooded the state with absentee ballot applications mailed to every registered voter despite the fact that state law strictly limits the ballot application process. In Wisconsin, the largest cities all deployed hundreds of unmanned, unsecured absentee ballot drop boxes that were all invalid means of returning absentee votes under state law. In Georgia, the Secretary of State instituted a series of unlawful policies, including processing ballots weeks before election day and destructively revising signature and identity verification procedures.

(*Id.* at p. 11.)[33]

Although Eastman did not explicitly label any of these actions as fraud, he argued that these (and other) actions invited fraud or were "drastic and *fraud-inducing*." (Exh. 262, p. 12, italics added.) In general, Eastman argued that President Trump "did not have to prove that fraud occurred. . . it is only necessary to demonstrate that elections in the Defendant States materially deviated from the 'manner' of choosing electors established by their respective state Legislatures." (*Id.* at p. 13.) Eastman speculated that actions taken in Georgia "made it *more*

[33] Contrary to Eastman's claims, in *Davis v. Secretary of State*, LC No. 20-000099-MM, Michigan's lower court, the Court of Claims, considered the issue of whether it was lawful for the Secretary of State to mail absentee ballot applications to all registered voters and in an August 25, 2020 decision, concluded that the Secretary of State had authority to do so. (Exh. 276, pp. 1-2.) By a decision filed September 16, 2020, the Court of Appeal affirmed the lower court's decision and, as Eastman acknowledged at trial, the Michigan Supreme Court denied review. (*Ibid.*; R.T. Vol. IX, pp. 88-90.)

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likely that ballots without matching signatures would be counted, [sic] had a material impact on the outcome of the election." (*Id.* at p. 16.)

However, as Eastman confided in his long-time friend, attorney Cleta Mitchell, on November 29, 2020, Eastman knew that there was no actual evidence of outcome-determinative fraud in the 2020 presidential election in any of the Defendant States, even though the statistical analyses he was aware of (a number of which were cited in the *Texas v. Pennsylvania* briefs), may draw that conclusion.[34] Specifically, Eastman stated, in relevant part:

> Main thing, and extremely important, is that the legal/constitutional trigger for legislative action after the fact has to be a failure to conduct the election on Nov 3 in accord with the statutory requirements. Article II, in my view, just doesn't allow the Legislature to reclaim the power to choose electors after the fact if the election has been conducted in accord with the statutes.
>
> Second key issue is going to be political. I can't imagine a legislature, particularly one with enough never-Trump republicans to make a difference, taking this step—which would be viewed as rather extraordinary—absent pretty compelling evidence of fraud. The statistical analyses that have been done might get you there, *but it would be nice to have actually hard documented evidence of the fraud in the areas to which the analyses pointed.*

(Exh. 39, italics added.) At trial, Eastman explained that in this email he was conveying that he had seen "significant statistical evidence that there might be fraud" and that the "statistical evidence points to where to look." (R.T. Vol. X, p. 163.)

The United States Supreme Court Denies Leave in Texas v. Pennsylvania

The United States Supreme Court disagreed with Texas. Without addressing the alleged "facts" or the merits of Texas's Bill of Complaint, the United States Supreme Court, by order

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[34] Among other statistical analyses, the Texas brief cited the Ryan Report's findings which found a discrepancy of about 400,000 ballots based on a flawed analysis of mail-in ballots in Pennsylvania which Texas determined was outcome-determinative. (Exh. 260, pp. 25-27.) The only copy of the Ryan Report lodged with the court was exhibit 1156, a five-page American Thinker article which referenced the Ryan Report and its conclusions but provided no support or documentation regarding those conclusions.

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dated December 11, 2020, denied the State of Texas leave to file the Bill of Complaint[35] and dismissed all other pending motions.[36] (Exhs. 356, 1376.)

Eastman's Involvement in Litigation Related to the 2020 Election Results in Georgia

Around the same time that *Texas v. Pennsylvania* was being litigated, Eastman got involved in several other election challenges to the 2020 presidential election results in Georgia.

Georgia's Presidential Election Results

Based on the machine tally of the 2020 presidential election votes cast in Georgia, Vice President Biden won in Georgia by a narrow margin.[37] By law, Georgia was required to conduct a statewide post-election risk limiting audit of the election results (Risk Limiting Audit). The Risk Limiting Audit ordered by Secretary of State Brad Raffensperger was a manual tally of votes cast and originally tabulated by machine count and was conducted from November 11-19, 2020. (Exhs. 86, 87.) While the Risk Limiting Audit did not confirm or correct the original stated margin of victory, it did confirm the original results; specifically, that former Vice President Biden won the 2020 presidential election in Georgia.

On November 20, 2023, Governor Brian Kemp certified Georgia's sixteen 2020 presidential state electors as former Vice President Biden electors (Biden electors). On November 21, 2023, Ray Smith III, counsel for President Trump, forwarded a vote recount

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[35] The denial provided, "The State of Texas's motion for *leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution*. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot." (Exh. 356, italics added.) Justices Alioto and Thomas dissented, stating "[i]n my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. See *Arizona v. California*, 589 U. S. ____ (Feb. 24, 2020). . . . I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on another issue." (*Id.*)

[36] The dismissal of the pending motions as moot included President Trump's Motion to Intervene and motions to intervene filed by Missouri, Arkansas, Louisiana, Mississippi, South Carolina and Utah. (R.T. Vol. XXV, p. 209.)

[37] The margin of victory in Georgia was 0.3%. (Exh. 87.)

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demand to Secretary of State Raffensperger. (Exh. 1048, p. 65.) A statutory recount was conducted.

On December 7, 2020, Governor Kemp amended the original Certificate of Ascertainment and re-certified the Georgia Biden electors. (Exh. 11.)

Trump v. Raffensperger

Amid a flurry of Georgia election challenges, Eastman provided legal advice on *Trump v. Raffensperger*, which was filed on December 4, 2020, in Fulton County Superior Court.[38] (Exhs. 2, 1048.) In sum, President Trump alleged that "the November 3, 2020, Presidential Election in Georgia (the "Contested Election") was not conducted in accordance with the Election Code and that the named Respondents [election officials], deviated significantly and substantially from the Election Code." (Exh. 1048, p. 4.) Trump further alleged "[d]ue to significant systemic misconduct, fraud, and other irregularities occurring during the election process, many thousands of illegal votes were cast, counted, and included in the tabulations from the Contested Election for the Office of the President of the United States, thereby creating substantial doubt regarding the results of that election." (*Ibid.*)

Trump v. Raffensperger had a short but tortured procedural history before the parties reached a publicly filed settlement agreement[39] and *Trump v. Raffensperger* was voluntarily dismissed on January 7, 2021.

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[38] *Trump v. Raffensperger*, Fulton County Superior Court, case No. 2020cv343255, was an election contest challenge filed pursuant to O.C.G.A. §21-2-522.

[39] In the agreement, one of the defense counsel noted, on January 3, 2021, "we are still willing to cooperatively share information with you outside the pending litigation on the condition that all currently pending suits against the Governor, the Secretary of State and/or the members of the State Election Board be voluntarily dismissed. . . . The allegations and evidence in the Petition related to the November 3, 2020 Election have been thoroughly examined. That examination shows the claims: (1) are factually wrong; (2) are based on improper speculation and faulty data and data analysis; (3) lack substantive legal merit; (4) are moot; and (5) are procedurally deficient. As you know, even one of your 'experts,' Mr. Braynard, recanted many

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Additional relevant *Trump v. Raffensperger* allegations are set forth below.

Trump v. Kemp

While *Trump v. Raffensperger* was pending, Georgia attorney Kurt Hilbert, on December 31, 2020, filed in the United States District Court, Northern District of Georgia, a Verified Complaint for Emergency Injunction and Declaratory Relief on behalf of President Trump (Verified Complaint) in *Trump v. Kemp*, Case No. 20-CV-5310. As Eastman's pro hac vice admission was pending at the time, Eastman signed the Verified Complaint as proposed co-counsel for President Trump. (Exh. 270.)

On December 31, 2020, Eastman's client, President Trump, signed a verification in support of the Verified Complaint.[40] By the Verified Complaint, President Trump sought a temporary restraining order and preliminary and permanent injunction directing defendants Governor Kemp and Secretary of State Raffensperger, to de-certify the November 3, 2020 election results. President Trump also sought declaratory relief stating that certification of the election results could not be deemed valid due primarily to November 3, 2020 election violations of the Georgia state law election code and, due to the failure of Georgia state courts to afford

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of the positions relied upon in your lawsuits in his testimony before the Georgia House of Representatives Government Affairs Committee. Your other main 'expert,' Mr. Geels admits his positions are speculative at best." (Exhs. 275, p. 3; 358, p. 2.) Defense counsel also noted that "[t]here have already been *three* state election challenges contesting the Presidential Election that have been finally dismissed by Georgia courts." (*Id.* at p. 2, italics in original.) Mr. Hilbert responded: "after speaking with all clients, and their respective counsel, we hereby accept the terms of your settlement proposal dated January 3, 2021" and stated that they would voluntary dismiss four of their election challenge lawsuits. (*Id.* at pp. 4-5.)

[40] The verification stated: "Personally appeared before me, a Notary Public, duly authorized by law to administer oaths, President Donald J. Trump, solely in his capacity as a candidate for President of the United States, who on oath says he has reviewed the Verified Complaint for Emergency Injunctive and Declaratory Relief and with regard to the facts contained therein, states that to the best of his knowledge and belief, and relying on the representations contained therein, the facts are true and correct where derived from his own knowledge and are believed to be true and correct where derived from the knowledge of others or from documents that are maintained in the course of business or are public records." (Exh. 270, pp. 33-34.)

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Trump his statutory right to challenge the results of the election. (*Id.* at pp. 28-29.) The *Trump v. Kemp* Verified Complaint incorporated in its entirety, the *Trump v. Raffensperger* Verified Petition and its exhibits. (*Id.* at p. 13.)

Of the numerous factual allegations set forth in *Trump v. Kemp* (and the incorporated *Trump v. Raffensperger* allegations), the court addresses below only those factual allegations which relate to Eastman's alleged misconduct in this disciplinary proceeding.

a.) State Farm Arena Ballots Counted Without the Public's Open Viewing

One of the most serious factual allegations in the *Trump v. Kemp* Verified Complaint was the allegation that, late on November 3, 2020, Fulton County election officials at the State Farm Arena vote tabulation center stopped the ballot counting. The Verified Complaint alleged that after poll observers and members of the media had left, "several election officials then proceeded to remove suitcases full of ballots from under a table where they had been hidden, and processed those ballots without open viewing by the public in violation of O.C.G.A. §21-2-483. . . . This illegal activity was captured on video tape [sic]. This is but one example of such misconduct by election officials and corruption of the process." (Exh. 270, pp. 10-11.)

To provide transparency about the alleged illegal State Farm Arena activities, Secretary of State Raffensperger had the entire State Farm Arena video posted to the securevotega.com website for viewing by members of the public.

The Georgia Secretary of State conducted an investigation and on December 5, 2020, Frances Watson, Chief Investigator in the Office of the Georgia Secretary of State, executed a declaration under penalty of perjury setting forth the conclusions reached by the Georgia Secretary of State as a result of its investigation into the State Farm Arena vote tabulation center activities on November 3 (the State Farm Arena investigation).

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The State Farm Arena investigation centered around the complaints Secretary of State Raffensperger received on November 3, 2020; specifically, "that Fulton County Board of Registrations and Elections directed clerks, public observers, and media personnel to leave the State Farm Arena location where ballots were being tabulated due to a water leak at the State Farm Arena, but Fulton County staff continued to scan ballots in the tabulation center at the State Farm Arena." (Exh. 98, p. 2.) Based on witness interviews and a thorough review of the State Farm Arena security footage, the investigators concluded that observers and media were not asked to leave. Rather, they left when they saw other workers depart who had completed their task of opening the envelopes. The investigators' review of the 24-hour security footage "revealed that there were no mystery ballots that were brought in from an unknown location and hidden under the tables as reported by some." (*Id.* at p. 3.) Around 10:00 p.m., in the presence of official monitors and the media, the videotape reflects that opened but not counted ballots were placed in the boxes, sealed, and stored under the table because employees thought they had finished for the night. (*Ibid.*) As of December 5, 2020, the Secretary of State investigators were continuing their inquiry.

On January 4, 2021, Robert Gabriel Sterling, Statewide Voting System Implementation Manager for the Secretary of State, held a press conference on C-Span that addressed the State Farm Arena election day activities. (Exh. 99.) According to Sterling, at around 9:45 p.m., "the cutters began putting their stuff away because everybody was under the impression they were going to get home" and "while the monitors and the press are still in the room" the opened absentee ballots were placed in the ballot carriers (not suitcases), the lids were placed on the carriers, and about 10:30 p.m. everyone was preparing to leave. (*Id.* at p. 3.) However, the Elections Director of Fulton County vetoed their request to finish for the evening because others were going to work through the night. After that directive, the ballot carriers were removed from

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under the table and those who remained were told "we've got to keep on scanning" and they did. (*Id.* at p. 4.)

Before filing *Trump v. Kemp* on December 31, 2020, Eastman had watched only portions of the State Farm Arena security footage. (R.T. Vol. V, p. 77.) Eastman believed "that people were sent home, and then that boxes of ballots or suitcases of ballots were then pulled out and continued to be processing [sic] outside of public view." (R.T. Vol. XI, p. 108.) However, as Eastman acknowledged, "[the Georgia Election Code] statute gives people the *opportunity* to be there for public [viewership]—for the canvassing. *It doesn't mandate that people be there.*" (*Id.* at p. 109, italics added.)

Eastman read information from the Office of Georgia's Secretary of State about the State Farm Arena video before filing the *Trump v. Kemp* complaint and at some point (but he didn't recall when), Eastman saw Frances Watson's December 5, 2020 declaration. (*Id.* at pp. 79-80.) During December 2020, Eastman recalled watching a Georgia Secretary of State press conference or press release which discussed the State Farm Arena.

b.) Georgia Election Officials Allowed Unqualified Individuals to Register and Vote

In *Trump v. Kemp*, President Trump also alleged that the Georgia election officials violated the State's Election Code by allowing unqualified voters to register and vote, resulting in "more than 11,779 'illegal' votes to be counted in the State of Georgia which is sufficient to change the outcome of the election or place the outcome in doubt as determined by the Legislature and set forth in the Election Code." (Exh. 270, pp. 5-6.) Some alleged Election Code violations included: (1) convicted felons still serving their sentence were allowed to vote in violation of O.C.G.A. §21-2-216(b); (2) "allowing underage individuals to register and then vote in violation of O.C.G.A. §21-2-216(c)"; (3) unregistered or late-registered individuals voted in violation of O.C.G.A. §21-2-224 (a); (4) voting in Georgia by out-of-state registered individuals

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(some of whom voted in another state as well), in violation of O.C.G.A. §21-2-217; (5) voting by individuals who had moved across county lines, in violation of O.C.G.A. §21-2-218 (b); (6) voting by individuals registered with a domicile at a post office box, church, or courthouse, in violation of O.C.G.A. §21-2-217 (a)(1); and (7) accepting votes cast by individuals who were deceased, in violation of O.C.G.A. §21-2-23 (a)-(b) and (d). (*Id.* at p. 5.)

At trial, Eastman did not recall the basis for each of these *Trump v. Kemp* allegations but contended they were supported by certain *Trump v. Raffensperger* allegations and the affidavits of retained experts Bryan Geels,[41] Matthew Braynard,[42] and Mark Davis, which were filed in support of the *Trump v. Raffensperger* Verified Complaint. (R.T. Vol. V, pp. 65-66, 74-77.)

Eastman received the Geels affidavit around December 3, 2020. (R.T. Vol. I, p. 99.) Between the time Eastman received the Geels affidavit and December 31, 2020, when Eastman caused the *Trump v. Kemp* complaint to be filed, Eastman reviewed the Geels affidavit, and decided that it looked credible to him, based on what he knew about voter rolls "and things like

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[41] Geels prepared two expert reports which were filed in support of the *Trump v. Raffensperger* and *Trump v. Kemp* verified petitions. (Exh. 1048, pp. 545, 613.) Geels described himself as "a licensed CPA, and I own a data analytics consultancy firm, Geels Consulting, based in Seattle, Washington. Before starting Geels Consulting, I worked for 9 years in public accounting at a large CPA firm. Based on my experience as an auditor working as a Senior Manager at a large CPA firm, I am an established data analytics and risk assessment expert." (*Id.* at p. 549.) Geels identified no experience or education involving the analysis of election data.

[42] According to Braynard's resume attached to his affidavit, he earned a Bachelor of Business Administration degree from George Washington University in 2000 and graduated from Columbia University with a Master of Fine Arts in 2018. His most recent employment included working as the Senior Analyst with Election Data Services, Inc. from 2001-2005; Director of the Data Division of Donald J. Trump for President, Inc. from October 2015 to March 2016; President of Look Ahead America, Inc. from March 2017 to the December 2020 and Principal of External Affairs, Inc. (Exh. 1048, p. 84). Braynard stated that he has "worked to build and deploy voter databases for the Republican National Committee, five Presidential campaigns and no less than 100 campaigns and election-related organizations." (*Id.* at p. 71.) Braynard had not authored any publications within the 10-year period before his affidavit was filed and he had not provided expert testimony at trial or in deposition between 2016 and 2020. (*Ibid.*)

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that." (R.T. Vol. I, pp.100-101.) Eastman took no affirmative measures to determine the reliability of the information in the Geels affidavit. Rather, Eastman assumed the *Trump v. Raffensperger* attorneys had assessed and determined that the information in Geels' affidavit was reliable since he believed the *Trump v. Raffensperger* lawyers to be "competent and adamant about not submitting anything they could not verify." (*Id.* at pp. 100-101.)

The declaration of Charles Stewart III,[43] the expert retained by the Georgia election official respondents, was filed on January 4, 2021. (Exh. 202.) Stewart's declaration critiqued the analysis of each *Trump v. Raffensperger* retained expert and his summary of certain relevant specific shortcomings in each "expert" analysis is set forth below. Stewart stated that all of the Trump "experts" lacked training and professional experience in database matching and election administration and failed to acknowledge election science literature and the inherent limitations in the analyses they performed. Eastman read Stewart's declaration by December 30 or December 31, before the filing of *Trump v. Kemp*. (R.T. Vol. I, p. 102.)

In a December 31, 2020 email to co-counsel Hilbert, Eastman acknowledged that some of the evidence cited in the *Trump v. Raffensperger* complaint was inaccurate: "Here's the issue. The complaint incorporates by reference the state court challenge [*Trump v. Raffensperger*]. Although the President signed a verification for that back on December 1, he has since been made aware *that some of the allegations (and evidence proffered by experts) has been inaccurate*. For him to sign a new verification with that knowledge (and incorporated by

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[43] According to Stewart's declaration, he is a Distinguished Professor of Political Science at the Massachusetts Institute of Technology (MIT), where he had been on the faculty since 1985. During that time, he has "done research and taught classes at the graduate and undergraduate levels in the fields of American politics, research methodology, elections, and legislative politics." (Exh. 202, p. 1.) In January 2016, he became the founding director of the MIT Election Data and Science Lab which was "devoted to impartial, scientific analysis of elections and election administration" in the United States. (*Id.* at p. 2.) Stewart also authored and co-authored numerous peer-reviewed publications and books on election administration and election science and has served as an expert witness in three federal district court cases.

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reference) would not be accurate." (Exh. 51, italics added.) Even though Eastman knew that some of the *Trump v. Raffensperger* allegations and evidence proffered by experts in support of those allegations were incorrect, he failed to identify the inaccurate accusations or evidence for the Northern District of Georgia court in his *Trump v. Kemp* filing. Nor did Eastman object to co-counsel Hilbert's attempt to camouflage the inaccurate and misleading information that formed the basis of the outcome-determinative vote allegations: "I took out numbers from the complaint, left them in the memorandum [of law]." (Exh. 52, p. 5.)

Instead of candidly addressing the erroneous evidence, Eastman and co-counsel Hilbert inserted an ambiguous and disingenuous footnote in the *Trump v. Kemp* complaint seeking to distance President Trump from the allegations and evidence which Eastman knew contained false and inaccurate statements.[44] (Exh. 270, p. 6.)

c.) Convicted Felons Still Serving a Sentence Were Allowed to Vote

According to the Geels Declaration, Geels compared the Inmates File and Georgia's November 3, 2020 voter database and determined "there could have been up to 2,560 individuals who cast ballots that were accepted and counted but who were inmates." (Exh. 1048, pp. 556, 570.) Geels stated that those 2,560 individuals in the Active Inmate File, identified by First

[44] The footnote read: "The facts and figures set forth in the [*Trump v. Raffensperger*]'s Verified Petition was presented to Plaintiff through the affidavits and expert opinions/reports attached to the Verified Petition and such information was presented to that lower court in affidavit form based on information publicly available to said experts, and without having access to the actual information being withheld and kept private by the Georgia Secretary of State and other governmental entities. Open Records requests have been timely submitted to attempt to obtain such information, but no records have been timely produced or made available. Accordingly, as a state court election contest is required to be verified, the facts and figures submitted by affidavits and experts reports/opinions in the lower court and incorporated herein by reference, have been relied upon by Plaintiff only to the extent that such information has been provided to Plaintiff, and which are subject to amendment, adjustment, and cure through expert opinion and final reports based on actual data and completion of ongoing government investigations (which the Secretary of State and other agencies are currently conducting). Plaintiff has not sworn to any facts under oath for which he does not have personal knowledge or belief." (Exh. 270, pp. 6-7, fn. 4.)

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Name, Last Name, and Birth Year, matched exactly to the Georgia Voter History File. However, Geels acknowledged that there may have been imperfect matches resulting in false positives because only the Birth Year was available in Georgia's voter record files. Stewart confirmed that Geels's matching methodology was "guaranteed to produce a result in which the number of false positives vastly exceeds the number of true positives." (Exh. 202, p. 22.) Stewart explained that a lack of unique identifiers across large databases creates a greater likelihood of false positive matches.[45] Geels did not state that he had created unique identifiers that would avoid the likelihood of false positive matches or utilized a more reliable matching method. Geels's calculations regarding the number of convicted felons who voted in the November 3, 2020 election were not reliable.

d.) Underaged Individuals Register and Then Vote

The *Trump v. Kemp* complaint alleged that Georgia election officials "allowed underage individuals to register and then vote, in violation of O.C.G.A. §21-2-216 (c)."[46] (Exh. 270, p. 5.) Similarly, in *Trump v. Raffensperger*, the parties alleged that "[i]n violation of O.C.G.A. §21-2-216(c), Respondents, jointly and severally, allowed at least 66,247 underage—and therefore ineligible—people to illegally register to vote, *and subsequently illegally vote*." (Exh. 1048, p. 17, italics added.) It was further alleged that "[i]n violation of Georgia law, Respondents, jointly and severally, counted these illegal votes in the Contested Election." (*Id.* at p. 18.) According to Eastman, each 66,247 "underage individual" registration and voter allegation was based on and

[45] Stewart illustrated this concept by stating that "[i]n September 2020, I purchased a copy of the Georgia voter file from the Secretary of State, to use in my academic research. That file, dated September 9, 2020, contains 7,346,219 records. Of these, 7,280,948 are unique name + birth year combinations, leaving the remaining 65,271 registrants sharing a first name, middle name, last name, and birth year with *at least one* other voter." (Exh. 202, p. 8.)

[46] According to Eastman, Georgia allows an individual to register to vote when they reach the age of 17 ½. (R.T. Vol V, p. 67.)

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supported by the same Geels expert report filed as an affidavit in *Trump v. Raffensperger*. (R.T. Vol. V, pp. 65-66.)

However, Geels's expert report was flawed. Although Geels initially stated in his report that he compared Registration Dates and Birthdates in Georgia's Voter Registration File and Absentee Early Votes and concluded that 66,247 underaged individuals were allowed to register to vote, that was not true. As Eastman acknowledged, Geels *actually* compared data from the Georgia Voter Data "Date Added" field instead of using the "Registration Date" field in performing his analysis. (*Id.* at pp. 73-74.)

Moreover, as Geels subsequently admitted, his use of the wrong data field in his December 1, 2020, declaration resulted in a gross miscalculation. (Exh. 1271.) Instead of 66,247 underaged individuals who allegedly registered to vote in Georgia, Geels determined that the correct number should have been much lower—2,047. Later, after an additional reassessment of his analysis, Geels, using the "Registration Date" field instead of the "Date Added" field, further lowered the number of underage individuals he contended to have registered in Georgia to 778. (*Ibid.*)

However, as Eastman knew when *Trump v. Kemp* was filed on December 31, 2020, Geels neither analyzed data for, nor quantified, the number of purported underage individuals who actually voted in the 2020 presidential election.[47] (R.T. Vol. V. 68; see also Exh. 1048, pp. 565-

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[47] "Court: Is it your understanding that the Geels analysis included underage individuals who were not only registered to vote, but who did vote? Is that your understanding?

Eastman: No. The Geels analysis never asserts that underage people voted." (R.T. Vol. V., p. 68.)

It is Eastman's view that if an underage person registered to vote and if, by the time s/he voted, that individual is legal voting age, that individual's vote would be illegal (but not fraudulent), due to that individual's underage registration and his/her post-registration vote would continue to be an illegal vote until that individual re-registered. (*Id.* at p. 69.) Eastman had no information from Geels and identified no other source which identified the number of

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566.) Therefore, the allegation of any underaged individuals that registered and voted in the 2020 presidential election was unsupported and false.

e.) Unregistered or Late Registered Individuals Vote

Geels stated that 98 absentee and early voters registered to vote in Georgia after October 5, 2020, the last date to legally register and to vote in the November 3, 2020 election. (Exh. 1048, p. 562.) Geels applied a general filter to an unidentified database and concluded that the 98 voters registered after the October 5, 2020 deadline to legally register to vote.

f.) Individuals Allowed to Vote Across County Lines

Eastman incorporated into *Trump v. Kemp*, the *Trump v. Raffensperger* the allegation that 40,279 individuals voted who had moved across county lines at least 30 days prior to November 3, 2020, and voted in their old county without re-registering to vote in their new county. (Exh. 1048, p. 22.) President Trump supported that allegation with the affidavit of Mark Alan Davis. According to Davis, Georgia allows a 30-day grace period for an individual who has relocated to a new county to vote in the old county of residence. Davis stated that based on his review of the USPS National Change of Address (NCOA) records, 312,971 Georgians moved within the state during an undefined time frame. Davis did not clearly explain how he reached the 40,279 cross-county relocation figure but speculated: "[I]t appears to me we *probably* had tens of thousands of illegal votes cast in our last election. Worse, that has *probably* been happening for many, many years." (*Id.* at p. 580, italics added.)

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these purported underage individuals who may have re-registered to vote. (*Id.* at p. 74 ["My understanding is that Mr. Geels never identified people who were underage when they voted"].)

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g.) Individuals Registered to Vote with Non-Residential Addresses

Based on his review of Georgia's Voter Absentee Files and the USPS Owned and Leased Facilities Reports, Braynard stated that 1,043 early and absentee ballots were cast by voters who registered their primary residential address as a post office box. (Exh. 1048, pp. 79, 81.)

However, as Stewart opined, Braynard's analysis is unreliable because some voters do actually live in commercial facilities that conform to local building codes; other voters may have been uncertain about how to properly fill out the voter registration materials and "Braynard relies on unreliable algorithms to conduct the matching and provides no information about how he confirmed that his matches were precise enough to warrant his conclusions." (Exh. 202, p. 13.)

h.) Acceptance of Votes of Deceased Individuals

Geels opined that as many as 10,315 individuals cast ballots but were deceased prior to the November 3, 2020 presidential election and 8,718 of those individuals passed prior to the date Georgia accepted their ballot. Geels pointed out that "only the Birth Year is available for records of voters in the [Georgia] database" and "[b]ecause only a Birth Year is provided, there may indeed be false positives in the population—for example, due to the match of multiple people with a common name who were also born in the same year or to the omission of a suffix." (Exh. 1048, p. 556.)

Stewart agreed that there was a likelihood of false positive matches, noting that "1,091,659 Georgia voters share an exact match on first name, last name, and birth year" and by applying Georgia's 1.06% death rate to the number of Georgians with first and last name and birth year matches, he "would expect 11,572 registered voters in Georgia to share the same first and last name of another voter in the state who died." (Exh. 202, p. 21.)

Grimmer also agreed that Geels's faulty methodology rendered many false positives, which would seem to render Geels's analysis unreliable. (R.T. Vol. VI, pp. 26-27.)

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Eastman's Testimony Regarding Outcome-Determinative Fraud in Georgia

On several occasions, Eastman stated that there was outcome-determinative absentee ballot fraud in Georgia. When asked, at trial, about evidence he had of outcome-determinative absentee ballot fraud that he was aware of as of January 2, 2021, Eastman responded that he had evidence that "the weakening of signature verification in Georgia and Pennsylvania caused a dramatic decline in the disqualification of ballots" and "the declined disqualification rates in both of those states was significant enough to have affected the outcome of the election." (R.T. Vol. X, p. 79.) Eastman also contended "[w]hen a ballot comes in and the signature does not even remotely look like the signature on file, that's evidence of potential voter fraud." (*Ibid.*) In other words, in Georgia, Eastman equated absentee ballot fraud with lax signature verification and lax signature matching by election officials in the 2020 presidential election.

According to Eastman, the evidence of outcome-determinative fraud in Georgia could also be established by the number of "people voting after they had moved out of the jurisdiction,"[48] and the failure to perform signature verification when "absentee ballot applications were brought in." (R.T. Vol. XXXI, p. 89.) He also speculated that "if the signature on the absentee ballot application or on the absentee ballot bears no resemblance to the signature on file in the registration card, that's a pretty good indication of fraud." (*Ibid.*) Eastman pointed to a forensic audit performed by Garland Favorito[49] supposedly showing "about 5,000 votes fraudulently counted multiple times—and the vote flipping that went on in Ware County" which

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[48] Eastman characterized this as evidence of fraud and illegality. (R.T. Vol. XXXI, p. 89.)

[49] Garland Favorito is an IT consultant who formed his consulting company in the 1980s and by 2002, he began to focus on voting machines. He co-founded VoterGA (Voters Organized for Trusted Election Results in Georgia) in 2006. (R.T. Vol. XIV, p. 50.) VoterGA is comprised of volunteers who are involved in giving legislative advice, addressing election integrity issues surrounding "verifiability" and "auditability." (*Id.* at pp. 51-52.) It also filed several lawsuits involving the 2020 general election.

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taken together he believed were "outcome-determinative." (*Ibid.*) However, Favorito's "multiple counting" and "vote flipping" conclusions were debunked by Halderman and Harry Hursti and Dr. Phillip Stark, and other computer scientists and election security experts who stated on November 16, 2020, that claims regarding technical vulnerabilities were unsubstantiated. (Exh. 187.)

As further evidence of outcome-determinative fraud in the 2020 Georgia presidential election, Eastman relied on the absentee ballot analyses performed by Geels, Braynard, and Dr. Cicchetti—none of which actually concluded that there was outcome-determinative fraud in the Georgia 2020 presidential election. Eastman nonetheless believed fraud was evidenced by a decline in the disqualification rate of 2020 absentee ballots as compared to the 2016 presidential election. (R.T. Vol. X, pp. 80-82.) Eastman didn't recall whether any of these analyses addressed the disqualification rate based on category or reason for disqualification. Nor did Eastman recall whether, in Georgia, the reason for rejection of an absentee ballot was publicly available information in the absentee voter file. (*Id.* at pp. 79-82.)

Eastman's conclusion that there had been a notable change in the absentee rejection rate in Georgia was correct, as there was a 3.1 percentage point decline from 2018 to 2020. (R.T. Vol. XXXI, p. 226.) However, that decline was a decline in overall ballot rejections—not just a decline in the signature verification or signature match rejection rate and it did not equate to absentee ballot fraud. Based on information publicly available in 2020, the decline in Georgia rejected absentee ballots was not primarily due to signature match issues as about 90 percent of this decline resulted from both a decrease in the percentage of ballots arriving after the deadline and a decrease in the percentage of ballots rejected due to issues with the oath envelope. (*Ibid.*)

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Eastman's Dual Slate of Electors Theory

Alongside the aforementioned legal challenges, from at least early December 2020 through December 14, 2020, Eastman worked mightily (meeting and conferencing with contested state legislators and various individuals and groups, speaking publicly and forwarding emails to Eric Herschmann, President Trump's White House advisor), to encourage Republicans in the seven "contested states" to meet and vote on Trump electors by December 14, 2020, and then to transmit those non-certified slates to Vice President Pence and the Archivist of the United States. (Exhs. 40, 42, 44, 45; R.T. Vol. X, pp. 165-169.) Eastman believed that by creating a non-certified "contingent" slate of electors on December 14, and with pending election challenge lawsuits (many of which he coordinated or filed), uncertainty would be created in some states as to both the certified and "contingent" slates of electors. Eastman also believed that he may then have time to expose illegality that might prompt legislatures to act. (*Id.* at p. 168.)

Eastman asserted that his belief was rooted in historical precedent in the 1960 presidential election in Hawaii, which involved competing slates of electors for John F. Kennedy and Vice President Richard Nixon when the State of Hawaii forwarded three slates of electors to then President of the Senate, Vice President Nixon.[50] However, Eastman ignored the fact that

[50] The first slate of electors for Hawaii were electors for Vice President Nixon that were certified as electors by the acting Governor of the State on November 28, 1960. They met on the date designated by Congress, cast their votes, and transmitted those votes to the President of the Senate. The group of Kennedy electors from Hawaii also met on the designated date and, without having been certified by any authority in the State, the Kennedy electors from Hawaii cast votes and transmitted those votes to the President of the Senate. (Exhibit 1011.) A recount of Hawaii's votes, ordered by a Hawaii court in response to a petition filed by 30 Hawaii voters, was pending at the time the Nixon and Kennedy electors met and cast votes. On December 28, 1960, the recount concluded, and the state court determined that Kennedy won the State of Hawaii, instead of Vice President Nixon. On January 4, 1961, the newly-elected Democratic Governor of Hawaii, based on the results of the recount conducted pursuant to the court order, certified the Kennedy electors and the Governor of Hawaii transmitted his certification of ascertainment, along with the Kennedy elector votes, to the President of the Senate.

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the 1960 Hawaii presidential election involved competing slates of electors, two certified by the Governor of Hawaii and one non-certified, which resulted in the counting of the more recent *certified* slate of electors, which was certified by the Governor of Hawaii due to a recount. Moreover, no member of Congress objected to the counting of the second certified slate of electors and Vice President Nixon expressly stated that his actions were not intended to establish any precedent outside of this particular set of circumstances.

Eastman, as a constitutional scholar, understood that alternate, contingent or "dual" slates of *non-certified* electors would carry no import on January 6 during the counting of electoral votes. Eastman knew that there was no constitutionally mandated provision allowing for any non-certified, non-ascertained "dual" or "contingent" slates to be considered in conjunction with the voting or counting of presidential electoral votes. As Eastman stated in his email of December 19, 2020, to Bruce Colbert, "[a]s for the Legislatures—not a one has acted. *Electors* did in 7 states, but unless those electors get a certification from their State Legislators, they will be dead on arrival in Congress. With such a certification, we will have a deadline that will invoke sec. 15, but the textual claim that the 'executive' certification would prevail in such an instance over the legislature-certified slate is contrary to Article II. And at that point, we might

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On January 6, 1961, Vice President Nixon, in his capacity as President of the Senate, stated; "The Chair has received three certificates from persons claiming to be the duly appointed electors from the State of Hawaii. The Chair will hand these certificates one at a time to the tellers who will read the certificates and the attached papers in full." (Exh. 1012, p. 3.) After consideration of the certificates by the tellers, Vice President Nixon stated, "[t]he Chair has knowledge, and is convinced that he is supported by the facts, that [the Kennedy certificate issued by the Governor, dated January 4, 1961,] properly and legally portrays the facts with respect to the electors chosen by the people of Hawaii. (*Id.* at p. 4.) He then stated, "[i]n order not to delay the further count of the electoral vote here, the Chair, *without the intent of establishing a precedent*, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii. (*Ibid.*) Vice President Nixon continued: "If there be no objection in this joint convention, the Chair will instruct the tellers—and he now does—to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961." (*Ibid.*) No objection being registered, the votes were counted.

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well have the opportunity for a Supreme Court resolution without the need to trigger the Pelosi scenario." (Exh. 380, p. 2; see also exh. 6, p. 30.)[51]

Eastman's view on this issue did not change. In his January 10, 2021 response to Valerie Moon's emailed inquiry—"[t]ell us in layman's language, what the heck happened with the dual electors? Please?" (Exh. 61.) Eastman reiterated his view that "[*n]o legislature certified them (because governors refused to call them into session), so they had no authority. Alas*." (*Ibid.*, italics added.)

Eastman's trial constitutional expert, Dr. John Yoo,[52] agreed with the characterization that the Trump Campaign's dispute over the 2020 presidential electors, specifically, the appointment of Trump electors, was "a made-up dispute, rather than a real one" (R.T. Vol. XVIII, p. 62), reasoning that each contested state had only one certified set of electors, "[n]o branch of any state government challenged its electors in 2020," and "[n]o state or federal court and no legislature or executive had found fraud"; as such, there was no "factual predicate" to trigger Vice President Pence's dispute resolution role with regard to the elector slates. (*Id.* at pp. 63-64). Dr. Yoo concluded that not only did Vice President Pence not have authority to reject elector votes on January 6 on the grounds that the elector appointments were invalid but,

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[51] According to Eastman, "Section 15 of the same Title [3 of the U.S. Code] provides in part that, in the case of a disagreement between the House and Senate as to which slate of electors to count if two or more have been received, then 'the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted,' *even if the alternate slate was certified by the Legislature of the State*." (*Id.*, italics added.)

[52] Dr. Yoo is a Harvard University graduate who earned a Juris Doctor degree from Yale Law School in 1992. As an Acting Professor (1993-1999), Professor of Law (1999-2013) and in his present role as Emanuel S. Heller Chair in Law & Distinguished Professor of Law, he has taught Constitutional Law at the University of California at Berkeley School of Law since 1993. Dr. Yoo has been a Visiting Scholar (2003-2021) and Nonresident Senior Fellow (2021-present) at American Enterprise Institute. He has been a Visiting Fellow at Stanford University Hoover Institute from 2018 to the present. Dr. Yoo has authored or co-authored about 100 scholarly articles and 10-12 books on Constitutional Law.

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under the circumstances present, Vice President Pence was on "unassailable" grounds for not overturning the electoral results of the 2020 presidential election. (R.T. Vol. XVIII, p. 47:17; p. 66:20-25.)

Eastman's Two-Page and Six-Page Memos Detailing January 6 Scenarios

On December 23, 2020, Eastman drafted and sent a two-page legal memorandum to Boris Epshteyn and Kenneth Chesebro, attorneys and strategic advisors to President Trump and the Trump Campaign (two-page memo). (Exh. 6, p. 26; R.T. Vol. X, p. 69.) The two-page memo outlined Eastman's suggested "January 6 scenario," detailing a strategy and plan of action for Vice President Pence to declare President Trump as the re-elected president. (Exh. 3.)

Central to Eastman's new two-page memo strategy was his belief that it was "hugely important" for Republican electors in the "contested states"—Arizona, Georgia, Michigan, Nevada, Pennsylvania, New Mexico and Wisconsin to meet and to vote for a Trump slate of electors on the constitutionally set date of December 14 and then transmit those slates of Trump electors in accordance with federal law. (Exh. 40; R.T. Vol. X, p. 165-166.)

The first sentence of the two-page memo states, "7 states have transmitted *dual* slates of electors to the President of the Senate." (Exh. 3, p. 1, italics added.) The seven states are referring to Arizona, Georgia, Michigan, Nevada, Pennsylvania, New Mexico and Wisconsin (the contested states). Before December 23, 2020, the date Eastman forwarded the two-page memo, Eastman was aware that Arizona, Georgia, Michigan, Nevada, Pennsylvania, New Mexico and Wisconsin had each forwarded as required, at least one official Certificate of Ascertainment[53] referencing presidential electors who had been certified by the governor of that state. (Exhs. 10-17.)

[53] The states of Arizona (exh. 10, p. 6), Nevada (exh. 14, p. 3), and Wisconsin (exh. 17, p. 3), stated in their respective final Certificates of Ascertainment, that an election challenge had

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The major premise underlying Eastman's two-page memo was that under the Twelfth Amendment, Vice President Pence in his role as President of the Senate, had the authority to not only open and count each state's elector certificates of ascertainment but he also had the authority to unilaterally resolve "disputed" or "contested" electoral votes. Essentially, the two-page memo provided that on January 6, Pence would proceed as follows:

1) beginning with Alabama, Pence would begin to open and count the ballots;
2) when Arizona was called, Pence would announce that he had multiple slates of electors so he would "defer decision" on Arizona until he finished calling the other States;
3) declare that due to the "ongoing disputes in the 7 States," none of their electors would be deemed validly appointed, **resulting in none of the 7 States' electors' votes being counted** (according to Eastman's calculation, President Trump would prevail with 232 elector-appointed votes and Vice President Biden would only have 222 so "Pence then gavels Trump as re-elected";
4) after Democrats complain, Pence declares that no candidate has the required majority, sending the matter to the House "where 'the votes shall be taken by the states,'" and Trump would win under this scenario as well because Republicans controlled 26 of the state delegations; the bare majority needed to win;
5) if the ECA protocol was followed and there were objections to the Arizona slates, the two chambers convene separately and a senator would demand normal rules, creating a stalemate that might give sufficient time for the state legislatures to generate support for the alternate slate of electors; and
6) Vice President Pence should not ask for permission from members of the Joint Session of Congress or from the court since his position is "that the Constitution assigns this power to the Vice President as the ultimate arbiter." Eastman acknowledged that several steps in this two-page memo scenario represent a violation of the Electoral Count Act, e.g. deferring Arizona's electoral count until the end of the electoral count and refusing to adhere to the ECA time constraint on debating objections.

(Exh. 3, p. 2.)

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been filed in their state and judicially rejected before December 23, 2020. Arizona filed a supplemental Certificate of Final determination of Presidential Electors on January 6, 2021, which stated that a final determination of an election challenge regarding Arizona's electors had been resolved in *Burk v. Ducy*, case No. CV-20-0349-AP-EL, on January 5, 2021, and that case upheld the previously certified list of electors filed with the Archivist. (Exh. 10, p. 7.)

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However, Eastman has not always supported this position. For example, in November 2000, when Eastman testified before the Florida state legislature in connection with the *Bush v. Gore* presidential election, Eastman explained that *Congress* counts the votes, *Congress* is the ultimate arbiter as to any disputes regarding the count and, *Congress* answers to no one on this issue. (R.T. Vol. IX, p. 27; Exh. 25.)

Twenty years later, in a mid-October 2020 exchange between Eastman and Colbert discussing their post-election recommendations to President Trump, Eastman emphatically supported this position when Colbert suggested "[t]hat the President of the Senate decides authoritatively what 'certificates' from the states to 'open' and what electoral votes are 'counted,' under the 12th Amendment and the Electoral Count Act of 1887, 3 U.S.C. §15." (Exh. 38, p.1.) Eastman replied, "*I don't agree with this. The 12th Amendment only says that the President of the Senate opens the ballots in the joint session and then, in the passive voice, that the votes shall then be counted.* 3 U.S.C. §12 says merely that he is the presiding officer, and then it spells out specific procedures, presumptions, and default rules for which slates will be counted. *Nowhere does it suggest that the President of the Senate gets to make the determination on his own. §15 doesn't either.*" (Exh. 38, pp. 1-2, italics added.)

Eastman also disagreed with Colbert's interpretation of Article II regarding two or more conflicting slates of electoral votes authorizing the Legislature, not the governor or the popular vote to determine the appointment of the electors, stating: *"I don't agree with this either.* Article II says the electors are to be appointed 'in such manner as the Legislature thereof may direct,' but I don't think that entitles the Legislature to change the rules after the election and appoint a different slate of electors in a manner different than what was in place on election day. And 3 U.S.C. §15 gives dispositive weight to the slate of electors that was certified by the Governor in accord with 3 U.S.C. §5." (*Id.* at p. 2, italics added.)

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Acknowledging that these were positions Eastman held for over 20 years, positions which were contrary to the two-page memo scenario which stated Vice President Pence had unilateral authority to count and resolve disputed votes, Eastman claimed that his change of position between October 2020 and December 2020 was due to a significant amount of additional research.[54] (R.T. Vol. IX, pp. 23-25, 27.)

Approximately 11 days later, on January 3, 2021, Eastman drafted and sent a six-page legal memorandum to Epshteyn, an attorney and strategic advisor to Trump's campaign (six-page memo). Eastman composed this memo to outline a range of scenarios or options he was recommending to President Trump and the Trump campaign regarding the January 6th strategy they should pursue. It delineated the course of action Vice President Pence should take in relation to the electoral vote during the Joint Session of Congress on January 6, 2021.

As with the two-page memo, this six-page memo sets forth Eastman's proposed "January 6 scenario," which Eastman summarized in four sections: (1) a sampling of illegal conduct by election officials in Georgia, Pennsylvania, Wisconsin, Michigan, Arizona and Nevada; (2) a brief analysis of the 12th Amendment and Electoral Count Act of 1887 relating to the constitutional and statutory process of opening and counting electoral votes; (3) discussion of a proposed strategy and course of action (framed as War Gaming the Alternatives), for Vice President Pence to one way or the other, declare President Trump as re-elected president; and (4) justification for taking the BOLD action he recommended in the six-page memo. (Exh. 4.)

Eastman also claimed in the six-page memo that "**this Election was Stolen by a strategic Democrat plan to systemically flout existing election laws for partisan advantage;**

[54] The Court does not find that explanation credible as this new position seems to correlate more closely with the time frame of Eastman's representation of President Trump and the Trump Campaign than it does with time frame of the published research that Eastman relied upon, almost all of which pre-dated Eastman's newly articulated view by several years.

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we're no longer playing by Queensbury Rules, therefore." (*Id.* at pp. 3, 5, emphasis in original.)

Eastman's sampling of alleged illegalities set forth in the six-page memo contained one which Eastman acknowledged to be false—his statement that Michigan mailed out absentee ballots to every registered voter contrary to statutory requirements. This statement was false because Michigan's Secretary of State had mailed absentee ballot *applications,* not absentee ballots, to Michigan's registered voters.[55] (R.T. Vol. IX, pp. 87-88.) Despite acknowledging the falsehood of the statement, Eastman tried to justify it by stating that the Michigan Supreme Court's review of the *Davis* decision, discussed *supra*, had been denied amidst "significant dissent" and pointing out that members of the Michigan legislature vigorously contested the validity of those court decisions. (*Id.* at pp. 89-90.)

Although Eastman described the six-page memo as a compilation of nine January 6 scenarios that had been publicly discussed and intended for internal deliberation among Trump strategists, he disavows that it includes any explicit recommendations. (R.T. Vol. XXXI, pp. 40-41.) However, Eastman made several recommendations in reference to the action(s) called for by the scenarios which he labeled as "**BOLD, certainly**." (Exh. 4, p. 5, bold in original.) Eastman recommended that, for the purpose of counting the electors, Vice President Pence should, among other actions, unilaterally consider the validity (or invalidity) of certain ballots and adjourn the Joint Session of Congress, "determining that the time restrictions in the Electoral County [sic] Act are contrary to his [Vice President Pence's] authority under the 12th

[55] "Q: You had mentioned three violations of state law in the six-page memo regarding Michigan. The first one is that: 'Michigan mailed out absentee ballots to, every registered voter, contrary to statutory requirement that voter apply for absentee ballots. Do you recall that? Eastman: Yes. Q: And you have subsequently acknowledged that that statement is incorrect. Is that right? Q: Yes. They didn't mail out absentee applications for ballots." (R.T. Vol. IX, pp. 87-88.)

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Amendment and therefore void." (*Ibid.*) Moreover, Eastman directed, "[t]he main thing here is that VP Pence *should* exercise his 12th Amendment authority without asking for permission—either from a vote of the joint session or from the Court." (*Ibid.*, italics added.)

In both the two-page and six-page memos, Eastman stated that the ECA was "likely unconstitutional" because contrary to the 12th Amendment, which provides for a Joint Session of Congress, the ECA states that the two chambers of Congress, "acting separately" will decide the question of which votes of the electors shall be counted. (Exh. 3, p. 1.) As Eastman stated, "there is no court case holding either that the Electoral Count Act is constitutional or unconstitutional." (Exh. 6, p. 29, fn. 29.)

In the memos, Eastman also stated, falsely, that *"[t]here is very solid legal authority and historical precedent*, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch." (*Id.* at p. 3, italics added.) However, as Eastman knew before, during and subsequent to the time that he drafted and advocated implementation of certain of the January 6th scenarios, there was no *solid* legal authority regarding this issue and the only legal authority upon which he relied in drafting the memo consisted of four law review articles.[56] (R.T. Vol. IX, p. 159:8-161.)

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[56] The "solid legal authority" Eastman relied upon in the six page memo included the following law review articles: 1) Bruce Ackerman and David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 Va. L. Rev. 551 (2004); 2) Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653 (2002); 3) Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Manaaement*, 51 Loyola Chi. L. J. 309(2019); and 4) Nathan Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb* (2010). (Exh. 6, pp. 5-6; see also exhs. 1014, 1019, 1020, 1212.) Eastman testified that he also considered the Jack Beermann and Gary Lewis article, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes.* However, the Beermann and Lewis article was published March 1, 2021—almost 2 months after the January 3, 2021 six-page memo was circulated. The Robert Delahunty and John Yoo article,

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Moreover, Eastman contended that the question as to whether Vice President Pence had unilateral authority to resolve disputed electoral votes or to delay the electoral counting, was an "open question" and he knew there was no real judicial or primary legal authority, much less controlling legal authority on the issue.[57] (Exh. 31, p. 6.) During a January 4, 2021 meeting in the Oval Office, Eastman discussed and provided candid advice regarding the six-page memo scenarios to his client, President Trump. (R.T. Vol. XXXI, pp. 40-41.) President Trump was aware of the scenarios as early as December 2020.

Eastman's Appearance on the Bannon's War Room

Just before drafting and sending the six-page memo, on January 2, 2021, Eastman appeared as a guest on the "Bannon's War Room" radio program. Eastman was introduced as "one of the great thinkers about the Constitution" and repeatedly referred to by Steven Bannon as "the President's constitutional lawyer." (Exh. 28, pp. 1, 4.) Eastman spoke regarding the "failed" and "illegally conducted" 2020 presidential election, where, "in a number of state [sic] and most egregiously in Georgia, and Pennsylvania and Wisconsin, partisan elected officials, and in some cases partisan judicial officials, ignored or altered those legislative commands [regarding election laws requiring signature verification on absentee ballots and voter ID

Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count, 73 Case W. Rsrv. L. Rev., 27 was published in 2022. Dr. Yoo and Delahunty's article, *What Happens If No One Wins?* published in American Mind on October 17, 2020, was not a law review article.

[57] Many constitutional scholars will agree with Eastman's constitutional law expert, Dr. Yoo, that there are no Supreme Court cases that directly address whether Congress, the President of the Senate, the United States Supreme Court, or any other entity has authority to resolve a dispute arising over electoral votes – although, as Dr. Yoo noted, in *Bush v. Gore* the Supreme Court did discuss the Electoral College. (R.T. Vol. XIII, p. 46.) The dearth of judicial and legal authority on this issue has not impeded its vigorous discussion among constitutional scholars who debated it in a handful of law review articles that Eastman read and, for some reason considered not only as solid scholarship but also as precedent supporting the view that the President of the Senate does the counting, including the resolution of disputed electoral votes.

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requirements] and conducted the election in violation of the manner that the legislature had set out." (*Id.* at p. 4.)

Eastman urged listeners to put pressure on their respective state legislators (especially in Georgia, Pennsylvania, Wisconsin and Arizona) to demand that they convene a session to "either decertify the existing slate of [Biden] electors if there's just too much uncertainty about the results of the election, or *certify the correct slate of electors if the number of ballots that are shifted if you get rid of the illegal ones are enough to effect the outcome, as we believe they are.*" (*Id.* at p. 5, italics added.) Eastman proposed that listeners pressure their state legislators because "there was illegal conduct, and that likely opened the door for voter fraud that may have affected the outcome of the election." (R.T. Vol. X, p. 84.)

In discussing the power that the Constitution affords to state legislatures in the electoral process, Eastman stated that state legislators needed to act *promptly* because "what we have here is *massive evidence* that this election was at least conducted illegally. In violation of the state statutes. But, lots of evidence, as well, that as a result of that illegal conduct, removing checks against fraud in the absentee ballot process that *we have absentee fraud. More than enough to have affected the outcome of the election*. And, I think the duty of these legislators to fix this egregious conduct and make sure that we're not putting in the White House some guy that didn't get elected." (Exh. 28, p. 2, italics added.)

Although Eastman stated that illegality opened the door for fraud, Eastman acknowledged at trial that he did not know the extent to which there was any outcome-determinative fraud in the 2020 presidential election in Arizona, Michigan, Nevada, New

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Mexico or Wisconsin. (R.T. Vol. XXXI, pp. 87 [Wisconsin];[58] 88 [Nevada];[59] 90 [Arizona];[60] 93 [New Mexico and Michigan][61].)

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[58] Eastman initially testified that the report prepared by Justice Gableman regarding the Wisconsin election confirmed the illegality of steps taken by the Secretary of State that "opened the door for fraud," in a manner which affected as many of 200,000 ballots, (R.T. Vol. XXXI, p. 86.) Eastman then acknowledged that Justice Gableman did not make a determination as to how many ballots were fraudulently cast, and Eastman agreed with Gableman's view that there was more than an outcome-determinative number of ballots cast as a result of illegality even though Eastman could not quantify that number of fraudulent votes:

Q: "What is your view as to whether there was outcome-determinative fraud? Not asking about Justice Gableman.

Eastman: Well, you know, as I've said, I think, a number of times, once the ballots are separated from the envelopes it's hard to determine with proof—dispositive proof how much fraud was. That's why I've focused pretty regularly on the question of illegality. *I don't know the extent to which fraud affected the outcome*." (R.T. Vol. XXXI, p. 87, italics added.)

[59] Q: "But I didn't hear you say that you believe there was outcome-determinative fraud in Nevada. Is it fair to stay you don't know whether there was outcome-determinative fraud in Nevada?

Eastman: I don't know the extent of the fraud versus the illegality. I've not looked at that detail—and I said several times now. The illegality is sufficient in my view. To the extent that that actually produced fraudulent votes rather than illegal votes, I don't know, and it's a very hard thing to assess after the fact." (*Id.* at pp. 88-89.)

[60] Q: "I'm asking if you believe whether there was, in fact, outcome-determinative voter fraud in Arizona in the 2020 presidential election.

Eastman: Well, in Arizona, I had seen evidence—and again, I didn't have any involvement with Arizona, so I don't know the detail of that particularly. But I had seen evidence of a 35,000 vote injection at the third-party processor of votes. That's greater than the margin. *If that occurred*, that is evidence of fraud greater than the margin.

Q: If that occurred. *But do you know whether that occurred or not?*

Eastman: *I don't.*" (*Id.* at p. 90, italics added.)

[61] Q: "What about New Mexico? Do you believe there was outcome-determinative fraud in New Mexico in the 2020 election?

Eastman: I hadn't looked at New Mexico at all." (*Id.* at p. 93.)

Q: "What about Michigan?

Eastman: I don't know. There's a lot of evidence of—there's a lot of evidence of fraud in Michigan. I've not put together a spreadsheet identifying how many votes in Michigan may have been affected by fraud as opposed to illegality. I just don't know the answer to that." (*Ibid.*)

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Nevertheless, up to the date of trial, Eastman adhered to his false belief that "lots of evidence" of outcome-determinative fraud existed in the Pennsylvania 2020 presidential election, as he had emphatically stated during the Bannon radio program on January 2, 2021:

> Q: Were you alleging that there had been outcome-determinative absentee voter fraud to suggest that the election results were illegitimate?" [Objection overruled.]
>
> Eastman: I was alleging primarily there was illegal conduct, and that that likely opened the door for voter fraud that may have affected the outcome of the election.
>
> Q: But you didn't say that it may have affected the outcome of the election. You said that there was lots of evidence of fraud, and that there was more than enough to have affected the outcome of the election, right?
>
> Eastman: That's correct.
>
> Q: Okay. And that was your belief at the time, correct?
>
> Eastman: That was my belief at the time.
>
> Q: And is that still your belief?
>
> Eastman: Yes, it is.

(R.T. Vol. X, pp. 84-85.)

He characterized those "illegalities" as including the Pennsylvania Supreme Court's decision, *In re November 2, 2020 General Election*, which he said allowed removal of signature verification, the use of drop boxes and changing the deadline for mail-in ballots, providing advance notice of disqualified ballots in the pre-canvassing phase to "undermine" the Pennsylvania election law. (R.T. Vol. XXIX, p. 51.) Citing to the Pennsylvania State Representative Ryan's December 4, 2020 letter (the Ryan Report), Eastman contended that 58,200 absentee ballots were returned only one day after the mail date which was "near impossible." (*Id.* at p. 53; Exh. 1155.)

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Yet, there was no massive evidence of outcome-determinative fraud related to these alleged "illegalities" or any absentee voter fraud in connection with the Pennsylvania 2020 presidential election. The Ryan Report did not reference or set forth the data that supported its inaccurate claims, some of which seemed to be based on a misunderstanding of the publicly available data.[62] (*Id.*; R.T. Vol. III, pp. 121-123.)

None of the counties in Pennsylvania opened and counted mail-in or absentee ballots during the pre-canvassing period (before 7:00 a.m. on election day) or disclosed the vote totals prior to 8:00 p.m. on election day, contrary to Pennsylvania election laws.[63] (R.T. Vol. III, pp. 175, 151-153.) As the Pennsylvania Deputy Secretary of Elections and Commissions stated, there was no systemic insecurity or inaccuracy regarding Pennsylvania's 2020 presidential election based on the publicly available information posted by the county elections boards, the two-percent statistical sampling performed by each county three weeks after election day, and the statewide risk-limiting audit performed after the counties had certified their results of the November 2020 presidential election. (*Id.* at pp. 112-114.)

Moreover, pursuant to the Pennsylvania Election Code, the county boards of election and county district attorneys investigated 2020 presidential election-related complaints and claims of

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[62] Among other allegations, the Ryan Report calculated 400,000 missing votes, based on an erroneous analysis of the publicly available mail-in ballot data and a discrepancy between the number of ballots issued and the number of ballots received, which seemed to be based on a misunderstanding of Pennsylvania Act 77, enacted in 2019 regarding traditional absentee ballot voting and mail-in voting. (R.T. Vol. III, pp. 121-122.)

[63] As clarified by Pennsylvania's Deputy Secretary of Elections and Commissions, a 20 plus year employee whose duties included overseeing election administration at the Pennsylvania Department of State, the pre-canvassing of absentee and mail-in ballots refers to the handling of ballots "no earlier than 7:00 a.m. on election day, up to 8:00 p.m. on election day, there's canvassing of absentee and mail-in ballots that occurs after 8:00 p.m., and then there's the official canvass, which actually, pursuant to state law, begins on Friday after election day, when the county basically starts to accumulate all of the vote totals and adjudicate provisional ballots, et cetera." (R.T. Vol. III, pp. 146-147.)

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fraud and subsequently reported the outcome to the Elections and Commissions office with the Department of State, which learned of "individual cases of fraud prosecuted in various counties, but no indication that there was widespread fraud." (*Id.* at p. 117.)

January 4, 2021 Oval Office Meeting

On January 4, 2021, an Oval Office meeting at the White House was convened, with Eastman present as President Trump's counsel,[64] alongside President Trump, Greg Jacob, and Vice President Pence's Chief of Staff, Marc Short (the Oval Office meeting). (R.T. Vol. X, p. 86.) The purpose of the Oval Office meeting was to discuss Vice President Pence's role during the electoral count and Joint Session of Congress on January 6, 2021.

Starting from early December 2020, Vice President Pence had maintained the stance that he lacked the authority to reject electors on January 6th. By the time he attended the Oval Office meeting, Vice President Pence had participated in numerous discussions with Jacob, his White House Counsel,[65] reviewed a memo prepared by Jacob which analyzed constitutional and historical authority on the topic; read law review articles; obtained information from the parliamentarian; and sought and obtained the advice of constitutional scholar, Dr. Yoo, on the issue of whether Vice President Pence had the authority to unilaterally delay the electoral count or to disregard and/or reject electoral votes. (R.T. Vol. II, pp. 41-44; exh. 71.) Neither Dr. Yoo, nor any of these other sources, supported the view that Vice President Pence had the authority to delay the electoral count, disregard or reject the electoral votes under the circumstances present in January 2021, as the contested states had each provided a single set of executive-certified slate

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[64] This Court concludes that Eastman did not attend the Oval Office meeting as a private citizen petitioning for redress of a grievance. The meeting was scheduled at President Trump's request and during the meeting, President Trump asked and Eastman provided legal advice regarding the constitutionality of Vice President Pence rejecting certain elector votes.

[65] At the time, Jacob was serving as Counsel to the Vice President and Deputy Assistant to the President.

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of electors and no state legislature had challenged them. Vice President Pence also came to the conclusion that he lacked the authority to preside over the Joint Session of Congress in the manner Eastman and President Trump were pressuring him to because Vice President Pence believed his role as President of the Senate was a ministerial role that did not involve rejecting, delaying or counting electoral votes.

Eastman recalled that during the Oval Office meeting, President Trump asked whether Eastman agreed that Vice President Pence could "simply reject electors if he [Pence] had information that they were not legally certified" and Eastman responded, "[i]t's more nuanced than that" and "it's an open question in these circumstances that, namely, [with] only one set of certified electors—whether you have that power." (R.T. Vol X, p. 86-87.) Eastman suggested that even if Vice President Pence had that power, that he should refrain from exercising it, since the state legislatures had not provided an alternative certified elector slate. (*Id.* at pp. 86-87.) During the Oval Office meeting, Eastman stated that Vice President Pence "had unilateral authority to determine the validity of the electoral vote certificates" but proposed that Vice President Pence exercise the option to "delay" the electoral count for 10 days, rather than to reject certain electoral votes. (*Ibid.*) The meeting ended with President Trump requesting, and Vice President Pence agreeing, that Jacob would meet with Eastman again the next day however, Vice President Pence and Jacob thought that President Trump and Eastman were no longer pressuring Vice President Pence to reject electoral votes.

Events of January 5, 2021

On January 5, 2021 at 8:06 am., President Trump tweeted, "The Vice President has the power to reject fraudulently chosen electors." (Exh. 297.)

That same day, Jacob sent Vice President Pence a memo Jacob had prepared which outlined and analyzed some of Eastman's January 6 proposals that had been discussed during the

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January 4 Oval Office meeting (Jacob's Jan. 5 Memo). (Exh. 71; R.T. Vol. II, p. 80.) In the memo, Jacob characterized Eastman's proposals as requiring Vice President Pence to "skip opening and reading the electoral certificates for any state for which an alternate but uncertified slate of electors has been submitted"; open and read the Arizona, Georgia, New Mexico, Nevada and Pennsylvania electoral certificates at the end of the Joint Session rather than reading the certificates for those states in alphabetical order; and to refrain from counting the electoral certificates for these states until their state legislature determines whether to certify a competing slate of electors. (Exh. 71, p. 1.) Jacob outlined how each proposed step violated the Electoral Count Act and was also in conflict with *Wisconsin Voters Alliance*, a Washington D. C. district court decision filed the day before. Jacob noted that *Wisconsin Voters Alliance* held that "'[p]laintiffs' theory that [the Electoral Count Act is] unconstitutional and that the Court should instead require state legislatures themselves to certify every Presidential election lies somewhere between a willful misreading of the Constitution and fantasy.'"[66] (*Id.* at p. 3.)

Meeting Between Eastman, Jacob, and Short

Later that day, Jacob and Short met with Eastman in Short's office between 11:00 and 11:30 a.m. (January 5 meeting). However, Eastman's "ask" during the January 5 meeting differed from his "ask" at the end of the day before. Initially, during the January 5 meeting, Eastman asked that Vice President Pence *reject* the electoral votes from Arizona, Georgia, Wisconsin, Michigan, Pennsylvania and, possibly Nevada and New Mexico as well.[67] That

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[66] The court notes that the District Court's denial of preliminary injunction was also based on plaintiffs' failure to demonstrate standing, personal jurisdiction, or service on defendant Vice President Pence. In sum, plaintiffs did not establish a likelihood of success on the merits. (See *Wisconsin Voters Alliance, et al. v. Pence et al.* (2021) 514 F.Supp. 3d 117, 120-122). The notice of errata filed by OCTC on December 26, 2023 and Eastman's December 28 response, addressed the District Court's January 4, 2021 decision in *Wisconsin Voters Alliance.*

[67] Eastman contends that during the January 5 meeting, he did not propose that Vice President Pence should reject the elector slates from the contested slates. However, that is not

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request precipitated a robust, almost 2 hour discussion regarding historical precedent, the fact that no vice president in the entire history of the country ever actually exercised authority to reject electoral vote certificates and, how courts would likely deny Eastman's rejection theory. (R.T. Vol. X, pp. 57-58.)

During the January 5 meeting, Jacob and Eastman discussed a number of law review articles regarding the authority of a vice president, including a 2004 law review article entitled "Thomas Jefferson Counts Himself into the Presidency" by Bruce Ackerman and David Fontana which addressed actions taken by Vice Presidents John Adams in connection with the election of 1796;[68] and Thomas Jefferson in connection with the election of 1800.[69] Eastman agreed with

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credible as during the January 5 meeting Jacob made handwritten notes, indicating "John Eastman meeting 1/5/21… Requesting VP reject…" (Exh. 65.) Moreover, certain January 6 emails (4:29 p.m. by Jacob) and Eastman (6:09 p.m.) acknowledge that elector rejection the "most aggressive position (the elector rejection option) had been raised and not "retreated to" until the night of January 5. Therefore, this court finds Jacob's testimony credible that Eastman did initially, during the January 5 meeting, request that Vice President Pence reject electoral votes from the contested states rather than delay the counting until it became apparent that Eastman's rejection request didn't gain traction with Jacob; then Eastman changed his request to a delay of the electoral count. (R.T. Vol. X, pp.77-78.)

[68] The election of 1796 was the first contested presidential election in the United States. The leading candidates were John Adams (the sitting Vice President) and Thomas Jefferson. Adams presided over the electoral count on February 8, 1797. Vermont was a pivotal state in the 1796 election and although contemporaneous sources rumored that Vermont's electors were appointed in violation of state law, the *Annals of Congress* reflect that Adams handed the certificate with the four Vermont votes cast for Adams to the teller for counting, and, hearing no objection, Adams sat down for a moment and then stood up and announced that in obedience to the commands of Congress and pursuant to the joint resolutions—John Adams was elected President of the United States. (Exhs. 179, pp. 32-35; 1358, pp. 72-73.)

However, as Dr. Yoo pointed out, the Vermont electoral votes were the only votes certified by Vermont and for that reason, Vice President Adams may have thought he was required to count them and that he had no authority to look past the certification he had received in order to identify possible irregularities. (Exh. 1358, p. 74.)

[69] The electoral count for the 1800 presidential election was held on February 11, 1801 and lasted almost a week. The leading presidential candidates were President John Adams who was seeking re-election and Thomas Jefferson. There were technical deficiencies in Georgia's certificate for four electors which could have supported rejection and that potentially could have been outcome determinative, even though the deficiencies did not affect the validity of the

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Jacob that the actions taken by Jefferson, basically ignoring defects in Georgia's certificate, crediting Georgia with its three electoral votes and proceeding with the electoral count, did not give rise to a rejection of electors or represent an incident where a vice president asserted any authority involving a substantive determination about an electoral certificate. (R.T. Vol. II, p. 63-65.) After further discussion about the 1796 incident involving Adams, Eastman agreed that neither the Adams nor Jefferson examples reflected that either vice president had rejected electoral vote certificates, claimed any authority to do so or claimed they had authority to make any substantive decisions about electoral vote certificates. (*Id.* at pp. 65-67.) Jacob concluded that neither Congress nor a vice president has authority to reject electors and, as Vice President Pence stated all along and articulated clearly in his Dear Colleague letter the next day, Vice President Pence had reached the same conclusion.

Jacob and Eastman had a further discussion about whether the United States Supreme Court would agree with Eastman's view that a vice president could reject electoral votes and they subsequently agreed that although there may be one or two dissenting opinions, a majority of the justices would likely vote against it. (*Id.* p. 70.)

Eastman and Jacob ultimately agreed that during the 130 years that the Electoral Count Act had been in effect, there was never a departure from its procedures, not even when Nixon, as President of the Senate on January 6, 1961, announced that with no objections, the third slate, which was the last slate certified and ascertained by the Governor of Hawaii, was the operative slate of electors for Hawaii. (*Id.* at p. 61.)

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appointment of the electors. Yet, the Georgia votes were counted and neither the *Annals of Congress*, the House Journal nor the Senate Journal reflect any dispute, resolution of a dispute by the President of the Senate or others during or after the electoral count. Although Eastman contends that Jefferson exercised unilateral authority to resolve a Georgia electoral vote dispute, the historical records do not support that contention. (Exh. 179, pp. 37-42; see also exh. 1358, pp. 75-77.)

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Following that hearty discussion during the January 5 meeting, Eastman requested that Vice President Pence delay rather than reject the contested state electors, based in part, on requests made for a delay by some individual state legislators. (*Id.* at pp. 72-73.) However, as Jacob noted, "[t]here was no dual slates of electors where there was an imprimatur of state authority that would cause them to have legal status under the Electoral Count Act that would trigger its procedures," no state legislature had sought a delay of the electoral count and no state legislative majorities indicated an intent to do so. (*Id.* at p. 76; exh. 71, p. 3.)

Eastman's Discussions with Trump and Jacob After the Jan. 5th Meeting

After Eastman met with Jacob and Short in Short's office, Jacob and Eastman had two more phone calls that day – the first of which took place at 5:00 or 5:30 p.m. and included President Trump, Eastman, and another attorney. During that call, they acknowledged that Vice President Pence was not going to agree to reject electors so they asked whether Vice President Pence "would reconsider the possibility of the procedural option of sending it back to the states" – in other words, to opt for an adjournment, recess, or delay for some period of time. (R.T. Vol. II, p. 169.)

The second phone call Jacob had with Eastman on the evening of January 5th involved a renewed discussion about a delay for further consideration by the state legislatures and that while some individual Republican state legislators forwarded letters seeking a delay of the electoral count, numerous state legislature leaders stated they had no interest in taking further action and that "no legislative body in any of the states where a majority of that body had indicated that that they were interested in revisiting the question of who had won that state in the [2020 presidential] election." (R.T. Vol. II, pp. 74, 169-170.)

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Neither the January 5 meeting nor the subsequent two phone calls caused Jacob or Vice President Pence to alter their position that as President of the Senate, Vice President Pence did not have authority to reject electoral votes, to recess or delay the electoral count.

Eastman emailed Jacob at 9:32 p.m. that night, stating: "This is huge, as it looks like PA legislature will vote to recertify its electors if Vice President Pence implements the plan we discussed. Give me a call once you've had your sit-down with the VP and let me know where we stand." (Exh. 66, p. 2) Jacob and Vice President Pence were not swayed.

According to the White House Presidential Call Log, Eastman and President Trump spoke from 9:54 p.m. to about 9:58 p.m. on January 5. (Exh. 386, p. 3) Two minutes later, at 10:00 p.m., President Trump tweeted "If Vice President@Mike Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!" (Exh. 298.) Eastman knew that contrary to the statements he made in his email about Pennsylvania, no state legislature was going to certify a Trump slate of electors.

The White House Presidential Call Log further reflects that from 11:23 to 11:37 p.m. and then from 11:39-11:50 p.m., President Trump spoke with Giuliani. (Exh. 386, p. 5.)

Eastman's Discussions with Russell Ramsland and Joe Oltmann

Also on January 5, 2021, Eastman had conversations with a few people among the Willard Hotel Save America rally organizers whom he believed had varying levels of technical expertise and who had been involved with analyses of the systems, among them Russell Ramsland and Joe Oltmann. Eastman met Ramsland and Oltmann for the first time the evening of January 5, 2020. (*Id.* at pp. 52-5.) During a reception, they discussed a single page chart compiled by Ramsland and Oltmann (Ramsland/Oltmann diagram). (R.T. Vol. XI, pp. 93-94;

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see also exh. 1217.) The Ramsland/Oltmann diagram was a flow chart suggesting that phantom and fake ballots[70] were introduced into the voted stream of ballots at multiple points by manipulating Dominion voting machine vulnerabilities. (*Id.*; R. T. Vol. XI, pp. 91-92.)[71]

Eastman had never heard of Oltman, and he did not conduct any background Internet or other research regarding either Ramsland or Oltman.[72] (*Id.* at pp. 55, 99.) As a matter of fact, Eastman did not recall inquiring about Oltmann's credentials, e.g., educational or professional background or professional experience, that would qualify Oltmann to competently render the analysis of the Dominion voting machine vulnerabilities set forth in the Oltmann diagram. (*Id.* at pp. 88-89, 96.) Eastman did not recall Oltmann providing any support for the purported Dominion machine vulnerabilities or quantifying the number of pre-loaded ballots/suspense folder ballots that were allegedly counted due to Dominion machine vulnerabilities.

Eastman did recall, however, that none of the individuals with whom he discussed this issue provided any documentation, research or data regarding the credibility of the alleged Dominion machine vulnerabilities set forth in the Ramsland/Oltmann diagram. And Eastman did not make any effort to obtain information from Dominion regarding the Ramsland claims about the Dominion voting machines. (*Id.* at p. 59.)

Nevertheless, Eastman found the Ramsland/Oltmann diagram to be credible because some unnamed individuals who he believed had technical expertise, told him that there were

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[70] Eastman was told that phantom ballots were ballot images copied/replicated within the system and fake ballots were ballots pre-loaded into the system. Both phantom and fake ballots would have occurred after the initial processing of verified paper ballots. (R.T. Vol. XI, pp. 91-92.)

[71] A credible study of Dominion voting machines concluded that there was no evidence to suggest that Biden exceeded voting expectations in counties where these machines were utilized. (Exh. 174, p. 4.)

[72] Eastman did recall learning that Ramsland was consulted by Texas at some point when it was trying to determine which voting machines to purchase.

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vulnerabilities in the system and, because he believed he saw the diagram predictions play out as he was watched the Georgia Senate runoff election returns on January 5, 2021.[73] (R.T. Vol. XI, pp. 95-96.) The Ramsland/Oltmann prediction was that as a share of the counted votes would no longer increase, the estimated vote total would continue to increase. However, on January 5, 2021, the Ramsland/Oltmann prediction did not occur.[74] (*Id.* at pp. 255-256, 259-260.)

Events of January 6, 2021

Trump's Early Morning Tweet

At 8:17 a.m., President Trump tweeted that "States want to correct their votes . . . . All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage." (Exh. 299, p. 1.)

Vice President Pence's January 6, 2021 Letter

On January 6, 2021, shortly before the Joint Session of Congress, Vice President Pence forwarded a public letter to Congress (Dear Colleague Letter), which stated in pertinent part:

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[73] Specifically, Eastman believes he saw the number of votes cast (the denominator in the vote total estimates) change unexpectedly and then the counting or the reporting of the counting of ballots shutting down for an hour or two. (R.T. Vol. XI, p. 98.) When Eastman observed this phenomenon during the Georgia Senate race, he believed that as the reported vote totals reached 100%, that number would not change but more ballots were reported because pre-loaded ballots were being withdrawn from the suspense folders in the Dominion machines and were added into the vote tally. (Resp's closing brief – incorrectly cited p. 31.) Eastman was mistaken.

By October 2021, Eastman came to understand that the Associated Press characterized the fractional number to which Eastman referred, was actually an estimate which the Associated Press adjusted as they learned more during vote tabulation. (*Id.* at p. 101.) However, even after learning of that explanation, Eastman still believed the results were disputed, indicative of fraud and warranted further review since he was told by statistician Eric Quinnell that it was unlikely that the Associated Press estimate was so far off the actual figure.

[74] "The estimated vote count is just that, an estimate. It's going to change over the course of the evening. And there's no literature that indicates that movement in the estimated vote count from media companies like Edison is an indication that fraud of any kind or illegality of any kind is happening, let alone that there's machine manipulation occurring." (R.T. Vol. XXXI, p. 260.) Moreover, a gap in the reporting of votes did not mean that the counting of votes stopped. (*Id.* at p. 261.)

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> Dear Colleague:
>
> Today, for the 59th time in our Nation's history, Congress will convene in Joint Session to count the electoral votes for President of the United States. Under our Constitution, it will be my duty as Vice President and as President of the Senate to serve as the presiding officer.
>
> After an election with significant allegations of voting irregularities and numerous instances of officials setting aside state election law, I share the concerns of millions of Americans about the integrity of this election. . . . [¶]
>
> During the 130 years since the Electoral Count Act was passed, Congress has, without exception, used these formal procedures to count the electoral votes every four years. . . .
>
> Some believe that as Vice President, I should be able to accept or reject electoral votes unilaterally. Others believe that electoral votes should never be challenged in a Joint Session of Congress.
>
> After a careful study of our Constitution, our laws, and our history, I believe neither view is correct. [¶]. . . [¶]
>
> *[I]t is my considered judgment that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not.*

(Exh. 64, pp. 2-3, italics added.)[75]

Eastman's Speech at the Ellipse

On January 6, 2021, Eastman spoke to a crowd on the National Mall Ellipse at a televised "Save America" rally, better known as the "Stop the Steal" rally. Eastman estimated that there were between 250,000 and 500,000 people in attendance. (Eastman's Answer, pp. 38-39.) During the rally, speakers and attendees protested the results of the 2020 presidential election, which most of them characterized as having been stolen from President Trump.

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[75] Jacob did not believe that these allegations of voting irregularities or election law officials setting aside state election law gave Vice President Pence authority to unilaterally reject any electors. (R.T. Vol. II, p. 84.)

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Before he spoke, Eastman was introduced to the crowd by Rudy Giuliani, one of President Trump's lawyers, who stated, "I have Professor Eastman here with me to say a few words about that [everything outlined for the day being perfectly legal]. He's one of the preeminent constitutional scholars in the United States. . . ." (Exh. 30, p.1.) Giuliani contended that given the "questionable constitutionality" of the Electoral Count Act of 1887 (ECA), Vice President Pence could "cast it aside" and "can send it" back to the legislatures to give them five to ten days to find proof that the 2020 election was stolen—"over the next 10 days, we get to see the machines that are crooked. The ballots that were fraudulent." (*Ibid.*) Giuliani stated "let's have trial by combat," noting that Giuliani was willing to stake his reputation and "the President is willing to stake his reputation on the fact we're gonna find criminality there." (*Ibid.*) Giuliani went on to rail about his proof that the 2020 presidential election had been stolen;[76] "last night, one of the experts that has examined these crooked Dominion machines has absolutely what he believes is conclusive proof that in the 10%, 15% of the vote counted, the votes were deliberately changed by the same algorithm that was used in cheating President Trump and Vice President Pence. . . . You noticed they were ahead until the very end, right?" (*Id.* at p. 2.) Giuliani then asked Eastman to explain how "they" cheated in the January 5, 2021 Georgia Senate run-off and the November 3, 2020 [presidential] elections.

Eastman picked-up where Giuliani left off, alleging illegalities, election fraud, fraud involving Dominion voting machines[77] and demanding that Vice President Pence unilaterally delay the 1:00 p.m. electoral count to allow state legislatures to investigate these issues:

> Look, we've got petitions pending before the Supreme Court that identify it, chapter and verse, the number of times state election

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[76] According to Giuliani, the 2020 presidential election had been stolen in seven states with "crooked Democratic cities where they could push everybody around." (*Id.* at p. 2.)

[77] Eastman's comments regarding the purported vulnerabilities of the Dominion voting machines were based in large part on his discussions with Ramsland and Oltmann.

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> officials ignored or violated the state law in order to put Vice President Biden over the finish line. *We know there was fraud.* Traditional fraud that occurred. *We know that dead people voted.* But, we now know because we caught it live last time in real time how the machines contributed to that fraud.
>
> And, let me, as simply as I can, explain it. . . . They put those ballots in a secret folder in the machines. Sitting there waiting until they know how many they need. And then, the machine, after the close of polls, we now know whose [sic] voted and we know who hasn't. And, I can now, in that machine, match those unvoted ballots with an unvoted voter and put them together in the machine.
>
> And, how do we know that happened last night [January 5, 2021] in real time? You saw when it got to 99% of the vote total, and then it stopped. The percentage stopped, but the votes didn't stop. What happened, and you don't see this on Fox or any of the other stations, but the data shows that the denominator, how many ballots remain to be counted. How else do you figure out the percentage that you have? How many remain to be counted? That number started moving up. That means they were unloading the ballots from that secret folder, matching them to the unvoted voter, and voila. We have enough votes to barely get over the finish line.
>
> We saw it happen in real time last night, and it happened on November 3rd, as well. *And, all we are demanding of Vice President Pence is this afternoon at 1:00, he let the legislators of the state look into this so we get to the bottom of it*, and the American people know whether we have control of the direction of our government or not. We no longer live in a self-governing Republic if we can't get the answer to this question.
>
> This is bigger than President Trump. It is the very essence of our Republican form of government, and it has to be done. *And, anybody that is not willing to stand up to do it does not deserve to be in the office. It is that simple.*

(Exh. 30, pp. 2-3, italics added.)

Eastman knew that any votes cast in the name of a deceased person were not outcome-determinative in any state. (R.T. Vol. XI, pp. 49-50.) Eastman knew that his statements made during his January 6th speech on the Ellipse implied that there was fraud related to electronic voting. (R.T. Vol. XXXI, p. 84 ["Q: And you don't believe that your statements on January 6th

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at the Ellipse implied that there had been fraud related to electronic voting? A: It's quite possible it implied that"].) Eastman gave no consideration to the effect that his statements would have on the crowd. (*Id.* at p.85 [Q: Did you give any consideration to the effect that your statements would have on the crowd? A: I did not. I think I've testified earlier I was asked at the last minute to speak, and I spoke a lot less than three minutes"].)

Eastman made the damning statements at the Ellipse regarding purported Dominion voting machine vulnerabilities even though he had not seen conclusive proof that Dominion voting machines were used to fraudulently flip votes in the 2020 presidential election. (R.T. Vol. XI, pp. 33-34.)

Significantly, about two months before Eastman made the damning Dominion voting machine vulnerabilities remarks on the Ellipse, Eastman had become aware that the Cybersecurity and Infrastructure Security Agency (CISA) stated on November 12, 2020, "[t]he November 3rd election was the most secure in American history," notwithstanding the "many unfounded claims and opportunities for misinformation about the process of our elections." (Exh. 201.) CISA further stated "[w]e can assure you we have the utmost confidence in the security and integrity of our elections and you should, too. When you have questions, turn to the elections officials as trusted voices, as they administer elections." (*Ibid.*) Eastman found the CISA statement to be "rather implausible" and did not reach out to any election officials regarding the Dominion voting machines or the reliability of the election in their state. (R.T. Vol. X, pp. 121-124.) Eastman was also aware of the Election Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Executive Committees, bipartisan groups which prepared a November 16, 2020 statement by 59 computer

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scientists and election security experts[78] which stated there was no credible evidence that supports claims that the 2020 election outcome in any state was altered through technical compromise.[79] (Exh. 187.)

President Trump's Speech at the Ellipse

President Trump was the last speaker during the Stop The Steal rally. He complimented Giuliani[80] and thanked Eastman for a fantastic job, commenting that Eastman "is one of the most brilliant lawyers in the country and he looked at this and he said, what an absolute disgrace that this could be happening to our Constitution." (Exh. 322, p. 3.) Stating that "[w]e will never give up. We will never concede", President Trump for almost an hour railed about illegalities, election fraud in the contested states, "overwhelming evidence about a fake election", how he had won the 2020 presidential election by a "landslide" and numerous other false election denier troupes. (*Id.* at p. 2.) During his speech, President Trump repeatedly pressured Vice President Pence to act unilaterally to reject the electoral votes by sending them back to the states to re-certify their votes.[81]

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[78] Notably, Eastman found credible the work of J. Alex Halderman, who Eastman mistakenly claims supported Eastman's views on election irregularities (particularly with regard to the election in Antrim County, Michigan), and who was one of the computer scientists and election security experts who signed the November 16, 2020 statement. (Exhs. 206, p. 3; 187.) (See also discussion *infra*, re Antrim County and Halderman's forensic conclusions re its election.) Halderman commented that Ramsland's report on Antrim County "contain[ed] an extraordinary number of false, inaccurate or unsubstantiated statements and conclusions, the most serious of which I refute below." (Exh. 1062, p. 40; see also R.T. Vol. XI, pp. 56-58.)

[79] On January 11, 2021, Eastman sent an email to Giuliani, requesting to be included on President Trump's pardon list. This request stemmed from Eastman's apprehension that some individuals perceived his remarks at the Ellipse during the Save America rally as potentially influencing the events of the January 6 riots at the Capitol. (Exh. 62; R.T. Vol. XI, pp. 106-107.)

[80] "And Rudy, you did a great job. He's got guts." (Exh. 322, p. 3.)

[81] "And he [Eastman] looked at Mike Pence, and I hope Mike is going to do the right thing. I hope so. I hope so, because if Mike Pence does the right thing, we win the election. All he has to do, all—this is—this is from the number one or certainly one of the top Constitutional

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Trump encouraged his supporters to march down Pennsylvania Avenue to the Capitol and concluded by urging them to "fight like hell" to save the country. (*Id.*)

After the speeches at the Ellipse, at 2:24 p.m., President Trump tweeted that "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" (Exh. 300.)

Assault On The Capitol

Toward the end of the Stop The Steal rally on the Ellipse, some members of the crowd, protestors, rioters, and members of militia groups marched to the Capitol and began to riot around 2:00 p.m. EST; overwhelming the 800 deployed Metropolitan police, attacking the Capitol police, breaching the Capitol, breaking windows, entering and damaging Capitol offices and the chambers of Congress. Vice President Pence, members of Congress and their staff had to be evacuated to other locations for their safety. (R.T. Vol. II, pp. 86-89; exh. 165, pp. 31-33.)

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lawyers [Eastman] in our country. He [Pence] has the absolute right to do it. . . . States want to revote." (Exh. 322, p. 3)

"The states got defrauded…. Now they want to recertify. They want it back. All Vice President Pence has to do is send it back to the states to recertify, and we become president. . . . I just spoke to Mike. I said, Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage, and then we're stuck with a president who lost the election by a lot. . . . We're just not going to let that happen." (*Ibid.*)

"And Mike Pence is going to have to come through for us, and if he doesn't, that will be a sad day for our country, because you're sworn to uphold our Constitution. Now it is up to Congress to confront this egregious assault on our democracy, and after this, we're going to walk down, and I'll be there with you." (*Id.* at p. 6.)

"And they want to recertify their votes. They want to recertify, but the only way that can happen is if Mike Pence agrees to send it back. Mike Pence has to agree to send it back." (*Id.* at p. 14.) [The crowd chanting, "Send it back!"] (*Id.* at p. 14.).

"And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country, and if you're not, I'm going to be very disappointed in you, I will tell you right now." (*Id.* at p. 18.)

"When you catch somebody in a fraud, you're allowed to go by very different rules. So, I hope Mike has the courage to do what he has to do." (*Id.* at p. 22.)

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The violence and turmoil at the Capitol resulted in a cessation of the electoral count, which had started when the Joint Session of Congress convened at 1:00 p.m. Congress eventually reconvened and began to continue with the electoral count around 8:30 p.m. Eastern time.

Communications Between Jacob and Eastman

During the morning of January 6th and the violent attack on the Capitol, Jacob and Eastman continued to argue regarding the scope of Vice President Pence's unilateral authority as raised in the six-page memo, during the meetings and calls with President Trump and others. At 10:44 a.m., Jacob responded to Eastman's January 5th email sent at 9:32 p.m. by inquiring whether Eastman's proposal was constitutional in light of the ECA constitutional imperative regarding the process for addressing objections. (Exh. 66, p. 1.) Eastman's 1:33 p.m. email was dismissive: "I'm sorry Greg, but this is small-minded. You're sticking with minor procedural statutes while the Constitution is being shredded." (*Ibid.*)

Jacob retorted by pointing out that he did not believe a single Justice on the United States Supreme Court of a Courts of Appeal would be as "broad minded" as Eastman "when it comes to the irrelevance of statutes enacted by the United States Congress, and followed without exception for more than 130 years. They cannot be set aside except when in direct conflict with the Constitution . . . . I want election integrity fixed. But I have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal framework, it is a results oriented position that you would never support if attempted by the opposition and essentially entirely made up. And, thanks to your bullshit, we are now under siege." (Exh. 66, p. 1.)

A few minutes later Eastman pushed back—"My 'bullshit' ---seriously? You think you can't adjourn the session because the ECA says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming. The 'siege' is

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because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened." (Exh. 67, p. 1.)

Jacob's 1:05 p.m. email was pointedly but accurately critical of Eastman and his advice to President Trump:

> Respectfully, it was gravely, gravely irresponsible for you to entice the President with an academic theory that had no legal viability, and that you well know we would lose before any judge who heard and decided the case. And if the courts decline to hear it, I suppose it could only be decided in the streets. The knowing amplification of that theory through numerous surrogates, whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are.
> I do not begrudge academics debating the most far-flung theories. I love doing it myself, and I view the ferment of ideas as a good and helpful thing. But advising the President of the United States, in an incredibly constitutionally fraught moment, requires a seriousness of purpose, an understanding of the difference between abstract theory and legal reality, and an appreciation of the power of both the office and the bully pulpit that, in my judgment, was entirely absent here.

(Exh. 69, pp. 2-3.)

Between 4:29 p.m. and 4:45 p.m., Eastman and Jacob exchanged emails regarding the nature of the advice that Eastman gave to President Trump; specifically, whether Eastman had advised President Trump that "Vice President Pence 'DOES NOT have the power to decide things unilaterally? Because that was pushed publicly, repeatedly, by the President and by his surrogates this week. And without apparent legal correction." (Exh. 68, emphasis in original.) Eastman confirmed that he had given Trump that advice when Jacob was on the phone presumably, the evening of January 5th. (*Ibid.*)

Eastman emailed Jacob again at 6:09 p.m., advocating for an adjournment and criticizing Vice President Pence's Dear Colleague statement regarding his unilateral authority to accept or reject electoral votes as "the most aggressive position that was discussed and rejected." (Exhs.

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68, p. 1; 69, p. 2.) Eastman noted that "*we* had given a much more limited option, merely to adjourn to allow state legislatures to continue their work. I remain of the view not only would that have been the most prudent course as it would have allowed for the opportunity for this thing to be heard out, but also had a fair chance of being approved (or at least not enjoined) by the Courts. Alas." (*Id.* at p. 2, italics added.)

At 9:44 p.m., after the electoral count had resumed, Eastman again emailed Jacob, stating that the ECA had been violated that evening by both the Senate and House by debating the Arizona objections longer than the 3 U.S.C. §17 period of two hours and Vice President Pence had allowed debate after the question had been voted upon. Relentlessly, Eastman stated that with these purported ECA violations, "I implore you to consider one more relatively minor violation and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the massive amount of illegal activity that has occurred here." (*Id.*)

The American Mind Article

On January 18, 2021, the American Mind, an online publication of the Claremont Institute, published an article written by Eastman regarding the November 3, 2020, presidential election, entitled "Setting the Record Straight on the POTUS 'Ask'." Eastman wrote this article to dispute statements made by Vice President Pence in his January 6 "Dear Colleague" letter regarding President Trump's requests that Vice President Pence exercise unilateral authority to accept, reject, dispute, count and/or not count certain electoral votes during the Joint Session of Congress. Eastman contended that "when all was said and done" President Trump had not asked Vice President Pence to take these actions regarding the electoral count. (Exh. 31, p. 2.) Rather, according to Eastman, Vice President Pence was asked by both President Trump and by Eastman to merely "pause" the proceedings long enough to give the few states whose legislators had

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asked for more time to assess whether there was illegal conduct by their state election officials sufficient to warrant revoking the certified election results. (*Id.* at p. 7.) However, this Court notes, that the 10-day "pause" Eastman sought from Vice President Pence would, in and of itself, violate the Electoral Count Act and the evening of January 6, and Eastman himself acknowledged that fact.[82] (Exh. 69, p. 2.)

In the January 18, 2021 American Mind article, Eastman set forth a brief constitutional analysis of a hypothetical scenario, 3 U.S.C. §15 of the Electoral Act, the 12th Amendment and the vice president's role vis-a-vis Congress in the opening and counting of electoral votes, as analyzed by certain constitutional scholars. Amazingly, and contrary to statements made in his two-page and six-page memos and all of his post mid-October 2020 public statements, Eastman concluded "[a]ll this by way of background to show that *whether or not Vice President Pence had the constitutional authority to determine that certain slates of electors were invalid remains an open question.*" (Exh. 31 p. 6, italics added.)

In the January 18, 2021 American Mind article Eastman further proclaimed:

> A large portion of the American citizenry believes the illegal actions by partisan election officials in a few states have thrown the election. They saw it with their own eyes—in Fulton County, Georgia, where suitcases of ballots were pulled from under the table after election observers had been sent home for the night; in parts of Wayne County (Detroit), Michigan, where there are more absentee votes cast than had been requested; . . . in Antrim County, Michigan, where votes were electronically flipped from Trump to Biden.

(Exh. 31, pp. 9-10.) These statements were false.

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[82] After claiming that the Senate, the House, and Vice President Pence had violated the Electoral Count Act during the night of January 6 by extending the debate after Congress resumed its session following the assault on the Capitol, Eastman emailed Jacob: "I implore you to consider one more relatively minor violation and adjourn for 10 days to allow the legislatures to finish their investigations. . . ." (Exh. 69, p. 2.) This would have been a violation of the ECA that would have been unprecedented in American history.

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According to Jonathan Brater, Director of the Michigan Bureau of Elections,[83] the voter turnout in Detroit for the 2020 presidential election was about 4 percent higher in 2020 than it was in 2016 but, it was still less than the overall voter turnout which was about 15 percent higher. (R.T., Vol. VI, p. 169.)

As discussed previously, Eastman and others erroneously stated that the Michigan Secretary of State mailed absentee ballots to all registered voters. Moreover, absentee ballot applications were widely available in Michigan and could even be downloaded from the Michigan Department of State website. (*Id.* at p. 180.) In fact, according to Michigan Secretary of State Benson, over 174,000 absentee ballots were cast in Detroit in the 2020 presidential election. (Exh. 112, p. 20.) However, the Wayne County Absentee Voting Counting Boards displayed the data on a spreadsheet that reflected that there were *no* absentee ballots; and the City of Detroit reported a tally of zero absentee ballots, creating the impression that 100 percent of the absentee ballots cast were illegally or fraudulently cast. (R.T. Vol. XXXII, pp. 69-71.)

Although Eastman stated in the American Mind article that in parts of Wayne County, Michigan, more absentee votes were cast than had been requested, at trial Eastman stated he was unsure about the origin of this "information." Furthermore, because he was unable to retrace the information, he did not know if it was true. (R.T. Vol. XI, pp. 110-111.)

Secretary of State Benson congratulated the 1,600 local and county election officials who helped with Michigan's 2020 presidential election record-breaking turnout of 5.5 million voters. From October 2020 through mid-January 2021, Secretary of State Benson and her staff

[83] Mr. Brater supervised the Bureau of Elections which supports Michigan's chief election official, the Secretary of State, in administrating Michigan's election laws and supervising election city and local clerks.

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publicized numerous and ongoing statements regarding various election-related issues surrounding the 2020 presidential election in Michigan.[84]

In an effort to be transparent, Secretary Benson's November 11, 2020 press release acknowledged that there had been an "erroneous reporting of *unofficial* results from Antrim County [which] was a result of accidental error on the part of the Antrim County Clerk. The equipment and software did not malfunction, and all ballots were properly tabulated. However, the clerk accidently failed to update the software used to collect voting machine data and report unofficial results." (Exh. 100, p. 1, italics added.) Secretary Benson explained that "even though the tabulators counted all the ballots correctly, those accurate results were not combined properly when the clerk reported unofficial results" and "this was an honest mistake and did not affect any actual vote totals." (*Ibid.*)

In a December 17, 2020 press release, Secretary Benson stated that Michigan had conducted a full hand count audit of Antrim County 2020 presidential electoral votes and found that the Dominion vote tabulation machines accurately calculated the final votes: 9,759 for Trump and 5,959 for Biden. (Exhs. 109, 110.) According to the audit, the net difference between the hand-tallied audited votes and the Dominion tabulated votes was 12 votes—12 votes out of 15,718 total votes.

Eastman learned by November or December 2020, that Michigan state officials had analyzed the Antrim County software issue and determined that it was human error. (R.T. Vol. X, pp. 112-113.)[85] Nonetheless, Eastman stated in the American Mind article in mid-January 2021, that during the 2020 presidential election, Antrim County, Michigan votes for

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[84] See exhs. 100-112.

[85] Eastman incorrectly commented that expert Alex Halderman's March 26, 2021 Analysis of the Antrim County, Michigan report supported his statement lacks merit, given the publication date of the report. (*Id.* at pp. 112-115.)

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Trump had been electronically flipped to Biden. At trial, Eastman shied away from stating that any of those "electronically flipped" unofficial votes had been improperly counted for Biden. (R.T. Vol. XI, pp. 111-112.) But, Eastman affirmed his belief that his statement was true, noting that "experts" on both sides confirmed the statement[86] but there was a dispute as to whether this happened due to machine software. Eastman equivocated by stating that in the article he did not mean that Antrim County votes had been counted for Biden, but rather that he "was simply

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[86] Eastman commented that the report prepared by one of the experts, Alex Halderman, supported his statement. But, as Halderman's report, Analysis of the Antrim County, Michigan November 2020 Election Incident, predated Eastman's January 18, 2021 American Mind article by about two months, Eastman was incorrect. (See exh. 1062.) Moreover, Halderman summarized his findings as follows: "the Antrim County incident was not caused by a security breach. There is also no credible evidence that it was caused deliberately. . . . The major discrepancies in Antrim's results have been fully corrected. The final results match the poll tapes printed by the individual ballot scanners, and there is no evidence that the poll tapes are inaccurate, except for in specific precincts where particular circumstances I explain affected small numbers of votes, mainly in down-ballot races. . . . In Antrim, several layers of protections that were supposed to ensure accuracy broke down *due to human errors* on multiple levels…." (Exh. 1062, pp. 3-4, italics added.)

The other "expert" who prepared a declaration that addressed the use of the Dominion voting machines in Michigan was Russell Ramsland—one of the two individuals that Eastman collaborated with the evening of January 5 when Eastman, Ramsland and Oltmann fabricated the Dominion allegations (and Oltmann provided the one page diagram) that Eastman based some of Dominion-related remarks the next day at the Ellipse. Ramsland clearly lacked any election-related expertise and his declaration filed in the *King v. Whitmer* lawsuit erroneously stated that in two counties in Michigan, the Dominion machines were not functioning properly. Ramsland's analysis was actually based on election results from Minnesota, not Michigan and the Michigan counties that he referenced did not even utilize Dominion voting machines in the 2020 presidential election. (See R.T. Vol. VI, pp. 162-165.)

As to Antrim County, Ramsland prepared the "Antrim Michigan Forensics Report" (exh. 1047), which concluded that the Antrim County results should not have been certified and "that the Dominion Voting System is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results. The system intentionally generates an enormously high number of ballot errors. The electronic ballot errors are then transferred for adjudication" with no oversight, no transparency and no audit trail. (*Id.* at p. 1.) Ramsland's claims were not credible and reflected a fundamental misunderstanding of Michigan election administration. (R.T. Vol. VI, pp. 172-173.)

After an extensive analysis using "rigorous specifications," election expert, Grimmer did not find that Vice President Biden outperformed expectations in counties where Dominion voting machines were used. (Exh. 174, p. 4.)

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stating there was fact, that votes that had been case [sic] for Trump were recorded for Biden." (*Ibid.*) Eastman testified that he did not think that any flipped votes or that the missed Dominion machine software upgrade was deliberate or fraudulent. (R.T. Vol. X, pp. 119-120.)

Eastman's statement about "electronically flipped" Trump to Biden votes was a misrepresentation of the facts because, as Eastman knew, what he characterized as "electronically flipped" votes were not votes that were counted in the final results.[87]

Conclusions of Law

Eastman's First Amendment Defense

During these proceedings, Eastman has consistently asserted that his statements, specifically his interview at the Bannon War Room (count 5), his public statements at the Ellipse on January 6 (counts 1 and 7), his article in the American Mind (count 9), and his statements to Vice President Pence (counts 8 and 10), are protected expressions of his rights under the First Amendment, including freedom of speech and the right to petition the government for a redress of grievances. As such, he contends that these statements cannot be used as grounds for professional disciplinary action. The court disagrees.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or . . . to petition the Government for a redress of grievances." It is well-established that the "First Amendment protects the freedom of expression of all citizens, including lawyers." (*Jacoby v. State Bar* (1977) 19 Cal.3d 359, 368; *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 781 ["Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice"].) Therefore, this court cannot discipline an attorney for speech that is

[87] Moreover, although the mistake had been disclosed and any presidential candidate could have requested a recount of the Antrim County votes, no recount was requested. (Exh. 105.)

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protected by the First Amendment. (*In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 30 ["Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment"].)

At the same time, the First Amendment rights of attorneys are linked to the critical role that they perform within the judicial system. While these rights are fundamental, they must be calibrated to align with the unique role attorneys play in the administration of justice. As the Review Department has stated, "attorneys occupy a special status and perform an essential function in the administration of justice. Because attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them." (*In the Matter of Anderson, supra,* 3 Cal. State Bar Ct. Rptr. at p. 781, citing to *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792.) Even the United States Supreme Court has emphasized that "'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" (*Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 625, citations omitted.) "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" (*Goldfarb v. Virginia State Bar, supra,* 421 U.S. at p. 792.)

For these reasons, "speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice." (*Standing Comm. on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1442, citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1074-1075.) Because lawyers are "an intimate and trusted and essential part of the machinery of justice, an officer of the court in the most compelling sense,"

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(*id.* at p. 1072, citations and internal quotations omitted), it is contemplated that a lawyer's right to free speech is especially limited in the courtroom. (*Id.* at p. 1071 ["It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed"].) Even beyond the confines of the courtroom or the pendency of a case, attorneys are not necessarily "protected by the First Amendment to the same extent as those engaged in other businesses." (*Id.* at p. 1073.) For example, in evaluating restrictions on attorney solicitation or advertising, the Supreme Court has typically "engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue." (*Ibid.*)

Eastman is charged with making false and misleading public statements in his capacity as an attorney in violation of section 6106 (moral turpitude, dishonesty, or corruption), as charged in counts 5, 7, and 9. It has been established that the provisions of section 6106 satisfy *Gentile's* balancing test. (See *Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, 1072-1073 [applying *Gentile's* balancing test for in-court and out-of-court attorney speech charged as violation of section 6106].)[88] There is little doubt that the State's interest in section 6106, i.e., to protect the public, maintain the highest professional standards by attorneys, and preserve public confidence in the legal system, outweighs any potential free speech rights attorneys may assert in making false and misleading statements. It follows then that Eastman does not have a First Amendment right to make statements that violate the provisions of section 6106.

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[88] Attorney speech under the First Amendment can be understood as speech made by an attorney in the course of their professional duties. (See *Jacobson v. Schwarzenegger* (C.D. Cal. 2009) 650 F.Supp.2d 1032, 1054 [attorney's pursuit of administrative remedies, cross-examinations, and letters to state officials were part of his duties as appointed counsel for parolees and were not protected by the First Amendment as they were not made in his capacity as a private citizen but rather in his professional role].)

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Separately, the protections of the First Amendment are not absolute and certain categories of speech are subject to less constitutional protection. For example, false statements made knowingly or with reckless disregard of the truth are not protected speech. (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75 ["the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"];[89] *In the Matter of Anderson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 782 ["Neither a false statement made knowingly nor a false statement made with reckless disregard of the truth enjoys constitutional protection because there is no constitutional value in such false statement of fact"].)[90] To evaluate whether an attorney's false speech involves reckless disregard for the truth, the court applies an objective standard; it must determine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar

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[89] Eastman cites to *United States v. Alvarez* (2012) 567 U.S. 709, for the proposition that even if his statements were false (which he disputes), they are protected by the First Amendment. The court disagrees. In *Alvarez*, a majority of the Justices agreed that the Stolen Valor Act, which criminalized false claims of military honors, violated the First Amendment. A shared theme by the opinions was that the Act in question prohibited false statements only because of their falsity, stating that falsity alone is not sufficient to bring the speech outside the First Amendment. *Alvarez* does not hold that false statements are always protected speech, it merely holds that false speech is not, as a bright line rule, unprotected by the First Amendment. (*Id.* at p. 722 [rejecting the notion that "false speech should be in a general category that is presumptively unprotected"].) At the same time, the Court acknowledged that certain false speech could be restricted under the First Amendment and emphasized that its ruling did not suggest vulnerability in targeted prohibitions on such speech; "there are instances in which the falsity of speech bears upon whether it is protected," and "[t]his opinion does not imply that any of these targeted prohibitions are somehow vulnerable." (*Id.* at p. 721.) One such recognized exception to the First Amendment is making knowingly false statements and false statements made with reckless disregard of the truth. (*Garrison v. State of Louisiana, supra*, 379 U.S. at p. 75.) Further, Eastman's reliance on *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, is equally misguided. There, the court also acknowledged a specific restriction on speech that was knowingly false or made with reckless disregard of the truth. (See *id.* at p. 280 [prohibiting recovery of damages for defamation unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"].)

[90] In the attorney discipline context, OCTC bears the burden of proving the falsehood of any statement that serves as basis for culpability. (*In the Matter of Anderson, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 778, 786.)

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circumstances." (*U.S. Dist. Court v. Sandlin* (9th Cir. 1993) 12 F.3d 861, 867.) "The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which there were made." (*Standing Committee v. Yagman, supra,* 55 F.3d at p. 1437.) In assessing reckless disregard for the truth, the court "may take into account whether the attorney pursued readily available avenues of investigation." (*Id.* at p. 1437, fn 13; *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 375.)

In sum, attorneys have a First Amendment right to make statements in public in the course of their professional duties. However, this right does not extend to making knowing or reckless false statements of fact or law. Here, as shown below, Eastman made multiple false and misleading statements in his professional capacity as attorney for President Trump in court filings and other written statements, as well as in conversations with others and in public remarks. As further shown below, Eastman knowingly made these false statements or had no reasonable factual or legal basis for making them. Hence, Eastman's First Amendment defense fails.

Likewise, the First Amendment does not protect speech that is employed as a tool in the commission of a crime. (See *United States v. Hansen* (2023) 599 U.S. 762, 783 [the First Amendment does not protect "speech integral to unlawful conduct"]; *United States v. Williams* (2008) 553 U.S. 285, 298 ["Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities"].) Count 1 of the NDC charges Eastman with conduct and statements made in furtherance of a criminal scheme, i.e., conspiring to promote and assist President Trump in executing a strategy to overturn the legitimate results of the 2020 presidential election by obstructing the count of electoral votes of certain states, in violation of 18 U.S.C.

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§ 371. Attorneys do not have a constitutional right to collaborate with clients for purposes that are unlawful, criminal, or fraudulent. (Cf. Rules Prof. Conduct, rule 1.2.1 [prohibiting an attorney from advising or assisting the violation of law].) It follows then that Eastman can face disciplinary action for his speech in assisting and advising President Trump in illegal, criminal, or fraudulent activities.[91]

Finally, although the First Amendment protects the right "to petition the Government for a redress of grievances," which includes the right of access to the courts as with freedom of speech, the right to petition for redress of grievances has never been absolute. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 195 ["The right to petition for redress of grievances includes the right to sue . . . private as well as governmental entities. . . . However, 'the right to petition has never been absolute'. . . . [C]onstitutional rights to petition have been subjected to reasonable restrictions to prevent abuse of the right, and narrowly drawn restrictions on that right can be valid"].) In fact, it is "generally subject to the same constitutional analysis" as the right to free speech. (*Wayte v. United States* (1985) 470 U.S. 598, 610, fn. 11 ["Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis"]; see also *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 162 ["Restrictions on the right to petition generally are subject to the same analysis as restrictions on the right of free speech"].) Since the court finds that Eastman's free speech argument fails, so must his petition clause argument. (See *Canatella v. Stovitz, supra*, 365 F.Supp.3d at pp. 1077-1078.)

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[91] A separate category of speech subject to no constitutional protection is "advocacy of the use of force" where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447.) Although Eastman asserts that OCTC must prove that he intended to incite lawless action and his statements were likely to incite lawlessness, OCTC did not charge Eastman with inciting lawlessness except for count 11, which for the reasons stated below, this court has dismissed. Thus, the *Brandenburg* analysis does not apply in this case.

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What is more, because the right to petition the government for redress of grievances is a personal right, an attorney does not have the right to claim a personal right to petition based on the representation of a client. (*DePaoli v. Carlton* (E.D. Cal. 1995) 878 F. Supp. 1351, 1355 ["In the context of a court proceeding the right to petition is the client's, not the attorney's. An attorney may not claim a right to petition based upon representation of a client"].) So, Eastman cannot claim this right as part of his representation of President Trump or the Trump Campaign.

Based on the foregoing, the court rejects Eastman's First Amendment defense, and now turns to assessing the charges of professional misconduct brought against him.

Count Two – Seeking to Mislead a Court (§ 6068, subd. (d))[92]

OCTC charged Eastman with willfully violating section 6068, subdivision (d), by seeking to mislead the United States Supreme Court when he knowingly adopted certain false and misleading factual allegations contained in the Bill of Complaint filed in *Texas v. Pennsylvania*.

Section 6068, subdivision (d), provides that an attorney has a duty to employ those means only as are consistent with the truth and never to seek to mislead a judge or any judicial officer by an artifice or false statement of fact or law. "The statute requires an attorney to refrain from misleading and deceptive acts *without qualification*." (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315, italics added.) Moreover, "[c]oncealment of a material fact misleads a judge just as effectively as a false statement." (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) "No distinction can therefore be drawn among concealment, half-truth, and false statement of fact." (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.)

The Supreme Court has explained that whether an attorney has violated section 6068, subdivision (d), "depends first upon whether his representation to the . . . court was in fact

[92] The court will address Count One last due to its extensive overlap with some of the allegations in the other counts.

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untrue, and secondly, whether he knew that his statement was false and he intended thereby to deceive the court." (*Vickers v. State Bar* (1948) 32 Cal.2d 247, 252-253; accord, *In the Matter of Chestnut, supra,* 4 Cal. State Bar Ct. Rptr. at p. 174.) Willful blindness is equivalent to actual knowledge. (See *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 433.) "The conduct denounced by [section 6068, subdivision (d)] is not the act of an attorney by which he successfully misleads the court, but the presentation of a statement of fact, known by him to be false, which tends to do so. It is the endeavor to secure an advantage by means of falsity which is denounced." (*Pickering v. State Bar* (1944) 24 Cal.2d 141, 144-145.)

OCTC contends that Eastman knew that the factual allegations in Texas's Bill of Complaint were false and misleading, in violation of section 6068, subdivision (d). These allegations are separately considered below.

Allegation of Outcome-Determinative Voting Irregularities

OCTC argues that Eastman misled the court by adopting, in his Motion to Intervene, the following factual allegation contained in Texas's Bill of Complaint: "Citing 'rampant lawlessness arising out of Defendant States' unconstitutional acts,' the lawsuit asserted that '[t]aken together, these flaws affect an outcome-determinative numbers of popular votes in a group of States that cast outcome-determinative numbers of electoral votes.'" (NDC, p. 17.) OCTC alleges that Eastman knew there "was no evidence upon which a reasonable attorney would rely of fraud in any state election in sufficient numbers that could have affected the outcome of the election." (*Id.* at p. 18.)

Eastman's allegation of "outcome-determinative" voting irregularities was false and misleading. At the time Eastman filed the Motion to Intervene, it was evident, and known to Eastman, that federal courts had already considered and dismissed claims of outcome-determinative irregularities affecting the 2020 presidential election. The District Court for the

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Middle District of Pennsylvania had specifically ruled that these claims were "unsupported by evidence." (Exh. 222, p. 2.) Furthermore, the Third Circuit had concluded that the allegations lacked both specificity and proof of unfairness in the election.

Eastman knew about the federal court decisions because, at the time Eastman filed the Motion to Intervene, he had already undertaken a comprehensive examination of cases and factual information pertaining to what he perceived as election irregularities. He compiled this information into a spreadsheet, where he documented and monitored 2020 election litigation challenges he found in court documents. (Exh. 1055.) The Pennsylvania District Court case was included in his database, proving he was aware of the court's "unsupported by evidence" finding. Yet, although prior courts considered and rejected the claims of outcome-determinative irregularities, he continued to raise them in the Supreme Court.

Eastman's convenient failure to acknowledge the federal court cases that had already considered and rejected the factual allegations regarding outcome-determinative voting irregularities in his Motion to Intervene is evidence of his intent to mislead the court. Attorneys have a duty to provide courts with complete information, which includes prior adverse rulings, and to identify adverse authorities. (See *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1224-1225, 1233 [attorney violated § 6068, subd. (d), after filing complaint that cited Supreme Court decision as authority without disclosing the grant of a rehearing—rendering the opinion invalid]; see also *Perry v. Kia Motors of America, Inc.* (2023) 91 Cal.App.5th 1088, 1095-1096 [citing § 6068, subd. (d), plaintiff lost opportunity for appellate review because appellate counsel made misleading claim in her brief—incorrectly asserting that trial court found defendant improperly concealed evidence while, in truth, the court stated no concealment occurred]; *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 172 [attorney violated section 6068, subd. (d), by concealing from commissioner who granted client's bail that bail had twice been previously denied]; *In the*

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Matter of Jeffers (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 219 [attorney had duty to disclose death of client to court, especially considering court's inquiries that should have prompted attorney to reveal information].) This duty is part of an attorney's overarching ethical obligation to utilize methods that employ only such means as are consistent with the truth.

Eastman's omission of relevant case decisions was misleading as it excluded vital information about prior court rulings rejecting the unfounded outcome-determinative claims—creating the false impression that such matters had not been considered and decided. As the court in *Perry v. Kia Motors of America, Inc.* states: "'Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.' [Citations.]" (*Perry v. Kia Motors Am., Inc., supra*, 91 Cal. App.5th at p. 1096.)

Additionally, Eastman's contemporaneous email to Cleta Mitchell is further proof of his intent to mislead the court. He told Mitchell there was no documented evidence of fraud that existed but expressed optimism in the potential discovery of such evidence. His repeated claims of fraud with the knowledge that such assertions lacked support serve as compelling proof of Eastman's intent to mislead the court.

In his defense, Eastman claims he cannot be found culpable of this charge unless he was sanctioned under Rule 11 of the Federal Rule of Civil Procedure, which he was not. The court rejects this argument. There is no requirement that an attorney be sanctioned by the civil court for this court to find the attorney violated ethical standards. (Cf. *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709 [violation of § 6068, subd. (d), without imposition of sanctions]; see also *Di Sabatino v. State Bar, supra*, 27 Cal.3d at pp. 162-164.)

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Based on the foregoing, the court finds Eastman willfully violated section 6068, subdivision (d), with respect to this allegation.

Allegations of Election Code Violations in Pennsylvania

Next, OCTC argues that Eastman misled the court when he adopted the following factual allegation in his Motion to Intervene: "Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, violated Pennsylvania's election code and adopted the differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden." (NDC, p. 17.) OCTC maintains that Eastman knew the factual allegations in the Bill of Complaint were false and misleading and "[t]here was no evidence upon which a reasonable attorney would rely that the election officials in Philadelphia and Allegheny Counties had acted with the intent to favor Biden in the election through the alleged violations of election codes or adoptions of differential standards, or that the alleged violations of election codes or adoptions of differential standards 'affect[ed] an outcome-determinative numbers [sic] of popular votes.'" (*Id.* at p. 18.)

When the Bill of Complaint was filed, the Pennsylvania Supreme Court had considered and already rejected the argument that the Pennsylvania Secretary of State's guidance regarding the prohibition against rejecting absentee or mail-in ballots violated Pennsylvania election laws. Yet, Eastman adopted those false statements contained in the Bill of Complaint. Moreover, as stated above, when Eastman filed the Motion to Intervene, he created a matrix where he recorded and tracked legal challenges related to the 2020 election that he had identified in court documents. The matrix contained an analysis of the Pennsylvania Supreme Court's opinion—demonstrating that Eastman knew what the court had considered and decided. The contentions

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asserting non-legislative modifications to state election regulations by election officials within the executive branch were both material and false.

Eastman's failure to disclose, in his Motion to Intervene, the Pennsylvania Supreme Court opinion is strong evidence of his intent to mislead the court. A duty existed to reveal that the Pennsylvania Supreme Court had already determined that Pennsylvania's election laws had not been violated, but Eastman purposely omitted this information. (Cf. *Di Sabatino v. State Bar, supra,* 27 Cal.3d at p. 172.) Once again, Eastman left the impression that no court had resolved an important issue in the Bill of Complaint when that was not accurate.

So, Eastman's culpability for willfully violating section 6068, subdivision (d), has been clearly and convincingly established with respect to this allegation as well.

Allegation of Statistical Probability of Vice President Biden Winning the Popular Vote

Finally, OCTC argues that Eastman violated section 6068, subdivision (d), by adopting the factual allegation in the Bill of Complaint that the odds of Biden winning the popular vote in the Defendant States was less than 1 in 1,000,000,000,000,000 (one quadrillion)—an allegation that was false.[93] As there is no clear and convincing evidence that Eastman knew the statements were false, the court does not find Eastman culpable of violating section 6068, subdivision (d),

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[93] Specifically, OCTC alleged that the following statements were false: "'The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (i.e., 1 in 1,000,000,000,000,000^4)"; and "The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin— independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these four States collectively is 1 in 1,000,000,000,000,000^4." (NDC, pp. 17-18.)

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by adopting the statements regarding the statistical probability of former Vice President Biden winning the popular vote in the Defendant States.

The statistical analysis in the Bill of Complaint was supported by the declaration of Dr. Cicchetti. Eastman reviewed Dr. Cicchetti's declaration but never questioned him about his methodology or analysis—believing the information to be accurate.

OCTC presented evidence during the trial from its expert, Dr. Grimmer, who pointed out flaws in Dr. Cicchetti's analysis and methodology. And Dr. Cicchetti later criticized the utilization of his declaration to bolster the filing, noting it did not effectively support the argument that President Trump's odds of winning were significantly high. Dr. Cicchetti contested the interpretation of his declaration, which arguably suggests that the assertions regarding the likelihood of Biden winning the popular vote in the Defendant States were false. Nonetheless, OCTC has not furnished any proof indicating that Eastman was aware of the inaccuracy or falsehood of the statements when he endorsed them, nor has it demonstrated any intent on Eastman's part to mislead or deceive. Once it was established that the statements were untrue, the Bill of Complaint had already been dismissed. Thus, the court does not find Eastman violated section 6068, subdivision (d), by adopting the statements regarding the probability of former Vice President Biden winning popular vote in the Defendant States.

In sum, the court finds clear and convincing evidence that Eastman violated section 6068, subdivision (d), by adopting the false and misleading allegations and contentions in the Bill of Complaint with the intent to mislead the Supreme Court, as stated above.

Count Three – Moral Turpitude [Misrepresentation] (§ 6106)

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Broadly, any act contrary to honesty and good morals involves moral turpitude. (See *Stanford v. State Bar* (1940)

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15 Cal.2d 721, 727.) Acts of moral turpitude include an attorney's concealment as well as affirmative misrepresentations. (See *Grove v. State Bar,* supra, 63 Cal.2d at p. 315.) Indeed, as stated previously "[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact." (*Ibid;* see also *In the Matter of Chesnut, supra,* 4 Cal. State Bar Ct. Rptr. at p. 174.) While neither evil intent nor injury to a client is necessary for moral turpitude, some level of guilty knowledge or at least gross negligence is required. (See *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 331; see also *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.) Furthermore, an attorney's knowledge or intent can be established by direct or circumstantial evidence. (See *Zitney v. State Bar* (1966) 64 Cal.2d 787, 792.) Finally, willful blindness is tantamount to actual knowledge. (See *In the Matter of Carver, supra*, 5 Cal. State Bar Ct. Rptr. At pp. 432-433.)

In count three, OCTC charged Eastman with willfully violating section 6106 by drafting a two-page memo dated December 23, 2020, which falsely stated that seven states (Arizona, Georgia, Michigan, Pennsylvania, Nevada, New Mexico, and Wisconsin) "have transmitted dual slates of electors to the President of the Senate." (NDC, p. 19.) The court agrees and finds Eastman is culpable as charged.

The evidence shows that Eastman's "dual slates of electors" statement was false and misleading. Eastman knew that there were no legitimate dual slates of electors in the seven contested states because the Trump electors lacked certification and could not be legally considered on January 6, 2021. Moreover, Eastman was aware that Vice President Pence lacked the authority to decide which slate of electors would be counted because his sole responsibility was simply to open the ballots. Yet, Eastman used the false assertion concerning dual slates of electors to provide an alternative strategy for Vice President Pence to declare President Trump as

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the winner of the 2020 presidential election. The two-page memo was designed to provide legal support and convince Vice President Pence to carry out that strategy.

Eastman's claims, in this proceeding, that he believed "the slates were legitimate as a matter of historical precedent" are unbelievable and not supported by the record. (Eastman's Closing Brief, p. 56.) Likewise, the court finds no support for Eastman's purported belief, at the time, that the supposed Trump electors qualified for recognition by Vice President Pence under the ECA because it directs the Vice President to open and acknowledge all "papers purporting to be certificates of the electoral votes." (*Ibid.*)

As a constitutional expert, Eastman knew that the only slates of electors which Vice President Pence could lawfully consider, were those included in the certificates of ascertainment executed by the governor of each state. Eastman understood that the so-called dual electors lacked legitimacy and would not be tallied on January 6, 2021, and he also knew that there was no constitutional provision permitting counting of uncertified, unascertained dual slates of electors. None of the contested states' officials had submitted a certificate of ascertainment naming Trump electors, thereby lacking any semblance of authority or official endorsement. In fact, Eastman conceded so much in his December 19, 2020 email to Colbert, acknowledging that, without certification from state legislatures, the Trump electors would not be recognized by Congress. Even Dr. Yoo, Eastman's constitutional expert and friend, affirmed that despite the ambiguity in language and scholarly opinions, the absence of certification by state executive officers meant there was no constitutional dilemma on January 6, 2021, necessitating any purported unilateral action from Vice President Pence.

In defending his actions, Eastman incorrectly attempts to draw an analogy between the events of the 2020 presidential election and the 1960 presidential election in Hawaii. Eastman misconstrues the circumstances regarding the Hawaii slates of electors by ignoring the fact that

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the third and final slate of electors in Hawaii was certified by the Governor after a recount. It was that third certificate that Vice President Nixon considered without objection or dispute. Here, in the 2020 presidential election, each of the contested states had only one slate of electors certified by the governor of that state and, as Eastman knew, section 15 of Title 3 of the United States Code is clear—the officially certified slate is the one certified by the governor in the certificate of ascertainment.

Eastman also argues that he cannot be found culpable of moral turpitude because his statement amounted to no more than zealous advocacy in his representation of President Trump's interests. It is true that an attorney has a duty to engage in zealous advocacy on behalf of a client. (See Rules Prof. Conduct, rule 1.3 [duty to perform with diligence].) However, Eastman's inaccurate assertions were lies that cannot be justified as zealous advocacy. Eastman failed to uphold his primary duty of honesty and breached his ethical obligations by presenting falsehoods to bolster his legal arguments. Finally, the court notes that acts of moral turpitude are a departure from professional norms and are unequivocally outside the realm of protection afforded by the First Amendment and the obligation of vigorous advocacy. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45.)

In sum, Eastman's claim that there were dual slates of electors was knowingly false and made with the intent to deceive, given that Eastman knew the purported Trump electors lacked the proper certification and official approval mandated by law. As such, Eastman is culpable of willfully violating section 6106, as charged in count three.

Count Four – Seeking to Mislead a Court (§ 6068, subd. (d))

In count four, OCTC alleges that Eastman willfully sought to mislead the United States District Court for the Northern District of Georgia, by making statements in the Verified Complaint filed in *Trump v. Kemp* about the administration of Georgia's election, which

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Eastman knew to be false and misleading. Specifically, OCTC charges Eastman with making the following false statements: "Georgia election officials allowed unqualified individuals to register and vote, allowed convicted felons still serving their sentence to vote, allowed underaged individuals to register and then vote, allowed unregistered or late registered individuals to vote, allowed individuals to vote who had moved across county lines, allowed individuals to vote who had registered at a P.O. Box, church, or courthouse rather than their residence, and accepted votes cast by deceased individuals." (NDC, pp. 20-21.) The court agrees.

All of the statements above allege that individuals lacking the necessary qualifications were permitted to register and vote. However, at the time Eastman filed *Trump v. Kemp* on December 31, 2020—incorporating by reference the complaint and exhibits in *Trump v. Raffensperger*—Eastman knew these allegations were false because he was aware that the information upon which he relied in making these assertions, i.e., the declarations of Braynard and Geels, contained inaccurate and unreliable data. After the declarations were filed in *Trump v. Raffensperger*, and before *Trump v. Kemp* was filed, it was determined that the analysis and conclusions in the Braynard and Geels declarations contained inaccurate information and were unreliable. The Georgia official's expert, Stewart, scrutinized the evaluation conducted by Braynard and Geels, highlighting particular deficiencies found in the analysis of each expert and summarizing relevant shortcomings identified in their analyses. Eastman was aware that Stewart had undermined Braynard's and Geels's findings, causing Eastman to doubt the accuracy of the information they provided. This was evident from the filing of the *Trump v. Kemp* complaint, which omitted any mention of numerical values.

As further evidence that Eastman was aware of the inaccuracies in the allegations and evidence in support thereof, he consented to adding a footnote in the Verified Complaint and

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amending President Trump's Verification, disclaiming personal knowledge regarding the facts and figures stated therein, while keeping the allegations unchanged.

Furthermore, regarding the specific assertion that underage individuals were allowed to register and vote, Eastman acknowledged that he understood Geels's declaration to support the claim that underage individuals had been permitted to register, but the analysis "never asserts that underage people voted." (R.T. Vol V, p. 68.) Eastman also acknowledged that if an underaged person registered to vote, but did not actually vote, that person's registration would not be outcome-determinative. By knowingly presenting false and misleading information in the pleadings of *Trump v. Kemp*, Eastman's intent to deceive is established. (See *Vickers v. State Bar, supra*, 32 Cal.2d 247 at pp. 252-253.)

In addition to the statements alleging that unqualified individuals were permitted to vote in Georgia, OCTC alleges that the following statement in the *Trump v. Kemp* complaint was false and misleading: "Fulton County election officials 'remove[d] suitcases of ballots from under a table where they had been hidden, and processed those ballots without open viewing by the public in violation of [state law].'" (NDC, p. 21.) This statement was also false.

The State Farm Arena investigation revealed, as early as December 5, 2020, that there were no ballots "hidden" under a table. Moreover, Eastman acknowledges that Georgia law did not require public viewing of ballot canvassing at the State Farm Arena. Rather, the law merely gives the public the opportunity to view the process. Eastman also acknowledged that he did not view the entire video of the activities in the State Farm Arena, and he could not recall if he read Investigator Watson's declaration providing that there were no mystery ballots hidden under a table. Nevertheless, the entire video was available for review, and Eastman read information from Georgia's Secretary of State about the legitimacy of the activities at the State Farm Arena before the complaint in *Trump v. Kemp* was filed.

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Enough information existed which revealed that the statements about the activities at the State Farm Arena were false, but Eastman never actively sought out information that might challenge his narrative nor considered any available accurate information. Eastman cannot avoid culpability through his willful blindness—willful blindness that is tantamount to Eastman's actual knowledge that the allegations regarding hidden ballots were false. (See *In the Matter of Carver, supra,* 5 Cal. State Bar Ct. Rptr. at p. 433 [attorney's willful blindness to ineligibility to practice law culpable of moral turpitude for the unauthorized practice of law; willful blindness equivalent to having actual knowledge of his ineligibility].)

In his defense, Eastman argues that OCTC failed to prove he had actual knowledge that the allegations in *Trump v. Kemp* regarding outcome-determinative illegal votes were false and that he intended to deceive the District Court for the Northern District of Georgia. Eastman's argument fails. He knew there was no hard evidence of outcome-determinative fraud in the 2020 presidential election. He explained to Mitchell in November 2020 that the statistical analyses were not enough to demonstrate fraud and that he was hoping the statistical analyses would assist with uncovering hard documented evidence of fraud. Moreover, as stated above, Eastman knew that the supporting evidence offered by the experts was faulty and inaccurate. "'The presentation to a court [in a complaint] of a fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [§ 6068].'" (*Davis v. State Bar* (1983) 33 Cal. 3d 231, 239-40; see also *Pickering v. State Bar, supra,* 24 Cal.2d at p. 144.)

Next, Eastman argues that he had a reasonable and good faith belief, based on the evidence that the combined tally of votes impacted by violations of state election statutes exceeded the 11,779-vote margin of victory. As detailed earlier, the evidence in support of the alleged violations of state election laws was flawed and invalidated. The inclusion of the footnote distancing Trump from the allegations and supporting evidence did not make the

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allegations in the complaint true, as Eastman asserts. Rather, it strongly demonstrates knowledge of the falsity of the allegations, otherwise such a footnote would not be needed.

Eastman also contends that he is not culpable of this charge because he relied on Hilbert, who was lead counsel, as well as credentialed, qualified experts. The argument fails because every attorney, including Eastman, bears an individual responsibility for their actions to ensure compliance with ethical obligations. Relying on the work of others, even attorneys, does not exempt a lawyer from discipline for a breach of ethics. Each attorney has a responsibility to uphold their professional duties and adhere to their ethical commitments, irrespective of the actions of others.

Finally, Eastman argues that the claims about the hidden ballots in the State Farm Arena were supported by witness affidavits and that he viewed a portion of the video during a Georgia Senate subcommittee hearing that occurred on December 3-4, 2020, thereby supporting his claims. Even if there was no information that the allegations regarding hidden ballots were false when *Trump v. Raffensperger* was filed, by the time *Trump v. Kemp* was initiated, evidence of the falsity of those allegations existed. Eastman chose to ignore that evidence.

Based on the foregoing, the court finds that the evidence clearly and convincingly establishes Eastman's violation of section 6068, subdivision (d), as charged in count four.

Count Five – Moral Turpitude [Misrepresentation] (§ 6106)

OCTC charged Eastman with willfully or gross negligently violating section 6106 – by aiming to foster doubt about the legitimacy of the election results in making statement on Bannon's War Room radio program that: (1) "there was massive evidence of fraud involving absentee ballots in the November 3, 2020 presidential election, 'most egregiously in Georgia and Pennsylvania and Wisconsin'"; and (2) "there had been more than enough absentee ballot fraud

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'to have affected the outcome of the election.'" (NDC, p. 22.) The court finds that Eastman is culpable of this charge.

Despite Eastman's assertions, there was no credible evidence of widespread absentee ballot fraud that impacted the outcome of the 2020 presidential election, as affirmed by federal and state courts that dismissed related claims due to lack of proof. While Eastman claimed that various illegalities provided opportunities for fraud, he admitted to having uncertainty regarding the degree of outcome-determinative fraud in the 2020 presidential election in Arizona, Michigan, Nevada, New Mexico, or Wisconsin. Furthermore, none of the analyses by the individuals Eastman relied upon established the presence of outcome-determinative fraud in the 2020 presidential election.

Next, Eastman's allegations of widespread absentee voter fraud in Pennsylvania during the 2020 presidential election were baseless and contradicted by official investigations, audits, and court rulings. During Pennsylvania's 2020 presidential election, no counties opened, counted, or disclosed mail-in or absentee ballots before the pre-canvassing period or before 8:00 p.m. on Election Day. The Pennsylvania Deputy Secretary of Elections and Commissions affirmed that—according to publicly available data, county election board postings, statistical sampling, and a statewide risk-limiting audit—there was no systemic insecurity or inaccuracy in the election outcomes. Additionally, in accordance with the Pennsylvania Election Code, county boards of election and district attorneys investigated complaints and allegations of fraud related to the 2020 presidential election, reporting their findings to the Department of State's Elections and Commissions office, which found no indication of pervasive fraud. Eastman relied on a report that failed to cite or present the data backing its erroneous assertions, some of which appeared to stem from a misinterpretation of publicly accessible information. Also, the Third

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Circuit rejected the claim that 1.5 million absentee and mail-in votes in Defendant Counties should not have been counted as there were no specific allegations of proof.

Eastman's claims of widespread absentee ballot fraud in Georgia during the 2020 election were also unfounded and contradicted by available data and analyses. Eastman's claims regarding signature matching did not equate to absentee ballot fraud. According to data accessible in 2020, the decrease in rejected absentee ballots in Georgia was not predominantly attributable to signature match discrepancies. Instead, approximately 90% of this decline stemmed from two main factors: a reduction in the proportion of ballots arriving after the deadline and a decrease in the percentage of ballots rejected due to problems with the oath envelope. As stated in count four, the various analyses Eastman relied upon were found to be inaccurate, and the individuals responsible for drafting the reports never actually concluded that fraud was established in the 2020 election in Georgia. Eastman himself acknowledged that he lacked evidence of outcome-determinative fraud, instead attributing any potential irregularities to illegalities that could enable fraud.

In sum, Eastman exhibited gross negligence by making false statements about the 2020 election without conducting any meaningful investigation or verification of the information he was relying upon. His interpretation of absentee ballot data was flawed; yet, had he sought the expertise of a professional to review his analysis, the inaccuracies could have been identified. Eastman made no inquiries into the studies, audits, or other information he received, which served as the foundation for his erroneous statements. He never verified the accuracy of the information received from others; rather, he simply accepted it as valid. In addition, Eastman never reached out to any Secretary of State in the contested states to inquire about or dispute their election findings. Once courts determined that there were no illegalities in the execution of the elections in the contested states, Eastman nevertheless continued to insist there was outcome-

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determinative fraud. Eastman's false statements regarding absentee voter fraud were significant and material, as they were intended to sow doubt about the legitimacy of the 2020 presidential election. He urged Bannon's audience to exert pressure on their legislators to invalidate former Vice President Biden's victory due to alleged uncertainties surrounding the election outcome—uncertainties that he assisted with creating. Eastman aimed to instill doubt about the election, prompting listeners to advocate for certifying Trump's electors over Biden's as part of his strategy to delay the electoral count. Despite knowing that the methodologies and reports he relied on were flawed and inaccurate, and being aware that federal courts had concluded there was no evidence of outcome-altering voter fraud, Eastman chose to appear on Bannon's War Room and perpetuate these false claims, showing a disregard for the truth and a willingness to mislead the public.

Eastman argues that his speech was protected by the First Amendment. But, as discussed above, Eastman does not have a First Amendment right to make false and misleading statements that violate the provisions of section 6106. Eastman also claims that he did not engage in moral turpitude as his statements were not made with "'baseness, vileness or depravity' or intended to mislead anyone." (Eastman's Closing Brief, p. 76.) However, Eastman overlooks case law indicating that moral turpitude can also be established through gross negligence. (*Fitzsimmons v. State Bar*, *supra*, 34 Cal.3d at p. 331; *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr.at p. 241.) Eastman also claims that his statements were based on his zealous advocacy of his client and his intent was to "try to identify problems with the conduct of the election and to try to investigate them and identify whether the problems and illegality may have affected the outcome of the election. . . ." (Eastman's Closing Brief, pp. 76, 77.) He ignored credible evidence that did not support his position of fraud, and as stated above, he failed to investigate or

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challenge the secretaries of state regarding the election results in the contested states. He turned a blind eye to any information that would not support his position of election fraud.

Finally, Eastman maintains that he had an honest, sincere belief in his statements at the time he made them. A defense against an accusation of moral turpitude through gross negligence arises when an attorney genuinely, albeit unreasonably, believes their actions are justifiable. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11.) As the court found previously (count two) Eastman had no actual knowledge or hard evidence of outcome-determinative voter fraud and the analyses he relied on lacked credibility (count four). In addition, the day before and the morning of his appearance on the Bannon War Room, Eastman was still searching for but had no evidence of fraud in Michigan, Arizona, and Nevada—demonstrating that he knew that he had no basis to state that there was evidence of outcome-determinative fraud. Despite Eastman's claim of an honest belief in his statements, the evidence demonstrates that he knew he lacked a factual basis for making any claims of outcome-determinative fraud, and he recklessly made these false claims during the Bannon's War Room interview.

Therefore, the court finds Eastman culpable of willfully violating section 6106, as charged in count five.

Count Six – Moral Turpitude [Misrepresentation] (§ 6106)

OCTC charged Eastman with moral turpitude and willful violation of Business and Professions Code section 6106 by stating the following in his January 3, 2021, six-page memo:

- There had been "outright fraud" through "electronic manipulation of voting tabulation machines;"
- There were "dual slates of electors from 7 states," because the Trump electors in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin had

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met on December 14, 2020, cast their electoral votes for Trump, and transmitted those votes to Pence;[94]

- The State of Michigan "mailed out absentee ballots to every registered voter, contrary to statutory requirement that voter (sic) apply for absentee ballots"; and
- "This election was stolen by a strategic Democrat plan to systemically flout existing election laws for partisan advantage."

(NDC, p. 23.)

Despite the absence of substantiated evidence, Eastman knowingly made false claims of fraud in the 2020 presidential election, suggesting manipulation of electronic voting machines to bolster his case for Vice President Pence to adjourn the Joint Session of Congress. A thorough examination of the data using strict criteria revealed no evidence to suggest that former Vice President Biden did better than expected in counties where Dominion voting machines were used. In addition, the Election Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Executive Committees found no credible evidence supporting claims that the 2020 election results in any state were changed due to technical compromise. In fact, CISA confirmed that the 2020 presidential election was the most secure in American history. Eastman was informed by November 2020, that CISA had determined the November 3 election to be the most secure in U.S. history, contradicting the numerous baseless claims and potential for misinformation surrounding the electoral process. Nevertheless, Eastman chose to ignore credible sources indicating there was no voting machine manipulation.

Eastman's assertion that every registered voter in Michigan received a ballot by mail was also untrue. As Eastman acknowledged, every registered voter was mailed an absentee ballot *application*, not the ballot itself. The fact that there was dissent regarding the Supreme Court's refusal to review the case establishing the Secretary of State's authority to send absentee ballot

[94] The court has already determined in count three that Eastman's statement that dual slates of electors had been transmitted to Vice President Pence was false.

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applications to all registered voters and that the Michigan legislature disagreed with the decision, does not make Eastman's statement true. The misrepresentations about the manipulation of voting machines and Michigan absentee ballots were significant and material. Eastman used them to bolster the argument for Vice President Pence to reject electoral votes and/or delay or adjourn the Joint Session of Congress.

Regarding the fourth alleged false statement about the election being stolen by a "Democrat Plan", numerous facts related to this representation are detailed within or closely connected to the facts outlined in other counts, i.e., election officials across Pennsylvania, particularly in Philadelphia and Allegheny Counties (where Democrats historically hold an advantage) knowingly violated the state's election laws by implementing biased standards to favor voters in these counties, aiming to benefit former Vice President Biden (count two); and Fulton County officials removed ballots from under a table, where they were concealed, and processed them without public observation, breaking state law (count four). Nevertheless, the court finds that Eastman's fourth statement was a statement of opinion rather than a statement of fact. In context, his statement reflected his opinion on summarizing what the purported "facts" revealed.

As it relates to the allegations in the six-page memo, Eastman contends that he did not violate section 6106 because Kurt Olsen, an attorney who worked with Eastman, concluded that it was illegal for Michigan Secretary of State, Jocelyn Benson, to distribute ballot applications to all registered voters. The court dismisses this argument because Eastman was aware, as of December 28, 2020, that the Michigan Secretary of State had such authority. Furthermore, the crucial falsehood that Eastman stated was that the Secretary of State sent ballots, not ballot applications to all registered voters. As such, Olsen's opinion concerning ballot applications is immaterial.

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Eastman next asserts that he held a sincere, honest good faith belief in the truth of his statements based on his knowledge and understanding at the time. The court does not consider Eastman's beliefs to be sincere, honest, or credible. He knowingly ignored any evidence contradicting the notion of voting machine manipulation; was aware that the Michigan Secretary of State had not distributed ballots to all registered voters; and as a constitutional scholar, understood that no conflicting dual slates of electors had been transmitted.

Finally, as determined above, the court rejects Eastman's claim that he was vigorously representing President Trump, as he exceeded ethical boundaries by transitioning from an impassioned advocate to engaging in deception.[95]

The evidence presented demonstrates that Eastman, despite claiming sincere belief, deliberately propagated false claims about the 2020 presidential election, thereby breaching his ethical duty as an attorney to prioritize honesty and integrity. With the exception of Eastman's opinion regarding the election being "stolen by a strategic Democrat plan," the court finds Eastman culpable of willfully violating section 6106 as alleged in count six.

Count Seven – Moral Turpitude [Misrepresentation] (§ 6106)

Eastman is charged with violating section 6106 by stating that "Dominion electronic voting machines had fraudulently manipulated the election results during the November 3, 2020, presidential election and during the January 5, 2021, run-off election in Georgia for its two Senate seats." (NDC, p. 25.)

During his speech on the Ellipse, Eastman was addressing a television audience and a live crowd that he estimated to include 250,000 to 500,00 individuals in his capacity as a lawyer. (R.T. Vol. XI, p. 49.) Giuliani introduced him as one of the preeminent constitutional scholars in

[95] Eastman employs the "zealous advocate" defense for counts seven through ten, all of which fail because, as stated above, zealous advocacy cannot excuse a section 6106 violation.

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the United States, who intended to explain how the Dominion machines were manipulated. Eastman claimed that during the 2020 presidential and the Georgia runoff elections, ballots were allegedly placed in a hidden folder within voting machines until it was determined how many votes were needed and after the polls closed, these ballots were used to manipulate the election results in favor of former Vice President Biden and other Democratic candidates. Eastman stated that an analysis of vote percentages indicated that these ballots were unloaded from the secret folder and fraudulently matched with unvoted voters, thereby tipping the election outcome in favor of the Democrats.

Eastman's statements were false. The court has previously determined that there was no voting machine manipulation (count six) and that Eastman ignored readily available evidence demonstrating that his statements were false. As such, the record demonstrates that Eastman willfully violated section 6106 by making intentionally false statements on January 6, 2021, at the Save America rally at the Ellipse.

Even if Eastman's false representations were not intentional, at a minimum, he is culpable of violating section 6106 by gross negligence. Eastman's statements about the Dominion voting machines were based on the theories of Ramsland and Oltmann and others he met on January 5, 2021. Before making the misrepresentations on January 6, 2021, Eastman failed to vet Ramsland and Oltmann, their theories, and their credentials. He never determined the credibility of the Ramsland/Oltmann diagram but accepted its conclusions because certain individuals (whose names he could not recall and whom he perceived to possess technical expertise) informed him about alleged potential vulnerabilities in the Dominion voting machine system. He ignored CISA's unwavering confidence in the security and integrity of the 2020 election. Eastman recklessly relied on Ramsland, Oltmann, and others without verifying the validity of their findings.

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Eastman maintains that he is not culpable of willfully violating section 6106 because he held a sincere, honest belief that his representations were true at the time. The court disagrees. Eastman deliberately disregarded information from credible sources confirming the security of the election and the absence of any credible evidence supporting allegations that the 2020 election results in any state were altered due to technical compromise. Eastman also claims his speech is protected by the First Amendment. The court has already determined Eastman did not have a constitutional right to make false and misleading statements in violation of section 6106.

The court finds that Eastman, at a minimum, acted with gross negligence amounting to moral turpitude by recklessly relying on unverified sources and unverified information while deliberately disregarding credible information about the security of the 2020 election, thereby violating section 6106. (See *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification that his clients were out of the county without first confirming that fact]; see also *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330 [culpability under section 6106 for act of moral turpitude where attorney was found to be grossly negligent in reporting her MCLE compliance without making any effort to confirm its accuracy].)

Count Eight – Moral Turpitude [Misrepresentation] (§ 6106)

In count eight, Eastman is charged with willfully violating section 6106 by sending an email to Greg Jacob on January 6, 2021, with the intent to pressure Vice President Pence to adjourn the Joint Session of Congress, wherein he wrote: "'You think you can't adjourn the session because the [Electoral Count Act] says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming?'" The court finds Eastman culpable of willfully violating section 6106.

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As previously established, there was no outcome-determinative fraud in the 2020 presidential election (counts four, five, six, and seven), and Eastman was aware or should have known that there was no affirmative proof of fraud (counts five, six, and seven). This lack of outcome-determinative fraud evidence indicates that there was no compelling or overwhelming evidence that the 2020 presidential election was stolen as Eastman claimed.

During the violent attack on the Capitol and while the electoral vote count remained unfinished, Eastman persisted in his attempts to persuade Vice President Pence to postpone the Joint Session of Congress, despite the ongoing crisis and the incomplete democratic process. Eastman continued to pressure Jacob and Vice President Pence even though Eastman, a constitutional scholar, knew that Vice President Pence had no authority to recess, delay, or adjourn the electoral count because as provided by 3 U.S.C. section 16, only the House or Senate may direct a recess—not a President of the Senate. Moreover, as the scholarship and history reflect and as Eastman, a constitutional scholar, had to know, from 1789 to 2016, all recesses and adjournments were initiated and controlled by Congress and "no President of the Senate has ever unilaterally declared a recess." (Exh. 179, p. 84.)

Once again, Eastman contends that his statements are protected by the First Amendment. As stated above, this defense fails because Eastman's false statements are not protected speech. Eastman also argues that he had a sincere, honest belief in his statements. Eastman's defense fails because a sincere, unreasonable belief in one's actions does not excuse intentional misconduct.

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In sum, despite substantial evidence disproving his claims, Eastman made false statements in his January 6, 2021 email with the intent to deceive and pressure Vice President Pence to violate the ECA, thereby demonstrating his willful violation of section 6106.[96]

Count Nine – Moral Turpitude [Misrepresentation] (§ 6106)

In count nine, OCTC charged Eastman with making the following three statements in the January 18, 2021 "Setting the Record Straight on the POTUS 'Ask'" article, which Eastman knew were false and misleading:

- "[I]n Fulton County, Georgia, where suitcases of ballots were pulled from under the table after election observers had been sent home for the night;"
- "[I]n parts of Wayne County (Detroit) Michigan, where there were more absentee votes cast than had been requested;" and
- "[I]n Antrim County, Michigan, where votes were electronically flipped from Trump to Biden."

(NDC, p. 28.)

First, the court has previously determined that Eastman's statement regarding the alleged hidden "suitcases of ballots" was false and that Eastman ignored any evidence of its falsity (count four). Eastman cannot evade responsibility for his "ostrich-like" behavior once he was aware that information existed showing there were no hidden ballots or evidence of improper activity. (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 432-433; see also *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388.)[97]

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[96] Although the facts that support culpability in count eight also support culpability in other counts, i.e., counts two and five, the court does not find the counts duplicative as Eastman made the misrepresentations to different individuals, in different situations, and at different timeframes.

[97] In both *Carver* and *Pierce*, the attorneys changed their official membership addresses to evade receiving notices from the State Bar and purposefully failed to retrieve or review mail from the State Bar. By avoiding the notices, each attorney remained willfully blind to their ineligible status to practice law.

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Eastman also intentionally misrepresented that votes in Michigan were electronically flipped from President Trump to former Vice President Biden. Eastman's half-truth assertion was deceptive and intellectually dishonest since he was well aware that any human error that occurred only affected the *initial unofficial* results and this error had been rectified before the final results were tallied. Furthermore, according to experts, and Eastman himself, there were no instances where Trump votes were flipped and tallied as Biden votes. Eastman became aware of the falsehood of the statement and acknowledged that he had learned about the comments made by Michigan election officials regarding this matter in November or December 2020. Eastman's false representations were significant and material. He persisted in misrepresenting the validity the 2020 presidential election to sow doubt among the public regarding the legitimacy of the results.

Eastman contends that he genuinely believed in the accuracy of his misrepresentations. As stated previously, Eastman's willful ignorance and refusal to consider evidence contrary to his assertions do not excuse him from responsibility for spreading falsehoods. The court also rejects Eastman's First Amendment defense since the court has already concluded that Eastman did not have a constitutional right to make false and misleading statements that violate section 6106.

Count Ten – Moral Turpitude (§ 6106)

In count ten, OCTC charges Eastman with moral turpitude in violation of section 6106, by repeatedly proposing and seeking to encourage Vice President Pence to exercise authority to disregard the electoral votes of certain states or delay the counting of electoral votes.

The evidence establishes that shortly before the counting of electoral votes on January 6, 2021, Eastman prepared a two-page memo and a six-page memo that falsely asserted that the

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Vice President was the "ultimate arbiter" to resolve disputes regarding electoral votes, and claiming that the Vice President had the power to take various unilateral actions, including determining the validity of electoral votes and adjourning the Joint Session of Congress.

The court has already determined, in counts three and six, that Eastman's statements in his two memos regarding the powers of the Vice President were false. No law or provision in the Constitution confers on the Vice President the power to reject electoral votes or delay the counting of votes. Eastman knew this. He knew, but didn't disclose, that there were only a handful of law review articles, not historical or legal precedent (such as the ECA or the Twelfth Amendment), which supported his contention that such unilateral authority was vested in the Vice President as President of the Senate. As further discussed under count six, Eastman also knew that the factual assertions of fraud and dual slate of electors underpinning the need for his unsupported plan were false. Still, he promoted this wild theory for the benefit of his client's desire to retain the presidency. Notably, the course of action Eastman proposed for Vice President Pence to take on January 6, 2021, was directly contrary to what he told Colbert just a few months prior—that nowhere in the law does it say that the President of the Senate (i.e., the Vice President) has the power to determine what electoral votes are counted. Eastman's scheme also faced criticism from his own expert, Dr. Yoo, who testified that not only did Vice President Pence not have authority to reject elector votes on the grounds that the elector appointments were invalid but, under the circumstances present, Vice President Pence was on "unassailable" grounds for not overturning the electoral results of the 2020 presidential election. (R.T. Vol. XVIII, pp. 47, 66.)

Still, Eastman persisted with his plan. At the January 4, 2021 Oval Office meeting with President Trump, Vice President Pence, Jacob, and Short, Eastman discussed his unfounded theory outlined in his memos, and presented Vice President Pence two options: reject electors or

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delay the count. He made the same request to Jacob and Short at another meeting the following day. In his conversations with Jacob, however, he conceded that his position would likely be unanimously rejected by the Supreme Court.

After attempts to convince Vice President Pence during the meetings failed, Eastman resorted to applying additional pressure on Vice President Pence through several emails sent to Jacob requesting that Vice President Pence follow his strategy. In a 6:09 p.m. email on January 6, 2021, Eastman told Jacob that "adjourn[ing] to allow state legislatures to continue their work" was the "most prudent course." (Exh. 68, p. 1.) Later that evening, at 9:44 p.m., Eastman insisted that the Vice President adjourn the counting of electoral votes, stating: "I implore you to consider one more relatively minor violation and adjourn for 10 days . . ." (Exh. 69, p. 2.).

Eastman was aware, or should have been aware, that the course of conduct he proposed in his memos was factually and legally unsupported. Eastman's dubious strategy to influence Vice President Pence to take unilateral action to determine the validity of slate of electors in the contested states or delay the Joint Session of Congress constitutes moral turpitude in violation of section 6106, as charged in count ten. No additional weight in discipline is assigned to this violation, however, because the same facts support culpability under count one below. (See *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no dismissal of charge where same misconduct proves culpability for another charge but no additional weight assigned for discipline purposes].)

Count Eleven – Moral Turpitude (§ 6106)

In count eleven, Eastman is charged with violating section 6106 by telling the crowd of protesters at the Ellipse on January 6, 2021, "that fraud had occurred in the election, that dead people had voted, that electronic voting machines had been used to fraudulently alter the election

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results, that Pence had authority to delay the counting of votes, and that [Vice President] Pence did not deserve to be in office if he did not delay the counting of votes." (NDC, p. 33.) OCTC alleged that these statements were false and misleading and "contributed to provoking the crowd to assault and breach the Capitol in an effort to intimidate [Vice President] Pence and prevent the electoral count from proceeding, when such harm was foreseeable." (*Ibid.*) The court does not find Eastman culpable of the misconduct alleged in this count.

The court has already determined that the following statements made by Eastman were false and deceptive: (1) that fraud occurred in the 2020 presidential election (count two); (2) that dead people voted (counts two and four); (3) that electronic voting machines were used fraudulently to alter the election results (count seven); and (4) that Vice President Pence had the authority to delay the vote counting (count ten). Regarding the fifth statement, Eastman did not expressly declare that Vice President Pence did not merit holding office if he refrained from delaying the vote counting but stated that "anybody" unwilling to postpone the vote tallying was unworthy of office. In the context of the speech, it suggests that Eastman was alluding to Vice President Pence. Nevertheless, a "'reasonable factfinder could [not] conclude that the contested statement implies an assertion of objective fact.' [Citation.]" (*Lieberman v. Fieger* (9th Cir. 2003) 338 F.3d 1076, 1079.) Therefore, the court finds that Eastman's statement regarding Vice President Pence is one of opinion and does not imply a factual assertion and it is thus protected by the First Amendment. (*Ibid.*)

Although four of the five statements made at the Ellipse were false and misleading, OCTC failed to provide any evidence that Eastman's statements "contributed to provoking the crowd to assault and breach the Capitol . . . when such harm was foreseeable." (NDC, p. 33.) Eastman's statements followed Giuliani's comments—"let's have trial by combat"—and preceded President Trump's comments—"fight like hell" to save the country—but OCTC

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presented no evidence to show that Eastman's statements contributed to the assault on the Capitol.

As such, count eleven is dismissed with prejudice.

Count One – Failure to Support the Laws of The United States (§ 6068, subd. (a))

Section 6068, subdivision (a), places a duty on attorneys to support the Constitution and laws of the United States and of this state. OCTC is required to specifically identify the underlying provision of law allegedly violated. (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486.) "The requirement of specification of the underlying provision of law allegedly violated means that the Supreme Court interprets section 6068(a) as a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act." (*Id.* at p. 487.)

Here, OCTC charges Eastman in count one with failure to support the Constitution and the laws of the United States in violation of section 6068, subdivision (a), by violating three provisions of the law; (1) 3 U.S.C. § 15; (2) Article II, Section 1, Clause 2 and the Twelfth Amendment of the United States Constitution; and (3) 18 U.S.C. § 371.

The 3 U.S.C. § 15 of the ECA outlines the precise procedure for the counting of electoral votes in Congress on January 6 following every meeting of the electors. Related to this statute, Article II, Section 1, Clause 2 of the United States Constitution provides that each state shall appoint electors, and the Twelfth Amendment specifies that, on January 6, the votes submitted by the electors for each state shall be counted, with the President determined by the winner of a majority of electoral votes. OCTC fails to assert, let alone prove, that Eastman violated either 3 U.S.C. § 15; Article II, Section 1, Clause 2 of the United States Constitution; or the Twelfth Amendment. OCTC merely alleges that Eastman *intended* to violate these provisions, which falls short of establishing culpability under section 6068, subdivision (a). (See *In the Matter of*

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Lilley, supra, 1 Cal. State Bar Ct. Rptr. at pp. 486-487 [section 6068, subd. (a), is a "a conduit by which attorneys may be charged and disciplined for *violations* of other specific laws" (italics added)].)

By contrast, OCTC has shown that Eastman conspired with President Trump to obstruct a lawful function of the government of the United States; specifically, by conspiring to disrupt the electoral count on January 6, 2021, in violation of 18 U.S.C. § 371. To prove a violation of 18 U.S.C. § 371, it must be established that: (1) at least two people entered into an agreement to obstruct a lawful function of the government; (2) by deceitful or dishonest means; and (3) there was at least one overt act in furtherance of the conspiracy. (See *United States v. Meredith* (9th Cir. 2012) 685 F.3d 814, 822.) "An agreement to commit a crime 'can be explicit or tacit, and can be proved by direct or circumstantial evidence, including inferences from circumstantial evidence.'" (*United States v. Kaplan* (9th Cir. 2016) 836 F.3d 1199, 1212.)

The evidence clearly and convincingly proves that Eastman and President Trump entered into an agreement to obstruct the Joint Session of Congress by unlawfully having Vice President Pence reject or delay the counting of electoral votes on January 6, 2021. Specifically, on December 23, 2020, and January 3, 2021, respectively, Eastman wrote two-page and six-page memos outlining a detailed plan of action for Vice President Pence to declare President Trump the re-elected president. On January 2, Eastman appeared on the Bannon War Room and publicly spoke about the illegal conduct of the 2020 presidential election and claimed that more than enough fraud had occurred to affect the outcome of the election.

On January 4, 2021, President Trump, Vice President Pence, Eastman, Jacob, and Short met at the Oval Office to discuss Eastman's memo, at which time Eastman presented Vice President Pence with two options: reject electors or delay the count. On January 5, Eastman met with Jacob and Short and asked again that Vice President Pence reject the electors and later, only

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after Jacob (Vice President Pence's counsel) refused to capitulate to Eastman's requests, in an evening phone call with President Trump and Jacob on January 5th, Eastman proposed that the Vice President delay the count of electoral votes the following day. A second phone call Eastman had with Jacob on the evening of January 5th involved a renewed discussion about a delaying to allow for further consideration by the state legislatures, in which it was noted that while some individual Republican state legislators forwarded letters seeking delay of the electoral count, numerous state legislature leaders had stated they had no interest in taking further action and no legislative body in those states had indicated that they were interesting in revisiting the question of who had won the state in the 2020 presidential election.

On January 6, 2021, at 1:00 a.m., President Trump tweeted "If Vice President @Mike_Pence comes through for us, we will win the Presidency . . . Mike can send it back." (Exh. 298.) At 8:17 a.m., President Trump tweeted again that "States want to correct their votes . . . All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage." (Exh. 299, p. 2.) Later that day, Eastman gave his remarks at the Ellipse, where he made false claims about the conduct of the election to the large crowd of protestors that had gathered. Eastman also told the crowd that they were "demanding" that at 1:00 p.m. Vice President Pence delay the electoral count so states could investigate.

Eastman's speech was followed by President Trump, who not only made similarly false and misleading statements to the crowd but who made multiple statements about Vice President Pence "doing the right thing" by unilaterally delaying the electoral count. Then, at 2:24 p.m., President Trump tweeted that "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" (Exh. 300.)

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Later that day, while the Capitol was under attack, Jacob emailed Eastman stating, "thanks to your bullshit, we are now under siege." (Exh. 67.) Eastman responded to Jacob at 2:25 p.m.:

> My 'bullshit'—seriously? You think you can't adjourn the session because the ECA says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming. The 'siege' is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.

(*Ibid.*)

In another email to Eastman that same day, Jacob highlighted the gravity of Eastman's conduct:

> Respectfully, it was gravely, gravely irresponsible for you to entice the President with an academic theory that had no legal viability, and that you well know we would lose before any judge who heard and decided the case. And if the courts decline to hear it, I suppose it could only be decided in the streets. The knowing amplification of that theory through numerous surrogates, whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are. . . [A]dvising the President of the United States, in an incredibly constitutionally fraught moment, requires a seriousness of purpose, an understanding of the difference between abstract theory and legal reality, and an appreciation of the power of both the office and the bully pulpit that, in my judgment, was entirely absent here.

(Exh. 69, pp. 2-3.)

Eastman pressed on. He emailed Jacob again at 6:09 p.m., advocating for an adjournment and criticizing Vice President Pence's Dear Colleague letter. (Exhs. 68, p.1; 69, p. 2.) At 9:44 p.m., after the electoral count had resumed, Eastman again emailed Jacob, stating: "I implore you to consider one more relatively minor violation and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the massive amount of illegal activity that has occurred here." (*Id.*)

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Upon consideration of the totality of the facts, the court finds weighty circumstantial evidence demonstrating a collaborative effort between Eastman and President Trump to impede the counting of elector votes on January 6, 2021, as articulated in Eastman's memos. (See *United States v. Kaplan, supra*, 836 F.3d at p. 1212 [an agreement to commit a crime "'can be explicit or tacit, and can be proved by direct or circumstantial evidence'"].) There is also extensive direct evidence demonstrating that each party involved in this plan actively participated in overt acts through in person meetings, communications with Vice President Pence and his counsel, and in public remarks to advance their shared objective—i.e., to have Vice President Pence reject or delay the counting of electoral votes on January 6. Furthermore, the court has previously determined, in the aforementioned counts, that Eastman's actions were carried out with deceit or dishonesty, as he was aware that his plan was unlawful and lacked any factual or legal support. Here, all elements of 18 U.S.C. § 371 are established.

Based on this evidence, the court finds that OCTC has met its burden of showing by clear and convincing evidence that Eastman violated section 6068, subdivision (a), by violating 18 U.S.C § 371 as charged in count one.

Aggravation and Mitigation

The parties must prove aggravating or mitigating factors by clear and convincing evidence. (Stds. 1.5 and 1.6.)[98]

Aggravating Circumstances

The court finds aggravation for three factors: multiple acts of wrongdoing, lack of candor and indifference.

[98] All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

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Multiple acts of Wrongdoing (Std. 1.5(b)): Substantial Weight

Eastman is culpable of multiple acts of misconduct, including seeking to mislead the United States Supreme Court in *Texas v. Pennsylvania* and seeking to mislead the United States District Court for the Northern District of Georgia in *Trump v. Kemp*. Eastman has engaged in other misconduct including six counts of moral turpitude by making numerous false and misleading statements to the general public and others, as well as one count of moral turpitude by encouraging Vice President Pence to disregard properly certified electoral votes and delay or adjourn the electoral count. Eastman is also culpable of failing to support the laws of the United States by violating 18 U.S.C. § 371. Given the numerous and serious transgressions, the court affords this aggravating factor substantial weight. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [multiple acts of misconduct as aggravation are not limited to the counts pleaded]; see also *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [53 threatening and abusive messages made over an approximately 8-month period found to be multiple acts of wrongdoing in aggravation]; *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [24 counts of misconduct assigned significant weight in aggravation].)

Intentional Misconduct, Bad Faith or Dishonesty (Std. 1.5(d)): No Weight

Standard 1.5(d) provides that aggravating circumstances may include intentional misconduct, bad faith, or dishonesty. OCTC argues that Eastman's actions were aggravated by his bad faith in pursuing a course of conduct to overturn the 2020 presidential election, which he knew lacked factual or legal merit. However, OCTC has not presented additional facts, separate and distinct from Eastman's misconduct leading to culpability, to support this aggravating circumstance. Therefore, the court assigns no aggravation as Eastman's alleged acts of bad faith were already considered in establishing culpability under sections 6068, subds. (a) and (d), and

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6106. (*In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402, 409, fn. 13 [improper to consider in aggravation factual findings already used to determine culpability].)

Significant Harm (Std. 1.5(j)): No Weight

Standard 1.5(j) allows for aggravation when an attorney's actions result in "significant harm to the client, the public, or the administration of justice." OCTC contends that Eastman's misconduct contributed to the violent attack on the Capitol on January 6, 2021. Additionally, OCTC claims that documents and testimony from multiple current and former state election officials demonstrate the harm caused by Eastman's misconduct, including the expenditure of resources to counter election disinformation, increased security measures, wasteful audits of the 2020 presidential election results, erosion of trust in election integrity, turnover in election offices, and harassment and threats against officials and their offices.

While the court acknowledges that there has been significant harm to the general public as evidenced by ongoing distrust in some of our democratic institutions and the electoral process, OCTC has not presented specific evidence to establish that the alleged harm occurred as a result of Eastman's actions. OCTC did not provide any witness or other evidence showing that Eastman's statements or actions, such as his speech on January 6, contributed to the attack on the Capital or that Eastman's peddling of disinformation regarding the 2020 presidential election specifically caused the harm unfortunately experienced by election workers, state election officials or the institutions they serve. The court rejects OCTC's argument that it is exempt from proving that Eastman was the cause of the harm. Under standard 1.5, OCTC must show aggravating circumstances by clear and convincing evidence. Here, the connection between Eastman's actions and the alleged harm remains speculative. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 784-785 [significant harm to client was not appropriate factor in aggravation without evidence that client suffered harm attributable to the attorney's misconduct].)

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OCTC's other argument that Eastman bears responsibility for the actions of others—presumably referring to then President Trump and Giuliani—based on a "concert of action" theory, is unpersuasive. OCTC cites to *Sindell v. Abbott Labs.* (1980) 26 Cal.3d 588, which examined the principle of group liability in tort when multiple parties collaboratively commit a tortious act. The court declines to adopt a theory of tort liability applied in civil cases under a different standard of proof than that required in a disciplinary proceeding. Extending such a theory of liability from tort law to this case would burden Eastman for the independent actions of others without OCTC meeting the requisite burden of proof for aggravation in disciplinary cases.

Based on this record, OCTC has not shown by clear and convincing evidence that Eastman caused the alleged harm. Therefore, the court assigns no aggravation under this factor.

Indifference (Std. 1.5(k)): Substantial Weight

"Indifference toward rectification or atonement for the consequences of the misconduct" is an aggravating circumstance. (Std. 1.5(k).) This case presents a clear instance of such indifference by Eastman. While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and come to grips with culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Eastman has failed to do so.

Despite the compelling evidence against him, as established in the culpability findings above, Eastman remains defiant, refusing to acknowledge any impropriety whatsoever in his actions surrounding his efforts to dispute the 2020 presidential election results. His lack of insight into the wrongfulness of his misconduct is deeply troubling. For instance, he testified he gave no consideration to the effect his televised statements made on January 6, 2021, at the Ellipse—implying electoral fraud from electronic voting—would have on the crowd, which he estimated to include one-half to a quarter million people. Eastman continues to hold the view

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that his statements were factually and legally justified. He demonstrated distain for these proceedings by characterizing them as a political persecution, claiming that the disciplinary charges against him contained false and misleading statements, and that those who brought them should themselves be disbarred.

Eastman's complete denial of wrongdoing, coupled with his attempts to discredit legitimate disciplinary proceedings are concerning. While Eastman is entitled to defend himself, his conduct goes beyond this, revealing a complete failure to understand the wrongfulness of his actions. His unwillingness to consider the impropriety of his conduct goes "beyond tenacity to truculence." (*In re Morse* (1995) 11 Cal.4th 184, 209 [unwillingness to consider appropriateness of legal challenge or acknowledge its lack of merit is aggravating].) Accordingly, the court assigns substantial weight in aggravation under this factor. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380-381 [ongoing failure to acknowledge wrongdoing instills concern that attorney may commit future misconduct].)

Lack of Candor (Std. 1.5(l)): Limited Weight

Aggravating circumstances in disciplinary proceedings may include lack of candor to the State Bar or State Bar Court during disciplinary investigations or proceedings. OCTC argues that Eastman demonstrated a lack of candor at trial because his testimony was evasive, inconsistent, and untruthful with respect to numerous issues such as whether there was outcome-determinative fraud in the seven states he contested and whether he urged Vice President Pence to reject certified slates of electors.

The court, in determining culpability, has rejected certain aspects of Eastman's unconvincing testimony in favor of more compelling evidence in the overall record. Eastman's testimony seemed evasive and inconsistent at times and there is limited clear and convincing evidence to establish that Eastman was dishonest in his testimony. (See *In the Matter of*

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Duxbury (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 67 [this factor must be supported by finding that testimony lacked candor or was dishonest].) Nonetheless, the court finds that Eastman lacked candor when he falsely testified that he did not exert pressure on Jacobs to reject the certified Biden electors. Jacob's records from January 5, 2021, revealed that Eastman urged Vice President Pence to reject the Biden electors, and Eastman's January 6, 2021 email acknowledged that the option of rejecting the electors had been discussed and dismissed the day before. Accordingly, the court affords limited weight in aggravation for this factor.

Mitigating Circumstances

The court finds mitigation for three factors; no prior discipline, cooperation, and good character.

No Prior Record of Discipline (Std. 1.6(a)): Moderate Weight

The absence of any prior record of discipline over many years of practice, coupled with present misconduct which is not likely to recur, is a mitigating circumstance. (Std. 1.6(a).)

Eastman was admitted to the State Bar of California in 1997. At the time of his misconduct, he had practiced law for approximately 23 years without discipline. This length of discipline-free practice satisfies the first prong of the standard—no prior record of discipline over many years of practice—and generally warrants substantial mitigation. (See, e.g., *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight for more than 10 years of practice].) However, the misconduct at issue is quite serious and, in consideration of his ongoing lack of insight or remorse, the facts of this case do not reflect aberrational misconduct, thus diminishing the mitigating weight of this factor. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long-term discipline-free practice is most relevant where misconduct is aberrational].) Under these circumstances, the court affords moderate weight in mitigation for Eastman's lack of prior discipline.

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Good Faith (Std. 1.6(b)): No Weight

Eastman may be entitled to mitigation if he can establish a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b).) Eastman contends that he is entitled to mitigation for his good faith belief that his statements and conduct did not violate any ethical standards.

As discussed, *ante*, the court finds among other things that Eastman made multiple false and misleading statements regarding the conduct of the 2020 presidential election and Vice President Pence's powers to refuse to count or delay counting properly certified slates of electoral votes on January 6, 2021. Even if Eastman honestly believed he acted in good faith, it was not objectively reasonable for him to have such belief. The circumstances of this case preclude any finding of good faith mitigation. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331 [attorney's honest belief not mitigating because belief was unreasonable].) Therefore, the court assigns no weight in mitigation for Eastman's assertion of good faith belief.

Lack of Harm (Std. 1.6(c)): No Weight

Standard 1.6(c) provides for mitigation where lack of harm to clients, the public, or the administration of justice can be established.

Eastman argues that OCTC failed to present evidence demonstrating that his actions caused any harm; and by implication that there is no harm. This argument is fundamentally flawed. The absence of evidence of harm does not constitute evidence of lack of harm. Eastman bears the burden to show mitigating circumstances by clear and convincing evidence. (Std. 1.6). He cannot simply shift the burden of proof onto OCTC without providing any evidence to support his assertion that no harm occurred. While it is true that OCTC did not present evidence to establish that Eastman's actions caused significant harm, this does not absolve him of his

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responsibility to demonstrate that his actions did not cause harm to his client, the public, or the administration of justice.

Without meeting this burden, his argument for mitigation on the grounds of a lack of harm fails. The court declines to assign any credit for this factor.

Cooperation (Std. 1.6(e)): Limited Weight

Mitigation may be assigned under standard 1.6(e) for cooperation with the State Bar. Eastman demonstrated cooperation with OCTC by entering into a stipulation as to facts. Eastman, however, did not admit culpability and "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Also, the nature of the stipulation, which admitted facts that were easily proven, obviated very little in terms of OCTC's preparation for trial. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to easily provable facts mitigating if facts assisted prosecution of case].) Thus, the court affords limited weight for Eastman's cooperation.

Extraordinary Good Character (Std. 1.6(f))—Substantial Weight

Eastman may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).)

Eastman presented 14 witness declarations and five live witnesses (four of whom also provided declarations) in support of his good character from a wide range of references in the legal and general communities, including a priest, an attorney, a writer, the Director of Administration at Claremont Institute, an associate professor at Benedictine College, a senior fellow and member of the board of directors of the Claremont Institute and Professor Emeritus at Azusa Pacific University, a managing editor of a magazine, the Director of the Claremont

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Institute, a retired attorney and former law clerk to former Supreme Court Justice Byron White, a former Attorney General of the United States, an Emeritus Dean and Professor at Michigan State University, a former justice of the California Supreme Court and United States Court of Appeals, a retired judge of the Los Angeles County Superior Court, a Professor Emeritus of Law at Cleveland State University and an attorney and adjunct professor at Trinity Law School. The court gives serious consideration to the attorney declarations in support of Eastman's character. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [attorneys and judges have "strong interest in maintaining the honest administration of justice"].)

Further, the court finds that the majority of these witnesses, who have known Eastman professionally for a period ranging from eight to 45 years, have shown understanding and familiarity with these disciplinary proceedings and the claims leveled against Eastman. Despite their awareness of the pending charges, the witnesses consistently and uniformly attested to Eastman's positive character traits, such as his professionalism, integrity, honesty, fairness, and respect. The court finds strong evidence of Eastman's good character and accords substantial weight in mitigation. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for good character for three witnesses who had longstanding familiarity with attorney and broad knowledge of good character, work habits, and professional skills].)

Discussion

Professional discipline aims to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high standards for attorneys. (Std. 1.1.) In its analysis, the court first considers the standards, which are not binding but entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Although not mandatory, a

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compelling, well-defined reason must be articulated for any deviation from the standards. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.7 provides that any aggravating or mitigating circumstance should be considered alone and in balance with other factors. If two or more acts of misconduct are present, the sanction shall be the most severe applicable. (Std. 1.7(a).) Several standards apply here. Standard 2.11 provides that "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty . . . intentional or grossly negligent misrepresentation or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the [attorney's] practice of law." Standard 2.12(a) also applies, and similarly provides that disbarment or actual suspension is the presumed sanction for a violation of section 6068, subdivisions (a) and (d). OCTC argues that Eastman should be disbarred, while Eastman disputes all charges and seeks dismissal.

As an initial matter, the court rejects Eastman's contention that this disciplinary proceeding and Eastman's resultant discipline is motivated by his political views or his representation of President Trump or President Trump's Campaign. Rather, Eastman's wrongdoing constitutes exceptionally serious ethical violations warranting severe professional discipline. As stated by Earl C. and others, "there is no right way to do the wrong thing." As counsel for President Trump during a disputed presidential election, Eastman made multiple patently false and misleading statements in court filings, in public remarks heard by countless Americans and to others regarding the conduct of the 2020 presidential election and Vice President Pence's authority to refuse to count or delay counting properly certified slates of electoral votes on January 6, 2021. These statements, made with varying degrees of intent, were

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improperly aimed at casting doubt on the legitimate election results and support for the baseless claim that the presidency was stolen from his client—all while relying on his credentials as an attorney and constitutional scholar to lend credibility to his unfounded claims.

Even after courts in key states authoritatively rejected unsupported allegations of outcome-determinative fraud in the election, Eastman persisted in proposing a legally unsustainable strategy. From November 2020 forward, as his many legal challenges failed, Eastman substantively advanced the false narrative that widespread fraud had tainted the election, and that Vice President Pence possessed the power to contravene the constitutional electoral process. His demonstrated intent was to foment loss of public confidence in the integrity of the 2020 election and persuade Vice President Pence to refuse to count or delay the counting of electoral votes on January 6. Most of his misconduct occurred squarely within the course and scope of Eastman's representation of President Trump and culminated with a shared plan to obstruct the lawful function of the government.

While attorneys have a duty to advocate zealously for their clients, they must do so within the bounds of ethical and legal constraints. Eastman's actions transgressed those ethical limits by advocating, participating in and pursuing a strategy to challenge the results of the 2020 presidential election that lacked evidentiary or legal support. Vigorous advocacy does not absolve Eastman of his professional responsibilities around honesty and upholding the rule of law. While his actions are mitigated by his many years of discipline-free practice, cooperation, and prior good character, his wrongdoing is substantially aggravated by his multiple offenses, lack of candor and indifference. Given the serious and extensive nature of Eastman's unethical actions, the most severe available professional sanction is warranted to protect the public and preserve the public confidence in the legal system.

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After careful review, the court could not find any controlling case law directly on point or substantially analogous to the facts of this case. OCTC cites to *Segretti v. State Bar* (1976) 15 Cal.3d 878, and argues that, here, disbarment is warranted because the misconduct in this case exceeds that of *Segretti*—who received a two-year actual suspension. The court agrees.

In *Segretti*, the attorney pleaded guilty to two federal offenses related to his work on President Richard Nixon's 1972 reelection campaign, including violating 18 U.S.C. section 612 (publication or distribution of political statements) and 18 U.S.C section 371 (conspiracy). Among other things, Segretti distributed letters containing false accusations about other candidates for president in order to create confusion among the candidates. The court found Segretti's actions involved moral turpitude as he "repeatedly committed acts of deceit designed to subvert the free electoral process." (*Id.* at p. 887.) Segretti had significant mitigation. He was only 30 years old at the time of the misconduct and thought he was acting under the umbrella of the White House. The court emphasized that Segretti's misconduct "was not committed in his capacity as an attorney" and that he recognized the wrongfulness of his acts, expressed regret, and cooperated with the investigating agencies. (*Id.* at p. 888.) Segretti received a two-year actual suspension.

The scale and egregiousness of Eastman's unethical actions far surpasses the misconduct at issue in *Segretti*. Unlike Segretti whose offenses occurred outside his role as an attorney, Eastman's wrongdoing was committed directly in the course and scope of his representation of President Trump and the Trump Campaign. This is an important factor, as it constitutes a fundamental breach of an attorney's core ethical duties. Additionally, while the *Segretti* court found compelling mitigation based on his expressed remorse and recognition of his wrongdoing, no such mitigating factor is present with Eastman. To the contrary, Eastman has exhibited an unwillingness to acknowledge any ethical lapses regarding his actions, demonstrating an

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apparent inability to accept responsibility. This lack of remorse and accountability presents a significant risk that Eastman may engage in further unethical conduct, compounding the threat to the public. Given the greater magnitude of Eastman's transgressions compared to *Segretti* and the heightened risk of future misconduct from his complete denial of wrongdoing, imposing greater discipline than in *Segretti* is appropriate to protect the public and uphold public confidence in the legal system.

Guided by the standards, case law, and the purposes of attorney discipline, the court recommends that Eastman be disbarred.

Monetary Sanctions are Warranted

As the NDC, filed after April 1, 2020, provided Eastman with notice that he could be subject to monetary sanctions, the court must make a recommendation to the Supreme Court regarding monetary sanctions. (See Rules Proc. of State Bar,[99] rule 5.137(E)(1), (H).) Here, the court recommends that Eastman pay $10,000 in monetary sanctions.

The court recognizes that the recommended amount is a deviation from rule 5.137(E)(2)(a), which provides for monetary sanctions up to $5,000 for disbarment. However, rule 5.137(E)(3) authorizes the court, in its discretion, to deviate from the range set forth in subdivision (E)(2)(a) "to a maximum of $5,000 *for each violation*, and $50,000 for each disciplinary order." (Rule 5.137(E)(3), italics added.) Here, a deviation from the range provided in subdivision (E)(2)(a) is appropriate under the facts and circumstances of this case given the gravity of Eastman's misconduct involving multiple acts of moral turpitude and the substantial aggravation, including his refusal to acknowledge any impropriety in his actions. Specifically, the court recommends that Eastman pay $5,000 in sanctions for his misconduct in connection with filing several pleadings seeking to mislead the courts. The court also recommends that

[99] Further references to rules are to this source, unless otherwise specified.

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Eastman pay another $5,000, for a total of $10,000, for making numerous false and misleading statements regarding the conduct of the 2020 presidential election and Vice President Pence's authority to refuse to count or delay counting properly certified slates of electoral votes and for his collaborative efforts with President Trump to impede the counting of electoral votes.

RECOMMENDATIONS

It is recommended that John Charles Eastman, State Bar Number 193726, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

CALIFORNIA RULES OF COURT, RULE 9.20

It is recommended that John Charles Eastman be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing discipline in this matter is filed.[100] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the Supreme Court order imposing discipline].)

MONETARY SANCTIONS

It is further recommended that John Charles Eastman be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $10,000 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Monetary sanctions are enforceable as a money judgment and may be collected by the State Bar through any means permitted by law. Monetary sanctions must be

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[100] John Charles Eastman is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

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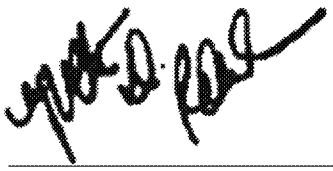
paid in full as a condition of reinstatement or return to active status, unless time for payment is extended pursuant to rule 5.137 of the Rules of Procedure of the State Bar.

COSTS

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of applying for reinstatement or return to active status.

INVOLUNTARY INACTIVE ENROLLMENT

John Charles Eastman is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). His inactive enrollment will be effective three calendar days after this order is served and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.



Dated: March 27, 2024

YVETTE D. ROLAND
Judge of the State Bar Court

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/29/2024 12:00:00 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Michael Pomante [michael@statesuniteddemocracy.org]
Subject: Review of RNC list maintenance allegations
Attachments: (Doc 001) 2024-03-13 Complaint[10].pdf; Michigan NVRA Letter[81].pdf; Works Cited for MI Voter List Lawsuite.docx

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

DPP MCL 15.243(1)(m)

If you'd like to discuss any of this with us, let us know.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 4/27/2024 4:16:31 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Osher, Daniel [OsherD@michigan.gov]
Subject: AFPI letter

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Heads up re AFPI letter on non-citizen voting if you haven't received it.

https://dailycaller.com/2024/04/26/america-first-policy-institute-battleground-elections/

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 4/29/2024 8:57:29 PM
To: Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: Keefer v. Biden (PA Kaardal case)--privileged

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Hi Dan and Heather,

I hope you had a good weekend. On Friday, the Supreme Court docketed a petition for certiorari before judgment from Erick Kaardal on behalf of the group of Pennsylvania legislators he represents. (Docket is here.) **DPP MCL 15.243(1)(m)**

DPP MCL 15.243(1)(m)

We'll keep you apprised of developments. Please let me know if you have any questions or would like to discuss in the meantime.

Best,

Jonathan

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/2/2024 5:41:38 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: RNC MTD response in NV--privileged
Attachments: 40. Response to SOS MTD.pdf; S REP 103-6.pdf

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Hi Heather,

I've attached the RNC's April 29 response to the motion to dismiss in its Nevada NVRA list maintenance case, in case it's helpful to you to get a head start. The reply is due on May 20.

DPP MCL 15.243(1)(m)

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Pro hac vice application pending

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

REPUBLICAN NATIONAL COMMITTEE, NEVADA REPUBLICAN PARTY, and SCOTT JOHNSTON,

Plaintiffs,

v.

FRANCISCO AGUILAR, *in his official capacity as Nevada Secretary of State*; LORENA PORTILLO, *in her official capacity as the Registrar of Voters for Clark County*; WILLIAM "SCOTT" HOEN, AMY BURGANS, STACI LINDBERG, and JIM HINDLE, *in their official capacities as County Clerks*,

Defendants.

No. 2:24-cv-00518-CDS-MDC

RESPONSE IN OPPOSITION TO MOTION TO DISMISS [ECF NO.26]

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INTRODUCTION

The arguments in the Secretary's motion to dismiss are often raised, and equally often rejected. Most recently, the Western District of North Carolina denied a motion to dismiss NVRA claims brought by voters in *Green v. Bell*, 2023 WL 2572210, at *7 (W.D.N.C. Mar. 20, 2023). Before that, the Western District of Michigan denied motions to dismiss in two different cases. *See Pub. Int. Legal Found. v. Benson* [*PILF*], 2022 WL 21295936, at *13 (W.D. Mich. Aug. 25, 2022); *Daunt v. Benson*, Doc. 376 at 19, No. 1:20-cv-522 (W.D. Mich. Nov. 3, 2020) (oral opinion, attached as Ex. A). And these recent cases rest on a body of precedent discussed in this brief. The *Green* case was for North Carolina what the *Daunt* case was for Michigan, and what this case is for Nevada.

All of these cases involved similar plaintiffs, raising a similar claim, based on similar evidence, in a similar complaint, following similar pre-suit notice. When North Carolina's and Michigan's chief election officials moved to dismiss on the three grounds raised here—lack of pre-suit notice, lack of Article III standing, and failure to state a claim—the district courts denied the motions in full. Instead of stopping this case before it starts, this Court should follow the well-established caselaw before it, deny the Secretary's motion to dismiss, and allow this case to proceed.

BACKGROUND

Nevada has stopped maintaining clean and accurate voter rolls. Five of Nevada's seventeen counties have registration rates over 90%. Compl. (Doc. 1) ¶¶50-51. Although registering 90% of eligible voters is a laudable goal, registration rates across the State and nation are closer to 70%. ¶¶53-56. Inflated rolls like these are a telltale sign that officials are failing to remove voters who have become ineligible. ¶57. In fact, three of the five counties with inflated rolls have registration rates over 100%—a mathematical

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impossibility. ¶50. The Justice Department and others have sued jurisdictions with similarly inflated registration rates, and those jurisdictions quickly admitted liability or agreed to clean up their rolls. ¶¶73-78.

The impossibly high registration rates are not the only indicators that Nevada is failing to maintain its rolls. Several counties have experienced high rates of residency changes in recent years, but they failed to remove voters for residency changes during that period. Compl. ¶63. Some counties removed none at all. ¶64. In addition, the State as a whole reports far more inactive voters than the national average, suggesting that Nevada is keeping inactive voters on the rolls rather than removing them. ¶66. Individual counties have rates of inactive voters that are double or triple the national and state averages, which is strong evidence that they are not making a reasonable effort to remove outdated registrations. ¶¶65, 68-69. In fact, 5,000 inactive registrations currently listed have been on the rolls for two full election cycles, which means they should have been removed after the 2022 election. ¶¶67. They weren't removed, which is direct evidence that Nevada is failing to fulfill its obligations under the NVRA.

Nevada is violating federal law. One of the NVRA's "main objectives" is to force States to "remov[e] ineligible persons from [their] voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). According to the bipartisan Carter-Baker Commission, inaccurate rolls are "the root" cause of "most problems encountered in U.S. elections." Compl. ¶38. Bloated rolls invite unlawful voting, dilute lawful votes, and decrease voters' confidence in elections. ¶¶38-41. Fraud, in particular, "is a real risk" that "has had serious consequences" in various States. *Brnovich v. DNC*, 141 S. Ct. 2321, 2348 (2021). The NVRA thus requires States to "conduct" a program that makes a "reasonable effort" to "remove the names of ineligible voters" who move or die from the

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rolls. 52 U.S.C. §20507(a)(4). Congress created a private right of action that allows individuals who serve a pre-suit notice to sue States that violate the NVRA. *Id.* §20510(b). According to Congress, this scheme "ensure[s] that accurate and current voter registration rolls are maintained," which safeguards both the "fundamental right" to vote and the "integrity of the electoral process." *Id.* §20501(a)(1), (b)(3)-(4).

Plaintiffs—the Republican National Committee, the Nevada Republican Party, and Scott Johnston—brought this suit to remedy Nevada's violations. The RNC is the national committee of the Republican Party and represents over 30 million registered Republicans throughout the country. Compl. ¶¶9-10. The Republican Party of Nevada is a political party in Nevada that represents over 550,000 registered Republicans in the State. ¶¶15-16. Together, the RNC and the NVGOP represent the interests of the Republican Party and its members throughout the country and the State. They rely on voter rolls daily. Inflated rolls cause the party to waste resources recruiting and communicating with ineligible voters, which diverts resources from other mission-critical activities. ¶¶13-14. And to fulfill its mission, the Republican Party must monitor States to ensure they are properly maintaining their voter rolls. ¶13. When States such as Nevada fail to maintain their rolls, the RNC is forced to divert resources to combat the presence of ineligible voters on the registration lists. ¶¶12-13, 21-23.

The RNC and NVGOP are joined in this suit by Scott Johnston, a registered voter in Washoe County. Compl. ¶18. Mr. Johnston is a resident of Nevada who votes in local and statewide elections. ¶¶18-19. He is also active in electoral politics and has held various leadership roles in the Republican Party. ¶20. Nevada's sloppy list maintenance undermines Plaintiffs' confidence in elections and risks diluting the votes of their members and individual voters such as Mr. Johnston. To redress their injuries, Plaintiffs

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sued the Secretary of State—the chief election official responsible for list maintenance in Nevada. Compl. ¶24. Plaintiffs also sued the registrars and clerks of five counties with particularly problematic voter rolls. Compl. ¶¶25-29. Those county officials play a direct role in maintaining accurate voter registration records. ¶¶25-29.

Before suing, Plaintiffs served the Secretary with a pre-suit notice. Compl. ¶¶79-82. The notice was fairly detailed. *See* Notice (Doc. 1-1). It identified the RNC, the NVGOP, and Mr. Johnston by name. *Id.* at 1. It reminded the Secretary that the NVRA obligates Nevada "'to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters' due to death or change of residence." *Id.* (quoting 52 U.S.C. §20507(a)(4)). It offered a wide range of statistics, including U.S. census data, to show that voter registration rates in many counties are abnormally or impossibly high. *Id.* at 3. It identified those counties by name and alleged that, as a result, Nevada is "violating Section 8 of the NVRA." *Id.* at 2. It addressed "the curative steps needed to bring the state into compliance" and warned that doing so was needed to "avoid litigation." *Id.* The Secretary responded one month later, denying any liability under the NVRA. Compl. ¶22. When Nevada failed to remedy its violation within the statutory timeframe, Plaintiffs filed this lawsuit. The Secretary now moves to dismiss this case under Rules 12(b)(6) and 12(b)(1). *See* Mot. (Doc. 26).

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) "tests" whether the complaint satisfies Rule 8. *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1052 (D. Nev. 2023) (Silva, J.). Rule 8 in turn requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the

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grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (cleaned up). This standard is "liberal." *Id.* at 94. Courts must accept the complaint's factual allegations as true, allow all reasonable inferences from those allegations, and construe the complaint in the light most favorable to the plaintiff. *Edwards v. Signify Health, Inc.*, No. 2:22-cv-95, 2023 WL 3467558, at *2 (D. Nev. May 12, 2023) (Silva, J.).

After drawing all those inference in Plaintiffs' favor, the question is whether the complaint states a claim that is "'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausible means a "reasonable inference that the defendant is liable." *Id.* It does not mean that liability is "probable," *id.*, or even that Plaintiffs are "likely to succeed," *Produce Pay, Inc. v. Izguerra Produce, Inc.*, 39 F.4th 1158, 1166 (9th Cir. 2022). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). To the extent the "parties proffer evidence" in their filings, "the court may not weigh [that] evidence in deciding a motion to dismiss." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1151 (C.D. Cal. 2003) (collecting cases).

When assessing a claim's plausibility, courts generally "'may not consider any material beyond the pleadings.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Courts can consider "'the face of the complaint [and] materials incorporated into the complaint by reference,'" such as Plaintiffs' pre-suit notice. *See In re Sorrento Therapeutics, Inc. Sec. Litig.*, 97 F.4th 634, 641 (9th Cir. 2024). Courts also can take judicial notice of official documents for their "existence," but not for their "truth." *Lee*, 250 F.3d at 690. And in no event can the court take "judicial notice of *disputed* facts," *id.*, or use outside materials to contradict the factual allegations or inferences in the complaint. *Khoja v.*

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Orexigen Therapeutics, Inc., 899 F.3d 988, 1003, 1014 (9th Cir. 2018). An outside document that "merely creates a defense to the well-pled allegations in the complaint" cannot "defeat otherwise cognizable claims." *Id.*

The same rules apply to the Rule 12(b)(1) motion. "When 'standing is challenged on the basis of the pleadings,'" the Court "must 'accept as true all material allegations of the complaint' and 'construe the complaint in favor of the complaining party.'" *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) (amended op.) (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988)). At this stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because the court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up).

ARGUMENT

I. Plaintiffs Provided Pre-Suit Notice.

The NVRA allows individuals to sue once the State's chief election official receives "written notice of the violation." 52 U.S.C. §20510(b)(1)-(2). No one disputes that, before filing this lawsuit, Plaintiffs gave the Secretary written notice of the violation. The Secretary says that pre-suit notice did not "plausibly allege any violation." Mot. 11-12. But the "[n]otice is an 'announcement,'" not a pleading. *Green*, 2023 WL 2572210, at *3. No court requires the notice letter to satisfy a Rule 8 pleading standard. "Plaintiffs' pre-suit notice announces a violation of the NVRA, so it satisfies the statute's notice requirement." *Id.*

Plaintiffs' notice satisfied the NVRA. It expressly put the Secretary on "statutory notice" that litigation was forthcoming. Notice 1, 4, 5. It identified the three plaintiffs here by name. *Id.* at 1. It identified the exact provision of the NVRA that the State is

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violating: section 8's requirement to conduct a program that reasonably removes ineligible voters who have moved or died. *Id.* at 1, 2. The notice identified counties by name that had unusually or impossibly high registration rates. *Id.* And it explained what data Plaintiffs used—a comparison of U.S. Census data to the State's list of registered voters—to make that determination. *Id.*

Courts have consistently upheld notices nearly identical to Plaintiffs'. In *Green*, Plaintiffs' counsel filed a virtually identical notice for voters in North Carolina. *Compare* Notice, *with Green v. Bell*, Doc. 1-1, No. 3:21-cv-493 (W.D.N.C. Sept. 17, 2021) (attached as Ex. B). When the defendants moved to dismiss for insufficient notice, the district court denied the motion. *Green*, 2023 WL 2572210, at *3. The court emphasized that "the statute requires notice of 'the *violation*,'" and "does not require notice of the violation's *cause*." *Id.* (quoting 52 U.S.C. §20510(b)(1)). In Michigan, the court in *Daunt* reached the same conclusion for a nearly identical letter. Doc. 44, No. 1:20-cv-522 (W.D. Mich. Oct. 28, 2020). And in *PILF v. Benson*, a different Michigan judge explained in detail why the Secretary's arguments here are wrong. 2022 WL 21295936, at *6-9. There, as here, the Secretary "challenge[d] the *quality* of the notice," which the court rejected because the notice "set forth the manner in which" the Secretary "failed to comply with the NVRA's list maintenance requirements" and stated that the plaintiffs "would commence litigation if the purported violation was not timely addressed." *Id.* at *7, 9.

Yet another court upheld a notice that simply identified "the provision of section 8 that the Defendant was allegedly violating," cited "evidence" for that violation (that one county's rolls had more registered voters than eligible voters), and "warn[ed] that the failure" to remedy this violation "could result in a lawsuit." *ACRU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 795 (W.D. Tex. 2015). Plaintiffs did at least that much here. As the

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Secretary admits, the NVRA requires him to make "a reasonable effort to remove voters who become ineligible based on death or change of residence," but it "does not provide a numerical threshold." Mot. 13. It is thus "not surprising" when a letter "does not contain any detailed allegations, inasmuch as the NVRA provision at issue does not contain any detailed requirements; it simply requires 'reasonable effort' on the part of the State." *Jud. Watch, Inc. v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012).

The Secretary suggests that the information in the notice letter must satisfy a Rule 8 pleading standard, Mot. 12, but neither Congress nor any court requires such a high bar. The one case the Secretary cites undercuts his argument. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015). In *La Raza*, the Ninth Circuit reversed the dismissal of NVRA claims because the district court imposed too high a bar on the notice letter. *Id.* at 1043. That the plaintiffs could have notified the Secretary of "some of the violations [they] uncovered" earlier did not defeat the "reasonable possibility" that "the violations were continuing" at the time of the complaint. *Id.* at 1044. The Secretary seizes on dicta that "[a] plaintiff *can satisfy* the NVRA's notice provision by plausibly alleging" an "ongoing, systematic violation," *id.* (emphasis added), but nothing about that brief sentence *requires* a plaintiff to meet a Rule 8 pleading standard in the notice letter. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022) ("This Court has long stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.'").

A pre-suit notice need only state the "general requirement" that the State is violating and the basic "reasons" for that conclusion. *King*, 993 F. Supp. 2d at 922. Courts consistently reject calls for more. *E.g.*, *La Raza*, 800 F.3d at 1044 (notice need not "specify that the violation has been actually observed" or identify a "'discrete violation'");

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Action NC v. Strach, 216 F. Supp. 3d 597, 619-20 (M.D.N.C. 2016) (rejecting the State's argument that a pre-suit notice must contain "'sufficiently particularized information'"); *Voter Integrity Proj. NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612, 617-18 (E.D.N.C. 2017) (similar); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 852 (D. Md. 2001) (conclusory allegation that a public assistance office "failed to provide voter registration services to its clients" was sufficient notice under the NVRA). The Secretary does not cite a single case deeming a notice like Plaintiffs' insufficient.

As for the statistics, the Secretary's criticisms of that data are irrelevant. Plaintiffs' statistics are enough to state a plausible claim under the Federal Rules, *see infra* Section III.A, so they are "more than sufficient" to provide pre-suit notice under the NVRA, *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1334 (N.D. Ga. 2012). Notice is given even if the State disputes that "the information offered" suggests a violation of the NVRA, and even if the State believes the notice does not provide "'an adequate basis upon which to investigate possible violations.'" *Id.* The NVRA does not require Plaintiffs to win their case—before it is even filed—in a battle of letters with the State.

II. Plaintiffs have plausibly alleged Article III standing.

Standing requires injury, causation, and redressability. Importantly, Congress created a private right of action for violations of the NVRA, including section 8's list-maintenance requirement. *See* 52 U.S.C. §20510(b). Courts evaluating Article III standing "must afford due respect to Congress's decision." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016)). Congress's judgment is "instructive and important" because the legislature is "well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*,

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578 U.S. at 341. In fact, Congress can "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* And Congress can "'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204-05. Because all Plaintiffs here seek the same relief under the same claim, "the Article III injury requirement is met if only one plaintiff has suffered concrete harm." *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Plaintiffs have standing under a variety of theories, any one of which is sufficient to deny the Secretary's motion.

A. The RNC and the NVGOP have organizational standing.

There is ordinarily little question that political parties have standing to challenge a State's failure to comply with federal election laws. *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019) (holding that the "need to divert resources from general voting initiatives or other missions of the organization" establishes standing "[i]n election law cases"). The complaint alleges that Defendants' violation of the NVRA inflates the voter rolls and causes Plaintiffs to divert their resources to address the fallout. Compl. ¶¶13-14, 17, 21-23 "[T]here can be no question" that diversions of resources are an "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The diversion injures Plaintiff because they "would have spent" their resources on "some other aspect" of their mission had the defendant "complied with the NVRA." *La Raza*, 800 F.3d at 1040. It is therefore "sufficient to confer standing" that a defendant's misconduct causes the plaintiff to, for example, spend resources registering additional voters. *Id.*; *Action NC*, 216 F. Supp. 3d at 616-18. In these circumstances, courts "have no difficulty concluding that Plaintiffs have adequately alleged that the injury they suffer is attributable to the State." *La Raza*, 800 F.3d at 1041.

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The Secretary's counterarguments are unavailing. The Secretary first argues that the resource-diversion allegations are "general, not specific to Nevada." Mot. 9. That misreads the complaint, which explicitly alleges that Plaintiffs "would have expended" their resources "on other activities," "[w]ere it not for *Defendants' failure* to comply with their list-maintenance obligations." Compl. ¶23 (emphasis added); *id.* ¶¶21-22. Regardless, "even when it is 'broadly alleged,'" a diversion-of-resources injury is sufficient "at the pleading stage." *La Raza*, 800 F.3d at 1041; *PILF*, 2022 WL 21295936, at *6 (allegations that the plaintiff organization "diverted resources that could have been expended in other states to address Michigan's alleged voter roll deficiencies" were sufficient); *League of Women Voters of Ariz. v. Reagan*, 2018 WL 4467891, at *4 (D. Ariz. Sept. 18) (allegation that plaintiffs "diverted resources to register voters rather than … other activities … due to Defendant's alleged noncompliance with the NVRA" was "sufficiently plausible to meet the low bar" of alleging standing at the pleading stage (cleaned up)); *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 581 (W.D. Tex. 2020) (explaining that the complaint need not identify "man-hours expended or specific activities resources were diverted away from" at the pleading stage (cleaned up)).

Though unnecessary at the pleading stage, the complaint provides significant detail on how Defendants' violations affect Plaintiffs' scarce resources. Plaintiffs use "voter registration lists to determine [their] plans and budgets" and to "estimate voter turnout." Compl. ¶14. Political parties rely on accurate registration records to determine "the number of staff" and the "number of volunteers" needed "in a given jurisdiction," as well as how much they "will spend on paid voter contacts." ¶14. Bloated voter rolls cause political parties to "misallocate their scarce resources" in ways that damage their mission. ¶92. In addition, Plaintiffs must divert additional resources to educating voters,

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increasing confidence in the election, monitoring Nevada's elections for fraud and abuse, persuading election officials to improve list maintenance, and other activities. ¶¶22-23. These allegations show "that it is plausible" that Plaintiffs have "suffered injury because of the Defendants' alleged failure to comply with the NVRA and therefore [have] standing to bring [their] List Maintenance Claim." *King*, 993 F. Supp. 2d at 925.

The Secretary also argues that "costs of litigation" are insufficient to support standing, but the argument is a strawman. Mot. 10-11. Nothing in the complaint cites litigation costs as an injury. The Secretary misconstrues other costs as litigation costs, but courts have rejected that bait-and-switch. *See ACRU*, 166 F. Supp. 3d at 790 ("Defendant remains free to present evidence" that certain monitoring and compliance activities "merely amount to 'litigation costs' … on a motion for summary judgment," but "such an argument on a motion to dismiss is premature"). Here, Plaintiffs' costs monitoring voter rolls and communicating with election officials are a consequence of Defendants violating the NVRA, not of Plaintiffs filing this lawsuit. These costs are "paired with an allegation that such costs are fairly traceable to the defendant's conduct," *id.* at 788, and thus sufficient to allege standing. *See PILF*, 2022 WL 21295936, at *5 (costs incurred "reviewing and analyzing Michigan's voter roll, investigating Defendant's list maintenance practices, and purchasing copies of the [voter files] and analyzing them against verifiable death records" satisfied organizational standing).

Defendants' NVRA violations also directly harm Plaintiffs' mission. This as an independent injury in NVRA cases. *Id.* at *6 (allegation that the Secretary's "failure to comply with the NVRA impairs [plaintiff's] essential and core mission of fostering compliance with federal election laws and promoting election integrity"). Plaintiffs' core mission includes electing Republican candidates, representing the interests of Republican

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voters, and maintaining confidence in the integrity of elections. Compl. ¶¶12-13. Ensuring States have clean voter rolls is essential to those goals. ¶¶19, 21, 31, 38. At "this stage," a "plausible allegation" that Plaintiffs' "ability to carry out [their] mission of cleaning up voter registration rolls has been 'perceptibly impaired' by the Defendants' alleged statutory violation" is sufficient to plead standing. *King*, 993 F. Supp. 2d at 925.

B. Voters have standing under the NVRA.

Mr. Johnston and Republican voters also have independent bases for standing.

First, Defendants' violations undermine their "confidence in the integrity of Nevada elections." Compl. ¶¶19, 90. Voter confidence has "'independent significance'" according to the Supreme Court because it "'encourages citizen participation in the democratic process.'" *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1104 (D. Col. 2021) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.)); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Undermining voter confidence thus burdens the right to vote, and "[t]here can be no question that a plaintiff who alleges that his right to vote has been burdened by state action has standing to bring suit to redress that injury." *King*, 993 F. Supp. 2d at 924.

Courts have repeatedly recognized this injury as a basis for standing in section 8 cases. *E.g.*, *Green*, 2023 WL 2572210, at *4; *Daunt*, Ex. A at 18-21; *Griswold*, 2021 WL 3631309, at *7; *King*, 993 F. Supp. 2d at 924. This injury is not "generalized" because "there is no indication that undermined confidence and discouraged participation are 'common to all members of the public.'" *Griswold*, 2021 WL 3631309, at *7 (quoting *Lance v. Coffman*, 549 U.S. 437, 440 (2007)). Mr. Johnston is a registered voter in Nevada who votes in the very local and statewide elections that are suffering from bloated rolls. *See* Compl. ¶¶18, 20, 63, 68. The RNC and the NVGOP represent hundreds of

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thousands of voters like him. ¶10, 16. Their injuries are not "speculative or hypothetical": they "already exist[]" because their "confidence is undermined now." *Griswold*, 2021 WL 3631309, at *7.

If there were any doubt that these injuries are sufficient, this Court should defer to Congress's judgment that inflated rolls undermine the "integrity of the electoral process." 52 U.S.C. §20501(b)(3)-(4). "When Congress 'elevates intangible harms into concrete injuries,' a plaintiff need not allege 'any additional harm beyond the one Congress has identified.'" *PILF v. Boockvar*, 370 F. Supp. 3d 449, 455 (M.D. Pa. 2019) (quoting *Spokeo*, 578 U.S. at 341; *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017)). Courts have thus found these congressionally designated injuries sufficient to satisfy Article III.

Second, Defendants' violations injure Plaintiffs by risking the dilution of their right to vote. Burdens on the right to vote are concrete, particularized injuries that support standing. *King*, 993 F. Supp. 2d at 924. That right "'can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (quoting *Purcell*, 549 U.S. at 4). Courts thus recognize that "vote dilution can be a basis for standing." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). Bloated voter rolls dilute the votes of eligible voters by facilitating fraudulent or otherwise ineligible votes. Compl. ¶¶19, 90. This injury is not a generalized grievance, *contra* Mot. 7-8, even though it's suffered by many Nevada voters, and even though the amount of dilution might be relatively slight. *See Baker v. Carr*, 369 U.S. 186, 208 (1962); *Spokeo*, 578 U.S. at 339 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). And their injuries are "particularized because the Plaintiffs allege that

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their votes are being diluted." *Green*, 2023 WL 2572210, at *4. The "harm of vote dilution is concrete and actual or imminent, not conjectural or hypothetical." *Kravitz v. Dep't of Com.*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (cleaned up).

This injury is also not "speculative." Mot. 8. While the Secretary focuses on intentional voter fraud, Mot. 8, bloated voter rolls invite all kinds of ineligible voting—fraudulent, intentional, accidental, and innocent—all of which dilute Plaintiffs' lawful votes. Nor is the link between inflated rolls and voter fraud overly speculative. It has been observed by the Carter-Baker Commission, Compl. ¶38, a well-respected authority relied on by the Supreme Court. *E.g.*, *Brnovich*, 141 S. Ct. at 2347-48; *Crawford*, 553 U.S. at 193-94, 197 (op. of Stevens, J.). Regardless, Plaintiffs are seeking "forward-looking, injunctive relief," so Article III allows them to sue over not just actual fraud, but also the "risk of" fraud. *TransUnion*, 594 U.S. at 435. "Fraud is a real risk" in Nevada and elsewhere, as courts have reiterated many times. *Brnovich*, 141 S. Ct. at 2348; *see* Compl. ¶¶38-39 (collecting cases). The complaint even details specific, recent instances of voter fraud in Nevada. Compl. ¶40. The link between inflated voter rolls and increased risks of illegal voting is not attenuated. *Contra* Mot. 8. It is obvious and well established.

Even if these events would be too speculative in a vacuum, "'Congress has the power'" to make it satisfy Article III, as it did here by enacting a private right of action for violations of the NVRA. *Spokeo*, 578 U.S. at 341. The Secretary relies on other, non-NVRA cases questioning vote dilution as "'speculative' at this juncture." Mot. 7 (quoting *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020)). But those cases did not "arise under a situation like the National Voter Registration Act where Congress has articulated the private right of action." *Daunt*, Ex. A at 20. Congress's judgment warrants respect, especially because harm to voters under the NVRA

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bears "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Green*, 2023 WL 2572210, at *4 (quoting *TransUnion*, 141 S. Ct. at 2213). Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law.'" *Baker*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). Courts have long recognized that vote dilution and losses of voter confidence burden the right to vote. And burdens on constitutional rights are classic examples of "intangible injuries" that satisfy Article III. *Spokeo*, 578 U.S. at 340.

* * *

Any of these theories demonstrates standing at the pleading stage. Plaintiffs' allegations are even stronger in light of Congress's creation of a private right of action for violations of the NVRA. So long as the Court finds that at least one Plaintiff "has standing," it "need not consider whether the [other parties] also have standing to do so." *Horne v. Flores*, 557 U.S. 433, 446 (2009). Courts confronting similar NVRA claims have approved every theory of injury suffered by Plaintiffs here. This Court likewise should recognize that at least one of these injuries is adequately pleaded and proceed to the merits.

III. Plaintiffs have plausibly alleged NVRA violations.

Section 8 of the NVRA "requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 138 S. Ct. at 1838 (quoting 52 U.S.C. §20507(a)(4)). The law makes the removal of dead or relocated voters "mandatory." *Id.* at 1842. Plaintiffs plausibly alleged that Nevada is not complying with this duty.

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A. Courts have held that inordinately high active voter registration rates plausibly suggest an NVRA violation.

The allegations regarding high registration rates alone raise a reasonable inference of liability. The complaint alleges that at least five counties have registration rates that are abnormally or impossibly high compared to the rest of the State and the rest of the country. Compl. ¶¶3-5, 50-56. These "unreasonably high registration rate[s]" create a "strong inference of a violation of the NVRA" that is "sufficient," on its own, to survive a motion to dismiss. *ACRU*, 166 F. Supp. 3d at 805. "Other courts" agree that "a registration rate in excess of 100%" indicates that a jurisdiction is "not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA." *Griswold*, 2021 WL 3631309, at *10; *e.g.*, *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620; *Green*, 2023 WL 2572210, at *5; *ACRU*, 166 F. Supp. 3d at 793; *Daunt*, Ex. A at 16.

The Secretary deems these allegations insufficient for three main reasons. First, he claims that the NVRA permits States to rely on the U.S. Postal Service's change-of-address information as a "safe harbor." Mot. 13. Second, the Secretary claims that, instead of poor list maintenance, the inflated rolls could be caused by population growth or the NVRA's limits on how fast voters can be removed. Mot. 13-14. And third, the Secretary disputes the data. Mot. 15-19. None of these arguments are a reason to dismiss a complaint at the pleading stage. Notably, the Secretary's primary authority for why Defendants haven't violated the NVRA is a case that was decided *at trial*, after the court received "extensive expert testimony." *Bellitto v. Snipes*, 935 F.3d 1192, 1207-08 (11th Cir. 2019). Earlier in the litigation, the district court *denied* the defendant's motion to dismiss, rejecting the same arguments the Secretary makes here. *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1365 (S.D. Fla. 2016).

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First, the so-called "safe harbor" for USPS data is not a reason to dismiss the complaint. The NVRA allows a State to "meet the requirement of subsection (a)(4)" by relying on "change-of-address information supplied by the Postal Service." 52 U.S.C. §20507(c)(1). The Secretary suggests the USPS data may be inaccurate, Mot. 13, but courts have found that argument "unconvincing" at this early stage. *ACRU*, 166 F. Supp. 3d at 793-94. If the USPS data were the sole cause of inflated rolls, the counties named in the complaint would not be outliers among the rest of the State. Compl. ¶¶55-57. Rather, "it is more likely that the Defendant's failure to maintain the voter rolls caused the registration rate to climb," which raises a "'strong inference'" that "is adequate to survive a motion to dismiss." *ACRU*, 166 F. Supp. 3d at 794.

Even if the argument were sound, the Secretary doesn't back it up with evidence. The Secretary doesn't even claim that the State or counties actually rely on USPS information. *See* Nev. Rev. Stat. §293.530(1) (counties may "use any reliable and reasonable means" to determine whether a voter has moved residences). And even if the Secretary were to introduce new evidence in reply showing that some counties use USPS data, that would not prove that the Defendants consistently and accurately apply that data, or that they follow through in removing voters. The USPS data is meaningless unless States actually *use* it, and ensure that county officials are using it, too. *See* 52 U.S.C. §20507(c)(1)(A) (requiring that the change-of-address information "is used"). Whether the State is complying with "subsection (c)(1)" and whether that compliance "defeats Plaintiff[s'] claims" is a "fact-based argument more properly addressed at a later stage of the proceedings." *Bellitto*, 221 F. Supp. 3d at 1366; *accord Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620 (similar); *Griswold*, 2021 WL 3631309, at *11 (similar).

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The provision is also not a "safe harbor," at least not in the way that the Secretary means. The NVRA requires States to remove voters who have moved, 52 U.S.C. §20507(a)(4)(B), and restricts how States can remove those voters, *id.* §20507(d). The process in subsection (c)(1) is thus a "permissible" way to satisfy these "mandates and accompanying constraints." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016), *rev'd*, 138 S. Ct. 1833. It is not a *sufficient* way to satisfy section 8's list-maintenance requirements. A process that admittedly permits "a substantial number of voters who have moved out of the jurisdiction" to remain on the rolls and fails to reach "40 percent of people who move," Mot. 13, is hardly a "reasonable effort" to conduct list maintenance, 52 U.S.C. §20507(a)(4)(B). Even if the provision were a safe harbor, it only pertains to a States' "obligations regarding change of address." *Bellitto*, 935 F.3d at 1210. Section 8 also requires States to remove voters who become ineligible due to "death," 52 U.S.C. §20507(a)(4)(A), and USPS data does not ensure Defendants are complying with that separate duty. *Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1356-57 (S.D. Fla. 2017).

Second, Plaintiffs do not have to disprove possible alternative explanations for Nevada's inflated rolls at this stage. *See Starr*, 652 F.3d at 1216. The Secretary argues that Plaintiffs must rebut "the possibility that the alternative explanation is true," Mot. 16, but he relies on a case in which "only one" of two "possible explanations" could be true, and "only one of which results in liability," *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). But the allegations here are "plausible," not merely "possible," and this case does not present two alternative scenarios, "only one of which can be true." *Id.* Even if the NVRA or population growth were responsible for some inflation of the rolls—and the Secretary does not say how much—that does not *exclude* the plausibility that deficient list-maintenance is responsible for the rest. To the extent there

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is "a potentially reasonable explanation for the high registration rate, … the validity of that explanation is not appropriate for determination at this early stage of the litigation, where the court views the factual allegations and inferences drawn therefrom in favor of [Plaintiffs]." *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. The Secretary's alternative explanations are especially unpersuasive because they are contradictory. On one hand, he claims that the rolls *are* inflated because the NVRA does not allow counties to quickly remove ineligible voters. Mot. 14. On the other hand, he claims that the rolls *are not* inflated because he reads the data differently. Mot. 15-18. These theories cannot render Plaintiffs' contrary inference of "substandard list maintenance" implausible. Compl. ¶57.

Third, the Secretary's criticisms of Plaintiffs' data are irrelevant. Again relying on the post-trial *Bellitto* case, he argues that census data is "insufficient to prove an NVRA violation." Mot. 15 (citing *Bellitto*, 935 F.3d at 1207-08). But at this stage, Plaintiffs don't need to "prove" anything. Even if the evidentiary disputes could be considered at this stage, they are unpersuasive. The Secretary disputes the census data, Mot. 15-18, but the U.S. Election Assistance Commission uses the census numbers to estimate voter turnout and registration "because of its availability for the majority of jurisdictions … and because it provides a more accurate picture of the population covered by the [survey]." U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2022 Comprehensive Report* 7 (June 2023), perma.cc/28SQ-T24L; *see also* Compl. ¶¶60-63.

The Secretary next quibbles with Plaintiffs' use of the five-year census estimate instead of the one-year estimate. Mot. 16-17. But the Census Bureau says that five-year estimate is the "[m]ost reliable" of the American Community Surveys.[1] In contrast, the one-year estimate is more "current" but "[l]less reliable," and it only has "[d]ata for areas

[1] U.S. Census Bureau, *When to Use 1-year or 5-year Estimates* (Sept. 2020), perma.cc/LJ8K-WJYQ

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with populations of 65,000+," *id.*, which excludes *all but two* of Nevada's counties.[2] Next, the Secretary's use of old registration rates from 2019 and 2020 is self-defeating. Mot. 16.-17. Plaintiffs challenge the registration practices of today, not those of five years ago. To the extent there is disagreement about which data best measures those practices, "the fact-intensive dispute about the accuracy and significance of the Plaintiffs' statistics must be resolved at the summary-judgment stage or at trial." *Green*, 2023 WL 2572210, at *5.

Plaintiffs' methodology has been repeatedly upheld. Their "census data is reliable," *ACRU*, 166 F. Supp. 3d at 791, especially since Plaintiffs used "the most recent census data available at the time of the filing of [their] complaint," *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. Regardless, this Court cannot dismiss the complaint even if it suspects that the "registration numbers may not be unreasonably high in context or there may be a reasonable explanation for them." *Griswold*, 2021 WL 3631309, at *11. At "the motion to dismiss stage, the Court does not 'weigh potential evidence that the parties might present'" in this manner. *Id.* The Secretary's disputes about "the reliability" and "significance" of "Plaintiffs' statistics" thus cannot defeat "a 'reasonable inference' that the defendant is liable." *Green*, 2023 WL 2572210, at *5.

B. The many other allegations in the complaint plausibly allege an NVRA violation.

Although courts have held that Plaintiffs' voter-registration data states a claim, the complaint here does not rest on those numbers alone. The complaint documents examples of six jurisdictions with similarly high registration rates who, after they were sued, essentially agreed that their rolls were inflated. *See* Compl. ¶¶73-78. The complaint also rules out alternative explanations for these inflated rolls. ¶¶57-58. And it details

[2] Nev. Legislature Research Div., *Population of Counties in Nevada* (Aug. 2021), perma.cc/NY8M-RFP6.

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even more data demonstrating that certain counties are not keeping up with residency changes, ¶¶59-64, and not removing voters even after marking them inactive, ¶¶65-69.

Start with residency changes. The Secretary says little about this data, but courts have recognized that it alleges an NVRA violation. *Compare Griswold*, 554 F. Supp. 3d at 1108 ("the 2018 EAC Report shows that 30 Colorado counties reported removing fewer than 3% of voters," even though "18% of Coloradans were not living in the same house as a year ago"), *with* Compl. ¶¶62-63 (the 2020-2022 EAC Report shows that two counties "reported removing less than 2% of their registration lists for residency changes" even though "more than 15% of Nevada's residents were not living in the same house as a year ago"). The Secretary obfuscates by changing the words of the statute: he claims the State can't "systematically act" on residence changes in the 90 days before an election. Mot. 14. That's false. The provision he cites says that the State cannot "systematically *remove*" voters from the rolls 90 days before an election. 52 U.S.C. §20507(c)(2)(A). Nothing in the NVRA prohibits Defendants from moving voters to inactive status before an election. In any event, these alternative explanations are irrelevant, and even the Secretary can't explain why some counties removed *no voters* for failing to respond to an address-confirmation notice. Compl. ¶64. The complaint contrasts a highly mobile population with unusually stagnant list-maintenance for those moves. ¶¶62-64. That data raises a plausible inference of a violation. *Griswold*, 554 F. Supp. 3d at 1108.

Even if Nevada had a "reasonable program" to maintain its rolls, how Nevada treats the inactive registrations on the rolls shows that it is not *implementing* that program. The complaint alleges that Nevada's rate of inactive registrations (16%) is much higher than the national average (11%). Compl. ¶65-66. The Secretary argues that shows Nevada is aggressively canceling registrations, Mot. 20-21, but that makes no sense. At

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most, it shows that Nevada is effective at *almost* canceling registrations but fails to actually remove those voters from the rolls. In other words, a "high 'inactive registration rate'" is evidence that, even if the State is "availing itself of the NVRA's safe harbor," it may "not actually be implementing it." *Griswold*, 554 F. Supp. 3d at 1097, 1108.

That inference must be drawn in Plaintiffs' favor, but the inference isn't even necessary: the complaint identifies some 5,000 inactive voters currently on the rolls that were listed in the June 10, 2019 voter file. Compl. ¶67. The Secretary compares these registrations to the total number of inactive voters, but that misses the point. Mot. 19-20. These 5,000 voters have been listed as inactive for two federal election cycles, which means that even by the Secretary's own data, these registrations should have been cancelled after the 2022 election. 52 U.S.C. §20507(b)(2). The NVRA requires States to "conduct" a list-maintenance program, not to simply *have* a list-maintenance program. *Id.* §20507(a)(4); *see Bellitto*, 935 F.3d at 1205-06 (defendants must demonstrate as a "factual" matter that they "reasonably used [the enacted] process"). Nevada's treatment of inactive registrations demonstrates it is failing to remove ineligible voters from the rolls.

In a final attempt to avoid plausible allegations, the Secretary demands the Court close its eyes to data that was not included in the notice letter. Mot. 19-21. But no court has held that the letter freezes the evidence or arguments that plaintiffs can rely on in a lawsuit. The Secretary cites a case in which the court declined to allow one plaintiff to "piggyback" on the notice provided by another plaintiff, *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014), but all Plaintiffs here were named in the notice. The NVRA requires only "written notice" of "the violation." 52 U.S.C. §20510(b)(1). Here, both the letter and the complaint allege a violation of section 8's requirement that States remove the names of ineligible voters. *Id.* §20507(4)(A)-(B). The notice need only state "[t]he general

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proposition" that a State is "not complying with the mandates of the NVRA"; the "statistics … simply serve as factual support for that general proposition." *Ga. NAACP*, 841 F. Supp. 2d at 1334. Regardless, because the NVRA's notice provision "is not jurisdictional," *ACRU v. Phil. City Comm'rs*, 2016 WL 4721118, at *4 (E.D. Pa. Sept. 9), courts can and have excused the requirement even in cases where the plaintiff provided no notice at all. *E.g.*, *ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). The Secretary can show no prejudice from more data, particularly where he continues to maintain that *none* of the data—no matter when he learned of it—amounts to a violation. Mot. 19-20.

Citing nothing, the Secretary concludes by arguing that Plaintiffs should have requested records from the Secretary of State that could have shed light on why Nevada's voter rolls are deficient. Mot. 22-23. Neither Congress nor the courts have imposed such a requirement. The NVRA requires pre-suit notice, not pre-suit exhaustion. In fact, requesting records is a *separate claim* under the NVRA that is independent of the claim for failure to conduct list maintenance. *See* 52 U.S.C. § 20507(h)(i). Plaintiffs sometimes bring both claims, *PILF*, 2022 WL 21295936, at *1, but often they bring just the list-maintenance claim, *Green*, 2023 WL 2572210, at *6. Tying together a motion that disputes the facts, the Secretary cites *Bellitto*, the post-trial case, one final time for the proposition that "courts ultimately rely" on details about "counties' methodologies" to determine whether the State has violated the NVRA. Mot. 23. But whatever evidence this Court "ultimately" relies on is not what governs this motion. Plaintiffs plausibly state a claim with a plethora of allegations approved by numerous courts.

CONCLUSION

The court should deny the motion to dismiss. If the Court grants the motion, it should also grant leave to amend. *Harris v. Amgen*, 573 F.3d 728, 737 (9th Cir. 2009).

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Dated: April 29, 2024

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S. REP. 103-6, S. Rep. No. 6, 103RD Cong., 1ST Sess. 1993, 1993 WL 54278 (Leg.Hist.)
P.L. 103-31, NATIONAL VOTER REGISTRATION ACT OF 1993
*1 ESTABLISHING NATIONAL VOTER REGISTRATION PROCEDURES
FOR FEDERAL ELECTIONS, AND FOR OTHER PURPOSES
DATES OF CONSIDERATION AND PASSAGE
House: February 4, May 5, 1993
Senate: March 10, 11, 15, 16, 17, May 6, 7, 11, 1993
Cong. Record Vol. 139 (1993)
House Report (House Administration Committee) No. 103-9,
Feb. 2, 1993 (To accompany H.R. 2)
Senate Report (Rules and Administration Committee) No. 103-6,
Feb. 25, 1993 (To accompany S. 460)
House Conference Report No. 103-66,
Apr. 28, 1993 (To accompany H.R. 2)

SENATE REPORT NO. 103–6

February 25, 1993
[To accompany S. 460]

The Committee on Rules and Administration, having considered S. 460, an original bill to establish national voter registration procedures for Federal elections, and for other purposes, reports favorably thereon and recommends that the bill do pass.

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PURPOSES

The purposes of the bill are to establish procedures which will increase registration of eligible citizens in elections for Federal office; to make it possible for Federal, State, and local governments to implement the Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; to protect the integrity of the political process; and to assure an accurate and current voter registration roll.

To increase registration of eligible citizens, this bill would require States that require registration to vote in elections for Federal office, to permit voter registration by the following means, in addition to any other method provided by State law: (a) by application simultaneous with an application for a motor vehicle driver's license–so-called "motor-voter" registration; (b) by use of a uniform mail application; and (c) by application in person at an ***2** agency designated to process registration applications in each State.

The bill would provide procedures and standards regarding the maintenance and confirmation of voter rolls to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction. The bill would not require a specific mandatory procedure for verifying or confirming voter rolls, but would establish standards for any such procedure a State might employ.

BACKGROUND

The declining numbers of voters who participate in Federal elections (only about half of the voting age population went to the polls in the 1988 Presidential election) spurred the Committee's search for possible remedies to this situation. It was noted that the national voter turnout in the 1990 Congressional elections was only 36 percent. Members were encouraged by the fact that the 1992 Presidential election turnout increased 4 percentage points over the 1988 election. Nevertheless, there are almost 70 million eligible citizens who did not participate in the election because they were not registered to vote. The Members are aware that there are multiple and complex factors that contribute to the decline in voter participation in Federal elections. While most contributing factors may not be affected by legislation, one–difficulties encountered by some who desire to register to vote–is susceptible to correction by legislation.

The Committee found that:

(1) The right of citizens of the United States to vote is a fundamental right;

(2) It is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) Discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

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While there may be no conclusive proof that an increase in the voter rolls will automatically or necessarily result in an increase in voter turnout, it is indisputable that it will increase the number of persons eligible to vote. There are also significant indications that most of those who are eligible to vote, do so. The most common excuse given by individuals for not voting is that they are not registered. The Congressional Research Service has indicated that only approximately 61 percent of those eligible to vote are registered, so that even with an enthusiastic electorate the participation rate by eligible voters would be unimpressive. It has been found, however, that over three-quarters of those who do register, do actually vote, at least in Presidential elections. The Bureau of the Census puts the figure for voter turnout of registered voters in Presidential elections at between 85 percent and 90 percent.

***3** Several witnesses at the Committee's hearings in the 102d Congress testified that registration procedures in the United States are not uniform and that discriminatory and restrictive practices that deter potential voters are employed by some States. Throughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote–which groups specifically depending on the decade and the locale. Among the techniques developed in the various localities to inhibit or exclude potential voters were annual registration, selective purging of the voter rolls, literacy tests and poll taxes. The Voting Rights Act of 1965 made most of these restrictive practices illegal, yet discriminatory and unfair practices still exist and deprive some citizens of their right to vote. This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act.

Some restrictive practices in the voting process arise from the attempts of States to respond to the legitimate administrative concerns of election officials, such as the detection and prevention of fraud, the maintenance of accurate and up-to-date voter rolls, and the removal of the names of ineligible persons from the rolls. These tasks are made particularly difficult by the mobility of our population.

In fashioning this bill, the Committee has been concerned with the impact of a regulation or practice on the exercise of the right to vote and not with the question of whether its impact was intentional or inadvertent. It must be remembered that the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority. Every effort has been made to produce a bill that balances the legitimate administrative concerns of the election administrators and the objectives of this legislation.

The Committee was also aware that some have questioned the Congress' constitutional authority to enact a measure on voter registration. This Act seeks to remove the barriers to voter registration and participation under Congress' power to enforce the equal protection guarantees of the 14th Amendment to the Constitution. Nevertheless, these critics argue that traditionally, it has been the role of the States to regulate the manner in which elections are conducted. Contrary to this view, the States do not have exclusive authority over elections. Article I, Section 4, clause 1 of the United States Constitution states:

> The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

In United States v. Classic, 313 U.S. 299 (1941), the Supreme Court clearly held that the right of the people to choose representatives in Congress is "a right established and guaranteed by the Constitution." Id. at 314. It is a right derived from the States, only in the sense that the Constitution authorizes States to legislate on the subject under Article I, Section 2. The Court said, however, that this power of the States only exists to the extent that Congress ***4** has not restricted State action by exercising its authority to regulate elections. Id. at 315. Moreover, in Oregon v. Mitchell, 400 U.S. 112 (1970), the Court supported the constitutional authority of Congress to enact election laws regulating Federal elections. In this case, the Court upheld the constitutionality of a Federal statute barring a State from denying the right to vote in any election because of a literacy test and of a Federal statute banning durational residency requirements. Justice Stewart wrote: " These cases and others establish that Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its powers under the Necessary and Proper Clause." Id. at 286. Justice Stewart concluded that the Constitution permits Congress to enact statutes protecting the fundamental right to vote.

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Congress has the power to regulate Federal elections, including the establishment of national voter registration procedures for Presidential and congressional elections. Congress' power has been clearly established under the Times, Places and Manner Clause and the Necessary and Proper Clause of the Constitution. These provisions, as interpreted by the Supreme court, belie assertions by those who argue that the States have exclusive authority to regulate the manner in which Federal elections are conducted.

COMMITTEE ACTION

On January 21, 1993, Senator Ford and Senator Hatfield introduced S. 2, the National Voter Registration Act of 1993. S. 2 was referred to the Committee on Rules and Administration. On February 17, 1993, H.R. 2, the companion bill in the House of Representatives, was received in the Senate and referred to the Committee. H.R. 2 passed the House of Representatives on February 4, 1993.

The substance of both S. 2 and H.R. 2 is based on S. 250, which passed both houses of Congress in the 102nd Congress and which was subsequently vetoed. In the 102nd Congress, the Committee held hearings on the measure and heard from several witnesses representing State and local governments, civic and civil rights organizations, and the U.S. Postal Service. Because the text of both S. 2 and H.R. 2 were identical to a similar measure on which there was substantial Committee hearing record, the Committee proceeded to consider this legislation without further hearings. Consequently, references to testimony in this report correspond to the Committee's hearings from the 102nd Congress.

On February 18, 1993, the Committee considered these bills at a mark-up session of pending legislation. During the consideration of these measures, the Chairman noted that both S. 2 and H.R. 2 presented procedural considerations relating to possible point of order. After consideration of the measures and the procedural circumstances, the Chairman proposed for himself and for Senator Hatfield, that the Committee report an original bill.

After a brief discussion, the roll was called on the motion to approve and report the original bill. That motion was passed by a record vote of 7–5 and the bill was ordered reported favorably by the Committee. Senator Stevens requested that the report include minority views.

*5 NATIONAL VOTER REGISTRATION PROCEDURES FOR ELECTIONS FOR FEDERAL OFFICE

I. "MOTOR-VOTER" REGISTRATION

Two points made in testimony before the Committee are central to the Committee's consideration of this legislation, and to the "motor-voter" provisions in particular. First, voter turnout of registered voters in Presidential elections since 1968 has been quite high. Census Bureau figures indicate a range from a high of 91.2 percent in 1968 to a low of 86.2 percent in 1988. While figures from election officials put the totals somewhat lower (from a high in 1968 of 82.5 percent to a low in 1988 of 70.6 percent) they are not adjusted for ineligible and duplicate names on the registration rolls. In any case it is clear that more than three quarters of those who are registered to vote do vote, at least in Presidential elections. And in all but a few States, a person must be registered before election day in order to vote.

Second, between 85 percent and 90 percent of people of voting age nationwide have driver's licenses or identification cards issued by State motor vehicle offices. A voter registration system tied to the application for or the renewal of a motor vehicle driver's license would be an ideal way to register most people of voting age throughout the country.

The driver's license procedure appears to be ideally suited to the purpose of registering voters. A procedure for licensing motor vehicle drivers is in place in every State. The States have developed exacting procedures to assure proper and correct identification of all licensees and to assure that a person has but a single license. Driver license applications require most

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of the information needed to determine the eligibility of a voting registration applicant, and include the additional protection of a photograph. This provision for simultaneous motor-voter applications permits the voter registrars to piggy-back on the identification techniques developed to assure accuracy in the licensing process.

Washington Secretary of State Ralph Munro, one of the first proponents of the motor voter concept, observed during his testimony before the Committee that incorporating voter registration into the drivers licensing process provides a secure and convenient method for registering voters; an effective means of reaching groups of individuals generally considered hard-to-reach for voting purposes, such as the youngest voting age population who generally have drivers licenses; and a procedure for keeping rolls current through contact with licensees who change addresses, both within a State and from one State to another, and are required to report such changes to the motor vehicles department.

Also, most States already have moved into centralized record keeping, with their driver's license application as the key document. This provision of the bill affords the States the opportunity to build on that process and to include the registration of voters. Although the bill does provide a procedure for registration that is ideally suited for automation in conjunction with the drivers license records, it does, however, permit each State some discretion as to how to administer this process and how to integrate it with *6 its drivers license process. That discretion would range from a fully integrated, automated process, a single application form for use by both agencies requiring minimal duplication of information, or separate application forms to be completed as part of a single, simultaneous application process at the driver's license agency.

While the bill permits some discretion to States as to how the two systems may be related, ideally the system should be so designed as to include the voter registration application as a simultaneous, automatic part of the overall process with the duplication of information requested and forms to be completed held to an absolute minimum. The system now in place in the District of Columbia accomplishes this goal by use of a single application format in which information entered on that portion of the form dealing with licensing information prints through to the voting registration form so that only a few questions pertaining to voting eligibility and the person's signature remain to be inserted after completion of the license portion.

It would not be sufficient under the terms of this legislation for a State motor vehicles office merely to make a voter registration application available upon request to a license applicant or to simply put some forms on a table in the agency. Likewise, it would not be sufficient to provide a voter registration application separate from the license application. Although this bill permits separate forms, it stresses that there must be a single application process and that requires the simultaneous delivery of the entire application, consisting of both forms, to an applicant. After receipt of the entire application, the applicant may choose not to register to vote by so indicating in writing and by not completing the voter registration portion of the application. Where a single combined form is used, an applicant's failure to sign the portion of the form containing the oath or attestation of eligibility to vote, shall be interpreted as an applicant's decision to decline the opportunity to vote.

To assure that the voter registration process is incorporated into the licensing application process so as to make it simultaneous and as automatic as possible, it is the Committee's intent that all applicants for motor vehicle drivers licenses or renewal thereof receive an application that includes both forms, and that all applicants complete the voter registration application form as part of the application procedure, unless they decline in writing to register to vote. For each license application processed by the motor vehicle registry, that office should receive either a completed voter registration application form to forward to the voting registrar or a written declination to register. Other than the requirement that it be in writing, the bill does not specify any particular form for this declination. So long as it produces a written record of the declination, any format would be sufficient, such as a check-off box on the license application form or a separate form signed by the applicant.

The Committee recognizes that in some jurisdictions, the application process is fully computerized. In such cases, any form signed by an applicant during the process shall contain an attestation to the questions on the application, including any declination question. It will be sufficient for purposes of the requirement of a written declination if the signature of the applicant on the final document produced during the transaction incorporates by reference all *7 questions which are asked of the applicant, including any declination question.

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The Committee is aware that some concern has been expressed that this provision of the bill transfers voting registration authority from State voting registrars to State drivers licensing officers. That is not the intent of this bill and a close reading of its provisions should make that very clear. Under this bill, the role of the motor vehicle registrar is to provide forms to applicants and receive completed voter applications for transmittal to the appropriate State voting registration official. It is that official who determines whether or not to accept the application and place the name on the voting roll for the appropriate voting jurisdiction. The bill requires that the appropriate voting registration official notify each applicant of the disposition of his or her application. Nowhere does the bill suggest that that determination be made by anyone other than the appropriate voting registrar under State law. Also this bill does not give any authority to the motor vehicle agency with regard to the design of the voting registration application form. Although some cooperation would be required to integrate the two application forms to be processed by the motor vehicles agency, the bill leaves it to State law as to the officer who is responsible for the design, layout and contents of the voting registration application form, subject to the requirements of this bill.

Twenty-seven States and the District of Columbia now have a system of registration through the State's Department of Motor Vehicles. In some States, the voter registration process is done on the same form as the application for a drivers license. In other States, employees of the motor vehicle bureau are deputized to register voters. And in some states, the Department of Motor Vehicles will accept the mail registration application and forward the form on to the appropriate election official. Many of the motor-voter programs are part of a larger State agency-based system whereby voter registration applications are available at a State agency, and the agency will accept the completed forms and forward them to the appropriate election official. The type and degree of assistance given or required to complete and process the forms does vary.

States in which the Department of Motor Vehicles accepts applications for voter registration (either directly or through deputy registrars employed by the DMV office) and a brief description of their programs are as follows:

Alaska. Although the program was not formalized until 1989, informally Alaska's Department of Motor Vehicles (DMV) has been accepting voter registration applications since 1983. A separate voter registration form is available at the State's DMV offices and must be filled out in front of and witnessed by DMV personnel. DMV will then forward the form to the State Election Office.

Arizona. The motor-voter program was established in 1982. A separate form is available in each DMV office and is accepted by a deputy registrar associated with the DMV office.

Colorado. The motor-voter program was first established in 1984. The single application form for both voter registration and driver's license was developed by April 1985.

***8** Idaho. Legislation has recently been passed that as of July 1, 1991, DMV offices in buildings not adjacent to county clerks' offices will accept voter registration applications and forward them to the appropriate county clerk. This affects approximately 6 counties in the State.

Illinois. As of September 1990, at least one employee in each DMV office is designated to become a deputy voter registrar. As such, the employee can register voters and witness applications within the DMV offices. However, it is a separate application process.

Iowa. The motor-voter program was established in 1987. At that time, voters were allowed to register through the State's DMV using a separate form for voter registration. As of 1989, Iowa has developed a single unified form for both registering to vote and applying for a driver's license.

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Louisiana. In 1989, the State legislature authorized a pilot project that would allow employees of the State's DMV office to volunteer to become deputy registrars and register persons to vote from within the DMV offices. However, few persons have volunteered for the program. In January 1991, the pilot project became law.

Maine. As of April 1990, Maine's DMV will accept applications for voter registration and forward them to the Secretary of State's office for further distribution. DMV employees are encouraged to ask all applicants for drivers licenses if they are registered to vote and direct them to the deputy registrar in the DMV if they wish to register. The program also covers drivers license renewals and changes of address.

Michigan. The motor-voter program was established in 1975. Voter registration requires completion of a separate form. DMV employees are trained to assist in voter registration and accept changes of address for purposes of voter registration.

Minnesota. The motor-voter program was established in 1987. While a separate form is required for voter registration, that form and the driver's license application are joined together. DMV personnel need only separate the two forms at a perforated line before sending the voter registration form to the appropriate voter registrar.

Montana. As of October 1, 1991, the State's DMV office began accepting voter registration applications and forwarding them to the appropriate election officials. In the future, a single combined drivers license/voter registration application form is planned.

Nevada. The motor-voter program was established in 1987. Persons desiring to register to vote must complete a separate form from that required to apply for a driver's license. DMV personnel will accept the voter registration application and forward it to the appropriate county registrar.

New Jersey. Motor-voter was established in 1989 by executive order. Employees of the State's DMV offices and other State agencies accept and forward on voter registration applications to the appropriate election officials. In 1991, legislation passed to implement parts of the executive order. Employees of the Department of Motor Vehicles and of Human Services of the ***9** New Jersey Transit Corporation, and the Office of Disabilities, are required under the legislation to accept and forward applications for voter registration to appropriate election officials. In addition, other State agencies, originally covered by the executive order, are still required because of that executive order, to process voter registration applications.

New Mexico. As of June 1991, the State's DMV offices will have at least one deputy registrar available to register persons to voter when they come in to apply for a drivers license. The program covers new drivers license applicants as well as renewals and changes of address.

North Carolina. The motor-voter program was established in 1983. Persons desiring to register to vote must complete a separate form. DMV personnel will accept the voter registration application and forward it to the State Board of Elections, which will then forward it to the appropriate county registrar.

Ohio. The motor-voter program was established in 1977, but not implemented unit 1982 when a statewide voter registration form was authorized and developed. Persons desiring to register to vote must complete a separate form. DMV personnel will accept the voter registration application and forward it to the appropriate county registrar.

Oregon. In 1989, the State legislature enacted motor-voter provisions into law, conditional on the passage of Federal legislation. However, in 1991, it was decided to proceed and implement a motor-voter registration system. Persons who are applying for a drivers license are asked if they are registered to vote and if they wish to be registered to vote. If they respond "yes", a combined form is printed, part for the DMV application and part for the voter registration application. The forms are accepted by the DMV and picked up by the appropriate election officials at regular intervals.

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Rhode Island. In January 1990, the legislature established a pilot project in the DMV to have a table occupied by a deputy registrar to register persons to vote. In 1991, this program was made permanent in the DMV where certain employees of the DMV were made deputy registrars. In 1992, the program was extended to several other State agencies. In all cases, selected employees of the agency are trained as deputy voter registrars, a separate voter registration form is used by the agency and the deputy registrar takes a sworn statement relating to the veracity of the information provided on the form.

Texas. In 1991, the State legislature passed a bill to implement a motor-voter registration program. The program automatically produces two forms if persons applying for a drivers license wish to be registered to vote. Both forms will be signed and the DMV will forward the voter registration forms to the appropriate election official.

Vermont. The motor-voter program was established in 1986. Persons desiring to register to vote must complete a separate form from the required to apply for a drivers license. DMV personnel will then administer an oath to the registrant, accept the voter registration application and forward it to the appropriate county registrar.

***10** Washington. In January 1992, motor-voter registration became official in the State. DMV employees will accept voter registration applications.

West Virginia. As of July 1, 1991, employees of the State's DMV office will ask all applicants and persons renewing their drivers licenses if they would like to register to vote. If the person wishes to register, they will be sent to the DMV's deputy voter registrar who will accept the voter registration application and administer the oath.

District of Columbia. The motor-voter program was established in 1989. A single combined form is used to both register voters and apply for a driver's license. The section of the form containing information required for both processes has a carbon attached; that part of the firm containing only information required by the Department of Elections has no carbon. A license applicant who wishes to register to vote must complete and sign both application sections of the form.

It has been reported that in the first month of operation of the motor-voter registration program in the District of Columbia, voter registrations were four times the usual monthly rate and that increase was achieved with one-half of the license applicants declining to register to vote. According to Emmett H. Fremaux, Executive Director of the D.C. Board of Elections and Ethics, who administers the program, during the first 20 months the program has been in operation, 32,000 persons have been registered to vote through the motor-voter program. That program accounted for 45 percent of all voter registrations during that period. Mr. Fremaux concluded, based on the experience in the District of Columbia, that "motor voter is so immediately and dramatically productive in putting new registrants on the roll that implementing this program nationally will produce a quantum leap in the level of voter registration in this country in a surprisingly short period of time. *** [I]t would mean adding more than 20 million persons to the national voter rolls from one presidential election to the next."

In addition to the States that accept or plan to accept voter registration applications and forward them to the appropriate election officials, a number of the States with mail registration make the forms available within the offices of public agencies, including the DMV office, and some (New York and Pennsylvania) specifically direct the persons visiting the office to where the forms are located. However, citizens still have to fill the forms out and mail them in themselves.

Although not the direct purpose of this bill, a side effect of its motor-voter and agency provisions will likely be to even out the work of voter registration offices throughout the year. Pre-election rushes of registrations caused by registration drives associated with an upcoming election will be minimalized. The continuous flow of drivers license applications throughout the year will result in a similar pattern of activity in the voting registration offices. Also, the voter rolls will be updated continuously throughout the year from renewals of licenses, notices of change of address and new applications by persons who move into the State and are required to obtain a State license within a prescribed period of time. All of these activities by the motor vehicle agency to comply with motor ***11** vehicle drivers license requirements and assure accurate and current information on drivers

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licenses and identification cards will result in the transfer of information to the voting registrar to help keep the voting rolls current and correct, as well.

Some concern has been expressed concerning the issue of fraud in the application process as a result of it being tied to the drivers license application process. This concern centers on the possibility of the registration of license applicants who are under age or not citizens since the requirements for a drivers license are not the same as for voting registration. Two things should be noted in this regard. First, most drivers license agencies require proof of the applicant's date of birth in order to apply for a license. Therefore, although the age requirements may differ, that information will be readily available to the clerk processing the application. Second, the bill requires that the application include a statement as to voting eligibility requirements, including age and citizenship, which must be attested to by the applicant upon signing the application. Thus, the processing of voting registration applications at the motor vehicles agency would lessen the likelihood of such fraud and certainly would not make it greater than it is now. As noted during the Committee's hearings in the 102nd Congress by Ralph Munro, Secretary of State of Washington, if the same scrutiny of driver's license applications is applied to voting registrations, the likelihood of registering ineligible people is severely diminished.

In addition to these safeguards, the bill provides for Federal criminal penalties for knowing and willful offenses, including the submission of voter registration applications containing materially false information. This is a broader provision than current law. Under the "false information" provision of the Voting Rights Act, the false information must relate to one of three items that are listed in the statute; that is, the name, address, and/or period of residence in the voting district. Under the provisions of this bill, prosecution for false information would be expanded beyond these three items.

With regard to the registration of noncitizens, current law at 18 U.S.C. S 911 prohibits the knowing and false assertion of United States citizenship by an alien. Under the provisions of this bill, every application for voter registration must include a statement that sets forth all the requirements for eligibility, including citizenship, and requires that the applicant sign an attestation clause, under penalty of perjury, that the applicant meets those requirements. Together with the criminal penalties section of the bill, the Committee is confident that this Act provides sufficient safeguards to prevent noncitizens from registering to vote.

II. UNIFORM MAIL REGISTRATION

The second approach of the bill is the development of uniform mail registration. Under the provisions of the bill, the Federal Election Commission, in conjunction with the chief election officials of the 50 States, will develop a universal mail registration form. The form may only require such identifying information (including the signature of the applicant) as is necessary for election officials to determine the eligibility of the applicant. The form ***12** must include a statement that specifies each eligibility requirement (including citizenship); contain an attestation that the applicant meets each such requirement; and require the signature of the applicant under penalty of perjury. The form may not include any requirement for notarization or other formal means of authentication, i.e. a witness requirement.

The bill provides flexibility by permitting States to develop and use their own mail registration form, as long as it meets the requirements of the Act. A registrant is permitted to use either the Federal form or the appropriate State form and the States would be required to accept either form.

Texas was one of the first States to institute a system of registration by mail–the person desiring to register mailed a card containing all pertinent information to a voter registrar. [1] Now, twenty-seven States and the District of Columbia have some form of mail registration program. Mail registration is an effective means for increasing the voter rolls because it relieves the voter of the need to appear in person at one central registration office during prescribed hours and it permits organizations to go to the voter with organized registration drives. Mail registration is convenient for the voter, for registration drive organizers and for voter registrars as well.

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Some have expressed concern that mail registration would increase the potential for fraud. This concern was expressed by the Department of Justice in a letter to the Chairman of the Committee, in the 102nd Congress.[2] The letter states, in part, "because some of the registration techniques mandated by the bill are fraught with the potential for fraud if adequate verification methods are not used in light of local conditions, *** the bill would present a serious potential for increased voting fraud and electoral corruption." In an accompanying memorandum, the Justice Department states that "[r]egistration by mail is much more susceptible to misuse because a would-be registrant never has to appear in person before a registrar for verification of identity and eligibility."

A study by the Congressional Research Service of States having mail registration procedures in 1984, found that "voter registration officials in all eighteen States for which data are available reported they have had little or no fraud with post care registration. Several said they have had no more fraud with post card registration than with in-person registration." In fact, Governor Barbara Roberts of Oregon testified that her State instituted mail registration in 1975, and that despite the fact that Oregon does not have a notarization or witness requirement, Oregon has not experienced any cases of fraud or fraudulent voting with mail registration. Governor Roberts stated that there was "Literally no abuse of the system."

***13** The Governor stated that when Oregon adopted mail registration, opponents raised the issue of fraud. As a result, the mail registration form includes detailed information to the registrant in red lettering that abuse of the registration process is punishable by a substantial fine and prison sentence. Moreover, despite Oregon's large migrant worker population, there has not been any indication of non-citizens registering in the State.

In addition to Oregon, it is significant to note that the States with a mail registration procedure include the most populous ones of California, New York, Texas, Ohio, New Jersey and Pennsylvania. Less than half of those States that have mail registration require a witness to thee applicant's signature and, of the more populous States, only New Jersey requires a witness. The most commonly used methods of confirming information on mail registration applications are a non-forwardable or forwardable mailing to the applicant after receipt of the application, and warnings of penalties for fraud on the application form. This bill requires a notice to each applicant as to the disposition of his or her application. Thus, it permits a State to use either a forwardable or non-forwardable mailing to confirm a registration. With regard to this notice requirement, States should be aware that such a notice should be drafted with regard to the purge provisions of this bill.

To address these concerns regarding fraud, the bill includes a provision which would permit the States to require by law that a first time voter who registered to vote by mail, and was not previously registered in that jurisdiction, make a personal appearance to vote.[3] This section of the bill again demonstrates the concern of the Committee that each State should develop mechanisms to ensure the integrity of the voting rolls. States may determine, based on their own circumstances, that a personal appearance for mail registrants is necessary to ensure the integrity of the voting rolls. Other States, based on their own experiences may determine that such a requirement is not necessary. Oregon is one such State which has mail registration and does not require a personal appearance to vote.

In addition, this bill requires that mail applications include a statement of voting qualifications and an attestation, which must be signed by the applicant under penalty of perjury, that the applicant meets all those requirements. All applicants must be informed of the penalties provided by law for submission of a false voter registration application and in the case of mail applications such notice would be on the form itself.

Mail registration provides a convenient method for reaching out to eligible voters. But while it makes registration convenient, the bill also provides that there will be sufficient safeguards to prevent an abuse of the system with fraudulent registrations.

***14** III. AGENCY REGISTRATION

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Agency-based voter registration provides a useful supplement to motor-voter registration systems, enables more low income and minority citizens to become registered, and is cost effective. Under the provisions of the bill, States will be required to designate agencies to serve as voter registration offices. The program of registering voters at various agency locations mirrors the registration program of the "motor-voter" provisions of the bill, but does not require the same integration of the voter registration application form with the agency forms. The agency-based registration program is designed to reach out to those sectors of the population which are not likely to have driver's licenses or other identification cards issued by a motor vehicle agency.

The agency-based program of the Act is a two tiered program. In the first tier, the States are required to designate all offices in the State which provide public assistance, unemployment compensation and related services, and all offices which provide State-funded programs primarily engaged in providing services to persons with disabilities. Such programs would include vocational rehabilitation but would also include other programs which provide assistance or services to physically challenged persons. The second tier of the agency-based registration program compliments the first and although each State must have such a program, a State is given discretion in determining which agencies will be included, as well as at which agency's local offices registration will be made available. This second tier may be comprised of Federal, State, local government offices or private sector agencies in the State. Such offices and agencies may include public libraries, schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bareaus, government revenue offices, and any office that provides services to persons with disabilities which are not included in the mandatory agency-based program. Within this second tier, a State has discretion to designate some or all of these offices, whichever is in the judgment of the State will serve the purposes of ensuring widespread voter registration opportunities.

Many persons will visit a public office or facility–a public assistance office, an unemployment office, a tax office, a library–in the course of a year. Agency-based voter registration provides a method whereby citizens may easily register to vote and fulfills the requirement that government should do all it can to make registration widely and easily available. Agency-based voter registration means that registration serivces–forms and assistance in completing such forms–will be available routinely and year round in many government and private sector offices.

As noted during the Committee's hearings last Congress, one of the advantages of the agency-based program is that it is an interactive registration. That is, there are individuals to assist registrants in completing the information on the registration application. Birgit Seifert of the Mexican American Legal Defense Fund noted that "mail registration is important, but perhaps more important are the agency registration procedures because [it is] ... an interactive form of registration. If you have a stack of mail registration ***15** cards available, that does not necessarily mean that people are going to pick them up and send them in."

While mail registration procedures make registration convenient, in communities where resources are limited, it has been demonstrated to be ineffective in registering those who have historically been left out of the registration process. Thus, in some instances, mail registration is inferior to agency-based registration. As Ms. Seifert noted in her testimony:

> If you couple placing the burden on community leaders to register people, and then you have the State affirmatively purging people, you have got them putting all their resources into getting something that is not getting them very far. They are having to marshal all their resources just to maintain the status quo ... [I]n a country which prides itself on a representative form of government, it is crucial that the government task affirmative steps to register its citizenry and that the burden not fall on communities, especially communities ... which lack resources.

The experience in many States with registration at schools, at libraries, or in motor vehicle offices provided the precedents for agency voter registration programs. Five States (Alaska, Iowa, Minnesota, New Jersey, and Ohio) have, either through executive order or law, established some form of public agency voter registration system other than motor-voter registration procedures, often as an adjunct to other voter registration procedures. In addition, nine States either make voter registration forms available within offices of State agencies or have added language to agency application forms asking if the applicant would like to register to vote. In these States, an applicant is given a mail voter registration form or is directed to the appropriate office for registration.

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An agency registration program may also include private offices and locations throughout a State. An agency program that includes private places at which persons may register to vote may be organized through cooperative arrangements and agreements between the sponsoring agency and appropriate local or State election officials. A comprehensive agency-based program should include private locations and offices, as well as public agencies, in order to make registration available on as broad a basis as possible in a State and to make registration readily available in areas that experience low registration.

To make the agency-based program as comprehensive as possible, the bill requires all entities and agencies of the Federal government to cooperate as much as practicable with the States in carrying out this program by participating as designated voter registration agencies. No specific Federal agencies are designated in this bill to participate; rather, it is left to the States to negotiate such arrangements with appropriate Federal agencies.

A Department of Transportation study noted that almost 50 percent of those persons who do not have a driver's license have annual incomes of less than $10,000. As a result, motor-voter registration programs may not adequately reach low income citizens and minorities. Active public and private agency-based voter registration programs available through such public agencies as State ***16** public assistance offices, State unemployment offices, or programs primiarly engaged in providing services to person with disabilities, as well as at private offices and locations in areas of low registration, are more likely to reach these eligible citizens, who are likely to have contact with a number of these agencies. Currently, most registration systems make it difficult for the low income citizen to qualify to participate in our nation's elections. Agency voter registration programs provide an institutional solution to the problem of unequal access to the voting booth.

Agency-based registration on a year-round basis may also indirectly minimize the necessity for periodic, large scale purges of voter registration lists by election registrars. With an effective agency-based registration system, voters would have the opportunity not only to register, but also to update their registrations each time they sought services at the government agency. Persons who receive social services–welfare, unemployment checks–must keep their addresses up-to-date in order to receive the benefit. Similarly, public housing recipients must keep their address information up-to-date. Like the motor-voter program, any application for renewal, recertification, or change of address would serve as an update for that person's registration to vote unless the applicant declines in writing.

The bill has a broad scope with regard to agency-based registration for persons with disabilities. As noted by a number of organizations representing the disabled community, particularly Disabled AND Able to Vote, there is no one agency which provides services to all, or even a large percentage of the disabled population. Vocational rehabilitation services, for example, reach no more than one disabled person out of 15 at any one time during their entire life. Independent living centers are overwhelmingly located in large cities and do not serve those persons with disabilities who live in suburbs, small towns, or rural areas. Thirty-seven percent of all persons with disabilities acquire the disability after the age of 55. As a result, employment, education and training programs rarely provide services to these individuals. In order to access this isolated population, it is essential that as many locations as possible which provide services to disabled Americans offer voter registration services: by making forms available, providing assistance with filling out the forms, and collecting and forwarding the registration forms to the appropriate election official.

Because many of these services may be offered by home visitations, the bill includes a provision which requires that any agency which provides services to persons with disabilities at the person's home must provide the same degree of assistance for voter registration in the home as an agency provides in the office.

Concerns have also been expressed that the agency-based registration programs risk various forms of intimidation of the public. However, this bill explicitly prohibits those engaged in registering voters from seeking to influence an applicant's political preference or party registration, displaying any political preference or party affiliation, or making any statement to an applicant the purpose of which is to discourage the applicant from voting. Agency personnel are also prohibited from intimidating a person to register who does not want to register, for fear of not receiving benefits. Moreover, ***17** under the criminal penalties section of the bill, it is a Federal offense to intimidate any person who attempts to register to vote. The

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Committee believes that these provisions are a sufficient deterrent to any person who would seek to intimidate any person who is entitled to register through the agency-based registration program, or any other registration program established by this bill or any other law.

Like the motor-voter provisions of the bill, the Committee is aware that some concern has been expressed that this provision of the bill transfers voting registration authority from State voting registrars to agencies. That is not the intent of this bill. This bill provides only that the role of the agency-based registration program is to provide forms to applicants and receive completed voter applications for transmittal to the appropriate State voting registration official. It is the voter registration official who determines whether or not to accept the application and place the name on the voting roll for the appropriate voting jurisdiction. The bill requires that the appropriate voting registration office notify each applicant of the disposition of the application. There is no provision in this bill which would require or suggest that determination be made by anyone other than the appropriate voting registrar under State law.

In addition, this bill does not give any authority to the agencies with regard to the design of the voting registration application form. In fact, the bill encourages agencies to incorporate their forms to provide one form for the applicant, as an application for services and voter registration. Ideally, the agency-based program would work efficiently if one form were created. In that instance, some cooperation would be required to integrate the two application forms to be processed by the agencies. The bill leaves it to State law as to the officer who is responsible for the design, layout and contents of the voting registration application form, subject to the requirements of this bill.

IV. VOTING LIST CONFIRMATION PROCEDURES AND STANDARDS

One of the purposes of this bill is to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction. The Committee recognizes that while voting is a right, people have an equal right not to vote, for whatever reason. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election. As the Reverend Jesse Jackson stated during the House hearings on voter registration reform in the 101st Congress: "No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue."

While most States use the procedure of removal for non-voting merely as an inexpensive method for eliminating persons believed to have moved or died, many persons may be removed from the election rolls merely for exercising their right not to vote, a practice ***18** which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

Such purging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again.

Although purge systems may be inefficient and costly, the Committee and other participants are well aware of the need for the States to maintain accurate voting rolls. An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis. The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud. These processes, however, must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register. Such processes must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.

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One of the advantages of the bill is the fact that the motor-voter and agency-based programs are ongoing and that applications and renewals may serve as updating the addresses of registered voters. Thus, the need for large scale purges and list cleaning systems becomes superfluous. Nevertheless, the bill requires States to conduct a program to maintain the integrity of the rolls. The Act requires that any program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll must be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965. Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act.

These programs may not remove the name of a voter from the list of eligible voters by reason of a person's failure to vote. States are permitted to remove the names of eligible voters from the rolls at the request of the voter or as provided by State law by reason of mental incapacity or criminal conviction. [4]

In addition, States are required to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence. Any program which the States undertake to verify addresses must be completed not later than 90 days before a primary or general election. It is intended by this requirement that the State outreach ***19** activity, such as the mailing of list verification notices or conducting a canvas, must be concluded not later than 90 days before an election, however, this would not prevent a State from making the appropriate changes to the official lists pursuant to the Act during the 90 day pre-election period.

A State or local subdivision may satisfy this requirement by using the National Change of Address program available through licensees of the U.S. Postal Service. The Committee strongly encourages all States to implement the NCOA program, which is efficient, is cost-effective once the start-up computerization expenses are absorbed, and properly implemented, is uniform and objective. Jurisdictions which choose not to use the NCOA program should implement another reasonable program which is designed to meet the requirements of the bill, i.e. that it be uniform, non-discriminatory and in conformance with the Voting Rights Act of 1965.

If in the course of using the NCOA program, it is determined that a voter has changed addresses within the jurisdiction of the same voting registrar, the registrar is directed to make the change on the official list of eligible voters and notify the voter of the change by sending a notice of the change by forwardable mail with a postage pre-paid return card for the registrant to verify or correct the information.

The Act allows the removal of a person's name from the official list by reason of a change of residence outside the jurisdiction of the registrar, only if the voter notifies the registrar of such a change or has failed to respond to a notice sent by the registrar and has failed to vote or appear to vote in two Federal general elections following date of the notice. [5] Under this notice requirement, the notice must be sent by forwardable mail, with a return postage prepaid and preaddressed card, on which the registrant may state his or her current address. This mailing must include a notice to the registrant that if he or she has not changed residence, or changed residence within the jurisdiction of the registrar, that the card should be returned no later than the time period provided for registration by mail. Further, if the card is not returned, confirmation or attestation may be required before the registrant is permitted to vote in the Federal election during the period between the date of the notice and ending after the second general election for Federal office that occurs after the date of the notice. If the registrant does not vote or appear to vote, his or her name will be removed from the list of eligible voters. This mailing must also give information to the registrant concerning how the registrant can continue to vote if he or she has moved outside the jurisdiction of the registrar. A voting registrar shall correct the roll based on information obtained through this program.

As previously noted, one of the guiding principles of this legislation to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction. Thus, when a registrant fails to return a card to the voting registrar, the voter must be permitted to vote if he or she appears at the polls within ***20** two general Federal elections after the date of

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the notice. While the bill secures the right of the voter to vote, it does not dictate the way in which the person is to vote. The State may establish its own requirements regarding the means of voting.

In response to the concerns of various witnesses representing civil rights organizations, these requirements of the bill were added to prevent the discriminatory nature of periodic voter purges, which they assert appear to affect blacks and minorities more than others. It should be noted that the bill does not mandate any specific time periods for when such list cleaning mechanisms must be used. While these provisions have been included to insure that voting rolls will be free from "deadwood", there will be less need for these mailing because the programs of voter registration include provisions for automatic updating of addresses. Thus, the process of updating registration rolls is an ongoing and continuous process.

V. ENFORCEMENT AND REGULATION

A. The Federal Election Commission

The Federal Election Commission (FEC) was created to oversee the campaign finance law authorized under the Federal Election Campaign Act and its amendments. The FEC officially became operative in 1975. Although known mostly for its regulatory activities in the area of Federal election campaign finance, the FEC is the only Federal agency uniquely set up to deal with Federal elections. Due to the politically sensitive nature of its role, the FEC was organized as an independent agency with members appointed with consideration of their political affiliations, but under restrictions designed to assure that no single political party would control its deliberations. Further, through its National Clearinghouse on Election Administration, the FEC has maintained an advisory role in election administration and has developed model election administration programs and information to assist States in conducting their elections. Given its composition and independent status, its experience in developing rules and regulations in the area of campaign finance, its unique position within the Federal government as the principal agency dealing with election administration, and its experience in developing model procedures for States, the Federal regulation of any national voter registration could best be administered from the FEC.

B. Enforcement

Many State and local election administrators expressed concern about the potential for an increase in voter fraud as a possible result of voter registration reform, and especially that registration by mail would make it easier for persons to vote fraudulently. This bill not only attempts to make voter registration convenient, but is also designed to prevent fraud and abuse of the electoral process.

The Committee is aware of the concerns regarding the potential for fraud in registrations. Throughout the bill, each registration program has been developed to assure the integrity of the voting rolls. One of the principle concerns expressed by critics of this bill is the use of mail registration. Based on the Congressional Research ***21** Service's study, however, the experience of the States with mail registration appears to be that voter fraud is no more prevalent under a mail registration system than under other types of voter registration systems. Moreover, where States have investigated fraudulent registration and voting, there has never been a recommendation to repeal mail registration. [6] As previously noted elsewhere in this report, the provisions relating to mail registration permit the States to require by law that a person make a personal appearance to vote if that person registered by mail and had not previously voted in that jurisdiction.

Nevertheless, a uniform national voter registration system should make it a Federal offense to fraudulently register to vote. Voter fraud is a crime against the legitimate electoral process. On the other hand, others expressed concern that legitimate voters should be able to go to the polls without fear of intimidation or threat by either officials or other citizens. As much as it is a crime to attempt to fraudulently cast a ballot, it is equally a crime to try to prevent an eligible citizen from casting a ballot in an election. Any national voter registration measure should discourage equally both of these activities. Language was added to the

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criminal penalties section to make clear that the person charged must have actual knowledge that the registration forms contain materially false information and were submitted with the specific intent to fraudulently affect the outcome of an election.

In addition to criminal enforcement, an effective national voter registration program must also include private civil enforcement. Such private initiative can encourage action to assure that a reasonable effort is undertaken to achieve its objectives in all States and, indeed, it may be essential to the success of such a program in some areas. Private civil enforcement should be designed to assure and to encourage, to the fullest extent possible, the cooperation of local and State election officials responsible for implementation of the voter registration programs. An essential element of an effective civil enforcement program is a requirement for notice of any complaint regarding its implementation to the appropriate election officials together with a process for its administrative resolution before legal action may be commenced.

SECTION-BY-SECTION DESCRIPTION AND DISCUSSION

SECTION 1. SHORT TITLE

This Act may be cited as the "National Voter Registration Act of 1993."

*22 SECTION 2. FINDINGS AND PURPOSES

Section (a) sets forth the findings of the Congress that the right to vote is a fundamental right of citizens; that it is the duty of Federal, State, and local governments to promote the exercise of that right; and that discriminatory and unfair registration laws and procedures have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

Section (b) sets forth the purposes of this Act, which are to increase the registration of voters, to make it possible for Federal, State, and local governments to implement the Act in a manner that enhances the participation of eligible citizens, to protect the integrity of the electoral process, and guarantee accurate and current voter registration rolls

SECTION 3. DEFINITIONS

Section 3 defines the term "motor vehicle driver's license" to include any personal identification document issued by a State motor vehicle authority, and applies the definitions of Section 301 of the Federal Election Campaign Act of 1971 to election terms used in this Act. "State" is defined to be a State of the United States or the District of Columbia. A "voter registration agency" is any office designated under this Act's agency-based registration provisions to perform registration functions which include distributing registration forms simultaneously with applications for services or benefits, providing assistance to applicants similar to that provided in the completion of the office's own forms, and receipt and transmittal of such forms to the appropriate voter registrar.

SECTION 4. NATIONAL PROCEDURES FOR VOTER REGISTRATION FOR ELECTIONS FOR FEDERAL OFFICE

Section 4(a) requires that the States, in addition to any other methods for voter registration provided for under State law, establish procedures to permit voter registration in elections for Federal office: simultaneously with an application for a driver's license; by mail application; by application in person, either at an appropriate registration office, or at a Federal, State or private sector location ("agency registration").

Section 4(b) provides that this Act is not applicable to a State where either or both of the following apply: a State in which there is no voter registration requirement for any voter in the State with respect to a Federal election; or, a State in which all voters may register to vote at the polling place at the time of voting in a Federal general election.

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The language of this section is specific as it relates to the exceptions. It is the intent of the Committee that these exceptions are narrowly drawn to assure that only those States in which any voter may vote either without registration or by registering at the polling place on election day would be exempt. A State would be exempt from the requirements of the bill if it meets either or both of these requirements. It is not the intent of this legislation to encourage the adoption of election day registration. Rather, the Committee believes that States which have implemented one or both of ***23** these exceptions have lessened the impediments to registration which goes significantly beyond the requirements of the bill. A State would not be exempt if it merely granted local jurisdictions the option of providing for election day registration or no registration if local jurisdictions also had the option of requiring any other form of registration. The Committee does not believe such an option results in a significant reduction in registration barriers.

SECTION 5. SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER'S LICENSE

Subsections (a) and (b) require that each State motor vehicle driver's license application, including a renewal application, shall also serve as an application for voter registration for Federal elections. In addition, such an application will also serve as updating any previous voter registration by the applicant. An applicant for a motor vehicle driver's license may decline to register to vote and such information may not be used for any purpose other than voter registration.

Although the declination to register must be in writing, no particular format is required so long as a record of the declination is created and retained. The Committee recognizes that in some jurisdictions, the application process is fully computerized. In such cases, it would be sufficient to satisfy the requirement of a written declination if the form signed by an applicant at the conclusion of the process contains an attestation to all questions in the application, including any declination question. It is the intent of the Committee that the application procedure should require the affirmative act of an applicant but only after the applicant has received a complete application that includes both the drivers license and voter registration application forms. States are afforded latitude in this section to develop an application which will meet the needs of the particular jurisdiction. In some instances, a State may determine that the application should include a box in either form for a registrant to check if he or she declines to register. In other instances where the application for the driver's license and voting registration are combined into a single form, the failure of an applicant to sign the voting registration application portion could serve as a declination to register, if the drivers license portion contains a notice to the applicant that the failure to complete and sign the voter registration application portion of that form is a declination to register.

This requirement that there be a written declination to register serves two purposes: first, to prevent unnecessary paperwork where a person is already properly registered; and, two, to prevent the registration of ineligible persons. It is not the intent of this bill to generate needless paperwork for either the registry of motor vehicles or the voter registrar. The Committee would expect the registry of motor vehicles staff to instruct applicants who are already properly registered or those who are otherwise ineligible to vote decline to register. Such instructions should also be included in any written materials provided to applicants as well as in any instructions posted in motor vehicle agency offices. Some have claimed that the failure to decline to register will result in the automatic ***24** registrations of such individuals. This is simply not true. This bill provides for simultaneous applications procedures, but still requires the intervening act of a review of the registration applications by the appropriate State or local election official.

Some have noted that the requirements for obtaining a driver's license are not the same as those for eligibility to vote, specifically, age and citizenship. The Committee would expect that any driver's license applicant who does not meet the requirements for eligibility to vote would decline to do so. It is important, therefore, that such applicant be advised of the voting requirements and the need to decline to register if he or she does not meet the requirements. The bill provides that all registration requirements should be set forth in the application to register to vote so that they will be readily available for each applicant to review during the application process. The applicant should be advised that there is no obligation to specify the particular reason for choosing to decline to register.

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Since some of the reasons for declining to register to vote may involve matters of personal privacy, such as ineligibility under State law due to mental incompetence or a criminal conviction, an individual who declines to register to vote shall not be questioned as to the reasons for such action. If an individual reveals such information, it must be treated as confidential and may not be used for any other purpose. As discussed later, the Act contains a general prohibition against a State or entity from revealing any information relating to a declination to register or to the particular location or agency where a person registered.

Subsection (c) requires that each State shall include a voter registration application form as part of an application for a State motor vehicle driver's license. The voter registration application form may not require any information that duplicates information required in the driver's license portion of the form, other than a second signature and the minimum amount of information necessary to prevent duplicate voter registration and enable State election officials to assess the eligibility of the applicant for voter registration and other parts of the election process, and must include a means by which an applicant may decline to register to vote. The voter registration application form must include a statement that states each eligibility requirement, including citizenship, and attestation that the applicant meets each such requirement, and the signature of the applicant under penalty of perjury. In addition, where appropriate, such forms should include information requesting the applicant's mail address if it differs from the applicant's residence. Each completed voter registration application form must be made available to the appropriate State election official as provided by State law.

The terms "State election officials" and "appropriate State election official" refer to whatever election official under State law has the appropriate responsibility for the administration of voter registrations and elections. In some cases, this may be a local election official.

Although the application for voting registration is simultaneous with an application for a driver's license, it is not the intent of the bill to supplant the traditional role of voting registrars over the registration procedure. The bill makes it very clear that the motor ***25** vehicle agency is responsible for forwarding voting registration applications to the appropriate State election official. It should be made very clear to any applicant in a driver's license bureau that the application for voter registration is an application which must be reviewed by the appropriate election officials. Only the election officials designated and authorized under State law are charged with the responsibility to enroll eligible voters on the list of voters. This bill should not be interpreted in any way to supplant that authority. Election officials should continue to make determinations as to an applicants eligibility, such as citizenship, as are made under current law and practice. Applications should be sent to the appropriate election official for the applicant's address in accordance with the regulations and laws of each State.

Although the Committee would encourage States to adopt a single form for a voter registration application and a motor vehicle driver's license application in order to expedite the process, to minimize the duplication of information, and to establish a truly simultaneous application process, it recognizes that administrative and funding considerations pose serious problems for some States. Thus, Section 5(c) is so drafted to describe an application process that permits the use of two forms, one for the motor vehicle driver's license application and one for the voting registration application, thereby avoiding any cost associated with revamping current procedures of computer programs. Where two forms are used, it is expected and intended that such forms will be used simultaneously as part of a single, integrated application process. All applicants appearing at the motor vehicle office must be given an application that includes both forms. If such an applicant does not wish to register to vote and so indicates by declining in writing to do so, such an applicant should not complete the voter registration portion of the application.

Subsection (d) provides that any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of a change of address for voter registration unless the registrant states on the form that the change of address is not for voter registration purposes. The requirements of residency pertaining to driver's licenses may vary from those pertaining to voting; therefore, this provision will permit a person to indicate that a change of address notification to the motor vehicle agency is not intended to effect a change in the address for voting purposes and should not be forwarded to the voting registrar.

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SECTION 6. MAIL REGISTRATION

Subsection (a) requires that all States accept and use the mail voter registration form prescribed by the Federal Election Commission. In addition, States are permitted to develop and use their own mail registration form, provided it meets the requirements of this Act. Mail registration forms may also be used for voter registration change of address.

The Federal Election Commission, in consultation with the chief election officials of the States, is required pursuant to Section 9 to promulgate a mail registration application form. That form shall ***26** include a statement that specifies each eligibility requirement for voting, contain an attestation that the applicant meets each such requirement, including citizenship, and require the signature of the applicant, under penalty of perjury. Where appropriate, the application form should include information requesting the applicant's mail address if it differs from the applicant's residence. The form may not include any requirement for notarization or other formal authentication, such as witnessing. If a State chooses to develop and use its own form, that form must comply with the same criteria that applies to the Federal form promulgated by the Federal Election Commission.

The requirements that States use a uniform mail registration application form serves to augment the extensive outreach features of the "motor-voter" and agency-based registration procedures. Uniform mail forms will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events. By permitting States to develop and use their own forms as well, the bill provides flexibility for the States. In those States that develop their own mail voter registration application, an applicant may use, and the State must accept, either the national form developed by the FEC or the State's own form.

Subsection (b) requires the chief State election official to make the mail registration forms available for distribution through governmental and private entities, with a particular emphasis on making such forms available to organized voter registration programs. Broad dissemination of mail application forms, when coupled with the other procedures of this bill, should reach most persons eligible to register to vote, and is, therefore, a key element of the voter outreach feature of the bill. Such forms may also be disseminated to agencies designated under the agency-based registration procedures for use by those agencies in their registration programs.

States that use mail registration application procedures generally employ a number of means to prevent fraud, such as including on the form a statement of voter qualification requirements or penalties for fraud, or a follow-up mailing. The form to be developed by the FEC is to include a statement setting forth the requirements to vote (including age and citizenship) and an attestation to be signed by the applicant under penalty of perjury. Mail registration forms developed by the State should contain the same statement and attestation.

The bill requires notice to each applicant of the disposition of his or her application. This requirement could be met by a follow-up mailing by any State that wishes to employ that procedure as a means of protecting against possible fraud in the mail registration process. With regard to this notice requirement, States should be aware that such a notice should be drafted with regard to the purge provisions of this bill.

The Committee believes that these provisions are sufficient to deter fraudulent registrations. Nevertheless, the bill includes an additional provision relating to first time voters which has been added to address the concerns that this process may be subject to ***27** misuse. Subsection (c) provides that a State may require by law that a person who registers to vote by mail and has not previously voted in that jurisdiction, vote in person. This requirement would not be applicable to any person who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act, or who is provided the right to vote otherwise than in person by the Voting Accessibility for the Elderly and Handicapped Act, or who is entitled to vote otherwise than in person by any other Federal law. States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill.

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SECTION 7. VOTER REGISTRATION AGENCIES

Subsection (a) requires that each State establish an agency-based registration program by designating various public private agencies or offices for the registration of voters for Federal elections. The Act requires that certain agencies must be included in such a program. Thus, each State must designate all public offices in the State of those agencies that provide public assistance, unemployment compensation, or related services and all agencies and offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities. In addition the State must designate additional Federal, State or local governmental agencies as well as private sector offices as registration agencies, but each State is given discretion as which agencies and what offices of those agencies to include. The Act provides that such discretionary agency programs may include public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, and any agency or office that provides services to persons with disabilities that is not included in the mandatory agency-based voter registration program. Federal, State and private sector offices could also be included in this program.

A voter registration agency that provides service or assistance in addition to conducting voter registration shall distribute simultaneously with each application for service or assistance, and with each recertification, renewal, or change of address, a mail voter registration application form promulgated by the Federal Election Commission as provided for in the Act or its own form, if the agency has devised its own form in compliance with the requirements of this Act. The offices should to the greatest extent practicable, incorporate in application forms and other forms used for purposes other than voter registration, a means by which an applicant may decline in writing to register to vote. With this "incorporation to the greatest extent practicable in the agency's own forms," the bill attempts to provide flexibility to the agencies to develop a program that best fits the type of program. For example, in the case of a program such as unemployment compensation, where eligibility must be recertified on a frequent (i.e., weekly or biweekly) basis, the Committee intends that the agency be required to provide voter registration materials and assistance at the time of initial application, upon any change in the address or eligibility status of the applicant, and upon any extension in the eligibility for benefits. If an applicant does not decline to register, the office is ***28** to provide the same type and degree of assistance in completing the registration application as it usually provides its applicants with regard to the completion of the offices own forms. Costs for registration application assistance for these offices should be considered matchable under the current Federal match rate for these programs.

A person who provides these voter registration services at an agency voter registration office shall not influence an applicant's political preference or party registration, display any political preference or party affiliation, or make any segment to an applicant the purpose or effect of which is to discourage the applicant from registering to vote.

While concerns have been raised that applicants will be coerced to affiliate with a particular political party or that the receipt of benefits is contingent upon the act of registering to vote, the Committee believes that these provisions, together with the criminal penalties provisions of the bill, are sufficient to deter any such activities. Moreover, no evidence has been presented that such abuses have occurred in a State which has implemented an agency-based registration program.

The mandatory portion of the agency-based registration program, which includes offices providing public assistance, unemployment compensation or related services and services primarily to persons with disabilities, is intended to supplement the motor-voter provisions of the bill by reaching out to those citizens who are likely not to benefit from the State motor-voter registration program. These agencies are included in the mandatory agency registration program because they are considered most likely to serve persons of voting age who may not have drivers licenses and therefore are not served by the motor-voter provisions. This mandatory portion provides a necessary balance to the motor-voter program, without unduly burdening State resources.

The second portion of a State's agency-based registration program includes other agencies and offices which the State may designate to extend its outreach to as many citizens of voting age as possible. While the States are required to have a discretionary

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agency registration program in addition to the mandatory one, the State is given latitude to determine which agencies, as well as which of their offices, should be included.

Each agency voter registration office is required to provide the following services: distribution of mail voter registration application forms (or the agency's own form), assistance to applicants in completing voter registration application forms, acceptance of completed voter registration application forms for transmittal to the appropriate State election official. The term "appropriate State election official" shall be interpreted in accordance with State law or practice and is intended to mean that official who is authorized under State law to register voters in the jurisdiction where the registrant resides.

Previous versions of this legislation included in the mandatory agency registration program offices that provide vocational rehabilitation services in an attempt to assure that persons with disabilities would be reached by some part of the State's registration programs. Representatives of programs that serve persons with disabilities ***29** made it clear that vocational rehabilitation offices would not have extensive contact with such persons and that a broader designation of offices would be necessary if a State's agency program was to include a sufficient number of persons with disabilities. The Act now includes a definition that is intended to have more extensive out-reach to persons with disabilities. While it would include vocational rehabilitation offices, it would also extend to many other agencies that have more contact on a regular basis with persons with disabilities, such as, but not limited to, those agencies which provide transportation, job training, education counseling, rehabilitation or independent living services.

The Committee also recognizes that many persons with disabilities are less likely to visit offices in order to obtain services or benefits. As a result, the bill requires that if a voter registration agency designated by the State provides services to a person with a disability at the person's home, the agency shall provide the voter registration services at the person's home, as well. The Committee notes that the provisions referring to persons with disabilities are not intended to reach any person otherwise ineligible to register, such as by reason of a current judicial determination of mental incapacity to vote.

Since the requirements for services or assistance at agency offices may differ significantly from those for voting registration purposes, the Committee would expect that any applicant for services or assistance from such an agency who does not meet the requirements for eligibility to register to vote would decline to do so. It is important, therefore, that each applicant be advised of the voting requirements and the need to decline to register if he or she does not meet the requirements. The bill provides that all registration requirements should be set forth in the application to register to vote so that they will be readily available for each applicant to review during the application process. These requirements must include a statement of citizenship, an attestation that the applicant meets each such requirement, and the signature of the applicant under penalty of perjury. The applicant should be advised that there is no obligation to specify the particular reason for choosing to decline to register.

Since some of the reasons for declining to register to vote may involve matters of personal privacy, such as ineligibility under State law due to mental incompetence or a criminal conviction, an individual who declines to register to vote shall not be questioned as to the reasons for such action. If an individual reveals such information, it must be treated as confidential and may not be used for any purpose other than voter registration. As discussed later, the Act contains a general prohibition against a State or other entity, including an agency designated under this provision, from revealing any information relating to a declination to register or to the identification of the agency where a person registered.

Subsection (b) requires all entities of the Federal government to cooperate as much as possible with the States in carrying out this program by participating as designated voter registration agencies. This participation requirement is subject to the Federal agency agreeing to participate pursuant to subsection (a). No specific Federal agencies are designated in this bill to participate, it being left ***30** to the States to negotiate such arrangements with the appropriate Federal agencies. It is the Committee's intention that any agency or organization providing assistance under the terms of this Act would negotiate a mutually satisfactory arrangement, which could include, where appropriate or required, reimbursement for services provided.

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Subsection (c) requires that a completed registration application shall be transmitted to the appropriate State election official no later than 10 days after the date of acceptance. If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application must be transmitted to the appropriate State election official no later than 5 days after the date of acceptance. An applicant may, if he or she chooses, mail the voter registration application directly to the appropriate State election official rather than returning it to the agency for transmittal. The agency providing voter registration services is prohibited from requiring a registrant to mail the form, and must accept it and forward it to the appropriate registration official if turned in by the applicant. Thus, the agency has an affirmative obligation to actively collect completed registration applications.

SECTION 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION

Subsection (a) provides that any person registered to vote not later than 30 days, or a lesser period as provided by State law, before a Federal election shall be permitted to vote. For these purposes, registration is complete upon submitting the form to the voting registrar, motor vehicle office, designated agency or office, or on date of postmark, if mailed. While the Act is clear with regard to the motor-voter and agency-based registration deadline requirement, the mail situation may be in need of some clarification. The reference, "or a lesser period as provided by State law" means, with regard to a mailed registration application, that the shorter State period would apply only if it is referenced to "date of postmark". If the shorter period provided by State law refers to the date of receipt in the registrar's office, the thirty day period provided for here would apply. It is not intended here to penalize a registration applicant; thus, if the application is postmarked after thirty days, but is received before the deadline specified by State law, it should be accepted. Also, one postmarked before thirty days but received after the deadline under State law, should also be accepted as timely.

Each State election official is required to give notice to each applicant regarding the disposition of his or her voter registration application. The means of notifying each applicant is not specified, so that each State may continue to use whatever means is required or permitted by State law or regulation. States should be aware that such notices should be drafted with regard to the purge provisions of the bill. States may adopt whichever procedure they deem best suited to provide notice to the applicant and to provide the registrar with verification of the accuracy of the information provided by the applicant. The Committee recognizes that such notices are sent by most States as a means of detecting the possibility of fraud ***31** in voting registration and intends to give each State discretion to adopt a means of notification best suited to accomplish that purpose as well as providing a means for notifying an applicant, who has not had direct contact with the voter registrar's office, of the appropriate voting place for his or her residence. The Committee believes that accurate and current voter registration lists are essential to the integrity of the election process and for the protection of the individual.

This section also provides that the name of a registered voter may not be removed from the official list of eligible voters except: at the request of the registrant; as provided by State law, by reason of criminal conviction or mental incapacity; or, in accordance with the requirements of the Act, by reason of the death or a change in the residence of the registrant. Recognizing the essential need to maintain the integrity of the voter registration lists, the bill requires that States conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of death or by a change of residence.

A "request" by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change-of-address notice through the drivers license process that updates the voter registration.

States are required to inform applicants of voter eligibility requirements, the penalties provided by law for the submission of a false voter registration application, and ensure that the identity of the voter registration agency through which any particular voter is registered is not publicly disclosed.

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Subsection (b) sets forth the standards for the confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current registration roll for Federal elections shall be (1) uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965; and (2) shall not result in the removal of the name of any person from the official list because of a failure to vote.

The purpose of this requirement is to prohibit selective or discriminatory purge programs. This requirement may not be avoided by a registrar conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity. The term "non-discriminatory" is intended to mean that the procedure complies with the requirements of the Voting Right Act of 1965.

The term "uniform" is intended to mean that any purge program or activity must be applied to an entire jurisdiction.

It is the intent of this section to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity that is used to start, or has the effect of starting, a purge of the voter rolls, without regard to how it is described or to whether it also may have some other purpose. For example, the mailing of sample ballots is clearly a program that has another purpose but might provide the basis for a purge of voter rolls. It it ***32** is to be used for that purpose and the registrar uses it to serve as his or her reason to send notices under subsection (d), that sample ballot mailing program must meet the standards of this section.

The Committee is mindful of the need to keep accurate and current voter rolls. The Committee is concerned that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing. Abuses may be found in the design of a program as well as in its implementation. In order to provide some guidance to the States, subsection (c) provides that a State may meet the requirements of conducting a general and comprehensive program that makes a reasonable effort to keep voting lists clean by establishing a program which uses the National Change of Address ("NCOA") program of the U.S. Postal Service. Use of the NCOA program by a State or any of its registration jurisdictions could be deemed to be in compliance with the requirements that the program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

By using the NCOA, a State may use change of address information to identify registrants whose addresses may have changed. If it appears from the information provided that a registrant has moved to a different address within the jurisdiction of the same voting registrar, the registrar is required to make the address change automatically and send the registrant a notice by forewardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information. If the registrant appears to have moved to an address outside of the jurisdiction of the registrar, the registrar may not remove the name of the voter until the registrar has sent a notice to the registrant as provided in subsection (d).

The section requires that a State complete any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters at least 90 days before a primary or general election for Federal office. This requirement applies to the State outreach activity such as a mailing or a door to door canvas and requires that such activity be completed by the 90-day deadline. This section does not prohibit a State during that 90-day pre-election day period from removing names from the official list of eligible voters on the basis of the request of the registrant, as provided by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act.

Subsection (d) prohibits a State from removing the name of a registered voter by reason of a change in residence, unless the registered voter confirms in writing that he or she has changed residence outside the jurisdiction in which registered; or has failed to respond to a notice sent by the State and has not voted or appeared to vote within two general elections for Federal office since the date of the notice.

If a State determines that a registrant may have changed residence, the State may send by forwardable mail a postage prepaid return card on which the registrant may state his or her current address, together with a notice which states that: if the registrant

has not changed residence or has changed residence within the ***33** same jurisdiction, the registrant should return the card before the time for closing registrations for the next Federal election, i.e. 30 days before an election, or such lesser period as may be provided by State law. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant would be permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the second general Federal election that occurs after the date of the notice. If the registrant has not voted in an election during that period, the registrant's name will be removed from the list. If the registrant has moved to a residence outside the jurisdiction, the notice on the mailing must include information concerning how the registrant may continue to be eligible to vote.

Within the official list of eligible voters, notations (such as an asterisk or "I" for inactive status) may be made of those eligible voters who have failed to respond to a notice under Section 8(d)(2). The requirement that names with notations be maintained on the official list of eligible voters permits the State to decline to use these names in performing the type of routine, administrative responsibilities that do not impair the right of such voters to vote as set forth in the Act and as protected by the Voting Rights Act. For example, those who have failed to respond to a Section 8(d)(2) notice need not be included for administrative purposes in determining the number of signatures that may be required under State law for ballot access, the number of precincts that may be needed to service voters, or the number of ballots or voting machines that may be required in the administration of the voting process.

The term "registrar's jurisdiction", as used in connection with the NCOA program and with regard to the "affirmation" or "confirmation" requirements, is a term of art for the purpose of this Act and is not intended to dictate to the States their actual administrative structure for the purpose of registering voters. The Committee intends that a "registrar's jurisdiction" for the purposes of the Act be no smaller than a county, parish, city or town. This conforms to current practice. A State would be free, for example, to divide a very large county or city into 2 or more administrative units for registering voters as long as the county continued to be treated as the "registrar's jurisdiction" for those purposes of the Act hereinafter specified. First, that provision pertaining to a person who returns the postcard described in section 8(d) indicating that the registrant has moved to another residence within the jurisdiction of the same voter registrar must have his or her registration corrected to reflect the new address. Second, the provision that requires that a person who has not sent in the card is entitled to vote after affirming or confirming that his or her new residence is within the same congressional district and the same registrar's jurisdiction as that of his or her former residence. And third, the provision that use of the national change of address program could be considered to be in compliance with the requirements of the Act that pertain to list maintenance programs could protect the State if used State-wide or a registrar if used within the registrar's jurisdiction. As long as these protections are maintained a State would be free to alter its administrative structure and jurisdiction for the purpose of registering voters for Federal elections.

***34** Subsection (e) establishes the procedures for voting in a Federal election where the registrant fails to return the card in accordance with the procedures outlined in subsection (d). If a registrant has moved from one residence to another within the jurisdiction of the same polling place, the person shall be permitted to vote at that polling place upon oral or written affirmation of the registrant's change of address, before an election official at the polling place. If a registrant has moved from a residence in one polling place to a residence in another polling place within the jurisdiction of the same voting registrar and the same congressional district, the registrant is provided three options. The registrant shall: (1) be permitted to correct the voting records and vote at the registrant's former polling place upon oral or written affirmation of the new address; or (2) be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction where a list of eligible voters is maintained upon written affirmation of the new address; or (3) be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address, and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation of the new address by such means as are required by State law. If State law permits the registrant to vote in the current election upon oral or written affirmation of the new address at the appropriate polling place for the new address, voting at the old polling place and the central location do not have to be provided as alternative options.

If the registration records incorrectly indicate that a registrant has changed his or her residence, the registrant shall be permitted to vote upon oral or written affirmation that the registrant continues to reside at the same address.

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This section of the bill attempts to incorporate an underlying purpose of the Act; that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction. This section ensures that if a registered voter moves within the jurisdiction of the same registrar, he or she should be permitted to vote. However, while this section sets out where an individual may vote, it is silent as to how that individual may be permitted to vote. Under certain circumstances it would be appropriate, and in compliance with the requirements of this Act, to require that such a person vote by some form of challenge ballot. It is not the intent of this provision to pre-empt any State requirement that a person whose eligibility to vote is challenged may be required to vote by a special ballot that is subject to post election rejection, where the challenge is sustained.

Subsection (f) provides that in the case of change of residence within the jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters, nor may a registrant be required to re-register as a result of such a change of residence. The obligation of the registrar to change the rolls to reflect the new residence is triggered by notice to the registrar of such change, not the date of such change. The intent of this requirement is that it is the responsibility of a registrar, upon notification of a change of residence by a voter to another residence within the registrar's ***35** jurisdiction, to make the necessary correction of the records. A registrar may not impose requirements, such as re-registration, upon such a voter. Although such notice of change of address might be made by the voter through the use of the motor-voter or agency-based registration process, the registrar's responsibility to make the correction is not dependent on the voter giving such notice; such notice may come through the Postal Service change of address program or other means conducted in conformance with the requirements of the Act, subject to verification by the voter.

Some State election officials expressed concern to the Committee that they had experienced difficulty in obtaining information regarding convictions for Federal offenses from the Federal courts which is needed to remove the names of persons convicted of certain offenses from the voter rolls under State law. Subsection (g) requires a United States Attorney to inform the appropriate State election official of the felony conviction of any person. Such notice must give the name, age, and address of the offender; the entry date of judgment; a description of the offenses on which the person was convicted; and the sentence imposed. Additional information may be provided at the request of the election official if necessary to determine whether a conviction affects the person's eligibility to vote. If such a conviction is overturned, the United States Attorney shall give notice to the appropriate election official.

Subsection (h) provides lower postal rates to a State or local voting registration official for any mailing which is certified to be required or authorized by the Act. This lower postal rate is the rate for any class of mail which is made available to a qualified nonprofit organization.

Subsection (i) provides that each State shall maintain for two years all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of addresses on the official list of eligible voters. The records must be made available for public inspection and, where available, photocopying at reasonable costs. the records shall include lists of names and addresses of all persons to whom notices were sent and information concerning whether or not each person has responded to the notice as of the date of inspection.

Provisions of this Act pertaining to voter registration programs require that information regarding a person's declination to register not be used for any purpose other than registration. There was also concern that information not be made public as to what voters registered at a particularly agency, such as a welfare or unemployment office. Therefore, these records may not contain any information relating to a declination to register or the identity of a voter registration agency through which any particular voter is registered, or a list of those persons registered through a particular agency.

SECTION 9. FEDERAL COORDINATION AND REGULATIONS

Subsection (a) provides that the Federal Election Commission shall prescribe appropriate regulations necessary to carry out this Act, consult with chief election officers of the States to develop a mail voter registration application form for Federal

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elections, and ***36** submit by June 30 of each odd-numbered year, a report to the Congress assessing the impact of the Act on the administration of elections for Federal office and recommendations for improvements in Federal and State procedures, forms, and other matters, and provide information to the States with respect to the responsibilities of the States under this Act.

It is the Committee's intent that the Commission should carefully determine which regulations are necessary and appropriate. In addition, nothing in the Act prohibits the Federal Election Commission from fathering the appropriate statistics necessary to meet its reporting requirements under the Act.

Subsection (b) sets forth the requirements of the mail registration form to be developed by the FEC. This form may only require such identifying information (including the signature of the applicant) and other information (including data relating to previous registrations) as is necessary to enable the appropriate State election official to assess the applicant's eligibility. The form must also include a statement that specifies each eligibility requirement (including citizenship); contain an attestation that the applicant meets such requirements, and require the signature of the applicant under penalty of perjury. This form may not include any requirement for notarization or other formal authentication, i.e., a witness requirement.

SECTION 10. DESIGNATION OF CHIEF STATE ELECTION OFFICIAL

Each State shall designate a State officer or employee as the chief State election official to be responsible for the coordination of State responsibilities under this Act. Various provisions of this Act assign to this official certain responsibilities regarding the promulgation of regulations, the design of the Federal mail registration form, the receipt of notice of civil suits, and the distribution of mail registration forms.

SECTION 11. CIVIL ENFORCEMENT AND PRIVATE RIGHT OF ACTION

Subsection (a) provides that the Attorney General may bring a civil action for declaratory or injunctive relief as is necessary to carry out this Act.

Subsection (b) provides a private right of action to any person who is aggrieved by a violation of this Act by providing written notice of the violation to the chief State election official. If the violation is not corrected within 90 days after receipt of the notice, or within 20 days if the violation occurs within 120 days before the date of an election for Federal office, the aggrieved individual may bring a civil action in Federal court for declaratory or injunctive relief. If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved individual may proceed to file a civil suit without notice to the chief State election official.

Section (c) permits a prevailing party (other than the United States) in a civil action to seek reasonable attorney fees, including litigation costs and expenses.

It should be noted that this section does not authorize the award of monetary damages. Rather, the civil remedies that are authorized are corrective action in the form of declaratory and injunctive ***37** relief, plus reasonable attorney fees. The Committee does not believe that reasonable attorney fees will result in excessive awards in civil actions brought under this Act.

Subsection (d) provides that the right and remedies established by this Act are in addition to all other rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965. Nothing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965.

SECTION 12. CRIMINAL PENALTIES

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This section would make a Federal offense, punishable by a fine and/or imprisonment for not more than 5 years, for any person, including an election official, who in any election for Federal office: (1) knowingly and willfully intimidates, threatens, or coerces, any person for registering to vote, or voting, or attempting to register or vote; urging or aiding any person to register to vote, to vote, or to attempt to register of vote: or exercising any right under this Act; or (2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process by the procurement or submission of voter registrations that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or the procurement, casting, or tabulation of ballots that are materially false, fictitious, or fraudulent under the laws of the State in which the election is held.

Concern has been expressed that these criminal provisions may be used to impede lawful political activities, such as distributing campaign literature, poll watching, and registration drives. Careful attention has been given to these concerns and this section has been specifically written to refer to acts which are "knowing and willful" and does not refer to inadvertent omissions or inaccuracies on voter registration forms or absentee ballots.

The second addresses the Federal criminal code only, and would not limit or restrict the availability of criminal penalties under State law.

SECTION 13. EFFECTIVE DATE

That Act will take effect on January 1, 1995. While this Act applies only to Federal elections and States are free to apply other regulations to State elections, many States will prefer to have the same requirements for both Federal and State elections. To accommodate those States that have constitutional obstacles to conforming State requirements to the Act, the effective date for such States will be January 1, 1996.

COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the estimate of costs of this measure prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act, is as follows:

***38** U.S. Congress,
Congressional Budget Office,
Washington, DC, February 25, 1993.

Hon. Wendell H. Ford,
Chairman, Committee on Rules and Administration,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for the National Voter Registration Act of 1993. Because enactment of the legislation could affect revenues, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: Not yet assigned.

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2. Bill title: National Voter Registration Act of 1993.

3. Bill status: As ordered reported by the Senate Committee on Rules and Administration on February 18, 1993.

4. Bill purpose: The bill would create a national system of voter registration procedures for elections for federal office. Responsibility for implementing the system would fall largely to the states, with the federal government responsible for enforcement, as well as some financial and technical assistance.

REQUIREMENTS FOR STATES

Under the national system of voter registration, most states (except those with election day registration and those with no registration requirement at all) would be required to provide the following methods of registration:

Motor/voter.–When someone applies for a driver's license (new, renewal, or change of address) at the state motor vehicle authority, the application procedure would have to include the opportunity to register to vote. An individual would have to decline in writing on an application form to avoid registering by this means, or would have to sign an attestation, under penalty of perjury, that the individual is eligible to register to vote.

Mail registration.–Each state would make available through various sources a form, prescribed by the Federal Election Commission (FEC), that applicants could complete and mail to the election official to register for federal elections.

Agency registration.–Each state would have to designate some state and federal offices as well as private sector locations (such as public libraries, unemployment offices, banks, fishing and hunting license bureaus, or post offices) to distribute and collect applications for voter registration. Such locations would then forward the applications to the appropriate election official.

Currently, the federal government has little involvement with voter registration. Each state has its own laws governing registration, and in practice, registration practices vary widely even among ***39** local election jurisdictions within a state. The bill would mandate that states provide the specific registration methods consistently in all jurisdictions.

In addition, the bill would mandate that any state programs used to update voter registration lists shall be uniform and nondiscriminatory and may not remove someone from the list for not voting. The bill would permit a state, if it determines a voter has moved, to remove the voter from the list only after sending a forwardable notice with a return card that would allow the voter to confirm the correct address.

Finally, each state would have to designate a chief state official responsible for implementing the state's functions under the bill.

REQUIREMENTS FOR THE FEDERAL GOVERNMENT

The legislation would require the U.S. Postal Service to provide election officials with a postal rate subsidy for any mailings that it requires the officials to conduct, such as the registration confirmation notice and the registration update notice. The bill authorizes the appropriation of funds sufficient to reimburse the Postal Service for its losses in providing the subsidy. If the Congress does not appropriate the necessary amounts, then the Postal Service would no longer offer the subsidy.

The bill would require the FEC to provide information to the states regarding their responsibilities and to report to the Congress once every two years on the impact of the registration procedures required by the bill. The FEC also would have to develop a uniform application form to be used by states for mail registration.

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In addition, the bill would authorize the Attorney General to bring civil actions in court to enforce its provisions. Individuals also would be allowed to ask the court for relief from any violations of the bill's provisions.

Finally, the bill would establish criminal penalties for persons who, in any election for federal office, interfere or seek to interfere with voting or voter registration, falsify voter registration applications, or knowingly cast or tabulate false or fraudulent ballots.

5. Estimated cost to the Federal Government:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***40** The costs of this bill fall within budget functions 370 and 800.

Basis of estimate: The subsidized postal rates would be used primarily to update voter registration files and to confirm the receipt of voter registration applications. Based on the total number of change-of-address actions filed with the Postal Service, CBO expects that the postal subsidy would amount to no more than $3 million annually–probably in the vicinity of $2 million–to cover a portion of the cost of mailing registration update notices. In addition, CBO estimates that officials would mail about 25 million voter confirmation notices, based on election officials' reports that the number of registration applications typically amounts to 20 percent of the total number of registered voters in the jurisdiction. (There are about 130 million registered voters nationwide.) Assuming an average subsidy of 7.3 cents per piece of mail, subsidizing the mailing of these confirmation notices would cost about $2 million annually at current rates. The postal subsidy would first be available in January 1995, a year in which CBO assumes that an increase in postal rates will occur. Assuming rates will rise about 15 percent, CBO estimates that the total postal subsidy would be about $4.5 million annually. The subsidy for fiscal year 1995 would be less because the subsidized rates would become available three months into the fiscal year.

Based on information from the FEC, CBO estimates that the additional staff and associated expenses necessary to develop a mail registration form and to provide assistance to the states would cost approximately $200,000 annually, beginning in 1994. The requirements imposed on states and localities would become effective beginning January 1, 1995, unless provisions in a state's constitution conflict with implementing the bill. In such cases, a state would not have to comply with the bill until January 1, 1996.

The imposition of criminal penalties could cause an increase in governmental receipts from penalty collections, but CBO cannot estimate the amount of such an increase. Such fines would be deposited into the general fund of the Treasury.

6. Pay-as-you-go considerations: The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. Enactment of the bill could result in greater receipts from penalty collections, but CBO cannot estimate the amount of any such increase.

7. Estimated cost to State and local governments: The bill would require most states to provide three types of voter registration for federal elections beginning in 1995: motor/voter, mail-in, and agency registration. The bill also would mandate that states use a uniform and nondiscriminatory program for maintaining accurate lists of eligible voters.

Consistent with CBO's usual procedures for estimating the cost effects of legislation, this estimate compares the cost to states of complying with the bill's provisions to the cost of their current practices under existing law. Few state and local governments currently employ all the methods required by the bill for registering and maintaining voters on the rolls. In addition, without the bill, states and localities are unlikely to replace their existing practices with those outlined in the legislation. Therefore, the costs states ***41** would incur in changing their registration procedures would be directly attributable to enactment of the bill.

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SUMMARY OF COSTS

Direct costs.–If the bill is enacted, state and local governments would have to pay for the cost of complying with the bill's registration provisions. For the additional staff, postage, and printing expenses associated with the expected increase in registrations, especially through motor/voter, CBO estimates that it would cost states and localities an average of about $20 million a year for the first five years of the program. Added costs would be somewhat lower than the average in federal election years, and above the average in other years, since the procedures required by the bill would have the effect of smoothing the current election-year peaks in registration costs. Some of these expenses would begin in 1994, the year before the bill's provisions take effect, as the states prepare to offer the new registration methods.

Although the bill would not directly require it, some states may decide to acquire, expand, or upgrade computer systems to facilitate implementation of the bill. To the extent that state and local governments make such changes in computer technology, their costs could increase further. For example, we estimate that one-time costs to computerize the registration lists of all the jurisdictions that currently do not have computers would amount to less than $25 million. We cannot predict how many jurisdictions would do so, or how many that now have computers would choose to change their system.

Another provision that would require most states to make a change from current practices affects the polling place where a registrant may be permitted to vote. Under the bill, if a registrant has changed addresses within a jurisdiction without notifying the registrar, but the new and old addresses have different polling places, then the registrant would have the option of voting at the old or new polling place, or some other polling place that has a list of registered voters. Election officials have indicated that this requirement would be quite difficult to implement without a computerized registration list. Without such a capability, it might not be possible to fully meet this requirement, so the cost to election officials of this provision cannot be estimated at this time.

Offsets to costs.–Because the bill would authorize the Postal Service to provide a rate subsidy to election officials for mailings it requires, state and local governments would be able to shift some of the costs they incur now to the federal government. The bill would require officials to notify registrants as to the outcome of their application and to contact those whom the officials plan to drop from the rolls because of a change in address. (Most officials already take both of these actions.) CBO estimates that the postal subsidy for these mailings would total about $4 million annually. Thus, upon enactment of the bill, state and local election officials would save approximately $4 million annually in postage costs.

Other costs.–To the extent that the legislation is successful in increasing the number of registered voters in all jurisdictions, state and local governments likely would face other costs that are not directly ***42** associated with implementing the bill's provisions. For example, if more people are registered, then presumably voter turnout during elections would increase. Because election officials try to maintain a certain ratio of voters per polling place, officials might have to add new polling places, voting machines, and poll workers. However, these officials would take similar steps because of growth or migration patterns, and it would be difficult to separate the bill's effect on increased turnout from other contributing factors.

Certain states with specialized election laws would encounter some secondary effects of the bill. California law, for example, requires state and local officials to mail all voters on the registration list a sample ballot and an explanation of all ballot initiative issues before each election. If enactment of the bill results in more people registered, then the cost of such special mailings will be greater. On the other hand, the bill's provisions that encourage improved list-cleaning would result in more accurate voter registration lists, and election officials would save money by not having to mail voting materials to or prepare polling places for people who no longer would be on the lists. We have not estimated the total costs or savings from such effects in the various states, which would depend in part on how successful this legislation would be in accomplishing its goals. California, which has some of the most extensive requirements relating to communications with registered voters, has estimated that it costs between $4 and $5 per registered voter to print ballots, print labels, mail sample ballots, and provide polling places. Most other states have lower costs, because they do not have all these requirements mandated by law.

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Because the legislation would allow individuals to sue for relief from violation of the bill's provisions, state and local governments and officials are potentially liable to pay fines and court and attorney fees if they lose a lawsuit. Such costs would not result directly from the bill, but rather from court cases that CBO cannot predict.

CURRENT LAW

Under current law, each state sets its own rules or guidelines for registering to vote in federal elections, and many states allow a wide range in practice among decentralized, local election jurisdictions (usually counties or cities and towns). About thirty states already have mail-in registration and about one-half of the states have some form of motor/voter registration. States and local jurisdictions pay the costs of registering voters, and the federal government does not currently assist them with these costs.

DATA COLLECTION

Because voting registration practices vary so widely, the incremental cost of implementing new procedures in the nation's 18,000 election jurisdictions is difficult to determine. In preparing this estimate, CBO assumed that local jurisdictions within a state generally follow registration guidelines set out by the state (even though there are some variations). We then compared the states' current guidelines with the requirements in the bill. (CBO relied on state-by-state summaries of registration practices prepared by various election information clearinghouses.)

***43** In so doing, CBO surveyed the election officials in just over half of the states (as well as about two dozen counties of varying sizes). We collected cost information from some states that already provide one or more of the registration procedures mandated in the bill. In addition, some states provided CBO with the fiscal notes prepared for their state legislatures when they were considering one of these options. We also contacted about half of the 12 states that currently do not offer any of the bill's registration methods for their assessment of the bill's likely impact.

ASSUMPTIONS

Based on this information about the general registration practices in each state and the steps each state would have to take under the bill, CBO makes the following assumptions regarding implementation that could affect the costs to state and local governments:

In most states, motor/voter would become the primary method of registering voters. Because most people have a driver's license and are required to renew it periodically, a motor/voter system eventually would provide most people with a convenient opportunity to register, especially after a change of address.

Although completing a driver's license application at the state department of motor vehicles (DMV) would be the most common way people would apply for registration, local election officials would remain largely responsible for maintaining accurate voter lists.

The several states with constitutional provisions that would conflict with the bill such as requiring voters to sign an oath in person in front of a registrar, would change their laws to be consistent with the bill. Otherwise, those states would have to maintain separate registration rolls and conduct federal elections separately from other elections. This estimate does not include any cost for such separate elections.

COSTS OF REGISTRATION PROVISIONS

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Motor/voter: DMV costs.–The bill would require states to include a voter registration application form as part of an application for a state driver's license. The bill language suggests that states use a consolidated form, but also allows them the flexibility of using two forms. CBO assumes that states could use two forms if they desire, because the committee's report language indicates the committee's intent to allow this option to states. Thus, states that already have a two-form motor/voter process would not have to change, and states that would have to decide how to set up a motor/voter process could have a choice.

Based on the experience of the states that already have motor/voter, it appears that the additional cost to states of implementing motor/voter registration would result mainly from hiring additional staff to handle the extra paperwork. For example, state DMVs would need more employees at high traffic locations to continue to process applicants in the same amount of time as they currently do. For the 25 states that do not now have some form of motor/voter, ***44** the cost of such additional employees and related expenses would probably be about $20 million annually during the first five years of implementation. Since most states require renewal of a driver's license every four years, costs would decrease in later years, because most people would have had an opportunity to register and only those who move would have to update their registration.

Motor/voter: Election official costs.–Once the DMV receives an application, it probably would forward a copy to the local election official to process the registration, as is current practice in the states that now have motor/voter. While CBO expects that officials in sparsely populated jurisdictions would be able to absorb small increases in the number of applications, others would face increased costs. In especially populous jurisdictions, election officials would have to hire more staff to handle the likely increase in applications and to check for duplicate registrations (although some states with motor/voter report these are less than they had originally anticipated). Counties we contacted report that the number of registration applications they handle annually amounts to about 20 percent of the number of registered voters in the county (there are about 130 million registered voters nationwide). Based on information from counties in states that currently have motor/voter, it appears that the workload could increase by 20 percent because of people registering who otherwise would not have registered, duplicate registrations, and ineligible applications.

Assuming the incremental cost for a county election office of handling an additional application is $1.50, then local jurisdictions, in aggregate, would have to pay an additional $5 million to $10 million annually. Some of these costs would only be incurred during the first few years. Once most people are on the rolls and the number of unregistered voters decreases, use of the motor/voter system would decrease as voters would only register if they have moved.

Such costs, however, would be somewhat offset by a reduction in the cost of part-time employees hired to handle the increased workload around each registration deadline. Officials in some states with motor/voter, such as Colorado and Michigan, report that receiving forms from the DMV evenly over the year rather than in a last-minute pre-election rush has allowed them to reduce their part-time hires and use their full-time staff more efficiently. Based on information from several localities that hire part-time staff during election years, we expect local officials nationwide could save about $10 million in a presidential election year and about $7 million in non-presidential election years by reducing part-time hires. (There would be no savings in non-election years because no part-time help is necessary.)

The total costs that election officials would face would be offset further by the postal rate subsidy authorized by the bill. While the legislation requires election officials to notify applicants of the outcome of their registration application, it also would provide a discount of about 43 percent for notices mailed by third class. Because most states already mail such notices to applicants, the notification requirement would not result in additional costs, but the subsidy ***45** would shift about $2 million of postage costs currently incurred by election officials to the federal government.

Motor/voter: Computer costs.–Rather than forwarding an application from the DMV to a county registrar, a possible alternative, untested thus far, would be to transmit the voter information electronically. The cost of adding registrants to a jurisdiction's list would be lower if the voter data were transferred to computer by tape or other device rather than entered by hand. Some states have indicated that they would probably implement the motor/voter requirement by switching their record-keeping from paper to computers, and arranging for electronic transfer of data from the DMV system to the voter registration

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system. Some state officials have suggested that record-keeping would be improved if election officials used signature digitizers to store voters' signatures on computer, but this would cost extra. Although the bill would not mandate states to computerize, in some instances states or counties might decide computerization would be the best action, even though it would require a significant one-time investment in equipment.

CBO has no information on which to base an estimate of how many counties would computerize or how many more states would create a statewide registration system. (Currently, 21 states have one.) Based on data from Election Data Services, it appears that jurisdictions already use computers to maintain lists for at least 70 percent to 80 percent of the registered voters in the country. Aside from jurisdictions that might wish to change their existing computer systems, jurisdictions could potentially purchase new equipment to computerize the remaining one-fourth of the nation's voters.

We have examined the costs of existing registration and election systems and have determined that it costs less than one dollar per voter record for a computer system. Therefore, computerizing the registration lists for the 25 million to 35 million people in jurisdictions currently without computers would probably cost less than $25 million.

Mail in an agency registration.–Because most voters (we assume 80 percent to 90 percent) eventually would register through the motor/voter system, mail-in and agency registration would serve as alternate means for those few remaining voters who do not have a driver's license. In those states that currently provide one or both of these methods, the number of registrations received from these sources would decrease over time as voters register instead through the DMV, and would, after the first few years, eventually generate from $5 million to $10 million in annual savings, which would partially offset increased costs of motor/voter. If all states that currently do not have mail-in registration were to implement it along with the other two methods it would cost them $1 million to $2 million annually because they would not use mail-in registration as much as states that currently have mail-in registration do.

Almost all states report that they have some form of agency or satellite registration, which in some states means a voter has to swear an oath in front of a deputy registrar at one of several county offices. The bill envisions a somewhat expanded type of agency registration in which forms are available at a variety of locations where voters can complete and submit them (or else take ***46** them home and mail them in). Again, this would not be a major source of registering voters, and the costs are not expected to be significant in aggregate, although some additional training costs might be necessary to expand the pool of people able to assist voters in completing the forms. Only those states that currently have just a deputy registrar system would have to print extra forms to be available throughout the jurisdiction, but these costs probably would be offset by the reduced amount of work for the registrars and clerks who would not have to register as many voters in persons.

COSTS OF VOTER CONFIRMATION PROVISIONS

Because voters usually do not notify election officials of address changes, the names and addresses of outdated registrants often accumulate on the rolls. Election officials revise registration lists to clean out those who have moved, died, or are otherwise ineligible to vote in that jurisdiction. The bill would prescribe that whatever method a state uses to maintain accurate registration rolls, it should be uniform and nondiscriminatory. Further, the bill would prohibit states from removing registrants from the list simply for not voting.

Current law.–Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the stats canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under the bill.

Whether states canvass all those on the list or just the non-voters, most send a notice to assess whether the person has moved. In a majority of states, election officials also provide voters with a way to update or prevent removal from the registration list.

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National change of address system.–The bill suggests, but does not require, an approach election officials can use to make sure that their list cleaning method is uniform and nondiscriminatory. Instead of using non-voting as an indication that a voter has changed addresses, an election official could contact only those who have actually moved, and at their new addresses. But using the National Change of Address (NCOA) system of the U.S. Postal Service, election officials could directly identify those who have moved and would send those people a forwardable notice with a pre-addressed, postage paid card that outlines the registration options available and allows people to respond to the officials. While an elections jurisdiction would have to pay a vendor licensed by the Postal Service to do a computer match of the registration list and the NCOA list (costing from $2 to $8 per 1,000 addresses matched), these costs probably would be offset by reducing the postage and printing costs that officials currently pay for less-focused canvassing. Several pilot studies of this system in California and Oregon, sometimes called Project MAIL, report that counties would save money by significantly reducing the number of notices sent out.

***47** Postal rate subsidy.–Whether election officials decide to use this NCOA approach or choose their current or other method for list cleaning (as long as it is uniform, nondiscriminatory, and does not drop for nonvoting), their postal costs associated with this process would decrease if the legislation is enacted. The bill authorizes a postal rate subsidy for mailings associated with the list cleaning requirement, thereby shifting costs from the states to the federal government. The ultimate amount of this shift would depend on the number of notices mailed. We have no data on the amount of mail election officials currently send out to update their lists. However, if most state adopt the NCOA approach, the number of changes of address, about 40 million annually, would represent the maximum possible number of matches between the registration rolls and the NCOA list. With an average third class subsidy of about 7.3 cents per piece of mail at current rates, the cost of this subsidy is unlikely to exceed $3 million annually. In fact, it is likely to be less–probably in the vicinity of $2 million–because not everyone on the NCOA list will be on a registration list, some changes of address are temporary only, and officials will update their lists through other methods such as motor/voter. When voters move within a state and get a new driver's license, they also would be updating their voting registration, thereby reducing the number of voters that officials will have to contact to determine whether they are recorded on the rolls accurately.

8. Estimate comparison: None.

9. Previous CBO estimate: On February 1, 1993, CBO prepared an estimate for H.R. 2, the National Voter Registration Act of 1993, as ordered reported by the Committee on House Administration on January 27, 1993. That estimate showed direct spending from the Crime Victims Fund because fines mandated by the bill would result in greater deposits into the fund. The estimate for this bill does not include any direct spending because income from fines would go into the general fund of the Treasury. The cost estimates for the two bills are otherwise identical.

10. Estimate prepared by: James Hearn, Mickey Buhl, and John Stell.

11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

REGULATORY IMPACT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee received the following information from the Federal Election Commission as to the regulatory impact of the bill, as reported by the Committee:

Federal Election Commission,
Washington, DC, February 25, 1993.

Hon. Wendell H. Ford,
Chairman, Committee on Rules and Administration,
U.S. Senate, Washington, DC.

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Dear Mr. Chairman: This letter responds to your inquiry of February 22, 1993, regarding the probable impact of regulatory and reporting responsibilities assigned to the Federal Election Commission ***48** (FEC) under the terms of the National Voter Registration Act of 1993, ad reported out of Committee.

At this time, we anticipate that the regulations will be limited to specifying the contents of the national mail voter registration form and the data to be collected and reported by State and local election authorities, pursuant to the reporting requirements set out in Section 9.

In response to the individual items you specified:

1. An estimate of the numbers and classes of individuals and groups who would be regulated.–The Commission estimates that its regulations and reporting requirements would, like other provisions of the bill itself, have a direct impact on approximately 8,000 State and local election officials throughout the nation who are responsible for conducting voter registration for federal elections. Tangentially affected would be the 189,000,000 persons of voting age in the United States who might come in contact with the registration process.

2. The economic impact of the regulations.–We foresee regulations pertaining only to the contents of the mail registration forms and State reporting required by the bill. The latter would have associated costs beyond that inherent in the bill itself. This is addressed under item 4 below.

3. The impact on the personal privacy of the individuals involved.–The Commission's regulations would have no impact on the personal privacy of the election officials themselves. However, certain items that might have to appear on the proposed national mail registration application form could be perceived by some members of the public as an invasion of personal privacy. Three such items are questions regarding Social Security number (required by 13 States, optional in 14 States), political party preference (required by the 26 States that conduct closed primaries) and race (required by some States in carrying out the purposes of the Voting Rights Act). These questions could be viewed as especially intrusive in States that do not require this information for voter registration purposes.

4. An estimate of the time, additional paperwork, and financial costs of recordkeeping requirements.–The Commission anticipates that minimum reporting requirements may necessitate the collection of the following data from State and local election authorities:

The number, method, source, and disposition of registration applications received;

The method, frequency, and consequences of confirming the voter registration lists;

The number and reasons for other deletions from the voter registration lists;

The number of persons of voting age and the percentage of those that are registered;

The number and types of the various mailings required under the bill; and

Costs of implementing the legislation, to include producing registration forms and other necessary materials, training, and maintaining records.

Although several jurisdictions, notably the large ones, routinely collect some or all of the data, a universal mandate to do so would ***49** unquestionably placed some additional burden or many election offices. This burden would fall unevenly or local jurisdictions dependent on both the size of their populations and the extent of their computerization. We can estimate costs

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of such a reporting mechanism based on the model devised for the Voting Accessibility for the Elderly and Handicapped Act wherein local jurisdictions report to the State, States to the FEC, and the FEC to the Congress.

Our assumption is that such reporting would require one-half (0.5) a staff month (on average) per local jurisdiction and two staff months per State. At $24,000 salary per person, the approximately 350 staff years would cost about $8,400,000 per year, to be borne by State and local governments. This figure would likely decrease over time with increased computerization. Furthermore, such data would prove useful to the State and local offices as well as to political parties, the Postal Service, and the Department of Justice.

Should you or your staff require any further information regarding these or other related matters, please do not hesitate to contact me.

Sincerely,

Scott E. Thomas, Chairman.

COMMITTEE ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote in the Committee on Rules and Administration during its consideration of the original bill, to report it favorably, was:

YEAS–7	NAYS–5
Mr. Pell	Mr. Stevens
Mr. Byrd	Mr. Helms
Mr. Moynihan	Mr. Warner
Mr. Dodd	Mr. McConnell
Mrs. Feinstein	Mr. Cochran
Mr. Mathews	
Mr. Ford	

Senator Stevens presented the proxy of Senator Hatfield in favor of the bill.

*50 MINORITY VIEWS OF SENATORS STEVENS, HELMS, WARNER, DOLE, MCCONNELL, AND COCHRAN ON THE NATIONAL VOTER REGISTRATION ACT OF 1993

Since this issue was last debated before the full Senate, two significant developments have occurred: (1) in the 1992 general election, voter turnout increased 5 percent over 1988; and (2) the financial condition of the Federal and State governments has worsened.

The first point clearly indicates that the National Voter Registration Act is not necessary to increase voter turnout. The key to increasing turnout is an electorate that feels they have something at stake and that there is a compelling reason to vote. Those elements were present in 1992.

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On the second point, States, the vast majority of whom must balance their budgets, have their backs against the financial wall. The unfunded mandates established by this bill will exacerbate the situation and force many States to resort to offsets in the form of program cuts or tax increases. For them, deficit spending is not an option.

If, as the majority report contends, the costs of this bill are relatively modest, then it should not be difficult for the bill's proponents to provide funding to implement its provisions. Regardless of whose cost estimates are the most accurate, Congress should not impose this bill on the states as the latest in a long line of unfunded Federal mandates.

The National Voter Registration Act of 1903 would require State and local governments to register voters in three ways: (a) by simultaneous applications when applying for motor vehicle drivers' licenses; (b) by applications received through the mail; and (c) by applications through all public assistance, unemployment and vocational rehabilitation offices.

No hearings were held on this bill in the 103d Congress, but the Rules Committee hearings held in 1991 afforded an opportunity for both the proponents and opponents of this legislation to be heard.

The enthusiasm of the bill's supporters for registering people to vote when applying for a driver's license is shared at the state level. In fact, fully 27 States plus the District of Columbia now provide citizens who want to register to vote while visiting a Department of Motor Vehicles office an opportunity to do so. In 1991, legislation was introduced in the statehouses of an additional 17 States to establish some form of motor voter or agency based systems. [1]

While the enthusiasm for such programs at the State level continues to grow, it has not translated into enthusiasm for the strictures of this legislation. This reluctance is partly because States ***51** are experiencing severe fiscal pressure and simply cannot afford the expensive and unnecessary costs this bill imposes.

State after State has insisted that the costs of motor voter will be substantial and they will have to curtail other programs such as education or child nutrition to come up with the funds needed to meet the unfunded mandates in the bill.

In fact, officials in 13 States with over 36 percent of the Nation's population are so concerned about the financial impact of this proposal they have taken the time to inform the committee of their objections to it. Ten of these States prepared cost estimates of the bill for their jurisdictions.

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Alabama, Minnesota, Missouri and South Dakota also expressed concern over the impact of the requirements contained in motor voter.

Furthermore, the following organizations have criticized the National Voter Registration Act for the unfunded mandates it would impose on state and local governments:

American Association of Motor Vehicle Administrators National Association of Counties.

National Governors Association.

National Association of Secretaries of State.

National Association of Towns and Townships.

National League of Cities.

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Imposing these additional costs on state and local governments is particularly hard to justify when one considers that any causal link between the registration programs required by the bill and increased voter turnout is tenuous. The Congressional Research Service studied motor voter programs in states that have adopted them and produced the following findings.

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***52** Note that voter turnout dropped after the adoption of motor voter programs in 7 of these 10 states. Collectively, voter turnout declined in states that adopted motor voter programs by 2.68 percent. For the states that practice the active form of motor voter (similar to the requirements of this bill, turnout went down 6.21 percent in Presidential elections. For non-Presidential elections, turnout increased by just over half of one percent.

Given its lackluster effect at the state level, motor voter is a surprising prescription for arresting the decline in voter turnout nationally.

It should also be noted that this bill provides states with a way to escape the expenses and rigors of the bill: adoption of election day registration. The Department of Justice has said that election day registration "... would greatly impair the ability of the Department and the states to combat voting and election fraud.... [and] would totally preclude meaningful verification of voter eligibility, and thus allow easy corruption of the election process by the unscrupulous." [2]

Permitting registration on the day of the vote eliminates the ability of election officials to confirm the identity, address and eligibility of a prospective voter. Congress should be reluctant to provide economic incentives to states to adopt a procedure that undermines the very basis of democracy.

For the first time, this bill would subject voter registration systems to the regulatory control of the Federal Elections Commission–an entity many have criticized for being unable to satisfactorily carry out its current federally mandated duties.

MAIL REGISTRATION

The National Voter Registration Act mandates unsupervised registration by mail for all states and forbids precautions states may take to reduce the chance of the unscrupulous taking advantage of the system. The Department of Justice wrote in 1991:

> ***53** [This proposal] would impose a sweeping requirement to allow mail-in registration while simultaneously limiting significantly the ability of the states to use a variety of techniques to verify the applicant's identity and eligibility. For this reason [the bill's] provision for registration by mail would entail a substantial and perhaps prohibitive risk of enhancing the opportunities for fraudulent registration and voting. [3]

Section 9(b)(3) of the bill states that a mail registration form "may not include any requirement or other formal authentication." Alaska requires registration applications received through the mail to be authenticated by the signatures of two adults. Other states require notarization of these applications. All of these precautions would be prohibited under the bill.

Mail registration also prohibits a requirement that registration applications be made in-person. By implication, states would be prohibited from asking applicants to supply identification to determine that persons registering are who they claim to be or live where they say they do. Currently, Connecticut requires a birth certificate, driver's license, or Social Security card to be shown at the time of registration. New Hampshire officials have the authority to require similar identification from applicants who are naturalized citizens.

In 1982, a New York Grand Jury reviewed widespread vote fraud charges in Kings County from 1968 to 1982. It observed:

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The advent of mail-in registration in 1976 made the creation of bogus registration cards even easier and less subject to detection. ... According to testimony, mail-in registration has become the principal means of perpetrating election fraud and has apparently resulted in the abandonment of the pre-1976 election fraud methods. [4]

As a District Attorney in New York, Elizabeth Holtzman wrote the New York Times lamenting "how easy it is to vote illegally" there and called for implementation of the recommendations contained in this Grand Jury Report. Under motor voter New York would be prevented from ending what the Grand Jury said had now become "the principal means of perpetrating election fraud."

The Justice Department pointed out that verification of mail registration applications in states that now have it may be inadequate. Many states rely upon the mailing of non-forwardable letters to mail registration applicants when the application is received by the election office. The assumption is that the Postal Service will return notices if an individual does not actually live at the address.

This assumption is false. The Federal Election Commission's Advisory Committee on Election Administration pointed out that such non-forwardable notices are only returned to the sender if the addressee files a change of address with the Postal Service. The Postal Service never inquires whether an addressee actually lives ***54** at an address. If no change of address form has been filed with the Post Office, the mail is delivered no matter who lives at an address.

The Department of Justice pointed out that because of this underlying assumption for verifying the authenticity of a mail registration application is false "... there may in fact be a great deal of fraudulent registration by mail that simply has gone undetected." Nevertheless, this bill mandates this suspect system of registration for all states while forbidding even modest verification procedures for it.

In an effort to reduce the fraud associated with mail registration, the bill has been changed to permit states to require that new voters who have registered by mail must vote in person the first time they vote. States could ask for identification at that time. However, the effectiveness of this requirement is greatly undermined by an exception in the bill that voids the provision if it conflicts with another law. Most states now have absentee balloting. Laying mail registration on top of absentee balloting would result in a complete mailbox voting system particularly susceptible to fraud.

The State of Illinois requires signatures on voter registration applications to be made in front of a registrar. On election day, the signature on the registration form is compared with the signature of the person seeking to vote under that registration form to guard against "ghost voting."

By implication, this bill would prohibit this verification procedure. The Chairman of the Illinois Board of Elections told the Committee that a mail registration program would prevent verification of the original voter application and "would destroy the signature verification process–a key factor in the prevention of vote fraud." [5]

This verification system helped a Grand Jury examining voter fraud in the 1982 Chicago election secure sixty-two indictments resulting in at least fifty-six convictions. [6] Much of the evidence in this case was based on the work of FBI handwriting experts who compared the signatures on authenticated voter registration cards with signatures made at the polling booths. Such detection would have been impossible if mail registration, as mandated by this bill, were in place.

With mail registration, the perpetrators could have easily escaped detection by simply sending in bogus registration forms, and on polling day, having the same person sign to cast a fraudulent ballot. The signatures would then have been identical.

Even with Chicago's signature verification system, a U.S. attorney has estimated that up to one hundred thousand fraudulent ballots were cast in each of the Chicago elections of 1982 and 1986. [7] It is difficult to imagine what the extent of the vote fraud problem in that city would be if its signature verification procedures were prohibited by this bill.

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***55** In California, mail registration led to fraudulent filings with a phenomenon called "creative writing." This state experienced fake and duplicate registrations because of registration drives in which registrations were filed, often without knowledge of the "applicant," simply to fill a quota. The problem led this state to hire an investigator to guard against this kind of fraud.

Nationwide mail registration, as proposed by this bill, raises the very real specter of adding to America's illegal immigration problems. Illegal aliens have used easy availability of voter registration cards as a means to gain entry into the United States. Voter registration cards have also been used to gain access to federal and state benefits and even to obtain jobs with the federal government.

The Grand Jury sitting in Chicago reported:

> Another pool of potential votes for the unscrupulous precinct captain was that of aliens who were illegally registered. Many aliens register to vote so that they can obtain documents identifying them as U.S. citizens; however, the number of aliens who actually voted is undocumented. We have learned that these aliens used their voters' cards to obtain a myriad of benefits, from Social Security to jobs with the Defense Department. [8]

Although this Grand Jury did not document aliens actually voting, a survey [9] by the Immigration and Naturalization Service of ballots cast in a 1989 U.S. House of Representatives special election in Florida did. In that election, it was confirmed that fully 11 percent of all ballots of foreign born voters sampled were cast by non-citizens. Furthermore, the Immigration and Naturalization Service reported that there is reason to believe that in this federal election, the incidence of illegal alien voting among all ballots examined was as high as 24 percent.

This fraud might be combated by requiring proof of citizenship at the time of registration. However, mail registration under this bill would preclude such corrective action.

This bill would mandate that voter registration cards be accepted by states through the mail from any location in the U.S. (and even around the world for that matter). Therefore, there is the potential for citizens of one state to use mail registration to gain access to another state's benefits.

Alaska, in addition to witnessed signatures, requires all out-of-state mail registration applicants to provide "identification or other documentation that supports... a claim to Alaska residency." [10] This precaution would be prohibited under this legislation.

The bill would require all mail registration applications to be processed if postmarked up to thirty days before an election. The Alaska Division of Elections has reviewed absentee mail ballots and found that almost thirty percent of them had illegible postmarks. This would be a problem around the nation and could unintentionally disenfranchise many voters.

***56** Election fraud disenfranchises voters. It erodes confidence in our democratic traditions. Unfortunately, it is not a problem confined to the past and, in some areas of the nation, it will continue to be a problem in the future. The mail registration provisions of this bill would strip the states of their ability to deal with these election fraud problems.

AGENCY BASED REGISTRATION

This bill would require all public assistance, unemployment, and vocational rehabilitation offices to register those who receive benefits from those offices.

In its letter to the Committee, the Department of justice wrote in 1991:

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The Department's experience demonstrates that public officials sometimes use their power to dispense or withhold benefits in order to pressure citizens into voting a particular way or registering for a particular party. This bill would increase substantially the opportunities for such intimidation and coercion of the public. [11]

The Justice Department was not engaging in mere speculation. The St. Louis Post-Dispatch reported on an investigation into allegations that public assistance employees were routinely registering public assistance applicants, "suggesting" who they should vote for and taking them to the polls. [12]

Such exploitation of vulnerable public assistance recipients is not a new phenomena and continues today. This bill would require public assistance employees across the nation to become actively involved in the administration of elections and we think the results will mean more political manipulation and abuse of public recipients.

The threat of public employee misconduct is not the sole objection to the agency registration provisions of this bill. Even the appearance that a person's public assistance benefits are linked to registering to vote violates the American tradition of voluntary participation in the political system. It should not be required by the federal government.

CONCLUSION

Although greater voter participation is a goal shared by all Members of the Committee, state experience with motor voter programs demonstrate that such programs do not increase voter turnout. What will increase are the costs to state and local governments and opportunities for election fraud.

The lion's share of any new registration under this bill is expected to be done at Departments of Motor Vehicles. The supporters of the bill assume that both mail registration and agency based registration under this bill will account for only a small portion of the new registrations. The bill as written, therefore, risks significant ***57** new opportunities for vote fraud and improprieties by governmental agencies for no significant increase in voter participation.

Rather than assisting state efforts to implement innovative voter registration program, this legislation will impose obligations that are impractical, ineffective and an expensive burden for states.

Ted Stevens.
Jesse Helms.
John Warner.
Bob Dole.
Mitch McConnell.
Thad Cochran.

***58** ADDITIONAL VIEWS OF SENATOR HATFIELD

The bill we report today is substantially similar to S. 250 of the 102nd Congress, the National Voter Registration Act. I supported this legislation last year after the Committee Chairman and I worked to improve its provisions related to protection of the electoral process from registration fraud.

During consideration of the bill last year, the Chairman and I worked to mandate an address verification system which makes a "reasonable" attempt to clean the voting rolls, as well as provisions to allow states to require mail registrants to vote in person the first time.

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The goal embodied in this legislation, to improve accessibility to the voting process, deserves our careful consideration at the federal level. The National Voter Registration Act sets a national standard through a national system to provide equal access to the process for all Americans.

My own state's experience with "motor-voter" legislation attests to the merits of a national standard. Oregon enacted its own law in 1991 and from all accounts, its effects on voting habits are quite positive. The number of registered voters in Oregon jumped by 15 percent between the 1990 and 1992 general election. Of all the transactions that have occurred at offices of the Oregon Motor Vehicles Division (DMV) across the state since the "motor-voter" law took effect in October of 1991, 24 percent involved some sort of voter registration activity.

I have remaining concerns about the cost which may be borne by the states in implementing this legislation. The bill now includes a postal rate reduction for state registrars which will be a helpful tool for offsetting the cost to the states of mail registration. My state reports that from the onset of Oregon's law in late 1991 to January 1 of this year, the DMV has spent $86,135 on voter registration activities. The Division's 1991–1993 biennial budget for "motor-voter" services if $122,593. These are not exorbitant expenditures, because my state has actively sought methods to cut costs. For example, county clerks in several Oregon counties save postage by going to the local DMV offices in person to pick up the new registration cards. Clearly, the postal rate reduction will be a supportive addition, but it does not compensate for the total additional costs of "motor-voter" procedures. This tradeoff suggests the value we in the federal government place on opening access to the electoral process.

I support the National Voter Registration Act and encourage its swift passage by the Senate.

Mark O. Hatfield.

***59** CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing rules of the senate, changes in existing law made by the bill, as reported by the Committee on Rules and Administration, are shown as follows (existing law proposed to be omitted is enclosed in [bold brackets], new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 39, UNITED STATES CODE

POSTAL SERVICE

PART I–GENERAL

CHAPTER 1–POSTAL POLICY AND DEFINITIONS

* * * * * * *

CHAPTER 24–APPROPRIATONS AND ANNUAL REPORT

Sec.

2401. Appropriations.

2402. Annual report.

S 2401. Appropriations

(a) There are appropriated to the Postal Service all revenues received by the Postal Service.

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* * * * * * *

(c) There are authorized to be appropriated to the Postal Service each year a sum determined by the Postal Service to be equal to the difference between the revenues the Postal Service would have received if sections 3217, 3403–3406, [and 3626(a)–(h) and (j)–(k) of this title,] 3626(a)–(h), 3626(j)–(k), and 3629 of this title had not been enacted and the estimated revenues to be received on mail carried under such sections and Acts. In requesting an appropriation under this subsection for a fiscal year, the Postal Service shall (i) include an amount to reconcile sums authorized to be appropriated for prior fiscal years on the basis of estimated mail volume with sums which would have been authorized to be appropriated if based on the final audited mail volume; and (ii) calculate the sums requested in respect of mail under former sections 4452(b) and 4452(c) of this title as though all such mail consisted of letter shaped pieces, as such pieces are defined in the then effective classification and rate schedules.

* * * * * * *

***60** CHAPTER 36–POSTAL RATES, CLASSES, AND SERVICES

SUBCHAPTER I–POSTAL RATE COMMISSION

Sec.

3601. Establishment.

3602. Terms of office.

3603. Rules; regulations; procedures.

3604. Administration.

SUBCHAPTER II–PERMANENT RATES AND CLASSES OF MAIL

3621. Authority to fix rates and classes.

3622. Rates and fees.

3623. Mail classification.

3624. Recommended decisions of Commission.

3625. Action of the Governors.

3626. Reduced rates.

3627. Adjusting free and reduced rates.

3628. Appellate review.

3629. Reduced rates for voter registration purposes.

S 3627. Adjusting free and reduced rates

If Congress fails to appropriate an amount authorized under section 2401(c) of this title for any class of mail sent at a free or reduced rate under section 3217, 3403–3406, [or 3626 of this title,] 3626, or 3629 of this title, the rate for that class may

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be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate.

* * * * * * *

S 3629. Reduced rates for voter registration purposes

The Postal Service shall make available to a State or local voting registration official the rate for any class of mail that is available to a qualified nonprofit organization under section 3626 for the purpose of making a mailing that the official certifies is required or authorized by the National Voter Registration Act of 1993.

1 The procedure adopted by Texas was limited to military personnel. The first State to adopt such a procedure universally and as a principal method of registering voters was Alaska.

2 During the Committee's consideration of similar legislation in the 102nd Congress, the Committee received a letter dated April 17, 1991 to the Chairman and signed by W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice. Throughout this report, there are a number of references to this letter and the Committee's response. Because this letter serves as the basis for much of the arguments made by opponents to this legislation, the Committee was inclined to include references of the letter in this report, as well as the Committee's response. However, it should be noted, that the views expressed in the April 17, 1991 letter may not accurately reflect the views of the current Department of Justice.

3 The bill provides certain exemptions from the personal appearance to vote, including those who are entitled to vote through other means as provided by the Uniformed and Overseas Citizens Absentee Voting Act, or those who are provided a right to vote otherwise than in person under the Voting Accessibility for the Elderly and Handicapped Act; or as provided by any other Federal law.

4 The bill also includes a provision which requires the U.S. Attorney to give notice to the chief State election official information regarding the criminal convictions of any person. This notice requirement will permit States to make a determination if such criminal conviction is reason for the removal of the person's name from the list of eligible voters.

5 A “request” by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change of address notice through the drivers license process that updates the voter registration.

6 Opponents to the legislation have often referred to a footnote reference in the April 17, 1991 Justice Department letter, which refers to an Illinois Grand Jury investigation of voter fraud. However, it should be noted that the Grand Jury never recommended that mail registration should be repealed. In addition, a Grand Jury investigation in Kings County, New York which found substantial incidents of voting fraud never recommended a repeal of New York's mail registration system. The Grand Jury did not conclude that mail registration was the cause or a significant contributing cause to the specific incidence of fraud it investigated. It should be further noted that during the Committee's consideration of S. 250 in the last Congress, the New York State Assembly passed legislation revising its registration laws. Part of this legislation was to maintain and expand the mail registration system. Clearly, if the State of New York believed that the mail registration system resulted in fraudulent registrations, it would have sought to limit or abandon mail registration.

1 100 percent Vote, A Project of Human Serve, Memorandum, May 1, 1991.

2 W. Lee Rawls, Assistant Attorney General, U.S. Department of Justice, Letter to the Honorable Wendell H. Ford, Chairman, U.S. Senate Committee on Rules and Administration, April 17, 1991, p. 10–11.

3 Ibid., p. 6.

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4 Supreme Court of the State of New York, County of Kings: Criminal Term, "In the Matter of Confidential Investigation R84–11", pp. 11–12.

5 Theresa M. Petrone, Chairman, State Board of Elections, State of Illinois: Testimony to Senate Committee on Rules and Administration; May, 1989, p.3.

6 U.S. District Court, Northern District of Illinois, Eastern Division: "Report of the Special January 1982 Grand Jury", pp. 3–6.

7 Mark Eissman, "Massive Fraud Found in Mayoral Primary", Chicago Tribune, March 8, 1986, p. 1, Section 1.

8 "Report of the Special January 1982 Grand Jury", op. cit., p. 8–9.

9 Richard Wallace, "INS: Noncitizens Voted in 1989 Election, State Doesn't Require Proof of Citizenship to Register to Vote", Miami Herald, March 9, 1991, p. 1B, Section Local.

10 6 Alaska Administrative Code 25.027 (c).

11 Rawls, op. cit., 7–8.

12 St. Louis Post-Dispatch, "State Investigating Centreville Township", August 29, 1990, p. 5a.

S. REP. 103-6, S. Rep. No. 6, 103RD Cong., 1ST Sess. 1993, 1993 WL 54278 (Leg.Hist.)

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 3/26/2024 5:54:34 PM
To: Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: Keefer v. Biden -- Privileged
Attachments: Keefer Opinion.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Happy to send you a summary later DPP MCL 15.243(1)(m) but I wanted to send you now the decision from the Middle District of Pennsylvania dismissing Erick Kaardal's ISL lawsuit on behalf of a group of Pennsylvania legislators based on lack of standing. The analysis begins at page 15. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAWN KEEFER, *et al.*,	:	Civil No. 1:24-CV-00147
Plaintiffs,	:	
v.	:	
JOSEPH R. BIDEN, *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

MEMORANDUM

This lawsuit, brought by twenty-six Pennsylvania State Representatives and one Pennsylvania Senator,[1] challenges certain executive actions regarding voter registration taken by both United States President Joseph R. Biden and various federal officials[2] and Pennsylvania Governor Joshua Shapiro and various state

[1] The Plaintiffs in this matter are Representatives Dawn Keefer, Timothy Bonner, Barry Jozwiak, Barbara Gleim, Joseph Hamm, Wendy Fink, Robert Kauffman, Stephanie Borowicz, Donald (Bud) Cook, Paul (Mike) Jones, Joseph D'Orsie, Charity Krupa, Leslie Rossi, David Zimmerman, Robert Leadbetter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rose, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen, and Senator Cris Dush. They are referred to collectively as "Plaintiffs."

[2] The individual federal government Defendants, all sued in their official capacity, are as follows: President Joseph R. Biden, Secretary of Agriculture Tom Vilsack, Secretary of Health and Human Services Xavier Becerra, Secretary of State Antony Blinken, Secretary of Department of Housing and Urban Development Marcia Fudge, Secretary of Energy Jennifer Granholm, and Secretary of Education Dr. Miguel Cardona. Plaintiffs also name the United States, U.S. Department of Agriculture ("USDA"), U.S. Department of Health and Human Services ("HHS"), U.S. Department of State ("State Department"), U.S. Department of Housing and Urban Development ("HUD"), U.S. Department of Energy, and U.S. Department of Education as defendants. Collectively, the foregoing people and entities will be referred to as "Federal Defendants."

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officials[3] on the ground that these executive actions violate both the Electors and Elections Clauses of the United States Constitution. (Doc. 18.) Before the court are the motions to dismiss for failure to state a claim and lack of jurisdiction filed by the Federal and State Defendants. (Docs. 40, 46.)[4] The motions to dismiss will be granted because this court does not have subject matter jurisdiction due to Plaintiffs' lack of standing to raise the claims at issue.[5]

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs challenge an Executive Order issued by President Biden, an announcement by Governor Josh Shapiro, and a "directive" issued by Former Pennsylvania Governor Tom Wolf, all regarding various aspects of voter registration. (Doc. 18.) Plaintiffs allege that these three executive actions have violated their individual Constitutional rights under the Electors and Elections Clauses of the United States Constitution. (*Id.* at ¶67.)

The Electors Clause provides as follows:

---

[3] The individual state government Defendants, all sued in their official capacities, are Governor Joshua Shapiro, Secretary of the Commonwealth Al Schmidt, and Deputy Secretary for Elections and Commissions Jonathan Marks. They are referred to collectively as "State Defendants."

[4] State Defendants filed their motion to dismiss on March 20, 2024. (Doc. 46.) Although this motion is not fully briefed, the issue of standing has been fully addressed in the context of Plaintiffs' motion for injunctive relief, such that the court can address the issue of standing with no further briefing.

[5] The court also notes that Plaintiffs filed a motion for preliminary injunction on February 16, 2024. (Doc. 19.) Because Plaintiffs do not have standing to bring the claims asserted in this lawsuit, the motion for preliminary injunction will be denied as moot in a separate order.

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> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

Plaintiffs allege that:

> [U]nder the Electors Clause, the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislators, as part of two associations called the senate and the house of representatives respectively, may enact laws, subject to the Governor's veto, to regulate the times, places, and manner of Presidential and Congressional elections. Thus, Plaintiffs, as individual state legislators, have federal rights under the Elections Clause and the Electors Clause to oversee and participate in making legislative decisions regulating the times, places, and manner of federal actions.

(Doc. 18, ¶¶ 49, 50.)

Regarding the Federal Defendants, Plaintiffs challenge Executive Order 14019 ("EO 14019"),[6] which, they allege "requires all federal agencies to develop a plan to increase voter registration, and increase voter participation, or get out the vote . . . efforts." (*Id.* at ¶ 70.) Plaintiffs allege that HHS, HUD, Department of

[6] EO 14019 went into effect on March 7, 2021.

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Energy, USDA, and U.S. General Services Administration "GSA"),[7] have implemented voter registration plans in accordance with EO 14019 and have registered voters in Pennsylvania in accordance with these plans. (*Id.* at ¶¶ 72–84.) Plaintiffs contend that EO 14019

> directs *all* non-independent executive agencies to engage in voter registration and to solicit and facilitate third-party organizations to conduct voter registration on agency premises, including those located in the state of Pennsylvania, so it is certain that other agencies are carrying out similar efforts without disclosing their unlawful activities to the public or to the Pennsylvania Legislature.

(*Id.* at ¶ 85.) Plaintiffs allege that EO 14019 requires all federal agencies to "identify and partner with specified partisan third party organizations[,]" "distribute voter registration and vote-by-mail ballot application forms[,]" "assist applicants in completing voter registration and vote-by-mail ballot application forms[,]" "solicit third-party organizations and directs state officials to provide voter registration services on agency premises." (*Id.* at ¶¶ 86–90.)

Plaintiffs contend that "all agency action in conformity with [EO] 14019 is without congressional delegation or funding, and conducted merely by executive fiat[,]" and that "all federal agency actions in conformity with [EO] 14019 are unauthorized by law." (*Id.* at ¶¶ 102, 103.) Plaintiffs further allege that EO 14019

[7] GSA is not a named defendant in this action.

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is not in conformity with Pennsylvania's voter registration scheme, as provided by Pennsylvania law. (*Id.* at ¶¶ 107, 108.)

In Count I, Plaintiffs request a declaratory judgment that EO 14019 is unconstitutional because it "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 178.) Plaintiffs also allege that they are suffering "an injury-in-fact because the Executive Order denies them a voting opportunity to which the Constitution entitles them." (*Id.* at ¶ 179.) In sum, the Plaintiffs allege that EO 14019 unlawfully attempts to regulate the registration of Pennsylvania electors and, thus, "[t]he order should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections." (*Id.* at ¶ 186.) In Count II, Plaintiffs challenge EO 14019 under the Administration[8] Procedure Act ("APA") as substantively arbitrary and capricious and contrary to Constitution or statute. (*Id.* at ¶¶ 194–201.) In Count III, Plaintiffs challenge EO 14019 as procedurally

[8] The court notes that 5 U.S.C. § 706 is more commonly referred to as the Administrative Procedure Act.

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arbitrary and capricious for failing to comply with notice and comment procedures under the APA. (*Id.* at ¶¶ 202–21.)

Regarding the State Defendants, Plaintiffs challenge two executive actions. First, Plaintiffs challenge Governor Shapiro's 2023 announcement that "he was unilaterally implementing automatic voter registration in Pennsylvania." (*Id.* at ¶ 109.) Plaintiffs allege that "[b]eginning on September 19, 2023, Commonwealth residents obtaining new or renewed driver licenses and ID cards have been and continue to be automatically registered to vote by the Pennsylvania Department of Transportation unless they opt out of doing so." (*Id.* at ¶ 110.) Plaintiffs allege that the "regulatory schema of elections" set forth by the legislature requires an "application" to register to vote, which requires an overt action by the applicant. (*Id.* at ¶¶ 115–119.) In sum, Plaintiffs argue that Governor Shapiro's directive to the Department of Transportation to change the process for applying to vote in conjunction with applying for a driver's license violates Pennsylvania's established procedures, codified at 25 PA. CON. STAT. ANN. §§ 1321, 1323, 1327. Plaintiffs allege that "Governor Shapiro's directive to the Pennsylvania Department of Transportation, and its implementation, is inconsistent with existing laws, and as such, is not legally authorized." (*Id.* at ¶ 128.)[9]

[9] Plaintiffs also allege that the state legislature has previously declined to pass automatic voter registration laws, most recently in January 2023, as support for their claim that this action by the Governor nullifies their votes. (*Id.* at ¶¶ 132, 133.)

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In Count IV, Plaintiffs bring a claim under 42 U.S.C. § 1983 against Governor Shapiro seeking an injunction "enjoining and prohibiting [his] automatic voter registration regime" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses, "diminishes the influence of the individual legislators," and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 215.) Plaintiffs also allege that the announcement "denies Plaintiffs a voting opportunity to the acceptance [or] rejection of a voter registration schema, that under the U.S. and Pennsylvania Constitutions can only originate in the Pennsylvania legislature or U.S. Congress." (*Id.* at ¶ 216.)

The second state executive action that Plaintiffs challenge is a 2018 "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications" ("2018 Directive") issued under former Governor Tom Wolf. (*Id.* at ¶ 139.) This challenge is brought against Secretary of the Commonwealth Al Schmidt and Deputy Secretary for Elections Jonathan Marks. (*Id.*) The 2018 Directive "directs Pennsylvania counties to register applicants even if an applicant provides invalid identification." (*Id.* at ¶ 140.) Plaintiffs allege that this directive violates Pennsylvania law, specifically 25

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PA. CONS. STAT. ANN § 1328. (*Id.* at ¶¶ 144–46.) Further, Plaintiffs allege that the directive, which "direct[s] the counties to process incomplete or inconsistent voter applications like all other applications violates clear provisions of Pennsylvania law[,]" and as such, "undermines the state legislature as the 'entity assigned particular authority by the Federal Constitution' to regulate the times, places, and manner of Presidential and Congressional elections." (*Id.* at ¶¶ 154, 155.)

In Count V, Plaintiffs bring a claim under 42 U.S.C. § 1983, asking the court to enjoin and prohibit the 2018 Directive "and similar guidance" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses, "diminishes the influence of the individual legislators" and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 223.) Plaintiffs also allege that the 2018 Directive denied them "their U.S. constitutional right to vote on and direct election policy, established under both the Elections Clause and Electors Clause." (*Id.* at ¶ 226.)

Underlying all counts, Plaintiffs allege they have standing as state legislators because they "are injured by Defendants when [Defendants] exercise positive regulatory authority over election practices that circumvent or usurp the authority of the legislature." (*Id.* at ¶ 160.) Specifically, Plaintiffs allege they have "been

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denied the opportunity to exercise their constitutionally vested authority to cast their legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.) Plaintiffs also allege they have standing as candidates who will suffer the harm of having to compete in "elections [that] have been interfered with by unlawful regulations" and "where their opponents have been provided an unlawful advantage." (*Id.* at ¶¶ 171, 172.) Finally, Plaintiffs allege they have standing as citizens, taxpayers, and voters. (*Id.* at ¶¶ 174, 175.)

Plaintiffs initiated this lawsuit by filing a complaint on January 25, 2024. (Doc. 1.) Thereafter, they filed the operative amended complaint and simultaneously filed a motion for preliminary injunction. (Docs. 18, 19.)[10] Federal Defendants filed a motion to dismiss for failure to state a claim and lack of jurisdiction on March 1, 2024. (Doc. 40.) Federal Defendants also filed a brief in opposition to the motion for preliminary injunction on the same date. (Doc. 41.) State Defendants filed a brief in opposition to the motion for preliminary injunction on March 1, 2024. (Doc. 42.) Plaintiffs filed reply briefs to State Defendants and Federal Defendants briefs in opposition on March 15, 2024. (Docs. 44, 45.) On March 20, 2024, State Defendants filed a motion to dismiss

[10] On February 23, 2024, the Foundation for Government Accountability filed a motion for leave to file an amicus brief, which was granted on February 26, 2024. (Docs. 29, 33.) The amicus brief was filed on February 26, 2024, and the court reviewed the amicus brief in considering the motions to dismiss. (Doc. 34.)

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and brief in support. (Docs. 46, 47.) Accordingly, the issue of standing is ripe for review.

STANDARD OF REVIEW

Defendants seek dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. The court, in determining whether it has subject-matter jurisdiction, must decide "whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006) (quoting *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 260 (3d Cir. 1994)). Rule 12(b)(1) challenges may be "facial" or "factual." *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges whether jurisdiction has been properly pled and requires the court to "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen*, 549 F.2d at 891.) Conversely, when a defendant sets forth a factual attack on subject-matter jurisdiction, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case. . . . 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional

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claims.'" *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *Mortensen*, 549 F.2d at 891).

In this instance, Defendants argue Plaintiffs do not have standing and present the court with a facial attack on subject matter jurisdiction. As a result, the court will "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc.*, 220 F.3d at 176 (citing *Mortensen*, 549 F.2d at 891.)

DISCUSSION

Both the Federal and State Defendants argue that the amended complaint must be dismissed for lack of subject matter jurisdiction because Plaintiffs lack standing to pursue their claims. Plaintiffs argue they have standing because the complaint alleges "that the Elections and Electors' Clauses' references to 'legislature' confer rights onto the individual state legislators." (Doc. 21, p. 10.) On this basis, Plaintiffs contend that their individual rights as state legislators are injured by the executive actions at issue because those actions are an "exercise [of] positive regulatory authority over election practices that circumvent[s] or usurp[s] the authority of the legislature." (Doc. 18, ¶ 160.) Essentially, Plaintiffs argue they have each been injured individually because they have "been denied the opportunity to exercise their constitutionally vested authority to cast their

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legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.)

Plaintiffs present various arguments to support their theory of individual legislator standing. First, Plaintiffs analogize their membership in the legislature to various other types of entities, such as a corporation, arguing that as "the purpose of extending rights to corporations is to protect the rights of the people associated with the corporation[,]" so too the "purpose of the Elections Clause and Electors Clause . . . is to protect the privileges and rights of the individual state legislators." (Doc. 21, p. 9.) Plaintiffs also analogize a state legislature to a militia and the press, as "entities" made up of real persons who have the right to defend their participation in the entity. (Doc. 44, pp. 10, 11.)

Second, Plaintiffs rely on *Coleman v. Miller*, 307 U.S. 433 (1939), *Moore v. Harper*, 600 U.S. 1, 27 (2023),[11] and their assertion that the Pennsylvania Supreme Court has authorized "individual state legislators to bring legislative usurpation claims." (Doc. 21, p. 10.) (citing *Fumo v. City of Phila.*, 972 A.2d 487, 491 (Pa. 2009)). Plaintiffs also argue that they have standing as candidates for office who

[11] Plaintiffs' reliance on *Moore v. Harper* consists of quoting the language from the decision stating: "[t]he legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution." 600 U.S. at 27. Plaintiffs rely on this quotation to support their theory that because they are members of "the entity assigned particular authority by the Federal Constitution [,]" they possess an individual right that gives them standing to vindicate that right in the federal courts. (Doc. 21, p. 10.)

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potentially may run in an unlawfully-operated election. (*Id.* at 12.) Plaintiffs argue that they are injured by the executive actions because "it results in the registration of voters outside of [Pennsylvania's] carefully constructed and constitutionally-authorized registration regime." (Doc. 45, p. 14.) Finally, Plaintiffs argue they have standing as citizens, taxpayers, and voters. (Doc. 21, p. 13.)

In response, Federal Defendants argue that, under Supreme Court case law, "individual members [of a legislature] lack standing to assert the institutional interests of a legislature." (Doc. 41, p. 11.) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019)). In support of this argument, Federal Defendants contend that Plaintiffs' alleged injury, usurpation of the authority to regulate elections conferred upon state legislatures, is not meaningfully distinguishable from the institutional injuries alleged in *Raines v. Byrd*, 521 U.S. 811 (1997), *Goode v. City of Phila.*, 539 F.3d 311 (3d Cir. 2008), and *Yaw v. Delaware River Basin Comm.*, 49 F.4th 301 (3d Cir. 2022). In each of these cases, the Supreme Court and Third Circuit, respectively, found that individual legislators did not have standing to bring a challenge to an action that allegedly injured the legislature as a whole. (Doc. 41, pp. 11–13.) In sum, Federal Defendants argue that the alleged injury "concerns the right to vote of '*all Members* of' the Pennsylvania Legislature 'equally,' and so it is precisely the type of non-

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particularized, 'institutional injury' that is insufficient for legislator standing." (*Id.* at 13) (emphasis in original)).[12]

In response to Plaintiffs' argument regarding their potential standing as candidates, Federal Defendants argue that the amended complaint "contains no concrete allegations establishing that the EO will have a material impact on the votes cast in Plaintiffs' particular districts, and that this impact will harm Plaintiffs' electoral prospects." (*Id.* at 15.)

State Defendants' arguments regarding institutional injury and legislative standing largely mirror those of Federal Defendants and rely on the same body of case law. (*See* Doc. 42, pp. 12–19.) State Defendants additionally note that the declarations attached to the amended complaint simply state that Defendants have violated the law and provide no individualized allegation of injury, the amended complaint contains no allegation of "how any Plaintiff is affected by the conduct challenged in this case in a way that is any different from any other member of Pennsylvania's General Assembly [,]" and the amended complaint contains no allegation that "legislative powers have been usurped" because "[n]either changes to a registration application nor instructions to counties–both done under statutorily

[12] Both Plaintiffs and Federal Defendants address standing globally and make no separate arguments based on the cause of action. Therefore, the court will do the same.

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assigned authority–stops the General Assembly from passing any laws regarding either topic." (*Id.* at 17–19.)

A. Article III Standing

Pursuant to Article III of the United States Constitution, federal courts are constrained to resolve only "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines*, 521 U.S. at 818 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976)). Ensuring that a plaintiff has Article III standing "'serves to prevent the judicial process from being used to usurp the powers of the political branches,' and confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted).

Article III standing requires that the plaintiff, who bears the burden of establishing these elements, prove: (1) an injury-in-fact; (2) that is fairly traceable to the defendant's conduct; and (3) that is likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). When standing is challenged at the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

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As to the first element, an injury-in-fact must be "'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 504 U.S. at 560). A particularized injury must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Further, any threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

1. Plaintiffs Lack Standing as Legislators

The seminal case regarding legislative standing is the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). There, members of the U.S. Congress who voted against the Line Item Veto Act sued the Secretary of the Treasury and the Director of the Office of Management and Budget, asserting that the Line Item Veto Act was unconstitutional because it altered "the legal and practical effect of all votes [the members] may cast on bills[,]" divested the members "of their constitutional role in the repeal of legislation," and altered "the constitutional balance of powers between the Legislative and Executive branches[.]" *Id.* at 816.

The Supreme Court held that the members who filed suit did not have standing because they did not allege any "injury to themselves as individuals," rather "the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to

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historical experience." *Id.* at 829 (citations omitted). The Court held that the members who filed suit failed to allege an injury to themselves as individuals because they had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies[,]" and they only alleged that the Act caused "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both House of Congress equally." *Id.* at 821. Further, the Court noted that the members did not allege a deprivation of "something to which they *personally* are entitled–such as their seats as Members of Congress after their constituents had elected *them*." *Id.*

The Court also distinguished one prior case that addressed the issue of legislator standing, *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Kansas State Senate was split twenty to twenty on the passage of the child labor amendment to the federal constitution. *Id.* at 436. The Lieutenant Governor then cast a tie-breaking vote, and the twenty losing Senators sued to challenge "the right of the Lieutenant Governor to cast the deciding vote in the Senate." *Id.* The Supreme Court held that the twenty senators who voted against ratification had standing to sue because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. The *Coleman* Court further explained that the Kansas senators had "set up and claimed a right and

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privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege." *Id.*

The *Raines* Court limited the holding and application of *Coleman*, stating that *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823. Thus, the *Raines* court held that the members in that case did not have standing under *Coleman* because they did not allege "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824.

The Supreme Court has considered legislator standing twice since *Raines*. In *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 792 (2015), the entire Arizona State Legislature sued to challenge the constitutionality of a voter-adopted initiative which established an independent commission charged with drawing and adopting redistricting maps, arguing that giving this authority to an independent commission is contrary to the Elections Clause's directive that the legislature of each state shall determine the times, places, and manner of elections. In *Arizona*, the defendants challenged the plaintiffs' standing under *Raines*, but the Supreme Court held that the legislature,

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as a whole and authorized by an internal vote, had standing to redress the alleged institutional injury suffered by the legislature as a whole. *Id.* at 802. Ultimately, the court held that the voter initiative at issue "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id.* at 804 (citing *Raines*, 521 U.S. at 823–24).[13]

Conversely, in *Va. House of Delegates*, the Supreme Court held that only one house of a bicameral state legislature did not have standing to sue on behalf of the legislature as a whole. *Va. House of Delegates*, 139 S. Ct. at 1952. First, the Court noted that it is possible for a state to designate its House of Representatives as its agent, which would be sufficient to confer standing to vindicate the state's interests. *Id.* at 1951–52. Per the *Va. House of Delegates* Court, a state may authorize the "House to litigate on the State's behalf, either generally or in a defined class of cases." *Id.* at 1952. The Court held that Virginia had not done so in that case. *Id.* Second, the Court considered whether the House of Representatives had legislator standing under *Raines*. The Court held that the "Virginia constitutional provision the House [challenges] allocates redistricting authority to the 'General Assembly,' of which the House constitutes only a part." *Id.* at 1953. Thus, the Court held the case was more similar to *Raines* because

[13] On the merits in *Arizona*, the Supreme Court held that "the Elections Clause permits the people of Arizona to provide for redistricting by independent commission[,]" and denied the Legislature's appeal. *Id.* at 813.

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"[j]ust as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953–54 (citations omitted).

The Third Circuit has decided cases in line with *Raines*, most recently in *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302 (3d Cir. 2022). In *Yaw*, a group of Pennsylvania Senators sued the Delaware River Basin Commission, arguing that the ban on fracking at issue in that case "deprived [them] of their lawmaking authority relative to millions of Pennsylvanians residing within the 6,000 square miles of Sovereign territory subsumed by the Basin and any legislation, now or in the future, on this subject has been nullified." *Id.* at 311. Relying on a review of the same cases discussed above, the Third Circuit held that "this argument runs headlong into the well-established principle that individual legislators lack standing to assert institutional injuries belonging to the legislature as a whole." *Id.* The Third Circuit held that the alleged injuries were "classic examples of institutional injuries because they sound in a general loss of legislative power that is 'widely dispersed' and 'necessarily damages all [members of the General Assembly] ... equally.'"[14] *Id.* at 314 (citing *Raines*, 521 U.S. at 821)

[14] The alleged injuries in *Yaw* included suspending law in the Commonwealth, displacing/suspending the Commonwealth's "comprehensive statutory scheme," attempting to "exercise legislative authority exclusively vested in the General Assembly," wholly nullifying

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(alterations in original). The Third Circuit noted that the plaintiffs "alleged no injury to themselves as individuals[,]" and had not "been authorized to represent the interests of these institutions in court." *Id.* at 314. Finally, the Third Circuit noted that, under the theory presented by plaintiffs, "*any* individual legislator would have standing to challenge *any* federal statute or regulation . . . that, under the Constitution's Supremacy Clause, has a preemptive effect on state lawmaking. Article III does not sweep so broadly." *Id.* at 315 (citation omitted).

Here, Plaintiffs attempt to circumvent the institutional injury issue by asserting that the Elections and Electors Clauses give them an "individual" right which they are seeking to vindicate. However, as the descriptions of their alleged injuries make clear, they are seeking to vindicate injuries that would be suffered by the Legislature as a whole.[15] Just as in the binding precedent described above,

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"any present or future legislative action," depriving Commonwealth citizens of the "right to be governed by their duly-elected representatives," diluting the rights of the citizens of the Commonwealth "to choose their own officers for governmental administration," and diminishing the "legislative powers of the Senate Plaintiffs." *Id.* at 313–14.

[15] For example, Plaintiffs allege that EO 14019 "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (Doc. 18, ¶ 178.) They allege the automatic voter registration announcement by Governor Shapiro "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 215.) And, they allege the HAVA directive by Secretary Schmidt "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional

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Plaintiffs here do not allege that they specifically, as individuals, are suffering a harm because of the executive actions at issue. Rather, the harm is to the authority of the Pennsylvania General Assembly to establish the times, places, and manner of elections as provided by the Constitution. Moreover, Plaintiffs claim that they, as "real persons who are part of an exclusive entity, the state legislature of Pennsylvania[, . . . have] a right to protect [their] individual [] constitutional rights and privileges to participate in making laws regarding the manner of elections []." (Doc. 44, p. 7.) Just as the Third Circuit concluded in *Yaw*, this claim sweeps too broadly. If every state legislator has an individual right to vindicate their right to "participate in making laws," then the standing requirement of a particularized injury would be rendered meaningless because *every* legislator would suffer an injury in the same way. *See Yaw*, 49 F.4th at 314.

Further, there is no allegation that these specific Plaintiffs have suffered an injury that is any different than any other member of the Pennsylvania General Assembly. Thus, Plaintiffs have alleged only an institutional injury resulting from "a general loss of legislative power[.]" *Yaw*, 49 F.4th at 314. Additionally, unlike in *Coleman*, Plaintiffs here have not suffered a complete nullification of their vote, such that they no longer can legislate in the election field. Plaintiffs' argument that

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powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 223.)

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they "have no ability to undo the executive actions through ordinary legislation[,]" and that the laws they already have passed "have been nullified and overridden by the executive actions[,]" overstates the matter, as none of the executive actions challenged in this case remove or divest any authority from the legislature in creating voting regulations within the state, such as in *Arizona*. Should the General Assembly wish to counter any of the alleged effects of the challenged executive actions, the executive actions do not constrain them from doing so. Moreover, as in *Arizona*, should the Pennsylvania General Assembly, as a whole, wish to challenge these executive actions as contrary to law and usurping its authority, the General Assembly may do so. However, these twenty-seven Plaintiffs, may not seek to vindicate that institutional injury without the approval of the institution. Therefore, Plaintiffs are seeking to assert an injury to the institutional rights of the Pennsylvania General Assembly, which they cannot do as individual legislators.[16]

[16] The court notes that there is no allegation that they have been authorized to undertake this action on behalf of the General Assembly as a whole. Plaintiffs argue that they have been "authorized' by the State to undertake litigation in a "class of cases" under *Va. House of Delegates*. (Doc. 45, p. 11.) Plaintiffs claim that Pennsylvania case law holding that legislators "are granted standing to challenge executive actions when specific powers unique to their functions under the constitution are diminished or interfered with[,]" shows that they have been authorized to litigate on the state's behalf in "a defined class of cases." (*Id.* (citing *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976) and *Va. House of Delegates*, 139 S. Ct. at 1952)). This is incorrect. The Supreme Court in *Va. House of Delegates* pointed to state statutes, such as in Indiana, where the legislature, through statute, had authorized itself to "employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." 139 S. Ct. at 1952 (citing Ind. Code § 2-3-8-1 (2011)). Holding that a certain party has standing to pursue a certain case does not equate to the state authorizing that party to bring all actions on its behalf.

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The court recognizes that Plaintiffs rely on *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014) ("*Kerr I*") to support their argument that an individual legislator has standing to challenge a specific law that "has stripped the legislature of its rightful power." *Id.* at 1167. However, as noted by State Defendants, although Plaintiffs state that the judgment in *Kerr I* was "vacated on other grounds," it was, in fact, vacated on the issue of standing after the Supreme Court decided *Arizona*. *See Hickenlooper v. Kerr*, 576 U.S. 1079 (2015). On remand, the Tenth Circuit looked again at the issue of whether individual legislator plaintiffs had standing to claim that a state constitutional amendment "deprive[d] them of their ability to perform the 'legislative core functions of taxation and appropriation.'" *Kerr v. Hickenlooper II*, 824 F.3d 1207, 1215 (10th Cir. 2016) ("*Kerr II*"). In *Kerr II*, the Tenth Circuit explicitly held that "the legislator-plaintiffs assert only an institutional injury, and thus lack standing to bring this action." Accordingly, the decision in *Kerr II* provides no support to Plaintiffs.

Finally, to the extent that Plaintiffs argue they have standing based on Pennsylvania law, this same argument was dismissed by the Third Circuit in *Yaw*. Whether it is true or not that individual legislators have standing under Pennsylvania law, the *Yaw* court held that "[t]he fact that a party has standing in state court does not mean that they have standing in federal court. . . . Article III standing 'limits the power of *federal* courts and is a matter of *federal* law. It does

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not turn on state law, which obviously cannot alter the scope of the federal judicial power.'" *Yaw*, 49 F.4th at 316 (citing *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 730–31 (7th Cir. 2020)).

Accordingly, the court concludes that, in reality, Plaintiffs allege an institutional injury to the power of the Pennsylvania General Assembly as a whole to legislate the times, places, and manner of elections. As such, Plaintiffs, as individual legislators, do not have standing because they have not alleged any particular injury that is not also suffered by each member of the Pennsylvania General Assembly.

B. Plaintiffs Lack Standing as Candidates

Plaintiffs also argue they have standing as candidates. (Doc. 18, ¶¶ 169–173; Doc. 21, pp. 11, 12; Doc. 45, pp. 12–15). Plaintiffs argue that "Defendants' actions collectively undermine the integrity of Pennsylvania's elections by introducing procedures that were not provided by the Legislature." (Doc. 21, p. 12.) They further argue that implementation of these executive actions results in "the pool of Pennsylvania voters [being] manipulated by legally unauthorized, deceptive practices, undermining the integrity of elections across the Commonwealth." (Doc. 45, p. 15.)

Federal Defendants argue that this injury is not "certainly impending[,]" as required by Article III and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401

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(2013), and the "Complaint contains no allegations describing how Plaintiffs' candidacies will 'certainly' be harmed by the EO." (Doc. 41, p. 15.) State Defendants argue that "Plaintiffs fail to identify any concrete or particularized way that eligible electors registering to vote injures them in any of these [candidates, citizens, taxpayers, and voters] capacities." (Doc. 42, p. 19 n.6)

The court agrees with the Federal and State Defendants that Plaintiffs have not alleged any particular harm to their candidacies as a result of any executive actions taken by any defendant. A vague, generalized allegation that elections, generally, will be undermined, is not the type of case or controversy that this court may rule on under Article III. *See Toth v. Chapman*, 2022 WL 821175, at * 7 (M.D. Pa. March 16, 2022.) Accordingly, Plaintiffs do not have standing as candidates.[17]

CONCLUSION

Plaintiffs do not have standing to assert the institutional injuries they raise here. Plaintiffs argue they have been granted an "individual" right in the Electors and Elections Clauses of the U.S. Constitution, but binding precedent obligates this court to reject this argument. The injuries that Plaintiffs allege are suffered equally

[17] Plaintiffs also alleged they have standing as citizens, taxpayers, and voters. (Doc. 18, p. 29.) As noted by both Defendants, these claims are entirely speculative, and Plaintiff does not argue these bases of standing beyond their motion in support of preliminary injunction. (Doc. 41, p. 16; Doc. 47, p. 22 n.4.) Accordingly, the court concludes that Plaintiffs have not established standings on any of these grounds either.

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by each Pennsylvania legislator. As such, Plaintiffs have not alleged any individualized and particularized harm. Accordingly, Plaintiffs do not have standing to pursue their challenges to the executive actions at issue in this lawsuit, and their amended complaint is dismissed. An order follows.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

Dated: March 26, 2024

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From: King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]
Sent: 5/11/2023 7:02:32 PM
To: Hammoud, Fadwa (AG) [HammoudF1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; beth@statesuniteddemocracy.org; Aaron@statesuniteddemocracy.org; christine@statesuniteddemocracy.org; Jonathan [jonathan@statesuniteddemocracy.org]

Subject: **DPP MCL 15.243(1)(m)**
Attachments:
Location: Microsoft Teams Meeting

Start: 5/12/2023 8:00:00 PM
End: 5/12/2023 8:30:00 PM
Show Time As: Tentative

Required Attendees: Hammoud, Fadwa (AG); Meingast, Heather (AG); Banghart-Linn, Linus (AG); beth@statesuniteddemocracy.org; Aaron@statesuniteddemocracy.org; christine@statesuniteddemocracy.org; Jonathan

ATTENDEES:
Chief Deputy Hammoud
Heather Meingast, AAG
Linus Banghart-Linn, AAG

Jonathan Williams
Beth Stevens
Aaron Scherzer
Christine Sun (who will join if she is able)

Microsoft Teams meeting

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From: King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]
Sent: 5/11/2023 7:00:00 PM
To: King-Piepenbrok, Pier (AG) [KingP1@michigan.gov]
Subject: Sidney Powell update - privileged
Attachments: Court Order on MTR.pdf

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, May 5, 2023 5:44 PM
To: Hammoud, Fadwa (AG) <HammoudF1@michigan.gov>
Cc: Christine Sun <christine@statesuniteddemocracy.org>
Subject: Sidney Powell update - privileged

Fadwa,

As expected, the trial court denied the Texas Commission for Lawyer Discipline's motion to reconsider the court's order granting summary judgment for Sidney Powell. The order is attached. The Commission has until May 23 to appeal. Our understanding is that the Commission has not yet decided whether to appeal. We'll continue to keep you posted. Please let us know if you have any questions or would like to discuss.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Cause No. DC-22-02562

COMMISSION FOR LAWYER DISCIPLINE,	§	IN THE DISTRICT COURT
Plaintiff,	§	
v.	§	DALLAS COUNTY, TEXAS
SIDNEY POWELL,	§	
Defendant.	§	116th JUDICIAL DISTRICT

ORDER DENYING MOTION FOR RECONSIDERATION OR NEW TRIAL

Before the Court is "The Commission's Motion for Reconsideration and/or for New Trial." Following the hearing held on May 1, 2023, the Court rules as follows:

I. COMMISSION'S MOTION FOR RECONSIDERATION OF CONTINUANCE

The Commission seeks reconsideration of a motion for continuance filed November 21, 2022, which the Commission contends to have been denied. That motion pre-dated one dispositive motion and both of the dispositive settings that led to judgment, and in any event, was never presented to the Court, so no ruling was made on it. Rather, the Commission's response to Powell's dispositive motions contained, as alternative relief, a request for continuance. *That* motion was denied.

To the extent, if any, that the Commission's motion can be construed to request reconsideration of that ruling, the record reflects that: (a) the Commission had no motion for additional discovery pending before the Court until after the Commission's

Obtained by Judicial Watch, Inc. v. Michigan FOIA

summary judgment responses were due;[1] (b) the case had been pending far in excess of 180 days beyond the respondent's answer by which time it (by rule) should have proceeded to trial; and (c) when asked at the May 1st hearing about evidence absent from the summary judgment record, counsel for the Commission argued that such evidence was accessible to all parties online, and had no explanation for its omission from the record. For these and other reasons, including failure to satisfy TRCP 251 and 252, reconsideration of the denial of a continuance is DENIED.

II. SUMMARY JUDGMENT

With the Commission offering no explanation for its failure to respond to Powell's no-evidence motion challenging elements of the Commission's claims under Rules 3.01, 3.02, or 3.04, reconsideration of the no-evidence summary judgment as to those claims is DENIED.

As to summary judgment on the remaining claims on traditional and no-evidence grounds, reconsideration of summary judgment as to those claims is also DENIED.

IT IS THEREFORE ORDERED that the Commission's motion is DENIED in its entirety.

Signed on May 4, 2023.

Andrea K. Bourussa
PRESIDING JUDGE

[1] At the May 1st hearing, the Court clarified that the Commission's joint response was deemed timely, despite being 5 days late for Powell's traditional summary judgment motion. The Commission confirmed its intent that the response was to be considered for both motions.

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Associated Case Party: COMMISSION FOR LAWYER DSICIPLINE

Name	BarNumber	Email	TimestampSubmitted	Status
Kristin Brady	24082719	kristin.brady@texasbar.com	5/4/2023 4:19:36 PM	SENT
Brittany Paynton		brittany.paynton@texasbar.com	5/4/2023 4:19:36 PM	SENT
Robert H.Holmes		rhholmes@swbell.net	5/4/2023 4:19:36 PM	SENT
Rachel Craig		rachel.craig@texasbar.com	5/4/2023 4:19:36 PM	SENT
Todd Hill		thill@collincountytx.gov	5/4/2023 4:19:36 PM	SENT

Case Contacts

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S. Michael McColloch	13431950	smm@mccolloch-law.com	5/4/2023 4:19:36 PM	SENT
Karen Cook	12696860	karen@karencooklaw.com	5/4/2023 4:19:36 PM	SENT

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Cause No. DC-22-02562

COMMISSION FOR LAWYER DISCIPLINE,	§	IN THE DISTRICT COURT
Plaintiff,	§	
v.	§	DALLAS COUNTY, TEXAS
SIDNEY POWELL,	§	
Defendant.	§	116th JUDICIAL DISTRICT

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Brittany Paynton		brittany.paynton@texasbar.com	5/4/2023 4:19:36 PM	SENT
Robert H.Holmes		rhholmes@swbell.net	5/4/2023 4:19:36 PM	SENT
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S. Michael McColloch	13431950	smm@mccolloch-law.com	5/4/2023 4:19:36 PM	SENT
Karen Cook	12696860	karen@karencooklaw.com	5/4/2023 4:19:36 PM	SENT

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 6/14/2024 1:12:40 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Dax Goldstein [dax@statesuniteddemocracy.org]; Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
Subject: Re: DPP MCL 15.243(1)(m) Privileged

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Wonderful. We'll make sure you're both invited.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, June 13, 2024 at 1:03 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>, Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: RE: DPP MCL 15.243(1)(m) Privileged

Hi Jonathan (Dax and Kelsey),

Chief Legal Counsel Linus Banhart-Linn and I would like to participate in the multistate call. I have included Linus here. We also appreciate the information that was shared.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, June 12, 2024 10:21 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Kelsey Stimple <Kelsey@statesuniteddemocracy.org>
Subject: DPP MCL 15.243(1)(m) Privileged

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Good to talk with you today, Heather. DPP MCL 15.243(1)(m) We're planning a multistate call on Monday, June 17, from 3:30-4 that we hope you can join. Let us know if you have any questions or would like to discuss.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**

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States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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Sent: 5/12/2023 8:49:35 PM
To: jonathan@statesuniteddemocracy.org
CC: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Michigan info
Attachments: Burkman Wohl AT Br.pdf; Burkman Wohl Corr AE Br.pdf

Jonathan,

Nice meeting you and your colleagues today!

You've asked for the briefing in Burkman/Wohl – those are attached, both the appellants' brief and our corrected brief filed this afternoon.

You also asked if there is a way to get those without "bothering" us. Since this case is headed for oral argument, it is on the cases awaiting oral argument page – our brief isn't on the page yet, but it should show up here: 164638-9, People of MI v John MacAuley Burkman, People of MI v Jacob Alexander Wohl (michigan.gov)

Once the case is scheduled for oral argument, I believe they will move it to a different section of the website, and you'll want to look for it here: Schedule of Oral Arguments (michigan.gov)

Unfortunately, although I think it used to be true that you could download briefs for any MCOA or MSC case, I think they have changed it so that you can only get opinions and orders now (other than cases the MSC has taken). If there's another case you're interested in in the future, the general search page is here: Cases, Opinions & Orders (michigan.gov).

You should be able to get opinions and orders there. I have a login that will let me download most documents, so if you see something you would like other than an opinion or order, don't hesitate to reach out. It's truly no bother.

DPP MCL 15.243(1)(m)

Finally, the hearing is going to be held via Zoom on June 29 at 9:30 a.m. Only parties are allowed on the Zoom, but it is being streamed to YouTube. The links are:
https://www.youtube.com/@michiganattorneydiscipline3923

https://www.youtube.com/@michiganattorneydiscipline4603

(I'm not sure if it's going to be on both YouTube channels, or if they just don't know yet which channel it will be on. So I am planning to check in on both.)

If you need anything else, please let me know!

Thanks, and have a great weekend,

Linus Banghart-Linn (he/him)
Assistant Solicitor General

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STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
LETICA, P.J., AND REDFORD AND RICK, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MACAULEY BURKMAN,

Defendant-Appellant.

Supreme Court No. 164638

Court of Appeals No. 356600

Circuit Court No. 20-004636 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB ALEXANDER WOHL,

Defendant-Appellant.

Supreme Court No. 164639

Court of Appeals No. 356602

Circuit Court No. 20-004637 FH

DEFENDANT-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTION

John Burkman and Jacob Wohl filed a motion to quash their felony charges in circuit court. The court denied the motion. The Court of Appeals initially denied interlocutory applications for leave to appeal. *People v Burkman*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356602). But this Court remanded both cases for consideration as on leave granted. *People v Burkman*, 508 Mich 951; 964 NW2d 604 (2021); *People v Wohl*, 508 Mich 951; 964 NW2d 585 (2021).

The Court of Appeals consolidated the cases. *People v Burkman*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356602). In a published opinion released June 2, 2022, the Court of Appeals majority affirmed. *People v Burkman*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602). The defense timely applied for leave to appeal in this Court, which granted the application on November 2, 2022. *People v Burkman*, ___ Mich ___; 980 NW2d 715 (2022). Jurisdiction is proper in this Court. Const 1963, art VI, § 4; MCR 7.303(B)(1).

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QUESTIONS INVOLVED

This Court has asked the parties to address the following questions:

(1) whether the Court of Appeals properly interpreted MCL 168.932(a); and

(2) whether MCL 168.932(a) is unconstitutional on its face or as applied to the defendants.

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INTRODUCTION

A couple months before the November 2020 election, conservative provocateurs John Burkman and Jacob Wohl disseminated a 30-second "robocall" in the 313-area code. The call said,

> Hi, this is Tamika Taylor from Project 1599, a civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing to use records from mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the man. Stay safe and beware of vote by mail.

Burkman and Wohl's aim—taking the evidence from the preliminary examination in the light most favorable to the prosecution—was to dissuade Blacks in the Detroit area from voting by mail. "Reprehensible," the district court judge called it. This Court will likely agree.

Reprehensible, though, is different from *criminal*. The Attorney General has charged Burkman and Wohl under MCL 168.932(a), which criminalizes deterring voters

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through "bribery, menace, or other corrupt means or device." Square peg, meet round hole.

The defense moved to quash in the circuit court, raising two arguments. First, the defense argued that MCL 168.932(a), correctly interpreted, does not criminalize Burkman and Wohl's conduct. Second, under First Amendment principles, the defense argued that MCL 168.932(a) is unconstitutional on its face and as applied to Burkman and Wohl. The trial court denied the motion, and the Court of Appeals, deploying dubious reasoning, affirmed.

This Court should reverse. The Attorney General has overreached. Neither the language of MCL 168.932(a) nor our state and federal constitutions can abide the prosecution of Burkman and Wohl. It should end here.

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FACTS

Burkman and Wohl are charged with four felonies: bribing or menacing voters, MCL 168.932(a); conspiracy to bribe or menace voters, MCL 750.157a; and two attendant counts of using a computer to commit a crime, MCL 750.796.[1] As the prosecution has conceded throughout, the latter three charges are derivative of the first charge of bribing or menacing voters under MCL 168.932(a), which provides:

> A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

The charges emanate from a "robocall" that Burkman and Wohl disseminated in the 313-area code. Again, the call said,

> Hi, this is Tamika Taylor from Project 1599, a civil rights organization founded by Jack

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[1] The Court of Appeals gave a gratuitous account of the facts of the case, even venturing outside the record to portray Burkman and Wohl in a negative light. *People v Burkman*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602); slip op at 2-6. (192a-196a). The defense here offers the essential facts necessary to resolve the legal issues.

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> Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing to use records from mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the man. Stay safe and beware of vote by mail.

At the preliminary examination, the only "victim" the prosecution presented was Derrick Thomas, a Detroiter who received the call. (11a, 15a). He testified that he was "appalled" and notified "news radio 950" after unsuccessfully trying to contact the Detroit Election Commission. (16a-17a). He was later contacted by the Attorney General's office. (20a). Thomas testified that he later voted and that he was not deterred from voting because of the robocall. (26a-27a). The Attorney General presented no witnesses who claimed that the call had deterred them from voting. (85a-86a).

To be sure, the message was intended to deter mail-in voting. And, as emails between Burkman and Wohl suggest, the robocall was targeted at Blacks. (55a-63a). But at the preliminary examination, the prosecution made no showing—directly or circumstantially—that Burkman and

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Wohl *knew* that the representations in the call were in any way false.

Khyla Craine, an attorney with the Secretary of State (111a), admitted that when a person registers to vote, their name and address become publicly available (114a-115a, 122a-123a). But she claimed that there are other databases that the Secretary of State maintains that are more commonly used by law enforcement and creditors. (115a-116a). She claimed that the voter database, to her knowledge, had never been used by creditors or law enforcement agencies. (117a-118a). Nor had the CDC accessed the database. (119a). Still, Craine admitted that it was possible that law enforcement, creditors, or the CDC could use the database. (124a).

The Information charges that the robocall was an attempt to deter electors by means of menace or "the corrupt means of presenting false and misleading statements about mail-in voting in a telephone message."

After the case was bound over to circuit court, the defense filed a motion to quash. The defense raised two overarching arguments. First, the defense argued that the robocall was not a "menace" or "other corrupt means or device" under MCL 168.932(a). Second, the defense argued that even if MCL 168.932(a) did criminalize the robocall, the statute was unconstitutional on its face and as applied to Burkman and Wohl. The circuit court denied the motion in an oral opinion. (176a-181a).

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The defense applied for leave to appeal in the Court of Appeals, which that court denied "for failure to persuade the Court of the need for immediate appellate review." *People v Burkman*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356602). The defense then filed applications for leave to appeal in this Court. In lieu of granting leave, the Court remanded the cases to the Court of Appeals "for consideration as on leave granted." *People v Burkman*, 508 Mich 951; 964 NW2d 604 (2021); *People v Wohl*, 508 Mich 951; 964 NW2d 585 (2021).

On remand, the Court of Appeals consolidated the cases. *People v Burkman*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356602). In a split decision, the Court of Appeals affirmed the trial court's denial of the quash motion. *People v Burkman*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602). As explored in more detail below, the court first rejected the defense's argument that *menace* requires a threat of physical harm. *Burkman*, ___ Mich App at ___; slip op at 8. (198a). The court held that *menace* encompasses any kind of *threat*. *Id.* (198a). Judge REDFORD dissented on this point only, finding that *menace* requires a threat of physical

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injury. *Burkman*, ___ Mich App at ___ (REDFORD, J., dissenting in part); slip op at 2-3. (207a-208a).

Next, the Court of Appeals held that the evidence presented at the preliminary examination was sufficient to establish that the robocall was a corrupt means or device. The court interpreted that phrase to mean any intentional wrongful conduct. *Burkman*, ___ Mich App at ___; slip op at 9. (199a). Here, according to the Court of Appeals, "A fact-finder could conclude . . . that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting." *Id.* at ___; slip op at 10. (200a). Additionally, the court said, "Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied." *Id.* at ___; slip op at 11 (cleaned up). (201a).

Finally, addressing the defense's constitutional challenges, the Court of Appeals rejected the prosecution's argument that the robocall represented a "true threat" beyond First Amendment protection. *Id.* at ___; slip op at 13-14. (203a-204a). But the court held that MCL 168.932(a) criminalizes "speech integral to criminal conduct" and so was not being applied unconstitutionally to Burkman and Wohl. *Id.* at ___; slip op at 14-15. (204a-205a).

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ARGUMENT

The defense raises two species of argument. First, the defense argues that the statute Burkman and Wohl are charged under does not cover their alleged conduct. Second, the defense argues that if the statute can be interpreted to reach Burkman and Wohl's conduct, it creates a constitutional free speech violation. Consistent with the rule of constitutional avoidance, the defense presents its statutory arguments before turning to its constitutional arguments. *People v McKinley*, 496 Mich 410, 415-416; 852 NW2d 770 (2014).

I. Burkman and Wohl's conduct does not make out a violation of MCL 168.932(a) as that statute is correctly interpreted.

Issue Preservation

This issue was raised before and decided by the trial court, so it is preserved for appellate review. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

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Standard of Review

A trial court's decision on a motion to quash is reviewed for an abuse of discretion. *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016). But where "a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id.*

Here, the facts are largely undisputed. The question is how the facts interact with MCL 168.932(a). So this Court's review is primarily de novo.

Analysis

This Court's goal when interpreting a statute is to discover and effectuate the intent of the Legislature. *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003). The Court must begin, of course, by looking to the plain language of the statute. *Id.* If that language is clear, the statute must be enforced as written. *Id.*

The prosecution of Burkman and Wohl under MCL 168.932(a) is unprecedented in Michigan jurisprudence. The Court of Appeals' decision in this case is the first opinion explicating MCL 168.932(a), whose key statutory terms are undefined. The defense's arguments rely on general principles of statutory interpretation as well as logic and common sense. At bottom, the plain language of

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MCL 168.932(a) does not criminalize the robocall in this case.

A. The robocall was not *menacing*, which requires a threat of physical assault.

Regardless of whether the statements in the robocall should be regarded as fact, fiction, or something else, one thing is clear—they were not "menacing" as that term is defined in the law.

MCL 168.932—part of the Michigan Election Law, MCL 168.1 *et seq.*—was enacted in 1954, 1954 PA 116, although it is a successor of 1846 RS, ch 19, § 2, whose language was substantively identical.[2] " 'If a word is obviously transplanted from another legal source, whether the

[2] 1846 RS, ch 19, § 2, stated:

> If any person shall by bribery, menace, or any other corrupt means or device whatever, either directly or indirectly, attempt to influence any elector in giving his vote, or deter him from, or interrupt him in giving the same, at any election held pursuant to the provisions of law, such person shall, on conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or both, in the discretion of the court.

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common law or other legislation, it brings the old soil with it.'"[3] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 73, quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 537 (1947). And where a word or phrase "may have acquired a peculiar and appropriate meaning in the law," that word or phrase "shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. See also *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010).

Menace or *menacing* has a specific meaning in the law. Dictionaries serve as a starting point. *People v Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020). *Black's Law Dictionary* defines *menacing* thus: "An attempt to commit common-law assault." *Black's Law Dictionary* (11th ed). Likewise, *menace* has been defined as "a show of an intention to inflict especially physical harm." *Merriam-Webster's Dictionary of Law* (2016). Michigan caselaw also referred to *menace* as creating a risk of bodily harm. *People v Doud*, 223 Mich 120, 127, 129, 130; 193 NW 884 (1923); *People v Johnson*, 407 Mich 196, 233-237, 241; 284 NW2d 718

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[3] The earliest reference to "bribery, menace, or any other corrupt means or device"—searchable on Westlaw at least—is from more than 200 years ago. *Lewis v Few*, 5 Johns 1 (NY 1809). As explored below, many states have statutes with similar language. Yet there is a dearth of caselaw interpreting these statutes.

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(1979) (LEVIN, J., dissenting). In short, *menace* requires a threat with a physical component.

What's more, as a point of usage, Michigan caselaw has referred to *menace* and *threat* distinctly. See, e.g., *Hamlin v Mack*, 33 Mich 103, 106 (1875) (". . . there must be violent acts or menacing or threatening words."); *People v Plumsted*, 2 Mich 465, 466 (1853) ("Upon attempting to return, she was prevented by force, menaces, and threats of the defendants."). This is not superfluousness. The law recognizes *menace* as a specific kind of threat.

Here, whatever can be said about the robocall, it did not threaten its receivers with any physical harm. So the *menace* theory of liability should be quashed.

But the Court of Appeals, referring to lay dictionary definitions, held that *menace* encompasses any amorphous *threat*, even threats of nonphysical harm. *Burkman*, ___ Mich App at ___; slip op at 8. (198a). But comparing MCL 168.932(a) to other states' voter bribery statutes disabuses this misapprehension. See *People v Randolph*, 466 Mich 532, 546; 648 NW2d 164 (2002) (comparing Michigan's armed robbery statute to other states' to discern its meaning). See also 2B Sutherland Statutory Construction (7th ed), § 52:3. Many statutes, along with bribery and menace, also list *threat*. See, e.g., Ariz Rev Stat Ann 16-1006 (referring to "force, threats, menaces, bribery or any corrupt means"); Fla Stat Ann 104.061 (referring to "bribery, menace, threat, or other corruption whatsoever");

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Idaho Code Ann 18-2305 (referring to "force, threats, menaces, bribery, or any corrupt means"). And other Michigan statutes have also referred to both threats and menace. See *People v Lyons*, 197 Mich 64, 66; 163 NW 484 (1917) (". . . who takes or detains a female with the intent to compel her by force, threats, menace or duress to marry him . . . ."). By the Court of Appeals' logic, this would be surplusage since *menace* incorporates any kind of nebulous *threat*. But when interpreting a statute, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (cleaned up). So the Court of Appeals' wide-ranging interpretation of *menace* is incorrect.

Plus, within the Election Law, the Legislature knew how to say *threat* when that's what it meant. MCL 168.733, for instance, prohibits threats by and against election challengers:

> A person shall not *threaten* or intimidate a challenger while performing an activity allowed under subsection (1). A challenger shall not *threaten* or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place. [MCL 168.733(4) (emphasis added).]

Why not use *menace* rather than *threaten* consistent with MCL 168.932(a)? "When the Legislature uses different

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words, the words are generally intended to connote different meanings." *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009). See also Reading Law, p 170. So reference to MCL 168.733(4) suggests that *menace* is distinct from *threat* in the Election Law.

And even accepting a broader definition of *menace*, communicating information about negative consequences for certain actions is not threatening. A threat is "an expression of intention to inflict evil, injury, or damage." *Merriam-Webster's Collegiate Dictionary* (11th ed).[4] Warning someone of potential danger is not a threat. Take the following sentence: "Don't smoke cigarettes because they will kill you." No one would say that the speaker was threatening the recipient not to smoke. By the same token, telling voters that their information could be used to vindicate legal rights of creditors and the state cannot be deemed a threat. Nor is telling voters that the CDC is *pushing* to use information for mandatory vaccines a threat. In short, a *warning* is not a *threat*.

The Court of Appeals disagreed that *menace* had acquired a peculiar meaning in the law. *Burkman*, ___ Mich App at ___; slip op at 8. (198a). The court found the

[4] *Threat* can also mean "an indication of something impending," such as "the sky held a threat of rain." *Id.* But this definition is not synonymous with *menace* as interpreted by the Court of Appeals.

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defense's reliance on criminal cases "not persuasive." *Id.* According to the court, "There is no indication that the Legislature intended to limit the term 'menace' as applied in cases charging criminal assault to this election statute." *Id.* But as Judge REDFORD correctly observed, *menace* has acquired a distinct meaning throughout the law, not just in the "criminal assault" context. *People v Burkman*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602) (REDFORD, J., concurring in part and dissenting in part); slip op at 2-3. (207a-208a). In other words, there's no indication that *menace* means one thing in criminal law and something else in election law.

The Court of Appeals majority also held—parroting an argument from the prosecution—that limiting *menace* to threats of physical violence would undermine the "purpose" of MCL 168.932(a), which is to prevent "the interference with the exercise of the right to vote as well as a breach of the integrity of the process through interference, i.e., the interruption of the elector in giving his vote." *Burkman*, ___ Mich App at ___ (majority opinion); slip op at 8. (198a). This is a canard. When interpreting a statute, the text controls, not the legislative "purpose" as divined by the prosecution or the Court of Appeals. *Wood*, 506 Mich at 127; *People v Pinkney*, 501 Mich 259, 272; 912 NW2d 535 (2018) ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain

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statutory language.") (cleaned up). To be sure, purpose can help decide "which of various *textually permissible meanings* should be adopted." *Id.* (emphasis in original), quoting *Reading Law*, p 57. But "no text pursues its purpose at all costs." *Wood*, 506 Mich at 127, quoting *Reading Law*, p 57 (cleaned up). And, importantly, voter interference that does not involve threats of physical violence could still be punished through the *other corrupt means or device* portion of the statute. So restricting *menace* to the defense's proposed definition would not, in fact, undermine the statutory purpose.

The Court of Appeals also pointed to "directly or indirectly" as used in the statute, saying, "By the Legislature's allowance for the menace to occur in a direct or indirect manner, the menace may be achieved with or without physical contact." *Burkman*, ___ Mich App at ___; slip op at 8. (198a). The court observed that *indirectly* can be "defined as 'deviating from a direct line or course'; 'not straightforward and open'; and 'not directly aimed at or achieved.'" *Id.*, quoting *Merriam Webster's Collegiate Dictionary* (11th ed). But *indirectly* has a more appropriate definition in this context: *through an intermediary*. See, e.g., *Labelle Mgt v Treas Dep't*, 315 Mich App 23, 36-37; 888 NW2d 260 (2016). See also *People v Shami*, 501 Mich 243, 254; 912 NW2d 526 (2018) (explaining that when a word in a statute is susceptible to multiple definitions, the "selection of the proper definition must be guided by the statutory context in which

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the term appears"). Under this definition, "directly or indirectly" would permit, for example, the leader of a crime syndicate who hatches a widespread voter bribery scheme to be punished the same as the underlings who carry it out. Remember, too, that *indirectly* applies to both *other corrupt means or device* and *bribery*. How could bribery be committed indirectly under the definition endorsed by the Court of Appeals? The defense cannot surmise. *Through an intermediary* is the only definition of *indirectly* that makes sense reading the statute as a whole. So "directly or indirectly" does not support the Court of Appeals' interpretation.

B. A robocall disseminating false information cannot be a "corrupt means or device."

Even if the robocall can be regarded as a knowingly false statement of fact, false statements—standing alone—are not a "corrupt means or device."

1. "Corrupt" does not mean "wrongful."

"Corrupt means or device" as used in MCL 168.932(a) has not been defined by caselaw. *Corrupt*, in the sense used in the statute, is defined by *Black's* as "having unlawful or depraved motives; given to dishonest practices, such as

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bribery." *Black's Law Dictionary* (11th ed) (cleaned up). See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining *corrupt* in this sense as "characterized by improper conduct (such as bribery or the selling of favors)"). Similarly, *Black's* defines *corruptly* as "in a corrupt or depraved manner; by means of corruption or bribery" and explains, "As used in criminal-law statutes, *corruptly* usu. indicates a wrongful desire for pecuniary gain or other advantage." *Black's Law Dictionary* (11th ed) (cleaned up). Likewise, a model jury instruction says, "An act is committed corruptly when it is done with the knowledge that it is wrong and with the intent to get money or to gain some other advantage." M Crim JI 22.12. This instruction defines "corruptly" as used in other bribery statutes. M Crim JI 37.1-37.2a. And this Court has previously approved a jury instruction defining a "corrupt act" as "an act characterized by an intent to gain advantage not consistent with one's official duty and the rights of others." *People v Ewald*, 302 Mich 31, 45; 4 NW2d 456 (1942). In short, *corrupt* is not a synonym for *wrongful* or *improper*; it is a specific kind of wrongdoing aimed at gaining some material advantage.

The Court of Appeals, though, gave a broader definition of *corrupt*, relying on caselaw explicating the crime of misconduct in office:

> This Court has previously explained in the context of misconduct in office that "corrupt behavior" refers to "intentional, purposeful, deliberate, and knowing wrongful behavior."

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> *People v Waterstone*, 296 Mich App 121, 138; 818 NW2d 432 (2012). Our Supreme Court has likewise described "corrupt intent" as a "sense of depravity, perversion or taint." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). Additionally, both lay and legal dictionaries provide similar definitions of corrupt. See *Merriam Webster's Collegiate Dictionary* (11th ed) ("morally degenerate and perverted," "characterized by improper conduct (as bribery or the selling of favors)"; *Black's Law Dictionary* (11th ed) ("[h]aving unlawful *or* depraved motives; given to dishonest practices, such as bribery") (emphasis added). [*Burkman*, ___ Mich App at ___; slip op at 9. (199a).]

At this point, misconduct in office and its "corrupt intent" requirement require exploration.

"At common law, misconduct in office constituted 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.'" *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), quoting Perkins & Boyce, Criminal Law (3d ed), p 543. See also MCL 750.505 ("Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony . . . ."). "An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for

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failing to perform any act that the duties of the office require of the officer, nonfeasance." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), citing Perkins & Boyce, p 540. "In the case of malfeasance and misfeasance, the offender also must act with a *corrupt intent*, i.e., with a 'sense of depravity, perversion or taint.' " *Perkins*, 468 Mich at 456 (emphasis added), citing Perkins & Boyce, p 542.

Michigan's misconduct in office jurisprudence emanates almost entirely from Professors Perkins and Boyce's treatise. A closer look shows that they use "corrupt intent" in an idiosyncratically broad sense. For the proposition that "corruption" "is used in the sense of depravity, perversion or taint," Perkins and Boyce cite *State v Seitz*, 40 Del 572; 4 A2d 710, 711 (1940). But, as Perkins and Boyce note, p 542 n 65, *Seitz* speaks of "evil intent *or* corrupt motive." *Seitz*, 4 A2d at 712 (emphasis added). And elsewhere, *Seitz* holds that malfeasance can be committed with "a dishonest, oppressive *or* corrupt motive." *Id.* at 711 (emphasis added). So the intent element of misconduct of office is broader than *corrupt*. A more fitting phrase is *bad faith*. 67 CJS Officers § 446 ("Bad faith is the essence of the offense . . . ."), citing *Commonwealth v Steinberg*, 240 Pa Super 139, 153; 362 A2d 379 (1976). Or, alternatively, *corrupt* should be regarded as a term of art in the misconduct in office context. The point is that *corrupt* as normally understood does not encompass all wrongful conduct. See *People ex rel Johnson v Coffey*, 237 Mich 591, 601; 213 NW 460

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(1927) (stating that "corruption or criminal intent is not necessarily implied" for malfeasance) (cleaned up). In other words, *corrupt* as used in the misconduct in office caselaw should not be imported to MCL 168.932(a).

This conclusion is buttressed by reference to other sections of the Election Law, which distinguish between misfeasance, malfeasance, and "corrupt conduct." *South Dearborn Envtl Improvement Assn, Inc v Dept of Envtl Quality*, 502 Mich 349, 367 n 16; 917 NW2d 603 (2018) ("Reviewing the entire text requires consideration of the relationship of text within a single statutory provision as well as its relationship to the text of other provisions within the same act."). Under MCL 168.83, "The governor shall have the power and it shall be his duty . . . to examine into the condition and administration of the public offices and the acts of the public officers enumerated herein, and to remove from office for *gross neglect of duty* or for *corrupt conduct in office*, or any other *misfeasance* or *malfeasance* therein . . . ." (Emphasis added). See also MCL 168.293 (containing identical language on removing members of education boards). So under the Election Law, "corrupt conduct" is a subset of wrongful behavior distinct from the broad categories of misfeasance and malfeasance. In other words, corruption is a particular kind of wrongdoing requiring—as argued above—an intent to gain some kind of material advantage.

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What's more, our Court of Appeals has distinguished misconduct in office from bribery. *People v Coutu*, 235 Mich App 695, 707; 599 NW2d 556 (1999). As the court explained, "The corrupt intent needed to prove misconduct of office does not necessarily require an intent for one to profit for oneself." *Id.* But MCL 168.932(a) uses *corrupt* by reference to bribery. This likewise counsels against importing *corrupt* as used in the misconduct in office caselaw to MCL 168.932(a).

2. False statements are not a corrupt means or device.

Moving past the idea that *corrupt* is synonymous with *wrongful*, the question becomes whether false statements qualify as a "corrupt means or device." This Court should answer no.

First, "corrupt means or device" should be interpreted in relation to its neighboring language in MCL 168.932(a). This implicates the associated words or *noscitur a sociis* cannon of statutory interpretation—the "familiar principle of statutory construction that words grouped in a list should be given related meaning." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003) (cleaned up). That is, "words in a statute should not be construed in the void, but should be read together to

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harmonize the meaning, giving effect to the act as a whole." *Id.* at 421 (cleaned up). So while "a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Id.* Here, then, "other corrupt means or device" should be interpreted by reference to "bribery" and "menace."

The history behind MCL 168.932(a) and its antecedents also illuminates its meaning. Reading Law, pp 400-401. Elections in the early years of this country bore little resemblance to modern elections. As recounted thoroughly in *Burson v Freeman*, 504 US 191, 200-206; 112 S Ct 1846; 119 L Ed 2d 5 (1992), in colonial times, many elections used public voice votes (*viva voce*) or shows of hands. *Burson*, 504 US at 200. These methods were eventually repealed given their susceptibility to bribery and intimidation. *Id.* After independence, most states used paper ballots. *Id.* "Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting." *Id.* Later, political parties began printing their own ballots for voters to use. *Id.* "These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance." *Id.* Even when states attempted to standardize their ballots, "the vote buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box." *Id.* And so "the evils associated with the earlier *viva voce* system reinfected the

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election process; the failure of the law to secure secrecy opened the door to bribery and intimidation." *Id.* at 200-201 (cleaned up). "Approaching the polling place under this system was akin to entering an open auction place." *Id.* at 202. As one contemporary observer put it, "In earlier times our polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.'" *Id.* at 204 (cleaned up).

It was within this chaotic milieu that the Legislature enacted 1846 RS, ch 19, § 2. Michigan did not adopt secret ballots until after 1888. *Burson*, 504 US at 202-203. Michigan's current constitution explicitly guards the right "to vote a secret ballot in all elections." Const 1963, art 2, § 4.

"Corrupt means or device" should be interpreted against this historical backdrop and by reference to the adjacent terms "bribery" and "menace." Doing so, it becomes clear that false statements are not a corrupt means or device.[5] Both bribery and menace are criminal acts in

[5] The Information charges that the "menace" or "corrupt means or device" here were false statements made in a telephone message. And at oral argument in the Court of Appeals, in response to a question from one of the judges, the prosecution said that they could prosecute a person under MCL 168.932(a) for speaking the language from the robocall on the street.

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themselves[6] that involve overt, targeted interactions between the perpetrator (or an agent) and the specific victim. False statements, by contrast, are not in themselves criminal or targeted at any victims. Simply put, a robocall—even one containing knowingly false statements—is not in the same league as bribery and menace. It is not a "corrupt means or device" under the statute as that phrase is correctly understood. [7]

Nor is a false statement—standing alone—a *means* or *device*. A *means* is "something that helps to attain an end; an instrument; a cause." *Black's Law Dictionary* (11th ed) (cleaned up). A *device* is "a scheme to trick or deceive; a stratagem or artifice, as in the law relating to fraud." *Id.* (cleaned up). Although both bribery and menace can be accomplished with speech, each contains an illicit stratagem beyond the speech (e.g., money for votes or threats of physical violence to influence votes). In other words, they are verbal acts. See, e.g., *Gompers v Buck's Stove & Range Co*, 221 US 418, 439; 31 S Ct 492; 55 L Ed 797 (1911). False statements, by contrast, are not a means or device in themselves.

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[6] "Menace" is an apprehension-type assault. See *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998).

[7] What would be "other corrupt means or device?" As just one example, blackmail, it seems, would fit neatly among bribery and menace.

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But the Court of Appeals "declined the request to apply *noscitur a sociis* in order to achieve defendants' goal of equating 'corrupt means or device' with menace or bribery." *Burkman*, ___ Mich App at ___; slip op at 9 (cleaned up). (199a). But the defense didn't argue that *other corrupt means or device* should be *equated* with menace or bribery. Instead, the defense argued that *other corrupt means or device* needs to be similarly egregious to bribery and menace and that false statements—standing alone—don't fit the bill.

At bottom, when politicians or political operatives lie or tell half-truths, we call that dishonest. We don't call it corrupt, a label reserved for specific kinds of wrongdoing. If the Legislature had wanted MCL 168.932(a) to prohibit dishonest conduct of every sort, it could have said so. It didn't.

And other states have taken more direct steps toward curbing false statements in politics. Several statutes prohibit attempts to influence legislators through "deceit" and "suppression of truth" in addition to bribery, menace, and corrupt means. See, e.g., Idaho Code Ann 18-4703 ("Every person who gives or offers to give a bribe to any member of the legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote . . . ."); Miss Code Ann 97-7-53 ("Every person who gives or offers to give a bribe to any member of the

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legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means to influence a member in giving or withholding his vote . . . ."); Cal Penal Code 85 ("Every person who gives or offers to give a bribe to any Member of the Legislature, any member of the legislative body of a city, county, city and county, school district, or other special district, or to another person for the member, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his or her vote . . . ."). If false statements were naturally encompassed within "corrupt means," the inclusion of deceit and suppression of truth would have been needless.

Remember, too, that the prosecution alleges that the statements in the robocall are the "corrupt means or device," not the instrumentality of a robocall.[8] Robocalls, as a medium, are amoral. Although often annoying, they are not inherently corrupt. They can even be good. Imagine a robocall a week before the election saying, "The election is Tuesday, November 3; don't forget to vote." No one would call this a "corrupt means or device" for encouraging people to vote. Necessarily, then, the prosecution is seeking to punish Burkman and Wohl for the statements in the robocall, not the fact that they were made via a robocall.

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[8] The prosecution concedes this point. (Pros MSC App Resp, p 8).

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Another hypothetical further illustrates the point.[9] Imagine an organization that wants to turn the United States into a monarchy. Its members disfavor voting altogether because they believe it perpetuates the current democratic system. A week before the election, they release a robocall that says, "Don't vote. Bring monarchy to America. Learn more at AmericansForMonarchy.org." To be sure, the robocall is an attempt to deter people from voting, consistent with the aims of the organization. But would it be a "corrupt means or device?" No. It's a communication of a

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[9] The Court of Appeals declined to engage with any of the defense's hypotheticals, saying that it "must focus on the specifics of the case at hand" since "these hypotheticals were raised in the context of a statutory constructions challenge and not First Amendment freedoms." *Burkman*, ___ Mich App at ___; slip op at 9 n 7. (199a). The court cited *People v Lockett*, 295 Mich App 165, 176; 814 NW2d 295 (2012), for this proposition. *Id.* But *Lockett* addressed a vagueness challenge to a criminal statute. *Lockett*, 295 Mich App at 173-174. In this context, "the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998) (cleaned up). Here, though, the defense is using hypotheticals not as part of a vagueness challenge but to illuminate the meaning behind "other corrupt means or device" as a matter of statutory interpretation. So the Court of Appeals' refusal to interact with the defense's hypotheticals was misguided.

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viewpoint, an opinion. MCL 168.932(a) does not prohibit all deterrents to voting, only corrupt ones. So even a robocall discouraging people from voting is not, in itself, a "corrupt means or device." Instead, what makes a robocall potentially corrupt is its content. It's the content, not the medium, that matters.

From that premise, there's no reason why, under the prosecution's interpretation, "corrupt means or device"—i.e., false statements—couldn't equally apply to one-on-one communication in the privacy of one's home. Imagine two friends, a Republican and a Democrat, having a conversation. The Republican says he's unsure whether he'll vote in the upcoming election. The Democrat, hoping to dissuade the Republican from voting, says, "Don't vote. I'm not voting. Voting is a waste of time. They're all crooks." Suppose the Democrat does plan on voting, though. And, as the Democrat knows, while some politicians might be crooks, they're not all crooks. Under the prosecution's reading of the statute, there's no reason why the Democrat's false statement would not be punishable as a "corrupt means or device." In other words, there's no reason why the Democrat would not be liable for a felony and 5 years in prison. MCL 168.935. The statute cannot reasonably be interpreted to reach such quotidian hyperbole and chicanery.

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False statements, even made knowingly, do not qualify as "bribery, menace, or other corrupt means or device." [10]

Even more acute dangers are posed by the prosecution's interpretation. Remember that the statute also prohibits a person from attempting "to *influence* an elector in giving his or her vote." MCL 168.932(a) (emphasis added). Imagine two coworkers who earn minimum wage. They begin to talk about politics. One coworker says to the other, "Don't vote for Joe Biden. He's going to raise your taxes." President Biden, though, has consistently said that he would not raise taxes on people making less than $400,000. See, e.g., Mengle, *Will Joe Biden Raise Your Taxes?*, Kiplinger, November 9, 2020, available at https://www.kiplinger.com/taxes/601524/will-joe-biden-raise-your-taxes. There's no reason why—under the prosecution's interpretation—the coworker could not be charged under MCL 168.932(a). Such an interpretation raises the specter of selective prosecutions and of prosecutors appointing themselves as arbiters of truth. This is not a credible interpretation of the statute.

Surveying the evidence from the preliminary examination, the Court of Appeals said, "A fact-finder could

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[10] The prosecution may respond that they are only prosecuting Burkman and Wohl because (1) the statements were false and (2) they were widely disseminated via a robocall. But that limiting principle is not self-executing.

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conclude from this evidence that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting." *Id.* at ___; slip op at 10. (200a). In other words, dishonest speech that deters or influences voting is a corrupt means or device. The Court of Appeals failed to acknowledge the startling consequences for political discourse that this interpretation of MCL 168.932(a) could wreak. Again, if a false statement is a corrupt means or device, MCL 168.932(a) criminalizes the mundane mendacity inherent in American politics. The man who says, "Biden will raise your taxes" is guilty of a felony. And who gets to decide what's true versus false speech? Prosecutors. Again, this is not a credible interpretation of the statute.

The district court called Burkman and Wohl's actions "reprehensible." (149a). This Court will likely agree. That doesn't make the robocall criminal. The prosecution of Burkman and Wohl under MCL 168.932(a) is the proverbial square peg in a round hole.

C. A robocall disseminating a person's opinion cannot be a "corrupt means or device."

The robocall in this case should be interpreted as a statement of *opinion*, not fact. The call explicitly states at the beginning that it is from an advocacy organization and merely gives predictions of what will happen if a person

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registers to vote by mail. The call ends by cautioning the listener to "beware of vote by mail." No reasonable person would interpret the call as a statement of absolute truth. Just like no reasonable person would interpret any political commentary as absolute truth. For example, "Donald Trump will ruin the country" is not a statement of fact, it's an opinion. And conveying an opinion cannot be a corrupt means or device. The prosecution has not suggested otherwise.

According to the prosecution, though, because the robocall used the word "will" it purported to convey facts rather than opinions. (Pros MSC App Resp, p 7). So, by that logic, saying "Joe Biden will raise your taxes" is a statement of absolute fact rather than opinion. This Court knows better. Self-assured opinions don't lose their quality as such by using modal auxiliary verbs.

The Court of Appeals held that "for the robocall to be deemed a corrupt means or device, it must be established that defendants deliberately used a wrongful method with a depraved intent to interfere with voting." *Burkman*, ___ Mich App at __; slip op at 11. (201a). According to the court, "Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied." *Id.* (cleaned up). So conveying opinions to influence voters is criminal according to the Court of Appeals. The

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implications of this holding are stunning. By the Court of Appeals' logic, someone who truly believes that Joe Biden will raise taxes (even though Biden has said he won't) and communicates that belief to another person in an attempt to influence that person to not vote for Biden has committed a felony. The Court of Appeals' decision holds the key to radically transforming political discourse in Michigan. Although the panel obviously took a dim view of Burkman and Wohl, it does not appear that they thought through the far-reaching ramifications of their decision.

D. A robocall disseminating plausibly true information cannot be a "corrupt means or device."

If the Court disagrees that the robocall expresses opinion rather than statements of fact, the robocall still cannot be regarded as a corrupt means or device because it communicates information that is plausibly true, or at least not demonstrably false.

As established at the preliminary examination, it is possible for law enforcement and creditors to use the registered voter database in the manner alleged in the robocall.[11] While, according to Craine, the database had

[11] The prosecution offered no evidence that the CDC was not "pushing to use records from mail-in voting to track people for mandatory vaccines." In other words, there is no

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never been used in these ways, this does not make the statements empirically false. "Joe Biden will raise your taxes" is plausibly true, but it could also turn out to be false. Again, "corrupt" refers to dishonesty used to get money or some other material advantage. Communicating plausibly true information cannot be corrupt.

As explored above, the Court of Appeals held, "Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied." *Burkman*, ___ Mich App at __; slip op at 11 (cleaned up). (201a). For the reasons already discussed, that can't possibly be correct. Communicating plausibly true information cannot be corrupt, and the Court of Appeals erred.

E. The robocall did not deter any voter from "giving his or her vote," it only deterred one *method* of voting.

Again, MCL 168.932(a) prohibits—through bribery, menace, or other corrupt means—deterring a person from "giving his or her vote." Here, the robocall's purported

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evidence that this particular statement was false. The burden is not on the defense to prove that the information in the call was true. And something is not false simply because the prosecution says it is.

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purpose was not to deter voting in toto, it was to deter *mail-in* voting, one *method* of voting. As all the prosecution witnesses conceded, the message did not refer at all to in-person voting. (31a, 96a, 140a). This being so, the robocall does not violate the plain language of the statute.

The prosecution has argued that deterring only mail-in voting still violates the statute. That's incorrect. The statute refers broadly to "giving his or her vote." Here, the robocall's purpose was not to deter all voting but only mail-in voting, one *method* of voting. Any voters who received the message still had the traditional option of voting in person. By analogy, discouraging someone from, say, eating oranges would not be deterring them from eating fruit, only one variety of fruit.

Another hypothetical further illustrates why the prosecution's position is incorrect. Imagine that before the 2020 election, an organization worried about the spread of COVID-19 put out a robocall that advised prospective voters to vote by mail rather than in person. The call warns of the dangers of COVID-19—which would be a *menace* under the prosecution's and Court of Appeals' definition—and says that voting by mail is a safe alternative. "Don't vote in person, vote by mail," the robocall concludes. Criminal? By the prosecution's logic, the answer would have to be yes. By discouraging any *method* of voting, the statute is violated according to the prosecution. But common sense says otherwise. The call is not discouraging voters from casting a

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ballot in the election; it's only discouraging one *way* of casting a ballot. Here, by the same token, Burkman and Wohl's robocall did not discourage people from voting, only from voting by mail. So the call did not deter any voters "in giving his or her vote."

According to the prosecution, though, the robocall deterred all voting because people were hesitant to vote in person during the COVID-19 pandemic. The trial court agreed, saying, "In the fall of 2020 when these were going out, we had a worldwide pandemic going on, where people were being encouraged to stay in their home and not leave their home if they don't have to." (179a). The Court of Appeals agreed, saying, "Our nation was in the midst of the COVID-19 pandemic, such that in-person voting carried with it a serious risk to a voter's health." *Burkman*, ___ Mich App at ___; slip op at 10. (200a).

But such musings—even if true—are not borne out by the record. Cases are decided on facts established on the record. Here, the prosecution presented no evidence that anyone anywhere declined to vote in person because of fear of catching COVID-19. If this fear were as widespread as the prosecution claims, it should have been easy to find a witness to testify to that effect at the preliminary examination. Instead, the prosecution has preferred to rely on its conception of "the political situation existing prior to the election." (Pros COA App Resp, p 15).

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The Court of Appeals held that "whether defendants influenced, deterred, or interrupted electors from giving their votes under these circumstances is a question of fact." *Burkman*, ___ Mich App at ___; slip op at 10. (200a). But the undisputed facts show that the message applied only to mail-in voting, not in-person voting. So there is no question of fact to resolve.

F. The prosecution has not provided any evidence that Burkman and Wohl *knew* that the information in the robocall was false.

MCL 168.932(a) does not have an explicit mens rea requirement. Still, it is presumed that criminal statutes require the defendant to have a culpable mental state. *Rehaif v United States*, ___ US ___, ___; 139 S Ct 2191, 2195; 204 L Ed 2d 594 (2019). Also, the acts proscribed by MCL 168.932(a)—bribery, menace, and other corrupt means or devices—by their very nature require knowledge and intent. There's no such thing as negligent bribery or unwitting menace.[12] And, as discussed above, *corrupt* and

[12] Bribery requires a "corrupt intent." *People v Ritholz*, 359 Mich 539, 554; 103 NW2d 481 (1960). And an apprehension-type assault requires the intent to put the victim in fear. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718

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corruptly require, at a minimum, dishonest or depraved motives, i.e., knowing and intentional wrongdoing. Here, then, the prosecution must show that Burkman and Wohl *knew* that the statements in the robocall were false.

This the prosecution has not done. Although the prosecution presented sufficient evidence at the preliminary examination to infer that Burkman and Wohl intended to deter mail-in voting, there was zero evidence demonstrating—directly or circumstantially—that they were aware of the purported falsity of the statements. Because the prosecution introduced no evidence on this element, the bindover should be quashed. *Shami*, 501 Mich at 250 (stating that a bindover requires sufficient evidence on each element or evidence from which each element can be inferred).

As explored above, the Court of Appeals held, "Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied." *Burkman*, ___ Mich App at __; slip op at 11 (cleaned up). (201a). Again, this is not a credible interpretation of the statute.

(1979); M Crim JI 17.1(3) ("An assault cannot happen by accident.").

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G. At best, whether Burkman and Wohl's conduct falls within the statute is ambiguous, and this Court should apply the rule of lenity.

As the foregoing discussion shows, at a minimum, whether MCL 168.932(a) applies to the robocall here is ambiguous. This being so, the Court should apply the rule of lenity. "The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (cleaned up). The rule applies "in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). The rationale for the rule is deeply rooted in our criminal law jurisprudence: " 'It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment' " *People v Bergevin*, 406 Mich 307, 312; 279 NW2d 528 (1979), quoting *Bell v United States*, 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955).

For the reasons discussed above, at the very least, it is unclear whether statements—even knowingly false ones—fit the definition of "menace" or "other corrupt means or

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device." Applying the rule of lenity, the charges should be dismissed.[13]

II. MCL 168.932(a) is unconstitutional on its face and as applied to Burkman and Wohl.

Issue Preservation

This issue was raised before and decided by the trial court, so it is preserved for appellate review. *Dupree*, 486 Mich at 703.

Standard of Review

A trial court's decision on a motion to quash is reviewed for an abuse of discretion. *March*, 499 Mich at 397. But where "a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id.*

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[13] Consistent with its analysis as discussed above, the Court of Appeals found MCL 168.932(a) unambiguous. *Burkman*, ___ Mich App at ___; slip op at 11-12. (201a-202a).

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Here, the facts are largely undisputed. The question is the constitutionality of MCL 168.932(a). So this Court's review is primarily de novo.

Analysis

If this Court interprets MCL 168.932(a) to reach the robocall in this case, then MCL 168.932(a) is unconstitutional.[14]

Under the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const, Am I. The right to free speech has been incorporated against the states. *Gitlow v New York*, 268 US 652; 45 S Ct 625; 69 L Ed 1138 (1925). The Michigan Constitution likewise protects the freedom of speech: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and

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[14] Concomitantly, the constitutional problems posed by a broad reading of MCL 168.932(a) counsel in favor of endorsing a narrow reading, because "whenever possible, interpretations that result in constitutional invalidity will be avoided." *Washtenaw Cnty. v State Tax Comm'n*, 422 Mich 346, 371; 373 NW2d 697 (1985).

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no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, Art I, § 5.

The defense raises two varieties of constitutional arguments here. First, the defense argues that MCL 168.932(a) is constitutionally invalid on its face. Second, the defense argues that if MCL 168.932(a) can be interpreted to cover the robocall in this case, it is unconstitutional as applied. As with the statutory interpretation arguments, finding caselaw on point has been challenging. The prosecution of Burkman and Wohl is unprecedented in Michigan and is seemingly without any analogue throughout the country.

A. FACIAL CHALLENGES

1. MCL 168.932(a) is void for vagueness because "other corrupt means or device" is insufficiently defined.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). "A criminal statute ought to be so plain and unambiguous that 'he who runs' may read, and understand whether his conduct is in violation of its provisions." *Pinkney*, 501 Mich at 268 (cleaned up). Three rationales justify invalidating vague criminal

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statutes. First, the law must provide "fair warning": "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 US at 108. Second, vague laws beget "arbitrary and discriminatory enforcement." *Id.* at 108-109. Third, and specific to the First Amendment context, vague laws can chill free speech. *Id.* at 109. So statutes that criminalize speech must be closely scrutinized. *Reno v ACLU*, 521 US 844, 871-872; 117 S Ct 2329; 138 L Ed 2d 874 (1997). See *id.* at 870-874 (statute criminalizing online transmission of "indecent" and "patently offensive" communications unconstitutionally vague).

Consider *People v Boomer*, 250 Mich App 534, 536; 655 NW2d 255 (2002).[15] There, the defendant "loudly uttered a stream of profanities" while canoeing on a popular river with children present. *Boomer*, 250 Mich App at 535-536. The defendant was prosecuted and convicted under MCL 750.337, which provides, "Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." *Id.* at 536. The Court of Appeals reversed, saying that "it would be difficult to conceive of a statute that would be more vague than

[15] *Boomer* has been cited favorably by this Court. *People v Harris*, 495 Mich 120, 136; 845 NW2d 477 (2014).

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MCL 750.337." *Id.* at 540. The court explained, "There is no restrictive language whatsoever contained in the statute that would limit or guide a prosecution for indecent, immoral, obscene, vulgar, or insulting language." *Id.* The court found that the statute failed to provide fair notice of its prohibitions, encouraged arbitrary and discriminatory enforcement, and impinged on free speech. *Id.* at 540-542.

Here, the phrase "other corrupt means or device," in particular, is vague.[16] The statute gives no definition of the phrase. See *Reno*, 521 US at 865 (noting that "indecent" was not defined in the statute). And under the prosecution's theory, the statute could apply not only to robocalls but also one-to-one private speech. Should a person of ordinary intelligence know that false statements ("Joe Biden will raise your taxes") uttered to a friend in the privacy of his home are a "corrupt means or device," subjecting the speaker to felony liability and up to 5 years in prison? What about statements that are recklessly false? Or negligently false? Or true but misleading? What about unverifiable but plausibly true statements? Or political hyperbole and puffery? The language of MCL 168.932(a) does not answer these questions. "This uncertainty undermines the likelihood that the [law] has been carefully tailored to" its goal of protecting the integrity of elections. *Reno*, 521 US at 871.

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[16] As argued above, *menace* should be interpreted to mean a threat of physical violence. If this Court disagrees, then *menace* is also vague.

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The phrase "corrupt means or device" is simply too vague. There is no restrictive language limiting or guiding prosecutors. *Boomer*, 250 Mich App at 540. It does not provide fair notice of what it entails, invites arbitrary enforcement, and chills free speech.

The Court of Appeals found that the statue is not vague because, based on the accepted definition of *corrupt*, "a person of reasonable intelligence should understand that he or she violates MCL 168.932(a) by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting." *Burkman*, ___ Mich App at ___; slip op at 12 (cleaned up). (202a). But this is internally inconsistent with the panel's earlier finding that even unknowingly false speech is proscribed by the statute. *Id.* at ___; slip op at 11. (201a). That the Court of Appeals—within the same opinion—interpreted the statute to mean different things at different points is further evidence that the statute is vague.

2. MCL 168.932(a) is overbroad because even false speech is constitutionally protected.

A law is overbroad where it criminalizes "a 'substantial' amount of free speech." *Virginia v Hicks*, 539 US 113, 118; 123 S Ct 2191; 156 L Ed 2d 148 (2003). This inquiry is made without reference to the facts of the specific case at hand.

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Id. In other words, even where a statute may have legitimate applications, if it sweeps too broadly, this "suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 119 (cleaned up). The rationale is that overbroad laws chill constitutionally protected speech. See *Ashcroft v Free Speech Coalition*, 535 US 234, 244; 122 S Ct 1389; 152 L Ed 2d 403 (2002).

Here, assuming that "corrupt means or device" applies only to knowingly false speech, it is overbroad. MCL 168.932(a) is "content based," meaning it "requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v Coakley*, 573 US 464, 479; 134 S Ct 2518; 189 L Ed 2d 502 (2014) (cleaned up). The United States Supreme Court has permitted content-based restrictions on speech in only a "few historic and traditional categories of expression long familiar to the bar." *United States v Alvarez*, 567 US 709, 717; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (cleaned). These include true threats, obscenity, defamation, and fighting words. *Id.* at 717.

But, as established by *Alvarez*, not among these categories is false speech. In *Alvarez*, the defendant falsely claimed to have received the Congressional Medal of Honor. *Id.* at 713-714. In doing so, he violated the Stolen Valor Act, which made it a crime to lie about receiving a

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military medal or decoration. *Id.* at 715-716. The defendant argued that the act violated the First Amendment. *Id.* The Supreme Court agreed. The Court first held that "false speech" is not categorically unprotected: "Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." *Id.* at 718. As the Court explained, "Some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* The Court noted that the Stolen Valor Act "would apply with equal force to personal, whispered conversations within a home." *Id.* "And it does so," the Court added, "entirely without regard to whether the lie was made for the purpose of material gain." *Id.* at 723.

Here, the prosecution has relied on the true threat exception. *Burkman*, ___ Mich App at ___; slip op at 6. (196a). " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). The Court of Appeals readily dispensed with the prosecution's reliance on the true threat exception, explaining that the robocall did not contain a threat of unlawful violence. *Burkman*, ___ Mich App at ___; slip op at 13-14. (203a-204a). On this score at least, the panel was correct.

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When a statute criminalizes protected speech, it must survive "strict scrutiny," that is, it must be narrowly tailored to fulfill a compelling governmental interest. See, e.g., *United States v Playboy Entmt Group, Inc*, 529 US 803, 813; 120 S Ct 1878; 146 L Ed 2d 865 (2000). Put differently, the restriction must be " 'actually necessary' to achieve its interest." *Alvarez*, 567 US at 725. This demands "a direct causal link between the restriction imposed and the injury to be prevented." *Id.* The government bears the burden of establishing that a content-based speech restriction is actually necessary. *Id.* at 716-717. "Content-based regulations are presumptively invalid." *RAV v City of St Paul, Minn*, 505 US 377, 382; 112 S Ct 2538; 120 L Ed 2d 305 (1992).

Once more, *Alvarez* is instructive. While the Court found that the government had a compelling interest in "protecting the integrity of the Medal of Honor," *id.* at 725, the Court concluded that the government had not shown that the Stolen Valor Act was actually necessary. First, the government had provided "no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez." *Id.* at 726. Second, the government had not shown "why counterspeech would not suffice to achieve its interest." *Id.* In Alvarez's case, for instance, his lie was quickly exposed without government intervention, and he was widely "ridiculed." *Id.* at 726-727. "Indeed, the outrage and contempt

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expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose." *Id.* at 727. Finally, the Court found that there was at least one less restrictive means to protect the integrity of military honors—a government-maintained database of recipients. *Id.* at 729. At bottom, "the remedy for speech that is false is speech that is true. This is the ordinary course in a free society." *Id.* at 727 (cleaned up).

Here, there's no question that protecting the integrity of elections is a compelling governmental interest. But there has been no showing that criminalizing false speech is necessary to fulfill this interest. Again, the burden is on the government to show why imposing criminal liability is necessary in this context. *Id.* at 716-717. Remarkably, the government has not even attempted to argue that MCL 168.932(a) is narrowly tailored. (Pros Cir Ct Mot Resp, p 22-24; Pros COA Br, p 22-23). "[T]he mere fact that a statutory regulation of speech was enacted for [an] important purpose . . . does not foreclose inquiry into its validity." *Reno*, 521 US at 875.

Nor could the prosecution show that MCL 168.932(a) is actually necessary to protect the integrity of elections. First, "the Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Alvarez*, 567 US at 726 (cleaned up). Here, for example, the robocall was quickly pilloried by the media, and

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there's nothing in the record to indicate that anyone was actually deterred from voting by mail. Instead, "the outrage and contempt expressed for" the robocall served "to reawaken and reinforce" the integrity of the election. *Id.* at 727.

Second, imposing criminal liability is not narrowly tailored. There has been no showing, for instance, why a civil sanction, as opposed to a criminal one, would not suffice. See *United States v X-Citement Video, Inc*, 513 US 64, 86; 115 S Ct 464; 130 L Ed 2d 372 (1994) (SCALIA, J., dissenting) ("I would find the statute, as so interpreted, to be unconstitutional since, by imposing criminal liability upon those not knowingly dealing in pornography, it establishes a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities."). For example, in *Gertz v Robert Welch, Inc*, 418 US 323, 350; 94 S Ct 2997; 41 L Ed 2d 789 (1974), the Court generally disallowed punitive damages for defamation cases, finding that punitive damages could be used "to punish expressions of unpopular views" and could also chill speech. If punitive damages infringe too far on free speech, so too can criminal penalties in certain cases. Here, given that this is apparently the first case ever prosecuted under MCL 168.932(a)

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or its antecedents to make its way to this Court, felony liability smacks of overkill.[17]

Because MCL 168.932(a) criminalizes protected speech, and because the government has not shown that MCL 168.932(a) is narrowly tailored to protect a compelling governmental interest, it is overbroad and unconstitutional.

Yet the Court of Appeals declined to address the defense's facial overbreadth challenge, relying on two propositions. First, the court claimed, "Defendants characterize this argument as a facial challenge, but only present arguments regarding the breadth of the statute as applied specifically to the robocall message." *Burkman*, ___ Mich App at ___; slip op at 13. (203a). Second, the court said, " 'A facial challenge attacks the statute itself, and requires the challenger to establish that no set of circumstances exist under which the act would be valid. The fact that the act might operate unconstitutionally under some conceivable set of circumstances is insufficient.' " *Id.*, quoting *People v Johnson*, 336 Mich App 688, 692; 971 NW2d 692 (2021) (cleaned up). But neither proposition is correct.

First, the defense did not only present arguments on the scope of the statute as applied to the robocall. The defense very clearly argued that the statute was overbroad without

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[17] Bribing or menacing voters was originally a misdemeanor, not a felony. 1846 RS, ch 19, § 2.

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focusing solely on the robocall. (Def COA Brs, p 28-33). The defense even noted that a facial overbreadth challenge considers the statute "without reference to the facts of the specific case at hand." (Def COA Brs, p 28, citing *Hicks*, 539 US at 118). So, respectfully, the defense finds this portion of the Court of Appeals' analysis bewildering.

Second, the Court of Appeals stated the wrong test for facial overbreadth challenges in the First Amendment context. When a defendant argues that a criminal statute is overbroad, the defendant must ordinarily show that the law could not be validly applied under any set of circumstances. *Johnson*, 336 Mich App at 692. This is the test the Court of Appeals relied on here. But a different test is used when First Amendment concerns arise: "The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges." *Hicks*, 539 US at 118. See also *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000). The doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *Chmura*, 461 Mich at 530. So the Court of Appeals' refusal to entertain the defense's facial challenge to MCL 168.932(a) emanates from a fundamental misunderstanding of First Amendment jurisprudence.

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B. AS-APPLIED CHALLENGES

1. The robocall contains opinions, and opinions cannot beget criminal liability.

As argued above, the robocall was a statement of opinion and prediction rather than a statement of absolute truth. Conveying an opinion cannot form the basis for criminal liability. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 US at 339-340. So MCL 168.932(a) is being applied unconstitutionally to Burkman and Wohl, and the charges should be quashed.

Recall that the Court of Appeals held that conveying opinions can create liability under MCL 168.932(a). So that court has endorsed an unconstitutional interpretation of the statute.

2. The statements in the robocall are plausibly true, and the First Amendment does not countenance prosecutions for conveying plausibly true facts.

As argued above, if the Court disagrees that the robocall expresses opinion rather than statements of fact, the robocall communicates information that is plausibly true.

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Under the First Amendment, a speaker cannot be prosecuted for disseminating information that is plausibly true. Only knowing or reckless falsehoods can potentially be proscribed. *Alvarez*, 567 US at 719. And even then, false statements are not categorically unprotected speech. *Id.* at 720. It follows that conveying information that is possibly true but turns out to be false cannot give rise to criminal liability.

Again, the Court of Appeals held that conveying plausibly true facts can be criminal under MCL 168.932(a), which is unconstitutional.

3. Even if the robocall was knowingly false, the statements in the call are still constitutionally protected.

Even if the robocall can be regarded as a knowingly false statement of fact, and even if false statements are a *corrupt means or device* under the statute, the statements in the robocall are still constitutionally protected. Again, the falsity of a statement is generally not enough to make it constitutionally unprotected. *Alvarez*, 567 US at 718. To be unprotected, the statement must otherwise fit within one of the traditional categories of unprotected speech. *Id.* at 717.

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Here, the prosecution has relied on the true threat exception. But as explored above, the Court of Appeals correctly held that the true threat exception does not apply because the robocall does not contain threats of unlawful violence.

The Court of Appeals instead relied on the "speech integral to criminal conduct" exception. *Burkman*, ___ Mich App at ___; slip op at 14. (204a). The court described this exception thus:

> *Giboney v Empire Storage & Ice Co*, 336 US 490; 69 S Ct 684; 93 L Ed 2d 834 (1949), the authority commonly cited for this exception, involved an injunction against peaceful picketing at an ice distribution facility by members of an ice peddlers union. *Id.* at 491-492. The union members' goal was to compel the ice distributor to stop selling to nonunion peddlers, contrary to a state statute prohibiting participation in any "pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition . . . ." *Id.* at 491 n 2, 492. Had the distributor agreed to stop selling ice to nonunion members, it too would have been in violation of the state antitrade restraint law. *Id.* at 493. The union peddlers argued, in part, that the injunction violated the First Amendment freedom of speech because they were merely publicizing truthful facts in a peaceful manner. *Id.* at 497-498. But the Supreme Court disagreed, reasoning that the "sole immediate object of the publicizing adjacent to the premises of

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> [the distributor] . . . was to compel [the distributor] to agree to stop selling ice to nonunion peddlers," contrary to state law. *Id.* at 498. The Court concluded that freedom of speech did not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502. [*Burkman*, ___ Mich App at ___; slip op at 14-15. (204a-205a).]

Relying on this understanding of the speech integral to criminal conduct exception, the Court of Appeals said, "Here, the purpose of MCL 168.932(a) is to preserve and protect the right to vote, a compelling state interest." *Id.* at ___; slip op at 15. (205a). "The statute carries out this goal," the court continued, "by prohibiting influencing, deterring, or interrupting an elector from giving his or her vote by way of bribery, menace, or other corrupt means or device." *Id.* "Like the picketing in *Giboney*," the court concluded, "the speech was an integral part of conduct criminalized by MCL 168.932(a) and should not be constitutionally protected merely because the conduct was 'carried out by means of language.' " *Id.*

Giboney and the speech integral to criminal conduct exception are controversial. See, e.g., Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev

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981 (2016). " 'Under the broadest interpretation, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense.' " *Buchanan v Crisler*, 323 Mich App 163, 186; 922 NW2d 886 (2018), quoting *United States v Matusiewicz*, 84 F Supp 3d 363, 369 (2015). As Professor Volokh has explained:

> The *Giboney* doctrine can't justify treating speech as "integral to illegal conduct" simply because the speech is illegal under the law that is being challenged. That should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal. Yet many lower courts have indeed cited *Giboney* for the proposition that speech loses its protection just because it is made illegal. *Giboney* has thus become, at times, a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down. [*The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev at 987-988 (cleaned up).]

This is precisely what happened here. Boiled down, the Court of Appeals' analysis goes like this: MCL 168.932(a) criminalizes false speech used to deter voting, so the

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robocall was integral to the criminal conduct proscribed by the statute. *Burkman*, ___ Mich App at ___; slip op at 15. (205a). But again, speech cannot be integral to criminal conduct simply because a statute prohibits it. Instead, the speech "must help cause or threaten *other* illegal conduct." *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev at 1011 (cleaned up). So the Court of Appeals' reliance on the speech integral to criminal conduct exception was misplaced.

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RELIEF REQUESTED

The defense asks this Court to reverse the lower courts' decisions and order that the charges against Burkman and Wohl be dismissed.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Letica, PJ., Redford and Rick, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs-Appellees, v JOHN MACAULEY BURKMAN, Defendant-Appellant. _____/	Supreme Court No. 164638 Court of Appeals No. 356600 Wayne County Circuit Court No. 20-004636-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs-Appellees, v JACOB ALEXANDER WOHL, Defendant-Appellant. _____/	Supreme Court No. 164639 Court of Appeals No. 356602 Wayne County Circuit Court No. 20-004637-FH

CORRECTED BRIEF ON APPEAL OF APPELLEES PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellee People of the State of Michigan accepts the statement of jurisdiction by Defendants-Appellants John Macauley Burkman and Jacob Alexander Wohl.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This Court has directed the parties to address two specific questions:

1. Did the Court of Appeals properly interpret MCL 168.932(a)?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

2. Is MCL 168.932(a) unconstitutional on its face or as applied to the defendants-appellants?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, U.S. Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MCL 168.932(a) provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> (a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

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INTRODUCTION

In a blatant attempt to suppress the minority vote during the 2020 Presidential Election, John Burkman and Jacob Wohl sent a robocall message into specific zip codes in cities with high Black populations. The robocall message implicitly threatened the liberty as well as the financial and physical harm of those voting by mail in the election.

Sent during the height of the pandemic, when public gatherings were being discouraged, the call warned recipients not to be finessed into giving their private information to "the man," and to beware of vote by mail. The message asserted that if a person votes by mail his or her personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts. It further asserted that the Center for Disease Control and Prevention (CDC) is pushing to use records from mail-in voting to track people down for mandatory vaccination.

As a result of this robocall message, criminal and civil proceedings were initiated against Burkman and Wohl in several different jurisdictions. Based on this robocall message to Detroit voters, Burkman and Wohl were charged with violating Michigan's voter intimidation statute, MCL 168.932(a). That statutory provision makes it a crime by means of "menace" or "corrupt means or device" to influence an election or to deter someone from voting:

> A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

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The issues presented in this interlocutory appeal are (1) whether MCL 168.932(a) applies to the conduct demonstrated in this case, and (2) whether this robocall is constitutionally protected by the First Amendment. The answers are first, yes, the record developed at the preliminary examination is sufficient to establish the elements of the crime, and second, no, the false message by Burkman and Wohl is not constitutionally protected. Michigan's voter intimidation law is constitutional.

The targeting of minority voters, the defendants' stated goal of "hijacking this boring election," and other facts and circumstances surrounding the publishing of the robocall are sufficient to raise a question of fact as to whether Burkman and Wohl unlawfully intended to deter minority electors from voting in this election. Viewed in proper context, the common definitions of those terms establish that "menace" and "a corrupt means or device" were both used as methods to achieve the goal of deterring voting.

The term "menace" is generally defined as a show of an intention to inflict harm. While here there is a subtle threat to do physical violence in the assertion that voting records may be used to track people down for mandatory vaccinations, the threats to financial and liberty interests are also within the accepted definition of the term. "Menace" is not limited to threats of physical assault.

Likewise, the term "corrupt means or device" is generally viewed as intentional, purposeful, deliberate and knowingly wrongful behavior. Here, the record below establishes that the defendants acted with the intent to "hi-jack this

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boring election." That alone is sufficient to establish a question of fact as to whether the robocall message was a "corrupt means or device" used as a method to deter voting. The evidence here was more than sufficient to bind them over on this charge.

Furthermore, with regard to the second question, this robocall is outside of constitutional protection. While the First Amendment generally protects speech, there are certain well-established exceptions to its protections. There are at least two exceptions that apply in this case: (1) speech integral to criminal conduct; and (2) true threats. Based on each exception, the speech at issue here is not constitutionally protected. And MCL 168.932(a) is not unconstitutionally vague or overbroad.

For the reasons stated and discussed in this brief, this Court should affirm the decision below and remand the case to the trial court for a trial on the merits.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Defendants John Macauley Burkman and Jacob Alexander Wohl were charged in a complaint and warrant with the offenses of: (1) Election Law–Bribing/Intimidating Voters, in violation of MCL 168.932(a); (2) Conspiracy To Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 750.157a and MCL 168.932(a); (3) Using a Computer to Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 752.796, MCL 752.797(3)(d) and MCL 168.932(a); and (4) Using a Computer to Commit Conspiracy To Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 752.796, MCL 752.797(3)(d), MCL 750.157a and MCL 168.932(a).

The gravamen of the charges is that the defendants attempted to unfairly affect the outcome of the 2020 General Election by suppressing the vote in minority communities. They conspired with each other to send a robocall message into communities with a high minority population. Their message falsely claimed that mail-in voting records would be used by law enforcement to execute outstanding warrants and by creditors to collect on outstanding debts. The caller also falsely implied that the CDC was seeking to use mail-in voting records to ensure mandatory vaccinations. The message warned against being finessed by "the man" into giving personal information. The defendants used computers and computer systems throughout the conspiracy, and as a vehicle to deliver their false and intimidating message to minority voters.

The matter came before a 36th District Court Judge for preliminary examination on October 29, 2020. The People presented three witnesses, one who

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received one of these false robocalls from Burkman and Wohl, the officer who investigated the matter and further linked the calls to the defendants (including their admissions in federal court), and an elections official from the Secretary of State, who explained that the information contained in the robocalls was false.

To begin**, Derrick Thomas** testified that he was a 62-year-old retired firefighter who resides in the City of Detroit. (App'x, PE 10/29/20, 11a, 35a). He is a qualified elector who has been voting for many years. (App'x, PE 10/29/20, 11a–12a). He intended to vote in the 2020 General Election. (App'x, PE 10/29/20, 26a). Mr. Thomas testified to receiving and listening to a robocall that was made to his land-line telephone at 11:16 a.m. on August 26, 2020. (App'x, PE 10/29/20, 12a–14a, 23). He stated that he had caller ID on his telephone, and the number appearing on the caller ID was 703-795-5364. (App'x, PE 10/29/20, 18a). Mr. Thomas identified an audio recording as a true and accurate recording of the robocall he received, and the recording was admitted into evidence as Exhibit 1. (App'x, PE 10/29/20, 15a). The content of the recorded robocall is as follows:

> Hi, this is Tamika Taylor from Project 1599, a civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The [Center for Disease Control and Prevention (CDC)] is even pushing to use records from mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the man. Stay safe and beware of vote by mail. [App'x, Exhibit 1, 192a–193a.]

Jeffrey Campbell testified that he is a Special Agent for the Michigan Department of Attorney General with over 25 years' experience in law enforcement.

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(App'x, PE 10/29/20, 43a, 81a). He was assigned to lead the investigation into the robocall that was admitted as Exhibit 1. (App'x, PE 10/29/20, 44a–45a, 79a). After discussing the robocall with Mr. Thomas, he drafted a search warrant to U.S. Telecom, a trade association of the major telecommunication service providers, to trace the origin of the robocall. (App'x, PE 10/29/20, 45a–46a). U.S. Telecom responded to the search warrant with information that caused him to draft a second search warrant for the records of Message Communications, a Los Angeles, California whose president was Robert Mahanian. (App'x, PE 10/29/20, 46a).

Message Communications provides robocall services for paying clients. S/A Campbell described the process:

> The client can sign up for those services by way of online applications. They essentially can provide whatever recording that they wish to upload into the account. They pay for the services, either by check or by electronic transmission through that website. They can schedule the robo calls that they wish to go out. They can use databases as they upload or pick from existing databases by zip code and schedule the robo calls to go out that way, on their own. It, essentially, allows clients to manage their own campaign through the on-line service. [App'x, PE 10/29/20, 89a–90a.]

A search warrant regarding Message Communications was issued by a California judge. (App'x, PE 10/29/20, 46a). S/A Campbell participated in the execution of that search warrant along with another Michigan Attorney General Special Agent and California law enforcement agents. (App'x, PE 10/29/20, 46a–47a). During the execution of the warrant, the officers found electronic communications between Mahanian and JackBurkman2016@gmail.com and JacobWohl@gmail.com. (App'x, PE 10/29/20, 48a). Based on this information S/A

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Campbell obtained a search warrant for subscriber information and records from Google. (App'x, PE 10/29/20, 49a).

Google responded to the search warrant by providing records electronically through a portal available only to law enforcement. (App'x, PE 10/29/20, 49a–50a). Along with the records, Google provided a Certificate of Authenticity attesting to the accuracy of the records kept in the normal course of business. (App'x, PE 10/29/20, 50a–52a).

A series of documents was marked as proposed Exhibit 8. S/A Campbell identified this exhibit as some, but not all, of the emails provided by Google in response to the search warrant. (App'x, PE 10/29/20, 52a). The documents in the proposed exhibit were Bates stamped for easy reference. (App'x, PE 10/29/20, 54a). Exhibit 8 was admitted into evidence pursuant to MRE 902(11) as certified records of regularly conducted activity. (App'x, PE 10/29/20, 53a). S/A Campbell then read portions of the exhibit into the record.

S/A Campbell identified Exhibit 8, Bates stamp 11 as an email chain:

> Okay. This email says in subject line regarding Dem dated August 19th, of 2020 at 11:49. It's from Jack Burkman 2016 Gmail, to Jacob Wohl Gmail.com first part of email, yes America needs W.B. This is in response to an email sent by Jacob Wohl email to Jack Burkman, 2061 (sic) at Gmail.com on Wednesday August 19th, that's 11:40 a.m. That message says Bill Clinton . . . dem convention speech viewership on-line stream total viewership, ABC, 727, CBS 424, NBC 196, no, I'm not missing any zeros. Our press conference is literally get [sic] 50 to a hundred times more views, which is why ***we must hi-jack this boring election***. [App'x, PE 10/29/20, 55a–56a (emphasis added).]

S/A Campbell then went on to read into the record other emails that were part of Exhibit 8:

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This is an email, it says on the subject line, Robert and it's dated August 22nd, 2020, at 2:48. It's from Jack Burkman, 2016 at Gmail.com to Robert at MessageCommunications.Com and Jacob Wohl@gmail.com. It says want to make sure check arrived. ***We are ready to begin the robo calls.*** [*Id.* at 58a (emphasis added).]

This one also says in the subject line regarding Robert, it's dated August 23rd, 2020 at 332. It's from Robert at Message Communications.com to Jack Burkman 2016@gmail.com and Jacob Wohl@Gmail.com. It says Hi Jack. The check hasn't arrived yet, but I'll check again on Monday morning. Do you have a tracking number for it? As soon as I receive it, I'll send over the paid invoice showing both payments in 2020 for 2000 dollars. Thank you, again and signed by Robert Mahanian. [*Id.* at 58a–59a.]

This email says robo call tape in the subject line. It's dated August 25th, of 2020 and 0010. It's from Jacob Wohl@Gmail.com to Jack Burkman 2016@Gmail.com. It says ***attached is the audio file for the robo call. We should send it to black neighborhoods in Milwaukee, Detroit, Philadelphia, Charlotte, Richmond, Atlanta and Cleveland . . .*** it showed down the bottom of the page, you see there was [sic] indications of attachments at the bottom that said **1599 vote by mail, robo call.wav.** In the Google records provided to me, that is an actual attachment of an audio recording that is the mail in voting recording that went out on August 26th, 2020. [*Id.* at 59a (emphasis added).]

This email message on the subject line ***working on robo now***. It's dated August 25th, of 2020 at 1751. It's from Burkman 2016@Gmail.com to Jacob Wohl@gmail.com. It says ***Cleveland, Philadelphia, Minnesota, Chicago, New York City and Detroit.*** [*Id.* (emphasis added).]

This one says subject line, robo, it's dated August 25th, 2020, 1848 hours from Jack Burkman 2016@gmail.com to Jacob Wohl@gmail.com. The message says ***data all loaded, ready. Many zip codes***. We have two wavs, the 267,000 calls each. If you could do me one favor, just go in and upload the recording. Message Communications.Com account 12013, pass code 5202. Then I will enable, pick days and go in and hit go. [*Id.* at 60a (emphasis added).]

The emal (sic) regarding got call uploaded. It dated ***August 26th, 2020 at 10:47***. It's fromRobert@Messagecommunications.com to Jacob Wohl@Gmail.com and Jack Burkman 2016@Gmail.com. The message

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says yes, ***your campaign is currently running and recording***, uploaded about 20 minutes ago, is running. I believe you are all set. It's signed Robert Mahanian and it's in response to the email message on this page just below it. [*Id.* at 60a (emphasis added).]

This one says on of [sic] the subject line regarding the got call uploaded, August 26th, 2020, 10:51 a.m. Jack Burkman2016@Gmail.com to Jacob Wohl@Gmail.com. It says ***great job*** in response to an email from Jacob Wohl at Gmail.com, that says ***I just uploaded the wav file.*** You can successfully update the calls per minute number to the maximum. We should be ready to go now. [*Id.* at 60a–61a (emphasis added).]

In the subject line robo. It's dated August 26th, 1527. It's from Jacob Wohl@Gmail.com to Jack Burkman@2016 Gmail.com. It says robo getting quite a bit of play on Twitter. I think they will have to write. [*Id.* at 61a.]

This one says in the subject line regarding protests dated August 26th, 2020 at 1236, it's from Jack Burkman2016@Gmail.com to Jacob Wohl@Gmail.com, it says let's leave Thursday 6:30 p.m. with Louis Thursday. ***I love these robo calls getting angry black call backs, win or lose, the black robo calls was a great idea.*** This is in response to an email sent by Jacob Wohl@ Gmail.com regarding, it says the writers are starting their mayhem tomorrow at 7 p.m. Black Lives Matter plaza formerly known as Lafayette Square. We should definitely get Louis and bull horns. [*Id.* (emphasis added.]

This one is an email that says in subject line Deny, it's dated August 27th of 2020 at 1234. It's from Jacob Wohl@Gmail.com to Jack Burkman2016@Gmail.com. It says deny to Will, ex cetera, regarding robo. That will make them write. [*Id.* at 61a–62a.]

This is in the subject line email that says regarding robo call to Michigan dated August 27th, 2020 at 1326. It's from Jack Burkman2016@Gmail.com to Tierney Sneed at Talking Points Memo.Com and it says in the message, we have no connection to those robo calls. Thank you. It's in response to an email sent to Jack Burkman2016@gmail, from Tierney Sneed. [*Id.* at 62a.]

This one says on the subject line regarding robo call in Michigan dated August 27th, of 2020 at 1338, it's from Jack Burkman2016@gmail.com to Tierney Sneed at Talking Points Memo.Com. It says couple points, one, no one in their right mind would put their cell on robo call. I bet a

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> Soros Group is trying to embarrass us. Thirdly, we have been asked by the Trump Campaign to do robo calls and politely declined. We don't do that stuff. [*Id.* at 62a.]
>
> This is an email that says in the subject line regarding robo call, it's dated August 27th of 2020 at 1718 hours. It's from Jack Burkman2016@gmail.com to G. Edgards at 18.org, it is – it is a message, says no sir, not at all, in response to a question from David Edgards of the AP that says Hi Jack, I'm reaching out about this. Are you or Jacob Wohl involved? Thanks and then it also includes what appears to be a copy of a press release by Secretary of State Benson and Attorney General Nessel. [*Id.* at 62a–63a.]

After reading the emails into the record, S/A Campbell next identified a transcript of a proceeding in the United States District Court for the Southern District of Michigan. It was marked as proposed Exhibit 9. (App'x, PE 10/29/20, 63a). The transcript was certified with the court reporter's signature. (App'x, PE 10/29/20, 63a–64a). It was offered for only limited purposes and was admitted for only those limited purposes. (App'x, PE 10/29/20, 63a–64a, 67a). The transcript contained separate admissions by each defendant. However, the entire transcript was offered into evidence for the sole purpose of giving meaning to the admission. Such was necessary to establish that the proceeding involved the same robocall as that in this case. (App'x, PE 10/29/20, 63a–67a).

S/A Campbell then read into the record that portion of the transcript dealing with the admissions by Defendant Burkman:

> Starting with line 17, the Court says Mr. Burkman, my question was not whether they're true or false right now. My question was whether you, acting alone or with anyone else, prepared that message and caused it to be sent?
>
> Mr. Burkman responded oh, yes, your Honor. Yes, that is our call. Yes, yes.

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> The Court asked, you don't deny that you caused this call to be made and that you -- Mr. Burkman interrupts and says no. The Court says don't deny the content of it? Mr. Burkman says no, your Honor, we do not. [App'x, PE 10/29/20, 65a–66a.]

S/A Campbell next read into the record the statements made by Defendant Wohl during the federal court proceeding:

> Beginning line 20, it says let me then ask Mr. Wohl if he wishes to make any statement.
>
> Mr. Wohl answers yes, your Honor. ***I would second everything that Mr. Burkman just pointed out.*** I would also say and I would stress the point that there are no robo calls underway. There have not been any robo calls underway since the beginning of any sort of legal proceedings in Michigan and what we believe that this is not an effort to stop robo calls. No one, least of all the Plaintiffs, and no one else has alleged that any robo calls have taken place since the proceedings began in Michigan. So what this represents is an effort not to stop robo calls, but to stifle our constitutionally protected political speech and as to Miss Narvarro's mention of the bail conditions in Michigan and the like, that was examined by the Court, there was another hearing since the one that she referred – that she referenced and everything is all in good standing as it relates to the bail in Michigan. That's what I would conclude with, your Honor.
>
> The Court says all right. Thank you. Mr. Wohl you indicated that you echo all of what Mr. Burkman said. Does that include acknowledgement that you participated in the preparation of the content of the messages and it's communications to plaintiffs through the entity in California? Mr. Wohl answered yes, your Honor as to Mr. Burkman's specific representations, yes, yes. [App'x, PE 10/29/20, 67a–68a (emphasis added).]

Bowing to the inevitable, defense counsel then made a representative admission under MRE 801(D)(2) by stipulation that Mahanian was employed by the defendant to make a robocall. (App'x, PE 10/29/20, 78a–79a). S/A Campbell subsequently testified that Mahanian's records show that the message was

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uploaded with directions that it be sent out to certain postal Zip Codes. (App'x, PE 10/28/20, 106a).

S/A Campbell identified proposed Exhibit 6 as series of emails that were seized during the execution of the search warrant at Mahanian's office. (App'x, PE 10/29/20, 72a–73a). These were identified as emails between Mahanian and the conspirators. (App'x, PE 10/29/20, 73a). Emails in Exhibit 8, which was provided by Google from the defendants' email accounts and shown by the records to have originated in Virginia, were the same emails found during the execution of the search warrant in California. (App'x, PE 10/29/20, 78a). Exhibit 6 was thus offered as evidence that a computer system was used in furthering the conspiracy and carrying out the purpose of publishing the robocall. (App'x, PE 10/29/20, 78a).

Finally, **Khyla Craine** testified she was a deputy to the Secretary of State. She serves as second in command of the Legal Services Administration and provides legal and policy advice to the Secretary. (App'x, PE 10/29/20, 111a). As part of her duties, she serves as the Chief Privacy Officer of the Department. (App'x, PE 10/29/20, 112a). She became aware of the robocall because of an accusation that it was a voter suppression call targeting Black citizens in the City of Detroit. (App'x, PE 10/29/20, 113a). She was offended by the robocall because of her responsibility to ensure that voters are not given misinformation about the accuracy or security of their ballot. She saw the content of the robocall as false information. (App'x, PE 10/29/20, 126a). During the 18 months that she has held her position, she has never

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seen law enforcement, credit card companies, or the CDC utilize voter records for the purposes stated in the robocall. (App'x, PE 10/29/20, 142a).

Ms. Craine pointed out certain verbiage in the robocall that appeared to be directed to Black Americans and other people of color. She expressly noted the references to mandatory vaccinations and the warning to not give personal information to "the man." (App'x, PE 10/29/20, pp 141a–142a).

She testified that while the Qualified Voter File (QVF) is a public record, and that some parts of it are subject to disclosure, it would not make any sense for law enforcement, creditors or the CDC to use it for the purposes stated in the robocall. She stressed that telephone numbers and email addresses cannot be disclosed from the QVF. She noted that there are various other databases available to law enforcement, creditors and the CDC that would enable them to get much more information about any individual. (App'x, PE 10/29/20, 111a–115a, 123a, 125a). She had a concern that people who listened to the robocall and got the misinformation might feel that mail-in voting was not safe. (App'x, PE 10/29/20, 120a).

After hearing the evidence, the district court judge bound both defendants over to the Wayne County Circuit Court on all four offenses charged in the complaint and warrant. The matter was ultimately assigned to a circuit court judge. Defendants then challenged the bindover by means of identical motions to quash. The parties submitted briefs on the issues and came before the court for oral argument on February 23, 2021. After considering the briefs and arguments, the trial court denied the motions to quash.

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Defendants then sought leave to appeal that non-final order denying the motions to quash. On May 6, 2021, the Court of Appeals issued separate orders on each application denying relief for failure to persuade the Court of the need for immediate appellate review. Defendants then sought relief by method of separate applications for leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Michigan Supreme Court remanded both cases to the Court of Appeals for consideration as on leave granted. In an order dated November 9, 2021, the Court of Appeals consolidated the two cases to advance the efficient administration of the appellate process.

On November 9, 2021, the parties came back before the trial court for a special pre-trial on the still pending charges. After being apprised of the remand to the Court of Appeals the circuit court judge stayed further proceedings in the trial court pending a decision from the Court of Appeals.

Briefs were submitted and the Court of Appeals heard oral argument. On June 2, 2022, the Court of Appeals issued an opinion that rejected the arguments made by Burkman and Wohl and affirmed the denial of the motion to quash. The Court of Appeals' majority expressly held that the conduct established by the record satisfied the elements of the charged voter intimidation statute, and that the robocall fell within the statutory requirement that the method here used to deter voting fell within the proper definition of both "menace" and "corrupt means or device." In a partial concurrence and dissent, Judge Redford agreed that the

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evidence established probable cause of "corrupt means or device," but dissented on the bindover with regard to the "menace" theory of liability.

The Court further determined without dissent that the robocall was outside of constitutional protection because it involved speech integral to criminal conduct. But the Court expressly rejected the People's argument that the robocall was also outside of First Amendment protection because it constituted a "true threat." In this regard, the Court determined that the "true threat" doctrine was limited to threats of physical violence.

The defendants then sought leave to appeal the June 2, 2022 decision by the Court of Appeals. On October 24, 2022, while the application for leave was still pending in the Supreme Court, Burkman and Wohl pled guilty to a felony telecommunications fraud charge in the Cuyahoga County (Ohio) Common Pleas Court. The charge was based on a robocall message sent to minority voters in Cleveland. But that was the exact same robocall message that was sent to Detroit voters in the present case.

On November 2, 2022, between the time of the Ohio plea and sentencing, this Court granted leave and directed the parties to address (1) whether the Court of Appeals properly interpreted MCL 168.932(a) and (2) whether MCL 168.932(a) is unconstitutional on its face or as applied to the defendants.

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STANDARD OF REVIEW

The district court's decision to bindover a defendant is reviewed to determine whether the district court abused its discretion in making its decision. *People v Drake*, 246 Mich App 637, 639 (2001). However, where the decision entails a question as to whether the alleged conduct falls within the scope of a penal statute the issue is a question of law that an appellate court reviews de novo. *Id.*

Moreover, constitutional issues, as questions of law, are reviewed de novo. *TM v MZ,* 326 Mich App 227, 236 (2018). A statute is presumed to be constitutional unless its unconstitutionality is plainly apparent. *People v Harris*, 495 Mich 120, 134 (2014). If possible, a statute is to be construed as constitutional. *Id.*

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ARGUMENT

I. The Court of Appeals properly interpreted MCL 168.932(a) and found there was adequate evidence to bind Burkman and Wohl over on this criminal charge.

The primary charge addressed in both defendants' motions to quash and their briefs on appeal address the crime of bribing/intimidating voters under MCL 168.932(a). The language of the statute provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> (a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

No attack was made on the related conspiracy count or the counts alleging the use of a computer to commit a crime. But it is here conceded that all the counts are dependent upon a finding that the defendants attempted, by means of menace or other corrupt means or device, either directly or indirectly, to deter an elector from giving the elector's vote in any election in this state.

The statute establishes the elements. It requires proof of (1) bribery, menace, or other corrupt means or device, either directly or indirectly (2) to influence, to deter, or to interrupt an elector from voting. MCL 168.932(a). Burkman and Wohl assert that the Court of Appeals erred in concluding that the conduct demonstrated by the evidence at the preliminary examination fell within the scope of this charged offense. The crux of their argument may be digested as follows.

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The defendants argue that the evidence (A.1) does not demonstrate the use of another corrupt means or device; (A.2) does not demonstrate the use of any menace; and (B) does not establish an attempt to deter electors from voting. All of their other arguments are really related to these three main assertions, which are questions of statutory construction. All of the defendants' arguments are unavailing.

A. The robocalls were both a "corrupt means or device" used to deter voting and a menacing method to do so.

While the robocalls were both menacing and constituted a corrupt means or device, those statutory terms are distinct and will be discussed in turn. Either satisfies the crime's first element. The distinction between a "menace" and a "corrupt means or device" actually involves whether the assertion was threatening or otherwise wrongful. Where it threatened a harm, it was a "menace." And the invidious, misleading nature of the assertions made in the robocall establishes it as "a corrupt means or device" to accomplish the purpose.

1. The robocall was a "corrupt means or device" used to deter voting.

For the "corrupt means or device" theory, it is important to note that the message asserted that the personal information *will* be used by law enforcement and creditors. It was not simply a warning that such information may be used, or an expression of opinion that there was a risk of it being used. It asserted as fact that it will be used. The testimony at the preliminary examination demonstrates the wrongfulness of the defendants' assertions of fact.

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Discussions of corrupt behavior have most generally arisen in the context of misconduct-in-office cases. "Corrupt behavior" has been defined as "intentional, purposeful, deliberate, and knowing wrongful behavior." *People v Waterstone*, 296 Mich App 121, 138 (2012). "Corrupt intent" has been recognized as a sense of depravity, perversion, or taint. *People v Perkins*, 468 Mich 448, 456 (2003).

The use of this message in a manipulative way as a means to deter voting based on a racial classification satisfies the statutory requirement of a "corrupt means or device." It is the nature of the communication, which was deliberately wrongful in nature through false and exaggerated claims and directed to a specific audience to discourage Black citizens from voting, which is the "corrupt means or device." The fact that it was a robocall did not make it wrongful. A similarly ugly, misleading effort directed to the targeted audience done in person to suppress minority voting would also constitute a "corrupt means or device" under the statute. It is the invidious character of the communication that is the corrupt means used to deter voting.

2. The robocall was a "menacing" method used to deter voting.

Defendants also assert that the term "menace" as used in MCL 168.932(a) is limited to threats of physical assault. They argue that since there was no evidence of any threat of physical harm to deter anyone from voting it was error to find a violation of the statute. They further assert that the Court of Appeals erred in applying a lay definition of the term to conclude that it encompasses threats of both physical and nonphysical harm.

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First of all, it should be recognized that the facts in this case actually do demonstrate a subtle threat to do physical harm. The blatantly false assertion that the CDC is pushing to use records from mail-in voting to track people for mandatory vaccination, in the context of the other evidence presented at the preliminary examination, is a subtle threat of an unwanted bodily intrusion if you allow yourself to be "finessed" by "the man." (App'x, PE 10/29/20, Exhibit 1, 192a–193a). Even if viewed as unreasonable, vaccination hesitance is real. Here, Burkman and Wohl are playing on the threat of possible unwanted mandatory vaccination to further their purpose of deterring voting in a minority community.

But even without this subtle threat of a possible battery from an unwanted injection, the threats to one's liberty interests and financial interests are sufficient to demonstrate "menacing" conduct. The term "menace" is properly defined as a show of intention to inflict harm, that may be achieved with or without physical contact. See App'x 198a, (COA slip op, p 8) (Letica, J., majority opinion) (" 'Menace' is defined as 'a show of intention to inflict harm'; 'one that represents a threat'; 'to make a show of intention to harm'; or 'to represent or pose a threat to.' *Merriam Webster's Collegiate Dictionary* (11th ed). The term 'menace' as defined in the dictionary does not require an accompanying physical component, but may be established through a threat."). The Court of Appeals got it right.

Whenever judicial construction is warranted, a court may consult dictionary definitions. Words should be given their common, generally accepted meaning, if consistent with the legislative aim in enacting the statute. *People v Spann*, 250

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Mich App 527 (2002). This statute has been in place in substance as a felony since at least 1929.[1] Either relying on the dictionaries at the time of this enactment or the time this was reenacted with small revisions, see Public Act 261 of 1995, the answer is the same that "menace" does not require an element of threat of physical harm. For *Webster's International Dictionary* (Ed. 1921), it provides that "menace" as a noun means "[t]he show of an intention to inflict evil; a threat; indication of probable evil or catastrophe to come." *Id.* at 507. In fact, the *Bouvier's Law Dictionary* (Ed. 1926) expressly states that no physical element is necessary:

> A threat; a declaration of an intention to cause evil to happen to another. *The word menace is* ***not*** *restricted to threats of violence* to person and property nor to threats of accusing a person of crime; it includes a threat to accuse one of immoral conduct. [*Id.* at 797 (emphasis added).]

In relation to the time of reenactment, the *Webster's New World Dictionary* (Ed. 1988) provides similarly for "menace" as a noun: "1. a threat or the act of threatening[;] 2. anything threatening harm or evil[.]" *Id.* at 846.

These generally recognized definitions of "menace" cover any threat to a person or to society as a whole. It also fits the purpose of the law. Statutory language should be construed reasonably, keeping in mind the purpose of the

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[1] The precursor to this law in 1929 as a felony likewise prohibited the influencing of an elector by either "menace" or "corrupt means or device":

> If any person shall by bribery, menace, or any other corrupt means or device whatever, either directly or indirectly, attempt to influence any elector in giving his vote, or deter him from, or interrupt him in giving the same at any election or primary election held pursuant to law, such person shall, on conviction, be deemed guilty of a felony. [CL 1929, chapter 57, § 3289.]

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statute. *People v Seeburger*, 225 Mich App 385, 391 (1997) (citations omitted). The Court of Appeals expressly recognized in an order denying an application for leave to appeal that MCL 168.932(a) is a voter intimidation statute. *Lambert v Sec'y of State*, COA No. 355266 (October 29, 2020) ("Voter intimidation is—and remains—illegal under current Michigan law. MCL 168.932(a)") (App'x A). Its purpose is to protect the constitutional and statutory rights of a voter to exercise the right to vote without fear or intimidation. To limit the prohibited conduct to threats of physical injury would be counter to this purpose.

Thus, a menace is a threat to cause some harm, and to menace someone is to threaten harm to that person. As noted, there is no requirement that the threat be to physically injure or do physical violence to the person. A threat to do harm to the individual, be it physical, emotional, financial, or otherwise, is sufficient to "menace" a person.

B. Whether or not the statements in the robocall were true, were plausible, were simply opinion, or were not known to be false, the critical point was that Burkman and Wohl acted corruptly, and with menace, to intimidate minority voters.

Burkman and Wohl argue that the robocall message cannot lead to criminal liability under MCL 168.932(a) because the message asserted opinion, plausibly true facts, or untrue facts that they did not know were false. But regardless of whether the threats in the robocall were stated in the form of an opinion, were possibly true, or unknowingly false, the statute would be satisfied if they intended

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to influence, deter, or interrupt an elector in giving the elector's vote by means of these assertions where they acted in a corrupt way or with menace.

Here, the truth or falsity of the threats are of no moment where the method was both menacing and corrupt. What then is important is the state of mind with which Burkman and Wohl acted. For this inquiry, the critical question is whether they intended that those assertions made in the call would deter minority members from voting. The testimony developed at the preliminary examination is more than sufficient to demonstrate this intent. In other words, they acted with a corrupt method and with menace by attempting to intimidate by nefarious means a specific audience, Black voters, and discourage them from participating in the 2020 election. The Court of Appeals properly reasoned that the conduct at issue satisfied the statute regardless of whether the statements were "unknowingly false" where there was evidence of a wrongful method used as demonstrated here to deter voting:

> [F]or the robocall to be deemed a corrupt means or device, it must be established that defendants deliberately used ***a wrongful method*** with a depraved intent to interfere with voting. Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, ***if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied.*** The prosecution presented sufficient evidence to establish probable cause that defendants had the requisite intent, and the trial court did not abuse its discretion by denying defendants' motion to quash the bindover.
>
> [App'x, 201a (COA slip op, p 11) (Letica, J., majority opinion) (footnote omitted; emphasis added).]

This is the correct analysis.

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The key concept here is that a statement could be accurate (even though misleading) and still be wrongful or corrupt. This same basic idea is present in Michigan's law prohibiting extortion. See MCL 750.213.[2] As this Court stated more than a century ago in quoting a trial court's ruling, the fact that the threat of extortion may involve a truthful claim about the victim's conduct does not excuse it:

> The malice required by the statute was not a feeling of ill will towards the person threatened, but the willful doing of the act with the illegal intent. If the threat was willfully made with the intent to extort money, *it was a malicious act, and the fact that the charge was true would be immaterial.* [*People v Whittemore*, 102 Mich 519, 526 (1894) (emphasis added).]

See also 3 Gillespie Mich Crim Law & Procedure § 77:1 (2d ed) § 77:1 ("Where threats are made with a wrongful intent as set forth in the statute, the offense is complete regardless of whether the defendant believes the complainant guilty of the commission of the offense threatened to be revealed").

The same reasoning applies here. The act of defendants here would remain pernicious even if in some technical way they could be claimed to be true or that they somehow believed them to be true. The effort to frighten minority voters from exercising their constitutional rights through misleading statements is scurrilous and rightly subject to prosecution.

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[2] MCL 750.213 provides as follows:

> Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony[.]

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C. The rule of lenity simply does not apply in this case.

Burkman and Wohl argue that the question as to whether MCL 168.932(a) applies in this case is ambiguous, and thus the rule of lenity should apply. The rule of lenity stands for the proposition that penal laws are to be strictly construed with all doubts resolved in a defendant's favor. *People v Arnold*, 508 Mich 1, 24 n 51 (2021). This rule applies, however, only when the statutory text is ambiguous, such as when it irreconcilably conflicts with another provision of law. *Id.*

Thus, the rule of lenity does not apply here. The crime of voter intimidation, MCL 168.932(a), is not ambiguous, and the Legislature's intent is clear from the statutory language. The purpose is to protect a citizen's right to cast that citizen's vote without improper influence or deterrence. The rule of lenity has no application in this case. Whether Burkman and Wohl intended to deter voting is a question of fact for the jury. In particular, defendants assert that the evidence establishes only the intent to deter electors from a particular form of voting, and not from voting in general. But this argument fails for two different reasons.

First, the statutory language is sufficient to establish the crime when the intent was to deter *any* form of voting. The statutory language prohibits a person from deterring voting. This is a voter intimidation statute designed to ensure that the constitutional right of an elector to cast the elector's vote without threat or intimidation in any lawful manner in which he or she chooses to vote. The language does not limit the type of voting that is being protected. Even if the defendants' intent were simply to deter "mail-in voting," there would be a violation of the law here.

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Second, the evidence, and the reasonable inferences naturally flowing from the evidence, here demonstrate the intent to deter *all* forms of voting. There is more than sufficient evidence to demonstrate defendants' actual intent to deter all forms of voting among a minority population. The statements and actions of the conspirators should be viewed in the context of the political situation existing prior to the election. For the first time Michigan electors were eligible to vote by mail in a general election without meeting any specific criteria for doing so. There was much public debate over whether this would increase voter participation in elections. And just when the presidential campaign was beginning, the country was hit with a pandemic that discouraged public gatherings like those inevitable with in-person voting.

Looking at the totality of the circumstances, a fair inference can be drawn that the defendants believed that a large turnout in minority communities would be adverse to their preferred candidate and they believed that many persons in that community would simply not vote if they did not use the convenient method of mail-in voting. By discouraging mail-in voting, they were attempting to deter minority citizens from casting any type of vote in the election.

The evidence presented at the preliminary examination is more than sufficient to enable a juror to determine that Burkman and Wohl intended to deter voting by means of their robocall. The evidence presents a legitimate question of fact. This Court should affirm the sufficiency of the evidence to support the bindover.

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II. The crime of intimidating voters, MCL 168.932(a), is not unconstitutional, and the conduct of Burkman and Wohl was not constitutionally protected.

The First Amendment generally prevents government from proscribing speech based on disapproval of the ideas expressed. *RAV v City of St. Paul*, 505 US 377 (1992). But the right of free speech is not absolute at all times and under all circumstances, and certain well-defined and narrowly limited classes of speech are preventable and punishable. See *Estate of Grable v Brown (In re Dudzinski)* 257 Mich App 96, 100 (2003), citing *Chaplinsky v New Hampshire*, 315 US 568, 571–572 (1942).

The robocall message used to deter voting in the present case is outside of First Amendment protection for two separate and distinct reasons. These reasons will be discussed separately. The Court of Appeals correctly determined that the exception for speech integral to criminal conduct was here applicable. But analysis demonstrates that the "true threat" exception also applies in this case.

A. As the Court of Appeals ruled below, the "integral-speech" exception applies here.

Citing *Giboney v Empire Storage & Ice Co*, 336 US 490 (1949), the Court of Appeals concluded that that the exception for speech integral to criminal conduct was here applicable. See App'x 204a, (COA slip op, p 14) (Letica, J., majority opinion). In doing so, it recognized that it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal simply because it was initiated or carried out by means of language. The U.S. Supreme Court rejected "the contention that conduct [that is] otherwise unlawful is always immune

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from state regulation because an integral part of that conduct is carried on by" means of speech. *Giboney*, 336 US at 498.

Following *Giboney*, courts repeatedly have held that making a "course of conduct" illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." See *Cox v Louisiana*, 379 US 559, 563 (1965), quoting *Giboney*, 336 US at 502. Thus, "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *New York v Ferber*, 458 US 747, 761–762 (1982), quoting *Giboney*, 336 US at 498. "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v Rowlee*, 899 F2d 1275, 1278 (CA 2, 1990). For example, the fact that aiding and abetting an illegal act "may be carried out through speech" is "no bar to its illegality." *Nat'l Org for Women v Operation Rescue*, 37 F3d 646, 656 (DC Cir, 1994).

Here, the Court of Appeals has adopted a position well-argued by legal scholars. The best understanding of the integral-speech exception is that when speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct *other than the speech itself),* such as murder, fights, restraint of trade, child sexual abuse, discriminatory refusal to hire, and the like, this opens the door to possible restrictions on such speech. "The Speech Integral to Criminal Conduct Exception," 101 Cornell Law Review 981, 986–987 (2016).

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Modern political intimidation embraces a wide and ever-expanding range of coercive tactics, including onsite voter harassment and legally baseless offsite threats of legal harm. While it is true that false statements are not categorically excluded from First Amendment protection, see *United States v Alvarez*, 567 US 709, 722 (2012), even so statements intended to discourage people from exercising the right to vote are exempted from First Amendment protection when they tend to cause, attempt to cause, or make a threat to cause such illegal conduct, i.e., place citizens in fear of voting, through a wrongful method.

Giboney is the seminal case from the U.S. Supreme Court on the "integral speech" exception to the First Amendment. In *Giboney*, the U.S. Supreme Court held that enjoining otherwise lawful picketing activities did not violate the First Amendment where the sole purpose of that picketing was to force a company to enter an unlawful agreement restraining trade, and thus the speech was "an integral part of conduct in violation of a valid criminal statute." 336 US at 498. The courts have relied on *Giboney* in rejecting First Amendment claims to criminal convictions. See, e.g., *United States v Sayer*, 748 F3d 425, 433–434 (CA 1, 2014) (affirming a federal conviction for cyberstalking, stating "[t]o the extent [the defendant's] course of conduct targeting Jane Doe involved speech at all, his speech is not protected. Here, as in *Giboney*, it served only to implement Sayer's criminal purpose.").

That same analysis is applicable here. In fact, in its ruling on this basis, the Court of Appeals expressly relied on *Giboney*:

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> To the extent a fact-finder agrees with the prosecution's theory that defendants spread a dishonest message with the depraved intent to discourage voting, defendants' dissemination of the message deterred voting through corrupt means. Like the picketing in *Giboney*, the speech was an integral part of conduct criminalized by MCL 168.932(a) and should not be constitutionally protected merely because the conduct was "carried out by means of language." *Id.* [App'x 205a (COA slip op, p 15) (Letica, J., majority opinion).]

Here, the essence of the crime is a wrongful attempt to deter voting. That is the illegal conduct addressed by the statute. The robocall was simply the method used by Burkman and Wohl to engage in the illegal conduct. It is not the words themselves that are made illegal by the statute. The statute seeks to punish the attempt to intimidate electors from exercising their right to vote, which is the illegal conduct when done in a wrongful manner, and thus the speech used to achieve this end is not entitled to constitutional protection.

This point is more clearly made by the situation where one would be aiding and abetting the crime of larceny by telling another to go ahead and take some identified property because no one is looking. There, the aider and abettor would clearly be speaking words that assist and/or encourage the commission of the crime and would be just as criminally responsible as the person who took the property. Such criminal responsibility would be based upon the conduct that it tends to cause (the larceny) rather than simply the words themselves.

Here, MCL 168.932(a) criminalizes voter intimidation. It seeks to protect the right of all citizens to exercise their right to vote without interference. The robocall initiated by defendants is the vehicle by which the crime was perpetrated. As noted, the Court of Appeals correctly recognized that the robocall message was

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simply integral speech that is not constitutionally protected. This Court should affirm the decision below on this ground alone.

B. The "true threat" exception also applies here.

Here, the Court of Appeals directly rejected the "true threat" exception, on the basis that this exception was limited to threats of unlawful violence. See App'x 203a (COA slip op, p 13) (Letica, J., majority opinion). In doing so, the Court of Appeals overlooked the fact that the subtle threat of mandatory vaccination could be viewed as a threat that a battery would be committed on the listener if he or she participated in mail-in voting. Given the historical background and continuing public concerns over the infamous Tuskegee Experiment from American history,[3] the concept of mandatory vaccinations could be a true threat to minority voters—aimed, in this context, at engendering fear and disruption in that particular group of individuals.

But even aside from this point, this Court should adopt a rule recognizing that a "true threat" can arise from a threat of financial, liberty, or other non-violent harm where the threats were, as here, wrongful. The Court of Appeals is correct that Michigan law does not yet recognize that a "true threat" can involve a threat to do non-violent harm. See App'x 204a (COA slip op, p 14) (Letica, J., majority opinion). But there are strong legal reasons for now adopting a different rule in this State.

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[3] The Tuskegee Study of Untreated Syphilis (informally referred to as the Tuskegee Experiment) was a study conducted between 1932 and 1972 by the U.S. Public Health Service and the Centers for Disease Control and Prevention (CDC) on a group of nearly 400 Black American men with syphilis. The purpose of the study was to observe the effects of the disease when untreated, though by the end of the study medical advancements meant it was entirely treatable. The men were not informed of the nature of the experiment, and more than 100 died as a result.

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Over time, the U.S. Supreme Court has defined narrow categories of speech that can be prohibited based on content. Such categories include, for example, true threats, *Watts v United States*, 394 US 705 (1969); speech directed at and likely to incite imminent lawless action, *Brandenburg v Ohio*, 395 US 444 (1969) (per curiam); child pornography, *New York v Ferber*, 458 US 747 (1982); obscenity, *Miller v California*, 413 US 15 (1973); and fighting words, *Chaplinsky v New Hampshire*, 315 US 568 (1942).

As noted above, true threats are not entitled to First Amendment protection. See *Watts*, 394 US at 708. In fact, in *Virginia v Black*, 538 US 343 (2003), the U.S. Supreme Court recognized that, interpreted in a broader historical and social context, cross burnings can constitute true threats even though they communicate no explicit message. But the Court recognized there that such conduct involved a serious expression of an intent to commit an act of unlawful violence.

It is important to note that the U.S. Supreme Court has not squarely addressed whether threats of nonviolent or nonphysical harm can constitute true threats. There is a spilt of authority among different jurisdictions on this question. In *Black*, the U.S. Supreme Court explained that "[t]rue threats *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of *unlawful violence* to a particular individual or group of individuals." 538 US at 359 (emphasis added). But *Black* does not state that only threats of unlawful violence can be considered "true threats."

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Prohibition of true threats is appropriate, the U.S. Supreme Court reasoned, because it "protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Id.* (citations omitted). Thus, the U.S. Supreme Court's analysis in *Black* should not be interpreted to suggest that the government can ban *only* threats of physical harm. The threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence.

Here, the defendants threatened minority member voters that if they voted by mail-in voting their personal information would be used by police and creditors. The wrongful threat to privacy, financial security, and liberty contained in the robocall at issue here demonstrates it is a "true threat" that is not entitled to constitutional protection.

A few jurisdictions have favorable analysis addressing whether the "true threat" exception applies to non-physical harm. In reviewing the federal statute prohibiting threats of violence against federal officials, 18 USC 115(a) (threatens to assault, kidnap, or murder), the Second Circuit evaluated the nature of a "true threat" and noted that it was not a defense to the crime if "the speaker has no intention of carrying [the threats] out." See *United States v Turner*, 720 F3d 411, 420 (CA 2, 2013). In doing so, the court cited *Virginia v Black*, 538 US at 360, in making that point, but then also cited an article addressing this arena, which stated that the threat of a "substantial emotional disturbance" would be sufficient under the First Amendment:

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> "Despite the relevance of freedom of speech, *a legislature could reasonably decide to make it criminal for a person with apparent firmness of purpose to threaten a specific legal wrong grave enough to be likely either to cause* ***substantial emotional disturbance*** in the person threatened or to require the employment of substantial resources for investigation or prevention.". [*Turner,* 720 F3d at 420, quoting Kent Greenawalt, Speech, Crime, and the Uses of Language 91 (1989).]

In addition, the Ninth Circuit concluded that " 'True threats' are not limited to bodily harm only but also include property damage" in its evaluation of the federal law prohibiting the inciting of a riot, 18 USC 2101(a), 2102(a). See *United States v Rundo*, 990 F3d 709, 719 (CA 9, 2021).[4] The Sixth Circuit similarly ruled that certain threats to cause a reputational injury in an effort to extort money were "not protected speech." See *United States v Coss*, 677 F3d 278, 290, n 17 (CA 6, 2012) ("because it is a 'true threat' it is not protected speech . . . . it is the crime of extortion to threaten to injure the reputation [of another]"). Similarly, Michigan law prohibits extortion by punishing "malicious threat[s]" to the "property" of another. See MCL 750.213.

On this point, like extortion based on reputational injury or threats to incite violence against property, the legal reasons supporting the extension of the "true threat" exception to threats of non-physical harm in the circumstances of this case were eloquently stated in a case involving the very same robocall and defendant, Jacob Wohl:

> The right to vote embodies the very essence of democracy. Absent free and fair elections uninfluenced by fear, the underpinnings of democratic rule would crumble. The United States Constitution, as enforced by Congress and the courts, enshrines these principles. . . .

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[4] The Ninth Circuit did find the federal law overbroad for prohibiting "advocacy," and severed the unconstitutional language from the statute. *Id.* at 720–721. Unlike that law, however, Michigan's voter intimidation law does not criminalize advocacy, but only punishes the wrongful intimidation of voters.

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> Many Plaintiffs in this case assert that they were recipients of robocalls initiated by Defendants conveying messages that placed recipients in reasonable fear of casting their votes in the impending presidential election, in person or by mail. Upon initial factual review, this Court finds that the information Defendants' calls convey is manifestly false and meant to intimidate citizens from exercising voting rights.
>
> Defendants do not contest that they originated the robocalls. In fact, by their own admission in other public statements they reportedly made, they have worked overtly to influence potential voters through disinformation campaigns. Instead, as legal ground for their action, Defendants advance a sinister and pernicious theory. They contend that the expression their robocalls communicated constitutes speech protected by the First Amendment. Defendants' theory implicates a fundamental threat to democracy. This Court thus rejects it as justification for Defendants' baneful conduct. The First Amendment cannot confer on anyone a license to inflict purposeful harm on democratic society or offer refuge for wrongdoers seeking to undermine bedrock constitutional principles. Nor can it serve as a weapon they wield to bring about our democracy's self-destruction. [*National Coalition on Black Civic Participation v Wohl,* 498 F Supp 3d 457, 464 (SDNY 2020).]

Of course, a decision by a New York federal district court judge in a civil case cannot control a Michigan criminal case. This Court has recognized, however, that even when it is not binding, authority from other jurisdictions may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004).[5]

Given the high importance of protecting the right to vote, there are strong legal reasons here to extend the "true threat" exemption to threats of non-violent harm where, as here, the nature of the robocalls was wrongful. This is a second, and independent, basis on which to affirm the decision below.

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[5] The Court of Appeals below rejected this argument as it concluded it was constrained by prior case law. See App'x 204a (COA slip op, p 14 n 11) (Letica, J., majority) (noting that it was bound by prior published decision, MCR 7.215(J)(1), stating that "Michigan has applied the threat of violence to the true threat exception to First Amendment protections," citing *TM v MZ*, 326 Mich App 227, 239 (2018).)

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C. The defendants' argument that the statute here is "vague" and "overbroad" is unavailing; Michigan's voter intimidation law is constitutional.

The defendants make two additional arguments about why Michigan's intimidation law is unconstitutional, asserting that it is "vague," see Defs' Br, pp 42–45, and that it is "overbroad," *id.* at 45–52. They are wrong on both points.

As an initial point, the Michigan appellate courts distinguish between facial and as-applied challenges. See, e.g., *People v Wood*, 326 Mich App 561, 576 (2018), reversed on other grounds, 506 Mich 114 (2020). This Court has asked the parties to address each ground.

For a facial challenge, the ordinary rule is that the challenger must show that there are "no set of circumstances exists" under which the law would be valid, and the fact the law "might operate unconstitutionally under some conceivable set of circumstances is insufficient" to render it invalid. *Bonner v City of Brighton*, 495 Mich 209, 223 (2014) (cleaned up). This Court has recognized an exception to this rule for overbreadth challenges, that is a challenger must show a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *In re Chmura*, 461 Mich 517, 531–532 (2000).

For an as-applied challenge, the Court must analyze the statute "as applied" to the particular case. *Crego v Coleman*, 463 Mich 248, 269 (2000). In other words, an as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Boyenner*, 495 Mich at 223 n 27.

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1. MCL 168.932(a) is not vague.

Regarding vagueness, a statute may be challenged for vagueness on three grounds: "(1) that it fails to provide fair notice of the conduct proscribed; (2) that it is so indefinite that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; or (3) that its coverage is overbroad and impinges on First Amendment protections." *People v. Harris*, 495 Mich 120, 133–134 (2014). The party challenging the constitutionality a statute "bears the burden of proving that the law is unconstitutional" and this Court's "authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality." *Id.*, citing *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 (2007).

On the questions of fair notice and the definite nature of the crime, there is nothing vague about Michigan's prohibition of a defendant employing "corrupt means or device" against voters to deter them from voting. The statute has been in place for a hundred years or more. As noted above, the same standard of "corrupt" defines the common-law crime of misconduct of in office, which is a five-year felony under Michigan's catch-all provision, MCL 750.505. That statute has been repeatedly upheld against vagueness challenges. See, e.g., *People v Coutu*, 235 Mich App 695, 705, n 5 (1999) ("This statute [the misconduct-in-office statute] has been upheld as constitutional and has specifically withstood a challenge for vagueness."), citing *People v Pickett*, 339 Mich 294, 309–311 (1954), *People v O'Neal*, 22 Mich App 432, 434–436 (1970).

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In fact, earlier this year this Court reinstated a misconduct-in-office charge in a case, see *People v Clark,* 986 NW2d 602 (2023), in which the Court of Appeals in an unpublished opinion rebuffed an as-applied vagueness challenge. See *id.* at slip op, p 6 (majority opinion) ("Michigan courts have upheld the constitutionally of MCL 750.505 in the face of vagueness challenges time and again") (App'x B). The same is true here.

And federal case law in this circuit further supports the conclusion. In evaluating a vagueness challenge to the federal statutes that prohibit the effort to extort money by use of interstate communications and to threaten or injure the reputation of another with an intent to extort money in violation of 18 USC 875(d), the Sixth Circuit ruled that its implicit requirement of wrongfulness was sufficiently clear to withstand a vagueness challenge:

> In short, 18 U.S.C. § 875(d) is sufficiently cabined by its own *wrongful threat* and intent to extort requirements to survive constitutional muster. [*Coss*, 677 F3d at 290 (emphasis added).]

And, as explained earlier, Michigan law's understanding of "corrupt" is defined in terms of wrongfulness as well. And this Court has upheld a challenge on vagueness grounds to Michigan's extortion statute. See *Harris*, 495 Mich at 138 ("any claim that MCL 750.213 fails to provide fair notice of the conduct proscribed is meritless").

2. MCL 168.932(a) is not overbroad.

Regarding the defendants' claim that MCL 168.932(a) is overbroad, this Court employs this doctrine "with hesitation," requiring "substantial overbreadth." See *In re Chmura*, 461 Mich at 531–532. This Michigan law is not overbroad.

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As explained earlier, the two exceptions to the First Amendment of integral speech and true threats apply here, which answers their argument. The Michigan voter intimidation law does not limit constitutionally protected speech. The statements used to menace or corruptly frighten citizens from voting are outside the ambit of the First Amendment. That is the summation of these exceptions, i.e., MCL 168.932(a) does not ensnare constitutionally protected speech because it requires not only evidence of attempts to deter voting, but to do so with menace or a corrupt means, i.e., in a wrongful way. In the end, the Constitution does not protect speech that is part of the crime of intimidating voters from voting through wrongful means, such as here threatening Black voters with some physical or financial harm – which are true threats – through misleading statements if they vote by mail. This Court should affirm.

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CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly interpreted MCL 168.932(a), and the district court did not abuse its discretion in binding Burkman and Wohl over to the circuit court. Furthermore, the robocall here at issue is not constitutionally protected. This message falls within the "integral speech" exception, as well as the "true threat" exception to the First Amendment in this case.

Therefore, this Court should remand this case to the Wayne County Circuit Court for a trial on the merits.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

s Richard L Cunningham

Richard L. Cunningham (P29735)
Assistant Attorney General
Attorney for Plaintiffs-Appellees
Criminal Trials & Appeals Division
3030 W. Grand Blvd., Ste 10-354
Detroit, MI 48202
(313) 456-0204

Dated: May 10, 2023

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2022-0357117-A/MCOABrief/Burkman.JohnMaCauley

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Subject: DPP MCL 15.243(1)(m) - Privileged
Attachments: DPP MCL 15.243(1)(m).docx

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Good to talk with you today, Heather DPP MCL 15.243(1)(m) We're planning a multistate call on Monday, June 17, from 3:30-4 that we hope you can join. Let us know if you have any questions or would like to discuss.

Best,

Jonathan

Jonathan L. Williams | Senior Counsel
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Subject: Invitation: ICAP Virtual Reconvening on Preparing for the Threat of P... @ Thu Jun 13, 2024 10am - 2pm (EDT) (meingasth@michigan.gov)
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When

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Guests

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Start Time: 2024-06-13T10:00:00-04:00

End Time: 2024-06-13T14:00:00-04:00

Attendees: aaron.gulczynski.1@us.af.mil : aaron.gulczynski.1@us.af.mil, abrown@allvotingislocal.org, abrown@allvotingislocal.org, alewien@princeton.edu, alewien@princeton.edu, alex@courtaccountability.org : alex@courtaccountability.org, amaad.rivera@greenbaywi.gov : amaad.rivera@greenbaywi.gov, andrew.evans@state.mn.us : andrew.evans@state.mn.us, ann@projectoverzero.org : ann@projectoverzero.org, bennewitzlp@doj.state.wi.us : bennewitzlp@doj.state.wi.us, Ben Gifford : bg720@georgetown.edu, bradym@michigan.gov, bradym@michigan.gov, buddeb1@michigan.gov : buddeb1@michigan.gov, cdavis@joycefdn.org : cdavis@joycefdn.org, cltarrant@fbi.gov, cltarrant@fbi.gov, david.haynes@cartercenter.org : david.haynes@cartercenter.org, donovan.jarstad@us.af.mil : donovan.jarstad@us.af.mil, greg.engle@widma.gov : greg.engle@widma.gov, grossic@michigan.gov, grossic@michigan.gov, grottman@rcfp.org : grottman@rcfp.org, heidi@globalextremism.org : heidi@globalextremism.org, hilld16@michigan.gov, hilld16@michigan.gov, jacqueline.romero@usdoj.gov : jacqueline.romero@usdoj.gov, jcrofts@allvotingislocal.org : jcrofts@allvotingislocal.org, jeannie.m.jeanetta.mil@army.mil : jeannie.m.jeanetta.mil@army.mil, jh@isdglobal.org : jh@isdglobal.org, Jacob Glick, jhg75@georgetown.edu, jmandell@lawforward.org : jmandell@lawforward.org, jmandell@staffordlaw.org : jmandell@staffordlaw.org, john.chisholm@da.wi.gov : john.chisholm@da.wi.gov, julie.strother@state.mn.us : julie.strother@state.mn.us, justin.erickson@state.mn.us : justin.erickson@state.mn.us, katie@statesuniteddemocracy.org : katie@statesuniteddemocracy.org, kbarker@fbi.gov : kbarker@fbi.gov, kboockvar@gmail.com, kboockvar@gmail.com, keary@ohiomayorsalliance.org, keary@ohiomayorsalliance.org, kyle@blocbybloc.org, kyle@blocbybloc.org, lw@isdglobal.org : lw@isdglobal.org, mark.a.totten@gmail.com : mark.a.totten@gmail.com, mary.fee@state.mn.us, mary.fee@state.mn.us, matthew.p.beilfuss.mil@army.mil, matthew.p.beilfuss.mil@army.mil, matthew.stiegler@phila.gov, matthew.stiegler@phila.gov, Mary McCord : mbm7@georgetown.edu, meagan@statesuniteddemocracy.org : meagan@statesuniteddemocracy.org, meingasth@michigan.gov : meingasth@michigan.gov, mel.barnes@wisconsin.gov : mel.barnes@wisconsin.gov, nassim@statesuniteddemocracy.org : nassim@statesuniteddemocracy.org, neville-neillm@doj.state.wi.us : neville-neillm@doj.state.wi.us, npressley@allvotingislocal.org : npressley@allvotingislocal.org, Rupa Bhattacharyya : rb1796@georgetown.edu, richard.frohling@usdoj.gov, richard.frohling@usdoj.gov, richl1@michigan.gov : richl1@michigan.gov, rleggett@michiganrcv.org : rleggett@michiganrcv.org, ryan@bedrock.us, ryan@bedrock.us, sarah@ohiomayorsalliance.org : sarah@ohiomayorsalliance.org, Shelby Calambokidis : sc2053@georgetown.edu, scott@lawforward.org : scott@lawforward.org, shauntay@allvotingislocal.org, shauntay@allvotingislocal.org, shiller@princeton.edu, shiller@princeton.edu, soo.song@usdoj.gov : soo.song@usdoj.gov, stjohn@milwaukee.gov : stjohn@milwaukee.gov,

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Subject: Useful quick take on election standing implications

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From Derek Muller at Notre Dame: https://electionlawblog.org/?p=143653

Jonathan L. Williams | Senior Counsel
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(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
Subject: RE: DPP MCL 15.243(1)(m) Privileged

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DPP MCL 15.243(1)(m)

Dax Goldstein
415.938.6481
they/them

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Thursday, June 13, 2024 8:43 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Subject: RE: DPP MCL 15.243(1)(m) Privileged

Hi Jonathan (Dax and Kelsey),

Chief Legal Counsel Linus Banhart-Linn and I would like to participate in the multistate call. I have included Linus here. We also appreciate the information that was shared.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, June 12, 2024 10:21 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Dax Goldstein <dax@statesuniteddemocracy.org>; Kelsey Stimple <Kelsey@statesuniteddemocracy.org>
Subject: DPP MCL 15.243(1)(m) Privileged

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Good to talk with you today, Heather **DPP MCL 15.243(1)(m)**. We're planning a multistate call on Monday, June 17, from 3:30-4 that we hope you can join. Let us know if you have any questions or would like to discuss.

Best,

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Jonathan

Jonathan L. Williams | **Senior Counsel**
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CC: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Re: Michigan info

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DPP MCL 15.243(1)(m)

Best,

Jonathan

From: Banghart-Linn, Linus (AG) <Banghart-LinnL@michigan.gov>
Date: Friday, May 12, 2023 at 4:50 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Meingast, Heather (AG) <MeingastH@michigan.gov>
Subject: Michigan info

Jonathan,

Nice meeting you and your colleagues today!

You've asked for the briefing in Burkman/Wohl – those are attached, both the appellants' brief and our corrected brief filed this afternoon.

You also asked if there is a way to get those without "bothering" us. Since this case is headed for oral argument, it is on the cases awaiting oral argument page – our brief isn't on the page yet, but it should show up here: 164638-9, People of MI v John MacAuley Burkman, People of MI v Jacob Alexander Wohl (michigan.gov)

Once the case is scheduled for oral argument, I believe they will move it to a different section of the website, and you'll want to look for it here: Schedule of Oral Arguments (michigan.gov)

Unfortunately, although I think it used to be true that you could download briefs for any MCOA or MSC case, I think they have changed it so that you can only get opinions and orders now (other than cases the MSC has taken). If there's another case you're interested in in the future, the general search page is here: Cases, Opinions & Orders (michigan.gov).

You should be able to get opinions and orders there. I have a login that will let me download most documents, so if you see something you would like other than an opinion or order, don't hesitate to reach out. It's truly no bother.

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DPP MCL 15.243(1)(m)

Finally, the hearing is going to be held via Zoom on June 29 at 9:30 a.m. Only parties are allowed on the Zoom, but it is being streamed to YouTube. The links are:
https://www.youtube.com/@michiganattorneydiscipline3923

https://www.youtube.com/@michiganattorneydiscipline4603

(I'm not sure if it's going to be on both YouTube channels, or if they just don't know yet which channel it will be on. So I am planning to check in on both.)

If you need anything else, please let me know!

Thanks, and have a great weekend,

Linus Banghart-Linn (he/him)
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CC: Dax Goldstein [dax@statesuniteddemocracy.org]; Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Christine Sun [christine@statesuniteddemocracy.org]
Subject: DPP MCL 15.243(1)(m)
Attachments: DPP MCL 15.243(1)(m).docx

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Hi Heather,

DPP MCL 15.243(1)(m)

In the meantime, let us know if it would be helpful for us to send updates your way.

Best,

Jonathan

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Sent: 7/11/2024 6:42:16 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: NV transcript
Attachments: (Doc 96) 2024-06-18 Motion Hearing Transcript[49].pdf

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Hi Heather,

As I mentioned, there's no written order dismissing the complaint in the RNC's NV NVRA case. Here's the transcript from the Nevada MTD hearing. You'll see the court's oral ruling begins at page 70.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

REPUBLICAN NATIONAL COMMITTEE et al., Plaintiffs, vs. FRANCISCO V. AGUILAR, in his official capacity as the Nevada Secretary of State, et al., Defendants.	Case No. 2:24-cv-00518-CDS-MDC Las Vegas, Nevada Tuesday, June 18, 2024 2:14 p.m. - 4:30 p.m. Courtroom 6B Motion Hearing **C E R T I F I E D C O P Y**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CRISTINA D. SILVA,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

COURT REPORTER: Samantha N. McNett, RMR, CRR, CCR
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101
Samantha_McNett@nvd.uscourts.gov

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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Las Vegas, Nevada 89101
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(Appearances continued on next page.)

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LAS VEGAS, NEVADA; TUESDAY, JUNE 18, 2024; 2:14 P.M.

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P R O C E E D I N G S

THE COURTROOM ADMINISTRATOR: This is the time set for the motion hearing in case number 2:24-cv-00518-CDS-MDC, Republican National Committee et al versus Francisco Aguilar et al.

THE COURT: Good afternoon, everybody. I apologize for the technical difficulties. Even in 2024, Zoom gives us challenges.

I believe everyone has checked in with the courtroom deputy. If you have not yet checked in, please do so at the conclusion of this hearing, or if you are on Zoom, do so via chat. That way, we can make sure your presence is documented.

We are here this afternoon for defendant's motion to dismiss, which is docketed at ECF number 26.

I'm going to start with counsel for plaintiff and ask that they introduce themselves this afternoon.

MR. WOODFIN: Good afternoon, your Honor. Conor Woodfin for the plaintiffs.

THE COURT: Good afternoon.

MR. BARR: Good afternoon, your Honor. Jeff Barr on behalf of plaintiffs.

THE COURT: Good afternoon.

MS. CHATTAH: Good afternoon. Sigal Chattah on behalf

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of plaintiffs NVGOP.

THE COURT: Good afternoon to you, as well.

And who's present on behalf of defendants?

MS. ST. JULES: Good afternoon, your Honor. Laena St. Jules on behalf of the Secretary of State.

THE COURT: All right. And --

MR. DODGE: Good afternoon, your Honor. Christopher D. Dodge on behalf of the proposed interveners.

THE COURT: All right. Good afternoon.

I will not be addressing -- just for clarity purposes, and I'm sure the parties are aware -- the motion to intervene as I believe I need to resolve this motion first, but thank you for your presence.

All right. Let's go ahead and get started. This matter has now been fully briefed. And I did issue a minute order regarding the subject matter I want to address during this afternoon's hearing and then that changed slightly. I don't know if it changed really, but there was intervening case law issued last Thursday from the Supreme Court in FDA versus Alliance for Hippocratic Medicine. And so, as noted at ECF Number 92, I granted Defendant Aguilar's motion to supplement the authority as that addresses organizational standing.

As we proceed through this hearing, I will likely rule from the bench on some of the issues. I want to hear argument on many of the issues, and for that reason, I don't know

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whether or not I'll decide the motion in full from the bench. Rather, I want to hear argument and go from there.

Depending on how long this goes, we will take a break not only for my staff but primarily for my court reporter whose fingers will inevitably get tired. And I'm working tirelessly to speak slowly which is not my forte as anyone who has appeared in front of me knows.

All right. So let's get started. And I want to start with statutory standing.

Interesting language used in 52 USC Section 20510(b)(1) regarding pre-suit notice. While it reads as permissive, courts have interpreted it as nonpermissive and dispositive to a civil plaintiff's case if they fail to satisfy this element of statutory standing. As set forth in cases that address the statutory notice requirement, it provides, states an opportunity to attempt to comply with the NVRA before facing litigation.

My first question is for Defendant Aguilar. You argue that notice here is deficient. And I want you to address two parts of that:

One, is it deficient as they cited the specific section in which they believe there is a violation?

And two, how does your argument square with the National Council of La Raza's decision regarding the notice requirement, while mandatory, the Ninth Circuit seems to think

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it's kind of a "check the box" as opposed to "must be a full and fulsome notice requirement"?

You're welcome to stand there or you're welcome to come to the podium. It's up to you.

MS. ST. JULES: Thank you, your Honor. Laena St. Jules.

So I think I'll focus on the allegations that are new to the complaint that weren't raised in the notice letter. And as we've set out, the Fifth Circuit has explained that an opportunity to cure is part of the notice requirement.

Plaintiffs have raised allegations relating to inactive voters and also to relocation rates. This is nowhere in the notice letter. The notice letter focused solely on active registration rates. And I think that even under plaintiff's cases, their notice letter is deficient.

In American Civil Rights Union versus Martinez-Rivera, the Court explained the notice letter should give a defendant enough information to diagnosis the problem. The Judicial Watch, Inc. versus King court explained that the letter should set forth the reasons for plaintiff's conclusion that the defendants have failed to comply with the NVRA.

The Public Interest Legal Foundation versus Benson court explained that a notice letter is sufficient when it sets forth the reasons that a defendant purportedly failed to comply with the NVRA.

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None of these cases the plaintiffs have relied on address a similar situation to this where entire bases are missing.

And I don't think this is a formality in this case because specifically with respect to the 5,000 or so inactive voters that plaintiffs have alleged should have been removed, that's actually something that the Secretary of State could have acted on if it was actually properly noticed. Right now, as the Court is aware, we have 90 day restrictions in place kind of throughout this year. We have three elections that are subject to this 90 day restriction. One was in a February; it was a presidential preference primary. One was just last week, June 11, a primary election. And again, we're going to have the November general.

But if plaintiffs had raised these inactive voters back in December, right after the primary in February, the Secretary could have coordinated with the county clerks to make sure that there were no inactive voters that could have been removed at that time.

So I think even under plaintiff's cases, like I said --

THE COURT: Well, hold on. Wouldn't that have been within the 90 day period before the caucus or the primary?

MS. ST. JULES: I don't believe caucuses are actually included within the --

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THE COURT: But there is a primary, right? There was a primary here in Nevada?

MS. ST. JULES: That's right. So between February 6th and the next 90 day period, which started for the June election, we had -- let's see. The next 90 day period started March 13th. So between those two dates, they could have identified those inactive voters and they could have removed them.

They couldn't have done the full program to remove active -- or to inactive active voters. And I'm happy to explain that. But certainly, the inactive voters could have been addressed during that time. And we were denied the opportunity because they filed their complaint on March 18th and that was within the 30 day period for the June primary, as well.

Would your Honor like to hear about why the active voters couldn't have been addressed after the February primary?

THE COURT: No. What I want you to focus on is how your argument squares with the La Raza case.

MS. ST. JULES: Certainly, your Honor.

So La Raza had to do with -- it was an ongoing violation that was alleged relating to voter registration services that needed to be provided under the NVRA. There was no 90 day restriction for those kinds of activities and so there could be a violation within the 90 day period that can't

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exist here because we are precluded from taking action to implement the general program to remove voters who have changed residence. So it's not the same kind of violation that's being alleged.

And the Court ultimately held that no notice was required. And this is under 20510 -- let's see -- subsection 3. "If the violation occurred within 30 days before the date of an election, the agreed person need not provide notice to the chief election official of the state."

But there was no violation for us in this case because the State was precluded from implementing its program entirely. There -- they couldn't -- the State couldn't use reasonable efforts to conduct its programs during the 90 days before the -- the primary and general elections that are at issue here.

So under La Raza, you know, if there is a violation and it took place 90 days beforehand, then you would absolutely need to provide notice. I don't think that's -- that's conflicting with La Raza.

THE COURT: All right. Thank you very much.

I want to turn and ask defendants a question, and that is really where we left off with -- I'm sorry -- plaintiffs, where I left off asking the defendant the question. And that is how La Raza impacts this case. You rely on it in saying, essentially, you've met the requirement and look at the Ninth

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Circuit. They've, essentially, said that requirement is not necessary. I'm very -- I'm arguing that very broadly.

But as argued by defendant, that is a Section 7 case, not a Section 8 case. Why should I consider or apply La Raza here?

MR. WOODFIN: So the difference between Section 7 and Section 8 doesn't bear on the notice. La Raza still applies just as well to Section 8 cases. I'm not aware really of any -- of any court distinguishing between Section 7 and Section 8 as far as the quality of the notice.

THE COURT: I haven't seen any cases that distinguish between that either. However, there is a difference and a distinguishing factor and that is that 90 day requirement. So under Section 7, obviously, it's a voter registration provision, a Court could order relief requiring the enumerated entities to register people to vote as required under the section. And that could happen through an election, you know, at any time.

Here, the State would be prohibited from acting on any program whether it already exists or it would need to be modified.

Is it your position that there's still no distinction?

MR. WOODFIN: So a few points on this.

First, the notice letter did not reference the February primary. It did not demand any sort of removal of

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ineligible voters from the voter rolls before the February primary. In fact, the only mention of any election in the letter is a request that the Secretary and the defendants provide information and assurances that they would comply with the NVRA before the November general election. So that's a very simple reason why this 90 day blackout window doesn't apply.

The second is there's a distinction between -- in all the case law between discrete violations and systemic violations and this is really a more fundamental point. La Raza draws this distinction between discrete violations and systemic violations. And the point is this violation that we're alleging here is systemic. It's not that the Secretary failed to remove ineligible voters immediately before the February primary. It's, rather, that the defendants have been, over the course of, you know, the past few election cycles failing to remove ineligible voters. And the evidence we provide, both in the notice letter and in the complaint, supports those allegations.

And so because it's a systemic violation, it couldn't have been cured by a one-off removal of ineligible voters before February. A systemic violation requires systemic changes in order to cure that violation. That's what we alleged in the notice letter and in the complaint.

And third, turning more directly to La Raza, there,

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the Court held that the timing of the notice letter did not bear on the sufficiency of the notice letter. So, here, the text of the -- of this -- of this (b)(1) subsection is very important. It requires simply notice of the violation.

And to the extent timing matters at all, it only bears on when the plaintiff is allowed to file a lawsuit. So if the notice letter comes 120 days before a federal election, then they have to wait the full 90 days. If it comes within -- I -- excuse me -- within those 120 days before a federal election, then they have to wait 30 days, and if it comes within 30 days before a federal election, they don't have to send a letter at all.

So, here, to the extent that timing of the February primary mattered at all, under La Raza and under the plain text of the statute, the only effect it would have had is we could have actually sued much sooner. We could have sued only waiting 20 days for the Secretary to respond. Instead, we waited the full 90 days. And that's consistent with the statute. And it doesn't -- it doesn't bear on the sufficiency of the notice. It --

THE COURT: Right. Let's talk about the sufficiency of the notice. The notice is included at ECF 1-1. You talk about counties having voter registration rates that, according to your letter, exceed 90 percent of adult citizens over the age of 18. And that is apparently drawing from 2021 citizen

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voting age population data.

And then you go on to talk about three counties having more registered active voters than voting eligible citizens and others that have suspiciously high rates of voter registration.

And when I read the notice beginning with the bottom of page 3 and continuing through page 4, specifically the paragraph that begins, "These voter registration rates are abnormally, or in the case of counties with greater than 100 percent registration, impossibly high" and then you cite to some information and some tables. When I look at those tables, Nevada's rates are on par with the rest of the country.

And so I'm not -- so provide some clarity for me in regards to those tables. And tell me where in the notice it talks about systemic violations that would need to be remedied.

So let's start with the tables.

MR. WOODFIN: Okay. What -- specifically, what numbers are you referring to?

THE COURT: Sure. ECF Number 1-1 at page 4. You're looking -- you cite to *Voting and Registration in the Election of November 2020*, Table 4a, and then there's a cite to *Voting and Registration in the Election of November 20* -- I'm sorry. The first one is 2022 and the second one is 2020. And I printed that data and Nevada's rates change -- or aren't different from other states in any significant way.

So I'm wondering how this put the State on notice as

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to what you were challenging.

MR. WOODFIN: Right. Yes. So a few points on this.

So first, this is a very common, well-tested method of -- of noticing these systemic violations and then also pleading in the complaint. The U.S. Department of Justice pointed out this in United States versus Indiana. They allege that Indiana counties have between 90 and 95 voter registration rates. Looking at the same tables and the census data --

THE COURT: Right. But that is for, I believe, all 26 counties in Indiana, and here, we're looking at --

MR. WOODFIN: Well, yes, so --

THE COURT: -- six?

MR. WOODFIN: So a couple points.

First, we're pointing to, you know, only a handful of counties. And, of course, Nevada has fewer counties than Indiana.

THE COURT: You have to say Nevada if you're going to --

MR. WOODFIN: Nevada. I apologize. You're going to have to correct me.

THE COURT: It's only fair that I give you the heads-up.

MR. WOODFIN: I will do my best, but I can't make any promises.

So, of course, Nevada has fewer counties.

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But what's really more fundamental is that the -- the NVRA designates the Secretary -- it requires a chief election officer.

THE COURT: Sure.

MR. WOODFIN: And then Nevada law, in turn, designates the Secretary of State as the State's chief election officer.

And so to state a violation under the NVRA and to provide accurate notice under the letter, we don't need to show that every county is --

THE COURT: Sure.

MR. WOODFIN: -- is -- has bad rules.

THE COURT: I agree with you on that.

MR. WOODFIN: Right? To the extent even one county has bad rules, that is evidence or at least raises the inference that the Secretary is failing in his duty as the chief election officer to maintain a general program that keeps the counties in line and keeps the voter -- the voter rolls accurate.

THE COURT: Sure.

MR. WOODFIN: And so that's why, you know, we don't include every county as a defendant.

THE COURT: Sure.

MR. WOODFIN: It's the counties who have, compared to the census data, these excessive voter registration rates.

THE COURT: So -- okay. So I understand that that's

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the census bureau data that you're pulling from. Like I noted, Nevada is -- isn't different in any stark way.

So when I look at this and look at the letter and I look for where you're drawing the data from for the comparative information. So you cite to the most up to date counted -- count of registered active voters available from the Nevada Secretary of State. What is that? And what is that source?

MR. WOODFIN: So the NVRA also requires states to publish voter registration data, right? So we're pulling that information directly from the Secretary of State --

THE COURT: All right.

MR. WOODFIN: -- as individual counties.

THE COURT: And what's the date of that information?

MR. WOODFIN: So we -- if -- for each -- for both the notice letter and the complaint, we pulled the most recent data available from the Secretary.

THE COURT: What does that mean, though, right? Is that most recent? Is that --

MR. WOODFIN: So I --

THE COURT: I like specificity.

MR. WOODFIN: Yes. Yes. So it's published monthly. I don't think it's -- there's an exact day of the month or day of the week that it's published, but -- and my friend on the other side can correct me if that's wrong. But it's monthly data, essentially, for these voter registration rates. And

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then, in turn, we're comparing that to the most recent census data available.

So for here, this is really critical that that five year census data estimate from the community -- from the American Community Survey, that's both the most recent and the most accurate data available, the one and two year estimates, which defendants put forward as saying that would be more recent. But that data is not available for these counties.

THE COURT: I'm sorry. You mentioned the American Community Survey?

MR. WOODFIN: Yeah. So this is the census data we rely on. These are the tables.

THE COURT: Okay.

MR. WOODFIN: These are the census tables you were referencing in the letter.

THE COURT: All right. And so it's your position that the State would know, when you're writing "the most up to date count of registered voters -- active voters available from the State," that that would be what you're referring to? That's the comparison that you're doing?

MR. WOODFIN: That's correct. That's correct. Yes.

And -- and I would just add that that process, that method, has been held, even under ACRU, which the defense cited as -- as a case that indicates we need to provide enough information to diagnose the problem. There, this exact same

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method was used to show that Zavala County in Texas had 104 percent registration rate and that was enough to provide notice. In that case, the Court actually denied the motion to dismiss on that notice ground and held that that was sufficient notice.

And I would just like to address one last point on this notice letter since defense brought it up, the 5,000 registrants and then the other pieces of evidence that we include in the complaint that were not included in the notice letter. Those are still valid -- it's still valid evidence to support an inference of a violation in the complaint. Courts have not held that you need to exhaust the evidence that supports the violation in the notice letter. In fact, that would be -- I mean, that would create poor incentives.

THE COURT: Well, sure. And it would also create some disputes that probably wouldn't be able to be resolved. So I appreciate that.

MR. WOODFIN: Yeah.

THE COURT: My question is, when I'm looking at the sufficiency of the notice, is it enough to say, "Hey, we looked at this data and this is enough" when you're standing in front of me saying, well, you advised there was a systemic problem, and where is that in the letter itself?

MR. WOODFIN: So it is enough. A notice is just a notice of the violation. It's not a complaint. It's not

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evidence. It's not an expert report. We don't need to provide, you know, alternatives. It's simply notice of the violation.

And throughout the -- I mean, throughout the letter, all of what we're bringing up as evidence is evidence that the Secretary and the defendants are failing to conduct reasonable efforts, that whatever they've been doing so far has not amounted to reasonable efforts.

And so looking for, you know, the best language in the letter that would -- that would signify this. But it would probably be the last letter -- excuse me -- the last sentence in the first paragraph. "This evidence shows that your office and officials in these counties are not conducting appropriate maintenance to ensure that the voter registration rule is accurate and current as required by law."

We're not -- you know, the -- for example, these 5,000 extra voters, we're not saying those 5,000 extra voters need to be removed immediately. What we're saying is that is evidence that the defendants are failing in their list maintenance obligations under the NVRA, failing to make a reasonable effort.

I can go on to maybe other portions of -- of Article III standing or the merits --

THE COURT: We're going to talk about Article III standing later as I have some additional questions.

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But what I think would be helpful is you talked about briefly earlier is that you weren't asking them to remove, for example, those inactive voters, that 5,000 number before the primary. You were just asking for compliance before the November election.

When you say you're looking for compliance before the general election in November of this year, what does that look like for you?

MR. WOODFIN: So we think that goes more to the remedy. And, again, notice is notice of the violation. It's not notice of the steps we think would amount to reasonable efforts. We just have to allege, point out notice in the violation, and then in the complaint, provide enough facts to indicate that whatever they're doing right now is unreasonable.

That said, there are plenty of things that the Secretary could do and that the defendants could do that would, you know, perhaps, amount to reasonable efforts. Removing those 5,000 voters who have been on the rolls for two years, you know, would be a start.

But it would be systemic changes. It would be evidence that the Secretary is holding the county defendants accountable to the requirements that are already in place under Nevada law. So that would be a dispute of fact as to whether they're actually enforcing whatever program they have in place right now. And that would turn on, you know, discovery, we

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think. What are -- what is the evidence that the Secretary is actually enforcing the law and holding those county defendants accountable?

And so, you know, the precise nature of what, you know, any sort of injunction or remedy would look, we think, would depend on what exactly are the shortcomings of the list maintenance program that's in place.

But for here, we just have to show that the list -- that the list maintenance program that's in place right now does not amount to reasonable efforts. So that would be our burden at this stage.

THE COURT: All right. Those are the questions that I have on statutory standing at this time.

I want to turn and talk about Article III standing.

And counsel, you can return to your table as I'm going to narrow the issue on this subject matter because I'm going to, first, discuss the individual plaintiff, that is, Scott Johnston, and whether or not he has standing.

I don't think any party disputes that the Constitution gives federal courts the power to adjudicate only genuine cases and controversies. That power includes the standing requirement. And a plaintiff can only have standing if they allege personal injury that's fairly traceable to the defendant's allegedly unlawful conduct, which is well-known as the injury in fact, and likely to be redressed by the requested

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relief.

In reviewing the complaint, I find that Johnston fails to meet this standard. His basis for alleging standing are far too generalized and speculative to confer standing. I'm going to address each in turn.

First, he claims that there's a loss of confidence in the electoral system. This claim is too general. A plaintiff raising a generally available grievance about a government claiming only harm to him and every other citizen's interest in proper application of the Constitution and laws and seeking relief that no more directly intangibly benefits him than does the public at large does not state an Article III case or controversy -- or does not present a case or controversy under Article III. And that's from the Lance v. Coffman case, a 2007 decision out of the Supreme Court.

Johnston, like other voters, has no greater stake in this lawsuit than any other citizen and, therefore, he can't establish a particularized injury.

I also find this claim to be too speculative. Courts have universally concluded that an alleged injury related to a lack of confidence in the voting system is too speculative to establish injury in fact and, therefore, to establish standing where there is no standing for that. And that's courts from Arizona to Pennsylvania to the Second Circuit have all reached similar conclusions.

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I find that his claim of dilution of votes fairs no better. First, it, too, is too generalized. Plaintiff's injury of vote dilution is impermissibly generalized and speculative. And that is from Trump for President versus Cegavske. That's a decision out of this district from 2020.

The Eleventh Circuit made a similar decision in the Wood v. Raffensperger case. And I apologize if I'm mispronouncing that incorrect. For my court reporter, that's R-A-F-F-E-N-S-P-E-R-G-E-R. That's an Eleventh Circuit case from 2020 where they found that vote dilution where no single voter is specifically disadvantaged if a vote is counted improperly is paradigmatic generalized grievance that cannot support standing.

It also is too speculative. Here, as pled, the complaint insinuates that voter fraud could happen. It might happen. Not that it will happen, it's certainly impending, or there's a substantial risk of that. And so that makes this speculative at best.

And so I do find it appropriate to dismiss Johnston from this action at this time because he lacks standing.

My question is whether or not I should grant leave to amend, and if he were to be given leave to amend, what additional allegations would he bring forward?

MR. WOODFIN: So one point, your Honor.

THE COURT: Sure.

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MR. WOODFIN: I'm not sure if we could change your mind on dismissing him, but I'd just like to note we do point this out in our brief. For an Article III case or controversy, it turns on whether there's an injury in fact for each claim. And so even if you find that he doesn't lack standing, we think dismissal would be inappropriate unless you also find that the organizational plaintiffs lack standing. So as long as the organizational plaintiffs have standing, then dismissal, we think, would be inappropriate as to Mr. Johnston because there is still a live case or controversy.

THE COURT: I understand that was your argument. I'm not convinced. And I have a number of questions regarding organizational standing, so I have not made a decision on that.

MR. WOODFIN: Okay. Yes.

THE COURT: Nonetheless, I still would want to know what additional allegations you would bring forward regarding Johnston and his standing.

MR. WOODFIN: So I don't think there's anything we could bring -- we could add to his allegations regarding voter confidence.

The best case on this is Judicial Watch versus Griswold out of the District of Colorado explaining that under the NVRA in particular, voter confidence has a unique place because Congress has designated these otherwise intangible injuries that would have been insufficient outside of the NVRA,

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in Trump versus Cegavske, for example. And because Congress has designated those as now tangible injuries, we don't think there's anything to add to the voter confidence.

THE COURT: All right.

MR. WOODFIN: I would say on risk of fraud, there's a similar chain of reasoning that -- you know, in TransUnion, the Supreme Court explained that Congress can tie a chain of inference that would normally be speculative and make it nonspeculative. And our argument would be under the NVRA, that's exactly what's happened. Congress has specifically tied violations of the NVRA to a degradation of election integrity. And of course, the Supreme Court has noted that voter fraud is not a real risk. It's not simply a speculative risk.

That said, you know, if we were to amend and add allegations, you know, maybe we could -- we could find some specific voter fraud cases that relate to registration. Maybe that would -- that would put them over the edge, but we think --

THE COURT: Right. And so I guess that kind of ties to another question that I was going to ask later, but I'll ask it now.

When I look at the notice and then your complaint, you seem to be alleging both registration and inactive voters and/or lack of not registering people or getting them off the rolls, right? So you're doing both.

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MR. WOODFIN: Yes.

THE COURT: Is that your theory of the case that it is both or are you picking one or the other?

MR. WOODFIN: Well, it's certainly both as far as they pertain to Mr. Johnston and individual voters.

It's especially true because Nevada mails out ballots to all active voters. And so if they're -- if they're not moving voters off the active list to the inactive list, even if those voters shouldn't be removed from the rolls, that certainly undermines confidence in elections. It undermines Mr. Johnston's confidence.

THE COURT: All right. I'm going to take that under advisement. I'm not sure exactly what I'm going to do with that. So let me think about that.

MR. WOODFIN: Okay.

THE COURT: Let me turn to defendant. Anything you would like to add regarding whether he should be dismissed with or without prejudice?

MS. ST. JULES: Thank you, your Honor.

I think, as you noted, I don't know that the distinction between receiving a mail ballot versus not receiving a mail ballot is enough to push him over the edge. There are still safeguards that prevent somebody from fraudulently voting and he would be subject to criminal penalties. But I think the Ninth Circuit case law on

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speculativeness is pretty conclusive that undermined confidence isn't enough, that risk of vote dilution that is alleged as may occur is not enough.

And I would also note with respect to the allegations that Congress has made, you know, vote dilution concrete, I think this is Spokeo, in essence. And in Spokeo, they talked about concreteness which is separate from speculativeness. It's a separate component. You can't just allege a bare procedural violation. You still need some degree of risk that vote dilution based on inaccurate vote rolls will occur. And they -- they haven't alleged any risk that ties inaccurate voter rolls to vote dilution.

THE COURT: Okay. All right. Okay. I'm going to move on -- thank you -- to the next line of questioning, or, rather, subject matter I want to address and that is the organizational standing. It was like you knew where I was going.

Like an organization -- rather, like an individual, an organization can bring suit on its own behalf if it meets the standing requirements. And standing must be established independent of a lawsuit filed by a plaintiff.

There's a lot of case law on organizational standing, and, of course, I'll say it was, perhaps, sharpened last week by the FDA decision. It's been long established that organizations cannot manufacture an injury by incurring

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litigation costs. And Kavanaugh, in writing for the Supreme Court last week, wrote that a plaintiff attempting to show causation generally cannot rely on speculation about unfettered traces made by independent actors not before the Court.

There's a lot of case law talking about the needle that needs to be thread in order for an organization to have standing, and that, of course, is all tied to causation. There has to be causation between the alleged illegal conduct and the injury. And just like individual standing, it cannot be too speculative or too attenuated.

Causation also requires, as stated last week -- I think it was quoting the Allen decision -- virtually continuing monitors of the wisdom and soundness of a government action.

And in sum, the FDA, as I said, sharpened what is required for a plaintiff to show organizational standing.

Here, plaintiff alleges a couple of different things.

In paragraph 22 and 23, you talk about expending funds to bring this action. How is that not in direct violation of Ninth Circuit precedent that you can't manufacture an injury by incurring litigation costs?

MR. WOODFIN: Thank you, your Honor.

I think I'll start with Alliance. I'll tell you where I'm going first, perhaps. I'm going to look at paragraphs 12 and 14 of the complaint --

THE COURT: Okay.

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MR. WOODFIN: -- rather than 22 and 23. But I'll --

THE COURT: I still want you to address 22 and 23.

MR. WOODFIN: I will also address those, yes.

THE COURT: Okay.

MR. WOODFIN: But I'll start with the allegations that I think give us standing --

THE COURT: All right.

MR. WOODFIN: -- and then explain why 22 and 23 don't defeat that standing. So --

THE COURT: Okay. Well, I know you're going to talk about the -- the funds that you will have to expend. I'm going to come to that.

MR. WOODFIN: Okay.

THE COURT: So focus on 22 and 23 for me.

MR. WOODFIN: Okay. So -- so those are not necessary -- those are not litigation costs. Those were investigation costs to solve the problem of -- of these unclean voter rolls. It costs money to investigate these problems and to work with, you know, the defendants to solve these problems. Those are not litigation costs.

There is -- I believe it was the -- I'll find the case, but that -- a case that discussed these -- this is, essentially, not an issue at the motion to dismiss stage, that, perhaps, later on the Secretary can present evidence that all of those investigation costs were actually litigation costs,

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but they're not litigation costs. We don't say they're litigation costs in the complaint. These are costs to investigate the problem and to prevent the problem from harming the RNC and the Nevada Republican Party's mission.

And so that takes us back to paragraphs 12 and 14, which is the -- the allegations in the complaint that lay out the missions of those organizations. And so the mission is to elect Republican candidates and to turn out Republican voters. In doing that, in paragraph 14, they rely on accurate voter registration lists. And when lists are inaccurate, that results in these organizations not only misallocating resources but it harms their campaign efforts. They're now trying to turn out voters who are ineligible. And so they're wasting their time, they're wasting their resources, and are less effective at accomplishing their mission of turning out Republican voters and electing Republican candidates because they rely on what are inaccurate voter registration lists.

And in that respect, it's no different than the harm that was in Havens. There, in Havens, the organization was -- is nonprofit housing advocacy group. They requested information from a third party. That third party realtor turned over false or inaccurate information to them. That harmed their mission.

THE COURT: I don't think it was inaccurate. It was --

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MR. WOODFIN: It was false.

THE COURT: It was false, yeah.

MR. WOODFIN: It violated the Fair Housing Act for that reason. And -- and so that harmed the mission of that organization to, you know, provide housing resources to their constituents and, in turn, they expended resources to address that problem.

That's exactly what's going on here. The -- the RNC and the NVGOP have a mission that is independent of pursuing, you know, clean voter rolls. Their mission is to elect Republican candidates and to turn out Republican voters. That mission is tangibly harmed -- as paragraphs 12 and 14 say, it's tangibly harmed because they rely on these voter registration lists and the inaccurate lists result in them not being able to accomplish their mission as effectively as they would and, in turn, they divert resources to investigate, to solve this problem from other mission critical areas.

And in that respect, it's -- we don't read Alliance for Hippocratic Medicine as changing any of this.

THE COURT: That's why I called it sharpened, right?

MR. WOODFIN: I think that's about right. We don't -- it -- it applied to Havens. It didn't abrogate Havens. And so in that respect, the standards are the same.

And really, this is how the Ninth Circuit has applied Havens for years. It's this two-prong test, independent

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mission impairment plus diversion of resources.

THE COURT: So understanding that you talk about the mission and, you know, that is -- I think aligns with Havens and the conversation about core mission activities.

However, if I'm looking specifically at paragraph 14, the way it's pled is that the RNC may spend more resources on mailers, knocking on doors, or otherwise trying to contact voters or it may misallocate its scarce resources amongst different jurisdictions. And that kind of, "may," "might," "should" is pervasive. How does that give you standing --

MR. WOODFIN: So the --

THE COURT: -- as you stand here today? Go ahead.

MR. WOODFIN: So the "may" is -- it's conditional language. It's not speculative language, if that makes sense. So it's conditional on us obtaining relief. If we obtain relief, then we won't have to -- we will no longer have to spend these resources.

THE COURT: But have you spent those resources?

MR. WOODFIN: Yes. So --

THE COURT: But where is that in the complaint?

MR. WOODFIN: Well, first, it's in paragraphs 22 and 23. We're having to investigate. And second, it would be -- I think paragraphs 92 or 93 claim that the defendants' ongoing violations are continuing to cause injury.

And so, you know, if -- if amending the change "may"

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to "will" is necessary, we can certainly do that.

But here, we think fairly reading those allegations, the organizations are spending money. They're actively campaigning right now in the midst of an election through primaries and up coming to the general election. They are determining their plans and budgets. That's an ongoing effort. They are determining their strategy and their plans both in Nevada and outside.

THE COURT: Well, that leads me to another question and that is: Knowing that, it's not like it was any mystery that the 2024 election was coming, why was this action brought in March of this year as opposed to earlier?

MR. WOODFIN: So it -- you know, maybe there's evidence out there that would have supported a notice letter earlier. The Ninth Circuit rejected, you know, that proposition that that would, like, defeat a notice letter or defeat a complaint. The fact that, there, even the -- the plaintiffs discovered the violation in December and then waited until May to even send the notice letter.

THE COURT: Right.

MR. WOODFIN: Here, you know, that's not what happened. You know, we've put in the research and discovered the violation and sent the notice letter as soon as possible. And now, the complaint was filed, you know, just waiting after that 90 days.

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THE COURT: Right. And then after it was filed, this wasn't -- you didn't seek expedited emergency relief. And so I'm wondering why.

MR. WOODFIN: So -- well, two reasons. First, the fact that we don't, you know, pursue expedited relief doesn't defeat, you know, whether this complaint states a claim or not.

But besides that point, again, what we're returning to --

THE COURT: But I want to be clear, I'm not addressing these on the merits. I'm inquiring just because I think it could potentially be related to standing. Though, I'm not ready to ask additional questions on that yet because it's still processing in my mind.

MR. WOODFIN: Yeah.

THE COURT: But why?

MR. WOODFIN: So it's because our fundamental claim is a systemic violation.

So, again -- and this is kind of a common theme throughout the briefs, throughout the arguments, that we're not demanding -- and the way to comply with the NVRA is not a sudden removal of ineligible voters all at once. The way to comply is to run -- set up and -- and adequately run a general program that makes a reasonable effort to remove ineligible voters. And so the systemic violation, really, couldn't be cured, you know, through a -- a preliminary injunction motion.

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And, you know, to that point, we think a lot of this does turn on discovery. What exactly are the failures of the defendants? Here, the complaint and the notice letter provide enough notice of the violation and enough evidence to infer that the -- the current efforts are unreasonable. But, you know, the precise details as to what would be a reasonable program, we think, requires more development and discovery and -- and -- and then -- and then in crafting a remedy.

So that would be why we didn't move forward for expedited relief.

THE COURT: So is it the RNC's position that you're not seeking relief or remedy before the November election?

MR. WOODFIN: I mean, we're not -- we haven't pressed the Court for that, obviously.

THE COURT: Right.

MR. WOODFIN: We think -- normally, the -- you know, in a lot of these cases, as soon as it gets to discovery, you know, the parties tend to work something out and -- and negotiate a settlement. That's what happened in Daunt. And Green right now, I think, is the only -- only case on voter list maintenance that's currently in discovery.

But that said, you know, we could have -- we don't expect this to go -- how should I say this? The -- we're not trying to speed up the case for the sake of obtaining discovery before the November election.

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THE COURT: All right.

MR. WOODFIN: But of course, you know, the point of sending the letter was to encourage list maintenance practices before that election.

So -- and, you know, these -- because these are systemic violations, they don't turn on one election or another. These -- the reasonable efforts have to continue before an election and after an election. So we think if there's a violation, it -- whether it surrounds an election or -- or not is really irrelevant.

THE COURT: All right. Let me go back to the costs, the litigation costs which you are arguing that it's investigative costs and so that's separate and apart from litigation costs. When I dive a little deeper into the FDA case, it says directly that you can't manufacture standing based on incurring costs to oppose government actions.

So even if it's investigative, how is that not at odds with the FDA decision?

MR. WOODFIN: So -- so a couple things.

First, we have multiple different diversions of resources. The investigation is certainly one part of that. But -- but many other parts -- I mean, in order to address the harm to the mission of turning out voters and electing Republican candidates that are caused by the inaccurate voter rolls in paragraphs 12 and 14, the RNC has had to divert

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resources to counteract this.

And so regardless of whether --

THE COURT: That's not in the complaint.

MR. WOODFIN: That's -- it's in paragraphs 12 and 14. 12 lays out the mission and then 14 lays out exactly how the mission is harmed.

THE COURT: That -- that paragraph says, "The RNC relies on voter registration lists to determine its plan and budgets. It relies on registration lists to estimate voter turnout which informs the number of staff the RNC needs in a given jurisdiction, the number of volunteers needed to contact the voters, and how much the RNC will spend on paid voter contacts.

"If voter registration lists include names of voters who no longer -- should no longer be on the list, the RNC may spend more resources on mailers, knocking on doors, or otherwise trying to contact voters or it may misallocate its scarce resources amongst different jurisdictions."

So that actually isn't set forth in the complaint. That's a "may."

MR. WOODFIN: Well -- so, again, I fall back to my argument on "may." That's not -- it's conditional language. It's not speculative language. But even if you -- if you don't think that -- and you know, we could amend a change, "may" to "will."

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THE COURT: I don't disagree with you on that. That's why I'm asking these questions.

MR. WOODFIN: That would be why.

THE COURT: So as you stand here today, it's your position that the RNC has expended resources?

MR. WOODFIN: Yes. Oh, yes. Certainly.

THE COURT: Okay. And can you give me some specific examples?

MR. WOODFIN: Yeah. Well, it would be -- it's -- I can't give you more specific examples than what's alleged in the complaint. Of course, you know, later on, if we're moving for summary judgment, we can provide declarations about how exactly --

THE COURT: Yeah, that would be a different standard. Yeah.

MR. WOODFIN: -- how exactly they rely on the voter registration lists to determine their plans and budgets. You know, is it proportional to the population of active voters who are on lists or -- and you know, in determining, you know, how much money to put into Nevada for upcoming elections and campaigns, how much to allocate over various jurisdictions, and, you know, who to send to campaign, turning out voters and volunteers and -- based on how many voters are listed as active. All that would go into the campaign and the campaign strategy for -- for determining its plans to achieve its

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mission. And all of that is -- is harmed by inaccurate voter lists.

THE COURT: All right. Thank you very much.

I want to hear from defendants on organizational standing. I've asked a number of questions regarding FDA and how the facts of this case square with that decision. And I want to hear what your position is.

MS. ST. JULES: Certainly, your Honor.

We think the FDA case precludes organizational standing here. As the Court noted, they're alleging, essentially, speculative harms. I understand my partner on the other side of the aisle is saying that the harm is their inability to reach out to voters, but that's not one of their core missions. It's certainly not alleged as a core mission to contact their voters. It's to elect Republican candidates. It's not --

THE COURT: Wouldn't that be part and parcel of the same thing?

MS. ST. JULES: I don't think so. I think we have, in Havens, the case that the FDA examined -- the FDA case examined, the core mission was to inform home-seekers about housing opportunities. And so what information they gathered from Havens they were passing directly on. It was -- it was a much more direct line.

Here, we're talking about an incidental use of voter

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registration rules. The purpose of the NVRA is so that the states can efficiently run elections. It's not to provide major political parties with contact information for voters. It's an incidental use.

And you know, I -- I come back to the harm that they're talking about is really just this risk of vote dilution, that their candidates aren't going to get elected. And your Honor has already said that that is speculative.

I'd also point out with respect to the litigation costs argument, the Ninth Circuit has said that if you have costs that are business as usual, then that doesn't count as a diversion of resources. This is Friends of the Earth versus Sanderson Farms, Inc., 992 F.3d 939, Ninth Circuit, 2021.

And in their complaint, the plaintiffs allege that the RNC does monitors state and local election officials' compliance with their NVRA list maintenance obligations through publicly available records and jurisdictions across the nation. This is part and parcel of their business as usual to conduct these investigations. There is no diversion of resources.

I suppose there's, at some point, some diversion of resources once you start talking with the State as required under the NVRA to have a pre-litigation notice letter go out. And -- but then that becomes litigation costs. It's all part of a spectrum. It's either business as usual or it becomes litigation costs. There isn't a distinction to be made there.

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They're both not cognizable.

THE COURT: All right. So if you were to sum up your position regarding how the RNC organizational standing is precluded by the FDA decision, what would you say?

MS. ST. JULES: Well, I think your Honor pointed out, they only allege that this may harm them. They don't allege that it will. I understand they can possibly amend it and we'll raise arguments at that point if needed.

But I would also point out that the allegation is that they're talking about expending resources based on voter roll information from across the U.S. It's not specific to Nevada. They talk about different jurisdictions, and whatever other states are doing, it's not relevant to our state. And it's certainly not traceable to the Secretary of State.

THE COURT: All right. Thank you very much.

MS. ST. JULES: Thank you.

THE COURT: I would like counsel for plaintiffs to address the last argument in that what the RNC is doing across the country isn't tied to Nevada, much less directed or tied to the Secretary of State here.

MR. WOODFIN: So as far as organizational standing goes, you know, the RNC, obviously, is a national organization.

THE COURT: Sure.

MR. WOODFIN: The Nevada Republican Party is a state organization. So the -- the NVGOP does have state specific

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interests.

And then as far as the RNC goes, if 1/50th part of the mission is harmed from the RNC's standpoint from one state not having -- not complying with the NVRA, that's still a harm.

THE COURT: Sure. But that would still have to be tied to Nevada, correct?

MR. WOODFIN: And it is, because they rely on Nevada's voter rules --

THE COURT: Okay.

MR. WOODFIN: -- in the same way -- and would just add to respond to argument on that point --

THE COURT: Yeah.

MR. WOODFIN: -- that's still a direct -- it's the same informational communication that was in Havens and in TransUnion and these other cases that it's -- the NVRA doesn't just require states to accurately maintain their voter rolls. It's also requires them to make them public. And there's also a public records request in there. It requires them to publicize them. There's a reason for that.

The reason is that political parties and organizations, one, rely on these to determine their plans and budgets and run their campaigns, and two, to hold the states accountable. That's the very purpose of publishing this information. And that's why Congress created a cause of action both for individual plaintiffs and for organizations.

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THE COURT: Actually, I want to go back.

As I've sat here and thought more about some of your arguments regarding Johnston, is it your -- I want to make sure I didn't miss this argument.

Is it your position that as a member of the RNC, he would have standing?

MR. WOODFIN: So I think it kind of works the other way --

THE COURT: All right.

MR. WOODFIN: -- in that to the extent he has standing and voters in general have standing, the RNC also has associational standing on behalf of those voters.

THE COURT: All right.

MR. WOODFIN: Yeah.

THE COURT: I wanted to make sure I was understanding the line you were drawing and I wasn't drawing it backwards. That's why I asked that question.

MR. WOODFIN: Yeah.

THE COURT: All right. Thank you.

All right. I want to turn now and talk about redressability. And I've asked a couple of questions and it's come up a few times throughout this hearing this afternoon.

You seek five forms of relief in the complaint: Declaratory judgment that the defendants are in violation of Section 8, a permanent injunction barring violations of

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Section 8 of the NVRA, an order instructing defendants to develop and implement reasonable and effective registration list maintenance programs to cure their failure to comply with Section 8 and to ensure that ineligible registrants are not on the voter rolls, reasonable costs and expenses including attorneys fees, and then any other relief that you could be entitled to.

I'm going to ask this question again. And I asked it earlier and you gave me an answer, but I'm still lacking some clarity. What is it you're seeking?

MR. WOODFIN: So that paragraph C is, essentially, what we're seeking.

And the precise nature of the remedy, the injunction, you know, to maintain and make a reasonable effort to conduct a general program that removes ineligible voters, the nature of that injunction is going to depend in large part of the precise nature of the violations. How -- you know, what -- what are the -- what are their precise failings within the system, what controls do they lack, what controls are not being implemented.

THE COURT: Well, those are good questions. And then that kind of ties me to this in that aren't those questions, the injuries that need to be alleged in the complaint?

MR. WOODFIN: So, no, because the only injury is the failure to conduct a reasonable program.

So there's -- there's a thousand ways to conduct a

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reasonable program. We're not saying our injunction requires, you know, a single -- a single one of those right now. Once we get to that point, you know, then we can -- we can craft what -- what we think would be a reasonable program based on those violations.

But right now, the -- the pleadings standard is -- is simply have -- have the defendants violated the NVRA. Really, have we provided sufficient allegations to infer that they violated the NVRA.

So the violation is the failure to conduct a reasonable list maintenance program. So although there might be a thousand ways to conduct a reasonable maintenance list program, it's not our burden to allege the violation that we have to provide a single reasonable way.

THE COURT: Well, you do have to allege an actual injury.

MR. WOODFIN: And the injury is the -- well, the violation is the failure to conduct reasonable list maintenance. The injury is, as far as the organizations go, injury to their mission because they rely on the voter rolls.

THE COURT: Well, I'm confident you know this, but throughout every stage of litigation, an individual -- or an individual -- in this case, it would be an organization -- must have suffered or be threatened with an actual injury traceable to the defendant that is likely to be redressed by favorable

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judicial decision.

What you have said and what you have argued this afternoon is a systemic violation -- I think the word was a fundamental claim is a systemic violation. So that would require the development, and as set forth in your requested relief, implementation of a maintenance program to cure that systemic violation.

But at the time that you brought this action, the State could not have developed or implemented a program that would give you the relief that you've sought here today because they can't do anything with the voter rolls for those 90 day chunks of time that have been talked about here today. So it appears to me we have a redressability issue.

MR. WOODFIN: So, no. So I'll start with the remedy and how -- how it would -- how a remedy would redress the injury.

Because these organizations rely on voter -- on voter rolls to determine their plans and budgets and to determine their campaign strategy, all of that, to the extent that is harmed, and as we allege it is in the complaint, it is remedied by the -- the defendants then conducting a reasonable program in compliance with the NVRA.

In short, accurate rolls don't injure the plaintiffs. Inaccurate rolls injure the plaintiffs. And so if the rolls become accurate through the implementation of a reasonable

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program, then that either reduces or eliminates the injury to these organizations' mission.

THE COURT: All right. So let's pause right there. "Accurate rolls don't injure the plaintiffs. Inaccurate rolls do."

The inaccurate rolls, as allege, existed in December of 2023 when you sent the notice letter. The State couldn't do anything to change the rolls at that time. As alleged, the inaccurate rolls existed at the time you brought this action and the State couldn't do anything to touch the rolls at that time. And we're now on the clock before the next 90 day period clicks in, right, because the primary just concluded last week.

And so you're asking for the rolls -- you're saying you're okay with the rolls not being changed before the November election, but then you're also saying that's what the injury is. And if there's nothing the Court can do to change the injury you have alleged, I ask the question again: Don't we have a redressability issue?

MR. WOODFIN: So I think the difficulty here is we can all -- we can't -- we can't ask for more than the NVRA requires. The NVRA requires the defendants to conduct a reasonable program. It does not require them to immediately remove ineligible voters when we ask them to. So we couldn't have obtained that kind of relief before the February election or now which is why we haven't demanded the immediate removal

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of ineligible voters from the rolls. That's not what the NVRA requires.

Instead, what the NVRA requires is that the Secretary conduct a reasonable program to remove ineligible voters. So that's the most we can request under the NVRA because the NVRA doesn't require anything more. So that's the violation is the failure to conduct a reasonable program --

THE COURT: All right.

MR. WOODFIN: -- and the only remedy we can obtain is --

THE COURT: Implementation of one?

MR. WOODFIN: Is implementation of a reasonable program.

THE COURT: All right. So let's say I agree with you, right? For argument's sake, I agree with you and I say you have to implement a reasonable program. At every stage of the litigation, there has to be redressability, and even if I order them to implement a reasonable program, that program couldn't have been implemented at the time you gave the notice or at the time this action was brought because the State couldn't do anything with the program, right, because they're prevented from doing anything based on the plain language of the statute.

So I'm going to ask -- I feel -- I apologize, but do we not have a redressability issue?

MR. WOODFIN: Again, still, that goes to the timing of

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relief, not to whether it is redressable.

And so here, again, because we're alleging a systemic violation -- and, you know, the Ninth Circuit has discussed the difference between a discrete and a systemic violation. Vincent, all of these cases discuss that difference. And because the violation we're alleging is systemic, it's not that the -- the Secretary and -- and the defendants had to gear up and run a reasonable program immediately before the next election. The NVRA doesn't require that. It doesn't require them to immediately conduct a program before a February primary or before the next general --

THE COURT: Right. Because there's all the other deadlines that come in, right?

MR. WOODFIN: Absolutely.

THE COURT: The two years and the mail and the notice. I mean, we can all agree on that.

So then my question is: If you are -- you seem to accept that there is really nothing that can be done between now and November and there's no urgency in resolving the issue or the injury you have identified, why shouldn't this action be dismissed to be brought after the November election so the program, if that is the remedy that is required, be designed, created, implemented, etc., when there's no 90 day period that prevents that from happening?

MR. WOODFIN: So I think the timing of that would come

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down to when the remedy is ordered, not whether to dismiss a complaint at the outset.

So it could be that after we get through discovery and motions practice and, perhaps, a bench trial, that the timing of that remedy and now you order the defendants to implement a reasonable program and this is what it looks like, it could be that when that order comes, at the time the Court is poised to issue a remedy, that that is, perhaps, too close to the election -- to the next election, whenever that is.

THE COURT: Well, you're well-versed in federal practice. You know that there's not going to be a conclusion to this if I were to let it go forward and we were going to -- you know, we get to discovery. You know as well as I do that that would be a long time down the road.

Is it the RNC's position that they're okay with not resolving this issue? It seems like the answer is "yes," because at the time -- based on the timing in which this action was brought and the lack of urgency in resolving the allegations set forth in the complaint, the RNC knows and accepts that it's highly likely they'll be no answer or conclusion to this action before the November election. Is that correct?

MR. WOODFIN: A couple points.

So yes, we understand that these cases can take a long time especially in discovery. Green versus Bell is in

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discovery right now. It's a lot of documents. It's a lot of data that -- and it's a lot of depositions that go into these cases. So we understood, of course, when we filed the lawsuit that a lot of this, especially in discovery, could take some time and, perhaps, run past a November election.

Our -- our request for relief is -- again, does not depend on that election.

THE COURT: Sure.

MR. WOODFIN: So we would be fine --

THE COURT: And I would agree with you on that.

MR. WOODFIN: So we would be fine to continue litigating this case after election. That's not a problem. And of course, there are other avenues to resolve a lawsuit other than reaching an ultimate judgment. And so, perhaps, there would be a way to resolve this before the November election regardless.

But for our position, we're -- yes, we're prepared to litigate this case through the November election and after.

THE COURT: Thank you. I want to hear from defendants regarding my redressability question.

MS. ST. JULES: Thank you, your Honor.

I think the redressability question can also be framed as a prudential ripeness issue. And, of course, there's two parts to ripeness. There's constitutional ripeness and prudential ripeness. And prudential ripeness asks is it

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prudent for a court to entertain this action at this time.

There's two -- we didn't brief this and we can provide briefing if that would be helpful to the Court, but at a high level, there's two factors that courts analyze to determine whether a case is prudentially ripe. First, there's the fitness of the issues for judicial decision and, second, the hardship to the parties of withholding court consideration. And I would submit that neither prong is met mere.

With respect to the fitness of the issues for judicial decision, Nevada has been unable to remove active voters since November 8, 2023. The complaint uses numbers that are four years -- four months into that where, you know, new voters are being added to the lists and ineligible voters who have moved and would be subject to removal based on the general program are not being removed from the list. And it results in inflated numbers. We set this out in our response to the plaintiff's pre-litigation notice letter.

Right now, Nevada is in the process of sending out a round of confirmation notices. It's on a blazingly fast timeline, but this is important to the Secretary of State so we're making it happen. And all 17 counties are going to send out the notices. Voters will be inactivated before the November 24th general election. The Secretary of State is coordinating with the counties to identify inactive voters who need to be cancelled. And delaying adjudication would better

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define the issues because we would have more up to date numbers.

There's also no hardship to the plaintiffs. As they, more or less, conceded, there's not going to be really relief before the November general election if this election -- if this case proceeds.

THE COURT: All right. And so it's your -- to sum up your position, it would be that, essentially, there's a ripeness issue?

MS. ST. JULES: A prudential ripeness issue, that's correct.

THE COURT: Well, what about their argument that the specific relief that they're seeking is the design, implementation of the program? Putting aside the ability to do anything before the November election, how does that change your argument?

MS. ST. JULES: I don't think it does because I think the factual issues still need to be better defined. They're using numbers that just aren't reflective of reality because they're fixed in place.

THE COURT: I know, but that kind of goes to a merits question, right? Here at the motion to dismiss phase --

MS. ST. JULES: Well, it does and it doesn't because right now we're at the motion to dismiss phase and we're going based on what the allegations are in the complaint and we're

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tied to them. And if we're alleging that there's a failure to state a claim, we need to go based on what's in the complaint. And what's in the complaint is bloated numbers.

THE COURT: Right. But that would still be a factual determination, right? Because I'm supposed to accept the allegations -- assuming them, you know, as true as plausible.

MS. ST. JULES: Right. But the Court would have better up to date information so the factual issues would be better defined if we waited until the numbers were reduced through the general program, which they haven't been able to be reduced since November.

THE COURT: All right. Thank you. I don't have anymore questions on that in that regard.

We've been here for a little -- just shy of an hour and a half. I'm going to give my staff a break and the parties, as well. We're going to be in a 15 minute recess. And I may or may not have some additional questions for the parties. So we'll be in recess until about 3:45.

(Recess taken from 3:33 p.m. to 3:48 p.m.)

THE COURT: We are back on the record continuing argument on defendant's motion to dismiss docketed at ECF Number 26.

I did want to revisit a couple of issues. And I want to talk about the Havens case which is, obviously, discussed or refined in the FDA case.

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Counsel, you mentioned that the money you've spent furthering the RNC's mission, it relates to voters, etc. That case, however, makes it clear that to have organizational standing, it must impact or affect your core business activities. So that's different than mission. And that was discussed to some degree in the FDA decision, right? So there's the mission and there's the core business activities.

Tell me how your core business activities have been impacted.

And I'll give you the part that I'm focused on. Home, which was the decision, as you know, was not only an issue advocacy organization but also operated a housing counseling service. When Havens gave Home's employees false information about apartment availability, Home sued Havens, rather -- or is it Havens? -- whichever it is, because perceptively impaired Home's ability to provide counseling and referral services for low and moderate income home-seekers.

In other words, Havens' actions directly affected and interfered with Home's core business activities, which is not dissimilar to a retailer who sues a manufacturer for defective goods to a retailer.

MR. WOODFIN: Yes. So we read that difference between core business activities and mission, it's not -- it's not like a difference between, like, private and nonprofit or anything like that. Really, what the Court is getting at is a

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difference between activities that are essential to the core operations of the organization, whether it's a nonprofit or a business, and then what would be -- like, an insufficient mission would be an organization that is set up solely for the purpose of pursuing that activity.

So in Havens, it would be an organization that is set up solely for the purpose of requesting information from realtors and then suing them to hold them accountable for Fair Housing Act violations. That would not be the kind of mission that is -- that would -- that would support organizational standing.

Or in this context, it would be, perhaps, an organization that is set up solely for the purpose of investigating and holding states accountable for NVRA violations. That would be an organization -- there's, like, a one to one match between the core business activities and the mission, in other words, where the violation is simply an impairment of the mission.

Here, as an Havens, the core business activities or the mission, as you want to call it, of the Republican party is to elect Republican candidates. The fact -- and to turn out Republican voters. The fact that it's a nonprofit doesn't mean that's not -- that's not a business activity.

THE COURT: Sure. And I don't disagree with that.

MR. WOODFIN: But that's the purpose of the

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organization.

THE COURT: But the RNC's mission, as you stated, is to elect Republican candidates and turn out Republican voters. That is different and separate and apart from ensuring accurate voter rolls as alleged are relevant here for a Section 8 violation.

MR. WOODFIN: So it's -- the mission, as you noted, as our complaint says, is turning out Republican candidates, electing -- or sorry -- turning out voters, electing candidates. Those are the missions. Investigating and maintaining accurate list maintenance, relying on accurate voter rolls is conducive to achieving that mission.

If -- if the RNC and the NVGOP are relying on voter rolls that are inaccurate that violate the NVRA, that harms their business activities or their mission to elect Republican candidates. That harm is independent of whether they choose to investigate or spend money on the voter roll maintenance activities.

And so -- and so this is what's critical about resource diversion cases is that the organization must divert resources to solve the problem of that mission injury or -- or the injury to the -- to the core business activities.

Here, the injury to the core business activities derives from the NVRA violation and the organizations spend money, they divert resources from other mission critical

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activities to solve that problem.

THE COURT: All right. So a few times -- I understand how easy it is, because I think I did it myself earlier in this hearing, to conflate core business and mission.

And so here, you're talking about diverting mission resources as opposed to core business activities. I want to give you the opportunity to explain to the Court how those are different in your mind.

MR. WOODFIN: So we think the -- it -- I think it comes -- becomes difficult in the nonprofit world. And Havens was a nonprofit as --

THE COURT: I think that case also talked about that it can be confusing when the --

MR. WOODFIN: Yeah. Yeah.

THE COURT: -- can cross. I understand that.

So is it your position that, essentially, it's the same here, that when you're talking about core business and you're talking about mission, in terms of what the RNC's role is, is the same?

MR. WOODFIN: I think that's correct. That would be -- that's our reading of it.

And really, I think what that sentence is getting at in both Havens and -- and Alliance, the distinction between mission and core business activities isn't really, like, how the organization chooses to frame its goals. Really, what it's

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getting at is an organization can't simply exist for the purpose of filing these lawsuits.

And that's not what is happening here. That's not what was happening in Havens. And so that's why it's a one to one is that they exist for a -- for a mission independent of pursuing these violations. That mission is harmed by these violations. And then they have to divert resources to solve that harm. We think that's -- that's, essentially, what -- what the Court is getting at with that distinction.

THE COURT: All right. I would like to hear from the defendants on where -- you can see where I'm focused.

MS. ST. JULES: Yes, your Honor.

So I think there's a degree of causation issue that's different here than it was in Havens. So in Havens, Home was -- its business activity was providing information directly to home-seekers. And so when Havens provided false information to Home, Home's ability to provide counseling services, which was its activities, was directly and perceptibly impaired. They were giving false information to those who they sought to counsel.

Here, it's not a core business activity, it's not the mission to counsel and provide advice to voters. That's incidental to their mission of getting people elected.

THE COURT: But is that really -- I mean, does it all rise and fall on giving advice?

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MS. ST. JULES: Well, I think -- there, they're providing false information. Here, there is no provision of false information. Maybe they're going to reach out to some people who shouldn't be reached out to at that specific address. That's -- that's basically, what's happening. They're not providing false information out the way it was in Havens. And, you know, the Supreme Court was very cautious in saying that Havens was an unusual case.

Here, we lack the directness and the perceptible impairment of a business activity which isn't to provide voters with information. It's to get people elected. It is different. We lack that directness and that perceptible impact.

THE COURT: All right. All right. I don't have an additional question at this time.

I want to -- for you. I apologize.

I want to go back and talk about the redressability question. Both parties have answered questions and are now aware that that is where I have spent some time in trying to resolve this motion.

And so I'll start with plaintiffs. This is your complaint. And at the motion to dismiss phase, I think it's appropriate to give you every benefit of the doubt to, again, address the redressability question. I think it would be helpful to give, I'll call it, a brief closing argument as to

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why redressability isn't a barrier to you in regards to standing.

MR. WOODFIN: So, again, on the point of redressability, I'm just going to turn back to the language of the statute. The NVRA requires the defendants to conduct a reasonable program. We allege and we think the complaint shows that they have failed to conduct a reasonable program. And we think that that is a systemic violation. And that's what the complaint and the letter says.

What that means is the solution is for -- the solution is -- is an order requiring the defendants to comply with the NVRA and to set up and conduct a program that is reasonable. Now, the details of that, we think, are appropriate to discuss later in the litigation. There's no case that requires us to plead the specifics of that remedy up front. But the fact is that that would remedy the injury here because it would -- over time, it would remove the ineligible voters that shouldn't be on the rolls from the rolls and it would ensure that the State is in compliance with the NVRA.

And so, as -- you know, as I said before that inaccurate lists cause the harm. To the extent those lists are more accurate, that will not cause a harm.

And it's -- it's a matter of degree certainly, but that doesn't mean it's not redressable. It's redressable because it would bring the State into compliance with the NVRA

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and that would obviate all of the harms to the -- to the mission critical activities from the plaintiffs.

And I would just end with, you know, Congress set up a cause of action in the NVRA for the purpose of addressing these violations. The Supreme Court has said in Spokeo and in TransUnion and elsewhere that courts owe respect to Congress's decision to set up a cause of action and to designate those injuries.

If this isn't an injury, then, really, no organization, no individual plaintiff has standing to challenge these reasonable efforts. It has to be the case that conducting -- failing to conduct reasonable efforts does impose an injury and the -- the -- a court order requiring a defendant to conduct reasonable efforts would -- would redress that injury. That's the injury that Congress has identified. And that's all we need to allege here in the complaint.

THE COURT: I don't disagree with you that the cause of action exists for a reason and it's, you know, to address these injuries when needed.

I go back to the requirement -- the longstanding requirement that at every stage of the litigation, an injury must be able to be redressed.

MR. WOODFIN: Is the hang-up there that the Court maybe couldn't order a remedy immediately before the election? Is that -- is that the difficulty?

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THE COURT: No. The timing of the election at this point -- you've made it perfectly clear. So I appreciate that, right?

MR. WOODFIN: Okay.

THE COURT: The election ultimately isn't the focus -- if I understand correctly, and you can correct me if I'm wrong -- isn't the focus of this litigation. For the RNC, it is to correct the injury that you have suffered. And so you have said here, if it happens after, you understand that, you accept that. And I appreciate that clarity because that was a question I had.

So long story short, it's not before the election. It's that I couldn't give you the remedy you were seeking at the time that you brought this action because I couldn't order the State to implement -- develop and implement a program at the time because that would be in direct contravention of the law that says they can't do anything to the rolls within that 90 day period. And that is where I am, candidly, laser focused. And it's my concern.

MR. WOODFIN: So I think that goes more to the notice letter, perhaps.

When we filed the complaint, it was after the February primary. So no issue there. So I think that really just goes to the --

THE COURT: Right. But this action was brought within

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the next 90 day period before the primary.

MR. WOODFIN: For the June. Okay.

THE COURT: Right.

MR. WOODFIN: So I -- so I --

THE COURT: I think it was, like, five days so --

MR. WOODFIN: Right. So -- I -- again, I return to the -- to the remedy doesn't need to be you must conduct a program now. The remedy is, number one, a declaration that the defendants have violated the program -- the NVRA, and, number two, an order directing them to conduct reasonable list maintenance.

It doesn't need to be the case that that injunction issues and requires the defendants to implement that program immediately before the next election. That's -- that's not the remedy we request in the complaint. That's not the remedy we requested in the letter.

And so really, there's no -- there's no redressability issue because the injunction would come whenever it comes whether it's before election, during an election, after an election. It -- that -- the issue of timing would not affect the redressability. Does that clarify?

THE COURT: I understand your argument. I'm not sure if it clarifies.

MR. WOODFIN: The alternative would be no one can bring an NVRA complaint during an election year to allege

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systemic violations as we do. They -- you would have to wait until an off year when, perhaps, the voter rolls are -- are cleaner or less accurate. Who knows? But that's, essentially, what the holding would be is that there's a -- it's not a 90 day blackout period. It's -- it's a full blackout period before any election during an election year, essentially, because -- I mean, it -- because the --

THE COURT: Yeah, I understand. That hits home with me more, right? Because that's where I've honestly gone back and forth. That makes sense, right? That seems to be contrary to the -- the very law itself.

But as you know as well as I do that timing is everything in federal court. So that's where my concern lies.

MR. WOODFIN: So I'd also just return to the case law. La Raza was brought 30 days before an election. That was a systemic violation. The Court did not note that there were any redressability problems.

THE COURT: But there was no issue with Section 7 where the Court was prohibited from granting the relief being sought at the time.

MR. WOODFIN: So the same is true in Green versus Bell. Let's see. That wasn't -- let me think. Daunt versus Vincent was pretty soon before a election. Bellitto versus Snipes, I don't know exactly when the election was for that, but --

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THE COURT: I think that was brought after the election. I could be wrong, though.

MR. WOODFIN: That could be.

THE COURT: Yeah, I think it was November -- later -- unless I'm thinking of a different case. I think that was later in November.

Yeah, that's where I'm hung up, full disclosure --

MR. WOODFIN: Okay.

THE COURT: -- the timing issue.

MR. WOODFIN: So I -- again, I would just return back to the fact that we allege a systemic violation. So it's really not a Section 7, Section 8 distinction that matters here because we're not demanding immediate relief. We're not demanding an immediate conduct of a program. We're demanding systemic reforms to the defendants that would result in a program that complies with the NVRA. So we think that's the relevant distinction here.

And that distinction, again, was drawn in La Raza. It was drawn in -- in Bellitto, in Action NC. The Fifth Circuit drew the same distinction in Scott versus Schedler. The difference is discrete versus systemic, not Section 7 versus Section 8.

THE COURT: All right. Thank you very much.

I'd like to hear defendant's closing argument, if you will, on the redressability question.

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MS. ST. JULES: Yes, your Honor. Thank you.

Like I said before, I think this -- there is a timing issue. And I think prudential ripeness is the -- is the doctrine that's kind of designed to address this timing issue. And it's -- it affords the Court the ability to say that the relief you're asking for right now, it's not fit for judicial decision. You can't rule on it at this time.

So I do think there is a timing issue and I think waiting -- delaying adjudication, letting facts actually develop, those are concerns that the Court should focus on.

THE COURT: Well, what about his argument, which is well-founded, that if I'm focused on this 90 day I'll call it a dead zone, right, then that, essentially, means no one can bring a Section 8 violation during an election year. How do you address that argument?

MS. ST. JULES: I think that -- I'm struggling with that because it's just with the 90 day black out period, you have an inability -- you've tied the State's hands to be able to do -- to take any action.

And I would also note, you know, that the -- this -- if you're providing an opportunity to cure, if the NVRA is saying that the violation hasn't been cured within 120 days, you can bring an action within 90 days. Or maybe it's the other way around. If they're asking for relief that's far out, I -- I don't understand how that ties into the NVRA's correct

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the notice -- or correct the violation language. It seems in very sincere intention to me because they've, more or less, conceded that we couldn't cure the violation. So --

THE COURT: Is it sincere intention or is it, perhaps, a reflection of the NVRA's dual purpose of keeping elections -- getting people registered while also making sure that they are limiting --

MS. ST. JULES: Well I think --

THE COURT: -- other concerns?

MS. ST. JULES: I think it's implicit within the NVRA that a State could be afforded an opportunity to cure and where they're sending a pre-litigation notice letter and filing a complaint within the times you can't cure, you have a problem there. This isn't how the NVRA was set up. So I think that's the tension that I'm focusing on.

And I'd also say, just as far as my colleague's argument about, you know, who would have standing, the FDA case made very clear, it doesn't matter if nobody has standing. That's -- that's not a reason to find standing. So I would just highlight that, as well.

And additionally, the NVRA does authorize the Attorney General to bring an action. The Supreme Court said when it comes to vindicating the public interest, that's the function of Congress and the executive.

THE COURT: All right. All right. Thank you.

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Bear with me. I'm going back over my notes and seeing if I have any additional questions.

All right. I don't think I have any additional questions at this time.

As I noted at the beginning, I planned on ruling on parts -- or at least a part of this motion on the record which I have already done in regards to Mr. Johnston's lack of standing.

I think, in the interest of justice, it would be best for me to rule on this -- this motion on the record here today. And so I'm going the place my findings and conclusions on the record. The transcript of this hearing will serve as a record of my ruling. While the minutes will summarize my decision, they'll be no written order reflecting my ruling. So bear with me; this is going to take a minute.

It is well-established that there are limitations on federal jurisdiction. And it is well-established that standing is essential, and I think as the Lujan Court put it, an unchanging part of the case in controversy requirement. And that is a high threshold that I know both parties understand and agree with.

I have already placed on the record my reasonings for why I found Mr. Johnston did not have standing. And I asked what additional allegations would be brought if I were to grant him leave to amend. And I wasn't given a lot of information.

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And I understand plaintiffs have facts that they are working with, but I don't see and I was not convinced that he would be able to present additional allegations that would establish standing. And so he is dismissed with prejudice.

I want to turn next to the notice requirement and the statutory standing. I am concerned about the lack of clarity or specificity in the letter that was sent to the State. But the case law really makes clear that that notice can be pretty general. And so when I look at that case law together with the Ninth Circuit's ruling in the La Raza case, I'm not convinced that plaintiff's notice was so deficient as to not establish statutory standing. And so the motion to dismiss based on that argument is denied.

I do think it is important to note that I respectfully disagree that there really isn't a difference whether it's a Section 7 or a Section 8 violation. I think there is an important distinction that was addressed both in the motion and during argument here today. And that is the fact that the State cannot act within the 90 day window of any primary or election regarding the voter rolls. There's, you know, limited exceptions to that, but none of those seem applicable here nor were they argued by the plaintiff. And so, you know, I'm focused on redressability. And I note that I think that distinction between Section 7 and Section 8 is an important one.

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I considered carefully the decision that came out last week from the Supreme Court.

Can we pause the --

(Court and courtroom administrator conferring.)

THE COURT: I considered carefully the words from last week's decision and that is that no principle is more fundamental to the judiciary's power or proper rule in our system of Government than its constitutional limit to cases or controversies.

And so I turn to standing. And let me be clear. Standing itself is actually a relatively low bar. I think we can all agree on that. The question is making sure that there is standing to be in federal court, which is a strong -- I think is a high standard because that is an important distinction. I think that it is -- I don't think that is an issue or something that's lost on either side.

And here, my focus has been on redressing the injury.

Plaintiff's argument is that this is a systemic violation and that they are simply seeking a -- in the form of declaratory relief that there is a violation, and then in the form of injunctive relief, an order requiring them to develop and implement a program that would remedy the deficiencies they've identified.

But implementation is where I think this action fails. And that is because this action wasn't brought until March --

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make sure I get the date right -- 18th of 2024. And I'm going to take judicial notice of the fact that 90 days before the June primary that just concluded on June 11, 2024 is, I believe, March 15th. But let me double check that one more time. I stand corrected. Wednesday, March 13th, 2024. And so there was, again, a 90 day window where the Court simply could not order relief that the defendants -- rather, the plaintiffs are seeking. I could not order the defendants to implement the relief plaintiffs are seeking. So that's issue one.

Issue two is the question of ripeness. And as mentioned earlier, and I'll restate again here, timing is really everything in federal court. And that is at the heart of the Ripeness Doctrine. And I think it would be wise to exercise or find that prudential ripeness precludes this action from going forward because -- or for the reasons I have just mentioned in that I could not order the State to develop and implement a program at the time this action was brought.

It is not lost on me plaintiff's concern regarding their ability to bring a Section 8 violation during an election year. But time and time again, the Supreme Court, and as binding on me, the Ninth Circuit, has stated that standing, including redressability, must be present from the pleadings stage through trial. And it is simply not present here.

So consequently, I grant the motion to dismiss for lack of standing. I do not believe that the RNC has

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organizational standing. And that will be the Court's decision.

I'm going to start with defendant as this is your motion. Any questions or any clarification you seek from my ruling?

MS. ST. JULES: I apologize. I missed the very last part on organizational standing.

THE COURT: I do not find they have organizational standing.

MS. ST. JULES: Thank you, your Honor.

THE COURT: No problem.

And let me turn to plaintiff. Same -- same question: Any questions or clarifications you seek regarding my ruling?

MR. WOODFIN: Just one. I think you said the RNC lacked organizational standing. What about the Nevada Republican Party?

THE COURT: Both. And thank you for that question and need for clarification. Both. And that is for the same reason in that I couldn't grant the relief sought.

MR. WOODFIN: And then one more, your Honor. One last question.

THE COURT: Sure.

MR. WOODFIN: I understand under Ninth Circuit law that dismissal for lack of standing has automatic leave to amend, but I'd just like to formally request leave to amend for

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the record.

THE COURT: I will grant you leave to amend. My question is, timing-wise, how long are you seeking leave or time for leave to amend? If you want to take a moment, please take your time.

MR. WOODFIN: I think 14 days --

THE COURT: Fourteen days?

MR. WOODFIN: -- is sufficient.

THE COURT: All right. That's pretty standard.

All right. I'm sorry?

MR. DODGE: If I also may be heard on a logistical point of clarification at some point? I just wanted to ask if that was possible.

THE COURT: At the conclusion, sure.

MR. DODGE: Understood, your Honor.

THE COURT: No problem.

All right. Fourteens days is a reasonable request, and so you have 14 days to amend the pleadings.

Let me think about something really quickly.

You know, as I sit here and I've contemplated that request, I know I had said I was going to dismiss him with prejudice, but if you're going to amend the complaint, I'll give you the opportunity to amend the allegations regarding Johnston. So I'll change my ruling in that regard and he is dismissed without prejudice. I think that will give you fair

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opportunity to add him back in if you see appropriate and you have additional allegations you can bring forward.

All right. Let me then turn to counsel. You had a question regarding -- I don't know what.

MR. DODGE: Yes. Thank you, your Honor.

At the start of your hearing -- of the hearing, your Honor indicated that you felt you had an obligation to resolve the motion to dismiss before the now-briefed and ripe objections from plaintiffs on the magistrate judge's order recommending our intervention.

I just wanted to stress the -- that we would respectfully ask that the motion to intervene be resolved prior to or in tandem with any resolution of the motion to dismiss. I understand leave has been granted to replead so the timing is a little bit less of an issue now. But if the Court were to potentially dismiss the case without resolving the fully-briefed and ripe motion to intervene, it would potentially prejudice our ability to participate in any appeal.

And I would note that the magistrate judge found that we had two significantly protectable interests at stake in the case. We think that's amply supported in the record and in our briefing and would urge the Court to ensure that we have the opportunity to participate in further proceedings in view of those findings including potentially involvement in appeal.

THE COURT: All right. Let me hear from plaintiff

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regarding that request.

MR. WOODFIN: We submitted our objections to the magistrate judge's report and recommendation. So those objections are on the record. I won't repeat those here.

THE COURT: All right. Okay. I will take a look at that and take that into consideration.

MR. DODGE: We appreciate that, your Honor. Thank you.

THE COURT: No problem.

Anything else that needs to be addressed this afternoon?

No?

Okay. Thank you all very much for your patience and preparation for this hearing. It was a good hearing. Thank you very much.

(The proceedings concluded at 4:30 p.m.)

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COURT REPORTER'S CERTIFICATE

I, SAMANTHA N. MCNETT, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: June 20, 2024

/s/ Samantha N. McNett
Samantha McNett, RMR, CRR, CCR

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 7/14/2024 2:59:18 AM
To: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: RESOURCES: Trump Campaign Rally Incident
Attachments: 081324 - Statements.docx

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Linus and Heather,

DPP MCL 15.243(1)(m)

As always, please reach out with any questions. We're here for whatever you need.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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NATIONAL

President Joe Biden

I have been briefed on the shooting at Donald Trump's rally in Pennsylvania. I'm grateful to hear that he's safe and doing well. I'm praying for him and his family and for all those who were at the rally, as we await further information. Jill and I are grateful to the Secret Service for getting him to safety. There's no place for this kind of violence in America. We must unite as one nation to condemn it.
[HYPERLINK "https://x.com/POTUS/status/1812275407044940079" \o
"https://x.com/POTUS/status/1812275407044940079"]

Vice President Kamala Harris

I have been briefed on the shooting at former President Trump's event in Pennsylvania. Doug and I are relieved that he is not seriously injured. We are praying for him, his family, and all those who have been injured and impacted by this senseless shooting. We are grateful to the United States Secret Service, first responders, and local authorities for their immediate action. Violence such as this has no place in our nation. We must all condemn this abhorrent act and do our part to ensure that it does not lead to more violence.
[HYPERLINK "https://x.com/VP/status/1812282589807300679" \o
"https://x.com/VP/status/1812282589807300679"]

Speaker Mike Johnson

Kelly and I are praying for President Trump and all the attendees of the campaign rally today in Pennsylvania, and we send our gratitude to the law enforcement who responded at the scene. I have been briefed by law enforcement and am continuing to monitor the developments. This horrific act of political violence at a peaceful campaign rally has no place in this country and should be unanimously and forcefully condemned.
[HYPERLINK "https://x.com/SpeakerJohnson/status/1812266011359600746" \o
"https://x.com/SpeakerJohnson/status/1812266011359600746"]

Rep. Hakeem Jeffries

My thoughts and prayers are with former President Trump. I am thankful for the decisive law enforcement response. America is a democracy. Political violence of any kind is never acceptable.
[HYPERLINK "https://x.com/RepJeffries/status/1812259691663384967" \o
"https://x.com/RepJeffries/status/1812259691663384967"]

Senator Chuck Schumer

I am horrified by what happened at the Trump rally in Pennsylvania and relieved that former President Trump is safe. Political violence has no place in our country.
[HYPERLINK "https://x.com/SenSchumer/status/1812262032668049421" \o
"https://x.com/SenSchumer/status/1812262032668049421"]

Senator Mitch McConnell

Tonight, all Americans are grateful that President Trump appears to be fine after a despicable attack on a peaceful rally. Violence has no place in our politics. We appreciate the swift work of the Secret Service and other law enforcement.
[HYPERLINK "https://x.com/LeaderMcConnell/status/1812263053997879727" \o
"https://x.com/LeaderMcConnell/status/1812263053997879727"]

Rep. Nancy Pelosi

As one whose family has been the victim of political violence, I know firsthand that political violence of any kind has no place in our society. I thank God that former President Trump is safe. As we learn more

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details about this horrifying incident, let us pray that all those in attendance at the former President's rally today are unharmed.
[HYPERLINK "https://x.com/SpeakerPelosi/status/1812268746574020870" \o "https://x.com/SpeakerPelosi/status/1812268746574020870"]

Rep. Steve Scalise
Praying for President Donald Trump. There is never any place for political violence.
[HYPERLINK "https://x.com/SteveScalise/status/1812253463415280000" \o "https://x.com/SteveScalise/status/1812253463415280000"]

Senator Mitt Romney
Relieved the former President is safe and doing well. Outrageous and tragic that anyone would make such a heinous and evil act. Grateful for the quick response from Secret Service agents. This is a deeply sad day for America.
[HYPERLINK "https://x.com/MittRomney/status/1812264033388761303" \o "https://x.com/MittRomney/status/1812264033388761303"]

Gabby Giffords
Political violence is terrifying. I know. I'm holding former President Trump, and all those affected by today's indefensible act of violence in my heart. Political violence is un-American and is never acceptable—never.
[HYPERLINK "https://x.com/GabbyGiffords/status/1812266601053405691" \o "https://x.com/GabbyGiffords/status/1812266601053405691"]

PENNSYLVANIA
Governor Shapiro
Violence targeted at any political party or political leader is absolutely unacceptable. It has no place in Pennsylvania or the United States. I have been briefed on the situation. @PAStatePolice are on the scene in Butler County and working with our federal and local partners.

Lori and I are praying for President Trump, the Secret Service officers who protected him, those attending the event, and all of the first responders still on the scene.
[HYPERLINK "https://x.com/GovernorShapiro/status/1812257426793738316" \o "https://x.com/GovernorShapiro/status/1812257426793738316"]

NORTH CAROLINA
Governor Cooper
Violence has no place in our politics or communities. I am grateful for the quick response by law enforcement today and hope former President Trump is not seriously injured. - RC
[HYPERLINK "https://x.com/NC_Governor/status/1812263143059452291" \o "https://x.com/NC_Governor/status/1812263143059452291"]

AG Stein
I am outraged by what happened tonight at President Trump's rally. Political violence is abhorrent and has no place in America. I pray for his health and am grateful he was able to walk off the stage tonight. I appreciate the secret service and law enforcement for their immediate response. I am also praying for our deeply divided country. People should be able to have differing opinions without fear of violence or threats.

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[HYPERLINK "https://x.com/JoshStein_/status/1812262590774698018" \o "https://x.com/JoshStein_/status/1812262590774698018"]

ARIZONA

Governor Hobbs

Political violence is unacceptable, and has no place in this country. I am glad that former President Trump is safe, and hope that others at the rally were not seriously injured. I hope the perpetrator of this heinous act will be swiftly brought to justice.

[HYPERLINK "https://x.com/GovernorHobbs/status/1812265179926925817" \o "https://x.com/GovernorHobbs/status/1812265179926925817"]

AG Mayes

The attack against former President Trump must be strongly condemned by ALL Americans — no matter their political beliefs. Political violence is never acceptable. Never. My thoughts are with the former President and anyone else who may have been injured or hurt at today's rally.

[HYPERLINK "https://x.com/AZAGMayes/status/1812260609230262384" \o "https://x.com/AZAGMayes/status/1812260609230262384"]

Secretary Fontes

I condemn political violence in the most unequivocal terms. NO American political figure should ever be threatened with OR acted against with violence. If we want to beat a political opponent, we do it with ballots, not bullets.

[HYPERLINK "https://x.com/Adrian_Fontes/status/1812253882661446070" \o "https://x.com/Adrian_Fontes/status/1812253882661446070"]

NEVADA

Governor Lombardo

Donna and I thank God that former President Trump is safe and unharmed after being shot at during a rally in Pennsylvania. We are waiting for more information from the Secret Service. In the meantime, we are praying for calm and civility around the country.

[HYPERLINK "https://x.com/JosephMLombardo/status/1812264358237647031" \o "https://x.com/JosephMLombardo/status/1812264358237647031"]

AG Ford

This is not who we are as a country. Political violence from any side of the political spectrum should be met with the appropriate consequences. Grateful to the law enforcement that stepped in, and hoping for justice to prevail. Glad to see that former President Trump is safe.

[HYPERLINK "https://x.com/AaronDFordNV/status/1812261868553240982" \o "https://x.com/AaronDFordNV/status/1812261868553240982"]

MICHIGAN

Governor Whitmer

There is no place for political violence in this country, period. This is not how we solve our differences. I am horrified to learn of this news, and we will be following the situation closely. I am grateful for those in law enforcement who stepped in immediately.

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[HYPERLINK "https://x.com/GovWhitmer/status/1812256673098055850" \o "https://x.com/GovWhitmer/status/1812256673098055850"]

AG Nessel
Political violence is never acceptable under any circumstances. I sincerely hope any parties involved in this horrific act are brought to justice and held accountable.
[HYPERLINK "https://x.com/dananessel/status/1812259377773990340" \o "https://x.com/dananessel/status/1812259377773990340"]

Secretary Benson
Political violence is unacceptable, anytime, anywhere, against anyone. I pray for the swift recovery of the former president and am grateful for all in law enforcement who stepped in to protect everyone at the rally from further violence. May this disturbing incident provide a turning point - away from hateful rhetoric and threats and towards civility for all.
[HYPERLINK "https://x.com/JocelynBenson/status/1812265585398665244" \o "https://x.com/JocelynBenson/status/1812265585398665244"]

WISCONSIN
Governor Evers
My thoughts are with President Trump and all of the folks attending today's rally in Pennsylvania. Thank you to the first responders who acted quickly, putting themselves and their safety at risk in order to respond to a horrific act of violence and keep people safe.

My staff and I are in contact with those coordinating security planning for the RNC and will continue to be in close communication as we learn more about this situation. We cannot be a country that accepts political violence of any kind—that is not who we are as Americans.
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From: Robert Cotter [Robert@statesuniteddemocracy.org]
Sent: 7/2/2024 9:34:57 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Jonathan Williams [jonathan@statesuniteddemocracy.org]; Zack Goldberg [zack@statesuniteddemocracy.org]
Subject: Trump v. US Summary - PRIVLEGED
Attachments: SUDC - Summary of Trump v. US (July 2 2024).docx; Trump v. US.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Privileged and Confidential
Attorney Work Product

Hi all,

We wanted to update you on yesterday's U.S. Supreme Court decision about presidential immunity from criminal prosecution in Trump v. US. A complete summary is attached along with the opinion, but big picture, the Court held that a President has (1) absolute immunity for core constitutional powers, (2) "at least" presumptive immunity for all other official acts, and (3) no immunity for unofficial acts. It further held that not only does immunity protect from prosecution, but any immune conduct cannot be used as evidence in a criminal prosecution against the President. Finally, it provided some guidance on the official/unofficial character of the allegations in the case. **DPP MCL 15.243(1)(m)**

DPP MCL 15.243(1)(m)

Best,
Robert

--
Robert Cotter (he/him) | Counsel
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robert@statesuniteddemocracy.org

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TRUMP *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23–939. Argued April 25, 2024—Decided July 1, 2024

A federal grand jury indicted former President Donald J. Trump on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results. Trump moved to dismiss the indictment based on Presidential immunity, arguing that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, and that the indictment's allegations fell within the core of his official duties. The District Court denied Trump's motion to dismiss, holding that former Presidents do not possess federal criminal immunity for any acts. The D. C. Circuit affirmed. Both the District Court and the D. C. Circuit declined to decide whether the indicted conduct involved official acts.

Held: Under our constitutional structure of separated powers, the nature of Presidential power entitles a former President to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority. And he is entitled to at least presumptive immunity from prosecution for all his official acts. There is no immunity for unofficial acts. Pp. 5–43.

(a) This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. Determining whether and under what circumstances such a prosecution may proceed requires careful assessment of the scope of Presidential power under the Constitution. The nature of that power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the

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President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is entitled to at least presumptive immunity. Pp. 5–15.

(1) Article II of the Constitution vests "executive Power" in "a President of the United States of America." §1, cl. 1. The President has duties of "unrivaled gravity and breadth." *Trump* v. *Vance*, 591 U. S. 786, 800. His authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585. In the latter case, the President's authority is sometimes "conclusive and preclusive." *Id.*, at 638 (Jackson, J., concurring). When the President exercises such authority, Congress cannot act on, and courts cannot examine, the President's actions. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. The Court thus concludes that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority. Pp. 6–9.

(2) Not all of the President's official acts fall within his "conclusive and preclusive" authority. The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive constitutional authority do not extend to conduct in areas where his authority is shared with Congress. To determine the President's immunity in this context, the Court looks primarily to the Framers' design of the Presidency within the separation of powers, precedent on Presidential immunity in the civil context, and criminal cases where a President resisted prosecutorial demands for documents. P. 9.

(i) The Framers designed the Presidency to provide for a "vigorous" and "energetic" Executive. The Federalist No. 70, pp. 471–472 (J. Cooke ed. 1961) (A. Hamilton). They vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 750. Appreciating the "unique risks" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," the Court has recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.*, at 749, 751, 752, n. 32. In *Fitzgerald*, for instance, the Court concluded that a former President is entitled to absolute immunity from "damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.*, at 756. The Court's "dominant concern" was to avoid "diversion of the President's attention during the decisionmaking process caused by needless

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worry as to the possibility of damages actions stemming from any particular official decision." *Clinton* v. *Jones*, 520 U. S. 681, 694, n. 19.

By contrast, when prosecutors have sought evidence from the President, the Court has consistently rejected Presidential claims of absolute immunity. During the treason trial of former Vice President Aaron Burr, for instance, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. Marshall simultaneously recognized, however, the existence of a "privilege" to withhold certain "official paper[s]." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va.). And when a subpoena issued to President Richard Nixon, the Court rejected his claim of "absolute privilege." *United States* v. *Nixon*, 418 U. S. 683, 703. But recognizing "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," it held that a "presumptive privilege" protects Presidential communications. *Id.*, at 708. Because that privilege "relates to the effective discharge of a President's powers," *id.*, at 711, the Court deemed it "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.*, at 708. Pp. 9–12.

(ii) Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession. The danger is greater than what led the Court to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. *Fitzgerald*, 457 U. S., at 745. Although the President might be exposed to fewer criminal prosecutions than civil damages suits, the threat of trial, judgment, and imprisonment is a far greater deterrent and plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages. The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution," *McDonnell* v. *United States*, 579 U. S. 550, 575, raises "unique risks to the effective functioning of government," *Fitzgerald*, 457 U. S., at 751. But there is also a compelling "public interest in fair and effective law enforcement." *Vance*, 591 U. S., at 808.

Taking into account these competing considerations, the Court concludes that the separation of powers principles explicated in the Court's precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive

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Branch, and to enable the President to carry out his constitutional duties without undue caution. At a minimum, the President must be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U. S., at 754. Pp. 12–15.

(3) As for a President's unofficial acts, there is no immunity. Although Presidential immunity is required for *official* actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct. *Clinton*, 520 U. S., at 694, and n. 19. The separation of powers does not bar a prosecution predicated on the President's unofficial acts. P. 15.

(b) The first step in deciding whether a former President is entitled to immunity from a particular prosecution is to distinguish his official from unofficial actions. In this case, no court thus far has drawn that distinction, in general or with respect to the conduct alleged in particular. It is therefore incumbent upon the Court to be mindful that it is "a court of final review and not first view." *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201. Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegations covering a broad range of conduct. The Court offers guidance on those issues. Pp. 16–32.

(1) When the President acts pursuant to "constitutional and statutory authority," he takes official action to perform the functions of his office. *Fitzgerald*, 456 U. S., at 757. Determining whether an action is covered by immunity thus begins with assessing the President's authority to take that action. But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." *Id.*, at 756. The immunity the Court has recognized therefore extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond [his] authority." *Blassingame* v. *Trump*, 87 F. 4th 1, 13 (CADC).

In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such a "highly intrusive" inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose. *Fitzgerald*, 457 U. S., at 756. Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. Otherwise, Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect.

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Ibid. Pp. 17–19.

(2) With the above principles in mind, the Court turns to the conduct alleged in the indictment. Certain allegations—such as those involving Trump's discussions with the Acting Attorney General—are readily categorized in light of the nature of the President's official relationship to the office held by that individual. Other allegations—such as those involving Trump's interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Pp. 19–30.

(i) The indictment alleges that as part of their conspiracy to overturn the legitimate results of the 2020 presidential election, Trump and his co-conspirators attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors. According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud. The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him.

The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's use of official power. The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. The Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. *Nixon*, 418 U. S., at 693. And the President's "management of the Executive Branch" requires him to have "unrestricted power to remove the most important of his subordinates"—such as the Attorney General—"in their most important duties." *Fitzgerald*, 457 U. S., at 750. The indictment's allegations that the requested investigations were shams or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials. Because the President cannot be prosecuted for conduct within his exclusive constitutional authority, Trump is absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials. Pp. 19–21.

(ii) The indictment next alleges that Trump and his co-conspirators "attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." App. 187, Indictment ¶10(d). In particular, the indictment alleges several conversations in which Trump pressured the Vice President to reject States' legitimate electoral votes or send them back

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to state legislatures for review.

Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. Art. II, §1, cl. 3; Amdt. 12; 3 U. S. C. §15. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

The question then becomes whether that presumption of immunity is rebutted under the circumstances. It is the Government's burden to rebut the presumption of immunity. The Court therefore remands to the District Court to assess in the first instance whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding would pose any dangers of intrusion on the authority and functions of the Executive Branch. Pp. 21–24.

(iii) The indictment's remaining allegations involve Trump's interactions with persons outside the Executive Branch: state officials, private parties, and the general public. In particular, the indictment alleges that Trump and his co-conspirators attempted to convince certain state officials that election fraud had tainted the popular vote count in their States, and thus electoral votes for Trump's opponent needed to be changed to electoral votes for Trump. After Trump failed to convince those officials to alter their state processes, he and his co-conspirators allegedly developed and effectuated a plan to submit fraudulent slates of Presidential electors to obstruct the certification proceeding. On Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election. As the Government sees it, however, Trump can point to no plausible source of authority enabling the President to take such actions. Determining whose characterization may be correct, and with respect to which conduct, requires a fact-specific analysis of the indictment's extensive and interrelated allegations. The Court accordingly remands to the District Court to determine in the first instance whether Trump's conduct in this area qualifies as official or unofficial. Pp. 24–28.

(iv) The indictment also contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." *Trump* v. *Hawaii*, 585 U. S. 667, 701. So most of a President's public

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communications are likely to fall comfortably within the outer perimeter of his official responsibilities. There may, however, be contexts in which the President speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. *Snyder* v. *Phelps*, 562 U. S. 443, 453. Whether the communications alleged in the indictment involve official conduct may depend on the content and context of each. This necessarily factbound analysis is best performed initially by the District Court. The Court therefore remands to the District Court to determine in the first instance whether this alleged conduct is official or unofficial. Pp. 28–30.

(3) Presidents cannot be indicted based on conduct for which they are immune from prosecution. On remand, the District Court must carefully analyze the indictment's remaining allegations to determine whether they too involve conduct for which a President must be immune from prosecution. And the parties and the District Court must ensure that sufficient allegations support the indictment's charges without such conduct. Testimony or private records of the President or his advisers probing such conduct may not be admitted as evidence at trial. Pp. 30–32.

(c) Trump asserts a far broader immunity than the limited one the Court recognizes, contending that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution. But the text of the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted. See Art. I, §3, cl. 7. Historical evidence likewise lends little support to Trump's position. The Federalist Papers on which Trump relies concerned the checks available against a *sitting* President; they did not endorse or even consider whether the Impeachment Judgment Clause immunizes a *former* President from prosecution. Transforming the political process of impeachment into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of the Nation's Government. Pp. 32–34.

(d) The Government takes a similarly broad view, contending that the President enjoys no immunity from criminal prosecution for any action. On its view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court's decisions on such challenges should be deferred until after trial. But questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the

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discharge of his official duties." *Fitzgerald*, 457 U. S., at 752, n. 32. The Constitution does not tolerate such impediments to "the effective functioning of government." *Id.*, at 751. Pp. 34–37.

(e) This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? In answering that question, unlike the political branches and the public at large, the Court cannot afford to fixate exclusively, or even primarily, on present exigencies. Enduring separation of powers principles guide our decision in this case. The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But under our system of separated powers, the President may not be prosecuted for exercising his core constitutional powers, and he is entitled to at least presumptive immunity from prosecution for his official acts. That immunity applies equally to all occupants of the Oval Office. Pp. 41–43.

91 F. 4th 1173, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined in full, and in which BARRETT, J., joined except as to Part III–C. THOMAS, J., filed a concurring opinion. BARRETT, J., filed an opinion concurring in part. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined. JACKSON, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to . . . change electoral

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votes for [Trump's] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump]." App. 185, Indictment ¶10(a). Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." *Id.*, at 186, ¶10(b). Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." *Id.*, at 186–187, ¶10(c). Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." *Id.*, at 187, ¶10(d). And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." *Ibid.* Fifth, when "a large and angry crowd . . . violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification." *Id.*, at 187–188, ¶10(e).

Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U. S. C. §371, (2) conspiracy to obstruct an official proceeding in violation of §1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation

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of §1512(c)(2), §2, and (4) conspiracy against rights in violation of §241.[1]

Trump moved to dismiss the indictment based on Presidential immunity. In his view, the conduct alleged in the indictment, properly characterized, was that while he was President he (1) "made public statements about the administration of the federal election"; (2) communicated with senior Justice Department officials "about investigating election fraud and about choosing the leadership" of the Department; (3) "communicated with state officials about the administration of the federal election and their exercise of official duties with respect to it"; (4) "communicated with the Vice President" and with "Members of Congress about the exercise of their official duties regarding the election certification"; and (5) "authorized or directed others to organize contingent slates of electors in furtherance of his attempts to convince the Vice President to exercise his official authority in a manner advocated for by President Trump." Motion To Dismiss Indictment Based on Presidential Immunity in No. 1:23–cr–00257 (DC), ECF Doc. 74, p. 9. Trump argued that all of the indictment's allegations fell within the core of his official duties. *Id.*, at 27. And he contended that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, to ensure that he can undertake the especially sensitive duties of his office with bold and unhesitating action. *Id.*, at 14, 24.

The District Court denied the motion to dismiss, holding

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[1] Trump contends that the indictment stretches Section 1512(c)(2) "far beyond its natural meaning." Brief for Petitioner 39, n. 4. As we explained in *Fischer* v. *United States*, Section 1512(c)(2) covers acts that impair "the availability or integrity for use in an official proceeding of records, documents, objects, or . . . other things used in the proceeding." 603 U. S. ___, ___ (2024) (slip op., at 16). If necessary, the District Court should determine in the first instance whether the Section 1512(c)(2) charges may proceed in light of our decision in *Fischer*.

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that "former Presidents do not possess absolute federal criminal immunity for any acts committed while in office." 2023 WL 8359833, *15 (DC, Dec. 1, 2023). The District Court recognized that the President is immune from damages liability in civil cases, to protect against the chilling effect such exposure might have on the carrying out of his responsibilities. See *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749–756 (1982). But it reasoned that "the possibility of vexatious post-Presidency litigation is much reduced in the criminal context" in light of "[t]he robust procedural safeguards attendant to federal criminal prosecutions." 2023 WL 8359833, *9–*10. The District Court declined to decide whether the indicted conduct involved official acts. See *id.*, at *15.

The D. C. Circuit affirmed. 91 F. 4th 1173 (2024) (*per curiam*). Citing *Marbury* v. *Madison*, 1 Cranch 137 (1803), the court distinguished between two kinds of official acts: discretionary and ministerial. 91 F. 4th, at 1189–1190. It observed that "although discretionary acts are 'only politically examinable,' the judiciary has the power to hear cases" involving ministerial acts that an officer is directed to perform by the legislature. *Ibid.* (quoting *Marbury*, 1 Cranch, at 166). From this distinction, the D. C. Circuit concluded that the "separation of powers doctrine, as expounded in *Marbury* and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws." 91 F. 4th, at 1191. In the court's view, the fact that Trump's actions "allegedly violated generally applicable criminal laws" meant that those actions "were not properly within the scope of his lawful discretion." *Id.*, at 1192. The D. C. Circuit thus concluded that Trump had "no structural immunity from the charges in the Indictment." *Ibid.* Like the District Court, the D. C.

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Circuit declined to analyze the actions described in the indictment to determine whether they involved official acts. See *id.*, at 1205, n. 14.

We granted certiorari to consider the following question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." 601 U. S. ___ (2024).

II

This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse "the issue of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 634 (1952) (Jackson, J., concurring).

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. See Tr. of Oral Arg. 28. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity. See *id.*, at 28–30, 36–37, 124.

They disagree, however, about whether a former President can be prosecuted for his official actions. Trump contends that just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, *Fitzgerald*, 457 U. S., at 756, he must be absolutely immune from criminal prosecution for such acts. Brief for Petitioner 10. And Trump argues that the bulk of the indictment's allegations involve conduct in

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his official capacity as President. See Tr. of Oral Arg. 30–32. Although the Government agrees that some official actions are included in the indictment's allegations, see *id.*, at 125, it maintains that a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized. See Brief for United States 9.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." §1, cl. 1. The President's duties are of "unrivaled gravity and breadth." *Trump* v. *Vance*, 591 U. S. 786, 800 (2020). They include, for instance, commanding the Armed Forces of the United States; granting reprieves and pardons for offenses against the United States; and appointing public ministers and consuls, the Justices of this Court, and Officers of the United States. See §2. He also has important foreign relations responsibilities: making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering, and managing matters related to terrorism, trade, and immigration. See §§2, 3. Domestically, he must "take Care that the Laws be faithfully executed," §3, and he bears responsibility for the

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actions of the many departments and agencies within the Executive Branch. He also plays a role in lawmaking by recommending to Congress the measures he thinks wise and signing or vetoing the bills Congress passes. See Art. I, §7, cl. 2; Art. II, §3.

No matter the context, the President's authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U. S., at 585. In the latter case, the President's authority is sometimes "conclusive and preclusive." *Id.*, at 638 (Jackson, J., concurring). When the President exercises such authority, he may act even when the measures he takes are "incompatible with the expressed or implied will of Congress." *Id.*, at 637. The exclusive constitutional authority of the President "disabl[es] the Congress from acting upon the subject." *Id.*, at 637–638. And the courts have "no power to control [the President's] discretion" when he acts pursuant to the powers invested exclusively in him by the Constitution. *Marbury*, 1 Cranch, at 166.

If the President claims authority to act but in fact exercises mere "individual will" and "authority without law," the courts may say so. *Youngstown*, 343 U. S., at 655 (Jackson, J., concurring). In *Youngstown*, for instance, we held that President Truman exceeded his constitutional authority when he seized most of the Nation's steel mills. See *id.*, at 582–589 (majority opinion). But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

The Constitution, for example, vests the "Power to Grant Reprieves and Pardons for Offences against the United States" in the President. Art. II, §2, cl. 1. During and after the Civil War, President Lincoln offered a full pardon, with restoration of property rights, to anyone who had "engaged in the rebellion" but agreed to take an oath of allegiance to the Union. *United States* v. *Klein*, 13 Wall. 128, 139–141

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(1872). But in 1870, Congress enacted a provision that prohibited using the President's pardon as evidence of restoration of property rights. *Id.*, at 143–144. Chief Justice Chase held the provision unconstitutional because it "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." *Id.*, at 147. "To the executive alone is intrusted the power of pardon," and the "legislature cannot change the effect of such a pardon any more than the executive can change a law." *Id.*, at 147–148. The President's authority to pardon, in other words, is "conclusive and preclusive," "disabling the Congress from acting upon the subject." *Youngstown*, 343 U. S., at 637–638 (Jackson, J., concurring).

Some of the President's other constitutional powers also fit that description. "The President's power to remove—and thus supervise—those who wield executive power on his behalf," for instance, "follows from the text of Article II." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 204 (2020). We have thus held that Congress lacks authority to control the President's "unrestricted power of removal" with respect to "executive officers of the United States whom he has appointed." *Myers* v. *United States*, 272 U. S. 52, 106, 176 (1926); see *Youngstown*, 343 U. S., at 638, n. 4 (Jackson, J., concurring) (citing the President's "exclusive power of removal in executive agencies" as an example of "conclusive and preclusive" constitutional authority); cf. *Seila Law*, 591 U. S., at 215 (noting only "two exceptions to the President's unrestricted removal power"). The power "to control recognition determinations" of foreign countries is likewise an "exclusive power of the President." *Zivotofsky* v. *Kerry*, 576 U. S. 1, 32 (2015). Congressional commands contrary to the President's recognition determinations are thus invalid. *Ibid.*

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act

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of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

B

But of course not all of the President's official acts fall within his "conclusive and preclusive" authority. As Justice Robert Jackson recognized in *Youngstown*, the President sometimes "acts pursuant to an express or implied authorization of Congress," or in a "zone of twilight" where "he and Congress may have concurrent authority." 343 U. S., at 635, 637 (concurring opinion). The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress.

We recognize that only a limited number of our prior decisions guide determination of the President's immunity in this context. That is because proceedings directly involving a President have been uncommon in our Nation, and "decisions of the Court in this area" have accordingly been "rare" and "episodic." *Dames & Moore* v. *Regan*, 453 U. S. 654, 661 (1981). To resolve the matter, therefore, we look primarily to the Framers' design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.

1

The President "occupies a unique position in the constitutional scheme," *Fitzgerald*, 457 U. S., at 749, as "the only

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person who alone composes a branch of government," *Trump* v. *Mazars USA, LLP*, 591 U. S. 848, 868 (2020). The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." *Clinton* v. *Jones*, 520 U. S. 681, 712 (1997) (Breyer, J., concurring in judgment). They "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law*, 591 U. S., at 223–224 (quoting The Federalist No. 70, p. 471 (J. Cooke ed. 1961) (A. Hamilton)). The purpose of a "vigorous" and "energetic" Executive, they thought, was to ensure "good government," for a "feeble executive implies a feeble execution of the government." *Id.*, at 471–472.

The Framers accordingly vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U. S., at 750. He must make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Id.*, at 752. There accordingly "exists the greatest public interest" in providing the President with "'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Ibid.* (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979)). Appreciating the "unique risks to the effective functioning of government" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," we have recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U. S., at 749, 751, 752, n. 32.

In *Nixon* v. *Fitzgerald*, for instance, we recognized that as "a functionally mandated incident of [his] unique office,"

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a former President "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.*, at 749. That case involved a terminated Air Force employee who sued former President Richard Nixon for damages, alleging that Nixon approved an Air Force reorganization that wrongfully led to his firing. In holding that Nixon was immune from that suit, "our dominant concern" was to avoid "diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." *Clinton*, 520 U. S., at 694, n. 19. "[T]he singular importance of the President's duties" implicating "matters likely to 'arouse the most intense feelings,'" coupled with "the sheer prominence of [his] office," heightens the prospect of private damages suits that would threaten such diversion. *Fitzgerald*, 457 U. S., at 751–753 (quoting *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967)). We therefore concluded that the President must be absolutely immune from "damages liability for acts within the 'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U. S., at 756.

By contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. Marshall reasoned that "the law does not discriminate between the president and a private citizen." *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (*Burr I*). Because a President does not "stand exempt from the general provisions of the constitution," including the Sixth Amendment's guarantee that those accused shall have compulsory process for obtaining witnesses for their defense, a subpoena could issue. *Id.*, at 33–34.

Marshall acknowledged, however, the existence of a

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"privilege" to withhold certain "official paper[s]" that "ought not on light ground to be forced into public view." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (*Burr II*); see also *Burr I*, 25 F. Cas., at 37 (stating that nothing before the court showed that the document in question "contain[ed] any matter the disclosure of which would endanger the public safety"). And he noted that a court may not "be required to proceed against the president as against an ordinary individual." *Burr II*, 25 F. Cas., at 192.

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of "absolute privilege," given the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States* v. *Nixon*, 418 U. S. 683, 703, 707 (1974). But we simultaneously recognized "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," as well as the need to protect "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.*, at 705, 708. Because the President's "need for complete candor and objectivity from advisers calls for great deference from the courts," we held that a "presumptive privilege" protects Presidential communications. *Id.*, at 706, 708. That privilege, we explained, "relates to the effective discharge of a President's powers." *Id.*, at 711. We thus deemed it "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.*, at 708.

2

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and

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Nixon. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. *Fitzgerald*, 457 U. S., at 745. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages.

The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution," *McDonnell* v. *United States*, 579 U. S. 550, 575 (2016), raises "unique risks to the effective functioning of government," *Fitzgerald*, 457 U. S., at 751. A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, "the independence of the Executive Branch" may be significantly undermined. *Vance*, 591 U. S., at 800. The Framers' design of the Presidency did not envision such counterproductive burdens on the "vigor[]" and "energy" of the Executive. The Federalist No. 70, at 471–472.

We must, however, "recognize[] the countervailing interests at stake." *Vance*, 591 U. S., at 799. Federal criminal laws seek to redress "a wrong to the public" as a whole, not just "a wrong to the individual." *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892). There is therefore a compelling "public interest in fair and effective law enforcement." *Vance*, 591 U. S., at 808. The President, charged with enforcing

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federal criminal laws, is not above them.

Chief Justice Marshall's decisions in *Burr* and our decision in *Nixon* recognized the distinct interests present in criminal prosecutions. Although *Burr* acknowledged that the President's official papers may be privileged and publicly unavailable, it did not grant him an absolute exemption from responding to subpoenas. See *Burr II*, 25 F. Cas., at 192; *Burr I*, 25 F. Cas., at 33–34. *Nixon* likewise recognized a strong protection for the President's confidential communications—a "presumptive privilege"—but it did not entirely exempt him from providing evidence in criminal proceedings. 418 U. S., at 708.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the "effective discharge" of his powers when a prosecutor merely seeks evidence of his official papers and communications, *id.*, at 711, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U. S., at 754.

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute. See Part III–B, *infra*. Because we need not decide that question today, we do not

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decide it. "[O]ne case" in more than "two centuries does not afford enough experience" to definitively and comprehensively determine the President's scope of immunity from criminal prosecution. *Mazars*, 591 U. S., at 871.

C

As for a President's unofficial acts, there is no immunity. The principles we set out in *Clinton* v. *Jones* confirm as much. When Paula Jones brought a civil lawsuit against then-President Bill Clinton for acts he allegedly committed prior to his Presidency, we rejected his argument that he enjoyed temporary immunity from the lawsuit while serving as President. 520 U. S., at 684. Although Presidential immunity is required for *official* actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct. *Id.*, at 694, and n. 19. The "'justifying purposes'" of the immunity we recognized in *Fitzgerald*, and the one we recognize today, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions. 520 U. S., at 694, and n. 19 (quoting *Fitzgerald*, 457 U. S., at 755). "[I]t [is] the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Forrester* v. *White*, 484 U. S. 219, 229 (1988). The separation of powers does not bar a prosecution predicated on the President's unofficial acts.[2]

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[2] Our decision in *Clinton* permitted claims alleging unofficial acts to proceed against the sitting President. See 520 U. S., at 684. In the criminal context, however, the Justice Department "has long recognized" that "the separation of powers precludes the criminal prosecution of a sitting President." Brief for United States 9 (citing A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222 (2000); emphasis deleted); see Tr. for Oral Arg. 78.

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III

Determining whether a former President is entitled to immunity from a particular prosecution requires applying the principles we have laid out to his conduct at issue. The first step is to distinguish his official from unofficial actions. In this case, however, no court has thus far considered how to draw that distinction, in general or with respect to the conduct alleged in particular.

Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis. Because those courts categorically rejected *any* form of Presidential immunity, they did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial. Neither party has briefed that issue before us (though they discussed it at oral argument in response to questions). And like the underlying immunity question, that categorization raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution. As we have noted, there is little pertinent precedent on those subjects to guide our review of this case—a case that we too are deciding on an expedited basis, less than five months after we granted the Government's request to construe Trump's emergency application for a stay as a petition for certiorari, grant that petition, and answer the consequential immunity question. See 601 U. S., at ___. Given all these circumstances, it is particularly incumbent upon us to be mindful of our frequent admonition that "[o]urs is a court of final review and not first view." *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012) (internal quotation marks omitted).

Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegations covering a broad range of conduct.

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We offer guidance on those issues below. Certain allegations—such as those involving Trump's discussions with the Acting Attorney General—are readily categorized in light of the nature of the President's official relationship to the office held by that individual. Other allegations—such as those involving Trump's interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance.

A

Distinguishing the President's official actions from his unofficial ones can be difficult. When the President acts pursuant to "constitutional and statutory authority," he takes official action to perform the functions of his office. *Fitzgerald*, 457 U. S., at 757. Determining whether an action is covered by immunity thus begins with assessing the President's authority to take that action.

But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." *Id.*, at 756. And some Presidential conduct—for example, speaking to and on behalf of the American people, see *Trump* v. *Hawaii*, 585 U. S. 667, 701 (2018)—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the immunity we have recognized extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond [his] authority." *Blassingame* v. *Trump*, 87

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F. 4th 1, 13 (CADC 2023) (internal quotation marks omitted); see *Fitzgerald*, 457 U. S., at 755–756 (noting that we have "refused to draw functional lines finer than history and reason would support").

In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, "[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Fitzgerald*, 457 U. S., at 745 (quoting *Spalding* v. *Vilas*, 161 U. S. 483, 498 (1896)). We thus rejected such inquiries in *Fitzgerald*. The plaintiff there contended that he was dismissed from the Air Force for retaliatory reasons. See 457 U. S., at 733–741, 756. The Air Force responded that the reorganization that led to Fitzgerald's dismissal was undertaken to promote efficiency. *Ibid.* Because under Fitzgerald's theory "an inquiry into the President's motives could not be avoided," we rejected the theory, observing that "[i]nquiries of this kind could be highly intrusive." *Id.*, at 756. "[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 817–818 (1982).

Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. For instance, when Fitzgerald contended that his dismissal violated various congressional statutes and thus rendered his discharge "outside the outer perimeter of [Nixon's] duties," we rejected that contention. 457 U. S., at 756. Otherwise, Presidents would be subject to trial on "every allegation

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that an action was unlawful," depriving immunity of its intended effect. *Ibid.*

B

With these principles in mind, we turn to the conduct alleged in the indictment.

1

The indictment broadly alleges that Trump and his co-conspirators sought to "overturn the legitimate results of the 2020 presidential election." App. 183, Indictment ¶7. It charges that they conspired to obstruct the January 6 congressional proceeding at which electoral votes are counted and certified, and the winner of the election is certified as President-elect. *Id.*, at 181–185, ¶¶4, 7, 9. As part of this conspiracy, Trump and his co-conspirators allegedly attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors. See *id.*, at 215–220, ¶¶70–85. According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud. See, *e.g.*, *id.*, at 217, 219–220, ¶¶77, 84. The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him. See, *e.g.*, *id.*, at 216–217, ¶¶74, 77.

The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's "use of official power." Brief for United States 46; see *id.*, at 10–11; Tr. of Oral Arg. 125. The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. "[I]nvestigation and prosecution of crimes is a quintessentially executive function." Brief for United States 19 (quoting *Morrison* v. *Olson*, 487 U. S. 654, 706

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(1988) (Scalia, J., dissenting)). And the Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. *Nixon*, 418 U. S., at 693; see *United States* v. *Texas*, 599 U. S. 670, 678–679 (2023) ("Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" (quoting *TransUnion LLC* v. *Ramirez*, 594 U. S. 413, 429 (2021))). The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, §3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to 'preserve, protect, and defend the Constitution.'" *Mitchell* v. *Forsyth*, 472 U. S. 511, 520 (1985) (quoting Art. II, §1, cl. 8).

Investigative and prosecutorial decisionmaking is "the special province of the Executive Branch," *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985), and the Constitution vests the entirety of the executive power in the President, Art. II, §1. For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive" Presidential authority. As we have explained, the President's power to remove "executive officers of the United States whom he has appointed" may not be regulated by Congress or reviewed by the courts. *Myers*, 272 U. S., at 106, 176; see *supra*, at 8. The President's "management of the Executive Branch" requires him to have "unrestricted power to remove the most important of his subordinates"—such as the Attorney General—"in their most important duties." *Fitzgerald*, 457 U. S., at 750 (internal quotation marks and alteration omitted).

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The indictment's allegations that the requested investigations were "sham[s]" or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials. App. 186–187, Indictment ¶10(c). And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.

2

The indictment next alleges that Trump and his coconspirators "attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." *Id.*, at 187, ¶10(d). In particular, the indictment alleges several conversations in which Trump pressured the Vice President to reject States' legitimate electoral votes or send them back to state legislatures for review. See, *e.g.*, *id.*, at 222–224, 226, ¶¶90, 92–93, 97.

The Government explained at oral argument that although it "has not yet had to come to grips with how [it] would analyze" Trump's interactions with the Vice President, there is "support" to characterize that conduct as official. Tr. of Oral Arg. 128. Indeed, our constitutional system anticipates that the President and Vice President will remain in close contact regarding their official duties over the course of the President's term in office. These two officials are the only ones "elected by the entire Nation." *Seila Law*, 591 U. S., at 224; see Art. II, §1. The Constitution provides that "the Vice President shall become President" in the case of "the removal of the President from office or of his death or resignation." Amdt. 25, §1. It also "empowers the Vice President, together with a majority of the 'principal officers

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of the executive departments,' to declare the President 'unable to discharge the powers and duties of his office.'" *Freytag* v. *Commissioner*, 501 U. S. 868, 886–887 (1991) (quoting Amdt. 25, §4). And Article I of course names the Vice President as President of the Senate and gives him a tie-breaking vote. §3, cl. 4. It is thus important for the President to discuss official matters with the Vice President to ensure continuity within the Executive Branch and to advance the President's agenda in Congress and beyond.

The Vice President may in practice also serve as one of the President's closest advisers. The Office of Legal Counsel has explained that within the Executive Branch, the Vice President's "sole function [is] advising and assisting the President." Whether the Office of the Vice President Is an 'Agency' for Purposes of the Freedom of Information Act, 18 Op. OLC 10 (1994). Indeed, the "Twelfth Amendment was brought about" to avoid the "manifestly intolerable" situation that occurred "[d]uring the John Adams administration," when "we had a President and Vice-President of different parties." *Ray* v. *Blair*, 343 U. S. 214, 224, n. 11 (1952). The President and Vice President together "are the senior officials of the Executive Branch of government" and therefore "must formulate, explain, advocate, and defend policies" of the President's administration. Payment of Expenses Associated With Travel by the President and Vice President, 6 Op. OLC 214, 215 (1982).

As the President's second in command, the Vice President has historically performed important functions "at the will and as the representative of the President." Participation of the Vice President in the Affairs of the Executive Branch, 1 Supp. Op. OLC 214, 220 (1961). President Woodrow Wilson's Vice President, for instance, "presided over a few cabinet meetings while Wilson was in France negotiating" the Treaty of Versailles after World War I. H. Relyea, The Law: The Executive Office of the Vice President: Constitutional and Legal Considerations, 40 Presidential Studies Q. 327,

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328 (2010). During President Franklin Roosevelt's administration, the Vice President "became a regular participant in cabinet deliberations—a practice that was continued by each succeeding president." *Ibid.* And when President Dwight Eisenhower "suffered three major illnesses while in office . . . Vice President Richard Nixon consulted with the Cabinet and developed a procedure for relaying important matters to the President." Presidential Succession and Delegation in Case of Disability, 5 Op. OLC 91, 102 (1981). At the President's discretion, "the Vice President may engage in activities ranging into the highest levels of diplomacy and negotiation and may do so anywhere in the world." 1 Supp. Op. OLC, at 220. Domestically, he may act as the President's delegate to perform any duties "co-extensive with the scope of the President's power of delegation." *Ibid.*

Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. Art. II, §1, cl. 3; Amdt. 12; 3 U. S. C. §15. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. *Ibid.* Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President, Re: Conflict of

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Interest Problems Arising Out of the President's Nomination of Nelson A. Rockefeller To Be Vice President Under the Twenty-Fifth Amendment to the Constitution 2 (Aug. 28, 1974). With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, see, *e.g.*, 3 U. S. C. §15, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U. S., at 754; see *supra*, at 14.

At the same time, however, the President may frequently rely on the Vice President in his capacity as President of the Senate to advance the President's agenda in Congress. When the Senate is closely divided, for instance, the Vice President's tiebreaking vote may be crucial for confirming the President's nominees and passing laws that align with the President's policies. Applying a criminal prohibition to the President's conversations discussing such matters with the Vice President—even though they concern his role as President of the Senate—may well hinder the President's ability to perform his constitutional functions.

It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

3

The indictment's remaining allegations cover a broad range of conduct. Unlike the allegations describing

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Trump's communications with the Justice Department and the Vice President, these remaining allegations involve Trump's interactions with persons outside the Executive Branch: state officials, private parties, and the general public. Many of the remaining allegations, for instance, cover at great length events arising out of communications that Trump and his co-conspirators initiated with state legislators and election officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin regarding those States' certification of electors. See App. 192–207, Indictment ¶¶13–52.

Specifically, the indictment alleges that Trump and his co-conspirators attempted to convince those officials that election fraud had tainted the popular vote count in their States, and thus electoral votes for Trump's opponent needed to be changed to electoral votes for Trump. See *id.*, at 185–186, ¶10(a). After Trump failed to convince those officials to alter their state processes, he and his co-conspirators allegedly developed a plan "to marshal individuals who would have served as [Trump's] electors, had he won the popular vote" in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin, "and cause those individuals to make and send to the Vice President and Congress false certifications that they were legitimate electors." *Id.*, at 208, ¶53. If the plan worked, "the submission of these fraudulent slates" would position the Vice President to "open and count the fraudulent votes" at the certification proceeding and set up "a fake controversy that would derail the proper certification of Biden as president-elect." *Id.*, at 208–209, ¶¶53, 54(b). According to the indictment, Trump used his campaign staff to effectuate the plan. See, *e.g.*, *id.*, at 210, 212–213, ¶¶55, 63. On the same day that the legitimate electors met in their respective jurisdictions to cast their votes, the indictment alleges that Trump's "fraudulent electors convened sham proceedings in the seven tar-

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geted states to cast fraudulent electoral ballots" in his favor. *Id.*, at 214, ¶66. Those ballots "were mailed to the President of the Senate, the Archivist of the United States, and others." *Ibid.*, ¶67.

At oral argument, Trump appeared to concede that at least some of these acts—those involving "private actors" who "helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding" at the direction of Trump and a co-conspirator—entail "private" conduct. Tr. of Oral Arg. 29–30. He later asserted, however, that asking "the chairwoman of the Republican National Committee . . . to gather electors" qualifies as official conduct because "the organization of alternate slates of electors is based on, for example, the historical example of President Grant as something that was done pursuant to and ancillary and preparatory to the exercise of" a core Presidential power. *Id.*, at 37; see also *id.*, at 25 (discussing the "historical precedent . . . of President Grant sending federal troops to Louisiana and Mississippi in 1876 to make sure that the Republican electors got certified in those two cases, which delivered the election to Rutherford B. Hayes"). He also argued that it is "[a]bsolutely an official act for the president to communicate with state officials on . . . the integrity of a federal election." *Id.*, at 38. The Government disagreed, contending that this alleged conduct does not qualify as "official conduct" but as "campaign conduct." *Id.*, at 124–125.

On Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election. Of course, the President's duty to "take Care that the Laws be faithfully executed" plainly encompasses enforcement of federal election laws passed by Congress. Art. II, §3. And the President's broad power to speak on matters of public concern does not exclude his public communications regarding the fairness and integrity of federal elections simply because he

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is running for re-election. Cf. *Hawaii*, 585 U. S., at 701. Similarly, the President may speak on and discuss such matters with state officials—even when no specific federal responsibility requires his communication—to encourage them to act in a manner that promotes the President's view of the public good.

As the Government sees it, however, these allegations encompass nothing more than Trump's "private scheme with private actors." Brief for United States 44. In its view, Trump can point to no plausible source of authority enabling the President to not only organize alternate slates of electors but also cause those electors—unapproved by any state official—to transmit votes to the President of the Senate for counting at the certification proceeding, thus interfering with the votes of States' properly appointed electors. Indeed, the Constitution commits to the States the power to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl. 2; see *Burroughs* v. *United States*, 290 U. S. 534, 544 (1934). "Article II, §1's appointments power," we have said, "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo* v. *Washington*, 591 U. S. 578, 588–589 (2020). By contrast, the Federal Government's role in appointing electors is limited. Congress may prescribe when the state-appointed electors shall meet, and it counts and certifies their votes. Art. II, §1, cls. 3, 4. The President, meanwhile, plays no direct role in the process, nor does he have authority to control the state officials who do. And the Framers, wary of "cabal, intrigue and corruption," specifically excluded from service as electors "all those who from situation might be suspected of too great devotion to the president in office." The Federalist No. 68, at 459 (A. Hamilton); see Art. II, §1, cl. 2.

Determining whose characterization may be correct, and with respect to which conduct, requires a close analysis of

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the indictment's extensive and interrelated allegations. See App. 192–215, Indictment ¶¶13–69. Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. And the parties' brief comments at oral argument indicate that they starkly disagree on the characterization of these allegations. The concerns we noted at the outset—the expedition of this case, the lack of factual analysis by the lower courts, and the absence of pertinent briefing by the parties—thus become more prominent. We accordingly remand to the District Court to determine in the first instance—with the benefit of briefing we lack—whether Trump's conduct in this area qualifies as official or unofficial.

4

Finally, the indictment contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. It alleges that leading up to the January 6 certification proceeding, Trump issued a series of Tweets (to his nearly 89 million followers) encouraging his supporters to travel to Washington, D. C., on that day. See, *e.g.*, App. 221, 225–227, Indictment ¶¶87–88, 96, 100. Trump and his co-conspirators addressed the gathered public that morning, asserting that certain States wanted to recertify their electoral votes and that the Vice President had the power to send those States' ballots back for recertification. *Id.*, at 228–230, ¶¶103–104. Trump then allegedly "directed the crowd in front of him to go to the Capitol" to pressure the Vice President to do so at the certification proceeding. *Id.*, at 228–230, ¶104. When it became public that the Vice President would not use his role at the certification proceeding to determine which electoral votes should be

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counted, the crowd gathered at the Capitol "broke through barriers cordoning off the Capitol grounds" and eventually "broke into the building." *Id.*, at 230–231, ¶¶107, 109.

The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." *Hawaii*, 585 U. S., at 701; cf. *Lindke* v. *Freed*, 601 U. S. 187, 191 (2024). As the sole person charged by the Constitution with executing the laws of the United States, the President oversees—and thus will frequently speak publicly about—a vast array of activities that touch on nearly every aspect of American life. Indeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest. He is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government—for instance, to comfort the Nation in the wake of an emergency or tragedy. For these reasons, most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.

There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011) (internal quotation marks omitted). But "there is not always a clear line between [the President's] personal and official affairs." *Mazars*, 591 U. S., at 868. The analysis therefore must be fact specific and may prove to be challenging.

The indictment reflects these challenges. It includes only

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select Tweets and brief snippets of the speech Trump delivered on the morning of January 6, omitting its full text or context. See App. 228–230, Indictment ¶104. Whether the Tweets, that speech, and Trump's other communications on January 6 involve official conduct may depend on the content and context of each. Knowing, for instance, what else was said contemporaneous to the excerpted communications, or who was involved in transmitting the electronic communications and in organizing the rally, could be relevant to the classification of each communication. This necessarily factbound analysis is best performed initially by the District Court. We therefore remand to the District Court to determine in the first instance whether this alleged conduct is official or unofficial.

C

The essence of immunity "is its possessor's entitlement not to have to answer for his conduct" in court. *Mitchell*, 472 U. S., at 525. Presidents therefore cannot be indicted based on conduct for which they are immune from prosecution. As we have explained, the indictment here alleges at least some such conduct. See Part III–B–1, *supra*. On remand, the District Court must carefully analyze the indictment's remaining allegations to determine whether they too involve conduct for which a President must be immune from prosecution. And the parties and the District Court must ensure that sufficient allegations support the indictment's charges without such conduct.

The Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not "be held criminally liable" based on those acts. Brief for United States 46. But it nevertheless contends that a jury could "consider" evidence concerning the President's official acts "for limited and specified purposes," and that such evidence would "be admissible to prove, for example, [Trump's] knowledge or notice of the falsity of his election-fraud

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claims." *Id.*, at 46, 48. That proposal threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge. But "[t]he Constitution deals with substance, not shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867). And the Government's position is untenable in light of the separation of powers principles we have outlined.

If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. *Fitzgerald*, 457 U. S., at 756. The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted. See *Clinton*, 520 U. S., at 694, n. 19.

The Government asserts that these weighty concerns can be managed by the District Court through the use of "evidentiary rulings" and "jury instructions." Brief for United States 46. But such tools are unlikely to protect adequately the President's constitutional prerogatives. Presidential acts frequently deal with "matters likely to 'arouse the most intense feelings.' " *Fitzgerald*, 457 U. S., at 752 (quoting *Pierson*, 386 U. S., at 554). Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office. The prosaic tools on which the Government would have courts rely are an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President. Cf. *Nixon*, 418 U. S., at 706. Although such

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tools may suffice to protect the constitutional rights of individual criminal defendants, the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency.[3]

IV

A

Trump asserts a far broader immunity than the limited one we have recognized. He contends that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution. Brief for Petitioner 16.

The text of the Clause provides little support for such an absolute immunity. It states that an impeachment judgment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." Art. I, §3, cl. 7. It then specifies that "the Party convicted shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." *Ibid.* (emphasis added).

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[3] JUSTICE BARRETT disagrees, arguing that in a bribery prosecution, for instance, excluding "any mention" of the official act associated with the bribe "would hamstring the prosecution." *Post*, at 6 (opinion concurring in part); cf. *post*, at 25–27 (opinion of SOTOMAYOR, J.). But of course the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. See 18 U. S. C. §201(b)(2). What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety. As we have explained, such inspection would be "highly intrusive" and would "'seriously cripple'" the President's exercise of his official duties. *Fitzgerald*, 457 U. S., at 745, 756 (quoting *Spalding* v. *Vilas*, 161 U. S. 483, 498 (1896)); see *supra,* at 18. And such second-guessing would "threaten the independence or effectiveness of the Executive." *Trump* v. *Vance*, 591 U. S. 786, 805 (2020).

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The Clause both limits the consequences of an impeachment judgment and clarifies that notwithstanding such judgment, subsequent prosecution may proceed. By its own terms, the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted.

Historical evidence likewise lends little support to Trump's position. For example, Justice Story reasoned that without the Clause's clarification that "Indictment, Trial, Judgment and Punishment" may nevertheless follow Senate conviction, "it might be matter of extreme doubt, whether . . . a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments." 2 J. Story, Commentaries on the Constitution of the United States §780, p. 251 (1833). James Wilson, who served on the Committee that drafted the Clause and later as a Justice of this Court, similarly concluded that acquittal of impeachment charges posed no bar to subsequent prosecution. See 2 Documentary History of the Ratification of the Constitution 492 (M. Jensen ed. 1979). And contrary to Trump's contention, Alexander Hamilton did not disagree. The Federalist Papers on which Trump relies, see Brief for Petitioner 17–18, concerned the checks available against a *sitting* President. Hamilton noted that unlike "the King of Great-Britain," the President "would be liable to be impeached" and "removed from office," and "would afterwards be liable to prosecution and punishment." The Federalist No. 69, at 463; see also *id.*, No. 77, at 520 (explaining that the President is "at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by subsequent prosecution"). Hamilton did not endorse or even consider whether the Impeachment Judgment Clause immunizes a *former* President from prosecution.

The implication of Trump's theory is that a President who evades impeachment for one reason or another during his

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term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution.

Impeachment is a political process by which Congress can remove a President who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, §4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government.

B

The Government for its part takes a similarly broad view, contending that the President enjoys no immunity from criminal prosecution for any action. It maintains this view despite agreeing with much of our analysis.

For instance, the Government does not dispute that Congress may not criminalize Presidential conduct within the President's "conclusive and preclusive" constitutional authority. See Tr. of Oral Arg. 133 ("[C]ore powers . . . can't be regulated at all, like the pardon power and veto."); see also *id.*, at 84–85. And it too accords protection to Presidential conduct if subjecting that conduct to generally applicable laws would "raise serious constitutional questions regarding the President's authority" or cause a "possible conflict with the President's constitutional prerogatives." Application of 28 U. S. C. §458 to Presidential Appointments of Federal Judges, 19 Op. OLC 350, 351–352 (1995); see Brief for United States 26–29; Tr. of Oral Arg. 78. Indeed, the Executive Branch has long held that view. The Office of Legal Counsel has recognized, for instance, that a federal statute generally prohibiting appointments to "'any office or duty in any court'" of persons within certain degrees of consanguinity to the judges of such courts would, if

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applied to the President, infringe his power to appoint federal judges, thereby raising a serious constitutional question. 19 Op. OLC, at 350 (quoting 28 U. S. C. §458); see *id.*, at 350–352. So it viewed such a statute as not applying to the President. Likewise, it has narrowly construed a criminal prohibition on grassroots lobbying to avoid the constitutional issues that would otherwise arise, reasoning that the statute should not "be construed to prohibit the President or executive branch agencies from engaging in a general open dialogue with the public on the Administration's programs and policies." Constraints Imposed by 18 U. S. C. §1913 on Lobbying Efforts, 13 Op. OLC 300, 304 (1989); see *id.*, at 304–306.

The Government thus broadly agrees that the President's official acts are entitled to some degree of constitutional protection. And with respect to the allegations in the indictment before us, the Government agrees that at least some of the alleged conduct involves official acts. See Tr. of Oral Arg. 125; cf. *id.*, at 128.

Yet the Government contends that the President should not be considered immune from prosecution for those official acts. See Brief for United States 9. On the Government's view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court's decisions on such challenges should be deferred until after trial. See Tr. of Oral Arg. 69, 79–80, 154–158. If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial. See *Mitchell*, 472 U. S., at 524–530 (explaining that questions of immunity are reviewable before trial because the essence of immunity is the entitlement not to be subject to suit).

The Government asserts that the "[r]obust safeguards" available in typical criminal proceedings alleviate the need for pretrial review. Brief for United States 20 (boldface and

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emphasis omitted). First, it points to the Justice Department's "longstanding commitment to the impartial enforcement of the law," *id.*, at 21, as well as the criminal justice system's further protections: grand juries, a defendant's procedural rights during trial, and the requirement that the Government prove its case beyond a reasonable doubt, *id.*, at 22. Next, it contends that "existing principles of statutory construction and as-applied constitutional challenges" adequately address the separation of powers concerns involved in applying generally applicable criminal laws to a President. *Id.*, at 29. Finally, the Government cites certain defenses that would be available to the President in a particular prosecution, such as the public-authority defense or the advice of the Attorney General. *Id.*, at 29–30; see *Nardone* v. *United States*, 302 U. S. 379, 384 (1937); Tr. of Oral Arg. 107–108.

These safeguards, though important, do not alleviate the need for pretrial review. They fail to address the fact that under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with. As we have explained, when the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them. See Part II–A, *supra*. And he is at least presumptively immune from prosecution for his other official actions. See Part II–B, *supra*.

Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the discharge of his official duties." *Fitzgerald*, 457 U. S., at 752, n. 32. Vulnerability "'to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.'" *Id.*, at 752–753, n. 32 (quoting

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Gregoire v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (Hand, L., C. J.)). The Constitution does not tolerate such impediments to "the effective functioning of government." *Fitzgerald*, 457 U. S., at 751.

As for the Government's assurances that prosecutors and grand juries will not permit political or baseless prosecutions from advancing in the first place, those assurances are available to every criminal defendant and fail to account for the President's "unique position in the constitutional scheme." *Id.*, at 749. We do not ordinarily decline to decide significant constitutional questions based on the Government's promises of good faith. See *United States* v. *Stevens*, 559 U. S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Nor do we do so today.

C

As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine "in the first instance" whether and to what extent Trump's remaining alleged conduct is entitled to immunity. *Supra*, at 24, 28, 30.

The principal dissent's starting premise—that unlike Speech and Debate Clause immunity, no constitutional text supports Presidential immunity, see *post*, at 4–6 (opinion of SOTOMAYOR, J.)—is one that the Court rejected decades ago as "unpersuasive." *Fitzgerald*, 457 U. S., at 750, n. 31; see also *Nixon*, 418 U. S., at 705–706, n. 16 (rejecting unanimously a similar argument in the analogous executive privilege context). "[A] specific textual basis has not been considered a prerequisite to the recognition of immunity." *Fitzgerald*, 457 U. S., at 750, n. 31. Nor is that premise correct. True, there is no "Presidential immunity clause" in

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the Constitution. But there is no "'separation of powers clause'" either. *Seila Law*, 591 U. S., at 227. Yet that doctrine is undoubtedly carved into the Constitution's text by its three articles separating powers and vesting the Executive power solely in the President. See *ibid.* And the Court's prior decisions, such as *Nixon* and *Fitzgerald*, have long recognized that doctrine as mandating certain Presidential privileges and immunities, even though the Constitution contains no explicit "provision for immunity." *Post*, at 4; see Part II–B–1, *supra*. Neither the dissents nor the Government disavow any of those prior decisions. See Tr. of Oral Arg. 76–77.

The principal dissent then cites the Impeachment Judgment Clause, arguing that it "clearly contemplates that a former President may be subject to criminal prosecution." *Post*, at 6. But that Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his *official* conduct in particular. See *supra*, at 32–33. And the assortment of historical sources the principal dissent cites are unhelpful for the same reason. See *post*, at 6–8. As the Court has previously noted, relevant historical evidence on the question of Presidential immunity is of a "fragmentary character." *Fitzgerald*, 457 U. S., at 752, n. 31; see also *Clinton*, 520 U. S., at 696–697; cf. *Youngstown*, 343 U. S., at 634 (Jackson, J., concurring) (noting "the poverty of really useful and unambiguous authority applicable to concrete problems of executive power"). "[T]he most compelling arguments," therefore, "arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine." *Fitzgerald*, 457 U. S., at 752, n. 31.

The Court's prior admonition is evident in the principal dissent's citations. Some of its cherry-picked sources do not even discuss the President in particular. See, *e.g.*, *post*, at 7–8 (citing 2 Debates on the Constitution 177 (J. Elliot ed. 1836); 2 J. Story, Commentaries on the Constitution of the

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United States §780, pp. 250–251 (1833)). And none of them indicate whether he may be prosecuted for his official conduct. See, *e.g.*, *post*, at 6, 7, n. 2 (citing The Federalist No. 69; 4 Debates on the Constitution, at 109). The principal dissent's most compelling piece of evidence consists of excerpted statements of Charles Pinckney from an 1800 Senate debate. See *post*, at 7. But those statements reflect only the now-discredited argument that any immunity not expressly mentioned in the Constitution must not exist. See 3 Records of the Federal Convention of 1787, pp. 384–385 (M. Farrand ed. 1911). And Pinckney is not exactly a reliable authority on the separation of powers: He went on to state on the same day that "it was wrong to give the nomination of Judges to the President"—an opinion expressly rejected by the Framers. *Id.*, at 385. Given the Framers' desire for an energetic and vigorous President, the principal dissent's view that the Constitution they designed allows all his actions to be subject to prosecution—even the exercise of powers it grants exclusively to him—defies credulity.

Unable to muster any meaningful textual or historical support, the principal dissent suggests that there is an "established understanding" that "former Presidents are answerable to the criminal law for their official acts." *Post*, at 9. Conspicuously absent is mention of the fact that since the founding, no President has ever faced criminal charges—let alone for his conduct in office. And accordingly no court has ever been faced with the question of a President's immunity from prosecution. All that our Nation's practice establishes on the subject is silence.

Coming up short on reasoning, the dissents repeatedly level variations of the accusation that the Court has rendered the President "above the law." See, *e.g.*, *post*, at 1, 3, 11, 12, 21, 30 (opinion of SOTOMAYOR, J.); *post*, at 9, 10, 11, 12, 13, 19 (opinion of JACKSON, J.). As before, that "rhetorically chilling" contention is "wholly unjustified." *Fitzger-*

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ald, 457 U. S., at 758, n. 41. Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law." *Post*, at 18 (opinion of SOTOMAYOR, J.); see *post*, at 26, 29–30; *post*, at 8–9, 10, 12, 16, 20–21 (opinion of JACKSON, J.). The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. For instance, Section 371—which has been charged in this case—is a broadly worded criminal statute that can cover "'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" *United States* v. *Johnson*, 383 U. S. 169, 172 (1966) (quoting *Haas* v. *Henkel*, 216 U. S. 462, 479 (1910)). Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to

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avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.

Finally, the principal dissent finds it "troubling" that the Court does not "designate any course of conduct alleged in the indictment as private." *Post*, at 27. Despite the unprecedented nature of this case, the significant constitutional questions that it raises, its expedited treatment in the lower courts and in this Court, the lack of factual analysis in the lower courts, and the lack of briefing on how to categorize the conduct alleged, the principal dissent would go ahead and declare all of it unofficial. The other dissent, meanwhile, analyzes the case under comprehensive models and paradigms of its own concoction and accuses the Court of providing "no meaningful guidance about how to apply [the] new paradigm or how to categorize a President's conduct." *Post*, at 13 (opinion of JACKSON, J.). It would have us exhaustively define every application of Presidential immunity. See *post*, at 13–14. Our dissenting colleagues exude an impressive infallibility. While their confidence may be inspiring, the Court adheres to time-tested practices instead—deciding what is required to dispose of this case and remanding after "revers[ing] on a threshold question," *Zivotofsky*, 566 U. S., at 201, to obtain "guidance from the litigants [and] the court below," *Vidal* v. *Elster*, 602 U. S. 286, 328 (2024) (SOTOMAYOR, J., concurring in judgment).

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. In a case like this one, focusing on "transient results" may have profound consequences for the separation

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of powers and for the future of our Republic. *Youngstown*, 343 U. S., at 634 (Jackson, J., concurring). Our perspective must be more farsighted, for "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall's Defense of *McCulloch v. Maryland* 190–191 (G. Gunther ed. 1969).

Our first President had such a perspective. In his Farewell Address, George Washington reminded the Nation that "a Government of as much vigour as is consistent with the perfect security of Liberty is indispensable." 35 Writings of George Washington 226 (J. Fitzpatrick ed. 1940). A government "too feeble to withstand the enterprises of faction," he warned, could lead to the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge." *Id.*, at 226–227. And the way to avoid that cycle, he explained, was to ensure that government powers remained "properly distributed and adjusted." *Id.*, at 226.

It is these enduring principles that guide our decision in this case. The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings

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consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

JUSTICE THOMAS, concurring.

Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts. Fortunately, the Constitution does not permit us to chart such a dangerous course. As the Court forcefully explains, the Framers "deemed an energetic executive essential to . . . the security of liberty," and our "system of separated powers" accordingly insulates the President from prosecution for his official acts. *Ante*, at 10, 42 (internal quotation marks omitted). To conclude otherwise would hamstring the vigorous Executive that our Constitution envisions. "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison* v. *Olson*, 487 U. S. 654, 710–711 (1988) (Scalia, J., dissenting).

I write separately to highlight another way in which this prosecution may violate our constitutional structure. In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But, I am not sure that any office for the Special Counsel has been "established by Law," as the Constitution requires. Art. II, §2, cl. 2. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure. If there is

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no law establishing the office that the Special Counsel occupies, then he cannot proceed with this prosecution. A private citizen cannot criminally prosecute anyone, let alone a former President.

No former President has faced criminal prosecution for his acts while in office in the more than 200 years since the founding of our country. And, that is so despite numerous past Presidents taking actions that many would argue constitute crimes. If this unprecedented prosecution is to proceed, it must be conducted by someone duly authorized to do so by the American people. The lower courts should thus answer these essential questions concerning the Special Counsel's appointment before proceeding.

I

The Constitution sets forth how an office may be created and how it may be filled. The Appointments Clause provides:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Department." Art. II, §2, cl. 2.

The constitutional process for filling an office is plain from this text. The default manner for appointing "Officers of the United States" is nomination by the President and confirmation by the Senate. *Ibid.* "But the Clause provides a limited exception for the appointment of inferior officers: Congress may 'by Law' authorize" one of three specified ac-

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tors "to appoint inferior officers without the advice and consent of the Senate." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 312 (2017) (THOMAS, J., concurring). As relevant here, a "Hea[d] of Department"—such as the Attorney General—is one such actor that Congress may authorize "by Law" to appoint inferior officers without senatorial confirmation. Art. II, §2, cl. 2.

Before the President or a Department Head can appoint any officer, however, the Constitution requires that the underlying office be "established by Law."[1] The Constitution itself creates some offices, most obviously that of the President and Vice President. See §1. Although the Constitution contemplates that there will be "other Officers of the United States, whose Appointments are not herein otherwise provided for," it clearly requires that those offices "shall be established by Law." §2, cl. 2. And, "established by law" refers to an office that Congress creates "by statute." *Lucia* v. *SEC*, 585 U. S. 237, 254 (2018) (THOMAS, J., concurring); see also *United States* v. *Maurice*, 26 F. Cas. 1211, 1213 (No. 15,747) (CC Va. 1823) (Marshall, C. J.).

The limitation on the President's power to create offices grew out of the Founders' experience with the English monarchy. The King could wield significant power by both creating and filling offices as he saw fit. He was "emphatically and truly styled the fountain of honor. He not only appoint[ed] to all offices, but [could] create offices." The Federalist No. 69, p. 421 (C. Rossiter ed. 1961); see also 1 W. Blackstone, Commentaries on the Laws of England 271 (T.

[1] Although a Government official may also be a "nonofficer employe[e]," I set aside that category because it is difficult to see how an official exercising the Department of Justice's duties to enforce the criminal law by leading a prosecution could be anything but an officer. *Lucia* v. *SEC*, 585 U. S. 237, 253, n. 1 (2018) (THOMAS, J., concurring); see *SW General*, 580 U. S., at 314 (opinion of THOMAS, J.). If the Special Counsel were a nonofficer employee, the constitutional problems with this prosecution would only be more serious. For now, I assume without deciding that the Special Counsel is an officer.

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Cooley ed. 1871) ("[A]s the king may create new titles, so may he create new offices"). That ability to create offices raised many "concerns about the King's ability to amass too much power"; the King could both create a multitude of offices and then fill them with his supporters. J. Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 492 (2018) (Mascott); see also G. Wood, The Creation of the American Republic 1776–1787, p. 143 (1969) (describing "the power of appointment to offices" as "the most insidious and powerful weapon of eighteenth-century despotism"); T. Paine, Common Sense (1776), reprinted in The Great Works of Thomas Paine 11 (1877) (explaining that "the crown . . . derives its whole consequence merely from being the giver of places and pensions"). In fact, one of the grievances raised by the American colonists in declaring their independence was that the King "ha[d] erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance." Declaration of Independence ¶12. The Founders thus drafted the Constitution with "evidently a great inferiority in the power of the President, in this particular, to that of the British king." The Federalist No. 69, at 421.

The Founders broke from the monarchial model by giving the President the power to *fill* offices (with the Senate's approval), but not the power to *create* offices. They did so by "imposing the constitutional requirement that new officer positions be 'established by Law' rather than through a King-like custom of the head magistrate unilaterally creating new offices." Mascott 492–493 (footnote omitted); see also 1 Annals of Cong. 581–582 (1789) ("The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation"); see also *ibid.* (describing the power to "designat[e] the man to fill the office" as "of an Executive nature"). The Constitution thus "giv[es]

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Congress broad authority to establish and organize the Executive Branch." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 266 (2020) (KAGAN, J., concurring in judgment in part and dissenting in part). By keeping the ability to create offices out of the President's hands, the Founders ensured that no President could unilaterally create an army of officer positions to then fill with his supporters. Instead, our Constitution leaves it in the hands of the people's elected representatives to determine whether new executive offices should exist.

Longstanding practice from the founding to today comports with this original understanding that Congress must create offices by law. The First Congress, for instance, routinely and explicitly created offices by statute. See, *e.g.*, §35, 1 Stat. 92–93 (creating the offices of Attorney General and U. S. Attorney for each district); see also §§1–2, *id.*, at 50 (creating offices of Secretary of War and his Chief Clerk); ch. 12, §1, *id.*, at 65 (creating offices within the Department of Treasury for Secretary of the Treasury, a Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary). Still today, Congress creates the offices that the Executive Branch may fill. For example, Congress has created several offices within the Department of Justice, including the offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Solicitor General, and Assistant Attorneys General. See 28 U. S. C. §§503–506. For some agencies, Congress has also granted the agency head the power to "appoint such officers and employees . . . as are necessary to execute the functions vested in him." 7 U. S. C. §610(a) (Department of Agriculture); see also, *e.g.*, 20 U. S. C. §3461 (Department of Education); 42 U. S. C. §913 (Department of Health and Human Services).

In the past, Congress has at times expressly created offices similar to the position now occupied by the Special Counsel. Congress created an office for a "special counsel"

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to investigate the Teapot Dome Scandal and pursue prosecutions. See ch. 16, 43 Stat. 6. And, a statute provided for "the appointment of an independent counsel" that we addressed in *Morrison* v. *Olson*. See 28 U. S. C. §592. That statute lapsed, and Congress has not since reauthorized the appointment of an independent counsel. See §599.[2]

We cannot ignore the importance that the Constitution places on *who* creates a federal office. To guard against tyranny, the Founders required that a federal office be "established by Law." As James Madison cautioned, "[i]f there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices." 1 Annals of Cong. 581. If Congress has not reached a consensus that a particular office should exist, the Executive lacks the power to create and fill an office of his own accord.

II

It is difficult to see how the Special Counsel has an office "established by Law," as required by the Constitution. When the Attorney General appointed the Special Counsel, he did not identify any statute that clearly creates such an office. See Dept. of Justice Order No. 5559–2022 (Nov. 18, 2022). Nor did he rely on a statute granting him the authority to appoint officers as he deems fit, as the heads of some other agencies have.[3] See *supra*, at 5. Instead, the Attorney General relied upon several statutes of a general nature. See Order No. 5559–2022 (citing 28 U. S. C. §§509, 510, 515, 533).

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[2] To be sure, a few Presidents have appointed "special prosecutors" without pointing to any express statutory authorization. See generally T. Eastland, Ethics, Politics and the Independent Counsel 8–9 (1989) (describing past uses of special prosecutors). But, this Court had no occasion to review the constitutionality of those prosecutors' authority.

[3] In fact, Congress gave the Attorney General the power to appoint "additional officers . . . as he deems necessary"—but, only for the Bureau of Prisons. 18 U. S. C. §4041.

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None of the statutes cited by the Attorney General appears to create an office for the Special Counsel, and especially not with the clarity typical of past statutes used for that purpose. See, *e.g.*, 43 Stat. 6 ("[T]he President is further authorized and directed to appoint . . . special counsel who shall have charge and control of the prosecution of such litigation"). Sections 509 and 510 are generic provisions concerning the functions of the Attorney General and his ability to delegate authority to "any other officer, employee, or agency." Section 515 contemplates an "attorney specially appointed by the Attorney General *under law*," thereby suggesting that such an attorney's office must have already been created by some other law. (Emphasis added.) As for §533, it provides that "[t]he Attorney General may appoint *officials* . . . to detect and prosecute crimes against the United States." (Emphasis added.) It is unclear whether an "official" is equivalent to an "officer" as used by the Constitution. See *Lucia*, 585 U. S., at 254–255 (opinion of THOMAS, J.) (considering the meaning of "officer"). Regardless, this provision would be a curious place for Congress to hide the creation of an office for a Special Counsel. It is placed in a chapter concerning the Federal Bureau of Investigation (§§531–540d), not the separate chapters concerning U. S. Attorneys (§§541–550) or the now-lapsed Independent Counsel (§§591–599).[4]

To be sure, the Court gave passing reference to the cited statutes as supporting the appointment of the Special Prosecutor in *United States* v. *Nixon*, 418 U. S. 683, 694 (1974), but it provided no analysis of those provisions' text. Perhaps there is an answer for why these statutes create an office for the Special Counsel. But, before this consequen-

[4]Regulations remain on the books that contemplate an "outside" Special Counsel, 28 CFR §600.1 (2023), but I doubt a regulation can create a federal office without underlying statutory authority to do so.

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tial prosecution proceeds, we should at least provide a fulsome explanation of why that is so.

Even if the Special Counsel has a valid office, questions remain as to whether the Attorney General filled that office in compliance with the Appointments Clause. For example, it must be determined whether the Special Counsel is a principal or inferior officer. If the former, his appointment is invalid because the Special Counsel was not nominated by the President and confirmed by the Senate, as principal officers must be. Art. II, §2, cl. 2. Even if he is an inferior officer, the Attorney General could appoint him without Presidential nomination and senatorial confirmation only if "Congress . . . by law vest[ed] the Appointment" in the Attorney General as a "Hea[d] of Department." *Ibid.* So, the Special Counsel's appointment is invalid unless a statute created the Special Counsel's office *and* gave the Attorney General the power to fill it "by Law."

Whether the Special Counsel's office was "established by Law" is not a trifling technicality. If Congress has not reached a consensus that a particular office should exist, the Executive lacks the power to unilaterally create and then fill that office. Given that the Special Counsel purports to wield the Executive Branch's power to prosecute, the consequences are weighty. Our Constitution's separation of powers, including its separation of the powers to create and fill offices, is "the absolutely central guarantee of a just Government" and the liberty that it secures for us all. *Morrison*, 487 U. S., at 697 (Scalia, J., dissenting). There is no prosecution that can justify imperiling it.

* * *

In this case, there has been much discussion about ensuring that a President "is not above the law." But, as the Court explains, the President's immunity from prosecution for his official acts *is* the law. The Constitution provides for

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"an energetic executive," because such an Executive is "essential to . . . the security of liberty." *Ante*, at 10 (internal quotation marks omitted). Respecting the protections that the Constitution provides for the Office of the Presidency secures liberty. In that same vein, the Constitution also secures liberty by separating the powers to create and fill offices. And, there are serious questions whether the Attorney General has violated that structure by creating an office of the Special Counsel that has not been established by law. Those questions must be answered before this prosecution can proceed. We must respect the Constitution's separation of powers in all its forms, else we risk rendering its protection of liberty a parchment guarantee.

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SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

JUSTICE BARRETT, concurring in part.

For reasons I explain below, I do not join Part III–C of the Court's opinion. The remainder of the opinion is consistent with my view that the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct. That said, I would have framed the underlying legal issues differently. The Court describes the President's constitutional protection from certain prosecutions as an "immunity." As I see it, that term is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling.

There appears to be substantial agreement on the first point. Like the Court, the dissenting Justices and the Special Counsel all accept that some prosecutions of a President's official conduct may be unconstitutional. See *post*, at 16 (opinion of SOTOMAYOR, J.); Brief for United States 24–30. As for interlocutory review, our precedent recognizes that resolving certain legal issues before trial is necessary to safeguard important constitutional interests—here, Executive Branch independence on matters that Article II assigns to the President's discretion.

Properly conceived, the President's constitutional protection from prosecution is narrow. The Court leaves open the

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possibility that the Constitution forbids prosecuting the President for *any* official conduct, instructing the lower courts to address that question in the first instance. See *ante*, at 14. I would have answered it now. Though I agree that a President cannot be held criminally liable for conduct within his "conclusive and preclusive" authority and closely related acts, *ante*, at 8–9, the Constitution does not vest every exercise of executive power in the President's sole discretion, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring).[1] Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute. Article II poses no barrier to prosecution in such cases.

I would thus assess the validity of criminal charges predicated on most official acts—*i.e.*, those falling outside of the President's core executive power—in two steps. The first question is whether the relevant criminal statute reaches the President's official conduct. Not every broadly worded statute does. For example, §956 covers conspiracy to murder in a foreign country and does not expressly exclude the President's decision to, say, order a hostage rescue mission abroad. 18 U. S. C. §956(a). The underlying murder statute, however, covers only "unlawful" killings. §1111. The Office of Legal Counsel has interpreted that phrase to reflect a public-authority exception for official acts involving the military and law enforcement. Memorandum from D. Barron, Acting Assistant Atty. Gen., to E. Holder, Atty.

[1] Consistent with our separation of powers precedent, I agree with the Court that the supervision and removal of appointed, high ranking Justice Department officials falls within the President's core executive power. See *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 213–215 (2020); *ante*, at 19–21. I do not understand the Court to hold that all exercises of the Take Care power fall within the core executive power. Cf. *post*, at 24 (SOTOMAYOR, J., dissenting). I agree with the dissent that the Constitution does not justify such an expansive view. *Ibid.*

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Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 12–19 (July 16, 2010); see also Brief for United States 29–30; *post*, at 16, and n. 3 (SOTOMAYOR, J., dissenting). I express no view about the merits of that interpretation, but it shows that the threshold question of statutory interpretation is a nontrivial step.

If the statute covers the alleged official conduct, the prosecution may proceed only if applying it in the circumstances poses no "'dange[r] of intrusion on the authority and functions of the Executive Branch.'" *Ante*, at 14 (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 754 (1982)). On remand, the lower courts will have to apply that standard to various allegations involving the President's official conduct.[2] Some of those allegations raise unsettled questions about the scope of Article II power, see *ante*, at 21–28, but others do not. For example, the indictment alleges that the President "asked the Arizona House Speaker to call the legislature into session to hold a hearing" about election fraud claims. App. 193. The President has no authority over state legislatures or their leadership, so it is hard to see how prose-

[2] This analysis is unnecessary for allegations involving the President's private conduct because the Constitution offers no protection from prosecution of acts taken in a private capacity. *Ante*, at 15. Sorting private from official conduct sometimes will be difficult—but not always. Take the President's alleged attempt to organize alternative slates of electors. See, *e.g.*, App. 208. In my view, that conduct is private and therefore not entitled to protection. See *post*, at 27–28 (SOTOMAYOR, J., dissenting). The Constitution vests power to appoint Presidential electors in the States. Art. II, §1, cl. 2; see also *Chiafalo* v. *Washington*, 591 U. S. 578, 588–589 (2020). And while Congress has a limited role in that process, see Art. II, §1, cls. 3–4, the President has none. In short, a President has no legal authority—and thus no official capacity—to influence how the States appoint their electors. I see no plausible argument for barring prosecution of that alleged conduct.

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cuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.

This two-step analysis—considering first whether the statute applies and then whether its application to the particular facts is constitutional—is similar to the approach that the Special Counsel presses in this Court. Brief for United States 24–30. It is also our usual approach to considering the validity of statutes in situations raising a constitutional question. See, *e.g.*, *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 213, 229 (2020).[3] An important difference in this context is that the President is entitled to an interlocutory appeal of the trial court's ruling. See *ante*, at 36. A criminal defendant in federal court normally must wait until after trial to seek review of the trial court's refusal to dismiss charges. See *United States* v. *MacDonald*, 435 U. S. 850, 853–854 (1978); see also 18 U. S. C. §3731. But where trial itself threatens certain constitutional interests, we have treated the trial court's resolution of the issue as a "final decision" for purposes of appellate jurisdiction. *MacDonald*, 435 U. S., at 854–856; see 28 U. S. C. §1291; see also §1257.

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[3]The Court has sometimes applied an avoidance canon when interpreting a statute that would interfere with the President's prerogatives. See, *e.g.*, *Franklin* v. *Massachusetts*, 505 U. S. 788, 800–801 (1992); *Public Citizen* v. *Dept. of Justice*, 491 U. S. 440, 465–467 (1989); see also *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 188 (1993). The Office of Legal Counsel has advocated for a clear-statement rule if applying a statute would "raise serious constitutional questions relating to the President's constitutional authority." See Application of 28 U. S. C. §458 to Presidential Appointments of Federal Judges, 19 Op. OLC 350, 350–357 (1995). In my view, neither canon applies in this circumstance. Courts should instead determine the statute's ordinary meaning and, if it covers the alleged official acts, assess whether prosecution would intrude on the President's constitutional authority. See *Public Citizen*, 491 U. S., at 481–482 (Kennedy, J., concurring in judgment) (declining to apply the avoidance canon and concluding that the Federal Advisory Committee Act is unconstitutional as applied).

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The present circumstances fall squarely within our precedent authorizing interlocutory review. When a President moves to dismiss an indictment on Article II grounds, he "makes no challenge whatsoever to the merits of the charge against him." *Abney* v. *United States*, 431 U. S. 651, 659 (1977) (allowing interlocutory appeal of rejection of double jeopardy defense). He instead contests whether the Constitution allows Congress to criminalize the alleged conduct, a question that is "collateral to, and separable from" his guilt or innocence. *Ibid.* Moreover, the President's Executive Branch authority "would be significantly undermined if appellate review" of the constitutional challenge "were postponed until after conviction and sentence." *Id.*, at 660; see also *Helstoski* v. *Meanor*, 442 U. S. 500, 507 (1979) (allowing interlocutory appeal of refusal to dismiss an indictment on Speech or Debate Clause grounds). The prospect of a trial court erroneously allowing the prosecution to proceed poses a unique danger to the "independence of the Executive Branch." *Trump* v. *Vance*, 591 U. S. 786, 800 (2020). As the Court explains, the possibility that the President will be made to defend his official conduct before a jury after he leaves office could distort his decisions while in office. *Ante*, at 13–14, 36. These Article II concerns do not insulate the President from prosecution. But they do justify interlocutory review of the trial court's final decision on the President's as-applied constitutional challenge. See *Helstoski*, 442 U. S., at 507–508; *Abney*, 431 U. S., at 659–661; see also Reply Brief for United States in No. 23–624, p. 5 (agreeing that the President "has a right to an interlocutory appeal from the district court's rejection of his immunity defense").

I understand most of the Court's opinion to be consistent with these views. I do not join Part III–C, however, which holds that the Constitution limits the introduction of protected conduct as *evidence* in a criminal prosecution of a President, beyond the limits afforded by executive privilege. See *ante*, at 30–32. I disagree with that holding; on this

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score, I agree with the dissent. See *post*, at 25–27 (SOTOMAYOR, J., dissenting). The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable. Consider a bribery prosecution—a charge not at issue here but one that provides a useful example. The federal bribery statute forbids any public official to seek or accept a thing of value "for or because of any official act." 18 U. S. C. §201(c). The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. See Art. II, §4 (listing "Bribery" as an impeachable offense); see also Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President, Re: Conflict of Interest Problems Arising Out of the President's Nomination of Nelson A. Rockefeller To Be Vice President Under the Twenty-Fifth Amendment to the Constitution 5 (Aug. 28, 1974) (suggesting that the federal bribery statute applies to the President). Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution. To make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability.

I appreciate the Court's concern that allowing into evidence official acts for which the President cannot be held criminally liable may prejudice the jury. *Ante*, at 31. But the rules of evidence are equipped to handle that concern on a case-by-case basis. Most importantly, a trial court can exclude evidence of the President's protected conduct "if its probative value is substantially outweighed by a danger of . . . unfair prejudice" or "confusing the issues." Fed. Rule Evid. 403; see also Rule 105 (requiring the court to "restrict the evidence to its proper scope and instruct the jury accordingly"). The balance is more likely to favor admitting evidence of an official act in a bribery prosecution, for instance, than one in which the protected conduct has little

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connection to the charged offense. And if the evidence comes in, the trial court can instruct the jury to consider it only for lawful purposes. See *Richardson* v. *Marsh*, 481 U. S. 200, 206–207 (1987). I see no need to depart from that familiar and time-tested procedure here.

* * *

The Constitution does not insulate Presidents from criminal liability for official acts. But *any* statute regulating the exercise of executive power is subject to a constitutional challenge. See, *e.g.*, *Collins* v. *Yellen*, 594 U. S. 220, 235–236 (2021); *Zivotofsky* v. *Clinton*, 566 U. S. 189, 192–194 (2012); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 487–488 (2010). A criminal statute is no exception. Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.

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SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, *ante,* at 3, 13, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

I

The indictment paints a stark portrait of a President desperate to stay in power.

In the weeks leading up to January 6, 2021, then-President Trump allegedly "spread lies that there had been outcome-determinative fraud in the election and that he had actually won," App. 181, Indictment ¶2, despite being "notified repeatedly" by his closest advisers "that his claims were untrue," *id.*, at 188, ¶11.

When dozens of courts swiftly rejected these claims, Trump allegedly "pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss

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legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors" in his favor. *Id.*, at 185–186, ¶10(a). It is alleged that he went so far as to threaten one state election official with criminal prosecution if the official did not "'find' 11,780 votes" Trump needed to change the election result in that state. *Id.*, at 202, ¶31(f). When state officials repeatedly declined to act outside their legal authority and alter their state election processes, Trump and his co-conspirators purportedly developed a plan to disrupt and displace the legitimate election certification process by organizing fraudulent slates of electors. See *id.*, at 208–209, ¶¶53–54.

As the date of the certification proceeding neared, Trump allegedly also sought to "use the power and authority of the Justice Department" to bolster his knowingly false claims of election fraud by initiating "sham election crime investigations" and sending official letters "falsely claim[ing] that the Justice Department had identified significant concerns that may have impacted the election outcome" while "falsely present[ing] the fraudulent electors as a valid alternative to the legitimate electors." *Id.*, at 186–187, ¶10(c). When the Department refused to do as he asked, Trump turned to the Vice President. Initially, he sought to persuade the Vice President "to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." *Id.*, at 187, ¶10(d). When persuasion failed, he purportedly "attempted to use a crowd of supporters that he had gathered in Washington, D. C., to pressure the Vice President to fraudulently alter the election results." *Id.*, at 221, ¶86.

Speaking to that crowd on January 6, Trump "falsely claimed that, based on fraud, the Vice President could alter the outcome of the election results." *Id.*, at 229, ¶104(a). When this crowd then "violently attacked the Capitol and halted the proceeding," *id.*, at 188, ¶10(e), Trump allegedly

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delayed in taking any step to rein in the chaos he had unleashed. Instead, in a last desperate ploy to hold onto power, he allegedly "attempted to exploit the violence and chaos at the Capitol" by pressuring lawmakers to delay the certification of the election and ultimately declare him the winner. *Id.*, at 233, ¶119. That is the backdrop against which this case comes to the Court.

II

The Court now confronts a question it has never had to answer in the Nation's history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." *Ante,* at 6. This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official act[s]." *Ante,* at 14. Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. See *ante,* at 30–32. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

Argument by argument, the majority invents immunity

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through brute force. Under scrutiny, its arguments crumble. To start, the majority's broad "official acts" immunity is inconsistent with text, history, and established understandings of the President's role. See Part III, *infra.* Moreover, it is deeply wrong, even on its own functionalist terms. See Part IV, *infra.* Next, the majority's "core" immunity is both unnecessary and misguided. See Part V, *infra.* Furthermore, the majority's illogical evidentiary holding is unprecedented. See Part VI, *infra.* Finally, this majority's project will have disastrous consequences for the Presidency and for our democracy. See Part VII, *infra.*

III

The main takeaway of today's decision is that all of a President's official acts, defined without regard to motive or intent, are entitled to immunity that is "at least . . . *presumptive*," and quite possibly "absolute." *Ante,* at 14. Whenever the President wields the enormous power of his office, the majority says, the criminal law (at least presumptively) cannot touch him. This official-acts immunity has "no firm grounding in constitutional text, history, or precedent." *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 280 (2022). Indeed, those "standard grounds for constitutional decisionmaking," *id.*, at 279, all point in the opposite direction. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

A

The majority calls for a "careful assessment of the scope of Presidential power under the Constitution." *Ante,* at 5. For the majority, that "careful assessment" does not involve the Constitution's text. I would start there.

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. Of course, "the silence of the Constitution on this score is not

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dispositive." *United States* v. *Nixon*, 418 U. S. 683, 706, n. 16 (1974). Insofar as the majority rails against the notion that a "'specific textual basis'" is required, *ante,* at 37 (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 750, n. 31 (1982)), it is attacking an argument that has not been made here. The omission in the text of the Constitution is worth noting, however, for at least three reasons.

First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, §6, cl. 1 ("Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place"). They did not extend the same or similar immunity to Presidents.

Second, "some state constitutions at the time of the Framing specifically provided 'express criminal immunities' to sitting governors." Brief for Scholars of Constitutional Law as *Amici Curiae* 4 (quoting S. Prakash, Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. 55, 69 (2021)). The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers "had wanted to create some constitutional privilege to shield the President . . . from criminal indictment," they could have done so. Memorandum from R. Rotunda to K. Starr re: Indictability of the President 18 (May 13, 1998). They did not.

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump's argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. See *ante,* at 32–

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34; Part IV–C, *infra*. The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate "shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art. I, §3, cl. 7 (emphasis added). That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as "Bribery," Art. II, §4, which implicates official acts almost by definition.[1]

B

Aware of its lack of textual support, the majority points out that this Court has "recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Ante*, at 10 (quoting *Fitzgerald*, 457 U. S., at 749). That is true, as far as it goes. Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts.

The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69, p. 452 (J. Harv. Lib. ed. 2009). For Hamilton, that was an important distinction between "the king of Great Britain," who was "sacred and inviolable," and the "President of the United States," who "would be amenable to personal punishment

[1] Article II, §4, provides: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

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and disgrace." *Id.*, at 458. In contrast to the king, the President should be subject to "personal responsibility" for his actions, "stand[ing] upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware," whose State Constitutions gave them some immunity. *Id.*, at 452.

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention "conside[r] what privileges ought to be allowed to the Executive." 2 Records of the Federal Convention of 1787, p. 503 (M. Farrand ed. 1911). There is no record of any such discussion. *Ibid.* Delegate Charles Pinckney later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to . . . limi[t] privilege to what was necessary, and no more." 3 *id.*, at 385. "No privilege . . . was intended for [the] Executive." *Ibid.*[2]

Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. James Wilson recognized that federal officers who use their official powers to commit crimes "may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment." 2 Debates on the Constitution 177 (J. Elliot ed. 1836). A few decades later, Justice Story evinced the same understanding. He explained that, when

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[2] To note, as the majority does, see *ante*, at 39, that this Court has recognized civil immunities arguably inconsistent with this view is not to say that Pinckney was wrong about what the Framers had "intended." Indeed, Pinckney's contemporaries shared the same view during the ratification debates. See, *e.g.*, 4 Debates on the Constitution 109 (J. Elliot ed. 1836) (J. Iredell) ("If the President does a single act by which the people are prejudiced, he is punishable himself. . . . If he commits any crime, he is punishable by the laws of his country").

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a federal official commits a crime in office, "it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting, the common punishment applicable to unofficial offenders." 2 Commentaries on the Constitution of the United States §780, pp. 250–251 (1833). Without a criminal trial, he explained, "the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment." *Id.*, at 251.

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. The majority fails to recognize or grapple with the lack of historical evidence for its new immunity. With nothing on its side of the ledger, the most the majority can do is claim that the historical evidence is a wash. See *ante,* at 38–39. It claims that the Court previously has described the "relevant historical evidence on the question of Presidential immunity" as "'fragmentary'" and not worthy of consideration. *Ante,* at 38 (quoting *Fitzgerald*, 457 U. S., at 752, n. 31). Yet the Court has described only the evidence regarding "the President's immunity *from damages liability*" as "fragmentary." *Fitzgerald*, 457 U. S., at 751–752, n. 31 (emphasis added). Moreover, far from dismissing that evidence as irrelevant, the *Fitzgerald* Court was careful to note that "[t]he best historical evidence clearly support[ed]" the immunity from damages liability that it recognized, and it relied in part on that historical evidence to overcome the lack of any textual basis for its immunity. *Id.*, at 152, n. 31. The majority ignores this reliance. It seems history matters to this Court only when it is convenient. See, *e.g.*, *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. 1 (2022); *Dobbs*, 597 U. S. 215.

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C

Our country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Cf. *Chiafalo* v. *Washington*, 591 U. S. 578, 592–593 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions'" (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929))). Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability." Brief for United States 15; see also Public Papers of the Presidents, Gerald R. Ford, Vol. 1, Sept. 8, 1974, p. 103 (1975) (granting former President Nixon a "full, free, and absolute pardon . . . for all offenses against the United States which he . . . has committed or may have committed or taken part in during" his Presidency); R. Nixon, Statement by Former President Richard Nixon to P. Buchen, Counsel to President Ford, p. 1 (Sept. 8, 1974) (accepting "full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States").

Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law. See, *e.g.*, 1 L. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters: Investigations and Prosecutions 445 (1993) ("[B]ecause a President, and certainly a past President, is subject to prosecution . . . the conduct of Pres-

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ident Reagan in the Iran/contra matter was reviewed by Independent Counsel against the applicable statutes. It was concluded that [his] conduct fell well short of criminality which could be successfully prosecuted").

Indeed, Trump's own lawyers during his second impeachment trial assured Senators that declining to impeach Trump for his conduct related to January 6 would not leave him "in any way above the law." 2 Proceedings of the U. S. Senate in the Impeachment Trial of Donald John Trump, S. Doc. 117–2, p. 144 (2021). They insisted that a former President "is like any other citizen and can be tried in a court of law." *Ibid.*; see also 1 *id.*, S. Doc. 117–3, at 339 (Trump's impeachment counsel stating that "no former officeholder is immune" from the judicial process "for investigation, prosecution, and punishment"); *id.*, at 322–323 (Trump's impeachment counsel stating: "If my colleagues on this side of the Chamber actually think that President Trump committed a criminal offense . . . [a]fter he is out of office, you go and arrest him"). Now that Trump is facing criminal charges for those acts, though, the tune has changed. Being treated "like any other citizen" no longer seems so appealing.

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

IV

A

Setting aside this evidence, the majority announces that former Presidents are "absolute[ly]," or "at least . . . presumptive[ly]," immune from criminal prosecution for all of their official acts. *Ante,* at 14 (emphasis omitted). The majority purports to keep us in suspense as to whether this

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immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "[a]t a minimum, the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no 'dangers of intrusion* on the authority and functions of the Executive Branch.'" *Ibid.* (emphasis added). No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes. Nor should that be the standard. Surely some intrusions on the Executive may be "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). Other intrusions may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States* v. *Nixon*, 418 U. S. 683, 707 (1974). According to the majority, however, any incursion on Executive power is too much. When presumptive immunity is this conclusive, the majority's indecision as to "whether [official-acts] immunity must be absolute" or whether, instead, "presumptive immunity is sufficient," *ante,* at 6, hardly matters.

Maybe some future opinion of this Court will decide that presumptive immunity is "sufficient," *ibid.*, and replace the majority's ironclad presumption with one that makes the difference between presumptive and absolute immunity meaningful. Today's Court, however, has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts.

Quick on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." *Ante,* at 15. Of course he can. No one has questioned the ability to prosecute a former President for unofficial (other-

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wise known as private) acts. Even Trump did not claim immunity for such acts and, as the majority acknowledges, such an immunity would be impossible to square with *Clinton* v. *Jones*, 520 U. S. 681 (1997). See *ante*, at 15. This unremarkable proposition is no real limit on today's decision. It does not hide the majority's embrace of the most far-reaching view of Presidential immunity on offer.

In fact, the majority's dividing line between "official" and "unofficial" conduct narrows the conduct considered "unofficial" almost to a nullity. It says that whenever the President acts in a way that is "'not manifestly or palpably beyond [his] authority,'" he is taking official action. *Ante,* at 17 (quoting *Blassingame* v. *Trump*, 87 F. 4th 1, 13 (CADC 2023)). It then goes a step further: "In dividing official from unofficial conduct, courts may not inquire into the President's motives." *Ante,* at 18. It is one thing to say that motive is irrelevant to questions regarding the scope of civil liability, but it is quite another to make it irrelevant to questions regarding criminal liability. Under that rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed "unofficial" is destined to be vanishingly small.

Ultimately, the majority pays lip service to the idea that "[t]he President, charged with enforcing federal criminal laws, is not above them," *ante,* at 13–14, but it then proceeds to place former Presidents beyond the reach of the federal criminal laws for any abuse of official power.

B

So how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1983). Yet

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even that test cuts against it. The majority concludes that official-acts immunity "is required to safeguard the independence and effective functioning of the Executive Branch," *ante,* at 14, by rejecting that Branch's own protestations that such immunity is not at all required and would in fact be harmful, see Brief for United States 18–24, 29–30. In doing so, it decontextualizes *Fitzgerald*'s language, ignores important qualifications, and reaches a result that the *Fitzgerald* Court never would have countenanced.

In *Fitzgerald*, plaintiff A. Ernest Fitzgerald sued then-former President Nixon for money damages. He claimed that, while in office, Nixon had been involved in unlawfully firing him from his government job. See 457 U. S., at 733–741. The question for the Court was whether a former President had immunity from such a civil suit. The Court explained that it was "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Id.*, at 753–754. To determine whether a particular type of suit against a President (or former President) could be heard, a court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.*, at 754. The Court explained that, "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate the public interest in an ongoing criminal prosecution—the exercise of jurisdiction has been held warranted." *Ibid.* (citations omitted).

On the facts before it, the Court concluded that a "merely private suit for damages based on a President's official acts" did not serve those interests. *Ibid.* The Court reasoned that the "visibility of [the President's] office and the effect of his actions on countless people" made him an easy target for civil suits that "frequently could distract [him] from his

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public duties." *Id.*, at 753. The public interest in such private civil suits, the Court concluded, was comparatively weak. See *id.*, at 754, n. 37 ("[T]here is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions"). Therefore, the Court held that a former President was immune from such suits. *Ibid.*

In the context of a federal criminal prosecution of a former President, however, the danger to the functioning of the Executive Branch is much reduced. Further, as every member of the *Fitzgerald* Court acknowledged, see Part IV–B–2, *infra,* the public interest in a criminal prosecution is far weightier. Applying the *Fitzgerald* balancing here should yield the opposite result. Instead, the majority elides any difference between civil and criminal immunity, granting Trump the same immunity from criminal prosecution that Nixon enjoyed from an unlawful termination suit. That is plainly wrong.

1

The majority relies almost entirely on its view of the danger of intrusion on the Executive Branch, to the exclusion of the other side of the balancing test. Its analysis rests on a questionable conception of the President as incapable of navigating the difficult decisions his job requires while staying within the bounds of the law. It also ignores the fact that he receives robust legal advice on the lawfulness of his actions.

The majority says that the danger "of intrusion on the authority and functions of the Executive Branch" posed by criminally prosecuting a former President for official conduct "is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Ante,* at 13 (quoting *Fitzgerald,* 457 U. S., at 745). It is of course important that the President be able to

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"'"deal fearlessly and impartially with" the duties of his office.'" *Ante,* at 10 (quoting *Fitzgerald*, 457 U. S., at 752). If every action the President takes exposes him personally to vexatious private litigation, the possibility of hamstringing Presidential decisionmaking is very real. Yet there are many facets of criminal liability, which the majority discounts, that make it less likely to chill Presidential action than the threat of civil litigation.

First, in terms of probability, the threat of criminal liability is much smaller. In *Fitzgerald*, the threat of vexatious civil litigation loomed large. The Court observed that, given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.*, at 753. Although "'the effect of [the President's] actions on countless people' could result in untold numbers of private plaintiffs suing for damages based on any number of Presidential acts" in the civil context, the risk in the criminal context is "only that a former President may face one federal prosecution, in one jurisdiction, for each criminal offense allegedly committed while in office." 2023 WL 8359833, *9 (DC, Dec. 1, 2023) (quoting *Fitzgerald*, 457 U. S., at 753). The majority's bare assertion that the burden of exposure to federal criminal prosecution is more limiting to a President than the burden of exposure to civil suits does not make it true, and it is not persuasive.

Second, federal criminal prosecutions require "robust procedural safeguards" not found in civil suits. 2023 WL 8359833, *10. The criminal justice system has layers of protections that "filter out insubstantial legal claims," whereas civil litigation lacks "analogous checks." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 386 (2004). To start, Justice Department policy requires scrupulous and impartial prosecution, founded on both the facts and the law. See generally Dept. of Justice, Justice Manual §9–27.000 (Principles of Federal Prosecution) (June 2023). The

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grand jury provides an additional check on felony prosecutions, acting as a "buffer or referee between the Government and the people," to ensure that the charges are well-founded. *United States* v. *Williams*, 504 U. S. 36, 47 (1992); see also *Harlow* v. *Fitzgerald*, 457 U. S. 800, 826, n. 6 (1982) (Burger, C. J., dissenting) ("[A] criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability").

If the prosecution makes it past the grand jury, then the former President still has all the protections our system provides to criminal defendants. If the former President has an argument that a particular statute is unconstitutional as applied to him, then he can move to dismiss the charges on that ground. Indeed, a former President is likely to have legal arguments that would be unavailable to the average criminal defendant. For example, he may be able to rely on a public-authority exception from particular criminal laws,[3] or an advice-of-the-Attorney-General defense, see Tr. of Oral Arg. 107–108.[4]

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[3]See *Nardone* v. *United States*, 302 U. S. 379, 384 (1937) (explaining that public officers may be "impliedly excluded from [statutory] language embracing all persons" if reading the statute to include such officers "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm"); see also Memorandum from D. Barron, Acting Assistant Atty. Gen., Office of Legal Counsel, to E. Holder, Atty. Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 12 (July 16, 2010) (interpreting criminal statute prohibiting unlawful killings "to incorporate the public authority justification, which can render lethal action carried out by a government official lawful in some circumstances").

[4]Trump did not raise those defenses in this case, and the immunity that the majority has created likely will obviate the need to raise them in future cases. Yet those defenses would have protected former Presidents from unwarranted criminal prosecutions much more precisely than the blanket immunity the majority creates today.

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If the case nonetheless makes it to trial, the Government will bear the burden of proving every element of the alleged crime beyond a reasonable doubt to a unanimous jury of the former President's fellow citizens. See *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995). If the Government manages to overcome even that significant hurdle, then the former President can appeal his conviction, and the appellate review of his claims will be "'particularly meticulous.'" *Trump* v. *Vance*, 591 U. S. 786, 809 (2020) (quoting *Nixon*, 418 U. S., at 702). He can ultimately seek this Court's review, and if past practice (including in this case) is any indication, he will receive it.

In light of these considerable protections, the majority's fear that "'bare allegations of malice,'" *ante,* at 18 (alteration omitted), would expose former Presidents to trial and conviction is unfounded. Bare allegations of malice would not make it out of the starting gate. Although a private civil action may be brought based on little more than "'intense feelings,'" *ante,* at 11 (quoting *Fitzgerald*, 457 U. S., at 752), a federal criminal prosecution is made of firmer stuff. Certainly there has been, on occasion, great feelings of animosity between incoming and outgoing Presidents over the course of our country's history. Yet it took allegations as grave as those at the center of this case to have the first federal criminal prosecution of a former President. That restraint is telling.

Third, because of longstanding interpretations by the Executive Branch, every sitting President has so far believed himself under the threat of criminal liability after his term in office and nevertheless boldly fulfilled the duties of his office. The majority insists that the threat of criminal sanctions is "more likely to distort Presidential decisionmaking than the potential payment of civil damages." *Ante,* at 13. If that is right, then that distortion has been shaping Presidential decisionmaking since the earliest days of the Republic. Although it makes sense to avoid "diversion of the

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President's attention during the decisionmaking process" with "needless worry," *Clinton*, 520 U. S., at 694, n. 19, one wonders why requiring some small amount of his attention (or his legal advisers' attention) to go towards complying with federal criminal law is such a great burden. If the President follows the law that he must "take Care" to execute, Art. II, §3, he has not been rendered "'unduly cautious,'" *ante,* at 10 (quoting *Fitzgerald*, 457 U. S., at 752, n. 32). Some amount of caution is necessary, after all. It is a far greater danger if the President feels empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

So what exactly is the majority worried about deterring when it expresses great concern for the "deterrent" effect that "the threat of trial, judgment, and imprisonment" would pose? *Ante,* at 13. It cannot possibly be the deterrence of acts that are truly criminal. Nor does it make sense for the majority to wring its hands over the possibility that Presidents might stop and think carefully before taking action that borders on criminal. Instead, the majority's main concern could be that Presidents will be deterred from taking necessary and lawful action by the fear that their successors might pin them with a baseless criminal prosecution—a prosecution that would almost certainly be doomed to fail, if it even made it out of the starting gate. See *ante,* at 40. The Court should not have so little faith in this Nation's Presidents. As this Court has said before in the context of criminal proceedings, "'[t]he chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice.'" *Nixon*, 418 U. S., at 712, n. 20 (quoting *Clark* v. *United States*, 289 U. S. 1, 16 (1933)). The concern that countless

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(and baseless) civil suits would hamper the Executive may have been justified in *Fitzgerald*, but a well-founded federal criminal prosecution poses no comparable danger to the functioning of the Executive Branch.

2

At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit. All nine Justices in *Fitzgerald* explicitly recognized that distinction. The five-Justice majority noted that there was a greater public interest "in criminal prosecutions" than in "actions for civil damages." 457 U. S., at 754, n. 37. Chief Justice Burger's concurrence accordingly emphasized that the majority's immunity was "limited to civil damages claims," rather than "*criminal* prosecution." *Id.*, at 759–760. The four dissenting Justices agreed that a "contention that the President is immune from criminal prosecution in the courts," if ever made, would not "be credible." *Id.*, at 780 (White, J., dissenting). At the very least, the *Fitzgerald* Court did not expect that its balancing test would lead to the same outcome in the criminal context.

The public's interest in prosecution is transparent: a federal prosecutor herself acts on behalf of the United States. Even the majority acknowledges that the "[f]ederal criminal laws seek to redress 'a wrong to the public' as a whole, not just 'a wrong to the individual,'" *ante,* at 13 (quoting *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892)), such that there is "a compelling 'public interest in fair and effective law enforcement,'" *ante,* at 13 (quoting *Vance*, 591 U. S., at 808). Indeed, "our historic commitment to the rule of law" is "nowhere more profoundly manifest than in our view that . . . 'guilt shall not escape or innocence suffer.'" *Nixon*, 418 U. S., at 708–709 (quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935)).

The public interest in criminal prosecution is particularly

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strong with regard to officials who are granted some degree of civil immunity because of their duties. It is in those cases where the public can see that officials exercising power under public trust remain on equal footing with their fellow citizens under the criminal law. See, *e.g.*, *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974) ("[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights"); *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980) ("[J]udicial immunity was not designed to insulate the judiciary from all aspects of public accountability. Judges are immune from §1983 damages actions, but they are subject to criminal prosecutions as are other citizens"); *Imbler* v. *Pachtman*, 424 U. S. 409, 428–429 (1976) ("We emphasize that the [civil] immunity of prosecutors . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally").

The public interest in the federal criminal prosecution of a former President alleged to have used the powers of his office to commit crimes may be greater still. "[T]he President . . . represent[s] all the voters in the Nation," and his powers are given by the people under our Constitution. *Anderson* v. *Celebrezze*, 460 U. S. 780, 795 (1983). When Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

Finally, the question of federal criminal immunity for a former President "involves a countervailing Article II consideration absent in *Fitzgerald*": recognizing such an im-

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munity "would frustrate the Executive Branch's enforcement of the criminal law." Brief for United States 19. The President is, of course, entrusted with "'supervisory and policy responsibilities of utmost discretion and sensitivity.'" *Ante* at 10 (quoting *Fitzgerald*, 457 U. S., at 750). One of the most important is "enforcement of federal law," as "it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" *Id.*, at 750 (quoting Art. II, §3). The majority seems to think that allowing former Presidents to escape accountability for breaking the law while disabling the current Executive from prosecuting such violations somehow respects the independence of the Executive. It does not. Rather, it diminishes that independence, exalting occupants of the office over the office itself. There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity.

In the case before us, the public interest and countervailing Article II interest are particularly stark. The public interest in this criminal prosecution implicates both "[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution" as well as "the voters' interest in democratically selecting their President." 91 F. 4th 1173, 1195 (CADC 2024) (*per curiam*). It also, of course, implicates Congress's own interest in regulating conduct through the criminal law. Cf. *Fitzgerald*, 457 U. S., at 749, n. 27 (noting that the case did not involve "affirmative action by Congress"). Yet the majority believes that a President's anxiety over prosecution overrides the public's interest in accountability and negates the interests of the other branches in carrying out their constitutionally assigned functions. It is, in fact, the majority's position that "boil[s] down to ignoring the Constitution's separation of powers." *Ante,* at 40.

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C

Finally, in an attempt to put some distance between its official-acts immunity and Trump's requested immunity, the majority insists that "Trump asserts a far broader immunity than the limited one [the majority has] recognized." *Ante*, at 32. If anything, the opposite is true. The only part of Trump's immunity argument that the majority rejects is the idea that "the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution." *Ibid.* That argument is obviously wrong. See *ante*, at 32–34. Rejecting it, however, does not make the majority's immunity narrower than Trump's. Inherent in Trump's Impeachment Judgment Clause argument is the idea that a former President who was impeached in the House and convicted in the Senate for crimes involving his official acts could then be prosecuted in court for those acts. See Brief for Petitioner 22 ("The Founders thus adopted a carefully balanced approach that permits the criminal prosecution of a former President for his official acts, but only if that President is first impeached by the House and convicted by the Senate"). By extinguishing that path to overcoming immunity, however nonsensical it might be, the majority arrives at an official-acts immunity even more expansive than the one Trump argued for. On the majority's view (but not Trump's), a former President whose abuse of power was so egregious and so offensive even to members of his own party that he was impeached in the House and convicted in the Senate still would be entitled to "at least presumptive" criminal immunity for those acts.

V

Separate from its official-acts immunity, the majority recognizes absolute immunity for "conduct within [the President's] exclusive sphere of constitutional authority." *Ante,* at 9. Feel free to skip over those pages of the majority's

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opinion. With broad official-acts immunity covering the field, this ostensibly narrower immunity serves little purpose. In any event, this case simply does not turn on conduct within the President's "exclusive sphere of constitutional authority," and the majority's attempt to apply a core immunity of its own making expands the concept of "core constitutional powers," *ante,* at 6, beyond any recognizable bounds.

The idea of a narrow core immunity might have some intuitive appeal, in a case that actually presented the issue. If the President's power is "conclusive and preclusive" on a given subject, then Congress should not be able to "ac[t] upon the subject." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 638 (1952) (Jackson, J., concurring). In his *Youngstown* concurrence, Justice Robert Jackson posited that the President's "power of removal in executive agencies" seemed to fall within this narrow category. *Ibid.*, n. 4. Other decisions of this Court indicate that the pardon power also falls in this category, see *United States* v. *Klein*, 13 Wall. 128, 147 (1872) ("To the executive alone is intrusted the power of pardon; and it is granted without limit"), as does the power to recognize foreign countries, see *Zivotofsky* v. *Kerry*, 576 U. S. 1, 32 (2015) (holding that the President has "exclusive power . . . to control recognition determinations").

In this case, however, the question whether a former President enjoys a narrow immunity for the "exercise of his core constitutional powers," *ante,* at 6, has never been at issue, and for good reason: Trump was not criminally indicted for taking actions that the Constitution places in the unassailable core of Executive power. He was not charged, for example, with illegally wielding the Presidency's pardon power or veto power or appointment power or even removal power. Instead, Trump was charged with a conspiracy to commit fraud to subvert the Presidential election. It is true that the detailed indictment in this case alleges that Trump

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threatened to remove an Acting Attorney General who would not carry out his scheme. See, *e.g.*, App. 216–217, Indictment ¶¶74, 77. Yet it is equally clear that the Government does not seek to "impose criminal liability on the [P]resident for exercising or talking about exercising the appointment and removal power." Tr. of Oral Arg. 127. If that were the majority's concern, it could simply have said that the Government cannot charge a President's threatened use of the removal power as an overt act in the conspiracy. It says much more.

The core immunity that the majority creates will insulate a considerably larger sphere of conduct than the narrow core of "conclusive and preclusive" powers that the Court previously has recognized. The first indication comes when the majority includes the President's broad duty to "'take Care that the Laws be faithfully executed'" among the core functions for which a former President supposedly enjoys absolute immunity. *Ante,* at 20 (quoting Art. II, §3). That expansive view of core power will effectively insulate all sorts of noncore conduct from criminal prosecution. Were there any question, consider how the majority applies its newly minted core immunity to the allegations in this case. It concludes that "Trump is . . . absolutely immune from prosecution for" any "conduct involving his discussions with Justice Department officials." *Ante,* at 21. That conception of core immunity expands the "conclusive and preclusive" category beyond recognition, foreclosing the possibility of prosecution for broad swaths of conduct. Under that view of core powers, even fabricating evidence and insisting the Department use it in a criminal case could be covered. The majority's conception of "core" immunity sweeps far more broadly than its logic, borrowed from *Youngstown*, should allow.

The majority tries to assuage any concerns about its made-up core immunity by suggesting that the Government

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agrees with it. See *ante,* at 34. That suggestion will surprise the Government. To say, as the Government did, that a "small core of exclusive official acts" such as "the pardon power, the power to recognize foreign nations, the power to veto legislation, [and] the power to make appointments" cannot be regulated by Congress, see Tr. of Oral Arg. 85–87, does not suggest that the Government agrees with immunizing any and all conduct conceivably related to the majority's broad array of supposedly "core" powers. The Government in fact advised this Court to "leav[e] potentially more difficult questions" about the scope of any immunity "that might arise on different facts for decision if they are ever presented." Brief for United States 45. That would have made sense. The indictment here does not pose any threat of impermissibly criminalizing acts within the President's "conclusive and preclusive" authority. Perhaps for this reason, even Trump discouraged consideration of "a narrower scope of immunity," claiming that such an immunity "would be nearly impossible to fashion, and would certainly involve impractical line-drawing problems in every application." Brief for Petitioner 43–44.

When forced to wade into thorny separation-of-powers disputes, this Court's usual practice is to "confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore* v. *Regan,* 453 U. S. 654, 661 (1981). There is plenty of peril and little value in crafting a core immunity doctrine that Trump did not seek and that rightly has no application to this case.

VI

Not content simply to invent an expansive criminal immunity for former Presidents, the majority goes a dramatic and unprecedented step further. It says that acts for which the President is immune must be redacted from the narrative of even wholly private crimes committed while in office. They must play no role in proceedings regarding private

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criminal acts. See *ante,* at 30–32.

Even though the majority's immunity analysis purports to leave unofficial acts open to prosecution, its draconian approach to official-acts evidence deprives these prosecutions of any teeth. If the former President cannot be held criminally liable for his official acts, those acts should still be admissible to prove knowledge or intent in criminal prosecutions of unofficial acts. For instance, the majority struggles with classifying whether a President's speech is in his capacity as President (official act) or as a candidate (unofficial act). Imagine a President states in an official speech that he intends to stop a political rival from passing legislation that he opposes, no matter what it takes to do so (official act). He then hires a private hitman to murder that political rival (unofficial act). Under the majority's rule, the murder indictment could include no allegation of the President's public admission of premeditated intent to support the *mens rea* of murder. That is a strange result, to say the least.[5]

The majority's extraordinary rule has no basis in law. Consider the First Amendment context. Although the First Amendment prohibits criminalizing most speech, it "does not prohibit the evidentiary use of speech," including its use "to prove motive or intent." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 489 (1993). Evidentiary rulings and limiting instructions can ensure that evidence concerning official acts is "considered only for the proper purpose for which it was admitted." *Huddleston* v. *United States*, 485 U. S. 681, 691–692 (1988). The majority has no coherent explanation as to

[5] The majority suggests, in a footnote, that a "prosecutor may point to the public record to show the fact that the President performed the official act," so long as the prosecutor does not "invite the jury to inspect" the act in any way. *Ante,* at 32, n. 3. Whatever that suggestion is supposed to accomplish, it does not salvage the majority's nonsensical evidentiary rule.

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why these protections that are sufficient in every other context would be insufficient here. It simply asserts that it would be "untenable" and would deprive immunity of its "'intended effect.'" *Ante,* at 31 (quoting *Fitzgerald*, 457 U. S., at 756). The majority hazards an explanation that the use of official-acts evidence will "raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Ante,* at 31. That "unique risk," however, is not a product of introducing official-acts evidence. It is simply the risk involved in any suit against a former President, including the private-acts prosecutions the majority says it would allow.

VII

Today's decision to grant former Presidents immunity for their official acts is deeply wrong. As troubling as this criminal immunity doctrine is in theory, the majority's application of the doctrine to the indictment in this case is perhaps even more troubling. In the hands of the majority, this new official-acts immunity operates as a one-way ratchet.

First, the majority declares all of the conduct involving the Justice Department and the Vice President to be official conduct, see *ante,* at 19–24, yet it refuses to designate any course of conduct alleged in the indictment as private, despite concessions from Trump's counsel.[6] Trump's counsel conceded, for example, that the allegation that Trump

[6]The majority protests that it is "adher[ing] to time-tested practices" by "deciding what is required to dispose of this case and remanding" to lower courts to sort out the details. *Ante,* at 41. Yet it implicitly acknowledges that it reaches far beyond what any lower court considered or any party briefed by designating certain conduct official in the first instance. See *ibid.* (noting "the lack of factual analysis in the lower courts, and the lack of briefing on how to categorize the conduct alleged"). In reaching out to shield some conduct as official while refusing to recognize any conduct as unofficial, the majority engages in judicial activism, not judicial restraint.

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"turned to a private attorney who was willing to spread knowingly false claims of election fraud to spearhead his challenges to the election results" "sounds private." Tr. of Oral Arg. 29. He likewise conceded that the allegation that Trump "conspired with another private attorney who caused the filing in court of a verification signed by [Trump] that contained false allegations to support a challenge" "sounds private." *Ibid.*; see also *id.*, at 36–37 (Trump's counsel explaining that it is not "disputed" that such conduct is "unofficial"). Again, when asked about allegations that "[t]hree private actors . . . helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding, and [Trump] and a co-conspirator attorney directed that effort," Trump's counsel conceded the alleged conduct was "private." *Id.*, at 29–30. Only the majority thinks that organizing fraudulent slates of electors might qualify as an official act of the President, see *ante,* at 24–28, or at least an act so "interrelated" with other allegedly official acts that it might warrant protection, *ante,* at 28. If the majority's sweeping conception of "official acts" has any real limits, the majority is unwilling to reveal them in today's decision.

Second, the majority designates certain conduct immune while refusing to recognize anything as prosecutable. It shields large swaths of conduct involving the Justice Department with immunity, see *ante,* at 19–21; see also Part V, *supra,* but it does not give an inch in the other direction. The majority admits that the Vice President's responsibility "'presiding over the Senate'" is "'not an "executive branch" function,'" and it further admits that the President "plays no direct constitutional or statutory role" in the counting of electoral votes. *Ante,* at 23–24. Yet the majority refuses to conclude that Trump lacks immunity for his alleged attempts to "enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." App. 187, Indictment

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¶10(d). Instead, it worries that a prosecution for this conduct might make it harder for the President to use the Vice President "to advance [his] agenda in Congress." *Ante,* at 24. Such a prosecution, according to the majority, "may well hinder the President's ability to perform his constitutional functions." *Ibid.* Whether a prosecution for this conduct warrants immunity should have been an easy question, but the majority turns it into a debatable one. Remarkably, the majority goes further and declines to deny immunity even for the allegations that Trump organized fraudulent elector slates, pressured States to subvert the legitimate election results, and exploited violence at the Capitol to influence the certification proceedings. It is not conceivable that a prosecution for these alleged efforts to overturn a Presidential election, whether labeled official or unofficial under the majority's test, would pose any "'dangers of intrusion on the authority and functions of the Executive Branch,'" *ante,* at 14, and the majority could have said as much. Instead, it perseverates on a threshold question that should be immaterial.

Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. *Korematsu* v. *United States*, 323 U. S. 214, 246 (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military

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coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

* * *

The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines . . . all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77, p. 507 (J. Harvard Library ed. 2009). The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." *Ibid.* The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.

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SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

JUSTICE JACKSON, dissenting.

JUSTICE SOTOMAYOR has thoroughly addressed the Court's flawed reasoning and conclusion as a matter of history, tradition, law, and logic. I agree with every word of her powerful dissent. I write separately to explain, as succinctly as I can, the theoretical nuts and bolts of what, exactly, the majority has done today to alter the paradigm of accountability for Presidents of the United States. I also address what that paradigm shift means for our Nation moving forward.

I

To fully appreciate the profound change the majority has wrought, one must first acknowledge what it means to have immunity from criminal prosecution. Put simply, immunity is "exemption" from the duties and liabilities imposed by law. Black's Law Dictionary 898 (11th ed. 2019); see *Hopkins* v. *Clemson*, 221 U. S. 636, 643 (1911) (explaining that immunity is "exemption from legal process"). In its purest form, the concept of immunity boils down to a maxim—"'[t]he King can do no wrong'"—a notion that was firmly "rejected at the birth of [our] Republic." *Clinton* v. *Jones*, 520 U. S. 681, 697, n. 24 (1997) (quoting 1 W. Blackstone, Commentaries *246 (Blackstone)); see *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807). To say

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that someone is immune from criminal prosecution is to say that, like a King, he "is not under the coercive power of the law," which "will not suppose him capable of committing a folly, much less a crime." 4 Blackstone *33. Thus, being immune is not like having a defense *under* the law. Rather, it means that the law does not apply to the immunized person in the first place. Conferring immunity therefore "create[s] a privileged class free from liability for wrongs inflicted or injuries threatened." *Hopkins*, 221 U. S., at 643.

It is indisputable that immunity from liability for wrongdoing is the exception rather than the rule in the American criminal justice system. That is entirely unsurprising, for the very idea of immunity stands in tension with foundational principles of our system of Government. It is a core tenet of our democracy that the People are the sovereign, and the Rule of Law is our first and final security. "[F]rom their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised." *United States* v. *Mine Workers*, 330 U. S. 258, 308 (1947) (Frankfurter, J., concurring in judgment).

A corollary to that principle sets the terms for this case: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220 (1882). We have long lived with the collective understanding that "[d]ecency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen," for "[i]n a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

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II

A

These foundational presuppositions are reflected in a procedural paradigm of rules and accountability that operates in the realm of criminal law—what I would call an individual accountability model.

The basic contours of that model are familiar, because they manifest in every criminal case. Criminal law starts with an act of the legislature, which holds the power "to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820); accord, *Ohio* v. *Johnson*, 467 U. S. 493, 499 (1984). Criminal statutes are laws of general applicability that express "the assent of the people's representatives" that certain conduct is off limits in our society. *Wooden* v. *United States*, 595 U. S. 360, 391 (2022) (GORSUCH, J., concurring in judgment).

When the Federal Government believes that someone has run afoul of a criminal statute and decides to exercise its prosecutorial discretion to pursue punishment for that violation, it persuades a grand jury that there is probable cause to indict. U. S. Const., Amdt. 5. Then, the Government marshals evidence to prove beyond a reasonable doubt that the defendant engaged in the prohibited conduct and possessed the requisite state of mind. See *United States* v. *Bailey*, 444 U. S. 394, 402 (1980) (observing that, to hold a person criminally liable, "the concurrence of . . . 'an evil-meaning mind [and] an evil-doing hand'" must be proved (quoting *Morissette* v. *United States*, 342 U. S. 246, 251 (1952))).

For his part, the defendant "stands accused but is presumed innocent until conviction upon trial or guilty plea." *Betterman* v. *Montana*, 578 U. S. 437, 441 (2016). Notably, criminal defendants have various constitutionally protected rights during the criminal-liability process, including the rights to a speedy and public trial, the right to have a jury decide guilt or innocence, the right to the assistance

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of counsel, and the right to confront the witnesses against him. Amdt. 6. The defendant also has at his disposal many means to defend himself against the criminal charge. He can, of course, seek to hold the Government to its burden of proof at trial. And even before trial, in a motion to dismiss the indictment, he might make any number of legal arguments; he can assert, for example, that the Government's charging document does not give adequate notice of the charge against him or that the law he has been accused of violating is unconstitutionally vague. See *Hamling* v. *United States*, 418 U. S. 87, 117 (1974); *United States* v. *Davis*, 588 U. S. 445, 451 (2019). He might further claim that the law is unconstitutional as applied to his particular conduct. See *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). And he might maintain that his conduct, even if proved, does not violate the law at issue. See, *e.g.*, *Fischer* v. *United States*, 603 U. S. ___, ___ (2024) (slip op., at 2).

The defendant may also raise, and attempt to prove, affirmative defenses that "excuse conduct that would otherwise be punishable." *Dixon* v. *United States*, 548 U. S. 1, 6 (2006). Generally speaking, affirmative defenses are determinations (often adopted by legislation) that certain conduct otherwise punishable by law is justified. This might be the case, for example, when the Legislature determines that, under specified circumstances, the societal harm particular conduct causes "is outweighed by the need to avoid an even greater harm." 1 P. Robinson, Criminal Law Defenses §24(a) (1984) (Robinson).

Importantly, a defense is *not* an immunity, even though a defense can likewise result in a person charged with a crime avoiding liability for his criminal conduct. Consistent with our foundational norms, the individual accountability model adheres to the presumption that the law applies to all and that everyone must follow it; yet, the model makes allowances for recognized defenses. One such defense is the

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special privilege that Government officials sometimes invoke when carrying out their official duties.[1]

All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law; an accused person is innocent until proven guilty; and criminal defendants may raise defenses, both legal and factual, tailored to their particular circumstances, whether they be Government officials or ordinary citizens. For over two centuries, our Nation has survived with these principles intact.

B

With that understanding of how our system of accountability for criminal acts ordinarily functions, it becomes much easier to see that the majority's ruling in this case breaks new and dangerous ground. Departing from the traditional model of individual accountability, the majority has concocted something entirely different: a Presidential accountability model that creates immunity—an exemption from criminal law—applicable only to the most powerful official in our Government.

1

So, how does this new Presidential accountability model work? An initial problem is the lack of clarity regarding what this new model entails. The majority announces only its most basic contours. See *ante,* at 6 (asserting that "the

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[1] See R. Perkins & R. Boyce, Criminal Law 1093 (3d ed. 1982) ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority"); see also 2 Robinson §141(a) (describing the public-authority defense, under which a defendant may escape liability if he "has been specifically authorized to engage in the conduct constituting the offense in order to protect or further a public interest"); Brief for United States 29–30, n. 11; *ante,* at 16, n. 3 (SOTOMAYOR, J., dissenting) (citing *Nardone* v. *United States*, 302 U. S. 379, 384 (1937)).

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nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office"). Instead of no immunity (the individual accountability model) or an unqualified grant of absolute immunity for "*all* official acts," Brief for Petitioner 44 (emphasis added), the majority purports to adopt something of a hybrid.[2] It holds that a former President may or may not be immune from criminal prosecution for conduct undertaken while in office, to be determined on a case-by-case basis. According to the majority, whether a former President is immune depends on how his criminal conduct is classified, as among three possible categories.

First, with respect to any criminal conduct relating to a President's "core constitutional powers"—those subjects "within his 'conclusive and preclusive' constitutional authority"—the President is entitled to absolute immunity from criminal prosecution. See *ante*, at 6, 8. Second, expanding outward from this "core," regarding all other "acts within the outer perimeter of [the President's] official responsibility," the President is entitled to "at least a *presumptive* immunity from criminal prosecution." *Ante*, at 14.

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[2] Its feigned judicial humility notwithstanding, see *ante,* at 41, the majority's holding goes further—*much* further—than necessary to resolve this case. Petitioner's argument in both the lower courts and this one was that a former President is categorically immune from federal criminal prosecution for "all" acts within the outer perimeter of his official duties. See Opening Brief for Defendant-Appellant in No. 23–3228 (CADC, Dec. 23, 2023), p. 23; 91 F. 4th 1173, 1188–1189, 1195, 1208 (CADC 2024) (*per curiam*); Brief for Petitioner 41–47 (arguing for absolute immunity for "all actions within the 'outer perimeter'" of a President's responsibilities, and imploring the Court not to adopt a "'function-based' approach"). Thus, it would have been enough for the Court simply to reject petitioner's categorical claim and leave it at that. But the majority *sua sponte* rephrased the question presented, and it now takes full advantage of this opportunity to devise from whole cloth an entirely new legal framework for judicial evaluation of potential criminal immunity for former Presidents.

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Third, if the criminal conduct at issue comprises "unofficial acts, there is no immunity." *Ante*, at 15.[3]

Applying the majority's new Presidential accountability model thus seems to involve bearing down on the indictment's allegations and making a series of determinations about the nature of the conduct at issue. From the structure of the paradigm, it appears that the first decision point is whether the alleged criminal conduct involves one of the President's "core" powers. If so (and apparently regardless of the degree to which the conduct implicates that core power), the President is absolutely immune from criminal liability for engaging in that criminal conduct. If not, then one must proceed to consider whether the conduct qualifies as an "official" act or "unofficial" act of that President. If the crime is an official act, the President is presumptively immune from criminal prosecution and punishment. But even then, immunity still hinges on whether there is any legal or factual basis for concluding that the presumption of immunity has been rebutted. Alternatively, if the charged conduct is an unofficial act (a determination that, inci-

[3]It is important to note that the majority reframes the immunity question presented here as a separation of powers concern that is compelled by Article II—as if what is being asked is whether Congress can criminalize executive prerogatives. See, *e.g.*, *ante*, at 6–7; see also *ante*, at 1–2 (BARRETT, J., concurring in part). But that is not anywhere close to what is happening in this case. No one maintains that Congress has passed a law that specifically criminalizes the President's use of any power that the Constitution vests exclusively in the Executive, much less that the Judiciary is being conscripted to adjudicate the propriety of such a statute. To the contrary, the indictment here invokes criminal statutes of general applicability that everyone is supposed to follow, both on and off the job. So, the real question is: Can the President, too, be held accountable for committing crimes while he is undertaking his official duties? The nature of his authority under Article II (whether conclusive and preclusive, or shared with Congress, or otherwise) is entirely beside the point.

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dentally, courts must make without considering the President's motivations, *ante,* at 18), the President is not immune.[4]

2

The majority's multilayered, multifaceted threshold parsing of the character of a President's criminal conduct differs from the individual accountability model in several crucial respects. For one thing, it makes it next to impossible to know *ex ante* when and under what circumstances a President will be subject to accountability for his criminal acts. For every allegation, courts must run this gauntlet first—no matter how well documented or heinous the criminal act might be.

Thus, even a hypothetical President who admits to having ordered the assassinations of his political rivals or critics, see, *e.g.,* Tr. of Oral Arg. 9, or one who indisputably instigates an unsuccessful coup, *id.*, at 41–43, has a fair shot at getting immunity under the majority's new Presidential accountability model. That is because whether a President's conduct will subject him to criminal liability turns on the court's evaluation of a variety of factors related to the character of that particular act—specifically, those characteristics that imbue an act with the status of "official" or "unofficial" conduct (minus motive). In the end, then, under the majority's new paradigm, whether the President will be exempt from legal liability for murder, assault, theft, fraud,

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[4]JUSTICE BARRETT's version of the Presidential accountability paradigm works slightly differently; she would have us ask, first, "whether the relevant criminal statute reaches the President's official conduct." *Ante,* at 2. But, again, what is at issue here are statutes of general applicability—they only "reach" the President's conduct to the extent that he chooses to engage in the prohibited behavior. See n. 3, *supra.* JUSTICE BARRETT's framing, thus, sidesteps the fact that, when immunity is being considered, what is actually at issue is whether the President is exempt from punishment if he opts to exercise his official duties using means that violate criminal law.

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or any other reprehensible and outlawed criminal act will turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends.

Under the individual accountability paradigm, the accountability analysis is markedly less convoluted, and leads to a more certain outcome. None of the same complications or consequences arise, because, as I have explained, there are no exemptions from the criminal law for any person, but every defendant can assert whatever legal arguments and defenses might be applicable under governing law. Since no one is above the law, everyone can focus on what the law demands and permits, and on what the defendant did or did not do; no one has to worry about characterizing any criminal conduct as official or unofficial in order to assess the applicability of an immunity at the outset.

The majority's new Presidential accountability model is also distinct insofar as it accepts as a basic starting premise that generally applicable criminal laws do *not* apply to everyone in our society. In the majority's view, while all other citizens of the United States must do their jobs and live their lives within the confines of criminal prohibitions, the President cannot be made to do so; he must sometimes be exempt from the law's dictates depending on the character of his conduct. Indeed, the majority holds that the President, unlike anyone else in our country, is comparatively free to engage in criminal acts in furtherance of his official duties.

That point bears emphasizing. Immunity can issue for Presidents under the majority's model even for unquestionably and intentionally egregious criminal behavior. Regardless of the nature or the impact of the President's criminal conduct, so long as he is committing crimes "pursuant to the powers invested exclusively in him by the Constitution," *ante,* at 7, or as needed "to carry out his constitutional duties without undue caution," *ante,* at 14, he is likely to be

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deemed immune from prosecution.[5]

Ultimately, the majority's model simply sets the criminal law to one side when it comes to crimes allegedly committed by the President. Before accountability can be sought or rendered, the Judiciary serves as a newfound special gatekeeper, charged not merely with interpreting the law but with policing whether it applies to the President *at all*. Also, under the new Presidential accountability model, the starting presumption is that the criminal law does *not* apply to Presidents, no matter how obviously illegal, harmful, or unacceptable a President's official behavior might be. Regardless of all that, courts must now ensure that a former President is *not* held accountable for any criminal conduct he engages in while he is on duty, unless his conduct consists primarily (and perhaps solely) of unofficial acts.

3

The structure and function of the two accountability paradigms are not the only differences—the models also assign different roles to participants in the criminal justice system, and they ultimately generate different relationships between the Presidency and the Rule of Law.

Under the individual accountability model, duty-bound prosecutorial officers initially exercise their discretion to decide whether to seek punishment for alleged violations of

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[5]To fully appreciate the oddity of making the criminal immunity determination turn on the character of the President's responsibilities, consider what the majority says is one of the President's "conclusive and preclusive" prerogatives: "'[t]he President's power to remove . . . those who wield executive power on his behalf.'" *Ante,* at 8 (quoting *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 204 (2020)). While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death. Put another way, the issue here is not whether the President has exclusive removal power, but whether a generally applicable criminal law prohibiting murder can restrict *how* the President exercises that authority.

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criminal law (a determination that is made based on numerous factors). And even if prosecutors decide to bring a charge, a jury of the criminal defendant's peers ultimately determines whether that defendant (including a former President) will actually be held to account for having engaged in unlawful conduct, after the court has resolved any legal challenges and has instructed the jury as to the requirements of the law.

By contrast, under the majority's new Presidential accountability paradigm, what a prosecutor or jury does may not even matter, since the courts take center stage once charges are brought against a former President, marshaling their resources to conduct a complex and amorphous threshold immunity evaluation. Whether a former President will be entirely exempted from the dictates of the law (such that the roles of other participants in the criminal justice process become irrelevant) requires a judicial assessment, in the first instance, of his criminal conduct and the circumstances under which he acted.

Finally, and most importantly, recall that under the individual accountability model, an indicted former President can raise an affirmative defense just like any other criminal defendant. This means that the President remains answerable to the law, insofar as he must show that he was justified in committing a criminal act while in office under the given circumstances. In other words, while the President might indeed be privileged to commit a crime in the course of his official duties, any such privilege exists only when the People (acting either through their elected representatives or as members of a jury) determine that the former President's conduct was in fact justified, notwithstanding the general criminal prohibition.

Under the majority's immunity regime, by contrast, the President can commit crimes in the course of his job even under circumstances *in which no one thinks he has any ex-*

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cuse; the law simply does not apply to him. Unlike a defendant who invokes an affirmative defense and relies on a legal determination that there was a good reason for his otherwise unlawful conduct, a former President invoking immunity relies on the premise that he can do whatever he wants, however he wants, so long as he uses his "'official power'" in doing so. *Ante,* at 19. In the former paradigm, the President remains subject to law; in the latter, he is above it.

III

JUSTICE SOTOMAYOR has already warned of the dire consequences that are likely to follow from the majority's decision in this case. *Ante,* at 29–30 (dissenting opinion). I have thus far endeavored merely to explain what today's ruling amounts to on a theoretical level: the Court's abandonment of the individual accountability model as applied to Presidents, and its introduction of a new Presidential accountability model that authorizes the Judiciary to exempt Presidents from punishment under law, depending on the official or unofficial character of the criminal conduct at issue.

Here, I will highlight just two observations about the results that follow from this paradigm shift. First, by changing the accountability paradigm in this fashion, the Court has unilaterally altered the balance of power between the three coordinate branches of our Government as it relates to the Rule of Law, aggrandizing power in the Judiciary and the Executive, to the detriment of Congress. Second, the majority's new Presidential accountability model undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power, to the detriment of us all.

A

Consider the structural implications of today's decision from the standpoint of the separation of powers. Until now,

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Congress's laws, passed by the representatives of the People, bound the People and their elected officials just the same. Law, we have explained, "is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." *Lee*, 106 U. S., at 220. With its adoption of a paradigm that sometimes exempts the President from the dictates of the law (when the Court says so), this Court has effectively snatched from the Legislature the authority to bind the President (or not) to Congress's mandates, and it has also thereby substantially augmented the power of both the Office of the Presidency and itself.

As to the former, it should go without saying that the Office of the Presidency, the apex of the Executive Branch, is made significantly more powerful when the constraints of the criminal law are lifted with respect to the exercise of a President's official duties. After today's ruling, the President must still "take Care that the Laws be faithfully executed," Art. II, §3; yet, when acting in his official capacity, he has no obligation to follow those same laws himself.

But whatever additional power the majority's new Presidential accountability model gives to the Presidency, it gives doubly to the Court itself, for the majority provides no meaningful guidance about how to apply this new paradigm or how to categorize a President's conduct. For instance, its opinion lists some examples of the "core" constitutional powers with respect to which the President is now entitled to absolute immunity—a list that apparently includes the removal power, the power to recognize foreign nations, and the pardon power. *Ante,* at 6–9. However, the majority does not—and likely cannot—supply any useful or administrable definition of the scope of that "core." For what it's worth, the Constitution's text is no help either; Article II

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does not contain a Core Powers Clause.[6] So the actual metes and bounds of the "core" Presidential powers are really anyone's guess.

Nor does the majority explain how to consistently distinguish between official and unofficial acts. Quite the opposite, in fact. While acknowledging that this is a critical line that courts must draw in order for its new accountability model to work properly, the majority simultaneously cautions that making this distinction "can be difficult"—likely a gross understatement given the recognized "breadth of the President's 'discretionary responsibilities' under the Constitution and laws of the United States." *Ante,* at 17. The majority likewise provides no guidance as to when, how, or why the President's "presumptive" immunity for noncore official acts might be rebutted, saying only that applying the criminal law to a President's acts must pose "no 'dangers of intrusion on the authority and functions of the Executive Branch.'" *Ante,* at 14 (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 754 (1982)).

At most, to distinguish official from unofficial conduct, the majority advises asking whether the former President's conduct was "'manifestly or palpably beyond [his] authority.'" *Ante,* at 17 (quoting *Blassingame* v. *Trump*, 87 F. 4th 1, 13 (CADC 2023)). But that test can be illusory, as is evidenced by the facts alleged in this very case. With respect to the indictment's allegations concerning petitioner's attempt to assemble false slates of electors in conjunction

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[6] Some of the powers the majority designates as "core" powers are, at best, implied from indefinite constitutional language. See, *e.g.*, *Seila Law*, 591 U. S., at 268–269 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) ("Nowhere does the text say anything about the President's power to remove subordinate officials at will"); *Zivotofsky* v. *Kerry*, 576 U. S. 1, 11 (2015) ("[T]he Constitution does not use the term 'recognition,' either in Article II or elsewhere"); *id.*, at 63 (ROBERTS, C. J., dissenting) (calling the "asserted textual bases" for an exclusive Presidential recognition power "tenuous").

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with the events of January 6, 2021, for example, the majority admits that the "alleged conduct cannot be neatly categorized," and that "[t]he analysis therefore . . . may prove to be challenging." *Ante,* at 28–29. With that, at least, I could not agree more.

This much is clear: Before today, none of these kinds of inquiries was necessary for criminal liability to be fairly assessed with respect to persons accused of having engaged in criminal conduct. And, frankly, none is needed now—except as relates to the President under the new paradigm the majority has crafted.

Perhaps even more troubling, while Congress (the branch of our Government most accountable to the People) is the entity our Constitution tasks with deciding, as a general matter, what conduct is on or off limits, the Court has now arrogated that power unto itself when that question pertains to the President. In essence, the Court has now imposed its own preclearance requirement on the application of Congress's laws to a former President alleged to have committed crimes while in office. Who will be responsible for drawing the crucial "'line between [the President's] personal and official affairs'"? *Ante,* at 29. To ask the question is to know the answer. A majority of this Court, applying an indeterminate test, will pick and choose which laws apply to which Presidents, by labeling his various allegedly criminal acts as "core," "official," or "manifestly or palpably" beyond the President's authority.

Ironically, then, while purportedly seeking to transcend politics, see *ante,* at 41–42, the Court today displaces the independent judgments of the political branches about the circumstances under which the criminal law should apply. Effectively, the Court elbows out of the way both Congress and prosecutorial authorities within the Executive Branch, making itself the indispensable player in all future attempts to hold former Presidents accountable to generally applicable criminal laws. "The Framers, however, did not

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make the judiciary the overseer of our government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 594 (1952) (Frankfurter, J., concurring). To be sure, this Court may sometimes "have to intervene in determining where authority lies as between the democratic forces in our scheme of government." *Id.*, at 597. But it has long been understood that "we should be wary and humble" when doing so. *Ibid.*

The majority displays no such caution or humility now. Instead, the Court today transfers from the political branches to itself the power to decide when the President can be held accountable. What is left in its wake is a greatly weakened Congress, which must stand idly by as the President disregards its criminal prohibitions and uses the powers of his office to push the envelope, while choosing to follow (or not) existing laws, as he sees fit. We also now have a greatly empowered Court, which can opt to allow Congress's policy judgments criminalizing conduct to stand (or not) with respect to a former President, as a matter of its own prerogative.

B

If the structural consequences of today's paradigm shift mark a step in the wrong direction, then the practical consequences are a five-alarm fire that threatens to consume democratic self-governance and the normal operations of our Government. The majority shoos away this possibility. *Ante,* at 37 (accusing the dissents of "strik[ing] a tone of chilling doom that is wholly disproportionate to what the Court actually does today"). But JUSTICE SOTOMAYOR makes this point plain, see *ante,* at 29–30, and I will not belabor it.

Here, I will merely observe that, from a theoretical perspective, philosophers have long considered deterrence to be a key justification for adopting and maintaining systems

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that ensure accountability for criminal conduct.[7] For that same reason, some commentators also maintain that decreasing the certainty of accountability for wrongful acts at least arguably reduces incentives to follow the law.[8]

Under the individual accountability model, because everyone is subject to the law, the potential of criminal liability operates as a constraint on the actions and decisions of everyone, including the President. After today, that reality is no more. Consequently, our Nation has lost a substantial check on Presidents who would use their official powers to commit crimes with impunity while in office.

So, one might ask, what remains of accountability for Presidents under law? With today's paradigm shift, the majority leaves in place only the chance that this Court might someday determine that the criminal conduct in question was an "unofficial" act, or that the Government will somehow rebut the presumption of immunity that applies to a President's official acts, such that criminal consequences might attach. But with the parameters of official and unofficial conduct unknown, I think it highly unlikely that a sitting President would feel constrained by these remote possibilities.

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[7] See, *e.g.*, Plato, Laws 274 (B. Jowett transl. 2000) ("Not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evildoing"); see also J. Bentham, The Rationale of Punishment 20 (1830) ("General prevention ought to be the chief end of punishment, as it is its real justification"); A. von Hirsch, Doing Justice: The Choice of Punishments 44 (1976) ("The threat and imposition of punishment is called for in order to secure compliance—not full compliance, but more compliance than there might be were there no legal penalties at all").

[8] See, *e.g.*, M. Ryan, Taking Another Look at Second-Look Sentencing, 81 Brooklyn L. Rev. 149, 156, and n. 37 (2015) ("[U]ndermining the . . . certainty of punishment . . . could undermine the deterrence value of punishment").

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All of this leads me to ponder why, exactly, has the majority concluded that an indeterminate "core"-versus-"official"-versus-"unofficial" line-drawing exercise is the better way to address potential criminal acts of a President? Could it be that the majority believes the obviously grave dangers of shifting from the individual accountability model to the Presidential accountability model might nevertheless be offset by the great benefits of doing so? Cf. J. Bentham, A Fragment on Government and an Introduction to the Principles of Morals and Legislation 3 (W. Harrison ed. 1948) (arguing that acts can be justified by the maxim that "it is the greatest happiness of the greatest number that is the measure of right and wrong" (emphasis deleted)).

Some of the majority's analysis suggests as much. As far as I can tell, the majority is mostly concerned that, without immunity, Presidents might "be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Ante,* at 13. The Court's opinion candidly laments that application of the law to Presidents might not be evenhanded, and that, as a result, Presidents might be less "'vigorous' and 'energetic'" as executive officers. *Ante,* at 10; accord, *ante,* at 39. But that concern ignores (or rejects) the foundational principles upon which the traditional individual accountability paradigm is based. Worse still, promoting more vigor from Presidents in exercising their official duties—and, presumably, less deliberation—invites breathtaking risks in terms of harm to the American people that, in my view, far outweigh the benefits.

This is not to say that the majority is wrong when it perceives that it can be cumbersome for a President to have to follow the law while carrying out his duty to enforce it. It is certainly true that "[a] scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority." *Youngstown,* 343 U. S., at 613 (Frankfurter, J., concurring). But

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any American who has studied history knows that "our government was *designed* to have such restrictions." *Ibid.* (emphasis added). Our Constitution's "separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but . . . to save the people from autocracy." *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting).

Having now cast the shadow of doubt over when—if ever—a former President will be subject to criminal liability for any criminal conduct he engages in while on duty, the majority incentivizes all future Presidents to cross the line of criminality while in office, knowing that unless they act "manifestly or palpably beyond [their] authority," *ante,* at 17, they will be presumed above prosecution and punishment alike.

But the majority also tells us not to worry, because "[l]ike everyone else, the President is subject to prosecution in his *unofficial* capacity." *Ante,* at 40 (emphasis added). This attempted reassurance is cold comfort, even setting aside the fact that the Court has neglected to lay out a standard that reliably distinguishes between a President's official and unofficial conduct. Why? Because there is *still* manifest inequity: Presidents alone are now free to commit crimes when they are on the job, while all other Americans must follow the law in all aspects of their lives, whether personal or professional. The official-versus-unofficial act distinction also seems both arbitrary and irrational, for it suggests that the unofficial criminal acts of a President are the only ones worthy of prosecution. Quite to the contrary, it is when the President commits crimes using his unparalleled official powers that the risks of abuse and autocracy will be most dire. So, the fact that, "unlike anyone else, the President is" vested with "sweeping powers and duties," *ibid.*, actually underscores, rather than undermines, the grim stakes of setting the criminal law to the side when the President

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flexes those very powers.

The vision John Adams enshrined in the Massachusetts Declaration of Rights—"'a government of laws and not of men'"—speaks directly to this concept. *Mine Workers*, 330 U. S., at 307 (Frankfurter, J., concurring in judgment). Adams characterized that document as an homage to the Rule of Law; it reflected both a flat "rejection in positive terms of rule by fiat" and a solemn promise that "[e]very act of government may be challenged by an appeal to law." *Id.*, at 308. Thanks to the majority, that vision and promise are likely to be fleeting in the future. From this day forward, Presidents of tomorrow will be free to exercise the Commander-in-Chief powers, the foreign-affairs powers, and all the vast law enforcement powers enshrined in Article II however they please—including in ways that Congress has deemed criminal and that have potentially grave consequences for the rights and liberties of Americans.

IV

To the extent that the majority's new accountability paradigm allows Presidents to evade punishment for their criminal acts while in office, the seeds of absolute power for Presidents have been planted. And, without a doubt, absolute power corrupts absolutely. "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." *Id.*, at 312. Likewise, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead*, 277 U. S., at 485 (Brandeis, J., dissenting). I worry that, after today's ruling, our Nation will reap what this Court has sown.

Stated simply: The Court has now declared for the first time in history that the most powerful official in the United States can (under circumstances yet to be fully determined) become a law unto himself. As we enter this uncharted territory, the People, in their wisdom, will need to remain ever

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attentive, consistently fulfilling their established role in our constitutional democracy, and thus collectively serving as the ultimate safeguard against any chaos spawned by this Court's decision. For, like our democracy, our Constitution is "the creature of their will, and lives only by their will." *Cohens* v. *Virginia*, 6 Wheat. 264, 389 (1821).

For my part, I simply cannot abide the majority's senseless discarding of a model of accountability for criminal acts that treats every citizen of this country as being equally subject to the law—as the Rule of Law requires. That core principle has long prevented our Nation from devolving into despotism. Yet the Court now opts to let down the guardrails of the law for one extremely powerful category of citizen: any future President who has the will to flout Congress's established boundaries.

In short, America has traditionally relied on the law to keep its Presidents in line. Starting today, however, Americans must rely on the courts to determine when (if at all) the criminal laws that their representatives have enacted to promote individual and collective security will operate as speedbumps to Presidential action or reaction. Once self-regulating, the Rule of Law now becomes the rule of judges, with courts pronouncing which crimes committed by a President have to be let go and which can be redressed as impermissible. So, ultimately, this Court itself will decide whether the law will be any barrier to whatever course of criminality emanates from the Oval Office in the future. The potential for great harm to American institutions and Americans themselves is obvious.

* * *

The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our

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sakes, I hope that they are right.

In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 7/11/2024 8:12:46 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: Deceased voter NVRA case in AZ
Attachments: Mussi complaint.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

Here's the complaint I mentioned in the case involving a list maintenance challenged based on dead voters, *Mussi v. Fontes*, No. 2:24-cv-01310-DWL (D. Ariz. filed June 3, 2024). Similar to PILF, the plaintiffs claim that they identified 20,000-35,000 voters who died between December 2020 and November 2022 and were not removed. The plaintiffs are Arizona politicians and the state Republican Party. The plaintiffs are represented by Holtzman Vogel, which frequently represents republican candidates and parties. It's in the early stages, at the motion-to-dismiss stage.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SCOT MUSSI, GINA SWOBODA, in her capacity as Chair of the Republican Party of Arizona, and STEVEN GAYNOR Plaintiffs, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant.	Case No.: **COMPLAINT**

Plaintiffs bring this Complaint against Defendant Adrian Fontes in his official capacity as the Arizona Secretary of State (the "Secretary"), and allege as follows:

INTRODUCTION

1. Section 8 of the National Voter Registration Act (the "NVRA"), 52 U.S.C. § 20507, requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . (A) the death of the registrant; or (B) a change in the residence of the registrant" to maintain accurate and updated voter-registration records in a uniform manner across the state. 52 U.S.C. § 20507(a)(4)(A)–(B).

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2. Arizona has failed to comply with this requirement because Arizona voter registration data and statistics indicate the lack of an NVRA-compliant list maintenance program in the state.

3. Instead of establishing an efficient and uniform voter file maintenance program across Arizona, the Secretary—when providing information regarding its list maintenance programs to the state legislature—has responded that its program "is in development," meaning that the general maintenance program required of states by the NVRA does not currently exist in Arizona.

4. All counties in Arizona have registration rates that far exceed the national and statewide voter-registration rates in recent years.

5. Up to four Arizona counties—Apache, La Paz, Navajo, and Santa Cruz—have more registered voters than citizens over the age of 18 (*i.e.*, more registered voters than citizens eligible to register to vote).

6. Similarly, the remaining counties—apart from Greenlee (registration rate of approximately 76.5%)—have voter registration rates of between 80 and 99 percent, with the majority being over 90 percent.

7. These rates are implausibly high. By comparison, when reviewing latest Current Population Survey ("CPS") data from the U.S. Census Bureau and comparing estimates of registered voters who are actually eligible to be registered, the *national* voter registration rate as a percentage of potential voters is 69.1% (*i.e.*, average registration rate across the country) and for *Arizona* it is 69.9%.[1] The data made public by the Secretary show that Arizona counties have *actual* registration rates that exceed the *expected* registration rates provided by the U.S. Census Bureau and evidence a high rate of likely ineligible voter names on the official lists of eligible voters.

8. Based on even the most conservative data sources, Arizona has at least 500,000 registered voters on the voter rolls who should have otherwise been removed. In

[1] All the data discussed herein is supported by the expert report of Thomas M. Bryan, attached hereto as "Exhibit 1," and incorporated herein by reference.

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other words, at least 500,000 registered voters currently listed on the Secretary's voter rolls for Arizona are deceased or no longer reside in Arizona.

9. And a review of other reliable data sources shows that Arizona has between 1,060,000 and 1,270,000 unaccounted-for voters on the state voter rolls.

10. Either way, at a minimum, reliable data shows that Arizona's voter rolls contain at least 500,000 voters that should not be currently registered.

11. Removing registered voters who have died is one of the ways voter rolls must, under Section 8, be maintained.

12. In looking at Arizona deaths compared to voter file removals, from December 2020 to the end of November 2022 (the "Study Period"), there were approximately 20,000 to 35,000 registered voters who died and were not removed from Arizona's voter rolls. This amounts to a removal shortage for deceased voters of 20%–35%. Meaning that, of the approximately 143,278 Arizona citizens of voting age who died during the study period, only 108,103 were removed from the voter rolls.

13. Additionally, for Maricopa County during the Study Period, the Election Administration and Voting Survey ("EAVS") conducted by the U.S. Election Assistance Commission ("EAC") shows that 752,387 voter registration confirmation notices were sent to voters listed on the registration rolls in Maricopa County to determine if they still lived at the location where they were registered to vote. And while the data shows that 131,682 voters were removed for various reasons from the notice batch, there are no reported voter responses or removals by the Secretary accounting for the status of the remaining 620,000 notice letters.

14. Unlike Maricopa County, in the remaining Arizona counties, nearly every notice letter that went out was accounted for in EAVS.

15. The data shows that even when unremoved deceased voters are excluded from the approximate 500,000 unaccounted-for registered voters on Arizona's voter rolls, there remains a significant difference between Arizona's Citizen Voting Age Population ("CVAP") and registered voters.

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16. In other words, this data shows that the 500,000 unaccounted-for registered voters remaining on Arizona's voter rolls is primarily attributable to voters moving out of Arizona or voters who failed to respond to confirmation notices—both of which are established methods of maintaining clean and updated voter rolls.

17. The Secretary has admitted to the Arizona Legislature that he has not implemented an NVRA-compliant program to remove the names of ineligible voters from the official registration lists. Indeed, in every quarterly report since January 2023 provided to the Senate President and Speaker of the House—where the Secretary is required to account for voter roll list maintenance—the Secretary avers that the "process is in development" rather than outlining his voter list maintenance procedures.[2]

18. Based on this and other evidence, the Secretary is failing to make a reasonable effort to conduct appropriate list maintenance, despite the NVRA's requirement that he maintain updated and accurate voter rolls.

JURISDICTION AND VENUE

19. The Court has subject-matter jurisdiction because this case alleges violations of the NVRA. 28 U.S.C. § 1331.

20. Venue is proper because a substantial part of the events or omissions giving rise to the claims occurred in this County and because the Secretary "resides" here. 28 U.S.C. § 1391.

PARTIES

21. Plaintiff Scot Mussi is a duly registered Arizona voter who lives in Maricopa County. Mussi regularly votes in Arizona's primary and general elections, and is currently President of the Arizona Free Enterprise Club. Mussi has spent nearly 20 years working on conservative issues and causes in Arizona, and he plans to vote in Arizona's upcoming federal and state elections.

22. As a result, Mussi has a clear interest in supporting the enforcement of laws such as the NVRA that promote fair and orderly elections.

[2] The Secretary's last four report letters are attached hereto as "Exhibit 2," and are incorporated herein by reference.

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23. Plaintiff Gina Swoboda is Chair of the Republican Party of Arizona ("AZ GOP").

24. AZ GOP is a political party committee organized and operated pursuant to Title 16, Chapter 5 of the Arizona Revised Statutes.

25. As Chair of AZ GOP, Swoboda works in Arizona to advance conservative policies and to help elect Republican candidates. AZ GOP relies upon accurate voter registration rolls to engage in electoral activity, contact voters, get out the vote, monitor the integrity of elections, protect the efficacy of AZ GOP adherents' votes, and decide how to allocate limited resources.

26. Thus, Swoboda, in her capacity as Chair of the AZ GOP, has a clear interest in supporting the enforcement of laws such as the NVRA that promote fair and orderly elections.

27. Plaintiff Steven Gaynor is a duly registered Arizona voter who lives in Maricopa County. Gaynor regularly votes in Arizona's primary and general elections. He plans to vote in Arizona's upcoming federal and state elections.

28. Therefore, Gaynor has a clear interest in supporting the enforcement of laws such as the NVRA that promote fair and orderly elections.

29. Because the Secretary does not maintain accurate voter rolls, ineligible voters have an opportunity to vote in Arizona elections, risking the dilution of Plaintiffs' legitimate votes.

30. Further, Arizona's inaccurate rolls undermine Plaintiffs' confidence in the integrity of Arizona elections, which also burdens their right to vote.

31. In sum, based on Arizona's inaccurate voter rolls, Plaintiffs' votes risk being diluted, and their confidence in elections is undermined, regardless of their political party or the political party of the candidate they vote for in an election.

32. Additionally, because the Secretary does not maintain accurate voter rolls, Plaintiffs must spend more time and resources monitoring Arizona's elections for fraud

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and abuse, mobilizing voters to counteract it, educating the public about election-integrity issues, and persuading elected officials to improve list maintenance.

33. Plaintiffs also must spend more of their time and resources on get-out-the-vote efforts for like-minded individuals—eligible voters who, because the Secretary does not maintain accurate voter rolls, lack confidence in the accuracy and integrity of Arizona's elections. The time and resources that Plaintiffs divert to these activities would otherwise be spent on other projects and activities that would advance their goals.

34. Defendant, Adrian Fontes, is the Arizona Secretary of State. He is the State's chief election officer and is responsible for the statewide list maintenance required by the NVRA, 52 U.S.C. § 20509. Adrian Fontes is sued in his official capacity.

BACKGROUND

I. Statutory Background

35. Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3). Specifically, Section 8 was enacted "to ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b)(4).

36. Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections.

37. Section 8 obligates States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(a)(4).

38. Each State's program for maintaining voter-registration lists must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1).

39. Specifically, Section 8 requires States to remove individuals from the voter rolls who have become ineligible due to "death" or due to "a change in . . . residence" outside their current voting jurisdiction. 52 U.S.C. § 20507(a)(4)(A)–(B).

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40. The Help America Vote Act (HAVA) also requires States to adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. 52 U.S.C. § 21083(a)(2)(A).

41. States must "ensure that voter registration records in the State are accurate and are updated regularly"—an obligation that includes a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(A).

42. HAVA's list-maintenance requirements include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under state law due to a felony conviction. 52 U.S.C. § 21083(a)(2)(A)(ii)(I)-(II).

43. According to the bipartisan Carter-Baker Commission, "registration lists lie at the root of most problems encountered in U.S. elections."[3] Inaccurate voter rolls that contain "ineligible, duplicate, fictional, or deceased voters are an invitation to fraud." *Id.* "While election fraud is difficult to measure" (because many cases go undetected, uninvestigated, or unprosecuted), "it occurs." *Id.* at 45. "In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." *Id.* at 18. And "the perception of possible fraud contributes to low confidence in the system." *Id.*

44. Arizona, too, has experienced known cases of voter fraud.

45. But the known cases are a small percentage of the overall cases because Arizona is not well equipped to detect fraud. For example, Arizona has no system in place to detect when people vote in multiple States. While the Electronic Registration Information Center can reveal whether voters have moved out of state, 50% of States do not participate in that voluntary program.

46. Recognizing these concerns, the NVRA includes a private right of action. It empowers any "person who is aggrieved by a violation" to "provide written notice of the

[3] Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections*, at 10 (Sept. 2005), available at: https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF.

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violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). "If the violation is not corrected within 90 days after receipt of a notice, … the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief." *Id.* § 20510(b)(2).

II. The Secretary's Statutory Duty

47. The Arizona Secretary of State is primarily responsible for voter list maintenance in Arizona.

48. The NVRA requires each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. 52 U.S.C. § 20509.

49. Arizona law designates the Secretary of State as that individual. *See* A.R.S. § 41-121(A)(9) & (13).

50. Ultimate responsibility for coordinating and overseeing all list-maintenance activities rests with the Secretary of State under both state and federal law. Therefore, the Secretary of State is the appropriate defendant in this case. A chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted." *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008).

51. Indeed, "the NVRA's centralization of responsibility counsels against . . . buck passing." *Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014). Courts have rejected the view that, "once the state designates" a local entity to assist with complying with federal law, "her responsibility ends." *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008). "[I]f every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement burdens, even if NVRA violations occurred throughout the state." *Id.*

52. Accordingly, because the Secretary has the legal duty to ensure that all voter registration records in Arizona, regardless of the county, are maintained in an accurate and

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uniform manner across Arizona. He cannot abdicate this duty and place responsibility on the county recorders across Arizona to perform his duties under Section 8.

III. Plaintiffs' Statutory Notice

53. Under the NVRA, a plaintiff has standing to bring suit only if they first "provide written notice of the violation to the chief election official of the state involved," and then 90 days elapse without correction of the violation. 52 U.S.C. § 20510(b)(1)–(2).

54. In a lawsuit involving multiple plaintiffs, so long as one of the plaintiffs provided actual 90-day notice, it is not necessary that all plaintiffs provide separate 90-day notices. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (holding that where one plaintiff had already provided notice and the state had ignored it, additional notices from other plaintiffs would be futile and unnecessary).

55. On August 8, 2023, Plaintiff Mussi mailed a statutory notice letter ("90-Day Notice Letter") to the Secretary, notifying him that 14 Arizona counties were in violation of Section 8 of the NVRA and formally requested that he correct the violations within 90 days.[4]

56. Following the 90-Day Notice Letter, Plaintiffs received updated comparisons based on data that was released after the Letter, revealing that all 15 Arizona counties are in violation of Section 8. *See generally* Exhibit 1. Those numbers are reflected above.

57. The 90-Day Notice Letter stated that Mussi "hope[d] to avoid litigation and would welcome immediate efforts by [the Secretary] to bring Arizona into compliance with Section 8." Exhibit 3, at p. 3.

58. The 90-Day Notice Letter asked the Secretary to "modify [his] current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law" and to "identify and remove [several] categories of individuals from the official lists of eligible voters." *Id.* at pp. 3–4.

[4] All related correspondence with the Secretary is attached hereto as "Exhibit 3," and are incorporated herein by reference.

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59. The 90-Day Notice Letter also asked the Secretary to "respond in writing within 45 days of the date of this letter," "fully describ[ing] the efforts, policies, and programs [the Secretary is] taking, or plan[ning] to undertake prior to the 2024 general election to bring Arizona into compliance with Section 8," and "not[ing] when [the Secretary] plan[ned] to begin and complete each specified measure and the results of any programs or activities you have already undertaken." *Id.* at p. 4.

60. Additionally, the 90-Day Notice Letter requested that the Secretary advise Mussi "what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, state, and local entities" and to provide him with "a description of the specific steps [he] intend[ed] to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election." *Id.* The 90-Day Notice Letter also requested that the Secretary take steps to preserve documents as required by Section 8(i) of the NVRA, 52 U.S.C. § 20507(i)(1)-(2), and other federal law. *Id.* at pp. 4–5.

61. Finally, the 90-Day Notice Letter stated that a lawsuit would be filed under 52 U.S.C. § 20510(b)(2) if the identified violations were not corrected. *Id.* at p. 5.

62. The Secretary responded to the 90-Day Notice Letter on August 15, 2023. In his response, the Secretary mischaracterized Plaintiffs' statistics and denied that inflated voter rolls were evidence of an NVRA violation. *See generally id.* at pp. 6–10.

63. For example, the Secretary stated that "[a]s of 2022, there were more than 5 million total citizens of voting age in Arizona, only 3.5 million of which, or 62.1%, were registered to vote according to U.S. Census estimates." *Id.* at p. 7.

64. The Secretary is correct that there were roughly 5 million citizens, and that roughly 3.5 million registered—but clearly erred in his citation of the resulting registration rate being 62.1%.

65. Using the exact 2022 registered voter estimates provided by the Secretary—of 3,560,000 registered and 5,093,000 CVAP—the percent registered among *CVAP* is 69.9%. The 62.1% statistic misleadingly used by the Secretary in his response is the percent

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of registered voters of the total *Voting Age Population* ("VAP") of 5,731,000 in Arizona—thus failing to only consider *citizens* of voting age population.

66. Another example of the Secretary's efforts to excuse his complacency with misleading data is when he stated in response that "in 2020, Arizona Secretary of State records indicate a total of 4,143,929 active registered voters, while the U.S. Census data indicates only estimated 3,878,000 registered voters." *Id.*

67. The Secretary's response is correct in one regard but wrong in another (more important) sense. Specifically, although the U.S. Census Bureau data does indicate there were 3,878,000 registered voters for 2020, the response errs in reporting the Secretary's own recorded number of active registered voters. Defendant's own website (https://azsos.gov/elections/results-data/voter-registration-statistics, (last visited Apr. 4, 2024)) shows 4,281,308 active registered voters for 2020, while the 4,143,929 active registered voters mentioned in the August 15, 2023, response are from *2022*. In short, the Secretary's response mismatches the relevant years being compared.

68. The Secretary, in referencing the 90-Day Notice Letter, states that "the comparators used are estimates that undercount the number of actual registered voters in the state." Exhibit 3, at p. 7. However, in reality, it is the Secretary's use of the incorrect 2020 registered voter estimate (4.1MM, from 2022) instead of the actual (4.3MM, from 2020) against the official US Census Bureau's 2020 estimate (3.9MM) that creates an underestimate of the magnitude of difference between the two sources for 2020. The difference between the Secretary's 4.1MM *active registered* voters in the most recent period (2022) and the US Census Bureau's *registered* voter estimate for 2022 (3.6MM) is even larger.

69. A reply letter was sent to the Secretary on September 12, 2023, apprising the Secretary of his reliance on inaccurate data, and stating that "if Arizona fails to take the necessary curative steps to resolve the issues identified in [the correspondence], [we are] prepared to file a lawsuit seeking declaratory and injunctive relief." *See generally id.*, pp. 11–13.

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70. No further communication was received from the Secretary, and, no necessary curative steps were taken by the Secretary to resolve the issues identified in the 90-Day Notice Letter.

IV. The Secretary Has Failed to Perform His Mandatory List Maintenance Duty Under the NVRA.

71. The Secretary is failing to perform his mandatory list-maintenance duty under the NVRA. In fact, the Secretary has essentially admitted as much to the Arizona Legislature. *See generally* Exhibit 2 (repeatedly admitting that various components of the NVRA-complaint list maintenance program are "in development").

72. To determine if the Secretary is accurately maintaining the voter file, one must first compare the total number of eligible voters in Arizona (U.S. Citizens over 18 years of age) against the number that are actually registered.

73. The number of *potentially* eligible Arizona voters is determined by the U.S. Census Bureau and the total number of *actually* registered voters is calculated by state data, as well as multiple national surveys.

74. If there are more registered voters than eligible voters—or if the percentage of registered voters exceeds agreed-upon levels of registration—it is reasonable to infer that the voter rolls contain voter records that should otherwise have been removed by the Secretary.[5]

75. When determining voter registration percentages, best practices require use of Vote Eligible Population ("VEP") or CVAP—meaning those who are legally about to cast a ballot—as opposed to using VAP, which simply looks at age.

[5] Providing voter registration percentages using inaccurate data points may appear to show NVRA-compliant list maintenance, when in fact this is not the case. For example, instead of including the CVAP in the calculation, an election official might include only VAP (this number would include non-citizens, who are not eligible to vote). Or, as opposed to including total registered voters, an election official might include only "active" registered voters—thus removing from the calculation the universe of inactive voters who are still on the jurisdiction's voter rolls. By comparing VAP (as opposed to CVAP) against active registrants (as opposed to total registrants), one can see what the percentage of registered *should be* (by removing likely-moved inactive voters and non-citizens), not what the percentage of total registered voters *actually is*. In fact, this is exactly what the Secretary already attempted to do. *See supra* § III (discussing the letters attached as "Exhibit 3" where the Secretary responded to Plaintiff's 90-day notice letter by citing misleading statistics).

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76. Arizona's CVAP is determined by the U.S. Census Bureau's American Community Survey ("ACS"). This information is gathered and released on a rolling basis. As of filing of this Complaint, three ACS data sets are probative in determining the number of individuals in Arizona who are both citizens and of voting age: (1) 2017 – 2021 ACS; (2) 2018 – 2022 ACS; and (3) 2022 ACS (limited to state-wide data and data for counties with populations exceeding 50,000).

77. According to the U.S. Census Bureau, Arizona state-wide CVAP is as follows: (1) 2017 – 2021 ACS: 5,000,102; (2) 2018 – 2022 ACS: 5,118,553; and (3) 2022 ACS: 5,322,581.

78. The number of registered voters in Arizona can be ascertained through multiple sources: (1) Data reported by the State; (2) the U.S. Census Bureau's Current Population Survey ("CPS"); and (3) the Cooperative Election Study ("CES") (both pre- and post-election surveys).

79. The data reported by the State purports to be *actual* registration numbers, as opposed to the CPS and CES survey *estimates*. The CPS and CES data sets are both reputable and highly regarded national surveys that have long determined the number of registered voters in a particular jurisdiction. The CPS and CES almost universally show lower numbers of registered voters than numbers reported by states—leading to the inference that actual numbers reported by states are inflated with voters who should otherwise not be in the state voter file. This is the case in Arizona.

80. The number of registered voters in Arizona is as follows: (1) State Data: 4,833,160[6]; (2) 2022 CPS: 3,560,000; (3) 2022 CES Pre-Election: 3,773,000; and (4) 2022 CES Post-Election: 4,333,000.

[6] As discussed *supra* § III, this number refers to the *total* number of registered voters, not the number of active registered voters. In most instances, when the Secretary reports voter registration numbers, it only includes *active*, not *total*, registered voters. Compare data reported on the Secretary's website, https://azsos.gov/elections/results-data/voter-registration-statistics, with EAVS data at https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_for_Public_Release_V1.xlsx.

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81. Comparing the number of Arizona registered voters against the various CVAP metrics, the voter registration rates in Arizona are as follows:

Arizona ACS and Sec. of State	**CPS and CES National Surveys**
2017-2021 ACS & 2022 AZ Sec. of State 4,833,160 registrants CVAP 5,000,102 **96.7% Registration**	2022 CPS 3,560,000 registrants 5.093MM CVAP (reported) **69.9% +/- 3.3% Registration**
2018-2022 ACS & 2022 AZ Sec. of State 4,833,160 registrants CVAP 5,118,553 **94.4% Registration**	2022 CES Pre-Election 3,773,000 estimated* registrants ACS 2022: 5,322,581 CVAP **70.9% Registration**
2022 ACS & 2022 AZ Sec. of State 4,833,160 registrants ACS 2022: 5,322,581 CVAP **90.8% Registration**	2022 CES Post-Election 4,333,000 estimated* registrants ACS 2022: 5,322,581 CVAP **81.4% Registration**

82. Historically, one of the primary criticisms of the CPS is that it *overreports* its numbers, including voter registration. Said differently—the CPS's voter registration percentages are typically *higher* than the official reported numbers. In fact, in describing the CPS's numbers the U.S. Census Bureau said, "[i]n general, sample surveys like the CPS tend to yield higher voting rates than official results."[7] This further casts doubt on the State's reported registration rates of 90.8%, 94.4%, and 96.7%—depending on which ACS metric the registration numbers are compared against. The 2022 CPS shows a 69.9% voter registration rate in Arizona.

83. From CPS, the *national* percent of registered voters of CVAP in 2022 is 69.1%.

[7] https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf

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84. Stated differently, the best available data indicates that the number of people on the official voter registration rolls in Arizona is 20 or more percentage points higher than the number actually eligible and registered in Arizona.

85. Regardless of the metrics used to determine voter registration percentages, except for Greenlee County, all Arizona counties have exceptionally high rates of registered voters when compared to CVAP.

86. In fact, multiple counties (Apache, La Paz, Navajo, and Santa Cruz) show an impossible number of registered voters—more registered voters than people who are eligible to be registered.

87. The remaining Arizona counties all have voter registration rates that significantly exceed national averages, and reputable survey averages, for Arizona—with many of the registration rates being in the mid-to-high 90% range.

88. When looking at the various ACS CVAP metrics, compared against the total number of registered voters as reported by the State via the ACS, the county-by-county breakdown is as follows:

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Table III.B.1 ACS CVAP by Vintage: 2017-2021, 2018-2022 and 2022 and Total Registered Voters[8]

Geography	2017-2021 5-year CVAP	2018-2022 5-year CVAP	2022 1-Year CVAP	A1a Total Registered "TREG"	%TREG of 17-21 CVAP	%TREG of 18-22 CVAP	%TREG of FY 2022 CVAP
Apache	48,002	48,085	48,096	56,461	117.6%	117.4%	117.4%
Cochise	93,080	94,116	94,779	87,376	93.9%	92.8%	92.2%
Coconino	111,746	111,990	112,684	105,278	94.2%	94.0%	93.4%
Gila	41,905	42,340	NA	38,087	90.9%	90.0%	NA
Graham	27,616	27,942	NA	22,469	81.4%	80.4%	NA
Greenlee	6,782	6,746	NA	5,164	76.1%	76.5%	NA
La Paz	13,014	12,681	NA	13,141	**101.0%**	**103.6%**	NA
Maricopa	2,998,592	3,079,626	3,218,330	2,939,138	98.0%	95.4%	91.3%
Mohave	169,576	172,944	181,825	161,847	95.4%	93.6%	89.0%
Navajo	77,149	78,419	80,594	77,286	**100.2%**	98.6%	95.9%
Pima	763,822	775,517	798,113	705,072	92.3%	90.9%	88.3%
Pinal	305,976	317,927	338,587	282,575	92.4%	88.9%	83.5%
Santa Cruz	28,562	28,834	NA	32,244	**112.9%**	**111.8%**	NA
Yavapai	188,873	192,907	201,459	187,587	99.3%	97.2%	93.1%
Yuma	125,407	128,479	130,763	119,435	95.2%	93.0%	91.3%
TOTAL AZ	**5,000,102**	**5,118,553**	**5,322,581**	**4,833,160**	**96.7%**	**94.4%**	**90.8%**

Source: https://data.census.gov/all?q=b05003

89. There is no evidence that these counties experienced above-average voter participation compared to the rest of the country or state. The only likely explanation for these discrepancies is substandard voter list maintenance by the Secretary.

90. There is also evidence that the Secretary has failed in his duty to remove deceased voters from the rolls under the NVRA.

91. During the Study Period, there were approximately 20,000 to 35,000 registered voters who died and were not removed from Arizona's voter rolls. This amounts to a removal shortage for deceased voters of 20%-35%.

92. Unlike the change-of-address procedure outlined in Section 8 of the NVRA, States are not required to wait to remove the names of deceased voters until a specified number of federal general elections has passed. *See* 52 U.S.C. 20507(c), (a)(4) (specifying a multistep process for change-of-address removals but not for deceased removals).

[8] Red and black represent higher values and green represents lower values. The colors do not convey that an estimate is acceptable or unacceptable, or one that complies with the NVRA.

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Deceased voters may lawfully be removed from the voter rolls as soon as the Secretary receives confirmation of the voter's death.

93. The significant discrepancy between the estimated total number of registered voter deaths and the reported number of removals because of death demonstrates that the Secretary has not taken reasonable efforts to develop a consistent program to remove deceased voters from the rolls.

94. Additionally, when it comes to voter registration confirmation notices sent out to confirm voter registration files, nearly all Arizona counties account for every notice letter sent out in EAVS (*i.e.*, returned as undeliverable, responded that moved, responded that still at address, etc.). Meaning that if a county sent out 10,000 notices, they have documented nearly 10,000 responses or actions taken from those notices. However, the lone outlier is Arizona's most populous county—Maricopa.

95. During the Study Period, Maricopa County EAVS data shows that 752,387 voter registration confirmation notices were sent to voters in Maricopa County to determine if they still lived at the location where they were registered to vote. The data shows that 131,682 voters were removed for various reasons from the notice batch, thus leaving at least 620,000 of the notice letters unaccounted-for in EAVS—the clear outlier of all Arizona counties.

96. Given that a minimum of 500,000 unaccounted-for voters remain on Arizona voter rolls (possibly as many as 1,270,000, depending on the data source)—and given that unremoved deaths only account for 22,000–35,000 voters, by excluding other likely causes—this data shows that the 500,000 unaccounted-for registered voters on Arizona's voter rolls is primarily attributable to voters moving out of Arizona or voters who failed to respond to confirmation notices. Said differently, no other category of possible removals has 500,000 possible removals to make-up the difference.

97. Quarterly, the Secretary is required to provide a report to the Senate President and Speaker of the House accounting for voter roll list maintenance in Arizona. In the reports submitted in the last four quarters—January 25, 2024; November 1, 2023; August

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1, 2023; and May 8, 2023—in lieu of providing clear and concise data outlining voter list maintenance procedures, the Secretary admitted the absence of a program, stating instead that the "process is in development" and providing no substantive information. *See generally* Exhibit 2.

98. The Secretary is also required to submit information regarding his voter list maintenance program to the EAC every two years in response to the EAVS. As described above, the information submitted for Maricopa County shows no voter responses or removals for over 620,000 voters who received notices attempting to confirm their continued eligibility. This omission is further evidence that the Secretary has not implemented a program to remove ineligible voters.

99. The NVRA requires that the Secretary adopt a "uniform" program for voter list maintenance in Arizona. *See* 52 U.S.C. § 20507(b)(1). The diverging voter registration and removal rates from county to county, along with the fact that Maricopa failed to account for 620,000 verification notices sent to registered voters in Arizona—as compared to other counties which did account for these notices—shows the Secretary has failed to implement a "uniform" list maintenance program as required by the NVRA.

100. The Secretary's failure to maintain accurate voter rolls and adopt a "uniform" program for voter list maintenance in Arizona violates federal law and jeopardizes the integrity of Arizona's upcoming elections.

CLAIM

Violation of Section 8(a)(4), 52 U.S.C. § 20507(a)(4)

101. Plaintiffs repeat and reallege each of their prior allegations.

102. Section 8(a)(4) of the NVRA requires that "each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant[.]" 52 U.S.C. § 20507(a)(4).

103. The Secretary has failed to make reasonable efforts to conduct voter list-maintenance as required by Section 8(a)(4) of the NVRA by failing to remove the names

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of deceased voters and the names of those voters who have moved to other jurisdictions.

104. Plaintiffs have suffered irreparable injuries as a direct result of the Secretary's failure to maintain accurate voter rolls that properly reflect the names of eligible voters because Plaintiffs' legitimate votes risk dilution any time an ineligible voter casts a ballot and inaccurate voter registration rolls undermine Plaintiffs' confidence in Arizona's electoral system.

105. Plaintiffs are also harmed as they are required to divert their resources to address issues caused by the Secretary's failure to maintain Arizona voter rolls in compliance with federal law.

106. Plaintiffs will continue to be injured by the Secretary's violations of Section 8(a)(4) of the NVRA until the Secretary is enjoined from violating the law and required to identify and remove the names of ineligible voters from the rolls.

107. Plaintiffs have no adequate remedy at law beyond the judicial relief sought here pursuant to the NVRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against the Secretary and provide the following relief:

A. A declaratory judgment that the Secretary is in violation of Section 8 of the NVRA;

B. An injunction requiring the Secretary to fully comply with any existing procedures that Arizona has in place to ensure ineligible voters are identified and removed from the rolls;

C. An injunction requiring the Secretary to develop and implement additional reasonable and effective registration list-maintenance programs to cure their failure to comply with Section 8 of the NVRA and to ensure that ineligible registrants are not on the voter rolls;

D. Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees; and

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E. All other further relief that Plaintiffs may be entitled to.

Respectfully submitted this 31st day of May, 2024.

HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC

By: */s/ Andrew Gould*

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/15/2024 1:34:29 PM
To: Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Gillian Feiner [Gillian@statesuniteddemocracy.org]
Subject: Stefanie Lambert developments -- privileged
Attachments: Tina Peters - Criminal Cases[2].docx; 2024-08-13 DC DQ Decision[15].pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Heather and Linus,

We wanted to share two updates with you about Stefanie Lambert.

The first is the conviction of Tina Peters, a Colorado county clerk with whom Lambert is affiliated, for allowing improper access to voting machinery after the 2020 election. DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

Second, Lambert was disqualified as counsel in the Dominion v. Byrne in the federal district court in DC. As the order notes, such a remedy is "extraordinary and rarely granted outside of cases involving conflicts of interest." (p. 1) Lambert's deliberate violations of the protective order there—by disseminating Dominion documents marked confidential—"raise[d] the serious concern that she became involved in this litigation for the sheer purpose of gaining access to and publicly sharing Dominion's protected discovery." (p. 2). DPP MCL 15.243(1)(m)

DPP MCL 15.243(1)(m)

As always, we're happy to discuss any of this.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION, **Plaintiffs,** **v.** **PATRICK BYRNE,** **Defendant.**	Civil Action No. 1:21-cv-02131 (CJN) (MAU)

MEMORANDUM OPINION

This case arises out of the 2020 U.S. election. Plaintiffs US Dominion Inc., Dominion Voting Systems Inc., and Dominion Voting Systems Corporation ("Dominion") sue Defendant Patrick Byrne ("Byrne") for defamation related to allegedly false statements Byrne made about Dominion's role in that election. Compl. (ECF No. 1) ¶¶ 152–163.[1] Among the statements at issue are those in which Byrne claimed that Dominion ran the 2020 election; Dominion technology was developed by Hugo Chavez in Venezuela; and that Dominion hired a truck to shred "3,000 pounds of ballots." ECF No. 33 at 34. Dominion asserts that these statements are false and not only harmed its reputation and business, but also resulted in serious threats to its employees, their families, and election workers. Compl. ¶¶ 126–51.

[1] The other cases that are consolidated or coordinated for discovery are: *Dominion, et al. v. Herring Networks, Inc., et al.* (21-cv-2130); *Dominion, et al. v. MyPillow, Inc., et al.* (21-cv-445); *Dominion, et al v. Powell, et al.* (21-cv-040); and *Dominion, et al. v. Giuliani* (21-cv-0213). The *Giuliani* case is stayed pending bankruptcy proceedings. For all citations not otherwise specified, the Court cites to docket entries in Case No. 21-cv-2131 and page numbers in ECF headers.

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This litigation has been ongoing for nearly three years and is currently in discovery. This dispute centers on that discovery process, specifically repeated instances of non-compliance with the Court's Orders governing the disclosure and use of discovery material. From June 2023 until March 2024, all counsel and Parties in the case (including Byrne) seemingly abided by the Amended Protective Order ("Protective Order") governing discovery. ECF No. 46. Before even her first appearance in this case on March 12, 2024, however, Byrne's new counsel, Stefanie Junttila [Lambert] ("Lambert"), began openly violating orders, including by disseminating protected discovery material. ECF Nos. 71; 75; 82; 102; 108; 113. Due to Lambert's actions, thousands of documents ("Dominion's Litigation Documents") which all Parties, including Byrne himself, had agreed to keep confidential, have now been shared widely in the public domain. Lambert and Byrne continue to evade the Protective Order and this Court's March 19, 2024 Order ("Status Quo Order") that prohibits further dissemination until resolution of this Motion. ECF Nos. 75; 77; 82; 102; 105; 108; 113.

Before the Court is Dominion's Emergency Motion for Protective Relief and to Disqualify Counsel. ECF No. 75. Although Byrne has violated the Protective Order as set forth below, the full scope of Byrne's actions is not yet known. And what, if any, sanction Dominion might seek against him is not before this Court at this time.[2] The only questions currently before the Court are whether Lambert violated court orders and rules, and if so, whether she should be disqualified from this case.

The remedy Dominion seeks, Lambert's disqualification from serving as Byrne's counsel in this case, is extraordinary and rarely granted outside of cases involving conflicts of interest.

[2] Dominion has reserved its right to seek additional sanctions against Byrne and requested additional discovery into his conduct, including what led to the ultimate disclosures.

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Nevertheless, the record clearly shows that Lambert deliberately violated multiple court rules and orders and continues to do so despite having had ample warning of the consequences and assuring the Court she would comply. Lambert's repeated misconduct raises the serious concern that she became involved in this litigation for the sheer purpose of gaining access to and publicly sharing Dominion's protected discovery. Because Lambert's "truly egregious misconduct" has already and will undoubtedly continue to "infect future proceedings," this is the rare case in which disqualification is warranted. *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984), *vacated on other grounds*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). Dominion's motion is **GRANTED**.

BACKGROUND

The relevant facts are largely undisputed.

Protective Order

The Court initially entered the Protective Order in three related cases (which are now coordinated or consolidated for discovery) on December 6, 2022. ECF No. 152 in Case No. 21-cv-445 (applying to Case Nos. 21-cv-445; 21-cv-213; and 21-cv-40). On June 8, 2023, Dominion and Byrne jointly moved the Court to enter the December 2022 Protective Order in this case. ECF No. 45. Per the stipulation, Byrne expressly agreed:

> The Order governs the handling of Discovery Materials within the Consolidated Cases and allows the parties to the Order to share Discovery Materials between those three actions—but prohibits persons or entities receiving Discovery Material produced in the Consolidated Cases *from using those Discovery Materials outside of those three cases, except as specifically provided by the Order*.

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Id. at 1–2 (emphasis added). Dominion and Byrne requested that the Protective Order be entered in this case to "facilitate . . . voluntary discovery coordination." *Id.* at 2. The Court granted the Parties' joint motion and entered the Protective Order in this case on June 16, 2023. ECF No. 46.[3]

The Protective Order states:

> 1. Any Discovery Material produced in the Litigation will be used, except by the Producing Party, *solely for purposes of this Litigation and no Receiving Party will provide Discovery Material to any person or entity (including for any other litigation) or make any Discovery Material public except as permitted by this Order and in this Litigation*.

ECF No. 75-7 ¶ 1 (emphasis added).

The Protective Order defines "Discovery Material" as:

> [D]ocuments, testimony (in any form whether by affidavit, declaration, or deposition), exhibits, transcripts, written discovery requests, interrogatory responses, responses to requests for admission, responses to requests for documents, and any other information or material produced, given, or exchanged, including any information contained therein or derived therefrom ("Discovery Material"), by or among any Party or non-Party providing Discovery Material (each a "Producing Party") in the Litigation to the party receiving the Discovery Material ("Receiving Party").

Id. at 4.

Within the broad prohibition against using any Discovery Material outside of the related litigation, the Protective Order contains additional protections and procedures for the use of Confidential and Attorneys' Eyes Only ("AEO") materials. ECF No. 75-5. The Protective Order also sets forth procedures for how a Party can seek to challenge designations or disclose discovery

[3] Dominion attached ECF No. 46 to the Motion at issue because it was the operative Protective Order at the time. ECF No. 75-7. On March 21, 2024, after Dominion filed its Motion, the Court entered an amended Protective Order to which all Parties agreed. ECF No. 79. The Protective Order at ECF No. 79 is now the operative Protective Order but does not alter the relevant provisions of the initial Protective Order that has governed Party conduct in this case since June 16, 2023. To avoid confusion, the Court will use the ECF citation and page numbers for ECF No. 75-7 when citing to the Protective Order going forward.

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notwithstanding the order. *Id.* ¶¶ 15, 16. Paragraph 16 sets forth procedures for a Party to object to the initial designation of discovery materials as protected. *Id.* ¶ 16. Specifically, it permits a Party to object to the designation of Discovery Material as Confidential or AEO by sending written notice to and meeting and conferring with the designating Party. *Id.* If this process does not resolve the issue, the objecting Party may file a motion with the Court to strike the designation within twenty-one days of the meet and confer. *Id.* Importantly, while the dispute is pending, the discovery materials "will be treated as Confidential or [AEO] pursuant to [the] order." *Id.*

Paragraph 15 allows a Party to object to the continued restriction on public access to confidential/AEO discovery materials:

> Any Party who objects to the continued restriction on public access to any Confidential or Attorneys' Eyes Only Filing, or any portion thereof, will give written notice of the objection to the Party that designated the Discovery Material as Confidential or Attorneys' Eyes Only ("the Designating Party"). To the extent that the Designating Party seeks to continue the restriction on public access to the Confidential or Attorneys' Eyes Only Filing, or any portion thereof, the Designating Party will file an application with the Court within seven (7) days for a judicial determination as to whether good cause exists for continued restricted access to the Confidential Filing, or any portion thereof.

Id. ¶ 15.

Paragraphs 8 and 9 permit Confidential and AEO material to be disclosed to certain people, some of whom must sign an Undertaking to gain access. *Id.* ¶¶ 8, 9. The Party "showing, providing, or disclosing Confidential or [AEO] Discovery Material to any person required to execute an undertaking . . . will be responsible for obtaining such signed undertaking." *Id.* ¶ 10.

Additionally, Paragraph 26 requires that if a person in possession of Confidential or AEO discovery materials that they did not produce receives a subpoena for those materials, they must: 1) give notice of the request to the designating party within three business days (or 24 hours if the subpoena deadline is sooner); and 2) "object to the production of the Confidential or [AEO]

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Discovery Material on the grounds of the existence of this Order." *Id.* ¶ 26. If the designating Party opposes enforcement of the demand, the burden of opposing the demand falls to them. *Id.* This provision does not require the person or Party who is subpoenaed to appeal an order enforcing the demand or to otherwise seek relief from compliance. *Id.*

If a Party discloses discovery in violation of the Protective Order, the breaching Party must "immediately inform the Designating and Producing Party" and provide an accounting of the disclosure. *Id.* ¶ 27. Additionally, the order allows a non-breaching Party to seek sanctions against a breaching Party. *Id.* ¶ 29 ("If a Party violates this Order by releasing, leaking, or otherwise disclosing Confidential or [AEO] Discovery Material to persons or entities not entitled to such Discovery Material under this Order, the Court will have authority to impose sanctions under Rule 37(b)(2)(A)(i)–(vi).").[4]

According to Dominion, the Parties negotiated the Protective Order "[g]iven the national security concerns regarding voting machine information and the personal security concerns for Dominion employees—many of whom have been the subject of threats in the past." ECF No. 75 at 7. This concern is one of the reasons why the Protective Order applies to all discovery produced in this litigation regardless of whether it is stamped "confidential" or "[AEO]." ECF No. 75-7 ¶ 1; *id.* at 3–4 (other justifications for the Parties' Protective Order included their "belie[f] that certain information they have produced or will produce may contain information that is proprietary, commercially sensitive, or non-public"). Significantly, after stipulating to it, Byrne

[4] As the plain language of Fed. R. Civ. P. 37(b)(2)(A)(i)–(vi) permits sanctions against *parties* for discovery-related misconduct or disputes, Dominion relies in this Motion on the Court's inherent authority to regulate counsel before it.

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never objected to the Protective Order. He never asked the Court to amend or lift the Protective Order until after he and Lambert began disclosing Dominion's Litigation Documents.[5]

In addition to the Protective Order governing all party discovery, Dominion sought and obtained another protective order in the *MyPillow* litigation specifically related to third-party discovery. *See* ECF Nos. 145; 147; 149; 153; 154; 156; 157; 159 in Case No. 21-cv-445. This was "in response to certain third party subpoenas issued by Defendants Michael J. Lindell and MyPillow, Inc." ECF No. 145 at 1 in Case No. 21-cv-445. After several rounds of briefing, the Court entered the separate protective order governing third-party subpoenas in the *MyPillow* litigation ("Third-Party Protective Order"). ECF No. 159 in Case No. 21-cv-445.

Lambert Enters the Case

Lambert first formally entered her appearance as Byrne's counsel on March 12, 2024. ECF No. 71. Byrne's prior counsel, attorneys at McGlinchey Stafford PLLC ("McGlinchey"), withdrew the same day. ECF No. 72. Although Lambert did not appear in the case until March 2024, it is undisputed that she had been working with Byrne and his team for some time prior to that date, unbeknownst to Dominion. ECF No. 75 at 3. McGlinchey and Lambert have both acknowledged that Lambert "had access to Confidential Discovery Material as an attorney for Patrick Byrne who was assisting in this litigation" prior to her formal entry of appearance in March 2024. ECF No. 75-8 at 2. Neither Lambert nor McGlinchey has provided an exact date for when Lambert began serving as Byrne's attorney in this matter. That said, the record is clear that McGlinchey gave Lambert access to Dominion's Litigation Documents after she signed the Undertaking pursuant to the Protective Order on December 12, 2023. ECF Nos. 75-9; 103 at 27:10–19. In signing the Undertaking, Lambert guaranteed that she had "read the Protective Order

[5] Byrne filed a Motion to Lift Protective Order on April 18, 2024. ECF No. 90.

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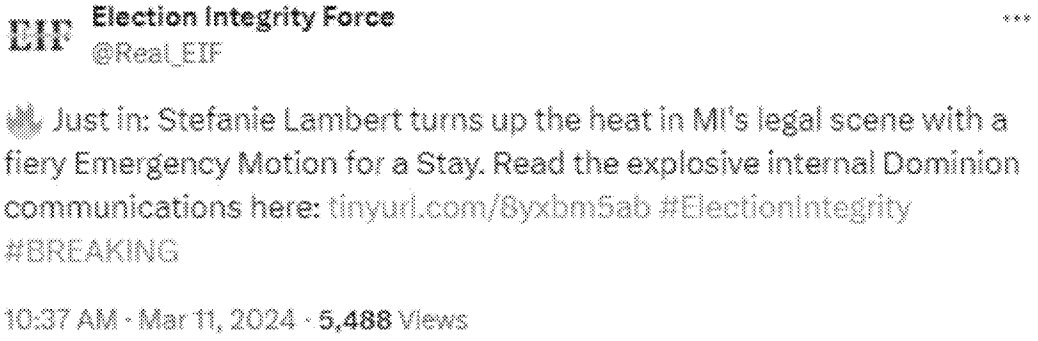
of June 16, 2023," and would "undertake to access and use Discovery Material, Confidential Material, and Attorneys Eyes Only Material *only as the Order permits*." ECF No. 75-9 (emphasis added). Lambert does not dispute that she executed the Undertaking months before she disclosed the documents in March 2024. ECF No. 103 at 58:25–59:6.

Dominion did not have notice that Lambert had access to its discovery and had signed the Undertaking until McGlinchey notified Dominion of the alleged breach on March 11, 2024. ECF Nos. 75-8 at 2; 78 at 20:13–17 ("MS. LAMBERT JUNTTILA: And for the record, your Honor, I did not provide that [the Undertaking] to counsel. That must have been provided by Mr. Byrne's previous counsel."). In fact, it appears that Dominion did not even know Lambert was involved in this case until after she had released countless Dominion discovery documents to a third party and inflicted damage Dominion could not undo. ECF Nos. 75 at 3; 75-8 at 2.

Lambert Publicly Disseminates Confidential Discovery Material

On March 11, 2024, McGlinchey notified Dominion that Lambert had publicly disclosed its discovery. ECF No. 75-8 at 2. McGlinchey told Dominion "[w]e had no advance knowledge of this use. We only became aware of the public disclosure by virtue of the below tweet." *Id.*



Id. McGlinchey notified Dominion that Lambert had disclosed Dominion's Litigation Documents in two ways. First, Lambert included the documents in a public filing as part of a Michigan criminal case in which she had been indicted on four felony counts related to the 2020 U.S.

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election. *Id.* (citing *People of the State of Michigan v. Stefanie Lynn Lambert Junttila*, Michigan Case No. 2023-285759-FH).[6] Lambert filed a *pro se* motion in that case on March 8, 2024 and attached Dominion's Litigation Documents as an exhibit. *Id.* at 5–63. Second, Lambert shared the documents with Barry County, Michigan Sheriff Dar Leaf ("Leaf"), an individual who has no role in this litigation, who went on to disseminate and discuss the documents in public. *Id.* at 2.

That same day, March 11, 2024, Dominion counsel responded to McGlinchey to request more information on the breach and to confirm that Lambert no longer had access to Dominion's Litigation Documents. ECF No. 75 at 11–12. McGlinchey withdrew from the case before responding. *Id.* When Lambert entered her appearance, Dominion counsel emailed Lambert and McGlinchey to again request information about the scope of the breach. *Id.* at 12. Lambert responded, but refused to provide the requested information. ECF No. 75-3. Instead, she wrote:

> Hi [Dominion Counsel],
>
> I had assumed that you, as counsel, were unaware of the criminal acts contained in discovery. These acts include, but are not limited to, perjury, fraud is [sic] services, wire fraud, and international interference in an election.
>
> If you were aware of the criminal acts, I will need to address fraud on the court and potentially accessory after the fact with threats of violating a protective order that does not extend to criminal acts committed by your client.
>
> My client insisted the evidence of criminal acts be provided to law enforcement.
>
> I'm happy to address this with the court.
>
> Please let me know if you need anything else.

---

[6] Lambert currently faces two sets of felony criminal charges in Michigan for allegedly attempting to interfere with voting equipment. On August 3, 2023, Lambert was indicted in Muskegon County, Michigan on four felony charges related to alleged tampering with voting systems following the 2020 U.S. election. ECF Nos. 75 at 14, 75-17, 75-18. Then, on May 8, 2024, Lambert and her client, Stephanie Scott, a clerk in Adams Township, Michigan, were indicted on felony charges related to allegedly "mishandling voter data without authorization in search of fraud." ECF Nos. 102-16 at 5; 101-1 at 1. Lambert's conduct described above occurred in the first of these criminal cases against her.

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Sincerely,
Stefanie

Id.

Neither Lambert nor McGlinchey gave Dominion information about the scope of the alleged breach or provided any assurances that Lambert could no longer access Dominion's Litigation Documents. *Id.* On March 14, 2024, Dominion counsel sent letters to managers of document databases that Byrne used for discovery, with a copy to Lambert. ECF Nos. 75-13; 75-14. Dominion notified those database managers of Lambert and Byrne's alleged breach and requested that the managers not allow Byrne and his legal team to access Dominion's Litigation Documents. ECF Nos. 75-13; 75-14. Lambert wrote the database managers on March 15, 2024 and insisted on maintaining access. ECF Nos. 75-15; 75-16. Lambert threatened that "any entity that collaborates with [Dominion] to withhold discovery and to interfere with the disclosure of evidence in the case would be obstructing justice, and would therefore be accessories after the fact to criminal acts." ECF Nos. 75-15; 75-16.

Between December 12, 2023 when Lambert signed the Undertaking and March 12, 2024, Lambert made no effort to raise with Dominion or the Court that she believed the documents were evidence of the "most serious national security crimes that have ever been committed on U.S. soil," as she now claims. ECF No. 103 at 35:7–9, 29:24–25, 46:6–8. Nor did she notify Dominion or the Court that she intended to turn over this "evidence" to "law enforcement[,]" referring to Leaf. *Id.* at 40:17–22 ("Everyone can go to law enforcement and report crimes, and I have an oath and obligation to do that."), 59:11–18. McGlinchey confirmed at the May 16, 2024 hearing ("May Hearing") that, while serving as Byrne's prior counsel, it never sought to lift the Protective Order,

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to de-designate any documents that were protected under the Order, or to "seek any relief whatsoever from the [P]rotective [O]rder on behalf of Mr. Byrne." *Id.* at 29:7–13.

Instead, Lambert and Byrne unilaterally decided to disclose thousands, if not millions, of Dominion's Litigation Documents to third parties and then promote the public dissemination of the documents through those third parties. *See generally* ECF Nos. 75; 82; 102; 108; 113.

Dominion's Motion and the March 2024 Hearing

On March 12, 2024, Dominion notified the Court of Lambert and Byrne's alleged breaches and sought the Court's permission to raise this issue at a forthcoming discovery hearing on March 18, 2024 ("March Hearing"). On March 15, 2024, Dominion filed this Motion. ECF No. 75. Dominion only sought relief based on Lambert's actions, but reserved the right to seek additional sanctions based on Byrne's conduct. *Id.* On March 18, 2024, Lambert filed an opposition on behalf of Byrne, shortly before the March Hearing. ECF No. 76. Although Byrne reserved the right to supplement his response, he did not file a timely supplement or seek leave to file a supplement out of time. On March 22, 2024, Dominion filed its Reply. ECF No. 82. Byrne then waited more than a month and ultimately sought leave to file a Sur-Reply on April 24, 2024. ECF No. 93. Over Dominion's objection, the Court granted Byrne's request for leave to file a Sur-Reply. ECF No. 97.

Hours before the March Hearing, Lambert posted the following on X:

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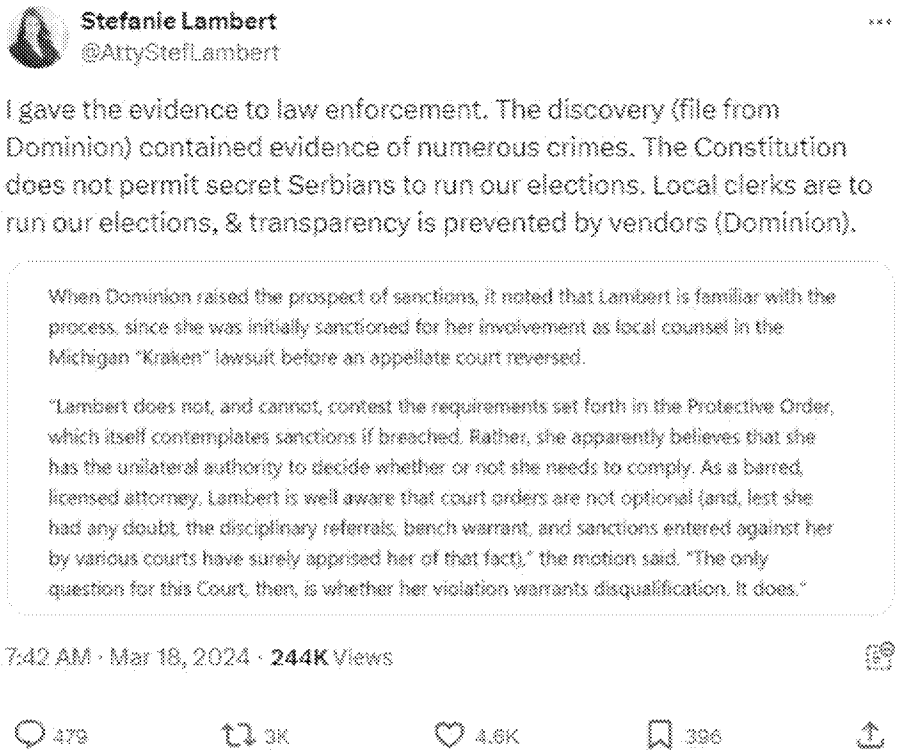

ECF No. 82-5.

At the March Hearing, Lambert did not dispute that she: 1) signed an Undertaking verifying that she would comply with the Protective Order; 2) gained access to Dominion's Litigation Documents; and 3) disseminated those documents in the manner Dominion alleged. ECF No. 78 at 18:1–15, 19:8–25:18. She also disclosed details about the scope of her alleged breach for the first time. *Id.* at 31:19–32:4. She reported that she not only gave Leaf documents, but that she also *gave him a username and password to the entire repository of Dominion's Litigation Documents*. *Id.* Lambert did not represent that she asked Leaf to sign an Undertaking pursuant to the Protective Order.

After Leaf gained access to Dominion's Litigation Documents, Leaf created an X (formerly Twitter) account and shared links so that the public could download the documents. ECF No. 82 at 6–7. Leaf's posts sharing the documents remain publicly available. ECF No. 103 at 18:3–12,

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51:4–7. Leaf also sent a letter to House Judiciary Committee Chair Jim Jordan (R-OH) asking him to investigate Dominion's alleged illegal acts. ECF No. 82-6. As of the date Dominion filed its Reply on March 22, 2024, Leaf's post with this letter and the link to "Traunche [sic] One" had been viewed 473,000 times. ECF No. 82 at 8. According to Lambert, Byrne had reportedly also provided Dominion's Litigation Documents to a U.S. Attorney and possibly others. ECF No. 78 at 23:21–24:5. Although Lambert claimed she did not know the full extent of Byrne's actions, it became apparent that her accounting to the Court of her own actions was incomplete as well. *Id.* at 23:21–24:25.

Importantly, at no point did Lambert herself notify the Court, Dominion counsel, or McGlinchey that she intended to or had already disclosed Dominion's Litigation Documents.

Status Quo Order

At the March Hearing, the Court ordered temporary protective relief to prevent any further dissemination of Dominion's Litigation Documents and other discovery while the Court considered this Motion. ECF No. 77. Among other things, the Court ordered Byrne and Lambert to "*immediately desist from sharing, distributing, providing access to or discussing any discovery material*" received in this case and the consolidated/coordinated cases. *Id.* ¶ 1 (emphasis added). The Court ordered Lambert to ensure that any individual who had access to Dominion's Litigation Documents or notes Lambert took on them not access or disseminate those materials, and that she sequester and secure the documents and any of her notes. *Id.* ¶¶ 4. 6. The Court ordered Lambert to "immediately confer with her counsel" in her Michigan criminal case regarding Dominion's Litigation Documents and "undertake every reasonable effort to remove such documents from the public record and file them under seal instead." *Id.* ¶ 3.

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Further, the Court ordered Lambert, Byrne, and McGlinchey to "preserve all documents and communications relating to the issues raised by Dominion's motion, including but not limited to, the release of any Dominion Litigation Documents in this case to any other entity or individual." *Id.* ¶ 7. Additionally, the Court ordered that, if Dominion's Litigation Documents existed in any form not already accounted for, including with any "associate or affiliate" of Lambert or Byrne, the "relevant party, party's attorney, or party's former attorney must immediately notify the Court." *Id.* ¶ 6.

Finally, the Court ordered that Byrne and Lambert file a "verification . . . that they have and will comply with each of their obligations in this Order until further Order of the Court" no later than March 21, 2024 at 5:00 PM EST. *Id.* ¶ 8. Both of them missed this deadline. *See generally* Docket in Case No. 21-cv-2131. On March 22, 2024, after the deadline had passed, Byrne and Lambert sought to extend the deadline to file their verifications. ECF No. 81. Byrne and Lambert asked the Court to extend this deadline to 5:00 PM on March 26, 2024. *Id.* The Court granted Byrne and Lambert's request but set the deadline at 12:00 PM on March 26, 2024. Again, Byrne and Lambert missed not only the Court-ordered deadline of 12:00 PM, but also their requested deadline of 5:00 PM. Lambert and Byrne did not file the verifications until 8:55 PM that day. Receipt for ECF No. 84. Though belated, Lambert and Byrne submitted statements in which each "verif[ied] that [they] have and will comply with the obligations set forth in the Court's March 19, 2024 Order (Docket No. 77) until further Order of the Court." ECF No. 84.

Conduct After the March Hearing

Neither the Court's March Hearing nor the Status Quo Order deterred Lambert or Byrne's continued misconduct. Lambert and Byrne continued to discuss and disseminate the documents

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and, in some cases, actively sponsored others' dissemination of the documents.[7] For example, on March 19, 2024, the day after the March Hearing, Lambert made the following statements to ABC News:

> There was no leak of data . . . I provided evidence of criminal acts to law enforcement. *The Dominion file contained evidence of perjury by John Poulos, Dominion CEO, Honest Service Fraud, Wire fraud, etc.* I'm on my way back to Michigan, and I look forward to truth and transparency for everyone.

ECF No. 82 at 14, n.2 (emphasis added).[8]

Moreover, on March 22, 2024, Lambert appeared alongside Leaf on an interview that was posted on X. *Id.* at 14. During the episode of Joe Oltmann's podcast with Conservative Daily News, Oltmann encouraged all listeners to download the Dominion documents Lambert had released to Leaf and send them to every county in the United States. ECF No. 103 at 13:3–17. As Dominion counsel recounted at the May Hearing:

> [O]n March 22nd, Ms. Lambert sat for an interview on Joe Oltmann Live, and, in that interview, Mr. Oltmann turns to her at 42:25 and he says, 'We have evidence from Dar Leaf, and way more that has not been released,' and when he starts to discuss the evidence, he hesitates and he turns to Ms. Lambert and he says, quote, 'Stefanie, I didn't get it from you, I got it from Twitter, X,' end quote. And Ms. Lambert does nothing to stop him from then launching into a discussion of the documents. In fact, Ms. Lambert follows up by telling Mr. Oltmann that he should have Dar on the show himself, because he can go through the investigation. And when Mr. Oltmann asks Ms. Lambert if Sheriff Dar Leaf is allowed to discuss his investigation and evidence, Lambert says, 'Sheriff Dar Leaf can do whatever he wants, it's his investigation.'

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[7] At the May Hearing, Dominion chronicled instances in which Lambert and Byrne continued to share and discuss the documents after the Status Quo Order. ECF Nos. 103 at 12–13; 102-3; 102-12; 102-13; 102-14; 102-15. Lambert and Byrne do not dispute the authenticity of their posts; they merely argue their conduct is permissible. *See e.g.*, ECF No. 103 at 34:17–25.

[8] "Laura Romero and Luke Barr, *Pro-Trump lawyer arrested on warrant after court hearing in separate case on Dominion leaks*, ABC News, https://abcnews.go.com/US/lawyer-election-denier-center-dominion-voting-systems-leak/story?id=108270385 (March 19, 2024)."

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ECF Nos. 103 at 13:3–17; 102-9 at 29. After the Court gave her ample opportunity to explain her conduct, Lambert never contested that she made or shared any of the posts at issue, participated in any of the interviews, or otherwise engaged in the conduct that Dominion asserts violates the Protective and Status Quo Orders. No. 103 at 34:2–25.

Further, Lambert did not remove or make any meaningful attempt to file under seal the copies of Dominion's Litigation Documents that she had attached to a publicly-available *pro se* filing in one of her Michigan criminal cases. ECF Nos. 77 ¶ 3; 103 at 10:1–11:12. Lambert claimed that she raised the issue with her counsel, Daniel Hartman ("Hartman"), but that Hartman "stated that he could not ask the Court in good faith, that the documents contained some of the serious crimes in national history and are a matter of national security." ECF No. 103 at 29:20–25, 30:4–15. Lambert did not inform the Court that she failed to comply with this requirement.

For his part, Byrne reposted and continued to emphasize posts on X about Dominion's Litigation Documents despite also promising that he would comply with the Status Quo Order. On March 18, 2024, he shared Leaf's letter to Rep. Jordan that referenced the documents:

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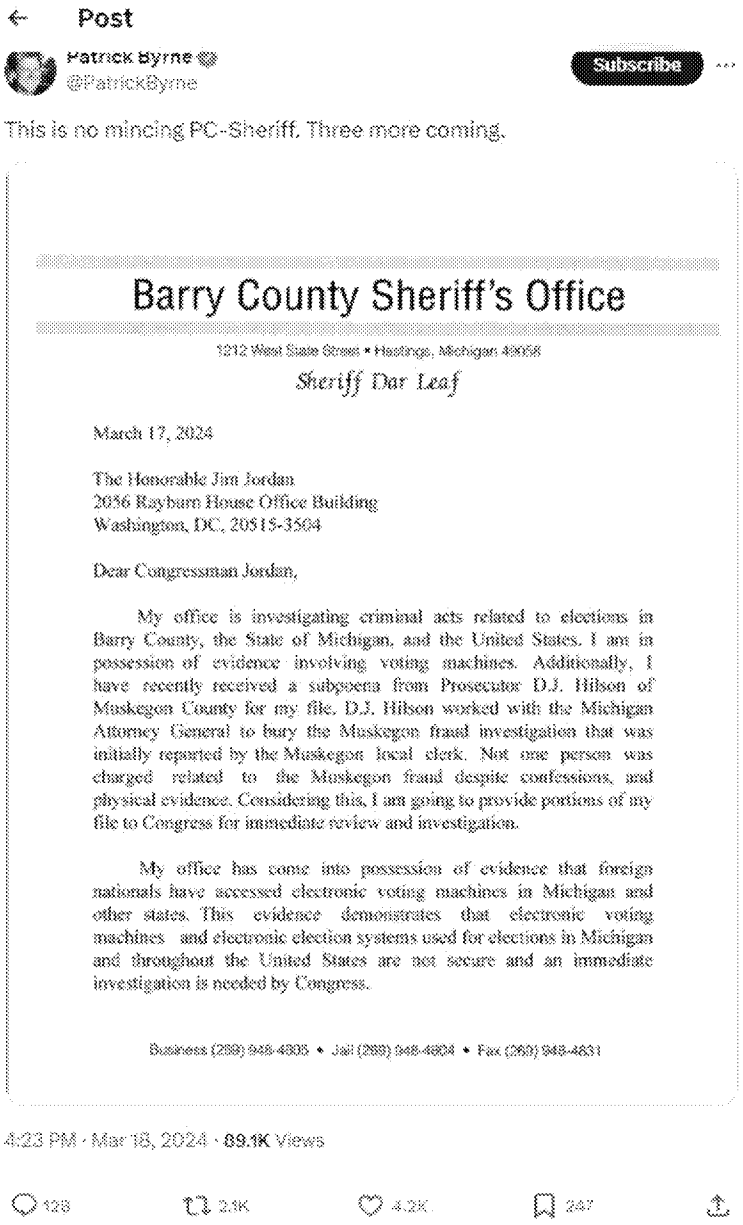

← Post

Patrick Byrne
@PatrickByrne

Subscribe

This is no mincing PC-Sheriff. Three more coming.

Barry County Sheriff's Office

1212 West State Street • Hastings, Michigan 49058

Sheriff Dar Leaf

March 17, 2024

The Honorable Jim Jordan
2056 Rayburn House Office Building
Washington, DC, 20515-3504

Dear Congressman Jordan,

My office is investigating criminal acts related to elections in Barry County, the State of Michigan, and the United States. I am in possession of evidence involving voting machines. Additionally, I have recently received a subpoena from Prosecutor D.J. Hilson of Muskegon County for my file. D.J. Hilson worked with the Michigan Attorney General to bury the Muskegon fraud investigation that was initially reported by the Muskegon local clerk. Not one person was charged related to the Muskegon fraud despite confessions, and physical evidence. Considering this, I am going to provide portions of my file to Congress for immediate review and investigation.

My office has come into possession of evidence that foreign nationals have accessed electronic voting machines in Michigan and other states. This evidence demonstrates that electronic voting machines and electronic election systems used for elections in Michigan and throughout the United States are not secure and an immediate investigation is needed by Congress.

Business (269) 948-4805 • Jail (269) 948-4804 • Fax (269) 948-4831

4:23 PM · Mar 18, 2024 · 89.1K Views

128 2.1K 4.2K 247

ECF No. 82-6.

On March 19, 2024, Byrne reposted a video on X that was originally posted by Tina Peters ("Peters"), a former County Clerk of Mesa County, Colorado who was indicted for allowing unauthorized access to Dominion machines.[9] ECF No. 82-10. In that post, Peters used the name

[9] Although the Court does not grant Dominion leave to file a third supplement, the Court acknowledges that Dominion alleges that in addition to representing Lambert in one of her criminal

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and photo of a Dominion employee in Belgrade, Serbia. *Id.* Dominion asserts, and Lambert does not dispute, that this is a reference to Dominion's Litigation Documents. ECF No. 82 at 12.

On March 20, 2024, Byrne shared another post on X that named a Serbian Dominion employee and claimed connections between Dominion, vote counting software, and Serbia. ECF No. 82-12. Shortly after, Byrne responded to another X post about the source code protocol entered in this case. ECF No. 82-13 (Byrne: "And what is going to be REALLY interesting is comparing that code to the SmartMatics [sic] source code. If only we could get it.").

May Hearing

On May 16, 2024, the Court held a hearing to entertain more fulsome argument on Dominion's Motion, which had not been fully briefed at the time of the March Hearing. At the May Hearing, Dominion chronicled Lambert and Byrne's actions and argued that Lambert's actions violated the Protective and Status Quo Orders and her ethical obligations as Byrne's counsel. ECF No. 102. This included a detailed presentation in which Dominion offered a timeline of Lambert and Byrne's misconduct using social media posts, interviews and other statements. *Id.*[10] Although Lambert disagreed about Dominion's characterizations of these actions, she did not dispute either the underlying conduct or the authenticity of any of the documents Dominion cited in its presentation. ECF No. 103 at 33:10–35:24.

The Court reminded Byrne and Lambert that the Status Quo Order expressly prohibits them from "sharing, distributing, providing access to or discussing any discovery material received" from Dominion in this case. ECF No. 103 at 60:11–62:25. The Court made clear that the

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cases, Hartman also represents Peters in her Colorado criminal case and has allegedly sought to introduce Dominion's Litigation Documents as evidence in that case. ECF No. 122.

[10] The Court ordered Dominion to file its presentation and supporting evidence on the docket by the end of the following day. ECF Nos. 102-1; 103 at 65:13–66:6.

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"discovery material" referenced in the Status Quo Order is the same broad definition of discovery material in the Protective Order. *Id.* The Court confirmed with both Byrne and Lambert on the record that they understood these orders and would comply with them, especially the provisions prohibiting them from sharing, disseminating, or discussing discovery material. *Id.* Both Lambert and Byrne agreed. *Id.* The Court also gave both of them multiple opportunities to ask questions about the scope of the orders. *Id.* Lambert had no questions. *Id.* The only question from Byrne was what he should do if he "is requested by Congress or the DOJ or law enforcement to cooperate with an investigation." *Id.* at 62:12–14. The Court reiterated that Byrne and Lambert must come to this Court first. *Id.* at 62:15–18. The Court warned the Parties that some of the actions purportedly taken in the name of law enforcement "aren't entirely supported" and reiterated that they "need to follow the strict guidelines of Judge Nichols' order to come to the Court if there are any such requests." *Id.* at 62:15–23. Lambert thanked the Court and neither Lambert nor Byrne had any additional questions or apparent reservations. *Id.* at 62:24.

Conduct After the May Hearing

Despite assuring the Court that they understood and would comply with all of its orders, Lambert and Byrne continued to disregard them.

For example, the morning after the May Hearing, Byrne shared a post on social media that included screenshots and discussions of Dominion's Litigation Documents. ECF No. 105.[11] On May 21, 2024, Dominion notified the Court of Byrne's actions. *Id.* On May 28, 2024, Lambert

[11] In the post, the user claimed that Dominion "*authenticated* all of the data released by @SheriffLeaf" in the May Hearing and included screenshots of Dominion's Litigation Documents. ECF No. 105 at 3 n.1 (https://x.com/pjcolbeck/status/1791259014124187903), n.2 (https://x.com/PatrickByrne/status/1791344198215500027), 4 n.3 (https://x.com/pjcolbeck/status/1791290146647593410).

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submitted a response on Byrne's behalf. ECF No. 106. Lambert did not dispute that Byrne shared the posts containing Dominion's Litigation Documents, instead arguing:

> Dr. Byrne's posts were nothing more than the reposting of information that had already been posted, and did not constitute a violation of this Court's orders, precisely because the orders [sic] did not disseminate further information beyond that which the Court has already taken account of in its previous orders . . . *Dr. Byrne did not post any new information, and the reposts constituted information that was already in the public sphere*. Thus, not only has Mr. Byrne not violated the court's direct orders, but he has also not disseminated or published any *new information* in contravention thereof.

Id. at 1–2 (emphasis added).[12]

In other words, because the documents were already in the public domain *due to Lambert's own unilateral actions*, Lambert argued that they were no longer subject to the strictures of the Protective Order. In making the argument, Lambert relied on an exception to the Protective Order that did not exist. Nothing in the Court's Status Quo or Protective Orders shields a Party from sanctions for reposting or sharing documents already made public due to that Party's own violation of those Orders. Moreover, Lambert did not come to the Court to raise this question despite promising to do so at the May Hearing. ECF No. 103 at 44:6–22, 45:14–23, 46:3–12. Instead, she continued to assert a right to decide unliterally when she and Byrne could share Dominion's Litigation Documents notwithstanding repeated Court Orders to the contrary.

Lambert did not stop there. In addition to attempting to excuse Byrne's violations of Court orders after the May Hearing, Lambert continues to attempt to disclose Dominion's Litigation Documents and other discovery herself. ECF Nos. 108; 113. These events are described in

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[12] Lambert claims that Dominion "previously sent only to the Court" its "notice of filing of a letter" raising this alleged violation. ECF No. 106 at 2. This is incorrect, as the ECF receipt from Dominion's filing shows Lambert received notice of the letter. Receipt for ECF No. 104. The Clerk rejected Dominion's initial filing for being in the wrong format—a letter instead of a motion—and instructed it to refile, which it did the following day. ECF Nos. 104; 105.

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Dominion's July 5, 2024 Motion to Enforce the Protective and Status Quo Orders ("Motion to Enforce") and its July 23, 2024 Supplement to its underlying Motion for Protective Relief and to Disqualify Counsel and Motion to Enforce ("Supplement"). ECF Nos. 108; 113. Notably, Byrne and Lambert do not dispute the facts in these briefs.[13]

First, Lambert attempted or threatened to disclose Dominion's Litigation Documents in response to a subpoena in Colorado's criminal case against Peters, *State of Colorado v. Tina Peters*, Case No. 2022-CR-371 (Colo. Dist. Ct.) ("Peters Criminal Case"). ECF No. 108 at 2. On July 1, 2024, Lambert notified Dominion that Peters' attorney subpoenaed Lambert to testify and produce documents in the Peters Criminal Case. *Id.* Paragraph 26 of the Protective Order sets forth procedures for how a Party must handle such a request. ECF No. 75-7 ¶ 26. Dominion responded and asked Lambert to confirm that she and her client would abide by the Protective and Status Quo Orders and not produce documents or other discovery materials to anyone. ECF No. 108 at 3. Lambert disagreed with Dominion's reading of the Protective Order and asserted that it was up to *Dominion* to file objections to the subpoena within forty-eight hours if it wanted to halt her compliance. *Id.* Dominion again pointed Lambert to the plain language of the Protective Order and asked her to confirm that she would comply with the requirement that she object to the subpoena. *Id.* Lambert repeatedly refused to confirm that she had and would comply with her obligations to object. *Id.* at 4. During these email exchanges, Lambert also argued that the

[13] In a one-page response to ECF No. 108, Lambert merely claimed that Dominion fails to request any new relief in its Motion to Enforce; she does not rebut any of the factual grounds for Dominion's Motion. ECF No. 111. Even though she gave no justification for her request, the Court permitted Lambert to file a sur-reply to ECF No. 108 by July 26, 2024. Lambert belatedly filed the sur-reply and vaguely asserted she has and would comply with the Court's Orders but refused to provide confirmation based on privilege. ECF No. 117. The Court permitted Lambert to file a response to Dominion's supplement at ECF No. 113 by July 26, 2024, but Lambert did not file any response, seek any extension, or otherwise indicate she would respond. 07/23/2024 Minute Order.

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materials were improperly labeled confidential or AEO, though she had not previously raised that argument in accordance with the process set forth in the Protective Order. ECF No. 108-12.

Second, Lambert attempted to disclose deposition testimony from Dominion CEO John Poulos ("Poulos") in response to a request from a Michigan State Representative, James DeSana. ECF No. 113 at 7–8. On July 12, 2024, Lambert notified Dominion that she received a request from DeSana for Poulos' deposition testimony. *Id.* Dominion objected to Lambert sharing the testimony on the same grounds as the first subpoena, as depositions clearly fall within the definition of protected discovery materials in the Protective Order. *Id.* In response, Lambert asserted that this situation was different as it was "not a person requesting the transcript in his individual capacity. This is a request by the government. The Michigan legislature." *Id.* She also asked Dominion to specify which portions of the deposition it objected to her sharing with DeSana, evidently still contesting that the Protective and Status Quo Orders apply to all discovery materials, despite the Court ordering otherwise. ECF No. 113-9 at 2–3.

As Dominion lays out in its Supplement, this request does not appear to be from the Michigan Legislature through any formal process or request, but instead is an email from an individual legislator. ECF No. 113.[14] Dominion also pointed out that even if the request were from a member of the government, that would not "vitiate" the Protective and Status Quo Orders, as the Court expressly warned at the May Hearing. *Id.*; ECF No. 103 at 62:12–24. Because Lambert again would not confirm that she would comply with the Protective Order and object to the subpoena, Dominion sought the Court's assistance on July 12, 2024. The Court entered a minute order reiterating what it had previously ordered: that no discovery materials may be shared

[14] Dominion points out that the Michigan Attorney General already dismissed a request by DeSana and others for the Attorney General to bring a criminal complaint against Dominion three months before. ECF No. 113 at 8.

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to unauthorized individuals without expressly obtaining the Court's permission. 07/12/2024 Minute Order. The Court expressly prohibited Lambert from sharing Poulos' deposition with DeSana without obtaining Court approval. *Id.* Lambert has not filed any request to lift the Protective and Status Quo Orders for this purpose.[15]

Finally, it recently came to light that John Case ("Case"), another attorney who represents Peters in the Peters Criminal Case, is also assisting Lambert with Byrne's defense in this case. ECF No. 113 at 3. Lambert never notified Dominion or the Court that Case is at all involved in this litigation. Dominion discovered this fact for the first time because Case filed a declaration in the Peters Criminal Case on July 10, 2024 stating:

> I am assisting Stefanie Lambert in her defense of Patrick Byrne in 1:21-cv-02131. I signed Exhibit A to Protective Order, the "Undertaking" in which I agreed to "access and use Discovery Material, Confidential Material, and Attorneys Eyes Only Material only as the [Protective] Order permits." I reviewed emails produced by Dominion in 1:21-cv-02131. The emails appear to be mis-labeled "Confidential," because their contents do not meet the definition of "Confidential Material" in paragraph 2 of the Protective Order 6/16/23.

ECF No. 113-4 at 3. Lambert refused Dominion's request for information about when Case joined Byrne's defense and what discovery he has accessed because of "privilege/work product." ECF No. 113-5. She even objected to providing the Undertaking that Case supposedly signed to gain access Dominion's Litigation Documents. *Id.* Nor has Lambert provided any details to the Court about Case's involvement, despite the Court directly requiring Lambert to give a full accounting of who had access to Dominion's Litigation Documents. ECF Nos. 77 ¶¶ 1, 6; 78 at 35:8–36:16.

Case's involvement in this litigation is not only striking because Lambert hid this information from the Court. Case has also attempted to use processes from other judicial

[15] Instead, on July 19, 2024, Lambert filed a motion for leave to file an emergency motion to lift the Protective Order for the specific purpose of producing documents in the Peters Criminal Case. ECF Nos. 110 (not attaching the proposed motion to her filing); 116.

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proceedings, such as the Peters Criminal Case, to access and release Dominion's discovery materials from this litigation. ECF No. 113 at 3. This includes the subpoena to Lambert that is the subject of Dominion's Motion to Enforce. ECF No. 108. In summary, while Case is ostensibly working with Lambert to advise Byrne on this case and signed an Undertaking to comply with the Protective Order, he is also seeking to use Dominion's Litigation Documents and other discovery in contravention of this Court's orders. Lambert is at least justifying, if not also facilitating, his efforts.

Impact of Lambert and Byrne's Actions

Because of Lambert and Byrne's actions, Dominion's Litigation Documents are now widely available to the public. As Dominion points out, the documents and related commentary have been viewed hundreds of thousands of times. ECF No. 82. For example, on March 18, 2024, former U.S. National Security Advisor Michael Flynn retweeted Leaf's letter to Rep. Jordan. ECF No. 82-14. As of Dominion's March 22, 2024 filing, Flynn's tweet was viewed 887,200 times. ECF No. 82 at 15. In a March 18, 2024 tweet, the Election Integrity Force shared a link to Dominion's Litigation Documents. *Id.* This tweet was viewed 121,600 times as of March 22, 2024. *Id.* (citing ECF No. 82-15). Another tweet suggesting Lambert's arrest after the March 18, 2024 hearing was related to her leak of the Dominion documents instead of her open bench warrant in Michigan has more than one million views. *Id.* (citing ECF No. 82-16); *see also* ECF No. 102-3 at 10 (Byrne: "Stefanie gave a whiff of that to Sheriff Dar Leaf in a criminal investigation and she ended up leaving the court in leg iron.").

Lambert and Byrne's actions have led to serious threats to Dominion and its employees. For example, a Dominion employee in Belgrade was "doxed" in a video posted to X which Byrne

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retweeted. ECF No. 82 at 16–17 (citing ECF No. 82-10).[16] Another Dominion employee's work address in Denver was posted online after being pulled from the leaked documents. *Id.* at 17. Another X user shared a letter from Leaf and added:

> HUGE!! We'll be adding to this over the weeks. Dominion President John Poulos [,] you're going to be arrested, tried and if convicted by a jury, hung for sedition. I dare you to sue me you crook. Dominion voting machines rig elections - we have proof.

ECF No. 75-2. As Lambert and Byrne continue to promote the dissemination of Dominion's Litigation Documents and other discovery, threats persist:

ECF Nos. 113 at 7; 113-7.

Lambert's Prior Election-Related Conduct and Admonishments

Dominion asserts that Lambert has a "vendetta against Dominion and . . . disregard for the rule of law." ECF No. 75 at 13. Regardless of Lambert's motivations, it is clear that before she entered her appearance in this case, she has shown a concerning pattern of conduct that gives the Court further pause that she would follow its orders.

For example, in Pennsylvania, Lambert was involved in litigation related to two Fulton County commissioners' decision to allow unauthorized access to and copying of voting systems and data. *Cnty. of Fulton v. Sec'y of Commonwealth*, 292 A.3d 974 (Pa. 2023). Lambert was

[16] "To dox someone means to release their personal or private information that may prove harmful or embarrassing." Rob Lever, *What Is Doxxing?*, U.S. NEWS & WORLD REPORT (Dec. 16, 2021) https://www.usnews.com/360-reviews/privacy/what-is-doxxing.

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never admitted as counsel in the case because the court repeatedly rejected her *pro hac vice* applications. *Id.* In its decision affirming sanctions for other attorneys, the Pennsylvania Supreme Court remarked:

> Attorney Lambert may be every bit as culpable as Attorney Carroll, at least in the pattern of non-compliance that has led us to impose upon him joint and several responsibility with the County. That said, perhaps ironically, we must conclude that the failure by the two lawyers to convince the Special Master that Attorney Lambert should be admitted pro hac vice precisely because she failed to satisfy the requirements for applying for that status protects her from sharing responsibility with Attorney Carroll and the County. Had she gained admission, the result might have been different.
>
> But we are not powerless to call attention to Attorney Lambert's own role in the misconduct highlighted above. In *King*, the judge referred Attorney Lambert and co-counsel to disciplinary review both in Michigan and anywhere else they were licensed. We will do the same, transmitting a copy of this Opinion to the Michigan Attorney Grievance Commission.

Id. at 1018–19.

In Georgia, Lambert was mentioned in litigation related to the 2020 election and Dominion Voting Systems. *See Curling v. Raffensperger*, Case No. 1:17-cv-2989-AT, 2023 WL 7463462, at *23–24 (N.D. Ga. Nov. 10, 2023). Advocacy organizations and voters challenged state and county officials' implementation of new voting systems and ongoing use of other voting systems, software, policies, and practices as infringing their right to vote and have their ballots be reliably counted under the First and Fourteenth Amendments. *Id.* at *1–5. The U.S. District Court for the Eastern District of Georgia found that Lambert had directed the transmission of a disc drive with material from the Coffee County Elections Office, which uses Dominion systems, to a private investigator and digital security firm. *Id.* Due to these and similar actions, a cybersecurity expert, Dr. Alex Halderman, opined that it was "impossible to determine the number of people or entities that [had] copies of the Coffee County software and data . . . *Id.* at *24. As a result, "because of these outside groups and individuals copying and distribution of the proprietary software that

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operates Georgia's election system and specific system configurations the risk that a future Georgia election will be attacked has materially increased." *Id.* (internal quotation marks omitted).

Lambert's conduct in these cases reflects a concern that she has a personal stake in advancing her claims against Dominion, and that personal stake overrides her regard for court orders and rules even in the face of such admonishment.

ANALYSIS

Dominion argues that Lambert and Byrne flagrantly and repeatedly disregarded court orders by leaking Dominion's Litigation Documents to the public; there is no justification for these acts; these acts have continued to harm Dominion and its employees; and that, importantly, Lambert's continued involvement in this case would infect future proceedings, including by making it impossible to continue the discovery process. ECF Nos. 75; 78; 82; 103; 105; 108; 113; *see also Koller*, 737 F.2d at 1056. As a result, Dominion asks the Court to disqualify Lambert from this case as a sanction for her misconduct. ECF Nos. 75; 82; 108; 113. Lambert and Byrne dispute these arguments, asserting they did not violate any orders or rules and that, even if they did, their actions were justified. ECF Nos. 76, 97, 106, 111, 117.

There are four questions for the Court: 1) whether the Protective Order applies to the documents Lambert and Byrne disclosed to third parties; 2) whether and to what extent Lambert violated any rules, law, or Court orders; 3) whether—if Lambert did violate rules, law, or orders—there is any justification for her actions; and 4) whether to disqualify Lambert. The Court bases its conclusions below on Lambert's conduct. Byrne's conduct, however, is relevant because Lambert refuses to ensure he complies with the Court's orders and, instead, attempts to justify his blatant violations with meritless and rejected arguments.

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I. Scope of Protective Order

A. Legal Standard

Federal Rule of Civil Procedure 26(c) provides that a court may enter a protective order upon motion if there is good cause. Fed. R. Civ. P. 26(c); *see also Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft in München v. Northrop Grumman Risk Management Inc.*, 312 F.R.D. 686, 690 (D.D.C. 2015) [hereinafter *Münchener*] ("Protective orders both facilitate efficient pre-trial discovery and prevent parties from abusing Rule 26's liberal discovery provisions."); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

This Court enforces protective orders consistent with their language. *See, e.g.*, *Pigford v. Veneman*, 307 F. Supp. 2d 51, 55 (D.D.C. 2004) (holding that class counsel violated a protective order by disclosing certain documents to pro bono counsel when the protective order only permitted disclosure of documents from the government). If a protective order "broadly prohibits disclosure of *any* materials obtained during discovery for any purpose other than litigation and to any person other than those associated with the litigation," disclosure of documents beyond that scope violates the protective order. *Dialog Information Servs., Inc. v. American Chemical Soc.*, Case No. 90-cv-1338, 1991 WL 283718, at *2 (D.D.C. Dec. 19, 1991).

B. The Protective Order Covers Dominion's Litigation Documents

There is no reasonable dispute that the Protective Order governs Dominion's Litigation Documents. Byrne and Lambert concede that a protective order is generally interpreted according to its plain language. ECF No. 76 at 20. They assert, however, that because Dominion discussed needing to protect trade secrets and proprietary information in a motion requesting a separate protective order, the Third-Party Protective Order, the Court should interpret the operative Protective Order in this case *inconsistent* with its plain language. *Id.* at 21 (citing ECF No. 145 in

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Case No. 21-cv-445) (asserting that "Dominion's motion for a protective order targets a very specific situation and sought to encompass only very specific, technical information – 'trade secrets,' 'proprietary information,' and 'confidential information' pertaining thereto."). Dominion responds that Byrne and Lambert's argument is based on a fundamental misunderstanding of the two separate protective orders. ECF No. 82 at 21–22.

The Court agrees with Dominion. It is clear from the record that, after the Parties negotiated a comprehensive Protective Order that applies to any Party-produced discovery, Dominion asked the Court to enter a separate protective order in the *MyPillow* litigation tailored to third-party discovery. *Compare* ECF Nos. 152 *with* 159 in Case No. 21-cv-445. There is no support for the conclusion that the *MyPillow* Third-Party Protective Order displaces this Protective Order or limits its scope. If there were any doubt, it would be resolved by Byrne's own stipulation and Joint Motion asking the Court to enter this Protective Order, noting that it "prohibits persons or entities receiving Discovery Material produced in the Consolidated Cases from using those Discovery Materials outside of those three cases, except as specifically provided by the Order." ECF No. 45 at 2–3. Moreover, prior to sponsoring Lambert's dissemination of documents subject to the Protective Order, Byrne never took the position that the Order was limited in any way.

Lambert and Byrne's argument here is not only meritless, it borders on frivolous, purposefully ignores contrary evidence and authority, and contradicts Byrne's own representations to the Court in his June 2023 stipulation.[17]

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[17] Byrne and Lambert have had ample opportunity to correct their clearly implausible argument. ECF Nos. 86; 90; 97. Instead of addressing what can generously be seen as a misunderstanding of the docket, Byrne and Lambert have doubled down. ECF No. 116. They did so even after Dominion explained how Byrne's reliance on ECF No. 145 in 21-cv-445 was plainly wrong. ECF No. 82. Lambert even continued to advance this theory at the May Hearing and claimed: "My client did not agree to false labels being placed on the documents by Dominion." ECF No. 103 at 37:7–8. This is again clearly contradictory to the joint stipulation.

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II. Violations of Rules, Laws, and Orders

A. Lambert Has Violated the Court's Orders

Dominion asserts that, through her actions, Lambert violated multiple rules and court orders, including D.C. Rule of Professional Conduct ("DCRPC") 3.4(c), DCRPC 8.4(d), the Protective Order, and the Status Quo Order. Lambert does not dispute that she committed the acts at issue; she argues instead that that her actions were permissible. Apart from the alleged violations of DCRPC 8.4(d), Dominion discussed these violations in its briefing at ECF Nos. 75, 82, 96, 105, 108, and 113. Specifically, Dominion alleges that Byrne and Lambert violated ¶¶ 1, 8, 11, 15, 26, and 27 of the Protective Order, and ¶¶ 1, 3, 6, 7, and 8 of the Status Quo Order. Because Lambert's alleged violations have been ongoing, Dominion introduced recent evidence of such actions at the May Hearing and have supplemented with additional evidence since then. ECF Nos. 102-1; 105; 108; 113. At the May Hearing, Dominion also discussed how Lambert allegedly made multiple misrepresentations to the Court, conduct which violates DCRPC 8.4(c). The Court has permitted Lambert to respond to these allegations, and Lambert continues to maintain that her actions were permissible, justified, and necessary to report evidence of an allegedly grave crime. ECF Nos. 76, 97, 106, 111, 117. In the past two weeks, Dominion has sought leave to file two additional supplements detailing additional alleged misconduct. ECF Nos. 118; 122. Despite the severity of the conduct alleged therein, the Court denies Dominion's latest motions to supplement in the interests of ending the ongoing cycle of alleged misconduct by resolving this underlying Motion.

1. Violations of Protective Order

Lambert and Byrne have violated a number of the provisions of the Protective Order. ECF No. 77 ¶¶ 1, 8, 11, 15, 16, 26, and 27.

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First, Lambert and Byrne disclosed and promoted the public dissemination of Dominion's Litigation Documents in a manner the Protective Order does not authorize. ECF Nos. 75 at 9–12, 82 at 6–17. The Protective Order prohibits disclosure of discovery outside of the Parties to the litigation and, even within those parameters, limits the purposes for which confidential material may be used. ECF No. 75-7 ¶¶ 1, 8. Lambert violated these provisions by attaching to a pleading in her criminal case in Michigan a declaration from Leaf that included Dominion's Litigation Documents as exhibits, providing Leaf with access to the document repository, and sharing social media posts that include the disclosed documents. *Id.*

Second, they did not notify Dominion that they intended to disclose any Confidential Discovery Material prior to disclosing it or schedule a time to meet and confer on the proposed objections to the documents.[18] These were documents Dominion had produced that it reasonably believed would be handled pursuant to the terms of the Protective Order. ECF No. 75-7 ¶¶ 15, 16. Third, Lambert and Byrne failed to come to the Court, as the Protective Order expressly requires in the event of an objection, to seek an Order de-designating the documents or allowing Lambert to disseminate these documents to a third party. *Id.*

Fourth, Byrne and Lambert did not immediately notify Dominion once they disclosed Dominion's Litigation Documents. ECF No. 75 at 12–13. It is notable that Lambert and Byrne even failed to notify McGlinchey—who represented Byrne at the time they began to make the disclosures—that Byrne or Lambert planned to and ultimately did disclose Dominion's documents. McGlinchey only learned about Byrne and Lambert's actions when they saw a social media post

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[18] There is no dispute that Lambert and Byrne disclosed "Confidential" documents, in addition to other documents covered by the Protective Order. First, Lambert admits to giving Leaf access to the *entire repository* of Dominion's Litigation Documents. ECF No. 78 at 31:19–32:4. Second, all of the documents attached to Leaf's declaration that Lambert filed *pro se* in her Michigan criminal case were stamped "Confidential." ECF No. 75-8 at 5–63.

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about Dominion's Litigation Documents. It was not until this point that McGlinchey, not Lambert or Byrne, notified Dominion of the breach. *Id.* In addition, Lambert refused to answer Dominion's questions about the scope of her breach. *Id.*; ECF No. 75-3. Instead, she threatened that "if [Dominion counsel] were aware of the criminal acts, I will need to address fraud on the court and potentially accessory after the fact with threats of violating a protective order that does not extend to the criminal acts committed by your client." ECF No. 75-3. Lambert and Byrne's conduct here violates Paragraph 27 of the Protective Order. ECF No. 75-7. Lambert only provided information about the scope of her possession and disclosures of the documents when the Court questioned her at the May Hearing. And now, it is clear that Lambert has still not disclosed the full list of individuals with whom she shared Dominion's Litigation Documents. ECF No. 113 at 3 (describing Case's involvement in this litigation); ECF No. 113-4 at 3.

Fifth, Lambert has apparently refused to object to subpoenas that she has received for Dominion's Litigation Documents. ECF Nos. 108 at 2, 3; 113 at 7, 8. Even though the Protective Order clearly requires a person to object to subpoenas on the grounds of the Order's existence, Lambert has repeatedly refused to confirm that she would do so. ECF Nos. 77 ¶ 26; 108 at 2, 3; 113 at 7, 8. Lambert does not assert that she has objected to these subpoenas. Instead, she vaguely maintains that she will comply with the Protective Order. ECF Nos. 108-8; 117. This promise instills little confidence moving forward, as Lambert continues to rely on an interpretation of the Protective Order that the Court has rejected.

2. Violations of Status Quo Order

Lambert and Byrne have also violated the Court's Status Quo Order, despite both verifying that they had and would comply with it. ECF No. 84. The Court will save for another day the absurdity of needing to require a barred attorney to independently verify that she will follow a

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Court Order. To date, Lambert and Byrne have violated at least five of the eight specific requirements of the Status Quo Order: ¶¶ 1, 3, 6, 7, 8.

First, as discussed, Lambert and Byrne missed multiple deadlines to submit their verifications. Notably, they only asked for an extension after their first deadline had passed. The delay in submitting the verification matters because Byrne continued to publicly discuss and share Dominion's documents in that time (and after). ECF Nos. 102-1 at 20; 103 at 11:13–12:14. And the delayed failure to comply with the Court's deadline is another example of Lambert and Byrne's cavalier disregard for the judicial process in this case.

Second, regarding the filing in one of her criminal cases, Lambert did not "immediately confer with her counsel in that matter and undertake every reasonable effort to remove such documents from the public record and file them under seal instead." ECF Nos. 77 ¶ 3; 103 at 10:1–11:12, 29:20–25, 30:4–15 (claiming that her counsel was unwilling to remove Dominion's Litigation Documents from the public docket in Michigan because he believed, like Lambert, they should remain publicly available.). Lambert made no effort herself to remove the documents from public access or raise the issue with the Michigan court, despite having filed them *pro se*. ECF Nos. 102-2; 103 at 10:1–11:12, 29:20–25, 30:4–15. Nor did she notify the Court or Dominion of her unilateral decisions to keep the documents on that public docket. ECF Nos. 77 ¶ 3 (Status Quo Order requirement); 84 (verifying Lambert had and would comply with all Status Quo Order requirements); 103 at 10:1–11:12 (explaining how Dominion learned Lambert did not remove the documents from the public docket).

Third, Byrne and Lambert have continued to share or sponsor the dissemination of the documents publicly. ECF Nos. 77 ¶ 1; 103 at 12:15–22. For example, on March 19, 2024, Lambert discussed the documents with ABC News, which quoted her as saying "[t]he Dominion file

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contained evidence of perjury by John Poulos, Dominion CEO, Honest Services Fraud, Wire Fraud, etc." ECF Nos. 102-1 at 21; 103 at 12:23–13:2. On March 22, 2024, Lambert was a guest on a podcast during which host Joe Oltmann discussed the documents. ECF Nos. 102-1 at 22; 103 at 13:3–17. When Oltmann asked whether Leaf was allowed to discuss his "investigation," which is based on Dominion's documents, Lambert said Leaf could go through whatever he wanted. ECF No. 103 at 13:3–17, 45:11–13. On April 7, 2024, Lambert gave an interview on "The Joe Hoft Show" on FrankSpeech. ECF Nos. 102-1 at 23; 103 at 13:18–14:7. The title of the episode was "Surviving Attacks for Standing Up for Fair Elections with Stefanie Lambert," and Lambert again discussed the documents she had disseminated. ECF Nos. 102-1 at 23; 103 at 13:18–14:7.

These actions remain ongoing. Immediately after Lambert and Byrne promised they would follow the Protective and Status Quo Orders, claimed to understand when the Court reiterated the broad scope of the Orders, and promised to seek Court guidance if there was any confusion, Byrne continued to share social media posts with and about the documents and Lambert attempted to justify his conduct. ECF Nos. 105; 106; *see also* ECF Nos. 108; 113. Significantly, neither Lambert nor Byrne meaningfully contest any of Dominion's evidence in support of its Motion. Lambert and Byrne do not, for example, contest the authenticity of their posts or re-posts on social media, interviews, appearances on various interviews or podcasts, etc. Nor have they argued that they did not participate in the conduct alleged or that any of the posts or statements are taken out of context.

Fourth, Lambert failed to "preserve all documents and communications relating to the issues raised by Dominion's motion, including but not limited to, the release of any Dominion Litigation Documents in this case to any other entity or individual." ECF No. 77 ¶ 7. Lambert admitted at the May Hearing that she viewed part of a video that Byrne posted on social media on

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April 3, 2024, in which Byrne ostensibly discussed this case and/or Dominion's Litigation Documents. ECF No. 103 at 47:2–48:10. Lambert represented to the Court that she directed Byrne to remove the video from social media. *Id.* Lambert did not ensure that she or Byrne preserved the video and has not provided the video to Dominion despite repeated requests. *Id.* By the time of the May Hearing, it appeared that the video no longer existed. *Id.* Lambert's failure to preserve the video she directed her client to remove from social media renders the Court unable to assess whether Byrne's statements violated the Court's Orders. Based on her conduct and lack of candor with the Court, it appears this is entirely what Lambert was hoping to achieve. *Id.* at 48:6–10 (Lambert stating that she does not have time to "babysit" Byrne's social media).

Fifth, Lambert failed to notify the Court if any other associate or affiliate had access to Dominion's Litigation Documents, as required in Status Quo Order ¶ 6. On July 10, 2024, Case submitted a declaration in the Peters Criminal Case representing that he was an attorney assisting with Byrne's defense in this litigation, had signed an Undertaking to comply with the Protective Order, and had reviewed Dominion's Litigation Documents. ECF No. 113-4 at 3. Lambert did not notify the Court of Case's involvement or access to Dominion's Litigation Documents. Instead, after Dominion independently discovered that Case had access to its documents, Lambert refused to provide any details about Case's involvement. ECF No. 113 at 5.

B. Lambert Has Violated the Rules of Professional Conduct

1. Standard

The DCRPC, as adopted by the District of Columbia Court of Appeals, govern attorney conduct in this Court. LCvR 83.15(a). Attorneys practicing in this Court are subject to discipline for violations thereof. *Id.* DCRPC 3.4(c) prohibits a lawyer from "[k]nowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no

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valid obligation exists." D.C. R. Prof. Conduct 3.4(c). DCRPC 8.4(d) prohibits a lawyer from "[e]ngag[ing] in conduct that seriously interferes with the administration of justice." D.C. R. Prof. Conduct 8.4(d). The D.C. Court of Appeals has interpreted DCRPC 8.4(d) to require showing: (1) an attorney's conduct was improper; (2) it "bears directly upon the judicial process"; and (3) it taints the judicial process in more than a de minimus way, or "at least potentially impact[s] upon the process to a serious and adverse degree." *In re Dobbie*, 305 A.3d 780, 809–10 (D.C. 2023) (internal quotations omitted). DCRPC 8.4(c) prohibits attorneys from making misrepresentations to the court. D.C. R. Prof. Conduct 8.4(c).

2. Lambert's Misrepresentations to the Court

Lambert has made many misrepresentations and misstatements to the Court. First, during the March Hearing, Lambert represented that her attorneys had publicly filed the motion in her Michigan criminal case attaching Dominion's Litigation Documents, when in fact it was Lambert herself who filed the motion *pro se*. ECF No. 78 at 46:6–21 (clarifying how the documents were submitted: "THE COURT: Okay. So they were filed by your counsel? MS. LAMBERT JUNTTILA: Correct."). This misrepresentation is significant, as Lambert attempted to mischaracterize the facts to reflect that she was less involved in one of the first public disclosures of Dominion's documents. *Id.* at 43:24–44:4 ("That was not my filing; that was an affidavit from the Sheriff.").

Second, at the March Hearing, Lambert represented to the Court that the only two people who had access to the relevant materials—Dominion's documents and her related notes—were her "assistant" Stephanie Scott and Russell Newman, another attorney in Lambert's office. ECF No. 78 at 35:8–36:16. The Court and Dominion learned through McGlinchey's filing on March 29, 2024, nearly two weeks later, however, that another alleged attorney for Byrne named Michael

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Smith also had access. ECF No. 85 at 4. The Court also later learned that Lambert failed to advise the Court that Ms. Scott was not just an assistant to Ms. Lambert, but is also the former Clerk of Adams Township, Michigan and Lambert's co-defendant in her pending felony criminal case in Hillsdale County, Michigan. Ms. Scott and Lambert face charges for allegedly "mishandling voter data without authorization in search of fraud." ECF Nos. 102-16 at 5; 101-1 at 1.

As discussed above, the Court learned through Dominion's Supplement that there is another attorney assisting with Byrne's defense, Case. ECF No. 113. If Case was involved at the time of the March and May Hearings, Lambert misrepresented to the Court the entire universe of people with whom she shared Dominion's Litigation Documents. ECF No. 78 at 35:1–36:23. If Lambert gave Case access to Dominion's Litigation Documents after those hearings, she violated the Status Quo Order. ECF No. 77 ¶¶ 1, 6. Because Lambert refuses to provide any information on Case's involvement, the Court has no way of assessing which is true. In either scenario, however, Lambert has made material omissions to the Court.

Third, in her verification that she and Byrne had and would comply with all provisions of the Status Quo Order, Lambert misrepresented that she and her client had complied with the Order. ECF No. 84. Lambert ultimately filed the verification on March 26, 2024, after engaging in much of the conduct described above. *Id.* For example, Lambert represented that she had and would "undertake every reasonable effort to remove such documents from the public record and file them under seal instead" in one of her criminal prosecutions in Michigan. ECF Nos. 77 ¶ 3; 84. Yet, Dominion presented evidence from the prosecutor in that case that neither Lambert nor her counsel attempted to place the documents under seal. ECF No. 102-2. Only after Dominion brought this matter to the Court's attention did Lambert admit that she did not remove this public filing. ECF No. 103 at 29:16–30:15 (asserting her counsel told her not to remove it). Even if Lambert had a

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legitimate reason to disregard the Court's order (the Court has yet to hear one), she still misrepresented to the Court that she had complied with this requirement. ECF Nos. 77, 84.[19]

In addition, Lambert represented that she had and would comply with the requirement in the Status Quo Order that she not share, distribute, provide access to, or discuss the documents. ECF Nos. 77 ¶ 1; 84. But Lambert signed this verification after she had already violated it by giving an interview in which she discussed the evidence she believed existed in the Dominion documents. ECF Nos. 102-1 at 21; 103 at 12:23–13:2. After signing the verification, Lambert continued to publicly discuss the documents. ECF Nos. 102-1 at 23; 103 at 13:18–14:7.[20]

Finally, as discussed above, Lambert assured the Court at the May Hearing that, going forward, she would come to the Court if there were any questions about what she or her client could do with the documents under the Protective and Status Quo Orders. ECF No. 103 at 44:6–22, 45:14–23, 46:3–12. Byrne was physically present at this hearing and ostensibly heard Lambert's promises, having himself agreed to comply with the Orders moving forward. *Id.* at 61:20–25. Only one day later, however, Byrne reposted screenshots of Dominion's Litigation Documents to his hundreds of thousands of followers on X. ECF Nos. 105, 106. Byrne has not removed this post as of the issuance of this Memorandum Opinion. Lambert not only did nothing to address Byrne's blatant violation, she has continued to justify his actions. ECF No. 106.

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[19] Even if Lambert had offered legitimate grounds to keep the motion from her criminal case itself publicly available, this still does not explain why she would need to keep the attachment of Leaf's affidavit with Dominion's Litigation Documents included as exhibits also publicly accessible. As Dominion argues, Lambert's conduct here also implicates DCRPC 3.3, which imposes upon counsel a duty of candor to the Court. ECF No. 103 at 53:23–54:14.

[20] As the Court reminded the Parties at the hearing, the Protective and Status Quo Orders do not prevent the Parties or Counsel from discussing or criticizing the case in general, whatever their views may be. Therefore, the Court did not fault or prohibit Byrne from making statements related to issues presently before this Court, about the Court, Dominion, or this litigation generally.

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The Court will not belabor this point by chronicling Lambert's other apparent misrepresentations. Suffice it to say that Lambert's misrepresentations reflect a deeply concerning pattern that does not appear to have any sign of stopping. *Compare* ECF No. 75-3, *with* ECF No. 102-3 at 10 (differing accounts of whether it was Lambert or Byrne that insisted on disclosing Dominion's Litigation Documents); *compare* ECF No. 25, *with* ECF No. 103 at 45:5–9 (differing representations of whether Byrne anticipated Dominion's Litigation Documents would unveil evidence of national security or election crimes).

3. Lambert's Conduct Violates the DCRPC

First, DCRPC 3.4(c) prohibits an attorney from "[k]nowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." D.C. R. Prof. Conduct 3.4(c). As discussed above, Lambert repeatedly violated the Court's the Protective Order and Status Quo Orders. Those violations likewise constitute violations of Rule 3.4(c) for all the same reasons discussed above. Specifically:

- Lambert failed to notify Dominion that she planned to disclose any of Dominion's Litigation Documents prior to disclosing them and arranging a time to meet and confer, as required by the Protective Order. ECF No. 75-7 ¶¶ 15, 16.
- Lambert failed to raise her objections with the Court and seek an order de-designating documents or allowing her to disclose the documents to a third party, as the Protective Order permits. *Id.*
- Lambert publicly disclosed and promoted public dissemination of Dominion's Litigation Documents in a manner not permitted by the Protective Order. *Id.* ¶ 1.
- Lambert refused to confirm that she would object to subpoenas as required by the Protective Order. *Id.* ¶ 26.

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- Lambert failed to immediately, or even at all herself, notify Dominion, McGlinchey, or the Court after she disclosed the documents, as required by the Protective Order. *Id.* ¶ 27.
- Lambert failed to provide information about the scope of her actions and the breach as required by the Protective Order. *Id.* ¶ 27.
- Lambert failed to timely sign and file a verification she had and would comply with the Status Quo Order, as required by that Order. ECF Nos. 84; 77 ¶ 8.
- Lambert failed to immediately confer with her counsel and undertake every reasonable effort to remove Dominion's Litigation Documents from the public docket in one of her criminal cases in Michigan, as required by the Status Quo Order. ECF No. 77 ¶ 3.
- Lambert continued to "shar[e], distribut[e], provid[e] access to or discuss[]" Dominion's Litigation Documents, as prohibited by the Status Quo Order. *Id.* ¶ 1; ECF Nos. 102-1 at 21–23; 103 at 12:15–14:7, 45:11–13.
- Lambert failed to preserve all documents related to the issues raised by Dominion's motion, as required by the Status Quo Order. ECF No. 77 ¶ 7.
- Lambert failed to immediately notify the Court that other associates or affiliates had access to the documents, as required by the Status Quo Order. *Id.* ¶ 6.

Although Lambert may argue that she violated the orders based on her assertion that no valid objection existed, any such argument is unavailing. As discussed below, Lambert has never offered a valid objection to either Order. Lambert has squandered any opportunity to defend her actions, claiming that she has no authority to support her conduct because there are no cases which stand for the proposition that "water is wet." ECF No. 103 at 40:7, 46:23, 59:15. Even if a valid

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objection to the Orders existed, Lambert at the very least acted in bad faith in the manner in which she disclosed the materials. If she had a valid objection, she would have first raised her objections with the Court instead of waiting until she caused irreparable damage by releasing Dominion's Litigation Documents. Moreover, she confirmed at the May Hearing that she would comply with all of her obligations going forward and did not dispute the provisions in the Status Quo Order, further underscoring her lack of any valid objection to the orders. ECF No. 103 at 60:11–62:25. As set forth above, she promptly disregarded that Order shortly after making that statement.

Second, DCRPC 8.4(c) prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation. D.C. R. Prof. Conduct 8.4(c); *see also In re Ukwu*, 926 A.2d 1106, 1111–14 (D.C. 2007) (holding that an attorney violated DCRPC 8.4(c) by conduct including "directing a client to file with the IRS a letter containing representations that [the lawyer], at a minimum, should have known were false . . ."). As chronicled above, Lambert has repeatedly made misrepresentations to this Court by:

- Representing that her attorney filed a motion with Dominion's Litigation Documents on a public docket in Michigan instead of her having filed the materials *pro se*. ECF No. 78 at 46:6–21.
- Representing that only two people had access to Dominion's Litigation Documents through working with her, when in fact at least a third attorney also had access. *Id.* at 35:8–36:16; ECF No. 85.
- Representing that she had informed the Court of any "associate or affiliate" who had access to Dominion's Litigation Documents and would immediately inform the Court if others had access to the documents while withholding Case's involvement from the Court. ECF Nos. 77 ¶ 6; 84; 113-5.

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- Representing that she and Byrne had and would comply with all of the provisions of the Status Quo Order, despite the numerous violations discussed above. ECF No. 84.
- Representing that she would come to the Court to seek guidance if she thought an exception to the Protective Order or Status Quo Order existed *before* she or her client took any action on the proffered exception, but failing to follow through on the promise. ECF Nos. 103 at 44:6–22, 45:14–23, 46:3–12; 105; 106.

Third, DCRPC 8.4(d) prohibits attorneys from "engag[ing] in conduct that seriously interferes with the administration of justice." D.C. R. Prof. Conduct 8.4(d). The Comment to DCRPC 8.4(d) includes failing to comply with court orders as conduct that seriously interferes with the administration of justice under DCRPC 8.4(d). Comment to D.C. R. Prof. Conduct 8.4(d) ("Paragraph (d)'s prohibition of conduct that 'seriously interferes with the administration of justice' . . . include[s] acts by a lawyer such as . . . failure to obey court orders"). As explained above, Lambert's conduct was clearly improper in that she repeatedly violated court orders and made misrepresentations to this Court. *See In re Dobbie*, 305 A.3d at 809–10. Lambert's conduct bears directly on the judicial process, including the Court and Parties' abilities to oversee and engage in discovery, presume other attorneys will comply with their ethical obligations, and rely on Parties following court orders. *Id.* The impact that Lambert's misconduct has had on this proceeding is severe, compounding, and shows every sign of continuing if she were permitted to remain counsel in this case. *Id.*[21]

[21] Although there is limited case law in this Court about when a DCRPC 8.4(d) violation occurs, especially under similar facts to the present case, the D.C. Court of Appeals has recognized violations for less serious conduct, for example, failing to appear at a hearing or interview when an attorney knew or should have known that they would be expected to appear. *See In re Ukwu*, 926 A.2d at 1143–44.

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To put it simply, given her conduct, the Court has no confidence that Lambert will comply with the Court's Orders past or future. The record amply supports the Court's serious concern that, instead, Lambert will continue to engage in tactics which taint and disrupt this judicial process. And it is not only the Court who cannot trust her tactics moving forward. Other Parties to the litigation cannot be sure that she will abide by the very agreements her client made (such as the Protective Order), having already flouted them in the most egregious manner.

III. Lambert's Justification for Violating Court Orders

None of the justifications Lambert has offered for her conduct, which as noted above is largely undisputed, excuse her actions as Byrne's counsel of record.

A. Lambert's Arguments

Lambert first argues that Dominion brought this Motion in bad faith to target her. ECF No. 76 at 26. She claims that this is a "'tactical' effort to stifle the truth and to prevent undersigned counsel who has introduced and presented corroborating expert analysis of the deficiencies in Dominion voting systems, and now has fulfilled her ethical duty to report the discovery of potential criminal violations to law enforcement." *Id.* Lambert asserts that Dominion seeks to disqualify her "because of her combined knowledge and the information she possesses from litigating cases in multiple jurisdictions," her "expertise and knowledge, including multiple expert analyses of the deficiencies in Dominion voting systems' product," and "to prevent her from using her expertise and knowledge to defend Mr. Byrne . . ." *Id.*[22] Lambert describes Dominion's motion as "puffery" and an "effort to downgrade" her with "*ad hominem* attacks." *Id.*; ECF No. 103 at 32:18–33:3.

[22] Lambert cites to expert reports she purportedly obtained related to Dominion's voting machines, ECF Nos. 76-5; 76-6. It does not appear that these reports have anything to do with this Motion.

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Lambert argues that neither she nor Byrne violated the Protective Order because the information was not covered by the Order. ECF No. 76 at 28. As explained above, this argument is meritless. Lambert asserts, alternatively, that any breach is justified under two "exceptions": (a) disclosure to law enforcement; and (b) the "*public interest* exception[,] which even the judiciary has a constitutional obligation to acknowledge." *Id.* at 28, 23 ("On this latter note, and equally, if not more, important, the information in the production contains information concerning criminal conduct and collusion and conspiracy with and by foreign nationals in the conducting of U.S. elections and therefore fall within an exception for matters of national security and constitutional important (sic), which have always enjoyed a robust 'tradition of accessibility' in this country.").

Lambert claims that Dominion's documents provide evidence of "some of the most serious crimes in national history and are a matter of national security." ECF No. 103 at 29:24–25. According to Lambert, this includes election fraud. ECF No. 76 at 30–32 (citing 52 U.S.C. § 10308, but no authority supporting its relevance or application here). She asserts that "foreign nationals are entering election systems in the United States before certification of the 2020 election," which "the public has a right to know" and "Dominion is complicit" in these events. *Id.* at 29. She further claims that "Dominion has filed this lawsuit . . . to hide these facts from the American public and to create a false narrative." *Id.*

Lambert cites no authority for these broad and significant assertions. Although she references cases that recognize the fundamental right to vote and articulate the general elements of alleged crimes, she cites no authority for the proposition that she was justified as a matter of law in taking the actions she did. ECF No. 103 at 40:17–22; ECF No. 76 at 25–45 (failing to offer any authority to support there is (a) an exception to protective orders for reporting what an attorney suspects is evidence of crime to law enforcement; b) an exception for disseminating what an

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attorney believes is evidence of election interference, or another topic of grave national interest; or c) because attorneys have an obligation to report such evidence of alleged criminal wrongdoing, it would have been improper for her to first seek review in a "civil" court).[23] Instead, Lambert vaguely claims that her oath to the Constitution as an attorney required her to take the actions she did. ECF No. 130 at 36:5–13. When pressed, Lambert's only answer to the Court for failing to cite any relevant authority was simply, and repeatedly, that the fact that her actions are justified is as obvious as the proposition that "water is wet." ECF No. 103 at 40:7, 46:23, 59:15. The Court addresses each of her arguments in turn.

B. Lambert's Disclosures Were Not Limited to Law Enforcement

As an initial point, Lambert's primary justification for her disclosures in violation of the Protective Order turns on she and Byrne having disclosed the documents to "law enforcement" akin to generally reporting evidence of a crime. ECF No. 103 at 34:17–25. Lambert cites no authority for this proposition or when such an exception may apply. This argument is flatly rejected.

Even if Lambert had authority for this argument, it would still not justify her actions. Lambert and Byrne apparently did disclose the documents to some law enforcement officials—Sheriff Dar Leaf and an unnamed Assistant U.S. Attorney—the extent of their disclosures is much broader. Lambert and Byrne have both publicly disseminated and discussed the documents to advance their theories about the 2020 election. This includes Lambert submitting an affidavit from Leaf in her *pro se* filing in one of her own criminal cases in Michigan. Both Lambert and Byrne

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[23] Lambert does not cite to any controlling authority in her discussion of the legal standard for disqualification. ECF No. 76 at 25 (citing cases from the Eleventh, Fifth, Second, and Sixth Circuits). Lambert repeatedly uses quotation marks or otherwise implies she is directly citing a source without actually citing a source. *Id.* at 15, 20, 29.

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have publicized Leaf's efforts to share the documents widely to non-law enforcement audiences. Accordingly, her argument that she was duty-bound to disclose the documents to law enforcement rings hollow in light of her subsequent actions.

C. Lambert Fails to Substantiate Her Arguments About Evidence of Crime

Lambert has failed to substantiate any of her conclusory allegations that Dominion's Litigation Documents contain evidence of national security crimes. She has not, for example, pinpointed certain documents and made an argument that they meet the elements of any particular crime. Nor has Lambert explained why, when faced with these documents supposedly reflecting serious crimes of national importance, she chose to disclose them to a single county sheriff in Michigan as opposed to a national law enforcement agency such as the Federal Bureau of Investigation or Department of Justice. To the contrary, Lambert continues to advance these allegations despite being unable to point to any court authority that substantiates them.

Lambert also argues that Dominion is engaging in "honest services fraud" in violation of 18 U.S.C. § 1846. ECF No. 76 at 33. Specifically, she argues that Dominion gets paid for providing voting machines and systems for U.S. elections, but has colluded with foreign nationals to give them access to these elections in "betrayal of public trust" and as part of "a deeper deception that would appear to include honest services fraud." *Id.* at 33. Relatedly, Lambert claims Dominion *may have* engaged in honest services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. *Id.* at 34 (claiming without authority that Serbia conspired to interfere in elections in Michigan and Pennsylvania). Further, Lambert argues Dominion engaged in a conspiracy to commit an offense against the United States or to defraud the United States, in violation of 18 U.S.C. § 371. *Id.* at 35–36. Per Lambert, Dominion did so by conspiring to impair "lawful government functions," specifically the "regulat[ing] and monitor[ing]" of "participation of

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foreign nationals in the American electoral process" and "impairing the requisite 'transparency in the American political process.'" *Id.* at 36 (alteration in original, but citing no source).[24] Beyond her own speculation, Lambert does not substantiate these legal arguments in any way. And in any event, she still fails to offer any legal support for the proposition that, notwithstanding her alleged discovery of criminal activity, she could unilaterally disregard and bypass the Protective Order.

D. Right to Vote Cases Do Not Provide Authority for Lambert's Position

Lambert proclaims that "[n]o constitutional right is more fundamental than the right to vote," but neglects to put forward any evidence for how *her* unilateral actions further that right. *Id.* at 40. She discusses at length cases that recognize the fundamental right to vote, and there is no dispute that this right is fundamental. *Id.* at 32–45. But Lambert points to no authority for the proposition that these cases somehow authorize her to violate any court order just because *she* believes she has evidence of a vast criminal attempt to subvert this right. *Id.*

Lambert's principal case, *Ex Parte Yarborough*, does not get her there. Lambert asserts that *Ex Parte Yarborough* held that "[voting rights] are recognized and justiciable in any forum and in any matter in which they may be properly pled." *Id.* at 32, 40 (citing *Ex parte Yarborough*, 110 U.S. 651, 661–63 (1884) ("[A]ny public inquiry into the deprivation of the fundamental right to vote is actionable, and the judiciary has an express obligation to abide because it has a duty to ensure that the Constitutional rights of American citizens to vote and to have their votes properly

[24] Lambert makes various other arguments without citing any legal authority, including that: 1) the Court should consider Dominion as a state actor, without providing any authority for how Dominion would clear the high bar the Supreme Court has set for such analyses; 2) all Dominion communications should be subject to FOIA; and 3) Dominion CEO John Poulos committed perjury in his testimony before the Michigan Legislature on December 15, 2020. ECF No. 76 at 37. On the third point, Lambert claims that "[t]he fact that the voting systems and machines have the capacity to connect to the internet *and* the software was created and engineered by foreign nationals acting in concert with and for Dominion is sufficient in itself to lift the protective order and to allow disclosure of these email communications." *Id.* at 38.

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counted are secured.").[25] *Yarborough* was a habeas action in which the Court recognized Congress's authority to enact criminal laws to punish voter interference, not a case where a private attorney in a civil lawsuit took unilateral action to "expose" confidential documents subject to a protective order. *See Ex parte Yarborough*, 110 U.S. at 662. Lambert's reliance on the case to support her conduct is unreasonable and borders on frivolous.

Lambert's other right to vote cases are similarly irrelevant to the questions before this Court. In *Reynolds v. Sims*, the Supreme Court struck down voting districts in Alabama for violating the Equal Protection Clause of the Fourteenth Amendment by not apportioning districts on a population basis. 377 U.S. 533, 583–87 (1964). In *Yick Wo v. Hopkins*, the Supreme Court recognized that, although it is not enumerated as an express grant in the Constitution, the right to vote is fundamental because it is "preservative of all rights." 118 U.S. 356, 370 (1886). The Supreme Court has repeatedly affirmed this holding. *See e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966). Again, nothing in these cases excuses Lambert's actions.

Finally, even if Lambert had a valid reason to disclose Dominion's Litigation Documents, she still has offered no viable, let alone meritorious, argument to justify all of her other misconduct. Her purported justifications do not excuse her other violations of the Protective Order, including the fact that she: a) did not notify Dominion of her intent to disclose the documents; b) did not seek Court approval to disclose the documents; c) refused to provide an accounting of the extent of her breach when Dominion requested it; and d) threatened Byrne's document database

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[25] In *Yarborough*, seven members of the Ku Klux Klan attacked a Black man to prevent him from exercising his recently-recognized right to vote. 110 U.S. at 657–67. The KKK members were convicted of violating federal laws protecting the right to vote, and they subsequently filed habeas petitions challenging their convictions. *See id.* The Supreme Court rejected the petitioners' arguments, holding that Congress properly acted within its authority to pass criminal penalties for certain conduct interfering with the right to vote. *See id.*

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management company with criminal penalties if they impeded her access to the documents. Nor do they address her subsequent misconduct and violations of court orders, despite her repeated assurances to the Court that she understood her obligations and would comply with the Court's orders.

IV. Disqualification

Because the Court concludes that the Protective Order governed the documents, Lambert repeatedly violated that and other court orders, and that there is no justification for her actions, the Court now considers whether to disqualify Lambert.

A. Legal Standard

A district court has "wide discretion in the exercise of its duty to supervise members of the bar appearing before it." *Koller*, 737 F. 2d at 1054 (citing *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983)); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991) (discussing the court's longstanding inherent authority to sanction misconduct before it); *United States v. Philip Morris Inc.*, 347 F.3d 951, 955 (D.C. Cir. 2003). "Motions to disqualify are governed by two sources of authority. First . . . the local rules of the court in which they appear . . . Second, because motions to disqualify counsel in federal proceedings are substantive motions affecting the rights of the parties, they are decided by applying the standards developed under federal law." *Paul v. Judicial Watch, Inc.*, 571 F. Supp. 2d 17, 20 (D.D.C. 2008) (internal quotation marks omitted) (citing case law from the Tenth, Fifth, and Eleventh Circuits).

The D.C. Circuit has held that disqualification should be granted rarely absent circumstances in which an attorney's prior representation compromises her ability to zealously represent a current client. *See Koller*, 737 F.2d at 1056. As the Circuit has held, "*[e]xcept in cases of truly egregious misconduct likely to infect future proceedings*, other means less prejudicial to

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the client's interest than disqualifying the counsel of [his] choice are ordinarily available to deal with ethical improprieties by counsel." *Id.* (emphasis added). In so stating, the D.C. Circuit cited with approval language in a Second Circuit decision:

> Indeed, we see much wisdom in the view expressed by Judge Mansfield in concurrence:
>
> 'The attorney is the client's choice. Disqualification is wasteful and time-consuming. Only where the attorney's unprofessional conduct may affect the outcome of the case is there any necessity to nip it in the bud. Otherwise conventional disciplinary machinery should be used and, if this is inadequate, the organized bar must assume the burden of making it effective as a deterrent.'

Id. (citing *Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1247–48 (2d Cir.1979) (internal quotations omitted).

Although it is rare, the D.C. Circuit has not "*prohibit[ed]* disqualification outside of the two enumerated circumstances." *Paul*, 571 F. Supp. 2d at 24 (emphasis in original); *see also Koller*, 737 F.2d at 1064 (holding that "questionable activities . . . [that] *do not* clearly violate a disciplinary rule and taint future proceedings" should be remedied by means other than disqualification) (emphasis added).

B. Disqualification is Warranted

Dominion acknowledges that disqualification is an extraordinary remedy. ECF No. 75 at 21. Dominion argues, however, that disqualification is necessary here because "lesser sanctions will not protect the integrity of this litigation." *Id.* In support, Dominion cites to Lambert's "well-documented historical efforts to obtain and misuse Dominion confidential information, her pattern of disregard for judicial rules, and her willful and ongoing violation of the Protective Order in this case." *Id.* Dominion asserts that Lambert's "truly egregious misconduct . . . has already and will continue to infect this, and frankly, all of Dominion's other proceedings." ECF No. 103 at 5:19–21. According to Dominion, although Lambert's conduct clearly meets the requirements for a

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contempt citation—violating a "definite and specific court order" of which the party is aware—contempt is insufficient because Lambert has repeatedly shown she will violate court orders without regard for the consequences. ECF No. 75 at 21–22 (citing *Pigford*, 307 F. Supp. 2d at 55–56). Additionally, Dominion argues that it cannot entrust Lambert with highly sensitive and confidential information that impacts "its business, and the safety of its own employees and our nation's election workers." *Id.* Lambert, on the other hand, has no meaningful response as to what would be appropriate if the Court finds sanctions are warranted. ECF Nos. 76; 97; 106; 111; 117.[26]

There is no question that disqualification is a rare sanction. *See Koller*, 737 F.2d at 1056. This, however, is one of those rare cases where the circumstances of Lambert's misconduct are "truly egregious" such that her continued involvement would "infect future proceedings." *Id.* The Court agrees with Dominion that no lesser sanction will suffice. There are at least five reasons that illustrate why Lambert's conduct meets the high bar for disqualification: 1) Lambert's breach of the Protective Order was intentional, had significant consequences, and was without justification; 2) Lambert has since repeatedly violated court orders and made misrepresentations to the Court; 3) Lambert's prior conduct and admonishment undermines her argument that she acted in good faith and reflects her disregard for the Court's orders and rules; 4) Lambert has not refuted Dominion's argument that if the Court should impose a sanction, disqualification is the most appropriate; and 5) Lambert's conduct has already severely tainted this proceeding and will continue to do so if she remains counsel in this case.

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[26] Byrne's first sur-reply raises a new procedural argument that Dominion improperly combined a motion for protective relief and disqualification in a single filing. ECF No. 97. Byrne has no excuse for waiting to raise this until six weeks after Dominion filed its Motion, and not in his first response. Byrne also alleges that Dominion improperly raised certain additional issues *ex parte*, such as the continued impact of Byrne and Lambert's breaches, without Byrne having an opportunity to respond. *Id.* As detailed herein and on the docket for this case, Byrne and Lambert have had ample opportunities to respond to Dominion's assertions.

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1. Nature and Severity of Lambert's Initial Misconduct

The record is clear that Lambert's initial breach of the Protective Order—disclosing anywhere between thousands and nearly three million of Dominion's Litigation Documents before she even entered her appearance in this case—was massive and intentional. ECF No. 96 at 3 (describing how many documents Dominion has produced in discovery). Most, if not all, of the documents were stamped "Confidential." ECF No. 82 at 20. Lambert was only allowed to access the documents after she signed the Undertaking confirming that she would comply with all provisions of the Protective Order. ECF No. 75-9. Yet she blatantly disregarded this Order and her guarantee that she would comply with it. This is not a case of an inadvertent breach or good faith disclosure; it is unfathomable for Lambert to believe she could do whatever she wanted with Dominion's Litigation Documents. Lambert's actions were intentional and clearly meant to inflict the harm that has resulted. Moreover, there is no dispute that the dissemination of the documents has led to individuals, including Dominion's CEO and employees, facing severe threats.

The Court also notes that this is not a case in which Lambert's conduct could be excused on the grounds that she was engaging in zealous representation of her client within the bounds of the rules and orders governing attorneys in this Court. If anything, it appears she was zealously pursuing her client's goals (and clearly her own goals as well), *outside* those boundaries.

2. Lambert's Repeated and Remorseless Misconduct

Even if Lambert's initial actions could be excused in some way, her repeated violations of numerous provisions of the Protective and Status Quo Orders since then demonstrate that the Court cannot trust her to follow orders if she were permitted to remain in this case. Lambert's actions are particularly concerning given her representations—both orally and in writing—that she understood her obligations and would abide by them. The Court has no reason to believe Lambert

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when she promises she will comply with the Court's Orders in the future, having already broken this promise repeatedly. *See, e.g.*, ECF No. 103 at 44:18–19 ("I will follow all specific orders that the Court gives."), 45:14–23. Not only does Lambert maintain that she did nothing wrong and that her actions were necessary, she clearly believes that following the Court's Orders and procedures will result in greater harm than proceeding according to her own view of the world:

> If I were to go to the counsel for the criminals and let them know that I believe there is evidence of a crime that I want to report to the police, that could result in a destruction of evidence, criminal actors fleeing, hiding.

Id. at 59:15–18. Lambert has even implied that this Court is obstructing her ability to comply with the law, remarking that "[i]f the Court were to rule that I was not able to report criminal acts with ongoing investigations already in place with Congress, law enforcement, prosecutors' offices, *that would be obstruction*." *Id.* at 39:22–40:1 (emphasis added). Even after being repeatedly warned and promising she would comply with Court orders or seek Court guidance if she had any confusion, Lambert continues to openly disregard court orders. At the May Hearing, Lambert even began to discuss the contents of Dominion's documents that she alleges evidence crime until the Court abruptly stopped her because the courtroom had not been sealed. *Id.* at 37:21–38:13. As noted, after the May Hearing, Lambert continued to make baseless claims about the scope of the Protective Order and allow herself and Byrne to violate the Order repeatedly. ECF No. 106.

This Court has recognized that a "clear violation of . . . the District of Columbia Rules of Professional Conduct" can merit disqualification. *Paul*, 571 F. Supp. 2d at 27.[27] Moreover, this

[27] In *Paul*, this Court acknowledged that the D.C. Circuit had not determined whether violation of an ethical rule itself would be sufficient for disqualification, or if the conduct must also somehow "taint" the underlying trial. *Paul*, 571 F. Supp. 2d at 26–27. This question did not impact the Court's outcome in that case because the rule that the attorney violated, Rule 1.9, "creates an irrebuttable presumption that its violation will taint the underlying trial." *Id.* at 26. Here, there is ample evidence that Lambert has violated her ethical obligations *and* that her continued involvement would taint the proceedings moving forward.

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Court views intentional violations of its orders as severe misconduct. *Münchener*, 312 F.R.D. at 686–89 (discussing an attorney's egregious misconduct including "knowingly violat[ing] the obligations imposed" in a protective order); *Stone v. U.S. Embassy Tokyo*, Case No. 19-cv-3273, 2021 WL 1110735, at *1–4 (D.D.C. Mar. 23, 2021) (describing how a *pro se* litigant's conduct in intentionally and publicly disclosing provisions of a protected government document and indicating he would not comply with court orders was severe enough to warrant dismissal as a sanction if the case were not already dismissed); *Young v. Office of U.S. Senate Sergeant at Arms*, 217 F.R.D. 61, 70 (D.D.C. 2003) (concluding that a plaintiff's repeated misconduct in discovery made it "extremely unlikely" that the plaintiff would obey a protective order going forward). Lambert clearly views compliance with Court Orders with which she does not agree as optional, which is incompatible with our judicial system. Allowing Lambert to continue as Byrne's counsel when she has already demonstrated a willingness, if not determination, to do whatever it takes to advance her theories infects this proceeding and jeopardizes this Court's ability to depend on counsel and parties adhering to their rules, obligations, and the law.

3. Prior Conduct and Admonishment

Lambert's conduct in her brief time representing Byrne in this litigation is sufficient by itself to warrant the sanction of disqualification. That said, in considering sanctions in other contexts (i.e., Rule 11), this Court has held that it may consider prior instances of misconduct outside of the case before it. *See Atkins v. Fischer*, 232 F.R.D. 116, 121–22, 129–30 (D.D.C. 2005) (internal citations omitted) ("It has long been held that in considering the implementation of sanctions against a party or a counsel to a litigation, a district court may consider all the circumstances surrounding the alleged violation. The totality of the circumstances can include events which did not occur in the case proper but occurred in other cases and are, by their nature, relevant to the pending controversy.").

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Although this Court has not answered the same question with respect to questions of disqualification, Lambert herself has referenced her conduct in other proceedings as being relevant to resolving Dominion's Motion. ECF Nos. 76 at 9–10, 24 (arguing that Dominion is engaged in a conspiracy to prevent Lambert from being involved in such cases with others including the Michigan Attorney General); 103 at 32:24–33:3 (claiming that she has "won" every time Dominion and others attack her), 41:19–42:12 (claiming that Dominion is only seeking to disqualify her because of her work on election cases). Despite Lambert's claim that she has "won" every time she encountered any sort of grievance or discipline, the Pennsylvania and Georgia courts' opinions paint a concerning picture of her conduct in those cases nonetheless. ECF No. 103 at 32:24–33:3; *Cnty. of Fulton*, 292 A.3d at 1018–19; *Curling*, 2023 WL 7463462, at *23–24. Both her prior admonishment and conduct in this case cast doubt on Lambert's claim that she "did everything in good faith" and is committed to following Court orders going forward. ECF No. 103 at 46:1–2.

4. Lambert's Concessions

"It is well understood in this Circuit that when a [Party] files an opposition to a dispositive motion and addresses only certain arguments raised by the [other Party], a court may treat those arguments that the [Party] failed to address as conceded." *Hopkins v. Women's Div., General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd* 98 Fed. Appx. 8 (D.C. Cir. 2004). Dominion has put forth a compelling case for why the Court should disqualify Lambert and why lesser sanctions are insufficient. ECF No. 75. Lambert did not address Dominion's arguments about the insufficiency of any lesser sanction beyond disqualification, and she has not otherwise asked the Court to consider any lesser sanction. *Cf.* ECF No. 76.

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In fact, Lambert herself has acknowledged that disqualification might be an appropriate sanction. At the May Hearing, while Lambert was assuring the Court that she would come to it first in the future with any questions about the scope of the Court's orders, she noted that if the Court did not disqualify her based on her conduct to date, it could always do so in the future. ECF No. 103 at 49:2–15, 59:20–24 (". . . but the Court needs to understand my mindset was in good faith, and the Court does have the ability to issue sanctions or remove me from the case should I do anything inconsistent moving forward with a Court order."). As set forth above, Lambert continues to violate the Court's Orders to this day and her actions undermine her claim that she has done everything in good faith.

5. Lambert's Egregious Misconduct Has and Will Infect These Proceedings

Finally, as discussed extensively in this Memorandum and summarized below, Lambert's conduct has already substantially infected and will continue to infect these proceedings. In her short time as counsel in this case, Lambert has caused exponential harm that cannot be undone. The Court's only meaningful option to mitigate the specific risk of future harm Lambert poses is by removing her from this case.

First, Lambert's conduct has significantly hampered discovery in at least Byrne's specific case, if not also the coordinated/consolidated cases. ECF No. 81 at 5 ("Defendant needs additional time to comply with the discovery scheduling due to the fact that he and undersigned are effectively unable to prepare for depositions and further preparation in light of the Court's current order (Docket No. 77), prohibiting any access to discovery materials and documents produced by Dominion (Dominion Discovery Materials)."). It is remarkable how issues relating to Lambert's misconduct completely subsumed what were supposed to be the final two months of discovery. ECF No. 60 (setting a discovery deadline of May 30, 2024); 06/13/2024 Minute Order (updating

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the discovery deadline to September 30, 2024). Lambert did not enter her appearance as Byrne's counsel until March 12, 2024. ECF No. 71. Five days later, this Court entered the Status Quo Order that prevented Lambert and Byrne from accessing Dominion's discovery. ECF No. 77. Since then, Byrne has reportedly been at an "insurmountable disadvantage for the preparation of depositions and further litigation concerning Dominion's claims." ECF No. 81 at 6.

Dominion's counsel has represented that Lambert's continued role in this case has also impacted their ability to zealously represent their client. ECF No. 103 at 20:3–10. Dominion's counsel reports that for "every document [they] produce" and "every person [they] put up for deposition," they have "no good faith reason to believe that the . . . attorney on the other side is going to follow the Court's orders." *Id.* As for the Court, Lambert's conduct has prevented it from considering other discovery issues in the consolidated or coordinated cases, as it has had to first address Lambert and Byrne's continuing violations of the Court's Orders. The Court has now held two multi-hour hearings and reviewed over 2,500 pages of briefs and exhibits related to the violations of the Protective and Status Quo Orders and Lambert's other misconduct. *See* ECF Nos. 75; 76; 78; 81; 82; 84; 85; 90; 92; 93; 94; 95; 96; 97; 98; 99; 100; 101; 102; 103; 105; 106; 108; 110; 111; 112; 113; 114; 116; 117.[28]

Second, Lambert refuses to take any responsibility for her client repeatedly violating court orders. For example, the Court does not know the contents of a video Byrne posted to a social media platform on April 3, 2024 because Lambert directed Byrne to take down the video and did preserve a copy pursuant to the Status Quo Order and her obligations as his counsel. ECF No. 103

[28] This list is nowhere near exhaustive. For example, the Court does not include ECF No. 86 or ECF No. 87, which are prior motions that Lambert, on behalf of Byrne, erroneously filed and the Court rejected for failing to comply withs the Local and Federal Rules. Nor does it include other docket entries that the Court considered in the *Lindell* litigation. *See e.g.*, ECF Nos. 145; 147; 149; 152; 153; 154; 155; 156 in Case No. 21-cv-445.

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at 47:2–48:10. Lambert stated that she only saw part of the video, so she could not answer questions about whether Byrne discussed Dominion's documents in the video. *Id.* She represented that, from the portions she did see, Byrne "was addressing that he wanted to comply with what the Court is ordering and that he believed that we hadn't done anything wrong." *Id.* It is difficult to fathom how, if that was the extent of Byrne's video, Lambert would feel the need to advise her client to remove it from public view and fail to keep a copy. When asked about other social media posts, Lambert remarked:

> [M]y client posts frequently about many, many topics. I do not have time, nor do I want to bill him for babysitting his social media.

Id. at 48:6–10. Indeed, the day after the May Hearing at which Byrne expressly affirmed that he understood and would comply with the requirements in the Protective and Status Quo Orders, he again violated these orders by sharing social media posts that included Dominion's Litigation Documents. *Id.* at 61:23–25 ("THE COURT: And are you prepared to comply with [the Orders], sir? MR. BYRNE: Yes."); ECF No. 105.

Byrne has made clear he has no intention of following this Court's orders and Lambert has made clear she does not feel responsible for ensuring he does so. On April 2, 2024, the day before he posted the video that he later deleted, Byrne said the following in another video on X:

> It's absolutely incorrect, Judge, to tell us we have to honor that agreement to keep these crimes secret. And I'm telling you here, and Judge, with all due respect, you decide what you want. *We're giving you the honor this time of going through the steps that Stefanie evidently was supposed to do last time. But there's no chance in hell I'm not going to make this public.*
>
> This is crazy, what we have. We got to go through all this Kibuki dance. But we are giving him the respect this time of allowing him the opportunity to unseal this. *But I'm affirmatively saying, I don't care. I have it now. I have it on my machine.* I'm not in the country. This stuff doesn't get unsealed, *I'm just going to make it public*. You can throw me in jail. Because we know we're right, and you're covering up if you don't let this – the whole nation hinges on this. You obviously have a duty, Your Honor, to unseal this Dominion case. And *I'm going to do it*

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> *anyway if you make the wrong decision and you throw me in prison*. And I mean that.

ECF No. 102-3 at 11 (emphasis added). Byrne added:

> *I'm going to make this stuff public*. So I hope you make the right decision, but I'm not going to keep this quiet. I'm going to give you time to make the right decision. And if you make the wrong decision, I'm just going to do the right thing anyway and you throw me in jail. Fuck you . . . I shouldn't say fuck you to a judge . . . but I'm saying fuck you to the judicial system.

Id. (emphasis added). Lambert's refusal to ensure her client's compliance with the Court's Orders will no doubt continue to disrupt these proceedings.

Third, permitting Lambert to remain Byrne's counsel would both minimize the severe consequences of their actions and risk continued harm. Byrne—with Lambert's support—has made expressly clear that he plans to follow through on his promise to do whatever it takes, including risking jail time, to disseminate Dominion's Litigation Documents. *Id.*; ECF Nos. 105; 106. Byrne and Lambert's acts have not only fueled theories of widescale election fraud and crime—which Dominion describes as xenophobic for being purely based on Dominion's employment of Serbians—they have resulted in real harm and threats to Dominion employees. ECF Nos. 75; 82; 108; 113. Byrne and Lambert were on notice that their actions could result in harm, as that is part of Dominion's underlying suit against Byrne. It was abundantly foreseeable that similar statements to those at issue in the Complaint could lead to similar results.

Finally, the reasoning behind the D.C. Circuit's high bar for disqualification due to egregious misconduct would lead to an untenable result if Lambert were permitted to remain counsel here. The main justification for limiting disqualification to extreme circumstances (absent conflicts of interest) is our system's recognition of the importance of litigants being able to choose their counsel. This principle cannot mean that courts must protect such a choice that is based on the counsel's willingness to engage in such egregious misconduct or to facilitate their client's

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similarly extreme and egregious misconduct. *See* ECF No. 75-3 ("My client insisted the evidence of criminal acts be provided to law enforcement.").[29]

Dominion has raised a plausible narrative that Lambert became involved in this litigation so that she could gain access to Dominion's documents and use them for improper purposes. ECF No. 75 at 3, 21–22. After thoroughly reviewing Lambert's conduct, responses, and representations to this Court, the Court does not disagree. It is undisputed that Lambert entered the case without giving notice for months, gained access to Dominion's documents, shared the documents with Leaf and used them in her own criminal case while hiding these actions from even McGlinchey, all before she entered her formal appearance. Lambert has failed at every opportunity to show the Court that she will act in accordance with its rules and requirements.

Lambert's conduct in the past few weeks continues to exacerbate this concern. At best, Lambert failed to inform the Court and Dominion that Case, another attorney, had access to Dominion's Litigation Documents and, at some point, became involved in this litigation. ECF No. 113. This failure is severe, as the Court clearly and repeatedly prohibited Lambert from sharing Dominion's Litigation Documents with anyone else, and at the very least required her to inform the Court if anyone else gained access to the documents. But even more troubling, Dominion has put forth another plausible narrative that Lambert and Case have orchestrated a series of new moves to disseminate Dominion's Litigation Documents and other discovery publicly in contravention of this Court's orders. ECF Nos. 108; 113. According to Dominion, Lambert has clearly enabled Case to access Dominion's Litigation Documents and Case seeks to use the documents outside this litigation. ECF Nos. 113 at 3–7; 113-4 at 3. But even more concerningly,

---

[29] *See also In re BellSouth Corp.*, 334 F.3d 941, 946–47 (11th Cir. 2003) (rejecting a mandamus petition to review a disqualification ruling as not immediately appealable when a court disqualified counsel for "act[ing] with the purpose of forcing [a judge] to disqualify" himself).

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Lambert and Case now seek to publicly release Poulos' deposition—which is not yet, as far as the Court is aware, publicly available. ECF Nos. 108 at 2–10; 113 at 3–7; 116 at 25. Dominion's well-founded concern about Lambert's continued involvement in this litigation was that she would find other ways to circumvent Court orders. It now appears that is exactly what she has done. Lambert has no response to this theory. ECF Nos. 111, 117.

Despite that no party, particularly Lambert, has made any meaningful argument in favor of lesser sanctions, the Court has considered whether there is an available sanction less severe than disqualification that could mitigate the harm Lambert has and continues to inflict on the judicial process. As set forth above, however, no order, rule, warning or prohibition has stopped her misconduct in this case. For example, after the period of time following the Status Quo Order, she could have complied strictly with both Orders and given the Court *some* faith that she would cease her misconduct. Instead, she continued to violate the Orders, put forth baseless arguments to excuse Byrne's continued flagrant misconduct, and create fire drills for Dominion and the Court by refusing to be forthright with the Court.

The bottom line is that, in her short time as counsel, Lambert has repeatedly shown that she has no regard for orders or her obligations as an attorney before this Court. *See e.g.*, ECF Nos. 103 at 40:6–14 ("I have an obligation to report criminal acts that I reviewed in this discovery that are black and white and clear. I can see fraud of services in these documents. I can see conspiracy in these documents."); 106. Lambert's blatant disregard for this Court and her obligations is unending; her actions have already severely infected this proceeding. There is no doubt that they would continue to do so if she were permitted to remain counsel in this case.[30] This Court cannot

[30] As noted, in the past two weeks Dominion sought leave to file two additional supplements detailing even more incidents of alleged misconduct by Lambert, highly concerning remarks from Byrne, and efforts to use Dominion's Litigation Documents in the Peters Criminal Case. ECF

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allow such intentional, dangerous, and relentless misconduct to continue. Lambert is immediately disqualified from serving as counsel in this case.

CONCLUSION

For the foregoing reasons, Dominion's Motion is **GRANTED**.

Date: August 13, 2024

SIGN HERE

MOXILA A. UPADHYAYA
UNITED STATES MAGISTRATE JUDGE

Nos. 118; 122. The Court appreciates efforts to supplement as the Court previously requested, but it resolves this Motion without addressing these latest incidents because it appears that any other approach will only continue the cycle of alleged misconduct while this Motion is pending.

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From: Amanda Carberry [amanda@statesuniteddemocracy.org]
Sent: 8/21/2024 4:02:39 PM
To: Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; sargenta@michigan.gov; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Edward Medrano [edward@statesuniteddemocracy.org]
Subject: Re: **DPP MCL 15.243(1)(m)**

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi all,

Here are some times that Jonathan and Ed are available to meet for a 30 minute block:

Thursday 8/22: 1-2pm, 3-4pm ET
Tuesday 8/27: 11:30am-12pm, 1-1:30pm, 2:30-3pm ET
Wednesday 8/28: 2-2:30pm, 3:30-4pm ET
Thursday 8/29: after 2pm ET

Let me know if any of these times work for you.

Best,

Amanda Carberry (she/her) | Legal Assistant
States United Democracy Center
401-585-4702 | @statesunited
amanda@statesuniteddemocracy.org

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

From: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Date: Wednesday, August 21, 2024 at 11:41 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, sargenta@michigan.gov <sargenta@michigan.gov>, Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Edward Medrano <edward@statesuniteddemocracy.org>, Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: Re: **DPP MCL 15.243(1)(m)**

Wonderful! Thank you!

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, August 21, 2024 11:36:10 AM
To: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>; sargenta@michigan.gov <sargenta@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Edward Medrano <edward@statesuniteddemocracy.org>; Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: Discussion re: **Wk Prod MCL 15.243(1)(h)**

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CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good morning DPP MCL 15.243(1)(m) We'd be happy to assist with that. Perhaps we could have a short call to discuss? My colleague Amanda will email some times that Ed Medrano and I are available to discuss. Thanks, and we look forward to working with you on this.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/29/2024 4:47:11 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: USPS draft common-interest agreement

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Thanks very much, and talk to you soon.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Thursday, August 29, 2024 at 12:46 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: USPS draft common-interest agreement

Ok, I am going to send on to Linus.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, August 29, 2024 12:35 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: Re: USPS draft common-interest agreement

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

I'm checking in about getting a signature on the common interest agreement. Once we receive a signed copy, we can set up a call with the other states.

Thanks,

Jonathan

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Thursday, August 8, 2024 at 1:42 PM
To: Heather Meingast <meingasth@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: USPS draft common-interest agreement

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Hi Heather,

Following up on our earlier conversations regarding the USPS, in collaboration with our clients in Nevada, we've put together a draft Common Interest Agreement for your consideration. Once we've got everyone on board, we can schedule a multi-state call to discuss further. Please let us know if you have any questions or concerns.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Amanda Carberry [amanda@statesuniteddemocracy.org]
Sent: 8/26/2024 2:11:46 PM
To: Hagaman-Clark, Danielle (AG) [HagamanClarkD@michigan.gov]; Jonathan Williams [jonathan@statesuniteddemocracy.org]; sargenta@michigan.gov; Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Edward Medrano [edward@statesuniteddemocracy.org]
Subject: Re: Discussion re DPP MCL 15.243(1)(m)

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi all,

Following up here re setting up a call to DPP MCL 15.243(1)(m) Here are some updated times below for this week and next week:

Tuesday 8/27: 3:30-4pm ET
Wednesday 8/28: 3:30-4pm ET
Thursday 8/29: after 2pm ET

Tuesday 9/3: 2-2:30pm, 3:30-5pm ET
Wednesday 9/4: 2-3pm, 3:30-4:30pm ET
Thursday 9/5: 11am-12pm, 2:30-4pm ET

Let me know if any of these work for you – happy to find some more times if needed.

Best,

Amanda Carberry (she/her) | Legal Assistant
States United Democracy Center
401-585-4702 | @statesunited
amanda@statesuniteddemocracy.org

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

From: Amanda Carberry <amanda@statesuniteddemocracy.org>
Date: Wednesday, August 21, 2024 at 12:03 PM
To: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>, Jonathan Williams <jonathan@statesuniteddemocracy.org>, sargenta@michigan.gov <sargenta@michigan.gov>, Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Edward Medrano <edward@statesuniteddemocracy.org>
Subject: Re: Discussion re DPP MCL 15.243(1)(m)

Hi all,

Here are some times that Jonathan and Ed are available to meet for a 30 minute block:

Thursday 8/22: 1-2pm, 3-4pm ET

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Tuesday 8/27: 11:30am-12pm, 1-1:30pm, 2:30-3pm ET
Wednesday 8/28: 2-2:30pm, 3:30-4pm ET
Thursday 8/29: after 2pm ET

Let me know if any of these times work for you.

Best,

Amanda Carberry (she/her) | Legal Assistant
States United Democracy Center
401-585-4702 | @statesunited
amanda@statesuniteddemocracy.org

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From: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Date: Wednesday, August 21, 2024 at 11:41 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>, sargenta@michigan.gov <sargenta@michigan.gov>, Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Edward Medrano <edward@statesuniteddemocracy.org>, Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: Re: Discussion re DPP MCL 15.243(1)(m)

Wonderful! Thank you!

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Wednesday, August 21, 2024 11:36:10 AM
To: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>; sargenta@michigan.gov <sargenta@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Edward Medrano <edward@statesuniteddemocracy.org>; Amanda Carberry <amanda@statesuniteddemocracy.org>
Subject: Discussion re DPP MCL 15.243(1)(m)

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Good morning. DPP MCL 15.243(1)(m) We'd be happy to assist with that. Perhaps we could have a short call to discuss? My colleague Amanda will email some times that Ed Medrano and I are available to discuss. Thanks, and we look forward to working with you on this.

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/21/2024 3:40:51 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: USPS draft common-interest agreement
Attachments: 08 06 24 DRAFT CIA for USPS.docx

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Thanks, Heather. If you could send us an executed agreement (attached), we can move forward with scheduling the call. Thanks again.

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Date: Monday, August 19, 2024 at 3:37 PM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: RE: USPS draft common-interest agreement

Hi Jonathan,

Linus has reviewed, see his comment below. I think we are good to go.

DPP MCL 15.243(1)(m)

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingastH@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Thursday, August 8, 2024 1:43 PM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>; Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: USPS draft common-interest agreement

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

Following up on our earlier conversations regarding the USPS, in collaboration with our clients in Nevada, we've put together a draft Common Interest Agreement for your consideration. Once we've got everyone on

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board, we can schedule a multi-state call to discuss further. Please let us know if you have any questions or concerns.

Best,

Jonathan

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/29/2024 4:37:07 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: Trump and Harris electors
Attachments: 08 06 24 DRAFT CIA for USPS[41].docx

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Resending the agreement for convenience.

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Monday, August 26, 2024 at 11:30 AM
To: Heather Meingast <meingasth@michigan.gov>
Subject: Trump and Harris electors

Hi Heather,

When you have a chance, could you send me a list of the Harris and Trump electors?

Thanks,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 5/22/2023 7:39:03 PM
To: Hammoud, Fadwa (AG) [HammoudF1@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]; Banghart-Linn, Linus (AG) [Banghart-LinnL@michigan.gov]
CC: Christine Sun [christine@statesuniteddemocracy.org]
Subject: Powell update-privileged
Attachments: Notice of Appeal.pdf

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good afternoon. As you may have seen already, the Texas Commission for Lawyer Discipline filed a notice of appeal in the Powell proceeding on Friday. The notice is attached.

As far as what comes next, briefing deadlines run from the date that the record is filed with the court of appeals. The chart below sets out the anticipated briefing schedule, assuming that the appellate record is filed on the deadline.

DPP MCL 15.243(1)(m)

Best,

Jonathan

Date	Action or Deadline	Notes	Citation
06/22/23	Deadline for the appellate record to be filed with the Court of Appeals		Tex. R. App. Pro. 35.1(a)
07/22/23	The Commission's appellate brief deadline	Assumes appellate record filed on deadline Appellant brief due 30 days after later of reporter's record or clerk's record filing	Tex. R. App. Pro. 38.6(a)
08/21/23	Powell's appellate brief deadline	Assumes the Commission's brief filed on 07/22/23 Appellee's brief due 30 days after appellant's brief	Tex. R. App. Pro. 38.6(b)
09/10/23	The Commission's reply brief deadline	Assumes Powell's brief filed on 08/21/23 Appellant's reply brief due 20 days after appellee's brief	Tex. R. App. Pro. 38.6(c)

Jonathan L. Williams | **Senior Counsel**

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States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

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FILED
5/19/2023 3:41 PM
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
Shelia Bradley DEPUTY

CAUSE NO. DC-22-02562

COMMISSION FOR LAWYER DISCIPLINE	§	**IN THE DISTRICT COURT OF**
V.	§	**DALLAS COUNTY, TEXAS**
SIDNEY POWELL (File Nos. 202006349, 202006347, 202006393, 202006599, 202100006, 202100652, 202101297, 202101300, 202101301, 202103520, 202106068, 202106284, 202106181)	§	**116th JUDICIAL DISTRICT**

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the COMMISSION FOR LAWYER DISCIPLINE (the "Commission"), Petitioner, in this disciplinary action and files this Notice of Appeal pursuant to Rule 3.15 of the Texas Rules of Disciplinary Procedure and Rule 25 of the Texas Rules of Appellate Procedure. Petitioner gives notice that it desires to appeal to the Fifth Court of Appeals from this Court's following orders in Cause No. DC-22-02562, styled Commission for Lawyer Discipline v. Sidney Powell, in the 116th Judicial District Court, Dallas County, Texas:

1) Final Summary Judgment, issued on **February 22, 2023**, encompassing all rulings made by the Court therein, including its rulings: (i) denying the Commission's motion for continuance; (ii) sustaining or sustaining in part Powell's objections to the Commission's summary judgment evidence; (iii) granting Powell's no-evidence motion for summary judgment as to the Commission's claim under the Texas Disciplinary Rule of Professional Conduct; and (iv) granting Powell's partial motion for summary judgment as to the Commission's claim under Texas Disciplinary Rule of Professional Conduct.

2) Order Denying Motion for Reconsideration or New Trial, issued on May 4,

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2023.

Petitioner files this Notice of Appeal with the 116th Judicial District Court.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Kristin V. Brady
Assistant Disciplinary Counsel

Rachel Craig
Assistant Disciplinary Counsel

Office of the Chief Disciplinary Counsel
State Bar of Texas
The Princeton
14651 Dallas Parkway, Suite 925
Dallas, Texas 75254
Telephone: (972) 383-2900
Facsimile: (972) 383-2935
E-mail: Kristin.Brady@texasbar.com

/s/Kristin V. Brady
Kristin V. Brady
State Bar No. 24082719

/s/Rachel Craig
Rachel Craig
State Bar No. 24090049

ATTORNEYS FOR PETITIONER/APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served by electronic service through the electronic-filing manager in

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compliance with Texas Rule of Civil Procedure 21a on the 19th day of May 2023, to all counsel of record.

/s/Kristin Brady
Kristin Brady

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Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Cassidy Orozco on behalf of Kristin Brady
Bar No. 24082719
cassidy.orozco@texasbar.com
Envelope ID: 75829875
Filing Code Description: Notice Of Appeal - CT. Of Appeals
Filing Description: PLAINTIFF-DESIGNATION REQUESTED AT TIME OF ACCEPTANCE W/IN3 DAYS
Status as of 5/21/2023 2:58 PM CST

Associated Case Party: COMMISSION FOR LAWYER DSICIPLINE

Name	BarNumber	Email	TimestampSubmitted	Status
Kristin Brady	24082719	kristin.brady@texasbar.com	5/19/2023 3:41:22 PM	SENT
Robert H.Holmes		rhholmes@swbell.net	5/19/2023 3:41:22 PM	SENT
Rachel Craig		rachel.craig@texasbar.com	5/19/2023 3:41:22 PM	SENT
Todd Hill		thill@collincountytx.gov	5/19/2023 3:41:22 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
S. Michael McColloch	13431950	smm@mccolloch-law.com	5/19/2023 3:41:22 PM	SENT
Karen Cook	12696860	karen@karencooklaw.com	5/19/2023 3:41:22 PM	SENT

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/29/2024 4:35:23 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]
CC: Kelsey Stimple [Kelsey@statesuniteddemocracy.org]; Dax Goldstein [dax@statesuniteddemocracy.org]
Subject: Re: USPS draft common-interest agreement
Attachments: 08 06 24 DRAFT CIA for USPS[8].docx

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Hi Heather,

I'm checking in about getting a signature on the common interest agreement. Once we receive a signed copy, we can set up a call with the other states.

Thanks,

Jonathan

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Date: Thursday, August 8, 2024 at 1:42 PM
To: Heather Meingast <meingasth@michigan.gov>
Cc: Kelsey Stimple <Kelsey@statesuniteddemocracy.org>, Dax Goldstein <dax@statesuniteddemocracy.org>
Subject: USPS draft common-interest agreement

Hi Heather,

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Best,

Jonathan

Jonathan L. Williams | Senior Counsel
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/26/2024 1:56:12 PM
To: Osher, Daniel [OsherD@michigan.gov]; Meingast, Heather (AG) [MeingastH@michigan.gov]
Subject: RNC lawsuit against Detroit

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You've probably seen this already, but the RNC, state GOP, and several individuals in the local party sued Detroit in Wayne County for not having enough Republican election inspectors. Complaint is here.

Jonathan L. Williams | **Senior Counsel**
States United Democracy Center
(704) 578-4725 | @statesunited
jonathan@statesuniteddemocracy.org

Obtained by Judicial Watch, Inc. v. Michigan FOIA

From: Jonathan Williams [jonathan@statesuniteddemocracy.org]
Sent: 8/30/2024 2:16:19 PM
To: Meingast, Heather (AG) [MeingastH@michigan.gov]; Zack Goldberg [zack@statesuniteddemocracy.org]; Robert Cotter [Robert@statesuniteddemocracy.org]
Subject: Re: United Sovereign Citizens et al v Benson, et al - Michigan filing

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

https://www.democracydocket.com/news-alerts/federal-court-dismisses-right-wing-lawsuit-attempting-to-upend-maryland-election-administration/

This links the decision.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Friday, August 30, 2024 10:06:05 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: RE: United Sovereign Citizens et al v Benson, et al - Michigan filing

Did we talk that Maryland had a decision already? I cannot locate that email.

Heather

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
meingasth@michigan.gov
(517) 335-7659 (office)

From: Jonathan Williams <jonathan@statesuniteddemocracy.org>
Sent: Friday, August 30, 2024 10:05 AM
To: Meingast, Heather (AG) <MeingastH@michigan.gov>; Zack Goldberg <zack@statesuniteddemocracy.org>; Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: Re: United Sovereign Citizens et al v Benson, et al - Michigan filing

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Thanks. They just filed in NC, too.

Get Outlook for iOS

From: Meingast, Heather (AG) <MeingastH@michigan.gov>
Sent: Friday, August 30, 2024 9:13:58 AM
To: Jonathan Williams <jonathan@statesuniteddemocracy.org>; Zack Goldberg <zack@statesuniteddemocracy.org>;

Obtained by Judicial Watch, Inc. v. Michigan FOIA

Robert Cotter <Robert@statesuniteddemocracy.org>
Subject: United Sovereign Citizens et al v Benson, et al - Michigan filing

It appears out turn has arrived…

Heather S. Meingast, Division Chief
Civil Rights & Elections Division
Michigan Department of Attorney General
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(517) 335-7659 (office)

Obtained by Judicial Watch, Inc. v. Michigan FOIA

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30754
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

August 14, 2025

Robert J. Muise
The Muise Law Group, PLLC
P.O. Box 131098
Ann Arbor, MI 48113

Sent by email
rmuise@muiselawgroup.com

Dear Mr. Muise,

The Department of Attorney General (Department) is responding to your August 11, 2025 letter (copy attached) that concerns the Freedom of Information Act (FOIA) request submitted by your client, Mr. Mark Spencer of Judicial Watch, Inc. The Department has also attached its August 14, 2025 written notice addressed to Mr. Spencer, but emailed only to your law office. The written notice is accompanied by an email that provides the link to access the records.

The Department also confirms the telephone discussion with our office that the balance of the records will be provided to your office under a rolling production to be completed on or before September 5, 2025. If you have any questions, please contact the undersigned.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.